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HARMFUL TO NONE: WHY CALIFORNIA SHOULD RECOGNIZE OUT-OF-STATE SAME-SEX MARRIAGES UNDER ITS CURRENT MARITAL CHOICE OF LAW RULE

Sandra Cavazos*

ABSTRACT

In this Comment, Sandra Cavazos argues, based solely on California state law, that California courts should recognize same-sex marriages contracted outside of California. Essentially, her Comment serves as a "legal primer" for both lawyers and lay persons interested in finding out what will happen when same-sex couples married elsewhere seek to validate their marriages within California. After briefly describing recent efforts to legalize same-sex marriage and the negative federal and state responses to these efforts, Cavazos explains that California's general rule has always been that a marriage valid where contracted is valid in California. However, she notes that California courts have incorporated a public policy exception into this general rule. Under this public policy exception, only marriages which do not harm the state's public policies are recognized as valid. Cavazos then argues that the increasing acceptance of homosexuality and same-sex relationships in California, along with the scientific evidence that these relationships do not harm the state's interest in procreation or

* B.A., Harvard University, 1992; J.D., UCLA School of Law, 1998. The author wishes to thank UCLA School of Law Professors Grace G. Blumberg and Frances A. Olsen for their valuable time, the entire staff of the *UCLA Women's Law Journal* (and in particular Justine Meyers, Debby Cleaves, and Courtney Powers) for their patience and thoughtful assistance, Larry Goldblum and Alonzo Cavazos, for generously sharing their ideas and insights, and Sara Martínez for providing both "spousal support" and internet research assistance in regular doses, as needed by the author.

child-rearing, supports the conclusion that recognition of same-sex marriages contracted in other states will not significantly harm any of California's legitimate public policies.

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I. INTRODUCTION

This Comment contends, based solely upon California law, that California courts should recognize the same-sex marriages that may soon be contracted in Hawaii or in other jurisdictions. Part II begins with a brief review of the Hawaii case which re-ignited the debate over the legalization of same-sex marriage in America, *Baehr v. Lewin*.[1] Numerous states responded to *Baehr* by enacting statutes prohibiting same-sex marriages within their borders, and in a few cases, by explicitly prohibiting the recognition of any same-sex marriages contracted outside their borders. Congress responded to *Baehr* by enacting the Defense of Marriage Act, which specifies that the Full Faith and Credit Clause does not require the recognition of same-sex marriages and declares that couples who enter into same-sex marriages will not receive any of the federal benefits currently provided to members of opposite-sex marriages. These legal responses to *Baehr* raise many federal and state law questions about the validity of same-sex marriages and the attempts to prohibit their recognition.

Part III explains the limited scope of this Comment: it seeks only to describe California's marital choice of law[2] rule and how

1. 852 P.2d 44 (Haw. 1993), *appeal after remand sub nom.* Baehr v. Miike, 910 P.2d 112 (Haw. 1996), *on remand*, Baehr v. Miike, No.Civ.91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). Although this Comment chronicles the struggle for same-sex marriage as it occurred in Hawaii, its legal analysis is equally applicable to same-sex marriages from any state in the Union.

2. A choice of law rule "determin[es] what law should govern" when there is a conflict of laws between two or more jurisdictions. BLACK'S LAW DICTIONARY 241 (6th ed. 1990). Choice of law rules are a part of larger conflict of laws theories. Conflict of laws theories "address[ ] the questions of *when* and *why* foreign law should be applied and at the same time indicate[ ] the particular approach and orien-

California courts should apply it to three hypothetical same-sex marriages.[3] This Comment does not address the numerous federal and constitutional issues that would doubtless arise in these cases as well.

Part IV explains how to interpret California's marital choice of law statute, California Family Code Section 308. Section 308 represents California's codification of the long-accepted rule that a marriage valid where celebrated is valid everywhere.[4] Although the plain text of Section 308 calls for the automatic recognition of any marriage validly contracted in any jurisdiction, California courts have incorporated the well-known public policy exception into the statute. The public policy exception specifies that a foreign law need not be applied by a court if: (1) the forum state has a "positive rule, affirming, or denying, or restraining the operation of foreign laws," or (2) the foreign law is "repugnant to

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tation of a jurisdiction — as open or inward-looking — with regard to foreign-law related problems or issues." EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS § 2.1, at 5 (2d ed. 1992).

3. All three hypothetical marriages begin with the same basic action: a same-sex couple from California travels to Hawaii, gets married there, and immediately returns to California. Many other recognition scenarios may also arise, such as: (1) a Hawaii-domiciled couple marries in Hawaii and then moves to California, (2) a Vermont couple marries in Hawaii and then moves to California, (3) a California resident marries a Hawaii resident and they both move to California, and so on. This Comment focuses on three California couples marrying in Hawaii and then immediately returning to California because they represent "evasive marriages" — marriages where the couples have traveled to another state to evade California's marriage laws.

Evasive same-sex marriages are more likely to be considered offensive by judges than marriages where the parties are availing themselves of California law more or less by accident, as in, say, a case where a Hawaii couple vacationing in California suffers a tort to one of the spouses. The concept of offensiveness is based upon the idea that each state is sovereign and has the right to control the marital status of its citizens. Recognition of marriage laws that contradict California law focuses attention on the limitations of California's power in our federalist, constitutional system of government. The needs of one state must also be balanced against the needs of other states and the needs of the country. No government likes to be reminded of the limitations of its power, and parties to an evasive marriage may appear to a judge as having deliberately provoked a confrontation between California and Hawaii. Thus, by proving that these three evasive same-sex marriages nonetheless merit recognition in California, I also seek to prove by implication that many of the easier, non-evasive scenarios also merit recognition.

4. *See, e.g.*, RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971) [hereinafter RESTATEMENT (SECOND)]; SCOLES & HAY, *supra* note 2, § 13.5, at 438 n.6. This rule is known as the rule of *lex loci celebrationis*. California appears to be one of the few states that has also adopted the converse of this rule, which states that the validity of a marriage is governed by the *lex loci contractus*, or the place where the marriage was contracted. *See* McDonald v. McDonald, 58 P.2d 163, 164 (Cal. 1936).

. . . [the forum state's] policy, or prejudicial to its interests."[5] Throughout this Comment, I refer to these as the "legislative" and "repugnant" conditions of the public policy exception.

Part V examines California law and argues that neither the "legislative condition" nor the "repugnant condition" applies to our three hypothetical marriages, and therefore each one must be recognized as valid. The "legislative condition" does not apply because all attempts to pass legislation prohibiting the recognition of same-sex marriages contracted outside of California have so far been unsuccessful. The "repugnant condition" does not apply for two reasons: (1) California laws treat homosexuality and same-sex relationships with more ambiguity than animosity, and (2) scientific evidence indicates that homosexuality and same-sex relationships do not harm the general interests of the state in promoting procreation or raising children.

II. BACKGROUND: *BAEHR* RE-IGNITES THE CONTROVERSY OVER SAME-SEX MARRIAGE IN AMERICA

In May of 1993, the Hawaii Supreme Court issued an historic ruling for advocates of same-sex marriage.[6] In the case of *Baehr v. Lewin*,[7] the court ruled that the failure to grant marriage licenses to same-sex couples was sex discrimination[8], subject to strict scrutiny.[9] *Baehr* began on December 17, 1990, when the Hawaii Department of Health ("DOH") denied three same-sex couples the right to obtain marriage licenses solely because the couples were of the same sex.[10] Although Hawaii's marriage statute, Hawaii Revised Statutes ("HRS") Section 572-1, did not explicitly prohibit same-sex marriages,[11] the DOH had inter-

5. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS § 38, at 47 (Boston, Charles C. Little & James Brown eds., 4th ed. 1852).

6. *See, e.g.*, Lambda Legal Defense and Education Fund, *Cases:* Baehr v. Miike (last modified Oct. 21, 1998) [hereinafter *Lambda Webpage about* Baehr v. Miike] <http://www.lambdalegal.org/cgi-bin/pages/cases/record?record=17> (describing *Baehr v. Miike* as an "historic case" which "continues to represent the most likely legal path toward winning the freedom to marry for lesbian and gay couples.").

7. 852 P.2d 44.

8. *Id.* at 60.

9. *Id.* at 67. For an explanation of why Hawaii law subjects sex-based discrimination to strict scrutiny instead of intermediate scrutiny, *see infra* note 22.

10. *Baehr*, 852 P.2d at 49-50.

11. Hawaii Revised Statutes § 572-1 declares, in pertinent part:

Requisites of valid marriage contract. In order to make valid the marriage contract, it shall be necessary that:

. . . .

preted its gender-specific language to mean that same-sex couples could not marry under Hawaii law.[12] The three couples sued, basing their claims solely on Hawaii's state constitution.[13] They claimed the DOH's denial of same-sex couples' access to marriage licenses violated their right to privacy, as guaranteed by Article I, Section 6 of the Hawaii Constitution, and their right to due process and equal protection under Article I, Section 5 of the Hawaii Constitution.[14] Plaintiffs sought both a declaratory judgment that HRS Section 572-1 violated Hawaii's Constitution because it discriminated on the basis of sex without sufficient justification, and an injunction prohibiting the DOH from denying licenses to same-sex couples in the future on the sole basis of sex.[15] The Circuit Court ruled against the plaintiffs on all counts, granting the DOH's motion for judgment on the pleadings due to

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> (3) The *man* does not at the time have any lawful *wife* living and that the *woman* does not at the time have any lawful *husband* living;
>
> . . . .
>
> (7) The marriage ceremony be performed in the State by a person or society with a valid license to solemnize marriages and the *man and woman* to be married and the person performing the marriage ceremony be all physically present at the same place and time for the marriage ceremony.

See id. at 48-49, n.1 (quoting HAW. REV. STAT. § 572–1(3) and 1(7) (1985)) (alteration in original).

12. *Id.* at 49-50 n.3 (quoting letters from DOH officials to each of the three plaintiff couples, which declare that "*a valid marriage within the meaning of ch. 572, Hawaii Revised Statutes, must be one in which the parties to the marriage contract are of different sexes.* In view of the foregoing, *we decline to issue a license for your marriage to one another since you are both of the same sex* . . . .") (alteration in original).

13. Strategically, the plaintiffs' decision to limit their claims to those arising under the Hawaii Constitution foreclosed the possibility that a favorable decision legalizing same-sex marriages in Hawaii would be appealed to, and overruled by, the United States Supreme Court. A loss at the Supreme Court level would set an unfavorable precedent for advocates of same-sex marriage throughout the United States.

14. *See Baehr*, 852 P.2d at 50 nn.4, 5 (quoting the Hawaii Constitution).

> The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right. Haw. Const. art. I, § 6 (1978).
>
> No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry. Haw. Const. art. I, § 5 (1978).

Id.

15. *Id.* at 48-49.

the plaintiffs' failure to state any claim that would entitle them to relief.[16]

In an important ruling for advocates of same-sex marriage,[17] the Hawaii Supreme Court partially reversed and remanded the Circuit Court's decision. A plurality[18] of the Hawaii Supreme Court first held that the right to same-sex marriage did not meet the two-part test for a fundamental privacy right under Hawaii's Constitution. Since same-sex marriage was not "rooted in the traditions and collective conscience" of Hawaii's people, the "failure to recognize it" could not "violate the fundamental principles of liberty and justice."[19] Likewise, same-sex marriage was not so "implicit in the concept of ordered liberty . . . that neither liberty nor justice would exist if it were sacrificed."[20]

The court then examined whether the DOH's policy of denying marriage licenses to same-sex couples violated the plaintiffs' rights to due process and equal protection under the Hawaii Constitution. The court initially determined that Hawaii's marriage statute "denies same-sex couples access to the marital status" on the basis of "sex."[21] The court then stated that "sex is a

16. *Id.* at 52.

17. *See* Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 11 (1996) (criticizing constitutional arguments made in support of legalizing same-sex marriage but noting that in *Baehr*, "advocates of same-sex marriage have won a major judicial victory that could lead to the judicial legalization of same-sex marriage or to legislation authorizing same-sex domestic partnership[s] in that state.").

18. Hawaii's Supreme Court ordinarily consists of five permanent members, but only two permanent members were on the panel for this case: Acting Chief Justice Moon and Justice Levinson. *Baehr*, 852 P.2d at 48. One of the five permanent court seats was vacant at the time *Baehr* was argued, and was filled temporarily by Retired Associate Justice Hayashi. *Id.* The other two permanent justices, Justice Lum and Justice Klein, recused themselves from the case and were replaced by Chief Judge Burns and Judge Heen, both from the Hawaii Intermediate Court of Appeals. *Id.* Ultimately, Justice Levinson wrote the opinion for the Hawaii Supreme Court, joined by Acting Chief Justice Moon. *Id.* This two-person plurality held that same-sex marriage was not a fundamental privacy right under Hawaii's Constitution, but it also held that the DOH's failure to grant marriage licenses to the plaintiffs was sex-based discrimination subject to strict scrutiny. *Id.* at 57, 67.

Chief Judge Burns concurred in the result of sending the case back for a factual determination, because he felt that "questions of a large public import should not be decided on an inadequate factual basis." *Id.* at 68-69 (internal quotation omitted). Since Justice Hayashi's temporary assignment to the court had expired prior to the filing of the *Baehr* opinion, his vote "join[ing] in the dissent with Associate Judge Heen" was not counted. *Id.* at 48 n.*. This left Associate Judge Heen as the sole official dissenter. *Id.* at 48.

19. *Id.* at 57.

20. *Id.*

21. *Id.* at 60.

'suspect category' for purposes of equal protection analysis [under Hawaii law]"[22] and therefore HRS Section 572-1 would be subject to strict scrutiny.[23] Thus, HRS Section 572-1 would be "presumed . . . unconstitutional" unless justified by a compelling state interest and narrowly tailored to avoid unnecessary abridgment of constitutional rights.[24] The Hawaii Supreme Court remanded the case to the Circuit Court for a factual determination of whether Hawaii could show a "compelling" state interest to justify its discrimination.[25]

On remand before Circuit Court Judge Kevin S. Chang, the DOH argued that Hawaii had a compelling interest in: (1) "promot[ing] the optimal development of children. . . . [A]ll things being equal, it is best for a child that it be raised in a single home by its parents, or at least by a married male and female;" (2) "securing or assuring recognition of Hawaii marriages in other jurisdictions;" and (3) "protecting the public fisc from the reasonably foreseeable effects of approval of same-sex marriage."[26]

After a brief trial in the Fall of 1996, Judge Chang found that the DOH had failed to establish that granting same-sex couples the right to marry would adversely affect any of those stated interests.[27] Judge Chang's findings stemmed largely from the fact

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22. *Id.* at 67 (internal quotations omitted). Article 1 § 5 of the Hawaii Constitution provides that "[n]o person shall . . . be denied the equal protection of the laws . . . or be discriminated against . . . because of race, religion, sex, or ancestry." *Id.* at 60. On the other hand, the Equal Protection Clause of the United States Constitution does not mention sex as a protected category. *See* U.S. CONST. amend. XIV, § 1 ("No State shall make or enforce any law which . . . den[ies] to any person within its jurisdiction the equal protection of the laws."). Consequently, discrimination based upon sex currently receives only intermediate scrutiny in federal courts. *See* U.S. v. Virginia, 116 S.Ct. 2264, 2275 & n.6, 2276 (1996).

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

24. *Id.*

25. *Id.* at 68.

26. Baehr v. Miike, No. Civ. 91-1394, 1996 WL 694235, at *3 (Haw. Cir. Ct. Dec. 3, 1996).

The word "fisc" means "a treasury of a kingdom, nation, state, or other governmental body." BLACK'S LAW DICTIONARY 636 (6th ed. 1990).

27. *Baehr,* 1996 WL 694235, at *18 ("Simply put, Defendant has failed to establish or prove that the public interest in the well-being of children and families, or the optimal development of children will be adversely affected by same-sex marriage.").

> Whether other states will recognize or avoid recognizing same-sex marriages which take place in Hawaii and the consequences to Hawaii residents of other states' recognition or non-recognition of same-sex marriage (and all of the rights and benefits associated with marriage) is an important issue.

that the DOH had submitted evidence insufficient to prove that same-sex marriage would harm Hawaii's children, or its relations with other states, or its public coffers. Judge Chang then ruled that the DOH "has failed to sustain [its] burden to overcome the presumption that HRS Section 572-1 is unconstitutional . . . . [and that it] is narrowly tailored to avoid unnecessary abridgments of constitutional rights."[28] Although Judge Chang ordered the state to stop denying marriage licenses to same-sex couples "solely because the applicants are of the same sex,"[29] he stayed the order pending the DOH's appeal to the Hawaii Supreme Court.[30] Soon after Judge Chang's decision, commentators predicted that the Hawaii Supreme Court would affirm his ruling,[31] and that Hawaii might soon become the first state to legalize same-sex marriage.[32] However, the *Baehr* cases sparked a flurry of legal activity in Hawaii aimed at preventing the recognition of same-sex marriages; the recent success of some of these measures suggests that Hawaii's legal stance towards same-sex marriages may remain unsettled[33] for some time. Despite this indetermi-

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> However, except for asking the court to take judicial notice of the Defense of Marriage Act, P.L. 1-4-199 [sic] ("DOMA"), Defendant introduced little or no other evidence with regard to this significant issue of comity and same-sex marriage . . . .
>
> Except for the affidavit testimony of Kenneth K.M. Ling and Michael L. Meaney, which provided statistical, budgetary and operational information regarding the Family Court of the First Circuit and the Child Support Enforcement Agency, State of Hawaii, respectively, Defendant presented little or no other evidence which addressed how same-sex marriage would adversely affect the public fisc.

Id. at *19-20.

28. *Id.* at *21.

29. *Id.* at *22.

30. *See Lambda Webpage about* Baehr v. Miike, *supra* note 6 (noting that "Judge Chang ordered an end to sex discrimination in marriage, staying his injunction to permit the State to appeal again to the state high court . . . .").

31. *See, e.g.,* Cheryl Wetzstein, *Hawaii Fails to Legalize Same-Sex Unions: High Court May Overrule Circuit Panel*, WASH. TIMES, Dec. 20, 1996, at A2; Joel R. Brandes and Carole L. Weidman, *Same-Sex Marriage*, N.Y.L.J., Jan. 28, 1997, at 3. As of mid-November 1998, both sides of *Baehr v. Miike* have filed their briefs with the Hawaii Supreme Court, but no date for oral argument has been set. *See Lambda Webpage about* Baehr v. Miike, *supra* note 6.

32. Wardle, *supra* note 17, at 11.

33. On April 27, 1994, the Hawaii State Legislature passed a bill which defined marriage as the union of a man and a woman and asserted that any change in the definition of marriage should be made by the legislature and not the courts. *See Effort to Thwart Gay Marriages Made in Hawaii*, BOSTON GLOBE, Apr. 27, 1994, at 3 (National/Foreign Section). In the Summer of 1994, the Governor of Hawaii signed legislation establishing a committee to study the disparity in benefits between same-sex couples and different-sex couples and to recommend a solution to the legislature

nacy, I assume for the sake of argument that Hawaii (or some other state) will soon legalize same-sex marriages.[34]

Baehr had more than just a local impact on Hawaii; it re-ignited[35] the same-sex marriage controversy in academia and

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that would extend such benefits to same-sex couples. *See* Act of June 22, 1994, § 6, 1994 Haw. Sess. Laws No. 217, *reprinted in* 20 FAM. L. REP. 2013, 2016 (1994). Hawaii eventually enacted a statewide domestic partnership bill, which provides some, but not all of the benefits of marriage to same-sex couples. Susan Essoyan, *Hawaii Approves Benefits Package for Gay Couples Laws: Medical Insurance and Survivorship Rights are Allowed. But a Second Bill Will Put Amendment on Ballot That Would Let Legislators Forbid Same-Sex Marriages*, L.A. TIMES, Apr. 30, 1997, at A3. In November of 1998, the people of Hawaii approved, by a wide margin, the following legislative initiative: "Shall the Constitution of the State of Hawaii be amended to specify that the legislature shall have the power to reserve marriage to opposite-sex couples?" *See* Lambda Legal Defense and Education Fund, *Hawaii, Alaska Election Results Don't Stop Freedom to Marry Movement* [hereinafter *Hawaii, Alaska Election Results*] (last visited Jan. 23, 1999) <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=30>. This initiative, which passed by a vote of 68% to 28%, *see* Hawaii Office of Elections, *1998 General Elections Precinct Report* (last modified Nov. 6, 1998) <http://www.state.hi.us/elections/reslt98/general/98swgen5.html>, combined with Hawaii's law limiting marriage to the union of one man and one woman, may partially or completely nullify any expected positive decision by the Hawaii Supreme Court in the pending *Baehr* case. *See* National Gay and Lesbian Task Force ONLINE! (last modified Nov. 4, 1998) <http://www.ngltf.org/vote98.html> [hereinafter NGLTF webpage] (discussing the effect that the Hawaii initiative may have on *Baehr v. Miike*).

34. To date, same-sex couples have brought challenges similar to the ones in *Baehr v. Miike* in both Vermont and Alaska. *See* Lambda Legal Defense and Education Fund, *Supreme Moments in the Battle to Win the Freedom to Marry* (visited Jan. 23, 1999) <http://www.lambdalegal.org/cgi-bin/pages/documents/record?record=259>. The case of *Baker v. Vermont* is pending before the Vermont Supreme Court and oral argument has been scheduled for November 18, 1998. *See* Lambda Legal Defense and Education Fund (last modified Nov. 4, 1998) <http://www.lambdalegal.org/cgi-bin/pages/cases/record?record=67>. In Alaska, a trial court ruled that the "decision to choose one's life partner . . . [is] a fundamental right," and therefore the strict scrutiny standard of review applies to any limitations placed on this right. Brause v. Bureau of Vital Legal Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, *6 (Super. Ct. Alaska Feb. 27, 1998). This case, like the *Baehr* case, has been complicated by the recent passage of a statewide initiative which amended Alaska's Constitution to limit marriage to only opposite-sex couples. *See* NGLTF Webpage, *supra* note 33 (stating that the Alaska initiative was a response to *Brause* and passed by a 68% - 32% vote). The initiative amended Alaska's Constitution by including the following provision: "To be valid or recognized in this State, a marriage may exist only between one man and one woman." *Hawaii, Alaska Election Results*, *supra* note 33. Although I refer throughout this paper to "Hawaii same-sex marriages," my analysis of California's marital choice of law rule applies equally well to any state or country which may legalize same-sex marriages.

35. Although cases arguing for the recognition of same-sex marriage had arisen in the United States over twenty years ago, they had all been unsuccessful. *See generally*, Peter G. Guthrie, Annotation, *Marriage Between Persons of the Same Sex*, 63 A.L.R. 3d 1199 (1975 and Supp. 1998). These early cases generally relied upon circular reasoning to exclude same-sex couples from the legal definition of marriage.

across the nation.[36] Legal scholars soon published various constitutional arguments in favor of recognizing same-sex marriages, such as: (1) the right to same-sex marriage is a fundamental right protected by the U.S. Constitution;[37] (2) the Full Faith and Credit Clause[38] should be extended to apply to same-sex marriages;[39] (3) prohibitions on same-sex marriage discriminate on the basis of sex and violate the Equal Protection Clause;[40] (4) the right to privacy includes the right to choose to marry someone of

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See, e.g., Jones v. Hallahan, 501 S.W.2d 588, 589-90 (Ky. 1973) (pointing out that marriage had always been considered as a union of a man and a woman, and concluding that two women could not marry because of their own inability to enter into a marriage under this definition); Singer v. Hara, 522 P.2d 1187, 1196-97 (Wash. 1974) (relying upon the customary definition of marriage as a relationship between a man and a woman, and concluding that the nature and definition of marriage precluded same-sex couples from being able to marry).

36. *See, e.g.*, Kim I. Mills, *Public Attention Made '93 a Landmark Year for Gay Rights Backers*, DALLAS MORNING NEWS, Jan. 1, 1994, at 12A (listing numerous "wins and losses" of gay rights advocates in 1993); Bettina Boxall, *Gays Look Back on a Bumpy Year — And Ahead to a Bumpy '94: Favorable Court Rulings Made Up for Unfavorable Policy Decisions. But an ACLU Lawyer Says the Movement is Only Nearing the Halfway Point*, L.A. TIMES, Jan. 5, 1994, at A5.

37. *See, e.g.*, Robert L. Cordell II, Note, *Same-Sex Marriage: The Fundamental Right of Marriage and an Examination of Conflict of Laws and the Full Faith and Credit Clause*, 26 COLUM. HUM. RTS. L. REV. 247 (1994).

38. U.S. CONST. art. IV § 1 states that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

39. *See, e.g.*, Deborah M. Henson, *Will Same-Sex Marriages be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's* Baehr v. Lewin, 32 U. LOUISVILLE J. FAM. L. 551, 584-91 (1993-94); Habib A. Balian, Note, *'Til Death Do Us Part: Granting Full Faith and Credit to Marital Status*, 68 S. CAL. L. REV. 397 (1995).

The 1996 enactment of the federal Defense of Marriage Act, ("DOMA"), *see* Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (codified as amended at 1 U.S.C. § 7, 28 U.S.C. § 1738C), was intended to foreclose any arguments for same-sex marriage based on the Full Faith and Credit Clause. *See* 142 CONG. REC. S4871 (daily ed. May 8, 1996) Senator Nickles, the sponsor of DOMA in the Senate stated:

> If Hawaii sanctions same-sex "marriage", [sic] the implications will be felt far beyond Hawaii. . . . [Since] the U.S. Constitution requires every State to give "full [sic] faith [sic] and credit [sic]" to the "public Acts, Records, and judicial Proceedings" of each State, the other 49 States will be faced with recognizing Hawaii's same-sex "marriages" even though no State now sanctions such relationships.

Id.

See infra notes 46-58 for a fuller discussion of DOMA.

40. *See, e.g.*, Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197 (1994); MARK STRASSER, LEGALLY WED: SAME-SEX MARRIAGE AND THE CONSTITUTION 44-48 (1997).

the same sex;[41] and (5) prohibitions on same-sex marriage are based upon pure "animus," and thus fail rational basis review[42] under *Romer v. Evans*.[43]

The *Baehr* debate also moved quickly into the legislative arena. After the Hawaii Supreme Court's 1993 decision, many states feared they would soon have to recognize Hawaii same-sex marriages unless they specifically legislated against them.[44] By August 1997, forty-four states considered anti same-sex marriage bills, and twenty-five passed such measures.[45]

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41. *See, e.g.*, Jennifer L. Heeb, Comment, *Homosexual Marriage, the Changing American Family, and the Heterosexual Right to Privacy*, 24 SETON HALL L. REV. 347 (1993).

42. *See, e.g.*, Tobias Barrington Wolff, Case Note, 106 YALE L.J. 247, 248 (1996) (arguing that discrimination on the basis of sexual orientation may now receive a heightened level of scrutiny after *Romer v. Evans* — something even stronger than rational basis review).

43. 116 S. Ct. 1620 (1996). In *Romer,* the citizens of Colorado had passed a constitutional initiative entitled "Amendment 2." *Id.* at 1623. Amendment 2 prohibited "all legislative, executive, or judicial action at any level of state or local government designed to protect" persons on the basis of "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." *Id.* at 1622. Because it was a constitutional initiative, Amendment 2 essentially required any municipality seeking to protect homosexuals to first amend Colorado's Constitution via a statewide ballot. *Id.* at 1627. The *Romer* Court held that Amendment 2 violated the Equal Protection Clause because it "impos[ed] a broad and undifferentiated disability on a single named group," and because its "sheer breadth was so discontinuous with the reasons offered for it" that it seemed to be based upon "animus" towards gays and lesbians and thus lacked a rational relationship to any legitimate state interests. *Id.* at 1627.

44. Henry J. Reske, *A Matter of Full Faith: Legislators Scramble to Bar Recognition of Gay Marriages*, 82 A.B.A. J. 32 (July 1996) ("Driven by the fear that Hawaii courts may soon legitimize same-sex marriages, legislators in more than 30 states and in Congress have introduced legislation to ensure the states will not have to recognize such unions.").

In California, then State Attorney General Dan Lungren issued a letter supporting one of California's proposed anti same-sex marriage bills, A.B. 1982, claiming that California's "public policy against same-sex marriages" may not be "sufficiently apparent" to automatically preclude their recognition, and recommending the passage of legislation "explicitly bar[ring] recognition of out-of-state, same-sex marriages." *See* Daniel E. Lundgren, *Letter to the Honorable William "Pete" Knight: Support for Your Measure, AB 1982*, June 6, 1996, at 4-5 (on file with author).

45. As of February 1999, the 30 states that had passed anti same-sex marriage measures were: Alabama, Alaska, Arizona, Arkansas, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, North Carolina, North Dakota, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Virginia and Washington. *See* Lambda Legal Defense and Education Fund, *Anti-Marriage Bills, State-by-State Status Report (*visited February 22, 1999*)* <www.lambdalegal.org/cgi-bin/pages/documents/record?record=319>. As of February 1999, the 22 states that had considered but failed to advance such measures (or still had not reached a final

At the federal level, legislators passed the Defense of Marriage Act ("DOMA"),[46] an unprecedented effort by Congress to regulate marriage law, which has historically always been controlled by the states.[47] DOMA declares that, "No State . . . shall be required to give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . ."[48] DOMA also states that:

> In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or wife.[49]

DOMA's effect is two-fold. First and foremost, DOMA allows states to disregard the language of the Full Faith and Credit Clause[50] so that same-sex marriages validly contracted in other states need not be recognized under this constitutional provision. It is clear that by enacting DOMA,[51] Congress sought to preclude the use of the Full Faith and Credit Clause[52] to assure recognition of same-sex marriages between the states.[53] Second, DOMA creates a federal definition of marriage as a union be-

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decision on their pending measures) are: California, Colorado, Connecticut, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Rhode Island, Texas, Vermont, West Virginia, Wisconsin, and Wyoming. *Id.*

46. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).

47. *See* Williams v. North Carolina, 325 U.S. 226, 237 (1945) (noting that the "regulation of domestic relations has been left with the States and not given" to the federal government). Divorces, on the other hand, have been extended full faith and credit because they are final judgments of a state court; once a final judgment has been rendered by a state, it must be accorded full faith and credit by every other state in our federal system. Faunterloy v. Lum, 210 U.S. 230 (1908).

48. 28 U.S.C. § 1738(C) (Supp. II 1996).

49. 1 U.S.C. § 7 (Supp. II 1996).

50. U.S. CONST., art. IV, § 1. *See supra* note 38 for the text of the Full Faith and Credit Clause.

51. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996). DOMA passed the House by a 342–67 vote, *see* 142 CONG. REC. H7505 (daily ed. July 12, 1996), and it passed the Senate by an 85–14 vote, *see* 142 CONG. REC. S10,129 (daily ed. Sept. 10, 1996).

52. U.S. CONST. art. IV, § 1.

53. *See supra* note 39 (statement of Sen. Nickles); *see also* H.R. REP. NO. 104-664, at 4 (1996) *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906, 2910-15 (noting the possible implications of a positive ruling in *Baehr* on the rest of the states and the federal government).

tween one man and one woman, and prohibits same-sex couples from receiving any of the federal benefits available to opposite-sex couples.[54]

DOMA's constitutionality is a hotly debated topic in the legal and legislative community. Many commentators have argued that Congress exceeded its authority when it enacted DOMA by attempting to limit the application of the Full Faith and Credit Clause,[55] while others have argued that it violates the Equal Protection Clause[56] and the Establishment Clause.[57] On the other hand, some scholars maintain that DOMA passes constitutional muster.[58]

In sum, the 1993 and 1996 *Baehr* cases have sharply focused the nation's interest on the legality of same-sex marriage. The resulting state and federal legislation, and the scholarly debate that has followed, make the question of whether California must recognize same-sex marriages validly contracted in Hawaii or other jurisdictions difficult to answer. To simplify my analysis, I limit my discussion to the two issues below.

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54. *See* 1 U.S.C. § 7 (Supp. II 1996).

55. *See, e.g.*, Letter from Lawrence Tribe, Professor of Constitutional Law, to Senator Edward Kennedy (1996), *reprinted in* 142 CONG. REC. S5931, 5933 (daily ed. June 6, 1996) (statement of Sen. Kennedy) [hereinafter *Letter from Lawrence Tribe*]. Professor Tribe analogized DOMA to *Katzenbach v. Morgan*, 384 U.S. 641 (1966), a case in which the Court interpreted one of the Constitution's clauses that expressly authorizes Congress to enforce a constitutional mandate directed at the states. Professor Tribe noted that the U.S. Supreme Court had declared in *Katzenbach* that "Congress may effectuate such a mandate but may not 'exercise discretion in the other direction [by] enact[ing] statutes that 'dilute' the mandate's self-executing force. . . ." *Letter from Lawrence Tribe*, *supra* (quoting 348 U.S. at 651 n.10). Likewise, Tribe argues, a similar principle applies to the interpretation of Congress's legislative powers granted under the Full Faith and Credit Clause; the text of this provision leaves "no real doubt" that the self-executing reach of the provision may not be curtailed or negated under the pretense of enforcing the provision. *Letter from Lawrence Tribe*, *supra*, at 5933.

56. *See, e.g.*, Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1, 5 (1997).

57. *See, e.g.*, James M. Donovan, *DOMA: An Unconstitutional Establishment of Fundamentalist Christianity*, 4 MICH. J. GENDER & L. 335 (1997).

58. *See* Lynn D. Wardle, *DOMA: Protecting Federalism in Family Law*, 45 FED. LAW 30 (Feb. 1998).

III. DEFINING THE SCOPE OF THIS COMMENT: INTERPRETING CALIFORNIA'S CHOICE OF LAW RULE ON MARRIAGE, AS APPLIED TO THREE HYPOTHETICAL HAWAII SAME-SEX MARRIAGES

A. *Focusing on California's choice of law rules*

A state may generally regulate marriages within its own borders in any manner it sees fit, so long as such regulations do not run afoul of any rights protected by the United States Constitution.[59] Scholars disagree over what protections the United States Constitution offers same-sex marriages and what restrictions DOMA and similar statutes impose on them. Consequently, a complete analysis of whether California must recognize Hawaii same-sex marriages necessarily involves analyzing both state and federal law. Legal scholars must first identify California's marital choice of law rule and examine how it might apply to validate or invalidate Hawaii same-sex marriages. After this task is completed (or perhaps while the task is being completed), scholars must also analyze the federal constitution and DOMA to determine if this marital choice of law rule can survive constitutional scrutiny. This Comment focuses solely on the first task: it identifies California's marital choice of law rule and then applies it to three hypothetical same-sex marriages, ultimately concluding that all three marriages should be recognized.

B. *Marital status versus marital incidents: analyzing three hypothetical marriages under California's marital choice of law rule*

When two parties marry in California they enter into more than a civil contract;[60] they enter into a legal status[61] with many

59. Williams v. North Carolina, 317 U.S. 287, 303 (1942) ("Within the limits of her political power . . . [a state] may, of course, enforce her own policy regarding the marriage relation . . . .").

60. Section 300 of CAL. FAM. CODE states:

> Marriage is a personal relation arising out of a civil contract between a man and a woman, to which the consent of the parties capable of making that contract is necessary. Consent alone will not constitute marriage; it must be followed by the issuance of a license and solemnization as authorized by this code . . . .

CAL. FAM. CODE § 300 (West 1994).

61. *See* Willis L. M. Reese, *Marriage in American Conflict of Laws*, 26 INT'L & COMP. L. Q. 952, 953-54 (1977).

state-created rights, duties and obligations. A few of the most important rights, or incidents,[62] of California marriages are:

1. The right to live together openly as a married couple, referred to as the "right to cohabitation;"[63]

2. The right to have children born during the marriage be presumed legitimate children of *both* spouses;[64]

3. The right to bring tort actions for loss of consortium or wrongful death if a third party injures or kills the other spouse;[65]

4. The right to division of community property upon dissolution of the marriage;[66]

5. The right to seek spousal support [alimony] upon termination of the marriage;[67]

6. The power of testamentary disposition over one half of the community property of the marriage;[68]

7. The right to one half of the decedent's quasi-community property,[69] and the succession rights to all of the decedent's quasi-community property when the decedent dies intestate.[70]

Cases where the pure "status" of a marriage is the only issue before the court are rare, and they usually involve "action[s] for annulment where the relief sought is a declaration that no marriage ever came into existence,"[71] actions for "a declaratory judgment that a marriage does or does not exist,"[72] or actions involving bigamy prosecutions.[73] In the majority of cases, how-

62. The incidents of marriage may vary from state to state, according to each state's wishes, and courts often give the same incidents to an out-of-state marriage that they would give to marriages contracted within their own state. RESTATEMENT (SECOND), *supra* note 4, § 284, at 248.

63. *See* C. W. Taintor, II, *What Law Governs the Ceremony, Incidents and Status of Marriage*, 19 B.U.L. REV. 353, 357 (1939); *see also* Reese, *supra* note 61, at 957.

64. CAL. FAM. CODE §§ 7540, 7611 (West 1994); *see* Reese, *supra* note 61, at 957.

65. CAL. CIV. PROC. § 377.60 (West Supp. 1998); Rodriguez v. Bethlehem Steel Corp., 12 Cal. 3d 382 (1974).

66. CAL. FAM. CODE § 2550 (West 1994).

67. CAL. FAM. CODE § 4330 (West 1994 and Supp. 1998); *see also* CAL. FAM. CODE § 720 (noting that spouses owe each other obligations of mutual respect, fidelity, and support) (West 1994).

68. CAL. PROB. CODE § 100 (West 1991).

69. CAL. PROB. CODE § 101 (West 1991).

70. CAL. PROB. CODE § 6401(b), 6414 (West 1991).

71. Reese, *supra* note 61, at 953. *See, e.g.*, Vaughn v. Vaughn, 144 P.2d 658 (Cal. Ct. App. 1944).

72. Reese, *supra* note 61, at 953. *See, e.g.*, Norman v. Norman, 54 Cal. 143, 144 (1898); Barnett v. Hudspeth, 211 Cal. App. 2d 310 (Ct. App. 1962).

73. Reese, *supra* note 61, at 953.

ever, the validity of the marital status is not the sole issue before the court.[74] Instead, the validity of the marriage relates to the determination of whether or not an incident of the marriage should be granted or denied. For example, a couple "may attempt to claim certain benefits through one partner's private employer, such as health insurance coverage at the spouse/dependent reduced rate . . . or . . . [a] legal action may develop over the denial of . . . state spousal benefits, such as social security disability . . . ."[75]

Given the numerous incidents of marriage available in California, many different kinds of marital recognition cases might come before a California court. To facilitate analysis, only three incident-centered cases, which represent the marital recognition scenarios most likely to come before the courts,[76] are discussed in this Comment. The first hypothetical involves the incident of inheritance rights. A California same-sex couple travels to Hawaii, marries, and immediately returns home to California. Soon after, Spouse A dies intestate, forcing survivor Spouse B to bring suit against A's family to get her spousal share of the property.

In the second hypothetical, Spouse C and Spouse D immediately return to California, where they live for five years. During these five years, they buy a $15,000 car and save $30,000 from their paychecks, with each spouse contributing equally to the purchase of the car and the savings. The couple separates and Spouse C refuses to divide the property equally, insisting he owns a majority of it. Spouse D sues, seeking to have the marriage declared valid under California law so that he can receive his share of the community property.

In the third hypothetical, Spouse E and Spouse F quickly decide to apply for health insurance at the reduced spousal rate from Spouse E's employer, a large manufacturing firm. The employer refuses to grant Spouse E this reduced-rate coverage for Spouse F, and the couple sues the employer. The contract between the employer and Spouse E provides that reduced-rate health coverage will be available only to individuals whose marriages are considered valid under California law. Spouse E claims that under California Family Code Section 308, his Hawaii marriage to Spouse F must be recognized as valid in California, and therefore the employer has breached its contract.

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74. *Id.*

75. Henson, *supra* note 39, at 559.

76. Reese, *supra* note 61, at 953. *See also* Henson, *supra* note 39, at 559-60.

California courts faced with a question of whether to recognize these three out-of-state same-sex marriages must first understand the choice of law rule embodied in California Family Code Section 308 and its public policy exception. As the next two sections explain, the validity of these and similar marriages depends upon how strictly the court defines the public policy exception to Section 308.

IV. INTERPRETING CALIFORNIA'S MARITAL CHOICE OF LAW STATUTE: CALIFORNIA FAMILY CODE SECTION 308 AND ITS PUBLIC POLICY EXCEPTION

The generally accepted rule on marriage has long been that a marriage valid where celebrated is valid everywhere.[77] This is known as the rule of *lex loci celebrationis*.[78] California legislators first codified this rule in 1872, when they enacted California Civil Code Section 63, ("Section 63"), which declared that "[a]ll marriages contracted without this State, which would be valid by the laws of the *country* in which the same were contracted, are valid in this State."[79] Despite the fact that the language in Section 63 referred to marriages contracted in other countries, the California Supreme Court always used Section 63 to validate marriages contracted in sister states[80] as well as those marriages contracted in foreign countries.[81]

Section 63 has only been amended twice since its enactment in 1872, and both amendments have left the statute essentially unchanged. In 1969, the California Legislature changed the word "country" to "jurisdiction" and moved the entire statute over to

77. *See* JOHN PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, § 368 at 314 (4th ed. 1864); *id.* § 390 at 340 (5th ed. 1872); *see also*, B.E. WITKIN, SUMMARY OF CALIFORNIA LAW: HUSBAND AND WIFE, § 46 at 67-68 (9th ed. 1990 and Supp. 1997) (citing *In re* Marriage of Smyklo, 180 Cal. App. 3d 1095, 1097, 1099 (1986)).

78. *See, e.g.*, Barbara J. Cox, *Same-Sex Marriage and Choice-of-Law: If We Marry in Hawaii, Are We Still Married When We Return Home?*, 1994 WISC. L. REV. 1061, 1085 ("For marriage cases . . . the rule of lex loci celebrationis would apply; in other words, a marriage valid where celebrated is valid everywhere.").

79. CAL. CIV. CODE § 63 (West 1957) (*repealed by* Act of Sept. 4, 1969, ch. 1608 § 3, 1969 Cal. Stat. 3313) (emphasis added).

80. *See* Pearson v. Pearson, 51 Cal. 120 (1875) (recognizing Utah interracial marriage despite the fact that such marriages were illegal in California at that time under CAL. CIV. CODE § 60).

81. Estate of Bir v. Boyes, 188 P.2d 499 (Cal. Ct. App. 1948) (recognizing bigamous marriage contracted in India for the purpose of intestate succession despite the fact that bigamy has always been illegal in California).

California Civil Code Section 4104.[82] This change in language simply formalized the California courts' longstanding practice of using the statute to resolve both international and interstate marriage conflicts. In 1994, the statute was moved, without any textual changes, to California Family Code Section 308.[83]

The plain language of Family Code Section 308 appears to require the automatic recognition of all marriages validly contracted in any jurisdiction. However, California courts have incorporated a "public policy exception"[84] into Section 308.[85] This public policy exception "permits a court to reject a cause of action based on the law of a different jurisdiction on the ground that the other jurisdiction's law is not only different from but also offensive to generally accepted values in the forum."[86] Scholars trace the public policy exception back to the Middle Ages,[87] but

82. The Family Law Act, ch. 1808 §8, 1969 Cal. Stat. 3312.

83. CAL. FAM. CODE § 308 (West 1994).

84. *See generally* Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997); Andrew Koppelman, *Same-Sex Marriage, Choice of Law, and Public Policy*, 76 TEX. L. REV. 921 (1998).

85. *See, e.g.*, Norman v. Norman, 121 Cal. 620, 624-25 (1898); Estate of Wood, 137 Cal. 129 (1902). California courts have also adopted the public policy exception for use in resolving interstate disputes concerning wills and trusts (*see, e.g., In re* Estate of Lathrop, 131 P. 752 (Cal. 1913) (using the public policy exception to invalidate a bequest in a New York will of personal property located in California)), contracts (*see, e.g.*, Metropolitan Creditors Service of Sacramento v. Sadri, 15 Cal. App. 4th 1821, 1825 (Ct. App. 1993)) and torts (*see, e.g.*, Thome v. Macken, 136 P.2d 116 (Cal. Ct. App. 1943) (applying public policy exception to dismiss cause of action based on the tort of alienation of affection)).

86. John Bernard Corr, *Modern Choice of Law and Public Policy: The Emperor Has the Same Old Clothes*, 39 U. MIAMI L. REV. 647, 682-91 (1985); Koppelman, *supra* note 84, at 935 ("In a situation in which a state would ordinarily apply another forum's law . . . the public policy doctrine permits the state nonetheless to prefer its own law.").

Historically, courts traditionally understood the public policy exception as a purely jurisdictional doctrine; it allowed them to dismiss cases on jurisdictional grounds. Corr, *supra*. However, modern courts "seldom stop at the jurisdictional threshold, but rather make the occasion an excuse to apply forum law." Koppelman, *supra* 84, at 936. "This is invariably true in the marriage cases; rather than merely refuse to apply the place of celebration rule, courts routinely apply forum law and declare the suspect marriages invalid." *Id.* Just because a forum court finds a foreign law offensive does not make the forum state's law more or less applicable. *See id.* (citing Kramer, *supra* note 84, at 1974), and therefore I propose that the public policy exception should continue to be treated as a jurisdictional doctrine only.

87. Koppelman, *supra* note 84, at 936 ("The public policy doctrine dates back to the Middle Ages.") (citing FRIEDRICH K, JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 79 (1993)). *See* Corr, *supra* note 86, at 649 ("[The public policy doctrine] is one of the few features of the old learning to have survived the last generation's surge into modern choice of law thinking.").

it did not gain wide acceptance in America until the 19th century, when it was popularized by the influential conflict of laws scholar Joseph Story.[88] Story defined the public policy exception as follows: "In the silence of any positive rule, affirming, or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interests."[89]

In other words, if a state passes a statute specifically "affirming, or denying, or restraining the operation of foreign laws," then courts can invoke the public policy exception and refuse jurisdiction over the case.[90] I refer to this as the "legislative condition" of the public policy exception. In the absence of such a statute, however, courts can still invoke the public policy exception if the foreign law is "repugnant to [the forum state's] policy, or prejudicial to [the forum state's] interests."[91] I refer to this as the "repugnant condition" of the public policy exception. If either of these conditions is met, then the public policy exception applies and the forum court can invoke it to refuse jurisdiction over the case at hand.

A. *Neither the legislative nor the repugnant condition applies to our three hypothetical marriages*

1. The legislative condition does not apply because no anti same-sex marriage statutes have been passed in California

Two California Supreme Court cases, *Norman v. Norman*[92] and *In Re Estate of Wood*,[93] adopt Story's public policy exception and demonstrate how courts should use the "legislative condition" to resolve interstate marriage conflicts. *Norman v. Norman* involved a Los Angeles couple, too young to marry legally in California, who boarded a ship and were married out at sea

88. SCOLES & HAY, *supra* note 2, § 2.4, at 12 (noting that "[t]he influence of Story's work was profound . . . in the United States") (footnote omitted); Holly Sprague, Comment, *Choice of Law: A Fond Farewell to Comity and Public Policy*, 74 CAL. L. REV. 1447, 1450 (1986) ("The exception is rooted in Story's writings on comity, in which he emphasized that the limits of a forum's application of foreign law were reached when the forum found it repugnant to its own policy or prejudicial to its interests.").

89. STORY, *supra* note 5.

90. *Id.*

91. *Id.*

92. 121 Cal. 620, 624-25 (1898).

93. 137 Cal. 129 (1902).

about nine miles off the coast of Long Beach.[94] After being married by the ship's captain, the couple immediately returned to California to live for a blissful eight days.[95] At that point, Mr. Norman then filed suit to have the marriage declared valid and binding upon Mrs. Norman.[96] Mrs. Norman responded by requesting that the marriage be "declared illegal and void, and that the plaintiff be precluded and estopped from ever setting up or asserting or claiming to be the husband of defendant."[97] The *Norman* court found that:

> A marriage which is prohibited here by statute, because contrary to the policy of our laws, is yet valid if celebrated elsewhere according to the law of the place, even if the parties are citizens and residents of this commonwealth, and have gone abroad for the purpose of evading our laws, unless the legislature has clearly enacted that such marriages [contracted] out[side] of the state shall have no validity here.[98]

Since the California Legislature had not specifically enacted a law declaring that underage marriages contracted in other states were invalid, the *Norman* Court ruled that the marriage would be held valid if it could "find support by the laws of any country having jurisdiction of the parties at the place where the marriage ceremony was performed."[99] Ultimately, the marriage was held invalid, because it had been celebrated on the "high seas, where no written law . . . existed by which marriage could be solemnized . . . ."[100]

In re Estate of Wood began when Abbie Rose Wood petitioned a California court for a family allowance, claiming she was the surviving widow of Joseph M. Wood.[101] Abbie and Joseph

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94. *Norman*, 121 Cal. at 622.

95. *Id.* at 622-23.

96. *Id.* at 623.

97. *Id.*

98. *Id.* at 624 (quoting Commonwealth v. Lane, 113 Mass. 458. 464 (1873). *See also* Estate of Wood, 137 Cal. 129, 135-36 (discussing Pearson v. Pearson, 51 Cal. 120, 125 (1875), which held Utah interracial marriage valid in California under former CAL. CIV. CODE § 63, despite the existence of CAL. CIV. CODE § 60, which declared marriages "of white persons with negroes or mulattoes [entered into in California] illegal and void."). In *Pearson v. Pearson*, the California Supreme Court explicitly cited Joseph Story's treatise on the conflict of laws to support its holding. *Pearson*, 51 Cal. at 125 ("The validity of a marriage (except it be polygamous or incestuous) is to be tested by the law of the place where it is celebrated. 'If valid there, it is valid everywhere. It has a legal ubiquity of obligation. If invalid there, it is equally invalid everywhere.[sic] (Story on Conflict of Laws, Sec. 113)").

99. *Norman*, 121 Cal. at 624-25.

100. *Id.* at 625.

101. *Estate of Wood*, 137 Cal. at 130.

Wood had married in Reno, Nevada, in January of 1898.[102] At that time, Joseph was single and Abbie was a recent divorcee, having obtained a divorce in California from her first husband only four and one-half months before marrying Joseph.[103] Abbie and Joseph had married in Reno to evade California Civil Code Section 61, which declared that:

> A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, *is illegal and void from the beginning, unless*: 1. The former marriage has been annulled or dissolved; provided, that in the case it be dissolved, *the decree of divorce must have been rendered and made at least one year prior to such subsequent marriage*.[104]

After marrying in Reno, Abbie and Joseph returned to California, where they lived until the death of Mr. Wood a few years later.[105] When Abbie applied for a family allowance as Joseph's surviving widow, the trial court denied her request, and so Abbie appealed this denial to the California Supreme Court.[106] The executrix of Mr. Wood's estate, Martha Wood, argued that the California statute prohibiting remarriage within one year of divorce had the effect of making California divorce decrees ineffective until one year after their rendition.[107]

The California Supreme Court rejected this interpretation of California Civil Code Section 61, declaring instead that general statutes regulating marriage within California's borders will never be read to invalidate marriages contracted outside of California:

> [I]t is a fundamental rule that ***no statute***, whether relating to marriage or otherwise, if in the ordinary general form of words, ***will be given effect outside of the state or country enacting it***. . . . Hence, if a statute, silent as to marriages abroad . . . prohibits classes of persons from marrying generally, or from intermarrying . . . it has no effect upon marriages, even of domiciled inhabitants, entered into out of the state. Those

102. *Id.*

103. *Id.*

104. *Id.* at 131 (quoting from CAL. CIV. CODE § 61 as it existed at the time of the decision in 1902) (emphasis added).

105. *See* Wood v. Estate of Wood, 137 Cal. 148, 149 (1902). *Wood v. Estate of Wood* was a companion case to *Estate of Wood*, discussed in the text above. *See id.* at 148.

106. Estate of Wood, 137 Cal. at 130.

107. *Id.* at 132.

> marriages are to be judged of by the courts of such state just as though the [prohibitive] statute did not exist.[108]

In other words, *Norman v. Norman* and *Estate of Wood* make it clear that in order to satisfy the "legislative condition" and apply the public policy exception to California Family Code § 308, California courts must be able to point to a state statute whose language expressly regulates marriages contracted *outside the state*.[109]

Accordingly, *Norman v. Norman* and *Estate of Wood* preclude the possibility that California Family Code Section 300, which defines marriage as a "personal relation arising out of a civil contract between a man and a woman,"[110] satisfies the "legislative condition" of the public policy exception to Section 308.[111] The only way the "legislative condition" can apply to our three hypotheticals is if California legislators pass a law prohibiting the recognition within California of same-sex marriages validly contracted outside of California.

Although there has been a total of three attempts to pass such a law in California, each attempt has failed. The first attempt occurred in 1995, when California Assemblyman Pete Knight introduced A.B. 1982. It was later amended to state:

> SECTION 1. Section 308 of the Family Code is amended to read:
>
> 308. Except as provided in Section 308.5, a marriage contracted outside this state that would be valid by the laws of the jurisdiction in which the marriage was contracted is valid in this state.
>
> SECTION 2. Section 308.5 is added to the Family Code, to read:
>
> 308.5. Any marriage contracted outside this state between individuals of the same gender is not valid in this state.[112]

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108. *Id.* at 135 (emphasis added).

109. *See also* McDonald v. McDonald, 58 P.2d 163, 164 (Cal. 1936).

110. CAL. FAM. CODE § 300 (West 1994).

111. The legislative history of CAL. FAM. CODE § 300 indicates that California legislators added the phrase "between a man and a woman" to it in 1977 to preclude same-sex marriage advocates from fighting for the right to marry within California, as they had in other states. *See* Act of Aug. 17, 1977, ch. 339, § 1, 1977 Cal. Stat. 1295; Larry Liebert, *Brown Signs Bill to Ban Gay Marriage*, S.F. CHRON., Aug. 19, 1977, at A-1; *Senate OKs Bill Banning Marriage of Homosexuals*, L.A. DAILY J., Aug. 15, 1977, at A-12.

112. *See* Legislative Counsel, *AB 1982 Assembly Bill AMENDED* (last modified Mar. 19, 1997) <http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_1951-2000/ab_1982_bill_960129_amended_asm.html>.

As introduced, A.B. 1982 would have created an exception to California Family Code Section 308 for same-sex marriages. If passed by the California Legislature, A.B. 1982 would have satisfied the "legislative condition" because it specifically prohibited the recognition within California of any same-sex marriages contracted outside of California.

After passing in the Assembly Committee on the Judiciary by a vote of 9 to 4,[113] A.B. 1982 quickly passed the Assembly by a vote of 41 to 31 and moved to the Senate.[114] In July of 1996, the Senate Committee on the Judiciary held a public hearing on A.B. 1982.[115] Concerned about the constitutionality of A.B. 1982, the Judiciary Committee invited Professor Kathleen Sullivan from Stanford Law School to testify as an unbiased witness on behalf of the committee.[116] Professor Sullivan first testified that A.B. 1982 did not appear to violate the Full Faith and Credit Clause as it has been interpreted by the United States Supreme Court.[117] Professor Sullivan then explained that A.B. 1982 might not pass constitutional scrutiny under the Equal Protection Clause because it appears to be based on pure "animus" against homosexuals and same-sex marriage.[118] After the testimony of several witnesses for and against A.B. 1982, Democratic Senator Nick Petris proposed "compromise" language to A.B. 1982.[119] These proposed amendments kept in place A.B. 1982's prohibition on same-sex marriages, contracted outside of California, but allowed for California same-sex couples to enter into domestic partnerships and receive several incidents of marriage such as inheritance rights, hospital visitation rights, retirement benefits for

113. *See* Legislative Counsel, *AB 1982 Assembly Bill — Vote Information* (last modified Mar. 18, 1997) <http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_1982_vote_960124_000002_asm_comm.html>.

114. *See* Legislative Counsel, *AB 1982 Assembly Bill — Vote Information* (last modified Mar. 18, 1997) <http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_1951-2000/ab_1982_vote_960131_0955PM_asm_floor.html>.

115. *See* Legislative Counsel, *AB 1982 Assembly Bill — History* (last modified Mar. 18, 1997) <http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_1951-2000/ab_1982_bill_history.html>.

116. *See* Taped transcripts of July 9, 1996 Hearing on AB 1982. (Senator Calderon's opening remarks) (on file with author).

117. *Id.* (Testimony of Professor Kathleen Sullivan).

118. *Id.*

119. *AB 1982 Passes Senate Judiciary Committee 5-0*, ACTION ALERT FAX (LIFE: California's Lesbian/Gay and AIDS Lobby & Institute, Sacramento, Cal.), July 10, 1996 (on file with author).

domestic partners of state employees, and health benefits.[120] The committee accepted these "domestic partner" amendments,[121] which drastically altered the nature of the bill and effectively split the conservative bloc that had been supporting it.[122] A month later, a last-ditch effort by Republicans to delete the domestic partner language was narrowly defeated, and A.B. 1982 ultimately died in the Senate's "inactive file."[123]

In February of 1996, Assemblyman Pete Knight tried again to block the recognition of same-sex marriages by introducing A.B. 3227, which stated:

> Section 1. Section 300.5 is added to the Family Code, to read:
>
> 300.5. The Legislature finds and declares the following: (a) California's marriage laws were originally, and are presently, intended to apply only to male-female couples, not same-gender couples. This determination is one of policy. Any change in these laws must come from either the Legislature or by constitutional amendment, not the judiciary.
>
> (b) The statutory definition of marriage as between a man and a woman serves the compelling state interest of aiding couples to foster the best family conditions under which children may possibly be created and raised, and helping to build families that provide a caring, stable home with a mother and father. Linking the benefits, burdens, and obligations of marriage to only male-female couples is society's least intrusive way of aiding couples that, by the nature of their opposite genders, objectively manifest the possibility of procreation.
>
> (c) The male-female relationship is the most practical basis for the conferring of marriage benefits, despite occasional

120. *See* Legislative Counsel, *AB 1982 Assembly Bill — AMENDED* (last modified Nov. 19, 1997) <http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_1951-2000/ab_1982_bill_960711_amended_sen.html>.

121. The domestic partnership language that was incorporated into A.B. 1982 was identical to the language in A.B. 2810, a domestic partnership bill that had passed both the Assembly and the Senate in 1994, but had been vetoed by Republican Governor Pete Wilson. Compare the language of A.B. 2810 at Legislative Counsel, *Document info* (last modified Nov. 29, 1994) <http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab_2801-2805/ab_2810_bill_940825_enrolled>, with the domestic partnership language of A.B. 1982, at Legislative Counsel, *supra* note 121.

122. Mark Katches, *Gay Marriage Ban Dies in Knot: Limited Rights for Domestic Partners Ties Up Senate*, L.A. DAILY NEWS, Aug. 20, 1996, at A1. ("With the domestic partnership provisions left intact, Republican supporters immediately dropped their support for AB 1982.... Although the bill technically is alive, Knight said he would make no attempt to bring it to the Senate floor in its current form.").

123. *See* Legislative Counsel, *AB 1982 Assembly Bill — History* (last modified Mar. 18, 1997) <http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_1951-2000/ab_1982_bill_history.html>; *see also* Jon Matthews, *State Senate Foils Gay-Marriage Foes*, SACRAMENTO BEE, Aug. 20, 1996, at A1.

> cases of heterosexual infertility or personal choice to not have children.
>
> (d) Although it is not the intentions (sic) of the Legislature to prohibit religious ceremonies solemnizing same-gender relationships, nothing in this section shall be construed to confer any of the benefits, burdens, or obligations of marriage under the laws of California to same-gender couples.[124]

A.B. 3227 was then referred to the Assembly Committee on the Judiciary, where it passed by a vote of 8 to 4 on May 8th.[125] Shortly after this vote, Assemblyman Knight removed the bill to the "inactive file," for unknown reasons.[126] A.B. 3227 ultimately died in the Assembly's inactive file on November 30, 1996, after no action had been taken on it for close to six months.[127]

In February of 1997, a coalition of conservative senators and assembly members, led by Senator Richard Mountjoy and Assemblymen Bob Margett and Pete Knight, again sought to preclude the recognition of out-of-state same-sex marriages. They introduced identical bills in the Senate and Assembly, S.B. 911 and A.B. 800, entitled the "California Defense of Marriage Act."[128] These bills combined the substance of A.B. 1982 and A.B. 3227 into one bill. First, they sought to amend Section 308 to preclude recognition of same-sex marriages contracted outside California. Second, they declared that same-sex marriages are "contrary to, and in violation of, the strong public policy of this state . . . [and therefore] shall not be entitled to the benefits of

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124. *See* Legislative Counsel, *AB 3227 Assembly Bill — INTRODUCED* (last modified Mar. 19, 1997) <http://www.leginfo.ca.gov/pub/bill/asm/ab_3201-3250/ab_3227_bill_960223_introduced.html>.

125. *See* Legislative Counsel, *AB Assembly Bill — History* (last modified Mar. 18, 1997) <http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_3201-3250/ab_3227_bill_history.html>.

See Legislative Counsel, *AB 3227 Assembly Bill — Vote Information* (last modified Mar. 19, 1997) <http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_3201-3250/ab_3227_vote_960508_000001_asm_comm.html>.

126. *See* Legislative Counsel, *AB 3227 Assembly Bill — History* (last modified Mar. 18, 1997) <http://www.leginfo.ca.gov/pub/95-96/bill/asm/ab_3201-3250/ab_3227_bill_history.html>. Despite inquiries to advocates of same-sex marriage familiar with AB 3227, no one could verify the reasons why Representative Knight decided to remove AB 3227 to the inactive file and let it die.

127. *See id.*

128. *See* Legislative Counsel, *SB 911 Senate Bill — INTRODUCED* (last modified Nov. 8, 1998) <http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_0901-0950/sb_911_bill_19970227_introduced.html>; *see* Legislative Counsel, *AB 800 Assembly Bill — INTRODUCED* (last modified Nov. 8, 1998) <http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_0751-0800/ab_800_bill_199700226_introduced.html>.

marriage under the laws of this state."[129] S.B. 911 went to the Senate Committee on the Judiciary in March of 1997, where it failed to garner enough votes to move out of the committee.[130] A.B. 800 also died a quick death, after it failed to move out of the Assembly Committee on the Judiciary.[131] Accordingly, since California Legislators have not yet[132] passed any statutes specifically precluding the recognition of out-of-state same-sex marriages, the "legislative condition" has not been satisfied, and California courts cannot use it to bar the recognition of our three hypothetical marriages.

2. The "repugnant condition" does not apply because California's policy against same-sex marriages is weak and same-sex marriages do not threaten the state's interest in procreation or child rearing

a. Borrowing the Restatement (Second)'s approach to determine the validity of our three hypothetical marriages

California courts faced with cases similar to our three hypothetical same-sex marriages must decide whether the recognition of Hawaii's marriage laws permitting same-sex marriages would be "repugnant" to California's policies or "prejudicial to its interests."[133] Although California courts have incorporated Joseph

129. *See* Legislative Counsel, *AB 800 Assembly Bill — INTRODUCED*, *supra* note 129.

130. *See* Legislative Counsel, *SB 911 Senate Bill — History* (last modified Nov. 8, 1998) <http://www.leginfo.ca.gov/pub/97-98/bill/sen/sb_0901-0950/sb_911_bill_history.html>.

131. *See* Legislative Counsel, *AB 800 Assembly Bill — History* (last modified Nov. 8, 1998) <http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_0751-0800/ab_800_bill_history.html>.

132. In the Spring and Fall of 1998, recently-elected State Senator Pete Knight again led the drive to block recognition of same-sex marriages within California, this time by introducing the California Defense of Marriage Act, a ballot initiative aimed at precluding the recognition of out-of-state same-sex marriages within California. *See Knight in Fight vs. Gay Nuptials*, L.A. DAILY NEWS, Sept. 22, 1998, *available in* Westlaw, 1998 WL 3870026. The initiative is only 14 words long, stating: "Only marriage between a man and a woman is valid or recognized in California." Randy Thomasson, *Questions and Answers: The California Defense of Marriage Act* (last modified Oct. 9, 1998) <http://www.capitolresource.org/b_doma.html>.

On September 21, 1998, Knight announced that his group had gathered 675,000 signatures in support of the initiative, far more than the 433,269 signatures required to place the measure on California's March 2000 ballot. *Knight in Fight vs. Gay Nuptials*, *supra*.

133. STORY, *supra* note 5.

Story's public policy exception into California's marriage law, none have ever used the exception to invalidate a marriage.[134] Looking at the use of the public policy exception in other areas of California law does not help either; California courts employing the doctrine have not consistently applied it.[135] Some courts have interpreted the public policy exception very narrowly, while other courts interpret the exception very broadly.[136] So, how should a court decide whether a marriage contracted outside of California is sufficiently "repugnant" that it does not merit recognition under Section 308?

To resolve this problem, California courts should employ an approach similar to one proposed in the Restatement (Second) of the Conflict of Laws.[137] The Restatement (Second) begins its

134. *See* annotated cases under CAL. FAM. CODE § 308 and former CAL. CIV. CODE §§ 63 and 4104.

135. *See* Corr, *supra* note 86, at 651 (summarizing criticism of the public policy doctrine as due to "the failure of the courts using public policy to identify and adhere consistently to an articulated standard against which scholars and practitioners would measure arguments for the application of public policy."). *E.g., compare.* Loucks v. Standard Oil Co, 120 N.E. 198, 202 (Ct. App. N.Y. 1918) (holding that courts should not refuse jurisdiction over a foreign cause of action unless the application of the foreign law "would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."), *with* Muth v. Educators Sec. Ins. Co., 170 Cal. Rptr. 849, 854 (Ct. App. 1981) ("[C]ourts will never give effect to a foreign law when . . . the enforcement of the foreign law would contravene the positive policy of the law of the forum whether that policy be reflected in statutory enactment or not.").

136. Sprague, *supra* note 91, at 1450-51.

> [T]he public policy exception lacks analytical focus. Despite almost universal citation of the *Loucks* definition, courts have failed to distinguish between legislative policies reflected in the enactment of particular statutes and fundamental societal policies. California's cases point out the differing applications of the doctrine. Some California cases have . . . requir[ed] more than a showing of a different outcome under California statutes. . . . In contrast, there are California cases that have held that the mere existence of a different statute is sufficient to invoke the public policy exception. . . . [In a few cases] the court went so far as to say that with respect to exemption laws . . . [courts should recognize foreign laws] only when the forum law is "practically the same" as the foreign law.

Id. (citing Loranger v. Nadeau, 10 P.2d 63, 65 (Cal. 1932); Biewend v. Biewend, 109 P.2d 701, 705 (Cal. 1941); *In re* Estate of Lathrop, 131 P.2d 752, 754 (Cal. 1913); Hudson v. Von Hamm, 259 P. 374, 377-78 (Cal. Ct. App. 1927); Victor v. Sperry, 329 P.2d 728, 732-33 (Cal. Ct. App. 1958); *In re* Marriage of De Lotel, 73 Cal. App. 3d. 21, 24 (1977)).

137. RESTATEMENT (SECOND), *supra* note 4 ("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.").

analysis by noting that "[u]pholding the validity of a marriage is . . . a basic policy in all states."[138] Likewise, courts considering the validity of our three hypothetical marriages must recognize the "general rule preferring validation of marriages, which exists with an 'overwhelming tendency' in the United States."[139] This validation rule is embedded in California Family Code Section 308,[140] and it provides the stability and predictability essential to successful marriages and to harmonious interstate and international relations,[141] particularly when property and children are involved.[142]

Bearing this presumption of marital validity in mind, courts should first look, as we have already done, for any statutes explicitly invalidating within California marriages contracted outside of California.[143] Because California Legislators have not

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By pointing California courts to the Restatement (Second), however, I do not mean to imply that they should adopt, wholesale, the Restatement's "significant relationship" approach. Instead, courts should use the Restatement (Second) as a helpful, organizing principle or "system of analysis" for resolving "question[s] of first impression." *See* Cox, *supra* note 78, at 1063.

138. *See* RESTATEMENT (SECOND), *supra* note 4, cmt. i, at 237.

139. Cox, *supra* note 78, at 1064 (quoting WILLIAM M. RICHMAN ET AL., UNDERSTANDING CONFLICT OF LAWS § 116, at 362 (2d ed. 1993)); *see also* SCOLES & HAY, *supra* note 2, § 13.2, at 431 ("The two strongest policies [reflected in the law of marriage] seem to be (1) to assure complete individual freedom in the exchange of consents and (2) once the relationship is assumed to have been freely entered [into], to sustain its validity."); *In re* Estate of Lenherr, 455 Pa. 225, 229-30 (1974) (declaring that "[s]pecifically regarding conflicts as to recognition of marital status, there is a strong policy favoring uniformity of result. In an age of widespread travel and ease of mobility, it would create inordinate confusion and defy the reasonable expectations of citizens whose marriage is valid in one state to hold [their] marriage invalid elsewhere.").

140. CAL. FAM. CODE § 308 (West 1994).

141. *See* SCOLES & HAY, *supra* note 2, § 13.2, at 432.

142. *See* Estate of Wood, 137 Cal. 129, 131-32 (1902).

> [T]he policy of the civilized world is to sustain the validity of marriage contracts. . . . [A]n opposite conclusion . . . would nullify hundreds of marriages, place the stamp of illegitimacy upon scores of children, and change the source of title to great property interests. Unless the law points plainly to that end, such a conclusion should not be declared.

Id.

143. RESTATEMENT (SECOND), *supra* note 4, cmt. k, at 239.

> In determining whether the courts of the state of most significant relationship would have invalidated the marriage the forum will first consult the statutes of that state. Some states have statutes which invalidate in specified circumstances the out-of-state marriage of local domiciliaries. If the marriage comes within the provisions of such a statute, it is clear that it would be held invalid in the state of most significant relationship and the forum will hold it invalid likewise . . . .

Id.

passed any such statute,[144] courts should then examine California's marriage cases to see if they provide any guidance.[145]

i. The "succession" exception resolves our first two hypothetical marriages

The decisions of *Pearson v. Pearson*[146] and *Estate of Bir*,[147] when read together, establish the rule that the public policy exception does not apply to California marriage cases involving only the succession to property. In *Pearson*, the California Supreme Court recognized an out-of-state interracial marriage for the limited purpose of settling the claims of the surviving spouse to a distributive share of the deceased's estate, despite the fact that California law specifically declared such interracial marriages illegal and void.[148]

The Pearsons had married in Utah, where there was no anti miscegenation law at the time.[149] Immediately after getting married in Utah, the Pearsons moved to California, where they lived together for ten years and had six children together before Mr. Pearson died in 1865.[150] Mr. Pearson's will left everything to Mrs. Pearson and their children, omitting any mention of his daughter Adelaide from his first marriage.[151] As a pretermitted child, Adelaide, would have been entitled to the whole of her father's estate if Mr. Pearson's Utah marriage was not valid in

144. *See supra* notes 112-132 and accompanying text (noting that all attempts to prohibit the recognition in California of out-of-state same-sex marriages have failed).

145. RESTATEMENT (SECOND), *supra* note 4, cmt. k, at 239:

> If [there is] no such statute, the forum will next inquire whether the marriage would be held invalid by the courts of that state by application of their choice-of-law rules. If it can be determined from the prior decisions of these courts that they would have held the marriage invalid, the forum will do likewise . . . .

Id.

146. 51 Cal. 120 (1875).

147. 83 Cal. App. 2d 256 (1948).

148. *See* former CAL. CIV. CODE § 60 (1957) ("All marriages of white persons with negroes, Mongolians, members of the Malay race, or mulattoes are illegal and void.") (quoted in Perez v. Sharp, 198 P.2d 17, 18 (Cal. 1948), which declared the statute unconstitutional on equal protection grounds, *see id.* at 718). Section 60 was formally repealed by the California Legislature in 1959. See Act of Apr. 20, 1959, ch. 146 §1, 1959 Cal. Stat. 2043.

149. *See Pearson*, 51 Cal. at 124; *Estate of Wood*, 137 Cal. at 136.

150. *See Pearson*, 51 Cal. at 123 ("There [was] no law or regulation at the time prevailing in the Territory of Utah interdicting intermarriage between white and black persons. . . .").

151. *See id.* at 120.

California,[152] because illegitimate children were generally not allowed to receive any property under a will unless they were specifically named in the will. However, if the marriage was valid, Adelaide would have to share Richard Pearson's estate with his six children from the Utah marriage with Laura.[153] The trial court held "that Laura Pearson was the lawful wife of Richard" and gave "judgment for the plaintiff [Adelaide Pearson] for an undivided one-seventh of two-thirds" of Pearson's estate.[154] The *Pearson* court affirmed the trial court's decision and likewise recognized the Utah marriage as valid.[155] Although the *Pearson* court cited to Story's public policy exception, it did not apply the exception to invalidate the marriage.[156]

A fuller explanation of the rationale behind the *Pearson* decision not to apply the public policy exception is found in *Estate of Bir*,[157] where the Court of Appeals was called upon to settle a dispute between the two surviving spouses to an Indian polygamous marriage. In *Estate of Bir*, Dalip Singh Bir legally married two women in India and then relocated himself and his two wives to California.[158] Mr. Bir later died intestate, and his two wives petitioned the court to determine their respective inheritance rights, claiming that each should get an equal share of his estate.[159] The trial court had concluded that it would violate California's public policy to recognize both marriages as valid.[160] The *Bir* court reversed on this point, declaring:

> The decision of the trial court was influenced by the rule of "public policy"; but that rule, it would seem, would apply only if 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. . . . "Public policy"

152. *Id.* at 120-21.

153. *Id.*

154. *Id.*

155. *See id.* at 125 ("The marriage of these parties, being valid by the law of the place where it was contracted, is also valid in this State. . . . Judgment and order denying a new trial [to Adelaide is] affirmed.").

156. *Pearson*, 51 Cal. at 125 ("The statute [CAL. CIV. CODE § 63] accords with general principle of law theretofore prevailing. The validity of a marriage (except it be polygamous or incestuous) is to be tested by the law of the place where it is celebrated.").

157. 83 Cal. App. 2d 256 (1948).

158. *See id.* at 257.

159. *Id.* at 256.

160. *Id.* at 257 ("[T]he trial court concluded that under the laws of California and the public policy thereof, only the first wife of decedent can be recognized as his legal widow.").

> 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.[161]

The *Bir* court applied this "succession exception"[162] to validate the polygamous marriage, despite the fact that California law has always declared polygamous marriages void.[163]

Pearson[164] and *Estate of Bir*[165] assume that the prohibitions on interracial and polygamous marriages were preventive, designed to keep persons from entering into marriages thought to be actually harmful to the participants and to prevent societal offense at having to witness these marriages. Since the offensive marriages in *Pearson* and *Estate of Bir* had already ended due to the death of one of the spouses, these courts assumed that goals behind the prohibitions on interracial and polygamous marriages would not be affected by treating the marriages as valid. The refusal to grant validity in *Pearson* and *Estate of Bir* would have caused significant harm to the spouses and families involved, with little or no appreciable effect on the number of people entering into those prohibited marriages.

Thus, our first hypothetical, which also concerns a dispute between the surviving spouse and the decedent's family, calls for a very straightforward application of *Pearson*'s and *Estate of Bir*'s "succession exception." As I explain fully in the next section, California's public policy against same-sex marriages is quite weak, making our first hypothetical marriage easier to validate than the marriages in *Pearson* or *Estate of Bir*, where the public policies against interracial marriages and polygamous marriages were very strong and clearly expressed in California's

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161. *Id.* at 261-62.

162. *See* 11 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, ch. XVI, § 49 (West Supp. 1997):

> The general rule that a marriage valid where contracted will be recognized here is subject to a basic exception: Where a foreign marriage is offensive to a fundamental local policy, the local courts may refuse to give effect to it. Polygamous or incestuous marriages have been suggested as examples. . . . But this [public policy] exception is, by modern authorities, qualified as follows: Where the objectionable relationship has been terminated by *death*, rights of succession often present no problem of public policy and may be enforced.

Id. (citations omitted) (emphasis added).

163. CAL. FAM. CODE § 2201 (West 1994) (declaring bigamous marriages illegal and void, and thus making polygamous marriages illegal and void by implication).

164. 51 Cal. 120 (1875).

165. 83 Cal. App. 2d 256 (1948).

marriage statutes and penal statutes.[166] Just as in *Pearson* and *Estate of Bir*, there is little reason to assume that the refusal to recognize Spouse B's marriage will significantly further California's weak public policy against same-sex marriage. To begin, those California citizens opposed to same-sex marriage have already been "offended" by the marriage when it existed. A failure to recognize Spouse B's succession rights might discourage a few same-sex couples from attempting to marry, but this "preventive" effect is likely to be small, because persons who marry do so for both emotional and economic reasons. Although many same-sex couples may be interested in receiving the economic benefits that accompany opposite-sex marriages, these couples will probably still want to get married for symbolic reasons even if they knew their marriages might not be accorded equal treatment under California laws. Thus, the small "preventive" effect of any negative decision should be outweighed by the fact that surviving spouses like Spouse B will suffer considerable harm if the marriage is not recognized. Accordingly, our first hypothetical marriage, like the interracial marriage in *Pearson* and the polygamous marriage in *Estate of Bir*, should be recognized for the limited purpose of granting Spouse B her rights of succession.

Our second hypothetical marriage should also be validated by analogy to *Pearson*'s and *Estate of Bir*'s "succession exception." Since the second hypothetical marriage will already be over by the time the case appears before a court, California's weak policy against same-sex marriages is not likely to be furthered by a court's refusal to recognize the marriage as valid for the limited purpose of equitably distributing the couple's marital property.

While *Pearson* and *Estate of Bir* provide helpful guidance for resolving our first two hypotheticals, California cases do not provide us with any guidance for our third hypothetical marriage. In the absence of both statutory and judicial precedent, the Restatement advises courts to "use [their] own judgment" in determining whether or not a "sufficiently strong public policy" within the state warrants invalidating the marriage.[167]

166. *See* Perez v. Sharp, 198 P.2d 17, 18 (Cal. 1948) (citing then-existing CAL. CIV. CODE § 60, which declared interracial marriages illegal and void); CAL. PENAL CODE § 281 (West Supp. 1998) (criminalizing bigamy and, by implication, polygamy in California).

167. RESTATEMENT (SECOND), *supra* note 4, cmt. k, at 239.

ii. Why our third hypothetical should be recognized as valid: California's public policy against same-sex marriage is ambiguous, not strong

The last two decades show an increasing tolerance and acceptance of homosexuality and same-sex relationships in California. This pattern of acceptance began in 1975, when California repealed its consensual sodomy law.[168] During the 1980s California granted gays and lesbians protection from discrimination in public and private employment,[169] housing,[170] and insurance.[171] Anti gay violence is specifically prohibited by civil and criminal laws.[172] Today, California does not consider sexual orientation an automatic bar to adoption,[173] and several California counties and cities currently recognize domestic partnerships.[174] In addition, several religions now recognize same-sex unions,[175] includ-

168. California's sodomy statute, codified in CAL. PENAL CODE § 286 (West 1998), was amended in 1975 to delete the former statute's prohibition against the "infamous crime against nature." *Compare* CAL. PENAL CODE § 286 (West 1988) (Historical Note) (noting that as originally enacted in 1872, California's sodomy statute provided that, "Every person who is guilty of the infamous crime against nature, committed with mankind or with any animal, is punishable by imprisonment in the state prison not less than five years."), *with* Act of Sept. 18, 1975, ch. 877, 1975 Cal. Stat. 1957. This change meant that California no longer criminalized sodomy or oral copulation between consenting adults.

169. *See* CAL. LAB. CODE §1102.1 (West Supp. 1998). *See generally*, H. Thomas Cadell, Jr., *Enforcing the New Sexual Orientation Discrimination Law*, 16 L.A. LAW. 26 (July/Aug. 1993).

170. Hubert v. Williams, 184 Cal. Rptr. 161, 164 (1982).

171. *See* CAL. INS. CODE §§ 10140(a) and 10140(b) (West Supp. 1998) (prohibiting insurance agencies from discriminating on the basis of a customer's sexual orientation).

172. *See* CAL. CIV. CODE § 51.7 (West Supp. 1998) (prohibiting violence against individuals based on their sexual orientation); CAL. PENAL CODE §§ 422.6, 422.7 (West 1988) (prohibiting the injury or threatening of a person based on their sexual orientation). For a recent application of this provision, *see In re* M.S., 896 P.2d 1365, 1368 (Cal. 1995).

173. *See* BANCROFT-WHITNEY, CALIFORNIA CIVIL PRACTICE-FAMILY LAW LITIGATION, § 21:22 (1996) (noting that courts "may consider anything bearing on the suitability of petitioners when making its decision" — but petitioner's homosexuality is not specifically listed as a bar to adoption).

174. The counties which currently recognize domestic partnerships are: Alameda, Los Angeles, Marin, San Mateo, San Francisco, and Santa Cruz. Henson, *supra* note 39, at 570; Lambda Legal Defense and Education Fund, *California State Law: Domestic Partnership* (visited 1/28/99) <http://www.lambdalegal.org/cgi-bin/pages/states/record?record=5#Marriage>. The cities which currently recognize some form of domestic partnerships are: Berkeley, Davis, Laguna Beach, Long Beach, Los Angeles, Oakland, Palo Alto, Sacramento, San Diego, San Francisco, Santa Barbara, Santa Cruz, West Hollywood. *Id.*

175. *See* WILLIAM N. ESKERIDGE, JR., FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT: THE CASE FOR SAME-SEX MARRIAGE, 193-96, 201-07 (1996); John

ing the Episcopalian, Lutheran, Methodist, Presbyterian, Reformed Jewish and Unitarian Universalist churches.[176] Last but not least, there are many openly gay California politicians, movie stars and sports figures.[177]

The recent legislative activity around same-sex marriage indicates that Californians have conflicting attitudes toward same-sex marriage. So far, three bills specifically designed to prohibit the recognition of Hawaii same-sex marriages have failed to pass the Legislature, but some by a very narrow margin.[178] Likewise, a statewide domestic partnership bill nearly became law in 1994, after it was passed by both the California Assembly and Senate, but was vetoed by Republican Governor Pete Wilson.[179] This bill, known as A.B. 2810, would have provided same-sex couples some of the marital benefits automatically available to opposite-

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M. Broder and Mary Curtius, *Clinton Visit to Bay Area Elicits Small Protest*, L.A. TIMES, June 10, 1996 at A1 (noting that the Metropolitan Community Church in San Francisco performs "about 100 same-sex marriage ceremonies each year.").

176. SUZANNE SHERMAN, LESBIAN AND GAY MARRIAGE: PRIVATE COMMITMENTS, PUBLIC CEREMONIES, 4-7 (Suzanne Sherman ed., 1992); *see also* Larry B. Stammer, *Episcopalians in Southland Reject Stand on Gays*, L.A. TIMES, Dec. 6, 1998, at A-1 (noting that delegates to the annual convention of the six-county Los Angeles Episcopal Diocese adopted, by a 203-105 vote, a resolution declaring "God calls some homosexual people to live together in committed relationships, and the church does bless and ordain" homosexual members. This resolution responded to a prior resolution in which Anglican bishops had declared "homosexual practice to be incompatible with biblical morality.").

177. Rep. Sheila James Kuehl is an openly gay lesbian who has become one of the most powerful Democratic members of the California Assembly. *See* Daniel M. Weintraub, *Political Clash Looms Over State Bill to Ban Bias Against Gays in Schools*, THE ORANGE COUNTY REGISTER, Feb. 3, 1997, at A1 (stating that Rep. Kuehl is a "Democrat who in her third year in the Legislature already has risen to the No. 2 leadership post in the Assembly.") Additionally, there are hundreds of openly gay and lesbian politicians in California. DEP'T PUB. POL'Y & COMM., L.A. GAY & LESBIAN CENTER, *List of Politicians and Contacts*, July 8, 1996 (on file with author) (listing over 240 openly gay or gay-friendly California politicians, appointed city officials, school board members, and superior and municipal court judges). In the entertainment world, the April 1997 episode of the television show "Ellen" in which Ellen Degeneres "comes out" had one of the highest ratings of any television show that year. *See* Brian Lowry, *Ratings, Not Sexuality, Steer Future of 'Ellen,"* L.A. TIMES, Mar. 11, 1998, at F1 (Calendar Section). In sports, Olympic champion and California resident, Greg Loughanis came out in February of 1995 with the publishing of his autobiography. *See* GREG LOUGHANIS, BREAKING THE SURFACE (1995).

178. *See supra* notes 112-132 and accompanying text, which detail all the anti same-sex marriage bills that have failed to pass in California in the last three years.

179. Legislative Counsel, *Document info* (last modified Nov. 29, 1994) <http://www.legino.ca.gov/pub/93-94/bill/asm/ab_2801-2850/ab_2810_bill_history>.

sex couples, such as hospital visitation rights, conservator rights, and the right to leave property to a domestic partner at death.[180]

Only one of California's public laws indicates that recognizing same-sex marriages might offend a recognized moral standard in California: California Family Code Section 300.[181] As explained earlier, this provision defines a marriage entered into in California as a "civil contract between a man and a woman."[182] The language restricting the definition of marriage to opposite-sex couples was added by the California Legislature in 1977, in response to the nascent efforts of some same-sex marriage advocates to obtain marriage licenses for same-sex couples under California's prior gender-neutral marriage statute.[183] When courts compare California's increasing pattern of acceptance of homosexuality and same-sex relationships over the last twenty years to this singular statute, it becomes apparent that California's public policy against same-sex marriages is, at best, ambiguous.

Opponents of same-sex marriage will likely assert that gay activists have only changed Californians' attitudes toward homosexuality, but have not changed the underlying policy reasons for limiting marriage to opposite-sex couples. Commonly, opponents contend that marriage must be limited to opposite-sex couples because: (1) same-sex couples threaten the institution of heterosexual marriage,[184] and (2) the recognition of same-sex marriages will harm children by exposing them to increased risks of sexual molestation,[185] by encouraging them to become gay,[186]

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180. *See* Legislative Counsel, *Document info* (last modified Nov. 29, 1994) <http://www.leginfo.ca.gov/pub/93-94/bill/asm/ab_2801-2850/ab_2810_bill_940825_enrolled>; Ken Chavez, *Wilson: No to Domestic Partner Bill*, SACRAMENTO BEE, Sept. 12, 1996, at A1.

181. CAL. FAM. CODE § 300 (West 1994).

182. *Id.*

183. *See supra* note 111 (discussing the legislative history of California Family Code § 300).

184. *See* H.R. REP. NO. 104-664, at 2 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2905, 2906 (identifying one of the governmental interests protected by DOMA: "defending and nurturing the institution of traditional, heterosexual marriage . . ."). *Id.* at 12, 1996 U.S.C.C.A.N. 2916.

185. *See, e.g.*, Charlotte J. Patterson, *Adoption of Minor Children by Lesbian and Gay Adults: A Social Science Perspective*, 2 DUKE J. GENDER L. & POL'Y 191, 199 n.42 (1995) (citing J.L.P.(H) v. D.J.P., 643 S.W.2d 865, 869 (Mo. Ct. App. 1982) ("Every trial judge . . . knows that the molestation of minor boys by adult males is not as uncommon as the psychological experts' testimony indicated.")).

186. *See id.* at 198 n.37 (discussing Jacobson v. Jacobson, 314 N.W.2d 78, 81 (N.D. 1981), and noting that "the court was concerned about 'whether or not the fact the

or by subjecting them to social condemnation from society.[187] When examined, these arguments do not withstand scrutiny and should not provide a justification for concluding that same-sex marriages harm the "general interests" of Californians and thus contravene any of its public policies.

(a) *Identifying the threat same-sex marriages pose to heterosexual marriage: the procreation argument*

Opponents of same-sex marriage claim that it is necessary to reserve marriage as a heterosexual institution because the ultimate purpose of marriage is to beget children.[188] Since same-sex sexual activity does not result in the possibility of procreation, legislative and judicial opponents of same-sex marriage seize upon this perceived inability to procreate as sufficient justification for a state's refusal to recognize same-sex marriages.[189]

California's current marriage laws do not support the view that marriage exists primarily for the purpose of procreation. The state requires neither ability, nor intention, to procreate

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custodial parent is homosexual or bisexual will result in an increased likelihood that the children will become homosexual or bisexual.'").

187. *See id.* at 197 (discussing the case of Bottoms v. Bottoms, No. CH93JA0517-00 (Va. Cir. Ct. Henrico County Sept. 7, 1993), in which the trial court denied custody of a two year-old boy to his biological mother because she identified herself as a lesbian and the court felt the child would suffer "social condemnation."). *See id.* at 199 n.44 (citing Thigpen v. Carpenter, 730 S.W.2d 510, 514 (Ark. Ct. App. 1987) ("[H]omosexuality is generally socially unacceptable, and children could be exposed to ridicule and teasing.")).

188. *See* H.R. REP. NO. 104-664, 1996 U.S.C.C.A.N. 2918, *supra* note 185, at 14 ("Were it not for the possibility of begetting children inherent in heterosexual unions, society would have no particular interest in encouraging citizens to come together in a committed relationship.").

189. In an explanatory memo to A.B. 1982, California's failed anti same-sex marriage bill, Assemblyman Pete Knight opined that marriage ought to be reserved for different-sex couples who at least have the "inherent[ ] capab[ility]" of procreating, regardless of the fact that many different-sex couples cannot or choose not to have children and can still get married. According to Assemblyman Knight, discouraging same-sex couples from marrying remains the best place to "draw the line." Assemblyman William J. "Pete" Knight, *Author's Statement on A.B. 1982* (on file with author); *see also* Singer v. Hara, 522 P.2d 1187, 1195 (Wash. Ct. App. 1974) ("Thus the refusal of the state to authorize same-sex marriage results from impossibility of reproduction rather than from an invidious discrimination 'on account of sex.'").

In Hawaii, the Commission on Sexual Orientation and the Law rejected a very similar argument made by legislative opponents of same-sex marriage on the grounds that it was "invalid, inconsistent and discriminatory . . . [and not] a compelling state interest." State of Hawaii, Report of the Commission on Sexual Orientation and the Law, 30-31, Dec. 8, 1995.

before opposite-sex couples may marry.[190] The state forbids the use of sterility as a basis for annulling a marriage,[191] and does not require couples to divorce or annul their marriages when a woman reaches menopause or a man becomes infertile. Moreover, the United States Supreme Court has ruled that states may not compel married[192] or unmarried[193] persons to procreate by prohibiting the use of contraceptives.

Even assuming procreation is the primary purpose of marriage, same-sex couples, like opposite-sex couples, can choose to have or raise children through, adoption, donor insemination, or surrogate motherhood.[194] In addition to these options, many lesbians, gays, and bisexuals are already raising children from previous heterosexual relationships or marriages.[195] Last but not least, the state's alleged interest in promoting procreation seems weak in the face of evidence that California is threatened by

190. CAL. FAM. CODE contains no provisions requiring either party to be fertile before a marriage license would be issued by the state.

191. *See* CAL. FAM. CODE § 2210(f) (defining physical incapacity to enter into the marriage state as a reason marriage can be annulled; incapacity is defined as the inability for copulation, not the inability of reproduction) (West 1994). *See, e.g.*, Stepanek v. Stepanek, 193 Cal. App. 2d 760, 762 (1961) (noting that inability need only be for "normal copulation").

192. Griswold v. Connecticut, 381 U.S. 479 (1965) (holding unconstitutional a Connecticut statute prohibiting the use of contraceptives because it violated the right of privacy in a marital relationship).

193. Eisenstadt v. Baird, 405 U.S. 438 (1972) (holding unconstitutional a Massachusetts statute prohibiting the distribution of contraceptives to unmarried persons under the Equal Protection Clause).

194. *See* Barbara A. Robb, Note, *The Constitutionality of the Defense of Marriage Act in the Wake of* Romer v. Evans, 32 NEW ENG. L. REV. 263, 319 n.355 (1997) (citing cases from Massachusetts, New York, Vermont, the District of Columbia, Illinois, New Jersey, Connecticut that have permitted adoptions by lesbians) (noting that some statisticians estimate "10,000 children are being raised by lesbians who become pregnant by means of artificial insemination") (citing "*A Statistical Battleground": Counting Lesbians and Gay Men in the United States, in* GAY AND LESBIAN STATS, 9 (Bennett L. Singer & David Deschamps eds., 1994)). Adoptions by openly gay individuals have been performed in California, as well as the District of Columbia and Ohio. *See* Patterson, *supra* note 185, at 195.

195. To date, no comprehensive, scientific study of the total number of gay, lesbian, or bisexual parents exists, either for the country or for California. However, scholars and commentators estimate that the numbers of children of gay or lesbian parents range from 6 million to 14 million. *See* Charlotte J. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025, 1026 (1992); Kathryn Kendell, *The Custody Challenge: Debunking Myths About Lesbian and Gay Parents and Their Children*, 20 FAM. ADVOC. 21 (1997) ("Between eight and fourteen million children are being raised in homes headed by a lesbian or gay parent"); Barbara Kantrowitz, *Gay Families Come Out*, NEWSWEEK, Nov. 4, 1996, at 50.

overpopulation, not underpopulation.[196] Consequently, courts should not preclude the application of Section 308 based on any of the above-mentioned procreational harms to the state.

(b) *Contradicting assertions that homosexuals are more likely than heterosexuals to harm children*

Opponents of same-sex marriage will probably also claim that recognizing same-sex marriage relationships will harm California's children because homosexuals pose a greater risk of molesting children, of encouraging them to become gay, and of exposing them to social harassment and ridicule. However, there is ample evidence to rebut these arguments.

To begin with, research on the sexual abuse of children demonstrates that offenders are disproportionately heterosexual men,[197] and that "gay men and lesbians are no more likely to molest children or to commit crimes with children than are heterosexual[s]."[198] In addition to refuting claims that homosexuals are more likely to molest children, social science research also

196. *See* Government Information Sharing Project — Oregon State University, *Social Characteristics for California* (last visited Jan. 28, 1999) <http://govinfo.library.orst.edu/cgi-bin/buildit?3s-state.cas> (noting that, according to the 1990 Census information, the population of California is 29,760,021); *California Rush: State Destined to be Fastest Growing in Nation, Feds Say*, L.A. DAILY NEWS, Nov. 28, 1998, at N1 (noting that California is the most populous state with 31.6 million people, that "California's high birth and immigration rates are expected to push its population from roughly 32 million residents to about 50 million during the next 27 years, a growth rate of 56 percent," and that "births . . . are driving up the population. . . . [Because] annual births lately have outnumbered deaths by about 545,000 to 230,000."). Elizabeth Shogren, *Birthrate for Unwed Women Shows Decline in Pregnancy: Government Statistics Mark First Drop in Nearly 20 Years. Figures for Teenagers Also Fall*, L.A. TIMES, Oct. 5, 1996, at A1 (noting that California leads the nation in births to teens). Thus, the slight national dip in birthrates does not make the current threat of overpopulation less dire.

197. Marc E. Elovitz, *Adoption By Lesbian and Gay People: The Use and Mis-Use of Social Science Research*, 2 DUKE J. GENDER L. & POL'Y 207, 216-217, n.55 (1995) (citing Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 LAW & SEXUALITY 133, 156 (1991) (reviewing research on sexual orientation and child abuse and concluding that gay men are not more likely to molest children than are heterosexual men)).

198. David K. Flaks, *Gay and Lesbian Families, Judicial Assumptions, Scientific Realities*, 3 WM. & MARY BILL RTS. J. 345, 360 (1994) (citing A. Nicholas Groth, *Patterns of Sexual Assault Against Children and Adolescents, in* SEXUAL ASSAULT OF CHILDREN AND ADOLESCENTS 3, 4 (Ann W. Burgess et al. eds., 1978)). *See also* Carlos A. Ball and Janice Farrell Pea, *Warring With Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 307 n.279 (citing numerous studies about child molestation). These studies support the conclusion that "the vast majority of child molestation acts in this country, including those perpetrated on boys, are perpetrated by heterosexual men." *Id.* at 307.

indicates that homosexuality is not per se related to mental illness or pathology.[199] The American Psychiatric Association removed homosexuality from its lists of mental disorders in 1973,[200] and the American Psychological Association reached a similar decision in 1975.[201] In 1994, the American Psychological Association provided expert opinions to the Virginia and Wyoming Supreme Courts "denying any rational, scientific basis for not awarding custody of children to homosexuals."[202]

As for opponents' fears that girls growing up in lesbian households will think of themselves as boys, or that boys growing up in gay homes will end up more "effeminate" than their peers, the existing scientific data is sparse, but it indicates that such fears are unwarranted.[203] In most children, their sense of whether they are male or female is "firmly established and resistant to change by the age of three."[204] The formation of gender roles in children is a slower, more flexible process that is influenced by "parental reinforcement, social pressure, and modeling and imitation of parents, peers and television characters."[205] The available research indicates that even when parents consciously try to "counteract traditional sex typing" in society, they are only partially successful.[206] Gender roles are, for better or worse, a inescapable part of our larger society today, and children raised by gay or lesbian parents can be expected to complement what

199. Flaks, *supra* note 198, at 347 (quoting John C. Gonsiorek, *The Empirical Basis for the Demise of the Illness Model of Homosexuality*, *in* HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY 197, 115 (James D. Weinrich & John C. Gonsiorek eds., 1991) (citing studies on the relationship between homosexuality and psychopathology)).

200. *Id.* at 348 (citing AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 380 (3d. ed. 1980)).

201. *Id.* (citing Am. Psychol. Ass'n, *Minutes of the Council of Representatives*, 30 AM. PSYCHOL. 620, 633 (1975)).

202. Paul Cameron and Kirk Cameron, *Did the APA Misrepresent the Scientific Literature to Courts in Support of Homosexual Custody?*, 131 J. PSYCHOL., INTERDISC. & APPLIED 313 (1997).

203. Patterson, *supra* note 185, at 198-201 (discussing twelve studies of over three hundred children examining the issues of gender identity and sexual orientation of children raised by gays and lesbians). Patterson concludes that "[n]ot one study provides any evidence for concern." *Id.* at 199. *See also* Ball and Pea, *supra* note 198, at 291-295 (discussing the findings of several important studies on gender roles and gender identity). Ball and Pea conclude that these studies rebut the suggestion that there are "significant and, therefore undesirable differences . . . in the psychosocial development of children raised by homosexual parents." *Id.* at 294

204. Ball and Pea, *supra* note 198, at 292.

205. *Id.* at 296.

206. *Id.* at 292.

they learn at home about gender with what they learn from the larger society.

Similarly, available data contradicts the assertion that children raised in gay or lesbian households will grow up to be gay. The consensus among researchers is that there is "no correlation between a parent's sexual orientation and the sexual orientation of his or her child. On the contrary, the incidence of same-sex [sexual] orientation among children of lesbian or gay parents is the same as that in the general population."[207]

Opponents of same-sex marriage also contend that children raised by gay or lesbian or bisexual parents will be subjected to substantial harassment, to their detriment. This argument mirrors those brought up against the recognition of interracial marriages in California in 1948 in the case of *Perez v. Sharp*.[208] In *Perez*, the California Supreme Court held that California's statute restricting marriages between white persons and "negroes, Mongolians, members of the Malay race, or mulattoes"[209] infringed upon the fundamental individual right to marry and violated the Equal Protection Clause of the United States Constitution.[210] Opponents of interracial marriages argued that "the progeny of a marriage between a Negro and a Caucasian suffer not only the stigma of such inferiority but the fear of rejection of members of both races."[211] The *Perez* court appropriately responded to this argument by declaring that:

> If they do [suffer from such harassment], the fault lies not with their parents, but with the prejudices in the community and the laws that perpetuate those prejudices by giving legal force to the belief that certain races are inferior. If miscegenous marriages can be prohibited because of tensions suffered by the progeny, mixed religious unions could be prohibited on the same ground.[212]

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207. Kendell, *supra* note 195, at 23-24 (citing Ann O'Connell, *Voices From the Heart: The Developmental Impact of a Mother's Lesbianism on the Adolescent Children*, 63 SMITH C. STUDIES IN. SOC. WORK 281, 285 (1993)). *See also* Ball and Pea, *supra* note 198, at 281-289 (reviewing the results of major published studies on this topic over the last twenty years). In only one study of these numerous studies "was the rate of homosexuality among children of gays and lesbians higher than . . . the general population." *Id.* at 284.

208. 198 P.2d 17 (Cal. 1948).

209. *Id.* at 18.

210. *Id.* at 29.

211. *Id.* at 26.

212. *Id.* By drawing upon the similarities to the prejudices held against interracial marriages, I do not mean to imply that the discrimination suffered by the African American and other communities is exactly the same as the discrimination

Although courts often cite fear of harassment or ostracism of the child to support their decisions to deny a lesbian or gay parent custody of their biological child,[213] "[o]nly one reported case nationwide has presented actual evidence of harassment, and this was found to occur while the child was in the custody of the non-gay parent."[214]

In sum, scientific evidence neutralizes the arguments that recognizing same-sex marriages will threaten procreation or harm children. Consequently, courts faced with our third hypothetical marriage should hold that the public policy exception to California Family Code Section 308 does not apply and proceed to declare the marriage valid under California law.

V. CONCLUSION

If Hawaii or some other state grants marriage licenses to same-sex couples, California will need to determine whether it will recognize these marriages as valid. This Comment examined the validity of three hypothetical same-sex marriages that might soon come before a California court. Although the plain language of California Family Code Section 308 seems to require the automatic recognition of the three hypothetical marriages, California courts have incorporated the public policy exception into Section 308. This public policy exception gives California courts the discretion to refuse to recognize out-of-state marriages if one of two conditions is met. First, courts may refuse to apply a foreign marriage law if the legislature has specifically barred the recognition of such marriages within California. Although California has tried three times to pass such a statute prohibiting the recognition of out-of-state same-sex marriages within California, each of these attempts has failed. Thus, the first condition does not apply to any of our three hypothetical marriages. Second, courts may refuse to recognize out-of-state marriages if the recognition of such marriages would be repugnant to California's policies or prejudicial to its interests. However, the cases of *Pearson v. Pearson* and *Estate of Bir* establish an exception to this rule by declaring that the public policy exception does not apply to marriage cases involving only succession rights. This

suffered by the gay, lesbian, bisexual, or transgender communities. However, I do believe there are insightful parallels, as in the above example.

213. *See* Patterson, *supra* note 185, at 199.

214. Kendell, *supra* note 195, at 21 (citing L. v. D., 630 S.W.2d 240, 244 (Mo. Ct. App. 1982)).

succession exception directly applies to our first hypothetical marriage involving succession rights, and thus it must be automatically recognized. This succession exception also resolves our second hypothetical; since the second marriage is also already over by the time the case comes before the court, judges should likewise hold the second marriage valid for the limited purpose of distributing the marital property equally.

This leaves only our third hypothetical. For this hypothetical, California courts must decide whether recognizing this same-sex marriage would be repugnant to California's policies or prejudicial to its interests. The fact that there has been a growing acceptance of homosexuality and homosexual relationships in California over the last two decades, when combined with the lack of empirical evidence that same-sex relationships are actually harmful to California's general interests, proves that California's policies against same-sex marriage are not very strong. Consequently, California courts should recognize the third hypothetical marriage as well.