SISTER-STATE RECOGNITION OF VALID SAME-SEX MARRIAGES *BAEHR V. LEWIN*–HOW WILL IT PLAY IN PEORIA?*

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> Only twenty-five years ago . . . it was a crime for a black woman to marry a white man. Perhaps twenty-five years from now we will find it just as incredible that two people of the same sex were not entitled to legally commit themselves to each other. Love and commitment are rare enough; it seems absurd to thwart them in any guise.
>
> Anna Quindlen[1]

INTRODUCTION

Catherine and Dorothy live in Hawaii. They meet, fall in love, and decide to spend the rest of their lives together. Wishing to formalize their private commitment to each other, Catherine and Dorothy obtain a marriage license, and are wed on Waikiki beach. Among the wedding guests are Steve and John, a couple who have flown in from California for the occasion. Inspired by the ceremony, Steve and John also obtain a marriage license issued by the State of Hawaii and are married in Hawaii before returning to the mainland. After their wedding, Catherine and Dorothy inform their respective employers of their marriage. Dorothy adds Catherine to her company's health care plan as her spouse, and they file a joint federal tax return at the end of the year. Although the preceding story is fictional, it accurately portrays what may become legally achievable as a result of the groundbreaking ruling in *Baehr v. Lewin*.[2]

The Hawaii Supreme Court ruled in *Baehr* that the statute limiting marriage to opposite-sex couples may violate the state's constitutional guarantee of equal protection on the basis of sex.[3] The court reinstated a lawsuit against the Hawaii Department of Health that was instituted by same-sex couples who were seeking to marry. On remand, the state will be required to show that continuing to deny same-sex couples marriage licenses is "justified by compelling state interests."[4] The court declined to treat the case as a matter of privacy rights, equal protection of homosexuals, or the right of same-sex couples to marry. Noting that sexual orientation is irrelevant to the issue of same-sex marriage, the court observed that "[p]arties to a same-sex marriage could theoretically be either homosexuals or heterosexuals."[5] The issue is whether the "state's regulation of access to the status of

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1. ANNA QUINDLEN, THINKING OUT LOUD 35 (1993).

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

3. *See* HAW. CONST. art. I, § 5. This section provides: "No person shall be deprived of life, liberty or property without due process of law, nor 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."

4. *Baehr*, 852 P.2d at 67.

5. *Id.* at 51 n.11.

married persons, on the basis of the applicants' sex,"[6] denies same-sex couples the equal protection of the laws. In other words, the question is whether allowing a man to marry a woman, but not allowing a woman to marry a woman, is a form of sex discrimination. Because the state's denial of access to marriage by same-sex couples is presumptively unconstitutional, if the state fails to carry its substantial burden of showing a "compelling state interest," same-sex marriages will be legally available in Hawaii.[7]

What effect will be given to the legally-sanctioned marriages of the characters in the scenario described at the beginning of this Note? If Catherine and Dorothy remain in Hawaii, they presumably will have full access to all the rights and obligations conferred upon married persons. These rights include the right to any benefits extended to spouses by employers, insurance companies, or other organizations; the right to the spouse's elective share of an estate; the right to maintain a wrongful death action as the surviving spouse; and numerous tax advantages. But what if Catherine and Dorothy leave Hawaii and move to Illinois, Ohio, Alabama, or any other state? Will the rights that they enjoy as married persons in Hawaii be recognized in another state? What rights will Steve and John have upon their return to California pursuant to their marriage in Hawaii? Will their marriage be recognized as valid in California?

This Note explores the possible outcomes of validly-married same-sex couples seeking recognition of their marriages from other states. Part I discusses state recognition of foreign marriages and the public policy exception as traditionally applied to deny recognition. Part II reviews the case history of the application of the public policy exception to marriages involving incest, polygamy, nonage (marriages involving minors), and miscegeny (mixed-race marriages). Part III discusses the prospective application of the public policy exception to same-sex marriages. Finally, this Note briefly concludes by proposing the circumstances under which same-sex marriages will be afforded recognition by sister states and by noting the parallels between the struggle for acceptance of same-sex marriages and the struggle for acceptance of mixed-race marriages.

I. Recognition of Foreign Marriages

A. The General Rule

In general, a marriage will be recognized as valid in any state if it is valid under the laws of the state in which it is contracted.[8] If a marriage is valid where made, it is generally recognized as valid in every other jurisdiction.[9] Thus, the marriage of *A* and *B* in State *X* will be recognized in State *Y*, with limited exceptions.[10] This rule applies regardless of the domiciles of the parties. Consequently, if the general rule is followed, any marriage contracted in Hawaii, valid under its laws, by parties residing either there or elsewhere, is valid and recognizable in any other state.

Interstate recognition of marriages exists not merely as a matter of comity, but also because public policy favors predictability, certainty, and uniformity of result in protecting

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6. *Id.* at 60.
7. *See supra* note 4 and accompanying text.
8. 52 Am. Jur. 2d *Marriage* § 80 (1970).
9. Loughran v. Loughran, 292 U.S. 216, 223 (1934).
10. *See infra* subpart I.C.

the justified expectation of the parties.[11] If the marriage is recognized as valid, a couple who has wed outside the forum state need not fear criminal sanctions being imposed for violation of state laws prohibiting cohabitation or fornication. The legitimacy of any children born to the couple after the marriage is clearly established. The parties can rely on the property rights that arise from their marital status to produce predictable results. The multiplicity of rights, benefits, and obligations that are contingent upon the legal status of marriage depends on the validity of the marriage in question.

In addition, recognition of sister-state marriages is favored for reasons of judicial economy. Without such recognition, court dockets would be clogged with petitions to determine the validity of marriages, especially in today's highly mobile society. The ability of a married couple to move from one state to another without disturbing the couple's marital status or without forcing the couple to obtain a judicial decree affirming that status supports one of this country's basic freedoms–the unrestricted freedom of movement between and among the states. Application of the rule also affords ease in the judicial determination of validity when that question must be addressed by a court. The only issue to be resolved is whether the marriage was valid according to the laws of the contracting state. No inquiry into the effect of differences between the laws of the contracting state and local marriage laws is necessary.

B. Validation Statutes and Evasion Statutes

Some states have enacted validation statutes codifying the general rule that marriages valid where contracted are valid in all other jurisdictions.[12] Although there are some differences in language which may be significant,[13] the acts codify the general rule that recognizes the validity of a marriage, "even if the parties to the marriage would not have been permitted to marry in the state of their domicil."[14] However, some states have engrafted, by judicial interpretation, a requirement that the marriage in question not violate the public policy of the forum state.[15] Also, a question remains whether a state that has enacted the Uniform Marriage and Divorce Act's validation statute will forego applying prior

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11. *See* RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 283 cmt. b (1969) [hereinafter RESTATEMENT].

12. *See, e.g.*, CAL. FAM. CODE § 308 (West 1994); IDAHO CODE § 32-209 (1983); KAN. STAT. ANN. § 23-115 (1988); KY. REV. STAT. ANN. § 402.040 (Michie/Bobbs-Merrill 1984); NEB. REV. STAT. § 42-117 (1988); UNIF. MARRIAGE AND DIVORCE Act § 210 (1973) (§ 210 adopted by Arizona, Colorado, Illinois, Minnesota, Missouri, and Washington).

13. Most states use some slight variation on the language used in California's act ("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." CAL. FAM. CODE § 308. (West 1994)). However, Kentucky's act is limited by its terms to residents who marry out of state, leaving open the question of recognition for marriages performed out of state by non-residents ("If any resident of this state marries in another state, the marriage shall be valid here if valid in the state where solemnized." KY. REV. STAT. ANN. § 402.040. (Michie/Bobbs-Merrill 1984)).

14. UNIF. MARRIAGE AND DIVORCE ACT § 210 cmt.

15. *See* Estate of Loughmiller, 629 P.2d 156 (Kan. 1981) (exceptions to the statute if the marriage is polygamous, incestuous, or prohibited by the state for public policy reasons); *In re* Takahashi's Estate, 129 P.2d 217 (Mont. 1942) (statute declaring miscegenic marriages null and void limits application of the validation statute).

authority decided under a previous act that codified exceptions.[16]

Alternatively, other states have enacted evasion statutes to limit recognition of out-of-state marriages by residents to those that would be valid under the laws of the forum.[17] Evasion statutes reflect the view, endorsed by the *Restatement (Second) of Conflict of Laws*,[18] that the marriage is subject to the policies of the state with the dominant interest in the issue in question.[19] By enacting an evasion statute, a state asserts that its right to control the marital status of its citizens extends beyond its geographic boundaries.[20] By contrast, some states have expressly refused to give extraterritorial effect to local state law.[21] Enacting an evasion statute also implies a state's strong interest in implementing its own policies and its disregard for the policies of the contracting state.[22] But even in the absence of evasion statutes, states have applied the exception to the general rule in order to invalidate marriages that violate the public policy of the forum, particularly in cases where one or more of the parties is a domiciliary of the forum.[23]

C. The Public Policy Exception

Where a marriage made out of state contravenes a strong public policy of the forum, a public policy exception allows the forum to refuse to recognize the marriage. Statutes that declare certain marriages void or impose criminal sanctions on those attempting to contract such marriages, as well as widely applied common law prohibitions (such as those against incest and polygamy), are indicative of the strong public policy of a state.[24] The strength of a state's interest in implementing its policy choices is related to the methods by which the state has indicated those choices. Statutes declaring a particular marriage void or criminal are perhaps the strongest indicators. A critical element in applying the exception is the domicile of the parties at the time the marriage was contracted. A state's interest in applying its own policy choices is highest when both parties reside in the forum state and lowest when neither party is a resident. When the domiciles of the parties are mixed, the results tend to be mixed as well.

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16. *See* Payne v. Payne, 214 P.2d 495 (Colo. 1950) (prior Colorado law excepted bigamous and polygamous marriages from the operation of its validation statute).

17. *E.g.*, MASS. GEN. LAWS ANN. ch. 207, § 10 (West 1987); N.D. CENT. CODE § 14-03-08 (1991); W. VA. CODE § 48-1-17 (1992).

18. RESTATEMENT, *supra* note 11, § 283. Section 283 reads:

> (1) The validity of a 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.
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> (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.

19. *Id.* cmt. b.

20. State v. Tutty, 41 F. 753 (C.C.S.D. Ga. 1890).

21. *See, e.g.*, Stevenson v. Gray, 56 Ky. 193, 211 (1856) (statute prohibiting marriage between a nephew and his uncle's widow did not invalidate the marriage, contracted out-of-state, between two Kentucky residents).

22. *Id.*

23. *See infra* Part II.

24. *See generally* 52 AM. JUR. 2D *Marriage* § 82 (1970).

Analysis of the cases discussed in this Note indicates that the next consideration when a marriage is challenged on public policy grounds is the nature of the prohibited conduct. Whether a particular state will find a marriage invalid as contravening local public policy is not readily predictable. In addition to the questions of domicile and the nature of the conduct, the results of applying the exception frequently turn on whether the parties are both alive and before the court or whether the marriage has terminated by the death of one or both of the parties. The state's interest in enforcing its policy choices is highest when confronted with affording a couple all the incidents that accrue to the marital state and is lowest when the marriage has lost its vitality and only survivor rights are at stake.[25]

Marriages that are incestuous (between parties in the direct line of consanguinity or between closely-related collaterals, such as brothers and sisters) have been universally refused recognition on the grounds that they are contrary to public policy.[26] Statutory prohibitions against marriage between parties more remotely related, such as between an uncle and his niece or between first cousins, have formed the basis for asserting the invalidity of a marriage by application of the exception.[27] Generally, analysis of the cases discussed in this Note indicates that first-cousin marriages have been recognized as valid when at least one of the parties was not a resident of the forum at the time the marriage was contracted. When both parties are residents, a first-cousin marriage may violate a state's evasion statute and thus be invalidated, even when only survivor rights were concerned.[28] Marriages between an uncle and his niece, being within a closer degree of consanguinity than first-cousin marriages and prohibited in all states, have generated mixed results when the validity of the marriage has been questioned, regardless of the vitality of the parties.[29]

Polygamous marriages are also banned in all states as offensive to public policy.[30] Although polygamous marriages of Native Americans have been recognized for all purposes,[31] such marriages between domiciliaries of a foreign country have been recognized only for purposes of succession.[32]

Some states also apply the exception to marriages which violate state requirements concerning the minimum age at which a party is permitted to contract a marriage. In the cases reviewed in this Note where nonage was the issue, all the parties were living. Because of the state's heightened interest in imposing its policy choices on living persons, it might be expected that these cases would illustrate strict enforcement of nonage laws. However, in many jurisdictions, the public policy of the state dictating the age of consent to marry is not strong enough to justify invalidating a marriage where one of the parties is underage, even when both parties are residents of the local forum.[33]

Before the Supreme Court struck down miscegeny laws as an unconstitutional

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25. *See generally* RESTATEMENT, *supra* note 11, § 283 cmts. i-k.

26. 52 AM. JUR. 2D *Marriage* § 63 (1970).

27. *See infra* subparts II.A.1 and II.B.1.

28. *See, e.g., In re* Mortenson's Estate, 316 P.2d 1106 (Ariz. 1957).

29. *See, e.g.,* Campione v. Campione, 107 N.Y.S.2d 170 (N.Y. Sup. Ct. 1951); Catalano v. Catalano, 170 A.2d 726 (Conn. 1961).

30. 52 AM. JUR. 2D *Marriage* § 67 (1970).

31. *See, e.g.,* Hallowell v. Commons, 210 F. 793 (8th Cir. 1914), *aff'd,* 239 U.S. 506 (1916).

32. *See infra* subpart II.A.3.

33. *See infra* subparts II.A.2 and II.B.2.

infringement of a "fundamental freedom,"[34] such laws were frequently the basis for refusal to recognize out-of-state marriages for reasons of public policy. Generally, the strength of the state's policy against miscegenic marriage was insufficient to require invalidation of the marriage by extending its application to non-residents, regardless of the vitality of the parties.[35] However, the policy was vigorously applied in refusing to recognize the miscegenic marriage of forum residents, even when the issue was succession.[36]

The public policy exception is likely to be invoked to invalidate same-sex marriages when couples seek recognition of their Hawaiian marriages in other states. Although some courts have recognized certain rights of same-sex couples, such as the right to adopt the partner's child[37] and the right to retain an apartment lease as a qualified surviving "family" member upon the tenant's death,[38] no court in the United States has recognized the rights of same-sex couples to occupy the marital status.[39] A logical implication of this failure is that courts will tend to resist efforts to extend recognition of valid same-sex marriages by applying the public policy exception. Whether same-sex couples can resist invalidation of their marriages on public policy grounds will depend on the same factors used in applying the exception to incestuous, polygamous, underage, and miscegenic marriages: the domiciles of the parties at the time the marriage was contracted; the strength of the policy as evidenced by statutes prohibiting the conduct in question and by judicial interpretation of the measure and extent of that strength; and the vitality of the parties to the marriage.

II. History of the Application of the Public Policy Exception

A. Both Parties Domiciliaries of the Contracting Forum

1. Incest.—One reported case addressed the issue of whether to recognize a marriage between persons within the degree of consanguinity which the laws of the non-contracting state declared incestuous. In *Garcia v. Garcia*,[40] the parties were first cousins and were both citizens and residents of California when they married there.[41] Upholding the lower court's dismissal of an action for annulment, the Supreme Court of South Dakota refused to give extraterritorial effect to its own laws, which declared marriages between cousins void and subject to criminal prosecution.[42] The court held that the marriage, "valid in the state where it was contracted, is to be regarded as valid in this state."[43] It noted that South Dakota marriage law "cannot properly be held to apply to marriages contracted in other states, legal and valid where contracted, and where, as in this state, there is no provision in our Code authorizing our courts to declare such marriage legally contracted in another state void in this

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34. Loving v. Virginia, 388 U.S. 1, 12 (1967).
35. *See infra* subpart II.A.4.
36. *See infra* subpart II.B.3.
37. *See In re* Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993).
38. *See* Braschi v. Stahl Assoc. Co., 543 N.E.2d 49 (N.Y. 1989).
39. *See infra* subpart III.B.
40. 127 N.W. 586 (S.D. 1910).
41. *Id.* at 587.
42. *Id.* at 589.
43. *Id.*

state."[44]

The court's acceptance of the applicability of the rule in this case was based on two factors: (1) the marriage was not against "the generally accepted opinions of Christendom" (not being within the direct line of consanguinity or between brothers and sisters); and (2) the legislature had not provided that such marriages in other states might be declared void by the courts of South Dakota.[45] The question remains, then, whether a same-sex marriage would be invalidated on the basis that it was either against the "opinions of Christendom" or against a legislative enactment authorizing such invalidation. As to the former, it is unlikely that a court would wish to incur an Establishment Clause[46] challenge by basing its decision on so-called "Christian" principles. The latter situation (a statute giving extraterritorial effect by authorizing invalidation) provides a possible avenue for avoiding recognition of same-sex marriages. However, no American court has invalidated a marriage which was validly contracted in another American state by parties domiciled there.[47]

2. Underage.—Courts have refused to invalidate marriages contracted outside the forum because the parties were underage. A New York appellate court declined to hear an action to annul a marriage, validly contracted between residents of the British West Indies in their place of domicile, upon the parties becoming residents of New York.[48] In affirming the lower court's dismissal on jurisdictional grounds, the appellate court held that New York courts:

> have no power to annul and declare invalid ab initio a marriage contracted in another state or country between two actual bona fide residents, and citizens or subjects, of such state or country, when the marriage was by the laws of such state or country valid when and where it was performed.[49]

Similarly, an Ohio appellate court refused to invalidate a marriage performed in Pennsylvania between two of its residents, one of whom was underage, because Pennsylvania courts would not have invalidated the marriage on the grounds of nonage.[50]

3. Polygamy.—The cases addressing the issue of polygamy without exception involve parties validly married in foreign countries (no American state permits a polygamous union). In actions regarding the descent of property, courts have granted the right of succession to surviving spouses of a polygamous marriage. As noted by a California appellate court, the public policy of the state in prohibiting polygamous marriages would apply only if the parties attempted to cohabit within the state and such policy would not be affected by dividing the decedent's estate between his surviving wives.[51]

Polygamous marriages of foreign nationals, however, have been held invalid when the parties are living. A New York court held that a Nigerian national could not raise, as a

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44. *Id.*

45. *Id.*

46. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .").

47. RESTATEMENT, *supra* note 11, § 283 Reporter's Note cmts. j-k.

48. Simmons v. Simmons, 203 N.Y.S. 215 (N.Y. App. Div. 1924).

49. *Id.* at 220.

50. Abbott v. Industrial Comm'n, 74 N.E.2d 625, 628 (Ohio Ct. App. 1946).

51. *In re* Dalip Singh Bir's Estate, 188 P.2d 499, 502 (Cal. Ct. App. 1948).

defense to the charge of second-degree rape, his marriage to the complainant, whom he claimed as his "'second' or 'junior' wife."[52] The defendant was already legally married to another at the time of his "marriage" to the complainant in Nigeria, which allows polygamous marriages. Citing a statutory provision declaring a bigamous marriage "absolutely void," the court declared that "a polygamous marriage legally consummated in a foreign country will be held invalid in New York."[53]

Application of the public policy exception to same-sex marriage by analogy to polygamous marriages is unlikely, given that the polygamy exception applies exclusively to residents of foreign countries. The analogy fails when applied to a valid same-sex marriage contracted in the United States by U.S. citizens.

4. Miscegeny.—In applying the public policy exception to cases involving miscegeny, the courts have uniformly recognized out-of-state marriages for purposes of granting the right to succession.[54] The Supreme Court of Florida found inapplicable an antimiscegenic provision in the state constitution and antimiscegenic statutes, and refused to invalidate a mixed-race marriage so as to prevent the surviving spouse from inheriting property in Florida, a state in which the marriage would have been invalid.[55] The couple were both residents of Kansas when they married there, and had remained in Kansas until the death of the wife.[56]

Similarly, the Supreme Court of Louisiana was asked to invalidate the Spanish marriage in Havana of a mixed-race couple, which would have prevented legitimization of their daughter, born while the couple was unmarried and living in Louisiana, and prevented her inheritance of her father's estate.[57] However, the court refused, noting that Louisiana law, which prohibited miscegenic marriages, applied "to parties living in Louisiana who had anywhere contracted the kind of marriage not permitted by its policy," and "would not have recognized as valid in Louisiana the marriage of Caballero in Havana."[58] The Supreme Court of Mississippi also limited the reach of its antimiscegenic laws to parties living in Mississippi when it recognized the marriage in Illinois of Illinois residents "to the extent only of permitting one of the parties thereto to inherit from the other property in Mississippi."[59]

The Supreme Court of California, however, fully accepted the validity of a miscegenic marriage, prohibited under California law, validly contracted in Utah by Utah residents who subsequently moved to California.[60] Although the case involved intestate succession, the court indicated that all the incidents of marriage would be recognized in California. The court cited a state statute which provided that "all marriages contracted without the State, which would be valid by the laws of the country in which the same were contracted, shall be

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52. People v. Ezeonu, 588 N.Y.S.2d 116, 118 (N.Y. Sup. Ct. 1992).

53. *Id.* at 117.

54. *See, e.g.*, Whittington v. McCaskill, 61 So. 236 (Fla. 1913); Caballero v. Executor, 24 La. Ann. 573 (1872); Miller v. Lucks, 36 So. 2d 140 (Miss. 1948); Pearson v. Pearson, 51 Cal. 120 (1875).

55. *Whittington*, 61 So. at 237.

56. *Id.* at 236.

57. *Caballero*, 24 La. Ann. at 575.

58. *Id.*

59. Miller v. Lucks, 36 So. 2d 140, 142 (Miss. 1948).

60. Pearson v. Pearson, 51 Cal. 120, 125 (1875).

valid in all courts and places within the State."[61] By stating the rule that "[t]he validity of a marriage (except it be polygamous or incestuous) is to be tested by the law of the place where it is celebrated,"[62] the court implied that it would recognize for all purposes the miscegenic marriage of living persons.

Results were mixed when courts were asked to invalidate out-of-state marriages and hold cohabiting couples liable for violating local antimiscegenic statutes.[63] The Tennessee Supreme Court in *Bell* held that it was an indictable offense for a man to live in Tennessee with his wife, whom he validly married in Mississippi, in violation of the antimiscegenic laws of Tennessee.[64] The court limited the applicability of the rule that "a marriage good in the place where made . . . shall be good everywhere" to recognition of out-of-state marriages where only the ceremonial formalities differed from the forum.[65] Stating that "[e]ach State . . . cannot be subjected to the recognition of a fact or act contravening its public policy and against good morals, as lawful, because it was made or existed in a State having no prohibition against it or even permitting it,"[66] the court placed miscegeny on par with polygamy, incest between parent and child, and incest between siblings as being "revolting" and "unnatural."[67]

However, the Supreme Court of North Carolina refused to find a couple, validly married in South Carolina, guilty of fornication and adultery.[68] Even though the law of North Carolina prohibited miscegenic marriages, the court found that it was "compelled to say that this marriage being valid in the State where the parties were bona fide domiciled at the time of the contract must be regarded as subsisting after their immigration here."[69] The court reasoned that affording sister-state recognition of validly contracted marriages promotes uniformity of laws and avoids numerous inconveniences, and that those advantages outweighed the difficulty of subjecting the people of North Carolina to "the bad example of an unnatural and immoral but lawful cohabitation."[70] Unlike the Tennessee court in *Bell*, the North Carolina court refused to treat miscegeny as analogous to incest and polygamy.[71] It characterized polygamous marriages, and incestuous marriages in the direct line and between nearest collaterals, as the few cases that all states agree are invalid, but noted that beyond those cases, differences exist among the states as to which marriages are permitted.[72] Even though "revolting" to North Carolinians, valid marriages performed in another state between residents of that state would be recognized in North Carolina "under obligations of comity to our sister States."[73]

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61. *Id.*
62. *Id.*
63. *See, e.g.*, State v. Bell, 66 Tenn. 9 (1872); State v. Ross, 76 N.C. 242 (1877).
64. *Bell*, 66 Tenn. at 11.
65. *Id.* at 10.
66. *Id.* at 10-11.
67. *Id.* at 11.
68. State v. Ross, 76 N.C. 242, 247 (1877).
69. *Id.*
70. *Id.*
71. *Id.* at 246.
72. *Id.*
73. *Id.* at 246-47.

B. One or Both Parties Domiciliaries of the Local Forum

1. Incest.—In 1981, the Supreme Court of Kansas was faced with reconciling a Kansas statute that declared first cousin marriages "incestuous and absolutely void" with its validating statute in determining whether to recognize a Colorado marriage between a Kansas resident and an Oklahoma resident who returned to live in Kansas.[74] The court found the marriage valid, basing its decision on the following: (1) it could not find "that a first cousin marriage validly contracted elsewhere is odious to the public policy of this state," noting that sexual intercourse between first cousins was not within the statute prohibiting incest; (2) Kansas did not have an evasion statute; and (3) there was no precedent for voiding a marriage as an evasion of Kansas law.[75]

Michigan courts have limited the applicability of its prohibition against first cousin marriages to those solemnized in that state,[76] even recognizing such marriages when the Michigan residents went out of state to avoid its prohibitions.[77] The Supreme Court of Ohio recognized the validity of a marriage between one of its citizens and his first cousin in her place of domicile, Massachusetts.[78] In order to avoid a Massachusetts evasion law which would have invalidated the marriage, the Ohio court had to decide the question of whether a marriage between first cousins was void ab initio in Ohio.[79] Based on the absence of a statute expressly declaring such marriages void and the absence of criminal sanctions against sexual relations between first cousins, the court found that first cousin marriages were not void ab initio in Ohio. Because the Massachusetts marriage was valid, the court recognized the marriage in Ohio.[80]

Recognizing the validity of an Italian marriage between a New York resident and his Italian niece, a New York court stated that, although a marriage between an uncle and a niece is incestuous and void under New York law, the prohibition applied only to marriages performed in that state.[81] While stating the rule that "marriages, legal where performed, will be recognized in New York unless repugnant to the laws of nature," the court noted that uncle-niece marriages were legal in New York prior to 1893 and presently were "not universally condemned."[82] The implication is that uncle-niece marriages are not "repugnant to the laws of nature."[83]

Evasion statutes have been invoked to invalidate incestuous marriages where at least one party is a resident of the forum. The Supreme Court of Arizona, applying an evasion statute, did not recognize the marriage of two of its residents for the purposes of intestate succession.[84] The couple, who were first cousins, had been validly married in New Mexico

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74. Estate of Loughmiller, 629 P.2d 156, 158 (Kan. 1981).
75. *Id.* at 161.
76. *See* Toth v. Toth, 212 N.W.2d 812, 813 (Mich. Ct. App. 1973).
77. *See In re* Miller's Estate, 214 N.W. 428 (Mich. 1927).
78. Mazzolini v. Mazzolini, 155 N.E.2d 206 (Ohio 1958).
79. *Id.* at 208.
80. *Id.* at 208-09.
81. Campione v. Campione, 107 N.Y.S.2d 170, 171 (N.Y. Sup. Ct. 1951).
82. *Id.*
83. *Id.*
84. *In re* Mortenson's Estate, 316 P.2d 1106, 1108 (Ariz. 1957).

and then returned to Arizona to live. A Connecticut court similarly used an evasion statute to deny the validity of a marriage contracted in Italy between one of its citizens and his Italian niece.[85] The court based its finding that an uncle-niece marriage was against the strong public policy of the state on the state's long-standing statutory prohibition against such marriages and its imposition of criminal penalties "for such kindred to either marry or carnally know each other."[86] The dissent criticized the majority's denial of survivor's rights, finding the widow "innocent of any intent to violate [Connecticut] laws."[87] The dissent would have sustained annulling the marriage only if it was clear that the parties married outside the state to avoid its laws.[88]

Similarly, a New Jersey court denied full recognition of an Italian marriage between a New Jersey resident and his Italian niece.[89] Because the intention of the parties at the time of the marriage was to reside in New Jersey, the court found that the validity of the marriage should be determined by New Jersey, not Italian, law.[90] The court held that recognition of the marriage as valid would be contrary to the public policy of the state as evidenced by its statutes that declared uncle-niece marriages absolutely void and subject to criminal sanctions.[91]

2. Underage.—Modern courts are more willing to apply the doctrine of comity and recognize out-of-state marriages in nonage cases than in cases involving incest or miscegeny. Generally, such marriages are voidable by statute, not void ab initio.[92] Absent an action by one of the parties, courts have upheld the validity of marriages by underage residents, even when contracted out-of-state to evade local age requirements.[93] The Supreme Court of Arkansas agreed with a trial court's finding that the Mississippi marriage of two Arkansas residents, who were both underage by Arkansas law, was valid.[94] The court found "no strong public policy in this state requiring the courts to declare that marriages such as the one involved here are void ab initio." Similarly, a New Jersey court recognized the Maryland marriage of two New Jersey residents as valid until annulled, even though "the juveniles were married in Maryland to evade [the] New Jersey statute."[95]

The Tennessee Supreme Court applied Georgia law to validate the marriage of two of its residents, one of whom was underage by Tennessee standards.[96] In denying the petition for annulment by the wife's father, the court noted that the public policy of the state regarding

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85. Catalano v. Catalano, 170 A.2d 726, 728 (Conn. 1961).

86. *Id.*

87. *Id.* at 731.

88. *Id.* at 731-32.

89. Bucca v. State, 128 A.2d 506, 511 (N.J. Super. Ct. Ch. Div. 1957).

90. *Id.* at 510.

91. *Id.* at 510-11. *Compare,* Campione v. Campione, 107 N.Y.S. 2d 70 (N.Y. Sup. Ct. 1951), discussed *supra* at notes 81-83 and accompanying text.

92. Wilkins v. Zelichowski, 140 A.2d 65 (N.J. 1958); Mitchell v. Mitchell, 117 N.Y.S. 671 (N.Y. Sup. Ct. 1909).

93. State v. Graves, 307 S.W.2d 545 (Ark. 1957); *In re* State in Interest of I., 173 A.2d 457 (N.J. Juv. & Dom. Rel. Ct. 1961).

94. *Graves,* 307 S.W.2d at 547.

95. *In re I.*, 173 A.2d at 460.

96. Keith v. Pack, 187 S.W.2d 618 (Tenn. 1945).

underage marriages, as evidenced by its statutes, provided for discretionary annulment of such marriages, unlike miscegenic marriages, which were void by statue.[97] Kentucky's highest court held underage marriages to be voidable only if they were contracted in the state, reaching this result on the basis of its validating statute.[98] The court found that underage marriages were not against the public policy of Kentucky as such marriages could be ratified by later cohabitation and were declared by statute to be merely voidable, not void.[99]

An early nonage case applied local law to annul the out-of-state marriage of two of its citizens.[100] The Supreme Court of Oklahoma refused to consider the validity of a marriage between Oklahoma residents, one of whom was underage, under the law of Arkansas, where it had been contracted.[101] Invoking the state's sovereign right to determine the status of its citizens, the court applied Oklahoma law to affirm the lower court's annulment of the marriage.[102]

3. Miscegeny.—With one exception, courts have applied the public policy exception vigorously to invalidate miscegenic marriages where at least one of the parties was domiciled in the forum state. In *Medway v. Needham*,[103] the exceptional case, a couple residing in Massachusetts was married in Rhode Island where miscegenic marriages were not prohibited, then returned to Massachusetts to live. The Massachusetts Supreme Court refused to give extraterritorial effect to its laws, which prohibited miscegenic marriages and declared them void.[104] In finding that miscegenic marriages could be declared void only "if contracted within this state,"[105] the court reasoned that the avoidance of "extreme inconveniences and cruelty"[106] required recognition of marriages contracted outside the forum. The court distinguished the application of the public policy exception to cases, such as incest, "which would tend to outrage the principles and feelings of all civilized nations," from the toleration of marriages, such as miscegenic marriages, "which are prohibited merely on account of political expediency."[107] The precedential effect of *Medway*, however, carried little weight, especially after Massachusetts enacted an evasion statute that would have dictated a different result.[108]

The strongest assertion of the public policy exception to invalidate out-of-state

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97. *Id.* at 619.

98. Mangrum v. Mangrum, 220 S.W.2d 406, 408 (Ky. 1949).

99. *Id.*

100. Ross v. Bryant, 217 P. 364 (Okla. 1923).

101. *Id.* at 365.

102. *Id.* at 366.

103. 16 Mass. 157, 158 (1819).

104. *Id.* at 159.

105. *Id.*

106. *Id.* at 160.

107. *Id.* at 161.

108. State v. Kennedy, 76 N.C. 251, 253 (1877). In reviewing precedent on the recognition of marriages contracted out-of-state by in-state residents, the *Kennedy* court noted that after the decision in *Medway*, Massachusetts enacted legislation to "extend her law prescribing incapacities for contracting marriage over her own citizens who contract marriage in other countries by whose law no such incapacities exist"; *i.e.*, an evasion statute. Since the decision in *Medway* was based on the absence of any ability to give extraterritorial effect to its own laws, the presence of an evasion statute would have overcome this deficiency.

marriages occurred when courts applied the principle to miscegenic marriages. In refusing to allow the right of succession to the surviving spouse of a miscegenic marriage of Louisiana residents, the Supreme Court of Louisiana concluded:

> Whatever validity might be attached in France to the singular marriage contract, and subsequent unnatural alliance there celebrated between the plaintiff and the deceased testatrix, it is plain that, under the facts in evidence, the Courts of Louisiana cannot give effect to these acts, without sanctioning an evasion of the laws, and setting at naught the deliberate policy of the State.[109]

The same North Carolina court that gave full recognition to an out-of-state miscegenic marriage of non-residents[110] later affirmed the conviction of two of its residents on charges of fornication and adultery.[111] The couple's marriage, which was validly contracted in South Carolina and which would have been a defense to the charges, was not recognized by the court, based upon the North Carolina law, which declared miscegenic marriages void.[112] The court distinguished the rule that the place of contracting governs the formalities of the marriage from the rule that the place of domicile determines the capacity of its citizens to marry: "[W]hen the law of North Carolina declares that all marriages between negroes and white persons shall be void, this is a personal incapacity which follows the parties wherever they go so long as they remain domiciled in North Carolina."[113]

The Supreme Court of Virginia refused to recognize the miscegenic marriage of two of its residents, validly contracted in the District of Columbia, for the purposes of legitimizing the offspring of the parties and thereby allowing the children to recover a legacy.[114] Refusing to consider the applicability of statutes that legitimized the issue of parents who subsequently married and those of a marriage deemed null at law, the court based its decision upon the rule that the place of domicile determines the personal capacity of its residents to marry.[115] As pointed out by the dissent, the legitimizing statutes had been applied to hold legitimate the children of a bigamous marriage[116] (the only other grounds, besides miscegeny, which rendered a marriage absolutely void under Virginia law).[117] However, the decision implies that the majority considered miscegeny the more serious offense.

In 1890, a federal circuit court in Georgia found no constitutional impediment to the state of Georgia's indictment, on charges of fornication, of a Georgia couple who had left the state to contract a valid marriage in the District of Columbia, then returned to Georgia to reside.[118] The court reviewed the state's antimiscegenation and evasion statutes and found both to be proper exercises of the state's authority to regulate marriages.[119] As in the other

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109. Dupre v. Boulard's Executor, 10 La. Ann. 411, 412 (1855).
110. State v. Ross, 76 N.C. 242 (1877). *See supra* notes 68-73 and accompanying text.
111. *Kennedy*, 76 N.C. at 253.
112. *Id.* at 252.
113. *Id.*
114. Greenhow v. James' Executor, 80 Va. 636, 638-39 (1885).
115. *Id.* at 641.
116. *Id.* at 649.
117. *Id.* at 646.
118. State v. Tutty, 41 F. 753 (C.C.S.D. Ga. 1890).
119. *Id.* at 762-63.

cases, the circuit court distinguished between the rule recognizing foreign marriages where the form and ceremony differed from local law and the rule that such marriages are void if against the public policy of the state of domicile.[120]

The Supreme Court of Oklahoma ruled that the surviving spouse of a miscegenic marriage had inherited no property rights from his deceased spouse because the marriage was void under Oklahoma law.[121] Since both parties were Oklahoma residents before and after their marriage was contracted in Arkansas, the court refused to recognize the validity of the marriage because it was made in evasion of Oklahoma's antimiscegenation statute.[122] The Supreme Court of Montana also refused to recognize a miscegenic marriage, finding that it had been made in order to evade local law.[123] Montana's statute, which declared miscegenic marriages "utterly null and void," extended its reach to apply to such marriages contracted elsewhere by Montana residents.[124] Because the deceased husband was a Japanese national and a resident of Montana at the time of the marriage, the court refused to recognize his spouse as the surviving widow.[125]

The cases discussed above indicate a strong willingness by the courts to invalidate the miscegenic marriages of state residents. Given that prior to 1967, there was a split of opinion among the states as to the propriety of such marriages,[126] the consistency of results in refusing to recognize miscegenic marriages is noteworthy. With one exception,[127] the courts ignored the policy choices of the states in which the marriages were validly contracted. In contrast, the split of opinion among the states as to the propriety of first-cousin marriages did not generate the same consistency of results.[128] Rather, courts were more willing to accept the policy choices of the contracting forum in recognizing out-of-state first-cousin marriages, even though such marriages were prohibited as incestuous by local law.

Proponents of recognition of out-of-state same-sex marriages should take note of the contrast in the results of applying the public policy exception to miscegenic and first-cousin marriages of local domiciliaries. Proponents could argue that the same deference given to the policy choices of sister states regarding first-cousin marriages should be given to policy choices of sister states regarding same-sex marriages. Opponents could be placed in the embarrassing position of appealing to the authority of courts that enforced the miscegeny prohibitions that were declared unconstitutional more than a quarter century ago.

III. Same Sex of Parties as a Public Policy Exception

Resistance to the recognition of valid same-sex marriages depends on successfully establishing that the public policy of the state contravenes such recognition. Evidence of a

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120. *Id.* at 761-62.

121. Eggers v. Olson, 231 P. 483, 486 (Okla. 1924).

122. *Id.* at 485.

123. *In re* Takahashi's Estate, 129 P.2d 217, 222 (Mont. 1942).

124. *Id.* at 219.

125. *Id.* at 222.

126. Loving v. Virginia, 388 U.S. 1, 6 n.5 (1967).

127. *See* Medway v. Needham, 16 Mass. 157 (1819), discussed *supra* at notes 104-08 and accompanying text.

128. *See supra* subpart II.B.1.

state's public policy regarding same-sex marriages may be adduced from the presence or absence of state statutory prohibitions and from state decisional authority on the subject. Other factors that indicate the strength of a state's public policy against same-sex marriage are state constitutional provisions and court decisions on matters related to the incidents of marriage where the couple is of the same sex. In regard to the latter, such matters as child custody decisions and visitation rights, adoption, division of property, and rights of survivors may be instructive.

A. Statutory Prohibitions

Statutory prohibitions regarding same-sex marriages may be in the form of a statute limiting the term "marriage" to parties of the opposite sex. The limitation may be express[129] or implied.[130] The absence of same-sex marriages from the list of those prohibited by the state may bolster the argument that the policy of the state is insufficient to require invalidation of such marriages.[131] To counter the attachment of significance to the absence of same-sex marriages from the list of statutory prohibitions, an argument could be made that since marriage, by definition, contemplates that the parties are of the opposite sex, an explicit prohibition would be superfluous. Overcoming this objection would require the court to eschew acceptance of the circular argument that marriage is limited to a union between a man and a woman because marriage is a union between a man and a woman.[132]

The existence of sodomy statutes may be used as evidence of a state's public policy against same-sex marriage. The implication is that a same-sex marriage necessarily includes homosexual activity of the type prohibited by statute. Twenty-one states currently have active sodomy statutes, four of which limit the prohibition to persons of the same sex.[133] The difficulty in using the existence of a sodomy statute as evidence of a state's public policy against same-sex marriage is threefold.

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129. *E.g.*, the Uniform Act clearly defines the limitation: "Marriage is a personal relationship between a man and a woman . . . ." UNIF. MARRIAGE AND DIVORCE ACT § 201 (1973). Ohio's statute states the limitation more ambiguously: "Male persons . . . and female persons . . . may be joined in marriage." OHIO REV. CODE ANN. § 3101.01 (Anderson 1989 & Supp. 1993). The ambiguity arises because, by using the plural, one might read the statute to mean "male persons may be joined and female persons may be joined." However, an Ohio court construed the statute to permit marriage "only between members of the opposite sex." Gajovski v. Gajovski, 610 N.E.2d 431, 433 (Ohio Ct. App. 1991).

130. *E.g.*, the Hawaii statute implies the limitation, stating: "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." HAW. REV. STAT. § 572-1(3) (1993) (emphasis added).

131. Although the Uniform Act clearly limits the term "marriage" to "a man and a woman" (*supra* note 130), it does not include as a prohibited marriage one in which the parties are of the same sex. UNIF. MARRIAGE AND DIVORCE ACT § 207 (1973).

132. *See* Baehr v. Lewin, 852 P.2d 44, 61, discussed *supra* at notes 2-7 and accompanying text, which characterized similar reasoning as "circular and unpersuasive."

133. The states in which sodomy is prohibited, regardless of the sex of the participants are Alabama, Arizona, Florida, Georgia, Idaho, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Montana, North Carolina, Oklahoma, Rhode Island, South Carolina, Utah, and Virginia; the states which prohibit sodomy only between persons of the same sex are Arkansas, Kansas, Missouri, and Tennessee. *Sodomy Statutes*, THE LAMBDA UPDATE (Lambda Legal Def. and Educ. Fund, New York, N.Y.), Spring 1993, at 17.

First, such use assumes that the parties to a same-sex marriage are homosexual. As the Supreme Court of Hawaii indicated in *Baehr*, the sexual orientation of the parties is irrelevant to the issue of same-sex marriage.[134] Because the parties to a same-sex marriage may be heterosexual, the existence of a sodomy statute does not provide cogent evidence of a state's public policy concerning same-sex marriage.

Secondly, sodomy statutes merely proscribe certain types of sexual behavior between *unmarried* participants.[135] Thus, in a state prohibiting sodomy regardless of the sex of the participants, the sodomy statute is no more indicative of public policy against same-sex marriage than it is of public policy against opposite-sex marriage. The intent of the statute is to proscribe certain sexual activity between unmarried individuals, not to proscribe sexual activity between persons married to each other.

Thirdly, use of a sodomy statute as evidence of a state's public policy against same-sex marriage assumes that the parties will necessarily engage in sexual activity. Because it is neither assumed nor required that sexual activity will occur between parties to an opposite-sex marriage,[136] it is illogical to make a similar assumption or impose a similar requirement on the parties to a same-sex marriage. Consequently, a statute prohibiting certain acts would shed little light on the subject of a state's public policy regarding the status between parties who may or may not commit those acts. In sum, the existence of a sodomy statute has no relevance in determining a state's public policy regarding same-sex marriage.

B. Case History of Same-Sex Marriage

Until the *Baehr* decision, the outcome of cases addressing questions regarding same-sex marriage was consistently unfavorable to the parties seeking to assert the right to marry. Cases challenging the state's refusal to issue marriage licenses to same-sex couples (*Baker v. Nelson*,[137] *Jones v. Hallahan*,[138] and *Singer v. Hara*[139]) were uniformly decided in favor of the state's right to deny those couples the right to occupy the marital status.[140] The relevance of these decisions to the issue of applying the public policy exception to invalidate a same-sex marriage is questionable. In all three cases, the question presented was not whether the public policy of the state prohibited recognition of a same-sex marriage validly contracted out-of-state, but whether state law authorized issuance of marriage licenses to same-sex couples. A similar distinction can be made between a court deciding that first-

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134. *Baehr*, 852 P.2d at 51 n.11, discussed *supra* at notes 2-7 and accompanying text.

135. *E.g.*, UTAH CODE ANN. § 76-5-406 (1990 & Supp. 1993). This section reads, in part: "An act of . . . sodomy . . . is without consent of the victim [if] . . . (7) the actor knows that the victim submits or participates because the victim erroneously believes that the actor is the victim's spouse . . . ." In other words, the crime of sodomy is not committed if the participants are each other's spouse.

136. The only area in the marriage statutes where sexual activity is mentioned is when an annulment of the marriage is sought because one party "lacks the physical capacity to consummate the marriage by sexual intercourse, and at the time the marriage was solemnized the other party did not know of the incapacity." UNIF. MARRIAGE AND DIVORCE ACT § 208(a)(2) (1973).

137. 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

138. 501 S.W.2d 588 (Ky. 1973).

139. 522 P.2d 1187 (Wash. Ct. App. 1974).

140. For an in-depth analysis of *Baker*, *Jones*, and *Singer*, see Otis R. Damslet, Note, *Same-Sex Marriage*, 10 N.Y. L. SCH. J. HUM. RTS. 555, Parts III-A, III-B, and III-C (1993).

cousin marriages are not authorized by state law, yet deciding to recognize a first-cousin marriage validly contracted elsewhere. The narrower and more pertinent question is whether a state, which has found that its own statutes prohibit same-sex marriage, will give extraterritorial effect to that local prohibition. The precedential value of these decisions is that the question of whether same-sex marriages are prohibited locally has been answered. The courts in those states, like the courts in others, will still be required to answer choice-of-law questions, determine the strength of the public policy supporting the prohibition, and decide whether state policy choices should be enforced by invalidating the marriages.

Two cases have addressed the question of the validity of a same-sex marriage. In *Anonymous v. Anonymous*, a New York court declared that the marriage ceremony in Texas between a New York male resident and a male who appeared to be female (and who was presumably a resident of Texas) was a nullity.[141] The court did not consider Texas law, but based its decision on the assertions that "[t]he law makes no provision for a 'marriage' between persons of the same sex" and that "[m]arriage is and always has been a contract between a man and a woman."[142] Apparently, the court assumed these assertions were universal truths, thereby obviating the need to consult Texas law. Since that assumption could not be made when faced with a same-sex marriage contracted in a state which recognized such marriages, that case is inapposite for the question at hand.

In *Adams v. Howerton*, the Ninth Circuit held that the marriage of two males in Colorado did not qualify one of the parties to be the "spouse" of the other for immigration purposes.[143] Finding it unnecessary to determine the validity of the Colorado marriage, the court determined that "Congress intended that only partners in heterosexual marriages be considered spouses"[144] under an immigration law provision granting preferential admission treatment to spouses. This conclusion was based upon two factors: (1) Congress did not indicate an intent to enlarge the meaning of the term "marriage" to include same-sex marriages, and (2) provisions excluding homosexuals were part of the same immigration act, implying an inconsistency if homosexuals were then accorded preferential treatment as spouses. In regard to the first factor, the court's reasoning is flawed in that it merely reiterates the circular argument that the term "marriage" does not include relationships between two persons of the same sex because two persons of the same sex cannot marry. As to the second factor, the court erroneously assumes that homosexuality is a prerequisite of same-sex marriage. As noted in *Baehr*, the sexual orientation of the parties is irrelevant to a same-sex marriage.[145]

A New York court refused to allow the surviving partner of a homosexual relationship to claim spousal rights against his partner's will.[146] Asserting that the only reason he and the decedent were not married was "because marriage license clerks in New York state will not issue licenses to persons of the same sex,"[147] the surviving partner argued that the denial

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141. 325 N.Y.S.2d 499, 501 (N.Y. Sup. Ct. 1971).

142. *Id.* at 500.

143. 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982).

144. *Id.* at 1041.

145. *Baehr*, 852 P.2d at 51 n.11, discussed *supra* at notes 2-7 and accompanying text.

146. *In re* Estate of Cooper, 564 N.Y.S.2d 684 (N.Y. Sur. Ct. 1990), *aff'd*, 592 N.Y.S.2d 797 (N.Y. App. Div. 1993), *appeal dismissed*, 82 N.Y.2d 801 (N.Y. 1993).

147. *Id.* at 685, quoting appellant's petition.

deprived him of his constitutional guarantee of equal protection of the law.[148] The court held that "persons of the same sex have no constitutional rights to enter into a marriage with each other."[149] Because the surviving partner did not contend that he and the decedent were married to each other, the precedential value of this decision suffers from the same limitations as those of *Baker*, *Jones*, and *Singer*.[150] The decision that a same-sex marriage cannot be entered into in New York is not dispositive of the issue of the validity of such marriages entered into elsewhere.

C. State Constitutional Provisions

The heart of the *Baehr* decision is that the state statute restricting marriage to opposite-sex couples may violate the equal protection provision of the state constitution.[151] The Hawaii Constitution specifically bans discrimination on the basis of sex, as do the constitutions of several other states.[152] In states that have constitutional provisions similar to Hawaii's, such provisions may provide a definitive answer to the question of discerning the public policy of the state with respect to same-sex marriage. A constitutional provision that prohibits an abridgment of rights on the basis of sex is a public policy statement of sufficient strength to abrogate any legislative enactments expressing a contrary policy. Consequently, in a state having such a provision, invalidation of a same-sex marriage by application of the public policy exception may be avoided by urging that the state constitution would be violated by allowing a man to marry a woman yet prohibiting a woman from marrying a woman.

Singer, however, is contrary authority.[153] The Washington Supreme Court held that the

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148. *See* U.S. CONST. amend. XIV, §1.

149. *In re Estate of Cooper*, 564 N.Y.S.2d at 685.

150. *See* discussion *supra* at notes 138-40 and accompanying text.

151. *See* Baehr v. Lewin, 852 P.2d 44, discussed *supra* at text accompanying notes 2-7.

152. *See* COLO. CONST. art. II, § 29 ("Equality of rights under the law shall not be denied or abridged by the state of Colorado or any of its political subdivisions on account of sex."); CONN. CONST. art. I, § 20 ("No person shall be denied the equal protection of the law nor be subjected to . . . discrimination in the exercise or enjoyment of his or her civil or political rights because of . . . sex . . . ."); ILL. CONST. art. I, § 18 ("The equal protection of the laws shall not be denied or abridged on account of sex by the State or its units of local government and school districts."); LA. CONST. art. I, § 3 ("No law shall arbitrarily, capriciously, or unreasonably discriminate against a person because of birth, age, sex, culture, physical condition, or political ideas or affiliations."); MASS. CONST. art. 1 ("Equality under the law shall not be denied or abridged because of sex . . . ."); MD. CONST. D. of R. art. 46 ("Equality of rights under the law shall not be abridged or denied because of sex."); PA. CONST. art. I, § 28 ("Equality of rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual."); R.I. CONST. art. I, § 2 ("No person shall be . . . denied equal protection of the laws. No otherwise qualified person shall, solely by reason of race, gender or handicap be subject to discrimination by the state, its agents or any person or entity doing business with the state."); TEX. CONST. art. I, § 3a ("Equality under the law shall not be denied or abridged because of sex . . . ."); UTAH CONST. art. IV, § 1 ("Both male and female citizens of this State shall enjoy equally all civil, political and religious rights and privileges."); WYO. CONST. art. VI, § 1 ("Both male and female citizens of this state shall equally enjoy all civil, political and religious rights and privileges.").

153. Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974), discussed *supra* at text accompanying note 140.

state's equal rights amendment "does not require the state to authorize same-sex marriage."[154] Although this holding does not support the proposition that invalidating out-of-state same-sex marriages would violate the state's constitutional guarantee of equal rights regardless of sex, neither does it support the proposition that invalidation is mandated by state policy.

Other state constitutional provisions may also be helpful in avoiding invalidation on public policy grounds.[155] A provision that prohibits the granting of privileges or immunities to one citizen or class of citizens that is not granted to all citizens supports the argument that states violate their constitutional mandates in recognizing the marriages of opposite-sex couples while denying the same privilege to same-sex couples.

It might prove quite difficult, however, to appeal to state constitutional provisions to avoid invalidation if they are similar to provisions in the United States Constitution. *Baker*[156] is authority for the proposition that state denial of marriage licenses to same-sex couples is not violative of the First, Eighth, Ninth, or Fourteenth Amendments of the United States Constitution.[157] The United States Supreme Court dismissed the appeal from the Minnesota court's decision in *Baker* for want of a substantial federal question.[158] Because such a dismissal operates as a holding that the constitutional challenge was rejected,[159] *Baker* remains good authority that there is no constitutional impediment on the federal level to prohibit same-sex marriages.

CONCLUSION

If the subsequent decision in *Baehr* ends Hawaii's restriction of marriage to opposite-sex couples, same-sex couples will marry in Hawaii and will seek recognition of their marriages in other states. Because it is generally believed that a same-sex marriage implies that the parties are homosexual, and because "[p]olls about gays suggest that Americans are most tolerant of sexual differences when they don't have to confront them,"[160] it is almost

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154. *Id.* at 1195.

155. *See* ARIZ. CONST. art. II, § 13 ("No law shall be enacted granting to any citizen, class of citizens or corporation other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."); CAL. CONST. art. I, § 7(b) ("A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens."); IND. CONST. art. I, § 23 ("The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens."); IOWA CONST. art. I, § 6 ("[T]he General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens.").

156. Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed* 409 U.S. 810 (1972). *See* discussion accompanying *supra* note 138.

157. *Id.* at 187. Baker argued that the Ninth Amendment guaranteed a fundamental right to marry that, by application of the Fourteenth Amendment, could not be restricted. Further, Baker contended that the Due Process and Equal Protection Clauses of the Fourteenth Amendment were offended by the state's restriction of marriage to only opposite-sex couples. Baker's First and Eighth Amendment challenges were dismissed by the court without discussion.

158. *Id.*

159. Hicks v. Miranda, 422 U.S. 332, 344 (1975).

160. *The Power and the Pride*, NEWSWEEK, June 21, 1993, at 60.

certain that the visibility attendant to seeking recognition will encounter resistance. Whether same-sex couples can overcome such resistance will depend on whether choice-of-law issues and issues regarding the public policy exception to recognition of valid marriages are resolved in their favor.

Assuming a decision favorable to the plaintiffs in *Baehr*, same-sex couples who reside in Hawaii when they marry will probably be afforded recognition of their marriages in other states. Other couples, who are domiciled outside of Hawaii when they marry there, will probably generate a patchwork of decisions when they seek recognition—some of those marriages will be recognized, but others will be invalidated. The uncertainty of results would fuel an inexorable march to the door of the United States Supreme Court, much as the miscegeny decisions did a generation ago.[161]

In Justice Warren's words, "The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men."[162] For those free men (and women) long denied this right, the Hawaii Supreme Court has courageously cracked open the access door. Only after the legal battles have been fought will we know whether other state courts can match its courage.

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161. Loving v. Virginia, 388 U.S. 1 (1967), discussed *supra* at note 34 and accompanying text.

162. *Id.* at 12.