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SAME-SEX MARRIAGE AND THE PUBLIC POLICY EXCEPTION IN CHOICE-OF-LAW: DOES IT REALLY EXIST?

By Barbara J. Cox*

I have been working with Evan Wolfson at Lambda Legal Defense and Education Fund in developing a practice manual for attorneys who will bring marriage recognition cases once same-sex couples win the right to marry in Hawaii. (Even if the *Baehr v. Miike*¹ case does not result in a finding that the marriage statutes in Hawaii are unconstitutional, some state will, at some point in the near future, permit us² to marry.)³ With the help of Jeff Gibson, then Chair of the American Bar

* Professor of Law, California Western School of Law. I would like to thank the following people and institutions for their help with this project: Andrea Schneider-Noriega, Sheila Sullivan, and Jennifer Whitko, my research assistants; Evan Wolfson and Brian Jacobson from Lambda Legal Defense and Education Fund; Jeff Gibson, Mary Benauto, and the numerous attorneys, law professors, and law students who are assisting in this research project; California Western School of Law's publication support program; Sandy Murray, Elizabeth Johnson, and Mary Ellen Norvell in faculty support; and my partner, Peg Habetler. I would also like to publicly thank Evan Wolfson, not only for his help on this project, but also for the incredible work that he has been doing to obtain the right to marry for same-sex couples. When we one day obtain that right, it will be in no small part a result of the vision and the work that Evan has done.

1. When the Hawaii Supreme Court first decided it, the case was known as *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). Baehr commenced that action against John C. Lewin, then State Director of Health. Following the 1994 general election, Governor Cayetano appointed Lawrence H. Miike to succeed Lewin as Director and, pursuant to Appellate Procedure Rule 43(c)(1), Miike was substituted for Lewin as a named defendant in the case. *Baehr v. Miike*, 910 P.2d 112, 112 n.1 (1996). Trial in the case, following the Hawaii Supreme Court's remand, began September 10, 1996 in front of Circuit Court Judge Kevin S.C. Chang. The trial resulted in a decision in favor of the plaintiffs and is now on appeal to the Hawaii Supreme Court. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Dec. 3, 1996).

2. Consistent with a significant discussion occurring in feminist and other "outsider" communities, I subscribe to the "anti-essentialist" tenet that there are no outside observers when analyzing issues. "It is important to reflect upon your own location in relation to the issue and the people under discussion, because your perspective necessarily affects the way you perceive and the way you are perceived by others." Nitya Duclos, *Some Complicating Thoughts on Same-Sex Marriage*, 1 LAW & SEXUALITY 31, 40 (1991). My perspectives include my years teaching feminist theory and sexual orientation theory as a law professor, my years spent as a community activist working for the recognition of gay and lesbian families, my years as an "out" lesbian, and my years involved in a long-term relationship with my partner, Peg Habetler, following our commitment ceremony in 1992.

3. A state will do that, if not for the "right" reason of recognizing that gay and lesbian

Association's Section on Individual Rights and Responsibilities, and Mary Bonauto from the New England Gay and Lesbian Advocates and Defenders, we organized a group of over seventy attorneys, law professors, and law students from around the country who have been doing in-depth research, using a checklist that we developed, asking for information on each state's marriage validation statutes, marriage evasion statutes, choice-of-law theory, prior marriage recognition cases, and full faith and credit cases.⁴ At this point, we have received research for thirty-two states. As the research comes in, I analyze it, determine what information is still needed, have research assistants do that research, and then we revise the material into a consistent format. While I have read research from every state that we have received, I have not had the opportunity until just before this conference to pull together some of the research and determine what we have found out. While the research is not yet complete, I wanted to share some of the initial findings here today.

I. INTRODUCTION

For those of you who have researched in the choice-of-law field, particularly in the area of recognition of marriages that took place outside the forum state,⁵ you know that the standard explanation of how courts handle these cases includes a public policy exception. Let me give you a few examples. For those states that still use the *First*

relationships are entitled to societal and legal recognition, then for the "other" reason that Professor Jennifer Brown has so clearly outlined: it is almost impossible for any state to resist forever the status of "first mover" state and the \$4 billion dollars that will result from that status. See Jennifer G. Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S. CAL. L. REV. 745, 752-820 (1995) (analyzing the "first mover" economic benefits reaped from recognizing same-sex marriages).

4. Evan Wolfson, Jeff Gibson, Mary Bonauto, and I drafted the checklist and summary of issues that was sent to all members of the research clearinghouse. To review that checklist and other supporting documents in this effort, see Evan Wolfson, *Fighting to Win and Keep the Freedom to Marry: The Legal, Political, and Cultural Challenges Ahead*, 1 (No. 2) NAT'L J. OF SEXUAL ORIENT. L. (1995) <<http://sunsite.unc.edu/gaylaw>>.

5. For purposes of this article, I will be referring to marriages entered into out-of-state, most likely in Hawaii, by domiciliaries of another state. I am assuming those parties went to Hawaii for a short stay, celebrated a marriage, and then returned to their domicile. This is the most controversial case in which to argue for recognition. I do that here because this is the most likely scenario for gay and lesbian couples once Hawaii legalizes same-sex marriages. For a discussion of the "more interesting" choice-of-law question that results when Hawaiian couples who marry leave the islands for another state and the impact that the federal Defense of Marriage Act, Pub. L. No. 104-09, 110 Stat. 2419 (1996) will have on resolving this discussion, see Mark Strasser, *Loving the Romer Out for Baehr: On Acts in Defense of Marriage and the Constitution*, 58 U. PITT. L. REV. 279 (1997).

Restatement of Conflict of Laws,⁶ determining whether to recognize a marriage includes two steps. Under section 121, the rule of *lex loci celebrationis* would apply; in other words, a marriage that is valid where celebrated is valid everywhere.⁷ In discussing section 121, comment d states that because the law of the domicile governs the domestic status of marriage, the differences between states' marriage laws would "lead to great difficulty, if it were not for the fact that all Anglo-American states agree in creating the status of marriage (except in rare cases considered in sections 131 and 132) in every case where there is a contract of marriage valid in the state where the contract is made."⁸ Under the *First Restatement*, denying a normal incident of marriage to a validly married couple should be avoided unless enjoyment of that incident "violently offends the moral sense of the community."⁹

Under section 132, however, "a marriage which is against the law of the state of domicil of either party, though the requirements of the law of the state of celebration have been complied with, will be invalid everywhere"¹⁰ Although marriages by same-sex couples are not included in the marriages listed, comment b states that the list "is not intended to be an exclusive enumeration and if a marriage offends a strong policy of the domicil in any other respect, such marriage will be invalid everywhere."¹¹ This allows courts in states using the *First Restatement* to determine whether recognizing same-sex marriages offends the forum's "strong policy."¹²

6. RESTATEMENT OF CONFLICT OF LAWS (1934) [hereinafter FIRST RESTATEMENT]. Fifteen states (Alabama, Georgia, Kansas, Maryland, Montana, Nevada, New Mexico, North Carolina, South Carolina, South Dakota, Tennessee, Vermont, Virginia, West Virginia, and Wyoming) still use the First Restatement. Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 357 (1992).

7. FIRST RESTATEMENT, *supra* note 6, § 121.

8. *Id.* § 121 cmt. d. Section 131 applies to remarriage after divorce and § 132 applies to marriages void under domicile law. *Id.*

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

10. FIRST RESTATEMENT, *supra* note 6, at § 132. That section lists the following marriages as invalid: "polygamous marriage, incestuous marriage between persons so closely related that their marriage is contrary to a strong public policy of the domicil, marriage between persons of different races where such marriages are at the domicil regarded as odious, [and] marriage of a domiciliary which a statute at the domicil makes void even though celebrated in another state." *Id.*

11. *Id.* § 132, cmt. b.

12. Comment c, referring to miscegenous marriages, indicates that not only must there be a statute prohibiting the marriage, but the marriage must also offend a "deep-rooted sense of morality predominant in the state." *Id.* Miscegenous marriages can no longer be prohibited, following the Supreme Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967). Thus, even in those few states that do prohibit marriage by same-sex couples statutorily, it is possible that those prohibitions do not establish this "sense of morality" that would be offended. At the time of the Baehr decision, only six states had explicit statutes prohibiting marriages by same-sex couples: Indiana, Louisiana,

For those states that use the *Second Restatement*,¹³ section 283 controls recognition of out-of-state marriages. It states:

- (1) The validity of marriage will be determined by the local law of the state which, with respect to the particular issue, has the most significant relationship to the spouses and the marriage under the principles stated in § 6.
- (2) A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage.¹⁴

Thus, a court would consider whether the marriage would violate the "strong public policy" of the state with the most significant relationship to the spouses and the marriage at the time of the marriage.¹⁵ The *Second Restatement* clearly tends toward validation as a general rule but also indicates a concern to protect "the interest of a State in not having its domiciliaries contract marriages of which it disapproves."¹⁶ It

Maryland, Texas, Utah, and Virginia. 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, 1070 n.216-217 [Hereinafter referred to as Cox, *Choice of Law*]. During the recent spate of states passing statutes to limit the impact of the *Baehr* decision nationally, Arizona, Delaware, Illinois, Kansas, Michigan, and South Dakota passed statutes also explicitly prohibiting marriages by same-sex couples. Barbara J. Cox, *Are Same-Sex Marriage Statutes the New Anti-Gay Initiatives?*, 2 (No. 2) NAT'L J. OF SEXUAL ORIENT L. (Jan. 1997) [hereinafter Cox, *Anti-Gay Initiatives*] <<http://sunsite.unc.edu/gaylaw>>.

13. RESTATEMENT (SECOND) OF CONFLICT OF LAWS (1971) (hereinafter SECOND RESTATEMENT). Borchers indicates that Alaska, Arizona, Colorado, Connecticut, Delaware, the District of Columbia, Florida, Idaho, Illinois, Indiana, Iowa, Louisiana, Maine, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Texas, Utah, and Washington all follow the Second Restatement. Borchers, *supra* note 6, at 373 & n.113. Some other commentators disagree about whether all these states follow the Second Restatement. Gregory E. Smith, *Choice of Law in the United States*, 38 HASTINGS L.J. 1041, 1172-74 (1987); Herma Hill Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 591-92 (1983).

14. SECOND RESTATEMENT, *supra* note 13, § 283. Section 6 states that when no statutory directive exists, the court should consider several factors to determine which state has the "most significant relationship" to the marriage. Those factors include: (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issues; (d) the protection of the parties' justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability, and uniformity of result; and (g) ease in the determination and application of the law to be applied. *Id.* § 6(2). When a statutory directive exists, a court will follow the directive of its own state on choice of law, subject to constitutional restrictions. *Id.* § 6(1).

15. For a discussion of how the "at the time of the marriage" language in § 283 might impact a court's decision when there exists a forum state, Hawaii as the state of celebration, and a third state which was the parties' domicile, see Strasser, *supra* note 5.

16. Willis L.M. Reese, *Marriage in American Conflict of Laws*, 26 INT'L & COMP. L.Q. 952, 965 (1977).

would defer to the domiciliary state, as the state with the most significant relationship to the couple, to consider whether a given marriage violates its public policy.¹⁷

The other two major choice-of-law theories also instruct the courts to consider public policy in deciding whether to recognize an out-of-state marriage by that state's domiciliaries. Governmental interest analysis, developed by Brainerd Currie in the 1950's and 1960's, refers courts to policy considerations.¹⁸ Currie believed that the statutory and case law of a state express policy choices which the state has an "interest" in applying to that state's domiciliaries.¹⁹ In a situation such as this, where the parties have a common domicile, Currie would conclude that this was a "false" conflict. Because the domiciliary state has the only interest in applying its law, the forum state (if different from the domiciliary state) should apply the law of the common domicile.²⁰ Finally, Robert Leflar's "choice-influencing considerations" theory²¹ focuses on those factors that influence courts in their choice-of-law analysis.²² "Leflar's considerations include: (1) predictability of result, (2) maintenance of interstate and international order, (3) simplification of the judicial task, (4) advancement of the forum's governmental interests, and . . . (5) application of the better rule of law."²³ Leflar indicates that "justice in the individual case" is the ultimate result to be achieved in choice-of-law cases²⁴ and expects that judges may be led to use the forum's own law, especially if foreign law "might interfere with fundamental local policies."²⁵

All of these choice-of-law theories instruct courts to consider public policy. The general rule which exists with an "overwhelming tendency" in the United States is to prefer validation of marriages.²⁶ Under this rule, marriages will be found to be valid if there is any reasonable basis for doing so.²⁷ Again, due to significant public policy reasons, this rule has become entrenched in the substantive law of all

17. Cox, *Choice of Law*, *supra* note 12, at 1095.

18. BRAINERD CURRIE, *SELECTED ESSAYS ON THE CONFLICT OF LAWS* 187 (1963).

19. Borchers, *supra* note 6, at 360-61.

20. Cox, *Choice of Law*, *supra* note 12, at 1090.

21. Robert A. Leflar, *Choice-Influencing Considerations In Conflicts of Law*, 41 N.Y.U. L. REV. 26, 282 (1996).

22. Smith, *supra* note 13, at 1049.

23. *Id.*

24. Leflar, *supra* note 21, at 296.

25. *Id.* at 298.

26. WILLIAM M. RICHMAN & WILLIAM L. REYNOLDS, *UNDERSTANDING CONFLICT OF LAWS* § 116 (a) (2d ed. 1993).

27. *See generally id.*

states.²⁸ "The validation rule confirms the parties' expectations, it provides stability in an area where stability (because of children and property) is very important, and it avoids the potentially hideous problems that would arise if the legality of a marriage varied from state to state."²⁹

"Despite this overwhelming tendency to validate the marriage, [a] same-sex couple will remain unsure whether their marriage will be recognized, due to courts' discretion to refuse recognition on public policy grounds."³⁰ For the past several months, I have been reviewing the research from the thirty-two states that we have in our clearinghouse at this time.³¹ My summary today focuses on two main questions:

- (1) Have courts actually used public policy exceptions to refuse to recognize out-of-state marriages entered into by their domiciliaries, or have they simply indicated their discretion to find such an exception, without actually using a public policy exception to refuse validation of a marriage?
- (2) Have courts used marriage evasion statutes or other statutory prohibitions to refuse to validate an out-of-state marriage by their domiciliaries even when those domiciliaries left their domicile to evade statutory prohibitions preventing their marriage in-state, or have they instead validated the marriage despite the evasion statute?

In answering these questions, our research has found, although with exceptions regularly occurring in states with marriage evasion statutes, that courts do not use a public policy exception to refuse to validate an out-of-state marriage even when the domicile has an explicit statutory prohibition against the marriage in question. Instead, courts repeatedly indicate that they have the discretion to use such a public policy exception but then validate the out-of-state marriage following the general rule in favor of recognition. Although a few states use the exception consistently, virtually all the rest recognize the existence of

28. *Id.*

29. *Id.*

30. Cox, *Choice of Law*, *supra* note 12, at 1065.

31. This review was completed as of September 1, 1996. The states that were considered are Alaska, Arkansas, California, Connecticut, the District of Columbia, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Mississippi, Nebraska, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, West Virginia, and Wisconsin. I have not done this research myself but, instead, am relying on the research that has been conducted by the people participating in the Clearinghouse Project. It is possible that this research is incomplete, inaccurate, or inexact. But, having read all the research from these states, I have concluded that it is accurate and complete enough for purposes of drawing some conclusions from these materials.

such an exception but rarely use it.

The question that will occur once Hawaii, or some other state, permits marriage by same-sex couples is whether this rarely-used public policy exception will come into play, just as it did for miscegenous marriages. Only in those states with anti-miscegenation statutes can one find consistent and repeated use of public policy exceptions to refuse to recognize otherwise valid out-of-state marriages.³² Once the Supreme Court outlawed such refusals as unconstitutional, the public policy exception fell into disuse.³³ Perhaps once again, courts will try to bring out this exception, dust it off, and assert it as a legitimate reason to refuse to recognize marriages by same-sex couples. Perhaps once again, it will take a case like *Romer v. Evans*,³⁴ to stop courts from using a tool, in the name of public policy, that is simply a way to unconstitutionally deny the fundamental right to marry³⁵ to yet another segment of our population.³⁶

II. HAVE COURTS ACTUALLY USED A PUBLIC POLICY EXCEPTION TO REFUSE RECOGNITION OF OUT-OF-STATE MARRIAGES?

After reviewing the cases from the states for which research has been completed, I feel confident in arguing that the vast majority of courts have not used a public policy exception to invalidate their domiciliaries' out-of-state marriages. That is not to say that the courts do not repeatedly claim that they can use such a public policy exception to refuse to recognize those marriages that they believe violate the domicile's public policy. The courts make this claim, believing that using the public policy exception to invalidate the marriage is superior

32. Many of the courts which have refused recognition of interracial marriages are in states for which we do not have research at this time. Rather than do a seriously incomplete analysis of the interracial marriage cases, which varied significantly in result depending on location of the state, I have excluded those cases from consideration in this article. While that clearly lessens the thoroughness of this article, I refer the reader who is interested in analysis of those cases to the excellent article by Professor Andrew Koppelman which is included in this symposium issue. See Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIPIAC L. REV. 105 (1997).

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

34. 116 S. Ct. 1620 (1996).

35. The right to marry is a part of the fundamental right to privacy implicit in the Fourteenth Amendment's Due Process Clause. *Cox, Choice of Law*, *supra* note 12, at 1054, citing *Zablocki v. Redhail*, 434 U.S. 374 (1978) and *Skinner ex rel. Williams v. Oklahoma*, 316 U.S. 535 (1942). No court has indicated that the fundamental right to marry extends to same-sex couples, including the Hawaii Supreme Court in *Baehr* which explicitly rejected such an argument. *Baehr v. Lewin*, 852 P.2d 44,52 (Haw. 1993).

36. See *Cox, Anti-Gay Initiatives*, *supra* note 12, for a discussion of the ways in which the recent passage of statutes refusing recognition of marriages by same-sex couples may violate *Romer*.

to using the general choice of law rule that would validate the marriage.

In short, 'public policy' is one way to avoid the application of a choice of law rule which the forum wishes to avoid. The objection of the forum, thus, is not to the content of the foreign law but to its own choice of law rule. Rather than to change or modify the supposedly applicable rule the court may refuse on public policy grounds to apply the law to which the rule makes reference. The closer the tie between the forum and the facts of a given transaction the more readily we may expect the forum to use its own law to judge the matter before it. In such a view the 'public policy' doctrine becomes a kind of choice of law principle, imprecise, uncertain of application, but nevertheless discharging a choice of law function. It is a way of saying, 'In these circumstances this forum makes reference to its internal law rather than to the law of another state to which our 'normal' choice of law rule would direct us.'³⁷

Given the frequency with which courts refer to the public policy exception, they clearly believe they are justified in rejecting their own choice-of-law rules in order to refuse recognition of a validly contracted marriage. But they have been quite reluctant to use the exception and quite liberal in recognizing marriages celebrated in other states.³⁸ Finding cases where the courts have actually used a public policy exception to refuse to recognize their domiciliaries' out-of-state marriages was difficult. That is not to say that they do not exist; they do.

For example, in *Pennegar v. State*,³⁹ the Tennessee Supreme Court considered the marriage of a woman who was divorced on the ground of adultery and who went to Alabama to marry the man with whom she had committed adultery.⁴⁰ Such remarriage was prohibited by Tennessee statute during the life of her first husband.⁴¹ Explaining the general rule in favor of recognition, the court noted that:

[m]arriage is an institution recognized and governed to a large degree by international law, prevailing in all countries, and constituting an essential

37. Monrad G. Paulsen & Michael I. Sovern, "Public Policy" in the Conflict of Laws, 56 COLUM. L. REV. 969, 981 (1956).

38. *Id.* at 994 n.90. The authors compare cases in which the courts have recognized out-of-state marriages (when remarriage was prohibited in the domicile, when interracial marriage was prohibited in the domicile, and when incestuous marriage was prohibited in the domicile) against those when they have refused recognition (when remarriage was prohibited in the domicile, when interracial marriage was prohibited in the domicile, when incestuous marriage was prohibited in the domicile.) *Id.*

39. 10 S.W. 305 (Tenn. 1889).

40. *Id.* at 305.

41. *Id.*

element in all earthly society. The well-being of society . . . demands that one state or nation shall recognize the validity of marriage had in other states or nations, according to the laws of the latter, unless some positive statute or pronounced public policy of the particular state demands otherwise.⁴²

The court noted the two usual exceptions to the general rule—marriages deemed contrary to the law of nature (which it defined as those involving polygamy or incest) and marriages which the local law-making power has declared invalid (either expressly or by implication).⁴³ The court then went on to discuss, with more concern than many other courts, what statutes embody “distinctive state policy, as affecting the morals or good order of society.”⁴⁴

It is not always easy to determine what is a positive state policy. It will not do to say that every provision of a statute prohibiting marriage, under certain circumstances, or between certain parties, is indicative of a state policy in the sense in which it is used in this connection. To so hold would be to overturn this most solemn relation, involving legitimacy of offspring, homestead dower, and the rights of property, . . . Each state or nation has ultimately to determine for itself what statutory inhibitions are by it intended to be imperative, as indicative of the decided policy of the state concerning the morals and good order of society, to that degree which will render it proper to disregard the *jus gentium* of ‘valid where solemnized, valid everywhere.’⁴⁵

The court explained the difference in results from state-to-state as dependent on each court’s interpretation of “the meaning, intent, and scope of each particular statute on the subject of marriage in the light of the known policy of the state”⁴⁶ When considering the prohibition on remarriage by an adulterous spouse, the court concluded that the statute was intended to protect the sensibilities of the innocent ex-spouse and prevent an affront to the public decency because “the moral sense of the community is shocked and outraged” by the adulterous couple living together openly.⁴⁷ The court thus held the remarriage to be invalid and let stand the conviction of lewdness.⁴⁸

42. *Id.* at 306.

43. *Pennegar*, 10 S.W. at 306.

44. *Id.*

45. *Id.*

46. *Id.* at 308.

47. *Pennegar*, 10 S.W. at 308.

48. *Id.* See also, *Rhodes v. McAfee*, 457 S.W.2d 522, 523-24 (Tenn. 1970) (finding the Mississippi marriage of a stepfather and his stepdaughter, which would also be void in Mississippi, invalid in Tennessee due to the “discord and disharmony” it would cause within the family).

In *Brinson v. Brinson*,⁴⁹ the Louisiana Supreme Court refused to recognize a common-law marriage entered into in Mississippi.⁵⁰ Although the court concluded that the parties had married in bad faith because both knew that the man was still married to his first wife at the time of the second marriage, it was uncertain whether Mississippi law would recognize a common-law marriage under such circumstances.⁵¹ Assuming that the marriage would be valid in Mississippi, the court considered whether it was valid in Louisiana.⁵² The court stated that "it would be contrary to the public policy of this state to hold that a bigamous marriage contracted in bad faith in another state may nevertheless produce its civil effects under our law."⁵³ Stating that "[i]t is a well established rule of conflict of laws that the spirit of comity between states does not require a state to recognize a marriage which is contrary to its own public policy[.]"⁵⁴ the court concluded that Louisiana code and cases required "absolute good faith" on the part of a spouse claiming civil effects from a bigamous marriage.⁵⁵ Thus, it held that "it would be inimical to public policy for this [c]ourt to conclude that such a relationship, conceived in bad faith, will be given effect in Louisiana merely because it may be sanctioned in the state wherein it existed."⁵⁶

New York reached a similar result in the recent case of *People v.*

49. 96 So. 2d 653 (La. 1957).

50. *Id.* at 659.

51. *Id.* at 658. Discussing Mississippi law, the Court referred to various cases that seemed to require good faith by the parties to have their common-law marriage considered valid once the impediment that marriage had been removed by the first wife's divorce if they had not entered into a new agreement to marry following removal of the impediment. *Id.* at 658-59. But since the Court recognized, given a mix of cases from Mississippi, that it might be interpreting Mississippi law incorrectly, it turned to the question of whether such a marriage would be valid in Louisiana assuming it was valid in Mississippi. *Brinson*, 96 So.2d at 658-59.

52. *Id.*

53. *Id.* at 659.

54. The Court cited 35 AM. JUR., *Marriage*, § 172 for the proposition:

Although the general rule is that the validity of a marriage contract is determined by the *lex loci contractus* and *celebrationis*, it is not every marriage which may be valid by such law that will be recognized as legal everywhere else. Every sovereign state is the conservator of its own morals and the good order of its society. Consequently, where marriages between certain persons are prohibited by the public policy and law of one jurisdiction as contrary to the morals and social order, they will not be deemed valid therein, although they are deemed valid in the state or place where they were celebrated, and although the parties to the marriage were there domiciled

96 So. 2d at 659.

55. *Id.* at 659.

56. *Id.*

Ezeonu.⁵⁷ In this case, a Nigerian national was charged with second-degree rape of a woman, whom he claimed was his "second" or "junior" wife.⁵⁸ If the court found the Nigerian marriage between the parties to be valid in New York, then it would constitute a factual defense to the charge of rape.⁵⁹ The court found that the defendant was married to another woman under the laws of both Nigeria and New York, and thus, even though the second marriage comported with Nigerian custom, it was null and void in New York.⁶⁰ Although the court recited the general rule that a marriage valid where celebrated would also be valid in New York, it stated that "it is well established that this general rule does not apply where recognition of a marriage is repugnant to public policy."⁶¹ Turning to New York Domestic Relations Law which declares a marriage to be "absolutely void" if contracted by a person with a living wife by a former marriage,⁶² and New York Penal Law which makes bigamy a crime in New York,⁶³ the court concluded that the marriage was absolutely void in New York and could not be asserted as a defense to the rape charge.⁶⁴ The court noted that "it has been held that when this state is called upon to recognize either an incestuous or bigamous marriage, it will assert its strong public policy of condemnation thereof and refuse recognition even if that marriage was valid where consummated."⁶⁵

57. 588 N.Y.S.2d 116 (N.Y. Sup. Ct. 1992).

58. New York Penal Law § 130.30 provided that: "A person is guilty of Rape in the Second Degree when, being eighteen years old or more, he or she engages in sexual intercourse with another person to whom the actor is not married less than fourteen years old."

59. *Ezeonu*, 588 N.Y.S.2d at 117.

60. 588 N.Y.S.2d at 117.

61. *Id.* New York has refused to recognize marriages on other public policy grounds as well. For example, see *Holland v. Holland*, 212 N.Y.S.2d 805 (N.Y. Sup. Ct. 1961) and *Cunningham v. Cunningham*, 99 N.E. 845 (N.Y. 1912) where both courts refused to recognize marriages between New York residents out-of-state when one of the parties was underage. In *Holland*, the court referred to exceptions from the general rule of validation "where the countervailing public policy of the domicile of the contracting parties are affected, particularly where the rights and welfare of infants are involved and where the contracting parties were domiciled at the time of the marriage and where the State of the domicile is also the forum." 212 N.Y.S.2d at 806.

62. N.Y. DOM. REL. LAW § 6 (Consl. Supp. 1996).

63. N.Y. PENAL LAW § 255.15 (Consl. 1984).

64. *Ezeonu*, 588 N.Y.S. 2d at 117-18.

65. *Id.* at 117 (quoting *Bronislaw K. v. Tadeusz K.*, 90 Misc. 2d 183, 393 N.Y.S.2d 534 (1977) (citing *Matter of May's Estate*, 305 N.Y. 486 (1953)). Interestingly, the court refers to *Matter of May's Estate* as support for this proposition. That well-known case upheld the validity of a Rhode Island marriage between an uncle and a niece who were Jewish, as permitted by their religion and excepted from a Rhode Island prohibition of such marriages. Considering the marriage between the parties, both New York residents, which lasted thirty-two years, the May court held that "subject to two exceptions presently to be considered, and in the absence of a statute expressly regulating within the domiciliary State marriages solemnized abroad, the legality of a marriage between person sui juris is to be determined by the law of the place where it is celebrat-

These examples establish that courts do, in fact, use a public policy exception to refuse to validate marriages which they believe fall outside the general rule favoring recognition. But the cases are rare enough to make one wonder what all the fuss about a public policy exception is about. As discussed below, only in states with marriage evasion statutes have courts regularly refused to validate marriages prohibited under their own statutes when they believed their domiciliaries left the state with the sole purpose of evading those statutes. But even there, the courts have been far from consistent. The most consistent refusal of recognition was for marriages out-of-state that violated the domicile's anti-miscegenation statute and again, even there, the cases are not consistent.⁶⁶ It is likely that courts will treat marriages by same-sex couples similarly to the way they treated interracial marriages; some states will recognize them, some states will not, and uniformity will not be achieved until the Supreme Court recognizes that same-sex couples have a fundamental right to marry.

The answer to the question posed above, after reviewing this research (which, admittedly, is far from complete), is that states do not regularly use a public policy exception to refuse recognition of out-of-state marriages. In fact, what surprised me is that courts have not used a public policy exception to refuse recognition even when their domiciliaries would have been prohibited within the state from entering into the marriage that they entered into out-of-state. It is not surprising to find that courts recognize marriages that would be valid in the domicile even when entered into outside the domicile; that is, after all, what the general rule on marriage recognition tells us. But I did not expect to find that the courts, while espousing the right to use a public policy exception, have not done so even when the marriage would violate the domicile's own marriage statutes.

Some of these cases are not surprising. When the parties violated some form or license requirement or some other technicality was miss-

ed." *Id.* at 6. Because the New York statute prohibiting such marriages as incestuous did not have extraterritorial effect and thus did not fit under the exception of cases within the prohibition of positive law, the court then turned to whether it fell within the exception for "cases involving polygamy or incest in a degree regarded generally as within the prohibition of natural law." *Id.* The court concluded that the marriage between persons of the Jewish faith who were not in the "direct ascending or descending line or consanguinity and who were not brother and sister" was not "offensive to the public sense of morality to a degree regarded generally with abhorrence and thus was not within the inhibitions of natural law." *Id.* at 7. This same refusal to use public policy to deny recognition of other such marriages is discussed throughout the remainder of this paper.

66. See *supra* note 32.

ing, one would hope the courts would not destroy the parties' justified expectations and reek havoc with their personal relationships just to affirm a statutory technicality. Some people may also discount cases discussed below where courts validated out-of-state marriages that violated underage restrictions. Many of us would agree that courts should find those restrictions to be "directory" only.

But it is difficult to discount cases where the out-of-state marriage violated the domicile's restrictions on first cousins or uncle/niece marriage as incestuous, violated the domicile's restrictions on adultery or when a divorced person could remarry, or violated the domicile's restrictions on interracial marriage and even polygamy.⁶⁷ One might expect to find that in these cases the courts would turn to a public policy exception. They seem to fit within those limited occasions when a court might be expected to use public policy.

The right of a court to declare what is or is not in accord with public policy does not extend to specific economic and social problems which are controversial in nature and capable of solution only as the result of a study of various facts and conditions. It is only when a given policy is so obviously for or against the public health, safety, morals or welfare that there is a virtual unanimity of opinion with regard to it, that a court may constitute itself the voice of the community in so declaring. There must be a positive, well defined, universal public sentiment, deeply integrated in the customs and beliefs of the people and in their conviction of what is just and right and in the interests of the public weal If, in the domain of economic and social controversies, a court were, under the guise of the application of public policy, in effect to enact provisions it might consider expedient and desirable, such action would be nothing short of judicial legislation Only in the clearest cases, therefore, may a court make an alleged public policy on the basis of judicial decision.⁶⁸

But the courts have not used public policy in those situations. Clearly, incest and adultery would seem to fit this description of when courts would be expected to declare that the states' public policy would forbid recognition of such marriages. But the courts have not reached that result. Reading that description, we might expect that courts would use it to refuse to validate marriages by same-sex couples. And they may. But it seems difficult to distinguish incest and adultery as within

67. I do not want to overstate the case. The polygamy case referred to is from California where the court recognized a polygamous marriage simply for inheritance purposes and specifically noted it would have refused to do so for cohabitation purposes. *In re Dalip Singh Bir's Estate*, 188 P.2d 499 (Cal. 1948) (recognizing polygamous marriage from India so as to allow estate claims by both wives).

68. *Mamlin v. Genoe*, 17 A.2d 407, 409 (Pa. 1941). *Accord, In re Christoff Estate*, 192 A.2d 737, 739 (Pa. 1963) (quoting *Mamlin*, cert. denied, 375 U.S. 965 (1964)).

the public policy of a state which has prohibited it and marriage by same-sex couples as outside the public policy of a state especially when the state has not prohibited it.⁶⁹

Perhaps they are mindful of the words of Judge Beach in their hesitance:

It would be an intolerable affectation of superior virtue for the courts of one state to pretend that the mere enforcement of a right validly created by the laws of a sister state 'would be repugnant to good morals, would lead to disturbance and disorganization of the local municipal law,' or would be of such evil example as to corrupt the jury or the public.⁷⁰

Similarly, another commentator noted: "As among our states, the sight of the courts of one state refusing to apply the law of another because the second state's rule shocks the morals of the forum, is one to make the judicious grieve."⁷¹

In these situations, the majority of cases that I have found have validated the marriage. They did not have to do so; they had the public policy exception at hand to support a refusal of recognition. But they did recognize the out-of-state marriage. If anything consistent can be found from this research, it is that they did recognize those marriages. Apparently, up until this time, courts from around the country have found that virtually no marriage violates public policy, including those that violate the domiciliary state's own marriage statutes. A review of those cases leads to this inescapable conclusion.

A. *Arkansas*

Arkansas has used two different choice-of-law theories in upholding out-of-state marriage by its domiciliaries. In *State v. Graves*,⁷² the supreme court used the *First Restatement* to determine that a marriage between underage domiciliaries of Arkansas, which was entered into in Mississippi, where such a marriage was valid with the parents' consent, was valid in Arkansas. *Graves* is an interesting opinion because, after citing the general rule of validation, the court refers to the section 132 exceptions,⁷³ which include "(4) marriage of a domiciliary which the

69. See *supra* note 12, indicating that only twelve states explicitly prohibit marriages by same-sex couples.

70. John K. Beach, *Uniform Interstate Enforcement of Vested Rights*, 27 YALE L.J. 656, 662 (1918).

71. Herbert F. Goodrich, *Foreign Facts and Local Fancies*, 25 VA. L. REV. 26, 35 (1938).

72. 307 S.W.2d 545 (Ark. 1957).

73. *Id.* at 547.

statute at the domicile makes void even though celebrated in another state."⁷⁴ The court cited numerous other out-of-state cases, including *In re Perez' Estate*,⁷⁵ which stated:

Was the Arizona marriage of respondent and decedent void because it was contracted between the parties for the specific purpose and with the specific intent of evading the laws of California? This question must be answered in the negative. If parties who are residents of and domiciled in California, where their marriage would have been invalid, are married in another state in conformity with the laws of such state, even though they have entered such state with the avowed purpose of evading the laws of the state of California, such motive does not invalidate the marriage.⁷⁶

After reviewing previous Arkansas cases in which there was a conflict on whether underage marriages are void ab initio, the court concluded:

For a period of more than a century, the established law, as well as the public policy of the State, was that underage marriages were valid until they were nullified by a court of competent jurisdiction In the circumstances, it can hardly be said that the public policy of this State against under-age marriages is so strong that such a marriage, valid in the state where it was contracted, is void in this state We have no statute which provides that marriages such as the one involved here, celebrated in another state, are void in the State of Arkansas.⁷⁷

The court reached this conclusion despite the fact that Arkansas Statutes section 55-102 specifically states that a marriage by persons under age fourteen shall be void and despite the fact that another statute explicitly indicated that Arkansas courts could find such marriages to be void.⁷⁸

In another Arkansas case,⁷⁹ the court used Leflar's choice-influencing considerations to uphold as valid an out-of-state marriage that violated Arkansas' incest statute because it was a marriage between first cousins.⁸⁰ The court, in explaining its decision to validate the

74. FIRST RESTATEMENT § 132(d).

75. 219 P.2d 35 (Cal. Dist. Ct. App. 1950).

76. *Id.* at 36 (citing *McDonald v. McDonald*, 6 Cal. 2d 457, 459, 58 P.2d 163, 165 (1936)).

77. *Graves*, 307 S.W.2d at 550.

78. *Id.* at 459. The court does cite ARK. STAT. § 55-106 which provides: "When either of the parties to a marriage shall be incapable, from want of age or understanding, of [contracting] to any marriage . . . the marriage shall be void, from the time its nullity shall be declared by a court of competent jurisdiction." *Graves*, 307 S.W.2d at 549. While this statute implies that the marriage in this case, thus, was not void yet, the court could have, presumably, used that statute and the public policy it embodied to find the marriage void despite being valid in Mississippi. *Id.*

79. *Etheridge v. Shaddock*, 706 S.W.2d 395 (Ark. 1986).

80. *Id.* at 395-96. The parties were married in Arkansas without realizing that their marriage,

marriage despite the Arkansas incest statute which prohibited it, stated:

We have no doubt that the Arkansas policy against incest is so strong that we would not recognize the validity of a marriage, even if performed in another state, between very close blood relatives, such as a father and daughter or a brother and sister. The majority view, however, in states forbidding a marriage between first cousins, is that such a marriage does not create 'much social alarm,' so that the marriage will be recognized if it was valid by the law of the state in which it took place.⁸¹

Citing *State v. Graves*,⁸² the court said the "heart" of that opinion stated that:

The celebration of a marriage gives rise to many ramifications, including questions of legitimacy, inheritance, property rights, dower and homestead, and causes of action growing out of the marital status. We have no statute which provides that marriages such as the one involved here, celebrated in another state, are void in the State of Arkansas.⁸³

The court saw "no reason to elaborate upon a line of reasoning that is still good."⁸⁴ So rather than using public policy to invalidate an out-of-state marriage, even though it would be invalid in-state, the courts used public policy to affirm the general rule.

B. California

For over 120 years, California courts have repeatedly recognized that the expressed, long-term and unquestioned public policy of California has been to respect validly contracted marriages.⁸⁵ Even when

as first cousins, was prohibited by ARK. STAT. ANN. § 55-103 (repealed 1971). *Etheridge*, 706 S.W.2d at 396. A year later, the parties were informed that their marriage was invalid under Arkansas law and went to Texas for the sole purpose of remarrying there, since Texas law did not prohibit the marriage. *Id.*

81. *Etheridge*, 706 S.W.2d at 396 (citing LEFLAR, AMERICAN CONFLICTS LAW § 221 (3d ed. 1977)).

82. 307 S.W. 2d 545 (Ark. 1957).

83. *Etheridge*, 706 S.W.2d at 396 (citing *Graves*, 307 S.W.2d at 550).

84. *Etheridge*, 706 S.W.2d at 396.

85. *Tatum v. Tatum*, 241 F.2d 401 (9th Cir. 1957) (recognizing common law marriage from out of state); *Barrons v. United States*, 191 F.2d 92 (9th Cir. 1951) (recognizing proxy marriage from Nevada, although California did not recognize proxy marriages); *In re Dalip Sing Bir's Estate*, 188 P.2d 499 (Cal. Dist. Ct. App. 1948) (recognizing polygamous marriage from India so as to allow estate claims by both wives); *Colbert v. Colbert*, 169 P.2d 633 (Cal. 1946) (recognizing in California a common law marriage which was validly contracted in a sister state); *McDonald v. McDonald*, 58 P.2d 163 (Cal. 1936) (recognizing Nevada marriage contracted within four and a half months of one spouse's divorce, in violation of California's one year waiting period before a divorcee could remarry); *Pearson v. Pearson*, 51 Cal. 120 (1875) (recognizing interracial marriage

those marriages violated current California laws, such as those prohibiting interracial marriage, prohibiting remarriage after divorce within one year, and prohibiting underage marriage, the state's overriding policy of protecting validly contracted marriages held sway.⁸⁶

In *Norman v. Norman*,⁸⁷ the court considered whether a marriage between a man and an underage woman was valid when it was solemnized while the parties were at sea off the coast of California. Explaining the rules in question, the court stated:

If the marriage in question can find support by the laws of any country having jurisdiction of the parties at the place where the marriage ceremony was performed, we should feel constrained by our code rule and well-considered decisions to declare it valid here, even though the parties were here domiciled at the time and went to the place where they attempted to be married for the purpose of evading our laws which they believed forbade the bans.⁸⁸

The court, however, found that the parties, by going onto the high seas, went where no written law existed for solemnizing the marriage, and therefore it was invalid.⁸⁹

When considering an interracial marriage which would not have been valid if entered into in California due to its anti-miscegenation statute, the court nevertheless recognized the marriage of a white man and black woman entered into in Utah.⁹⁰ The court found that there was no law in Utah at the time of the marriage prohibiting interracial marriage and therefore a lawful marriage had been contracted.⁹¹ Using California's validation statute, the court determined that out of state marriages that were valid where contracted were valid within California, except for those that were polygamous or incestuous.⁹² Another case affirmed the marriage of California domiciliaries in Nevada even though they were under the age of consent at the time of the marriage.⁹³ Although noting that the marriage, if it had occurred in California, would be subject to annulment for failure of the parties to pro-

despite California laws nullifying them).

86. *McDonald*, 58 P.2d at 163; *Estate of Wood*, 69 P. at 900; *Pearson*, 51 Cal. at 120.

87. 54 P. 143 (Cal. 1898).

88. *Id.* at 144.

89. *Id.* at 146.

90. *Pearson*, 51 Cal. 120 (1875).

91. *Id.* at 124.

92. *Id.* at 125.

93. *McDonald v. McDonald*, 58 P.2d 163 (Cal. 1936).

cure parental consent,⁹⁴ the marriage was valid in Nevada.⁹⁵ Again citing the validation statute,⁹⁶ the court held:

Even though the parties here, residents of and domiciled in California, went to the state of Nevada to be married, and with the avowed purpose of evading our laws relating to marriages, such a motive, if in the minds of the parties, would not change the operation of the well-settled rule that a marriage which is contrary to the policies of the laws of one state is yet valid therein if celebrated within and according to the laws of another state. . . . Each state may follow its citizens into another state and regulate the status of its own citizens, especially such a status as the marriage relation The Legislature of California has not enacted a statute that such marriages shall have no validity here. In the absence of such a statute of the domicile of the parties, expressly and clearly regulating marriages abroad, the *lex loci contractus* governs as to the validity of the marriage. An exception, of course, arises when the marriage is regarded as odious by common consent of nations: e.g., where it is polygamous or incestuous by the laws of nature.⁹⁷

The court refused to permit the annulment of the marriage because it would not only repudiate the entire concept of marriage (to invalidate a valid marriage), but it "would also indirectly repudiate the doctrine of Conflict of Laws, universally recognized and embodied in section 63 of the Civil Code."⁹⁸

The court reached the same result when recognizing common law marriages entered into outside of California even though California did not recognize them,⁹⁹ and recognizing a proxy marriage entered into in Nevada although California did not recognize them.¹⁰⁰ In a case frequently cited, *In re Estate of Dalip Singh Bir*,¹⁰¹ the court permitted two wives of the deceased to share equally in the proceeds of his estate, each being his lawful wife from marriages entered into in India

94. *Id.* at 163 (referring to CAL. CIV. CODE § 82(1) (1874)).

95. *Id.*

96. "Cal. Civ. Code § 63 provides: 'All marriages contracted without the state, which would be valid by the laws of the country in which the same were contracted, are valid in this state.'" *Id.* at 164.

97. *McDonald*, 58 P.2d at 164 (citations omitted).

98. *Id.* at 165. The court continued: "Under appellant's reasoning, by recognizing the validity of the foreign law until the subject reaches our borders, and then denying the validity previously recognized, we would effectually eliminate from our jurisprudence the entire field of Conflict of Law." *Id.*

99. *Tatum v. Tatum*, 241 F.2d 401 (9th Cir. 1957) (recognizing common law marriages created in states that allow them but holding that plaintiff did not meet the burden of proving formation of an agreement); *Colbert v. Colbert*, 169 P.2d 633 (Cal. 1946).

100. *Barrons v. United States*, 191 F.2d 92 (9th Cir. 1951).

101. 188 P.2d 499 (Cal. 1948).

where polygamous marriages are permitted.¹⁰² The court reviewed numerous early decisions and several commentators' views before noting that "it is not correct to say that English law can in no case recognize polygamous marriages as valid, or the issue thereof as legitimate."¹⁰³ It then concluded that the trial court's decision, to allow inheritance only by the first wife, was influenced by the rule of "public policy."¹⁰⁴ The court determined, however, that public policy would "apply only if the decedent had attempted to cohabit with his two wives in California. Where only the question of descent of property is involved, 'public policy' is not affected."¹⁰⁵ "'Public policy' would not be affected by dividing the money equally between the two wives, particularly since there is no contest between them and they are the only interested parties."¹⁰⁶

In most other states, this has also been what we found when doing the research. Like California, the other state courts claim that the public policy exception permits them to refuse to recognize out-of-state marriages by state domiciliaries that were valid where entered but not valid in their home state. But they repeatedly validate these marriages, despite this claimed ability to refuse to do so via the public policy exception.

C. Connecticut

Connecticut has neither a marriage validation statute nor an evasion statute. On two occasions, it did use public policy to refuse to recognize a marriage entered into outside Connecticut. In one case, the Connecticut Supreme Court considered a marriage between an uncle and a niece which was validly performed in Italy because the couple had received a dispensation.¹⁰⁷ The court invalidated the marriage, nonetheless, stating that the criminal incest statute expressed a strong public policy against recognition.¹⁰⁸ The court focused on the fact that this incestuous relationship had been criminally prohibited in the state since 1702, and the stiff penalty of up to ten years in prison clearly reflected the strong public policy of the state.¹⁰⁹ The court stated that "a state has the authority to declare what marriages of its citizens shall

102. *Id.* at 502.

103. *Id.* at 501 (internal quotations omitted) (citing W.E. Beckett, *Recognition of Polygamous Marriages Under English Law*, 48 LAW REV. Q. 341, 351 (1932)).

104. *Id.* at 502.

105. *In re Estate of Dalip Singh Bir*, 188 P.2d at 502.

106. *Id.*

107. *Catalano v. Catalano*, 148 Conn. 288, 170 A.2d 726 (1961).

108. *Id.* at 290, 170 A.2d at 728.

109. *Id.* at 291, 170 A.2d at 728.

be recognized as valid, regardless of the fact that the marriages may have been entered into in foreign jurisdictions where they were valid."¹¹⁰ This result was particularly harsh because the couple had a child together, and she was denied any right to inheritance.¹¹¹ It is somewhat less surprising, however, because it was a foreign marriage, not one from a sister state.

In the only other case to use public policy grounds to invalidate a marriage, the court considered the marriage of two nineteen year-olds who crossed the New York state line and married on a dare from their friends.¹¹² They never lived together.¹¹³ Although the court turned to New York law, nothing in its law would permit the marriage to be voided for lack of intent to marry.¹¹⁴ The court said that intent to marry was so basic that the marriage was void without it.¹¹⁵ Since nothing in New York law led it to that conclusion, it turned to universally accepted notions of what a marriage entails to invalidate the marriage for lack of intent to marry.¹¹⁶

In a later case explaining its understanding of public policy, the court, while upholding a common law marriage contracted in Rhode Island, stated that a marriage will be invalid only where it is "against the strong [public] policy of this state so as to shock the conscience."¹¹⁷ A commentator has indicated that marriages that are against public policy are ones which are clearly against the public interest, such as those involving incest, bigamy, or an underage individual.¹¹⁸ However, in *Anderson v. Anderson*,¹¹⁹ the court held that the issue of whether a marriage is bigamous, and therefore void, must be determined by the law of the state where the marriage took place.¹²⁰ Thus, it seems that the court was unwilling to use the public policy of Connecticut to invalidate that marriage.

110. *Id.*

111. *Catalano*, 148 Conn. at 289, 170 A.2d at 727.

112. *Davis v. Davis*, 119 Conn. 194, 175 A. 574 (1934).

113. *Id.* at 196, 175 A. at 575.

114. *Id.* at 201, 175 A. at 576.

115. *Id.* at 203, 175 A. at 577.

116. *Davis*, 119 Conn. at 203, 175 A. at 577. After this decision, numerous cases arose where individuals attempted to invalidate their marriages due to lack of consent. The Supreme Court retreated from the holding in *Davis* and in no other cases has a marriage been invalidated for lack of consent. See Harriet S. Daggett, *Annulment of Marriage in Connecticut*, 25 CONN. B.J. 1 (1951).

117. *Delaney v. Delaney*, 34 Conn. Supp. 230, 231, 405 A.2d 91, 92 (1979).

118. C.E.P. Davis, *Annulment of Marriage*, 27 CONN. B.J. 41, 63 (1953).

119. 27 Conn. Supp. 342, 238 A.2d 45 (Conn. 1967).

120. *Id.* at 46.

D. *Illinois*

Illinois is an interesting example. As noted below, the Illinois courts are quick to invalidate marriages that violate Illinois' statutory prohibitions when the court believes that Illinois' domiciliaries went to another state to avoid Illinois' statutes. But the court has used Illinois' validation statute to uphold otherwise valid out-of-state marriages. In *In re Estate of Banks*,¹²¹ the court had to determine whether a decedent's Arkansas marriage in July 1991 was valid or whether it was precluded by his first marriage which was not dissolved until September 1991.¹²² The first wife asserted that the second wife was not entitled to the estate because she was never legally married to the decedent.¹²³ The first wife argued that Illinois law did not control because the marriage was contracted under Arkansas law, and that the marriage would have been void under Arkansas law.¹²⁴ The court determined that under the validation statute, "out-of-State marriages are recognized as valid thereby giving full faith and credit to a sister State's laws, if they were valid when contracted."¹²⁵ The court concluded the decedent's marriage to his second wife was invalid under Arkansas law, because Arkansas does not recognize bigamous marriages and Arkansas had no legislation validating such marriages subsequent to the decedent's second marriage.¹²⁶ However, the court did validate the marriage, because as residents of Illinois, the decedent and his second wife were subject to the law of Illinois, which automatically validated their marriage after the first marriage was dissolved.¹²⁷ The first wife contended that the statute only applied to marriages contracted in Illinois. The court refused to so limit the section and stated that to do so would not serve the purpose of the Illinois validation statute, which is "to strengthen and preserve the integrity of marriage and safeguard family relationships."¹²⁸

121. 629 N.E.2d 1223 (Ill. 1994).

122. *Id.* at 1224.

123. *Id.*

124. *Id.*

125. *In re Estate of Banks*, 629 N.E.2d at 1225.

126. *Id.*

127. *Id.* at 1226. 750 ILL. COMP. STAT. 5/212(b) (West 1992) states that prohibited bigamous marriages become valid marriages at the time the impediment to the marriage is removed. Use of this statute to validate the marriage is consistent with the validation statute because the statute specifies that all marriages contracted outside of Illinois that were subsequently validated by the domicile of the parties are valid in Illinois. § 750 ILL. COMP. STAT. 5/213 (West 1992).

128. *In re Estate of Banks*, 629 N.E.2d at 1223, 1225 (Ill. 1994).

The Illinois courts have also refused to allow statutory prohibitions to be used to invalidate marriages when it finds those prohibitions to be "directory" only, not making the marriage a nullity. For example, in *Reifschneider v. Reifschneider*,¹²⁹ two minors went to Indiana where they contracted a marriage, returned to Illinois, and kept the marriage a secret for three years.¹³⁰ When one of the parties filed for maintenance, the other claimed that the Indiana marriage violated Indiana law because they had lied about their age and had not obtained parental consent as required by Indiana law.¹³¹ Using section 7295 of the Indiana Revised Statutes which states that no marriage is void or voidable for want of a license or other formal requirement if both parties thought they were married, the Illinois court refused to invalidate the marriage. It noted that "the general rule is that, unless a statute expressly declares a marriage contracted without the necessary consent of the parents, or other requirements of the statute, to be a nullity, such statutes will be construed to be directory, only, in this respect, so that the marriage will be held valid"¹³²

E. Iowa

In Iowa, the courts have also affirmed marriages using the general rule and not imposing a public policy exception. In *Boehm v. Rohlf*s, two Wisconsin residents, aged nineteen and fourteen, were unable to obtain a Wisconsin marriage license and, therefore, went to Minnesota to marry.¹³³ They returned to Wisconsin immediately. In a dispute over the nineteen-year-old's uncle's will, the question was whether he had reached "majority by marriage" as required by the will.¹³⁴ The Supreme Court of Iowa held that because the marriage was solemnized in Minnesota, its validity would be determined under Minnesota law.¹³⁵ The court concluded that because the marriage was valid in Minnesota it was valid everywhere; it opined that finding a marriage between two young people void when either could have asked to have it annulled was harsh and unwarranted.¹³⁶ The only other Iowa case involving marriage recognition concerned whether it would recognize a

129. 89 N.E. 255 (Ill. 1909).

130. *Id.* at 256.

131. *Id.* Section 7292 of the Revised Statutes of Indiana required parental consent.

132. *Id.* at 257. *See also* Walker v. Walker, 44 N.E.2d 937 (Ill. App. Ct. 1942) (same result in an underage marriage without parental consent by Illinois residents in Missouri).

133. 276 N.W. 105 (Iowa 1937).

134. *Id.* at 107.

135. *Id.* at 108.

136. *Id.*

common law marriage supposedly entered into in California. In *In re Marriage of Reed*, the court held that, using either the *Second Restatement's* significant contacts approach or the *First Restatement's* traditional rule, the marriage was not valid.¹³⁷ The court found that California did not recognize common law marriages entered into within its borders and that no public policy favored common law marriages in Iowa, thus, neither state had reason to recognize the marriage.¹³⁸

F. *Kentucky*

Kentucky courts have indicated that out-of-state marriages that violate Kentucky public policy will not be recognized. The court referred to Kentucky statutes which declare that incestuous marriages, bigamous marriages, marriages with someone incapable of contracting a marriage, and underage marriages are void.¹³⁹ However, when faced with the case of a girl from Kentucky who married at thirteen in Mississippi (which permits marriages by girls above the age of twelve), the court held that the marriage was voidable but not void.¹⁴⁰ The court gave no reason for its conclusion that incestuous and bigamous marriages are void but underage marriages were only voidable, except that it was the intent of the legislature since underage marriages are not contrary to public policy.¹⁴¹ The court was not clear, however, on how such public policy was determined.

In 1952, the Kentucky Supreme Court noted that no previous case had reached it in which exceptions to the general rule had been allowed.¹⁴² When explaining the purpose behind the general rule recognizing marriages if valid where celebrated, the court stated that:

The sanctity of the home and every just and enlightened sentiment require uniformity in the recognition of the marital status. The necessity that persons legally married according to the laws of one jurisdiction shall not be considered as living in adultery in another, and that children begotten in lawful wedlock in one place shall not be regarded as illegitimate in another, has given rise to the general principle of international and interstate law that the validity of a marriage is to be determined by reference to the law of the place where it was celebrated.¹⁴³

137. 226 N.W.2d 795, 796 (Iowa 1975).

138. *Id.*

139. *Mangrum v. Mangrum*, 220 S.W.2d 406, 406-07 (Ky. 1949).

140. *Id.* at 407.

141. *Id.* at 407-08.

142. *Beddow v. Beddow*, 257 S.W.2d 45, 47 (Ky. 1952).

143. *Id.*

The court held that the state's public policy was violated by an out-of-state marriage by a person who had been adjudged by the courts to be insane and refused to recognize the marriage.¹⁴⁴ While finding that many persons unable to "exercise clear reason, discernment and sound judgment" entered into valid marriages, the court found "the thought of marriage by one who is devoid of reason, or whose mind is so beclouded by insanity as to be incapable of understanding the nature of such a contract, is abhorrent."¹⁴⁵ Kentucky courts have also refused to recognize common-law marriages when Kentucky domiciliaries visited Ohio for a day or a week stating that "it takes more than riding across the Ohio River to make one legal."¹⁴⁶ It may be that these cases will be used to oppose a Hawaiian marriage by Kentucky domiciliaries who visit Hawaii for a short period of time. Such a marriage in Hawaii, however, would be distinguishable because it would be celebrated in the state and not made subject to a claim of common-law status.

G. *Maryland*

Maryland claims to have a public policy exception to recognizing out-of-state marriages, but its cases show a different result. Bigamy and polygamy are crimes in Maryland.¹⁴⁷ For example, in *Roth v. Roth*,¹⁴⁸ the court held that such marriages are void ab initio when contracted in another state.¹⁴⁹ The court determined, however, that the marriage in that case, entered into in Virginia, would have been invalid in both states.¹⁵⁰ Maryland, however, did recognize the validity of a technically bigamous marriage that was valid under California law where the second marriage took place.¹⁵¹ Maryland applied a Califor-

144. *Id.* at 48.

145. *Id.*

146. *Vaughn v. Hufnagel*, 473 S.W.2d 124, 124 (Ky. 1971); *see also Kennedy v. Damron*, 268 S.W.2d 22, 22 (Ky. 1954). *But see Brown Adm'r v. Brown*, 215 S.W.2d 971, 975 (Ky. 1948) where the court did validate an out-of-state common-law marriage where the parties had actually lived together during the winters of 1942 and 1945 in Florida, which would have been sufficient to establish a common-law marriage in that state.

147. MD. ANN. CODE Art. 27, § 18 (1993).

148. 433 A.2d 1162 (Md. Ct. Spec. App. 1981).

149. *Id.* at 1164.

150. *Id.*

151. *Bannister v. Bannister*, 29 A.2d 287, 288 (Md. 1942). Mrs. Bannister had received an interlocutory divorce decree before marrying Mr. Bannister, but her previous divorce was not final until two months after the second marriage. The question was whether a California statute passed after the date of the second marriage applied retroactively to four and one half years before the marriage.

nia statute retroactively thus validating the marriage in Maryland, because "marriages are valid everywhere if the requirements of the marriage laws of the state where the contract of marriage takes place are complied with."¹⁵²

In explaining the reason for its decision in *Bannister*, the court stated:

The reason for this rule is that it is desirable that there should be uniformity in the recognition of the marital status, so that persons legally married according to the laws of one state will not be held to be living in adultery in one state, and that children begotten in lawful wedlock in one state will not be held illegitimate in another.¹⁵³

The court went on to note that the state has the sovereign power to regulate marriages, and the effect it chose to give to marriages contracted in other states is merely because of comity, or because public policy and justice demand the recognition of such laws.¹⁵⁴ "[H]owever, the State is not bound to give effect to marriage laws that are repugnant to its own laws and policy. Marriages that are tolerated in another state but are condemned by the State of Maryland as contrary to public policy will not be held valid in this State."¹⁵⁵ The only example of such a case that the court cited was *Jackson v. Jackson*,¹⁵⁶ where the court refused to recognize an interracial marriage entered into outside of Maryland in violation of Maryland law.¹⁵⁷

Despite that claim, Maryland upheld the validity of a marriage between a Jewish man and his niece even though it violated the Maryland statute prohibiting marriages within certain degrees of consanguinity and affinity.¹⁵⁸ The Court of Appeals found that the couple married in Rhode Island to avoid Maryland's law.¹⁵⁹ But it upheld the marriage by finding it merely voidable, not void.¹⁶⁰ "[T]he provision contained in the statute of this state prohibiting the marriages of uncles and nieces does not, we think, fall within any of the enumerated excep-

152. *Id.* at 289. Maryland applied the California statute retroactively because the statute did not clearly express that it was not retroactive. *Id.*

153. *Henderson v. Henderson*, 87 A.2d 403, 409 (Md. 1952).

154. *Id.* at 408.

155. *Id.*

156. 33 A. 317 (Md. 1895).

157. *Id.* at 319. "The statutes of Maryland preemptorily forbid the marriage of a white person and a negro and declare all such marriages forever void. It is, therefore, the declared policy of this state to prohibit such marriages." *Id.* For a discussion of how courts have treated interracial marriages in violation of anti-miscegenation statutes, see Koppelman, *supra* note 32.

158. *Fensterwald v. Burk*, 98 A. 358, 360 (Md. 1916), *error dismissed*, 248 U.S. 592 (1916).

159. *Id.* at 359.

160. *Id.* at 358.

tions to the general rule (that a marriage valid where performed is valid everywhere). It is not incestuous according to the generally accepted opinion of Christendom¹⁶¹ and will not affect the morals or good order of society.¹⁶² Maryland's courts have also found that statutory requirements for solemnization of marriage are merely related to "form and ceremony" so that common-law marriages are not repugnant to Maryland's laws and policy,¹⁶³ although a later decision expressly declared that "it is firmly settled that Maryland does not permit common law marriages to be formed within its borders."¹⁶⁴ Thus, Maryland will recognize common law marriages entered into out-of-state despite those marriages violating clearly established Maryland policy. So too does Maryland recognize out-of-state marriages by its domiciliaries who are underage,¹⁶⁵ despite the fact that such marriages are severely curtailed in Maryland by state statute.¹⁶⁶ The court found the statutory requirements regarding age and parental consent were directory, not mandatory; therefore, they "do not go to the essential validity of a marriage."¹⁶⁷ Just how Maryland would interpret its public policy exception is unclear; thus, even though it statutorily prohibits marriages by same-sex couples, it has not used the public policy exception to refuse recognition of other out-of-state marriages that also violate state statutory provisions.¹⁶⁸

161. *Id.* at 358.

162. *Fensterwald*, 98 A. at 358. *See also*, *Harrison v. State*, 22 Md. 468 (1864) (marriage between uncle and niece, which predated statute declared void was made valid by retroactive application of statute); John S. Strahorn, Jr., *Void and Voidable Marriages in Maryland And Their Annulment*, 2 MD. L. REV. 211 (1938).

163. *Henderson v. Henderson*, 87 A.2d 403, 409 (Md. 1952). *See also* *Laccetti v. Laccetti*, 225 A.2d 266, 268 (Md. 1967) (valid D.C. common-law marriage valid in Maryland); *Jennings v. Jennings*, 315 A.2d 816, 823-24 (Md. Ct. Spec. App. 1974) (valid D.C. common-law marriage valid in Maryland); and *Blaw-Knox Construction Equipment Co. v. Morris*, 596 A.2d 679, 686 (Md. Ct. Spec. App. 1991).

164. *Mendelson v. Mendelson*, 541 A.2d 1331, 1339 (Md. Ct. Spec. App. 1988).

165. *Picarella v. Picarella*, 316 A.2d 826, 847 (Md. Ct. Spec. App. 1974) (upholding marriage of sixteen year old who committed fraud by lying about his age).

166. MD. CODE ANN., FAM. LAW § 2-301 (1991).

167. *Picarella*, 316 A.2d at 835.

168. MD. CODE ANN., FAM. LAW § 2-201 (1996) implicitly requires a couple to be heterosexual to be married in Maryland: the statute states that "only a marriage between a man and a woman is valid in this state." *Id.* For a discussion of how the courts have used the public policy exception in Maryland in conflicts cases, see Richard Bourne, *Modern Maryland Conflicts: Backing into the Twentieth Century One Hauch at a Time*, 23 U. BALT. L. REV. 71, 93-104 (1993).

H. *Nebraska*

Nebraska recognizes the out-of-state marriages of its domiciliaries even when those marriages would have been invalid if entered into within the state. In *State v. Hand*,¹⁶⁹ the Nebraska Supreme Court considered the marriage of two Nebraska residents who were prohibited from marrying under Nebraska law.¹⁷⁰ The court found that the defendants went to Iowa for the express purpose of evading that law and were married.¹⁷¹ Since that marriage would have been valid in Iowa, the court determined that “in the absence of express words, a legislative intent to contravene the *jus gentium* under which the question of the validity of a marriage contract is referred to the *lex loci contractus* cannot be inferred. The intent must be clear and unmistakable expression.”¹⁷² Finding that the marriage must be affirmed even though done intentionally to evade state law, the court reasoned “[t]o hold otherwise would be to render void numberless marriages and to make illegitimate thousands of children the country over.”¹⁷³ Citing Nebraska’s marriage validation statute, the court concluded that the marriage was valid.¹⁷⁴

The court reached the same conclusion in *Staley v. State*,¹⁷⁵ where the husband was charged with bigamy and he defended on the grounds that his first marriage was invalid because he and his first wife were first cousins.¹⁷⁶ That marriage was held in Iowa where it would have been valid, although it would have been invalid in Nebraska.¹⁷⁷ Citing *Hand*, the court concluded that since it was valid in Iowa, it was also valid in Nebraska.¹⁷⁸ The court reached a different result when considering whether a common-law marriage had been entered into by the parties during a few visits in Colorado.¹⁷⁹ Although Colorado did recognize common-law marriages, Nebraska did not and the court concluded that no marriage existed between the parties.¹⁸⁰

169. 126 N.W. 1002 (Neb. 1910).

170. *Id.* at 1002.

171. *Id.*

172. *Id.* at 1003.

173. *Hand*, 126 N.W. at 1003.

174. *Id.*

175. 131 N.W. 1028 (Neb. 1911).

176. *Id.* at 1029.

177. *Id.*

178. *Id.*

179. *In re Binger's Estate*, 63 N.W.2d 784 (Neb. 1954).

180. *Id.* at 791.

I. Oregon

Oregon has case law that, while announcing the right to invalidate out-of-state marriages due to the public policy exception, has not done so and, in fact, has used public policy as the basis for validating the marriages, despite violation of Oregon statutes. The clearest case is that of *Sturgis v. Sturgis*,¹⁸¹ in which a ward who had been adjudged a spendthrift and had a guardian appointed, wanted to marry.¹⁸² The guardian refused to give permission which was required under Oregon law.¹⁸³ The parties went to Washington and married there.¹⁸⁴ When the couple returned to Oregon to live, the guardian challenged the marriage.¹⁸⁵

The court, citing a Rhode Island case on similar facts, held:

[I]t requires no argument to show that, even if the marriage might have been void if solemnized in this state, it is nevertheless not such a union that it can in any sense be considered so subversive of good morals, or so threatening to the fabric of society, as to fall within the exception to the general rule regarding foreign marriages.¹⁸⁶

The court noted the two general exceptions that are frequently cited: "marriages which are deemed contrary to the law of nature as generally recognized in Christian countries, such as involve polygamy and incest, and marriages which the local lawmaking power has declared shall not be allowed any validity, either in express terms or by necessary implication"¹⁸⁷ The court also discussed a distinction Oregon had recognized between

marriage of divorced parties declared by law incapable of marrying and marriage in violation of some statutory prohibition penal in its nature. In the one case the marriage is absolutely void, and in the other it is often held to be valid, although the party may be punished criminally for violating the prohibitory statute.¹⁸⁸

181. 93 P. 696 (Or. 1908).

182. *Id.*

183. *Id.* at 697.

184. *Id.*

185. *Sturgis*, 93 P. at 697.

186. *Id.* at 699 (citing *Ex parte Chace*, 58 A. 979 (R.I. 1904)).

187. *Id.* at 698.

188. *Id.* at 698-99. The court was referring to *McLennan v. McLennan*, 50 P. 802 (Or. 1897), where the parties had divorced in Oregon and then gone out-of-state to remarry before the waiting period in Oregon had expired. *Sturgis*, 93 P. at 698-99. The court found such remarriage invalid, because technically one of the parties to the new marriage was not yet divorced under Oregon law. *McLennan*, 50 P. at 803.

Oregon also specifically used public policy to refuse to use the law of the place of the parties' previous domicile in order to validate an out-of-state marriage. In *Garrett v. Chapman*,¹⁸⁹ a woman, who divorced her husband in Montana on February 16th, married her second husband in Idaho en route to Oregon on March 6th.¹⁹⁰ The question before the Oregon court was whether the second marriage was valid in Montana.¹⁹¹ While noting that the general rule was that a marriage valid in the state where it was performed will be valid in Oregon, the court held that "[t]here may be exception to the general rule where the policy of this state dictates a different result than would be reached by the state where the marriage was performed."¹⁹² The court held that when the domiciliary state (Montana) is not the state in which the parties intend to reside, the marriage should be recognized if it is valid by the laws of the state where it was consummated.¹⁹³

J. *Pennsylvania*

Pennsylvania's description and use of its public policy exception makes it questionable whether its courts would feel justified in asserting such an exception to invalidate an out-of-state marriage by a same-sex couple that was otherwise valid. There are two older cases that use the public policy exception to refuse to recognize the marriages of Pennsylvania domiciliaries who leave the state, marry out-of-state to evade its laws, and then return to Pennsylvania to live.¹⁹⁴ In both cases, the statute that the parties were trying to evade was the one prohibiting the remarriage of an adulterous partner during the lifetime of the previous spouse.¹⁹⁵ In both cases, while recognizing that the general rule is that a marriage valid where celebrated is valid everywhere, the courts noted exceptions where the marriage is contrary to the good morals, public policy, or positive law of the state.¹⁹⁶ The *Stull* court concluded that this marriage was against good morals, violated public

189. 449 P.2d 856 (Or. 1969).

190. *Id.* at 858.

191. *Id.*

192. *Id.*

193. *Garrett*, 449 P.2d at 860.

194. *In re Stull's Estate*, 39 A. 16 (Pa. 1898) (marriage in Maryland for the express purpose of evading the Pennsylvania paramour law); *Maurer v. Maurer*, 60 A.2d 440 (Pa. Super. Ct. 1948) (same).

195. *In re Stull's Estate*, 39 A. 16 (Pa. 1898); *Maurer v. Maurer*, 60 A.2d 440 (Pa. Super. Ct. 1948).

196. *Stull*, 39 A. at 17; *Maurer*, 60 A.2d at 442. Another case, *Commonwealth v. Custer*, 21 A.2d 524, (Pa. Super. Ct. 1941), noted that the result in *Stull* was reached because "a personal incapacity to marry anywhere had been imposed by statute and the very living together of the parties was contrary to good morals." *Id.* at 526.

policy, and was done to evade Pennsylvania law.¹⁹⁷ A third case, *United States v. Rodgers*,¹⁹⁸ held that a marriage between Russian Jews, who were uncle and niece, although valid in Russia, was invalid in Pennsylvania.¹⁹⁹ Pennsylvania statutes forbade such a marriage as incestuous and the court concluded that:

[w]hatever may be the standard of conduct in another country, the moral sense of this community would undoubtedly be shocked at the spectacle of an uncle and niece living together as husband and wife; and I am, of course, bound to regard the standard that prevails here, and to see that such an objectionable example is not presented to the public.²⁰⁰

Despite these cases, in other Pennsylvania cases, the courts did not turn to public policy to validate out-of-state marriages. In *Schofield v. Schofield*,²⁰¹ one party to a marriage between first cousins sought to have the marriage declared void.²⁰² The two had left Pennsylvania to evade its law disallowing such marriages and went to Delaware to marry.²⁰³ Finding that the general rule pointed toward validation and that "infinite mischief and confusion" would result from a contrary rule,²⁰⁴ the court found only two exceptions to the general rule.²⁰⁵ First, the rule would not be applied to sustain a polygamous marriage or one considered by all civilized nations to be incestuous or immoral.²⁰⁶ Second, an exception existed when positive law forbade an individual from contracting marriage by language indicating an intent to impose the incapacity on those outside the state or where the marriage is between relatives of a certain degree and the law expressly disallows it because the marriage would be "contrary to God's law."²⁰⁷ The court applied these principles to find that the incest statute did not expressly prohibit individuals from contracting first-cousin marriages outside the state nor did it render cohabitation by first-cousins unlawful in the

197. *Stull*, 39 A. at 18. The Maurer court determined that the marriage should not be recognized, in accord with the First Restatement, for violating the positive law of the state. *Maurer*, 60 A.2d at 442.

198. 109 F. 886 (E.D. Pa. 1901).

199. *Id.* at 888.

200. *Id.*

201. 51 Pa. Super. 564 (1912).

202. *Id.* at 567.

203. *Id.*

204. *Id.* at 568.

205. *Schofield*, 51 Pa. Super. at 658.

206. *Id.* at 570.

207. *Id.* This second exception was limited to situations where the statute forbids an individual from entering a certain type of marriage based on expediency rather than morals.

state.²⁰⁸

In a recent case, the Pennsylvania Supreme Court used the *Second Restatement* to determine whether an out-of-state marriage was valid.²⁰⁹ The case arose when a widow attempted to avail herself of certain estate tax benefits.²¹⁰ The parties had gone to West Virginia to marry after the wife was divorced on grounds of adultery.²¹¹ West Virginia law did not prohibit the marriage but a Pennsylvania statute prohibited any person from marrying a co-respondent in adultery while the ex-spouse who was the "victim" of the adultery was still living.²¹² The court said:

there is a strong policy favoring uniformity of result [in out-of-state marriage recognition cases]. In an age of widespread travel and ease of mobility, it would create inordinate confusion and defy the reasonable expectations of the citizens whose marriage is valid in one state to hold that marriage invalid elsewhere.²¹³

Against this strong policy in favor of recognizing out-of-state marriages, the court balanced the particular policy behind the prohibition of such marriages in Pennsylvania to determine whether recognition for the limited purpose of receiving the tax benefit was appropriate.²¹⁴ Because denial of the tax exemption would not deter adulterous conduct or spare the aggrieved former spouse an affront, the court found that the policy in favor of recognition should prevail.²¹⁵

K. Rhode Island

Rhode Island is another state that asserts a public policy exception exists but it has not used that exception to invalidate out-of-state mar-

208. *Id.* at 576.

209. *In re Estate of Lenherr*, 314 A.2d 255 (Pa. 1974).

210. *Id.*

211. *Id.* at 256-57.

212. 48 PA. CONSL. STAT. § 169 (repealed 1990).

213. *In re Estate of Lenherr*, 314 A.2d at 258.

214. *Id.* The court did not reach the question of whether the marriage was valid for all purposes. For a discussion of the difference between recognizing marriages for all purposes and recognizing them only for the purpose of granting a particular incident of marriage, see Hans W. Baade, *Marriage and Divorce in American Conflicts Law: Governmental-Interests Analysis and the Restatement (Second)*, 72 COLUM. L. REV. 329, 356-57 (1972); David E. Engdahl, *Proposal for a Benign Revolution in Marriage Law and Marriage Conflicts Law*, 55 IOWA L. REV. 108-10 (1969); and J. David Fine, *The Application of Issue-Analysis to Choice of Law Involving Family Law Matters in the United States*, 26 LOY. L. REV. 31 (1980). For a discussion of the problems that would occur if this incident-by-incident analysis were used to determine the validity of marriages by same-sex couples, see Cox, *Choice of Law*, *supra* note 12, at 1063 n.168.

215. *In re Estate of Lenherr*, 314 A.2d at 259.

riages in violation of its own statutory provisions. In *Ex Parte Chace*,²¹⁶ the court considered an out-of-state marriage by a ward who was prevented from marrying by his guardian. The ward went to Massachusetts, married, and returned to Rhode Island with his wife.²¹⁷ The court held that "the capacity or incapacity to marry depends on the law of the place where the marriage is celebrated, and not on that of the domicile of the parties."²¹⁸ The court went on to say that the

well-recognized exception to [this] general rule that if a marriage is odious by the common consent of nations, or its influence is thought dangerous to the fabric of society, so that it is strongly against the public policy of the jurisdiction, it will not be recognized there, even though valid where it was solemnized.²¹⁹

The court held that the marriage in this case was valid because it was not "so subversive of good morals, or so threatening to the fabric of society"²²⁰ Thus, Rhode Island was willing to recognize the validly contracted marriage, even though in evasion of the marriage laws of the parties' domicile, because

all nations have consented, or must be presumed to consent, for the common benefit and advantage, that such marriages should be good or not, according to the laws of the country where they are made By observing this law no inconvenience can arise; but infinite mischief will ensue if it is not.²²¹

L. *Conclusion*

As can be seen from the review of cases above, only rarely did the courts in any state invoke the public policy exception to avoid using the general rule to validate marriages entered into by their domiciliaries out-of-state. Even in cases where the marriages were prohibited within the states as incestuous, adulterous, lacking permission to marry, or underage, the courts still validated the out-of-state marriages. That such marriages violated the states' own marriage statutes was not dispositive in any of the courts' decisions whether to recognize the out-of-state marriage. Even though they were fully aware of the public policy exception, and usually referred to it in their decisions, the courts did not turn to the exception to prevent what were

216. 26 R.I. 351 (1904).

217. *Id.* at 352.

218. *Id.* at 354.

219. *Id.* at 356. Examples of "odious" are polygamy and incest.

220. *Ex Parte Chace*, 26 R.I. at 357.

221. *Id.* at 355.

intentional, knowing decisions by domiciliaries to violate their state's public policy as expressed by its marriage statutes.

By examining the courts' efforts to avoid invalidation, what is clear is that the courts are reluctant, and reasonably so, to invalidate a marriage. Considering all the policy reasons behind the general rule, such as protecting the parties' expectations, providing stability, protecting children, needing to know whether one is married or not, and avoiding uncertainty about one's marital status during litigation to determine it, we should be relieved that the courts have not easily turned to a policy exception to refuse to recognize an otherwise valid marriage. Our federalist system of co-equal and related sovereigns should lead us to expect this benefit. The only question that remains is whether the courts will continue to be reluctant to invalidate out-of-state marriages when those marriages are entered into by same-sex couples. It would be naive to expect that courts will not immediately reach for the public policy exception as a way to avoid recognizing marriages by same-sex couples; while one can say much about those of us who do battle for gay and lesbian civil rights, it is difficult to call us naive. But it may be possible, and partially as a result of the discussion we are having here today, to convince a court to remain steadfast, as courts before it have remained steadfast when faced with other out-of-state marriages that they concluded did not violate public policy.

Given the lengths that the courts have gone to avoid finding that marriages do violate public policy, it may be possible to convince courts to make the same efforts to validate marriages by same-sex couples. In states that do not prohibit marriage by same-sex couples, it would be disingenuous to conclude that those out-of-state marriages are against public policy when courts have found other out-of-state marriages which were prohibited by statute do not violate public policy. Even in states which do prohibit marriage by same-sex couples, those out-of-state marriages are no more against public policy than other out-of-state marriages which were also prohibited by statute but were found not to violate public policy. The precedent examined above provides strong support to advocate that, using the public policy exception now, when it has never or only rarely been used before, violates the state's clear choice of law rules and should be unconstitutional under an equal protection analysis.

III. HOW HAVE COURTS USED STATUTORY PROHIBITIONS TO DETERMINE WHETHER AN OUT-OF-STATE MARRIAGE WAS VALID?

When courts have refused to validate an out-of-state marriage by

their domiciliaries, they have frequently been in states that have marriage evasion statutes and the marriage was statutorily prohibited. Of states without marriage evasion statutes, only New Jersey has repeatedly used the public policy exception to refuse recognition of marriages in violation of its own statutory prohibitions. The only consistent exception can be found in those states that refused to recognize interracial marriages which violated their anti-miscegenation statutes. Thus, it was not a public policy exception per se that lead these courts to refuse to recognize the out-of-state marriages; instead, it was use of their marriage evasion statutes or prohibitions in their own marriage statutes that led courts to refuse recognition. Reviewing the cases leads to the conclusion that only in the face of statutory demands, and specifically only when ordered to do so by a marriage evasion statute, do courts refuse to validate the otherwise valid marriages entered into out-of-state by their domiciliaries. Even with such evasion statutes, courts do not consistently use them to refuse to recognize otherwise valid out-of-state marriages.

Until the recent wave of legislation attempting to prevent recognition of marriages by same-sex couples should they be permitted in the future,²²² the modern trend has been away from prohibiting evasion of marriage statutes.²²³ In fact, the evasion statutes reflect a policy of declining strength.²²⁴ The Uniform Marriage Evasion Act was withdrawn²²⁵ as inconsistent with the comity rule contained in the Uniform Marriage and Divorce Act.²²⁶ "The comity rule under the Act also does not incorporate the 'strong public policy' exception, suggesting a developing trend away from that exception."²²⁷ Given the de-

222. For a list of states that have passed such statutes, see Cox, *Anti-Gay Initiatives*, *supra* note 12.

223. See Koppelman, *supra* note 32.

224. See *id.*

225. UNIFORM MARRIAGE & DIVORCE ACT § 210, 9A U.L.A. 176, cmt. at 177 (1987).

226. *Id.* § 210, cmt. at 176.

227. *Leszinske v. Poole*, 798 P.2d 1049, 1054 (N.M. Ct. App. 1990). In this interesting case, a divorced father appealed an order awarding the mother primary physical custody of the parties' three children, despite the mother's remarriage to her uncle in Costa Rica. *Id.* at 1050-51 Although both New Mexico and California (the two states with significant relationships with the marriage under the Second Restatement analysis) outlawed the relationship as incestuous, the court held that even though the penal statutes indicate the marriage is against the public policy of the states, "[n]evertheless, the dispositive question is whether the marriage offends a sufficiently strong public policy to outweigh the purposes served by the rule of comity." *Id.* at 1055. Finding that the California courts would use a test for public policy that asks whether "the marriage is considered odious by the common consent of nations or whether such marriages are against the laws of nature," the court said it was difficult to conclude that such marriages violated public policy because twenty-three South and Central American and northern European nations recognize such marriag-

cline in evasion statutes, it would challenge that trend to find a sudden upsurge both in the passage and use of marriage evasion statutes.²²⁸ The question of whether to recognize marriages by same-sex couples may lead to the same situation as occurred in the 1930's and 1940's when divorce became more prevalent and states convulsed over whether and in what circumstances to permit their domiciliaries to remarry.

A. *District of Columbia*

Even in states with evasion statutes, the courts have been far from consistent in their use of those statutes as a basis for invalidating out-of-state marriages by their domiciliaries. For example, the Supreme Court held that the District of Columbia's marriage evasion statute applied "solely to marriages void, because incestuous or polygamous, and to those which are voidable, because entered into by a person who was a lunatic, under the age of consent, or impotent, and those which are voidable because procured by force or fraud."²²⁹ However, in that case, despite a statutory prohibition against adulterers remarrying, the Court held that D.C. had to recognize the remarriage of an adulteress in another state.²³⁰ In a later case, despite the Supreme Court's reference in *Loughran* to underage marriage as one covered by the marriage evasion statute,²³¹ the D.C. Municipal Court of Appeals did not use the evasion statute to invalidate such a marriage.²³² In this case, a couple under the age of legal marriage got married in Virginia by lying about their ages.²³³ Although prohibited statutorily in D.C., the court held that this type of marriage was "voidable" and not "void ab initio," thus it had the discretion to recognize the marriage.²³⁴ The U.S. District Court for the District of Columbia reached a similar conclusion in *Hitchens v. Hitchens*,²³⁵ where an underage female married a male in

es. *Id.* at 1055-56.

228. See Koppelman, *supra*, note 32.

229. *Loughran v. Loughran*, 292 U.S. 216, 224 (1934). In making this holding, the court relied on the statutory prohibitions contained in the marriage evasion statute, D.C. CODE ANN. § 1287 (1901):

If any marriage declared illegal by the foregoing sections shall be entered into in another jurisdiction by persons having and retaining their domicile in the District of Columbia, such marriage shall be deemed illegal, and may be decreed to be void in said District in the same manner as if it had been celebrated therein.

Loughran, 292 U.S. at 224.

230. *Loughran*, 292 U.S. at 224.

231. *Id.*

232. *Duley v. Duley*, 151 A.2d 255, 257 (D.C. 1959).

233. *Id.* at 256.

234. *Id.* at 257.

235. 47 F. Supp. 73 (D.D.C. 1942).

Maryland without the consent of her parents.²³⁶ Although valid under Maryland law, it was prohibited by D.C. law and D.C.'s evasion statute purports to give such marriages the same effect as if they had been entered into within the District.²³⁷ Finding that such marriages were not "repugnant and void,"²³⁸ the court concluded that the better rule was to hold the marriage to be valid in the absence of fraud or duress.²³⁹

B. *Illinois*

Illinois has used both its evasion statute and general public policy to refuse to recognize marriages that violate its statutory prohibitions. In the only case interpreting its evasion statute,²⁴⁰ the court refused to recognize a marriage when the parties were first cousins who were Illinois residents.²⁴¹ They went to Kentucky for the sole purpose of evading the law of Illinois, which prohibits marriages between first cousins and renders such marriages incestuous and void.²⁴²

In an earlier non-evasion statute case, the court reached the same conclusion concerning the Indiana marriage of a couple who was unable to marry in Illinois for a year following one of the parties' divorce.²⁴³ The court stated that the general rule is that the marriage of citizens of one state celebrated in another state, which is valid in the latter state, is recognized as valid in the domicile, except when incestuous according to the recognized belief of Christian nations, polygamous, or declared by positive law to have no validity in the domiciliary state.²⁴⁴ The court then cited *Wilson v. Cook*,²⁴⁵ which held that to recognize the validity of a marriage "celebrated by crossing the state line to evade the laws of [Illinois] would render legislation futile and

236. *Id.* at 77.

237. *Id.* at 75.

238. *Id.*

239. *Hitchens*, 47 F. Supp. at 77.

240. 750 ILL. COMP. STAT. 5/216 states:

[t]hat if any person residing and intending to continue to reside in this state and who is disabled or prohibited from contracting marriage under the laws of this state, shall go into another state or country and there contract a marriage prohibited and declared void by the laws of this state, such marriage shall be null and void for all purposes in this state with the same effect as though such prohibited marriage had been entered into in this state.

241. *Whelan v. Whelan*, 105 N.E. 2d 314, 316 (Ill. App. Ct. 1952).

242. *Id.* at 315-16.

243. *Stevens v. Stevens*, 136 N.E. 785, 786-87 (Ill. 1922).

244. *Id.* at 786.

245. 100 N.E. 222 (Ill. 1912).

ascribe practical imbecility to the legislature"²⁴⁶ Because the appellee violated the required statutory waiting period, the court concluded that the marriage was invalid.²⁴⁷ The Illinois courts reached the same result in refusing to recognize a claimed Colorado common law marriage between two Illinois residents.²⁴⁸ The court stated that "where a state has . . . a positive policy of the state for the protection of the morals and good order of society against serious social evils, a marriage contracted in disregard of the statutory prohibition, wherever celebrated, will be void in the state of domicile."²⁴⁹ Because both parties were domiciled in Illinois at the time of the alleged common law marriage, the court refused to recognize the marriage.²⁵⁰

C. Mississippi

In Mississippi, the court has interpreted its marriage evasion statute narrowly.²⁵¹ Mississippi's evasion statute only refers to marriages outside the state which attempt to evade the state's incest prohibitions.²⁵² When a defendant was indicted for marrying his mother-in-law in an alleged violation of section 458 of the 1942 Mississippi Code,²⁵³ the court held that since the criminal statute did not prohibit this particular marriage, criminal statutes were strictly construed in favor of the defendant, and the marriage evasion statute did not apply to void the marriage.²⁵⁴ Two attempts to use the marriage evasion statute to apply to interracial marriages were held to be invalid because the marriage evasion statute applied, by its terms, only to marriages that are incestuous and neither interracial marriage fit within that prohibition.²⁵⁵ In interpreting its prohibition against members of different

246. *Stevens*, 135 N.E. at 786.

247. *Id.* at 787.

248. *In re Estate of Enoch*, 201 N.E. 2d 682, 689 (Ill. 1964).

249. *Id.*

250. *Id.*

251. See *Ratcliffe v. State*, 107 So. 2d 728 (Miss. 1958); *Rose v. State*, 107 So. 2d 730 (Miss. 1958); *State v. Winslow*, 45 So. 2d 574 (Miss. 1950).

252. MISS. CODE ANN. § 93-1-3 (1994) ("Any attempt to evade section 93-1-1 [incest prohibitions] by marrying out of this state and returning to it shall be within the prohibitions of said section.").

253. MISS. CODE ANN. § 458 stated:

The father shall not marry his son's widow; a man shall not marry his wife's daughter, or his wife's daughter's daughter, or his wife's son's daughter, or the daughter of his brother or sister; and the like prohibition shall extend to females in the same degrees; and all marriages prohibited by this and the preceding section are incestuous and void.

254. *State v. Winslow*, 45 So. 2d 574, 575-76 (Miss. 1950).

255. *Ratcliffe v. State*, 107 So. 2d 728, 730 (Miss. 1958); *Rose v. State*, 107 So. 2d 730, 731 (Miss. 1958). The defendants in both cases were convicted under § 2000 of the Mississippi Code which stated that "persons whose marriage is prohibited by law by reason or race or blood and

ances from marrying, the court noted that the policy behind the prohibition was to "prevent persons of white and negro blood from living together as husband and wife in Mississippi."²⁵⁶ Since that policy was not affected by recognizing an interracial marriage validly contracted in Illinois, the court agreed to recognize the marriage "to the extent only of permitting one of the parties thereto to inherit from the other property in Mississippi"²⁵⁷

D. *New Jersey*

New Jersey is an interesting state. It does not have a marriage evasion statute but its courts protect its statutory marriage requirements in the same way that courts do in states with evasion statutes. New Jersey's courts consistently invalidate statutorily prohibited marriages entered into out-of-state by its domiciliaries just as courts do in states with evasion statutes. When faced with non-statutorily prohibited marriages, however, its courts react like virtually all other courts—they validate the out-of-state marriages by their domiciliaries.

In two cases in 1957 and 1958, the Appellate Courts of New Jersey struck down their domiciliaries foreign marriages because each of them violated a New Jersey statute regulating marriage. In *Bucca v. State*,²⁵⁸ the plaintiff brought an action to obtain a judgment declaring that his marriage to his niece in Italy, in accordance with a dispensation granted under Italian law, was entitled to full recognition in New Jersey and that any subsequent cohabitation with her would not constitute incest.²⁵⁹ The court found that the marriage violated New Jersey's laws against incest²⁶⁰ and was invalid.²⁶¹ The court stated the general rule that a marriage valid where celebrated is valid everywhere, but held that "[e]xceptions to the general rule are . . . marriages prohibited by the public acts of the forum for reasons of local distinctive policy

which marriage is declared to be incestuous and void, who shall cohabit shall be guilty of a felony." *Ratcliffe*, 107 So. 2d at 729; *Rose*, 107 So. 2d at 731. Because the defendants had been charged with cohabiting in a relationship that was incestuous and void, they were not convicted because the incest statute, and hence the evasion statute, did not apply to them, even though they were violating the anti-miscegenation statute. *Ratcliff*, 107 So.2d at 729; *Rose*, 107 So. 2d at 731 (citing MISS. CODE ANN. § 2000 (1956)).

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

257. *Id.* at 142. The court noted that its decision "in accord with the holding of courts of other states faced with this negro problem." *Id.*

258. 128 A.2d 506 (N.J. Ch. 1957).

259. *Id.*

260. N.J. STAT. ANN. § 37: 1-1 (West 1968).

261. *Bucca*, 128 A.2d at 510-11.

. . . ”²⁶² The court held that “the recognition of the marriage as valid by the State of New Jersey would be contrary to the public policy of this State.”²⁶³

In *Wilkins v. Zelichowski*,²⁶⁴ the plaintiff sought the annulment of her marriage to the defendant on the grounds that she was under eighteen at the time of the marriage in violation of New Jersey Statutes Annotated section 2A: 34-1(e),²⁶⁵ the statute requiring parental consent for minor females to marry.²⁶⁶ Plaintiff was under seventeen when she married. Although the superior court appellate division refused to allow her to annul the marriage, the supreme court reversed.²⁶⁷ Speaking very clearly to the public policy exception, the court held:

While that State [Indiana] was interested in the formal ceremonial requirements of the marriage, it had no interest whatever in [the] marital status of the parties. Indeed, New Jersey was the only State having any interest in that status, for both the parties were domiciled in New Jersey before and after the marriage and their matrimonial domicile was established here. The purpose in having the ceremony take place in Indiana was to evade New Jersey’s marriage policy and we see no just or compelling reason for permitting it to succeed²⁶⁸ The authority of a state to decide what marriages it will recognize is beyond question, . . . and if it is repugnant to the public policy of the domiciliary state, that state, through its courts, has the power to annul it.²⁶⁹

Despite these two examples, in several other cases, the New Jersey appellate courts have held that the validity of a marriage is governed by the state of celebration.²⁷⁰ They did that consistently when no New Jersey statute prohibited the marriage and when the marriage was otherwise valid where celebrated.

262. *Id.* at 508.

263. 128 A.2d at 510-11.

264. 140 A.2d 65 (N.J. 1958).

265. N.J. STAT. ANN. § 2A: 34-1 (West 1987).

266. *Id.*

267. *Id.* at 69.

268. *Id.* at 68 (citations omitted).

269. *Id.* (quoting *Sirois v. Sirois*, 50 A.2d 88, 89 (N.H. 1946)).

270. *Clark v. Clark*, 30 A. 81 (N.J. 1894); *Smith v. Smith*, 19 A. 255 (N.J. Super. Ct. 1889); *Bolmer v. Edsall*, 106 A. 646 (N.J. Ch. 1919); *Capossa v. Colonna*, 122 A. 378 (N.J. Ch. 1923); see also *McMorrow v. Schweiker*, 561 F. Supp. 584, 590 (D.N.J. 1982) holding:

[T]he law of New Jersey has long been that the form or method of contracting a marriage is regulated by the law of the sovereign where the marriage takes place, and if the marriage is valid there its validity is everywhere recognized This rule does not apply to polygamous or incestuous marriages

E. *North Dakota*

In North Dakota, the state has a statute that is a combination of marriage validation and evasion statute.²⁷¹ In 1955, the North Dakota Supreme Court held that a marriage that was prohibited within North Dakota due to the female's mental incompetence could not be legally entered into by leaving the state and going to Minnesota.²⁷² The court stated "the domicile of the parties being in this state and the marriage being prohibited by the law in this state, our statutes will be applied and will govern the court in determining and decreeing the nullity of the marriage."²⁷³ In a related case, however, the court validated a Minnesota marriage by two North Dakota domiciliaries even though the marriage license was obtained by fraud.²⁷⁴ The court focused on the validation portion of the statute, not the evasion portion, and found that "if such marriage is valid under the laws of Minnesota, then such marriage is recognized as valid in this state."²⁷⁵

F. *Utah*

Utah has also used a statutory prohibition to refuse to recognize an out-of-state marriage by its domiciliaries, despite its marriage validation statute.²⁷⁶ The Utah Supreme Court carved out an exception to the marriage validation law to refuse to recognize a legal common law

271. N.D. CENT. CODE §14-03-08 (1991) titled "Foreign Marriages Recognized" states that: [A]ll marriages contracted outside of this state, which are valid according to the laws of the state or country where contracted, are valid in this state. This section does not apply when residents of this state contract a marriage in another state which is prohibited under the laws of North Dakota.

272. *First Nat'l Bank In Grand Forks v. North Dakota Workmen's Compensation Bureau*, 68 N.W.2d 661 (N.D. 1955).

273. *Id.* at 664.

274. *Johnson v. Johnson*, 104 N.W.2d 8, 17 (N.D. 1960).

275. *Id.* at 17-18.

276. *In re Vetas*, 170 P.2d 183 (1946). At the time of the case, the Utah validation statute stated that "marriages solemnized in any other country, state, or territory, if valid where solemnized, are valid here." UTAH CODE ANN. § 30-1-4 (1953). Since then, the Utah legislature was the first to amend their validation statute to refuse recognition of marriages by same-sex couples. H.B. 366, 51st Leg. (Utah 1995). House Bill 366 amended section 30-1-4 so that it now states: "marriages solemnized in any country, state, or territory, if valid where solemnized are valid here unless it is a marriage 1) that would be prohibited and declared void in this state under subsection 30-1-2 subsections (1), (3), or (5); or 2) between parties who are related to each other within and including three degrees of consanguinity." UTAH CODE ANN. § 30-1-4 (Supp. 1996). Section 30-1-2 states that: "[t]he following marriages are prohibited and declared void: (1) there is a husband or wife living, . . . (3) the male or female is under age 14, . . . or (5) the parties are of the same sex." UTAH CODE ANN. § 30-1-2 (Supp. 1996).

marriage in Idaho.²⁷⁷ Because at the time Utah did not recognize common law marriages, the courts refused to apply the validation statute.²⁷⁸ Using section 132 of the *First Restatement*, the court stated that foreign marriages by domiciliaries were invalid if a domicile statute makes it void.²⁷⁹ The court asserted that the public policy behind the solemnization requirement is to protect the rights of the parties to the marriage as well as third parties.²⁸⁰

G. Wisconsin

Wisconsin also has a marriage evasion statute,²⁸¹ which its courts have repeatedly used to refuse to recognize marriages entered into in violation of it. For example, in *Lanham v. Lanham*,²⁸² the court held that a Wisconsin couple who traveled to Michigan to avoid the Wisconsin statutory prohibition of remarriage within one year of divorce was not validly married in Wisconsin.²⁸³ The court explicitly determined that "the Legislature deemed that it was against public policy and good morals that divorced persons should be at liberty to immediately contract new marriages."²⁸⁴ The court held that the legislature was clearly concerned with public policy in creating this prohibition, that the only means to further this public policy was to declare the Michigan marriage as void, and that the statutory restriction against

277. *In re Vetas*, 170 P.2d 183 (Utah 1946).

278. UTAH CODE ANN. § 30-1-2 (1995) lists persons who are qualified to validly solemnize a marriage. The refusal to recognize common-law marriages from other states has been lifted by UTAH CODE ANN. § 30-1-4.5 (Supp. 1996) which validates common law marriages upon a judicial finding. *Id.*

279. *In re Vetas*, 170 P.2d at 185 (Utah 1946) (citing FIRST RESTATEMENT § 132(d)).

280. *Id.* at 186.

281. WIS. STAT. ANN. § 765.04 (West 1993). Parts (1) and (2) of the statute state:

(1) If any person residing and intending to continue to reside in this state who is disabled or prohibited from contracting marriage under the laws of this state goes into another state or country and there contracts a marriage prohibited or declared void under the laws of this state, such marriage shall be void for all purposes in this state with the same effect as though it had been entered into in this state.

(2) Proof that a person contracting a marriage in another jurisdiction was (a) domiciled in this state within 12 months prior to the marriage, and resumed residence in this state within 18 months after the date of departure therefrom, or (b) at all times after departure from this state, and until returning maintained a place of residence within this state, shall be prima facie evidence that at the time such marriage was contracted the person resided and intended to reside in this state.

The penalty for evading this statute is a fine of between \$200-1,000. See WIS. STAT. ANN. § 765.30(1)(a) (West 1993).

282. 117 N.W. 787 (Wis. 1908). This case was decided before the Wisconsin evasion statute was passed in 1915 but numerous evasion statutes cases have cited its public policy discussion.

283. *Id.* at 789.

284. *Id.* at 788.

remarriage within a year after a divorce was intended to apply to Wisconsin citizens extraterritorially.²⁸⁵ The court reached the same result when a couple left Wisconsin to marry in Illinois, which did not have a restriction, contrary to Wisconsin, against epileptics marrying.²⁸⁶ The Wisconsin Supreme Court refused to apply the evasion statute to void marriages when the party seeking annulment had not brought the annulment action within the ten-year statute of limitations,²⁸⁷ and when the marriage did not meet certain statutory procedural requirements.

H. *Conclusion*

This review of cases indicates that even when a state has a marriage evasion statute prohibiting its residents from leaving the state to avoid its laws and going to another state to marriage, the courts are not consistent in finding such marriages to be invalid. Like the general public policy exception cases above, the courts explore the public policy behind the domicile's prohibition of marriage within the state and consider that policy in determining whether the marriage is invalid under the evasion statute.

IV. CONCLUSION

Having examined countless cases considering both public policy exceptions and marriage evasion statutes, it is difficult to believe that either should have significant impact on whether marriages by same-sex couples will be recognized. This review shows that courts, although regularly referring to a public policy exception which would permit them to refuse to recognize out-of-state marriage, have rarely done so. Even in states with marriage evasion statutes, the results are not at all consistent in whether a court will use the evasion statute to invalidate the marriage or will side-step the statute to validate the marriage. While this inconsistency does not give same-sex couples any guarantees that their marriages will be recognized in their domiciliary state, it does lead one to expect that many courts should validate these marriages. For courts to suddenly become consistent in invoking public policy against marriages by same-sex couples when they have not done so for marriages that violate the state's own marriage statutes would indicate

285. *Id.* at 789.

286. *In re Canon's Estate*, 266 N.W. 918 (Wis. 1936).

287. *Ginkowski v. Ginkowski*, 137 N.W.2d 403 (Wis. 1965). The court held that the marriage had ripened into a valid, binding marriage because of the lapse of time and the operation of law. *Id.* at 406.

that they are refusing to follow precedent and are using anti-gay animus, rather than choice of law theory and precedent, to support such a change in result.

