BREAKING UP IS HARD TO DO: MINI-DOMA STATES, MIGRATORY SAME-SEX MARRIAGE, DIVORCE, AND A PRACTICAL SOLUTION TO PROPERTY DIVISION

John M. Yarwood[*]

[*] J.D. Candidate, Boston University School of Law, 2010; B.F.A. Acting/Theater Performance, Boston University College of Fine Arts, 2002. I would like to thank Professor Andrew Kull for his guidance in the development of this Note, Professor Kristin Collins for her aid at the inception of this Note, and Professor Linda McClain for her help in developing the ultimate premise of this Note. Lastly, I would like to thank my wife, Noreen J. Yarwood, for her undying patience and support.

INTRODUCTION

In the 1990s, some states began legally recognizing same-sex relationships by granting rights to, and imposing responsibilities on, couples who apply and qualify for recognition under state law. Massachusetts extended full marriage rights to same-sex couples following the landmark 2003 decision, *Goodridge v. Department of Public Health*.[1] Other states have followed suit.[2] In contrast, many states have defined marriage as between one man and one woman through statutes and amendments to state constitutions, mandating that no rights shall be honored that flow from a same-sex marriage in another state.[3] The federal government has also limited marriage to only a relationship between a man and a woman.[4] Unfortunately, these two legal phenomena have come in conflict and are likely to continue to do so because of our increasingly mobile society. One such area of potential conflict is the area of marriage dissolution.

This Note addresses the division of property upon the dissolution of a same-sex marriage, focusing on married same-sex couples who have migrated to a state that clearly defines marriage as between a man and a woman. Part I surveys the current status of legal recognition afforded to same-sex relationships in the United States, including challenges faced by same-sex married couples in obtaining rights identical to opposite-sex married couples in the state where they are married and abroad. Part II examines how states around the country treat property claims and claims for division of property

[1] 798 N.E.2d 941 (Mass. 2003).

[2] *See* ME. REV. STAT. ANN. tit. 19-A, § 650-A (2009); N.H. REV. STAT. ANN. § 457:1-a (2009); VT. STAT. ANN. tit. 15, § 8 (2009); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009).

[3] *See, e.g.*, FLA. CONST. art. I, § 27; 750 ILL. COMP. STAT. 5/212 (2009); 23 PA. CONS. STAT. ANN. § 1704 (West 2009).

[4] *See* 1 U.S.C. § 7 (2006).

between former unmarried cohabitant couples. Part III attempts to resolve the conflicts between the needs of same-sex married couples who terminate their relationships and the desire of the states to enforce their interpretation of marriage. It accomplishes this by analogizing the doctrine concerning the legally unrecognized relationships of unmarried cohabitants to legally unrecognized relationships of same-sex marriages. Part III promotes the adoption of a scheme that grants property rights upon dissolution of a same-sex marriage based on the ALI's *Principles of Family Dissolution: Analysis and Recommendations*. Should states not adopt the scheme because it reaches farther than the public policy of the state, Part III calls for each state to treat same-sex marriages as they would former cohabiting opposite-sex couples in claims of property division, with some relaxation of the legal standards afforded because there exists a valid out-of-state same-sex marriage.

I. SAME-SEX MARRIAGE AND CURRENT CHALLENGES TO ITS FREE ENJOYMENT

A. *The State of Legally Recognized Same-Sex Relationships in the United States*

Over the last two decades, some states began to legally recognize same-sex relationships, granting specific rights to the partners within these relationships.[5] The form of recognition changes from state to state, manifesting as reciprocal beneficiaries,[6] domestic partnerships,[7] and civil

[5] *See, e.g.*, California Domestic Partner Rights and Responsibilities Act, ch. 421, 2003 Cal. Legis. Serv. 2586 (West) (codified as amended at CAL. FAM. CODE §§ 297-99 (West 2008)) (granting same-sex couples, and heterosexual couples meeting an age requirement, the "same rights, protections, and benefits, and . . . the same responsibilities, obligations, and duties under law . . . as are granted to and imposed upon spouses"); An Act Relating to Civil Unions, 2000 Vt. Acts & Resolves 72 (codified as amended at VT. STAT. ANN. tit. 15, §§ 1201-07 (2008)) (granting same-sex couples the "same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage"); Act effective July 22, 2007, ch. 156, 2007 Wash. Legis. Serv. 496 (West) (codified as amended at WASH. REV. CODE ANN. § 26.60.010 to .090 (West 2008) (legally acknowledging domestic partnerships for same-sex couples and those over the age of sixty-two in order to "provid[e] a legal framework for such mutually supportive relationships").

[6] *See, e.g.*, HAW. REV. STAT. ANN. §§ 572C-1 to -7 (LexisNexis 2008) (listing the requirements of and granting legal recognition to "significant personal, emotional, and economic relationships with another individual [that] are prohibited by such legal restrictions from marrying" but "not . . . the same rights and obligations under the law that are conferred through marriage").

[7] *See, e.g.*, CAL. FAM. CODE §§ 297-99; D.C. CODE §§ 32-701 to -710 (2001) (establishing procedures and rights for domestic partnerships); WASH. REV. CODE ANN. § 26.60.010 to .090; Oregon Family Fairness Act, ch. 99, 2007 Or. Laws 607 (creating domestic partnerships in Oregon).

unions,[8] each of which grants its own sets of rights and responsibilities. Many of these states limit their recognition of same-sex relationships to exclude marriage.[9] However, in 2003, the Supreme Judicial Court of Massachusetts determined that the denial of marriage rights to same-sex couples violated the constitution of that state, opening the door for the legalization of same-sex marriage.[10] The supreme courts of Connecticut, California, and Iowa followed suit,[11] and the Maine, New Hampshire, and Vermont legislatures legalized same-sex marriage in 2009 without the motivation or mandate of a judicial opinion.[12] The extension of marriage rights to same-sex couples grants those couples the same rights as heterosexual married couples,[13] much like previous civil union statutes.[14] These rights include marital property rights, medical decision-making rights, hospital visitation rights, custody rights, joint title rights, and many others.

The 1996 federal Defense of Marriage Act ("DOMA") presented an immediate, preexisting obstacle to the exercise of valid marriage rights by same-sex couples.[15] The act provides that:

[8] *See, e.g.*, N.J. STAT. ANN. § 37:1-28 to -36 (West 2008) (recognizing "civil unions between same-sex couples in order to provide these couples with all the rights and benefits that married heterosexual couples enjoy").

[9] *See, e.g.*, CAL. FAM. CODE § 300 ("Marriage is a personal relation arising out of a civil contract between a man and a woman . . . ."); HAW. REV. STAT. ANN. § 572C-1 (extending reciprocal beneficiary status to same-sex couples who are "couples composed of two individuals who are legally prohibited from marrying under state law").

[10] *See* Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

[11] *In re* Marriage Cases, 183 P.3d 384, 453 (Cal. 2008) (making "marriage available both to opposite-sex and same-sex couples"); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 482 (Conn. 2008) ("[G]ay persons are entitled to marry the otherwise qualified same sex partner of their choice."); Varnum v. Brien, 763 N.W.2d 862, 907 (Iowa 2009) (requiring that gays and lesbians have "full access to the institution of civil marriage"). As very publicly noted, California's voters reversed the California Supreme Court's ruling in *In re Marriage Cases* with Proposition 8, or the Marriage Protection Act, which the California Supreme Court later upheld while validating the previously granted same-sex marriages. *See* Strauss v. Horton, 207 P.3d 48 (Cal. 2009) (upholding the Marriage Protection Act, which defines marriage in California as between a man and a woman, while validating all same-sex marriages granted in California prior to the Act's effective date).

[12] ME. REV. STAT. ANN. tit. 19-A, § 650-A (2009); N.H. REV. STAT. ANN. § 457:1-a (2009); VT. STAT. ANN. tit. 15, § 8 (2009).

[13] *See Kerrigan* 957 A.2d at 480 (articulating equal protection jurisprudence); *Goodridge*, 798 N.E.2d at 969 ("[B]arring an individual from the protections, benefits, and obligations of civil marriage . . . violates the Massachusetts Constitution.").

[14] *See, e.g.*, VT. STAT. ANN. tit. 15, §§ 1201-07 (2007); Andrew Koppelman, *Interstate Recognition of Same-Sex Marriages and Civil Unions: A Handbook for Judges*, 153 U. PA. L. REV. 2143, 2143 (2005) ("Vermont and Connecticut recognize 'civil unions,' . . . that have virtually all the rights of marriage."). Professor Koppelman made this observation prior to both Vermont and Connecticut extending marriage rights to same-sex couples.

[15] 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006).

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife.[16]

Thus, DOMA prevents same-sex couples from enjoying federal rights conferred on married couples, such as tax benefits, employment benefits, and many others.[17] Under DOMA, states are also explicitly permitted to not recognize a same-sex marriage from another state nor preserve any privileges or rights flowing from that marriage.[18] Thus, same-sex couples married in a state which permits same-sex marriage cannot rely on the many federal benefits and rights granted to married couples in the state in which the marriage was executed (the home state) or abroad.[19]

Some states also began defining marriage as between only a man and a woman, passing their own "defense of marriage" statutes or state constitutional amendments, called mini-DOMAs.[20] A majority of states have enacted mini-DOMA laws or amendments, and of those, five indicate they will not recognize same-sex marriage-related judicial proceedings, such as divorce proceedings, and some will not recognize marriage-like relationships such as civil unions and domestic partnerships certified in other states.[21] Many states enacted these statutes and amendments in the wake of *Baehr v. Lewin*,[22] the Hawaii Supreme Court decision declaring that denial of marriage rights to

---

[16] 1 U.S.C. § 7.

[17] *See* Michael Clarkson & Ronald S. Allen, *Same-Sex Marriage & Civil Unions: 'Til State Borders Do Us Part?*, 36 A.B.A. J. 54, 56 (2007) (explaining that DOMA prevents same-sex couples married in Massachusetts from collecting federal tax benefits or federally implicated employment benefits); Mark Strasser, *Some Observations About DOMA, Marriages, Civil Unions, and Domestic Partnerships*, 30 CAP. U. L. REV. 363, 364 (2002) (acknowledging the inference found in DOMA that federal benefits are not available to same-sex married couples).

[18] *See* 28 U.S.C. § 1738C (2006) ("No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage . . . or a right or claim arising from such relationship.").

[19] *See* Clarkson & Allen, *supra* note 17, at 56 ("[T]he federal government has specifically exempted same-sex couples from the protections, benefits, and obligations available under federal law.").

[20] *See* Koppelman, *supra* note 14, at 2166-94 (detailing each mini-DOMA statute and amendment).

[21] Joanna L. Grossman, *Resurrecting Comity: Revisiting the Problem of Non-Uniform Marriage Laws*, 84 OR. L. REV. 433, 447 (2005) (surveying the effects of state mini-DOMA laws); *see* Koppelman, *supra* note 14, at 2165 (listing each state with a mini-DOMA and the broader implications of a few).

[22] 852 P.2d 44, 59-67 (Haw. 1993).

same-sex couples was sex discrimination warranting strict scrutiny under the state constitution.[23] Opponents of same-sex marriage perceived a possible threat from imported same-sex marriage and moved to protect themselves.[24] These mini-DOMAs, combined with the federal Defense of Marriage Act, suggest that these states will not recognize out-of-state same-sex marriages, much less allow same-sex marriage in their own states. In fact, many states explicitly refuse to recognize same-sex marriages performed out of state.[25] Important for this Note, some state courts have also refused to dissolve same-sex civil unions and marriages, based on an unwillingness to recognize a same-sex relationship at all.[26]

B. *Problems Facing Mobile Married Same-Sex Couples*

These federal and state DOMAs could present a problem to same-sex couples married in Connecticut, California, Iowa, Maine, Massachusetts or Vermont, as well as same-sex couples with civil unions or domestic partnerships.[27] Our society has become increasingly mobile with many forms of transportation becoming ever more common.[28] Additionally, the Constitution allows free travel across all state lines as a right, preventing states from barring entrance to those it may wish to keep out.[29] These two phenomena create fertile ground for same-sex couples legally joined in states that recognize same-sex marriage to interact, both physically and legally, with

[23] *See* Grossman, *supra* note 21, at 448-50 (discussing *Baehr* and the states' reaction to it).

[24] *Id.* at 449.

[25] *Id.* at 447 (stating that as of 2005, "[t]hirty-eight of those states also refuse to recognize a same-sex marriage validly celebrated elsewhere").

[26] *See, e.g.*, O'Darling v. O'Darling, 188 P.3d 137, 139 (Okla. 2008) (implying in dicta that the fact that the plaintiff was attempting to dissolve a same-sex marriage would have been fatal to her action); Chambers v. Ormiston, 935 A.2d 956, 963 (R.I. 2007) (recognizing a lack of jurisdiction in the family court to hear a same-sex divorce, because the legislature did not intend the divorce statute to include same-sex marriages).

[27] *See* Adam Weiss, *Federalism and the Gay Family: Free Movement of Same-Sex Couples in the United States and the European Union*, 41 COLUM. J.L. & SOC. PROBS. 81, 81 (2007) ("[I]n America, the legal response . . . has been to prevent the movement of same-sex couples from forcing states to offer [them] greater rights than those made available through the state's political process."). In California's case, the marriages in question must have taken place prior to the enactment of Proposition 8 and the subsequent California Supreme Court decision affirming its constitutionality. *See supra* note 12.

[28] *See* Koppelman, *supra* note 14, at 2155 (naming the automobile and airplane as reasons why "the country is far more mobile than it once was"); Weiss, *supra* note 27, at 82 (specifying that LGBT people, in particular, move around frequently).

[29] *Id.* at 2162 (restating the right to travel recognized in Crandall v. Nevada, 73 U.S. (6 Wall.) 35, 49 (1868)); Weiss, *supra* note 27, at 82, 96 (eliciting the right to travel as a basic assumption of the federal structure and detailing the practical effects of free movement).

states that do not recognize their union.[30] For example, Massachusetts alone borders five states that approach the issue of same-sex marriage very differently; New Hampshire, Vermont and Connecticut now grant same-sex marriages,[31] and New York and Rhode Island have no definitive law on the issue.[32] Same-sex couples would face a different legal framework depending solely on which direction they traveled out of Massachusetts.

Professor Andrew Koppelman applies four classifications to same-sex marriages when considering their relationship to other states: evasive marriages, migratory marriages, visitor marriages, and extraterritorial marriages.[33] "Evasive marriages" occur when a couple travels from its "home" state – where same-sex marriage is illegal – to one where it is legal to marry, and then returns home.[34] These are the marriages most feared by opponents of same-sex marriages.[35] "Migratory marriages" are marriages performed in the couple's "home" state, in which the couple has no intention of leaving at the time of marriage, but for various reasons moves to another state.[36] "Visitor marriages" occur where the couple temporarily travels out of its "home" state and runs into the need of marital legal rights in another state, such as hospital visitation or power of attorney.[37] "Extraterritorial marriages" involve the same-sex married couple coming into contact with a foreign state only through remote court actions such as property litigation, but where the couple does not leave its "home" state.[38] These classifications can be used to analyze the legal conflicts that arise between states concerning same-sex relationships. As

[30] Koppelman, *supra* note 14, at 2155 ("[M]any people cross state lines every day . . . [and] [i]t would be ridiculous to have people's marital status blink on and off like a strobe light as they jet across the country.").

[31] *See* N.H. REV. STAT. ANN. § 457:1-a (2009); VT. STAT. ANN. tit. 15, § 8 (2009); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 482 (Conn. 2008).

[32] *See* Martinez v. County of Monroe, 850 N.Y.S.2d 740, 743 (App. Div. 2008) (recognizing a same-sex marriage and finding it not against the public policy of New York to do so absent legislative prevention); Chambers v. Ormiston, 935 A.2d 956, 963 (R.I. 2007) (refusing to grant a divorce to a same-sex marriage from Massachusetts because the legislature did not understand marriage to include same-sex marriage when it wrote the divorce statute).

[33] *See* Koppelman, *supra* note 14, at 2145-46.

[34] *Id.* at 2145, 2152-53 (describing the classification and observing that these relationships are clearly invalid in the couples' home states as a matter of explicit public policy).

[35] *See* Grossman, *supra* note 21, at 449-51 (highlighting how the fear of "exported" same-sex marriage "galvanized" opponents of same-sex marriage).

[36] *See* Koppelman, *supra* note 14, at 2145, 2153-59 (examining this type of marriage through the rubric of miscegenation precedent as well as policy).

[37] *Id.* at 2145, 2159-60 (urging recognition of homosexual marriages in these extraordinary circumstances as a doctrinal matter).

[38] *Id.* at 2145-46, 2162-63 (defining the classification as well as arguing that these marriages should be universally recognized based on miscegenation case history).

Professor Koppelman writes, evasive, visitor, and extraterritorial marriages fall under clear doctrines of how states should and could treat them.[39] This doctrinal approach offers a less certain outcome when one considers "migratory marriages."[40] Thus, this Note will focus solely on migratory same-sex marriages.

One of the problems a migratory same-sex married couple could face would be obtaining a valid divorce in their new state, should that state have a mini-DOMA. The current divorce rate in the United States is about 50%.[41] Thus, statistically it is likely that some same-sex marriages will end in divorce. This is anecdotally supported by recent case law.[42] However, if a couple seeks dissolution in a state that does not recognize their marriage or explicitly bars recognition, this non-recognition may prove to be an impediment not only to having marriage rights in that state, but also to obtaining dissolution.[43] The Supreme Court of Rhode Island refused to grant a divorce of a Massachusetts same-sex marriage because it found that the jurisdictional statute to grant divorces was founded on the definition of marriage as between a man and a woman.[44] If a court will not grant divorce based on an interpreted definition of marriage, the court surely will not grant divorce when that definition is codified in a mini-DOMA. Georgia statutorily bars granting divorces to same-sex couples married out-of-state.[45] Yet, in the face of this obstacle, couples

[39] *See id.* at 2152-53, 2159-63 (stating that evasive marriages should not be recognized, especially when the "home" state has a mini-DOMA, and arguing that both visitor marriages and extraterritorial marriages should be universally recognized).

[40] *See id.* at 2153-59 (proposing various tools and policies for states to deal with migratory marriages).

[41] BETZAIDA TEJADA-VERA & PAUL D. SUTTON, BIRTHS, MARRIAGES, DIVORCES, AND DEATHS: PROVISIONAL DATA FOR JANUARY 2008, NAT'L VITAL STAT. REP., Aug. 21, 2008, at 1, 1, *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr57/nvsr57_03.pdf (listing from January 2007 to January 2008, 7.3 marriages per 1000 people and 3.6 divorces per 1000 people for a divorce rate of approximately 50%).

[42] For a variety of cases dealing with a Massachusetts same-sex married couples seeking divorces, see generally C.M. v. C.C., 867 N.Y.S.2d 884 (Sup. Ct. 2008); Gonzalez v. Green, 831 N.Y.S.2d 856 (Sup. Ct. 2006); Chambers v. Ormiston, 935 A.2d 956 (R.I. 2007).

[43] *See, e.g.*, *Gonzalez*, 831 N.Y.S.2d at 858-59 (dismissing an action for a divorce because a New York court found a same-sex marriage performed in Massachusetts null and void); O'Darling v. O'Darling, 188 P.3d 137, 139 (Okla. 2008) (implying that a same-sex marriage would not have been eligible for an Oklahoma divorce); *Chambers*, 935 A.2d at 963 (stating that a same-sex marriage in Massachusetts was not eligible for a Rhode Island divorce).

[44] *See Chambers*, 935 A.2d at 962 & n.13 (reviewing dictionary definitions of marriage at the time of the enactment of the relevant statute and remarking that other Rhode Island statutes referring to marriage use gender terms concurrent with the definition).

[45] *See* GA. CODE ANN. § 19-3-3.1(b) (2004) ("[T]he courts of this state shall have no jurisdiction whatsoever under any circumstances to grant a divorce or separate maintenance with respect to such marriage or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such marriage.").

will likely continue to desire the finality of divorce as it pertains to emotional and mental closure,[46] legal status,[47] and property division.[48] The intuition is that the purposes of divorce will not diminish simply because a state does not wish to recognize the marriage itself. This Note will therefore focus on one of those enduring needs: property division.

As previously mentioned, this Note will focus on the property division of couples in migratory marriages who seek dissolution after moving to their new state. Additionally, this Note will focus on couples who migrate to mini-DOMA states.[49] Within these parameters, those in same-sex marriages still face obstacles in achieving the dissolution of their marriages. The initial, and possibly greatest, limitation on these couples is that the state they reside in will not want to grant a divorce for fear of recognizing the marriage.[50] Returning to the "home" state for dissolution proceedings is no simple matter as some states have residency requirements that would require one member of the couple to move back to their "home" state for as long as one year before dissolution.[51] The needs of the couple and society to determine ownership of marital property after a marriage dissolves countervail these problems.[52] Within this context, state courts, and the American Law Institute ("ALI"), urge striving for fair and equitable division.[53] Because states may be reluctant to recognize a same-sex marriage outright or through a legal dissolution of the marriage, courts could seek a practical method of property division that refrains from legally recognizing the same-sex marriage.

---

[46] *See* Jessica A. Hoogs, Note, *Divorce Without Marriage: Establishing a Uniform Dissolution Procedure for Domestic Partners Through a Comparative Analysis of European and American Domestic Partner Laws*, 54 HASTINGS L.J. 707, 707 (2003) (citing Paul Bohannon, *The Six Stations of Divorce*, *in* DIVORCE AND AFTER 29, 32 (Paul Bohannon ed., 1970) (1968)) for the proposition that divorce "can provide individuals a sense of finality, even accomplishment").

[47] *See id.* at 708 (commenting that same-sex couple dissolution "should be treated exactly the same as dissolution of a marriage, so that issues of support, property division and child custody/visitation can be judicially determined").

[48] *See id.*

[49] *See supra* Part I.A (describing various DOMA states and their limited definition of marriage).

[50] *See supra* note 43.

[51] *See, e.g.*, MASS. GEN. LAWS ANN. ch. 208, § 5 (West 2008) (requiring residency a year prior to commencement of a divorce, and barring divorces when it appears the moving party moved to Massachusetts solely for the divorce); VT. STAT. ANN. tit. 15, § 1206 (2008) (stating that civil unions are subject to residency requirements for dissolution purposes).

[52] *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6 (2002) [hereinafter ALI PRINCIPLES].

[53] *See, e.g.*, *In re* Marriage of Bouquet, 546 P.2d 1371, 1378 (Cal. 1976) (enforcing "[t]he state's interest in the equitable dissolution of the marital relationship"); *see also* ALI PRINCIPLES, *supra* note 52, § 6.02(1) (advocating for principles of fair and equitable distribution in dissolutions of all families).

II. PROPERTY DIVISION IN COHABITATION RELATIONSHIPS

Same-sex relationships are not the only legally unrecognized relationships in the United States. With the decline of common law marriage across most of the country,[54] non-marriage cohabitation has become a legally unrecognized relationship in many states. Some claim the demise of common law marriage came about because of outdated and unconstitutional concerns, such as public fears over miscegenation and the eugenics movement.[55] Others offer more currently legitimate reasons like concerns over fraudulent claims and efficiency burdens on courts due to heavily fact-intensive inquiries.[56] Whatever the reasoning, only eleven states recognize common law marriages.[57] Thus, the large majority of unmarried cohabitants will not have their relationships legally recognized.

[54] *See* Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 849 (2005) (stating that only a minority of states recognize common law marriage, whereas two thirds of states used to do so); Ashley Hedgecock, *Untying the Knot: The Propriety of South Carolina's Recognition of Common Law Marriage*, 58 S.C. L. REV. 555, 555 n.2 (2007) (stating that only eleven states still recognize common law marriage).

[55] *See* Hedgecock, *supra* note 54, at 565 (discussing the "racist motivations for abolishing common law marriage"); Andrew W. Scott, Note, *Estop in the Name of Love: A Case for Constructive Marriage in Virginia*, 49 WM. & MARY L. REV. 973, 994-95 (2007) ("[S]tates were concerned that miscegenation might become rampant if common law marriage were permitted, as non-licensed marriages could be a means of circumventing statutory prohibitions on performing interracial marriages . . . [and] [t]he eugenics movement, which . . . sought to use the state as a mechanism to create and perpetuate an ideal race of people . . . found common law marriage to be inimical to their goals of biological fitness.").

[56] *See* Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 1000 (2000) (attributing the demise of common law marriage to fears over conniving women bringing fraudulent claims against virtuous men); Garrison, *supra* note 54, at 850 (relating that the fact-intensive nature of determining a common law marriage through litigation led to its demise); Charlotte K. Goldberg, *The Schemes of Adventuresses: The Abolition and Revival of Common-Law Marriage*, 13 WM. & MARY J. WOMEN & L. 483, 486-87 (2007) (citing fraudulent claims as a motivation to California's abolition of common law marriage and explaining that this came about because of contradictory, antiquated opinions about femininity); Hedgecock, *supra* note 54, at 565 (rebutting the argument that fraudulent claims are a concern and discussing the high burden of proof for a claimant asserting a common law marriage); Scott, *supra* note 55, at 995-96 (refuting the concern of fraudulent common law marriage claims with modern empirical evidence).

[57] Scott, *supra* note 55, at 996 (adding that the District of Columbia also recognizes common law marriage).

Unmarried cohabiting couples share property, domestic labor, children, and many other things that married and civilly unionized couples share.[58] They also end their relationships, as many couples in legally recognized relationships do. This type of dissolution presents many of the same problems as marriage dissolution, especially if the couple has cohabitated for a long time.[59] In this way, migratory same-sex married couples and unmarried cohabiting couples have much in common. The difference between these two legally unrecognized types of relationships is that all states have a determined doctrine when hearing property claims between unmarried cohabitants, but not between married same-sex couples who have migrated from other states. State courts began to develop this cohabitation doctrine using their equitable powers and contract law in the 1976 California case, *Marvin v. Marvin*.[60]

A. Marvin v. Marvin

The back-story to *Marvin v. Marvin* is certainly fantastic, involving the movie actor Lee Marvin and his live-in girlfriend, Michelle Triola Marvin.[61] Lee Marvin was an Oscar winner and star of such well-known films as *Paint Your Wagon* (1969) and *The Dirty Dozen* (1967).[62] He and Michelle began living together while he was in the process of separating from his wife, and they cohabited from October 1964 until May 1970.[63] After their relationship ended, Lee continued to support Michelle until November 1971, and Michelle subsequently filed suit for half his earnings during their time together.[64]

At the time, the conventional doctrine held that any agreement flowing from the illicit, unmarried cohabitant relationship was void as a matter of public policy.[65] This policy was based on the idea that the sexual relations of the couple tainted any agreement flowing from the relationship.[66] These

[58] *See generally* Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381 (2001) (surveying empirical research and case law concerning cohabitation in its various forms and identifying the many needs of cohabitating couples).

[59] *See generally id.* (describing the issues faced in the separation of unmarried cohabitating couples, including custody over children, property interests and gains from employment).

[60] 557 P.2d 106 (Cal. 1976).

[61] *See* Estin, *supra* note 58, at 1381 (recalling the story of the movie star, his cohabiting partner, and the dissolution of their relationship).

[62] *Id.*

[63] *Id.*

[64] *Id.*

[65] *See* Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L.Q. 537, 558 n.86 (2007) (noting that, due to changing social attitudes, *Marvin v. Marvin* "abandon[ed] the law's position that these contracts were against public policy").

[66] *See* Hewitt v. Hewitt, 394 N.E.2d 1204, 1209 (Ill. 1979) ("[T]he situation alleged here was not the kind of arm's length bargain envisioned by traditional contract principles, but an intimate arrangement of a fundamentally different kind."); William A. Reppy, Jr., *Choice of Law Problems Arising When Unmarried Cohabitants Change Domicile*, 55 SMU L. REV.

relationships were commonly labeled "meretricious relationships."[67] Thus, the holding was groundbreaking, though the reasoning may not have been. The court granted Michelle Marvin a financial recovery from Lee Marvin, including property to which she did not hold title, upon the termination of their relationship,[68] though the Marvins had never married. This new form of ex-partner support was popularly termed "palimony."[69] The court based its decision upon a breach of contract theory finding that the Marvins had expressly contracted to live together as a couple and share in all their earned property whether earned individually or jointly.[70] This was not entirely novel to California law, as explicit contracts between unmarried couples were valid so long as there was no illicit meretricious consideration.[71] The court reasoned, "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 have apparently been so widely abandoned by so many."[72] Similarly, societal opinions and approaches to homosexuality have changed dramatically over the last thirty years.[73] Thus, the court removed the "judicial

273, 275 (2002) ("[T]hey are disabled, because of the immorality of their sexual relations."); *see also* Scott, *supra* note 65, at 558 (describing the moral arguments that elevated marriage above non-marital cohabitation, making marriage "the only acceptable basis for an intimate relationship" and non-marital cohabitation "immoral").

[67] *See* Scott, *supra* note 65, at 558 ("At a minimum, informal unions received no legal recognition or protection, with courts declining to enforce contracts between parties in 'meretricious relationships.'").

[68] *See* Marvin v. Marvin, 557 P.2d 106, 122-23 (Cal. 1976) ("[A] nonmarital partner may recover in quantum meruit for the reasonable value of household services rendered less the reasonable value of support received if he can show that he rendered services with the expectation of monetary reward.").

[69] *See* Estin, *supra* note 58, at 1381 (recalling that a *Newsweek* reporter coined the term).

[70] *Marvin*, 557 P.2d at 110, 122.

[71] *See* Ryan M. Deam, Comment, *Creating the Perfect Case: The Constitutionality of Retroactive Application of the Domestic Partner Rights and Responsibilities Act of 2003*, 35 PEPP. L. REV. 733, 738 (2008) ("[T]he holding was limited to validation of agreements between unmarried persons unless they relied solely upon illicit meretricious consideration."). Deam defines "meretricious" as pertaining to prostitution, implying that meretricious consideration relates to unmarried persons using the illicit relations as consideration for a property exchange or profit distribution. *Id.* at 738 n.30.

[72] *Marvin*, 557 P.2d at 122 (alluding to moral considerations in support of marriage that prevented granting property division in dissolution of a relationship between an unmarried cohabiting couple).

[73] *See* Mary Patricia Byrn, *From Right to Wrong: A Critique of the 2000 Uniform Parentage Act*, 16 UCLA WOMEN'S L.J. 163, 190-95 (2007) (reviewing the increasing social and civil acceptance of homosexuals in society, including the delisting of homosexuality by the American Psychiatric Association, the barring of discrimination based on sexual orientation in many corporations, the political appointments of openly gay persons, and the extension of domestic partnership rights in many cities and states); Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its*

barriers" standing in the way of the "reasonable expectations" about property ownership and property division of unmarried, cohabiting couples.[74]

Yet the court went further; in dicta following the holding, the court left open the possibility that implied contract theory and equitable principles, such as constructive trusts and resulting trusts, could be applied to property division of unmarried cohabitation relationships.[75] And finally, the court allowed for one greater possible award to cohabitants in dissolution: a partner could seek recovery "in quantum meruit for the reasonable value of household services rendered less the reasonable value of support received if he can show that he rendered services with the expectation of monetary reward."[76] The possibility of implied contracts and quantum meruit claims flowing from the nature of the relationship itself ran counter to traditional meretricious relationship doctrine, which invalidated claims between unmarried cohabitants.[77] The holding and the dicta elevated cohabitation to a status closer to marriage.[78] Other states have responded to *Marvin* in various ways; some rejected it outright,[79] some adopted something in the middle,[80] and others created a doctrine that treats cohabitation as a distinct positive status with its own rights and responsibilities.[81]

Name, 117 HARV. L. REV. 1893, 1901 & n.28 (2004) (stating that "the social backdrop had become considerably more receptive to homosexuality," asserting that this was a factor in setting the stage for the *Lawrence* opinion, and noting that this social change was manifested in court opinions and even television characters and actors).

[74] *Marvin*, 557 P.2d at 122 ("We conclude that the judicial barriers that may stand in the way of a policy based upon the fulfillment of the reasonable expectations of the parties to a nonmarital relationship should be removed.").

[75] *See id.*

[76] *Id.* at 122-23.

[77] *See* Hewitt v. Hewitt, 394 N.E.2d 1204, 1208 (Ill. 1979) ("'An agreement in consideration of future illicit cohabitation between the plaintiffs is void.' This is the traditional rule, in force until recent years in all jurisdictions." (quoting Wallace v. Rappleye, 103 Ill. 229, 249 (1882))); Garrison, *supra* note 54, at 817 ("[S]ome American courts have adhered to the traditional view that even explicit written contracts between unmarried cohabitants are unenforceable . . . .").

[78] *See* Deam, *supra* note 71, at 737-39 (highlighting that the opinion "created an alternative for people who wished to gain some of the rights of matrimony without the formalities of traditional marriage" and "opened the door for . . . unmarried couples to exploit some of the rights and obligations imposed on their legally married counterparts").

[79] *See* Garrison, *supra* note 54, at 817.

[80] *See* Estin, *supra* note 58, at 1383 (remarking that many state courts will enforce contracts *and* allow for equitable claims upon the dissolution of a cohabitation relationship).

[81] *See* Reppy, *supra* note 66, at 277-78 (identifying states where claims need not be based on contract or equitable theories, but rather the claimant must only prove that she and her partner lived together in a relationship, meeting certain requirements, to receive the benefits of the status).

B. *States' Treatment of the Dissolution of Cohabitation Relationships*

States have their own non-universal doctrines concerning claims for property division arising from the dissolution of a cohabitation relationship.[82] On one end of the spectrum, a handful of states do not validate any property claims arising out of a non-marriage cohabitation relationship.[83] Some states validate express and sometimes even implied contracts made by cohabiting partners.[84] Other states hold contract claims valid and will also allow claims in equity.[85] Lastly, a few states acknowledge certain cohabitation relationships as granting rights and responsibilities to each party, obviating the need for claimants to satisfy contract and equitable standards.[86] This Section details varying doctrines from around the country.

1. "All-or-Nothing Approach," or the "Negative Status" Doctrine

Now let us turn to Professor Hedgecock's "All-or-Nothing-Approach"[87] and Professor Reppy's "Negative Status" doctrine. [88] A small minority of states

[82] *See* Estin, *supra* note 58, at 1383 ("[T]he law governing nonmarital relationships remains largely an ad hoc affair, with tremendous variation between states and from case to case.").

[83] *See id*. ("[C]ourts in Illinois and Georgia . . . will not enforce even express written 'relationship' contracts between unmarried cohabitants."); Hedgecock, *supra* note 54, at 573 (discussing the holding in *Hewitt*, which invalidated the claim based on the parties' status as an unmarried couple); Reppy, *supra* note 66, at 275-76 ("[T]hey are disabled, because of the immorality of their sexual relations, from entering into a broad agreement for pooling of gains they make during their relationship.").

[84] *See* Salzman v. Bachrach, 996 P.2d 1263, 1267-68 (Colo. 2000) (reviewing instances in which courts validated contract claims between parties to a cohabitation relationship); Hedgecock, *supra* note 54, at 570-71 (commenting on the various contract-based doctrines and their limitations); Reppy, *supra* note 66, at 282-86 (examining the various doctrines of states that recognize contracts between cohabiting couples, and the ramifications of those doctrines).

[85] *See* Estin, *supra* note 58, at 1383 ("[M]ost states' courts . . . recognize various equitable claims between unmarried partners, particularly where they share a business or property."); Hedgecock, *supra* note 54, at 571-72 (outlining equitable remedies that courts grant in claims arising out of cohabitation relationships). *See generally* Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711 (2006) (critiquing the use of restitution and equitable claims in the context of cohabitation relationships without the standard restitution requirements being met).

[86] *See* Estin, *supra* note 58, at 1383 (listing Washington and Nevada as states that follow this doctrine); Garrison, *supra* note 54, at 836 (citing *In re* Marriage of Lindsey, 678 P.2d 328 (Wash. 1984)) (criticizing Washington's extension of "marital obligation" to non-married cohabitation couples without more discussion of public policy); Reppy, *supra* note 66, at 277-78 (naming Washington, West Virginia, and Kansas as states that grant rights to couples in cohabitation relationships).

[87] Professor Hedgecock labels the refusal to validate contracts made in non-marital cohabitation relationships as the "All-or-Nothing Approach." Hedgecock, *supra* note 54, at 573.

hold to the "traditional view" that contracts for property division between unmarried cohabitants are unenforceable.[89] At present, this minority includes Georgia, Illinois, Louisiana, Mississippi, Ohio, and West Virginia.[90] These courts primarily base denial of these claims on public policy concerns.[91] The courts find it against the policy of their respective states to support illicit, non-marital relationships through recognition of contract[92] or equitable[93] claims for property division flowing from unmarried cohabitation relationships. Some courts find basis for this in statutory interpretation,[94] and some through the common law of the state.[95] Some of these opinions draw a negative conclusion

[88] Professor Reppy terms the doctrine that unmarried cohabitants are disabled from advancing contract claims arising from their relationship as the "Negative Status" doctrine. *See* Reppy, *supra* note 66, at 275.

[89] *See* Garrison, *supra* note 54, at 817.

[90] *See, e.g.*, Rehak v. Mathis, 238 S.E.2d 81 (Ga. 1977); Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979); Schwegmann v. Schwegmann, 441 So. 2d 316 (La. Ct. App. 1983); *In re* Estate of Alexander, 445 So. 2d 836 (Miss. 1984); Lauper v. Harold, 492 N.E.2d 472 (Ohio Ct. App. 1985); Thomas v. LaRosa, 400 S.E.2d 809 (W. Va. 1990).

[91] *See* Long v. Marino, 441 S.E.2d 475, 476 (Ga. Ct. App. 1994) ("Meretricious sexual relationships are by nature repugnant to social stability, and our courts have on sound public policy declined to reward them by allowing a money recovery therefor."); *Hewitt*, 394 N.E.2d at 1211; *Schwegmann*, 441 So. 2d at 323 (acknowledging the plaintiff's argument that the development of "Louisiana Law on concubinage . . . was predicated on public policy construed by the judiciary").

[92] *See, e.g.*, *Hewitt*, 394 N.E.2d at 1211 (holding that the claimant's contract claims were unenforceable); *Schwegmann*, 441 So. 2d at 322, 324 (denying oral and implied contract claims); Tarry v. Stewart, 649 N.E.2d 1, 6 (Ohio Ct. App. 1994) ("[T]his court has failed to discover, any Ohio cases allowing cohabiting individuals to recover under a constructive trust theory for contributions to a relationship."); *Thomas*, 400 S.E.2d at 809 (barring any contracts between unmarried cohabiting couples for future support whether they are explicit or implied contracts).

[93] *See, e.g.*, *Rehak*, 238 S.E.2d at 82 (invalidating plaintiff's claims in equity against former partner based on the domestic service and companionship provided by her during the relationship); *Schwegmann*, 441 So. 2d at 325 (refusing to exercise the court's power of equity to grant an equitable lien and recovery in quantum meruit); *Lauper*, 492 N.E.2d at 475 (finding that a non-marriage cohabitation relationship voided any claims for unjust enrichment or constructive trust based on actions taken in conjunction with the relationship).

[94] *See, e.g.*, *Hewitt*, 394 N.E.2d at 1209 (reasoning that recognition of property rights between cohabitants would violate the policy of the Illinois Marriage and Dissolution of Marriage Act).

[95] *See, e.g.*, *Rehak*, 238 S.E.2d at 82 ("It is well settled that neither a court of law nor a court of equity will lend its aid to either party to a contract founded upon an illegal or immoral consideration." (emphasis omitted)); *Schwegmann*, 441 So. 2d at 323 ("A great body of jurisprudence has grown up confirming that concubines and paramours have no rights in each other's property."); *Lauper*, 492 N.E.2d at 474 ("There is no precedent in Ohio for dividing assets or property based on mere cohabitation without marriage and we think it advisable not to start or follow a trend to the contrary.").

that enforcing such claims would undermine the public policy favoring support of the institution of marriage,[96] similar to the conclusion that granting same-sex divorces will recognize and validate same-sex marriage counter to a state's public policy codified in its mini-DOMA.

Some "All-or-Nothing" states, however, allow for variations on the doctrine[97] and even allow for the possibility of abandoning the doctrine, provided that change is motivated by the legislature.[98] For instance, Mississippi relaxes its absolute approach when the couple has been married, divorced, and later resumes cohabiting.[99] This practice rests on the theory that any cohabitation subsequent to the divorce resumes a lawful relationship in the eyes of either the couple or the public, since the couple had been lawfully married in the past.[100] Some states will enforce contract agreements between

[96] *See, e.g.*, *Hewitt*, 394 N.E.2d at 1209 (declaring that granting property rights between cohabitants "contravenes the Act's policy of strengthening and preserving the integrity of marriage"); *Schwegmann*, 441 So. 2d at 323-24, 326 ("The State has valid reason to discourage relationships which serve to erode the cornerstone of society, i.e., the family. . . . Thus, aside from religious or moralistic values, the State is justified in encouraging the legitimate (marriage) over the illegitimate (concubinage), for to do otherwise is to spread the seeds of destruction of the civilized society.").

[97] For instance, some states will enforce unjust enrichment claims with a resulting trust when one partner retains title to property that the other cohabiting partner significantly contributed to financially, and some courts will find an implied partnership in business activities between unmarried cohabitants when the business is distinct from the relationship. *See* Reppy, *supra* note 66, at 276.

[98] *See Hewitt*, 394 N.E.2d at 1209 ("The question whether change is needed in the law governing the rights of parties in this delicate area of marriage-like relationships involves evaluations of sociological data and alternatives we believe best suited to the superior investigative and fact-finding facilities of the legislative branch in the exercise of its traditional authority to declare public policy in the domestic relations field."); *In re* Estate of Alexander, 445 So. 2d 836, 839 (Miss. 1984) ("We are of the opinion that public policy questions of such magnitude are best left to the legislative process, which is better equipped to resolve the questions which inevitably will arise as unmarried cohabitation becomes an established feature of our society." (citing Carnes v. Sheldon, 311 N.W.2d 747 (Mich. Ct. App. 1981))).

[99] *See, e.g.*, Wooldridge v. Wooldridge, 856 So. 2d 446 (Miss. Ct. App. 2003) (enforcing equitable distribution of property subsequent to the dissolution of a cohabitation relationship of a couple that had been previously married).

[100] *See id.* at 453 ("Here, Steve and Debra were more than 'pals' by virtue of their previous marriage, their having a second child during their post-divorce period of cohabitation, their holding themselves out to the public as being husband and wife and through their relationship of provider and domestic caretaker. Steve and Debra resumed cohabitation approximately one month after their divorce, and but for want of obtaining another marriage license, they lived in the same relationship in which they had lived from 1973 through 1994, holding themselves out to the public as well as their two daughters as having legally remarried. While we do not sanction palimony, we do believe in equitable distribution consistent with each party's contribution.").

the cohabiting couple that do not arise from the illicit relationship, such as business and joint property agreements.[101] Though they will not validate contract agreements between cohabitants, other state courts allow claims in equity such as constructive trust and resulting trust, as long as the claimant can satisfy the standard requirements of the equitable claim.[102] These variations show differences between these states. Yet, the "All-or-Nothing" states share a steadfastness in their stance that non-marriage cohabitation itself does not confer any benefits or rights on either cohabitant upon the dissolution of the relationship, nor can any valid contract flow from the unmarried, cohabitant relationship.[103]

2. State Court Enforcement of Contracts and Unjust Enrichment Claims Arising from Unmarried Cohabitation Relationships

"Courts in a few states have signaled their willingness to compensate cohabitants for the types of sharing behavior that we associate with marriage."[104] Still, most of these cases involve dividing mixed property or rewarding one cohabitant for a substantial contribution to his or her partner's "business or property interests," as opposed to an equitable division of all the property accumulated during the relationship one would find within the context of marriage.[105] Different states permit different remedies and invoke different doctrines to justify these remedies.[106] States utilize contract law and principles

[101] *See Hewitt*, 394 N.E.2d at 1208 (stating that unmarried cohabitants may make contracts with each other that are independent of the relationship); Thomas v. LaRosa, 400 S.E.2d 809, 812-14 (W. Va. 1990) (distinguishing the facts of the case from favorable reviews of other state court opinions and the *Restatement of Contracts*, which enforce contracts between unmarried cohabitants so long as the agreement is independent of the relationship).

[102] *See, e.g.*, Guerin v. Bonaventure, 212 So. 2d 459, 461 (La. Ct. App. 1968) ("[T]he claims of a paramour and concubine will be recognized and enforced with respect to joint or mutual commercial ventures, provided such enterprises arose independently of the illicit relationship."), *cited in* Schwegmann v. Schwegmann, 441 So. 2d 316, 325 (La. Ct. App. 1983); Lauper v. Harold, 492 N.E.2d 472, 475 (Ohio Ct. App. 1985) (validating an unjust enrichment claim based on car payments made by the plaintiff, where the car was still in the possession of the ex-cohabitant defendant). The claim in *Schwegmann* was a claim in quantum meruit for compensation for business services performed. 441 So. 2d at 324.

[103] *See* Rehak v. Mathis, 238 S.E.2d 81, 82 (Ga. 1977); Long v. Marino, 441 S.E.2d 475, 476 (Ga. Ct. App. 1994); *Hewitt*, 394 N.E.2d at 1206; *Schwegmann*, 441 So. 2d at 326; *Alexander*, 445 So. 2d at 840; Tarry v. Stewart, 649 N.E.2d 1, 6 (Ohio Ct. App. 1994); *Lauper*, 492 N.E.2d at 474; *Thomas*, 400 S.E.2d at 812.

[104] Estin, *supra* note 58, at 1391.

[105] *See id.* at 1384 (remarking that most cohabiting couples "have no rights or obligations that arise by virtue of their shared life").

[106] *See id.* at 1391-1402 (surveying doctrine concerning property division and claims arising from cohabitation relationship dissolution); Hedgecock, *supra* note 54, at 570-75 (identifying four distinct approaches to unmarried cohabitation relationship property

of unjust enrichment[107] to enforce written and oral express contracts,[108] validate implied contracts,[109] impose constructive and resulting trusts,[110] and award quantum meruit.[111] Some states use multiple doctrines to form their approach to the dissolution of cohabitation relationships.[112] Many states that will validate property claims between former cohabitants under contract law or principles of equity require evidence that the relationship has met a marriage-like standard.[113] It is unclear whether these states will accept a valid out-of-state marriage, invalid in that state, as evidence of a marriage-like relationship.

a. *State Approaches to Unmarried Cohabitation Property Division Based on Contract Law*

States that validate property division contract claims between prior unmarried cohabitants follow the holding in *Marvin v. Marvin*.[114] They validate the property division agreement by acknowledging an express written or oral contract or by determining the existence of an implied-in-fact contract.

division); Reppy, *supra* note 66, at 275-90 (sorting state approaches to cohabiting couple property division according to the varying legal doctrines invoked).

[107] *See* Hedgecock, *supra* note 54, at 569-70 (listing methods by which states provide property remedies for former unmarried cohabitants, sometimes characterized as equitable claims though really based on claims of restitution and unjust enrichment).

[108] *See* Estin, *supra* note 58, at 1395-97 (examining state doctrines that allow for claims between former cohabitants based on contract law); Reppy, *supra* note 66, at 282-85 (discussing various state approaches to recovery under express contract claims).

[109] *See* Reppy, *supra* note 66, at 285-86 (analyzing the benefits and limitations of implied-in-fact contracts as remedies for property division claims between former cohabitants).

[110] *See* Estin, *supra* note 58, at 1397-99 (describing different circumstances in which courts will use the remedies constructive trust and resulting trust for property division claims by former unmarried cohabitants); Hedgecock, *supra* note 54, at 571 (stating that some states will recognize unjust enrichment claims, awarding recovery through constructive or resulting trusts).

[111] *See* Estin, *supra* note 58, at 1400 (explaining the circumstances in which courts allow recovery under a quantum meruit theory for cohabitant property claims).

[112] *See, e.g.*, Hedgecock, *supra* note 54, at 570 (remarking that some states will validate property claims under express or implied contract theory).

[113] *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 (Tentative Draft No. 3, 2004) (allowing recovery in certain circumstances under a theory of restitution between former unmarried cohabitants who "have lived together in a relationship resembling marriage"); Reppy, *supra* note 66, at 285 ("The crucial fact upon which the agreement is recognized is that the pair lived together as do a husband and wife lawfully married.").

[114] 557 P.2d 106, 122-23 (Cal. 1976); *see* discussion *supra* Part II.A.

Some states, however, limit *Marvin*'s broad language through either statute[115] or judicial interpretation.[116]

Texas and Minnesota fold cohabitating couples' agreements to share property into their statute of frauds, requiring such agreements to be in writing.[117] Texas specifically requires any "'agreement made on consideration of conjugal cohabitation'" to be in writing.[118] Texas courts have "construed [this] to bar any kind of relief for cohabitants permissible in . . . *Marvin v. Marvin*."[119] Texas even refrains from validating oral contracts based on household services, with no basis in sex, for fear that they are attempts to hide the palimonial nature of the claim.[120] Minnesota's statute of frauds pertains to property agreements between unmarried cohabitants if "sexual relations between the parties are contemplated."[121] The Supreme Court of Minnesota has interpreted this clause to mean that an oral agreement is invalid only if the sole consideration is sexual relations.[122]

There are other states that will only validate express contracts to share property between unmarried cohabitants but do not require them to be in writing.[123] These states still examine the agreement for any immoral sexual consideration that may invalidate the agreement as contrary to public policy.[124] Some of these states will invalidate contracts if sexual relations form any part of the consideration, while others will validate the agreement if there is any consideration other than sexual relations.[125] Massachusetts law concerning

---

[115] *See* Reppy, *supra* note 66, at 282-84 (discussing the Texas and Minnesota statutes requiring all property sharing agreements between unmarried cohabitants to be in writing under their statutes of frauds).

[116] *See* Estin, *supra* note 58, at 1391-99; Hedgecock, *supra* note 54, at 570-73; Reppy, *supra* note 66, at 285 (commenting that states enforcing pooling contracts "have to grapple with matters of construction and implied terms to fill gaps left by the cohabitants").

[117] *See* Reppy, *supra* note 66, at 283.

[118] *Id.* at 283 (quoting Zaremba v. Cliburn, 949 S.W.2d 822 (Tex. App. 1997)).

[119] *Id.*

[120] *See id.*

[121] *Id.* (quoting MINN. STAT. ANN. § 513.075 (West 2008)).

[122] *See id.* at 283-84 (commenting that under the Minnesota Supreme Court's interpretation that only contracts whose sole consideration is sexual relations are invalid, the court would have to hold that any additional consideration would validate a contract, and thus the statute would be superfluous because prostitution is illegal in Minnesota).

[123] *See id.* at 284-85 & n.60 (exploring the spectrum of the effect of sexual relations on cohabitation agreements where statutes of fraud do not apply, where Texas is on one end of the spectrum and Minnesota on the other, noting Florida, Arizona, Colorado, North Carolina, and Massachusetts as states that follow express contract theory without the statute of frauds applying).

[124] *See id.*

[125] *Id.* at 284 (comparing a case where plaintiff's role as a "lover" automatically invalidated the contract with "Minnesota's approach . . . [that] the contract [is] valid if there is any consideration in addition to sex").

unmarried cohabitants lies in the middle of these two extremes, validating unmarried cohabitants' property agreements so long as the sexual relationship is not the dominant consideration in the contract.[126] Though these states approach recognition of express contracts differently, they are all similar in their unwillingness to recognize implied-in-fact contracts between former unmarried cohabitants.[127]

There are, however, states that will enforce implied-in-fact contracts between former unmarried cohabitants.[128] These states treat a claim for property division similarly to the approach taken by Washington or the ALI, which will divide property between former unmarried cohabitants based on their status as a cohabiting couple,[129] except that states validating implied-in-fact agreements base their approach on contract law.[130] Interestingly, this similarity extends to an emphasis on the relationship having been marriage-like.[131] The court will look to facts such as performance of household services, joint bank accounts, joint tax filings, and joint purchases to infer the agreement.[132] And these courts will always look for some consideration other than sexual relations if they are to validate the implied contract claim.[133] Once again, it is unclear if a valid out-of-state marriage, invalid in-state, would satisfy this inquiry.

---

[126] *Id.* at 284-85.

[127] *See* Estin, *supra* note 58, at 1396-97 ("In New York and several other states, the courts have approved enforcement of express, but not implied, contracts, because of the problems of proof with implied contracts."); Hedgecock, *supra* note 54, at 570 ("Some . . . jurisdictions recognize . . . claims only if they are based on express contract."); Reppy, *supra* note 66, at 282 ("Several American states have held that only an express pooling agreement made by cohabitants will be enforced.").

[128] *See* Estin, *supra* note 58, at 1391 ("In California, West Virginia, and Wisconsin, courts achieve a similar result through generous application of implied contract principles."); Reppy, *supra* note 66, at 285-86.

[129] *See infra* Part II.B.3.

[130] *See* Reppy, *supra* note 66, at 286 ("The caselaw concerning general pooling agreements implied-in-fact . . . seems indistinguishable from the caselaw in positive status states except that the stated theory of recovery is contract, not status.").

[131] *See* Estin, *supra* note 58, at 1391-93; Reppy, *supra* note 66, at 285 ("The crucial fact upon which the agreement is recognized is that the pair lived together as do a husband and wife lawfully married."); *infra* Part II.B.3.

[132] *See* Estin, *supra* note 58, at 1393-94; Reppy, *supra* note 66, at 286 (stating these actions indicate a "tacit pooling of gains").

[133] *See* Reppy, *supra* note 66, at 286 ("[T]here is always some consideration independent of sexual services so that immoral consideration is no more a problem than it is in positive status states.").

There are limitations on property division claims based on an agreement between unmarried cohabitants to share property.[134] First, many couples are unlikely to form an express contract concerning property division upon the potential event that their relationship will dissolve.[135] Couples may enter the relationship with the intent to share their labor and property, but may never consciously determine the necessary elements to form a contract.[136] Additionally, courts will often need to "fill gaps left by cohabitants" in their express contracts.[137] Implied-in-fact contracts are heavily dependent on a close examination of the facts involved in each case.[138] "Additionally, for courts willing to conduct a case-by-case analysis to determine whether an unmarried cohabitant is entitled to recover, problems of arbitrary distinctions may arise due to the difficulty of ascertaining the true nature of the cohabitants' relationship."[139] Also, courts granting implied-in-fact contract remedies will need to determine how long of a separation is necessary to terminate the implied contract to pool property.[140] Lastly, courts must determine whether the division of property based on implied-in-fact contracts will be a fair and equitable division or an equal, "50-50," division.[141] Many of these issues parallel the problems that led to the demise of common law marriage, and thus states may be hesitant to continue the practice.[142]

b. *State Approaches to Unmarried Cohabitation Property Division Based on Principles of Unjust Enrichment and Restitution*

States that award restitution to a prior unmarried cohabitant, using unjust enrichment principles which are commonly labeled as equitable principles, follow the dictum at the end of the *Marvin* opinion.[143] Some states will impose constructive trusts or resulting trusts on property owned by one cohabitant if

---

[134] *See* Hedgecock, *supra* note 54, at 571 ("*Marvin*-type remedies offer some protection for parties after the dissolution of a nonmarital relationship; however, the protection is limited."); Reppy, *supra* note 66, at 284-86.

[135] *See* Hedgecock, *supra* note 54, at 570.

[136] *Id.* (citing Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 774 (1996)).

[137] *See* Reppy, *supra* note 66, at 285.

[138] *See* Hedgecock, *supra* note 54, at 570 (stating that the "same issues of intent that arise in common law marriage cases" will arise in inquiries as to cohabitation implied-in-fact agreements).

[139] Erin Cleary, Note, *New Jersey Domestic Partnership Act in the Aftermath of* Lewis v. Harris*: Should New Jersey Expand the Act to Include All Unmarried Cohabitants?*, 60 RUTGERS L. REV. 519, 544 (2008).

[140] *See* Reppy, *supra* note 66, at 286 (listing separation length among the issues that courts will have to "grapple" with).

[141] *Id.*

[142] *See supra* note 56 and accompanying text.

[143] *See supra* note 75 and accompanying text.

the other cohabitant made a substantial contribution to its procurement.[144] Other states will permit quantum meruit for services performed by one of the cohabitants for the other.[145] And at least one state has utilized equitable estoppel to grant property remedies to prior unmarried cohabitants.[146]

States that use restitution remedies to settle claims arising from a former unmarried cohabitation relationship do so using the doctrine of unjust enrichment.[147] This allows the courts to impose a constructive or resulting trust upon property that is titled in and in the possession of the non-claimant cohabitant.[148] Typically, a claimant cohabitant will have to prove she made a substantial contribution to its procurement, that the holding cohabitant promised joint title in the property, or coerced the claimant into relinquishing a previous interest in the property.[149] Contributions that have satisfied courts include services, property, direct financial investment in the property, and loans to obtain the property, so long as the contribution is quantifiable.[150] This limits the recovery to the actual amount contributed.[151]

[144] *See* Estin, *supra* note 58, at 1399 (highlighting constructive trust as a remedy for situations of joint economic investment between cohabitants); Hedgecock, *supra* note 54, at 571 (stating that courts will grant recovery of resulting or constructive trust to a former unmarried cohabitant under a theory of unjust enrichment); Annie Y. Wang, *Unmarried Cohabitation: What Can We Learn from a Comparison Between the United States and China?*, 41 FAM. L.Q. 197, 206-07 (2007) (commenting that some courts rely on constructive trusts as opposed to quantum meruit).

[145] *See* Estin, *supra* note 58, at 1400 (acknowledging courts' practice of granting quantum meruit when one cohabitant's services for the other go beyond "the ordinary give-and-take of a shared life"); Wang, *supra* note 144, at 206.

[146] *See* Hedgecock, *supra* note 54, at 571 (remarking that Tennessee uses this doctrine when the cohabitants have held themselves out as married).

[147] *Id.*

[148] *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 (Tentative Draft No. 3, 2004) ("[T]he person making such contributions has a claim in restitution against the owner of the asset as necessary to prevent unjust enrichment."); Estin, *supra* note 58, at 1399 (stating that courts will allow this in situations of shared property or joint investment between former cohabitants, though the title may only be in the name of one).

[149] *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 (Tentative Draft No. 3, 2004) ("[I]f one of the former cohabitants owns a specific asset to which the other has made substantial, uncompensated contributions in the form of property or services, the person making such contributions has a claim in restitution . . . ."); Estin, *supra* note 58, at 99 ("Cohabiting partners who have recovered in these cases have typically made a substantial equity investment . . . .").

[150] *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 cmt. d (Tentative Draft No. 3, 2004) (listing appropriate contributions to the defendant cohabitant's assets and requiring that the "benefit conferred is properly quantifiable"); Estin, *supra* note 58, at 1399.

[151] *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 cmt. e (Tentative Draft No. 3, 2004) ("When a claimant under this Section seeks restitution in

The Restatement (Third) of Restitution and Unjust Enrichment tacitly approves of the use of unjust enrichment theory and restitution remedies to settle property claims between former unmarried cohabitants.[152] It provides that:

> At the termination of a period in which two persons, not married to each other, have lived together in a relationship resembling marriage, if one of the former cohabitants owns a specific asset to which the other has made substantial, uncompensated contributions in the form of property or services, the person making such contributions has a claim in restitution against the owner of the asset as necessary to prevent unjust enrichment.[153]

The Reporter's notes remark that these claims must arise out of a cohabitation relationship that resembled marriage.[154] This requirement is similar to that of recovery under contract law.[155] The prior existence of this type of relationship allows courts to relax the standard restitution maxims that there will be no recovery based on purely donative action, nor for something that could have been contracted for.[156] Without the relaxation of these maxims, most former cohabitants could not recover because either their investment in the property looks gratuitous, or the claimant could have contracted for a future interest.[157] The Reporter's notes justify this relaxation by stating that though the claimant's contribution was "essentially gratuitous – had the parties' relationship only turned out differently," the "unjust enrichment becomes visible only after the termination of the parties' relationship – show[ing] that the propriety of the claim is explained by other elements of the parties' relation."[158] Thus, recovery under unjust enrichment is

respect of services, the measure of recovery is the value of the services rendered, not their traceable product.").

[152] *See id.* § 28.

[153] *Id.*

[154] *See id.* § 28 cmt. b (adding that same-sex couples can satisfy this requirement). *But see* Estin, *supra* note 58, at 1391-92 (citing Vasquez v. Hawthorne, 994 P.2d 240, 242-43 (Wash. Ct. App. 2000)) (stating that at least one court has denied recovery to a same-sex cohabitant because a same-sex cohabitation relationship cannot be marriage-like, as the couple cannot marry).

[155] *See supra* note 113 and accompanying text.

[156] *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 cmt. b (Tentative Draft No. 3, 2004) (highlighting that the cohabitation policy departs from standard restitution requirements because of the special issues related to the cohabitation relationship).

[157] *See id.* For criticism of the relaxation of these requirements, see Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711, 723-30 (2006).

[158] RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 cmt. c (Tentative Draft No. 3, 2004).

best explained by the "claimant's frustrated expectations."[159] The notes point out one other difference from standard restitution remedies:[160] when based on services rendered by the claimant, recovery is limited to the quantifiable amount of the contributing service made by the claimant, and cannot be traced into the product of those services like a standard recovery in restitution would be.[161]

Lastly, some states have permitted a former cohabitant to recover under a theory of quantum meruit.[162] This allows the claimant to recover a monetary award as opposed to granting an interest in specific property through constructive trust or resulting trust.[163] This remedy provides for the claimant to recover for services provided to her former cohabitant,[164] but recovery is limited to services beyond the household labor divided between a couple in the run of a normal relationship.[165] Thus, a claimant could not recover for providing household labor such as cleaning and cooking.[166] The cases reveal quantum meruit awards for services contributed to a business or in home construction and renovation.[167]

Remedies based on a theory of unjust enrichment for former unmarried cohabitants also have their limitations.[168] "Parties do not know where they stand in advance, and when disputes arise, there is no framework for compromise" because these claims are so dependent on the specific facts of each case.[169] Additionally, like contract based remedies, restitution-like

[159] *Id.*

[160] *See id.* § 28 cmt. e.

[161] *Id.*; *see also* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT §§ 55, 58 (Tentative Draft No. 6, 2008) (describing the remedy of constructive trust and the ability to follow the product of property upon which the court imposes a constructive trust upon, respectively).

[162] *See* Estin, *supra* note 58, at 1400; Wang, *supra* note 144, at 206.

[163] *See* Wang, *supra* note 144, at 207 ("Constructive trusts differ from quantum meruit primarily because they permit the plaintiff to claim title to specific property rather than pursue an action for damages.").

[164] *See* Estin, *supra* note 58, at 1400.

[165] *Id.* ("[C]ourts will not order compensation for services performed by one partner that can be characterized as part of the ordinary give-and-take of a shared life.").

[166] RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 cmt. d (Tentative Draft No. 3, 2004) ("Claims to restitution based purely on domestic services are less likely to succeed, because services of this character tend to be classified among the reciprocal contributions normally exchanged between cohabitants whether married or not."); Estin, *supra* note 58, at 1400 n.101 (noting that courts do not traditionally provide restitution for household service, unless the claimant cohabitant was hired for that purpose prior to the relationship).

[167] *See* Estin, *supra* note 58, at 1400.

[168] *See* Hedgecock, *supra* note 54, at 572-73 (examining various problems with equitable remedies for property claims made by former unmarried cohabitants).

[169] Sherwin, *supra* note 157, at 735.

remedies usually do not provide for ongoing support, like alimony.[170] They are limited to the specific amount of the contribution in the property for which the claimant makes a claim, to the specific services performed that benefited the non-claimant, and to property gathered during the relationship.[171] Former cohabitants are also typically unable to recover for contributions or investments in the couple's shared life, such as rent, mortgage payments, groceries, and childcare.[172]

3. Equitable Property Rights Based on a Relationship Status: The "Functional Approach," or "'Pure' Positive Status"

A few states use a "Functional Approach," which grants property rights based on relationship status.[173] These states will grant an equitable and just division of property to unmarried, cohabiting couples if their relationship meets the standards of a certain status.[174] Washington has the most developed law of this type.[175] Additionally, the ALI advocates a similar structure in its *Principles of the Law of Family Dissolution: Analysis and Recommendations*.[176] Both Washington and the ALI grant certain property

[170] *See* Estin, *supra* note 58, at 1392 (stating that recovery is likely limited to property accrued during the time of the relationship and would not extend to ongoing support). *But see id.* at 1392 n.67 (citing Byrne v. Laura, 60 Cal. Rptr. 2d 908, 913-16 (Ct. App. 1997)) (noting that one court has enforced a promise for support).

[171] *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 cmts. d, e (Tentative Draft No. 3, 2004); Estin, *supra* note 58, at 1392.

[172] *See, e.g.*, Estin, *supra* note 58, at 1401-02 ("In denying compensation, one court put the issue this way: 'The evidence clearly establishes parties living in a family relationship with each contributing work or money to the common cause and each receiving mutual benefits from the joint efforts.'" (quoting Murphy v. Bowen, 756 S.W.2d 149, 151 (Ky. Ct. App. 1988))).

[173] Annie Wang describes regimes that grant property rights based on a relationship status as the "Functional Approach," and Professor Reppy describes this approach as "'Pure' Positive Status." *See* Reppy, *supra* note 66, at 277; Wang, *supra* note 144, at 211.

[174] *See* Amanda J. Beane, Note & Comment, *One Step Forward, Two Steps Back:* Vasquez v. Hawthorne *Wrongly Denied Washington's Meretricious Relationship Doctrine to Same-Sex Couples*, 76 WASH. L. REV. 475, 482-83 (2001) (discussing Washington's approach to property division for meretricious relationships); *see also* Estin, *supra* note 58, at 1383, 1394 (discussing the Washington and Nevada approaches to property division for some unmarried, cohabitation relationships); Reppy, *supra* note 66, at 277-78.

[175] *See* Reppy, *supra* note 66, at 277-81 (highlighting Washington's approach to "meretricious relationships," the Washington label for relationships that meet the threshold necessary to qualify for property rights, and stating that the law granting unmarried cohabitants property rights based on regulating status in West Virginia and Kansas is "embryonic at the present time").

[176] *See generally* ALI PRINCIPLES, *supra* note 52, § 6 (describing the requirements of and rights granted by what it labels domestic partnership status).

rights to same-sex couples if their relationship attains the specified required status.[177]

a. *Washington's Committed Intimate Relationship Status*

Washington used to adhere to what was known as the "Creasman Presumption," which presumed that couples intended to dispose of their property as they actually did, and thus the party with title should retain ownership of the property.[178] Then, after California's *Marvin* decision in 1984, the Washington Supreme Court ruled in *In re Marriage of Lindsey*[179] that courts must "'examine the [meretricious] relationship and the property accumulations and make a just and equitable disposition of the property.'"[180] A relationship that sufficiently meets the criteria necessary in order to grant property rights status was called a "meretricious relationship," and is now called a "committed intimate relationship."[181] The old moniker may seem odd, considering the traditional doctrine that abrogated contracts if the court found meretricious consideration.[182] The court refined this doctrine in multiple opinions, notably *Connell v. Francisco*,[183] where the court identified a rebuttable presumption that property acquired during the relationship is owned by both parties and thus subject to equitable division.[184] The opinion set down which elements the status granting relationship should contain, and identified relevant factors a court could evaluate in order to determine if the relationship has those necessary elements.[185]

A relationship must be a "stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not

[177] *See* Vasquez v. Hawthorne, 33 P.3d 735, 737-38 (Wash. 2001) (ruling that a couple's status as homosexual does not prevent their relationship from attaining the status of "meretricious relationship"); ALI PRINCIPLES, *supra* note 52, § 6.01 (granting domestic partner status to "two persons of the same or opposite sex").

[178] *See* Beane, *supra* note 174, at 480 (describing the development of cohabitation status law in Washington).

[179] 678 P.2d 328 (Wash. 1984).

[180] *Id.* at 331 (quoting Latham v. Hennessey, 554 P.2d 1057, 1059 (Wash. 1976)).

[181] *See* Olver v. Fowler, 168 P.3d 348, 350 & n.1 (Wash. 2007) (mentioning "Washington's law of meretricious or committed intimate relationships" and noting that "[w]hile this court has previously referred to such relationships as 'meretricious,' we, like the Court of Appeals, recognize the term's negative connotation . . . [and] substitute the term 'committed intimate relationship,' which accurately describes the status of the parties and is less derogatory"); Connell v. Francisco, 898 P.2d 831, 834 (Wash. 1995) (calling a "meretricious relationship" one that meets the qualifications necessary to obtain the status that grants property right similar to marriage).

[182] *See supra* Part II.A.

[183] 898 P.2d 831.

[184] *See* Wang, *supra* note 144, at 212.

[185] *See* Beane, *supra* note 174, at 482 (describing the change and refinement that *Connell* brought to the meretricious relationship doctrine in Washington).

exist."[186] Courts may look to "continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties."[187] The court does not limit the examination to these factors alone, however.[188] Courts may only consider property accumulated during the committed intimate relationship, much like community property in a marriage.[189] The courts may use other facets of marital property law to address many of the individual questions that arise during the division of property from a committed intimate relationship,[190] but the *Connell* court is very clear that it is not equating unmarried cohabitation relationships to marriage.[191] Later cases have limited the correlations that can be made between marriage and unmarried cohabitation relationships.[192] Ultimately, the court "(1) evaluates the interest each party has in the property acquired during the relationship, and (2) makes a just and equitable distribution of the property."[193]

In Washington, those seeking the equitable and just division of property accumulated during the unmarried cohabitation relationship need not rely on some contract theory or claim for an equitable remedy.[194] The determination heavily centers on the conduct of the couple during the relationship.[195] Washington decisions address the question of what types of facts implicate the elements necessary to establish the existence of a "meretricious relationship."[196] The courts seem to focus on the "continuity and duration" of the relationship to satisfy the stability requirement of a committed intimate

[186] *Connell*, 898 P.2d at 834.

[187] *Id.*

[188] *See id.*

[189] *See id.* at 836 ("The critical focus is on property that would have been characterized as community property had the parties been married.").

[190] *See* Reppy, *supra* note 66, at 278-79 (stating that the rules for division of property from a meretricious relationship are similar to those for marital property division for "reimbursement for use of divisible property to improve nondivisible property[,] . . . uncommingling, when fungible assets . . . have been commingled[, and] . . . segregating gain in the value of property that is nondivisible at the termination of a meretricious relationship from gain due to labor by a cohabitant").

[191] *See Connell*, 898 P.2d at 835 ("A meretricious relationship is not the same as a marriage . . . . As such, the laws involving the distribution of marital property do not directly apply to the division of property following a meretricious relationship. Washington courts may look toward those laws for guidance.").

[192] *See* Reppy, *supra* note 66, at 279 (listing various marital doctrines inapplicable to unmarried cohabitation relationships in Washington, such as the ability to divide separate property belonging to one spouse, the ability to award attorneys' fees upon divorce, and the right to make certain inheritance claims).

[193] *Connell*, 898 P.2d at 835.

[194] *See* Beane, *supra* note 174, at 483.

[195] *Id.* at 485, 491.

[196] *See* Reppy, *supra* note 66, at 280.

relationship, and look to purpose, intent, and pooling of resources to determine if the relationship was marital-like.[197]

The Washington courts have not established a bright line rule for any of these factors, so the evaluation comes down to a case-by-case analysis.[198] The different factors must be weighed against each other with no one factor having more weight than any other.[199] For instance, a relationship that was characterized by multiple periods of separation was found to be a "meretricious relationship" because the couple owned property and had a child together, whereas another relationship in which one partner moved out twice, the couple did not pool assets, and one refused to marry was ruled to not be a "meretricious relationship."[200] Additionally, no specific time period has been found necessary to establish a committed intimate relationship.[201]

In determining whether a non-marriage cohabitation relationship is sufficiently marriage-like, Washington courts look to the purpose and intent of the relationship and whether the couple pooled resources.[202] The purpose element has been described as "the intent to create a long-term, stable, nonmarital family relationship."[203] Couples can satisfy this inquiry by proving they had planned to spend their lives together.[204] Evidence "that the couple intended to form a long-term, familial relationship such as intending to remain together as a couple" may satisfy this intent element. [205] It is unclear whether a couple must hold themselves out to society as if they were married, or not.[206] Oddly, a member of the relationship being married to a third party does not "per se bar the recognition of a meretricious relationship."[207] Lastly, courts

[197] *See* Beane, *supra* note 174, at 486 (outlining the typical approach taken by Washington courts in evaluating meretricious relationships).

[198] *See* Wang, *supra* note 144, at 213.

[199] *See* Beane, *supra* note 174, at 491.

[200] *Id.* at 486.

[201] *Id.* at 486-87.

[202] *Id.* at 486.

[203] *Id.* at 488 (quotations omitted).

[204] *Id.* at 488-89 (commenting that courts have identified "companionship, friendship, love, and mutual support" as factors that can establish a marital-like relationship).

[205] *Id.* at 489.

[206] *Id.* ("A party may evidence intent to remain together by showing that the couple modeled themselves after married couples. Courts, however, are inconsistent regarding whether or not the couple must have publicly acted as if they were married. Older, pre-*Lindsey* and *Connell* cases examined whether or not the couple 'held themselves out as husband and wife.' More recently, the Washington Court of Appeals rejected the proposition that the parties must have publicly appeared as a marital-like couple." (citation omitted)).

[207] Reppy, *supra* note 66, at 280 (citing Foster v. Thilges, 812 P.2d 523 (Wash. Ct. App. 1991) and Warden v. Warden, 676 P.2d 1027 (Wash. Ct. App. 1984) and commenting that such a situation "creates an inference that the parties did not intend to have such a relationship"); *see also* Beane, *supra* note 174, at 490 ("[C]ertain circumstances may

may look for a marital-like relationship by looking to evidence that couples shared the burden of household expenses, personal expenses, home improvement, and business development without a distinct salary.[208] As previously mentioned, the Washington courts weigh these factors on a case-by-case determination based on the couple's conduct, with no one factor carrying more weight than another.[209] There is no indication whether a prior marriage, invalid in Washington, would suffice to establish committed intimate relationship status.

b. *The ALI Extension of Property Rights to Unmarried Cohabitation Relationships*

In 2002, The American Law Institute completed its eleven year project on family dissolution, *Principles of the Law of Family Dissolution: Analysis and Recommendations* (hereinafter ALI Principles).[210] Chapter Six of the ALI Principles pertains to opposite-sex and same-sex unmarried cohabitants, labeling them "Domestic Partners."[211] In form, the ALI Principles are similar to Washington's committed intimate relationship status; much like Washington law, the ALI principles confer property rights on a claimant based on the relationship attaining a legal status based upon certain characteristics of the relationship.[212] The status pertains only to inter se claims between the cohabitants and confers no rights on the couple concerning third parties or the government, unlike marriage which may implicate such things as government benefits, information rights with third parties, or contracts with third parties.[213] Additionally, many of the rights conferred by Chapter Six on unmarried cohabitants are similar to those that arise out of the dissolution of marital relationships, though Chapter Six does not grant all of the rights that come

support a finding of a meretricious relationship when one of the parties is married. Courts in at least three cases have found meretricious relationships despite one party's marriage to a third party during a period of the meretricious relationship.").

[208] *See* Beane, *supra* note 174, at 490 (adding that courts may look for a shared bank account to establish pooled resources, but that it is not necessary to establish a meretricious relationship).

[209] *See supra* notes 198-208 and accompanying text.

[210] ALI PRINCIPLES, *supra* note 52, § 6.

[211] *See id.* § 6 (listing the requirements, parameters, and limitations of the ALI domestic partnership status).

[212] *See id.* § 6.03 (directing courts to examine the duration of the unmarried cohabitation relationship, the nature of the household where they reside, and many other factors); *supra* Part II.B.3.a (laying out the Washington doctrine requiring an examination of the conduct of the couple to determine "meretricious relationship" status).

[213] *See* ALI PRINCIPLES, *supra* note 52, § 6.01 cmt. a (confining Chapter Six claims to inter se claims between cohabiting couples, and commenting that this limitation prevents Chapter Six from reinstating common law marriage).

with marriage.[214] The ALI Principles explicitly permit claims though one cohabitant may have been married to a third party.[215] Chapter Six of the ALI Principles provides solely for the fair and equitable distribution of property attained during the domestic partnership period, the same property that courts would consider marital property had the couple been married.[216]

Many of the differences that arise between the ALI Principles and Washington's committed intimate relationship status apply to procedural function.[217] While Washington's doctrine calls for the weighing of multiple factors in each case, the ALI Principles reserve a balancing test as a method of last resort that the claimant must satisfy.[218] Primarily, the court must look to whether a couple "share[d] a primary residence and a life together as a couple" "for a significant period of time."[219] A claimant may invoke the court's presumption, though rebuttable, that the couple was a domestic partnership if the couple maintained a common household for the statutory period, called the "cohabitation period,"[220] or for a separate statutory period in which the couple raised a common child together, called the "cohabitation parenting period."[221] If the couple meets the ALI's requirements and the statutory requirement, then

[214] *See, e.g.*, *id.* § 6.04 cmt. b (explaining that although in marriages some separate property will be recharacterized as marital property upon dissolution, this is not true of cohabitation relationships).

[215] *Id.* § 6.01(5) ("Claims arise under this Chapter from any period during which one or both of the domestic partners were married to someone else only to the extent that they do not compromise the marital claims of a domestic partner's spouse.").

[216] *Id.* § 6.04. This division scheme is very similar to Washington's limitation on "meretricious relationship" claims that the only property available for "just and equitable" distribution is that which would have been community property had the couple been married. *See supra* Part II.B.3.a.

[217] *See* ALI PRINCIPLES, *supra* note 52, § 6; *supra* Part II.B.3.a.

[218] *See* ALI PRINCIPLES, *supra* note 52, § 6.03(6), (7), cmt. e (establishing that should the claimant not meet the standard tests in section 6.03(2) or (3) for domestic partnership, then the claimant must prove that the couple shared a "primary residence and a life together as a couple" based on the numerous factors in section 6.03(7), each carrying no more weight than the other).

[219] *Id.* § 6.01(1).

[220] *Id.* § 6.03(3) ("Persons not related by blood or adoption are presumed to be domestic partners when they have maintained a common household . . . for a continuous period that equals or exceeds a duration, called the *cohabitation period*, set in a rule of statewide application."). Section 6.03(4) defines a common household as a "share[d] . . . primary residence only with each other and family members; or . . . if they share a household with other unrelated persons, they act jointly, rather than as individuals, with respect to management of the household."

[221] *Id.* § 6.03(2) ("Persons are domestic partners when they have maintained a common household . . . with their common child . . . for a continuous period that equals or exceeds a duration, called the *cohabitation parenting period*, set in a rule of statewide application."). Section 6.03(5) defines a "common child" as a child of whom both members of the couple are the legal parent or parent by estoppel, "as defined by § 2.03." *See id.* § 6.03(5).

the court presumes that the couple was in a domestic partnership.[222] If the claimant is unable to establish that the couple shared a common household, that they cohabited for the statutory period, and/or that they shared a common child, the court applies a farther ranging balancing test made up of many factors to determine if the couple was in a domestic partnership.[223] The ALI Principles do not address whether a valid out-of-state marriage, illegal in-state, would suffice to prove the status. Additionally, the ALI Principles allow for compensatory damage payments, similar to alimony, for economic losses incurred during the relationship whereas Washington has not granted these rights.[224]

Both the ALI Principles and the Washington committed intimate relationship status have been criticized.[225] First, some have said the ALI Principles may be ahead of their time or ineffective, such that no United States jurisdiction has adopted them in full.[226] Professor Marsha Garrison criticizes these status granting regimes as so called "conscription regimes," because they do not allow the couple to opt in voluntarily, but instead force the status on the couple in the event that one party brings a property claim.[227] This contrasts

[222] *See id.* § 6.03(2), (3), cmt. b.

[223] *See id.* § 6.03(7); *supra* note 218 and accompanying text.

[224] *See* ALI PRINCIPLES, *supra* note 52, §§ 6.06, 6.02 (allowing for compensatory payments like those in marriage based on the objectives outlined in section 6.02, which compensate for financial losses arising out of the termination of the relationship such as loss of earning capacity, losses from changes in life opportunities, and "primacy of the income earner's claim to benefit from the fruits of his or her own labor").

[225] *See generally* Michael R. Clisham & Robin Fretwell Wilson, *American Law Institute's* Principles of the Law of Family Dissolution, *Eight Years After Adoption: Guiding Principles or Obligatory Footnote?*, 42 FAM. L.Q. 573 (2008) (hypothesizing that the ALI Principles have little or no relevance in modern day law); Garrison, *supra* note 54 (critiquing status-based systems from a variety of angles, including the unfairness of imposing responsibilities on those who have chosen not to seek it, the non-equivalence between marriage and unmarried cohabitation, the insufficiency of cohabitation status in addressing the same-sex marriage dilemma, and others); Reppy, *supra* note 66 (examining the uncertainty around how to contract out of pure status state regimes).

[226] *See* Clisham, *supra* note 225, at 576-77 (remarking, "[a]lthough one state, West Virginia, borrowed from the *Principles* in enacting child custody legislation, no other state code or legislation enacted since 1990 referencing the *Principles* was found," highlighting "the ALI's shrinking relevance, as measured by the *Principles*' impact" and suggesting that it "'may be ahead of our time'" (quoting Harry D. Krause, *Comparative Family Law: Past Traditions Battle Future Trends – and Vice Versa*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 1099, 1107 (Mathias Reimann & Reinhard Zimmermann eds., 2006))).

[227] *See* Garrison, *supra* note 54, at 848, 857 (remarking that "[t]he evidence on equivalence establishes that it would be grossly unfair to treat all or even most cases of cohabitation like marriage: despite a small number of marriage-like relationships, cohabitants typically do not see their relationships as marital and do not behave like married couples . . ." and that "[c]onscriptive cohabitation laws . . . impos[e] obligations on those who have not chosen them").

with the voluntary status schemes previously or currently seen in domestic partnership, civil union, and reciprocal beneficiary states.[228] Garrison also equates the status regimes to common law marriage, claiming that the decline of common law marriage was due to inherent difficulty of "litigation-based determination[s] of marital commitment," and projecting that difficulty onto "conscriptive regimes."[229] Also, Professor Reppy raises questions about how a couple may opt out of the imposed status, and what would be necessary to demonstrate that intent.[230] Some claim that granting status to unmarried cohabitation relationships in some way undermines marriage, while others claim this status may force unmarried cohabitants to approach more deliberately their relationships by imposing marital-like duties on those who sought to avoid those responsibilities under prior cohabitation law.[231]

[228] *See supra* notes 5-9 (reviewing the specificities of various civil union, domestic partnership, and reciprocal beneficiary laws).

[229] Garrison, *supra* note 54, at 849-50.

[230] *See* Reppy, *supra* note 66, at 280-82 (questioning whether courts should begin imposing their own statute of frauds on opt-out contracts, and the propriety of such judge-made law).

[231] *Compare* Estin, *supra* note 58, at 1406, 1408 (commenting that "there are important arguments for not imposing marriage-like rules in [the situation of unmarried cohabitants]" and highlighting that "[t]hose who believe that law is a useful tool for shaping family behavior sometimes argue for maintaining a strong distinction between cohabitation and marriage in order to channel couples into marriage"), Garrison, *supra* note 54, at 857 ("The extension of marital obligations and rights to those who have not made marital commitments signals – inaccurately – that marriage and cohabitation are the same. Such a signal discourages marital commitment and investment. Such a signal also devalues marriage, a status of enormous symbolic importance to most citizens and one associated with greater health, wealth, happiness, and stability than cohabitation."), *and* Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 330 (2008) ("In addition to their other disadvantages, conscriptive schemes conflict with social policies favoring formal marriage and marital childbearing by suggesting that public support for marriage is declining."), *with* ALI PRINCIPLES, *supra* note 52, § 6.02 cmt. b ("It is not an objective (or a likely effect) of this Chapter to encourage parties to enter a nonmarital relationship as an alternative to marriage. On the contrary, to the extent that some individuals avoid marriage in order to avoid responsibilities to a partner, this Chapter reduces the incentive to avoid marriage because it diminishes the effectiveness of that strategy."), *and* Beane, *supra* note 174, at 501 ("Because the intent and purpose of the meretricious relationship doctrine is to provide only limited rights for unmarried couples, the meretricious relationship doctrine does not detract from the state's role in encouraging couples to marry legally.").

III. A PRACTICAL APPROACH TO PROPERTY DIVISION WHEN COURTS ARE ASKED TO DISSOLVE A MIGRATORY SAME-SEX MARRIAGE BUT ARE LIMITED BY A STATE'S MINI-DOMA LAW AND ARE UNABLE TO RECOGNIZE THE MARRIAGE

If a married couple has not contracted as to how dissolution should proceed with an ante-nuptial agreement, they are left in limbo, as a mutual agreement may be difficult to reach at such a tense time.[232] Most couples would then turn to the courts to determine how to proceed based on their state's divorce law. Many courts in mini-DOMA states may be unwilling to dissolve same-sex marriages for fear of giving legal recognition to the marriage, and thus violating that state's mini-DOMA.[233] But this does not lessen the couple's and society's need to determine the couple's legal status, divide their property, and provide a sense of finality to the relationship.[234] Thus, mini-DOMA states should attempt to reach a practical solution to this problem. Given the success of popular referendums on mini-DOMAs and the legal definition of marriage as between a man and a woman, legislatures are unlikely to lead the way in creating this solution.[235] While courts in mini-DOMA states may have serious objections to determining the legal status of a marriage they label illegitimate, they may still use certain doctrines at their disposal to approach the issue. Specifically, without legally acknowledging the validity of the marriage, granting a legal divorce, or deciding issues such as who should have custody of children, courts may distribute property. Certainly this does not achieve all the goals of a couple seeking dissolution of the marriage, but a fair and equitable property division allows the couple to move on with their lives economically and physically.[236] This may even aid in providing a mental and emotional sense of closure. In fact, courts currently determine property division for couples not in a legally recognized relationship through existing cohabitation law.

The development of cohabitation law as it pertains to property division after the termination of the unmarried cohabitation relationship began with *Marvin v. Marvin* and was motivated by dramatic changes in social mores.[237] As previously mentioned, social attitudes towards homosexuals and same-sex

---

[232] *See* Hoogs, *supra* note 46, at 716-19 (evaluating the importance of a formal dissolution proceeding framework because with no rules, dissolutions have a tendency to "drag out" because of highly contentious issues).

[233] *See supra* notes 43-44 and accompanying text.

[234] *See supra* notes 46-48 and accompanying text (discussing the need for mental and legal finality to a relationship).

[235] *See supra* Part I.A.

[236] *See* Hoogs, *supra* note 46, at 707, 716 (characterizing divorce as giving closure to couples and allowing them to move on).

[237] *See supra* Part II.A.

couples have changed over the last thirty years.[238] Gay characters and performers regularly appear in cultural media such as film and television.[239] Governments and companies have extended benefits and rights to same-sex couples.[240] Additionally, courts have taken notice of this new social acceptance and may have been motivated by it in some decisions.[241] Though states may have a strong public policy against fully accepting same-sex couples by granting marriage rights, there is a way to settle property claims between migratory married same-sex couples without violating that policy. Courts in mini-DOMA states should use the existing doctrine of cohabitation law to settle these property claims by transferring a doctrine for one legally unrecognized group of couples onto another. Courts should do so in acknowledgement of society's changing mores regarding same-sex couples, similar to the attitudes that motivated the *Marvin* court to change the law concerning unmarried cohabitants.

A. *Mini-DOMA States Should Utilize Chapter Six of the ALI Principles to Achieve the Fair and Equitable Property Division of Valid Migratory Same-Sex Marriages.*

Mini-DOMA states should utilize cohabitation law to settle property division claims between couples who entered valid marriages in same-sex marriage friendly states that later traveled into the mini-DOMA state. Specifically, courts should use Chapter Six of the ALI Principles to determine the best way in which to divide the couple's property. This approach resolves the conflicts mentioned earlier. The couple receives a close approximation of marital property division, including alimony-like awards and allowance in the property division determination for economic loss suffered by one member of the couple as a result of the relationship.[242] The ALI Principles call for "fair distribution of the economic gains and losses incident to termination of the relationship," satisfying society's desire that one member of the couple should not benefit from the termination of the relationship at the expense of the

[238] *See supra* note 73 and accompanying text (discussing society's changing views toward homosexuality and same-sex marriage).

[239] *See* Tribe, *supra* note 73, at 1901 n.28 (noting examples such as Ellen DeGeneres and *Will and Grace*).

[240] *See* Byrn, *supra* note 73, at 191 (remarking that "many companies now extend benefits to gay and lesbian employees and their partners" and that "ninety state and local governments, and 104 colleges and universities, provided domestic partnership benefits in 2000").

[241] *See id.* at 193-95 (highlighting the change in court approaches to custody proceedings for homosexual families and the decisions in Hawaii, New Jersey, Vermont, and Massachusetts concerning marriage-like and full marriage rights); Tribe, *supra* note 73, at 1901 (implying that the change in society's acceptance of homosexuals provided a fertile ground for the Supreme Court's ruling in *Lawrence v. Texas*).

[242] *See supra* Part II.B.3.b (listing the rights granted under the ALI Principles to unmarried cohabitants upon dissolution).

other.[243] Chapter Six of the ALI Principles only provides for property distribution, avoiding the implication of other legal doctrines that may run the risk of a state recognition of the same-sex marriage, like custody, the legality of the marriage, or finding fault for the dissolution.[244] The Chapter Six doctrine only pertains to inter se claims, and thus the mini-DOMA state court would not create any rights or responsibilities for the state or third parties, further minimizing any risk of a legal recognition of the same-sex marriage.[245] Also, the ALI Principles are ready-made and easy for a state to adopt.

The ALI Principles have limitations, however. First, Chapter Six calls for a factual inquiry into the couple's living situation and the duration of the relationship, and should that inquiry fail to establish a domestic partnership the court must perform an even further reaching inquiry.[246] This runs the risk that a short marriage or one in which the couple lived apart for a time would not attain the status of domestic partnership under the ALI Principles. Additionally, it puts the claimant in the stressful position of proving the validity of the relationship in the eyes of the doctrine. Therefore, states should remove the factual inquiry of ALI Principles section 6.03 for validly married same-sex couples when there is definitive proof of the marriage, such as a marriage certificate or witness testimony.[247] This alteration also answers critics that claim the ALI Principles require a heavily fact-intensive inquiry, which is inefficient and too close to the widely abolished common law marriage.[248] Another limitation arises in that adoption of Chapter Six, as applied to valid same-sex migratory marriages, provides neither for determining the legal status of the marriage nor for settling custody disputes.[249] However, if the courts are to give the couple any satisfaction in accord with the policy elicited in the mini-DOMA, they will likely be reluctant to provide any relief of that kind, anyway. Lastly, Chapter Six only allows for the division of property accumulated during the relationship in question,[250] whereas upon dissolution of a marriage, the couple's separate property may be part of any

[243] ALI PRINCIPLES, *supra* note 52, § 6.02(1).

[244] *Id.* § 6.01 (limiting the scope of Chapter Six to financial claims upon dissolution of the relationship).

[245] *Id.* (limiting the scope of the chapter to solely claims between the cohabitants, and not claims between the cohabitants and third parties or the state).

[246] *Id.* § 6.03 (detailing the process by which courts must determine whether a couple is in a domestic partnership, first focusing on the common household, cohabitation parenting period, and cohabitation period threshold tests, and then urging the court to weigh factors listed under section 6.03(7) should the threshold tests not be met).

[247] *Id.*

[248] *See supra* Part II.B.3.b and note 225.

[249] *See* ALI PRINCIPLES, *supra* note 52, § 6.

[250] *Id.* § 6.04 (restricting the chapter's applicability to property earned during the domestic partnership period, the period in which the couple cohabitates, and barring the recharacterization of separate property, earned prior or subsequent to cohabitation, as domestic partnership property for equitable reasons, unless contracted for).

property division settlement, depending on the state.[251] Therefore, courts should include separate property as part of the property considered for division.

Many courts may look at this strategy with skepticism and reluctance. First, mini-DOMA state courts may see the extensive breadth of Chapter Six as reaching too far, approaching or effectuating the legal recognition of same-sex marriages, similar to the criticism that Chapter Six resurrects common law marriage.[252] However, the limitations of Chapter Six listed above demonstrate that it would not give couples the same rights as those of married couples in the mini-DOMA state, nor in the state where the marriage was granted.[253]

Some mini-DOMA state courts, such as those in any state that has not adopted a "Pure Positive Status" approach, may feel hindered in adopting Chapter Six of the ALI Principles because their state's own cohabitation law does not reach as far as Chapter Six.[254] They may also feel that a separate doctrine solely for couples seeking to dissolve migratory same-sex marriages is inefficient and an inequitable application of the law. States can remedy this by adopting Chapter Six of the ALI Principles for cohabiting couples as well as migratory same-sex married couples. Or, courts may use their equitable powers to apply Chapter Six only to migratory same-sex marriages because of the unique situation that these couples find themselves in. The couple created and approached their relationship under the context of a marriage in another state, with all of the rights and responsibilities that come with that. Hence, they were not conscious of the possibility of their relationship being invalidated in a foreign court of law ex ante, and thus may not have planned for a potential dissolution outside the context of marriage, relying on divorce law instead. "Negative Status" states should look past meretricious consideration as a reason to ignore these claims because, in the minds of the parties, the couple lived their lives as married without illicit sexual relations outside of that context.[255]

Although courts in mini-DOMA states may have substantial and serious objections to adopting Chapter Six of the ALI Principles in order to distribute the property of migratory same-sex marriages, Chapter Six does not contradict the mini-DOMAs' definitions of marriage. The unique circumstances of a same-sex couple married out-of-state may prevent the couple from planning or behaving under the expectation of facing another state's cohabitation law upon dissolution. The ALI principles are the best method of remedying this

[251] *See id.* § 4.11 (permitting the reallocation of separate property to that of marital property for purposed of division in certain circumstances).

[252] *See supra* Parts I.A, II.B.3.b.

[253] *See supra* Parts II.B.3.b, III.A.

[254] *See* Reppy, *supra* note 66, at 277-82 (discussing status based approaches to unmarried cohabitant relationship dissolution).

[255] *See supra* Part II.A (describing meretricious consideration doctrine).

dilemma while still honoring the mini-DOMAs and the needs of the same-sex couple.

B. *An Alternate Solution*

Should courts in mini-DOMA states not adopt Chapter Six of the ALI Principles for application in property division of migratory same-sex marriages, they should apply the cohabitation law of their state with some doctrinal variations for validly entered, migratory same-sex marriages. For many of the reasons listed above, this approach does not conflict with the mini-DOMAs. It is not necessary that courts recognize the validity of same-sex marriage in the mini-DOMA states in order to distribute property. Additionally, in most states, the tentative draft of the Restatement (Third) of Restitution Section 28 and the ALI Principles apply cohabitation law to same-sex couples already so this would not require too much of a doctrinal leap.[256] Yet, state courts should make some changes to their doctrine when approaching migratory same-sex marriages.

1. "Negative Status" States

Initially, intuition implies that "Negative Status" cohabitation states, those that will not validate contract claims between unmarried cohabitants because of the taint of the sexual relationship, that have mini-DOMAs will not budge to allow relief for termination of same-sex marriages either.[257] If they offer no relief to cohabiting, unmarried couples wholesale, they will likely not grant relief to cohabiting couples who are, in the mini-DOMA state, invalidly married. However, as discussed above, meretricious consideration is not an issue with these couples, or at least it is not the same issue. Couples in same-sex marriages were married in their home states, in line with the public policy underlying meretricious consideration: that the state should promote marriage. The couple's intent was not to have illicit sexual relations, but rather to have relations in the context of marriage. If the courts can overcome this logical hurdle, they may then be able to apply contract theory to property division, discussed below. This is admittedly unlikely. These courts take an "all or nothing" approach to cohabitation, and the mini-DOMA, without the concurrent adoption of a civil union-like regime, implies an unwillingness to establish a special status for same-sex couples.

---

[256] *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 cmt. b (Tentative Draft No. 3, 2004) (commenting that relationships under the section "may include a relationship between persons of the same sex"); ALI PRINCIPLES, *supra* note 52, § 6.01(1) ("[D]omestic partners are two persons of the same or opposite sex . . . ."); Estin, *supra* note 58, at 1390 (identifying same-sex couples as a specific demographic subject to cohabitation law).

[257] *See* Reppy, *supra* note 66, at 275-77.

2. States That Allow Recovery Under Contract Theory for Unmarried Cohabiting Couples

Most contract states allow recovery at the termination of both opposite sex and same-sex unmarried couples' relationships.[258] These states with mini-DOMAs should make slight variations on their doctrines for migratory same-sex marriages. Specifically, these state courts should accept the marriage alone as establishing the existence of a contract without further inquiry into the facts of the case. The marriage itself is a form of contract.[259] Also, there is forethought and ceremony surrounding most marriages, thus satisfying the requirement of intent to contract.[260] Courts could view the marriage, not as a marriage, but rather a contract to divide their property upon termination of the relationship in the manner provided under the divorce law of the couple's marriage state. This also allows those states requiring express contracts, including those that apply a statute of frauds to cohabitation contracts, to divide property of the couple without a specific contract as to every single issue. The marriage ceremony and certificate expressly created an agreement between the couple. The terms of the contract are not implied or difficult to determine because they are written in the state code and accepted by the couple unless the couple contracted around them. Courts already have experience with applying the divorce law of other states, and so applying the divorce law of the marriage state will not require a novel expertise from the court.[261] Clearly, this theory would more than satisfy the requirements of states that enforce oral or implied-in-fact contracts between unmarried cohabiting couples.

Mini-DOMA state courts may worry about adopting such an exception to the contract theory because it will create a special class in migratory same-sex married couples and may be an implicit recognition of same-sex marriage. However, courts can recognize the marriage as a contract without speaking to the validity of the marriage itself. A mini-DOMA state court would already validate a standalone contract that set forth terms of property distribution upon

[258] *See* Garrison *supra* note 54, at 890 & n.314 (noting cases in which courts have granted *Marvin*-like claims to same-sex couples and stating that "[i]n States that follow *Marvin*, same-sex couples can establish private rights and obligations . . . through a private agreement").

[259] *See id.* at 821 ("Marital obligation is based on mutual consent. The identities of the contracting parties have varied; the consent of brides, grooms, guardians, and even feudal lords has at one time or another been required. The content of the marriage agreement has also varied widely across centuries and societies; marriage has accommodated polygamy as well as monogamy and suttee as well as no-fault divorce. But at all times marriage has been predicated on an explicit agreement to assume marital roles and obligations.").

[260] *Id.* at 857-61 (characterizing marriage as a serious social commitment imbued with important rights and benefits, and holding a very significant symbolic status in society).

[261] *See* Reppy, *supra* note 66, at 290-302 (analyzing conflict of law rules that courts use to determine whether to apply their own state cohabitation or divorce law or that of another state in the dissolution claims).

termination, as long as the contract was validly entered into. In situations discussed in this Note, the valid contract would be the marriage, and the terms would be the property division methods under the divorce law of the state where the couple was married, which the couple adopted upon finalizing their marriage. So why should a court invalidate a similar agreement simply because it was come to by marriage as opposed to the negotiation of a different arm's length contract? Mini-DOMA courts may also blanch at this theory because the divorce law of the marriage state may provide far more than most contract states would allow under cohabitation law, such as alimony or the division of separate property.[262] Ultimately, the grant of this additional relief should not matter, because the couple could form an enforceable standalone contract to the same effect.

3. States That Uphold Unjust Enrichment Claims Arising Out of the Termination of an Unmarried Cohabitation Relationship

Mini-DOMA state courts that allow for equitable claims arising out of the termination of an unmarried cohabitation relationship should make two distinct alterations to their doctrine in cases of migratory same-sex marriages. Most of these states require that a cohabiting relationship be marriage-like in order for the claimant to succeed.[263] Some have postulated that this excludes same-sex couples in mini-DOMA states because they cannot marry.[264] Mini-DOMA state courts should relax this requirement and any sexual orientation related limitation to it. The couple did marry in another state, so they had a marriage-like relationship in their own minds even if the state in which they ultimately resided did not legally recognize it. The court should accept evidence of this marriage as proof of a marriage-like relationship without a further, standard factual inquiry into the nature of the relationship. Also, these state courts make an inquiry into the contribution made by the claimant in accumulation of the property at the center of the claim.[265] This is to prove that the claimant actually has an interest in property to which he or she does not hold title.[266] Courts should accept evidence of the marriage as de facto proof of contribution in accumulation of the property, rebuttable by the defendant. When the couple married, they agreed to share their jointly acquired property no matter who held title, unless they contracted out of this system with an ante-nuptial

---

[262] *See id.* at 282-86 (outlining states that validate property claims between unmarried cohabitants based on contract theory, and that doctrine's limitations).

[263] *See* Estin, *supra* note 58, at 1391-92 (remarking that states require the unmarried cohabitation relationship to be "marriage-like" in order to validate equitable claims arising from the relationship).

[264] *Id.* at 1394.

[265] *See supra* Part II.B.2.

[266] *See* Estin, *supra* note 58, at 1398-1400 (surveying various equitable remedies for unmarried cohabitants granted only when the cohabitant has demonstrated some form of preexisting property interest in the property to be divided).

agreement.[267] Thus, the courts should infer the contribution of the claimant from an agreement inherent in the marriage.

Additionally, other alterations come to mind. Equitable theory states could allow for support payments, contrary to the standard doctrine. Much like the Restatement's "frustrated expectations" theory in equitable recovery for unmarried cohabitants upon termination, the same-sex married couple expected to support each other. The parties accepted the responsibility to do so in marriage and divorce, should one of the married couple be in a better financial position than the other.[268] Thus, one could make the argument that this expectation is then frustrated by the circumstances of moving to a mini-DOMA state and an inability to gain a support order in property division proceedings. The claimant should then be able to use that change in circumstances as the groundwork for support payment claims. Admittedly, this is a tenuous argument and unlikely to succeed. Many courts may object to these proposed exceptions for the reasons listed in the discussion of contract theory states and "Negative Status" states. Lastly, claimants may be able to blend contract and equitable claims to overcome the limitations of each, in states that will validate both types of claim for unmarried cohabitants.

4. "Pure Positive Status" States

While the "Pure Positive Status" states are similar to the scheme this Note proposes, there are differences between existing doctrine and the ALI Principles, so those state courts may not wish to adopt the exact proposed scheme.[269] Additionally, like the ALI Principles, there are some changes that should be made to "Pure Positive Status" doctrines in order to account for migratory same-sex marriages.[270] States like Washington should first alter their approach in order to establish that the same-sex marriage satisfies the requirements necessary to attain committed intimate relationship status.[271] The existence of a valid marriage in a same-sex marriage friendly state should de facto satisfy the inquiry into whether the relationship had the requisite status in Washington. In and of itself, a validly executed decision to marry would meet all necessary elements of a committed intimate relationship, so no further

[267] *See* 15A AM. JUR. 2D. *Community Property* § 2 (2008) (describing specific "community property" regimes as promoting "partnership[s] in which the spouses devote their particular talents, energies, and resources to their common good, and acquisitions and gains that are directly or indirectly attributable to community expenditures of labor and resources are shared equally by the community"); 24 AM. JUR. 2D. *Divorce and Separation* § 473 (2008) (describing the concept of marital property and its application in divorce).

[268] This, of course, depends on the state. *See* 41 C.J.S. *Husband and Wife* § 66 (2008) (describing the duty of support between spouses in marriage and divorce).

[269] *See supra* Part II.B.3.

[270] *See supra* Part III.A.

[271] *See supra* Part II.B.3.a.

factual inquiry need be made.[272] Secondly, when the state in which the couple married allows for it, "Pure Positive Status" states should include separate property in the property division. The couple would have lived in contemplation of this occurring upon divorce and could have contracted around it otherwise. Additionally, the claimant may have sacrificed earning capacity and his or her own separate property in support of the marriage, with the assumption he or she would be compensated upon divorce or continuation of the marriage. Thus, the inclusion of separate property upon dissolution would offset any imbalance arising from those events for which the community property could not provide. Courts could easily adopt the first suggestion as it intuitively makes sense. The adoption of the second suggestion is less likely because it provides something to one specific class of unmarried cohabitant, unmarried in the eyes of that state, and not to others.

CONCLUSION

The development of same-sex marriage as a legal reality over the last seven years requires a response, even from those states that refuse to acknowledge its legal validity. But states must respond in more dynamic and creative ways than simply confining marriage to different-sex couples and denying rights to same-sex couples married in other states. Statistics indicate that a substantial number of these same-sex marriages will end in divorce.[273] Additionally, the mobile nature of our culture and economy suggest that many same-sex couples will end up living in states outside of the one in which they were married.[274] This implicates two forms of marriages identified in Part I, "evasive marriages" and "migratory marriages."[275] "Evasive marriages" are of little concern because they will likely be considered invalid, as the couple knew they were violating their home state's public policy when it traveled to the same-sex marriage state to get married.[276] Couples in "Migratory Marriages," however, obtained the marriage validly with no intent to contravene law or public policy.[277] Their change of residence does not change their understanding of their relationship nor their interaction as a family or obligations to each

[272] *Id.*

[273] *See supra* note 41 (highlighting the approximate 50% divorce rate in the United States).

[274] *See supra* notes 28-30 and accompanying text (listing the many factors leading to the frequent mobility of society and this mobility's implications for same-sex marriage).

[275] *Supra* Part I (outlining Professor Koppelman's characterization of ways in which marriages may interact with states outside of the state in which they are married).

[276] *See* Koppelman, *supra* note 14, at 2145 ("Such marriages will be invalid if they violate the strong public policy of the couple's home state. Discerning public policy will be easy in the forty states that have legislation on the books declaring that they will not recognize foreign same-sex marriages.").

[277] *See id.* ("[T]hey contracted a marriage valid where they lived and subsequently moved to a state where their marriage was prohibited.").

other.[278] As previously mentioned, these couples face significant legal, physical, and financial obstacles in obtaining dissolution in their home, same-sex marriage friendly, state.[279]

As more states expand marriage to include same-sex couples, and more same-sex couples take advantage of those opportunities, other states will see more same-sex married couples migrating within their borders. If the current balance shifts to an equal split of states granting and denying same-sex marriage, or even a majority of states granting same-sex marriage, the issue will be ever more relevant to those states that continue to define marriage as between only a man and a woman. Additionally, as more and more states see married same-sex couples move within their borders, states will see these couples have more conflicts. Thus, states will increasingly see migratory same-sex married couples coming to their courts to settle disputes arising from dissolutions. Some states may wish to refrain from legally recognizing same-sex marriages; however, they must still establish a doctrine for administrating these claims that satisfies both the needs of the couples and society.

Many state courts settle property claims for unmarried cohabitating couples who wish to terminate their relationships. These states also do not legally recognize unmarried cohabitation relationships by granting special rights or imposing responsibilities, similar to the manner in which same-sex marriage is treated in some of these states. Therefore, state courts can easily apply the legal reasoning that allows them to provide relief in property claims arising out of unmarried cohabitation relationships to same-sex marriages. The best doctrinal scheme that will satisfy a couple's needs and still allow the court to refrain from recognizing and validating same-sex marriage is a slightly altered Chapter Six of the ALI's *Principles of Family Dissolution: Analysis and Recommendations*, which pertains to cohabiting couples. However, for many reasons, states may be reluctant to adopt this regime. Should this be the case, states should at least extend their unmarried cohabitation relationship dissolution doctrine to same-sex marriage dissolution claims, with some minor alterations to account for the commitment and expectations of married same-sex couples.

Although same-sex marriage exists in a minority of states, it is a legal reality. Other states may wish to ignore that legal reality, yet they cannot ignore the real couples and the real problems that will flow into their states from same-sex marriage states. As more states extend civil marriage to same-sex couples, through legislative activity and judicial fiat, more and more of these couples will face problems in mini-DOMA states. Therefore, these mini-DOMA states must establish ways to provide effective solutions to these problems, while still maintaining their public policy. Breaking up is hard to do, but it should not be impossible.

---

[278] *See id.* at 2153-59 (examining migratory same-sex marriages and the difficulties for couples and society when marriages are invalidated once a couple crosses state lines).

[279] *See supra* Part I.B.