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## Essay

### Common Law Same-Sex Marriage

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*In this Essay, I demonstrate that, with the extension of the right to marry to same-sex couples in Iowa, the District of Columbia, and New Hampshire (all states that recognize common law marriage), there now exists the possibility that—for the first time in the United States—a same-sex couple may enter into a legally recognized common law marriage. In the Essay, I first show, as a doctrinal matter, that same-sex couples have the right to enter into common law marriages in these three jurisdictions, and I explain and compare the criteria for entering into common law marriages in each of them. I then address the question whether it makes sense—as a policy matter—to expand the concept of common law marriage to include same-sex couples, including an analysis of whether being a closeted same-sex couple is consistent with being in a common law marriage. I conclude that the lack of consistent access to religious and public officials willing to perform same-sex marriages coupled with the libertarian spirit underlying both same-sex marriage and common law marriage militate in favor of recognizing common law same-sex marriages. I also demonstrate the advantages that common law marriage—with its lack of a paper trail—provides to same-sex couples who need to keep their relationships closeted, such as those in the military or foreign nationals with temporary visas. Finally, on the assumption that the U.S. Supreme Court may eventually hold that same-sex couples have a constitutional right to marry, I examine the criteria for entering into common law marriages in the remaining nine states that recognize common law marriage. With respect to these remaining states—nearly all of which have bans on same-sex marriage enshrined into their state constitutions and that thus will allow same-sex marriage only if ordered to do so by a federal court—I conclude that the policy arguments in favor of recognizing same-sex common law marriage are even more compelling than they are in jurisdictions that currently recognize same-sex common law marriage.*

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# Common Law Same-Sex Marriage

PETER NICOLAS\*

## I. INTRODUCTION

When courts and legislators in Iowa,<sup>1</sup> the District of Columbia,<sup>2</sup> and New Hampshire<sup>3</sup> extended the right to marry to same-sex couples, they did more than just join the small but growing list of jurisdictions in the United States to do so.<sup>4</sup> In addition, they introduced the possibility that—for the first time in the United States—a same-sex couple might be able to enter into a legally recognized common law marriage.

Historically in the United States, there have existed two major types of marriage: ceremonial marriage and common law marriage.<sup>5</sup> A ceremonial marriage is a marriage that comes into being through a formal process that involves compliance with statutory formalities, such as applying for a license, followed by formal solemnization by a religious or civil official.<sup>6</sup> In contrast, a common law marriage is a marriage that comes into being informally through the statements and conduct of the two individuals,

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<sup>1</sup> *Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009) (“[T]he language in [the] Iowa Code . . . limiting civil marriage to a man and a woman must be stricken from the statute, and the remaining statutory language must be interpreted and applied in a manner allowing gay and lesbian people full access to the institution of civil marriage.”).

<sup>2</sup> D.C. CODE § 46-401(a) (LexisNexis Supp. 2010).

<sup>3</sup> N.H. REV. STAT. ANN. § 457:1-a (Supp. 2009).

<sup>4</sup> Other states that extend the right to marry to same-sex couples include Connecticut, Vermont, and Massachusetts. CONN. GEN. STAT. ANN. § 46b-20(4) (West Supp. 2010); 2009 Conn. Acts 78–79 (Reg. Session); VT. STAT. ANN. tit. 15, § 8 (LexisNexis Supp. 2009); *see also* *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003) (“We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.”). For a period of just under five months, same-sex couples were lawfully permitted to marry in California. Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES, Nov. 6, 2008, at A1 (“On Wednesday [after Proposition 8 passed], five months of same-sex marriages in California—declared legal by the State Supreme Court in May—appeared to have come to a halt.”); *see also In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2008) (holding that statutes limiting marriage to a union between a man and a woman was unconstitutional, and must be understood as making marriage available to opposite-sex and same-sex couples). The right for same-sex couples to marry was rescinded by Proposition 8, a voter initiative that amended California’s constitution, to provide, “[o]nly marriage between a man and a woman is valid or recognized in California.” CAL. CONST. art. I, § 7.5; *Strauss v. Horton*, 207 P.3d 48, 59, 64 (Cal. 2009) (holding that Proposition 8 lawfully amended the constitution of California).

<sup>5</sup> 52 AM. JUR. 2D *Marriage* § 1 (2000); *see also In re Marriage of Martin*, 681 N.W.2d 612, 616–17 (Iowa 2004) (explaining that Iowa recognizes two types of marriage: ceremonial marriage, which is governed by statute, and common law marriage, which is informal).

<sup>6</sup> 52 AM. JUR. 2D *Marriage* § 13 (2000).

without formal solemnization or compliance with statutory formalities.<sup>7</sup>

When entered into, a common law marriage provides the same rights, privileges, and responsibilities as a ceremonial marriage,<sup>8</sup> and is as durable as a ceremonial marriage, requiring divorce proceedings to terminate the relationship.<sup>9</sup> Thus, while common law marriage allows for a less formal method of entry into marriage, there is no equally informal exit option, such as “common-law divorce.”<sup>10</sup>

Once available in a majority of U.S. states, common law marriages fell out of favor during the twentieth century,<sup>11</sup> and today only eleven states and the District of Columbia recognize common law marriages newly entered into within their borders,<sup>12</sup> although other states will typically recognize common law marriages lawfully entered into in sister states.<sup>13</sup>

Given the small number of states that recognize same-sex marriages and the small number of states that still recognize common law marriages, it is perhaps no surprise that, until recently, there was no overlap between those two groups and thus, no possibility that a same-sex couple could legally enter into a common law marriage,<sup>14</sup> making the concept of

<sup>7</sup> 52 AM. JUR. 2D *Marriage* § 36 (2000); 55 C.J.S. *Marriage* § 10 (2009).

<sup>8</sup> See, e.g., *Robinson v. Evans*, 554 A.2d 332, 337 (D.C. 1989) (“[A] common-law marriage is as valid as any performed by a magistrate or a member of the clergy.”); *Martin*, 681 N.W.2d at 617 (“[A] common law marriage is as valid as a ceremonial marriage.”); 52 AM. JUR. 2D *Marriage* § 41 (2000) (“[A] common-law marriage is as valid as a ceremonial marriage. It is treated with the same dignity as a ceremonial marriage and given the same legal significance.” (footnotes omitted)); 55 C.J.S. *Marriage* § 10 (2009) (“[C]ommon-law marriages are as fully valid as ceremonial marriages . . . .”); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.01 cmt. a (Am. Law Inst. 2000) (“Where recognized, common-law marriage is fully equivalent to duly licensed ceremonial marriage.”).

<sup>9</sup> Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 737 (1996); see also 52 AM. JUR. 2D *Marriage* § 41 (2000) (“The mere passage of time and ceasing of cohabitation will not serve to terminate a common-law marriage once it is in existence.”).

<sup>10</sup> Lisa Milot, *Restitching the American Marital Quilt: Untangling Marriage from the Nuclear Family*, 87 VA. L. REV. 701, 708 (2001).

<sup>11</sup> Herma Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women’s Rights and Family Law in the United States During the Twentieth Century*, 88 CALIF. L. REV. 2017, 2037–38 (2000).

<sup>12</sup> See Jennifer Thomas, Comment, *Common Law Marriage*, 22 J. AM. ACAD. MATRIM. LAW 151, 151 (2009) (listing fifteen states that recognize common law marriages, but noting that four of them only recognize common law marriages created before dates specified by law). Of those eleven states, one state—New Hampshire—recognizes common law marriages entered into within its borders only for limited purposes. *Id.*

<sup>13</sup> See, e.g., *People v. Badgett*, 895 P.2d 877, 897 (Cal. 1995) (noting that California recognizes common law marriages “contracted in another state that would be valid by the laws of that state”); *Smith v. Smith*, 111 A.2d 531, 533 (N.H. 1955) (“When a common-law marriage has been validly contracted, it will be recognized as valid in another state in which the parties later become domiciled . . . .”); *Mott v. Duncan Petroleum Trans.*, 414 N.E.2d 657, 658–59 (N.Y. 1980) (stating that New York will recognize a common law marriage as valid “if it is valid where contracted”); RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) & cmt. g. (1971); RESTATEMENT (FIRST) OF CONFLICT OF LAWS § 123 (1934).

<sup>14</sup> The four states—California, Connecticut, Massachusetts, and Vermont—in which same-sex marriage was lawful prior to legal recognition of same-sex marriages in Iowa, the District of Columbia, and New Hampshire have not ever recognized common law marriage or have not done so for some time. See, e.g., *Elden v. Sheldon*, 758 P.2d 582, 587 (Cal. 1988) (noting that common law marriages

common law same-sex marriage an interesting concept in the abstract but little more. In only a handful of cases have litigants even suggested the possibility that a court recognize a same-sex common law marriage, and in those cases, courts held that common law marriage is an alternative to, and not a competing substitute for, ceremonial marriage, and thus that a type of ceremonial marriage that is prohibited by law cannot be entered into by means of a common law marriage.<sup>15</sup>

Yet, with the introduction of legalized same-sex marriage in Iowa, New Hampshire, and the District of Columbia, there now exists the very real possibility that a same-sex couple could be deemed legally married, and have that marriage recognized in other states, without filling out a marriage application or going through any sort of formal ceremonial process. In other words, common law gay marriage—a true fusion of something old and something new—has arrived in the United States.

## II. A CLOSER LOOK AT THE LAW IN IOWA, NEW HAMPSHIRE, AND THE DISTRICT OF COLUMBIA

Although entering into a common law marriage does not require a formal process, there are certain elements that must exist in order for a common law marriage to come into being. While these elements vary across jurisdictions, they are typically said to include the following: (1) a present intent and mutual agreement to be married; and (2) cohabitation as a couple.<sup>16</sup> In addition, many jurisdictions require that the couple hold themselves out to others as a married couple, and/or that they are so reputed to be within their community.<sup>17</sup> The three jurisdictions in which same-sex common law marriage is theoretically possible differ somewhat significantly from one another on the elements required to establish a common law marriage.

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have been illegal in the state since 1895); *Norman v. Norman*, 54 P. 143, 146 (Cal. 1898) (holding that marriage requires solemnization by a judge, justice of the peace, or priest); *Loughlin v. Loughlin*, 910 A.2d 963, 972 (Conn. 2006) (stating that common law marriages are not recognized); *State ex. rel. Felson v. Allen*, 29 A.2d 306, 307–08 (Conn. 1942) (stating that all marriages not conforming to statutory requirements are void); *Wilcox v. Trautz*, 693 N.E.2d 141, 146 (Mass. 1998) (“We have never recognized common law marriage in this Commonwealth . . .”); *Collins v. Guggenheim*, 631 N.E.2d 1016, 1017 (Mass. 1994) (noting that common law marriages are invalid); *Stahl v. Stahl*, 385 A.2d 1091, 1092 (Vt. 1978) (stating that the state does not accept common law marriages); *Morrill v. Palmer*, 33 A. 829, 830–31 (Vt. 1895) (holding that common law marriage has never been valid in the state).

<sup>15</sup> See *De Santo v. Barnsley*, 476 A.2d 952, 953–55 (Pa. Super. Ct. 1984) (stating that “the limits of common law marriage must be defined in light of the limits of statutory marriage”); *accord Kulstad v. Maniaci*, 220 P.3d 595, 599, 610 (Mont. 2009) (affirming the lower court’s determination that a same-sex common law marriage is not recognized and therefore cannot be dissolved).

<sup>16</sup> 52 AM. JUR. 2D *Marriage* §§ 37–39 (2000); 55 C.J.S. *Marriage* §§ 10, 13, 23, 24, 26 (2009). Capacity to make such an agreement is sometimes also listed as an element, 55 C.J.S. *Marriage* § 13, but because capacity is required for both ceremonial and common law marriages, courts do not always mention it as an element of common law marriage.

<sup>17</sup> 52 AM. JUR. 2D *Marriage* § 40 (2000).

Under Iowa law, three elements must exist to create a common law marriage: (1) a present intent and agreement to be married by both parties; (2) continuous cohabitation; and (3) a public declaration that the parties are husband and wife.<sup>18</sup> Iowa precedent considers the public declaration to be the “acid test” of whether a common law marriage exists;<sup>19</sup> there is thus no such thing in Iowa as a “secret common law marriage,” although precedent allows for some declarations that are inconsistent with marriage—indeed, even some in which the person indicates being single—requiring only a “substantial holding out to the public in general . . . .”<sup>20</sup>

In contrast, there are only two elements needed to establish a common law marriage in the District of Columbia: (1) “an express mutual agreement to be husband and wife,” in words of the present tense; (2) followed by cohabitation as husband and wife.<sup>21</sup> Thus, under District of Columbia law, there is no requirement that the couple hold itself out or be reputed to be a couple, allowing for the possibility—at least as a theoretical matter—of a so-called “secret common law marriage.”<sup>22</sup>

New Hampshire is the most unusual of the three states, so unusual that it is sometimes difficult to decide whether to classify it as a state that recognizes common law marriage, although at the very least it can be said to recognize a limited form of common law marriage.<sup>23</sup> In New Hampshire, the general rule is that it will not recognize a common law marriage entered into within its borders except to the “limited extent” provided by statute, under which there is an exception to this general rule after the death of one of the two persons, for probate and inheritance purposes.<sup>24</sup> If both of the partners to the marriage are alive, a court in New Hampshire will not consider them “married” for purposes of divorce, alimony, or any other right, privilege, or responsibility of marriage.<sup>25</sup>

Pursuant to the terms of the New Hampshire statute, a couple will be deemed to have been legally married upon or after the death of one partner if they (1) cohabited and acknowledged each other as husband and wife and were “generally reputed to be such”; (2) for a period of three years and until the death of one partner.<sup>26</sup> The requirement that there be an

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<sup>18</sup> *In re Marriage of Winegard*, 278 N.W.2d 505, 510 (Iowa 1979); see also *In re Marriage of Martin*, 681 N.W.2d 612, 617–18 (Iowa 2004).

<sup>19</sup> *Martin*, 681 N.W.2d at 618.

<sup>20</sup> *Id.*; accord *In re Estate of Dallman*, 228 N.W.2d 187, 190 (Iowa 1975).

<sup>21</sup> *East v. East*, 536 A.2d 1103, 1105 (D.C. 1988).

<sup>22</sup> *Martin*, 681 N.W.2d at 618.

<sup>23</sup> *Bowman*, *supra* note 9, at 770–71.

<sup>24</sup> *In re Estate of Bourassa*, 949 A.2d 704, 706 (N.H. 2008).

<sup>25</sup> See *Joan S. v. John S.*, 427 A.2d 498, 499–500 (N.H. 1981) (“The plaintiff asks us . . . to apply a divorce-like property settlement to this case. This we decline to do. The right to a divorce is predicated upon the existence of a valid marriage between the parties.”); *Fowler v. Fowler*, 79 A.2d 24, 27 (N.H. 1951) (stating that New Hampshire does not recognize common law marriages).

<sup>26</sup> N.H. REV. STAT. ANN. § 457:39 (Supp. 2009).

acknowledgement refers to a public acknowledgement to third persons,<sup>27</sup> which, when coupled with the requirement that they be reputed as such, makes it akin to Iowa's test barring secret common law marriages. In addition, it is the only one of the tests that has a minimum period of cohabitation and public acknowledgement as a couple.

Although the various tests for common law marriage use the gendered phrase "husband and wife," it seems likely that courts in states recognizing ceremonial same-sex marriage would adapt their common law to include those who cohabit as, and hold themselves out as, "husband and husband" or "wife and wife." Indeed, when the District of Columbia extended marriage rights to same-sex couples, it enacted a statute making it clear that gender-specific terms relating to the marital relationship, whether they appear in statutes or in the common law, shall be construed to be gender neutral.<sup>28</sup>

Thus, while each of the three jurisdictions has a slightly different test, it appears that—at least as a doctrinal matter—common law same-sex marriage is a possibility in all three states.

### III. DOES COMMON LAW SAME-SEX MARRIAGE MAKE SENSE?

Despite the mechanically neat doctrinal arguments in favor of recognizing common law same-sex marriage in jurisdictions in which common law marriage exists, it is fair to ask whether it makes sense from a public policy standpoint to expand the scope of a waning doctrine such as common law marriage to encompass the relatively novel concept of granting legal recognition to same-sex relationships.<sup>29</sup>

To answer this question, it helps to ask why common law marriage came into being in the first place, and what has motivated some states to eliminate it. According to many courts and commentators, judicial recognition of common law marriages occurred as a matter of historical necessity since the social conditions of America's frontier society made access to clergy or public officials difficult, due to the difficulties of traveling and the lack of nearby officials.<sup>30</sup> As society evolved and travel became more fluid, the rationale for recognizing common law marriages

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<sup>27</sup> See *Bourassa*, 949 A.2d at 707 (affirming the trial court's finding that the parties did not acknowledge their marriage when they told third parties they were not married).

<sup>28</sup> D.C. CODE § 46-401(b) (LexisNexis Supp. 2010).

<sup>29</sup> See *De Santo v. Barnsley*, 476 A.2d 952, 955 (Pa. Super. Ct. 1984) (noting that, over time, the common law has moved toward reluctant toleration of common law marriage, and that "[t]o expand common law marriage to include a contract between two persons of the same sex would be, not simply inconsistent with such reluctant toleration, but an about-face").

<sup>30</sup> *E.g., id.*; John B. Crowley, *Is the Honeymoon over for Common-Law Marriage: A Consideration of the Continued Viability of the Common-Law Marriage Doctrine*, 29 CUMB. L. REV. 399, 402–03 (1999); Perry Dane, *A Holy Secular Institution*, 58 EMORY L.J. 1123, 1147 (2009); Ashley Hedgecock, *Untying the Knot: The Propriety of South Carolina's Recognition of Common Law Marriage*, 58 S.C. L. REV. 555, 560 (2007); Thomas, *supra* note 12, at 155.

dissipated.<sup>31</sup>

To be sure, in the modern era, problems of travel have largely been eliminated, and public and religious officials are prevalent throughout the country. Yet in another sense, America—or at least certain parts of it—remains a frontier society of sorts for gays and lesbians, who perceive, often with good reason, that their relationships are not valued by public and religious officials charged with solemnizing marriages. Indeed, in states in which same-sex marriage has been legalized, some officials have refused to solemnize marriages between persons of the same sex, and some local governments have even gone so far as to stop issuing licenses to opposite-sex couples as a means of avoiding having to marry same-sex couples.<sup>32</sup> Moreover, many of the statutes extending the right to marry to same-sex couples include specific provisions stating that religious officials are free to refuse to solemnize a marriage that is inconsistent with their religious beliefs.<sup>33</sup> Thus, because gays and lesbians may lack full access to those charged with solemnizing marriages, the spirit behind the “frontier society” rationale for recognizing common law marriage makes some sense as far as same-sex marriages are concerned.

Moreover, not all courts and commentators accept the “frontier society” rationale for recognizing common law marriages, or they describe it as, at best, the stated rationale but not the true reason for recognition.<sup>34</sup> As an initial matter, the courts and commentators who invoke the “frontier society” rationale do not support their contention with actual data from historical records showing the absence of available clergy and public officials,<sup>35</sup> and indeed, critics of that rationale contend that religious and civil officials empowered to perform marriages were regularly present throughout America’s frontier society.<sup>36</sup> In addition, critics of the “frontier society” rationale point out that recognition or non-recognition of common

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<sup>31</sup> *E.g.*, *De Santo*, 476 A.2d at 955; *Dane*, *supra* note 30, at 1147–48; *Hedgecock*, *supra* note 30, at 564; *Thomas*, *supra* note 12, at 160.

<sup>32</sup> *See, e.g.*, *Marisa Lagos, 2 Counties Won’t Do Weddings, Gay or Not*, S.F. CHRON., June 11, 2008, at A1 (reporting that some clerks and activists claim that the decisions of two California counties to stop performing all wedding ceremonies due to a lack of resources may be veiled discrimination against gay and lesbian couples).

<sup>33</sup> *E.g.*, CONN. GEN. STAT. ANN. § 46b-22b (Supp. 2010); N.H. REV. STAT. ANN. § 457:37(I), (II) (Supp. 2009); VT. STAT. ANN. tit. 9, § 4502(I) (Supp. 2009); *id.* tit. 18, § 5144(b).

<sup>34</sup> *See, e.g.*, *In re Estate of Hall*, 588 N.E.2d 203, 208 (Ohio Ct. App. 1990) (Grey, J., concurring) (stating that the frontier society rationale “may have been a good rationale, it is hardly in accord with the real circumstances of frontier life”); Sonya C. Garza, *Common Law Marriage: A Proposal for the Revival of a Dying Doctrine*, 40 NEW ENG. L. REV. 541, 542–43 (2006) (noting that most scholars rely on the frontier conditions argument, but that it is not all true and that there was a singular rationale for the adoption of common law marriage).

<sup>35</sup> *See* John L. McCormack, *Title to Property, Title to Marriage: The Social Foundation of Adverse Possession and Common Law Marriage*, 42 VAL. U. L. REV. 461, 473–74 (2008) (noting that “proponents of the ‘frontier conditions’ argument base their contention on assumptions about what frontier conditions actually were instead of historical records”).

<sup>36</sup> *Hall*, 588 N.E.2d at 208 (Grey, J., concurring).

law marriage across the United States was often not correlated with the “frontier conditions” extant in a given jurisdiction; for example, common law marriage was recognized in New York City but not in Wyoming.<sup>37</sup>

If not frontier conditions, what other rationales existed for recognizing common law marriages? One oft-cited rationale is a libertarian concept of autonomy and independence, the idea that marriage is a natural right and that individuals should be free to enter into marriages without the need to invoke the power of the state.<sup>38</sup> That rationale would appear to have particular force so far as same-sex couples are concerned: having experienced for so long the denial of the right to marry at the hands of public officials,<sup>39</sup> the idea of being able to enter into marriage without invoking the assistance of a state-sanctioned official would likely have a certain amount of appeal for same-sex couples. Indeed, the quest to expand marriage to include same-sex couples is arguably a libertarian one—although the pure libertarian position would probably be to eliminate state involvement in the business of marriage altogether.

Other historical rationales for recognizing common law marriage apply with equal force to same-sex couples. Among those were legitimizing the children of those who did not enter into ceremonial marriages and preventing women—historically, the dependent partner in an opposite-sex couple—from becoming economically dependent on the state should their partners die or decide to leave them.<sup>40</sup> Broadly construed, these two rationales apply with equal force today to many same-sex couples, for despite the offensiveness of the concept of “legitimacy” in the former and the gendered nature of the latter, both rationales are designed to assure the same thing: that economically dependent members of a family unit are financially supported.<sup>41</sup>

Nor is the “meretricious relationship” doctrine that has developed in states that have abolished common law marriage—such as in California<sup>42</sup>

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<sup>37</sup> Bowman, *supra* note 9, at 724; McCormack, *supra* note 35, at 474.

<sup>38</sup> See Hall, 588 N.E.2d at 208 (Grey, J., concurring) (noting that common law marriage was adopted in recognition of the importance of personal independence and to avoid the injustice of not recognizing an otherwise valid marriage); Bowman, *supra* note 9, at 723 (“[U]pholding the ability to marry without invoking the civil authority may have been seen as a mark of freedom and autonomy from control of the state.”); Thomas, *supra* note 12, at 156 (“The first and probably most important rationale for the adoption of common law marriage was the belief that marriage derived from a natural right that every human possessed.”).

<sup>39</sup> *E.g.*, Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 949–50 (Mass. 2003) (noting that same-sex couples were denied marriage licenses by city and town clerks); Baker v. Nelson, 191 N.W.2d 185, 185 (Minn. 1971) (noting that a same-sex couple was denied a marriage license by the county clerk).

<sup>40</sup> Thomas, *supra* note 12, at 156–57, 162.

<sup>41</sup> See *id.* at 157 (noting that couples were responsible for the support of their offspring and that courts encouraged families to take care of each other).

<sup>42</sup> See Marvin v. Marvin, 557 P.2d 106, 116 (Cal. 1976) (“[A]dults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting

or Washington<sup>43</sup>—an adequate substitute for common law marriage for same-sex couples, notwithstanding the fact that the doctrine has been extended to them.<sup>44</sup> The scope of the meretricious relationship doctrine is extremely narrow and is limited to a small set of property rights and, thus, is in no way analogous to common law marriage.<sup>45</sup> As a result, couples covered by the doctrine cannot invoke other rights and responsibilities associated with marriage, such as the privilege not to testify against one another<sup>46</sup> or to sue for the wrongful death of the other.<sup>47</sup>

In sum, while there may be good reasons for a state to opt to eliminate common law marriage for all couples, such as the evidentiary problems associated with proving that the marriage was entered into and the attendant risk of fraudulent claims,<sup>48</sup> the arguments in favor of common law marriage generally apply with equal force to same-sex couples. So long as a state concludes that common law marriage makes sense for opposite-sex couples, it should extend that right to same-sex couples as well.

#### IV. COMMON LAW MARRIAGE AND THE CAVEAT OF THE CLOSET

Same-sex couples differ in one important way from their heterosexual counterparts that may be significant in considering the expansion of common law marriage to include them. While heterosexuals do not, as a general rule, mask their sexual orientation (and by extension, do not mask

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their earnings and property rights. . . . [T]hey may agree to pool their earnings and to hold all property acquired during the relationship in accord with the law governing community property . . . .”)

<sup>43</sup> See *Olver v. Fowler*, 168 P.3d 348, 350 (Wash. 2007) (applying Washington’s law of meretricious or committed intimate relationships to divide assets between committed partners’ estates where both partners are deceased); *In re Marriage of Lindsey*, 678 P.2d 328, 331 (Wash. 1984) (“[C]ourts must ‘examine the [meretricious] relationship and the property accumulations and make a just and equitable disposition of the property.’”)

<sup>44</sup> See *Whorton v. Dillingham*, 248 Cal. Rptr. 405, 408 n.1 (Cal. Ct. App. 1988) (stating that the court saw no legal basis to make a distinction for same-sex partners when applying the theory of *Marvin*); *Vasquez v. Hawthorne*, 33 P.3d 735, 737 (Wash. 2001) (noting that equitable claims under theories such as the meretricious relationship doctrine are not “limited by the gender or sexual orientation of the parties”).

<sup>45</sup> See John E. Wallace, Comment, *The Afterlife of the Meretricious Relationship Doctrine: Applying the Doctrine Post-Mortem*, 29 SEATTLE U. L. REV. 243, 272 (2005) (noting that “[a]pplying the meretricious relationship doctrine post mortem will not re-create common law marriage” and acknowledging that meretricious partners have more limited property rights than married persons).

<sup>46</sup> See, e.g., *People v. Delph*, 156 Cal. Rptr. 422, 425 (Cal. Ct. App. 1979) (holding that the testimony of a woman who was cohabiting with the defendant and acting as the defendant’s wife was not privileged).

<sup>47</sup> See *Elden v. Sheldon*, 758 P.2d 582, 582 (Cal. 1988) (stating that a plaintiff who “witnessed the tortious injury and death of the person with whom he shared a cohabitant relationship” could not recover for loss of consortium and negligent infliction of emotional distress).

<sup>48</sup> See *Bowman*, *supra* note 9, at 735 (discussing courts’ concerns about fraudulent claims under the common law marriage doctrine); Marsha Garrison, *The Decline of Formal Marriage: Inevitable or Reversible?*, 41 FAM. L.Q. 491, 494–95 (2007) (discussing the decline in the number of states that recognize common law marriage and increase in the number of evidentiary problems posed by common law marriage doctrine).

the nature of their relationship with their intimate partner), it is not at all unusual for gay individuals to selectively or completely mask their sexual orientation from friends, family, co-workers, and others due to fears of discrimination, rejection, and violence.<sup>49</sup> Is being closeted about one's sexual orientation—and the identity of one's life partner—compatible with the concept of common law marriage? On the flip side, does common law marriage provide a method of entry into marriage for those same-sex couples who want or need to closet their sexual orientation or their relationships?

As discussed above, some states—including Iowa and New Hampshire—require as an element of common law marriage that the couple publicly hold themselves out as a married couple and be reputed as such. In the words of the Iowa Supreme Court, there is no such thing as a “secret common law marriage,”<sup>50</sup> a requirement that would seem to make common law marriage incompatible with the closet. Even Iowa's test, however, appears to allow a person to be partially closeted, for the court has said that it requires only a “substantial” holding out to the public in general, and has held common law marriages to be valid despite the fact that the partners sometimes represented themselves as single.<sup>51</sup> Thus, such a test should be compatible with a couple who is to some extent out, but who is selectively closeted, such as in situations in which they might fear a particular instance of discrimination, rejection, or violence. In contrast, the District of Columbia's test for common law marriage appears to be compatible with a deeper form of being closeted, as it neither requires that the couple hold themselves out as a married couple nor that they be reputed to be one.

Moreover, common law marriage allows a form of closeting one's self that may be of particular benefit to selected classes of gay and lesbian couples. Specifically, those couples in which one partner is serving in the military, or in which one is a foreign national present in the United States on a temporary visa, might benefit from a legal regime in which their relationship is “closeted” in the sense that it is not easily discoverable by those conducting public record searches.

Under the military's “don't ask, don't tell” policy, service members have historically been (and, in the short-term, continue to be) subject to discharge if they marry or attempt to marry a person of the same-sex or

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<sup>49</sup> See Kristine Shaw, *Local Sexual Orientation Non-Discrimination Laws: A Means of Community Empowerment*, 10 CORNELL J.L. & PUB. POL'Y 385, 387 (2001) (“Fearing such discrimination, many gay, lesbian, bisexual, and transgender people do not ‘come out’ to their employers, their co-workers, and even their friends and family.”).

<sup>50</sup> *In re Marriage of Martin*, 681 N.W.2d 612, 618 (Iowa 2004).

<sup>51</sup> See *id.* (“[I]t does not mean that all public declarations must be entirely consistent with marriage.”).

state that they are homosexual.<sup>52</sup> Entering into a ceremonial marriage or, for that matter, a domestic partnership or civil union, creates a public record that could serve as evidence used to discharge a service member under the military's policy, either under the provision addressing marriage and attempted marriage or that addressing statements regarding one's sexual orientation.<sup>53</sup> Indeed, for this reason, advocates for the rights of gays serving in the military counsel against entering into such relationships.<sup>54</sup> Although a common law same-sex marriage would still be a "marriage" potentially subjecting a service member to discharge, and while the act of holding one's self out as a couple would likewise subject one to discharge for making statements regarding one's sexual orientation, the lack of a paper trail in common law marriage reduces the risk of being discovered, at least in a public records search. Accordingly, while by no means foolproof, common law marriage could allow those serving in the military the opportunity to continue to serve while at the same time allowing them to marry.

Common law marriage might also be beneficial to same-sex couples where one partner is a foreign national present in the United States on a temporary visa. Because applicants for such visas are required to state in their applications an intent to return to their home countries, evidence contained in public records indicating that they have entered into a marriage—or a domestic partnership or civil union—with a U.S. citizen or permanent resident can result in either their deportation or their being denied future temporary visas to enter the United States.<sup>55</sup> As with those subject to the military's "don't ask, don't tell" policy, entering into a common law marriage could, in theory, subject a foreign national admitted on a temporary visa to be deported or denied future temporary visas, but

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<sup>52</sup> 10 U.S.C. § 654(b)(2)–(3) (2006). Although Congress recently voted to repeal "don't ask, don't tell," the current policy remains in full force until sixty days after a variety of different policies and regulations are put into place and a certification is made by the President, the Secretary of Defense, and the Chairman of the Joint Chiefs of Staff. See Don't Ask, Don't Tell Repeal Act of 2010, Pub. Law No. 111-321, 124 Stat. 3515 (Dec. 22, 2010). For this reason, the Servicemembers Legal Defense Network continues to advise members of the military not to disclose their sexual orientation in any way. See *SLDN Warning to Service Members—DADT Is Still in Effect*, SERVICEMEMBERS LEGAL DEFENSE NETWORK, [www.sldn.org/stillatrisk](http://www.sldn.org/stillatrisk) (last visited Jan. 12, 2011).

<sup>53</sup> SERVICEMEMBERS LEGAL DEFENSE NETWORK, *THE SURVIVAL GUIDE: A COMPREHENSIVE GUIDE TO "DON'T ASK, DON'T TELL" AND RELATED MILITARY POLICIES* 11, 33 (5th ed. 2007).

<sup>54</sup> See *id.* at 9–11 (counseling against same-sex marriage, or even attempted same-sex marriage, as one of the three things that will lead to discharge).

<sup>55</sup> See Adam Francoeur, *The Enemy Within: Constructions of U.S. Immigration Law and Policy and the Homoterrorist Threat*, 3 STAN. J. C.R. & C.L. 345, 360 (2007) (noting that evidence of a same-sex marriage entered into in the United States may be construed by the government as intent to remain past the terms of the visa, resulting in deportation or the denial of a visa petition); Amy K.R. Zaske, Note, *Love Knows No Borders—The Same-Sex Marriage Debate and Immigration Laws*, 32 WM. MITCHELL L. REV. 625, 651 (2006) (explaining that foreign nationals in the United States on a non-immigrant visa are advised not to seek recognition of the relationship as it could be grounds for denial of the visa).

the lack of a paper trail reduces the likelihood of discovery, giving the couple time to sort out their immigration issues while still establishing their legal relationship as a couple.

#### V. THE PROSPECTS FOR COMMON LAW SAME-SEX MARRIAGE IN OTHER STATES

How likely is it that other states will join Iowa, the District of Columbia, and New Hampshire in embracing the concept of common law same-sex marriage? For any expansion of the doctrine to occur, at least one of three events must occur: (1) a state that currently recognizes same-sex marriages entered into within its borders but not common law marriages must begin recognizing the latter; (2) a state that currently recognizes common law marriages entered into within its borders but not same-sex marriages must begin recognizing the latter; or (3) a state that currently recognizes neither same-sex nor common law marriages entered into within its borders must begin recognizing both.

The likelihood that one of the three states that currently recognizes same-sex marriage but not common law marriage—Connecticut, Massachusetts, and Vermont—will suddenly begin recognizing the latter is extremely low. Massachusetts and Vermont have never recognized common law marriage,<sup>56</sup> and Connecticut has not recognized it since 1820.<sup>57</sup> Moreover, the historical trends are against any state newly recognizing common law marriage. While the majority of states that had previously recognized the doctrine abandoned it during the twentieth century,<sup>58</sup> only one state that previously had not recognized the doctrine—Utah—began recognizing common law marriages in the twentieth century.<sup>59</sup>

Similarly, the likelihood that one of the nine remaining states that recognize common law marriages entered into within their borders—Alabama, Colorado, Kansas, Montana, Oklahoma, Rhode Island, South Carolina, Texas, and Utah<sup>60</sup>—will voluntarily begin to recognize same-sex marriages is extremely low. Of those nine states, all but one—Rhode Island—have recently amended their state constitutions to explicitly ban

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<sup>56</sup> See *Wilcox v. Trautz*, 693 N.E.2d 141, 146 (Mass. 1998) (“We have never recognized common law marriage in this Commonwealth . . . . We do not do so now.”); *Morrill v. Palmer*, 33 A. 829, 831 (Vt. 1895) (“We hold, therefore, that . . . the ‘loose doctrine of the common law’ in relation to marriage was never in force in this state.”).

<sup>57</sup> See *State ex. rel. Felson v. Allen*, 29 A.2d 306, 307 (Conn. 1942) (discussing the enactment of the 1820 statute which invalidates any marriage not performed by certain persons, such as ministers).

<sup>58</sup> See *Bowman*, *supra* note 9, at 731–32, 740 (discussing the waves of reform that have led to the abolition of common law marriage at various times during the twentieth century).

<sup>59</sup> *Id.* at 749.

<sup>60</sup> See *Thomas*, *supra* note 12, at 151 (listing these states and five others that recognize common law marriages under more limited circumstances).

recognition of same-sex marriages.<sup>61</sup> Only in Rhode Island is there an open question whether the state's constitution requires that the state permit same-sex couples to marry,<sup>62</sup> and only in Rhode Island could the legislature voluntarily extend the right to marry to same-sex couples without a constitutional amendment.<sup>63</sup>

The recent decision, however, by a federal district court in California striking down that state's constitutional amendment prohibiting same-sex marriages on federal equal protection and due process grounds<sup>64</sup>—if affirmed by the U.S. Court of Appeals for the Ninth Circuit or, ultimately, the U.S. Supreme Court—raises the prospect of setting a precedent that would require some or all states, including those that currently recognize common law marriage, to extend the right to marry to same-sex couples.<sup>65</sup> Accordingly, it is worth considering how the doctrine of common law marriage in those nine states compares with that of Iowa, the District of Columbia, and New Hampshire, as well as to consider the policy arguments in favor of recognizing same-sex common law marriage in those states.

Most of those remaining nine states, like Iowa and New Hampshire, require that the couple hold themselves out publicly to others as a married couple and/or that they are reputed so to be.<sup>66</sup> Courts in some of those states, including Alabama,<sup>67</sup> Montana,<sup>68</sup> and Texas,<sup>69</sup> have explicitly held

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<sup>61</sup> ALA. CONST. art. I, § 36.03; COLO. CONST. art. II, § 31; KAN. CONST. art. XV, § 16; MONT. CONST. art. XIII, § 7; OKLA. CONST. art. II, § 35; S.C. CONST. art. XVII, § 15; TEX. CONST. art. I, § 32; UTAH CONST. art. I, § 29.

<sup>62</sup> See *Chambers v. Ormiston*, 935 A.2d 956, 967–68 (R.I. 2007) (Suttell, J., dissenting) (emphasizing that the case required the court to consider only whether family court may recognize a same-sex marriage for the limited purpose of entertaining a divorce petition, and not whether a same-sex marriage is entitled to recognition in Rhode Island for any other purpose); Letter from Rhode Island Attorney General Patrick C. Lynch to Commissioner Jack R. Warner (Feb. 20, 2007), available at <http://www.glad.org/uploads/docs/cases/ri-ag-statement.pdf> (concluding that because Rhode Island does not have a strong public policy against homosexuals or same-sex relationships, Rhode Island should recognize same-sex marriages lawfully performed in Massachusetts).

<sup>63</sup> With the recent election of Lincoln Chafee as governor in Rhode Island, the likelihood that the right to marry will be extended to same-sex couples appears to have increased significantly. See, e.g., Peter Cassels, *Chafee: Let's Get Marriage Equality Passed*, EDGE (Oct. 18, 2010), <http://www.edgeboston.com/index.php?ch=news&sc=&sc2=news&sc3=&id=111689>; Amy Rasmussen, *Chafee's Election Renews Hope for R.I. Gay Marriage Movement*, BROWN DAILY HERALD (Nov. 11, 2010), available at <http://www.browndailyherald.com/news/metro/chafee-s-election-renews-hope-for-r-i-gay-marriage-movement-1.2401687>.

<sup>64</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 995, 997 (N.D. Cal. 2010).

<sup>65</sup> If the decision were to be affirmed by the Ninth Circuit and the U.S. Supreme Court declined to review the decision, it would be binding on federal courts in one of the common law marriage states, Montana, which is located in the Ninth Circuit.

<sup>66</sup> See, e.g., *Creel v. Creel*, 763 So. 2d 943, 946 (Ala. 2000) (holding that because the Creels held themselves out as being married following their 1976 divorce, Joyce Creel was the common law wife of Joseph Creel at the time of his death).

<sup>67</sup> In full, Alabama law requires the following to establish a common law marriage: “(1) capacity; (2) present agreement or mutual consent to enter into the marriage relationship, permanent and exclusive of all others; (3) public recognition of the existence of the marriage; and (4) cohabitation or

that keeping the relationship a secret is inconsistent with this requirement; thus, like Iowa, they have declared that there is no such thing as a secret common law marriage,<sup>70</sup> creating challenges for those same-sex couples who are fully closeted. Most of the others, including Colorado,<sup>71</sup> Kansas,<sup>72</sup> Oklahoma,<sup>73</sup> Rhode Island,<sup>74</sup> and Utah,<sup>75</sup> have not explicitly held that there is no such thing as a secret common law marriage; yet, like New Hampshire, these states make either holding themselves out as a couple, a reputation as such, or both, a critical element for establishing a common law marriage, thus making same-sex common law marriage an impossibility for a fully closeted couple in those states. Even in these eight states, like Iowa, some degree of being in the closet may be consistent with the establishment of a common law marriage; thus, for example, Texas courts have held that “a marriage that is secret from some persons can still be a common-law marriage.”<sup>76</sup> On the other hand, some decisions appear

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mutual assumption openly of marital duties and obligations.” *Adams v. Boan*, 559 So. 2d 1084, 1086 (Ala. 1990).

<sup>68</sup> In full, Montana law requires the following to establish a common law marriage: (1) the competency of both individuals to enter into marriage; (2) mutual consent and agreement to enter into it; and (3) cohabitation and public repute. *E.g.*, *In re Estate of Ober*, 62 P.3d 1114, 1115 (Mont. 2003); *Barnett v. Hunsaker*, 968 P.2d 281, 286 (Mont. 1998).

<sup>69</sup> In full, Texas law requires the following to establish a common law marriage: (1) agreement to be married; (2) cohabitation thereafter as husband and wife; and (3) representation of marriage to others. TEX. FAM. CODE ANN. § 2.401(a)(2) (West 2006); *Russell v. Russell*, 865 S.W.2d 929, 932 (Tex. 1993).

<sup>70</sup> *Golden v. Golden*, 360 So. 2d 994, 996 (Ala. Civ. App. 1978) (holding that keeping the relationship “clandestine, secret” is contrary to the public recognition requirement); *Ober*, 62 P.3d at 1117; *Barnett*, 968 P.2d at 286; *Tompkins v. State*, 774 S.W.2d 195, 209 (Tex. Crim. App. 1987); *Ex Parte Threet*, 333 S.W.2d 361, 364–65 (Tex. 1960) (“[T]here can be no secret common law marriage . . . . The secrecy is inconsistent and irreconcilable with the requirement of a public holding out that the couple are living together as husband and wife.”).

<sup>71</sup> In full, Colorado law requires the following to establish a common law marriage: (1) mutual consent or agreement of the parties to be husband and wife; (2) followed by a mutual and *open* assumption of a marital relationship. *People v. Lucero*, 747 P.2d 660, 663–64 (Colo. 1987). A “mutual public acknowledgement of the marital relationship” is considered “essential to the establishment of a common law marriage.” *Id.* at 663–64.

<sup>72</sup> In full, Kansas law requires the following to establish a common law marriage: “(1) capacity of the parties to marry; (2) a present marriage agreement between the parties; and (3) a holding out of each other as husband and wife to the public.” *In re Adoption of X.J.A.*, 166 P.3d 396, 410 (Kan. 2007); *In re Estate of Antonopoulos*, 993 P.2d 637, 647 (Kan. 1999).

<sup>73</sup> In full, Oklahoma law requires the following to establish a common law marriage: (1) actual, mutual agreement to be husband and wife; (2) permanent relationship; (3) exclusive relationship, as proved by cohabitation; and (4) holding out to the public as husband and wife. *Blake v. State*, 765 P.2d 1224, 1225 (Okla. Crim. App. 1988).

<sup>74</sup> In full, Rhode Island law requires the following to establish a common law marriage: (1) serious intention to enter into a husband-wife relationship; and (2) conduct of such character as to lead to a belief in the community that they were married. *Fravala v. City of Cranston ex. rel. Baron*, 996 A.2d 696, 703 (R.I. 2010); *Sardonis v. Sardonis*, 261 A.2d 22, 24 (R.I. 1970).

<sup>75</sup> In full, Utah law requires the following to establish a common law marriage: (1) cohabitation; (2) assumption of marital rights and duties; (3) a holding out as and general reputation as husband and wife; (4) capacity to marry; (5) capacity to give consent; (6) consent. UTAH CODE ANN. § 30-1-4.5 (LexisNexis 2007); *Whyte v. Blair*, 885 P.2d 791, 793–94 (Utah 1994).

<sup>76</sup> *Winfield v. Renfro*, 821 S.W.2d 640, 651 (Tex. App. 1991); *see also Vinson v. Vinson*, 69 So. 2d 431, 433 (Ala. 1954) (requiring only that there be “some” public recognition); *Petrarca v.*

to require that the couple be public about their relationship in at least some situations in which they have nothing to gain financially or otherwise from doing so; in Kansas, for example, a court found no common law marriage for a couple that held themselves out as such only to their employer and landlady, concluding that they held themselves out as married “only when it was advantageous to assume a marriage posture.”<sup>77</sup>

The final state, South Carolina, like the District of Columbia, appears to be a state in which a fully closeted same-sex couple could establish a common law marriage if that state were to begin recognizing same-sex marriages within its borders. Under South Carolina law, all that is required to establish a common law marriage is mutual assent to marry. Although cohabitation and reputation as a couple are a way of proving the mutual assent to marry—and indeed, create a rebuttable presumption that such mutual assent existed—cohabitation and reputation as a couple are not separate elements necessary for establishing a common law marriage.<sup>78</sup> In the words of the South Carolina Supreme Court, “[t]he intent in marriage is usually evidenced by a public and unequivocal declaration of the parties, but that is not necessary; the intent may exist though never public and formally declared . . . .”<sup>79</sup>

If same-sex marriage were to be legalized in these states by means of a federal court decision, the policy arguments in favor of recognizing same-sex common law marriage in most of these states would be even stronger than they are in states such as Iowa, the District of Columbia, and New Hampshire. The fact that eight of these nine states have amended their constitutions to ban recognition of same-sex marriage suggests an even more frontier-like environment for gay and lesbian couples in which actual or perceived access to public and religious officials to solemnize their marriages is likely to serve as a serious barrier to obtaining formal, legal recognition of their relationships for some time to come.

## VI. CONCLUSION

It is not at all unusual for gays and lesbians to refer publicly to their partners as their “husband” or “wife” despite the fact that they are not legally married to one another. With the expansion of legalized same-sex marriage into states recognizing common law marriage, such statements—previously largely symbolic in nature—take on legal significance in that

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Castrovillari, 448 A.2d 1286, 1290 (R.I. 1982) (requiring only that the reputation for being married be among those with whom the couple is acquainted).

<sup>77</sup> *State v. Johnson*, 532 P.2d 1325, 1329 (Kan. 1975).

<sup>78</sup> See *Callen v. Callen*, 620 S.E.2d 59, 62 (S.C. 2005) (“[W]hen the proponent proves that the parties participated in ‘apparently matrimonial’ cohabitation, and that while cohabiting the parties had a reputation in the community as being married, a rebuttable presumption arises that a common-law marriage was created.”).

<sup>79</sup> *Kirby v. Kirby*, 241 S.E.2d 415, 416 (S.C. 1978).

they can, with the right intent and when other criteria are satisfied, serve as the basis for forming a legally recognized common law marriage in certain jurisdictions in the United States.

While common law marriage has its detractors, and there exist sound policy arguments for its elimination, there is no basis in doctrine or policy to permit its continued existence for opposite-sex couples while denying it to same-sex couples. Indeed, there are sound reasons why in some cases it makes even greater sense for common law marriage to be available to same-sex couples.