

ARTICLES

SAME-SEX MARRIAGE AND CHOICE-OF-LAW: IF WE MARRY IN HAWAII, ARE WE STILL MARRIED WHEN WE RETURN HOME?

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This Article explores the choice-of-law question of whether a same-sex couple, married in Hawaii after successful completion of the *Baehr v. Lewin* case, will have their marriage recognized by the state of their domicile upon their return from Hawaii. This Article first applauds the *Baehr* court's decision that prohibiting same-sex marriage is unconstitutional sex discrimination but then critiques its decision that the fundamental right to marry does not extend to same-sex couples.

The second Part considers the choice-of-law questions that will arise in cases litigating the validity of a couple's same-sex marriage upon their return to their domicile. It considers statutory directives, such as marriage validation and evasion statutes, and surveys the major choice-of-law theories in use today. Given the judicial discretion whether to recognize these marriages, the third Part argues that judges should recognize same-sex marriages using the better rule of law methodology. Recognizing these marriages is "better" because it would end age-old discrimination based on prejudice and misunderstanding, and would eliminate overzealous state interference with and condemnation of a most personal and intimate relationship. This Article analogizes from choice-of-law cases which arose during the reign of anti-miscegenation statutes to argue that the post-*Baehr* cases will expose the inherent discrimination that underlies the prohibition of same-sex marriage and argues for using choice-of-law principles to end that discrimination.

The Stonewall riots on June 27, 1969¹ changed the face of the lesbian and gay civil rights movement in a public way that was unprecedented. In fact, those riots, in which primarily young, nonwhite, drag queens stood up to challenge the continuous police harassment that dogged their lives, are universally recognized as the ignition point for the modern lesbian and gay civil rights movement.² Without ignoring the

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1. JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES 1940-1970*, at 231 (1983).

2. *Id.* at 231-33.

previous decades of courageous struggle led by countless pioneers,³ those riots became a rallying point around which lesbians and gay men, scattered across the country throughout numerous communities, moved away from the shadowy existence most had lived and toward a willingness to speak openly of our⁴ existence and our refusal to accept society's denial, harassment, and deprivation.⁵

That movement led to the April 1993 March on Washington where nearly a million lesbians and gay men stood openly and proudly before the President, Congress, the entire country, and the world and demanded even more changes in the status quo.⁶ We demonstrated for increased AIDS funding, for parental rights, for freedom to express our sexuality without fear of repressive laws, to serve openly in the military, for recognition as equal members of society, and for repeal of laws that harm us and passage of civil rights laws to protect us.⁷

One of the major events that took place during the weekend of the March was "The Wedding." Hundreds of couples joined together and exchanged vows in the presence of assembled friends and families.⁸ These are vows which every state in the country refuses to recognize.⁹

3. See generally *id.* (discussing the homophile movement from 1940 through 1970 and the way in which the members of that movement paved the way for the gay rights liberation movement which followed the Stonewall riots).

4. Following up on significant discussion in the feminist community, I subscribe to the anti-essentialist tenet which states that there are no outside observers when analyzing any issue. "It is important to reflect upon your own location in relation to the issue and the people under discussion, because your perspective necessarily affects the way you perceive and the way you are perceived by others." Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 *LAW & SEXUALITY* 31, 40 (1991). The perspectives I bring to this Article include my years teaching feminist theory and sexual orientation theory as a law professor, my years spent as a community activist working on recognition of domestic partners and alternative families, and my years spent as an "out" lesbian and partner in a long-term committed relationship. For a list of articles discussing anti-essentialism, see *id.* at 35 n.15.

5. D'EMILIO, *supra* note 1, at 246-47.

6. After the March, a significant discrepancy surfaced between March organizers and U.S. Park Police estimates regarding the number of demonstrators. Organizers claimed that one million people attended the march, while park police estimated 300,000 participated. Charles W. Hall, *The Clash over Crowd Estimates*, *WASH. POST*, Apr. 26, 1993, at A1.

7. Bettina Boxall & James Gerstenzang, *Gays, Lesbians Celebrate on Eve of Rights March*, *L.A. TIMES*, Apr. 25, 1993, at A1.

8. *Id.*

9. Duclos, *supra* note 4, at 31-32. Although same sex marriages are not permitted in Denmark, Sweden, and the Netherlands, these countries have adopted "registered partnerships," which are closely modeled after the concept of marriage. Some differences remain. For example, in Denmark, same sex couples cannot adopt one another's children or unrelated children, cannot share custody of children, cannot form

Their recognition would forever change the landscape of lesbian and gay rights in the United States.

Stonewall symbolized a break from accepting the status quo, and very little since those riots has challenged the lesbian and gay community as much as the debate over marriage. This debate has spanned the past several years and includes the question whether seeking the right to marry should be the focus of our community's efforts, political influence, and financial resources.¹⁰ As is often true in such political debates, both

a partnership unless one of the parties is a citizen of the country, and cannot have the partnership recognized in other countries. Shaughn Morgan, *Legal Recognition of Gay and Lesbian Relationships*, 3 AUSTRALASIAN GAY & LESBIAN L.J. 57, 64-65 (1993).

10. Perhaps the best known presentation of the "debate" occurred in *Gay Marriage: A Must or a Bust?*, where Paula Ettelbrick argued in *Since When Was Marriage a Path to Liberation?* against pursuing a right to same-sex marriage and Tom Stoddard argued in *Why Gay People Should Seek the Right to Marry* in favor of pursuing same-sex marriage, in *LESBIANS, GAY MEN AND THE LAW* 398 (William B. Rubenstein ed., 1993). Other articles discussing whether lesbians and gay men should pursue the right of same-sex marriage include: a symposium issue of the *Law & Sexuality Review* where Professors Harlon L. Dalton, Nan D. Hunter, Nitya Duclos, and Mary C. Dunlap discuss this question, see Symposium, *The Family in the 1990s: An Exploration of Lesbian and Gay Rights*, 1 LAW & SEXUALITY 1 (1989); Michael L. Closten & Carol R. Heise, *HIV-AIDS and the Non-Traditional Family: The Argument for State and Federal Judicial Recognition of Danish Same-Sex Marriages*, 16 NOVA L. REV. 809 (1992); Ruth Colker, *Marriage*, 3 YALE J.L. & FEMINISM 321 (1991); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624 (1980); Ruthann Robson & S.E. Valentine, *Lov(H)ers: Lesbians as Intimate Partners and Lesbian Legal Theory*, 63 TEMP. L.Q. 511 (1990). Other articles on same-sex marriages include: G. Sidney Buchanan, *Same-Sex Marriage: The Linchpin Issue*, 10 U. DAYTON L. REV. 541 (1985); Catherine M. Cullem, *Fundamental Interests and the Question of Same-Sex Marriage*, 15 TULSA L.J. 141 (1979); Alissa Friedman, *The Necessity for State Recognition of Same-Sex Marriage: Constitutional Requirements and Evolving Notions of Family*, 3 BERKELEY WOMEN'S L.J. 134 (1987); John D. Ingram, *A Constitutional Critique of Restrictions on the Right to Marry—Why Can't Fred Marry George—Or Mary and Alice at the Same Time*, 10 J. CONTEMP. L. 33 (1984); Claudia A. Lewis, *From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage*, 97 YALE L.J. 1783 (1988); Dwight J. Penas, *Bless the Tie That Binds: A Puritan-Covenant Case for Same-Sex Marriage*, 8 LAW & INEQ. J. 533 (1990); Hannah Schwarzschild, *Same-Sex Marriage and Constitutional Privacy: Moral Threat and Legal Anomaly*, 4 BERKELEY WOMEN'S L.J. 94 (1988); Mark Strasser, *Family, Definitions, and the Constitution: On the Antimiscegenation Analogy*, 25 SUFFOLK U. L. REV. 981 (1991); Otis R. Danslet, Note, *Same-Sex Marriage*, 10 N.Y.L. SCH. J. HUM. RTS. 555 (1993); Deborah Gray, Note, *Marriage: Homosexual Couples Need Not Apply*, 23 NEW ENG. L. REV. 515 (1988); Julienne C. Scocca, Comment, *Society's Ban on Same-Sex Marriages: A Reevaluation of the So-Called "Fundamental Right" of Marriage*, 2 SETON HALL CONST. L.J. 719 (1992); Arthur J. Silverstein, Comment, *Constitutional Aspects of the Homosexual's Right to a Marriage License*, 12 J. FAM. L. 607 (1972); Adrienne K. Wilson, Note, *Same-Sex Marriage: A Review*, 17 WM. MITCHELL L. REV. 539 (1991); Note, *Homosexuals' Right to Marry: A Constitutional Test and a Legislative Solution*, 128 U. PA. L. REV. 193 (1979); Note, *The Legality of*

sides to the debate make important arguments about the impact that the right to marry will have on each member of our community, on the community as a whole, and on our place in society.¹¹

Homosexual Marriage, 82 YALE L.J. 573 (1973).

11. In *Since When Is Marriage a Path to Liberation?*, Paula Ettelbrick argues against same sex marriage because she believes it will not liberate lesbians and gay men, but rather will make us more invisible, force assimilation, and undermine the lesbian and gay civil rights movement. Ettelbrick, *supra* note 10, at 402. She also argues that same sex marriage will not encourage society to respect relationship choice and family diversity, goals central to the gay and lesbian civil rights movement. *Id.* Ruth Colker, in *Marriage*, echoes Ettelbrick's concerns, arguing that rather than expanding the concept of marriage to more types of couples, we should change the institution of marriage to eliminate its marriage-dependent benefits, so that people will choose it for symbolic, rather than legal or utilitarian, reasons. Colker, *supra* note 10, at 324. Colker also recognizes the class-based assumptions inherent in the marriage debate, realizing that for most poor people, marriage offers few economic advantages. *Id.* at 325. Nitya Duclos examines four reasons advanced for same-sex marriage (political reform, public legitimation, socioeconomic benefits, and safeguarding children of lesbian or gay parents) in her article *Some Complicating Thoughts on Same-Sex Marriage*, *supra* note 4. She concludes the lesbian and gay communities will not uniformly feel the effect of allowing same sex marriages, and questions whether marriage will exacerbate differences of power and privilege in those communities. *Id.* at 58-59.

In *Why Gay People Should Seek the Right to Marry*, Thomas Stoddard notes the oppressive nature of marriage in its traditional form, but believes that lesbians and gay men should be able to choose to marry and that the civil rights movement should seek full recognition of same-sex marriages. Stoddard, *supra* note 10, at 398. Stoddard's three stated reasons for pursuing this right are the practical advantages associated with marriage-related benefits, the political strategy of using marriage to end discrimination against lesbians and gay men, and a philosophical explanation that lesbians and gay men should have the right to choose to marry. Providing that right, he believes, will be the principal means toward eliminating marriage's sexist trappings. *Id.* at 399-401. Nan Hunter argues that legalizing lesbian and gay marriage will destabilize marriage's gendered definition by disrupting the link between gender and marriage. Nan Hunter, *Marriage, Law and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 12 (1989). She analyzes both marriage and domestic partnership against the feminist inquiry of how law reinforces power imbalances within the family, and views same-sex marriage as a means to subvert gender-based power differentials. *Id.* Mary Dunlap finds that same-sex marriage is constructive in combatting the gay-bashing which lesbians and gay men are encountering as a result of the decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986). Mary Dunlap, *The Lesbian and Gay Marriage Debate: A Microcosm of Our Hopes and Troubles in the Nineties*, 1 LAW & SEXUALITY 63, 81 (1989). She examines the values underlying the push for same-sex marriage (such as equality, autonomy, fairness, privacy, and diversity) and encourages expansion of the marriage debate outside legal circles. *Id.* at 85.

For interviews with lesbian and gay couples, some of whom have chosen to have public ceremonies celebrating their commitment and some of whom have chosen to keep their commitment private, see generally LESBIAN AND GAY MARRIAGE: PRIVATE COMMITMENTS, PUBLIC CEREMONIES (Suzanne Sherman ed., 1992).

Without resolving that debate here,¹² it seems clear that obtaining

12. The debate continues to rage, as seen from articles contained in the *Virginia Law Review's* recent symposium issue. Compare William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993) (arguing that historical acceptance of same-sex marriage indicates its appropriate place in modern society) with Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535 (1993) (arguing in contrast that same-sex marriage will neither liberate lesbians or gay men nor heterosexual marriage). For a fascinating historical account of same-sex marriage, see JOHN BOSWELL, *SAME-SEX UNIONS IN PREMODERN EUROPE* (1994).

My response to the debate (obviously favoring marriage as an option, as revealed by the tone of this Article) is best expressed in the following short essay, which explains the vital political change that can result from the simple act of same-sex marriage.

Yes, I know that weddings can be "heterosexual rituals" of the most repressive and repugnant kind. Yes, I know that weddings historically have symbolized the loss of the woman's self into that of her husband's, a denial of her existence completely. Yes, I know that weddings around the world continue to have that impact on many women and often lead to lives of virtual slavery. Yes, I know. Then how could a feminist, out, radical lesbian like myself get married in April 1992? Have I simply joined the flock of lesbians and gay men rushing out to participate in a meaningless ceremony that symbolizes heterosexual superiority?

I think not.

When my partner and I decided to have a commitment ceremony, we did so to express the love and caring that we feel for one another, to celebrate that love with our friends and family, and to express that love openly and with pride. It angers me when others, who did not participate or do not know either of us, condemn us as part of a mindless flock accepting a dehumanizing ceremony. But it distresses me more that they believe that their essentialist vision of weddings explains all—because they have been to weddings, both straight and queer, they can speak as experts on the inherent nature of marriage.

Perhaps these experts should consider the radical aspect of lesbian marriage or the transformation that it makes on the people around us. As feminists, we used to say that "the personal is political." Have we lost that vision of how we can understand and change the world?

My commitment ceremony was not the mere "aping" of the bride that I supposedly spent my childhood dreaming of becoming. In fact, I was a very satisfied tomboy who never once considered marriage. My ceremony was an expression of the incredible love and respect that I have found with my partner. My ceremony came from a need to speak openly of that love and respect to those who participate in my world.

Those months of preparing for and having that ceremony produced some of the most politically "out" experiences I have ever had. My sister and I discussed for weeks whether she would bring her children to the ceremony. Although I had always openly brought the women with whom I was involved home with me, I had never actually sat down with my niece and nephews to discuss those relationships. My sister was concerned that her eldest son, particularly, might scorn me, especially at a time when he and his friends tended toward "faggot" jokes. After I expressed how important it was for me to have them attend, she tried to talk with her son about going to this euphemistically-entitled "ceremony." He kept asking why my partner and I were having a "ceremony" and she kept hedging. Finally he just said, "Mom, Barb's gay, right?" She said yes, they all

the right to marry will drastically impact the lesbian and gay civil rights movement. Our internal discussion has primarily focused on whether we should pursue this right, whether it is good for our community, and whether it is good for ourselves individually. But this internal discussion has recently expanded.

With the case of *Baehr v. Lewin*,¹³ the Hawaii Supreme Court has moved the issue beyond our community. Without waiting for the long struggle involved with petitioning state legislatures to expand the marriage

came, and things were fine. Her youngest son sat next to me at dinner after the ceremony, and tried to understand how the marriage worked. "You're married, right?" "Yes." "Who's the husband?" "There is no husband." "Are you going to have children?" "No." "So there's no husband and no children but you're married, right?" "Yes." "OK," and he happily turned back to his dinner.

My partner invited her large Catholic family to the ceremony. We all know how the Pope feels about us. Despite that, her mother and most of her siblings, some from several states away, were able to attend. Her twin brother later told us that our ceremony led him to question and resolve the discomfort that had plagued his relationship with his sister for many years.

Because I was leaving town early for the ceremony, I explained to my two law classes (one of 95 and one of 20 students) that I was getting "married" to my partner, who is a woman. (I actually used the word "married" because saying I was getting "committed" just didn't quite have the right ring to it.) The students in one of my classes joined together to buy my partner and me a silver engraved frame that says "Barb and Peg, Our Wedding." My colleagues were all invited to the ceremony and most of them attended. One of them spoke to me about the discussion he and his wife had within their family explaining to the children that they were going to a lesbian wedding.

How can anyone view these small victories in coming out and acceptance as part of flocking to imitate, or worse join, a potentially oppressive heterosexual institution? Is it not profoundly transformative to speak so openly about lesbian love and commitment? The impact was so wide-ranging, not just on my partner and myself, but on our families, our friends, and even the clerks in the jewelry stores when we explained we were looking for wedding rings for *both* of us. The ceremony impacted the 200 people who received my mother's annual xeroxed Christmas letter with a paragraph describing the ceremony. It impacted the clerk in the store who engraved the frame for my students, and the young children who learned that same-sex marriage exists.

Yes, we must be aware of the oppressive history that weddings symbolize. We must work to ensure that we do not simply accept whole-cloth an institution that symbolizes the loss and harm felt by women. But I find it difficult to understand how two lesbians, standing together openly and proudly, can be seen as accepting that institution. What is more anti-patriarchal and critical of an institution that carries the patriarchal power imbalance into most households than clearly stating that women can commit to one another with no man in sight?—to commit to one another with no claim of dominion or control, but instead with equality and respect? I understand the fears of those who condemn us for our weddings, but I believe they fail to look beyond the symbol and cannot see the radical claim we are making.

13. 852 P.2d 44 (Haw. 1993).

statutes, a few courageous same-sex couples¹⁴ decided that they wanted to marry and wanted the option of having that marriage recognized.¹⁵ These couples brought their action, lost in the trial court, and appealed to the highest court of Hawaii, asking that a history of discrimination and denial not prevent them from obtaining state recognition of the personal commitment each member of the couple was prepared to make to the other. Perhaps to the plaintiffs' surprise, the Hawaii Supreme Court took their request seriously and could find little reason to prevent their marriages. The *Baehr* court held that the Hawaii marriage statute violated Hawaii's constitutional prohibition against sex discrimination and that the statute was presumably unconstitutional unless, upon remand, the State could establish that the statute was justified by a compelling state interest and was narrowly drawn so as to avoid unnecessary abridgement of the plaintiffs' constitutional rights.¹⁶ That question will be addressed by the trial court upon remand.¹⁷

Although those of us in the community who have longed to see this day arrive are still holding our collective breath, it seems likely that in the near future, Hawaii, or perhaps another state, will grant us the same right to marry as all other adult citizens, absent some statutory bar.¹⁸ Once

14. When this Article refers to same-sex couples, it presumes that these couples will consist of lesbians or gay men. The Hawaii Supreme Court stated that whether the plaintiffs were homosexuals was irrelevant for its analysis, *id.* at 58 n.17, even though it could be expected that most people who would form a same-sex couple and attempt to marry would be lesbians or gay men. Doctrinally, the question of whether same-sex marriage would be found to be protected against sexual orientation discrimination, rather than sex discrimination, may result in a different answer. See generally Francisco Valdes, *Sexual Minorities in the Military: Charting the Constitutional Frontiers of Status and Conduct*, 27 CREIGHTON L. REV. 381 (1994).

15. The plaintiffs were two lesbian couples and one gay couple: Ninia Baehr, Genora Dancel, Tammy Rodrigues, Antoinette Pregil, Pat Lagon, and Joseph McLilio. 852 P.2d at 48.

16. *Id.* at 68.

17. *Id.* at 74 (granting motion for clarification). Legal experts agree that meeting the "compelling state interest" standard rarely occurs, unless public safety is at stake. In fact, the Hawaii Attorney General, Robert A. Marks, had been "clutching at straws" in trying to express ways in which prohibiting same-sex marriage furthered some compelling state interest. What impact the newly passed statute, Act 217, will have on the remand is unknown. See *infra* note 91. Some believe that the language in the Act "clarifying" that the marriage statutes are only intended to apply to "one man and one woman" may persuade the court that the same-sex marriage prohibition is "benign" discrimination. Jane Gross, *After a Ruling, Hawaii Weighs Gay Marriages*, N.Y. TIMES, Apr. 25, 1994, at A1, B8. Given the extensive benefits that opposite-sex couples receive but that same-sex couples are denied, it is difficult to take seriously any claim that denial of the opportunity to marry could be considered benign discrimination. See *infra* notes 59-65 and accompanying text.

18. See *infra* note 70 and accompanying text.

that happens, another stage in the struggle toward same-sex marriage will begin.

We will take our marriage certificate home with us from Hawaii (or another state), the glow of family and friends celebrating our joy and commitment with us (hopefully)¹⁹ will start to fade, and we will frame our pictures and polish our rings. We will then ask our employers to enroll us as a married couple for health insurance, ask our lawyer to write our wills as a married couple, apply for marital discounts at our health clubs, move into a single-family neighborhood, file joint tax returns as a married couple, and perhaps change our names. Each time we assert our new marital status, people will look and question, whisper and ask (just as they currently do whenever we step out of the closet). We will have to fight new legal battles over whether our home state and the various institutional entities within it will recognize our newly acquired status and whether they will protect it to the same extent that they protect opposite-sex married couples' status.

This major question will be resolved by considering the choice-of-law questions surrounding whether a lesbian or gay couple married in a state which allows them to marry will receive recognition of the marriage in their home state, which has not granted the right to marry. Must one's home state recognize this new marital status, or is it only valid if one remains in the state where the marriage was celebrated? Without such home-state recognition, we will have won a meager right indeed. For although most of us would be happy to live forever in Hawaii, whatever has kept us in our home states will probably still pull us to return, and we will bring with us, besides our snapshots and fading leis, a demand that our new marital status accompany us.

This Article is composed of three main Parts. The first discusses the *Baehr* decision, questioning the analytical framework which the Hawaii court used. Specifically, it argues that the court was correct in its decision to use the *Loving v. Virginia*²⁰ analysis in holding that the denial of the right to marry was sex discrimination in violation of Hawaii's equal protection clause,²¹ just as the same denial was race discrimination in *Loving*. Within its equal protection analysis, the court rejected custom and history as acceptable bases for denying same-sex marriage, but was unable to reject those same rationales when considering whether same-sex couples have a fundamental right to marry. The court incorrectly framed the issue, leading it to make the same analytical error

19. For a discussion of problems that lesbians and gay men have faced upon deciding to have a marriage ceremony, see LESBIAN AND GAY MARRIAGE: PRIVATE COMMITMENTS, PUBLIC CEREMONIES, *supra* note 11, at 3-4.

20. 388 U.S. 1 (1967).

21. HAW. CONST. art. I, § 5.

that the U.S. Supreme Court made in *Bowers v. Hardwick*.²² Just as the *Bowers* court erred by asking whether there exists a fundamental right to homosexual sodomy, instead of asking whether there exists a fundamental right to privacy in one's choice of sexual partners, so too did the *Baehr* court err in asking whether there exists a fundamental right to same-sex marriage, instead of asking whether there exists a fundamental right to marry which should include same-sex couples.

The second Part begins by presenting the underlying choice-of-law principle which generally controls recognition of out-of-state marriage cases: if a marriage is valid where celebrated, then it is entitled to recognition in the celebrants' home state.²³ Whether this recognition will occur, however, depends on policy decisions made by state legislatures and state courts. Although many states have statutes affirming this rule, others have statutes prohibiting "evasion" of state marriage restrictions by domiciliaries leaving the state, marrying in another state, and returning to the pre-marital domicile. States without these statutory mandates turn to choice-of-law theories for guidance in making the policy decision whether to affirm or reject the couple's marriage. A review of these statutes and theories leads the reader to understand that little more than guidance exists. Courts retain significant discretion in deciding whether to recognize their domiciliaries' out-of-state marriages.

The third Part, acknowledging this discretion, argues for the use of choice-of-law theories encouraging recognition of "the better rule of law" to resolve these conflicts. In these cases, the better rule of law would be to honor the same-sex marriage. Such a choice is "better" because it eliminates age-old discrimination based on prejudice and misunderstanding, and because it eliminates overzealous state interference with and condemnation of a most personal and intimate relationship. This Part considers the analogous legal revolution which led to rejecting anti-miscegenation statutes because they were based on irrational prejudice.

22. 478 U.S. 186 (1986).

23. Willis L.M. Reese, *Marriage in American Conflict of Laws*, 26 INT'L & COMP. L.Q. 952, 955 (1977). Some commentators argue that other states must recognize Hawaiian marriages under the Full Faith and Credit Clause of the U.S. Constitution. See Deborah M. Henson, *Will Same-Sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriage Following Hawaii's Baehr v. Levin*, 32 J. Fam. L. (forthcoming 1994); Evan Wolfson & Gregory V.S. McCurdy, "Let No One Set Asunder": *Full Faith and Credit for Validly Contracted Marriages of Same-Sex and Different-Sex Couples* (forthcoming 1994). See generally Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice of Law*, 92 COLUM. L. REV. 249 (1992); Ralph U. Whitten, *The Constitutional Limitations on State-Court Jurisdiction: A Historical-Interpretative Reexamination of the Full Faith and Credit and Due Process Clauses*, 14 CREIGHTON L. REV. 499 (1981).

That revolution was fueled by the numerous choice-of-law cases determining whether states should recognize the interracial marriages entered into by couples fleeing prejudicial laws. The choice-of-law cases that will arise once any state recognizes same-sex marriage will again provide an opportunity for courts to reject similar antiquated restrictions. Some choice-of-law theories permit recognition of the progressive dynamics driving the *Baehr* court's rejection of discrimination against same-sex couples. The better rule of law, recognized by many of these theories as an important factor for courts to consider when making difficult policy decisions,²⁴ should lead jurists to a gradual acceptance of same-sex marriage, even if not statutorily permitted in many states for several years to come.

This Article begins by reviewing the case which may have a greater impact on lesbian and gay rights than anything that has occurred in the twenty-five years since the Stonewall riots, a case that is potentially even more important than *Bowers*. But this Article does not end its focus there. Instead, it assumes that Hawaii, or some other state, will grant the right of same-sex marriage in the near future, and grapples with the interesting choice-of-law question that will follow immediately after recognition of that right.

I. *BAEHR V. LEWIN*

The Hawaii Supreme Court made history on May 5, 1993 when it remanded the case of *Baehr v. Lewin*²⁵ to the trial court to determine whether the State of Hawaii had committed sex discrimination by refusing to grant marriage licenses to the plaintiffs. The trial court is now considering this question and will soon issue its decision as to whether the state of Hawaii met its burden on remand.

The Hawaii Supreme Court's analysis in finding that a prohibition against same-sex marriage violated the state constitution's equal protection clause, while simultaneously determining that same-sex couples do not have a fundamental right to marry, is questionable. In determining that abridging the couples' right to marry was sex discrimination, the court did not fall into the trap of embracing the tautological argument presented by the State of Virginia in *Loving v. Virginia* that Virginia was not discriminating on the basis of race because divine providence had not intended that the marriage state extend to interracial unions.²⁶ Similarly,

24. Courts in states that do not currently use the "better rule of law" in their choice-of-law analysis can use the analysis suggested *infra* part III.A to conclude that the "better" public policy result would be to validate the same-sex marriage.

25. 852 P.2d 44 (Haw. 1993).

26. *Loving v. Virginia*, 388 U.S. 1, 3 (1967).

the *Baehr* court rejected the argument that the state was not discriminating on the basis of sex because same-sex couples were definitionally incapable of forming a marriage, which by definition required an opposite-sex couple.²⁷ But that same reasoning should have led it to conclude that the Hawaii marriage statutes also denied the plaintiffs their fundamental right to marry.

In *Baehr*, the plaintiffs' complaint alleged that Baehr/Dancel, Rodrigues/Pregil, and Lagon/Melilio applied for marriage licenses with the Department of Health (DOH) under Hawaii Revised Statute section 572-6.²⁸ The DOH refused to grant their applications and sent letters to each couple stating its belief that "the law of Hawaii does not treat a union between members of the same sex as a valid marriage."²⁹ The plaintiffs claimed that they had met all marriage requirements except for the stated prohibition against same-sex applicants, that they were being denied marriage licenses because of DOH's statutory construction, and that DOH was acting in its official capacity and under color of state law in denying their applications.³⁰ The plaintiffs claimed that the determination made by DOH violated their rights to privacy under article I, section 6 of the Hawaii Constitution, and their rights to equal protection of the laws and due process under article I, section 5 of the Hawaii Constitution.³¹

The Hawaii Supreme Court reviewed the trial court's grant of the defendant Lewin's³² motion to dismiss for failure to state a claim upon which relief can be granted,³³ which was part of a motion for judgment on the pleadings.³⁴ The defendant's motion was unsupported by

27. 852 P.2d at 63.

28. HAW. REV. STAT. § 572-6 (Supp. 1992) enunciates the requirements to obtain a marriage license in Hawaii. The person must appear personally before an agent and file a written application. The application must include a signed statement of each person's full name, date of birth, residence, relationship, parents' full names, and a statement that all prior marriages, if any, have been dissolved. The statute then directs the agent to issue the license which will be in force for thirty days. *Baehr*, 852 P.2d at 49 n.2.

29. *Id.* at 49-50 n.3.

30. *Id.* at 50.

31. *Id.* The plaintiffs did not raise the issue of whether DOH's refusal denied them corresponding rights of privacy, equal protection, and due process under the United States Constitution. It can be assumed that they did not invoke the United States Constitution due to the increasingly limited protection that Court has given to homosexuals. *See, e.g., Bowers v. Hardwick*, 478 U.S. 186 (1986).

32. John C. Lewin participated in the proceedings in his official capacity as Director of the Department of Health, State of Hawaii. *Baehr*, 852 P.2d at 48.

33. HAW. DIST. CT. R.C.P. § 12(b)(6).

34. HAW. DIST. CT. R.C.P. § 12(h)(2) permits the defense of failure to state a claim upon which relief can be granted to be made in a motion for judgment on the pleadings. *See also id.* § 12(c). In addition to his motion for judgment on the pleadings,

affidavits, as the parties had not yet conducted discovery.³⁵ Lewin's motion stated that Hawaii's marriage law considered marriage valid only as between a man and a woman, that the only marriage of right was a heterosexual marriage which left the plaintiffs with no cognizable right to enter into homosexual marriages,³⁶ and that the state's marriage laws did not burden or penalize the plaintiffs' private relationships in any way.³⁷

The plaintiffs opposed Lewin's motion and argued that they had a fundamental constitutional right to sexual orientation.³⁸ They repeated their claim that DOH's refusal to grant them licenses violated their rights to privacy, equal protection and due process.³⁹ On October 1, 1991, the trial court granted Lewin's motion for judgment on the pleadings and dismissed the plaintiffs' complaint with prejudice.⁴⁰

On appeal, a plurality of the supreme court noted that the trial court erred in making numerous findings of fact and conclusions of law.⁴¹

Lewin asserted defenses of sovereign immunity, qualified immunity, and abstention in favor of legislative action. *Baehr*, 852 P.2d at 50. The trial court ruled only on the motion for judgment on the pleadings and did not consider Lewin's other defenses. *Id.* at 50 n.6. The supreme court also did not consider those defenses. *Id.*

35. *Id.* at 51.

36. The court noted that the plaintiffs' complaint did not allege that any of the plaintiffs were homosexuals and that Lewin's motion sought to place the issue of homosexuality before the court. *Id.* at 52 n.12. The court stated that it was irrelevant, for its constitutional analysis, whether the plaintiffs were homosexuals. *Id.* at 53 n.14.

Although the court refers to lesbians and gay men as homosexuals, this Article uses the terms lesbians and gay men instead.

37. *Id.* at 51-52. Lewin's memorandum also stated that "(4) the state is under no obligation 'to take affirmative steps to provide homosexual unions with its official approval'; (5) the state's marriage laws 'protect and foster and may help to perpetuate the basic family unit, regarded as vital to society, that provides status and a nurturing environment to children born to married persons' and, in addition, 'constitute a statement of the moral values of the community in a manner that is not burdensome to [the] plaintiffs'; (6) assuming the plaintiffs are homosexuals [a fact not pleaded in the plaintiffs' complaint] they 'are neither a suspect nor a quasi-suspect class and do not require heightened judicial solicitude'; and (7) even if heightened judicial solicitude is warranted, the state's marriage laws 'are so removed from penalizing, burdening, harming, or otherwise interfering with [the] plaintiffs and their relationships and perform such a critical function in society that they must be sustained.'" *Id.* at 52.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 54. Among the trial court's findings of fact were that HAW. REV. STAT. § 572-1 does not infringe on a person's individuality or lifestyle decisions, does not restrict or burden the exercise of the right to engage in a homosexual lifestyle, that the plaintiffs failed to show that they had been ostracized or oppressed in Hawaii, that homosexuals in Hawaii are not in a position of political powerlessness, that there was no evidence that the "homosexual agenda" had failed to gain legislative support in Hawaii, that plaintiffs had not established that homosexuals were a suspect class for equal

The plurality considered its task to be determining whether Lewin was entitled to judgment as a matter of law and whether it appeared beyond doubt that the plaintiffs could not prove any set of facts in support of their claim which would entitle them to relief.⁴² The plurality held that the circuit court erred in dismissing the plaintiffs' complaint and vacated that decision for further proceedings consistent with its opinion.⁴³

Just what proceedings would be consistent with the plurality's opinion remains unclear. The plurality, consisting of Justices Levinson and Moon, remanded to the trial court indicating that Lewin would be required at trial to "overcome the presumption that HRS § 572-1 is unconstitutional by demonstrating that it furthers compelling state interests and is narrowly drawn to avoid unnecessary abridgements of constitutional rights."⁴⁴ Justice Burns, who filed a concurring opinion, held that the trial court erred by dismissing the complaint because the case contained genuine issues of material fact.⁴⁵ Justice Burns indicated that his interpretation of the word "sex" in the Hawaii Constitution included "all aspects of each person's 'sex' that are 'biologically fated.'"⁴⁶ He then concluded that if "heterosexuality, homosexuality, bisexuality, and asexuality are 'biologically fated[,] then the word 'sex' also includes those differences."⁴⁷ If indeed the word "sex" in the Hawaii Constitution encompasses those differences, Burns would "probably" conclude that the Hawaii Constitution forbids discrimination against "the sexual orientation difference."⁴⁸ If these differences are not

protection purposes, that the question of whether homosexuality is immutable has engendered significant dispute in the scientific community, and that § 572-1 "obviously" was designed to promote the community's general welfare by sanctioning "traditional man-woman family units and procreation." *Baehr*, 852 P.2d at 53-54. The trial court erred by making findings of fact when improperly reviewing a claim that was evidentiary in nature, even though the trial court did not have any evidentiary record before it. *Id.* at 53.

The trial court's conclusions of law (although not denominated as such) were: the right to enter into a homosexual marriage is not a fundamental right under the Hawaii Constitution; allowing heterosexual, but not homosexual, marriage does not violate due process under that constitution; homosexuals do not constitute a suspect class for purposes of equal protection analysis; and § 572-1 meets the rational relationship test under equal protection analysis because it is clearly "a rational, legislative effort to advance the general welfare of the community by permitting only heterosexual couples to legally marry." *Baehr*, 852 P.2d at 54.

42. *Id.*

43. *Id.* at 68.

44. *Id.*

45. *Id.*

46. *Id.* at 69.

47. *Id.* at 69-70.

48. *Id.* at 70.

“biologically fated[.]” then “sex” does not include those differences and, according to Burns, Hawaii could prefer heterosexuality over homosexuality without violating its constitution.⁴⁹ Thus, Justice Burns would have remanded for a trial to determine the relevant questions of fact as to whether heterosexuality, homosexuality, bisexuality, and asexuality are “biologically fated.”⁵⁰

On a motion for reconsideration or clarification by Lewin, the plurality again ordered Lewin to overcome the presumption that Hawaii Revised Statute section 572-1 is unconstitutional.⁵¹ Justice Burns indicated, however, that given the court’s three opinions,⁵² the only thing agreed upon by a majority of the court was that the case involved genuine issues of material fact which required a trial.⁵³ The case is currently pending before the trial court.

While concluding that the trial court order violated Hawaii’s equal protection clause and unresolved factual questions precluded entry of judgment,⁵⁴ the court rejected the plaintiffs’ claims that their rights to privacy and due process were harmed by the state permitting only heterosexual marriage.⁵⁵ By carefully examining the court’s equal protection analysis, it becomes clear that this same analysis should have led the court to also recognize same-sex couples’ fundamental right to marry.

A. Prohibiting Same-Sex Marriage Violates Hawaii’s Equal Protection Clause

The court began its equal protection analysis by stating that marriage is a state-conferred legal status.⁵⁶ The state’s power to confer that status is exclusive, as seen by the fact that Hawaii has eliminated common law marriages, thus forcing all people interested in getting married to meet the

49. *Id.*

50. *Id.*

51. *Id.* at 74.

52. Those opinions consist of the plurality of Levinson-Moon, the concurrence of Burns, and the dissent of Heen-Havashi. Actually, Justice Havashi, who was on the court through a temporary assignment, was no longer a member of the court when Heen’s dissent was issued on May 5, 1993, but the opinion indicates that he would have joined in Justice Heen’s dissent had he remained. *Id.* at 48 n.*.

53. *Id.* at 75. In fact, Burns stated that “there is no majority agreement as to what these issues are or which side has the burden to prove them.” *Id.* For the remainder of this Article, a reference to “the court” will mean the plurality opinion.

54. *Id.* at 54.

55. *Id.* at 57.

56. *Id.* at 58.

statutory requirements.⁵⁷ The state's "monopoly" on creating marriages has been codified for more than 100 years.⁵⁸

The court acknowledged that DOH's refusal to allow the plaintiffs to marry deprived them of numerous significant rights and benefits that are based on marital status.⁵⁹ Those rights include:

(1) a variety of state income tax advantages, including deductions, credits, rates, exemptions and estimates; (2) public assistance from and exemptions relating to the Department of Human Services; (3) control, division, acquisition, and disposition of community property; (4) rights relating to dower, curtesy, and inheritance; (5) rights to notice, protections, benefits, and inheritance under the Uniform Probate Code; (6) award of child custody and support payments in divorce proceedings; (7) the right to spousal support; (8) the right to enter into premarital agreements; (9) the right to change of name; (10) the right to file a nonsupport action; (11) post-divorce rights relating to support and property division; (12) the benefit of the spousal privilege and confidential marital communications; (13) the benefit of the exemption of real property from attachment or execution; and (14) the right to bring a wrongful death action.⁶⁰

The court also noted that it was undisputed, for the purposes of the suit, that the applicant couples would be entitled to receive all these benefits and rights were it not for the state's prohibition against same-sex marriage.⁶¹

The court did not discuss other rights and benefits that same-sex couples would also obtain were they entitled to bona fide marital status. These benefits for lesbian and gay couples would include the public legitimation and community recognition that one's primary relationship deserves.⁶² Same-sex marriage might also legitimate the sexual relationship between adults in a family, lessening the risk that the children

57. *Id.*

58. *Id.*

59. *Id.* at 59.

60. *Id.* at 59 (citations to statutes omitted).

61. *Id.*

62. Duclos, *supra* note 4, at 50-51. Duclos, however, goes on to argue that neither public legitimation nor community approval will necessarily result in less discrimination against lesbians and gay men. *Id.* at 51. She notes that double standards can remain, and that a "public" right to marry may not carry over into religious or familial recognition of the marriage. *Id.*

in the family would be taken out of their homes by a finding of parental unfitness.⁶³ It is also likely that, if lesbians and gay men were allowed to marry, they would be able to seek injunctive relief from prosecutions for sodomy and thereby dismantle the legacy of *Bowers*: sodomy statutes prohibiting oral/genital or anal/genital sexual conduct.⁶⁴ Finally, permitting lesbian and gay couples to marry might help countless individuals to realize that intimate and committed relationships are not limited to opposite-sex couplings.⁶⁵

The *Baehr* court did recognize that the ability of the state to restrict marriage is subject to constitutional limitations.⁶⁶ While the state may deny individuals the right to marry, it may only do so for compelling reasons, such as consanguinity (to avoid incest), immature age (to prevent child marriage), venereal disease (to protect health), or bigamy.⁶⁷ Limitations that are not based on such compelling reasons,⁶⁸ such as the prohibition against same-sex marriage, run afoul of the equal protection clause.

Hawaii's equal protection clause is more detailed than the United States' version. It declares that "[n]o person shall . . . be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry."⁶⁹ The court recognized that Hawaii's marriage statutes, by implicitly restricting the marital relation to one man and one woman,⁷⁰ deny same-sex couples the option to marry, which gives rise to an equal protection complaint.⁷¹

DOH argued that same-sex couples were not encountering sex discrimination when they were denied the option to marry; rather, the

63. *Id.* at 55. Duclos notes, however, that the ability to marry might lead to increased court resolution of custody conflicts. This might result in the courts forming a hierarchy of preferred parents, and placing lesbians and gay men low in that hierarchy. *Id.* at 56-57.

64. *Id.* at 51.

65. *Id.* at 87.

66. *Baehr*, 852 P.2d at 59.

67. *Id.* at 59 n.19.

68. For a discussion questioning whether these statutory bars present compelling state reasons for state prohibition, see Ingram, *supra* note 10.

69. *Baehr*, 852 P.2d at 60 (citing HAW. CONST. art. I, § 5).

70. *Id.* at 60. Those statutes include HAW. REV. STAT. § 572-1, which restricts marital relations to one male and one female in different sections: § 572-1(1) precludes marriages between brother and sister, uncle and niece, and aunt and nephew; § 572-1(3) forbids marriage between a man or woman who already has a living wife or husband; and § 572-1(7) refers to the man and woman desiring to marry in setting forth the requisites for marriage ceremonies.

71. *Baehr*, 852 P.2d at 60.

denial was due to their “biologic inability as a couple to satisfy the definition of the status to which they aspire.”⁷² The court rejected, as circular and unpersuasive, this argument that “the right of persons of the same sex to marry one another does not exist because marriage, by definition and usage, means a special relationship between a man and a woman.”⁷³ Had the court followed its reasoning to its logical conclusion, it also would have determined that the fundamental right to marry includes same-sex marriages.

The court considered the previous same-sex marriage cases of *Jones v. Hallahan*⁷⁴ and *Singer v. Hara*⁷⁵ to help decide the case.⁷⁶ In both of those cases, the courts used definitional limitations to reject the challenges to their state statutes. The *Jones* court held that “marriage has always been considered as a union of a man and a woman. . . . It appears to us that appellants are prevented from marrying . . . by their own incapability of entering into a marriage as that term is defined. . . . In substance, the relationship proposed by the appellants does not authorize the issuance of a marriage license because what they propose is

72. *Id.* at 61 (quoting Respondent’s Answering Brief at 21).

73. *Id.* at 61 (quoting Respondent’s Brief at 7).

74. 501 S.W.2d 588 (Ky. Ct. App. 1973). Two lesbians challenged the State of Kentucky’s refusal to issue a marriage license to them as violating their right to marry, their right of association, and their right to free exercise of religion. They characterized the denial as constituting cruel and unusual punishment. *Id.* at 589.

75. 522 P.2d 1187 (Wash. Ct. App.), *review denied*, 84 Wash. 2d 1008 (1974). Two gay men challenged the State of Washington’s refusal to grant them a marriage license, arguing that Washington’s statutes did not prohibit same-sex marriages. The plaintiffs also argued that the denial of a marriage license violated Washington’s equal rights amendment as well as the Eighth, Ninth and Fourteenth Amendments to the U.S. Constitution. *Id.* at 1188-89.

76. The court rejected two other same-sex marriage cases cited by Lewin as not controlling. *Id.* at 61. The court rejected *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *cert. denied*, 409 U.S. 810 (1972), because it involved interpretation of Minnesota statutes. The *Baker* court found that the Minnesota statute prohibited same-sex marriage without violating the U.S. Constitution, and raised no state constitutional questions. The *Baehr* court also rejected *DeSanto v. Barnsley*, 476 A.2d 952 (Pa. Super. Ct. 1984) because *DeSanto* held that common law same-sex marriage did not exist in Pennsylvania. *Baehr*, 852 P.2d at 61.

Additional cases denying recognition of same-sex marriage include: *McConnell v. Nooner*, 547 F.2d 54 (8th Cir. 1976); *Adams v. Howerton*, 486 F. Supp. 1119 (C.D. Ca. 1980), *aff’d*, 673 F.2d 1036 (9th Cir.), *cert. denied*, 458 U.S. 1111 (1982); *In re Estate of Cooper*, 564 N.Y.S.2d 684 (Sur. Ct. 1990), *aff’d*, 592 N.Y.S.2d 797 (App. Div. 1993), *appeal dismissed by* 624 N.E.2d 696 (N.Y. 1993); *Anonymous v. Anonymous*, 325 N.Y.S.2d 499 (Sup. Ct. 1971); *Dean v. Barry*, C.A. No. 90-13892 (D.C. Super. 1991); *see also* Dan Levy, *Gay Couple Fight for Right to Wed*, S.F. CHRON., Mar. 9, 1992, at A18 (detailing Craig Dean and Patrick Gill’s losing attempt to marry in the District of Columbia).

not a marriage."⁷⁷ The *Singer* court found that the state's statutes were not defective under either the United States Constitution or the Washington Constitution because: "Appellants were not denied a marriage license because of their sex; rather, they were denied a marriage license because of the nature of marriage itself."⁷⁸

The *Baehr* court, in the clearest language possible, rejected this "exercise in tortured and conclusory sophistry."⁷⁹ It noted that only by using this sophistry were the other courts "relieved" of the virtually impossible task of trying to distinguish *Loving v. Virginia*⁸⁰ from the current case. In *Loving*, the United States Supreme Court struck down Virginia's anti-miscegenation laws which prohibited interracial marriages. The trial court in *Loving*, similar to the trial courts in *Jones* and *Singer*, used a definitional defect as its rationale for upholding the statute. The court stated that divine providence had not intended that the marriage state extend to interracial unions.⁸¹

Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend for the races to mix.⁸²

On appeal, the United States Supreme Court struck down the Virginia law on equal protection and due process grounds. The Court found that the law rested solely on racial distinctions.⁸³ Because laws based on racial classifications were entitled to the "most rigid scrutiny" and because there was "patently no legitimate overriding purpose independent of invidious discrimination" to justify the classification, the Court had "no doubt" that restricting the freedom to marry based on race violated the Equal Protection Clause.⁸⁴

The *Baehr* court used *Loving* to "discredit the reasoning of *Jones* and unmask the tautological and circular nature of Lewin's argument" with regard to the Hawaii marriage statute.⁸⁵ The Virginia courts had declared that interracial marriage could not exist because "it had

77. *Baehr*, 852 P.2d at 61 (quoting *Jones*, 501 S.W.2d at 589-90).

78. *Id.* at 63 (quoting *Singer*, 522 P.2d at 1196).

79. *Id.*

80. 388 U.S. 1 (1967).

81. *Baehr*, 852 P.2d at 62 (citing *Loving*, 388 U.S. at 3).

82. *Id.*

83. *Id.* at 62 (citing *Loving*, 388 U.S. at 11).

84. *Id.* at 62-63.

85. *Id.* at 63.

theretofore never been the 'custom' of the state to recognize mixed marriages, marriage 'always' having been construed to presuppose a different configuration."⁸⁶ Although a similar argument against same-sex marriage had convinced the courts in *Jones* and *Singer*, the *Baehr* court rejected this contention when advanced by Lewin. The *Baehr* plurality also used the *Loving* Court's rationale to discredit Justice Heen's dissent. Just as the U.S. Supreme Court rejected the notion that "equal application" of the anti-miscegenation statute to both whites and blacks immunized the statute from running afoul of the Equal Protection Clause, the *Baehr* plurality simply substituted "sex" for "race" to reject Heen's argument that, because the statutes denying same-sex marriage applied to both men and women, they were not based on sex discrimination.⁸⁷

The court determined that "strict scrutiny" review should be used when laws classify on the basis of "suspect categories."⁸⁸ After finding that section 572-1 regulated marital status on the basis of the applicants' sex,⁸⁹ the *Baehr* court decided, for the first time, that under Hawaii's constitution, sex should be treated as a suspect category entitled to strict scrutiny review.⁹⁰ Having made that decision, the court held "that (1) HRS § 572-1 is presumed to be unconstitutional (2) unless Lewin, as an agent of the State of Hawaii, can show that (a) the statute's sex-based classification is justified by compelling state interests and (b) the statute

86. *Id.*

87. *Id.* at 68.

88. *Id.* at 63-64.

89. *Id.* at 64. HAW. REV. STAT. § 572-1 states:

(1) The respective parties do not stand in relation to each other of ancestor and descendant of any degree whatsoever, brother and sister of the half as well as to the whole blood, uncle and niece, aunt and nephew, whether the relationship is legitimate or illegitimate;

...

(3) The man does not at the time have any lawful wife living and that the woman does not at the time have any lawful husband living;

...

(7) The marriage ceremony be performed in the State by a person or society with a valid license to solemnize marriages and the man and the woman to be married and the person performing the marriage ceremony be all physically present at the same place and time for the marriage ceremony.

90. *Baehr*, 852 P.2d at 67. The court held that it was time "to resolve once and for all" the question of whether sex was a suspect category. It held that "sex is a 'suspect category' for purposes of equal protection analysis under article I, section 5 of the Hawai'i Constitution and that HAW. REV. STAT. § 572-1 is subject to the 'strict scrutiny' test." *Id.*

is narrowly drawn to avoid unnecessary abridgements of the applicant couples' constitutional rights."⁹¹

No one can deny that the *Baehr* court took a courageous step forward in welcoming lesbians and gay men toward full acceptance by society.⁹² Had the court taken the next logical step from its equal protection holding, it would have moved lesbians and gay men even further down the path of acceptance. On equal protection grounds, the court had the courage to reject the "tortured" reasoning which had supported discrimination against same-sex marriage in the past: that lesbians and gay men could not fit within the only marriage configuration ever recognized

91. *Id.* Since the *Baehr* court's remand to the trial court, the Hawaii legislature has passed Act 217, H.B. 2312, which went into effect after the Governor's approval of the bill on June 22, 1994. Section 8 states that the act applies retroactively to any marriage license application pending or rejected by the Department of Health before the effective date of the act. Act of June 22, 1994, No. 217, § 8, 1994 Haw. Laws [hereinafter Act 217]. Therefore, it claims to control the plaintiffs' applications in this case.

The Hawaii legislature amended HAW. REV. STAT. § 572-1 to read: "In order to make valid the marriage contract, *which shall be only between a man and a woman*, it shall be necessary that" before returning to the statute's original language. *Id.* § 1.

The Hawaii legislature, in § 1, also lectures the supreme court about incorrectly making policy decisions better decided by the legislature, and about incorrectly interpreting the Hawaii marriage statutes to apply to same-sex couples. The remaining portion of its lecture effectively rejects the plurality's analysis and applauds and adopts the dissent's analysis. The legislative lecture concludes with a statement that one purpose of the Act, among others, is to

expressly reiterate the original intent of the legislature in enacting section 572-1, Hawaii Revised Statutes, that that section, and all of Hawaii's marriage licensing statutes, both originally and presently are intended to apply only to male-female, not same-sex couples, and that this application of the statute is consistent with Article I, section 5, of the Hawaii Constitution

Id. § 1. It concludes by directing the legislature to review and interpret Hawaii's marriage statutes in light of the legislative findings contained in Act 217.

It is difficult to believe that this legislative posturing will have any impact on the trial court on remand. Although it is clearly within the legislature's province to clarify its intent, that intent still seems to violate the Hawaii Constitution's prohibition of sex discrimination. For while the legislature can claim that sex discrimination was not behind its restriction of marriage to opposite-sex couples, it is difficult to see that restriction as anything short of discrimination. The *Baehr* court was able to ascertain that discriminatory intent before Act 217's amendment and nothing in the Act lessens the statute's discriminatory result.

92. Many lesbians and gay men do not seek this full acceptance, fearing that it will "domesticate" us and bring us under society's control. For an excellent analysis of this concern of "domestication" as it relates to lesbians and marriage, see RUTHANN ROBSON, *LESBIAN (OUT)LAW: SURVIVAL UNDER THE RULE OF LAW* 18-19, 126-27 (1992).

in the United States, that of requiring one man and one woman, and that this "custom" was reason enough to forbid present expansion beyond that configuration.⁹³ While recognizing that constitutional law often mandates that "customs change with an evolving social order"⁹⁴ in relation to equal protection jurisprudence, the court was seemingly unable to move beyond those same customs and history when considering whether same-sex couples had a fundamental right to inmarry.⁹⁵

B. Prohibiting Same-Sex Marriage Does Not Violate the Fundamental Right to Marry

The Hawaii Supreme Court recognized the well-established right of personal privacy or a guarantee of certain zones of privacy implicit in the United States Constitution,⁹⁶ and noted that article 1, section 6 of the Hawaii Constitution expressly states that "[t]he right of the people to privacy is recognized and shall not be infringed without the showing of

93. *Baehr*, 852 P.2d at 63.

94. *Id.*

95. Perhaps the *Baehr* court was relying on the difference between the equal protection clause and the due process clause explicated by Cass Sunstein in his article, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161 (1988). In that article, Sunstein argues that the "Due Process Clause is backward-looking; a large part of its reach is defined by reference to tradition. . . . The Equal Protection Clause, by contrast, is grounded in a norm of equality that operates largely as a critique of traditional practices." *Id.* at 1179. However, Sunstein notes that this distinction does not completely explain the court's privacy jurisprudence:

Traditions can be described as varying levels of generality. There may well be, for example, a tradition of respect for intimate association. The application of that tradition has hardly been consistent, however, and the hard cases arise when the general tradition of respect meets a particular context [such as same-sex marriage] in which the general tradition has been repudiated and, to that extent, does not exist at all.

Id. at 1173. In those "hard cases," Sunstein argues that tradition cannot be controlling and normative inquiry must be made into how to characterize the relevant tradition. *Id.* Sunstein finds the *Bowers* decision "troublesome," especially considering the tradition underlying *Roe* and *Griswold*. *Id.* at 1173-74. For the same reason, this Article argues that the *Baehr* court mistakenly considered whether a fundamental right to same-sex marriage exists, rather than asking the more general question of whether there is a fundamental right to marry. See also Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981 (1979). For an example of the disagreement between Justice Scalia and Justice Brennan on the correct level of generality when considering traditions in a family law context, compare *Michael H. v. Gerald D.*, 491 U.S. 110, 122-27 (1989) (Scalia, J.) with *id.* at 137-41 (Brennan, J., dissenting).

96. *Baehr*, 852 P.2d at 55.

a compelling state interest" because privacy is a fundamental right.⁹⁷ The court stated that, at a minimum, the Hawaii Constitution "encompasses all of the fundamental rights expressly recognized as being subsumed within the privacy protections of the United States Constitution."⁹⁸ The U.S. Supreme Court has declared that the right to marry is part of the fundamental right of privacy implicit in the Fourteenth Amendment's Due Process Clause.⁹⁹

In discussing whether the right to marry extends to same-sex couples, the *Baehr* court turned to federal cases for guidance.¹⁰⁰ The court primarily reviewed the Supreme Court's decisions in *Skinner ex rel. Williams v. Oklahoma*¹⁰¹ and *Zablocki v. Redhail*.¹⁰² The *Skinner* Court stated that, in considering marriage, it was reflecting on one of our most basic civil rights.¹⁰³ The *Baehr* court concluded that the Supreme Court was "contemplating unions between men and women when it ruled that the right to marry was fundamental."¹⁰⁴ It then used *Zablocki* to document the evolution of the federally recognized fundamental right to marry, moving from *Maynard v. Hill*'s¹⁰⁵ characterization of marriage as "the most important relation in life"¹⁰⁶ and the "foundation of the family and of society, without which there would be neither civilization nor progress";¹⁰⁷ to *Meyer v. Nebraska*'s¹⁰⁸ statement that marriage is a central part of the liberty protected by the Due Process Clause;¹⁰⁹

97. *Id.* The Hawaii Constitutional Convention of 1978 clearly stated that it was expressly including a right to privacy in its constitution to avoid the confusion over the source of the right and its existence. This confusion has plagued discussions of whether the U.S. Constitution includes such a privacy right. *Id.*

98. *Id.*

99. *Id.* (citing *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978)).

100. *Baehr*, 852 P.2d at 55.

101. 316 U.S. 535 (1942).

102. 434 U.S. 374 (1978).

103. Actually, the *Skinner* Court considered it to be a basic civil right of men. *Skinner*, 316 U.S. at 541.

104. *Baehr*, 852 P.2d at 56. The court did not find this surprising considering that at the time, none of the states sanctioned any other marriage configuration. *Id.* However, the assumption that same-sex couples cannot procreate, and thus can be denied this "basic civil right," is false for two reasons. First, heterosexuals who cannot procreate are not denied the opportunity to marry. Second, same-sex couples can "procreate" through alternate avenues, including sperm donation, surrogacy, and egg donation. Chris Keller, Comment, *Divining the Priest: A Case Comment on Baehr v. Lewin*, 12 LAW & INEQ. J. 501, 517 (1994).

105. 125 U.S. 190 (1888).

106. *Id.* at 205.

107. *Id.* at 211.

108. 262 U.S. 390 (1923).

109. *Id.* at 399.

and to *Skinner*'s conclusion that marriage is "fundamental to the very existence and survival of the race."¹¹⁰

The *Baehr* court did not find it surprising that "*the decision to marry*" has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships.¹¹¹ In fact, the court found that "it would make little sense to recognize a right of privacy with respect to those other matters of family life and not with respect to the *decision* to enter the relationship that is the foundation of the family in our society."¹¹²

The court made an analytical error when it found that "[i]mplicit in the *Zablocki* Court's link between the right to marry, on the one hand, and the fundamental rights of procreation, childbirth, abortion, and child rearing, on the other, is the assumption that the one is simply the logical predicate of the others."¹¹³ It then concluded that the fundamental right to marry contemplates unions between men and women, presumably because procreation, childbirth, and child rearing are not "logical" steps following same-sex marriage.¹¹⁴

The court questioned whether it should extend the fundamental right to marry beyond its current bounds, which the court found to be limited to opposite-sex couples, to include same-sex couples. It stated, and asserted that the plaintiffs agreed, that the court was being asked to recognize a new fundamental right.¹¹⁵ While recognizing that it had the authority to so interpret the Hawaii Constitution,¹¹⁶ the court followed its earlier precedent to determine that the privacy right in the Hawaii Constitution was similar to the federal privacy right. The court found that no "'purpose to lend talismanic effect' to abstract phrases such as

110. *Skinner*, 316 U.S. at 541.

111. *Baehr*, 852 P.2d at 56 (emphasis added).

112. *Id.* (emphasis added).

113. *Id.* at 56. For a more detailed discussion of the Court's error in linking the right to marry with procreation, see *Keller*, *supra* note 104, at 516-23. For a discussion of the inconsistent theological basis for the claim that procreative purpose is the sole legitimation for sexual relations between husband and wife, see BOSWELL, *supra* note 12, at xxi.

114. This assumption is simply incorrect. Currently, a lesbian "baby boom" has been growing around the country; thousands of lesbians are having children, many of them with their partners in families that look quite similar to the traditional nuclear family. Barbara J. Cox, *Love Makes a Family—Nothing More, Nothing Less: How the Judicial System Has Refused to Protect Nonlegal Parents in Alternative Families*, 8 J.L. & POLITICS 5, 6 n.7 (1991). Additionally, it has been estimated that the number of children living with a lesbian or gay parent ranges from one to six million. *Id.* For a further discussion of lesbian parents and their children, see PHYLLIS BURKE, *FAMILY VALUES: TWO MOMS AND THEIR SON* (1993).

115. *Baehr*, 852 P.2d at 57.

116. *Id.*

'intimate decision' or 'personal autonomy' [could] be inferred from [the Hawaii Constitution]."¹¹⁷

In determining what the fundamental right to privacy meant under the Hawaii Constitution, the Hawaii Supreme Court looked again to U.S. Supreme Court cases for assistance. Those cases defined the fundamental right to privacy as "'deal[ing] with a right . . . older than the Bill of Rights'"¹¹⁸ which was given substance by looking to the "'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental.'"¹¹⁹ The inquiry was whether the right in question "is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions . . .'"¹²⁰

The *Baehr* court then stated that a right to same-sex marriage was not so rooted in the traditions and collective conscience of our people.¹²¹ It also did not believe that a right to same-sex marriage was "implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if it were sacrificed."¹²² Thus, same-sex couples who apply for marriage licenses do not have a fundamental right to same-sex marriage arising out of the Hawaii Constitution's articulated right to privacy or its due process clause.¹²³

In finding that the fundamental right to marry is restricted to opposite-sex couples, the Hawaii Supreme Court made the same error that the United States Supreme Court made in *Bowers v. Hardwick*.¹²⁴ Just as the *Bowers* Court erred by focusing on the existence of a fundamental right to homosexual sodomy, instead of recognizing a fundamental right to privacy in one's choice of sexual partners,¹²⁵ so too did the *Baehr*

117. *Id.* at 57 (quoting *State v. Mueller*, 671 P.2d 1351, 1360 (Haw. 1983)).

118. *Id.* (quoting *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965)).

119. *Id.* (quoting *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring)) (citations omitted). For a criticism of using only the "traditions and collective conscience" test to determine fundamental rights, see Keller, *supra* note 104, at 523-32.

120. *Id.* (citing *Griswold*, 381 U.S. at 493 (Goldberg, J., concurring)) (citations omitted).

121. *Id.* at 57. Justice Scalia has made this same argument in U.S. Supreme Court cases. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

122. *Baehr*, 852 P.2d at 57. This reference is to those freedoms which are protected against state infringement by way of the Fourteenth Amendment's Due Process Clause. *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

123. *Baehr*, 852 P.2d at 57.

124. 478 U.S. 186 (1986).

125. For a list of articles criticizing the *Bowers* decision, see Barbara J. Cox, *Refocusing Abortion Jurisprudence to Include the Woman: A Response to Bopp and Coleson and Webster v. Reproductive Health Services*, 1990 UTAH L. REV. 543, 575

court err by focusing on the existence of a fundamental right to same-sex marriage, instead of applying the already recognized fundamental right to marry to same-sex couples.¹²⁶

Neither court understood that what has been protected under United States Supreme Court due process and right-to-privacy precedent is not any particular practice or act, but instead the decision to take certain actions. As argued elsewhere concerning the right to choose an abortion, both the liberty interest of the Due Process Clause and the right to privacy include the freedom to choose actions significantly less intrusive on an individual's liberty and privacy than whether to enter into a same-sex marriage.¹²⁷

This right to make intimate decisions has been repeatedly recognized by the United States Supreme Court throughout its explication of the Due Process Clause's liberty interest. From *Meyer v. Nebraska*,¹²⁸ where the Court protected the right to teach children languages other than English;¹²⁹ to *Pierce v. Society of Sisters*,¹³⁰ where the Court protected the liberty of parents to make choices concerning the education of their children;¹³¹ to *Loving v. Virginia*,¹³² where the Court protected the "freedom of choice to marry [un]restricted by invidious racial discrimination";¹³³ to *Moore v. City of East Cleveland*,¹³⁴ where the Court noted that it had long protected "freedom of personal choice in matters of marriage and family life";¹³⁵ to *Roe v. Wade*,¹³⁶ where the Court protected a woman's right to choose whether to have an abortion;¹³⁷ the Court has been less concerned with the specific practice that was statutorily regulated than it was with considering the importance of the choice in expressing an individual's liberty.

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing and education. . . . These

n.201.

126. *But see supra* note 95.

127. Cox, *supra* note 125, at 563-65, 572-73.

128. 262 U.S. 390 (1923).

129. *Id.* at 400.

130. 268 U.S. 510 (1925).

131. *Id.* at 534-35.

132. 388 U.S. 1 (1967).

133. *Id.* at 12.

134. 431 U.S. 494 (1977).

135. *Id.* at 499 (quoting *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40 (1974)).

136. 410 U.S. 113 (1973).

137. *Id.* at 153.

matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.¹³⁸

This focus on the decision, rather than the practice, also carries over into the Supreme Court's privacy jurisprudence. From *Griswold v. Connecticut*,¹³⁹ where the Court protected the right of a married couple to decide whether to use contraceptives;¹⁴⁰ to *Eisenstadt v. Baird*,¹⁴¹ where the Court extended the right to decide whether "to bear or beget a child" to unmarried individuals;¹⁴² to *Stanley v. Georgia*,¹⁴³ where the Court acknowledged the individual's right to decide what to read or observe;¹⁴⁴ to *Roe v. Wade*,¹⁴⁵ where the Court recognized that the right of privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy";¹⁴⁶ the Court has focused on whether the decision, not the practice, fell within the area protected by the right of privacy.

Reviewing the Supreme Court's jurisprudence establishes that the *Baehr* court made the same error as the *Bowers* Court in focusing too closely on the practice, instead of on the decision. In deciding whether Georgia could prohibit a gay man from engaging in sodomy, the *Bowers* Court focused on the historical prohibition of homosexual sodomy in American history.¹⁴⁷ In writing for the Court, Justice White stated that its previous privacy cases related to family, marriage, and procreation and

138. *Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2807 (1992) (citations omitted); see also *Roberts v. United States Jaycees*, 468 U.S. 609, 618-19 (1984) where the Court stated that "[I]t must afford the formation and preservation of certain kinds of highly personal relationships a substantial amount of sanctuary from unjustified interference by the State. . . . Protecting these relationships from unwarranted state interference therefore safeguards the ability independently to define one's identity that is central to any concept of liberty."

139. 381 U.S. 479 (1965).

140. *Id.* at 485.

141. 405 U.S. 438 (1972).

142. *Id.* at 453.

143. 394 U.S. 557 (1969).

144. *Id.* at 565.

145. 410 U.S. 113 (1973).

146. *Id.* at 153.

147. 478 U.S. 186, 192-94 (1986).

no connection could be made between those familial activities and homosexual sodomy.¹⁴⁸

But the question in *Bowers* should not have been whether homosexual sodomy was prohibited historically. Instead, the question should have been whether the Constitution protects the individual's decision to engage in homosexual sodomy. "That fundamental choice is protected by the right to privacy, just as the choice whether to possess obscene materials in one's home,¹⁴⁹ the choice whether to use contraceptives,¹⁵⁰ the choice to marry interracial,¹⁵¹ and the choice to have an abortion,¹⁵² among others, are protected by the privacy right."¹⁵³

Both Justices Blackmun and Stevens, dissenting in *Bowers*, noted this misconstruction of the constitutional question. Justice Blackmun emphasized that earlier privacy cases protected just these sorts of decisions.¹⁵⁴ He wrote:

The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to *choose* the form and nature of these intensely personal bonds.¹⁵⁵

Justice Stevens also emphasized that fundamental decisions are protected by the privacy right. He underscored the need to protect every individual's right to make "certain unusually important decisions" and to respect "the dignity of individual choice," thereby rejecting the notion that such choices belong only to heterosexuals.¹⁵⁶

Thus, too, in *Baehr*, the question should not have been whether "same-sex couples possess a fundamental right to marry."¹⁵⁷ It should have been whether individuals possess a fundamental right to choose to

148. *Id.* at 186-91.

149. *See Stanley v. Georgia*, 394 U.S. 557 (1969).

150. *See Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

151. *See Loving v. Virginia*, 388 U.S. 1 (1967).

152. *See Roe v. Wade*, 410 U.S. 113 (1973).

153. *Cox*, *supra* note 125, at 576.

154. *Bowers*, 478 U.S. at 204-05 (Blackmun, J., dissenting).

155. *Id.* at 205.

156. Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521, 535 (1989) (citing *Bowers*, 478 U.S. at 217-19 (Stevens, J., dissenting)).

157. *Baehr*, 852 P.2d at 57.

marry, a choice which had traditionally been improperly restricted to opposite-sex couples. The court should not have considered whether a right to same-sex marriage is "so rooted in the traditions and collective conscience of our people" nor whether it was "implicit in the concept of ordered liberty."¹⁵⁸ Instead, it should have asked whether the right to marriage, in and of itself, was "so rooted" and "implicit." By asking that question, the court would have answered "yes" because no other unrelated adults without any independent marriage bar¹⁵⁹ are forbidden this fundamental right.

While it was easy for the *Baehr* court to phrase the question so as to preclude recognizing same-sex marriages as fundamental, it is perplexing why it went to the effort to do so. While discussing the equal protection question, it rejected the argument that "the right of persons of the same sex to marry one another does not exist because marriage, by definition and usage, means a special relationship between a man and a woman."¹⁶⁰ In fact, it had earlier found this argument to be "circular and unpersuasive."¹⁶¹ It is therefore difficult to understand why the *Baehr* court did not also find limiting the fundamental right to marry to opposite-sex couples to be "circular and unpersuasive."

If, under an equal protection analysis, it is circular and unpersuasive to argue that, by its very definition, marriage is prohibited for same-sex couples because of "their biologic inability as a couple to satisfy the definition of the status to which they aspire,"¹⁶² how can it be convincing when the court makes that same argument in relation to fundamental rights by finding that same-sex marriage is not rooted in the traditions and conscience of society?¹⁶³ Given the court's earlier analysis, it would seem that the only reason same-sex marriage has not been rooted in the traditions and conscience of society is because courts have rejected the notion that a same-sex couple could satisfy the definitional requirements for marriage. Clearly, marriages of all other types, except those statutorily barred, and until recently, miscegenous marriages, are rooted in the traditions and conscience of society simply because they fit the prevailing requisite definition. By fitting that definition, such marriages became protected as fundamental. Were it not for years of restrictive definitions of marriage that required both a man and a woman, it is conceivable that marriage between same-sex couples

158. *Id.*

159. *See supra* notes 67-68 and accompanying text (discussing various statutory bars against marriage for reasons of incest, age, disease, and bigamy).

160. *Baehr*, 852 P.2d at 61.

161. *Id.*

162. *Id.*

163. *But see supra* note 95.

could have flourished, just as opposite-sex marriages flourished.¹⁶⁴ If the court can understand that an argument for opposite-sex marriage alone is circular and unpersuasive because it employs a needlessly restrictive definition, how can it fail to see that it is only the restrictive definition itself that has prevented same-sex marriage from locating its roots deep within the collective conscience?

To accept the argument within one context, while rejecting it in the other, indicates that perhaps the court had reached a line beyond which it could not go. While it may have been within the court's ability to recognize that marriage laws restricted to opposite-sex couples violate Hawaii's equal protection clause, it could not imagine that those same restrictive marriage laws also violate the fundamental right to marry. Perhaps the notion that same-sex marriage could be "fundamental" was too disturbing. Perhaps the court could not conceive that "neither liberty nor justice would exist if [same-sex marriage] were sacrificed."¹⁶⁵ Whatever its reasons, the court, while at long last taking a step toward welcoming gay men and lesbians into the circle of people entitled to constitutional protection, could not quite welcome us with open arms and full acceptance. While implicitly recognizing the clear discriminatory nature of the opposite-sex marriage laws under the equal protection clause, the court may have needed to provide the state another chance to prevent this welcoming. By remanding and allowing the state to show a compelling state interest and narrowly drawn statute, the court was able to avoid deciding, at least initially, whether gay men and lesbians can achieve this basic right in our society.¹⁶⁶

164. See Anne B. Goldstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of Bowers v. Hardwick*, 97 YALE L.J. 1073, 1087 n.78 (1988); Eskridge, *supra* note 12.

165. *Baehr*, 852 P.2d at 57.

166. The court may continue to be able to avoid this decision, given the factual requirements the plaintiffs will have to address according to Justice Burns' concurring opinion. See *supra* notes 46-50 and accompanying text. Establishing that homosexuality is "biologically fated" may prove difficult indeed and, if Burns insists on such a factual finding before finding sex discrimination, the plaintiffs' case may not succeed. However, it is unclear what the membership of the Hawaii Supreme Court will be should another appeal result from the trial court's decision. On the motion for reconsideration, an additional Justice, Nakayama, had taken the place of Justice Hayashi, and Burns' continuity on the bench is uncertain because he was appointed in place of Justice Lum, who had been recused but who had subsequently retired. *Baehr*, 852 P.2d at 74.

II. STATUTORY AND THEORETICAL GUIDANCE ON RECOGNIZING THE SAME-SEX MARRIAGE

Once Hawaii protects the right of same-sex couples to marry, or, should the *Baehr* remand not conclude with this result, some other state recognizes same-sex marriage first, the question will remain as to what extent an out-of-state same-sex marriage by one state's domiciliaries will be validated upon the couple's return to that domicile. It is to that question that this Article now turns. To reduce complexity and to consider the most likely scenario, the final two Parts will limit discussion of their same-sex marriage and choice-of-law to the following facts.

Amy and Betty or Andy and Barry travel from their home state to Hawaii to marry following recognition of same-sex marriage upon favorable conclusion of the *Baehr* case. Following their marriage and honeymoon in Hawaii, they return to their domicile and assert their marital status in that state.¹⁶⁷ At some point, a benefit provider (be it a health insurance carrier, health club owner, workers' compensation board, or other institution) will refuse to accept that assertion. Then the couples will proceed to litigate their marital status within their

167. The author recognizes that, by using two domiciliaries from one state, rather than, for example, using a domiciliary from Hawaii and one from another state, this Article does not consider a theoretically complex choice-of-law question. The other example would be more theoretically complex because then at least two states would have undeniably strong interests involved. Rather than seek an answer to that more theoretical question, this Article chooses to focus on what will be the most commonly occurring scenario, that of two domiciliaries from one state traveling to another state, such as Hawaii, to marry, and then returning to their domicile. Until states start to recognize or permit same-sex marriage, the other scenario is unlikely to happen regularly.

domicile.¹⁶⁸ Whether their marriage will be recognized is questionable, regardless of whether controlled by statute or common law theory.

The Restatement (Second) of Conflict of Laws provides a system of analysis for courts seeking to resolve this question of first impression.¹⁶⁹ Although some commentators object to the Second Restatement's position on marriage¹⁷⁰—numerous other theories will be explored later in this Article¹⁷¹—the Second Restatement's usefulness at this point is to indicate an organization for analyzing how courts in various jurisdictions will address same-sex marriage. Section 283 states that:

168. Some commentators object to the idea that marital status is "universal" and believe that one's marital status should be determined on an issue-by-issue basis, after considering the policies behind each particular incident of marriage. Hans W. Baad, *Marriage and Divorce in American Conflicts Law: Governmental-Interests Analysis and the Restatement (Second)*, 72 COLUM. L. REV. 329, 356-57 (1972); David E. Engdahl, *Proposal for a Benign Revolution in Marriage Law and Marriage Conflicts Law*, 55 IOWA L. REV. 56, 108-10 (1969); J. David Fine, *The Application of Issue-Analysis to Choice of Law Involving Family Law Matters in the United States*, 26 LOY. L. REV. 31 (1980); Reese, *supra* note 23, at 952, 965. This analysis would be perfectly acceptable in many situations and conforms to the factual reality of the way in which most cases arise.

The problem with this analysis in the situation as given, however, is that our couple is concerned about their "status"; that is, whether in fact they are married for all purposes. Some courts have resolved the choice-of-law problem by finding a person to be a spouse for some purposes, for example, intestate succession, but not for others, such as cohabitation. *See In re Dalip Singh Bir's Estate*, 188 P.2d 499, 502 (Cal. Ct. App. 1948) (holding that public policy would not be affected by dividing property between polygamous wives validly married abroad, but would be affected by cohabitation in the state); *Miller v. Lucks*, 36 So. 2d 140, 142 (Miss. 1948) (recognizing interracial couple's marriage for purposes of intestate succession but not for in-state cohabitation); and other cases cited in Engdahl, *supra*, at 102 nn.218-26. This piecemeal response is unacceptable in same-sex marriage cases.

Litigating marital recognition for a specific incident of marriage after one spouse has already died, as occurred in the above cases, is a legitimate exercise. In such situations, considering the policies behind each incident could more easily lead to recognition of the marriage, where normally, universal recognition would be denied, because the policy behind granting the incident would not be "offended" by recognizing the marriage. But if our couple is denied the opportunity to determine their "universal" marital status for all incidents of marriage, they must relitigate their marital status repeatedly as they request recognition of their marriage for each incident. This is an untenable prospect and would be unacceptable for other couples. In fact, our couple may choose to bring a declaratory judgment action upon returning to their domicile to determine their marital status for all purposes. *See Reese, supra* note 23, at 953.

169. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) [hereinafter SECOND RESTATEMENT].

170. *See, e.g., Baad, supra* note 168; Albert A. Ehrenzweig, *Miscegenation in the Conflict of Laws: Law and Reason Versus the Restatement Second*, 45 CORNELL L.Q. 659 (1960).

171. *See infra* parts II.C, III.A.

- (1) The validity of marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in § 6.
- (2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.¹⁷²

Section 6 states that "A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law."¹⁷³ When no statutory directive exists, the court should consider various factors relevant to the choice-of-law to determine the state with the "most significant relationship" to the issue.¹⁷⁴

Thus, this Part will begin, as the courts must do, by considering the statutory directives of the various states in determining whether our couple's marriage will be validated within their domicile.¹⁷⁵ When no statutory directive exists, the courts of the state with the "most significant relationship," usually the parties' domicile, will consider choice-of-law theories to resolve whether to recognize the marriage which was valid where celebrated.

Courts considering this issue should begin by recognizing the general rule preferring validation of marriages, which exists with an "overwhelming tendency" in the United States.¹⁷⁶ Under this rule, marriages will be found valid if there is any reasonable basis for doing

172. SECOND RESTATEMENT, *supra* note 169, § 283.

173. *Id.* § 6(1).

174. *Id.* § 6(2). Those factors include: (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (d) the protection of the parties' justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability and uniformity of result; and (g) ease in the determination and application of the law to be applied. *Id.*

175. Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. REV. 267, 271 (1966), states that if the forum's legislature has enacted a choice-of-law statute, forum courts will follow it, once they determine what it means. Willis L.M. Reese also notes that a marriage validation statute, such as § 210 of the Uniform Marriage and Divorce Act, would require a court to uphold a foreign marriage. Reese, *supra* note 23, at 963; see *infra* parts II.A, II.B.

176. WILLIAM M. RICHMAN ET AL., UNDERSTANDING CONFLICT OF LAWS § 116, at 362 (2d ed. 1993).

so.¹⁷⁷ There are such strong policy reasons behind this rule that it has become well entrenched in the substantive law of all the states.¹⁷⁸ “The validation rule confirms the parties’ expectations, it provides stability in an area where stability (because of children and property) is very important, and it avoids the potentially hideous problems that would arise if the legality of a marriage varied from state to state.”¹⁷⁹ The parties’ expectations arise from the fact that the married couple needs to know “reliably and certainly, and at once, whether they are married or not.”¹⁸⁰ Additionally, the concern about uncertainty arises either because the couple is married in one state and not another or because the couple’s marital status is ambiguous during the pursuit of litigation to determine it.¹⁸¹

Despite this overwhelming tendency to validate the marriage, our same-sex couple will remain unsure whether their marriage will be recognized, due to courts’ discretion to refuse recognition on public policy grounds. Given this inherent uncertainty, this Part tries to provide guidance gleaned from statutes and choice-of-law theories, to determine the validity of our couple’s marriage.

The first sub-part considers statutory choice-of-law rules that follow section 210 of the Uniform Marriage and Divorce Act or other statutes which provide that out-of-state marriages are valid if valid where contracted.¹⁸² The second sub-part reviews the states that have evasion statutes, many adopted during the lifetime of the Uniform Marriage Evasion Law,¹⁸³ which nullify out-of-state marriages by domiciliaries if the marriage would be prohibited within the state.¹⁸⁴ The third sub-part attempts to determine how courts will resolve questions of the

177. *Id.*

178. *Id.*

179. *Id.*

180. ROBERT A. LEFLAR ET AL., *AMERICAN CONFLICTS LAW* § 220, at 605 (4th ed. 1986).

181. *Id.*

182. Fine, *supra* note 168, at 38 n.13. Section 210 provides that “[a]ll marriages contracted . . . outside this state, that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicile of the parties, are valid in this State.” *Id.*

183. J. Philip Johnson, Note, *The Validity of a Marriage Under the Conflict of Laws*, 38 N.D. L. REV. 442, 454 (1962). That Act was adopted by only five states before the Act was withdrawn in 1943 because of its limited adoption. *Id.* Those states are Illinois, Louisiana, Massachusetts, Vermont, and Wisconsin. *Id.* at 454 n.77.

184. *Id.* The states which adopted § 1 of the Uniform Marriage Evasion Act usually also adopted § 2, which nullifies marriages by nonresidents within the state when their own domicile’s law would have declared the marriage void. *Id.* However, as of 1980, there were no reported cases applying § 2. Fine, *supra* note 168, at 37 n.12.

validity of same-sex marriages celebrated out-of-state when the parties return to their domicile in situations unguided by statutory directives. It surveys the major choice-of-law theories in use today and considers what result would occur in courts using them to resolve this question. After considering both the statutory directives and the theoretical guidance, one discovers that courts retain significant leeway to resolve the issue regardless of these directives and guidance.

A. Same-Sex Marriage and Uniform Marriage/Divorce Act Section 210

Numerous states have adopted some form of section 210 of the Uniform Marriage and Divorce Act, which was intended to validate marriages celebrated outside a state within the adopting state. There are some variations in the statutory language. Colorado has a statute which, like most other states, simply incorporates the language from the Uniform Marriage and Divorce Act:

All marriages contracted within this state prior to January 1, 1974, or outside this state that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicile of the parties are valid in this state.¹⁸⁵

Other jurisdictions with essentially similar statutes include Arkansas,¹⁸⁶ California,¹⁸⁷ Connecticut,¹⁸⁸ the District of Columbia,¹⁸⁹

185. COLO. REV. STAT. ANN. § 14-2-112 (West 1991).

186. ARK. CODE ANN. § 9-11-107 (Michie 1993) ("All marriages contracted outside this state which would be valid by the laws of the state or country in which the marriages were consummated and *in which the parties then actually resided* shall be valid in all the courts in this state.") (emphasis added). The underlined portion of the statute may cause difficulty for our couple, assuming they did not actually reside in Hawaii before returning to Arkansas.

187. CAL. FAM. CODE § 308 (West 1994) ("A marriage contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state.").

188. CONN. GEN. STAT. ANN. § 46b-24a (West 1993 & Supp. 1994) ("All marriages celebrated before October 1, 1993, otherwise valid except that the license for any such marriage was issued in a town other than the town in which such marriage was celebrated, are validated."). Although this statute does not explicitly include out-of-state marriages, presumably it would apply to them.

189. D.C. CODE ANN. § 30-105 (1993) ("If any marriage declared illegal by the foregoing sections shall be entered into in another jurisdiction by persons having and retaining their domicile in the District of Columbia, such marriage shall be deemed illegal, and may be decreed to be void in said District in the same manner as if it had been celebrated therein.").

Hawaii,¹⁹⁰ Idaho,¹⁹¹ Kansas,¹⁹² Kentucky,¹⁹³ Michigan,¹⁹⁴ Minnesota,¹⁹⁵ Montana,¹⁹⁶ Nebraska,¹⁹⁷ New Mexico,¹⁹⁸ South Dakota,¹⁹⁹ Utah,²⁰⁰ Virginia,²⁰¹ and Wyoming.²⁰² Illinois' variation declares all marriages that are valid where contracted are valid

190. HAW. REV. STAT. § 572-3 (1993) ("Marriages legal in the country where contracted shall be held legal in the courts of the State.")

191. IDAHO CODE § 32-209 (1983) ("All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, are valid in this state.")

192. KAN. STAT. ANN. § 23-115 (1992) ("All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in this state.")

193. KY. REV. STAT. ANN. § 402.040 (Michie/Bobbs-Merrill 1993) ("If any resident of this state marries in another state, the marriage shall be valid here if valid in the state where solemnized.")

194. MICH. COMP. LAWS ANN. § 551-271 (West 1989) ("All marriages heretofore contracted by residents of this state and who were, at the time of such marriages, legally competent to contract marriage according to the laws of this state . . . are hereby declared to be and remain valid and binding marriages under the laws of this state to the same effect and extent as if solemnized within this state and according to the laws thereof.")

195. MINN. STAT. ANN. § 517.20 (West 1990) ("All marriages contracted within this state prior to March 1, 1979 or outside this state that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicile of the parties are valid in this state.")

196. MONT. CODE ANN. § 40-1-104 (1993) ("All marriages contracted within this state prior to January 1, 1976, or outside the state, that were valid at the time of the contract or subsequently validated by the laws of the place in which they were contracted or by the domicile of the parties are valid in this state.")

197. NEB. REV. STAT. § 42-117 (1988) ("All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in this state.")

198. N.M. STAT. ANN. § 40-1-4 (Michie 1989) ("All marriages celebrated beyond the limits of this state, which are valid according to the laws of the country wherein they were celebrated or contracted, shall be likewise valid in this state, and shall have the same force as if they had been celebrated in accordance with the laws in force in this state.")

199. S.D. CODIFIED LAWS ANN. § 25-1-38 (1992) ("All marriages contracted without this state which would be valid by the laws of the jurisdiction in which the same were contracted are valid in this state.")

200. UTAH CODE ANN. § 30-1-4 (Michie 1989) ("Marriages solemnized in any other country, state or territory, if valid where solemnized, are valid here.")

201. VA. CODE ANN. § 20-371 (Michie 1990) ("All marriages heretofore solemnized outside this Commonwealth by a minister authorized to celebrate the rites of marriage in this Commonwealth, under a license issued in this Commonwealth, and showing on the application therefor the place out of this Commonwealth, where said marriage is to be performed shall be valid as if such marriage had been performed in this Commonwealth."). Because this statute requires that the marriage license be issued by Virginia, it is unlikely that our couple would be able to be validly married in Hawaii.

202. WYO. STAT. § 20-1-111 (1987) ("All marriage contracts which are valid by the laws of the country in which contracted are valid in this state.")

in Illinois, "except where contrary to the public policy of this State"²⁰³ or where entered into to evade Illinois' marriage laws.²⁰⁴ Louisiana's version declares such marriages valid unless recognition would "violate a strong public policy" of the applicable state.²⁰⁵ Arizona's statute indicates that marriages valid where contracted are valid in the state, but also includes an evasion provision.²⁰⁶ Georgia has a similar combination of statutes.²⁰⁷ Finally, North Dakota's statute validates "[a]ll marriages contracted outside of this state" except "when residents of this state contract a marriage in another state which is prohibited under the laws of North Dakota."²⁰⁸

The comments to the Uniform Marriage and Divorce Act indicate that section 210 was intended to validate marriages, even if the parties would not have been allowed to marry in their domicile.²⁰⁹ The comment also states that section 210 "expressly fails to incorporate the 'strong public policy' exception of the Restatement [Second] and hence may change the law in some jurisdictions. *This section will preclude invalidation of many marriages which would have been invalidated in the past.*"²¹⁰ Thus, a strong argument can be made in states which have adopted section 210 that they are prevented from contradicting the policy behind that section—validation in all circumstances—by refusing to recognize our couple's marriage on public policy grounds.

Many states with validation statutes also adopted section 207 of the Uniform Marriage and Divorce Act, which lists narrow prohibitions against marriage. For example, the Colorado statute states:

203. ILL. ANN. STAT. ch. 750, para. 5/213 (Smith-Hurd 1993).

204. *Id.* para. 5/216.

205. LA. CIV. CODE ANN. art. 3520 (West 1994) ("A marriage that is valid in the state where contracted, or in the state where the parties were first domiciled as husband and wife, shall be treated as a valid marriage unless to do so would violate a strong public policy of the state whose law is applicable to the particular issue under Article 3519.").

206. ARIZ. REV. STAT. ANN. § 25-112 (1991). That statute also states that marriages solemnized in another state of parties intending to reside in Arizona shall have the same legal consequences and effect as if solemnized in that state (§ 25-112(B)) and that parties residing in Arizona may not evade the laws of the state relating to marriage by going to another state to solemnize the marriage (§ 25-112(c)). For a discussion of the evasion section, see *infra* part II.B.

207. GA. CODE ANN. § 53-214 (1991) ("All marriages solemnized in another state by parties intending at the time to reside in this state shall have the same legal consequences and effect as if solemnized in this state. Parties residing in this state may not evade any of the laws of this state as to marriage by going into another state for the solemnization of the marriage ceremony.").

208. N.D. CENT. CODE § 14-03-08 (1991).

209. UNIF. MARRIAGE AND DIVORCE ACT § 210, 9A U.L.A. 176 (1987).

210. *Id.* (emphasis added).

- (1) The following marriages are prohibited:
 - (a) A marriage entered into prior to the dissolution of an earlier marriage of one of the parties except a currently valid marriage between the parties;
 - (b) A marriage between an ancestor and a descendent or between a brother and a sister, whether the relationship is by the half or the whole blood;
 - (c) A marriage between an uncle and a niece or between an aunt and a nephew, whether the relationship is by the half or the whole blood, except as to marriages permitted by the established custom of aboriginal cultures.²¹¹

Colorado cases which apply these two sections of the Marriage and Divorce Act are similar to those cases found in other states. Those cases give out-of-state marriages clear acceptance, even when contrary to other marriage statutes in the state, unless the marriages are expressly prohibited. For example, in *Payne v. Payne*²¹² and *Spencer v. People*,²¹³ the Supreme Court of Colorado declared each challenged marriage to be valid, because each was contracted in a state where it was valid. This was so despite Colorado statutes which declared each marriage to be either void or voidable for violating the age restrictions in Colorado's marriage statutes.²¹⁴ Because the marriages were not expressly prohibited, they were found to be valid. Cases from other states listed above reached the same conclusion.²¹⁵

Similarly, because same-sex marriage has not been expressly prohibited in most of these states, one could expect a court to reach the same result with our couple. Of the states with validation statutes, only

211. COLO. REV. STAT. ANN. § 14-2-110 (West 1989 & Supp. 1993).

212. 214 P.2d 495 (Colo. 1950).

213. 292 P.2d 971 (Colo. 1956).

214. *Id.* at 973; *Payne*, 214 P.2d at 497.

215. *See* *Stevenson v. Gray*, 56 Ky. (17 B. Mon.) 193 (1856) (holding that Kentucky residents who went to another state to marry with express intent to evade Kentucky laws were married if marriage valid where performed); *Johnson v. Johnson*, 104 N.W.2d 8 (N.D. 1960) (holding that validity of marriage contracted outside North Dakota is determined by North Dakota law and, since not prohibited, is valid); *cf. In re Estate of Enoch*, 201 N.E.2d 682, 689 (Ill. App. Ct. 1964) (Illinois court refusing to recognize a common-law marriage entered into in Colorado because of statutory prohibitions).

Virginia and Utah expressly prohibit same-sex marriage.²¹⁶ Whether Minnesota and Kansas prohibit same-sex marriage is somewhat more ambiguous due to the statutory language.²¹⁷ Arguably, with the exception of Virginia and Utah, our couple could return to states with validation statutes and persuasively argue that their marriage should also be validated.

But even states with validation statutes may turn to public policy to determine whether our couple's marriage would be valid.²¹⁸ For

216. UTAH CODE ANN. § 30-1-2 (1989 & Supp. 1994) ("The following marriages are prohibited and declared void: . . . (5) between persons of the same sex."); VA. CODE ANN. § 20-45.2 (Michie 1990) ("A marriage between persons of the same sex is prohibited.").

For other states that prohibit same-sex marriage, see also IND. CODE ANN. § 31-7-1-2 (West 1984) ("Only a female may marry a male. Only a male may marry a female."); LA. CIV. CODE ANN. art. 89 (West 1993) ("Persons of the same sex may not contract marriage with each other."); MD. CODE ANN. FAM. LAW § 2-201 (1991) ("Only a marriage between a man and a woman is valid in this state."); TEX. FAM. CODE ANN. § 1.01 (West 1993) ("A man and a woman desiring to enter into a ceremonial marriage shall obtain a marriage license from the county clerk of any county of this state. A license may not be issued for the marriage of persons of the same sex."). Most other state statutes do not explicitly exclude same-sex marriages. Strasser, *supra* note 10, at 983.

217. The Minnesota statute is ambiguous. See MINN. STAT. § 517.01 (1990) ("Marriage, so far as its validity in law is concerned, is a civil contract *between a man and a woman*, to which the consent of the parties, capable in law of contracting, is essential.") (emphasis added). The emphasized language was added to the statute following the decision in *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971). Strasser, *supra* note 10, at 983 n.5. Although declaring that marriage is a contract between a man and a woman, this statute does not *prohibit* same-sex marriage. Given the interpretation of the validation cases affirming out-of-state marriages which are not prohibited by the state, an argument could be made that our couple's same-sex marriage should be valid in Minnesota. Kansas' statute is similar: "The marriage contract is to be considered in law as a civil contract between two parties who are of opposite sex . . ." KAN. STAT. ANN. § 23-101 (1988).

Other states with similarly ambiguous statutes include: CONN. GEN. STAT. ANN. § 46a-81r (West Supp. 1994) ("Nothing in [various statute sections outlawing discrimination based on sexual orientation] . . . shall be deemed or construed . . . (4) to authorize the recognition or the right of marriage between persons of the same sex."); IDAHO CODE § 32-202 (1983) ("Any unmarried male . . . and any unmarried female . . . are capable of consenting to and consummating marriage."); NEV. REV. STAT. ANN. § 122.020 (Michie 1993) ("A male and a female person . . . may be joined in marriage."); OHIO REV. CODE ANN. § 3101.01 (Anderson 1993) ("Male persons . . . and female persons . . . may be joined in marriage."); WYO. STAT. § 20-1-101 (1994) ("Marriage is a civil contract between a male and a female person . . ."). Because none of these statutes expressly prohibit same-sex marriage, one could expect that they would not inherently invalidate our couple's marriage.

218. *But see supra* notes 185-202 and accompanying text (indicating that those states with validation statutes adopted as part of the Uniform Marriage and Divorce Act

example, even though Kentucky's statute does not indicate an exception for public policy reasons, its courts have so interpreted the statute. In *Mangram v. Mangrum*,²¹⁹ the court considered the validity of a marriage between a sixteen-year-old male and a thirteen-year-old female. In interpreting section 402.040 of the Kentucky Statutes, which provides that if any Kentucky resident marries in another state, the marriage will be valid in Kentucky if valid where solemnized, the court noted an exception for marriages against the state's public policy.²²⁰ Having found that exception, the court nevertheless affirmed the marriage in that case because it found that the Kentucky statute prohibiting marriage by females under age fourteen²²¹ rendered those marriages voidable, not void.²²² Because the marriage was simply voidable, the court held that section 402.040 controlled and found the marriage to be valid.²²³

What will be particularly interesting is how courts in Kentucky and Minnesota will determine the policy question of whether to follow their statutes validating out-of-state marriages or their precedent refusing to permit same-sex marriages.²²⁴ The Kentucky situation is particularly interesting given the recent mix of policy declarations. In *Jones v. Hallahan*, the Kentucky court of appeals expressly stated that Kentucky statutes do not prohibit marriages between persons of the same sex, although they do contain references to a male and a female.²²⁵ In fact, the court went on to state that the appellants, two women, were not prevented from marrying by the statutes of Kentucky, but instead by their own incapability of entering into a marriage.²²⁶ Given the lack of a statutory prohibition, and therefore the lack of express legislative policy to the contrary, and given the Kentucky statute declaring out-of-state marriages to be valid,²²⁷ one could argue that our couple, validly

are presumed to have eliminated any public policy exception to the validation of out-of-state marriages).

219. 220 S.W.2d 406 (Ky. 1949).

220. *Id.* at 407. The court cited *Damron v. Damron*, 192 S.W.2d 741 (Ky. 1945) and *Gilbert v. Gilbert*, 122 S.W.2d 137 (Ky. 1938).

221. KY. REV. STAT. ANN. § 402.020 (Baldwin 1992).

222. *Mangrum*, 220 S.W.2d at 407.

223. *Id.* at 408.

224. *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed for want of substantial federal question*, 409 U.S. 810 (1972).

225. 501 S.W.2d at 589 & n.1.

226. *Id.* at 589.

227. KY. REV. STAT. ANN. § 402.040. Prohibited and void marriages include certain incestuous marriages, those in which one partner is mentally disabled, bigamous marriages, those not solemnized, and those in which one or both partners are under 18. Same-sex marriages are not prohibited. *Id.*

married in Hawaii, should be able to return to Kentucky and maintain a valid marriage in that state.²²⁸

This would seem particularly true given the recent expression of Kentucky public policy found in the case of *Commonwealth v. Wasson*.²²⁹ In that case, the Supreme Court of Kentucky struck down the state statute criminalizing homosexual sodomy as violating the defendant's rights of privacy and equal protection under the state constitution.²³⁰ The court explained that its constitution imposed an affirmative duty on the State to protect individual liberty,²³¹ and stated that "public indignation" may be codified into legislation only when behavior produces "harmful consequences to others."²³² Thus, the right of privacy under the state constitution was broad enough to include homosexual sexual conduct.²³³ On equal protection grounds, gay men and lesbians are "a separate and identifiable class for Kentucky constitutional law analysis because no class of persons can be discriminated against under the Kentucky constitution."²³⁴ Even if a majority of the state's citizens believe that homosexual conduct is

228. The question is more difficult in Minnesota because the legislature changed its statute after the *Baker* case. Strasser, *supra* note 10, at 983. In *Baker*, the plaintiffs argued that same-sex marriage was permitted under the state marriage statutes because the legislature had not explicitly excluded it, but the court rejected their argument. 191 N.W.2d at 185-86. In 1977, the Minnesota legislature added the language that marriage is "a civil contract between a man and a woman" to its marriage statute. MINN. STAT. § 517.01 (1990). Given the express statement that only opposite-sex couples can be married in the state, despite the statute affirming out-of-state marriages as valid, one would expect that Minnesota may follow its marriage restriction, rather than its choice-of-law statute.

In *Singer v. Hara*, the Washington Court of Appeals also held that Washington statutes did not permit same-sex marriage. 522 P.2d 1187, 1189 (Wash. Ct. App. 1974). While not permitting the marriage, it also appears that Washington statutes do not prohibit same-sex marriage, unless references to males and females can be seen as implying a prohibition. *Id.* at 1189 n.3, 1191.

229. 842 S.W.2d 487 (Ky. 1992).

230. *Id.* at 491-92.

231. *Id.* at 492-93; *see also* Recent Case, 106 HARV. L. REV. 1370, 1371 (1993). It also cited *Commonwealth v. Campbell*, 117 S.W. 383 (Ky. 1909), in explaining that "[t]he theory of [Kentucky's] government is to allow the largest liberty commensurate with the public safety. . . . [T]here is no room for that inquisitorial and protective spirit which seeks to regulate the conduct of [people] in matters in themselves indifferent." *Wasson*, 842 S.W.2d at 387.

232. *Wasson*, 842 S.W.2d at 496.

233. *Id.* at 491.

234. *Id.* at 500. The state did not establish a legitimate governmental interest justifying a distinction based on sexual preference, and the court found the state's attempted justifications based on connecting homosexuality with pedophilia, promiscuity, and exhibitionism to be "outrageous." *Id.* at 501.

immoral, that belief does not provide a rational basis for criminalizing gay men and lesbians' sexual activity.²³⁵ Although the court's opinion is somewhat murky in explaining the doctrinal basis for its decision,²³⁶ it seems to invite the type of question that our couple returning from Hawaii would pose. Kentucky's statute and precedent validating out-of-state marriages, the Kentucky court's prior finding of no statutory prohibition against same-sex marriage, and its recent recognition of privacy and equal protection rights for gay men and lesbians in Kentucky point toward recognizing same-sex marriage, while its previous objection to same-sex marriage points toward rejecting it. As can be seen from this example, courts looking to discover a state's public policy on whether to validate a same-sex marriage will have numerous expressions of policy to consider.

Illinois has both a statute adopting Uniform Marriage and Divorce Act section 210 and a statute adopting the Uniform Marriage Evasion Act.²³⁷ Perhaps there is no great inconsistency in adopting both of these statutes given Illinois' additional language in its validation statute which preserves the right of the state to exclude marriages, even though valid in other states, that violate the express public policy of the state. Illinois had a consistently strong policy against marriages which violate public policy even before it adopted its version of the Uniform Marriage Evasion Act.²³⁸ The 1920 case of *Lincoln v. Riley*²³⁹ noted that "the general rule that a marriage valid where it is celebrated is valid everywhere has two exceptions; viz., marriages which are contrary to the laws of nature, as generally recognized by Christian countries, and those which are declared by the positive law to have no validity."²⁴⁰ The court went on to cite *Wilson v. Cook*²⁴¹ for the principle that marriages contracted in violation of a statute "imposing upon its citizens an incapacity to contract marriage by reason of a positive policy of the State for the protection of

235. *Id.* at 502.

236. *See* Recent Case, *supra* note 231, at 1374. The article also notes the "frailty" of rights found in state constitutions and questions whether a firm basis for expanded rights for lesbians and gay men can be found in *Wasson*. *Id.* at 1374-75.

237. The comments following Uniform Marriage and Divorce Act § 210 indicate that approval of the Uniform Marriage Evasion Act was withdrawn because § 210 and § 207 (prohibiting certain marriages) are inconsistent with the Act. The comment suggests that "[a] state adopting this Act should repeal the earlier one, if it exists therein." UNIF. MARRIAGE AND DIVORCE ACT § 210, 9A U.L.A. 177 (1987). *See also infra* part II.B.

238. *See infra* notes 253-60 and accompanying text.

239. 217 Ill. App. 571 (1920).

240. *Id.* at 575. For a discussion of this "natural law" exception, see Joseph W. Hovermill, *A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii's Recognition of Same-Sex Marriages*, 53 MD. L. REV. 450, 459-60, 482-85 (1994).

241. 100 N.E. 222 (Ill. 1912).

the morals and the good order of society against serious social evils" are void.²⁴² What is more difficult to determine is whether our couple's marriage in Hawaii would fall within the general rule pointing to validation, or the exception which allows public policy, however defined, to prevent validity. This question will be clarified in the next sub-part when considered under Illinois precedent interpreting its evasion statute.

States with validation statutes should be urged to follow their statutory directives, as ordained by section 210 of the Uniform Marriage and Divorce Act and section 6(1) of the Second Restatement, and validate our couple's marriage.²⁴³ Previous cases, if available, which have validated marriages although contrary to state statutes, can be used to bolster this argument. It is difficult, however, to ascertain whether any specific court will validate our couple's marriage because of the likelihood that it will consider policy concerns despite these statutory directives.

B. Same-Sex Marriage and Evasion Statutes

Four states adopted the Uniform Marriage Evasion Act during its brief existence. Those states are Illinois, Massachusetts, Vermont, and Wisconsin.²⁴⁴ The typical language contained in these statutes can be found in the Vermont statute:

If a person residing and intending to continue to reside in this state is prohibited from contracting marriage under the laws of this state and such person goes into another state or country and there contracts a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state.²⁴⁵

242. *Lincoln*, 217 Ill. App. at 575.

243. Robert A. Sedler also notes, in discussing interest analysis, that when the forum's legislature has directed that a statute shall apply to a case containing a foreign element, "the forum must apply the statute to that situation, totally apart from choice of law considerations." Robert A. Sedler, *Interest Analysis and Forum Preference in the Conflict of Laws: A Response to the "New Critics"*, 34 MERCER L. REV. 593, 610 (1983).

244. ILL. ANN. STAT. ch. 750, para. 5/216 (Smith-Hurd 1993); MASS. GEN. LAWS ANN. ch. 207, § 10 (West 1994); VT. STAT. ANN. tit. 15, § 5 (1993); WIS. STAT. § 765.04 (1993).

245. VT. STAT. ANN. tit. 15, § 5 (1993). This language corresponds with § 1 of the Uniform Marriage Evasion Act. Section 6 prevents couples from going to Vermont to marry if the marriage would be void in their own domicile. This section does not relate to our couple because Hawaii, the probable location of our couple's same-sex marriage, has not adopted that section and residents of Hawaii would not go to Vermont to obtain a same-sex marriage. Section 6 states:

When applying this type of evasion statute to our couple married in Hawaii, a few questions emerge. It would seem, on the face of the statute, that the Hawaii marriage might well be declared null in these jurisdictions. First, our couple did reside in the state and they intend to continue residing in the state. Second, they went to another state and contracted a marriage. What is questionable, however, is whether our couple contracted a marriage that was prohibited by their home state. Unlike cases involving incest, polygamy, under-age marriage, or premature marriage following divorce, very few state statutes have declared same-sex marriages to be "prohibited and declared void." Because the marriage statutes of these states do not restrict marriage to opposite-sex couples, same-sex marriages are arguably not prohibited within the meaning of the evasion statutes.

Precedent is helpful in defining the parameters concerning which marriages would be "prohibited and declared void by the laws of this state." The Vermont case of *Wheelock v. Wheelock*²⁴⁶ explores the meaning of this language. In that case, the woman was divorced in May, 1917; she then married her new husband in New York City in June, 1918. Both knew that they could not be legally married in Vermont because a Vermont statute prohibited a divorced person from marrying someone, besides the person she divorced, for three years after the divorce.²⁴⁷ Despite that statute, which had been held to apply to in-state marriages, the Vermont courts had considered out-of-state marriages, prior to enactment of the marriage evasion statute, to be valid because the statute had no extra-territorial force. The courts followed the general rule that a marriage valid where celebrated is valid everywhere.²⁴⁸

The *Wheelock* court noted two exceptions to this general rule which it found to be well-recognized: marriages contrary to the law of nature as generally recognized by Christian civilized states, and marriages which the state's lawmakers had declared invalid on public policy grounds.²⁴⁹ The court discussed only the second exception. Presumably, it could be argued that the first exception would apply to same-sex marriage although

A marriage shall not be contracted in this state by a person residing and intending to continue to reside in another state or jurisdiction, if such marriage would be void if contracted in such other state or jurisdiction. Every marriage solemnized in this state in violation of this section shall be null and void.

VT. STAT. ANN. tit. 15, § 6 (1993).

246. 154 A. 665 (Vt. 1931).

247. General Law of March 16, 1925, § 3602 (current version at VT. STAT. ANN. tit. 15, § 560 (1993)).

248. 154 A. at 665-66.

249. *Id.* at 666.

historically that exception has only been applied to polygamous marriages and incestuous marriages of close consanguinity.²⁵⁰ In determining whether the second exception applied in the *Wheelock* case, the court noted that, although the state clearly had the power to prohibit marriages as against established public policy, in order to render the out-of-state marriage void under the evasion statute, there must be "an express statutory provision to that effect."²⁵¹ In that case, a statute did prohibit re-marriage within three years; thus, an express statutory provision applied and the marriage was declared invalid.²⁵²

This same requirement that an express statutory prohibition is needed to invalidate the marriage is also found in other evasion statute states. For example, in *Schwartz v. Schwartz*,²⁵³ an Illinois court considered a case involving two young people who, although domiciled in Chicago, were married in Indiana. Under the Illinois statute, they were competent to contract a legal marriage with their parents' consent.²⁵⁴ Because the statute did not declare a marriage to be void if performed without consent, the court held that the evasion statute did not apply.²⁵⁵ The court focused on the language of the evasion statute which required that the marriage be "prohibited and declared void by the laws of this state" in order to be "null and void,"²⁵⁶ and held that no statute "prohibits and declares void" the marriage contracted by the parties in that case.²⁵⁷ The court referred to the case of *Reifschneider v. Reifschneider*,²⁵⁸ which explained the difference between statutes which declared a nullity and those which were directory only.

The general rule is, that unless the statute expressly declares a marriage contracted without the necessary consent of the parents, or other requirements of the statute, to be a nullity, such statutes will be construed to be directory, only, in this

250. EUGENE F. SCOLES & PETER HAY, *CONFLICTS OF LAWS* § 13.5, at 436 (2d ed. 1992); see also G.W. Bartholomew, *Recognition of Polygamous Marriages in America*, 13 INT'L & COMP. L.Q. 1022 (1964); Hovermill, *supra* note 240; Frederic P. Storke, *The Incestuous Marriage—Relic of the Past*, 36 U. COLO. L. REV. 473 (1964).

251. *Wheelock*, 154 A. at 666; see also Johnson, *supra* note 183, at 454 (noting that evasion statutes are not as broad as originally believed because "they apply only to marriages 'declared void' by the domicile").

252. *Wheelock*, 154 A. at 666.

253. 236 Ill. App. 336 (1925).

254. CAHILL'S STAT. ch 89, § 3 (1921) (repealed 1977).

255. 236 Ill. App. at 337.

256. CAHILL'S STAT. ch. 89, § 20 (repealed 1977) (current § 1 of the Uniform Marriage Evasion Act of 1915).

257. 236 Ill. App. at 337.

258. 89 N.E. 255 (Ill. 1909).

respect, so that the marriage will be held valid although the disobedience of the statute may entail penalties on the licensing or officiating authorities.²⁵⁹

The *Schwartz* court noted that, although the *Reifschneider* case was decided before the evasion statute was enacted, nothing in the evasion statute changed this general rule.²⁶⁰

Couples living in these four marriage evasion statute states who intend to travel to Hawaii to enter a same-sex marriage may find their marriages subject to challenge under the evasion statutes. Since none of these states expressly prohibit same-sex marriage, however, it is likely that their courts would be bound to follow earlier precedent requiring an express prohibition in the positive law of the state before the evasion statute's language would become relevant. If that is the case, same-sex marriage should be upheld as valid.

This same analysis would seem to apply to those states which have adopted evasion statutes other than the Uniform Marriage Evasion Act's version. For example, Arizona combines the statute on validity with one on evasion:

Marriages contracted in other state; validity and effect

- A. Marriages valid by the laws of the place where contracted are valid in this state.
- B. Marriages solemnized in another state or country by parties intending at the time to reside in this state shall have the same legal consequences and effect as if solemnized in this state.
- C. Parties residing in this state may not evade the laws of this state relating to marriage by going to another state or country for solemnization of the marriage.²⁶¹

259. *Id.* at 257.

260. 236 Ill. App. at 338; *see also* *Acklin v. Employees' Benefit Ass'n of American Steel Foundries*, 222 Ill. App. 369 (1922) (considering legality of marriage performed in foreign state to be determined by laws of state in which the marriage was performed unless marriage is in violation of some *positive* law of the state). It should be noted, however, that because a marriage violating a state's age requirements is not one which would be "abhorrent" to state policy, these cases might be valid although "abhorrent" marriages might not be. Charles W. Taintor, II, *Effect of Extra-State Marriage Ceremonies*, 10 MISS. L.J. 105, 129 (1938). Marriages considered "abhorrent" would have included miscegenous marriages and remarriage with a paramour. *Id.* at 129 & n.121.

261. ARIZ. REV. STAT. ANN. § 25-112 (1991).

Numerous other states also have evasion statutes.²⁶² But none of the

262. Those statutes indicate the following restrictions: DEL. CODE ANN. tit. 13, § 104 (1992) ("If a marriage prohibited by this chapter is contracted or solemnized outside of the State, when the legal residence of either party to the marriage is in this State, and the parties thereto shall afterwards live and cohabit as husband and wife within the State, they shall be punished in the same manner as though the marriage had been contracted in this State."); D.C. CODE ANN. § 30-105 (1981) ("If any marriage declared illegal by the foregoing sections shall be entered into in another jurisdiction by persons having and retaining their domicile in the District of Columbia, such marriage shall be deemed illegal, and may be decreed to be void in said District in the same manner as if it had been celebrated therein."); GA. CODE ANN. § 19-3-43 (1982) ("Parties residing in this state may not evade any of the laws of this state as to marriage by going to another state for the solemnization of the marriage ceremony."); IND. CODE § 31-7-6-6 (1993) ("A marriage is void if the parties to the marriage: (1) are residents of Indiana; (2) had their marriage solemnized in another state with intent to: (A) evade IC 31-7-3-3 [marriage license requirements] or IC 31-7-3-10 [mental incompetency prohibition]; and (B) subsequently return to Indiana and reside in Indiana; and (3) without having established residence in another state in good faith, return to Indiana and reside in Indiana after the marriage is solemnized."); ME. REV. STAT. ANN. tit. 19, § 91 (West 1978) ("When residents of this State, with intent to evade subchapter II [incest, mental incompetency and polygamy prohibitions] and to return and reside here, go into another state or country and there have their marriage solemnized and afterwards return and reside here, such marriage is void in this State."); MASS. GEN. L. ch. 207, § 10 (1988) ("If any person residing and intending to continue to reside in this commonwealth is disabled or prohibited from contracting marriage under the laws of this commonwealth and goes into another jurisdiction and there contracts a marriage prohibited and declared void by the laws of this commonwealth, such marriage shall be null and void for all purposes . . ."); MISS. CODE ANN. § 93-1-3 (1993) ("Any attempt to evade section 93-1-1 [incest prohibitions] by marrying out of this state and returning to it shall be within the prohibitions of said section."); VA. CODE ANN. § 20-40 (Michie 1990) ("If any persons, resident in this Commonwealth, and within the degrees of relationship mentioned in that section, [incest and bigamy prohibitions] shall go out of this Commonwealth for the purpose of being married, and with the intention of returning, and be married out of it, . . . they shall be punished as provided in this section, and the marriage shall be governed by the same law as if it had been solemnized in this Commonwealth."); VT. STAT. ANN. tit. 15, § 5 (1993) ("If a person residing and intending to continue to reside in this state is prohibited from contracting marriage under the laws of this state and such person goes into another state or country and there contracts a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state."); W. VA. CODE § 48-1-17 (1992) ("If any person resident of this State shall, in order to evade the law, and with an intention of returning to reside in this State, go into another state or country, and there intermarry in violation of section one (§ 48-2-1), article two of this chapter [divorce definitions], and shall afterwards return and reside here, such marriage shall be governed by the same law, in all respects, as if it had been solemnized in this State.").

None of these statutes explicitly prohibit same-sex marriage and thus, arguably, by the terms of the statutes, they would not prohibit our couple from going to Hawaii, getting married, and returning to these states.

references to prohibited marriages contained in those statutes consider same-sex marriages to fall within the bounds of the evasion statutes.²⁶³

Cases interpreting the Arizona statute conform to the above analysis. In *Horton v. Horton*,²⁶⁴ the court considered the validity of a marriage contracted in New Mexico within the one-year time period when remarriage was not permitted in Arizona, and noted that the remarriage statutes did not declare such a marriage to be void, but “merely in general terms prohibit[ed] such a marriage. No penalty is affixed for disobedience.”²⁶⁵ The court referred to the “overwhelming weight of the better reasoned cases” which held that a marriage, even if prohibited by statute, is valid if celebrated elsewhere, even when the parties marry in that place to evade local laws “unless the Legislature has clearly enacted that such marriages out of the state shall have no validity here.”²⁶⁶ The court believed that the reasoning behind such validation could be traced back to Justice Story’s treatise on Conflicts:

All civilized nations allow marriage contracts. They are juris gentium, and the subjects of all nations are equally concerned in them. Infinite mischief and confusion must necessarily arise to the subjects of all nations with respect to legitimacy, succession, and other rights, if the respective laws of different countries were only to be observed as to marriages contracted by subjects of those countries abroad; and therefore all nations have consented, or are presumed to consent, for the common benefit and advantage, that such marriages shall be good or not according to the laws of the country where they are celebrated. By observing this rule few, if any, inconveniences can arise. By disregarding it, infinite mischiefs must ensue.²⁶⁷

263. *But see* IND. CODE ANN. § 31-7-1-2 (West 1984) and VA. CODE ANN. § 20-45.2 (Michie 1990) (prohibiting same-sex marriage). While these statutes prohibit same-sex marriage within Indiana and Virginia, neither state’s evasion statute considers same-sex marriages to violate the evasion statute. *See also* *Toler v. Oakwood Smokeless Coal Corp.*, 4 S.E.2d 364 (Va. 1939) and *Hager v. Hager*, 349 S.E.2d 908 (Va. Ct. App. 1986) (declaring those bigamous marriages void *ab initio*).

264. 198 P. 1105 (1921).

265. *Id.* at 1106.

266. *Id.* (quoting *Commonwealth v. Lane*, 113 Mass. 458 (1873)).

267. *Horton*, 198 P. at 1107 (citing JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 121 (7th ed. 1872)). *But see* Engdahl, *supra* note 168, at 99-103 (challenging Story’s assertion of universal status for marriage).

The court determined that because the legislature did not prohibit remarriages out-of-state within the time period, the evasion statute did not apply.²⁶⁸

When, however, the Arizona legislature had expressly declared a marriage void, the court invalidated the marriage under the evasion statute. In *In re Mortenson*,²⁶⁹ the court considered a marriage in New Mexico between two Arizona residents who were first cousins and who returned to their domicile in Arizona following the ceremony. New Mexico law did not prohibit marriage between first cousins but an Arizona statute did.²⁷⁰ Invalidating the New Mexico marriage, the court held that, due to the "clear intention on the part of the legislature to establish a strong public policy," the marriages were void within Arizona.²⁷¹ The court noted: "A marriage declared void by our statute cannot be purified or made valid by merely stepping across the state line for purpose of solemnization. We cannot permit the public policy of this state to be defeated by such tactics."²⁷² Therefore, one can expect that only those marriages which are expressly declared void or prohibited by statute will be invalid within a state having a combination of an evasion statute and a statute validating out-of-state marriages.

Because most marriage statutes are silent about same-sex marriage, it could be possible, but potentially dangerous, to argue that a court should consider other expressions of state public policy, as well as prior choice-of-law decisions, when deciding whether the out-of-state marriage violates public policy. Advocates must resolve this tactical question of whether to pursue this course depending on whether expressions of state policy could be viewed as positive or negative. They should be prepared, however, to expect the other side to raise those expressions of public policy on the issue that could be viewed negatively.

For example, in Wisconsin, such a review of other statutes might yield positive results for our couple. In 1982, Wisconsin became the first state to adopt a statute prohibiting discrimination against lesbians and gay men on the basis of sexual orientation, and since has developed a comprehensive statutory scheme prohibiting discrimination.²⁷³

268. *Horton*, 198 P. at 1107.

269. 316 P.2d 1106 (Ariz. 1957).

270. ARIZ. REV. STAT. ANN. § 25-101 (1991).

271. *Mortenson*, 316 P.2d at 1107.

272. *Id.*

273. The Wisconsin legislature has not simply evinced a passive attitude toward sexual minorities living in Wisconsin. It has taken significant steps to prevent harmful differences in treatment. Each statute prohibits some form of differential treatment due to sexual orientation. WIS. STAT. ANN. § 943.01(3) (West 1993) (felony to damage community property based on sexual orientation); *id.* § 939.645(1)(b) (increased penalties

Additionally, Wisconsin has adopted a consenting adults statute which ended state regulation of sexual activity between consenting adults in private.²⁷⁴ These statutory provisions indicating respect for lesbian and gay lifestyles and prohibiting discrimination could be used to argue that Wisconsin's public policy would support the notion of same-sex marriage, and that given the marriage statutes' silence and lack of an express prohibition, out-of-state same-sex marriages should not be voided by the marriage evasion statute.²⁷⁵ Finding similar expressions of policies

for crimes against victims based on sexual orientation); *id.* § 440.77(1)(o) (prohibits discrimination in loan practices); *id.* § 234.29 (prohibits discrimination in housing projects); *id.* § 230.18 (prohibits discrimination in civil service); *id.* § 230.01(2) (prohibits discrimination in state employment); *id.* § 227.10(3)(a) (prohibits discrimination in state administrative rules); *id.* § 146.025(7)(c)1 (HIV test results may not indicate patient's sexual orientation); *id.* § 111.85(2)(b) (prohibits discrimination in fair share agreements); *id.* § 111.81(12)(b) (prohibits discrimination in state employee labor organizations); *id.* § 111.70(2) (prohibits discrimination in municipal fair share agreements); *id.* § 111.321 (prohibits employment discrimination); *id.* § 111.32(13)(m) ("sexual orientation" defined as having, having a history of, or being identified with, a preference for heterosexuality, homosexuality, or bisexuality); *id.* § 111.31(1) (employment discrimination substantially and adversely affects state's general welfare); *id.* § 101.22(1) (prohibits housing discrimination); *id.* § 66.433(3) (community commissions recommend solutions to sexual orientation discrimination in housing, employment, and public accommodations and facilities); *id.* § 66.432(1) (equal opportunity in housing is local concern); *id.* §§ 66.431(3)(e)2, 66.43(2m) (entitlement to slum clearance benefits without regard to sexual orientation); *id.* § 66.405(2m) (equal opportunity in urban redevelopment projects); *id.* § 66.40(2m) (prohibits discrimination by housing authorities); *id.* § 66.395(2m) (prohibits discrimination in elderly housing); *id.* § 66.39(13) (prohibits discrimination in veterans housing); *id.* § 38.23(1) (prohibits discrimination against vocational, technical, and adult education students); *id.* § 36.12(1) (prohibits discrimination against University of Wisconsin System students); *id.* § 21.35 (prohibits discrimination in Wisconsin National Guard admission); *id.* § 16.765(1) (prohibits discrimination by state contractors); *id.* § 15.04(1)(g) (state agency heads must take remedial action to end discrimination).

These statutes clearly indicate that sexual minorities may not be treated differently due to their sexual orientation.

274. The legislature, by ending its regulation of private sexual activity between consenting adults, indicated an acceptance of relationships outside the marital relationship although it did not expressly condone them. *Id.* § 944.01. By revising §§ 944.15 and 944.17 so that they no longer criminalize certain gay and lesbian sexual activity, the legislature indicated a willingness to allow individuals to choose the intimate relationships that best express their personalities, desires, and beliefs.

275. However, the Wisconsin Supreme Court has not been as receptive to recognizing the rights of gay men and lesbians. For example, in *In re Z.J.H.*, 162 Wis. 2d 1002, 471 N.W.2d 202 (1991), the court held that a lesbian co-parent was not eligible to obtain custody or visitation of her ex-partner's biological child. *Accord* *Nancy S. v. Michele G.*, 279 Cal. Rptr. 212 (Ct. App. 1991); *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991). The court is currently considering a case which could overrule this decision, *Holtzman v. Knott*, 520 N.W.2d 91 (Wis. 1994) (granting petition to bypass court of appeals). However, that seems unlikely given its recent decision in *In re Angel*

positive toward lesbians and gay men in other states would make it possible to assert the same argument in those states.²⁷⁶

However, by expanding the search for public policy statements beyond the marriage statutes, it becomes equally possible for opponents to turn to sodomy statutes²⁷⁷ or adoption statutes²⁷⁸ which indicate an unwillingness to accept a lesbian or gay lifestyle. If a court were to consider all expressions of public policy by the legislative, executive, and judicial branches of the state, it might hold that the out-of-state same-sex marriage should be voided. Statutory interpretation in this area is amorphous and searching for clear meaning is difficult. The best our couple can hope for is a solid understanding of the factors the courts will consider and a set of strong arguments in support of validating their same-sex marriage from Hawaii.

Lace M., 184 Wis. 2d 492, 516 N.W.2d 678 (1994). In that case, the Wisconsin Supreme Court rejected a lesbian couple's petition which requested the court to allow the co-parent to adopt her partner's biological child, while allowing the biological mother to retain parental rights.

276. Among the states where these arguments may be persuasive would be those prohibiting discrimination based on sexual orientation. In addition to Wisconsin, those states include California, Hawaii, Minnesota, Vermont, Massachusetts, Connecticut, New Jersey and the District of Columbia. Advocates in Massachusetts and Minnesota, however, may encounter opposing arguments based on the public policy expressed in their sodomy statutes. Gross, *supra* note 17, at C12. Additionally, other state courts which have expressed state policies favorable to gay men and lesbians include: *In re* Petition of L.S. and V.L., Nos. A-269-90, A-270-90, 1991 WL 219598 (D.C. Super. Aug. 30, 1991) (allowing adoption by lesbian couple of each other's biological child); *In re* Kowalski, 478 N.W.2d 790 (Minn. Ct. App. 1991) (granting guardianship of severely disabled woman to her lesbian life partner despite her family's objection); *Braschi v. Stahl Assocs.*, 543 N.E.2d 49 (N.Y. 1989) (including same-sex couples within family definition of rent control statute); *In re* Evan, 583 N.Y.S.2d 997 (Sup. Ct. 1992) (allowing adoption of child by same-sex partner of child's biological mother); *In re* R.C., No. 9088 (Vt. P. Ct. Dec. 9, 1991) (allowing adoption in similar case). This limited listing of supportive statutes and cases is intended to serve as an example of the numerous options advocates have for finding positive expressions of state public policy toward same-sex couples.

277. Gross, *supra* note 17, at B12; *see also* *Bowers v. Hardwick*, 478 U.S. 186 (1986).

278. Florida and New Hampshire expressly prohibit adoptions by gay men and lesbians. *See* FLA. STAT. ANN. § 63.042(3) (West 1985); N.H. REV. STAT. ANN. § 170-B:4 (1990). Additionally, many states deny child custody to gay or lesbian parents upon divorce. *See, e.g.*, *S.E.G. v. R.A.G.*, 735 S.W.2d 164 (Mo. Ct. App. 1987) (finding that mother's lesbianism causes unhealthy environment for children). *But see* *S.N.E. v. R.L.B.*, 699 P.2d 875 (Alaska 1985) (holding reliance on possible stigma due to mother's lesbianism to be an impermissible reason to change custody to father); *Bottoms v. Bottoms*, 444 S.E.2d 276 (Va. Ct. App. 1994) (overruling trial court's decision to take custody from natural parent, holding that mother's lesbianism did not make her an unfit parent).

C. Same-Sex Marriage in Statutorily Unguided Situations

In addition to the original Restatement of Conflict of Laws which continues to be used by fifteen states,²⁷⁹ the remaining thirty-five states and the District of Columbia use some alternative choice-of-law approach; chief among them are Brainerd Currie's "governmental interest analysis,"²⁸⁰ the Second Restatement's "most significant relationship"²⁸¹ test and Robert A. Leflar's "choice-influencing considerations."²⁸² This sub-part now reviews these approaches for resolving choice-of-law disputes and considers how to use each when advocating for recognition of an out-of-state same-sex marriage. This sub-part also attempts to categorize each state under one of the approaches²⁸³ so that advocates will be able to use arguments consistent with a state's choice-of-law approach when arguing for recognition of same-sex marriage.²⁸⁴

279. Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 357 (1992). Those states are Alabama, Georgia, Kansas, Maryland, Montana, Nevada, New Mexico, North Carolina, South Carolina, South Dakota, Tennessee, Vermont, Virginia, West Virginia and Wyoming. *Id.* at 373 n.112.

280. BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 90 (1963).

281. SECOND RESTATEMENT, *supra* note 169, § 6.

282. Leflar, *supra* note 175. Additional theories that courts use, to a minor extent, include the center of gravity test, which chooses the law of the state with the greatest number of contacts with the case; David Caver's "principles of preference" system, which considers governmental interests and party expectations; Chief Judge Fuld's rules from *Neumeier v. Kuehner*, 286 N.E.2d 454 (N.Y. 1972), which also focus on those interests and expectations; and "lex fori," which applies the law of the forum. Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1046-48, 1049-50 (1987). These methods of analysis are used sparingly and by few courts. *Id.* at 1047 n.24, 1049.

283. After analyzing the states' different approaches, Patrick Borchers was left with three states (Kentucky, Michigan and New York) which were impossible to classify under any given approach. Borchers stated that Kentucky and Michigan have exercised "a blunt forum law preference" and he categorized them as having chosen the *lex fori*. New York defied classification and used a combined approach which its court of appeals classified as *lex loci delicti* and interest analysis. Borchers, *supra* note 279, at 374; *see also* William A. Reppy, Jr., *Eclecticism in Choice of Law: Hybrid Method or Mishmash?*, 34 MERCER L. REV. 645, 678-84, 698-702 (1983).

284. This attempt to categorize is difficult. Examining all choice-of-law marriage cases for every state is beyond the scope of this Article. *But see* Barbara J. Cox, *Same-Sex Marriage and State-by-State Categorization of Choice-of-Law Approach* (forthcoming). For this Article, I have primarily used three sources for categorization. Borchers, *supra* note 279; Smith, *supra* note 282, and Herma Hill Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521 (1983). Those articles focus primarily on torts and contracts cases. There are disagreements between the authors as to which particular states follow which approach. Many of those disagreements stem from either the time lag between each survey's compilation, the difference between focusing on a

1. THE FIRST RESTATEMENT

Even the Restatement of the Conflict of Laws would not always lead a state court to validate an out-of-state same-sex marriage.²⁸⁵ This is true despite the fact that the First Restatement is characterized by fixed, mechanical, and thus predictable, rules.²⁸⁶ The First Restatement is based on the multi-lateralist theory of choice-of-law, which attempts to solve conflicts problems by establishing choice-of-law norms that are external to the forum's substantive law.²⁸⁷ These rules select which state's laws govern the case without considering the substantive content of the rules vying for use.²⁸⁸ As the First Restatement is grounded in the "vested rights" theory, the Restatement's reporter, Joseph Beale, explained that the forum court's role is not to apply foreign law, but instead to enforce existing rights created under that foreign law.²⁸⁹ The First Restatement requires courts to apply the law of the geographical place where the key event leading to the plaintiff's cause of action occurred.²⁹⁰

specific subject matter (Borchers and torts) as opposed to conducting a more broad-based survey (Smith and Kay), and questions about how to categorize a given state. See, e.g., Borchers, *supra* note 279, at 368 (noting 11 problematic jurisdictions). For additional surveys, see P. John Kozyris & Symeon C. Symeonides, *Choice of Law in the American Courts in 1989: An Overview*, 38 AM. J. COMP. L. 601 (1990); Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49 (1989).

As Borchers notes, surveys become obsolete quickly given the pace with which states change or modify their approaches. Using Professor Kay's surveys as an example, Borchers notes that Kay reported 22 states as following the First Restatement in Kay's 1983 survey. Borchers further observes that only 16 states followed the First Restatement in Kay's 1989 survey. Borchers, *supra* note 279, at 367 n.87. Because Borchers' work was completed in 1992 and thus is the most up-to-date work on this issue, this Article uses Borchers' categorizations, while attempting to note any conflicts with Kay or Smith.

While recognizing that each state will have an already-developed choice-of-law approach, this Article continues in Part III.A to encourage the use of one of Leflar's choice-influencing considerations, "the better rule of law," which should lead to recognition of same-sex marriage. Advocates in states which do not use Leflar's approach could, instead, frame their arguments to contend that recognizing same-sex marriage is the "better" public policy result, given many of the reasons explained *infra* part III.

285. RESTATEMENT OF THE CONFLICT OF LAWS (1934) [hereinafter FIRST RESTATEMENT].

286. SCOLES & HAY, *supra* note 250, § 2.6, at 15.

287. Borchers, *supra* note 279, at 359.

288. *Id.* at 359; see also David F. Cavers, *A Critique of the Choice of Law Problem*, 47 HARV. L. REV. 173, 194 (1933); Friedrich K. Juenger, *General Course on Private International Law*, 193 RECUEIL DES COURS 119, 208 (1985).

289. *Id.* at 359-60.

290. Smith, *supra* note 282, at 1043.

For marriage cases decided under section 121 of the First Restatement, the rule of *lex loci celebrationis* would apply; in other words, a marriage valid where celebrated is valid everywhere.²⁹¹ Although comment d to section 121 indicates that the law of the domicile governs the domestic status of marriage, the differences between states' marriage laws would "lead to great difficulty, if it were not for the fact that all Anglo-American states agree in creating the status of marriage (except in rare cases considered in sections 131 and 132) in every case where there is a contract of marriage valid in the state where the contract is made."²⁹² The courts are understandably reluctant "to negate a relationship upon which so many personal and governmental considerations depend."²⁹³ In fact, denying a normal incident of marriage to a validly married couple is a harsh measure that should be avoided unless enjoyment of that incident "violently offends the moral sense of the community."²⁹⁴

But it is possible, under the First Restatement, that our couple's marriage in Hawaii could be found to offend a community's moral sense and be treated as one of the "rare" cases under section 132. That section states:

A marriage which is against the law of the state of domicil of either party, though the requirements of the law of the state of celebration have been complied with, will be invalid everywhere in the following cases:

- (a) polygamous marriage,
- (b) incestuous marriage between persons so closely related that their marriage is contrary to a strong public policy of the domicil,
- (c) marriage between persons of different races where such marriages are at the domicil regarded as odious,

291. FIRST RESTATEMENT, *supra* note 285, § 121. For cases applying this rule, see Fine, *supra* note 168, at 37 n.11. *But see* C.W. Taintor, II, *What Law Governs the Ceremony, Incidents and Status of Marriage*, 19 B.U. L. REV. 353, 368 (1939) (questioning a focus on the law of the place of the ceremony because that state has no interest in the intrinsic validity of the marital status).

292. FIRST RESTATEMENT, *supra* note 285, § 121 cmt. d. Section 131 applies to remarriage after divorce and § 132 applies to marriages void under domicile law. *Id.*

293. Johnson, *supra* note 183, at 456.

294. Charles W. Taintor, II, *Marriage in the Conflict of Laws*, 9 VAND. L. REV. 607, 615 (1956).

- (d) marriage of a domiciliary which a statute at the domicil makes void even though celebrated in another state.²⁹⁵

Thus, although section 121 of the First Restatement would lead one to expect that our couple, married in Hawaii, could return to their domicile and find strong support for validation of their marriage, section 132 allows the domiciliary state to limit marital recognition. Although same-sex marriages are not specifically included within section 132, comment b indicates that the list is “not intended to be an exclusive enumeration and if a marriage offends a strong policy of the domicil in any other respect, such marriage will be invalid everywhere.”²⁹⁶ However, with regard to miscegenous marriages (which were still restricted when the First Restatement was published) comment c indicates that, in order to be “odious” under section 132(c), they must “not only be prohibited by statute but must offend a deep-rooted sense of morality predominant in the state.”²⁹⁷ Thus, despite section 132, in states following the First Restatement, our same-sex couple could have their marriage in Hawaii validated if (1) the state chose to follow section 121 which would validate it automatically or, (2) even if the state followed section 132, it did not have a statute prohibiting same-sex marriage, or same-sex marriage was not found to offend that state’s “predominant” sense of morality.

When the First Restatement refers to offending public policy, it does not simply mean that the state’s law does not address the issue. Recognizing this is important for our couple because most states do not have statutes addressing same-sex marriage.²⁹⁸ The case of *Loucks v. Standard Oil Co.*²⁹⁹ is instructive. Although it was addressing the issue of whether a right of action which arose under a Massachusetts wrongful death statute could be enforced in New York, the court turned to the question of whether the difference between New York and Massachusetts law was a sufficient reason to decline jurisdiction over the case.

295. FIRST RESTATEMENT, *supra* note 285, § 132.

296. *Id.* at cmt. b.

297. *Id.* at cmt. c. Although miscegenous marriages are now protected by *Loving v. Virginia*, states which still follow the First Restatement could use comment c to invalidate a same-sex marriage. *See also* Taintor, *supra* note 294, at 625 (concluding that only when a state declares a marriage will be void does that state express “a strong enough public policy to require the inference that it makes extra-state ceremonies ineffective”). Taintor was describing the state of the law under the First Restatement which was in effect almost universally at the time of that article. Thus, it may be that only those First Restatement states which expressly prohibit same-sex marriage have sufficiently declared that these marriages are odious within the meaning of § 132(c).

298. *See supra* notes 216-17 and accompanying text.

299. 120 N.E. 198 (N.Y. 1918).

Our own scheme of legislation may be different. We may even have no legislation on the subject. That is not enough to show that public policy forbids us to enforce the foreign right. . . . We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home.³⁰⁰

Justice Cardozo continued by noting:

The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors, unless help would violate *some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal.*³⁰¹

It is possible that our couple's same-sex marriage would be found to violate that sense of morality.³⁰² Despite the fixed rule in favor of validity, numerous older cases following the First Restatement did reject out-of-state marriages as invalid, despite the fact that they were valid where celebrated.³⁰³ These results occurred because the Restatement's rigid rules led judges to invoke a system of escape devices. "Because the rules by and large ignore government interests, the policies behind legal rules, the parties' expectations, and justice in the individual case, the escape devices have been used to import those considerations into the choice-of-law process."³⁰⁴ Thus, even when choice-of-law decisions tended to follow mechanical rules, courts maintained their prerogative to

300. *Id.* at 201.

301. *Id.* at 202 (emphasis added).

302. Additionally, § 134 of the First Restatement could be used by states that do not want to recognize the same-sex marriages of couples who did not originally reside in the state but who moved to that state after their marriage. Section 134 allows one state to refuse to extend any particular incident of marriage to a couple if it finds it sufficiently offensive to public policy to do so. *See* cases cited *supra* note 168.

303. *See* Taintor, *supra* note 260, Taintor, *supra* note 291, Taintor, *supra* note 294; Johnson, *supra* note 183.

304. RICHMAN ET AL., *supra* note 176, § 67, at 190. The escape devices were dangerous because the judges employing them simply stated the technical rationales for their use, rather than stating the concerns for policy and justice that motivated their use. *Id.* "In other words, the escape device assures that the reasons for the court's *decision* will have little to do with the reasons announced in the court's *opinion*. The result is that the court has a freedom to indulge in unprincipled decision-making, a freedom incompatible with the rule of law." *Id.* (footnote omitted).

invalidate marriages when contrary to local public policy.³⁰⁵ Because section 132 allows an explicit “escape device” from section 121’s rule favoring validation, courts hesitant to recognize same-sex marriages may attempt to invoke public policy grounds to refuse recognition. Advocates in First Restatement states should pressure courts to be true to the narrow exemption and only invalidate the marriage if it offends the state’s “deep-rooted sense of morality.”³⁰⁶

Fifteen states still follow the First Restatement. Those states are Alabama, Georgia, Kansas, Maryland, Montana, Nevada, New Mexico, North Carolina, South Carolina, South Dakota, Tennessee, Vermont, Virginia, West Virginia, and Wyoming.³⁰⁷ Of those states, only Maryland and Virginia specifically prohibit same-sex marriage.³⁰⁸ Thus, only those two states fall into the situation expressed in section 132(c), characterizing same-sex marriage as “odious” by statutorily prohibiting it.³⁰⁹ The rest of the First Restatement states, particularly Georgia, Kansas, Montana, New Mexico, South Dakota, and Wyoming (which all have marriage validation statutes), should be receptive to arguments that our couple’s marriage should be recognized because it would not offend state public policy.³¹⁰

305. Perhaps these escape devices are what saved the First Restatement from extinction. Although some of its resilience comes from the dearth of recent court decisions in some of those states, several jurisdictions have recently rejected modern choice-of-law theories in favor of the more definite, predictable rules found in the First Restatement. RICHMAN ET AL., *supra* note 176, § 67, at 190-91.

306. FIRST RESTATEMENT, *supra* note 285, § 132 cmt. c.

307. Borchers, *supra* note 279, at 373. Both Kay and Smith also agree that these states follow the First Restatement. Kay, *supra* note 284, at 591-92; Smith, *supra* note 282, at 1172-74.

308. See *supra* note 216.

309. Comment c indicates that not only must there be a statute prohibiting the marriage, but that the marriage must also offend a “deep-rooted sense of morality predominant in the state.” It is thus possible that the same-sex marriage prohibitions do not, by themselves, establish this “sense of morality” which would be offended. It could be argued, however, that because each state also has a sodomy statute, those statutes, taken together, express such a sense of morality. Since Maryland and Virginia’s sodomy statutes prohibit both heterosexual and homosexual sodomy, it could be argued that those statutes do not evince a particularized sense of morality against same-sex couples. However, § 132 cmt. d indicates that sub-section (d) has the evasion statutes in mind when it refers to statutes which the domicile enacts to void out-of-state marriages, and declares that § 132(d) would void all marriages in these circumstances. Virginia has such an evasion statute but it has a marriage validation statute as well. FIRST RESTATEMENT, *supra* note 285, § 132 cmts. c, d. Additionally, at least one other commentator has assumed that Virginia probably would not recognize a same-sex marriage. Kay, *supra* note 284, at 589.

310. Note that Georgia, Tennessee, Vermont and West Virginia also have evasion statutes. See *supra* part II.B. However, because none of those states prohibit same-sex

Having considered how First Restatement states would analyze same-sex marriage cases, it is now time to turn to other approaches used to resolve choice-of-law cases and consider how our couple's marriage would be analyzed under each. Growing dissatisfaction with the First Restatement's rigidity led to a "revolution" in American conflicts law,³¹¹ which is still proceeding today. But that revolution also left choice-of-law theory in a state of considerable disarray which has existed for some time.³¹²

When the vested rights theory crumbled under sustained assault in the late 1950s, observers of the conflicts scene predicted confidently that a new theory (or possibly two) would emerge dominant from scholarly and judicial activity. That hope has proven forlorn. Instead, current choice-of-law theory is marked by eclecticism and even eccentricity. No consensus exists among scholars as to whether rules are desirable, whether the choice-of-law process should evaluate the substantive content of a rule, or whether courts can consider the merits of competing state policies The disarray in the courts may be worse. Four or five theories are in vogue among the various states, with many decisions using—openly or covertly—more than one theory. . . . Robert Leflar, the dean of conflicts scholars, refers, not critically, to such decisions as employing a "mish-mash."³¹³

This Part next considers those major theories. But none of them provide much certainty for our couple, returning from Hawaii, determined to live as a married couple, when confronting the institutions in their home state.

2. GOVERNMENTAL INTEREST ANALYSIS

In the late 1950s and early 1960s, Brainerd Currie developed his "governmental interest analysis" theory in a series of law review articles.³¹⁴ Currie argued that the positive law and common-law rules of a state express state policy choices which that state has an "interest"

marriage, it seems that those evasion statutes similarly would not extend to cover same-sex marriages contracted outside the domicile.

311. SCOLES & HAY, *supra* note 250, § 2.6, at 15.

312. RICHMAN ET AL., *supra* note 176, § 82, at 241.

313. *Id.* § 82, at 241-42 (citation omitted).

314. These articles are collected in CURRIE, *supra* note 280.

in applying to the state's domiciliaries.³¹⁵ Currie's theory attempted to ensure that the law applied in a particular context is the one "whose application in a particular context will serve the purposes for which that law was created."³¹⁶ Currie divided the conflicts world into three portions: false conflicts, true conflicts, and unprovided-for cases.³¹⁷ False conflicts occur when the parties have a common domicile; that state has the only interest in applying its law, so the forum should apply the law of the common domicile.³¹⁸ True conflicts arise when more than one state has an interest in applying its law to a party. Unprovided-for cases occur when no domiciliary benefits from application of his or her state's law.³¹⁹ In the latter two cases, Currie suggested applying the forum law; since the problem is insoluble, there is no good reason to displace that jurisdiction's law.³²⁰ Interest analysts note that courts, regardless of their purported approach or method, generally end up applying their own law, as Currie advocated they should.³²¹

Currie would probably find that our couple's situation involves a "false" conflict because, although they were married under one state's law, that state was not their domicile. Instead, their domicile's law

315. Borchers, *supra* note 279, at 360-61.

316. Smith, *supra* note 282, at 1047.

317. Borchers, *supra* note 279, at 361.

318. *Id.*

319. *Id.*

320. *Id.* But see Larry Kramer, *The Myth of the "Unprovided-For" Case*, 75 VA. L. REV. 1045 (1989); Larry Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 U. CHI. L. REV. 1301, 1305-09 (1989) (questioning Currie's presumption in favor of forum law in true conflict cases). Currie did recognize that forum law might not always be appropriate and argued for a "more moderate and restrained interpretation both of the policy and of the circumstances in which it must be applied to effectuate the forum's legitimate purpose" in an attempt to avoid the conflict. Kay, *supra* note 284, at 540. Sedler points out that there are "relatively few cases" in which a court has to make a choice-of-law decision because there are very few cases that are actually connected with more than one state, the laws of which differ. Sedler, *supra* note 243, at 597.

321. Sedler, *supra* note 243, at 595.

should control.³²² But, as can be seen from the statutory review above, the domicile's law may be quite difficult to ascertain.³²³

Many other commentators who encourage the use of interest analysis would applaud "a benign revolution" in marriage cases in choice-of-law situations.³²⁴ These commentators believe that choice-of-law should reject the notion that a marriage valid where celebrated is "universally" valid and should instead determine whether the "status" of marriage exists by considering the particular "incident" of marriage that is in controversy

322. Leflar has argued, however, that "false conflict" is a misnomer. He would consider a "true conflict" to occur whenever any two states' laws could be applied; he uses the term "false conflicts" to refer to false conflicts of governmental interests, not false conflicts of laws. James A. White, Comment, *Stacking the Deck: Wisconsin's Application of Leflar's Choice-Influencing Considerations to Torts Choice-of-Law Cases*, 1985 WIS. L. REV. 401, 407 n.35 (citing Robert A. Leflar, *The Torts Provisions of the Restatement (Second)*, 72 COLUM. L. REV. 267, 274-75 (1972); Robert A. Leflar, *True "False Conflicts" et Alia*, 48 B.U. L. REV. 164, 169 (1968)).

Also consider Professor Brilmayer's example of the "activist" state legislature that passes various consumer protection laws that it believes should be applied to every case because its purpose is to protect all consumers, not just those who are residents of that state. LEA BRILMAYER, *CONFLICT OF LAWS: FOUNDATIONS AND FUTURE DIRECTIONS* § 2.3, at 72 (1991). Brilmayer believes that Currie would respond that the state only has an "interest" if the consumer is a resident of the state. Be that as it may, it would be hard to argue that the state's "policy" is not to protect all consumers. Currie would probably believe that Hawaii was overgrasping by trying to apply its marriage law outside of Hawaii and, as Brilmayer notes, should "mind its own business." *Id.*; see also Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 294-95 (1990). But the *Baehr* court's analysis recognizing unconstitutional sex discrimination and attempting to end it would seem to establish Hawaii's "interest" in whether same-sex marriages occurring in Hawaii are recognized by other states. It could also be possible that Hawaii might consider itself to have an "interest" in attracting same-sex couples to the state for marriage purposes, which would result in obvious tourism benefits. Courts using interest analysis have considered "interests" such as these in other cases. See Susan Frelich Appleton, *Surrogacy Arrangements and the Conflict of Laws*, 1990 WIS. L. REV. 399, 426 n.105; see also Reese, *supra* note 23, at 962 (explaining that some marriage cases would have reached "unfortunate results" if reliance on the state law of the common domicile were required). Reese was considering the cases of *In re May's Estate*, 114 N.E.2d 4 (N.Y. 1953) (upholding the validity of a 32-year Rhode Island marriage by New York domiciliaries who were uncle and niece) and *In re Ommang's Estate*, 235 N.W. 529 (Minn. 1931) (upholding the validity of a Minnesota marriage by Wisconsin domiciliaries who could not marry in Wisconsin because the woman had been recently divorced).

323. Sedler does note that courts' primary concern in choice-of-law situations is achieving a "functionally sound and fair result" in the case before it. Sedler, *supra* note 242, at 603. If this is true, then advocates should focus their arguments on why recognizing same-sex marriage is sound and fair. Sedler may disagree with this characterization of what is sound and fair, instead arguing that what is sound and fair is to apply the forum's law to recognize that state's substantive law and policies. *Id.* at 636.

324. See *supra* note 168 (discussion of Engdahl).

and decide whether providing the incident to the couple in that situation would further the policy behind the statute or rule of law at issue.³²⁵

Regardless of whether it would usually be helpful to consider only the particular issue involved in the case, this methodology seems problematic for our couple's same-sex marriage. Unlike most, our couple's marital status will be questioned each and every time it is asserted. Litigating each incident of marriage, issue by issue, may, in some circumstances, achieve a positive result. As with miscegenous marriages, some policies behind granting incidents may not be offended by recognizing the same-sex marriage.³²⁶ But for most same-sex couples, practicality will require that they try to determine their "marital status" universally, or they will be subject to relitigation every time they assert it. In fact, they may choose to institute a declaratory judgment action immediately upon returning to the domicile to clarify their marital status.³²⁷ Because interest analysts would consider our couple to have

325. Engdahl, *supra* note 168, at 108-10; *see also* Baade, *supra* note 168, at 357. Interest analysts are not the only ones suggesting such a denial of the universality doctrine. Willis Reese, Reporter for the Second Restatement, makes a similar argument. Reese, *supra* note 23, at 952. He believed that, except for the few situations where validity is the only issue in the case, the particular issue involved should be considered in making the choice of law in a manner consistent with other areas of choice-of-law. *Id.* at 965; *see also* Taintor, *supra* note 291, at 368. In fact, Baade comments that the Second Restatement's abandonment of the *lex loci celebrationis* and its adoption of the issue-by-issue approach were major doctrinal milestones. Baade, *supra* note 168, at 379. *But see* Fine, *supra* note 168, at 32-33 (arguing that the Second Restatement primarily considers whether a couple is "married" in a universal sense, rather than considering validity in relation to each particular incident). Comment a to § 283 of the Second Restatement indicates that § 283 is concerned with what law governs a marriage's validity as such, "without regard to any incident involving the marriage." SECOND RESTATEMENT, *supra* note 169, § 284 cmt. a. It also indicates that courts tend to act on the assumption that a decision concerning the validity of the marriage should precede a determination of the incidents of the marriage. *Id.* Section 284 of the Second Restatement considers when to allow an incident of marriage from an out-of-state couple's marriage and concludes that a state will give the same incidents to such a marriage that it gives to a valid locally contracted marriage. SECOND RESTATEMENT, *supra* note 169, § 284 cmt. b. An exception is allowed in subsection (c) which would allow a state to withhold recognition of an incident to an out-of-state marriage if to do so would violate the strong public policy of the state, even though the marriage was valid where celebrated. SECOND RESTATEMENT, *supra* note 169, § 284 cmt. c. Just because the marriage would have been invalid if contracted in the state is not sufficient to warrant denial of the incident; the court should first find a strong public policy requiring denial. *Id.*

326. Engdahl, *supra* note 168, at 105-06; *see also* *Inhabitants of Medway v. Inhabitants of Needham*, 16 Mass. 157 (1819) (marriage valid for purposes of support); *State v. Ross*, 76 N.C. 242 (1877) (marriage valid for fornication purposes).

327. *See* Reese, *supra* note 23, at 953.

raised a false conflict, they would turn to the domicile's law to determine their marriage's validity.

Borchers found that California, Hawaii, Massachusetts, and New Jersey have adopted interest analysis as their choice-of-law approach.³²⁸ Advocates in those states should expect to have the case characterized as a false conflict and the domicile's law used. Hawaii has a validation statute which, under this analysis, obviously does not present a problem.³²⁹ Massachusetts also has an evasion statute, which might lead the court to invalidate the marriage unless it is persuaded that because Massachusetts has not prohibited same-sex marriages, the evasion statute does not apply. New Jersey may follow the precedent of *Wilkins v. Zelichowski*, which refused to recognize an out-of-state marriage by two underage domiciliaries of New Jersey because New Jersey was the only state with an interest in the marriage.³³⁰ The court concluded that the couple had attempted to evade its public policy, as expressed by its marriage statutes, and there was "no just or compelling reason" to let that evasion attempt succeed.³³¹

An argument could be made that California law would support the same-sex marriage given its validation statute and its prohibition of discrimination in employment and public accommodations.³³²

328. Borchers notes that Hawaii and Massachusetts are problematic jurisdictions. Borchers, *supra* note 279, at 373 n.114. Kay found that only California and New Jersey adopted interest analysis' theoretical basis, Kay, *supra* note 284, at 544, while noting that other commentators included additional states in the interest analysis camp. *Id.* at 542-44. Smith included the District of Columbia for tort cases, Louisiana for tort and contract cases, New York for contract cases, and Oregon for tort and contract cases. Smith, *supra* note 281, at 1172-73.

329. HAW. REV. STAT. § 572-3, amended by Act of June 22, 1994, No. 217, § 4, 1994 Haw. Laws. As part of newly passed Act 217, the Hawaii legislature amended § 572-3 to read: "Marriages between a man and a woman legal in the country where contracted shall be held legal in the courts of this State." *Id.* This new language may be relevant if same-sex marriages are not first recognized in Hawaii and if a Hawaii resident goes to another state to be married.

330. 140 A.2d 65, 67-68 (N.J. 1958).

331. *Id.* at 68. It may be possible to distinguish *Wilkins* because the case involved a wife's request for annulment. Reese, *supra* note 23, at 960. Thus, New Jersey had a reason to sever the union which was invalid under New Jersey law, and doing so did not disappoint the expectations of one of the parties. *Id.* at 963. A counter-argument could be made in the case of our couple, who are seeking recognition, not annulment, based on the policy of protecting their expectations, which is a principal value behind universal validation. *Id.* at 960.

332. CAL. LAB. CODE § 1102.1 (West Supp. 1994) prohibits discrimination in employment due to sexual orientation. Although not explicitly protected by the Unruh Civil Rights Act, cases interpreting that Act have extended its protections to gay men and lesbians. See *Rolon v. Kulwitzky*, 200 Cal. Rptr. 217 (Ct. App. 1984) (prohibiting business establishments from discriminating on the basis of sexual orientation); *Hubart v.*

Additionally, California has rejected Currie's view that the forum should apply its own law in all true conflict cases.³³³ If California were to consider this a true conflict, then it would merge its interest analysis approach with a "comparative impairment" analysis,³³⁴ and might be persuaded to consider whether Hawaii's interest would be more impaired than California's by refusing to recognize our couple's marriage.

3. THE SECOND RESTATEMENT

The Restatement (Second) of Conflict of Laws, reported by Professor Willis Reese, was completed in 1971.³³⁵ According to Reese, the Restatement's goal was to state narrow, precise, and definite rules in areas such as status, corporations, and property, where some consensus about which factors to consider existed among courts, while retaining broad, flexible rules in areas such as contracts and torts which would lead courts to sound results.³³⁶ Reese noted that the Second Restatement is "eclectic" in nature, and places an emphasis upon territory, including the state "where a person is domiciled or a resident."³³⁷ Although opposed by numerous scholars,³³⁸ the American Law Institute adopted Reese's theory to resolve conflicts cases. A court may exercise a "mild" presumption in favor of forum law, but that presumption can be overcome

Williams, 184 Cal. Rptr. 161 (Ct. App. 1982) (prohibiting discrimination on the basis of sexual orientation in housing). Additionally, California no longer criminalizes oral or anal sex between consenting adults. See CAL. PENAL CODE §§ 286, 288a (West 1993) (stating sodomy and oral copulation statutes do not apply to consenting adults).

333. Kay, *supra* note 284, at 549.

334. See William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1 (1963). Baxter argued that in true conflict cases the forum should determine which state's policies would be most impaired if its law were not applied. BRILMAYER, *supra* note 322, § 2.1, at 63. The California Supreme Court used this approach in *Offshore Rental Co. v. Continental Oil Co.*, 583 P.2d 721 (Cal. 1978) and *Bernhard v. Harrah's Club*, 546 P.2d 719 (Cal.), *cert. denied*, 429 U.S. 859 (1976). Kay criticized this step away from "true" interest analysis in Herma H. Kay, *The Use of Comparative Impairment to Resolve True Conflicts: An Evaluation of the California Experience*, 68 CAL. L. REV. 577 (1980) and Kay, *supra* note 284, at 552. Missouri, which follows the Second Restatement, also considered "comparative impairment" in *Hicks v. Graves Truck Lines*, 707 S.W.2d 439 (Mo. Ct. App. 1986); see Appleton, *supra* note 322, at 435-36.

335. SECOND RESTATEMENT, *supra* note 169.

336. Kay, *supra* note 284, at 552-53 (citing Willis L.M. Reese, *Conflicts of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROBS. 679 (1963)).

337. Willis L.M. Reese, *The Second Restatement of Conflict of Laws Revised*, 34 MERCER L. REV. 501, 508 (1983).

338. Those included Currie, Albert Ehrenzweig and others. Borchers, *supra* note 279, at 362.

by applying multiple factors.³³⁹ Section 6 of the Second Restatement requires a court to apply the law of the state with the “most significant relationship” to the parties and issue involved in the case, upon considering the general principles collected in that section.³⁴⁰ Thus, state policies, considerations central to governmental interest analysis, and other policies were joined with black letter choice-of-law rules.³⁴¹

When considering the validity of out-of-state marriages, the Second Restatement directs courts to consider the law of the state with the “most significant relationship to the spouses and the marriage” and to the issue involved in the particular case.³⁴² What state has the “most significant relationship” is determined by consulting the factors in section 6.³⁴³ Having determined which state has this “most significant relationship,” the court should, using section 283(2), then consider the marriage to be valid if it was valid where celebrated “unless it violates the strong public policy” of the state with the most significant relationship to the marriage.³⁴⁴ Reese notes that the primary values involved are protection of the parties’ expectations in intending to enter into a valid marriage, and recognition of the general policy favoring validation of marriages.³⁴⁵ The Second Restatement, although clearly tending toward validation as a general rule, also attempts to protect “the interest of a State in not having its domiciliaries contract marriages of which it disapproves”³⁴⁶ and would defer to the domiciliary state, as the state with the most significant relationship to the couple, to consider whether a given marriage violates its public policy.³⁴⁷ Again, this analysis

339. *Id.* Those factors are: (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue; (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability and uniformity of result; and (g) ease in the determination and application of the law to be applied. SECOND RESTATEMENT, *supra* note 169, § 6.

340. Smith, *supra* note 282, at 1044.

341. Kay, *supra* note 283, at 555. Kay notes that Reese made clear that section 6 is not a rule, but rather an approach. It does not function as a rule by providing courts with a formula that will lead to a conclusion but instead lists relevant factors to consider. *Id.* (citing Willis L.M. Reese, *Choice of Law: Rules or Approach*, 57 CORNELL L. REV. 315 (1972)).

342. SECOND RESTATEMENT, *supra* note 169, § 283(1).

343. *Id.* § 6.

344. *Id.* § 283(2).

345. Reese, *supra* note 23, at 967.

346. *Id.* at 965.

347. Baade rejects § 283(2) as a “tool for the rational solution of conflicts problems” because it does not properly inquire into underlying governmental interests. Baade, *supra* note 168, at 358-61.

potentially leaves the court significant discretion to determine whether such a strong public policy exists and, if so, what that policy is.

Borchers indicates that Alaska, Arizona, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Utah and Washington all follow the Second Restatement.³⁴⁸ Of these states, Arizona, Connecticut, Colorado, the District of Columbia, Idaho, Illinois, Louisiana, Montana, Nebraska, North Dakota, and Utah have validation statutes, which could be used to argue that public policy supports recognition of our couple's marriage.³⁴⁹ This argument would probably not work in Utah which also prohibits same-sex marriage. Arizona, Delaware, the District of Columbia, Illinois, Indiana, Maine, and Mississippi have evasion statutes, but because only Indiana prohibits same-sex marriage, precedent can be used in the other states to argue that the evasion statute does not apply.³⁵⁰ Texas also prohibits same-sex marriage, and its additional prohibition of sodomy may lead its courts to conclude that a same-sex marriage would offend its public policy.³⁵¹ Much room exists in the Second Restatement states to advocate for recognition of our couple's same-sex marriage.

4. LEFLAR'S CHOICE-INFLUENCING CONSIDERATIONS

Finally, Robert Leflar's "choice-influencing considerations" theory attempts to focus on those factors that influence courts in their choice-of-law analysis.³⁵² Leflar's considerations include: (1) predictability of result, (2) maintenance of interstate and international order, (3) simplification of the judicial task, (4) advancement of the forum's

348. Borchers, *supra* note 279, at 373 & n.113. Borchers considers the District of Columbia, Louisiana, Pennsylvania and Oregon to be problematic jurisdictions, because these states combine interest analysis with the Second Restatement. North Dakota uses a center of gravity approach which is quite similar to the Second Restatement. *Id.* Kay and Smith disagree about several of these states. Kay, *supra* note 284, at 591-92; Smith, *supra* note 282, at 1172-74.

349. *See supra* part II.A.

350. *See supra* part II.B..

351. *See supra* note 216. The lower courts of Texas, however, have declared its sodomy statute to be unconstitutional. Gross, *supra* note 17, at B12. Additional Second Restatement states with sodomy statutes include Arizona, Florida, Idaho, Louisiana, Mississippi, Missouri, Oklahoma, and Utah. *Id.* Missouri and Texas are the only Second Restatement states which prohibit same-sex sodomy, *id.*, so it would be possible to argue in the other states that public policy, as expressed in the sodomy statute, does not indicate a clear condemnation of a gay or lesbian lifestyle.

352. Smith, *supra* note 282, at 1049.

governmental interests, and (5) application of the better rule of law.³⁵³ Excepting the better rule of law consideration, Leflar's factors resemble the factors listed in section 6 of the Second Restatement.³⁵⁴ The theory is extremely flexible and allows courts to apply a law that the other theories would not permit but which would be appropriate in a particular case.³⁵⁵ The better rule of law consideration—one that finds no parallel in section 6 of the Second Restatement—is one that has proven most controversial, due to fears that it would lead courts to give inadequate deference to the forum state's legislation, or that it would lead to an uncritical application of forum law.³⁵⁶ Leflar accepts the first objection but rejects the second, believing that judges are "perfectly capable" of realizing when local forum law is not better, and should have the freedom to ignore the disfavored local law that would otherwise control in domestic cases.³⁵⁷ Thus, if a court were willing to recognize the progressive nature of Hawaii's decision to permit same-sex marriages, it could use Leflar's theory, and the better rule of law, to validate our couple's marriage.³⁵⁸

Borchers lists Arkansas, Minnesota, New Hampshire, Rhode Island, and Wisconsin as following Leflar's approach in choice-of-law cases. Additionally, Arkansas and Minnesota have validation statutes, which in combination with the better rule of law argument, could lead those courts to validate our couple's marriage.³⁵⁹ Wisconsin has an evasion statute but since it does not also prohibit same-sex marriage, and in fact has numerous statutes expressly prohibiting differential treatment of gay men and lesbians, the Wisconsin evasion statute may not prohibit our couple's same-sex marriage.³⁶⁰

5. CONSIDERING SAME-SEX MARRIAGE UNDER THESE APPROACHES

Regardless of the approach used by any particular state, advocates will find significant general support for validation of our couple's same-sex marriage as the starting point under each approach. Commentators, ranging from Leflar, MacDougal and Felix,³⁶¹ to Richman and

353. *Id.*

354. Kay, *supra* note 284, at 563.

355. Smith, *supra* note 282, at 1049.

356. Kay, *supra* note 284, at 564.

357. *Id.*

358. *See infra* part III. Because part III.A. specifically focuses on Leflar's theory, this part is abbreviated in comparison to the others above.

359. *See supra* part II.A.

360. *See supra* part II.B.

361. *See* LEFLAR ET AL., *supra* note 180, §§ 219-221.

Reynolds,³⁶² and Scoles and Hay,³⁶³ tend to treat marriage as a relatively settled area of choice-of-law. None of them, however, have anticipated what will happen when a domicile that does not recognize same-sex marriage is faced with a challenge to a resident couple's same-sex marriage celebrated in a state which recognizes its validity.

Courts have an overwhelming tendency to validate marriages, using either the First Restatement's *lex celebrationis*, which recognizes marriage as a status question and looks to the state creating the status to determine its validity, or using modern theories which protect parties' expectations, provide stability, and avoid the "hideous" problems that result when one's marital status varies from state to state.³⁶⁴ Considerations such as providing predictability for the parties involved and protecting interstate order would lead to validation, whether considered under Leflar's theory³⁶⁵ or sections 6(a) and (f) of the Second Restatement. Following the approach often taken in contracts cases, states will validate the marriage to protect the parties' expectations, unless doing so would offend a state's strongly held public policy.³⁶⁶

This exception for a state's public policy recognizes the role of Currie's governmental interest analysis and section 6(b) of the Second Restatement in protecting the purpose behind a state's marriage laws. It also fits within Leflar's emphasis on the forum state's interest in applying its law when its domiciliaries leave the state to marry in another state which permits a marriage not allowed to be celebrated within the domicile.³⁶⁷ All of these modern theories leave it to the court to consider the strength of the domicile's policies underlying particular marital regulations, which will vary from state to state, although based on similar regulations and prohibitions.³⁶⁸ Thus, to determine whether our couple is validly married, most courts will find that it is "(a) the whole law of the domicile, including its conflicts rules, that we should look to in the first instance; and (b) its conflicts rules will ordinarily refer the question to the law of the place of performance, which will usually sustain the marriage; but (c) in some cases its reference will be to its own internal marriage laws."³⁶⁹

362. See RICHMAN ET AL., *supra* note 176, § 116.

363. See SCOLES & HAY, *supra* note 250, §§ 13.1-13.18.

364. RICHMAN ET AL., *supra* note 176, § 116, at 362.

365. LEFLAR ET AL., *supra* note 180, § 220, at 605.

366. RICHMAN ET AL., *supra* note 176, § 116, at 363.

367. LEFLAR ET AL., *supra* note 180, § 220, at 606.

368. *Id.*

369. *Id.*; see also *Williams v. North Carolina*, 317 U.S. 287, 298 (1942) ("Each state as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders.").

But what result? The tendency to validate the marriage, which many commentators recognize as extremely strong,³⁷⁰ will be countered by the overwhelming homophobia existing in the judiciary today.³⁷¹ Courts will be able to refuse recognition of our couple's marriage by choosing to group it with cases of incest and polygamy which comprise the most frequent examples of invalidity.³⁷² Perhaps a more exact match would be miscegenous marriages, which are conceptually similar to same-sex marriages.³⁷³ By studying the history of the change from prohibiting miscegenous marriages to finding them constitutionally protected, we discover a suitable analogy supporting validation of our couple's same-sex marriage in their domicile.

III. SAME-SEX MARRIAGE AND THE BETTER RULE OF LAW

Having considered the statutory guidance provided by the legislature and starting from the premise that a court will use the choice-of-law approach currently in effect in that state, it may seem unrealistic to end this Article with a section pleading for courts to consider the better rule of law when deciding whether to recognize our couple's same-sex marriage. While this plea may be considered in Arkansas, Minnesota, New Hampshire, Rhode Island, and Wisconsin, that is because those states have already adopted Leflar's choice-influencing considerations as their approach for resolving choice-of-law problems.³⁷⁴ While it is unrealistic to expect the other states to switch approaches, it could be beneficial for advocates to argue that, when considering the policy considerations or governmental interests behind various statutes or public policies, courts should conclude that recognizing same-sex marriage is the better public policy. This result will advance the state's interest in ending

370. LEFLAR ET AL., *supra* note 180, at 605; RICHMAN ET AL., *supra* note 176, § 116, at 362; COLES & HAY, *supra* note 250, § 13.5, at 436.

371. See Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979).

372. COLES & HAY, *supra* note 250, § 13.5, at 436.

373. See generally Ehrenzweig, *supra* note 170.

374. In his summary chart, Smith notes that Alaska uses Leflar's theory but the text describing Alaska's choice-of-law approach is not consistent with that categorization. Smith, *supra* note 282, at 1051-52, 1172. He also notes that Hawaii also uses Leflar, but if Hawaii becomes the only state to allow same-sex marriage, it will not face the choice-of-law question. Additionally, since Hawaii's law would coincide with the foreign law, it would presumably validate a foreign same-sex marriage. Reppy argues that California uses the better law, by its use of comparative impairment, as a break choice for true conflicts. Reppy, *supra* note 283, at 673-74, 706. Thus, the better law approach might persuade California courts as well as the others noted.

discrimination just as recognizing miscegenous marriages advanced that same interest.

In addition to the five states which will consider the better rule of law under their current approach, fifteen states use the First Restatement, which points toward validation unless contrary to a strong public policy. This traditionally has been a very narrow exception based on a clear statutory expression of that policy. Another twenty-four states use the Second Restatement, which first points to statutory directives (which should guide a court toward validation), and then urges the domicile state (the one with the most significant relationship to the marriage under section 6) to recognize the marriage as valid under section 283(2) unless it violates its *strong* public policy. Except for states which have expressly forbidden same-sex marriage, courts should not find a strong public policy from the absence of a statute permitting same-sex marriage. "Similarity of legislation has indeed this importance; its presence shows beyond question that the foreign statute does not offend the local policy. But its absence does not prove the contrary."³⁷⁵ The remaining seven states which use either interest analysis or some other approach could be persuaded that governmental interests would be advanced by prohibiting discrimination.

Borchers notes that courts often consider the better rule of law (the one leading to the result that they favor) despite their claimed adoption of a particular theoretical approach.

If, as I suggest, the new theories usually amount to little more than long-winded excuses to do what courts wanted to do in the first place, one may ask whether the current state of affairs is satisfactory. It seems to me that counsel, courts and parties would be better off if judges would admit candidly—as do courts in states that follow Leflar's approach—that substantive preferences control results in multistate cases.³⁷⁶

Because all the approaches do leave the judges in a position to reach the result that they believe is best, the parties litigating these cases need to explain and educate the judges as to why recognizing same-sex marriage is the better result. "If, as I suggest, the real issue in conflicts cases is the relative merits of the rules, counsel and lower courts are likely to be of much more help to higher courts if they are pointed in the right direction."³⁷⁷

375. Loucks v. Standard Oil Co., 120 N.E. 198, 201 (N.Y. 1918).

376. Borchers, *supra* note 279, at 382.

377. *Id.* at 383.

Pointing these courts in the right direction means explaining why Hawaii's rule recognizing same-sex marriage is better:

[N]one of the modern theories acts as a substantial check on judicial discretion. In practice, courts appear to reach their preferred substantive results, and—except for Leflar's theory that allows courts to admit their substantive preferences—the new theories are little more than veils for the real reasoning of courts. As a consequence, choice of law in the United States is at the crossroads. Either we can admit that results are the primary determinant in multistate torts [and other] cases, or we can retreat to a regime resembling the First Restatement. In my view, the preferable road is for us to get on with the business of admitting that results are important.³⁷⁸

This Part, recognizing that results are important, argues for applying the various choice-of-law theories in a better manner to resolve these disputes. In these cases, the better result would be to recognize the same-sex marriage. Such a result is better because it eliminates age-old discrimination based on prejudice and misunderstanding, and because it eliminates overzealous state interference with and condemnation of a most personal and intimate relationship. Thus, same-sex marriage should not violate forum public policy.

The first sub-part explores the numerous choice-of-law theories which include a factor considering the better rule of law when determining which law to apply in conflicts cases. Courts considering whether to validate a same-sex marriage should recognize the step taken by the *Baehr* court toward ending age-old discrimination against same-sex marriages, in much the same way that the Court led the way toward ending discrimination against interracial couples in *Loving v. Virginia*, and find that the better result would be to validate the marriage.

The second sub-part considers, as analogous, the legal revolution which rejected anti-miscegenation statutes on the basis of irrational prejudice. The need for this revolution was seen in the numerous choice-of-law cases that had to determine whether states should recognize interracial marriages entered into by couples fleeing prejudicial laws.

The third sub-part concludes that the choice-of-law cases which will arise once any state recognizes same-sex marriage will again provide an opportunity for courts to reject similar antiquated restrictions. Some choice-of-law theories exist that offer the chance to recognize the progressive tendencies driving the Hawaii court's rejection of

378. *Id.* at 384.

discrimination against same-sex couples. Courts using theories which recognize the better rule of law as an important factor in making difficult policy decisions may be led to accept same-sex marriages, hopefully without having to wait for Supreme Court insistence. That progression will lead to the gradual acceptance of same-sex marriage, even if not statutorily protected in many states for years to come. The choice-of-law question, resolved in a better manner, can lead this revolution.

A. Recognizing the Better Rule of Law

Analyzing court decisions using the various modern theories (chiefly Currie's interest analysis, the Second Restatement, and Leflar's choice-influencing considerations), one discovers that the results are "largely indistinguishable."³⁷⁹ Given this lack of distinction in results, this sub-part argues that when courts are faced with the case of a resident couple's same-sex marriage, those courts should follow the better rule of law and validate the marriage, rather than manipulate public policy to reject it.³⁸⁰

Numerous choice-of-law theories consider the better rule of law when determining which law to use. These theories encourage courts to throw off the provincialism of preferring the *lex fori*³⁸¹ and instead recognize

379. *Id.* at 383-84; RICHMAN ET AL., *supra* note 176, § 82, at 242. Borchers does find that results under the First Restatement differ from those reached under modern theories. Borchers, *supra* note 279, at 383. But courts following the First Restatement do use escape devices that could lead to results that would be the same as under the modern theories. RICHMAN ET AL., *supra* note 176, § 82, at 242 n.8. This is particularly true in out-of-state marriage cases given § 132's express "escape device" allowing consideration of state public policy.

380. As noted above, courts that do not currently include "the better rule of law" in their choice-of-law considerations should be urged to use the same type of analysis and find that validation is "the better public policy." Numerous expressions of state public policy, including marriage validation statutes, evasion statutes that do not include same-sex marriages within their provisions, and anti-discrimination statutes or case law, would support recognizing same-sex marriage.

381. Theories which tend to promote use of the *lex fori* include Brainerd Currie's governmental-interest theory and Albert A. Ehrenzweig's *lex-fori* approach. SCOLES & HAY, *supra* note 250, § 2.6, at 15; see Brainerd Currie, *Notes on Methods and Objectives in the Conflicts of Laws*, 1959 DUKE L.J. 171, 178. Currie argues that "[n]ormally, even in cases involving foreign elements, the court should be expected as a matter of course, to apply the rule of decision found in the law of the forum." *Id.* In circumstances of "true" conflicts (when the laws differ and the policies underlying each call for its application), the forum will apply its own law. SCOLES & HAY, *supra* note 250, §2.6, at 17; see Albert A. Ehrenzweig, *The Lex-Fori—Basic Rule in the Conflict of Laws*, 58 MICH. L. REV. 637 (1960) (proposing that the substantive rule of the forum should apply as "residuary" law when the foreign rule does not apply under constitutional "superlaw" or the forum's choice of law rules, and that an interpretation of the forum's law does not

progressive opportunities to avoid discriminatory, restrictive laws. When a court is faced with choosing the law of another forum, which is more progressive and signals a trend toward ending discrimination, or choosing its own law, which tends toward prejudice and condemnation, it should forego its reflex response to choose forum law. Instead, the court should recognize the opportunity to develop progressive jurisprudence within its state via the conflicts cases.

Perhaps the best known of the theories which would support such an argument is that developed by Robert Leflar. Leflar tries to identify goals and objectives that would lead courts to formulate new rules,³⁸² and focuses on choice-influencing considerations, including "the application of the better rule of law."³⁸³ Leflar indicates that "justice in the individual case" is the ultimate result to be achieved in choice-of-law cases.³⁸⁴ He believes that the better law would be the one that upholds a "fair transaction entered into by the parties in good faith," including a marriage.³⁸⁵ He refers to Albert Ehrenzweig's "basic rule of validity," which would validate a marriage if valid where celebrated, where one of the parties was domiciled at the time of the marriage, or where the parties were domiciled at the time of the suit.³⁸⁶

Leflar does recognize that looking to the better rule might lead judges to the forum's own law, especially if foreign law might "interfere with fundamental local policies."³⁸⁷

It is evident that the search for the better rule of law may lead a court almost automatically to its own lawbooks. The idea that the forum's own law is the best in the world, especially better than fancy new sets of laws based on such nontraditional approaches as research and policy analysis, is unfortunately but understandably still current among some members of our high courts.³⁸⁸

lead to displacement of the forum law); SCOLES & HAY, *supra* note 250, §2.7, at 20-21. Additionally, Kentucky and Michigan have adopted the *lex fori* as their approach to resolving choice-of-law questions in torts cases. *See supra* note 283.

382. SCOLES & HAY, *supra* note 250, § 2.10, at 27.

383. Leflar, *supra* note 175, at 295-304. Leflar's other considerations are predictability of results, maintenance of interstate and international order, simplification of the judicial task, and advancement of the forum's governmental interests. *Id.* at 282.

384. *Id.* at 296.

385. *Id.* at 297.

386. *Id.* (citing ALBERT A. EHRENZWEIG, CONFLICT OF LAWS § 139, at 378 (1962)). Ehrenzweig does indicate the marriage could be invalid if offensive to an overriding policy of the forum. *Id.*; *see also* Ehrenzweig, *supra* note 170.

387. Leflar, *supra* note 175, at 297.

388. *Id.* at 298.

He does not believe, however, that this will always be true³⁸⁹ and finds an automatic preference of forum law to be unjustifiable.³⁹⁰ Leflar believes that judges can appreciate that their forum law is anachronistic, behind the times, or a "drag on the coat tails of civilization."³⁹¹ He refers to Sunday laws, fellow-servant rules, and married women's incapacity to contract as illustrations.³⁹² Archaic laws should yield to more progressive ones, thereby serving one of choice-of-laws' functions as "growing pains for the law of a state, at all events in a federation such as our own."³⁹³

When a court finds itself faced with a choice between such anachronistic laws still hanging on in one state, and realistic practical modern rules in another state, with both states having substantial connection with the relevant facts, it would be surprising if the court's choice did not incline toward the superior law. A court sufficiently aware of the relation between law and societal needs to recognize superiority of one rule over another will seldom be restrained in its choice by the fact that the outmoded rule happens still to prevail in its own state. One way or another it will normally choose the law that makes good sense when applied to the facts.³⁹⁴

Leflar believes that judges are "perfectly capable" of preferring rules of law that "make good socio-economic sense for the time when the court speaks."³⁹⁵ Judges concerned with "justice in the individual case" and "protection of justified expectations of the parties" should prefer the better rule of law.³⁹⁶ It seems likely that judges considering these factors would recognize our couple's marriage in Hawaii.

Among the other theories that could support this type of argument are those of Arthur T. von Mehren and Donald T. Trautman, which focus on a principled weighing of conflicting policies.³⁹⁷ One principle to be

389. *Id.*

390. *Id.* at 299.

391. *Id.*

392. *Id.* at 299 n.113.

393. *Id.* (citing Paul A. Freund, *Chief Justice Stone and the Conflict of Laws*, 59 HARV. L. REV. 1210, 1216 (1946)).

394. *Id.* at 300.

395. Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1588 (1966).

396. *Id.*

397. SCOLES & HAY, *supra* note 250, § 2.8, at 24. Von Mehren and Trautman explain their theory in ARTHUR T. VON MEHREN & DONALD T. TRAUTMAN, *THE LAW OF MULTISTATE PROBLEMS* 342-75 (1965), and von Mehren's *Recent Trends in Choice-of-*

weighed is "the choice of the law reflecting an 'emerging' policy over one embodying a 'regressive' policy."³⁹⁸ In determining the strength of the state's conviction behind its policy, one should consider whether the policy is regressing or emerging.³⁹⁹ Under their considerations, a policy which does not reflect an emerging trend should be limited in application and seen as the weaker policy.⁴⁰⁰ Russel J. Weintraub also advocates a weighing approach and includes criteria such as (1) advancing a clearly discernible trend in the law and (2) avoiding anachronistic or aberrational rules.⁴⁰¹ The criterion considering anachronism and aberration favors a rule that is "more representative of current developments."⁴⁰² His approach tends to focus the court's attention away from forum law.⁴⁰³

David Cavers would appraise the results "from the standpoint of justice between the litigating individuals or . . . broader considerations of social policy."⁴⁰⁴ He believes that "principles of preference" should be developed to direct courts in resolving choice-of-law cases.⁴⁰⁵ Cavers is reluctant to accept the better law criterion as one of his principles of preference because he is concerned that the choice of which law is better might not always be principled.⁴⁰⁶ But he does recognize that the better rule of law is influential as an "inevitable psychological reaction in marginal cases."⁴⁰⁷ Friedrich K. Juenger adopts use of the better law

Law Methodology, 60 CORNELL L. REV. 927 (1975).

398. COLES & HAY, *supra* note 250, § 2.8, at 24.

399. VON MEHREN & TRAUTMAN, *supra* note 397, at 377. In examining the distinction between emerging and regressing trends, the court can consider the policy trends of the states on the whole. *Id.* at 394.

400. *Id.*

401. RUSSEL J. WEINTRAUB, COMMENTARY ON THE CONFLICTS OF LAWS § 6.4, at 284, § 6.6, at 287-88 (3d ed. 1986); *see also* COLES & HAY, *supra* note 249, § 2.8, at 24.

402. WEINTRAUB, *supra* note 401, § 6.6, at 289.

403. COLES & HAY, *supra* note 250, §2.8, at 25. Weintraub would only use the "better law" criterion when the conflict is not spurious and when the better law is chosen by objective standards. WEINTRAUB, *supra* note 401, § 6.27, at 343 (citing Friedrich Juenger, *Choice of Law in Interstate Torts*, 118 U. PA. L. REV. 202, 235 (1969)).

404. David Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 192-93 (1933).

405. David Cavers, *The Value of Principled Preferences*, 49 TEX. L. REV. 211, 212 (1971).

406. *Id.* at 215.

407. *Id.* Additionally, Cavers would not resort to any of these principles unless he found that the conflict was neither false nor avoidable. To make this decision, courts should examine the laws in conflict, their purposes, and the circumstances of the case. DAVID F. CAVERS, *THE CHOICE-OF-LAW PROCESS* 137 (1965). Further, Cavers' principles might lead a court to consider whether the domicile had enacted its restrictive laws to protect its domiciliaries, and whether the marriage in Hawaii or another state was

as his principal guiding factor in resolving conflicts cases.⁴⁰⁸ Although first questioning the propriety of using conflicts law for result selectivity, Juenger concludes that if courts are free to resolve choice-of-law cases in a result-selective manner, the better rule of law "must be considered seriously."⁴⁰⁹ Juenger explains this problem succinctly when discussing marriage and divorce restrictions, and private international law.

These examples, drawn from several countries, should suffice to indicate the role of teleology in domestic relations conflict of laws. When the realization that overly strict requirements for marriage and divorce are bound to increase human misery without a corresponding benefit began to spread, nations [and states] reformed their laws accordingly, but not all of them at the same time. How did the law of conflicts respond to the fact that, for religious and political reasons, some lagged behind?⁴¹⁰

He goes on to note: "Reform may take time. . . . Continued rebuffs from abroad do, however, clarify that all is not well in domestic law and they put the onus of reform squarely where it belongs."⁴¹¹

All of these theories recognize that the better law may be considered residually, at least, when other criteria do not lead to a clear resolution of the conflict.⁴¹² This use of the better law would tend to temper "the normal forum preference with consideration of developing trends of the law with respect to the particular area in issue when there is no express legislative direction or prior case law."⁴¹³

The problem is that, even when used residually, a judge considering the better law will often turn to forum law.⁴¹⁴ "The judge applying foreign law is a dilettante, a beginner; he [or she] is timid. The judge

entered into manipulatively to evade the domicile's law. If it answered these questions in the affirmative, the court would probably apply the domicile's law. Appleton, *supra* note 322, at 428.

408. SCOLES & HAY, *supra* note 250, § 2.3, at 11 n.14; *see also* Friedrich Juenger, *Leflar's Contributions to American Conflicts Law*, 31 S.C. L. REV. 413 (1980); Friedrich Juenger, *Mass Disasters and the Conflict of Laws*, 1989 U. ILL. L. REV. 105, 126.

409. Juenger, *supra* note 403, at 233.

410. FRIEDRICH JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 228 (1993).

411. *Id.* at 231.

412. SCOLES & HAY, *supra* note 250, § 2.11, at 30.

413. *Id.*

414. *Id.*

applying the *lex fori* is a learned expert; he [or she] is a sovereign, superior."⁴¹⁵

Most of the cases which have adopted the "better law" approach have found the forum's law to be the better law.⁴¹⁶ But Borchers' recent exhaustive study of conflicts cases concluded that, although Leflar's approach should favor forum law, his data do not support that conclusion.⁴¹⁷ Courts using the "better law" approach have chosen to apply foreign law when they considered it to be better than forum law.

For example, in *Schlemmer v. Fireman's Fund Insurance Co.*,⁴¹⁸ the Arkansas Supreme Court recognized that the Arkansas guest statute in effect at the time of the accident was "archaic and unfair"⁴¹⁹ and instead applied Tennessee law. It stated: "Courts sometimes realize that certain of their own laws, especially statutory ones, are archaic, anachronistic, out of keeping with the times. . . . Some states have recently repealed [guest statutes], though it is not as easy to repeal an archaic statute as it would be to prevent its current enactment if it were not already law."⁴²⁰

Similarly, in *Hunker v. Royal Indemnity Co.*,⁴²¹ the Wisconsin Supreme Court held that Ohio's liability statute which barred third-party suits against co-employees was "better" than Wisconsin's law which permitted such suits. The court reiterated its position that it would, "without hesitation, if other choice-influencing considerations were in equilibrium, select the rule of another jurisdiction if analysis convinced us that it indeed constituted the better law."⁴²² It then determined that the Ohio law banning suits was not a "vestige of 'a creed outworn'" and noted that although many states permitted third-party suits, the trend in recent years was toward barring the suits.⁴²³ Because it could not conclude that Wisconsin's rule "unmistakably represents the better law," it applied Ohio's law and barred the suit.⁴²⁴ In another torts case, the Wisconsin Court of Appeals also had "no difficulty in applying the law" of Illinois because it recognized that Wisconsin was "in the minority on

415. *Id.* § 2.11, at 29-30.

416. *Id.* § 2.11, at 31.

417. Borchers, *supra* note 279, at 378.

418. 730 S.W.2d 217 (Ark. 1987).

419. *Id.* at 219.

420. *Id.*

421. 57 Wis. 2d 588, 204 N.W.2d 897 (1973).

422. *Id.* at 907.

423. *Id.*

424. *Id.* at 908.

the issue of allowing economic damage in a tort case, [which] weighs in favor of the application of Illinois law."⁴²⁵

The United States District Court for Rhode Island, in *Gravina v. Brunswick Corp.*,⁴²⁶ applied Illinois law in a right of privacy case because the court found it to be "better" than Rhode Island law, which denied a cause of action. The court stated:

The final question to be considered is which of the conflicting rules of law is the better one. For the answer the court only has to note the steady trend toward recognition of the right of privacy by jurisdictions across the country ever since the elements of the right were first articulated by Warren and Brandeis in 1890 The court feels that the right of privacy is destined for universal recognition and it applauds this destiny as founded in the most basic concepts of human rights. For the purposes of this conflict of laws analysis, the Illinois law—recognition at common law of the tort of invasion of privacy—must be deemed the better rule of law.⁴²⁷

Additionally, the Supreme Court of Minnesota followed the better rule of law to find that Iowa's survival statute was preferable to Minnesota's in *Bigelow v. Halloran*.⁴²⁸ The court recognized that Minnesota's statute was "a remnant of the early common law" and that "the modern trend" was that tort causes of action should survive death.⁴²⁹ Because the state's interest was to compensate its tort victims fully, Minnesota's statutory bar against intentional tort claims after one party's death undermined that interest. The court reasoned that it should "prefer rules of law which make good socio-economic sense for the time when the court speaks, whether they be its own or another state's rules."⁴³⁰

425. *Edward E. Gillen Co. v. Valdars Stone and Marble, Inc.*, No. 90-1157, 1990 WL 262093, at *3 (Wis. Ct. App. Feb. 12, 1991) (This is an unpublished opinion, which has no precedential value. WIS. STAT. ANN. § 809.23(3) (West 1993). It is mentioned here simply as another example of courts finding foreign law to be better than forum law.).

426. 338 F. Supp. 1, 7 (D.R.I. 1972).

427. *Id.* at 6 (citation omitted).

428. 313 N.W.2d 10, 13 (Minn. 1981).

429. *Id.* at 12.

430. *Id.* at 13 (citing Leflar, *supra* note 395, at 1588). In fact, one commentator has noted that Minnesota's governmental interest, Leflar's fourth consideration, would always be to apply the "just" law, which would also be the "better" law. Reppy, *supra* note 283, at 694.

As these cases establish, courts are perfectly able to select foreign law as the “better rule” in appropriate situations.⁴³¹ Using the language of the courts mentioned above, advocates could argue that state laws which do not recognize same-sex marriage are “archaic and unfair.” Same-sex couples are the only adults, other than those who violate some additional statutory proscription, who are not freely permitted to marry the partner of their choice. Restricting marriage to opposite-sex couples can also be seen as merely continuing “the vestige of a creed outworn” or “a remnant of early common law.” Social and legal trends, as seen from the passage of consenting adults statutes, repeal of sodomy statutes, and provision of domestic partner benefits, are toward recognizing the validity of same-sex relationships. Allowing same-sex couples to make legal commitments to one another and to protect and preserve their intimate relationships by obtaining recognition and benefits from society and the state “make[s] good socio-economic sense” in the 1990s.

Although commentators fear that advocating the better law approach might result in its overuse, even when not needed because other considerations would resolve the question,⁴³² this approach would be particularly useful in difficult cases, such as those involving same-sex marriages. In same-sex marriage choice-of-law cases, a judge is faced with a case of first impression, which will have a significant impact on all parties as well as on countless individuals outside the litigation. State policy considerations lead in countless directions, from those validating marriage and protecting individuals’ expectations to those condemning lesbian or gay lifestyles, and from those validating marriage when conflicting laws exist to those urging protection of local public policy. If the better law approach were taken, strong arguments would exist for applying the law leading to recognition of same-sex marriage.

As Chief Justice Kenison stated in *Clark v. Clark*:⁴³³ “If it is our own law that is obsolete or senseless (and it could be) we will try to apply the other state’s law.”⁴³⁴ But J.H.C. Morris responded:

431. For additional cases that applied foreign law, see *Williams v. Carr*, 565 S.W.2d 400 (Ark. 1978); *McGinity v. Ballentine Produce, Inc.*, 408 S.W.2d 891 (Ark. 1966); *Hoffman v. Henderson*, 355 N.W.2d 322 (Minn. Ct. App. 1984); *Schneider v. Schneider*, 260 A.2d 97 (N.H. 1969); *Busby v. Perini Corp.*, 290 A.2d 210 (R.I. 1972); *Lichter v. Fritsch*, 77 Wis. 2d 178, 252 N.W.2d 360 (1977); *Peterson v. Warren*, 31 Wis. 2d 547, 143 N.W.2d 560 (1966), *overruled on other grounds*, *Allen v. Ross*, 38 Wis. 2d 209, 215, 156 N.W.2d 434, 438 (1968); *Burns v. Geres*, 105 Wis. 2d 764, 409 N.W.2d 428 (Ct. App. 1987); *Pitts v. Mut. Serv. Casualty Ins. Co.*, 140 Wis. 2d 197, 318 N.W.2d 23 (Ct. App. 1981).

432. SCOLES & HAY, *supra* note 250, § 2.11, at 31.

433. 222 A.2d 205 (N.H. 1966).

434. *Id.* at 209.

“And it could be”: there’s the rub. Could it be? Is there any case in which a court has said “Our law on this point is a drag on the coat-tails of civilization; if our legislature won’t repeal it, we will give it the narrowest possible scope; whenever it conflicts with the law of another state concerned (however remotely), we will apply the other state’s law.”? I doubt it.⁴³⁵

However, there is reason to believe, especially given the cases above, that if the argument were presented by proponents urging validation of same-sex marriage, courts might be inclined to recognize Hawaii’s law and validate the marriage, because that law is more enlightened and progressive. Consider the case of *Perez v. Lippold*⁴³⁶ and the evolution the California Supreme Court led in striking down California’s miscegenation statute. That evolution concluded nineteen years later with the United States Supreme Court’s decision in *Loving v. Virginia* finding all miscegenation statutes to be unconstitutional. Likewise, *Baehr* may lead to a similar evolution. Despite its defects,⁴³⁷ *Baehr* is clearly a more reasoned and analytically sound decision than *Jones*, *Singer*, *Baker*, and other cases which preceded it.⁴³⁸ In *Baehr*, the court recognized the numerous disabilities imposed on same-sex couples who are prohibited from marrying, and refused to allow tautological, definitional excuses to prevent it from recognizing the clear discrimination that exists in precluding same-sex couples from marrying. By granting significant leeway in making the choice-of-law decision necessary when same-sex couples, married in Hawaii, return to their domiciles, the “better law” approach provides a theoretical basis for guiding courts to enlightened decisions.

B. Choice-of-Law Cases Based on Miscegenation Restrictions Lead to Overruling Anti-Miscegenation Statutes

The miscegenation cases are similar in many respects to the case of our couple. Those cases usually involved domiciliaries who left their home state to marry abroad and returned to live in that state.⁴³⁹ Some

435. J.H.C. Morris, *Law and Reason Triumphant or How Not to Review a Restatement*, 21 AM. J. COMP. L. 322, 324 (1973). But see the cases cited *supra* notes 418-30 for decisions in which courts were able to determine that a foreign state’s law was “better” and should be followed.

436. 198 P.2d 17 (Cal. 1948); see *infra* text accompanying note 471.

437. See *supra* part I.B. (discussing the *Baehr* court’s refusal to extend the fundamental right to marry to same-sex couples).

438. See *supra* notes 74-76.

439. Taintor, *supra* note 294, at 628.

state statutes included anti-evasion provisions which were used to invalidate marriages under these circumstances.⁴⁴⁰ When no evasion provision existed, it was left to the judge to determine whether the local policy was strong enough to overcome the general rule validating marriages if valid where celebrated.⁴⁴¹

Most of the southern courts refused to recognize these marriages, although other states did recognize them. An example of the policies behind the statutes used to invalidate these marriages can be found in *Kinney v. Commonwealth*,⁴⁴² where an interracial couple's marriage, celebrated in the District of Columbia, was declared void.

The purity of public morals, the moral and physical development of both races, and the highest advancement of our cherished southern civilization . . . require that [the races] should be kept distinct and separate, and that connections and alliances so unnatural that God and nature seem to forbid them should be prohibited by positive law, and be subject to no evasion.⁴⁴³

In contrast, consider *Medway v. Needham*,⁴⁴⁴ where an interracial couple was married in Rhode Island, and the marriage was found to be valid in Massachusetts. In considering the state's policy behind its anti-miscegenation statute, the court found the marriage to be valid under the general rule validating marriages, and limited invalidity to cases involving incest.⁴⁴⁵ The court drew a distinction between prohibited marriages based on "political expediency," which the forum would nevertheless tolerate, and those "which would tend to outrage the principles and feelings of all civilized nations," which it would not.⁴⁴⁶ The difference in results between these two cases can be explained by the weight given to the domicile's policies, which were dependent on local conditions and mores.⁴⁴⁷

The purpose behind the miscegenation statutes was similar to the purpose behind the restrictions on gay and lesbian sexuality and marriage.

440. Rebecca Bailey-Harris, *Madame Butterfly and the Conflict of Laws*, 39 AM. J. COMP. L. 157, 173 (1991).

441. *Id.*

442. 71 Va. (30 Gratt.) 858 (1878).

443. *Id.* at 699.

444. 16 Mass. 157 (1819).

445. Bailey-Harris, *supra* note 440, at 175.

446. *Id.*

447. *Id.*

Although concerned with sodomy laws specifically, the following explains the caste system which these laws were developed to maintain.

[S]odomy and miscegenation statutes violate the equal protection clause for the same reason: Beyond the immediate harm they inflict upon their victims, their purpose is to support a regime of caste that locks some people into inferior social positions at birth. Miscegenation laws discriminated on the basis of race, and they did so in order to maintain white supremacy. Similarly, sodomy laws [and prohibitions on same-sex marriage] discriminate on the basis of sex—for example, permitting men, but not women, to have sex with women—in order to impose traditional sex roles.⁴⁴⁸

Supporting such a racially-based caste system was clearly the purpose of the State of Virginia's declared statutory policy in *Loving*. The United States Supreme Court noted that "the State's legitimate purposes were 'to preserve the racial integrity of its citizens,' and to prevent 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride,' obviously an endorsement of the doctrine of White Supremacy."⁴⁴⁹ These prohibitions against interracial marriage were enacted to preserve the "polarities of race on which white supremacy rested."⁴⁵⁰ Interracial marriage called into question the "distinctive and superior status of being white."⁴⁵¹ For that reason, it had to be prevented with the entire power of the State.

Anti-miscegenation statutes did not exist at common law or in England, but were instead developed in the United States.⁴⁵² Justifications behind the earliest miscegenation laws included maintaining clear racial boundaries in a society based on African-American slavery, and promoting whites' belief in their racial superiority, by describing interracial sex as "a 'disgrace' that would result in 'spurious issues,' [which] reinforced colonial perceptions that Blacks had a 'bestly' sexuality."⁴⁵³ These laws also perpetuated and protected the slavery

448. Andrew Koppelman, Note, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145, 147 (1988).

449. *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (quoting *Naim v. Naim*, 87 S.E.2d 749, 756 (Va. 1955)).

450. Koppelman, *supra* note 448, at 158.

451. *Id.* at 159.

452. Kenneth J. Lay, *Sexual Racism: A Legacy of Slavery*, 13 NAT'L BLACK L.J. 165, 165 (1993).

453. *Id.* at 166.

system to prevent obscuring the racial barriers necessary to maintaining the caste-based system of slavery.⁴⁵⁴

Since the racially based systems of slavery that developed in the New World were premised on the concept of the racial inferiority of the enslaved, it would have been far simpler had there been no intermingling of races, no anomalous offspring, no confusion of the 'natural order' by beings who did not clearly belong to one rather than another of the three populations of Indians, Africans, and Europeans. But human sexual behavior did not respect the 'natural order,' and mixed-race children invariably sprang up wherever the races had contact.⁴⁵⁵

Whites disturbed by racial intermingling introduced laws to prevent this "abominable mixture and spurious issue."⁴⁵⁶

The "two distinct races" had, in fact, been mixing for some 250 years, but the myth of the "pure white race" was used to support social and legal action and to justify oppression of non-whites.⁴⁵⁷ The laws prohibiting voluntary interracial sex imposed much harsher penalties on whites than non-whites, because maintaining white racial purity and sexual morality was considered whites' particular responsibility.⁴⁵⁸

This desire to maintain white supremacy increased over the years as the laws defining who was "white" became obsessive. While it had been true that "white" included anyone with one less than one-eighth African-American blood, by 1900 the laws defined "mulatto" as anyone having any "portion or perceptible traces of Negro blood."⁴⁵⁹ The justification was racial purity, but the need for it came from a desire for white supremacy. Intermixture between blacks and whites "would soon prevent those able to exploit the race issue from being able to direct mass hatred against blacks" which was needed to maintain economic exploitation of African-Americans.⁴⁶⁰ In order to sustain the caste-system based on

454. *Id.* at 167.

455. A. Leon Higginbotham, Jr. & Barbara K. Kopytoff, *Racial Purity and Interracial Sex in the Law of Colonial and Antebellum Virginia*, 77 *GEO. L.J.* 1967, 1970 (1989).

456. *Id.* (citing Act 16, 3 Laws of Va. 86, 86 (Hening 1923) (enacted 1691)).

457. *Id.* at 1983.

458. *Id.* at 2000-01.

459. Lay, *supra* note 452, at 170.

460. DERRICK A. BELL, JR., *RACE, RACISM AND AMERICAN LAW* § 2.3, at 75 (3d ed. 1992).

race, children of interracial couples had to be deemed to fall into the lower caste.

Perhaps [the colonist] sensed as well that continued racial intermixture would eventually undermine the logic of the racial slavery upon which his society was based. For the separation of slaves from free men depended on a clear demarcation of the races, and the presence of mulattoes blurred this essential distinction. Accordingly, he made every effort to nullify the effects of racial intermixture. By classifying the mulatto as a Negro he was in effect denying that intermixture had occurred at all.⁴⁶¹

Virginia's "Racial Integrity Act" of 1924 demonstrates this denial of racial intermixture with its definition of "Negro" as including anyone with a "single drop of Negro blood."⁴⁶² These laws were intended to perpetuate a belief that African-Americans were low in status and unfit for equal treatment with whites, as can be seen from Chief Justice Taney's opinion in the *Dred Scott* decision.⁴⁶³ There he wrote that "a perpetual and impassable barrier was intended to be erected between the white race and the one which they had reduced to slavery, . . . and . . . looked upon as so far below them in the scale of created beings, that intermarriage between white persons and negroes or mulattoes were regarded as unnatural and immoral, and punished as crimes."⁴⁶⁴

A significant difference between the miscegenation cases and cases regarding same-sex marriages is that all the miscegenation cases involved prohibitory provisions. These varied in degree of strength, ranging from constitutional prohibitions and statutory declarations that such marriages were void, to provisions with criminal penalties for such marriages.⁴⁶⁵ The local laws embodied mores significant to maintaining the social order of the communities concerned.⁴⁶⁶ Virtually all of the cases declared the marriages to be void.⁴⁶⁷

One case, *State v. Bell*,⁴⁶⁸ exemplifies the similarity between these cases and our same-sex couple married in Hawaii. In *Bell*, the husband

461. Higginbotham & Kopytoff, *supra* note 455, at 2005 (quoting W. JORDAN, *WHITE OVER BLACK* 177-78 (1968)).

462. Lay, *supra* note 452, at 171.

463. *Dred Scott v. Sanford*, 60 U.S. 393 (1857).

464. *Id.* at 409.

465. Taintor, *supra* note 294, at 628 & n.109.

466. Fine, *supra* note 168, at 43.

467. Taintor, *supra* note 294, at 628.

468. *State v. Bell*, 66 Tenn. (7 Barger) 9 (1872).

was charged with fornicating with his "wife." The couple, who lived in Tennessee, went to Mississippi to get married and immediately returned to Tennessee. Not bothering to follow any choice-of-law rule in reaching its decision, the court delineated local views which it felt were expressed in Tennessee's attempt to regulate the racial composition of Tennessee families.⁴⁶⁹

Extending the rule to the width asked for by the defendant, and we might have in Tennessee the father living with his daughter, the son with mother, the brother with the sister, in lawful wedlock, because they had formed such relations in a State or country where they were not prohibited. The Turk or Mohammedan, with his numerous wives, may establish his harem at the doors of the capitol, and we are without remedy. Yet none of these are more revolting, more to be avoided, or more unnatural than the case before us.⁴⁷⁰

It does not take much imagination to envision reading this language applied to a same-sex marriage, celebrated in Hawaii, and challenged in various states.

Not until the 1948 case of *Perez v. Lippold*,⁴⁷¹ when the California Supreme Court declared its anti-miscegenation statute to be unconstitutional, did a trend begin toward recognizing the racial discrimination inherent in these statutes. As Justice Traynor noted in *Perez*: "A member of any of these races may find himself barred by law from marrying the person of his choice and that person to him may be irreplaceable. Human beings are bereft of worth and dignity by a doctrine that would make them as interchangeable as trains."⁴⁷² It took nineteen years, until the Supreme Court in *Loving* declared all anti-miscegenation statutes to be unconstitutional, before states were required to validate the interracial marriages of their domiciliaries who went to another state to be married, and returned to the domicile to live as a married couple.⁴⁷³ The result of *Loving* is that "legislative bigotry based upon social, economic, political, religious, or historical beliefs about racial supremacy cannot restrict an individual's right to freely

469. *Id.*

470. *Id.* at 11.

471. 198 P.2d 17 (Cal. 1948).

472. *Id.* at 25.

473. Despite their being declared unconstitutional, state legislatures did not repeal miscegenation statutes immediately. As late as 1972, Alabama federal courts had to order state officials to stop enforcing its anti-miscegenation law, and Mississippi did not repeal its law until that same year. Lay, *supra* note 452, at 177.

choose his or her sexual partners or spouses."⁴⁷⁴ Freedom to choose one's sexual partners without regard to race signaled the end of legalized second-class citizenship.⁴⁷⁵ Hopefully, the revolution concerning same-sex marriages that has begun with *Baehr* will also signal the end of legalized second-class citizenship for people choosing same-sex relationships.

C. Recognizing Same-Sex Marriage Is the Better Rule of Law

The *Loving* court ended hundreds of years of prohibitions against interracial marriage in numerous states. Today no one questions that anti-miscegenation statutes were discriminatory.⁴⁷⁶ Those statutes are now outlawed because they promoted feelings of inferiority and second-class citizenship, which the state should not be allowed to promote.⁴⁷⁷

Denying same-sex marriage similarly promotes feelings of inferiority and second-class citizenship. Either gay men and lesbians are being singled out for adverse treatment under marital legislation, which is invidious discrimination, or, although gay men and lesbians are being singled out and treated adversely, it is not based on invidious discrimination because the group deserves that treatment.⁴⁷⁸ "Most theorists and jurists supporting the ban on same-sex marriages deny that the state is singling out and punishing homosexuals by refusing to recognize same-sex marriages. Instead, they appeal to the definition of marriage or to the traditions behind marriage."⁴⁷⁹

But, as the *Baehr* court recognized, the *Loving* court's rejection of definitional or traditional bases for prohibiting miscegenous marriages applies equally to same-sex marriages. Just as anti-miscegenation statutes promoted white supremacy, so too the ban on same-sex marriages promotes the idea that heterosexuals are superior to gay men and lesbians.⁴⁸⁰ Legislators and judges attempting to avoid the charge of

474. *Id.* at 178.

475. *Id.*

476. Strasser, *supra* note 10, at 1016.

477. *Id.* at 1016.

478. *Id.*

479. *Id.*

480. *See id.* at 1016-17 n.152 (discussing the following sources: *McConnell v. Anderson*, 451 F.2d 193, 196 (8th Cir. 1971) (describing homosexuality as socially repugnant), *cert. denied*, 405 U.S. 1046 (1972); Buchanan, *supra* note 10, at 565 (moral excellence promoted by heterosexual marriage would be undermined by recognizing homosexual marriage); Hannah Schwarzschild, *Same-Sex Marriages and Constitutional Privacy: Moral Threat and Legal Anomaly*, 4 BERKELEY WOMEN'S L.J. 94, 123 (1988-89) (traditional concern is that recognition of same-sex marriage would be uniquely destructive threat to the institution of traditional heterosexual marriage); J. Harvie Wilkinson III &

invidious discrimination may claim that they were prohibiting same-sex marriage, not due to discrimination against gay men and lesbians, but due to concerns for promoting the institutions of marriage and family.⁴⁸¹ These same justifications, however, were also used when considering the anti-miscegenation statutes. Legislators and judges claimed that invidious discrimination was not behind the laws; instead, they were attempting to preserve racial integrity, to prevent the "corruption of blood" and "obliteration of racial pride." One only needs to consider their language to recognize their purpose.

Prohibiting this invidious discrimination, as the *Baehr* court has done, is the better public policy. Just as *Perez* led the evolution of the law from accepting anti-miscegenation statutes to declaring them to be unconstitutional in *Loving*, so too does *Baehr* lead a similar evolution. State court judges faced with choice-of-law questions when their domiciliaries leave the state, go to Hawaii and marry, and return to their domicile should reach the better result and recognize the Hawaiian marriage. While it will be difficult for many judges to take this progressive step, choice-of-law statutes and theories provide ample support for such a result. Since granting or denying recognition are equally likely results, courts should prohibit invidious discrimination and uphold our couple's marriage.

IV. CONCLUSION

Baehr v. Lewin began a legal revolution that has the potential to change the face of the United States. In 1995, the trial court will consider the case on remand⁴⁸² and determine whether the State of Hawaii can establish a compelling state interest in restricting marriage to opposite-sex couples and whether its marriage statutes further that interest

G. Edward White, *Constitutional Protection for Personal Lifestyles*, 62 CORNELL L. REV. 563, 572 (1977) (hallowed marital status should not be given to alternative life choices such as homosexuality)).

481. Strasser, *supra* note 10, at 1017. For example, in Act 217, the Hawaii legislature finds that § 572-1 of the Hawaii Revised Statutes and all other marriage licensing statutes were enacted to "foster and protect the propagation of the human race through male-female marriages." Act 217, § 1. The legislature found this to be true, despite its recognition that this finding would seemingly run counter to its claim, later in the act, that the statute's 1984 amendment, deleting the requirement that applicants show that they are not impotent or physically incapable of entering into a marriage, did not detract from the statute's "original purpose." *Id.* If proving one's ability to propagate is unnecessary for opposite-sex couples, it is difficult to understand how restricting marriage to opposite-sex couples will further the state's claimed purpose of procreation behind its marriage statutes. See also *supra* note 104.

482. Gross, *supra* note 17, at B12.

with the least restrictive means possible. Regardless of how the case is ultimately resolved, *Baehr* has moved same-sex couples one step closer to having the constitutionally-protected right to marry extended to us. Whichever state becomes the first to recognize same-sex marriage will see scores of couples arriving to exchange marriage vows.

Then these couples will return home and the next level of the revolution will occur. With marriage licenses in hand, they will ask various institutions to recognize their new marital status. Some will refuse, and the courts will be the arena for determining whether their right to marry will be vindicated. Those courts will decide the issue using statutory construction and choice-of-law theories. Advocates for same-sex couples will need to become conversant in the statutes and theories that control the discourse. For many courts, the issue will ultimately turn on whether recognizing an out-of-state same-sex marriage violates the state's strong public policy. Using statutes and precedent, advocates will attempt to push the courts toward validation of the marriage. Some will resist, and it will be time to explain to those courts that recognizing same-sex marriage is the better choice. Using the miscegenation cases analogously, we will attempt to convince the courts that ending age-old discrimination and extending the right to marry to same-sex couples is a better expression of state policy than continuing homophobic objections to these marriages.

This road, like the one leading to the *Baehr* case, will not be easy. But advocates who are well-versed in choice-of-law jurisprudence will be able to obtain victories for their clients. Once states recognize these out-of-state marriages, it will simply be a matter of time before states statutorily permit them at home. Same-sex marriage will follow miscegenous marriage in finally finding legal acceptance.