Using an “Incidents of Marriage” Analysis When Considering Interstate Recognition of Same-Sex Couples’ Marriages, Civil Unions, and Domestic Partnerships

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USING AN "INCIDENTS OF MARRIAGE" ANALYSIS WHEN CONSIDERING INTERSTATE RECOGNITION OF SAME-SEX COUPLES' MARRIAGES, CIVIL UNIONS, AND DOMESTIC PARTNERSHIPS

Barbara J. Cox*

I. AN(OTHER PERSONAL) INTRODUCTION ON SAME-SEX MARRIAGE

My spouse, Peg Habetler, and I were married last summer, after almost thirteen years in a committed relationship. I still struggle to use the word "spouse" after referring to her as "partner" for so many years. Our local paper ran an article about us getting married last summer. As the article noted, "I proposed in December of 1991. And in July of 2003 we're finally getting married. It was a very long engagement." Like many U.S. couples, we went to Ontario, Canada, shortly after the Court of Appeal for Ontario, that province's highest court, held that the exclusion of same-sex couples from the institution of civil marriage violated

* Professor of Law, California Western School of Law; J.D. University of Wisconsin, 1982; B.A. Michigan State University, 1978. I would like to thank my family and friends for all their support for our wedding in July 2003 in Canada. I would also like to thank Bobbi Weaver, reference librarian at California Western, for her extensive assistance in obtaining non-US materials for this article, as well as CWSL's other reference librarians who assisted me, and Steven Jodlowski (J.D. 2004) for his research assistance. I would also like to thank my spouse, Peg Habelter, for her continuing support and inspiration.


3 Id. Actually, we had a commitment ceremony in April 1992, so our "wedding" came only five months after my proposal. Although that ceremony had all the significance of a wedding for us, our friends, and our families, like all same-sex relationships in the United States at that time, it provided no legal recognition, benefits, or responsibilities.
Canada's federal Constitution—the Charter of Rights and Freedoms. 4

My work seeking legal recognition of and protection for same-sex couples' relationships began in 1983 when I chaired a task force of the Madison, Wisconsin Equal Opportunities Commission that was studying whether to provide rights and legal recognition to people in "alternative family" relationships. As detailed in two earlier articles, 5 we were among a handful of cities at the time considering how to provide rights and recognition to these relationships. Now known as domestic partnerships, in the twenty years since those early efforts, significant changes have occurred. Marriage by same-sex couples is now permitted in the Netherlands, Belgium, 6 and Canada, 7 and has just been won in Massachusetts. 8

7 Halpern, 65 O.R.3d at 199-200; EGALE Canada Inc. v. Att'y Gen. of Canada, [2003] 15 B.C.L.R.4th 226 (amending 13 B.C.L.R.4th 1, which had found the limitation of marriage licenses to opposite-sex couples to be unconstitutional, but postponed the effective date of its decision to July 2004). Both of these courts declared same-sex couples could marry immediately. The Canadian federal government declined to appeal the Halpern decision, and instead, asked the Supreme Court to respond to the "Reference" of questions on whether the government's draft bill defining marriage as the "lawful union of two persons to the exclusion of all others" was consistent with the Canadian Charter of Rights and Freedoms. See Nicholas Bala, Controversy over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships, 29 Queen's L.J. 41, 77-79 (2003). The Government has since asked the Court whether the traditional definition of marriage as between a man and a woman is consistent with the Charter. This change will set back the date of
In these locations, any two people who are otherwise permitted to marry\(^9\) may do so with exactly the same rights and responsibilities as all other couples.

In many European countries, including Denmark, Finland, France, Germany, Greenland, Iceland, Norway, Sweden, and apparently soon in Britain, same-sex couples are permitted to enter into some type of "registered partnership" whereby most, but not all, of the rights of marriage are provided to those couples.\(^{10}\) In four states—Vermont, Hawaii, California, and New Jersey—same-

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\(^{9}\) Some restrictions remain, such as both individuals being of age (as defined by that jurisdiction), not within certain family relationships, and mentally competent to enter into a marriage.

sex couples who form "civil unions," "reciprocal beneficiaries relationships," or "domestic partnerships," respectively, are given most, but not all, of the state rights and responsibilities of marriage. Countless cities, municipalities, and counties also offer some domestic partner rights, and thousands of U.S. companies offer domestic partner benefits, including family-based health insurance, to same-sex couples.

As Congress holds hearings and ponders whether to add an amendment, which discriminates against the marriages of same-sex couples, to the United States Constitution, my spouse and I found ourselves surprised by the significant change we felt from getting


12 See Barbara J. Cox, "The Little Project" From Alternative Families to Domestic Partnerships to Same-Sex Marriage, 15 WIS. WOMEN'S L.J. 77, 79 (2000) [hereinafter "The Little Project"].

13 H.R.J. Res. 56, 108th Cong. (2003), introduced on May 21, 2003, states the following:

Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution [n]or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred on unmarried couples or groups.

Id. Alternative proposals eliminating the statutory references have also been proposed. The Constitutional Amendment to ban gay marriage failed in the United States Senate on July 15, 2004, by a vote of 48-50. Same-Sex Marriage Senate Battle Over, War is Not: GOP Leaders Fail to get Enough Votes to Advance Measure, (July 15, 2004), available at http://www.cnn.com/2004ALLPOLITICS/07/14/samesex.marriage (last visisted July 26, 2004).
married. We have both spent the past several months struggling with how to describe the difference it made for us.

We have considered ourselves married since April 1992, and our friends and family have treated us that way. After eighteen months in a long-distance relationship between Madison, Wisconsin, and San Diego, California, we had a commitment ceremony to celebrate the love and support that we had found in our relationship. Before many other gay and lesbian couples were making public commitments to one another, we decided we wanted to ask our friends and families to join us in celebrating a relationship that we were prepared to commit to for our lifetimes. We had two celebrations, one in Madison and one in San Diego, and over one hundred people attended each. In this support, we have been blessed unlike many same-sex couples whose families or friends turn away from them as they take steps to express the commitment and love they have found in their most significant relationship.¹⁴

So when we called our family members last summer and told them that we were going to get married in Canada, many expressed confusion. They asked, "Why do you want to get civilly married when you're already married?" and "If your Canadian marriage may not be honored in the U.S., why take that additional step?" As we struggled to explain to them what we struggled to know for ourselves, we experienced firsthand the complex, often contradictory, emotions that connect the institution of marriage to members of this society.

Perhaps we should have simply read to them from the Ontario Court of Appeal's decision in Halpern v. Attorney General of Canada.

Marriage is, without dispute, one of the most significant forms of personal relationships .... Through the institution of marriage, individuals can publicly express their love and commitment to each other. Through this institution, society publicly recognizes expressions of love and commitment

¹⁴ They turn away when most opposite-sex couples are embraced by their friends and families during a time filled with bridal showers, bachelor parties, wedding registries, developing relationships between the spouses' families, and feelings of excitement, hope, and happiness for the new couple.
between individuals, granting them respect and legitimacy as a couple. This public recognition and sanction of marital relationships reflect society's approbation of the personal hopes, desires and aspirations that underlie loving, committed conjugal relationships. This can only enhance an individual's sense of self-worth and dignity.¹⁵

Even while we struggled to explain why we were taking this additional step of getting legally married in another country, we continued to receive support from our friends and families. Our friends threw us a bridal shower (complete with gag-gifts and matching "Bride" baseball caps). My parents, Jean and Lyn Cox, loaned us their car to drive from Kentucky to Windsor, Canada, and Peg's brother, Bob Habetler, and his daughter, Kristen Habetler, stood up for us as witnesses while we "eloped" to the City Hall and the Metropolitan Community Church there.

While planning the wedding, we encountered many of the differences that exist between having a "private" commitment ceremony and having a "public" wedding. One was the legal trappings to which we never had access before. Like all other soon-to-be married couples, we went to the City Clerk's office at the Windsor City Hall, and submitted our "marriage application" and paid the required fee. Like all other soon-to-be married couples, we swore an oath that the information in our application was true and were given a "marriage license." Like all other soon-to-be married couples, we took the license with us to meet with the minister, Reverend Brenda Hunt of the Metropolitan Community Church of Windsor, and were married in the chapel that same morning.

Unlike most other couples, we had already had a ceremony and celebration with our friends and family slightly more than eleven years earlier. When we got "committed" in 1992, we were claiming a status for ourselves and our relationship that we thought might be the only one we would ever be permitted to claim. We could barely imagine a time in our lifetimes when we could marry just as our heterosexual parents, siblings, and friends could marry.

Following our wedding in Windsor, we were given the official "Record of Solemnization of Marriage," something we also never

believed would be ours. This governmental sanction of our relationship was another significant difference between our commitment ceremony and our wedding. Reverend Hunt ended the ceremony with the following words, "By the authority given by our government to solemnize matrimony and the relationship we share as members of the same family, I declare that you who were two families are now one family, joined in matrimony and blessed by the Spirit of Love." Although registered as domestic partners in both Madison, Wisconsin, and in California, and with my employer, California Western School of Law, our relationship had never received the full force and acceptance of a nation's government. Were we living in Canada, our marriage would be treated the same as any other couple's marriage.

Perhaps what had the most meaning for us is that we now share a relationship with countless other couples who also decided they wanted to share their lives together. The word "marriage" has such a significant force in our society. We all know what it means to be married, and we all recognize a couple who is married as one that has made a long-term commitment to each other, to share the good and bad in their lives, to join together as a couple, and to seek support and love from each other. As we keep talking about our

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16 Peg and I have often joked that we were going to continue collecting partnership certificates until one day they provide real rights, benefits, and responsibilities. The Madison, Wisconsin, domestic partnership permitted us to live together in areas zoned for single families and to visit each other in the hospital or in jail (luckily, we needed neither visitation right). The domestic partnership registry with my employer provides both of us health insurance benefits. The California domestic partnership gives us rights of hospital visitation, medical and financial decision making, disability benefits; the right to sue for wrongful death or emotional distress; the use of form wills and automatic appointment as administrator; the use of stepparent adoption process; unemployment insurance benefits; the use of sick leave to care for domestic partners and their children; rights to health insurance; limited tax benefits; the right to inherit through intestacy; the right to take paid employment leave to care for a seriously-ill domestic partner or child; the right to live in senior citizen developments and to stay upon the other partner's death; and the right to obtain birth or death records for their partner. As indicated by 2003 Cal. Adv. Legis. Serv. 421, we will soon receive other significant rights, responsibilities, and benefits. See supra note 11. It may take some time to find out what rights our Canadian marriage gives us.
"new" relationship, we continue to be amazed by the power of the word and the deep feelings we have about being "married."

II. SAME-SEX COUPLES WIN THE FREEDOM TO MARRY IN THE UNITED STATES

Six months to the day after we married in Canada, the Massachusetts Supreme Judicial Court, in Goodridge v. Department of Public Health, became the fourth U.S. court to declare that denying its same-sex citizens the freedom to marry violated its state constitution. In language that described the differences my spouse and I have been feeling after having a commitment ceremony, registering as domestic partners, and getting married, Chief Justice Marshall eloquently summarized why same-sex couples must be permitted by the State to marry:

Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and

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18 Courts in Hawaii, Alaska, and Vermont have also held that excluding same-sex couples from the right to marry violated their state constitutions. Inching Down the Aisle, supra note 6, at 2005 n.11 (citing Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998); Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), reh’g granted in part, 875 P.2d 225 (Haw. 1993), remanded to Baehr v. Miike, Civ. No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996), aff’d, 950 P.2d 1234 (Haw. 1997); Baker v. State, 744 A.2d 864 (Vt. 1999)). However, constitutional amendments mooted the decisions in Hawaii and Alaska. See Inching Down the Aisle, supra note 6, at 2005 n.12 (citing ALASKA CONST. art I, § 25 (adopted 1998); HAW. CONST. art. I § 23 (adopted 1998)). For a discussion of Baehr, see Barbara J. Cox, Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?, 1994 WIS. L. REV. 1033. (1995) [hereinafter If We Marry]. The Vermont legislature adopted its civil unions bills after the Baker court indicated that it could create "some equivalent statutory alternative" to avoid "disruptive and unforseen consequences." Baker, 744 A.2d at 867, 887. The Vermont legislature established the institution of "civil unions" in VT. STAT. ANN. tit. 15, § 1204(a) (2002), which states that parties to a civil union "shall have all the same benefits, protections and responsibilities under law . . . as are granted to spouses in a marriage." For a discussion of this case, see Barbara J. Cox, But Why Not Marriage: An Essay on Vermont’s Civil Unions Law, Same-Sex Marriage, and Separate But (Un)Equal, 25 VT. L. REV. 113 (2000) [hereinafter But Why Not Marriage].
mutual support; it brings stability to our society .... The Massachusetts Constitution affirms the dignity and equality of all individuals. It forbids the creation of second-class citizens ....

Barred access to the protections, benefits, and obligations of civil marriage, a person who enters into an intimate, exclusive union with another of the same sex is arbitrarily deprived of membership in one of our community's most rewarding and cherished institutions. That exclusion is incompatible with the constitutional principles of respect for individual autonomy and equality under law.19

Following the lead of the Court of Appeal for Ontario, Canada, the supreme judicial court redefined the common law meaning of marriage and said, "We construe civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others."20 The court declared that "barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution."21 The court remanded the case to the superior court for entry of a judgment consistent with the opinion, but stayed entry of that judgment for 180 days "to permit the Legislature to take such action as it may deem appropriate in light of this opinion."22

Interestingly, much of the furor in Massachusetts has been over whether the court, by focusing on the "protections, benefits, and obligations"23 of marriage and by staying entry of its judgment, would permit the legislature to create "some equivalent statutory alternative" to marriage, similar to Vermont's civil unions. On December 11, 2003, the Massachusetts Senate voted to ask the court whether it would satisfy the state constitution for the legislature to adopt Senate Bill No. 2175, a civil unions bill that provides all the "benefits, protections, rights and responsibilities of

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20 Id. at 969.
21 Id.
22 Id. at 970.
23 Id. at 949.
marriage, but which also limits marriage to unions between a man and a woman, rather than extending marriage rights to same-sex couples.\textsuperscript{24}

On February 3, 2004, the justices responded to the Senate's question.\textsuperscript{25} Writing for the majority, Justice Robert J. Cordy quoted parts of the court's opinion in \textit{Goodridge},\textsuperscript{26} and then explained why providing same-sex couples with all the benefits and responsibilities of marriage, while still segregating them from marriage as was proposed in the civil unions bill, would not be constitutional.

The constitutional difficulty of the proposed civil union bill is evident in its stated purpose to 'preserve the traditional, historic nature and meaning of the institution of civil marriage.' . . . Yet the bill, as we read it, does nothing to 'preserve' the civil marriage law, only its constitutional infirmity . . . . The very nature and purpose of civil marriage, the court concluded, renders unconstitutional any attempt to ban all same-sex couples, as same-sex couples, from entering into civil marriage.\textsuperscript{27}

Focusing on same-sex couples' exclusion from marriage under the proposed bill, Justice Cordy emphasized that


\textsuperscript{26} "Because it fulfils [sic] yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition." \textit{Id.} at 567 (citing \textit{Goodridge}, 798 N.E.2d 941, 955 (Mass. 2003)). "The court stated that the denial of civil marital status 'works a deep and scarring hardship on a very real segment of the community for no rational reason.'" \textit{Id.} (citing \textit{Goodridge}, 798 N.E.2d at 968).

\textsuperscript{27} 802 N.E.2d at 569.
[b]ecause the proposed law by its express terms forbids same-sex couples entry into civil marriage, it continues to relegate same-sex couples to a different status. The holding in Goodridge ... is that group classifications based on unsupportable distinctions ... are invalid under the Massachusetts Constitution. The history of our nation has demonstrated that separate is seldom, if ever, equal.28

Recognizing that the difference between civil unions and civil marriage was neither just ""semantic"" nor ""innocuous,"29 the justices concluded:

[I]t is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status .... For no rational reason the marriage laws of the Commonwealth discriminate against a defined class; no amount of tinkering with language will eradicate that stain. The bill would have the effect of maintaining and fostering a stigma of exclusion that the Constitution prohibits.30

28 Id. (emphasis added). See also But Why Not Marriage, supra note 18, at 123-36, which discusses our nation's earlier attempts to create "'separate but equal" institutions in both the race and sex contexts, and how both were ultimately rejected as unconstitutional. The justices' opinion clearly explains why similar attempts to do so in the sexual orientation context are equally unconstitutional.

29 802 N.E.2d at 570. The majority justices specifically reject that portion of Justice Sosman's separate opinion which, quoting Shakespeare, argues that the distinction between civil unions and civil marriages is not of constitutional significance. Id. at n.4. "'If . . . the proponents of the bill believe that no message is conveyed by eschewing the word 'marriage' and replacing it with 'civil union' for same-sex 'spouses,' we doubt that the attempt to circumvent the court's decision in Goodridge would be so purposeful." Id. at 570.

30 Id.
III. INTERSTATE RECOGNITION OF CIVIL UNIONS BY SAME-SEX COUPLES

Now that Massachusetts will join the Netherlands, Belgium, and two provinces in Canada in permitting same-sex couples to marry, the next issue that will arise is whether those marriages will be treated like other marriages and honored by other states, provinces, and countries or whether they will face discrimination and be refused recognition. Like all other U.S. same-sex couples who married in Canada, my spouse and I also wonder whether our marriage will be honored by those institutions (whether private or public) with whom we will have dealings as a married couple. Countless Canadian and U.S. opposite-sex couples have had their Canadian marriages recognized and validated in this country. This same question will arise when Massachusetts same-sex couples leave their state and travel throughout this country and the world.

31 This article refers to interstate recognition of Vermont civil unions because the six cases discussed below concerned those relationships. But as same-sex couples in civil unions, domestic partnerships, and reciprocal beneficiary relationships seek legal remedies based on their coupled status, courts will be faced with resolving issues relating to all three types of legal status. Additionally, courts will soon be faced with marriages from Massachusetts, Canada, Belgium, and the Netherlands, and issues of whether those marriages will be honored and validated. Although I believe marriages have a stronger claim to interstate recognition, see But Why Not Marriage, supra note 18, at 137-44, the analysis provided in this section can and should be used by courts when addressing interstate recognition of any of these legal relationships. See also Ralph U. Whitten, Exporting and Importing Domestic Partnerships: Some Conflict-of-Laws Questions and Concerns, 2001 BYU L. REV. 1235 (2001) (arguing that states will not be constitutionally required to recognize other states’ domestic partnerships, except when faced with judgments concerning the partnerships); Robert Wintemute, Conclusion to LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 759, 769 (Robert Wintemute & Mads Andenaes eds., 2001) (discussing how using a name other than marriage facilitates the task of denying recognition to same-sex relationships: "Registered partnership? What’s that? We’ve never heard of it. It doesn’t exist here.")

32 For a discussion of how recognition of international marriages may differ from recognition of U.S. marriages in U.S. courts since neither the Full Faith and Credit clause of the U.S. Constitution nor the Federal DOMA statutes apply to foreign marriages, see Herma Hill Kay, Same-Sex Divorce in the
They will join us in asking whether our marriages will be honored as virtually all other marriages are honored, or whether we will face discrimination from a society that somehow remains troubled by using this term to describe our relationships.\textsuperscript{33}

The Massachusetts Department of Public Health specifically argued to the Supreme Judicial Court of Massachusetts that "expanding the institution of civil marriage in Massachusetts to include same-sex couples will lead to interstate conflict."\textsuperscript{34} The court responded by saying that it "would not presume to dictate how an[y] other state [or country would] respond" to its ruling.\textsuperscript{35} But it concluded with the following:

But neither should considerations of comity prevent us from according Massachusetts residents the full measure of protection available under the Massachusetts Constitution. The genius of our Federal system is that each State's Constitution has vitality specific to its own traditions, and that, subject to the minimum requirements of the Fourteenth Amendment, each State is free to address difficult issues of individual liberty in the manner its own Constitution demands.\textsuperscript{36}

I have written many articles on interstate recognition of same-sex relationships and whether the marriages of same-sex couples entered into in one U.S. state would be honored and recognized


\textsuperscript{33} See Developments in the Law (pt. 3), \textit{Constitutional Constraints on Interstate Same-Sex Marriage Recognition}, 116 HARV. L. REV. 2028, 2050-51 (2003) [hereinafter \textit{Constitutional Constraints}] (explaining that when courts are comfortable with the unions of same-sex couples, they will view them as highly analogous to traditional marriages, but when courts are uncomfortable with these unions, they may reject the suggestion that cases involving interstate recognition of same-sex couples' unions should be governed by the same principles used for recognizing traditional marriages).

\textsuperscript{34} Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 967 (Mass. 2003).

\textsuperscript{35} \textit{Id.}

\textsuperscript{36} \textit{Id.}; see also Ops. of the Justices to the Senate, 802 N.E.2d 565, 571 (discussing whether same-sex couples' marriages from Massachusetts will be recognized in other states as valid and how "personal residual prejudice against same-sex couples" may continue).
like most other out-of-state marriages in this country,\(^{37}\) or whether our marriages would be treated in a manner not seen since the prohibitions on interracial marriages were declared unconstitutional by the U.S. Supreme Court.\(^{38}\) This issue arose in the early 1990s during the second wave\(^{39}\) of litigation seeking the freedom for same-sex couples to marry that started with the Hawaiian litigation and that state's supreme court decision in *Baehr v. Miike*.\(^{40}\) At that time, I began researching the question of whether a marriage in Hawaii or elsewhere would be recognized when a same-sex couple returned home from an out-of-state wedding ceremony in whatever state became the first to permit marriages of same-sex couples.\(^{41}\) As part of a group of law professors, lawyers, and law students organized by Lambda Legal Defense and Education Fund, I supervised and edited a detailed analysis of every state's marital recognition law.\(^{42}\) Numerous commentators on all sides of the issue have long been discussing


\(^{39}\) During the first "wave" of litigation, several cases were tried in the late 1970s and early 1980s. All the courts that considered claims of marital rights for same-sex couples rejected those challenges. See Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974); *Jones v. Hallahan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971); *If We Marry*, supra note 18, at 1049 n.76 (citing additional cases).

\(^{40}\) Originally known as *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993), the case became *Baehr v. Miike*, 910 P.2d 112 (Haw. 1996), and was later dismissed as moot following an amendment to the Hawaii constitution in 1998, which limited marriage to opposite-sex couples. See *Baehr v. Miike*, 994 P.2d 566 (Haw. 1999).

\(^{41}\) See *If We Marry*, supra note 18; see also Jennifer G. Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745 (1995) (discussing possible "first mover states" and the economic benefits that would be realized by that state).

\(^{42}\) A discussion of this research can be found in *Public Policy Exception*, supra note 37, at 61.
whether courts would honor the legal relationships of same-sex couples entered into in one state, province, or country when they were seeking recognition of those relationships in another state, province, or country.\textsuperscript{43}

Finally, we have cases within the European Union and within the United States discussing recognition of same-sex couples' legal relationships outside the jurisdiction in which they were formed. Two cases from the European Union discuss whether the relationships of same-sex couples will be treated the same as relationships between opposite-sex couples. In \textit{Grant v. South-West Trains Ltd},\textsuperscript{44} the Court of Justice of the European Communities held that a woman was not entitled to travel concessions for her same-sex partner, even though they were provided by her employer to both the spouses and unmarried partners of opposite-sex couples.\textsuperscript{45} In \textit{D and Kingdom of Sweden v. Council},\textsuperscript{46} the Court of Justice held that D was not entitled to have his Swedish registered partnership with his same-sex partner treated the same as a marriage for purposes of obtaining a household allowance provided to married officials.\textsuperscript{47}


\textsuperscript{44} Case C-249/96, Grant v. South-West Trains Ltd, 1998 E.C.R. I-621, 1 CMLR 993 (1998).

\textsuperscript{45} \textit{Id.} In this case, the court ruled that refusing to provide travel concessions to the same-sex partner of an employee did not constitute equal pay discrimination under Article 119 of the EC Treaty or Council Directive (EEC) 75/117.


\textsuperscript{47} \textit{Id.} In this case, the Kingdom of Sweden, the Kingdom of Denmark, and the Kingdom of the Netherlands all supported D's position. The court, in rejecting the argument that the registered partnership must be treated the same as
Some commentators have begun discussing these issues in light of the number of European Union countries that permit marriage or registered partnerships. They recognize that numerous issues will arise as same-sex couples in relationships legally recognized in their domiciles move or travel throughout the world.  

A reciprocal agreement does exist between Denmark, Norway, and Sweden to recognize one another's registered partnerships. On February 11, 2003, the European Parliament voted that the non-European Union citizen, same-sex partners of European Union nationals should have the same right of residency as spouses, if either the host country or home-member state treats the couple the same as married couples. On April 15, 2003, the European Commission tabled the amendments which would have "give[n] the right of residence to the same-sex spouses [or]

a marriage for household allowance purposes, noted that under Swedish law registered partnerships are not given all the rights of marriages. As long as the Swedish legislature did not treat the two relationships as equal and prevented same-sex couples from marriage, the European Community was also not required to treat the two statuses as equal for these purposes. Id. at ¶ 33-38. This same issue has and will arise with civil unions and domestic partnerships. See But Why Not Marriage, supra note 18, at 137-44. How the Court of Justice will handle the marriages of same-sex couples from the Netherlands and Belgium, who are provided with the same rights as married opposite-sex couples, is unclear, especially since a portion of the Court's decision focused on the need for an interpretation that would fit the whole European community, not individual member states. D & Kingdom of Denmark, 2001 E.C.R. I-431 at ¶ 49.


McClure, supra note 10, at 805; Inchng Down the Aisle, supra note 6, at 2008 n.29.

registered or unmarried partners of E[uropean] U[nnion] citizens."\(^{51}\)

At this point, the European Commission is not expected to address a community-wide solution in the near future and will leave recognition of the marriages or registered partnerships of same-sex couples to the courts of the forum where the issue arises.\(^{52}\) Professor Katharina Boele-Woelki believes that the variety in the forms of legal relationships in the European Union will cause numerous private international law problems, and she anticipates major legislative changes within a few years.\(^{53}\)

In September 2003, a same-sex couple from Canada was denied recognition of their Canadian marriage when they tried to enter the United States using a customs form declaring themselves members of the same family.\(^{54}\) The customs agent refused to recognize their marriage and required them to enter as single individuals—something the two men would not do. Refusing to "divorce" themselves to enter to U.S., they said, "We could have gone in as single individuals, signed two forms, but to do that would be an affront to our dignity and human rights."\(^{55}\)

Usually, principles of comity would lead another country, state, or province to recognize another jurisdiction's marriage if the marriage were valid under the local laws of that country. In this way, countries recognize the laws of the couple's home country and provide a way for married couples to move from country to country or visit between countries, without leaving their marital status at their own country's borders.

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\(^{51}\) Free Movement of People: Commission Opposes Extending Right of Residence to Same-sex Couples, EUR. REP., April 18, 2003, at 462.

\(^{52}\) Jennifer J. Lee, Gay 'Marriages' Tangle European Laws; Nations Differ on Recognition of Rights of Migrants, WASH. TIMES, Dec. 8, 2003, at A01. But see E.U. to Expand Rights of Same-Sex Couples, UNITED PRESS INT’L, Sept. 25, 2003 (referring to European Union ministers endorsing "a set of rules that would ensure recognition of the marriages of same-sex couples from the Netherlands and Belgium throughout the [European] Union").


\(^{55}\) Id.
How this general rule works can be seen in two recent cases where U.S. courts honored opposite-sex marriages entered into other countries, even though the marriages were technically invalid in those countries. In *Xiong v. Xiong*, the Wisconsin Court of Appeals considered whether the children of a woman could sue for the wrongful death of their mother. Wisconsin law would not permit the children to sue for wrongful death if their mother was survived by her spouse. Although invalid under Laotian secular law, the court held that the marriage was valid under "the traditional ethnic law of the spouses," who believed in good faith that they were married. Finding them qualified as putative spouses, the husband was entitled to bring the wrongful death suit as one of the incidents of marriage. In *Donlann v. Macgurn*, the Arizona Court of Appeals honored a marriage from Puerto Vallarta, Mexico, despite its invalidity under Mexican law because the person who officiated did not sign the marriage license. Focusing instead on an Arizona statute that validated foreign marriages if they would have been valid if performed in Arizona, the court recognized the marriage using choice of law principles, which it said permitted Arizona to "give the same incident to an invalid foreign marriage that it would give to a marriage that has been validly contracted within its territory."

In this same article, the author also discusses the *Burns v. Burns* and *Rosengarten v. Downes* cases discussed below. It is striking that the Georgia and Connecticut Courts of Appeals

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56 648 N.W.2d 900 (Wis. Ct. App. 2002).
58 Id. at 83 (citing Xiong v. Xiong, 648 N.W.2d 900, 906 (Wis. Ct. App. 2002)).
59 Id. (citing Xiong v. Xiong, 648 N.W.2d 900, 906 (Wis. Ct. App. 2002)).
60 The Court also determined that their three years spent in Pennsylvania would entitle them to be recognized as common law status. Id.
61 Id.; Symeonides, *supra* note 57, at 83.
refused to honor civil unions validly entered into and celebrated in Vermont by same-sex couples, even while their counterpart courts in Wisconsin and Arizona went to such lengths to honor marriages by opposite-sex couples that were not even valid where celebrated. It is striking that courts can so clearly alter their willingness to follow the general rule promoting validation, the parties' reasonable expectations, and protecting the couple depending simply on whether the couple before the court is an opposite-sex one or a same-sex one.

Despite discussions for over ten years, we still do not have any decisions on interstate or international recognition of marriages by same-sex couples. We do have, however, six cases in the United States on the interstate recognition and validation of Vermont civil unions. In these six cases, same-sex couples from six different states who had entered into Vermont civil unions came to their courts seeking resolution of legal issues that arose in their relationships. The rest of this article now turns to these six decisions and considers how each court dealt with the same-sex couple seeking legal assistance with the problems that had arisen for them. I review each case and consider whether each court could have recognized the civil union for the particular incident of marriage at issue in the case. I also consider whether using that analysis and prior precedent in each state should have led each court to recognize the civil union for, at least the limited purpose raised in the lawsuit.

65 Obviously, previous cases concerning whether an opposite-sex couple could receive an incident of marriage only had to address legal marriages and common law marriages. Unlike opposite-sex couples whose interracial, underage, incestuous, or polygamous marriages or remarriages were questioned, only same-sex relationships have generated the variety of alternative institutions. Thus, although these alternative institutions are limited to same-sex couples, when talking about incidents of marriage, I do consider "incidents of marriage" that would arise whether the same-sex couples has entered a marriage, a civil union, or a domestic partnership.
A. Recognizing the Parties’ Legal Relationship Universally or Recognizing the "Incident of Marriage" at Issue in the Case

When first writing about interstate recognition of the marriages of same-sex couples, I argued that same-sex couples in ongoing relationships need to have the status as married couples recognized universally, rather than being required to seek recognition for each incident of marriage as the need arose.\(^{66}\) Courts regularly view the term "marriage" as "an all-purpose concept."\(^{67}\) For same-sex couples in ongoing relationships who will be interacting with numerous governmental and private institutions, this "universal" recognition of the status as a married couple is vital. Same-sex couples should not have to live with the uncertainty and expense that would arise from having to litigate one incident of marriage at a time, rather than having the marriages honored on a universal basis.\(^{68}\)

But there are occasions, well-illustrated by the six cases considering interstate recognition of Vermont civil unions, discussed below, when the same-sex couple’s marriage, civil union, or domestic partnership could, and should, be recognized at least with regard to the particular incident of marriage involved, even if a court were to refuse to honor it universally within the forum state.\(^{69}\) "Incidents of marriage" refer to each of the specific

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\(^{66}\) See If We Marry, supra note 18, at 1063 n.168.


\(^{68}\) Additional problems with an issue-by-issue determination of rights and responsibilities include uncertainty and arbitrariness. See Inching Down the Aisle, supra note 6, at 2024-25 (discussing how a "functional" approach to recognizing or rejecting same-sex unions "perpetuates the second-class status of same-sex couples, leaving them uncertain as to their rights and responsibilities and denying them the symbolic ‘recognition of shared humanity’ that accompanies legalization of marriage").

\(^{69}\) Let me clarify again that I believe a same-sex couple’s marriage, validly entered into under the law of the place of celebration, should usually be universally honored as valid everywhere. That is the general rule found in the RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971) which states: "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
benefits, rights, or responsibilities flowing to a married couple based on their marital status. Professor Willis Reese, Reporter for the Restatement (Second) Conflict of Laws, and others in the late 1960s through 1980, argued that courts should develop choice-of-law rules for marriage, not as a universal status, but rather by considering the issue facing the court in each particular case, the policies behind the incident of marriage at issue, and whether the couple should be viewed as married for that purpose. As Reese explained:

In the great majority of situations, the validity of the marriage will be a question that is incidental to the determination of another issue. This is so, for example, when a person, claiming to be a surviving spouse, asserts rights to testate or intestate succession, to pension, social security or work[ers’] compensation benefits, or to recover under the life insurance policy or for the wrongful death of the other spouse. The problem is whether in these situations the validity of the marriage should first be established independently of the other issue involved or whether determination of the validity of the marriage should be made with reference to that issue.

When discussing how courts decide marriage recognition cases, Professor J. David Fine concluded: "It appears that the most important factor in a court’s assessment of the law to be used in passing upon the validity of marriage is the issue giving rise to the to the spouses and the marriage at the time of the marriage." The meaning of the exception for violations of strong public policies has been extensively discussed in the literature. See, e.g., If We Marry, supra note 18; Public Policy Exception, supra note 37; Larry Kramer, Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception, 106 Yale L.J. 1965 (1997).


Reese, supra note 67, at 953.
Professor Fine considers numerous issues arising during a marriage, including capacity to marry, benefits for widows, and succession by children.

Additionally, Professors Eugene F. Scoles, Peter Hay, Patrick J. Borchers, and Symeon C. Symeonides, in their treatise on conflict of laws, noted that scholars repeatedly have pointed out that:

> [T]he courts could and should treat all questions simply as claims to incidents but such has not been the course of the decisions . . . . [I]n recent choice-of-law cases, the courts have begun to recognize that the enjoyment of different incidents of marriage involves different policies. Consequently, a uniform reference to a single state to resolve all choice-of-law questions involving marriage cannot be expected.

They conclude that "[l]ike other issues, the dominant policies and significant relationships relevant to the particular issue including the purpose for which the determination of status is pertinent will guide the court in seeking a just result."

Even when faced with a marriage prohibited in the forum by a state statute, a court does not have to reject the marriage for all purposes. These authors explain that although the statute prohibiting the marriage does show a policy against the marriage,

the policy thus expressed runs afoul, in these cases, of other policies which are well settled, whether expressed in positive terms by statute or not. One is the general policy upholding a marriage whenever possible. Others relate to the particular

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73 Fine, supra note 71, at 33. See also 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 Marriages Following Hawaii's Baehr v. Lewin, 32 U. LOUISVILLE J. FAM. L. 551, 559-60 (1994).

74 Fine, supra note 71.

75 EUGENE F. SCOLES ET AL., CONFLICT OF LAWS § 13.2 (3d ed. 2000) (citations omitted); see also Constitutional Constraints, supra note 33, at 2049-50 (noting modern scholars have suggested use of an "incidents of marriage" approach, rather than considering a marriage's universal validity, before considering the issue raised in the case).

76 SCOLES ET AL., supra note 75, § 13.3.
issue involved . . . The controlling issue becomes whether the policy of prohibition, as expressed by the legislative body, is strong enough in regard to the particular issue before the court to prevail over the policies furthered by upholding the marriage.\textsuperscript{77}

They conclude that usually the court will have to decide which of these competing policies should be given the greatest weight.\textsuperscript{78}

Professor David Engdahl, another proponent of an "incidents of marriage" approach, has argued that granting or denying validity to a marriage on a universal basis, as opposed to considering its validity on an issue-by-issue basis, frequently defeats the state's strong public policies that are expressed by providing particular rights and benefits to married couples.

Those [conflicts] rules, for their part, are grounded, not on policies concerning, for example, succession to property or welfare expenditures, but on policies concerning the conditions under which persons should be permitted to cohabit. The consequence is that entitlement to rights is determined with reference to policies extraneous to those on which the law conferring those rights is based, and often in derogation of some strong policy sought to be achieved by that law.\textsuperscript{79}

Engdahl pointed out that when a marriage prohibited by the forum state's law escapes discovery until after any opportunity to challenge it has passed, such as when one spouse has died or when the relationship has ended, denying the rights that normally attach to the marriage is not effective to affirm the policy behind the marriage restriction.\textsuperscript{80}

At best, it is a sterile vindication of the policy of the marriage laws, often at great human expense to a party who, through good faith, or ignorance, or carelessness, or naivete, or because he or she belonged to a subculture whose marital habits did not

\textsuperscript{77} Id. § 13.9.
\textsuperscript{78} Id.
\textsuperscript{79} Engdahl, supra note 71, at 105.
\textsuperscript{80} Id. at 105-06.
conform nicely to the law, is found to have offended the norm.\textsuperscript{81}

For example, Engdahl questioned whether the purpose behind Social Security benefits or workers’ compensation benefits is to punish a person for failing to follow the forum’s marriage laws or rather to provide benefits to survivors who were dependent on the decedent for support.\textsuperscript{82} Applying this analysis to several situations, he points out that (a) a surviving spouse’s right to workers’ compensation benefits should be based on the policies behind that law to support survivors, not on the policies designed to prevent "undesirable forms of cohabitation;" (b) a divorcing spouse’s right to alimony should be based on whether the policies underlying the right to alimony would be served, not on the policies about whether the husband’s \textit{ex parte} divorce was valid; (c) a polygamist’s right to cohabit with two wives should be based on the state’s policies concerning cohabitation, not on policies of whether his marriage in another country was valid or void; and (d) multiple wives’ rights to inherit property from their bigamist husband should be based on the state’s policies concerning intestate succession, not on policies in that state on cohabitation.\textsuperscript{83}

While recognition of a same-sex couple’s ongoing relationship may sometimes require a court to determine its marital status on a universal basis, other courts should instead consider whether recognizing the couple’s marriage, civil union, or domestic partnership would promote the policies behind the particular incident at issue in the case before them. Although some couples will request universal recognition of their ongoing relationship, other couples may only seek recognition of some more limited aspect of their relationship. By considering only the incident of marriage before the court and the policies behind providing that incident of marriage to married couples, some courts may recognize the marriage, civil union, or domestic partnership for that particular purpose, even while refusing to honor the relationship for other purposes.

\begin{footnotes}
\footnote{Id. at 106.}
\footnote{Id.}
\footnote{Id. at 109.}
\end{footnotes}
This approach has been followed by the courts in numerous cases. Three well-known cases discussed below are examples of courts faced with marriages as vigorously prohibited by the forum’s marriage statutes as some of the statutes prohibiting marriages by same-sex couples: a polygamous marriage, an interracial marriage, and a remarriage after a divorce based on adultery.\(^8^4\) In each case, the court granted the incident of marriage to the spouse(s) while noting that it would have refused recognition of the marriage on a universal basis. Each case provides insights for courts considering whether to recognize a same-sex couple’s marriage, civil union, or domestic partnership.

In the case of *Estate of Dalip Singh Bir*,\(^8^5\) the Court of Appeal of California was faced with a petition by Harnam Kaur and Jiwi, the wives of decedent Dalip Singh Bir, for equal shares in the estate of their husband.\(^8^6\) The trial court found that both marriages entered into in India were valid under its laws, that only the first wife would be recognized in California as the widow of the decedent, and that the case needed to be continued pending proof of which marriage was first.\(^8^7\)

On appeal, the court of appeal reviewed the prior cases involving recognition of polygamous marriages and found that several U.S. cases did recognize those marriages for certain purposes, including succession to property.\(^8^8\) The court acknowledged the trial court's concern with "public policy," but believed that policy concerns "would apply only if decedent had attempted to cohabit with his two wives in California."\(^8^9\) Finding that public policy was not affected by a case involving only succession to property and noting no cases opposed to that

\(^8^4\) Actually, many of these restrictions are stronger than the ones leveled against same-sex couples because many involved criminal penalties for their violation and attached felony status and prison sentences. See Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIPIAC L. REV. 105, 108-09 (1996) [hereinafter *The Miscegenation Precedents*].

\(^8^5\) 188 P.2d 499 (Cal. Ct. App. 1948).

\(^8^6\) *Id.* at 499. The wives were still residents of India, and the husband had been a resident of India when he entered into both marriages. *Id.*

\(^8^7\) *Id.* at 499-500.

\(^8^8\) *Id.* at 500-01.

\(^8^9\) *Id.* at 502.
conclusion, the court held that the two wives should share equally in decedent’s estate.\footnote{90}

Similarly, the Supreme Court of Mississippi recognized an interracial couple’s out-of-state marriage for purposes of intestate succession even though the Mississippi Constitution and its state statutes prohibited interracial marriage within that state.\footnote{91} The couple, an African-American woman and a white man, were indicted in Mississippi in 1923 for unlawful cohabitation, but the case was dropped when the woman agreed to leave the state. In 1939, they were legally married in Illinois and they lived together until the wife’s death.

The attorneys for the heirs challenging the validity of the marriage argued:

In Mississippi marriages between whites and negroes are considered unnatural, and so odious as to offend a deep rooted sense of morality predominate in the state; and being abhorrent to the morals and customs of its society, such marriages are declared to be contrary to the public policy of the state and absolutely void.\footnote{92}

\footnotetext[90]{Id. But see People v. Ezeonu, 588 N.Y.S.2d 116, 116 (N.Y. Sup. Ct. 1992) (holding that polygamous marriage was "absolutely void" in New York, although valid under Nigerian law where it was celebrated, and thus did not provide a defense to a charge of rape of the defendant's thirteen year old, "junior" wife). For a discussion of courts refusing to recognize the children of U.S. nationals as legitimate for immigration purposes due to the fact they were from their parents' second marriages validly entered into in China, see Ng Suey Hi v. Weedin, 21 F.2d 801, 802 (9th Cir. 1927); Constitutional Constraints, supra note 33, at 2041 (discussing a court's "refus[al] to tolerate polygamous cohabitation on American soil [and] refus[al] to countenance any attempt by the would-be immigrant to gain any privileges by virtue of the polygamous marriage"). It is important to note that all these cases involved a question of recognizing foreign polygamous marriages as a way to gain ongoing benefits in the United States.}

\footnotetext[91]{Miller v. Lucks, 36 So. 2d 140, 142 (Miss. 1948).}

\footnotetext[92]{Id. at 140. Reading this language in 2004 is quite troubling, but I included it to emphasize that the opposition to the marriages of interracial couples in 1948 in Mississippi was as strong, if not stronger, than the opposition to the marriages of same-sex couples today. See also Eggers v. Olson, 231 P. 483, 484-85 (Okla. 1924); Naim v. Naim, 87 S.E.2d 749, 755 (Va. 1955).}
The Supreme Court of Mississippi noted that both the state constitution and its state statutes voided any marriage between a white person and a person with "one-eighth or more of negro blood." Concluding that neither statute should be given extra-territorial effect, it held that the valid Illinois marriage "must be recognized and given effect as such unless so to do violates this statute or the state's public policy as declared therein." The court emphasized that the parties were married in Illinois and that neither party returned to Mississippi after they left. Finding that the "manifest and recognized purpose of this statute was to prevent persons of Negro and white blood from living together in this state in the relationship of husband and wife," permitting one spouse to inherit property in the state "does no violence" to the purposes of the constitutional and statutory prohibitions. Finding that cases from other states "faced with this Negro problem" reached the same conclusion, the court recognized the marriage "to the extent only of permitting one of the parties thereto to ... inherit from the other property in Mississippi."

The Supreme Court of Pennsylvania faced the issue of whether to recognize a second marriage validly entered into by its domiciliaries in West Virginia. Each of the spouses, while living in Pennsylvania, had been married previously and each was divorced from their prior spouse based on their adultery with the other. They wanted to marry but Pennsylvania statute section 169 prevented those guilty of the crime of adultery from marrying "the person with whom the said crime was committed, during the life of

93 Miller, 36 So.2d at 141 (citing MISS. CONST. of 1890, art. 14, § 263 (repealed 1987); MISS. CODE ANN. § 459 (1942) (both stating such marriages are "unlawful and void")).
94 Id.
95 Id. at 142.
96 Id. (citing Whittington v. McCaskill, 61 So. 236 (Fla. 1913); Caballero v. Executor, 24 La. Ann. 573 (La. 1872) (both recognizing out-of-state interracial marriages for succession to property purposes, while noting that the marriages would have been invalid for purposes of ongoing cohabitation)). See also The Miscegenation Precedents, supra note 84, at 119-26, and cases cited therein.
98 Id. at 256-57.
the former wife or husband. Thus, they traveled to West Virginia to marry, returned to Pennsylvania to live, and lived there together until the husband's death.

Then the wife sought a marital exemption from the property transfer tax that was permitted under state inheritance law. After deciding that the remarriage prohibition contained in section 169 applied to those divorced due to adultery, not just to those convicted in a criminal proceeding, and thus Pennsylvania law prevented the couple from marrying, the court determined whether West Virginia law or Pennsylvania law applied to the case.

The court followed the Restatement (Second) of Conflict of Laws and referred to the principles in section 6 and section 283 to guide its analysis. Noting the strong policy favoring uniformity of result in marriage cases, the court noted in a time of "widespread travel and ease of mobility, it would create inordinate confusion and defy the reasonable expectations of citizens whose marriage is valid in one state to hold that marriage invalid elsewhere."  

Concluding that Pennsylvania had the "most significant relationship" to the spouses and the marriage, the court focused

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99 Id. at 257 (citing PA. STAT. ANN. tit. 48, § 169 (Supp. 1978)).
100 Id.
101 Id. at 256.
102 Id. at 257.
103 RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 6, 283 (1971). The principles in section 6 are intended to guide courts when deciding between conflicting laws in marriage recognition cases. Those principles 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.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971). For the language of section 283, see supra note 69.
104 Lenherr Estate, 314 A.2d 255, 258 (Pa. 1974). The court also noted its concern that couples might try to circumvent legitimate state policies by the "sham of travelling [sic] to a nearby less stringent jurisdiction." Id.
105 This refers to the standard contained in section 283 of Restatement (Second) of Conflict of Laws.
on whether the policy behind section 169 was so strong that it must control the case, "thereby destroying the uniformity of result which is so desirable in a case concerning the recognition of a marriage that is valid in the state where it was contracted." The court was clear that the strength of the policy supporting section 169 depended "to a significant degree" upon the incident of marriage at issue in the case. Thus it balanced the policy behind section 169 "as it relates to the marital exemption to the inheritance tax, against the need for uniformity and predictability of result."

The court concluded that the policy behind section 169 was not to punish the adulterous spouses so much as to protect "the sensibilities of the injured and innocent husband or wife . . . to be wounded, or the public decency to be affronted, by being forced to witness the continued cohabitation of the adulterous pair." While concluding that this policy might be significant "with respect to cohabitation, and many other incidents of marriage," it would not be furthered by denying the surviving spouse the tax exemption because any such affront caused by the second marriage ended with the husband's death. The court determined that the policy behind the tax exemption for transfers of property between spouses on one spouse's death recognized that jointly held property was "in reality the product of their joint efforts and should pass to the survivor without the imposition of a tax." Noting that this policy would be "frustrated" by applying section 169 to this marriage and that the policy behind section 169 was "significantly outweighed by countervailing policies," the court refused to invalidate the marriage.

Writing about *Lenherr Estate*, Professor Reese noted that the Supreme Court of Pennsylvania

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106 *Lenherr Estate*, 314 A.2d at 258.
107 *Id.*
108 *Id.*
109 *Id.* at 259 (quoting In re Stull's Estate, 39 A. 16, 18 (Pa. 1898), although that court refused to recognize the out-of-state marriage entered into in Maryland).
110 *Id.*
111 *Id.*
112 *Id.*
113 *Id.*
did not follow the usual practice of first determining, without regard to the principal issue involved, whether the marriage was either valid or invalid. Instead, it addressed itself immediately to the principal issue .... It made entirely clear that it would have held the marriage invalid for other purposes as, for example, whether the parties could lawfully cohabit with one another. In other words, the court did not treat marriage as an all-purpose concept. This is in line with the approach suggested here.114

When same-sex couples are litigating their marital status in an ongoing relationship, they need judicial decisions that embrace the universality principle and recognize their marriages as valid for all purposes. Some courts, however, will be unwilling to recognize the marriage for all purposes, although they may be willing to recognize the marriage for more limited purposes. Additionally, other courts will not be confronted with whether the relationship should be recognized as an ongoing marriage with all the rights and responsibilities that other married couples enjoy because the parties may be seeking dissolution of the marriage or other incidents of marriage that arise only upon the death of one of the spouses. In such situations, courts should consider the particular incident of marriage at issue and the public policy reasons for providing that incident to married couples, and they may find it appropriate to validate the marriage at least for those limited purposes.

In the six cases discussed below, four involved petitions for dissolution of the couples’ civil union status and separation of the couples’ property and debts. Another case involved whether a couple’s civil union satisfied an earlier custody decree permitting each parent to have visits of their minor children so long as only that parent’s spouse shared the parent’s household. The final case involved a lawsuit for wrongful death by a surviving spouse acknowledged by the decedent’s blood family as that person’s spouse.

In each case, the courts should have recognized the civil union between the couple and provided them with the assistance that they

114 Reese, supra note 67, at 970.
sought. In no case, except perhaps Burns,\(^{115}\) was the court confronted with the question of acknowledging an ongoing same-sex relationship within the forum. Three cases provided their citizens with the help they sought (two of which are on appeal),\(^{116}\) and three refused their citizens that assistance. By reviewing the cases and the policies at issue, we can see how focusing on the particular issue at hand may lead courts to recognize the legal relationships of same-sex couples for some purposes, even when they may be unwilling to recognize their status for all purposes.

\section*{B. Decisions of Courts Where the Same-Sex Couple Was Seeking Dissolution of Their Civil Union}

\subsection*{1. Connecticut—Appellate Court Refused to Grant Dissolution}

In July 2002, the Appellate Court of Connecticut released its decision in Rosengarten \textit{v.} Downes.\(^{117}\) In this case, the court showed a surprising reluctance to provide assistance to one of its own citizens. An appeal to the Supreme Court of Connecticut was dismissed as moot after Glen Rosengarten died while the appeal was pending.\(^{118}\)

Glen Rosengarten, a resident of Connecticut, filed an action to dissolve the civil union that he and his partner, Peter Downes, a resident of New York, entered into in Vermont in December

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\footnote{Bums \textit{v.} Bums, 560 S.E.2d 47 (Ga. Ct. App. 2002). In Burns, the court considered whether a civil union entered into in Vermont by one parent with her same-sex partner was sufficiently similar to a marriage so as to permit visitation of the woman's three minor children while her same-sex partner was present in the house. Thus, even this case is not about the civil union itself but about its sufficiency within that context.}


\footnote{802 A.2d 170 (Conn. App. Ct. 2002).}

\footnote{Janice G. Inman, \textit{Dissolving a Same-Sex Marriage}, N.Y. FAM. L. MONTHLY, July 11, 2003, at 1. The Supreme Court's order granting the appeal can be found at 806 A.2d 1066 (Conn. 2002).}

\end{footnotesize}
His complaint stated that the civil union had broken down irretrievably and asked the court to dissolve the civil union.  The trial court dismissed Rosengarten's complaint, finding that it did not have subject matter jurisdiction over the action because the civil union did not fall within the court's broad powers under Connecticut General Statutes section 46b-1. The appellate court affirmed the court's decision, agreeing that the superior court had no jurisdiction over Rosengarten's complaint.

Without repeating all of the court's lengthy explanation of why subject matter jurisdiction did not exist in this case, a few points merit attention. After finding that none of the first sixteen subsections of Connecticut General Statutes section 46b-1 provided subject matter jurisdiction for the case, the court concluded that subsection 17 also did not apply. That subsection states:

Matters within the jurisdiction of the Superior Court deemed to be family relations matters shall be matters affecting or involving... (17) all such other matters within the jurisdiction of the Superior Court concerning children or family relations as may be determined by the judges of said court.

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120 Civil unions entered into in Vermont may be dissolved in Vermont only after one of the spouses has been a resident of the state for one year. See VT. STAT. ANN. tit. 15, § 592 (2002).
121 Rosengarten, 802 A.2d at 172.
122 Id. at 184.
123 It is somewhat surprising that the court concluded that "clearly" none of the following subsections of section 46b-1 were potentially applicable to the case:

Matters within the jurisdiction of the Superior Court deemed to be family relations matters shall be matters affecting or involving: (1) Dissolution of marriage...; (2) legal separation; (3) annulment of marriage; (4) alimony, support, custody and change of name incident to dissolution of marriage, legal separation and annulment...; [and] (15) actions related to prenuptial and separation agreements and to matrimonial decrees of a foreign jurisdiction... .

CONN. GEN. STAT. ANN. § 46b-1 (West 2004).
124 Id. § 46b-1(17) (emphasis added).
At the end of its decision, the court stated "we conclude that a
civil union is not a family relations matter. . . ."25 It is difficult to
understand how the civil union of a same-sex couple in Vermont
whereby they are entitled, in Vermont at least, to "receive the
benefits and protections and be subject to the responsibilities of
spouses,"16 is anything but a "family relations matter." Given the
breadth of the jurisdiction stated in subsection 17 over "all such
other matters," it is hard to understand why the court took such
steps to avoid requiring the trial court to hear the plaintiff's
complaint.

The court then proceeded through a lengthy analysis,
considering the Full Faith and Credit Clause of the U.S.
Constitution, other Connecticut statutes, and common law
principles, finding no support for the idea that dissolution of the
civil union of one of its citizens could fall within the court's
subject matter jurisdiction as a "family relations matter." This is
ture even though Connecticut statutes expressly prohibit
discrimination on the basis of sexual orientation; the court
dismissed this argument by concluding that the legislature
expressly stated that the state's policy against discrimination did
not mean the state had a policy condoning same-sex
relationships.127 This is true even though Connecticut statutes
permit second parent adoption by the nonbiological parent in a
same-sex relationship; the court dismissed this argument by
concluding that, even by recognizing this parental relationship with
the child's biological parent, the legislature had no intention of
endorsing same-sex relationships.128 This is true even though

125 Rosengarten, 802 A.2d at 184.
127 Rosengarten, 802 A.2d at 179-80; CONN. GEN. STAT. ANN. §§ 46a-81a
to 46a-81r (West 2004). Section 46a-81r does state: "Nothing in [the
nondiscrimination statutes] shall be . . . construed (1) to mean the state of
Connecticut condones homosexuality or bisexuality or any equivalent lifestyle .
. . . [or] (4) to authorize the recognition of or the right of marriage between persons
of the same sex . . . ."
128 Rosengarten, 802 A.2d at 180-81; CONN. GEN. STAT. ANN. §§ 45a-724
to 45a-737 (West 1993). The court also quotes section 5 of the bill that states
that "nothing in this act shall be construed to establish or constitute an
endorsement of any public policy with respect to marriage, civil union or any
Connecticut has no statute refusing to recognize out-of-state marriages or civil unions; the court dismissed this argument by concluding that the legislature thought it unnecessary to pass such a bill.\footnote{129}

For every argument the plaintiff made for finding subject matter jurisdiction in the courts to dissolve his civil union, the court responded by saying that Connecticut had no policy endorsing same-sex relationships and thus, its courts could not grant a dissolution. But nowhere did the plaintiff ask the court to endorse his Vermont civil union with his same-sex partner. Instead, he simply asked the court to let him legally dissolve that relationship. Plaintiff was not seeking recognition of his Vermont civil union for purposes of obtaining marital benefits in Connecticut flowing from that union. Rather, he simply asked for help in dissolving his civil union in Connecticut, rather than having to return to Vermont to do so (something that seemingly would have been difficult to do given his ill health).

After rejecting the plaintiff's statutory arguments, the court also rejected his arguments based on language from \textit{Boland v. Catalano},\footnote{130} where the Supreme Court of Connecticut indicated that its "courts should "enforce express contracts between nonmarital partners ... [and] [i]n the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties."\footnote{131} The \textit{Rosengarten} court noted that the Supreme Court of Connecticut in \textit{Boland} held that courts may provide "'equitable remedies' when warranted by the facts of the case."\footnote{132} Amazingly, the appellate court in \textit{Rosengarten}
concluded "[i]f before or during purportedly entering the Vermont civil union, the parties to this action entered an implied or express contract to ‘share their earnings and the fruits of their joint labor,’ the court had jurisdiction to grant relief in law or equity as to that claim." However, the court refused to use the equitable power granted to it by Boland to provide such equitable remedy because it said the plaintiff had not alleged any "express or implied agreements" in the complaint and because the plaintiff had not "distinctly claimed on appeal that jurisdiction might be exercised on this ground." The plaintiff did appeal the lower court’s complete denial of any basis for jurisdiction over his case. Surely, an equitable basis for jurisdiction would have survived the appeal.

Finally, it is important to remember that Glen Rosengarten was not asking the court to recognize an ongoing civil union and to provide it with the same status in Connecticut that it had in Vermont. He went to the court as a citizen of Connecticut who wanted to dissolve a civil union he entered into in Vermont. The court, to permit the dissolution in the Superior Court of Connecticut, could have determined that dissolution of another state’s civil union was sufficiently a "family relations matter." Even without such a finding, the court could have decided that the civil union evinced an implied or express contract between the parties, and Rosengarten was entitled to rescind that contract by dissolving the parties’ civil union.

As Professor Herma Hill Kay noted when writing about this case:

[T]he most striking aspect of the appellate court’s opinion is that virtually all of its analysis is devoted to same-sex marriage, rather than to same-sex divorce. Yet the only issue before the trial court was whether plaintiff, a citizen and resident of Connecticut, could have access to the superior court to dissolve a legal relationship he contracted in Vermont.

Professor Kay questioned why the court looked at the issue of divorce jurisdiction only from the perspective of its marriage law,
and its conclusion that the plaintiff could not have entered into a marriage or civil union with his same-sex partner in Connecticut. Professor Kay also questioned why that conclusion on Connecticut's marriage law should control the plaintiff's request to dissolve his Vermont civil union.\textsuperscript{136}

If the court had focused on the question of divorce, and if it had kept clearly in mind that plaintiff did not ask to be allowed to cohabit in Connecticut with his partner in the Vermont civil union but rather to be freed of any such obligation, and—most significantly—if it had been able to put aside its obvious concern that to recognize the civil union for purposes of its dissolution might require it in future cases to recognize such unions for all purposes, it might have reached a different conclusion.\textsuperscript{137}

The question remains, why did the appellate court go to such lengths to avoid helping its own citizen in what must have been a difficult and challenging situation? Glen Rosengarten asked his home state's court to help him dissolve a relationship that was irretrievably broken, rather than forcing him to leave his domicile and move to Vermont solely to end his civil union.

Additionally, there is precedent in Connecticut that the appellate court should have considered in deciding whether to dissolve the civil union, even if the precedent would not have permitted Rosengarten to obtain other incidents of marriage in Connecticut based on the civil union. In \textit{Delaney v. Delaney},\textsuperscript{138} a Connecticut Superior Court judge granted the wife's petition for dissolution of a marriage that was celebrated in Rhode Island by Rhode Island domiciliaries, despite Connecticut's longstanding policy against permitting common law marriages to be created in the state.\textsuperscript{139} Finding that a marriage's validity was governed by the law where it was contracted, the court noted that only marriages that were invalid as incestuous were excepted from the validation

\textsuperscript{136} \textit{Id.} at 53.
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} 405 A.2d 91 (Conn. Super. Ct. 1979).
\textsuperscript{139} \textit{Id.} at 92.
Even in *Parker v. Parker*, where the Connecticut Superior Court held that a second marriage in Connecticut was void before the husband's divorce from his first marriage in Massachusetts was final, the court still provided relief to the wife and ordered the husband to pay her alimony. In *Anderson v. Anderson*, the court looked to the law of New York to decide whether to annul a second marriage celebrated in New York while the wife's first marriage was still valid. Finding the second marriage to be void at its inception, the court still granted an annulment and gave the wife custody of the children and support from the husband.

In each of these cases, the Connecticut courts provided help to its citizens by extending some incident of marriage (even just dissolution) to them. Similarly, the appellate court could have dissolved Rosengarten's civil union, even if it were unwilling to recognize it for any other purpose. Denying Rosengarten's petition for dissolution was not required by Connecticut's statutory law nor by prior precedent. Unfortunately, due to the dismissal of the appeal, we do not know how the Connecticut Supreme Court might have ruled in the case.

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140 *Id.* (citing Catalano v. Catalano, 170 A.2d 726, 728 (Conn. 1961) (invalidating an Italian marriage between an uncle and a niece that was valid under Italian law, and finding that the public policy against incestuous marriages in Connecticut was very strong since the penalty at the time was imprisonment for up to ten years)). No similar public policy exists in Connecticut against the legal relationships of same-sex couples because Connecticut has never passed an antimarriage statute. See *Rosengarten v. Downes*, 802 A.2d 170, 182 (Conn. App. Ct. 2002). However, the appellate court held that the legislature did not pass such a statute "not because it intended to evince a willingness to recognize civil unions but because it thought such an enactment unnecessary." *Id.* Without such a statute, however, it is difficult to believe that Connecticut has decided that entering into a civil union would so "shock the conscience" that it could not be recognized in the state for any purpose. See *Delaney*, 405 A.2d at 92.


142 *Id.* at 94-96 (citing CONN. GEN. STAT. ANN § 46-28, which then permitted courts to order alimony following an annulment, just as they could award alimony upon divorce).


144 *Id.* at 46.
2. Texas—Trial Court Refused to Grant Dissolution

In one of the more bizarre of these six cases, the District Court of Jefferson County, Texas, initially dissolved the civil union between R.S. and J.A., but later vacated its decision after the Texas Attorney General intervened. The district court had determined that it had jurisdiction over the case and that the petitioner had been a domiciliary of Texas for a sufficient length of time to be eligible to seek divorce in Texas.\textsuperscript{145}

After finding that it had jurisdiction, the court decreed that R.S. and S.A. were "divorced and that the civil union between them [was] dissolved on the ground of insupportability."\textsuperscript{146} It then determined that the parties had entered into an enforceable contract that divided their property in a "just and right division."\textsuperscript{147} The court listed the separate property of each party (including each person's retirement accounts and the businesses they owned) and divided their debts. Thus, the court treated the couple the same as any other couple facing divorce and dissolved their legal relationship with each other.

Once the divorce was final and reported in the media, on March 27, 2003, the Texas Attorney General, Greg Abbott, issued a press release stating that the district court did not have subject matter jurisdiction over the case "because Texas law does not provide for dissolution of a civil union, and a divorce cannot be granted where a marriage never existed."\textsuperscript{148} Thus, according to Abbott, "the court's final decree of divorce [was] void as a matter of law."\textsuperscript{149} On March 28, 2003, Judge Tom Mulvaney vacated his decree.

This claim by Abbott, of a lack of subject matter jurisdiction, seems contrary to the Texas Supreme Court's decision in \textit{Dubai


\textsuperscript{146} Id. at ¶ 6.

\textsuperscript{147} Id. at ¶ 8.


\textsuperscript{149} Id.
In that case, the Court held that a Texas district court is a court of general jurisdiction and "[t]hus, all claims are presumed to fall within the jurisdiction of the district court unless the Legislature or Congress has provided that they must be heard elsewhere."\(^{151}\)

Prior marriage validation cases in Texas illustrate the state's strong public policy in favor of recognizing marriages. In *Texas Employers Insurance Ass’n v. Elder*,\(^{152}\) the supreme court held that "[t]he presumption in favor of the validity of a marriage which, as in this case, has been duly shown to have been contracted is one of the strongest, if, indeed, not the strongest, known to law."\(^{153}\) Thus, even though the surviving spouse had entered into a common law marriage previously and no evidence existed that it had been terminated, her second common law marriage was honored. Therefore, she was entitled to death benefits under the workers' compensation laws. The court stated that "[i]t is well that the presumption should be so regarded, for it is grounded upon a sound public policy which favors morality, innocence, marriage, and legitimacy[,] rather than immorality, guilt, concubinage, and bastardy."\(^{154}\) In *Houston Oil Co. v. Griggs*,\(^{155}\) the Texas Court of Civil Appeals also validated a common law marriage between a man and a woman who was his son's widow.\(^{156}\) Finding that they left Florida to come to Texas, where their marriage was not prohibited, the court noted that marriages "should be considered with great liberality, and, wherever it is possible so to do, to solve all doubt affecting the matrimonial relationship in favor of sustaining such relationship."\(^{157}\)

\(^{150}\) 12 S.W.3d 71 (Tex. 2000).
\(^{151}\) Id. at 75.
\(^{152}\) 282 S.W.2d 371 (Tex. 1955).
\(^{153}\) Id. at 373.
\(^{154}\) Id. The court went on to say that "when a marriage has been duly established its legality will be presumed, and the burden of proving the contrary is upon the one attacking its legality." Id. at 374. Interestingly in this case, no one attacked the validity of the parties' Vermont civil union, except the Texas Attorney General who was not a party before the court.
\(^{156}\) Id. at 836.
\(^{157}\) Id.
Contrary to this strong presumption in favor of the marriages of opposite-sex couples, Texas's antimarriage statute denies all same-sex couples from marrying. After the decision In re R.S. and J.A., the Texas legislature passed and the governor signed a bill which provided the following: "A marriage between persons of the same sex or a civil union is contrary to the public policy of this state and is void in this state." The law further defined a civil union as an "alternative to marriage" that "grants to the parties of the relationship legal protections, benefits, or responsibilities granted to the spouses of a marriage." Thus, Texas joined Nebraska as the second state specifically declaring that a Vermont civil union will not be honored in that state. Given these Texas statutes stating that the marriages and civil unions of same-sex couples are against the state’s public policy, one wonders why the district court and the attorney general did not want to promote that policy by permitting the parties to dissolve their union rather than requiring them to continue in a legal relationship that the state apparently abhors.

3. West Virginia—Family Court Granted Its Dissolution

M.G. and S.G. entered into a civil union on July 3, 2000, in Bennington, Vermont. M.G. sought a dissolution based on irreconcilable differences on July 29, 2002, in the Family Court of Marion County, West Virginia. The parties had no children and

158 TEX. FAM. CODE ANN. § 2.001(b) (Vernon 1998) ("A license may not be issued for the marriage of persons of the same sex.").
160 2003 Tex. Gen. Laws 124 (enacting TEX. FAM. CODE § 6.204(b)), was signed into law by the governor on May 27, 2003. Section 3 states that the new law applies to a same-sex marriage or civil union whether it was entered into before, on, or after the act’s effective date.
161 Id. (enacting TEX. FAM. CODE § 6.204(a)(1)-(2)).
162 NEB. CONST. art. I, § 29 (2001) states the following: "Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar-sex relationship shall not be valid or recognized in Nebraska."
had resolved all issues concerning division of property. Thus, the only issue before the court was "whether or not petitioner and respondent should be granted a divorce or a dissolution of the civil union..."\(^{164}\) The court referred to section\(^2\) 1201(2) of the Vermont statutes, which it interpreted as meaning that "two eligible persons have established a relationship pursuant to this chapter and may receive the benefits and protections and be subject to the responsibilities of spouses."\(^{165}\) The court also noted that, under Vermont law, parties to a civil union must be members of the same sex while parties to a marriage must be one woman and one man.\(^{166}\)

Interestingly, the court determined that West Virginia's statute, which purports to \(^{167}\) refuse recognition of marriages between persons of the same sex, did not apply to the case. West Virginia Code section\(^1\) 48-2-603 states the following:

A public act, record or judicial proceeding of any other state, territory, possession or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of the other state, territory, possession, or tribe, or a right or claim arising from such a relationship, shall not be given effect by this state.\(^{168}\)

Despite finding that a civil union gave the parties the "benefits and protections" and "responsibilities of spouses," the court held that "Vermont law does not define a Civil Union as a marriage," and thus, section 48-2-603 did not apply to this action.\(^{169}\) The court reached this conclusion despite language in the statute which makes it applicable to "a relationship between persons of the same sex that is treated as a marriage under the laws of the other state, territory, possession, or tribe, or a right or claim arising from such a relationship, shall not be given effect by this state."\(^{168}\)

and has not received the media attention of the Texas and Iowa lower court decisions, for privacy reasons, I am using the women's initials only, even though the court opinion includes their full names.

\(^{164}\) Id. ¶ VI.
\(^{165}\) Id. (citing VT. STAT. ANN. tit. 15, § 1201(2) (2002)).
\(^{166}\) Id. (citing VT. STAT. ANN. tit. 15, § 1201(4) (2002)).
\(^{167}\) None of the so-called "Defense of Marriage Acts" have been challenged in court as unconstitutional. Until their constitutionality is upheld, I will refer to them in this manner.
\(^{168}\) W. VA. CODE ANN. § 48-2-603 (Michie 2001).
\(^{169}\) In re M.G. and S.G., No. 02-D-292, ¶ IX.
sex *that is treated as a marriage* . . . or a right or claim arising from such a relationship. . ."

Given the language of section 48-2-603, the court might have determined that a civil union fell within that section, because Vermont law treats civil unions the same as marriages. It could have then followed the lead of the Connecticut and Texas courts and denied M.G. and S.G. the legal assistance they were seeking in the legal dissolution of their relationship.

Instead, the court was clear that it should not deny the parties the relief they were seeking. It found that "[t]he parties are citizens of West Virginia in need of a judicial remedy to dissolve a legal relationship created by the laws of another state." Because West Virginia citizens needed the assistance of their state court, the court declined to use section 48-2-603 as a way to deny them that assistance. Unlike the courts of Connecticut and Texas that refused to provide assistance to their own citizens who were seeking legal dissolution of their civil unions, this West Virginia family court chose to provide the parties with a judgment ending their civil union. The court ordered that the civil union be dissolved for irreconcilable differences and that the parties have "no further legal responsibility or relationship with each other."

The actions of this family court judge were similar to those of several other West Virginia courts. In *State v. Austin*, the West Virginia Supreme Court upheld the underage marriage of a woman in Maryland against a charge that the husband had contributed to the delinquency of a minor. The court specifically noted that neither party to the marriage was seeking to annul the marriage, that they were both happily married, and that the wife had not instigated the charge against her husband. Despite violating West Virginia's evasion statute, the court upheld the Maryland marriage, noting that marriages valid in another state will generally be recognized as valid in West Virginia. Although the marriage

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171 In re M.G. and S.G., No. 02-D-292, ¶ IX.
172 Id. ¶ 1.
174 Id. at 664.
175 Id. at 662.
176 Id. at 662-63.
was subject to annulment, it was valid and entitled to be fostered and encouraged like all other marriages until, and unless, it was annulled.\(^1\)

In *Spradlin v. State Compensation Commissioner*,\(^1\) the West Virginia Supreme Court also recognized a marriage, celebrated in Kentucky, that was claimed to be bigamous because the husband supposedly had been previously married and not divorced.\(^1\) Finding that the evidence failed to establish any prior marriage of the husband, the court noted that the presumption that a "lawfully solemnized or consummated" marriage exists is "one of the strongest presumptions of the law, . . . [regardless of] whether the marriage was a common-law marriage or a ceremonial one, . . ., whether regularly or irregularly, or however proven, whether directly or by circumstantial evidence."\(^1\) Thus the wife was entitled to receive workers' compensation benefits upon her husband's death.\(^1\)

The West Virginia Supreme Court also upheld the validity of a common law marriage created in the District of Columbia, even though West Virginia law did not recognize common law marriage.\(^1\) Applying D.C. law, the court found that the parties had validly entered into a common law marriage during the six years they lived in the district, despite living for twenty-four years in Virginia, which also did not recognize common law marriages.\(^1\)

These cases show that West Virginia courts have been willing to honor the relationships that their citizens have entered and provide the assistance those citizens needed from their courts. Similarly, the West Virginia court dissolved the civil union of

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\(^1\) Id. 113 S.E.2d 832 (W. Va. 1960).
\(^1\) Id. at 834.
\(^1\) Id. at 835.
\(^1\) Id. at 835-36. It is important to note that the court considered, but did not decide, whether it should apply Kentucky law, which would declare a subsequent bigamous marriage to be void, or West Virginia case law, which would find such a marriage only voidable until judicially declared a nullity. Id. at 834-35 (citing Sledd v. State Comp. Comm'r, 163 S.E. 12, 13 (W. Va. 1932)).
\(^1\) See generally *In re Foster*, 376 S.E.2d 144 (W. Va. 1988).
\(^1\) Id. at 147.
these two women because they were "in need of a judicial remedy."

4. Iowa—District Court Granted Dissolution

In another case that has drawn significant media attention, the Iowa District Court for Woodbury County, Iowa, granted a dissolution to KJB and JSP on November 14, 2003. According to the petition for dissolution, the two women had "married" in Bolton, Vermont, on March 25, 2002; the marital relationship broke down "to such an extent that the legitimate objects of matrimony ha[d] been destroyed and there remain[ed] no reasonable likelihood that the marriage c[ould] be preserved;" and they sought dissolution of their relationship with property and debts to be equally divided between the two.

With little fanfare, District Court Judge Jeffrey A. Neary granted the dissolution of marriage, finding that their "Stipulation in Dissolution of Marriage" was duly signed by the parties and proper, and made its provisions part of the Decree dissolving the women's "marriage." Nowhere did the court indicate that it was dissolving a Vermont civil union (as opposed to a Vermont marriage), and nowhere did the court indicate any concern about subject matter jurisdiction or contrary Iowa statutes. In fact, in media stories after his decision, Judge Neary was quoted as saying that he signed the divorce agreement "without realizing the couple who wished to break up were both women." After noticing the two women's names on the petition and discussing the matter with the lawyer for one of the women, the judge decided to allow the

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185 In re KJB and JSP, No. CD/03 119660 (Woodbury County Dist. Ct, Iowa Nov. 14, 2003) (unpublished opinion on file with author). I have used initials to protect the parties' privacy.
186 Petition for Dissolution, at 1-2, filed with the court on August 1, 2003 (unpublished court papers on file with the author). The parties referred to themselves as being "married" and to their "marital" relationship having been irretrievably broken down, even though they did not legally marry but rather entered into a Vermont civil union.
187 Burge, supra note 184, at B1.
divorce to stand. He said, "We can't ignore it from a legal perspective. "We have to figure out how to deal with it. If people have disputes, and they otherwise live here, then they should have access to the judicial system."

But others were not as understanding and tolerant as Judge Neary. After Neary's decision was reported by the media, four state representatives, two state senators, one congressman, one private citizen, and one church challenged his ruling in the Iowa Supreme Court. The basis for their petition was that Iowa code section 595.2(1) states that "[o]nly a marriage between a male and a female is valid." Thus Judge Neary lacked the legal authority to acknowledge a Vermont civil union as a marriage and to dissolve this civil union under chapter 598 of the Iowa code which controls divorce. They concluded that the judge "usurped lawmaking powers designated to the legislature by redefining 'marriage.'"

Among the grievances that flow from this act, the petition stated that (1) as taxpayers, they have been injured by the court opening up a new class of litigants outside those who are provided for under state law requiring an expenditure of judicial resources; (2) as married people, they are interested in promoting marriage as a legal union that confers on the legally married certain rights and privileges not granted others; and (3) as members of the legislature, they were active in restricting marriage to opposite-sex couples only. They asked the court to annul the district court's

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188 Id.
190 Id. at 2 (citing IOWA CODE § 595.2(1) (2001)). But see generally Andrea L. Clausen, Note, Marriage of Same-Sex Couples in Iowa: Iowa Code 595.2 Is Not Constitutional Under the Iowa Constitution Article I, §§ 1, 6, and 9, 6 J. GENDER RACE & JUST. 451 (2002).
191 Alons, at 2. The petitioners also allege that the two women were not married as indicated in their petition for dissolution, because VT. STAT. ANN. tit. 15, § 8 (2002) defines marriage as "the legally recognized union of one man and one woman," and VT. STAT. ANN. tit. 15, § 1202(2) (2002) requires that the parties of a civil union "[b]e of the same sex and therefore excluded from the marriage laws of this state." Id.
192 Id.
193 Id. at 3.
ruling "in order to avoid injustice which will result unless such relief is granted." 194

In the amazingly public struggle over these women’s private relationship, Judge Neary then issued a revised opinion following the petition for certiorari. In a two-page ruling, he said that "he had no jurisdiction to dissolve a marriage defined by state law, but he could terminate the civil union that joined the women." 195 He determined that the parties’ "civil union no longer existed," the parties "are free of any obligations incident thereto," and that both were "declared to be single individuals with all the rights of an unmarried individual, including but not limited to, the right to marry." 196 When he originally granted a divorce to the women, Judge Neary noted that "[w]e can’t turn people away from our court system and say we can’t resolve your disputes . . . . I clearly look at this as a dispute between parties that in some way I’m going to have to solve." 197

Unlike the petitioners seeking to intervene in the case, it is clear that Judge Neary recognized the importance of helping Iowa citizens who were seeking dissolution of a legal relationship that no longer worked for the parties. While he did not cite Iowa precedent, it seems that he was providing the same type of assistance to this couple as the Iowa Supreme Court has applied when honoring out-of-state marriages in the past.

In Boehm v. Rohlfs, 198 the court considered whether the marriage of two Wisconsin residents (one age nineteen, one age fourteen) in Minnesota was valid in Iowa. 199 The question before the court was whether Harry Rohlfs, the husband, had attained his

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194 Id. at 6.
195 Frank Santiago, Judge Revises His Ruling on Lesbians’ Divorce, DES MOINES REG., Dec. 31, 2003, at 3B.
196 Id. Unfortunately, Judge Neary seemed to ignore that the uproar created by his earlier ruling was based, specifically, on the fact that these two women are legally prevented from marrying in Iowa. Unlike other unmarried individuals, those who wish to enter into a same-sex marriage are denied the right to marry.
197 Id. As Daniel Bray, chair of the Iowa State Bar Association’s Family Law section, stated, "[A]ll the two women ‘wanted was a legal remedy.’ . . . And Judge Neary is clearly within what the law would allow." Id.
198 276 N.W. 105 (Iowa 1937).
199 Id. at 107.
majority (then twenty-one) by marrying Ruth Dutter in Minnesota, which would have entitled him to inherit from his decedent uncle. The court noted that Wisconsin law, which is where the couple was domiciled at the time of the marriage, prevented marriage by females under the age of fifteen. Additionally, Wisconsin law also prevented Wisconsin residents from leaving the state to contract a marriage that would have been prohibited under Wisconsin law, by also making those out-of-state marriages null and void in Wisconsin.

Finding that the marriage was voidable, but not void, the court concluded that it was valid under Minnesota law where it was celebrated, and "a marriage valid where made is valid everywhere." Noting that had the husband not died and the parties remained married for one year, the marriage would no longer be voidable. The court focused on the policy reasons behind permitting underage spouses to have their marriages honored, noting that "it is not the policy of the law to impose upon them and especially their innocent offspring, the distressing penalties that would result if the marriage was held to be absolutely void."

5. Conclusion

What can be seen from reviewing these four cases is that the courts of Connecticut and Texas refused to provide their citizens with the help that they were seeking in legally ending their civil
unions. Unlike those courts, the courts of West Virginia and Iowa (and initially the judge from Texas) understood that their role was to help their own state's citizens dissolve a legal relationship that was irretrievably broken. Rather than using technical arguments based on limits of subject matter jurisdiction to refuse assistance to same-sex couples who needed legal help, these judges acknowledged that their citizens had entered into a valid legal relationship in Vermont and needed to end that relationship in a way that was valid and legal in their own domicile. By using the broad subject matter jurisdiction of their courts and providing a remedy to those who needed it, the West Virginia and Iowa courts provide guidance to other courts that will be facing similar decisions in the future.

Although none of the four courts expressly used an "incidents of marriage" analysis when considering how to handle the interstate recognition of a Vermont civil union, the judges from West Virginia, Iowa, and (initially) Texas implicitly applied that analysis. Rather than be distracted by considering whether the parties' civil union needed to be honored for all purposes because the parties before them were asking for legal dissolution alone, the judges used their broad authority to resolve their citizens' legal problems and provided the limited assistance requested. Had the Texas Attorney General not intervened and focused on the civil union's universal status ("a divorce cannot be granted where a marriage never existed"\(^{204}\)), the Texas judge would have joined the West Virginia and Iowa judges in recognizing the Vermont civil union for the only reason requested—a legal dissolution. Providing that limited legal remedy to its citizens seeking assistance would have promoted policies inherent in the lower courts' broad jurisdictional powers while not addressing issues that the parties were not raising, such as whether their Vermont civil union requires universal recognition during ongoing cohabitation in the state.

\(^{204}\) See Simoneaux, supra note 148.
"INCIDENTS OF MARRIAGE" ANALYSIS

C. Decisions of Courts When the Same-Sex Couple Was Seeking Recognition of Its Civil Union For an Incident of Marriage

1. Georgia—Appellate Court Refuses to Recognize Civil Union

The Georgia Court of Appeals decision in *Burns v. Burns* was the first reported appellate decision concerning the interstate recognition of a Vermont civil union. In that case, a dispute arose between Darian and Susan Burns over the meaning of the consent decree entered following their divorce to control custody of their three children. After an earlier dispute arose, the parties agreed to a court order modifying their custody rights and requiring that "there shall be no visitation nor residence by the children with either party during any time where such party cohabits with or has overnight stays with any adult to which such party is not legally married or to whom the party is not related within the second degree."

In July 2000, Susan Burns and her female partner entered into a civil union in Vermont. Darian then filed an action for contempt alleging that Susan violated the consent decree by living with her partner while the children were visiting. Susan opposed the motion, arguing that she had complied with the consent decree’s requirements by virtue of her Vermont civil union.

The trial court held that the civil union was not a marriage and that Susan was in contempt of its decree. On appeal, the Georgia Court of Appeals also held that the civil union was not a marriage, neither in Vermont nor Georgia, and thus she was violating the consent decree. Under Vermont law, the legislature had explicitly stated that marriage in Vermont was restricted to the "legally recognized union of one man and one woman," and civil unions were reserved for same-sex couples who were "excluded from the

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206 *Burns*, 560 S.E.2d at 48.

marriage laws" of Vermont. The court also held that Georgia would not recognize the Vermont civil union as a marriage, even if Vermont had permitted same-sex couples to marry, because Georgia Code section 19-3-3.1(a) states that the public policy of Georgia is "to recognize the union only of man and woman. Marriages between persons of the same sex are prohibited in this state." It also considered Georgia Code section 19-3-3.1(b), which states:

No marriage between persons of the same sex shall be recognized as entitled to the benefits of marriage. Any marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction or otherwise shall be void in this state. Any contractual rights granted by virtue of such license shall be unenforceable in the courts of this state and the courts of this state shall have no jurisdiction whatsoever under any circumstances to grant a divorce or separate maintenance with respect to such marriage or otherwise to consider or rule on any of the parties' respective rights arising as a result of or in connection with such marriage.

The Georgia Court of Appeals concluded that the Georgia legislature had chosen not to recognize marriages between persons of the same sex and it was bound by that decision. Professor Andrew Koppelman has questioned the validity of such a "blanket rule of nonrecognition," like those contained in Georgia's and other states' antimarriage statutes by noting that such a rule has never been seen before in conflict of law statutes. Even with interracial marriages in the South, where both state statutes and constitutions declared such marriages to be void and

208 Id. § 1202(2).
210 Id. § 19-3-3.1(b).
211 Burns, 560 S.E.2d at 49.
212 See Koppelman, supra note 43, at 926. He notes that the Georgia statute may not quite be a "blanket rule of nonrecognition" because it states that "contractual rights" arising from same-sex marriages are unenforceable, without indicating whether other rights, such as wrongful death or intestate inheritance rights, are prohibited. See The Miscegenation Precedents, supra note 84, at 130.
subjected their celebrants to criminal penalties, states did honor out-of-state interracial marriages for some purposes.\textsuperscript{213} "Yet even in this charged context, the courts rejected the blanket rule of nonrecognition. In every case that did not involve cohabitation within the forum, and in some that did, Southern courts recognized interracial marriages."\textsuperscript{214} Whether in the U.S. or in other countries, Koppelman concluded that a blanket rule of nonrecognition is an "extraordinary" rule and found that "there appear to be few settled bodies of law anywhere in the world that routinely refuse to give any effect to any set of foreign marriages validly contracted elsewhere by foreign domiciliaries."\textsuperscript{215} Under such an analysis, Georgia's statute may someday be held to be invalid given its extreme breadth, especially when compared to its usual practice of validating the marriages of opposite-sex couples.

The Georgia Court of Appeals also rejected Susan's argument that her right to privacy was denied by not permitting her to cohabit with her partner when her children were present. It stated that Susan had agreed to be bound by the language in the consent decree.\textsuperscript{216} Showing a complete indifference to the difficult decision it was forcing on Susan either to live with her partner or share custody of her children, the court stated that "if Susan wanted to ensure that her civil union would be recognized in the same manner as a marriage, she should have included language to that effect in the consent decree itself."\textsuperscript{217}

Clearly, the court never considered whether Susan had already come out as a lesbian at the time she entered into the consent decree. If she had not, then it was foolish for the court to assume she would request language during her divorce that would include a possible same-sex relationship in the future when she had never before considered entering such a relationship. Even if she had already come out, the court never considered whether it was

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\textsuperscript{213} Koppelman, \textit{supra} note 43, at 929.

\textsuperscript{214} \textit{Id.}

\textsuperscript{215} \textit{Id.} See Koppelman's "Appendix: Public Policy and Marriage in Comparative Perspective," \textit{id.} at 992-1001, for authorities from around the world.


\textsuperscript{217} \textit{Id.}
realistic to expect her to discuss living with her same-sex partner while negotiating custody of her children before a family court judge unlikely to be favorably inclined toward protecting both relationships. Numerous cases have refused custody and visitation to lesbians and gay men, and it seems unrealistic to expect Susan to put her custody or visitation at risk in order to insist on a right to visitation while her same-sex partner was living in her home. Finally, the court never considered whether Susan understood the difference between civil marriages and civil unions drawn by the court.

The court also did not consider the different purposes behind the cohabitation restriction. At least one purpose could have been to ensure that the parties’ minor children were not subjected to having numerous adults in their household while they were growing up. It limited each parent to one long-term partner living in the parent’s house and ensured that there would be some stability in a living situation already made difficult by the parents’ inability to coexist peacefully after their divorce.

Additionally, the Court made no effort to consider whether recognizing Susan’s civil union for such limited purposes would be consistent with prior Georgia precedent from marriage recognition cases. For example, in Montgomery v. Gable, the Georgia Court of Appeals recognized a second marriage by a Georgia man celebrated in Alabama, despite a divorce decree from his first marriage that forbade him to remarry. Although the husband and his second wife met in Georgia, he followed her to Alabama where they married and lived briefly before returning to Georgia. The court found that neither Georgia Code section’ 53-214, which

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218 See, e.g., Elizabeth Trainor, Annotation, Initial Award or Denial of Child Custody to Homosexual or Lesbian Parent, 62 A.L.R.5th 591 (1998); Elizabeth Trainor, Annotation, Custodial Parent’s Homosexual or Lesbian Relationship with Third Person as Justifying Modification of Child Custody Order, 65 A.L.R. 5th 591 (1999) (citing numerous cases in which custody or visitation was denied or modified based on the parent’s sexual orientation or based on the parent’s same-sex relationship).

219 The court never stated that the marriage restriction was added as a means for Susan’s ex-husband to limit her relationships to those whom she could marry (at that time, only men) or that Susan was a lesbian at the time the consent decree was entered.

states that only those out-of-state marriages that could be solemnized in state will be recognized in the state, and 'which prevents parties from leaving the state to evade its marriage laws by going to another state to marry, did not prevent recognition of the marriage in question.' It reached this conclusion despite easy arguments to the contrary that the marriage could not have been solemnized in Georgia and that the couple seemed to be evading Georgia's marriage laws by marrying in Alabama. Finding that the wife was a bona-fide resident of Alabama, the court upheld the marriage for the purposes of permitting the wife to inherit, over the objection of the daughter from the first marriage.

The court reached a similar conclusion on similar facts in *Bituminous Casualty Corp. v. Wacht.* There, the Court of Appeals also recognized a marriage by a woman who was prohibited from remarrying in Georgia after her divorce, who moved with her parents to Alabama, and who married her second husband there. They lived in other states for two and one-half years, before moving to Georgia, thus clearly marrying and living outside the state for purposes other than evading the Georgia disability on the wife.

Finally, in *Smith v. Smith,* the guardians of a young man's estate tried to have his marriage declared void because he was underage when he married his wife in Alabama, and then returned immediately to live in Georgia. The court found that the marriage was "not so much contrary to law as unauthorized by law," despite reviewing numerous sources that declared such marriages to be void and despite similar wording in the Georgia statute. Instead, the court concluded that the couple had ratified the

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221 Id.
222 Id.
224 Id. at 758-59.
225 Id.
226 11 S.E. 496 (Ga. 1890).
227 Id. at 498.
228 Id. at 498-99. Interestingly for same-sex couples whose marriages the Georgia legislature had also declared to be void, the court stated that "there is no absolute incompatibility—no positive incongruity—between [a] void marriage and a marriage which is susceptible of being ratified, and thereby made valid." Id. at 499.
marriage by living together after the age of consent, and therefore, the wife was entitled to a new trial on whether she could inherit from her husband.\textsuperscript{229}

The court could have recognized Susan’s civil union for the limited purpose of permitting her to live with her partner and have her children visit, without violating any Georgia statute. Not only is a civil union not a marriage and thus, under the terms of the Georgia statute, not actually prohibited,\textsuperscript{230} but Susan had fulfilled the primary intent of the restriction in the consent decree. She had done as much as possible to enter into a legally sanctioned relationship with her female partner, given Georgia’s refusal to permit same-sex couples to marry, and to ensure that visitation with her children would not be lost by living with her partner. Having taken every step she could have taken, other than living alone or entering into a marriage with a man, the court should have recognized her civil union as fulfilling the purpose of the restriction in the consent decree. Its callous refusal to do so prevents one of that state’s families from enjoying the protection and assistance it was entitled to receive from its own courts.

2. New York—Trial Court Recognizes Civil Union

Contrary to the cases from Connecticut, Texas, and Georgia, where the courts seemed to go out of their way to refuse to honor a Vermont civil union, Justice Dunne of the New York Supreme Court of Nassau County held that John Langan should be treated as Neal Spicehandler’s spouse based on the couple’s Vermont civil

\textsuperscript{229} \textit{id.}.

\textsuperscript{230} I am not convinced that arguing for a limited reading of states’ antimarriage statutes, distinguishing between marriages and civil unions, domestic partnerships, or reciprocal beneficiary relationships, makes sense. Surely, its use will simply encourage states to pass or amend their statutes or constitutions to include these other relationships, as was seen in the Texas statute that refers to marriages or civil unions and the Nebraska constitution that refers to the marriages, civil unions, and domestic partnerships of same-sex couples. \textit{See supra} notes 158-60. For an argument that antimarriage statutes should be confined by their language to marriages alone and exclude these other legal relationships, \textit{see} Christopher D. Sawyer, Note, \textit{Practice What You Preach: California’s Obligation to Give Full Faith and Credit to the Vermont Civil Union}, 54 HASTINGS L.J. 727 (2003).
union, for purposes of Langan’s wrongful death lawsuit against St. Vincent’s Hospital. The court stated that the couple had lived together since 1986 and were joined in a civil union, attended by friends and family, in 2000.

The court noted that "New York adheres to the general rule that 'marriage contracts, valid where made, are valid everywhere, unless contrary to natural laws or statutes.'" Based on that rule, the court held that "if [the] plaintiff has a validly contracted marriage in the State of Vermont, and if the Vermont civil union does not offend public policy as would an incestuous or polygamous union, it will be recognized in the State of New York for purposes of the wrongful death statute." Explicitly following the incident of marriage analysis urged in this article, Justice Dunne explained that:

the court will not determine whether plaintiff has a valid marriage in the State of New York for all purposes, but only whether he may be considered a spouse for purposes of the wrongful death statute, much as the Court of Appeals has held that a same sex domestic partner is a 'family' member for the limited purposes of the New York City's rent control laws.

The court reviewed the numerous ways in which same-sex couples are given legal recognition and protection under New York law, including recognition by New York City and by the state for employment benefits, recognition as "family" members under rent control laws, permission to adopt one another’s children using second parent adoptions, and recognition for benefits following the September 11, 2001 attacks on New York City. The court noted that "while other jurisdictions were enacting [antimarriage laws], New York State amended [its laws] to prohibit discrimination on the basis of sexual orientation..." The court concluded that

232 Id. at 412.
233 Id. at 414 (quoting Shea v. Shea, 63 N.E.2d 113 (N.Y. 1945)).
234 Id. (citing Shea, 63 N.E.2d at 113).
235 Id. at 415.
236 Id. at 415-16.
237 Id. at 416.
"New York’s public policy does not preclude recognition of a same-sex union entered into in a sister state. . . ."  

New York precedent would also have led the court to honor a marriage that was valid in the state where contracted. For example, in Van Voorhis v. Brinntnall, the New York Court of Appeals considered whether a child from the second marriage of her father could inherit as his legitimate heir when he had been divorced in New York from his first wife on grounds of adultery and prohibited from remarrying within his first wife’s lifetime. Finding that the legislature could have prevented New York citizens from remarrying outside New York, the court concluded instead that "[t]he statute does not in terms prohibit a second marriage in another State, and it should not be extended by construction." Thus, even though New York statutes declared marriages after divorce for adultery to be "absolutely void" if entered into before the death of the first spouse, the court found there was no "intent so to impress the citizen with the prohibition as to make an act, which is innocent and valid when performed, an offense when he returns to this State[,] and himself a criminal for performing it." Thus, the court concluded the child was legitimate and entitled to inherit from her father.

Following this precedent, in Holland v. Holland, the court considered whether a marriage in Oregon by New York residents who were under the statutory age to marry in New York could be annulled in New York. The court stated the general rule as being one that honors marriages if valid where celebrated, "unless contrary to the prohibition of natural law or the express prohibition

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238 *Id.*. This could well be true, because the state’s public policy, even if opposed to marriages by same-sex couples, may not be violated by a claim by the surviving spouse after the death of his or her spouse. Henson, *supra* note 73, at 581. Henson also emphasized that this incident of marriage is not provided by the state (except by recognizing that the surviving spouse has standing to bring the suit), but instead is provided by a private enterprise in terms of damages awarded for the wrongful death. *Id.* at 581-82.

239 86 N.Y. 18 (1881).
240 *Id.* at 18.
241 *Id.* at 32.
242 *Id.* at 35.
243 *Id.* at 38.
of a statute of the state of which the parties were citizens at the time of their marriage and in which the marriage is questioned."\textsuperscript{245}

Additionally, the New York Court of Appeals in the case of \textit{In re May’s Estate},\textsuperscript{246} stated that "in the absence of a statute expressly regulating within the domiciliary State marriages solemnized abroad,"\textsuperscript{247} and except for polygamous or incestuous marriages, a marriage valid where celebrated will be honored in New York. Even after stating the exception for incestuous marriages, the court recognized a marriage in Rhode Island between an uncle and a niece, both of whom were New York residents.\textsuperscript{248} Although the New York statutes declared incestuous marriages to be void and imposed criminal penalties on violators, the court held that "the statute does not by express terms regulate a marriage solemnized in another State whereAs [sic] in our present case, the marriage was concededly legal."\textsuperscript{249}

Since no New York statute prevented it from recognizing the civil union before it, the \textit{Langan} court next considered the purposes behind Vermont's civil unions statute and determined that "the civil union is indistinguishable from marriage, notwithstanding that the Vermont legislature withheld the title of marriage from application to the union."\textsuperscript{250} Thus, John Langan should be recognized as Neal Spicehandler’s spouse and would be entitled to recover in a wrongful death action in Vermont.\textsuperscript{251} The only remaining question facing the court was whether to recognize Langan as Spicehandler’s spouse in New York, and the court used the same analysis that it would use in deciding whether to recognize a spouse in a sister state’s common law marriage.\textsuperscript{252}

The court turned to the legislative purpose of New York’s wrongful death statute and found that the statute was intended to "compensate the pecuniary losses first and foremost of the

\textsuperscript{245} \textit{Id.} at 806.
\textsuperscript{246} 114 N.E.2d 4 (N.Y. 1953).
\textsuperscript{247} \textit{Id.} at 6.
\textsuperscript{248} \textit{Id.} at 5.
\textsuperscript{249} \textit{Id.} at 6.
\textsuperscript{251} \textit{Id.} at 418.
\textsuperscript{252} \textit{Id.}
decedent's immediate family, that is, his or her spouse and children, those most likely to have expected support and to have suffered pecuniary injury."\textsuperscript{253} Finding Langan as "[t]he person most likely to have expected support and to have suffered pecuniary injury[,]" the court held that he was a spouse for purposes of the New York statute.\textsuperscript{254} Even though the legislature, when writing New York's wrongful death statute, would not have intended to include the same-sex spouses from civil unions within that definition, the court noted that concepts of marriage evolve over time.\textsuperscript{255} Finding that spouse is a gender neutral term, the court looked at the intended meaning of that term in determining that Langan should be viewed as a spouse within the meaning of the wrongful death statute. Even more importantly, the court recognized that excluding Langan from the remedy offered by the wrongful death statute would be based on little more than unconstitutional discrimination:

Spouse is a gender neutral word, it applies to a man or a woman, and is applied to plaintiff under the Vermont civil union. As the [wrongful death statute] is construed to apply to a common law couple who have not been joined by a civil ceremony and may separate at will, it is impossible to justify, under equal protection principles, withholding the same recognition from a union which meets all the requirements of a marriage in New York but for the sexual orientation of its partners.

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\ldots To withhold recognition from one joined under the Vermont statute on the grounds that it is not a marriage, when it requires all the same formalities as New York, and at the same time to extend recognition to a common law 'marriage'

\textsuperscript{253} \textit{Id.} at 419.

\textsuperscript{254} \textit{Id.} The court went on to note that among those spouses who were disqualified from being recognized as a surviving spouse included those whose "marriage was void as incestuous \ldots bigamous \ldots or a prohibited remarriage," not a marriage by a same-sex couple. \textit{Id.} (citing N.Y. DOMESTIC REL. LAW § 5-1.2(2) (McKinney 1999)) (omissions in original).

\textsuperscript{255} \textit{Id.} at 420.
of a sister state, does not withhold benefits equally from homosexuals and heterosexuals.  

3. Conclusion

These two courts reached opposite results, one recognizing a Vermont civil union and one refusing to do so. The New York judge’s opinion looked beyond negative prior precedent and concluded that there was no reason to refuse recognition to the plaintiff’s civil union from Vermont. The Georgia court’s decision, on the other hand, focused significantly on the literal words of the parties’ consent decree, finding that a civil union was not a marriage within the terms of that agreement and finding Ms. Burns in contempt for living with her same-sex partner and her children at the same time. Unfortunately, it may be possible that other courts will follow the limited view raised by the Burns court to avoid honoring the legal relationship entered into by the same-sex couple before the court.

But when considering these cases, courts should remember that countless cases exist recognizing out-of-state marriages by opposite-sex couples despite defects or problems that would have permitted the courts to refuse to honor those marriages. They should consider whether an "incidents of marriage" approach to the issue in the case may lead them to recognize the civil union, domestic partnership, or marriage based on the policy reasons behind that disputed issue. They should work as hard to honor the relationships of same-sex couples as they have worked to honor the relationships of opposite-sex couples.

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256 Id. at 420-22.