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GAY MARRIAGE: ANALYZING LEGAL STRATEGIES FOR REFORM IN HONG KONG AND THE UNITED STATES

Robin A. Warren[†]

Abstract: Like many countries, both the United States and Hong Kong face the question of whether to legalize gay marriage due to social, legal, and political forces within and beyond their borders. The legalization of same-sex marriage in one jurisdiction forces other jurisdictions to decide whether to recognize marriages celebrated there. Comparing the current state of U.S. and Hong Kong law reveals that only a direct challenge to discriminatory marriage laws will successfully effect change. Two U.S. state supreme court decisions provide examples of effective legal arguments in a direct challenge. Conflict of laws analysis for marriage and the public policy exception to the place of celebration rule in the United States and Hong Kong preclude “importing” gay marriage by availing oneself of friendlier law in another forum. Ultimately, the timing must be ripe to effectively mount a direct challenge. In the meantime, every effort made, even if unsuccessful, raises awareness within a forum, and slowly gives rise to tolerance.

“[W]ith the change of circumstances, institutions must advance also to keep pace with the times.” – Thomas Jefferson¹

I. INTRODUCTION

With the turn of the millennium have come efforts to legalize gay marriage across the globe. In Hong Kong, one *tongzhi*² couple exemplifies

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¹ Inscribed on the Jefferson Memorial in Washington D.C., taken from a letter by Thomas Jefferson to Samuel Kercheval, July 12, 1816.

² The most popular Chinese term for homosexual in Hong Kong's thriving gay rights movement, *tongzhi*, has its roots in revolution. CHOU WAH-SHAN, *TONGZHI: POLITICS OF SAME-SEX EROTICISM IN CHINESE SOCIETIES 1* (2000). The word means both “comrade” and “people who cherish similar aspirations.” The Institute for Tongzhi Studies, Mission Statement, at <http://www.tongzhistudies.org/about/about.html> (last visited May 5, 2004) [hereinafter Institute]; CHOU WAH-SHAN, *supra*, at 1. Chinese Communists adopted the term to refer to their co-revolutionaries. Institute, *supra*; CHOU WAH-SHAN, *supra*, at 1. In 1989, a Hong Kong gay activist appropriated it for Hong Kong's first Lesbian and Gay Film Festival because the more traditional term, *tongxing lian*, had overtones of medical pathology. Institute, *supra*; CHOU WAH-SHAN, *supra*, at 2. Even though homosexuality is no longer classified as a medical illness in Hong Kong, activists sought a more open and inclusive term. The term *tongzhi*, unlike some common Western terms like homosexual, does not overtly reference sexual

the struggle for legal recognition of gay relationships. In September 2003, Roddy Shaw Kwok-wah and his partner of five years, Nelson Ng Chin-pang, traveled to Toronto, Canada, where same-sex marriages are legal, to get married.³ Since then, they have returned to Hong Kong and so far unsuccessfully tried to gain legal recognition of their marital status.⁴ They want to further Hong Kong's gay rights movement by convincing the Hong Kong government to affirm their relationship's legitimacy.⁵ Although their overseas marriage has raised awareness of same-sex marriage issues in a way that may contribute to the eventual legalization of gay marriage in Hong Kong, a conflict of laws analysis demonstrates the slim likelihood that they will succeed in persuading the Hong Kong government to ultimately recognize their marriage.

Freedom to choose a marriage partner is fundamental to the unencumbered establishment of one's identity. Almost any married person can describe a litany of ways in which life changed after getting married. Government, community, and family all treat the married person differently. The preamble of almost any judicial opinion regarding marriage, gay or otherwise, will make some reference to the vital importance of the institution of marriage to the stability of society.⁶ For both a married couple and their children, marriage "provides an abundance of legal, financial, and social benefits [and in] return it imposes weighty legal, financial, and social obligations."⁷ It is no wonder, then, that gays and lesbians in the United States, Hong Kong, and many other countries around the world are becoming increasingly vocal about gaining access to those fundamental rights for themselves and their chosen life partners.⁸

practice. CHOU WAH-SHAN, *supra*, at 3. *Tongzhi* has been adopted at this point by a diverse community of people with alternative lifestyles – lesbians, gays, bisexuals and transgendered people. Institute, *supra*.

³ Ravina Shamdassani, *Gay "Newlyweds" Threaten Legal Action*, SOUTH CHINA MORNING POST, Oct. 6, 2003, at 3. Currently, two provinces in Canada, Ontario and British Columbia, have legalized gay marriage. For a thoughtful analysis of the 1999 Supreme Court of Canada decision that held denying same-sex couples the statutory rights enjoyed by opposite-sex couples was unjustified discrimination, see Nicholas Bala, *The Charter of Rights & Family Law in Canada: A New Era*, 18 CAN. FAM. L.Q. 373.

⁴ Shamdassani, *supra* note 3, at 3.

⁵ *Id.*

⁶ *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 948 (Mass. 2003).

⁷ *Id.*

⁸ Gay rights groups seeking legal marriage abound. *See, e.g.*, Freedom to Marry, at <http://www.freedomtomarry.org/> (last visited Feb. 6, 2004) (Freedom to Marry is a "gay and non-gay partnership working to win marriage equality nationwide."); Lambda Legal, at <http://www.lambdalegal.org/> (last visited Feb. 6, 2004) (Lambda Legal is a "national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, the transgendered, and people with HIV or AIDS through impact litigation, education, and public policy work."); Marriage Equality, at <http://www.marriageequality.org/> (last visited Feb. 6, 2004) (Marriage Equality works to "secure the freedom and the right of same-sex couples to enter a legally-recognized civil marriage having all the federal and state benefits and responsibilities which that entails.").

Marriage has been an unattainable goal for gays and lesbians around the world until recently. In 2001, the Netherlands legalized same-sex marriage⁹ and in 2003, Belgium and some provinces in Canada followed suit.¹⁰ A significant number of countries in Northern and Western Europe have provided for same-sex registered partnerships with varying benefits and burdens.¹¹ Changing social mores have prompted reinterpretation of marriage's long-standing definition and begun a revolution of the institution. Despite growing tolerance internationally, proponents of gay rights watch anxiously to see if their own countries and states will allow same-sex marriages and grant them status equal to heterosexual marriages.

While Hong Kong and the United States are on opposite sides of the globe, and Hong Kong's social and cultural milieu is generally less accepting of alternative lifestyles than the United States', similar bases for relevant legal analysis of gay rights to marriage exist in both places. Both Hong Kong and the United States are common law systems with similar bills of rights that provide a basis for analogy and for examining the tensions created by agitation for same-sex marriage rights. Further, both jurisdictions have decriminalized sodomy: Hong Kong in 1991,¹² the United States in 2003.¹³ Neither one has sexual orientation anti-discrimination legislation on a national level, nor provides for any form of domestic partnership. The United States has even promulgated a federal law explicitly refusing to recognize same-sex marriage for federal purposes.¹⁴ The issue is immediately current in the courts of both places in the form of a recent victory for same-sex marriage in Massachusetts in the United States, and a challenge for recognizing a foreign same-sex marriage in Hong Kong by Messrs. Shaw and Ng. This conjunction, coupled with the fact that Hong Kong gay rights leaders are looking to similarities between written U.S. and Hong Kong law as a source of rights at home, renders the comparison of U.S. and Hong Kong law relevant.

If a forum refuses to adopt gay marriage, proponents likely will not be able to force acceptance merely by marrying under foreign laws because

⁹ *Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004, 2004 (2003) [hereinafter *Differing Paths*].

¹⁰ *Id.* at 2004-05.

¹¹ *Differing Paths*, *supra* note 9, at 2007-08. Countries allowing for same-sex registered partnerships or some form of same-sex union include Denmark, Norway, Sweden, Iceland, Finland, Hungary, France, Germany and Portugal. *Id.* at 2008.

¹² See Hong Kong Crimes Ordinance (Cap. 200 § 118M). Hong Kong generally refers to the act as "buggery," which is defined in relevant part as "sodomy." BLACK'S LAW DICTIONARY 189 (7th ed. 1999). Sodomy is defined as "oral or anal copulation between humans, esp[ecially] homosexuals." *Id.* at 1396.

¹³ See *Lawrence v. Texas*, 123 S. Ct. 2472, 2472 (2003).

¹⁴ Defense of Marriage Act of 1996, 28 U.S.C. § 1738C (2000).

conflict of laws doctrine affords courts discretion to invalidate most such marriages.¹⁵ Decisions like *Goodridge v. Dep't of Pub. Health*¹⁶ and situations like Messrs. Shaw and Ng have prompted backlash against gay marriage, even though an analysis under the conflicts of law doctrine suggests that gay marriage cannot be imported successfully from one forum into another. In the United States, such backlash led to the Defense of Marriage Act of 1996 ("DOMA"), a law that, for federal purposes, defines marriage as a union between a man and a woman and that allows states to refuse to recognize gay marriages permitted by sister states.¹⁷ Many U.S. states have enacted similar laws at the state level.¹⁸ Even without these types of laws, courts have been able to invalidate polygamous or interracial marriages that are or have been repugnant to a forum under the conflicts of law doctrines.¹⁹ Similar doctrine in Hong Kong likewise prevents the importation of gay marriage.²⁰

Absent legislative change, only a direct challenge, an individual suing for the right to marry within a legal system, can possibly force the Hong Kong or U.S. government to legalize same-sex marriage. The cases discussed herein suggest strategies that potentially could be used to bring successful challenges both in Hong Kong and the United States. In Hong Kong, the failure to pass anti-discrimination legislation on the basis of sexual orientation suggests that the time is not ripe for a direct challenge. With greater signs of domestic social acceptance and a growing preponderance of international precedent, however, Messrs. Shaw and Ng could conceivably bring a direct challenge to Hong Kong's marriage laws.

This Comment analyzes different methods for reforming marriage laws in the United States and Hong Kong, and assesses the potential success of each. Part II traces the events leading to the decriminalization of sodomy in Hong Kong and the resulting development of Hong Kong's gay rights movement. Part III discusses the legal means to change laws with respect to same-sex marriage from within a particular forum. Part IV analyzes the likelihood of successfully importing same-sex marriage to a resistant forum and concludes that the conflicts of laws doctrines of both the United States

¹⁵ See *infra* Part IV.

¹⁶ See *infra* Part III.A.2.

¹⁷ 28 U.S.C. § 1738C.

¹⁸ Human Rights Campaign, *Laws Affecting GLBT People*, at

http://www.hrc.org/Template.cfm?Section=Civil_Marriage&Template=/CustomSource/Law/LawLegislationSearch.cfm&Submitted=1&KeywordCode=19&StatusInd=lawcurrent&Sort=c3 (last visited Apr. 29, 2004).

¹⁹ See *infra* Part IV.

²⁰ See *infra* Part IV.B.

and Hong Kong are unlikely to permit such an importation. Part V compares internal and external challenges to marriage laws and argues that internal challenges are far more likely to result in lasting change to domestic marriage laws than external challenges.

II. A BRIEF HISTORY OF GAY RIGHTS IN HONG KONG

The decriminalization of sodomy in Hong Kong provides a pertinent example of how law regarding gays and lesbians can change, and the circumstances that allow it to happen. Hong Kong's decriminalization of sodomy in 1991 paved the way for Messrs. Shaw and Ng to seek marriage rights. Further, decriminalizing sodomy provides insight into the legal arguments that might persuade a court to rule that Hong Kong's marriage laws extend to same-sex couples.

The attitude in Hong Kong towards homosexuality has changed over the course of the last twenty-five years, providing the basis for changes in the law. As a British colony, much of Hong Kong law stemmed from British law, including prohibitions against sodomy.²¹ Although Britain repealed its anti-sodomy laws in 1967, Hong Kong's laws remained unchanged until a series of public allegations of homosexuality galvanized the gay rights movement in the late 1970s and early 1980s.²² Forces set in motion by the agreement between the People's Republic of China ("PRC") and Great Britain to return sovereignty to the PRC highlighted civil rights issues in Hong Kong. In June 1989, the massacre in Beijing following student protests catalyzed political change and ultimately resulted in the passage of a Hong Kong Bill of Rights. The Bill of Rights allowed the decriminalization of sodomy in Hong Kong and, in turn, opened the doors for the growth of a gay rights movement. Even with these changes, however, Hong Kong still appears to be a long way from legalizing gay marriage.

A. *The Massacre in Beijing During the Transfer of Sovereignty Period Forced the Issue of Civil and Political Rights in Hong Kong*

Although both Great Britain and the PRC have had sovereignty over Hong Kong, it still maintains an independent legal system, and is thus not

²¹ For a history of the origins of Hong Kong's anti-sodomy laws, see Katherine O'Donovan, *Sexual Freedom*, in CIVIL LIBERTIES IN HONG KONG 302, 306-07 (Raymond Wacks ed., 1988).

²² See Carole J. Petersen, *Values in Transition: The Development of the Gay and Lesbian Rights Movement in Hong Kong*, 19 LOY. L.A. INT'L & COMP. L.J. 337 (1997). See also THE LAW REFORM COMMISSION OF HONG KONG, REPORT ON LAWS GOVERNING HOMOSEXUAL CONDUCT (TOPIC 2) 2-3 (1983) [hereinafter COMMISSION].

bound by legal precedent in either country with respect to gay marriage. During the early 1980s, homosexuality became a sensitive issue in Hong Kong due to increased enforcement of anti-sodomy legislation and the highly publicized death of an allegedly gay police inspector on the morning of his arrest.²³ The Hong Kong government consequently initiated a study of sodomy law, which concluded in 1983 that anti-sodomy laws should be repealed.²⁴ At about the same time, Great Britain and the PRC agreed to the terms of the Sino-British Joint Declaration that would return Hong Kong to PRC rule in 1997.²⁵ In this treaty, the PRC promised to preserve the economic and social status quo in Hong Kong²⁶ and pledged to maintain Hong Kong law, unchanged, for fifty years²⁷ under the motto, "one country, two systems."²⁸

Pursuant to the treaty, the PRC also agreed to create the Basic Law of the Hong Kong Special Administrative Region ("HKSAR"), which essentially operates as Hong Kong's constitution.²⁹ Article 83 of the Basic Law allows the courts to refer to precedent from other common law jurisdictions and essentially has preserved much of Hong Kong's common law court system.³⁰ Hong Kong law therefore remains distinct from Chinese law.³¹

The Beijing massacre started a chain reaction that led ultimately to the decriminalization of sodomy. Historically, Hong Kong has endeavored to maintain a laissez-faire economy in order to attract foreign business and maintain its status as a global business center.³² In this commerce-driven environment, human rights received little attention, especially in a colony

²³ Petersen, *supra* note 22, at 342.

²⁴ The Commission reached this conclusion eight years before it actually happened. For the Hong Kong Law Commission's published findings, see COMMISSION, *supra* note 22.

²⁵ Joint Declaration of the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the People's Republic of China on the Question of Hong Kong, Dec. 19, 1984, P.R.C.-U.K., at <http://www.info.gov.hk/trans/jd/> (last visited May 5, 2004) [hereinafter Joint Declaration]. The Joint Declaration was ratified in May 1985. *Id.*

²⁶ *Id.* § 3(5).

²⁷ *Id.* § 3(12).

²⁸ THE BASIC LAW, pmb. (Cap. 2101) (asserting that "under the principle of 'one country, two systems', the socialist system and its policies will not be practised in Hong Kong"). The Chinese Premier, Jiang Zemin, vowed at the handover that Hong Kong would continue to administer itself without interference from Chinese officials. RODA MUSHKAT, CHINA AND HONG KONG IN LEGAL TRANSITION 163 (Joseph W. Dellapenna & Patrick M. Norton eds., American Bar Association 2000).

²⁹ Joint Declaration, *supra* note 25, § 3(12); see YASH GHAI, HONG KONG'S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW 35 (2d ed. 1999).

³⁰ RAYMOND WACKS, LAW, MORALITY, AND THE PRIVATE DOMAIN 39 (2000).

³¹ GHAI, *supra* note 29, at 81.

³² Carole J. Petersen, *Hong Kong's First Anti-Discrimination Laws and their Potential Impact on the Employment Market*, 27 H.K. L.J. 324, 324 (1997).

where the residents did not have representative government.³³ The traditional political complacency of Hong Kong's citizens changed drastically after the PRC's violent suppression of student demonstrations in Beijing in June 1989.³⁴ The highly publicized massacre halfway through the transition period from British to PRC rule catapulted the issues of democracy and civil liberties to the forefront, as Hong Kong watched the clock ticking down to the handover.³⁵ Despite a history of political inactivity, more than one million Hong Kong citizens marched in "fear[] that the PRC would not adhere to the Joint Declaration and Basic Law."³⁶ Hong Kong citizens suddenly regarded with skepticism the promises made in the Joint Resolution and the Basic Law to maintain HKSAR's status quo.³⁷ Fears of the inadequacy of common law protection of human rights gave rise to demands for a bill of rights.³⁸

B. The Hong Kong Bill of Rights Incorporated the International Covenant on Civil and Political Rights into Hong Kong Law and Led to the Decriminalization of Sodomy

To reassure its people that the status quo would remain when sovereignty returned to the PRC, the Hong Kong government proposed a bill of rights in late 1989 that reiterated international civil rights norms.³⁹ The Hong Kong Bill of Rights Ordinance ("Bill of Rights") explicitly incorporated the International Covenant on Civil and Political Rights ("ICCPR"), an international treaty defining civil rights to be afforded all people.⁴⁰ By incorporating the ICCPR into the Bill of Rights, Hong Kong left little room for the PRC to object to its contents, because the PRC already

³³ Raymond Wacks, *Introduction*, in HUMAN RIGHTS IN HONG KONG 1, 1 (Raymond Wacks ed., 1992). As of spring 2003, voters directly elected only one third of the local legislature; the rest were appointed. Doreen Weisenhaus, *One Country, One System?*, 2003-APR. LEGAL AFFAIRS (2003).

³⁴ Wacks, *supra* note 33, at 1-2.

³⁵ *Id.* at 2.

³⁶ Petersen, *supra* note 22, at 345.

³⁷ Wacks, *supra* note 33, at 2.

³⁸ *Id.*

³⁹ H. L. Fu & Richard Cullen, *National Security Law in Hong Kong: Quo Vadis A Study of Article 23 of the Basic Law of Hong Kong*, 19 U.C.L.A. PAC. BASIN L.J. 185, 200-01 (2002).

⁴⁰ Petersen, *supra* note 32, at 345-46. The ICCPR is a United Nations international treaty. International Covenant on Civil and Political Rights, art. 19, opened for signature Dec. 19, 1966, 999 U.N.T.S. 171, available at http://www.unhchr.ch/html/menu3/b/a_ccpr.htm (last visited Jan. 28, 2004) [hereinafter ICCPR]. As Hong Kong's new sovereign, China deposited a letter with United Nations Secretary-General Kofi Annan on June 20, 1997, informing him that "[t]he provisions of the [ICCPR] and the International Covenant on Economic, Social and Cultural Rights shall remain in force beginning from 1 July 1997." *Recent Actions Regarding Treaties to which the United States is not a Party*, 36 I.L.M. 1671 (Nov. 1997), available at <http://www.hku.hk/ccpl/database/prclette.htm> (last visited Oct. 29, 2003).

had agreed the ICCPR should remain in force in Hong Kong.⁴¹ The Bill of Rights became effective on June 8, 1991⁴² and remained in operation after Hong Kong returned to the PRC.⁴³

The passage of Hong Kong's Bill of Rights influenced the debate over anti-sodomy law.⁴⁴ The ICCPR protects a right to privacy in Article 17,⁴⁵ which is repeated verbatim in the Bill of Rights: "(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honor and reputation. (2) Everyone has the right to the protection of the law against such interference or attacks."⁴⁶ This right to privacy could have supported a challenge to Hong Kong's anti-sodomy laws.⁴⁷ The *Dudgeon* case, decided in 1981 and the leading international decision regarding privacy and homosexual acts at the time, would have further girded such a challenge.⁴⁸ In this case, the European Court of Human Rights ruled that Northern Ireland's anti-sodomy laws breached Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which protects a right to privacy similar to the ICCPR.⁴⁹ The Legislative Council,

⁴¹ Petersen, *supra* note 22, at 346-47. In 1976, Great Britain had originally ratified the ICCPR for itself and Hong Kong. *Id.* at 347. In 1984, the PRC agreed to maintain the ICCPR's effect in Hong Kong via Article 39 of the Basic Law, so the Hong Kong government believed this reiteration would be hard to find objectionable. *Id.* See also GHAI, *supra* note 29, at 51. Article 39 provides that "[t]he provisions of the [ICCPR] . . . as applied to Hong Kong shall remain in force and shall be implemented through the laws of the [HKSAR]." The Bill of Rights remained in operation after Hong Kong returned to the PRC with the exception of only a few provisions. Lin Feng, *The Development of Jurisprudence of the Court of Final Appeal in Basic Law Litigation*, 5 J. CHINESE & COMP. L. 21, 43 (2001-2002). Following the British tradition, Hong Kong law only gives effect to international treaties if they are implemented by subsequent legislation. *Id.* (citations omitted). As a result, the Bill of Rights gave the ICCPR full effect in Hong Kong. *Id.* at 41-42.

⁴² Hong Kong Bill of Rights Ordinance (Cap. 383). For a general history of the Bill of Rights published by the Hong Kong government, see <http://www.info.gov.hk/info/billrght.htm> (last visited May 9, 2004).

⁴³ Feng, *supra* note 41, at 43. A handful of the Bill's provisions were repealed on handover to the PRC. For an analysis of the effect of the removed provisions, see Peter Wesley-Smith, *Maintenance of the Bill of Rights*, 27 H.K. L.J. 15 (1997). For a contrasting view, see Roda Mushkat, *Scrapping Hong Kong Legislation: An International Law Perspective*, 27 H.K. L.J. 12 (1997).

⁴⁴ Petersen, *supra* note 22, at 349.

⁴⁵ ICCPR, *supra* note 40.

⁴⁶ Hong Kong Bill of Rights Ordinance (Cap. 383 § 8). Bill of Rights' §3 allowed courts to invalidate provisions of law that were inconsistent with the Bill of Rights, but the PRC repealed that particular section along with a couple of others. See Feng, *supra* note 41, at 43. Professor Wesley-Smith reasons that the repeal of this section was unimportant because it merely codified a principle of common law. Wesley-Smith, *supra* note 43, at 16.

⁴⁷ Petersen, *supra* note 22, at 349.

⁴⁸ *Dudgeon v. United Kingdom*, (1982) 4 E.H.R.R. 149; Petersen, *supra* note 22, at 347-48.

⁴⁹ *Dudgeon v. United Kingdom*, (1982) 4 E.H.R.R. 149. Hong Kong courts generally refer to a variety of external sources when interpreting its Bill of Rights, including international law. Petersen, *supra* note 22, at 347. More importantly, Ireland's anti-sodomy laws at the time were identical to Hong Kong's. *Id.* at 348. The U.S. Supreme Court cited the *Dudgeon* Case in *Lawrence v. Texas* as an example of how its

conscious of the pending enactment of the Bill of Rights, voted to decriminalize male homosexual conduct in private between those twenty-one years of age and older in the Crimes (Amendment) Bill of 1991.⁵⁰

C. Hong Kong's Gay Rights Movement in the 1990s

Although not yet successful in passing anti-discrimination laws, the Hong Kong gay rights movement is growing stronger. This movement was virtually nonexistent during the events leading up to the decriminalization of sodomy. Today, it has become an outspoken minority led by activists such as Roddy Shaw Kwok-wah of Hong Kong's Civil Rights for Sexual Diversities.⁵¹ Although two separate efforts to pass anti-discrimination (on the basis of sexuality) legislation failed in the 1990s,⁵² the Hong Kong government has acknowledged a need for some measure of protection for gays and lesbians.⁵³ In 1996, the Hong Kong government issued a short brochure condemning sexuality-based discrimination and attempting to demystify homosexuality, but subsequently has not addressed the issue.⁵⁴ The Home Affairs Bureau, a policy bureau within the Hong Kong government, has also promulgated a code of practice against such discrimination.⁵⁵ While these measures fall short of legislation, they slowly foster acceptance and create a more permissive atmosphere that has allowed Hong Kong's gay rights movement to grow.

Like the gay rights movement in the United States, Hong Kong's *tongzhi* seek equal treatment, including the right to marry or have their

decision in *Bowers v. Hardwick* was at odds with modern Western thought. 123 S. Ct. 2472, 2481 (2003) (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)). In *Bowers*, the Court upheld a Georgia statute prohibiting private, consensual sodomy, regardless of whether the parties were of the same sex. 478 U.S. 186 (1986). *Lawrence* overruled *Bowers*, holding that a Texas law prohibiting private, consensual same-sex sodomy was unconstitutional because it violated the Due Process clause of the Fourteenth Amendment. 123 S. Ct. 2472, 2484 (2003).

⁵⁰ Petersen, *supra* note 22, at 350. See Hong Kong Crimes Ordinance (Cap. 200 § 118M).

⁵¹ Civil Rights for Sexual Diversities is a non-governmental organization "working for the rights of people who may be disadvantaged by the law, policies and social prejudices in Hong Kong because of their sexual orientation, gender identity, sexual expression and HIV status." Civil Rights for Sexual Diversities, <http://www.cr4sd.org/> (last visited May 9, 2004).

⁵² Petersen, *supra* note 22, at 351.

⁵³ *Gay Marriage is an Issue that Must be Faced*, SOUTH CHINA MORNING POST, Oct. 6, 2003 at 3.

⁵⁴ Petersen, *supra* note 22, at 361. The original brochure can be seen at http://www.hab.gov.hk/en/policy_responsibilities/the_rights_of_the_individuals/sexual1.htm (last visited May 13, 2004).

⁵⁵ Code of Practice Against Discrimination in Employment on the Ground of Sexual Orientation, at http://www.hab.gov.hk/en/policy_responsibilities/the_rights_of_the_individuals/sexual.htm (last visited May 13, 2004).

foreign same-sex marriages recognized.⁵⁶ The efforts of Roddy Shaw Kwok-wah recently culminated when he and his partner, Nelson Ng Chin-pang, married in Toronto, Canada, where same-sex marriages are legal.⁵⁷ Previously the couple had celebrated a non-marriage civil union under Vermont law.⁵⁸ When they returned to Hong Kong and sought a joint tax assessment, however, the Inland Revenue Department refused their request because a civil union did not qualify as a marriage under Hong Kong law.⁵⁹ Now that the two have legally married, they hope to appeal the Inland Revenue Department's decision by arguing that their Toronto marriage fits within the Inland Revenue Ordinance's criteria for recognition of marriages celebrated overseas.⁶⁰ In September 2003, Messrs. Shaw and Ng received a letter denying the joint assessment for procedural reasons without reaching the issue of their marital status.⁶¹ They plan to bring suit if they do not receive satisfaction from the department.⁶²

The gay rights movement has grown since the legalization of private, consensual homosexual conduct in 1991. The promulgation of an unenforceable anti-discrimination policy reflects limited progress. The government has acknowledged a problem, but as yet lacks the impetus and perhaps wider societal support to do more. Hong Kong's evolution to date respecting the rights of gays and lesbians suggests that same-sex couples are far from gaining access to marriage, but also provides the building blocks for creating a legal basis for securing those rights.

III. SAME-SEX MARRIAGE: LEGAL CHALLENGES FROM WITHIN A FORUM ARE MORE LIKELY TO EFFECT CHANGE

Change in societal and legal norms regarding an issue like the legalization of homosexual rights or same-sex marriage generally comes slowly, but such change is more likely to occur if it comes from within a forum. Individual U.S. states like Hawaii and Massachusetts have come close to legalization by striking down heterosexist marriage laws on equal

⁵⁶ The resumption of sovereignty by the PRC has not had a discernible impact on the movement's growth. Email from Carole Petersen, Associate Professor and Director, Centre for Comparative & Public Law, Faculty of Law, University of Hong Kong, to author (Nov. 6, 2003) (on file with author).

⁵⁷ Shandasani, *supra* note 3, at 3.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

protection and privacy grounds.⁶³ While these cases may provide useful precedent for litigants in Hong Kong and other places, the social environment must be hospitable to achieve legal change.⁶⁴

A. Recent U.S. Cases from Massachusetts and Hawaii Demonstrate Potentially Effective Arguments for Challenging Heterosexist Marriage Laws from within a Forum

Two U.S. cases, *Baehr v. Lewin* and *Goodridge v. Dep't of Pub. Health*, provide examples of effective legal arguments courts can use to strike down discriminatory marriage laws.⁶⁵ These decisions, based on various equal protection and privacy analyses, have broad implications because many jurisdictions, including Hong Kong, promise their citizens similar rights under their own laws.⁶⁶ Gay rights activists in Hong Kong should attempt to use *Baehr* and *Goodridge* as persuasive authority to bring suits in their own jurisdiction. Although these decisions reflect radical change in the American legal system, they are only small steps toward overall national legalization of same-sex marriage.

1. Hawaii's Approach: Equal Protection and Strict Scrutiny

The Hawaii Supreme Court used the Hawaii State Constitution's equal protection clause to strike down Hawaii's marriage law under a strict scrutiny analysis.⁶⁷ The court applies strict scrutiny to:

laws classifying on the basis of suspect categories or impinging upon fundamental rights expressly or impliedly granted by the

⁶³ See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

⁶⁴ U.S. decisions are not the only source of useful precedent for Hong Kong. Belgium and the Netherlands, however, countries which have legalized gay marriage and might as such provide a natural example, are civil law countries, and do not provide the same common law precedent. Canada provides common law precedent, but is outside the scope of this Comment. For a brief introduction to events there, see Michelle Mann, *Will Canada Lead the Way in Same-Sex Marriages?*, 2 NO. 27 A.B.A. J. E-Report 5 (Jul. 11, 2003).

⁶⁵ See *Baehr*, 852 P.2d at 44; *Goodridge*, 798 N.E.2d at 941.

⁶⁶ See, e.g., ICCPR *supra* note 40, art. 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"); *id.* art. 17(1) ("No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation").

⁶⁷ *Baehr*, 852 P.2d at 59-60.

constitution, in which case the laws are presumed to be unconstitutional unless the state shows compelling state interests which justify such classifications and that the laws are narrowly drawn to avoid unnecessary abridgments of constitutional rights.⁶⁸

Hawaii's equal protection clause provides: "[n]o person shall . . . be denied the equal protection of the laws, nor be denied the enjoyment of the person's civil rights or be discriminated against in the exercise thereof because of race, religion, sex, or ancestry."⁶⁹ Hong Kong's Bill of Rights contains a similar provision:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁷⁰

While strict scrutiny is an analytic framework specific to U.S. law, the underlying analysis, that opposite-sex marriage laws restrict rights based on sex, could be relevant to challenging Hong Kong law.

As demonstrated by the Hawaiian Supreme Court's decision in *Baehr v. Lewin*,⁷¹ close scrutiny of a law might necessitate legalizing same-sex marriage in forums that treat sex as a protected class. Hawaii's marriage statute restricted marriage to opposite-sex couples by its plain language.⁷² In 1993, the court held that the Hawaii Department of Health's refusal to grant marriage licenses to same-sex couples pursuant to this statute violated the equal protection clause in the state constitution.⁷³ Unlike the Fourteenth Amendment, which does not specify sex as a protected class, Hawaii's equal

⁶⁸ *Id.* at 63-64 (internal quotations omitted) (citing *Holdman v. Olim*, 581 P.2d 1164, 1167 (1978); *Nagle v. Bd. of Educ.*, 629 P.2d 109, 111 (1981)).

⁶⁹ HAW. CONST. art. I, § 5.

⁷⁰ Hong Kong Bill of Rights Ordinance (Cap. 383 § 8, pt. II, art. 22).

⁷¹ See *Baehr*, 852 P.2d at 44.

⁷² *Id.* at 60 (citing HAW. REV. STAT. § 572-1).

⁷³ *Id.* at 54.

protection clause provides specifically that sex shall not be a basis for denying equal protection of the law.⁷⁴

The *Baehr* court determined that the statute deprived the plaintiffs of a state-conferred legal status on the basis of sex, “giv[ing] rise to the question whether the [plaintiff] couples ha[d] been denied the equal protection of the laws in violation of . . . the Hawaii Constitution.”⁷⁵ The court therefore presumed the statute unconstitutional under a “strict scrutiny” test, requiring the state to show that “the statute’s sex-based classification is justified by compelling state interests and the statute is narrowly drawn to avoid unnecessary abridgements of the [plaintiffs’] constitutional rights.”⁷⁶ The court then remanded the case for further proceedings in which the burden would be on the state to show that the marriage statute met the strict scrutiny standard.⁷⁷

In contrast to its equal protection analysis, the *Baehr* court held that the right to privacy does not include a “[f]undamental [r]ight to [s]ame-[s]ex [m]arriage.”⁷⁸ According to the 1978 Hawaii Constitutional Convention proceedings, the right to privacy in Hawaii’s state constitution was analogous to the federal right.⁷⁹ Under federal jurisprudence, the right to marry is “part of the fundamental right of privacy implicit in the Fourteenth Amendment’s Due Process Clause.”⁸⁰ This right is “inextricably linked to the right of procreation” and thus “contemplate[s] unions between men and women.”⁸¹ The question for the *Baehr* court was therefore whether same-sex couples possessed “a fundamental right to marry,” which effectively would have extended the boundaries of the fundamental right of marriage.⁸² The *Baehr* court refused to do so, determining that the right to same-sex marriage was not “so rooted in the traditions and collective conscience of

⁷⁴ See *id.* at 59-60 (citing HAW. CONST. Art. I, § 5). While the Fourteenth Amendment does not list sex as a protected class, the Supreme Court has interpreted the amendment to require a level of intermediate scrutiny for laws based on gender. See, e.g., *United States v. Virginia*, 518 U.S. 515, 558 (1996) (striking down Virginia Military Institute’s rule limiting enrollment to men; classifications by sex must have an “exceedingly persuasive justification,” and the State has the burden of showing that gender-based discrimination serves an important governmental objective and is substantially related to achievement of that objective).

⁷⁵ *Baehr*, 852 P.2d at 59-60.

⁷⁶ *Id.* at 67.

⁷⁷ See *id.* at 68.

⁷⁸ *Id.* at 54-55.

⁷⁹ Comm. Whole Rep. No. 15, in *1 Proceedings of the Constitutional Convention of Hawaii of 1978*, at 1024 (1980) (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973)).

⁸⁰ *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978).

⁸¹ *Baehr*, 852 P.2d at 55-56 (citing *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Zablocki*, 434 U.S. at 374).

⁸² See *id.* at 56.

our people that failure to recognize it would violate the fundamental principles of liberty and justice that lie at the base of all our civil and political institutions.”⁸³

In response to the *Baehr* decision, Congress passed DOMA, which restricted marriage to opposite-sex couples for federal purposes, to prevent sister states from having to recognize gay marriages performed in Hawaii.⁸⁴ Moreover, the Hawaii legislature drafted an amendment to the state constitution that voters overwhelmingly approved in 1998.⁸⁵ The new section states that “[t]he legislature shall have the power to reserve marriage to opposite-sex couples.”⁸⁶ The Hawaii Supreme Court ruled in 1999 that the amendment resolved the issue of gay marriage in Hawaii and closed the subject.⁸⁷ Speculation regarding the impact of one state legalizing same-sex marriage on sister states, however, remained untested.

2. *Massachusetts’ Approach: Equal Protection and Rational Basis Review*

In a forum where sex is not a protected class under law, equal protection and privacy rights, both protected by the Hong Kong Bill of Rights,⁸⁸ can still provide a basis for legalizing gay marriage. The Massachusetts Supreme Judicial Court used these constitutional rights to legalize same-sex marriage in *Goodridge v. Dep’t of Pub. Health*.⁸⁹ Massachusetts General Laws chapter 207 provides minimal gate-keeping provisions with respect to who may marry, including commonly accepted prohibitions regarding consanguinity, polygamy, and nonage (being too young to marry under the law).⁹⁰ The court interpreted this licensing statute to impliedly prohibit gay marriage based on the statutory language used to

⁸³ *Id.* at 57. This standard derives from Justice’s Goldberg’s concurring opinion in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

⁸⁴ See 28 U.S.C. § 1738C (2000); Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965, 1966 (1997); see also *infra* Part IV.A.5.

⁸⁵ Lyle Denniston, *Voters in Alaska, Hawaii Defeat Initiatives on Homosexual Marriage*, BALTIMORE SUN, Nov. 5, 1998, at 15A.

⁸⁶ HAW. CONST. art. I, § 23.

⁸⁷ *Hawaii’s High Court Rules Gay Marriage Issue Closed*, L.A. TIMES, Dec. 11, 1999, at A17. The Hawaii Circuit Court on remand had reversed the original ruling against the parties on the basis of the supreme court’s first decision. The constitutional amendment then forced the supreme court to reverse the circuit court’s ruling for the plaintiffs. *Id.*

⁸⁸ See Hong Kong Bill of Rights Ordinance (Cap. 383 § 8, pt. II, arts. 14, 22).

⁸⁹ See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

⁹⁰ MASS. GEN. LAWS ch. 207 §§ 1-14 (1998).

describe the consanguinity provisions, which prohibit marriages between certain male and female relatives.⁹¹

The court reviewed both due process and equal protection arguments, which “frequently overlap [in matters implicating marriage, family life and the upbringing of children].”⁹² The court noted that marriage is a state-created and -governed institution with “enormous” benefits, “touching nearly every aspect of life and death.”⁹³ Moreover, the court found that a married couple’s children benefit from a series of legal and economic protections stemming directly from the fact of their parents’ marriage.⁹⁴ The court went on to call marriage a civil right, not to be denied for trivial reasons.⁹⁵ Further, unlike the *Baehr* court, the *Goodridge* court considered the right to marry part of the “fundamental right of privacy implicit in the Fourteenth Amendment’s Due Process Clause.”⁹⁶

Unlike the *Baehr* court, the *Goodridge* court held that prohibiting same-sex marriages did not meet the rational basis test without ever reaching the issue of whether sex is a suspect class under the Massachusetts Constitution.⁹⁷ Under the Massachusetts Constitution, equal protection and due process both require that a statute have a legitimate purpose that is rationally related to the legislative scheme in question for it to be constitutional.⁹⁸ The standard for equal protection requires that “an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class.”⁹⁹ The standard for due process requires that “statutes bear[] a real and substantial relation to the public health, safety, morals, or some other phase of the general welfare.”¹⁰⁰ The court held that Massachusetts’ ban on same-sex marriages did not meet either standard on a rational basis, and therefore did not reach the issue of whether sex was a

⁹¹ See *Goodridge*, 798 N.E.2d at 953.

⁹² *Id.* at 954.

⁹³ *Id.* at 955.

⁹⁴ See *id.* at 956.

⁹⁵ *Id.* at 957 (citing *Loving v. Virginia*, 388 U.S. 1, 12 (1967)).

⁹⁶ *Id.* (internal quotations omitted) (citing *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978)). Privacy was also the basis for the Supreme Court’s striking down anti-sodomy laws in *Lawrence v. Texas*, 123 S. Ct. 2472, 2483-84 (2003) (citing *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

⁹⁷ See *Goodridge*, 798 N.E.2d at 961.

⁹⁸ *Id.* at 960 (citing *Rushworth v. Registrar of Motor Vehicles*, 596 N.E.2d 340, 344 (Mass. 1992)).

⁹⁹ *Id.* (internal quotations omitted) (quoting *English v. New England Med. Ctr.*, 541 N.E.2d 329, 333 (Mass. 1989); *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 452 (1985) (Stevens, J., concurring)).

¹⁰⁰ *Id.* (internal quotations omitted) (citing *Coffee-Rich, Inc. v. Commissioner of Pub. Health*, 204 N.E.2d 281, 287 (Mass. 1965)).

suspect class requiring strict scrutiny.¹⁰¹ Rather than striking down the marriage laws in their entirety, however, the court “refined the common-law meaning of marriage” to mean “the voluntary union of two persons as spouses, to the exclusion of all others.”¹⁰² Since marriage is a statutory right, the court then gave the Massachusetts legislature one hundred and eighty days to take appropriate action.¹⁰³

The dissent in *Goodridge* is significant because it represents objections commonly faced by same-sex marriage proponents. Justice Cordy suggests that same-sex marriage is better handled by the legislature.¹⁰⁴ According to Justice Spina, no equal protection violation occurred because constitutional protections extend to individuals, not couples.¹⁰⁵ He argued that the marriage statutes did not discriminate on the basis of sex or sexual orientation because the Massachusetts marriage law did not show differential treatment between the sexes: neither men nor women may marry a person of the same sex.¹⁰⁶ The qualifications for obtaining a marriage certificate “create[] no distinction between the sexes, but appl[y] in precisely the same way.”¹⁰⁷

The dissent’s argument, however, misses the heart of the matter. In his concurrence, Justice Greaney pointed out that it is “disingenuous, at best, to suggest that such an individual’s right to marry has not been burdened at all, because he or she remains free to chose [sic] another partner, who is of the opposite sex.”¹⁰⁸ The U.S. Supreme Court rejected this reasoning in *Loving v. Virginia*, which struck down Virginia’s anti-miscegenation law as unconstitutional on both equal protection and due process grounds because equal application of the ban to both races could not cure its invidiousness.¹⁰⁹ Similarly, Massachusetts’ marriage laws cannot withstand constitutional

¹⁰¹ *Id.* at 961. The *Goodridge* court examined each of three legislative rationales proffered by the state for prohibiting same-sex marriages: “(1) providing a ‘favorable setting for procreation’; (2) ensuring the optimal setting for child rearing, which the department defines as ‘a two-parent family with one parent of each sex’; and (3) preserving scarce State and private financial resources.” *Id.* The court found none of these convincing. For the court’s detailed analysis of each of these rationales and their insufficiencies, see *id.* at 961-65.

¹⁰² *Id.* at 969 (citing the actions of the Court of Appeal for Ontario, the highest court of that Canadian province, on the same issue in *Halpern v. Toronto (City)*, 172 O.A.C. 276 (2003). Canada adopted the same common law definition of marriage from England as did the United States).

¹⁰³ *Id.* at 970.

¹⁰⁴ *Id.* at 983 (Cordy, J., dissenting).

¹⁰⁵ *Id.* at 975 (Spina, J., dissenting).

¹⁰⁶ *Id.* at 974-75 (Spina, J., dissenting).

¹⁰⁷ *Id.* at 974 (Spina, J., dissenting).

¹⁰⁸ *Id.* at 971 (Greaney, J., concurring).

¹⁰⁹ 388 U.S. 1, 8 (1967). For a thoughtful analysis of the relevance of anti-miscegenation laws to same-sex marriage, see Andrew Koppelman, *Same-Sex Marriage and Public Policy: The Miscegenation Precedents*, 16 QUINNIPIAC L. REV. 105 (1996).

scrutiny, even though they apply equally to both sexes.¹¹⁰ The comparison is important because such laws, like prohibitions against gay marriage, make one's choice of partner illegal based on an inherent characteristic.¹¹¹ The notion of forbidding marriage on the basis of race is shocking and offensive to modern sensibilities, which makes the analogy to same-sex marriage powerful as a tool for change. The analogy communicates the outrage and sense of marginalization felt by same-sex couples.

While the ultimate outcome in Massachusetts remains to be seen, reactions to the decision throughout the United States have been dramatic. Just like Congress passed DOMA in response to the *Baehr* decision, the response to the *Goodridge* decision has been fierce. President George W. Bush has promised to seek an amendment to the U.S. Constitution that defines marriage as a union between one man and one woman.¹¹² The federal amendment would prevent any state from legalizing gay marriage, even if the legislature wanted to pass such legislation.¹¹³ The state of Ohio, in direct response to *Goodridge*, passed a ban on gay marriage that goes further than any other state and prohibits the state from extending legal benefits of marriage to unmarried couples.¹¹⁴

In Massachusetts, Governor Mitt Romney is seeking a constitutional ban on same-sex marriage for his state constitution.¹¹⁵ Moreover, the state senate tried to avoid legalizing same-sex marriage by attempting to implement civil unions and requested an advisory opinion from the Massachusetts Supreme Judicial Court regarding the constitutionality of a civil union bill.¹¹⁶ Such a bill would be consistent with the thirty-seven states that have adopted "defense of marriage" initiatives, which restrict marriage to opposite-sex couples.¹¹⁷ The Massachusetts Supreme Judicial Court, however, rejected the notion that a civil union could provide a

¹¹⁰ *Goodridge*, 798 N.E.2d at 971-72 (Greaney, J., concurring).

¹¹¹ *See id.* at 958 (citing *Perez v. Sharp*, 728, 198 P.2d 17 (Cal. 1948) (striking down laws against interracial marriage); *Loving v. Virginia*, 388 U.S. 1 (1967)). There is still some debate as to whether sexual orientation is an inherent characteristic like race. Some U.S. federal cases regarding homosexuality have not applied heightened scrutiny under the Fourteenth Amendment on the basis that sexual orientation is not an inherent characteristic. *See, e.g., Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987).

¹¹² Molly McDonough, *Gay Marriage Decision Harks Back 55 Years*, 2 NO. 46 A.B.A. J. E-Report 1, 1 (2003).

¹¹³ Eric Shumsky, *The Amendment Speaks for Itself*, WASH. POST, Feb. 29, 2004, at B05. The text of the amendment reads: "Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups." *Id.*

¹¹⁴ Stephen Ohlemacher, *Taft Defends Gay-Marriage Ban*, PLAIN DEALER, Feb. 7, 2004, at B3.

¹¹⁵ McDonough, *supra* note 112, at 1.

¹¹⁶ Frank Phillips, *SJC Solicits Briefs on Civil Unions Mulls Request by Senate for Advisory Opinion*, BOSTON GLOBE, Dec. 17, 2003, at A1.

¹¹⁷ McDonough, *supra* note 112, at 1.

reasonable substitute for gay marriage, asserting that the difference between civil union and civil marriage “assign[s] . . . same-sex . . . couples to second class status.”¹¹⁸ The Massachusetts Legislature convened a constitutional convention in February 2004 and approved a proposed amendment to ban same-sex marriages and establish civil unions.¹¹⁹ Such an amendment will not prevent a change to Massachusetts’ marriage law because amending the constitution is a lengthy process, which takes at least three years, far beyond the 180-day stay granted by the court.¹²⁰ Governor Romney has publicly committed to doing whatever he can to avert the legalization of gay marriage in Massachusetts.¹²¹

3. *Baehr and Goodridge Provide Important Examples of Effective Means to Change Heterosexist Marriage Laws, but Only Begin the Process of Nationally Recognizing Same-Sex Marriage*

In the United States, recognition of same-sex marriages at the federal level requires incremental changes in law and society.¹²² The United States is a patchwork quilt of laws regarding gays and lesbians.¹²³ At the federal level, the U.S. Supreme Court struck down anti-sodomy laws in 2003, at which time nine out of fifty states still had such laws in effect.¹²⁴ The trend for same-sex marriage could follow a pattern similar to the decriminalization of sodomy. Sodomy was outlawed in most states for much of U.S.

¹¹⁸ Opinions of the Justices to the Senate, 2004 WL 202184, at *4 (Mass. Feb. 3, 2004).

¹¹⁹ Rick Klein, *Vote Ties Civil Unions to Gay-Marriage Ban; Romney to Seek Stay of SJC Order*, BOSTON GLOBE, Mar. 30, 2004, at A1.

¹²⁰ Raphael Lewis, *Weld, 2 Ex-AGs Urge Passage of Gay Marriage Law*, BOSTON GLOBE, Jan. 5, 2004, at A1. A majority of the 200 members of the legislature must approve the amendment in two successive sessions, and then voters must also approve it in a statewide election. *Id.* Some legislators are threatening to ignore the court’s ruling passing a bill to try to block it. This potentially upsets the separation of powers in Massachusetts, since the only legal way to contravene a constitutional decision by the court is to change the constitution. *Id.* See generally MASS. CONST. amend. XLVIII.

¹²¹ Klein, *supra* note 119, at A1.

¹²² Andrew Sullivan, senior editor for *The New Republic*, in a speech at a symposium hosted by Quinnipiac College School of Law, observed that while the notion of gay marriage existed in U.S. court cases as far back as the 1940s, “[n]o [legal] breakthrough occurred, partly because our understanding of the humanity and the equality of gay people had not evolved sufficiently to have entered the hearts and minds of enough people in this country. For judges had to absorb quietly the feeling and moral sentiment of people for that to have taken place.” Andrew Sullivan, *Recognition of Same-Sex Marriage*, 16 QUINNIPIAC L. REV. 13, 15 (1996).

¹²³ Much has been written about same-sex rights in America. Some good resources include: JAMES W. BUTTON ET AL., *PRIVATE LIVES, PUBLIC CONFLICTS: BATTLES OVER GAY RIGHTS IN AMERICAN COMMUNITIES* (1997); DAVID MOATS, *CIVIL WARS: GAY MARRIAGE IN AMERICA* (2004); WILLIAM N. ESKRIDGE, *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999).

¹²⁴ See *Lawrence v. Texas*, 123 S. Ct. 2472, 2474 (2003).

history.¹²⁵ Slowly, change came state-by-state until the U.S. Supreme Court finally struck down the remaining anti-sodomy laws.¹²⁶ While the decriminalization of sodomy in the United States may be viewed as the first fundamental step towards the legalization of same-sex marriage, gays and lesbians are still subject to discrimination at virtually every level of American life.¹²⁷ Although no anti-discrimination legislation exists at the federal level,¹²⁸ thirteen states prohibit discrimination on the basis of sexuality in both public and private employment, and ten states provide domestic partnership benefits for same-sex couples.¹²⁹ Eighty-five municipalities and counties in twenty-six states offer similar benefits.¹³⁰ These incremental steps taken at the state and local levels are vitally important in the larger social and legal movement aimed at legalizing gay marriage.

Like the state-by-state cases that began the legalization of consensual sodomy, the *Baehr* and *Goodridge* decisions are signs of this larger progress, provoking backlash that highlights the fundamental tension created by social and legal change. For example, in response to *Baehr v. Lewin*,¹³¹ Congress passed DOMA, which purported to prevent the risk of sister states having to recognize gay marriages in Hawaii.¹³² The backlash to *Goodridge*¹³³ has been even greater than the response to *Baehr*: efforts to amend the U.S. Constitution. Despite this backlash, the *Baehr* and *Goodridge* courts are among the first to institutionally sanction same-sex marriage in the United States, an important shift in the struggle for gay rights and a potential tool for gay rights activists in Hong Kong.

¹²⁵ See generally William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 UNIV. ILL. L. REV. 631 (1999).

¹²⁶ See *Lawrence v. Texas*, 123 S. Ct. 2472 (2003).

¹²⁷ See Yvonne L. Tharpe, Comment, *Bowers v. Hardwick and the Legitimization of Homophobia in America*, 30 How. L.J. 537, 589-39 (1987).

¹²⁸ See YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES 322-25 (paper ed. 2002).

¹²⁹ Lambda Legal Defense and Education Fund, *State Government Employers Offering Domestic Partnership Benefits*, at <http://www.lambdalegal.org/cgi-bin/iowa/states/domesticpart-map> (last visited Feb. 9, 2004). Some states provide registries as well. *Id.*

¹³⁰ See MERIN, *supra* note 128, at 246-48.

¹³¹ See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

¹³² 28 U.S.C. § 1738C (2000); Kramer, *supra* note 84, at 1966; see also *infra* Part IV.A.5.

¹³³ See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

B. Hong Kong Courts Have Not Addressed the Same-Sex Marriage Issue and Are Unlikely to Invalidate Laws Limiting Marriage to Opposite-Sex Couples in the Near Future

Hong Kong has taken only the first steps towards equalizing the position of gays and lesbians in its society. Decriminalizing sodomy in 1991¹³⁴ was the key first step, necessary to pave the way for other incremental changes.¹³⁵ Despite widespread resistance to passing anti-discrimination laws, Hong Kong has promulgated a code of practice condemning discrimination,¹³⁶ which may eventually lead to more concrete protections. Hong Kong's conservative administration and Legislative Council, however, are unlikely to pass such laws in the near future.¹³⁷ Further, Hong Kong still has different ages of sexual consent: twenty-one for homosexual conduct, but only sixteen for heterosexual conduct, demonstrating the unequal position gays continue to hold in Hong Kong society.¹³⁸ Hong Kong has not created any kind of same-sex couple recognition, like civil unions or registered partnerships. These legal changes would increase the likelihood of recognizing same-sex marriage.¹³⁹

While they are unlikely to use it, Hong Kong courts possess the power to strike down its marriage laws. The seeds of equality and privacy lie in the ICCPR, adopted and ratified during the development of Hong Kong's recent laws.¹⁴⁰ The ICCPR, and hence Hong Kong, promise both equality before the law and privacy in one's home. Article 26 of the ICCPR promises:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.¹⁴¹

¹³⁴ See Hong Kong Crimes Ordinance (Cap. 200 § 118M).

¹³⁵ See Petersen, *supra* note 22, at 351-59.

¹³⁶ See Code of Practice Against Discrimination in Employment on the Ground of Sexual Orientation, at <http://www.info.gov.hk/hab/paper/sexual.htm> (last visited Jan. 6, 2004).

¹³⁷ Email from Roddy Shaw, Founder, Civil Rights for Sexual Diversities in Hong Kong, to author (Nov. 8, 2003) (on file with author).

¹³⁸ Hong Kong Crimes Ordinance (Cap. 200 §§ 118C, 146).

¹³⁹ See *infra* Part V.

¹⁴⁰ See discussion of the ICCPR, *supra* Part II.B.

¹⁴¹ This same language is found verbatim in Hong Kong Bill of Rights Ordinance (Cap. 383 § 8, pt. II, art. 22).

This language potentially renders sex an especially protected class, such as how the *Baehr* court interpreted the reference to sex as a class in the Hawaii Constitution. A progressive court in suitable social conditions could use this language to strike down a Hong Kong law that prohibited same-sex couples from marrying, as in *Baehr*.

Further, article 17(1) asserts, "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."¹⁴² This language may provide the basis for privacy protections that include the choice of a marriage partner, as the *Goodridge* court held. Although the Hong Kong government used this privacy language to decriminalize sodomy, it is unlikely to legalize gay marriage now.¹⁴³ If it is reluctant to promulgate lesser protections against discrimination, gay marriage seems out of reach for the time being.

IV. SAME-SEX MARRIAGE: IMPORTING LAW FROM OUTSIDE A FORUM IS LESS LIKELY TO EFFECT CHANGE

Once one or more forums recognize same-sex marriage, others are potentially faced with having to decide whether or not to honor such marriages in a variety of contexts. This is the precise issue posed by Messrs. Shaw and Ng in trying to gain recognition of their Canadian marriage in Hong Kong.¹⁴⁴ In the United States, the Constitution's Full Faith and Credit Clause requires states to recognize and enforce the "public Acts, Records, and judicial Proceedings of every other State."¹⁴⁵ Consequently, a marriage celebrated in one state is generally recognized in all states.¹⁴⁶ One state's recognition of same-sex marriage therefore arouses fears that all states must recognize those marriages, which would significantly impact a state's right to wield authority over the marriages in its state and dictate the construction of the institution within its borders. An analogous question arises within Hong Kong's conflict of laws analytic framework. Both U.S. and Hong Kong courts, however, likely do not have to recognize such marriages, given their conflict of laws schemes.

¹⁴² ICCPR, *supra* note 40.

¹⁴³ See *supra* Part II.B.

¹⁴⁴ See *supra* Part II.C.

¹⁴⁵ U.S. CONST. art. IV, § 1 cl. 1.

¹⁴⁶ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 283(2) (1971) [hereinafter RESTATEMENT].

A. *U.S. Law: The Transportability of Marriages Celebrated in Sister States*

Once gay marriage is recognized in one state, serious difficulties can arise if a sister state refuses to recognize it. Each state has authority over its residents' marriages and the power to determine their validity.¹⁴⁷ When marriage is required for standing, a couple must ask a court to recognize their marriage. A court must decide whether to validate a same-sex marriage in a number of contexts, such as obtaining dependent healthcare benefits, enforcing inheritance rights, making medical decisions for an incapacitated spouse, or any other action for which marriage is required. A same-sex couple might also simply ask a court in their domicile for a decree recognizing their out-of-state marriage. The circumstances and character of a couple's marriage will affect a court's willingness to recognize it.

1. *The "Place of Celebration" Rule and the Public Policy Exception in General*

In general, marriages valid in the U.S. forum where celebrated are valid in all other U.S. forums under the "place of celebration rule," but a court may invalidate a marriage if it offends the forum's public policy.¹⁴⁸ The rule allows people to know with some certainty that when granted in good faith, a marriage will be honored in all jurisdictions.¹⁴⁹ A court decides whether to apply its forum's law over the marriage forum's law by performing a conflict of laws analysis.¹⁵⁰ Courts may choose their own

¹⁴⁷ 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, 553 (1993-94).

¹⁴⁸ RESTATEMENT, *supra* note 146; Henson, *supra* note 147, at 560 (lex loci contractus, citing EUGENE F. SCOLES & PETER HAY, CONFLICT OF LAWS §§ 13.1-2 (2d ed. 1992)); Kramer, *supra* note 84, at 1968. The first Restatement of Conflict of Laws continues to be followed in some states. Section 121 says: "a marriage is valid everywhere if the requirements of the marriage law of the state where the contract of marriage takes place are complied with," which is the place of celebration rule. Section 122 says: "A marriage is invalid everywhere if any mandatory requirement of the marriage law of the state in which the marriage is celebrated is not complied with." RESTATEMENT (FIRST) OF CONFLICT OF LAWS §§ 121, 122 (1934). At least one scholar has asserted that the place of celebration rule defies common sense. Professor Stanley Cox stated in a recent article: "Surely the state where the marriage is manifested, in the living out of the married life together, has the only legitimate interest in placing prohibitions upon who can marry whom or what must be done before a couple is considered qualified to marry." Stanley E. Cox, *DOMA and Conflicts Law: Congressional Rules and Domestic Relations Conflicts Law*, 32 CREIGHTON L. REV. 1063, 1069-70 (1999).

¹⁴⁹ Kramer, *supra* note 84, at 1969.

¹⁵⁰ *Id.* The accompanying comment on § 283(1) of the second Restatement, part c., states that the "relation of the state to the marriage and to the parties" is central to the analysis. The antenuptial and the

choice-of-law analytic framework when the law of more than one jurisdiction may validly apply.¹⁵¹

In spite of this general rule, a state may invalidate a marriage if it violates a strong public policy of the state having “the most significant relationship to the spouses and the marriage at the time of the marriage.”¹⁵² This is typically the state in which the couple lives. In a conflict of laws analysis, domicile is the dominant factor for determining whether a public policy exception should be employed.¹⁵³ Only the married couple’s domicile has direct contact with the marriage itself, since the benefits and burdens marriage bestows flow from state law. In contrast, the celebration state’s contact with the couple is solely the celebration itself.¹⁵⁴ Further, most states have only an indirect interest in regulating marital conduct outside their borders.¹⁵⁵ Equitable considerations are also relevant, since the analysis is fact-dependent, allowing courts discretion to apply the public policy exception to avoid injustice.¹⁵⁶

Some forms of unconventional marriage in the twentieth century, such as interracial or polygamous marriages, raised morality issues similar to those that arise in the same-sex marriage debate.¹⁵⁷ Courts often “manipulated their states’ conflicts rules” to deny the validity of such marriages, commonly adding “moralistic dicta” similar to that found in

post-nuptial states have a great interest in enforcing their own marriage policies, while the celebration state might have a greater interest in regulating the form a marriage ceremony should take, and less interest in enforcing marriage policy regarding consanguinity or age, and so forth. RESTATEMENT, *supra* note 146, § 283(1), cmt c. For an overview of choice-of-law theories used by the various states, see Herma Hill Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521 (1983).

¹⁵¹ *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 307 (1981) (holding that neither Due Process Clause nor Full Faith and Credit Clause was violated by application of Minnesota law was appropriate, even though parties were all residents of Wisconsin and relevant events occurred in Wisconsin, because deceased had commuted to Minnesota for work for sixteen years prior to his death, insurer was present and doing business in Minnesota, and deceased’s widow had become a resident of Minnesota for bona fide reasons prior to bringing law suit). The Supreme Court indicated in this case that the issue on review for choice-of-law decisions of lower courts is to determine whether the choice has exceeded federal constitutional limitations. *Id.*

¹⁵² RESTATEMENT, *supra* note 146.

¹⁵³ *Constitutional Constraints on Interstate Same-Sex Marriage Recognition*, 116 HARV. L. REV. 2028, 2037 (2003) (citing *Wilkins v. Zelichowski*, 140 A.2d 65 (N.J. 1958)) [hereinafter *Constitutional Constraints*].

¹⁵⁴ *See, e.g., Wilkins v. Zelichowski*, 140 A.2d 65 (N.J. 1958). In this case, a couple domiciled in New Jersey married in Indiana to avoid New Jersey’s age restrictions, and the court noted that New Jersey was “the only state having any interest in . . . [their] marital status,” and Indiana never had a real interest in the status, only the ceremonial requirements. *Id.* at 68.

¹⁵⁵ *Constitutional Constraints*, *supra* note 153, at 2037.

¹⁵⁶ *Id.* at 2036.

¹⁵⁷ *Henson*, *supra* note 147, at 561. Polygamy in this context refers to an antiquated form where someone remarried too soon after divorce. *Id.*

recent court opinions regarding various gay and lesbian issues.¹⁵⁸ Such examples provide a basis for anticipating how courts might handle choice-of-law issues regarding same-sex marriages celebrated in sister states, notwithstanding DOMA.¹⁵⁹

The conflict of law over marriage recognition arises in a variety of common scenarios that fall along a continuum with regard to how likely a court would be to validate each. In the first scenario, a so-called “evasive marriage,” a couple would marry outside their domicile forum in an attempt to evade its marriage laws. A second scenario is a “migratory marriage,” where a couple legally marries in the domicile forum, then later moves to another forum that would not allow their marriage to occur. Third, an “extra-territorial” marriage legally occurs in the domicile forum, and litigation requiring marriage for standing occurs outside the forum. Along this continuum, evasive marriages are least likely to be validated and extra-territorial marriages are most likely to be validated. The greater the connection a forum has to the marriage, the greater its interest in regulating the marriage, and the more likely it will apply its own law. In the United States, DOMA provides further barriers, purporting to limit marriage to opposite-sex couples for federal purposes and permitting all courts to invalidate judgments or acts arising from a same-sex marriage.¹⁶⁰

2. *Evasive Marriages Are Most Likely to be Invalidated Under the Place of Celebration Rule’s Public Policy Exception*

The place of celebration rule’s public policy exception is often applied to invalidate evasive marriages. A forum will sometimes apply the public policy exception if the couple went to the state that would legally sanction their marriage “solely to evade restrictions imposed” by their own domicile.¹⁶¹ This exception, however, is generally narrowly construed, often because the public policy in question is somewhat elastic.¹⁶²

Two mid-twentieth century cases demonstrate the discretionary nature of the public policy exception.¹⁶³ In *In re May’s Estate*, a New York appellate court validated the marriage of a niece and uncle, even though the couple eloped to Rhode Island to effectively avoid New York’s

¹⁵⁸ *Id.* at 562.

¹⁵⁹ 28 U.S.C. § 1738C (2000).

¹⁶⁰ *Id.*

¹⁶¹ *Kramer*, *supra* note 84, at 1969.

¹⁶² *Id.* at 1970.

¹⁶³ *Constitutional Constraints*, *supra* note 153, at 2038-39.

consanguinity marriage laws.¹⁶⁴ This outcome may be less related to the evasive nature of the marriage than the equity involved with the timing.¹⁶⁵ Thirty years after the marriage and at the wife's death, the daughter tried to prevent her father from administering her mother's estate, but the court refused to invalidate the marriage, in part because the couple had been married for so many years.¹⁶⁶ In contrast, in *Wilkins v. Zelichowski*, a couple eloped to Indiana in order to avoid New Jersey's age restrictions.¹⁶⁷ At the wife's behest, the *Wilkins* court subsequently annulled the marriage for nonage a few years later while the husband was in jail.¹⁶⁸ As one commentator put it, "[t]he court refused to bind her to an obviously ill-advised elopement with a juvenile delinquent that she had conducted at age sixteen."¹⁶⁹ These variations more likely reflect inconsistent state policy applied on a fact-specific basis, rather than an unprincipled use of the public policy exception.¹⁷⁰

A court is more likely to invalidate an evasive marriage if a forum's marriage polices are clear and unequivocal.¹⁷¹ For instance, courts often invalidated marriages performed in evasion of a forum's miscegenation statutes, regardless of the incident sought.¹⁷² Sometimes a court would pursue a middle ground such as recognizing the marriage for the purposes of the incident of marriage sought, like inheritance rights.¹⁷³ For instance, courts usually upheld interracial marriages celebrated in a domicile state that permitted them if the incident claimed involved property or inheritance rights after one of the spouses died.¹⁷⁴ In such cases, the offensive behavior, cohabitating mixed race couples, is no longer an issue, so the court has no reason to invalidate the marriage.

¹⁶⁴ 114 N.E.2d 4, 7 (N.Y. 1953).

¹⁶⁵ *Constitutional Constraints*, *supra* note 153, at 2038-39.

¹⁶⁶ 114 N.E.2d 4, 7 (N.Y. 1953).

¹⁶⁷ 140 A.2d 65, 69 (N.J. 1958).

¹⁶⁸ *Id.*

¹⁶⁹ *Constitutional Constraints*, *supra* note 153, at 2039.

¹⁷⁰ Cox, *supra* note 148, at 1071. Professor Cox pointed out that the domicile state is more apt to invalidate an underage marriage if one of the participants has "quick second thoughts" upon returning to the domicile state. *Id.* at 1071 n.22.

¹⁷¹ *Id.* at 1071.

¹⁷² *Constitutional Constraints*, *supra* note 153, at 2039; *see also* Henson, *supra* note 147, at 571-73.

¹⁷³ Henson, *supra* note 147, at 559-60; *id.* at 559 n.28. The incident sought is often an important factor in a court's analysis of the conflict of law. *Id.* at 560.

¹⁷⁴ *Id.* at 572.

3. *The Public Policy Exception is Less Often Used to Invalidate Migratory Marriages*

A same-sex migratory marriage, notwithstanding the effect of DOMA, has a greater chance of validation than an evasive marriage. In a migratory marriage, the couple legally marries in their domicile state, but later establishes residency in another state that does not allow their marriage. In this way, the couple has domiciliary contact with multiple states, lending force to each forum's policy for purposes of a conflicts analysis.¹⁷⁵ Courts generally have been less inclined to invalidate migratory marriages in contrast to evasive marriages, but have done so when the public policy is particularly strong, such as in cases of close consanguinity, cohabiting polygamy, and miscegenation.¹⁷⁶ Such cases also depended on equitable considerations and the incident of marriage sought.¹⁷⁷ For instance, cohabiting polygamy might result in the marriage's invalidation, but a polygamous marriage validly contracted under foreign law where the wives remained in the country of celebration might be upheld for purposes of inheritance rights.¹⁷⁸ Courts rarely invalidated migratory marriages occurring too soon after divorce (an older form of polygamy) under the forum's statute.¹⁷⁹ Similarly, nonage rarely has been a basis for invalidating a migratory marriage.¹⁸⁰

Courts are also split over migratory marriages that violated miscegenation laws or involved cohabiting close consanguineous marriages due to the varying weight given to external factors.¹⁸¹ The extent of court discretion is evident in the contrast of two migratory cases from the latter 1800s: *State v. Ross* and *State v. Bell*.¹⁸² In *Ross*, the court validated a migratory interracial marriage celebrated in South Carolina where the parties did not purposely seek to evade forum law.¹⁸³ In *Bell*, however, the court upheld miscegenation convictions for a migratory marriage where the couple had validly married in Mississippi.¹⁸⁴ The same mixed results are seen in

¹⁷⁵ See *Constitutional Constraints*, *supra* note 153, at 2040.

¹⁷⁶ *Id.*

¹⁷⁷ Henson, *supra* note 147, at 560.

¹⁷⁸ *Id.* at 563. In such cases, it is important to note that lack of cohabitation in polygamy cases would militate in favor of validating the marriage, because the forum's interest in enforcing the policy specifically regarded cohabitation. *Id.* 563-64.

¹⁷⁹ *Constitutional Constraints*, *supra* note 153, at 2040.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 2041.

¹⁸² See Koppelman, *supra* note 109, at 121-24 (citing *State v. Ross*, 76 N.C. 242 (N.C. 1877); *State v. Bell*, 66 Tenn. 9 (Tenn. 1872)).

¹⁸³ 76 N.C. at 250.

¹⁸⁴ 66 Tenn. at 10.

consanguinity cases, which range from validating evasive marriages to invalidating migratory marriages.¹⁸⁵ Although many of these cases are relatively old, courts would still likely split on whether or not to uphold a migratory same-sex marriage because of variations in state law and the discretionary, case-by-case nature of the conflict of laws analysis.

4. *Extraterritorial Marriages Are Rarely Overturned Under the Public Policy Exception*

Courts are most likely to validate extraterritorial same-sex marriages. In an extraterritorial marriage, the couple legally marries in a forum and remains domiciled there, but seeks to litigate a marriage-related issue in a different forum. In such cases, courts generally do not apply the public policy exception¹⁸⁶ because the couple did not cohabit within the litigation forum and therefore that forum's interest in regulating the marriage is minimal.¹⁸⁷ For example, even in miscegenation cases where courts found the public policy to be particularly strong, they generally upheld such marriages.¹⁸⁸ Courts normally agreed that forum prohibitions were not meant to extend extraterritorially, but only to have "local and limited effect."¹⁸⁹ This suggests that same-sex spouses trying to enforce a wrongful death action or a divorce decree in a sister state would have success.

State-level DOMA legislation, however, generally states that same-sex marriages are contrary to public policy.¹⁹⁰ Such states claim to be able to invalidate such marriages for any purpose, regardless of the circumstances, through this codification of public policy. In other words, a same-sex spouse would be unable to enforce a wrongful death decree in a hostile forum. Further, if a spouse from a same-sex marriage moves assets out of the couple's domicile state in anticipation of a divorce, those assets would be beyond the reach of a court of the domicile state. A sister state which does not recognize the marriage could refuse to enforce property allocation in a divorce decree.

¹⁸⁵ *Constitutional Constraints*, *supra* note 153, at 2042.

¹⁸⁶ *Id.* at 2042-43.

¹⁸⁷ *Id.* at 2037.

¹⁸⁸ Koppelman, *supra* note 109, at 126. For case examples, see *id.* at 126 n.83.

¹⁸⁹ *Caballero v. Executor*, 24 La. Ann. 573, 575 (1872).

¹⁹⁰ Thirty-nine states ban recognition of same-sex marriages. States include Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia. Human Rights Campaign, *Laws Affecting GLBT People*, *supra* note 18.

5. *The Effect of the Defense of Marriage Act on Conflict of Laws Analysis of Same-Sex Marriage*

DOMA is a federal law that allows states to invalidate same-sex marriages under any circumstances.¹⁹¹ Although Hong Kong has no equivalent legislation, no discussion of U.S. same-sex marriage law could be complete without analysis of DOMA's potential effect. The act provides 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 . . . or a right or claim arising from such relationship.¹⁹²

The statute therefore provides states with two bases for refusing to validate same-sex marriages celebrated in sister states. First, a court can refuse to "give effect" to a same-sex marriage. Alternatively, a court may refuse to recognize the marriage in the adjudication of "a right or claim arising" from it,¹⁹³ such as a wrongful death action, intestacy, divorce, wrongful death judgments, health benefits, and myriad other instances. For federal purposes, and for those states that have adopted similar statutes, a court potentially can also invalidate a same-sex marriage regardless of the circumstances that bring the case to trial, the incident of marriage being sought, or any other equitable consideration that historically has been considered relevant.¹⁹⁴

In many cases, DOMA is unlikely to change the way conflict of laws rules function with respect to validating marriages that violate a forum's public policy.¹⁹⁵ This Comment assumes the constitutionality of DOMA,

¹⁹¹ 28 U.S.C. § 1738C (2000).

¹⁹² *Id.* Federal law further seeks to define marriage, which is traditionally the province of the states' police power, in 1 U.S.C.A. § 7, which states:

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 a wife.

Legislation is pending to repeal 66 Tenn. 9.

¹⁹³ 28 U.S.C. § 1738C.

¹⁹⁴ *Id.*

¹⁹⁵ Jeffrey L. Rensberger, *Same-Sex Marriages and the Defense of Marriage Act: A Deviant View of an Experiment in Full Faith and Credit*, 32 CREIGHTON L. REV. 409, 419 (1988).

although many scholars question whether it can withstand scrutiny.¹⁹⁶ A hypothetical illustrates why DOMA is unlikely to affect most states' conflicts of laws analysis of marriages. In the most likely scenario, a same-sex couple leaves their domicile state to go to a state that has legalized same-sex marriage, gets married, and then returns home to seek direct validation of their marriage from a court in their domicile state. This is a classic evasive marriage,¹⁹⁷ and a court can easily apply its own law under the public policy exception to invalidate the marriage. Scholars most often discuss this hypothetical in reference to same-sex marriage because this is the exact scenario that frightens many same-sex marriage opponents about one state allowing same-sex marriage.¹⁹⁸ Unlike *In re May's Estate*,¹⁹⁹ the situation lacks equitable considerations that might militate towards validation.²⁰⁰ In *In Re May's Estate*, the challenge to a consanguineous marriage occurred after thirty years, upon the wife's death, and arose out a conflict over the execution of the wife's estate.²⁰¹ In the hypothetical, the couple has been married only briefly, never changed domiciles, and sought a judgment to directly validate the marriage from the domicile state. DOMA's express prohibition merely solidifies the forum's existing ability to invalidate such a marriage. The forum has more than enough contacts with the marriage, being both the pre- and post-nuptial domicile, to warrant applying its own law.

DOMA does not increase a court's ability to invalidate a migratory marriage beyond its ability to do so under general conflicts principles.²⁰² In such a case, a same-sex couple marries legally, remains domiciled in the celebration state for some time but later moves to a state that does not allow

¹⁹⁶ Commentators have attacked DOMA under the Full Faith and Credit and Due Process clauses. See, e.g., Mark Strasser, *Baker and Some Recipes for Disaster: On DOMA, Covenant Marriages, and Full Faith and Credit Jurisprudence*, 64 BROOK. L. REV. 307 (1998) (arguing that Congress exceeded its authority in purporting to lower full faith and credit standards in DOMA by allowing states to invalidate marriages valid in celebration state and domicile at the time of the marriage); Kramer, *supra* note 84 (arguing that DOMA is unconstitutional because Congress's power to impose choice of law rules on the states is limited by the Effects Clause); Cox, *supra* note 148; *Constitutional Constraints*, *supra* note 153. Some scholars have questioned whether DOMA violates the Equal Protection Clause under the precedent set in *Romer v. Evans*, 517 U.S. 620 (1996), where the U.S. Supreme Court held that a law motivated by mere animus towards gays and lesbians has no legitimate state interest. See, e.g., Barbara A. Robb, Note, *The Constitutionality of the Defense of Marriage Act in the Wake of Romer v. Evans*, 32 NEW ENG. L. REV. 236 (1997).

¹⁹⁷ See *supra* Part IV.A.2.

¹⁹⁸ See, e.g., Henson, *supra* note 147, at 559-60; Kramer, *supra* note 84, at 1968; Rensberger, *supra* note 195, at 419.

¹⁹⁹ See *supra* Part IV.A.2.

²⁰⁰ See 114 N.E.2d 4 (N.Y. 1953).

²⁰¹ *Id.*

²⁰² Rensberger, *supra* note 195, at 426.

same-sex marriage. The forum has enough contact, “[a]rguably . . . the strongest contact,” with the marriage as the current domicile to support application of forum law.²⁰³ Further, DOMA says that “[n]o State . . . shall be required to give effect . . .” to a same-sex marriage or judgments stemming from it,²⁰⁴ but this does not preclude a court from actually giving effect to the marriage if equity and circumstance so dictate. Thus, DOMA leaves control in the hands of the deciding court.

In the most significant departure from current conflicts principles, the court can invalidate marriages in extra-territorial situations under DOMA’s plain text.²⁰⁵ If a same-sex couple legally marries in their domicile state and seeks a judgment from a court in a state with a strong public policy against same-sex marriage, the contacts that bring the case to that forum likely supply enough contact to justify application of that state’s law.²⁰⁶ For example, DOMA seemingly allows a state to ignore a property settlement and refuse to enforce it. If the domicile state has issued the judgment, however, the Full Faith and Credit clause seems to require another forum to give it effect.²⁰⁷ DOMA allows the court to invalidate the marriage and to refuse to enforce the judgment, even though the parties are domiciled out of state, the judgment comes from another court, and the forum has no particular interest in the marriage itself. While unnecessary to allow a court to invalidate a same-sex marriage in most cases, DOMA essentially expands the public policy doctrine’s boundaries for same-sex marriages and obviates the conflict of laws analysis. This simplifies matters for the deciding court, but it removes equitable considerations from the equation and is likely to result in injustices in many instances. DOMA’s effect is therefore more restrictive than may be necessary, and is certainly less equitable than previous U.S. or current Hong Kong law.

B. Hong Kong Law: The Difficulties in Gaining Recognition of Same-Sex Marriages Celebrated in Other Countries

Foreign marriage laws in Hong Kong present similar conflict issues to U.S. jurisprudence but provide less flexibility, making recognition of a

²⁰³ *Constitutional Constraints*, *supra* note 153, at 2040. Professor Rensberger provides a thoughtful analysis regarding the effect of an “after-acquired domicile,” concluding that a change of domicile, along with other contacts, is sufficient to allow a forum to apply its own law. Rensberger, *supra* note 195, at 426-29.

²⁰⁴ 28 U.S.C. § 1738C.

²⁰⁵ *See supra* Part IV.

²⁰⁶ Rensberger, *supra* note 195, at 435.

²⁰⁷ *See Kramer*, *supra* note 84, at 2000.

foreign same-sex marriage even more difficult than recognition between U.S. sister states. Hong Kong law does not permit same-sex marriages. Roddy Shaw Kwok-Wah and Nelson Ng Chin-Pang's unsuccessful attempts to have the Hong Kong's Department of Inland Revenue recognize their legal Canadian marriage exemplify this non-recognition.²⁰⁸ They previously traveled to Vermont to enter into a civil union under that state's law, and the Inland Revenue Department refused to allow them a joint tax assessment, asserting that their union was not a marriage under Hong Kong law.²⁰⁹ They subsequently married legally in Toronto, hoping for a better result from the Hong Kong government.²¹⁰ Mr. Shaw, a Hong Kong lawyer, stated in an interview with the *South China Morning Post* that since the Inland Revenue Ordinance recognizes marriages contracted abroad for purposes of taxation, his Canadian marriage to Mr. Ng should be recognized.²¹¹ He asserted that: "[L]ocal authorities [must] recognize an overseas marriage 'whether or not so recognized' in Hong Kong as long as it was 'according to the law of the place where it was entered into and between persons having the capacity to do so.'"²¹² Mr. Shaw's recitation of law, however, turns on a convenient reading of established rules.

In general, a marriage foreign to Hong Kong must meet three common law criteria to be upheld.²¹³ First, the marriage must be valid according to the law where the marriage was celebrated (*lex loci celebrationis*), which accords with the U.S. place of celebration rule.²¹⁴ Second, each party to the marriage must have the capacity to marry, a determination "governed by the law of each party's antenuptial domicile."²¹⁵ A marriage is invalid if either party lacks such capacity, subject to a number of exceptions.²¹⁶ Similar to evasive marriages in the United States, parties trying to avoid limitations of their antenuptial domiciles generally will be unable to do so. The rule however, is more stringent than U.S. law because it can require compliance with up to three different jurisdictions: the place of celebration and each domicile of the parties, if they are different. Finally, like the general public

²⁰⁸ Shamdasani, *supra* note 3, at 3.

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Wong Zhong Lan Xiang v. Wong*, [2002] H.K.E.C. 470, para. 48 (Hong Kong Court of First Instance); 2 DICEY & MORRIS, *THE CONFLICT OF LAWS*, 17-055 (Lawrence Collins et al. eds., 13th ed. 2000) (rule 68). This text regards English law, but is often cited by the Hong Kong courts for conflicts principles.

²¹⁴ DICEY & MORRIS, *supra* note 213.

²¹⁵ *Id.*; *Wong Zhong Lan Xiang v. Wong*, [2002] H.K.E.C. 470, para. 48 (Hong Kong Court of First Instance).

²¹⁶ DICEY & MORRIS, *supra* note 213 (rule 68(1)-(2)).

policy exception in the United States, a foreign marriage will not be recognized by Hong Kong if it is “repugnant to the conscience of [the court].”²¹⁷ If a marriage is valid in the place of celebration and both parties’ antenuptial domiciles, British courts seem reluctant to invoke the exception. One British court even went so far as to suggest the public policy exception did not exist.²¹⁸ A Hong Kong court, however, recently included the general public policy description in a discussion regarding recognition of foreign marriages, suggesting that this exception still might be applied to invalidate same sex marriages.²¹⁹

A Hong Kong court could invalidate Messrs. Shaw and Ng’s marriage under either the antenuptial rule or the public policy exception. Messrs. Shaw and Ng meet the first part of Hong Kong’s test because under Hong Kong law, they both technically had the capacity to marry because both were of legal age and neither was married to another person. Courts, however, generally read “capacity to marry” as meaning the intended marriage would be valid under the antenuptial domicile laws.²²⁰ In one consanguineous marriage case, for example, a woman domiciled in England purported to marry her dead sister’s husband, who was domiciled in Germany.²²¹ Although valid under German law, the court invalidated the marriage because the wife “had not the capacity to contract the marriage—the marriage being, at that time, a contract of marriage which could not be made by English law.”²²² A Hong Kong court could find that its law did not allow same sex marriages and therefore is likely to invalidate Mr. Shaw and Mr. Ng’s same-sex marriage. While they married legally under Ontario law, their capacity to marry depends on their antenuptial domiciliary, which does not allow it.

V. CHALLENGES TO MARRIAGE LAWS WILL SUCCEED ONLY IF THEY COME FROM WITHIN A FORUM AND ARE BROUGHT AT THE RIGHT TIME

Gays and lesbians in Hong Kong and the United States will have to challenge marriage laws directly, either judicially or legislatively, in order to

²¹⁷ *Wong Zhong Lan Xiang v. Wong*, [2002] H.K.E.C. 470, para. 48 (Hong Kong Court of First Instance).

²¹⁸ *Cheni v. Cheni*, [1965] para. 85 (refusing to invoke the exception in the case of a marriage between an uncle and niece that was valid by the law of the parties’ domicile as well as the place of celebration).

²¹⁹ *Wong Zhong Lan Xiang v. Wong*, [2002] H.K.E.C. 470, para. 48 (Hong Kong Court of First Instance).

²²⁰ *See, e.g.*, *In Re Paine*, 1940 Ch. 46 (Eng.).

²²¹ *Id.*

²²² *Id.*

successfully legalize same-sex marriage. Attacks using foreign or another state's laws to import a marriage are an ineffective means, since conflict of laws rules will always allow a forum's public policy to trump the otherwise valid use of foreign or extra-state law. Even the less rigid conflicts principles that have developed in the United States preclude such strategies. Bringing a direct challenge, however, will only be effective when the forum asked to accept the marriage has developed enough tolerance to allow the change sought in the suit to take root.

Several different analyses are useful for understanding when U.S. or Hong Kong courts would be receptive to such a challenge. One approach to analyzing the likelihood of a successful challenge to marriage laws examines the incremental legal steps. Legal scholar Yuval Merin has called this "the necessary process," where each step in the expansion of rights gained not only paves the way for the next, but also is required.²²³ In this process, the legal system must first decriminalize homosexual conduct (judicially or legislatively), then prohibit discrimination on the basis of sexual orientation, and finally affirm that same-sex relationships equal opposite-sex relationships, starting with various economic benefits (such as civil unions), and ultimately comprehensively recognizing same-sex partnerships.²²⁴ The Netherlands, for instance, decriminalized sodomy in 1810, made the age of sexual consent equal for both homo- and heterosexual conduct in 1971, passed anti-discrimination legislation in 1983, allowed same-sex registered partnerships in 1998, and finally legalized same-sex marriage in 2001.²²⁵ At the national level, the United States and Hong Kong both have only achieved the beginning steps of this process.

Societal acceptance is another means for determining the most effective timing for challenging a forum's marriage laws. The factors that signify readiness to change marriage laws are complex and subtle, and reflect social mores to a large degree. The *Goodridge* decision sparked a flood of responses, both in support and opposition, each building on the other, and leading to some surprising developments. While efforts to amend the federal Constitution continue, various municipalities have actually conducted same-sex marriages, sometimes in defiance of a clearly stated public policy. For instance, San Francisco mayor Gavin Newsom ordered city officials to begin approving marriage licenses to same-sex couples until

²²³ MERIN, *supra* note 128, at 308-10. Even though this book specifically addresses trends in Europe and the United States, Hong Kong law is close enough kin by virtue of its origins in British common law to render the analysis useful.

²²⁴ MERIN, *supra* note 128, at 309.

²²⁵ *Differing Paths*, *supra* note 9, at 2009.

the California Attorney General obtained a court-ordered injunction.²²⁶ Other cities like Portland, Oregon, have followed suit.²²⁷ This wide variation in response reflects varying communities' regard for the rights of gays and lesbians to marry, and illustrates at least part of an equation for a successful challenge. Societal acceptance is a key ingredient, whether that acceptance exists in the heart of a deciding judge, or the community at large, for sometimes a court leads the way for social change, and sometimes follows changing social mores.

In the United States, internal challenges have gone furthest in changing the law, but the lack of social consensus accepting gay marriage indicates that national recognition is not imminent. *Goodridge* and *Baehr* provide examples of effective legal arguments for direct challenges, although other hurdles remain once a court has struck down marriage laws precluding same-sex couples. For example, Hawaii does not allow same-sex marriage, irrespective of the result in *Baehr*, due to the amendment to that state's constitution. Similarly, even though the *Goodridge* decision is likely to be given effect in Massachusetts, efforts in the state legislature to amend the state constitution, as well as efforts to amend the federal constitution, might render that decision moot. The existence of DOMA and the lack of federal anti-discrimination legislation protecting gays and lesbians illustrate the United States' unreadiness for national recognition of same-sex marriage.

In Hong Kong, the lack of success in passing anti-discrimination legislation suggests that internal challenges, while probably the best method, are unlikely to succeed at this time. A number of factors might indicate when the timing will be right for people like Messrs. Shaw and Ng to mount such an effort. The decriminalization of sodomy in 1991 provides an example of the elements that need to be in place in order for such change to occur, as well as the legal elements that might form for the basis for such change. Hong Kong decriminalized sodomy as a result of both increasing awareness of gays and lesbians in society, as well as the political exigencies wrought by the handover and the massacre of demonstrators in Beijing. The legal basis included recognition of privacy, an element cited by the *Goodridge* court as a basis for their decision. Also, article 26 of the ICCPR, incorporated and given full effect in Hong Kong's Bill of Rights, promises equality before the law and protection from discrimination based on sex. Additionally, international legal precedent militated for change. Further political events and similar changes in attitudes could contribute to the

²²⁶ Evelyn Nieves, *Now Portland is Gay Marriage Capital*, WASH. POST, Mar. 19, 2004, at A03.

²²⁷ *Id.*

overall readiness needed to enact changes in Hong Kong's marriage laws. Perhaps as more countries extend marriage rights to gays and lesbians, especially common law countries like Great Britain and the United States, Hong Kong will have greater reason to do the same. Until then, all efforts to further the gay rights movement in Hong Kong raise awareness in its citizens, and allow an "understanding of the humanity and the equality of gay people [to] evolve[] sufficiently to . . . enter[] the hearts and minds of enough people [for a legal breakthrough to occur]."²²⁸

VI. CONCLUSION

In many parts of the world, changes in the law regarding homosexuals and same-sex couples have been rapid over the past two decades. A comparison of the United States and Hong Kong's marriage laws likewise underscores a pervasive but changing attitude towards gays. In both places, recent years saw important strides being made toward equalizing the position of gays and lesbians in society, like the decriminalization of sodomy. Both places, however, are only at the beginning stages of providing full equality for gays and lesbians, and still institutionalize moral condemnation. While activists cannot "import" favorable law into their own forums, their efforts can create the awareness and sympathy that will ultimately contribute to their success.

The law is in constant flux, so while the near future might not provide marriage rights to same-sex couples, the larger trends indicate that the possibility exists. A growing number of countries are recognizing the need for legal protections and are willing to provide at least some analogous incidents of marriage. This is an important step to ultimately validating the status of gays and lesbians in our society. Activists like Roddy Shaw and Nelson Ng challenge the preconceived notions of their community and society, creating a dialogue, raising awareness, and ultimately giving rise to tolerance.

²²⁸ Sullivan, *supra* note 122, at 15.

