English Polygamy Law and the Danish Registered Partnership Act: A Case for Consistent Treatment of Foreign Polygamous Marriages and Danish Same-Sex Marriages in England

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Introduction

On October 1, 1989, Denmark became the first country in modern Western civilization legally to recognize same-sex marriages, officially calling these unions “registered partnerships.” This bold piece of Danish legislation, the Registered Partnership Act (Partnership Act), represents a milestone in the progression of human rights.

The Partnership Act, however, raises the question of whether other countries will recognize a marriage celebrated under that law. Implementation of the Partnership Act will affect other countries, especially Denmark’s European Community (EC) neighbors, as married Danish

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1. Sheila Rule, Rights for Gay Couples in Denmark, N.Y. TIMES, Oct. 2, 1989, at A8. For the balance of the Note I refer to these unions as marriages, since the Danish law regarding those unions incorporates Danish marriage law by reference and, as a result, the unions are effectively the same as different-sex marriages in Denmark. See discussion infra note 80.


3. In August 1993, Norway followed Denmark’s lead by enacting a similar law. See infra note 124 and accompanying text. This Note confines its discussion and analysis to the Danish law. Denmark, like Great Britain, is a member of the European Community. See infra note 143 and accompanying text. This Note does not discuss the immigration concerns that would arise if Norway, which is not yet a European Community member, were taken into account. The crux of the discussion and analysis of this Note, however, would apply equally to the recognition of a Norwegian same-sex marriage in England.

4. This question also is important because Denmark’s Partnership Act indicates the direction of Western matrimonial law. See discussion infra part II.B.2.

5. Treaty Establishing the European Economic Community [EEC Treaty].
same-sex couples migrate to neighboring countries and seek the protection and legal enforcement of their matrimonial union. This Note explores foreign recognition of marriages under the Partnership Act by analogizing the legal recognition of foreign same-sex marriages to the legal recognition of foreign polygamous marriages in England. The present social and political situation for lesbians and gays in England indicates an unwillingness to extend equal marital rights to same-sex couples. This Note argues that England should, at a minimum, recognize Danish same-sex marriages on the same terms as it recognizes foreign polygamous marriages.

Part I of this Note surveys the history of polygamy law in England, the current state of that law, and the status of English lesbian and gay rights. Part II examines the details and effects of Denmark's Partnership Act, the justifications for same-sex marriage laws and their foreign recognition, and the status of same-sex marriage as an emerging civil right. Part III expounds on the rationale for analogizing the recognition of foreign same-sex marriages to the recognition of foreign polygamous marriages in England. Finally, Part IV examines two important considerations in the judicial analysis of a Danish same-sex marriage in England and conducts both a conflict of laws analysis and a public policy analysis on a hypothetical case.

I. Recognition of Foreign Polygamy and (Non-) Recognition of Basic Lesbian and Gay Rights in England

Polygamy, a widely regarded non-Christian form of marriage, was formerly viewed by English courts with extreme hostility. Because the law was committing an injustice on immigrants in polygamous marriages, however, English courts dramatically altered the law to recognize such marriages almost unconditionally. Today, English courts would likely treat a Danish same-sex marriage the same way as they treated polygamous marriages more than a century ago, by denying them legal recognition outright.

A. Polygamy In England

1. The Evolution of English Polygamy Law

Since England's early polygamy cases, the common law has struggled to

6. The EEC Treaty gives the workers of its 12 Member States the freedom to move to other Member States. See infra note 131 and accompanying text.

7. The status of lesbian and gay rights in England is discussed infra part I.B.

8. But see discussion infra note 134. Although Christianity is not the only religion professing monogamy, this Note on numerous occasions refers to "Christian" notions of monogamous marriage because English courts repeatedly and expressly referred to these concepts in their discussion of English matrimonial law.

9. Technically, most of the cases discussed in this Note involve "polygyny," where one man has several wives, as opposed to "polyandry," where one woman has several husbands. As commentators explain, however, the latter is so rare that "polygamy," which includes both polygyny and polyandry, is generally used to refer only to the former. See J.G. Collier, Conflict of Laws 275 n.124 (1987); Albert V. Dicey & J.H.C. Morris, The Conflict of Laws 648-49 (Lawrence Collins et al. eds., 11th ed. 1987).
reconcile public policy concerns with conflict of laws rules. Until the twentieth century, English courts refused to recognize polygamous marriages as a matter of implicit public policy because such marriages were viewed as contrary to basic moral principles of Christianity. This is evident in early polygamy cases such as *Hyde v. Hyde.* In deciding whether to grant a divorce, the court repeatedly referred to Christian notions of marriage in considering the validity of a potentially polygamous Mormon marriage. In refusing to exercise jurisdiction over the husband's petition for a dissolution of the marriage, the court did not explicitly base its decision on policy grounds. Rather, the *Hyde* court based its decision on a legal technicality by reasoning that "the law of [England was] . . . adapted to the Christian marriage, and it is wholly inapplicable to polygamy." The dictum in the *Hyde* case, however, reveals the court's underlying considerations. The court, for example, remarked that marriage "as understood in Christendom . . . [is] defined as the voluntary union for life of one man and one woman, to the exclusion of all others." The court's refusal of plaintiff's petition for a divorce was a succinct expression of England's former public policy on polygamous marriage.

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10. [1866] 1 L.R.-P. & D. 130. This case concerned the divorce petition of an Englishman who joined a Mormon congregation in London and later joined the central Mormon community in Utah after being ordained a Mormon priest. *Id.* at 130. In Utah, he entered into a potentially polygamous marriage. *See infra* note 12 and accompanying text. The petitioner later renounced the Mormon church, however, and preached against it. *Hyde,* [1866] 1 L.R.-P. & D. at 130. After he resumed a domicile in England, he petitioned for a divorce because his wife, who remained in Utah, had married another Mormon. *Id.* at 130-31.

11. A decree of divorce is only one form of matrimonial relief in English law. Other forms include:

[A] nullity of marriage or judicial separation; a decree of presumption of death and dissolution of marriage; an order for financial provision on the ground of willful neglect to maintain; an order for the alteration of a maintenance agreement; ancillary relief; and an order under the Matrimonial Proceedings (Magistrates' Courts) Act 1960.


12. Marriages celebrated under a system of law permitting polygamy are considered "potentially polygamous" so long as the husband does not take another wife. DICKEY & MORRIS, supra note 9, at 649. An "actually polygamous" marriage is one in which the husband has exercised his right to take additional wives. *Id.*


15. The *Hyde* court explicitly declined to decide beyond its narrow technical holding. It held:

This court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of polygamous unions, or upon the rights or obligations in relation to third persons which people living under the sanction of such unions may have created for themselves. All that is intended to be here decided is that as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England.

*Id.* at 158.

16. *Id.* at 133.

17. Generally, English courts in this period used a conflict of laws approach when ascertaining the validity of foreign monogamous marriages. *See* MORRIS, supra note 13,
This hostile judicial attitude towards polygamy revealed itself again in *In re Bethell*. That case involved a devise of land in England by an Englishman to his son, Christopher Bethell, for life, and then in trust for the benefit of Christopher's child or children. Christopher was sent to the Cape of Good Hope (now South Africa) and never returned to England, although he officially remained domiciled in England. While a resident of Bechuanaland, not then an English dominion, Christopher married a woman named Teepoo according to the customs of the Baralong tribe, which permitted polygamy. He had a posthumous child by her ten days after his death. Citing *Hyde* dictum, the *Bethell* court held that Christopher's potentially polygamous marriage was a marriage in the Baralong sense only and not in the English sense, and therefore the child was illegitimate and could not succeed under the testator's will.

Scholars point out two possible grounds for the *Bethell* decision. The first is that polygamous marriages were wholly unrecognized by English law for all purposes. This view, however, is strange since the *Bethell* court incorrectly considered itself bound by *Hyde*. The second possible ground for *Bethell*, espoused by critics striving to establish a narrower ground for that decision, is that Christopher was domiciled in England when he married Teepoo and thus lacked the capacity under his "personal law" to enter a polygamous marriage. This explanation is also problematic, however, since the *Bethell* court never mentioned Christopher Bethell's place of domicile. Nevertheless, it is consistent with what has become the modern conflict of laws approach. As exemplified by this second explanation, legal scholars impute a conflict of laws analysis in the *Bethell* decision when in fact there was none. Indeed, this effort by legal scholars to explain the *Bethell* opinion typifies early calls for a shift to a conflict of laws approach in dealing with polygamy. Under the common law approach seen in *Hyde*, however, conflict of laws rules yielded to public policy on matters of polygamy. Consequently, marital rights were not extended to parties in such marriages.

This legal stance eventually changed, as illustrated in *The Sinha Peerage*...
Claim. In 1919, Lord Sinha conferred a barony on his son, Sir Satyandra Sinha, and his lawful male heirs. Although Lord Sinha had entered into a potentially polygamous Hindu marriage in India, the couple converted to another Eastern religion that forbade polygamy in 1886. After the death of Lord Sinha in 1928, Satyandra Sinha, born in 1887, claimed the right to succeed the peerage, and the House of Lords allowed the succession. Notwithstanding the vagueness of the opinion, Sinha marked a judicial shift towards greater legal recognition of polygamy so long as such marriages were valid under the conflict of laws rules relating to marriages generally.

Over the course of this century, English matrimonial law further adapted to changes within English society. England experienced an enormous influx of immigrants from some of its former colonies where polygamy was common and legal. By the 1950s, the common law, striving to further mitigate the severity of the Hyde rule, had developed a more favorable stance towards polygamy. This was accomplished by shifting to a conflict of laws approach in addressing the legal problem of foreign polygamy. By this period, polygamous marriages were generally

29. [1946] 1 All E.R. 348 n.
30. Id.
31. Id. at 348-49.
32. As one commentator points out, there are at least three grounds for the the Sinha opinion. The first is that the marriage was in fact monogamous since neither party took on another spouse. However, this ground is contrary to Hyde and In re Bethell since neither of these cases distinguished between potentially polygamous and actually polygamous marriages. The second theory is that the potentially polygamous marriage was converted into a monogamous marriage when Lord Sinha and his wife changed religion before the petitioner was born. This explanation also is contrary to Hyde in that the husband had changed his religion and domicile before petitioning for divorce. The third view is that there were no grounds for refusing recognition of the validity of a lawful polygamous marriage since the petitioner in Sinha was neither seeking to invoke English matrimonial law nor claiming to inherit English real estate. See Morris, supra note 13, at 295-97.
33. Id. at 298.
34. Dicey & Morris, supra note 9, at 678. See also Law Commission, Family Law: Report on Polygamous Marriages (Law Com. No. 42) ¶ 23 (1971) [hereinafter Law Comm'n No. 42].
35. The continued application of the harsh position taken by the Hyde court would also have created a large number of "bastards" among Queen Victoria's subjects. Collier, supra note 9, at 276.
36. According to a leading authority on the subject, the common law rule on the legal recognition of polygamy was that a marriage that was polygamous, as determined by the law of the place of celebration, and (1) that was not celebrated in England in accordance with polygamous forms and was without any civil ceremony as required by English law, and (2) whose parties' personal law permitted them to contract to such a marriage, would be recognized in England as a valid marriage unless there was some strong reason to the contrary. Dicey's Conflict of Laws 278 (J.H.C. Morris et al. eds., 7th ed. 1958) [hereinafter Dicey's] (citing The Sinha Peerage Claim, [1946] 1 All E.R. 348 n.; Srbn Vasan v. Srbn Vasan, [1946] P. 67; Baindail v. Baindail, [1946] P. 122 (Eng. C.A.); Bamgbose v. Daniel, [1955] App. Cas. 107 (P.C.)). After the Sinha decision, it was "clear that [polygamous marriages were] . . . recognised for many purposes." Id. at 279. The above stated rule clearly exhibits conflict of laws principles. See discussion infra notes 51-57 and accompanying text.
37. See supra note 36.
given proper legal effect, but matrimonial relief was still unavailable.\(^{38}\) A polygamous marriage was valid in England if both parties had the capacity to contract to it by their respective personal law\(^{39}\) at the date of the matrimonial ceremony and if the marriage was valid by the \textit{lex loci celebrationis} (the law of the place of celebration).\(^{40}\) Polygamous marriages celebrated in England, however, remained invalid regardless of the domicile of the parties.\(^{41}\)

A valid polygamous marriage produced the normal rights and obligations of marriage for the purposes of invalidating a subsequent monogamous marriage, legitimizing children for the law of succession and nationality, legitimizing widows as surviving spouses for the law of succession, and maintaining actions on behalf of widows or children.\(^{42}\) Although English polygamy law had progressed significantly by mid-century, marital relief, a major component of matrimonial law, was still unavailable to parties in a polygamous marriage.

Consistent with the post-World War II "explosion of law making in family matters,"\(^{43}\) English matrimonial law continued to develop in the early 1970s, when Parliament codified the common law on polygamy and finally extended marital relief to immigrant polygamous marriages. Following the recommendations of the Law Commission,\(^{44}\) Parliament instituted sweeping statutory changes with the enactment of the Matrimonial Proceedings (Polygamous Marriages) Act 1972. Section 1 of that Act—now embodied with minor changes in section 47 of the Matrimonial Causes Act 1973—effectively abrogated the \textit{Hyde} rule and granted matrimonial relief to parties to a polygamous marriage, whether actual or potential.\(^{45}\) Section 4 of the 1972 Act—now section 11(d) of the Matrimonial


\(^{39}\) "Personal law" is the law governing personal status, which is determined by the law of domicile. See 8 \textit{Halsbury's Laws of England} ¶ 473 (4th ed. 1974). Sometimes the religious law of the person determines his or her personal law. \textit{Id.} For instance, numerous African and Asian countries have legal systems in which each religious or ethnic community is governed by its own law in matters of personal status (e.g., Hindus are governed by Hindu law and Muslims by Islamic law). \textit{Dicey & Morris}, supra note 9, at 650. Thus, an English court ascertaining the personal law of a person in a foreign marriage must (1) determine that person's domicile, and (2) if the person is domiciled in a country using a legal system described above, the court must then inquire into that person's community. \textit{Id.}

\(^{40}\) \textit{Morris}, supra note 13, at 335. \textit{See also} Law Comm'N No. 42, supra note 34, ¶ 9.

\(^{41}\) The exception to this was a polygamous marriage celebrated in England before the ambassador of the country of which the parties were citizens. In such cases, the marriage was valid. \textit{Morris}, supra note 13, at 335. The validity of marriages celebrated in England was entirely regulated by statutory law. Law Comm'N No. 42, supra note 34, ¶ 16.

\(^{42}\) \textit{Morris}, supra note 13, at 336.


\(^{44}\) \textit{See} Law Comm'N No. 42, supra note 34, ¶ 135.

\(^{45}\) Section 47(1) of the Matrimonial Causes Act 1973 provides in part: "A court in England and Wales shall not be precluded from granting matrimonial relief or making
nial Causes Act 1973—codified the English policy, as widely interpreted at
that time, prohibiting English domiciliaries from contracting into polyga-
mous marriages.\textsuperscript{46} Since the implementation of this Act, statutes in other
areas of the law have adopted explicit polygamy provisions.\textsuperscript{47}

2. Current English Polygamy Law

English polygamy law today is largely the same as it was in the early 1970s,
except that it currently treats certain potentially polygamous marriages as
de facto monogamous marriages.\textsuperscript{48} Similar treatment of these forms of

\begin{equation}
\text{a declaration concerning the validity of a marriage by reason only that the marriage in question was entered into under a law which permits polygamy.} \text{ 27 Halsbury's Statutes 791 (4th ed. 1992 reissue).}
\end{equation}

\textsuperscript{46} Section 11 of the Matrimonial Causes Act 1973 (Grounds on Which a Marriage is Void) provides in part the following:

\begin{quote}
A marriage celebrated after 31st July 1971 shall be void on the following
grounds only, that is to say
\end{quote}

\begin{itemize}
\item[(b)] that at the time of the marriage either party was already lawfully married;
\item[(c)] that the parties are not respectively male and female;
\item[(d)] in the case of a polygamous marriage entered into outside England and
Wales, that either party was at the time of the marriage domiciled in England
and Wales.
\end{itemize}

For the purposes of paragraph (d) of this subsection a marriage may be polyga-
mous although at its inception neither party has any spouse additional to the
other.


\textsuperscript{47} See, e.g., Council Tax Benefit (General) Regulations, 1992 (SI 1992 No. 1814),
\textsection{} 11 (calculation of income and capital of members of claimant's family and of a poly-
magamous marriage); Disability Working Allowance (General) Regulations, 1991 (SI 1991
No. 2887), \textsection{} 12 (same); Housing Renovation etc. Grants (Reduction of Grant) Regula-
tions, 1990 (SI 1990 No. 1189), \textsection{} 13 (calculation of weekly grants for polygamous mar-
rriages); Community Charge Benefits (General) Regulations, 1989 (SI 1989 No. 1291),
\textsection{} 8 (calculation of applicable income support for polygamous marriages); Housing Bene-
fit (General) Regulations, 1987 (SI 1987 No. 1971), \textsection{} 17 (calculation of weekly grants for
polygamous marriages).

\textsuperscript{48} Before the landmark case by the Court of Appeal in Hussain v. Hussain, [1983]
Fam. 26 (C.A.), subsections 11(b) and (d) of the Matrimonial Causes Act 1973, see supra
note 46, were read literally to mean that under English law, no English domiciliaries
had the capacity to enter a polygamous marriage regardless of whether the marriage
was actually or potentially polygamous. Law Commission, Private International Law:
Polygamous Marriage (Law Comm'n No. 146) \textsect{} 2.7-2.10 (1985) [hereinafter Law
Comm'n No. 146] (discussing the impact of Hussain on the interpretation of section
11). However, Hussain ruled this assumption incorrect with regard to certain poten-
tially polygamous marriages. See Hussain, [1983] Fam. at 33; see also Law Comm'n No.
146, supra, \textsect{} 2.20. The case involved a Muslim man domiciled in England who married
a woman domiciled in Pakistan under Islamic law in Pakistan. Hussain, [1983] Fam. at
30. The Hussain court found that the marriage could not be polygamous because
neither party had the capacity to marry a second spouse under their personal laws. Id.
at 32-33. Islamic law permits polygyny, but not polyandry. Consequently, the wife was
forbidden by Islam, her personal law, to take additional husbands. Id. Similarly, the
husband's personal law, English law, forbade him to take additional wives. Id. The
Hussain court thus held that subsection 11(b), which prohibits bigamy, applied. Id. at
32. The court reasoned that since neither party had the capacity to take more than one
spouse, the marriage was monogamous and thus not invalid under section 11(d). Id. at
33. The practical consequence of this case is that a potentially polygamous marriage
marriage represents another effort by English law to accommodate the needs of an increasingly diverse English society while maintaining its public policy requirement that English domiciliaries enter only into de facto monogamous marriages.

Contemporary English law on actually polygamous marriages consists largely of conflict of laws principles. English courts will not recognize an actually polygamous marriage unless it was validly created according to English private international law (i.e., conflict of laws rules). The marriage must have been contracted between parties of full capacity and in compliance with the formal requirements of the \textit{lex loci celebrationis}. English courts will recognize an actually polygamous marriage for most purposes cannot be invalidated by that section if the husband is domiciled in England or, theoretically, any country with monogamous matrimonial law. \cite{dicey_morris_supra} at 660. \textit{See also LAW Comm'N No. 146, supra, \S 2.10.} Thus, this section applies only to actually polygamous marriages in which the wife is domiciled in England and the husband is domiciled in a country whose law permits polygyny. \cite{dicey_morris_supra} at 660-61; \textit{see also LAW Comm'N No. 146, supra, \S 2.10.} The approach by the \textit{Hussain} court is generally supported by legal scholars who argue that it is inappropriate to say that a marriage is polygamous when it is de facto monogamous and neither party can legally contract into additional marriages. \textit{See, e.g., DICEY & MORRIS, supra note 9, at 652.} As a result of \textit{Hussain}, English legal reformers are calling on Parliament to codify the new interpretation. \textit{See LAW Comm'N No. 146, supra, \S 2.17.} The Law Commission, however, recommended that section 11 be amended to allow men and women domiciled in England to have the capacity to enter marriages celebrated outside England in polygamous form but which are not actually polygamous (i.e., potentially polygamous marriages). \textit{See id.}

According to the Law Commission, the two remaining legal differences between a monogamous marriage and a potentially polygamous marriage are: (1) the present rules on the capacity to marry; and (2) the right to succession as an "heir" to real property, titles of honor, or entailed interests. \textit{LAW Comm'N No. 146, supra note 48, \S 3.5. See also P.M. NORTH & J.J. FAWCETT, CHESHIRE AND NORTH'S PRIVATE INTERNATIONAL LAW 626 (12th ed. 1992) [hereinafter CHESHIRE & NORTH].} Legal scholars point out, however, that the first difference will disappear if the Law Commission's reform proposals are adopted. \textit{Id.} As to the second distinction, they point out that the difference is more apparent than real, since the restrictions on succession appear to limit themselves to the children of actually polygamous marriages. \textit{Id.} The court in The Sinha Peerage Claim, [1946] 1 All E. R. 348 n., explained this problem succinctly: "If there were several wives, the son of a second or third wife might be the claimant to a dignity to the exclusion of a later born son of the first wife. Our law as to heirship has provided no means for settling such questions as these." \textit{Id.} at 349 n. Consequently, adoption of the Law Commission's proposals would effectively result in the equal treatment of both monogamous and potentially polygamous marriages. \textit{CHESHIRE & NORTH, supra, at 626.}

As the \textit{Hussain} court explained:

\textit{[I]t is difficult to conceive any reason why Parliament, in an increasingly pluralistic society, should have thought it necessary to prohibit persons, whose religious or cultural traditions accept polygamy, from marrying in their own manner abroad, simply because they are domiciled in England and Wales. On the other hand, it is obvious that Parliament, having decided to recognise polygamous marriages as marriages for purposes of our matrimonial legislation, would think it right to preserve the principle of monogamy for persons domiciled here.}

\textit{Hussain, [1983] Fam. at 32.}

\textit{51. CHESHIRE & NORTH, supra note 49, at 621.}

\textit{52. Id.}
poses if it is valid (1) with regard to form under the law where the marriage took place (lex loci celebrationis) and (2) with regard to capacity under each party's antenuptial domicile (lex domicilii, or the dual domicile test), unless strong reasons dictate otherwise (e.g., public policy). These requirements are based substantially on section 11 of the Matrimonial Causes Act 1973, which governs the capacity of English domiciliaries to contract into polygamous marriages. A marriage fulfilling these requirements, for example, would be one celebrated in Pakistan in accordance with Muslim rites between Pakistani domiciliaries. Hence, these legal requirements are restricted to affect mainly immigrants from countries whose customs include polygamy.

The present law has tipped the balance in favor of immigrants in actually polygamous marriages. Courts have moved from defining those exceptional instances where such marriages are recognized to defining those few instances where they are not. Thus, aside from access to the English matrimonial relief mechanism under section 47 of the Matrimonial Causes Act 1973, actually polygamous marriages enjoy most other privileges common to monogamous marriages. Marriage law experts note the following major continuing areas of difference between an actually polygamous marriage and a monogamous marriage: (1) the capacity to marry and (2) certain rules relating to social security benefits.

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54. This test is also commonly referred to as the "orthodox" theory. Law Comm'n No. 146, supra note 48, ¶ 2.2-2.3. See also 8 Halsbury's Laws of England ¶ 466 (4th ed. 1974). A minority approach discussed in Radwan v. Radwan (No. 2), [1973] Fam. 35, dictates that the parties' capacity to marry is determined by their intended matrimonial home. See id. at 45. Most English legal authorities, however, dismiss this theory as incorrect. See 8 Halsbury's Laws of England ¶ 477 (4th ed. 1974). The great majority of cases on this subject continue to apply the dual domicile test. Law Comm'n No. 146, supra note 48, ¶ 2.2-2.3. See, e.g., Lawrence v. Lawrence, [1985] T.L.R. (C.A.) (describing the dual domicile test as "the traditional and still prevalent view"). A third theory, rejected by English courts in Ali v. Ali, [1968] P. 564, looks to the law of the place of celebration. See also Law Comm'n No. 146, supra note 48, ¶ 2.2.


56. See text accompanying supra note 46.

57. Dicey & Morris, supra note 9, at 668.


60. The general pattern of legislative interpretation since the early 1970s has been a progressive one so that the term "wife" is generally taken to include the wives in an actually polygamous marriage. Cheshire & North, supra note 49, at 626.

61. Id.
B. The Status of Lesbian & Gay Rights in England  

Unlike polygamous marriages, same-sex marriages are not recognized in England. As discussed below, both English statutory and common law have traditionally been hostile to lesbian and gay rights and have only rarely addressed same-sex marriages. English law has yet to treat same-sex couples as other than legal strangers.  

English statutes address homosexuality in limited terms and in hostile and concessionary language. The Sexual Offences Act 1967, for example, legalized consensual "homosexual acts" in private, but it also imposed restrictions and penalties not otherwise imposed on different-sex acts. In practice, the definition of privacy under the act is rigidly narrow since sexual activity between consenting same-sex adults in a bedroom violates the act if more than two people are present in the entire house. Thus, even same-sex intimacy in a hotel room is technically illegal in England.  

Section 28 of the Local Government Act 1988, which prohibits local authorities from supporting lesbian and gay rights, better illustrates statutory hostility towards lesbians and gays. In particular, this statute prohib-
its local authorities from intentionally promoting homosexuality as a "pretended family relationship." Section 28 has had a considerable impact on English lesbians and gays; local authorities, for fear of prosecution, have denied grants to causes that might conceivably violate the discriminatory provision.

Further, section 11(c) of the Matrimonial Causes Act 1973 explicitly states that a marriage is void if the parties are not "respectively male and female," a view that is also shared in the common law. Current English law also fails to recognize any other type of same-sex relationship as illustrated in Harrogate Borough Council v. Simpson. In that case, the Court of Appeal dismissed an appeal by a woman, Ms. Simpson, evicted by the Harrogate Council from an apartment she shared with Ms. Rodrigo, her partner, for two-and-a-half years until Ms. Rodrigo died in 1984. The apartment was in Ms. Rodrigo's name, but Ms. Simpson argued that she should not be evicted because she was a member of Ms. Rodrigo's "family" under the section 30 of the Housing Act 1980. The Court refused her appeal, however, because it found that the two women did not meet the statutory "family" definition under section 50(3) of the Housing Act. In

(1) A local authority shall not-
(a) intentionally promote homosexuality or publish material with the intention of promoting homosexuality;
(b) promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship.


70. Id.

71. Tatchell, supra note 66, at 34. Further, the constraints imposed by section 28 tend to discourage coverage of homosexuality in sex education classes. Europe in the Pink, supra note 62, at 98. This denies students a full comprehension of human sexuality and ignores the needs of those who are struggling to understand their own homosexuality. Id.

72. Matrimonial Causes Act 1973, § 11(c), 27 Halsbury's Statutes 748 (4th ed. 1992 reissue). Section 11(c), however, does not mean that before July 31, 1971, parties of the same sex could enter into matrimony. This was regulated by common law. See infra note 73.

73. See Talbot v. Talbot, [1967] 111 Sol. J. 213 (pronouncing a decree nisi where the supposed husband in the marriage was in fact a woman); Corbett v. Corbett, [1970] 2 All E.R. 33 (holding a marriage null and void where the supposed wife was in fact a male-to-female transsexual).

74. [1986] 2 FLR 91.

75. Id. at 92.

76. Id. Section 30 of the Housing Act 1980 reads in part:
(1) Where a secure tenancy is a periodic tenancy and, on the death of the tenant, there is a person qualified to succeed him, the tenancy vests by virtue of this section in that person . . . .
(2) A person is qualified to succeed a tenant under a secure tenancy if he occupied the dwelling-house as his only or principal home at the time of the tenant's death and either—
(a) he is the tenant's spouse; or
(b) he is another member of the tenant's family and has resided with the tenant throughout the period of 12 months ending with the tenant's death.

Simpson, 2 FLR at 92-93 (emphasis added).

77. Simpson, 2 FLR at 95. Subsection 50(3) of the Housing Act 1980 only includes people who "live together as husband and wife" in its definition of "family." Id. at 93.
explaining its reasoning, the Simpson court wrote:

[I]t would be surprising in the extreme to learn that public opinion was such today that it would recognise a homosexual union as being akin to a state of living as husband and wife. The ordinary man and woman, neither in 1975 nor in 1984, would in my opinion not think even remotely of there being a true resemblance between those two very different states of affairs.\textsuperscript{78}

The Simpson court's opinion epitomizes English judicial views on same-sex relationships.

II. The Danish Registered Partnership Act and Its Significance

A. The Danish Registered Partnership Act

An understanding of the specific rights flowing from a registered partnership is important in understanding the precise legal rights of a married Danish same-sex couple in Denmark. It also provides a benchmark for how the law of another country should recognize the couple.

The legislation itself is short;\textsuperscript{79} it essentially incorporated the existing

\textsuperscript{78} Simpson, [1986] 2 FLR at 95 (emphasis added).

\textsuperscript{79} The Partnership Act, reads as follows:

\textbf{THE DANISH REGISTERED PARTNERSHIP ACT}

WE MARGRETHE THE SECOND, by the Grace of God Queen of Denmark, do make known that:

The Danish Folketing has passed the following Act which has received the Royal Assent:

1. Two persons of the same sex may have their partnership registered.

\textbf{Registration}

2. (1) Part I, sections 12 and 13(1) and clause 1 of section 13(2) of the Danish Marriage (Formation and Dissolution) Act shall apply similarly to the registration of partnership[s], cf. subsection 2 of this section.

(2) A partnership may only be registered provided both or one of the parties has his permanent residence in Denmark and is of Danish nationality.

(3) The rules governing the procedure of registration of a partnership, including the examination of the conditions for registration, shall be laid down by the Minister of Justice.

\textbf{Legal Effects}

3. (1) Subject to the exceptions of section 4, the registration of a partnership shall have the same legal effects as the contracting of marriage.

(2) The Provisions of Danish law pertaining to marriage and spouses shall apply similarly to registered partnership[s] and registered partners.

4. (1) The provisions of the Danish Adoption Act regarding spouses shall not apply to registered partners.

(2) Clause 3 of section 15 and section 15(5) of the Danish Legal Incapacity and Guardianship Act regarding spouses shall not apply to registered partners.

(3) Provisions of Danish law containing special rules pertaining to one of the parties to a marriage determined by the sex of that person shall not apply to registered partners.

(4) Provisions of international treaties shall not apply to registered partnership[s] unless the other contracting parties agree to such application.
marriage law by reference and extends it to same-sex couples, with a few exceptions. Under section 3 of the Partnership Act, all the legal consequences of a different-sex marriage apply equally to a registered partnership, subject to the exceptions listed in section 4 of the Act. Accordingly, Danish rules governing property in marriage and the right of married persons to social welfare payments apply to registered partnerships as well. Further, on the death of one of the partners, the registered partnership dissolves, and the surviving partner may keep undivided possession of the estate in accordance with Danish inheritance laws, subject to the exception regarding common heirs. Finally, obligations under family law, such as mutual maintenance duties, taxation, and possible alimony payments upon divorce, also apply to registered partnerships. To accommodate the various changes created by the Partnership Act, the Folketing simultaneously passed a companion bill amending the Danish Marriage Act, the Inheritance Act, the Inheritance and Gifts (Tax-

Dissolution

5. (1) Parts 3, 4, and 5 of the Danish Marriage (Formation and Dissolution) Act and Part 42 of the Danish Administration of Justice Act shall apply similarly to the dissolution of a registered partnership, cf. subsections 2 and 3 of this section.
(2) Section 46 of the Danish Marriage (Formation and Dissolution) Act shall not apply to the dissolution of a registered partnership.
(3) Irrespective of section 448 c of the Danish Administration of Justice Act[,] a registered partnership may always be dissolved in this country.

Commencement etc.

6. This Act shall come into force on October 1, 1989.
7. This Act shall not apply to the Faroe Islands nor to Greenland but may be made applicable by Royal Order to these parts of the country with such modifications as are required by the special Faroese and Greenlandic conditions.

Given at Christiansborg Castle, this Seventh Day of June, 1989[

Under Our Royal Hand and Seal
MARGRETHE R[.]

(Translation performed by the Danish Ministry of Foreign Affairs, Copenhagen, Denmark) (on file with the Cornell International Law Journal).

80. Partnership Act, supra note 2, § 3. See text supra note 79. Interestingly, the unions under the act are labeled "partnerships" rather than marriages. The act itself, however, compares its effects to those of marriage numerous times. See id. §§ 2(1), 3(1), 3(2), 5(1). For a comparison of registered partnerships to marriages, see generally Michael Elmer & Marianne L. Larsen, Explanatory Article on the Legal Consequences, Etc., of the Danish Law on Registered Partnership. This article is an English translation of an article that appeared in Juristen, a Danish law journal. The translation is available from Landsforeningen for Bøser og Lesbiske (National [Danish] Organization for Gays and Lesbians) in Copenhagen. See also Marianne H. Pedersen, Denmark: Homosexual Marriages and New Rules Regarding Separation and Divorce, 30 J. Fam. L. 289, 289-91 (1991-92).

81. Partnership Act, supra note 2, § 3. See text supra note 79.
82. Elmer & Larsen, supra note 80.
83. Id.
84. Id.
85. Id. See also Pederson, supra note 80 at 290.
86. The Folketing is the Danish Parliament. See 3 Modern Legal Systems Encyclopedia § 3.1(B) (1990).
To enter a same-sex marriage, at least one of the individuals must be a Danish citizen and a permanent resident of Denmark. Commentators believe that the citizenship provision was added because the Folketing believed that marriages under the Partnership Act would probably not be recognized abroad. In addition to the citizenship requirement, the unions must take place in civil ceremonies since the Partnership Act does not provide for ceremonies in the Danish Protestant Church.

The four exceptions imposed on same-sex marriages are embedded in section 4 of the Partnership Act. Subsection 4(1) exempts the provisions of the Danish Adoption Act from applying to registered partners. The partners are consequently unable to adopt jointly. Subsection 4(2) exempts the regulations of the Danish child custody law from applying to registered partners. Subsection 4(3) exempts a special provision of the Marriage (Effects) Act—requiring a husband to be responsible for "his wife's ordinary contracts entered into in satisfaction of her own special needs"—from applying to registered partnerships. Lastly, subsection 4(4) exempts the Partnership Act from international treaties unless the contracting parties agree otherwise.

The last of these exceptions, subsection 4(4), is of special importance to this Note. It explicitly exempts registered partnerships from international agreements. This provision is based on the expectation that for the moment registered partnerships will only have legal effect in Den-

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87. Elmer & Larsen, supra note 80. The Marriage Act, for example, was amended to provide that an undissolved registered partnership is an impediment to marriage in the same way as is a previous marriage. Id. at 4. Similarly, the Penal Code was amended to make bigamy in relation to a registered partnership punishable. Id.

88. Partnership Act, supra note 2, § 2(2). See text supra note 79.

89. Pedersen, supra note 80, at 290. The reasoning behind this notion may be that the Partnership Act is, as Denmark's Christian People's Party argued, at odds with the laws of other countries. See Rule, supra note 1.

90. Julian Isherwood, 11 Homosexual Couples Wed Under New Danish Law, UPI, Oct. 1, 1989, available in LEXIS, News Library, Arcnwss File; Pederson, supra note 80, at 290. One high church official, however, has expressed explicit support for the celebration of same-sex marriages in the Danish Protestant Church. In a comment expressing his hope that same-sex marriages would soon be celebrated in Denmark's Protestant Church, the senior bishop, Ole Bertelsen of Copenhagen, remarked that he hopes "that time is not far off." Isherwood, supra.

91. Elmer & Larsen, supra note 80; Pederson, supra note 80, at 290. This provision is based on the assumption that registered partners can have children separately but not together. Id. Danish legislators, however, admitted that the government's rationale behind §4(1) is the fear that Third World countries would stop the flow of adoptive children to Denmark. Isherwood, supra note 90.

92. This means that a registered couple cannot obtain common custody of children from a previous marriage of either party. Elmer & Larsen, supra note 80. There is nothing to prevent one of the partners, however, from obtaining custody of his or her child. Id.

93. Id.

94. As of yet, no agreement exists between Denmark and another nation to recognize the Partnership Act outside Danish borders. Opponents of the Partnership Act charged that the law was impractical because it would not be recognized elsewhere. See supra note 89 and accompanying text.
mark. This provision, however, does not prevent other governments from recognizing the rights of Danish same-sex couples outside Denmark.

B. A Milestone in the Progression of Human Rights

1. Justifications for Same-Sex Marriage Laws and Their Foreign Recognition

An amalgam of practical, legal, and moral arguments dictates the necessity for same-sex marriage laws. Few people would deny that marriage is a heavily favored institution in most societies. The United States Supreme Court, for example, described marriage as "one of the basic civil rights of [men and women]," and the freedom to marry as "essential to the orderly pursuit of happiness." In cultures everywhere, marriage triggers "a universe of rights, privileges and presumptions." In the United States, for instance, marriage carries with it a myriad of benefits, including: (1) numerous income tax advantages, including deductions, credits, and exemptions; (2) access to public assistance programs; (3) control, division, acquisition, and disposition of community property; (4) rights relating to dower, curtesy, and inheritance; (5) award of child custody and support payments in divorce proceedings; (6) the right to spousal support; (7) the right to enter into premarital agreements; (8) the right to change one's name; (9) the right to file a nonsupport action; (10) post-divorce rights relating to support and property division; (11) the benefit of the spousal privilege and confidential marital communications; and (12) the right to bring a wrongful death action.

Further, marriage promotes social stability through the protection it affords its participants and their families. Contrary to the assertions of same-sex marriage opponents, extending marital rights to same-sex couples would promote the family by protecting lesbian and gay families. Andrew Sullivan, the editor of the New Republic, argues that the
institution of same-sex marriage advances the conservative cause by "foster[ing] social cohesion, emotional security[,] and economic prudence." Similarly, civil rights attorney Tom Stoddard justifies legalizing same-sex marriage on three primary grounds. First, marriage provides practical economic and legal benefits. Second, marriage provides validity for lesbian and gay relationships. Third, legalizing same-sex marriages may divest marriage of its sexist base.

Legally-endorsed discrimination exists when some members of society are allowed to marry and enjoy its accompanying benefits while others are denied this privilege solely on the basis of their sexual orientation. Consequently, the law commits an injustice and a moral violation by stigmatizing lesbian and gay members as second-class citizens of society.

2. Same-Sex Marriage: An Emerging Civil Right

Western society generally considers the freedom to marry a fundamental civil right and has protected this freedom through its laws. The U.S. Supreme Court has characterized the freedom to marry as essential to the pursuit of happiness and as "one of the 'basic civil rights of man.'" The right to marry is also protected on an international level by human rights treaties such as the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and
Fundamental Freedoms\textsuperscript{112} (Convention). In Europe, the right to marry is guaranteed by the constitutions of several nations,\textsuperscript{113} and most European countries, including Denmark and England, belong to the Convention.\textsuperscript{114}

Despite this protection, marital laws have in the past helped keep minorities in inferior social strata. In the United States, for example, marriage among slaves was prohibited until the Civil War.\textsuperscript{115} In addition, many states enforced antimiscegenation statutes\textsuperscript{116} until the Supreme Court declared them unconstitutional in 1967.\textsuperscript{117}

Restrictions on the gender composition of a married couple\textsuperscript{118} are substantively identical to former restrictions on the racial composition of a married couple.\textsuperscript{119} The arguments supporting the prohibition of same-sex marriages parallel the arguments used to prohibit interracial marriages. In justifying their antimiscegenation statutes, Virginia and other

\begin{footnotes}
\item[\textsuperscript{112}] I.L.M. at 375.
\item[\textsuperscript{113}] Convention, supra note 108. Article 12 of the Convention provides: "Men and women of marriageable age have the right to marry and found a family, according to the national laws governing the exercise of this right." Id. art. 12.
\item[\textsuperscript{114}] The Convention constitutes a floor of protection since the Contracting States may not proscribe the basic rights and freedoms protected by the Convention. Lawrence R. Helfer, Lesbian and Gay Rights as Human Rights: Strategies for a United Europe, 32 Va. J. Int'l L. 157, 160 (1991). Contracting states, however, are free to maintain their own higher standards of protection. Article 60 of the Convention specifically provides: "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party." Convention, supra note 108, art. 60.
\item[\textsuperscript{115}] Kees Waaldijk, The Legal Situation in the Member States, in HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE 71, 91 (Kees Waaldijk & Andrew Clapham eds., 1993) (citing, for example, Art. 6 of the German Constitution and Art. 32 of the Spanish Constitution).
\item[\textsuperscript{116}] The Contracting States are those nations that have ratified the Convention. These nations include Austria, Belgium, Cyprus, Denmark, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. Hungary and the former Czechoslovakia signed the Convention in 1990 and 1991 respectively, although neither had ratified it as of March 1, 1991. Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Chart of Signatures and Ratifications, No. 5 (Mar. 1991).
\item[\textsuperscript{117}] See Loving v. Virginia, 388 U.S. 1 (1967).
\item[\textsuperscript{118}] I.e., male-male, male-female, or female-female.
\item[\textsuperscript{119}] For a legal discussion on the similarities between antimiscegenation statutes and those forbidding same-sex marriages, see Bahr v. Lewis, 852 P.2d 44, 59-63, 67-68 (Haw. 1993) (concluding that prohibitions on same-sex marriages are no different than those on interracial marriages); Eskridge, supra note 116, at 1507 (same). See also Mark Strasser, Family, Definitions, and the Constitution; On the Antimiscegenation Analogy, 25 Suffolk U. L. Rev. 981 (1991) (analogizing the legal prohibition of interracial marriages to that of same-sex marriages); James Trosino, Note, American Wedding: Same-Sex Marriage and the Miscegenation Analogy, 73 B.U. L. Rev. 93 (1993) (same).
\end{footnotes}
states asserted the same definitional (marriage has never included different-race couples), morality-based (God ordained this), and pragmatic (people would be upset if interracial couples were allowed to marry) arguments that states now invoke to justify prohibiting same-sex marriages. Unlike the dismantled antimiscegenation statutes, however, prohibitions on same-sex marriages exist in most of the modern world, with the exception of Denmark and Norway. For this reason, Denmark's Partnership Act represents a hallmark in the evolution of civil rights.

The Partnership Act is not the product of ephemeral politics in Denmark; rather, the Act resulted from over forty years of campaigning by advocates. The Act also seems to foreshadow similar changes in the laws of Denmark's European neighbors. The Norwegian government,
for example, recently enacted a same-sex marriage law, effective August 1, 1993, that is very similar to Denmark’s. Further, although no state in the United States currently recognizes same-sex marriages, many cities are moving to minimize the adverse effects of marital legal discrimination by creating domestic partnership laws in their jurisdictions and extending various benefits to partners of lesbian and gay city employees. The response by Denmark and Norway, as well as the legal dia-

legal contracts, arranging a set of private rights that are similar to those given to opposite-sex marriages. Id.

Significant progress on lesbian and gay rights is not limited to the above-mentioned countries. The European Court of Human Rights has protected the right of all Europeans to adult homosexual privacy through two major decisions: Dudgeon v. United Kingdom, 45 Eur. Ct. H.R. (ser.A) (1981), and Norris v. Ireland, 142 Eur. Ct. H.R. (ser.A) (1988). In addition, numerous other European countries have enacted lesbian and gay rights laws incorporating varying degrees of protection. See generally Tatchell, supra note 66; Europe in the Pink, supra note 62; Waaldijk, supra note 113.


125. The state of Hawaii, however, recently laid the groundwork for what may result in the first legal recognition of same-sex marriages in the United States. In Baehr v. Lewin, 859 P.2d 44 (Haw. 1993), three same-sex couples challenged Hawaii’s marriage law, which banned same-sex marriages. They argued, among other things, that it discriminated on the basis of sex (e.g., a woman can marry a man but not a woman). Id. at 49-50. One of the state’s main arguments was that the same-sex marriage prohibition was justified on notions of tradition. See id. at 52. The Hawaii Supreme Court, in a narrow plurality opinion, ruled that the law was presumptively unconstitutional under the state constitution’s equal protection clause. Id. at 68. The Baehr court rejected the state’s argument, finding that reliance on tradition is grounded in relative notions of religion and status quo but it is not a legal argument. Id. at 63. The Baehr court remanded the case, directing the lower court to subject the marriage statute to the strict scrutiny test. The court required the state to demonstrate that “(a) the statute’s sex-based classification is justified by compelling state interests and (b) the statute is narrowly drawn to avoid unnecessary abridgements of the applicant couples’ constitutional rights.” Id. at 67, 68.

126. Since the law has not “kept up with the changes in family life[,] . . . many groups which function as families are not recognized as such, and are denied benefits which society bestows upon families which resemble the traditional model . . . .” Mary P. Treuhaft, Adopting a More Realistic Definition of “Family,” 26 Gonz. L. Rev. 91, 92 (1990).

127. Some of the typical benefits extended to domestic partners include health benefits, sick leave, and bereavement leave. See id. at 101-02 n.32.

logue in other countries, thus illustrates that discriminatory prohibitions of same-sex marriages is an emerging civil rights issue.

III. England in Focus: Rationale for Analogizing Recognition of Foreign Same-Sex Marriages to Recognition of Foreign Polygamous Marriages

England has gone further than most countries in shedding the absolute supremacy of the concept of monogamous traditional marriages. This is illustrated by England's well-developed case law regarding the legal recognition of polygamy. England, however, also has a strong social and legal hostility to even basic gay and lesbian issues and is therefore a needy candidate for positive legal improvement. Additionally, as a member of the EC, England is affected by the social policy acts of other Member States since relocation within the EC is relatively easy.

The current state of English polygamy law exhibits a shift towards a conflict of laws approach and a retreat from the obsolescent public policy of strict conformance to conventional notions of marriage. The present rules represent a desire by English law to accommodate immigrants who entered into polygamous marriages abroad. The evolution of polygamy law in England thus serves as an ideal analogy for the argument that Danish same-sex marriages should be recognized by English courts under the same terms as are polygamous marriages.

Same-sex marriages are—as were polygamous marriages in early polygamy cases—considered contrary to conventional Christian matrimonial principles. English courts moved toward acceptance of foreign polygamous marriages by shedding the unyielding public policy of adher-


129. See supra part I.A.

130. See generally Stephen Jeffery-Poulter, Peers, Queers, and the Commons (1991); see also Tatchell, supra note 66, at 29-34.


132. See discussion supra notes 48-61 and accompanying text.

133. See discussion supra part I.A.1.

134. Compare, however, the polygamous beliefs of the Church of Jesus Christ of Latter-Day Saints (Mormon Church) and the same-sex marriages throughout Christian history. Joseph Smith, Jr., founder of the Mormon Church, described polygamy as "the most holy and important doctrine ever revealed to man on earth." Richard S. Van Wagoner, Mormon Polygamy: A History iii (1986). Smith insisted that without the practice of polygamy, "fullness of exaltation" in the hereafter was unattainable. Id. The Mormon Church publicly advocated polygamy until 1890 when it eliminated the practice under pressure from the U.S. Congress. Id. See also Jessie L. Embry, Mormon Polygamous Families: Life in the Principle 3-16 (1987). For a comprehensive discus-
ence to strict Christian matrimonial principles of monogamy, focusing instead on conflict of laws principles. This change in policy was necessitated by the enormous hardships that the previous policy placed on a significant sector of English immigrant society. Although English courts have yet to address this issue, a married same-sex couple from Denmark who moved to England today would probably face the same obstacles and judicial hostility toward the recognition of their marriage as immigrant polygamous marriages did in the early polygamy cases. The yielding to conflict of laws principles—in an effort to achieve just results with regard to polygamous marriages—illustrates the willingness of English courts to move away from exclusive Christian marital principles. Any theoretical argument against a similar legal recognition of other non-traditional marriages from other countries has consequently been forfeited. Not only would a negative legal stance on this issue by English courts undermine the legal, intellectual, and moral integrity of the law, but it would also undermine the law's intended goal of achieving just results.

IV. Analysis of Danish Same-Sex Marriage Recognition in England

A. Preliminary Considerations

Under typical conflict of laws rules, the courts of a given country must take into consideration another country's rule of law. These rules work best where the nations involved share common traditions. Problems can arise, however, when the legal philosophies of the countries in question differ despite their common cultural traditions. This is most apparent in marriage law where courts often must reconcile two views of an institution of polygamy in Christianity, see generally John Cairncross, After Polygamy Was Made a Sin: The Social History of Christian Polygamy (1974). Same-sex marriage ceremonies were performed in Christian Europe from the fifth century to as late as the 1940s. These ceremonies were performed by priests in churches from Constantinople to Rome and were considered to be a common custom. John E. Boswell, Jews, Bicycle Riders, and Gay People: The Determination of Social Consensus and Its Impact on Minorities, 1 Yale J.L. & Human. 205, 212 (1989). Professor Boswell notes that Montaigne was aware of same-sex marriages in Rome, English anthropologists such as M.E. Durham studied them, and novelists such as Christopher Isherwood mentioned them in this century. Id. at n.18. For a comprehensive historical account of same-sex marriage from ancient Egypt and Mesopotamia to the modern West, see Eskridge, supra note 116, at 1435-84.

Finally, it is perhaps ironic that one of the first couples married under the Danish Partnership Act was Reverend Ivan Larsen, a cleric at the Evangelical-Lutheran parish in Copenhagen, and Ove Carlsen, a school psychologist. Rule, supra note 1. When Reverend Larsen told his 11,000-member congregation that he would be joining in a homosexual partnership with Mr. Carlsen, the parishioners wished the couple good luck. Id.

135. Alternatively, one could argue that the public policy itself became more favorable to polygamous marriages.

136. See supra note 34 and accompanying text.


139. Morris, supra note 13, at 287.

140. Id.
tion that intimately affects human beings. Although no case on point has yet been reported, an English court deciding whether to legally recognize a Danish same-sex marriage would face difficult issues.

The immigration problems found in many polygamy cases are irrelevant to Danish same-sex marriages in England. Since both Denmark and Great Britain are members of the EC, workers from both countries can freely relocate within the EC without facing the immigration rules applicable to non-EC citizens. The analysis in part IV.B. of this Note thus focuses on the model of a same-sex married couple in which both parties are citizens and domiciliaries of Denmark but subsequently resettle in England for work-related reasons.

B. A Hypothetical Case

The circumstances under which a court would need to determine the validity of a Danish marriage are too numerous for the scope of this Note. Consequently, this Note focuses on only one such situation: intestate succession by a spouse.

In this hypothetical case, a same-sex married couple, Spouse 1 (SP1) and Spouse 2 (SP2), were married in Denmark under the Registered Partnership Act. Both parties were Danish citizens and domiciliaries, but they subsequently resettled in England for business reasons. Upon relocation, SP1 acquired a modest amount of real property in England for investment purposes. After a few years of residing together in England, SP1 died intestate and without any other living family members. An English court must decide whether to honor SP2's claim to SP1's estate, thus recognizing the same-sex marriage for succession purposes. If it decides that there are no ascertainable legal heirs, the estate belongs to the Crown. If, however, the English court recognizes the Danish marriage, SP2 then has

141. See id.
142. This occurs, for instance, because parties to a polygamous marriage who try to enter England usually come from parts of the world where polygamy is common. See supra note 34 and accompanying text.
143. See discussion supra note 132. The other current members of the EC are Belgium, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, and Spain. George A. Bermann et al., European Community Law 6-15 (1993).
144. See discussion supra note 3. Norway is not yet a member of the EC. See supra note 143.
145. As with different-sex marriages, such circumstances may involve questions ranging from marital tax issues to divorce. See supra text accompanying note 100.
146. Conceivably, an English court may simply dispense with the case by ruling that couples in SP1 and SP2's situation could have willed their property to each other. Such an action by the court, however, avoids the central legal issue.
147. In particular, if SP1 leaves no ascertainable legal heirs, his estate belongs to the Crown, the Duchy of Lancaster, or the Duke of Cornwall, as the case may be, as bona vacantia and in lieu of any right to escheat. E.H. Burn, Cheshire & Burn's Modern Law of Real Property 816 (13th ed. 1982). "Bona vacantia" refers to property, real or personal, which passes to the state as an incident of sovereignty when no owner, heir, or next of kin claims it. See Black's Law Dictionary 177-78 (6th ed. 1990).
A court deciding this claim faces two important considerations. The court may look to general conflict of laws rules, as English courts have done in examining polygamous marriages, and legally recognize the Danish marriage. Under this result, SP2 would rightfully inherit SP1's estate. Considering the controversial nature of the case, however, the court may resort to the public policy doctrine to trump the general conflict of laws rules and thus dismiss SP2's claim.

1. General Conflict of Laws Analysis

The court could follow the normal conflict of laws rules and reasoning, as with polygamy, in order to legally recognize the Danish same-sex marriage. The application of general conflict of laws rules is both difficult, because it represents a break with obsolete public policy, and simple, because of the straightforward analysis involved.

Since the union between the Danish same-sex couple is effectually a marriage, just as a polygamous union is a marriage, normal conflict of laws rules on marriage should apply. In the given hypothetical, (1) the marriage took place in Denmark and is valid in form by the lex loci celebrationis, and (2) both parties are Danish citizens and domiciliaries and had the capacity to contract into the marriage. Consequently, general conflict of laws rules dictate that the English court give full legal effect to SP1 and SP2's marriage in adjudicating SP2's claim. This simple analysis, essentially the same as that applied to polygamy, gives legal recognition to the same-sex marriage, thus allowing SP2 to rightfully succeed SP1's estate.

It is true that under subsection 4(4) of the Partnership Act, England, or any other country, is not legally obligated to recognize the Danish same-sex marriage. This provision, however, does not bar England from recognizing these marriages. In view of England's recognition of certain polygamous marriages, England should similarly recognize same-sex marriages if they otherwise meet the requirements set out in conflict of laws rules.

Statutory English matrimonial law is governed by the Matrimonial Causes Act 1973. Section 14 of this Act provides that a marriage go-

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148. If the property in question is immovable and is on English soil, English courts will apply English property law. See Cheshire & North, supra note 49, at 784.
149. See discussion supra note 80.
150. Recall that in In re Bethell (1887) 38 Ch. D. 220, an early polygamy case, the court noted that a polygamous marriage was not a marriage in the "English" sense. See id. at 236-37.
151. See Partnership Act, supra note 2. See also supra note 79 and accompanying text.
153. Id. Section 14 (Marriage Governed by Foreign Law or Celebrated Abroad Under English Law) of the Matrimonial Proceedings Act 1973 (formerly section 4(1) of the Nullity of Marriage Act 1971) reads in part:
Where, apart from this Act, any matter affecting the validity of a marriage would fall to be determined (in accordance with the rules of private international law) by reference to the law of a country outside England and Wales, nothing in section 11, 12 or 13(1) above shall-
(a) preclude the determination of that matter as aforesaid; or
erned by foreign law may be recognized by English courts notwithstanding section 11(c), which voids any marriage if the parties are not respectively male and female.\textsuperscript{154} Section 14 thus allows English courts to determine the validity of any marriage according to the rules of a foreign nation when the conflict of laws rules so require.\textsuperscript{155}

Much of the language used in English polygamy case law is as applicable to same-sex marriages as it is to polygamous marriages. For example, English courts in the mid-1800s once described polygamous marriages as "infidel."\textsuperscript{156} A vastly different stance toward such marriages, however, appeared in Cheni v. Cheni.\textsuperscript{157} In that 1965 opinion, the court acknowledged:

\begin{quote}
[T]he expression "Christendom" cannot be easily defined at the present day when in so many countries, whose inhabitants profess the Christian faith, legislative enactments have made marked departures from the canon law which was universal when the Church of Rome was . . . practically the sole maker of matrimonial laws. In general the phrase nowadays would seem to embrace civilised nations, and not exclusively those which profess the doctines of Christianity.\textsuperscript{158}
\end{quote}

In refusing to declare a foreign polygamous marriage void, the Cheni court ruled that an "injustice would be perpetrated and conscience would be affronted if the English court were not to recognise and give effect to the law of the domicile in this case."\textsuperscript{159} A similar injustice would clearly be perpetrated if English courts refused to recognize and give legal effect to the Danish same-sex marriage.

2. Public Policy Analysis

Recognition of the Danish same-sex marriage in England should occur if general conflict of laws rules are applied in the same manner as applied to foreign polygamy. An English court can, however, override this system of rules on public policy grounds. It is unrealistic to believe that an English court would confine its analysis to conflict of laws rules in resolving the hypothetical case. Ultimately, the public policy question will probably be the deciding factor, either explicitly or implicitly,\textsuperscript{160} in the English court’s decision to grant or deny legal recognition to the Danish same-sex marriage.

\textsuperscript{154} See supra note 46.
\textsuperscript{155} 27 HALSBURY’S STATUTES 751 n. (4th ed. 1992 reissue).
\textsuperscript{156} See Hyde v. Hyde, [1866] 1 L.R.-P. & D. at 134. An "infidel" is a person who is not a Christian or who opposes Christianity. MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 598 (10th ed. 1993).
\textsuperscript{157} [1965] P.85.
\textsuperscript{158} Id. at 96-97 (quoting 7 HALSBURY’S LAWS OF ENGLAND ¶ 163 (3d ed. 1954)).
\textsuperscript{159} Id. at 99.
\textsuperscript{160} The Hyde court, for example, implicitly relied upon the public policy doctrine. See discussion infra part I.A.1.
Conflict of laws rules regarding foreign polygamous marriage generally apply unless there is some strong public policy to the contrary. The public policy doctrine provides that English courts will not enforce or recognize a right, power, capacity, disability, or legal relationship arising under foreign law if doing so would be inconsistent with fundamental English public policy. Hence, domestic rules designed to protect the welfare of the public must prevail over inconsistent foreign rules.

The public policy that could potentially trump SP2's right to succeed SP1's estate is the conventional Christian notion of marriage. This notion, as quintessentially stated in *Hyde*, holds that a marriage may take place only between one man and one woman to the exclusion of all others. This policy is also expressed in subsequent common law, in section 11 of the Matrimonial Causes Act 1973, and in England's numerous anti-gay laws. Looking to these sources, an English court may decide that the Danish marriage is contrary to English public policy and refuse to recognize it. Such a holding would clearly defeat SP2's claim.

The public policy exception, however, is used only sparingly in the conflict of laws area; a broader use might frustrate the whole basis of the system. English courts are therefore reluctant to hold that a foreign law is contrary to public policy. The fact that a foreign relationship is unknown in English domestic law is not a ground for refusing to recognize its existence as shown in the recognition of polygamous marriages. A prominent legal authority has noted that "[a] transaction that is valid by its foreign lex causae should not be nullified on [public policy grounds] unless its enforcement would offend some moral, social or economic principle so sacrosanct in English eyes as to require its maintenance at all costs and without exception." In determining whether to recognize a for-

162. *Dicey & Morris*, supra note 9, at 92; see also Vervaeke v. Smith, [1983] 1 A.C. 145, 164 (Lord Glaisdale) ("There is abundant authority that an English court will decline to recognise or apply what would otherwise be the appropriate foreign rule of law when to do so would be against English public policy."); *Cheshire & North*, supra note 49, at 113.
165. The court may look to prior case law in which English courts have ruled that marriages between persons of the same-sex are null and void. See supra note 72. Those cases, however, are distinguishable from the situation here because the marriages in those cases took place in England where clearly the law did not (and does not) permit such marriages. Here, the marriage took place in Denmark where the law permits them.
166. See text supra note 46.
167. See discussion supra part I.B.
169. *Dicey & Morris*, supra note 9, at 92; see also *Working Paper* No. 89, supra note 53, ¶ 3.11.
170. *Dicey & Morris*, supra note 9, at 93.
172. Id. (emphasis added).
foreign law, English courts look at the results of its enforcement in England and not at the actual law itself. Ultimately, resolution of a public policy question thus depends on the nature of the foreign law.

In the hypothetical under consideration, enforcement of the Partnership Act would mean the recognition of a same-sex marriage on English soil.

The public policy exception is an intentionally amorphous doctrine. Rather than attempting to identify any clear boundaries, scholars have instead analyzed the public policy doctrine on a case-by-case basis. In the context of a Danish same-sex marriage, the public policy question pits changing societal norms and normal conflict of laws rules, on the one hand, against deep rooted homophobia (as expressed in English law) and the long-standing English public policy of sanctioning only traditional different-sex marriages, on the other. Thus, an English court should consider whether progressive developments at home, in Europe, and in the United States, indicating an increasing accept-

173. Dicey & Morris, supra note 9, at 94.
174. As one scholar commented: "[N]o attempt to define the limits of that reservation has ever succeeded." John Westlake, Private International Law 51 (7th ed. 1925).
175. See, e.g., Dicey & Morris, supra note 9, at 92-115; Cheshire & North, supra note 49, at 113-37.
176. See discussion supra part II.B.2.
177. See discussion supra part IV.B.1.
178. See discussion supra part I.B.
179. See supra text accompanying note 16.
180. While outright hostility towards lesbians and gays was a staple of the Thatcher years, current Prime Minister John Major announced the lifting of the ban on civil service recruitment of open lesbians and gay men to top posts. Colin Richardson, Homosexuality and the Judiciary, 142 New L.J. 130, 131 (1992). Although political attitudes toward lesbian and gay rights appear to be in a state of flux, concrete policy commitments remain elusive. See id.

In the EC, the European Court of Justice has accepted the principles of the Convention as "forming part of the Community legal order." Society for the Protection of Unborn Children Ireland Ltd. v. Grogan, 3 Common Mkt. L. Rep. 849 (1991); see also Clapham & Weiler, supra note 131, at 24. As a result, any practice violating the Convention, particularly those practices that the Convention's organs specifically have found to violate the Convention, will ipso facto be prohibited under EC law. Id. There are no EC provisions, however, explicitly prohibiting discrimination on the basis of sexual orientation. For a thorough treatment of the situation of lesbians and gay men in the EC legal order, see generally id.
182. See discussion supra part II.B.2.
ance of lesbian and gay rights, are sufficient to warrant recognition of the Danish same-sex marriage.

English courts should consider whether recognizing a foreign same-sex marriage is really any different from recognizing a foreign polygamous marriage. Although English public policy dictates that only monogamous marriages for England's own domiciliaries will be sanctioned, it yields in cases of foreign polygamous marriages. Similarly, although English public policy dictates sanctioning only different-sex marriages for England's own domiciliaries, this public policy should also yield to foreign same-sex marriages. English courts have shown a willingness to depart from strict traditional marriage principles with foreign polygamous marriages and there is no logical reason to treat foreign same-sex marriages any differently. It is difficult to argue that a same-sex marriage is more un-Christian or more untraditional than a polygamous marriage since both types of marriages violate conventional Christian norms.

The court must also query whether the public policy of sanctioning only different-sex marriages is really so sacrosanct "as to require its maintenance at all costs and without exception." Finally, although subsection 11(c) of the Matrimonial Causes Act 1973 only sanctions opposite-sex marriages among English domiciliaries, section 14 of the same act technically allows recognition of the Danish same-sex marriage.

Conclusion

An English court forced to determine the legal effect of a Danish same-sex marriage in England must take into account two important approaches. First, the court can look to general conflict of laws rules and legally recognize the Danish marriage. Second, it can resort to the public policy doctrine, preempting the general conflict of laws rules, and deny any legal recognition of the Danish same-sex marriage. The legal framework arguably already exists in English law to allow a court facing such a determination to reach a just result via conflict of laws rules.

Denmark, an overwhelmingly Christian nation, recently made a marked departure from conventional canon law by enacting the Partnership Act. This legislation foreshadows the status quo of future matrimonial law. If England fails to take appropriate action, it risks falling behind the standards of its peer "civilized" societies. England can take a giant stride toward this end by legally recognizing Danish same-sex marriages via conflict of laws rules as is done with polygamy. There is no logical reason to treat foreign same-sex marriages differently.

183. This Note also refers to potentially polygamous marriages that are de facto monogamous marriages. See supra note 12.
184. See discussion supra part I.A.
185. But see discussion supra note 134.
186. CHESIRE & NORTH, supra note 49, at 129.
187. See supra note 46 and accompanying text.
188. Ninety-two percent of Danes are members of the Lutheran Evangelical Church. ROYAL DANISH MINISTRY OF FOREIGN AFFAIRS, DENMARK IN A NUTSHELL 3 (1992).
It must be emphasized, however, that this approach is only second best. Ideally, England would extend marital rights to its entire population, regardless of the gender composition of a couple. Respect for civil rights and human dignity dictates such action. Until England is ready to do this, however, it must at least respect the choice of other countries who lead the way.