

UIC Law Review

Volume 45
Issue 3 *The 10th Annual Employee Benefits
Symposium*

Article 10

Spring 2012

Hospital Visitation: The Forgotten Gay Rights Struggle, 45 J. Marshall L. Rev. 939 (2012)

Meredith Fileff

Follow this and additional works at: <https://repository.law.uic.edu/lawreview>



Part of the [Family Law Commons](#), [Health Law and Policy Commons](#), [Legislation Commons](#), and the [Sexuality and the Law Commons](#)

Recommended Citation

Meredith Fileff, Hospital Visitation: The Forgotten Gay Rights Struggle, 45 J. Marshall L. Rev. 939 (2012)

<https://repository.law.uic.edu/lawreview/vol45/iss3/10>

This Comments is brought to you for free and open access by UIC Law Open Access Repository. It has been accepted for inclusion in UIC Law Review by an authorized administrator of UIC Law Open Access Repository. For more information, please contact repository@jmls.edu.

HOSPITAL VISITATION: THE FORGOTTEN GAY RIGHTS STRUGGLE

MEREDITH FILEFF*

I. INTRODUCTION

“When a loved one is in the hospital, you naturally want to be at the bedside. But what if the staff won’t allow it?”¹

Janice Langbehn and Lisa Marie Pond traveled from their home in Washington to enjoy a getaway with their adopted children in Miami.² The family vacation became a nightmare when Lisa, Janice’s partner of nearly twenty years, collapsed aboard a cruise ship in Miami.³ Paramedics rushed Lisa to the hospital, where Janice impatiently waited for news of her partner’s condition.⁴ She requested visitation with Lisa, but was refused access for eight hours.⁵ A hospital social worker informed Janice that since Florida was an “anti-gay state,” Janice was not going to be allowed to see Lisa or know about her medical condition.⁶ Later

* JD, The John Marshall Law School, May 2012. The author wishes to thank the editors of the Law Review for their dedicated work in preparing this Comment for publication. She also wishes to thank her family and friends for their love and support.

1. Tara Parker-Pope, *Kept From a Dying Partner’s Bedside*, N.Y. TIMES (May 18, 2009), http://www.nytimes.com/2009/05/19/health/19well.html?_r=1&pagewanted=print.

2. *Langbehn v. Pub. Health Trust of Miami-Dade Cnty.*, 661 F. Supp. 2d 1326, 1331 (S.D. Fla. 2009); Craig A. Conway, *Survey Finds Many U.S. Hospitals Do Not Have Same-Sex Nondiscrimination Policies Despite Recent Media Attention*, HEALTH LAW PERSPECTIVES 1 (July 2010), <http://www.law.uh.edu/healthlaw/perspectives/2010/%28CC%29%20Survey.pdf>.

3. *Langbehn*, 661 F. Supp. 2d at 1331; Steve Rothaus, *Court dismisses suit by lesbian who couldn’t see dying partner at Miami’s Jackson Memorial Hospital*, MIAMI HERALD (Sept. 29, 2009), <http://miamiherald.typepad.com/gaysouthflorida/2009/09/court-dismisses-suit-by-lesbian-who-couldnt-see-dying-partner-at-miamis-jackson-memorial-hospital.html>.

4. *Langbehn*, 661 F. Supp. 2d at 1331-32; Parker-Pope, *supra* note 1.

5. *Langbehn*, 661 F. Supp. 2d at 1332-33; Tara Parker-Pope, *No Visiting Rights for Hospital Trauma Patients*, N.Y. TIMES (Sept. 30, 2009), <http://well.blogs.nytimes.com/tag/janice-langbehn/>; Sheryl Gay Stolberg, *Obama Widens Medical Rights for Gay Partners*, N.Y. TIMES (Apr. 15, 2010), <http://www.nytimes.com/2010/04/16/us/politics/16webhosp.html>.

6. Susan Donaldson James, *Lesbians Sue When Partners Die Alone*,

that night when Lisa's sister arrived at the hospital, the hospital workers immediately told her where she could find Lisa for visitation.⁷ Lisa suffered an aneurysm and died later that night, without Janice or their adopted children's presence or comfort in her final hours of life.⁸

This is just one example of a common problem facing same-sex couples in the United States.⁹ While same-sex marriage grabs the headlines,¹⁰ there are a multitude of rights denied to gay Americans every day. Hospital visitation is an assumed right for most, but for same-sex couples many view it as a privilege.

The next section of this Comment will include a brief history of the gay rights movement that will provide a context for the current controversy over hospital visitation. That section will also discuss previous attempts by both states and the federal government to use statutes to grant patients' rights. The third section will analyze the various modern efforts concerning hospital visitation rights. It will focus on the means states have used to address a patient's right to choose his or her own visitors. These means include same-sex marriage statutes, domestic partnerships, and specified healthcare statutes. Additionally, that section discusses those states that do not grant the right to non-familial visitation. Section III will also introduce and critique the federal programs that have addressed a national right to choose one's

ABCNEWS.COM (May 20, 2009), <http://abcnews.go.com/Health/story?id=7633058&page=1>; Parker-Pope, *supra* note 1; *Lambda Legal Sues Florida Hospital for Mistreatment of Deceased Lesbian's Family*, LAMBDA LEGAL (June 25, 2008), http://www.lambdalegal.org/news/fl_20080625_lambda-sues-fl-hospital.

7. *Langbehn*, 661 F. Supp. 2d at 1333; Parker-Pope, *supra* note 1.

8. *Langbehn*, 661 F. Supp. 2d at 1333; James, *supra* note 6.

9. Deborah Kotz, *Hospital Visitation Rights for Lesbian Couples: A Brewing Legal Controversy*, U.S. NEWS & WORLD REPORT (May 20, 2009), <http://health.usnews.com/health-news/blogs/on-women/2009/5/20/hospital-visitiation-rights-for-lesbian-couples-a-brewing-legal-controversy>; Parker-Pope, *supra* note 1.

10. See David J. Garrow, *Altared States; How a movement that started in Vermont has become a national political issue*, WASH. POST, Apr. 18, 2004, at T13 (reviewing JONATHAN RAUCH, *GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, GOOD FOR STRAIGHTS, AND GOOD FOR AMERICA* (2004)) (reviewing a work that discusses how some states' choice to allow gay marriage has thrust the issue into national attention and controversy); See Andrew Gelman, Jeffrey Lax & Justin Phillips, *Over Time, a Gay Marriage Groundswell*, N.Y. TIMES (Aug. 21, 2010), <http://www.nytimes.com/2010/08/22/weekinreview/22gay.html> (noting that support for gay marriage has increased to over 50 percent in several states); see also Jeremy Pelzer, *Wyoming, nine other states say gay marriage not a fundamental right*, TRIB.COM (Sept. 24, 2010), http://trib.com/news/state-and-regional/article_d96d4a20-c804-11df-bb26-001cc4c002e0.html (explaining that ten states filed briefs reiterating that marriage is not an issue for a federal court to decide in an appeal of a district court's holding that California's gay marriage ban was unconstitutional).

visitors in the hospital. These federal initiatives center on President Obama's Memorandum of April 15, 2010,¹¹ which asked the Department of Health and Human Services ("HHS") to initiate legislation that requires all hospitals funded by Medicare and Medicaid to allow patients to select their visitors in the hospital.¹² The final part of this Comment will propose that the issue of hospital visitation needs immediate attention and should be remedied with national legislation that grants all same-sex couples full visitation rights without the use of legal documents or power of attorney forms. The ability to be with a loved one in his or her darkest moments should be a fundamental right, rather than one that must be planned and executed with legal documentation.

II. THE HISTORICAL PROGRESS OF GAY RIGHTS AND HOSPITAL VISITATION

A. *The Struggle for Gay Rights*

While national polls illustrate that acceptance of homosexuality has increased,¹³ this progress has only come as a result of a long struggle for equal rights for homosexuals.¹⁴ It is generally thought that the Stonewall incident in New York City was the birth of the modern gay rights movement.¹⁵ On June 27, 1969, New York City police entered the Stonewall Inn, a bar known to cater to homosexual clientele, and began forcibly removing patrons.¹⁶ This started quietly, but quickly escalated

11. See Memorandum for the Secretary of Health and Human Services, 75 Fed. Reg. 20,511 (Apr. 15, 2010) (recommending the passage of national legislation to respect a patient's choice of non-familial visitors while in the hospital) [hereinafter Memorandum].

12. *Id.*

13. See Karlyn Bowman, *Gay Marriage Slowly Gaining*, AMERICAN ENTERPRISE INSTITUTE (Aug. 20, 2010), www.aei.org/article/society-and-culture/civil-rights/gay-marriage-slowly-gaining/ (stating that while many are still reserved about same-sex marriage, attitudes about homosexuality generally have become more favorable). For example, in 1982 a Gallup poll asked "[s]hould homosexuality be an acceptable alternative lifestyle?" *Id.* While only 34 percent said "yes" then, 57 percent said "yes" in 2008. *Id.*

14. See generally Greg Johnson, *Vermont Civil Unions: The New Language of Marriage*, 25 VT. L. REV. 15 (2000) (noting that the gay rights movement has entered a modern age of struggle wherein same-sex couples's best chances at equal rights are civil unions).

15. Andrew M. Jacobs, *The Rhetorical Construction of Rights: The Case of the Gay Rights Movement, 1969-1991*, 72 NEB. L. REV. 723, 725 (1993); Salvatore J. Licata, *The Homosexual Rights Movement in the United States: A Traditionally Overlooked Area of American History*, 6 J. HOMOSEXUALITY 161 (1989).

16. The Editors, *Introduction: Stonewall at 25*, 29 HARV. C.R.-C.L. L. REV. 277, 277 (1994); Howard Smith, *Full Moon Over The Stonewall*, VILLAGE VOICE (July 2, 1969), <http://www.villagevoice.com/2009-06-24/news/stonewall->

into a violent riot with police putting homosexual males and females into a paddy wagon.¹⁷ The surrounding crowd set fire to the Stonewall Inn and the riots continued for over a week.¹⁸

While some activists utilized violence to bring about social change,¹⁹ gay rights advocates have often turned to the courts to end discrimination.²⁰ A court first considered same-sex marriage in 1971 with *Baker v. Nelson*, where the Minnesota Supreme Court upheld the denial of a marriage license for a same-sex couple.²¹ Same-sex couples once again tried to utilize the judicial system, this time in Hawaii, in *Baehr v. Lewin*.²² In *Baehr*, three same-sex couples brought suit to fight a state law banning same-sex marriage²³ after each couple was denied a marriage license.²⁴ The *Baehr* court was more receptive, stating that the statute concerning same-sex marriage violated the Equal Protection Clause of the Hawaiian Constitution unless the government could show a compelling interest and demonstrate that the statute was narrowly drawn to further that interest.²⁵ In response to this decision, the voters of Hawaii approved an amendment giving the legislature the power to define marriage as between a man and a

at-40-the-voice-articles-that-sparked-a-final-night-of-rioting/; Lucian Truscott IV, *Gay Power Comes To Sheridan Square*, VILLAGE VOICE (July 3, 1969), http://blogs.villagevoice.com/runninscared/archives/2010/07/stonewall_gay_p_hp.

17. The Editors, *supra* note 16, at 277; Smith, *supra* note 16.

18. JOHN D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970* 230-33 (Univ. of Chicago Pr., 3d ed. 1983); The Editors, *supra* note 16, at 277.

19. *See generally* The Editors, *supra* note 16 (illustrating how some gay rights activists chose to express their frustration through violent protests that resulted in property damage and police intervention).

20. *See generally* Jessica Pfisterer & Tiffany V. Wynn, *Legal Recognition of Same-Sex Relationships*, 11 GEO. J. GENDER & L. 1 (2010) (outlining the various lawsuits gay rights advocates brought to obtain civil rights such as marriage and sexual privacy).

21. *Id.* at 3. The court held against the same-sex couples because “[t]he Constitution does not require things which are different in fact or [in] opinion to be treated in law as though they were the same.” *Id.* (quoting *Baker v. Nelson*, 191 N.W.2d 185, 187 n.4 (Minn. 1971)).

22. *See generally* *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (holding that the state needed to provide evidence of a compelling interest for prohibiting same-sex marriage and demonstrate that the statute was narrowly tailored for that compelling purpose); Pfisterer & Wynn, *supra* note 20, at 4.

23. HAW. REV. STAT. § 572-1 (West 2010). The statute states that “marriage . . . shall be only between a man and a woman . . .” *Id.*

24. Pfisterer & Wynn, *supra* note 20, at 4; *see generally* Krystal D. Webb, Case Note, *Baehr v. Lewin: “The Sacrifice” Same-Sex Marriages and the Fundamental Right to Equal Protection, Privacy and Due Process*, 25 S.U. L. REV. 253 (1998) (discussing *Baehr v. Lewin* and its impact on the struggle for same-sex marriage, as well as the *Baehr* Court’s impact on this issue).

25. *Baehr*, 852 P.2d at 68.

woman exclusively.²⁶ The decision in *Baehr* also encouraged other states to pass state constitutional amendments prohibiting same-sex marriage,²⁷ as well as those defining marriage as between a male and a female only.²⁸

The Federal Government soon followed this trend when the Defense of Marriage Act (“DOMA”) was signed into law in 1996,²⁹ marking a significant setback for the gay rights crusade.³⁰ DOMA states in part that:

No State, territory, or possession of the United States, or Indian Tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship.³¹

DOMA was passed to ensure that citizens of states with bans on same-sex marriage could not travel outside those states to

26. Pfisterer & Wynn, *supra* note 20, at 4.

27. *Id.*; see also GLAD, A SHORT HISTORY OF THE DEFENSE OF MARRIAGE ACT 1 (Mar. 3, 2009), <http://www.glad.org/uploads/docs/publications/doma-short-history.pdf> (noting that the ruling handed down in *Baehr v. Lewin* prompted a large groundswell of anti-same-sex marriage laws beginning in 1995).

28. See, e.g., CAL. FAM. CODE § 301 (West 1997) (defining adults capable of marriage as one male and one female); COLO. REV. STAT. § 14-2-104 (1996) (“[A] marriage is valid in this state if . . . it is only between one man and one woman.”); MD. FAM. LAW CODE ANN. § 2-201 (1997) (stating “only a marriage between a man and a woman is valid in this State.”); MINN. STAT. § 517.01 (1996) (stating that marriage “is a civil contract between a man and a woman”); NEV. REV. STAT. ANN. § 122.020 (1995) (stating “a male and a female person” are “capable of marriage”); OR. REV. STAT. § 106.010 (1996) (stating “males . . . and females” may marry); S.D. CODIFIED LAWS § 25-1-1 (1997) (stating marriage is “between a man and a woman”); TENN. CODE ANN. § 36-3-113 (1997) (stating the only legally recognized marital contract is between one man and one woman); W. VA. CODE § 48-2-104 (2001) (requiring that every marriage license contain a statement that marriage is “between a woman and a man.”); WIS. STAT. § 765.001 (1995-1996) (stating “marriage is a legal relationship between [two] equal persons, a husband and wife”); WYO. STAT. ANN. § 20-1-101 (Michie 1997) (stating “[m]arriage is a civil contract between a male and a female person”); Nancy K. Kubasek, Kara Jennings & Shannon T. Browne, Article, *Fashioning a Tolerable Domestic Partners Statute in an Environment Hostile to Same-Sex Marriages*, 7 LAW & SEX. 55, 63 (1997).

29. GLAD, *supra* note 27, at 1; Peter Baker, *President Quietly Signs Law Aimed at Gay Marriages*, WASH. POST, Sept. 22, 1996, at A21.

30. Anisa Mohanty, *Medical Rights for Same-Sex Couples and Rainbow Families*, 13 RICH. J.L. & PUB. INT. 367, 379 (2010), available at http://rjolpi.richmond.edu/archive/Volume_XIII_Issue_3.pdf (citing Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2006))).

31. 28 U.S.C. § 1738C; Mohanty, *supra* note 30; GLAD, *supra* note 27, at 1–2.

marry and return home and expect the rights of marriage under the Full Faith and Credit Clause.³² This was a crushing blow to the movement.

While the gay rights movement has seen countless setbacks,³³ there have also been several successes.³⁴ Some of the most monumental triumphs came with a number of cases³⁵ and statutes³⁶ allowing civil unions, and even in one specific instance making same-sex marriage legal.³⁷ In that Massachusetts case, *Goodridge v. Department of Public Health*, the court found that civil unions are not enough, as they put an unconstitutional and inferior status on same-sex couples.³⁸ The court allowed the Massachusetts state legislature 180 days to re-assess the issue of same-sex marriage and change its position, which the legislature failed to do.³⁹ The state then chose to issue marriage licenses to

32. Pfisterer & Wynn, *supra* note 20, at 5; The U.S. Constitution guarantees that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." U.S. CONST. art. IV, § 1.

33. See GLAD, *supra* note 27 (outlining the negative impact DOMA had on gay rights generally and the movement for same-sex marriage in particular); see, e.g., *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding a Georgia anti-sodomy law as constitutional and noting that homosexuals do not have a fundamental right to engage in such behavior); see also *A Setback for Equality*, N.Y. TIMES (May 26, 2009), http://www.nytimes.com/2009/05/27/opinion/27wed2.html?_r=1&scp=1&sq=a+setback+for+equality&st=nyt (discussing how Proposition 8 in California was a setback amidst seemingly growing acceptance of homosexuality and same-sex relationships).

34. See generally Shayna S. Cook, Book Survey, *Finding Gold in the Rainbow Rights Movement*, 99 MICH. L. REV. 1419 (2001) (reviewing PATRICIA A. CAIN, *RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT* (Westview Pr., 2000)) (discussing both the great losses and monumental successes of the gay rights movement for public and private rights for homosexuals).

35. See *Baker v. State*, 744 A.2d 864, 889 (Vt. 1999) (holding that the state's prohibition of same-sex marriage was a violation of the state constitution and giving the legislature the choice to either allow same-sex marriage or a similar alternative); see also *Lewis v. Harris*, 908 A.2d 196, 224 (N.J. 2006) (holding that same-sex couples are entitled to the same protection as heterosexual couples under the New Jersey State Constitution).

36. CAL. FAM. CODE § 297-299.6 (West 2009); DEL. CODE ANN. tit. 13, § 201 (2012); HAW. REV. STAT. § 572 (2012); 750 ILL. COMP. STAT. 75 (2011); S.B. 283, 75th Leg., Reg. Sess. (Nev. 2009); N.J. STAT. ANN. § 26:8A-4 (West 2004); Oregon Family Fairness Act, 2007 OR. LAWS 99, § 9 (2007) (amending OR. REV. STAT. §§ 107.615, 192.842, 205.320, 409.3200, 432.005, 432.235, 432.405 and 432.408); R.I. GEN. LAWS § 15-3 (2011).

37. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

38. *Id.* at 962; Pfisterer & Wynn, *supra* note 20, at 11 (citing *In re Opinions of the Justices*, 802 N.E.2d 565, 572 (Mass. 2004)).

39. *Goodridge*, 798 N.E.2d at 969-70; Pfisterer & Wynn, *supra* note 20, at

same-sex couples as of May 17, 2004.⁴⁰ More than 1,000 marriage licenses were granted on the first day.⁴¹ Same-sex marriage is still legal in Massachusetts, even after several attempts by the legislature to pass an amendment similar to those of other states defining marriage as between one man and one woman.⁴² Since the decision in *Goodridge*, six other states (Connecticut, Iowa, New Hampshire, New York, Vermont, and Washington)⁴³ and the District of Columbia have agreed to issue marriage licenses to same-sex couples.⁴⁴

Gay rights advocates have utilized the courts to address other rights besides that of marriage.⁴⁵ In *Bowers v. Hardwick*,⁴⁶ the

10-11 (citing Yvonne Abraham & Michael Paulson, *Wedding Day: First Gays Marry; Many Seek Licenses*, BOSTON GLOBE, May 18, 2004, at A1, available at http://www.boston.com/news/specials/gay_marriage/articles/2004/05/18/wedding_day).

40. Pfisterer & Wynn, *supra* note 20, at 11-12.

41. *Id.*

42. Pam Belluck, *Massachusetts Gay Marriage Referendum is Rejected*, N.Y. TIMES, June 14, 2007, at A16, available at <http://www.nytimes.com/2007/06/15/world/americas/15iht-15gay-web.6150169.html>; Steve LeBlanc, *Massachusetts Retains Gay Marriage*, ASSOCIATED PRESS (Sept. 14, 2005), <http://www.deseretnews.com/article/605154618/Massachusetts-retains-gay-marriage.html>.

43. *Marriage Equality & Other Relationship Recognition Laws*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/files/assets/resources/Relationship_Recognition_Laws_Map%281%29.pdf (last updated July 6, 2011) (including a map of all states that recognize same-sex marriage legally through July 6, 2011). At the time this Comment was written, Washington had also recently approved a measure granting same-sex couples the right to marry. *Washington: Gay Marriage Legalized*, N.Y. TIMES (Feb. 13, 2012), <http://www.nytimes.com/2012/02/14/us/washington-gay-marriage-legalized.html?ref=samesexmarriage>. Maryland is on the cusp of granting same-sex marriage, but the measure must still face the Senate and receive the governor's signature. Sabrina Tavernise, *In Maryland, House Passes Bill to Let Gays Wed*, N.Y. TIMES (Feb. 17, 2012), http://www.nytimes.com/2012/02/18/us/maryland-house-approves-gay-marriage-measure.html?_r=1&ref=samesexmarriage. New Jersey also was close to approving same-sex marriage, but the Governor, Chris Christie, vetoed the measure passed by the New Jersey legislature. Kate Zernike, *Christie Keeps His Promise to Veto Gay Marriage Bill*, N.Y. TIMES (Feb. 17, 2012), <http://www.nytimes.com/2012/02/18/nyregion/christie-vetoes-gay-marriage-bill.html>.

44. *Marriage Equality & Other Relationship Recognition Laws*, *supra* note 43.

45. See generally *Romer v. Evans*, 517 U.S. 620 (1996) (ruling against a proposed Colorado Amendment which would prohibit any city, town, or county in the state from taking any steps to recognize homosexuals as a protected class); *Adar v. Smith*, 597 F.3d 697 (5th Cir. 2010) (ruling the state had to issue a birth certificate to two men adopting a baby even though the state had a law against two unmarried adults adopting); *Debra H. v. Janice R.*, 930 N.E.2d 184 (N.Y. 2010), *reargument denied*, 933 N.E.2d 210 (N.Y. 2010)

Supreme Court ruled that a Georgia anti-sodomy statute was constitutional since homosexual sodomy was not protected under the constitutional right to privacy.⁴⁷ This was considered a low point for the gay rights movement⁴⁸ because it appeared that the Supreme Court had suggested that discrimination against homosexuals was acceptable.⁴⁹ In June 2003, the sting of *Bowers* was eased with the Supreme Court's ruling in *Lawrence v. Texas*.⁵⁰ The Court held that Texas' anti-sodomy law was unconstitutional⁵¹ because the Due Process Clause of the Fourteenth Amendment conferred a right on homosexuals to engage in sodomy in private.⁵² In the majority opinion, Justice Kennedy stated, "[Gays and Lesbians] are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime."⁵³ *Lawrence* served as a large victory for the gay community, but its overarching impact on gay rights is debatable.⁵⁴

In looking at this history, it is important to note that over the last fifty years the gay rights movement has progressed tremendously, although perhaps not as significantly as some advocates would have hoped.⁵⁵ Hospital visitation is one area where there has been incremental progress, but there is still room for drastic improvement.

(holding that a non-biological mother in a same-sex relationship has the same custody and visitation rights as the natural mother); *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996) (considering whether a school violated the Fourteenth Amendment Equal Protection Clause in turning a blind eye to anti-homosexual abuse of a male student).

46. See generally *Bowers*, 517 U.S. 620 (holding that same-sex couples do not have a fundamental right to engage in sodomy); David M. Stauss, Note, *The End or Just the Beginning for Gay Rights Under the New Jersey Constitution?: The New Jersey Domestic Partnership Act, Lewis v. Harris, and the Future of Gay Rights in New Jersey*, 36 RUTGERS L.J. 289, 293 (2004).

47. Cook, *supra* note 34, at 1419; Laurence H. Tribe, Essay, *Lawrence v. Texas: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1900 (2004).

48. Cook, *supra* note 34, at 1427.

49. *Id.*

50. *Lawrence v. Texas*, 539 U.S. 558 (2003); Stauss, *supra* note 46, at 293.

51. *Lawrence*, 539 U.S. at 578.

52. *Id.* at 564; Stauss, *supra* note 46, at 294; see generally Tribe, *supra* note 47 (discussing in depth the decision of *Lawrence* and the constitutional arguments, which helped the court strike the anti-sodomy statute at issue).

53. *Lawrence*, 539 U.S. at 578; Pfisterer & Wynn, *supra* note 20, at 7.

54. Pfisterer & Wynn, *supra* note 20, at 9.

55. Cook, *supra* note 34, at 1422.

B. Patients' Rights

Although the issue of hospital visitation has a particularly devastating effect on the gay community,⁵⁶ it also holds significance for hospital patients generally.⁵⁷ A hospital's policy against open visitation could impact couples who choose not to marry, as well as single people who rely on friends rather than family for support.⁵⁸ While same-sex couples choose to highlight the homophobic motives behind policies of hospital visitation,⁵⁹ other states have attempted to use the larger veil of patients' rights to achieve change in hospital visitation rights.⁶⁰

Generally, hospitals have the freedom to limit hospital visitation to internal family members only.⁶¹ These policies do not expressly allow spouses visitation through a regulation because a spouse is considered family automatically.⁶² Several states have chosen to remedy this problem by creating a patients' bill of rights.⁶³ It has become a trend to remove some of an individual hospital's autonomy and require certain rights for all patients.⁶⁴ These regulations grant a multitude of rights, including the rights to clean facilities, adequate treatment, and in some cases, hospital visitation.⁶⁵

The idea that hospital patients are entitled to certain rights has earned national attention as well.⁶⁶ Both the House of

56. See generally *Langbehn*, 661 F. Supp. 2d 1326 (ruling on a case in which a female hospital patient spent the final hours of her life without her female life partner and their adopted children because of the hospital's refusal to allow same-sex partner hospital visitation).

57. See Memorandum for the Secretary of Health and Human Services, *supra* note 11 (highlighting that hospital visitation issues affect a wide variety of Americans including widows or widowers, religious organization members looking for non-familial support, as well as same-sex couples).

58. Parker-Pope, *supra* note 1.

59. See Lisa Keen, *Hospital Visitation Regs: Lambda Wants to Close the Loopholes*, KEEN NEWS SERVICE (Aug. 31, 2010), <http://www.keennewsservice.com/2010/08/31/hospital-visitation-regs-lambda-wants-to-close-the-loopholes/> (highlighting that the call for a change in hospital visitation rights stems from the substantial outcry concerning discrimination against same-sex couples).

60. See generally Robin Cheryl Miller, *Construction and Application of State Patient Bill of Rights Statutes*, 87 A.L.R. 5TH 277 (2001) (listing the states that choose to grant hospital visitation rights through the use of a patients' bill of rights passed by the state legislatures).

61. Nancy J. Knauer, *A Marriage Skeptic Responds to the Pro-Marriage Proposals to Abolish Civil Marriage*, 27 CARDOZO L. REV. 1261, 1274 (2006).

62. Mohanty, *supra* note 30, at 386 (citing Knauer, *supra* note 61, at 1274).

63. Miller, *supra* note 60, at *2a.

64. *Id.*

65. *Id.*

66. See, e.g., Judith Havemann, *Citing Success, White House Plans to Widen Patient Rights Initiative*, WASH. POST, Apr. 9, 1999, at A18 (illustrating how the issue of patients' rights drew a large focus in the national press and

Representatives and the Senate have proposed a large number of patients' rights legislation over the years.⁶⁷ This nationwide movement for a patients' Bill of Rights peaked in the 1990s with the rising concern over healthcare malpractice.⁶⁸ President Clinton proposed a national Patients' Bill of Rights through a Presidential Order issued in February 1998.⁶⁹ These proposed rights included: the right to receive prompt information so as to make informed health decisions, the right to emergency healthcare services, the right to considerate and respectful care from health professionals, and the right to fully participate in one's own healthcare decisions.⁷⁰ Noticeably absent from this proposed list is the right to choose one's visitors while in the hospital.⁷¹

President Clinton's Patients' Bill of Rights was not successful,⁷² but it gave the issue widespread media attention⁷³

propelled the issue to the spotlight); Katherine Q. Seelye, *Clinton Urges Petition Drive to Pass Health Plan*, N.Y. TIMES (Apr. 10, 1999), <http://www.nytimes.com/1999/04/10/us/clinton-urges-petition-drive-to-pass-health-plan.html?scp=1&sq=Seelye%20Clinton%20Urges%20Petition%20Drive&st=cse> (same).

67. See, e.g., Patients' Bill of Rights Act, S. 6/H.R. 358, 106th Cong., 1st Sess. (1999); Patients' Bill of Rights Act, S. 240, 106th Cong., 1st Sess. (1999); Patients' Bill of Rights Plus Act, S. 300, 106th Cong., 1st Sess. (1999); and Patients' Bill of Rights Act, S. 326/H.R. 240 106th Cong., 1st Sess. (1999). Other competing legislation includes the Promoting Responsible Managed Care Act, S. 374, 106th Cong., 1st Sess. (1999); Access to Quality Care Act, H.R. 216, 106th Cong., 1st Sess. (1999); Patient Protection Act, H.R. 448, 106th Cong., 1st Sess. (1999); Managed Care Reform Act, H.R. 719, 106th Cong., 1st Sess. (1999); Comprehensive Managed Health Care Reform Act, H.R. 1133, 106th Cong., 1st Sess. (1999); and Bipartisan Consensus Managed Care Improvement Act, H.R. 2723, 106th Cong., 1st Sess. (1999) (noting the efforts of Congress to extend a variety of basic rights such as quality care and staff to patients in the hospital).

68. Jason A. Glodt, *Watch Out HMOs: The Future of Patients' Rights Will Soon Be Determined*, 45 S.D. L. REV. 640, 644-46 (1999-2000) (outlining political debate about medical insurance coverage known as "Patients' Bill of Rights").

69. *Clinton Establishes Health Care 'Bill of Rights'*, CNN POLITICS (Feb. 20, 1998), <http://www.cgi.cnn.com/ALLPOLITICS/1998/02/20/health.rights/>; see also Alissa J. Rubin & Edwin Chen, *Clinton, Gingrich Seek Bipartisan Patients' Rights Bill*, L.A. TIMES (July 17, 1998), <http://articles.latimes.com/1998/jul/17/news/mn-4571> (covering the bipartisan agreement between Republicans and Democrats who were working to guarantee fundamental rights for all patients in hospitals nationwide).

70. Memorandum on Patients' Bill of Rights (Feb. 20, 1998), available at <http://govinfo.library.unt.edu/hcquality/press/pbor.html>.

71. *Id.*

72. See Amy Goldstein & Helen Dewar, *Senate Kills 'Patients' Rights' Bill*, WASH. POST, Oct. 10, 1998, at A1, available at <http://www.washingtonpost.com/wp-srv/politics/special/healthcare/stories/patients101098.htm> (noting that President Clinton's Patients' Bill of Rights failed for a multitude of reasons

thereby setting the stage for a future with overreaching rights for all patients in the hospital.

III. FROM SAME-SEX MARRIAGES TO STATUTES: THE WAYS THAT STATES ADDRESS HOSPITAL VISITATION

There are various means the states have used to address the issue of hospital visitation. These range from states that include hospital visitation as a right granted through same-sex marriage or civil unions, to those states that choose to allow hospital visitation for same-sex couples only if a traditional family member is not available. It is essential to analyze these methods in an attempt to formulate a model approach to guarantee the right of hospital visitation in the final section of this Comment.

A. Visitation Through Legalized Gay Marriage

Several states have chosen to include hospital visitation as one of many rights granted through legalized same-sex marriage. As of February 2012, seven states and the District of Columbia have made same-sex marriage legal.⁷⁴ Massachusetts was the first state to legalize same-sex marriage on May 17, 2004,⁷⁵ and extend

including an inability to compromise between parties as well as the President's sexual scandal).

73. See, e.g., Seelye, *supra* note 66 (exemplifying how the issue of patients' rights captivated the mass media's attention and became an issue of national debate and controversy); Neil A. Lewis, *Patients' Bill Set to Become An Issue For Campaign*, N.Y. TIMES (July 7, 2000), <http://www.nytimes.com/2000/07/07/us/patients-bill-set-to-become-an-issue-for-campaign.html> (commenting on how former President Clinton made patients' rights into a major campaign issue in both the 2000 Presidential election and in mainstream political discussion as a whole).

74. *Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/subjects/s/same_sex_marriage/index.html (last updated Feb. 28, 2012). A number of states, including Maine, have waived on the issue and could be added to this short list sometime in the future. *Id.* California, especially, is facing a complicated battle in the wake of the Ninth Circuit ruling that Proposition 8's ban on same-sex marriage is unconstitutional. *Id.* Maura Dolan, *Prop. 8: Gay-Marriage Ban Unconstitutional, Court Rules*, L.A. TIMES (Feb. 7, 2012, 9:57 AM), <http://latimesblogs.latimes.com/lanow/2012/02/gay-marriage-prop-8s-ban-ruled-unconstitutional.html>. At the time this Comment was written, it was unclear whether this issue would reach the United States Supreme Court. Wire Staff, *Appeals Court Rejects California's Proposition 8*, CNN.COM (Feb. 7, 2012), <http://www.cnn.com/2012/02/07/justice/california-proposition-8/index.html>.

75. *Same-Sex Couples Ready to Make History in Massachusetts*, CNN.COM (May 17, 2004), http://articles.cnn.com/2004-05-17/justice/mass.gay.marriage_1_lesbian-couples-marriage-law-federal-constitutional-amendment?_s=PM:LAW; Pam Belluck, *SAME-SEX MARRIAGE: THE OVERVIEW; Hundreds of Same-Sex Couples Wed in*

the rights of traditional marriage to all couples.⁷⁶ Massachusetts also issues marriage licenses to citizens of other states so that they can enter into same-sex marriages.⁷⁷ The Connecticut courts also chose to make same-sex marriage legal on October 10, 2008.⁷⁸ This ruling⁷⁹ was reinforced when the Connecticut legislature passed a law defining same-sex marriage as equal to traditional marriage.⁸⁰ The legislation on top of *Kerrigan* signified the inherent inequality of civil unions as a solution to same-sex rights.⁸¹

While legalized same-sex marriage is potentially the most ideal method of achieving hospital visitation rights, it is the least likely to achieve immediate relief for the problem. A Gallup poll conducted in May 2011 found that 53 percent of those polled thought marriages between same-sex couples should be recognized as valid by the law.⁸² Additionally, a CBS poll conducted in February 2012 found that 40 percent of people believed legalized marriage was closest to their views on same-sex relationships.⁸³ This is compared to 23 percent who believed civil unions were a more favorable choice for same-sex couples,⁸⁴ and 31 percent who

Massachusetts, N.Y. TIMES (May 18, 2004), <http://www.nytimes.com/2004/05/18/us/same-sex-marriage-the-overview-hundreds-of-same-sex-couples-wed-in-massachusetts.html>.

76. *Same-Sex Couples Ready to Make History in Massachusetts*, *supra* note 75; see also Pfisterer & Wynn, *supra* note 20, at 40 (explaining that the decision of *Goodridge* led to Massachusetts offering same-sex couples the same benefits enjoyed by opposite-sex spouses).

77. Michael Levenson, *Governor Signs Law Allowing Out-of-State Gays to Wed*, BOSTON.COM (July 31, 2008), http://www.boston.com/news/local/breaking_news/2008/07/gov_to_sign_bil.html.

78. *Kerrigan v. Comm'r of Public Health, et al.*, 957 A.2d 407, 412 (Conn. 2008); Robert D. McFadden, *Gay Marriage is Ruled Legal in Connecticut*, N.Y. TIMES (Oct. 10, 2008), <http://www.nytimes.com/2008/10/11/nyregion/11marriage.html>.

79. *Kerrigan*, 957 A.2d at 412. In a four to three decision, the Connecticut Supreme Court found in favor of eight same-sex couples who applied for marriage licenses. *Id.* The court found that a denial of same-sex marriages was unconstitutional. *Id.* The discrimination against same-sex couples was egregious due to the history of anti-gay sentiment and differential treatment. *Id.* at 444-45. Marriage in itself also carries a significant status which civil unions cannot match. *Id.* at 412.

80. Susan Haigh, *Vote Caps Decade-Long Gay Marriage Fight in Conn.*, READINGEAGLE.COM (Apr. 23, 2009), <http://readingeagle.com/article.aspx?id=135058>.

81. *Kerrigan*, 957 A.2d at 417-420; Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 S. CAL. L. REV. 1153, 1174 (2009); *Connecticut Supreme Court Legalizes Gay Marriage*, ADVOCATE.COM (Oct. 11, 2008), <http://www.advocate.com/article.aspx?id=42195>.

82. *Same-Sex Marriage, Gay Rights*, POLLINGREPORT.COM, <http://www.pollingreport.com/civil.htm> (last visited Feb. 20, 2012).

83. *Id.*

84. *Id.*

avored no legal recognition of same-sex relationships at all.⁸⁵ Polls such as this one illustrate the hesitancy of the majority of Americans to accept same-sex marriage as a means for giving equal rights to gay couples. Media coverage has also reinforced the fact that a large number of Americans are actively fighting against giving rights to homosexuals through legalized same-sex marriage.⁸⁶ Hospital visitation, if granted through gay marriage, would only exist in a small number of states. This is not an expedient means to achieve a universal right of hospital visitation, and this problem needs to be addressed immediately.

B. Visitation Through Civil Unions or Domestic Partnerships

While same-sex marriage is the ultimate goal for many activists, it is a step that many members of the general public are hesitant to take.⁸⁷ Some state legislatures have, however, recognized that same-sex couples deserve some of the same rights and privileges as opposite-sex couples.⁸⁸ In order to grant these rights and privileges, states have used civil union and domestic partnership statutes.⁸⁹ Both types of statutes create a recognized

85. *Id.*

86. See e.g., *Conservatives Join Fight Against D.C. Gay Marriage*, WASH. EXAMINER (May 21, 2009), <http://www.washingtonexaminer.com/local/Conservatives-join-fight-against-DC-gay-marriage-45790392.html> (noting how conservatives are rallying to change the fact that same-sex marriage is legal in the District of Columbia); Geoff Mulvihill, *New Jersey Group Pushes Against Gay Marriage Nationally*, THE PRESS OF ATLANTIC CITY (July 28, 2008) (describing a New Jersey group that has vowed that it will work to stop the issuance of marriage licenses nationwide); Bill Salisbury, *Poll: Voters Oppose Marriage Amendment; But Recent Survey Also Finds Majority are Against Gay Marriage*, ST. PAUL PIONEER PRESS, Mar. 26, 2006, at 1B (showing that while voters do not support a definition of marriage as between a man and a woman, they still choose not to support same-sex marriage generally).

87. *Same-Sex Marriage, Gay Rights*, *supra* note 82. A poll conducted nationwide in late August 2010 by the Pew Research Center for the People & the Press asked a sample of people, “[d]o you strongly favor, favor, oppose, or strongly oppose allowing gays to marry legally?” Of the respondent sample, 43 percent responded that they either strongly favor or favor gay marriage, while 49 percent responded that they either strongly oppose or oppose gay marriage. *Id.* A Gallup poll was also conducted in May 2010 that asked, “[d]o you think marriages between same-sex couples should or should not be recognized by the law as valid, with the same rights as traditional marriage?” *Id.* Forty-four percent of respondents answered that same-sex marriage should be recognized by the law as valid, while 53 percent believe that same-sex marriage should not be recognized by law. *Id.*

88. *Domestic Partnerships*, HUMAN RIGHTS CAMPAIGN, http://www.hrc.org/issues/marriage/domestic_partners.asp (last visited Feb. 19, 2012).

89. See John Holl, *Civil Union Door Opens to Same-Sex Couples*, N.Y. TIMES (Feb. 25, 2007), <http://query.nytimes.com/gst/fullpage.html?res=9E02E7DF103EF936A15751C>

relationship between same-sex couples, without giving them the title and some of the rights of a marriage.⁹⁰

Vermont was the first state to pass a civil union statute in 2000.⁹¹ With this civil union statute, same-sex couples were given the same rights as married couples, without the legal title of marriage.⁹² The Vermont statute makes reference to hospital rights, giving same-sex civil unions the benefits of hospital visitation and notification.⁹³ Vermont has since allowed same-sex marriage,⁹⁴ but its civil union statute paved the way for other states.

Illinois, Hawaii, and Delaware are the most recent states that have chosen to use civil unions to grant rights to same-sex couples.⁹⁵ The Illinois and Hawaii statutes are unique because both allow for civil unions between both same-sex and opposite-sex couples.⁹⁶ Illinois' statute took effect in June 2011⁹⁷ and Hawaii's took effect on January 1, 2012.⁹⁸ While Delaware's civil union

0A9619C8B63&scp=1&sq=John%20Holl%20Civil%20Union%20Door%20Open s%20to%20Same-Sex%20Couples&st=cse (reporting that New Jersey joined the other states that offer civil unions as a means to extend rights to same-sex couples without granting the title of marriage); Ashley Surdin, *Same-Sex Couples See Progress on Benefits for Domestic Partners*, WASH. POST., Nov. 27, 2009, at A4, available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/26/AR2009112602304.html> (explaining how some states have utilized domestic partnership statutes to grant rights to same-sex couples when they feel that legalized gay marriage is less desirable due to a lack of public support).

90. See Surdin, *supra* note 89 (illustrating how states have acknowledged that same-sex couples are entitled to some of the benefits of marriage, although not all of the same benefits, and how these states utilize domestic partnerships to achieve that status for same-sex couples).

91. VT. STAT. ANN. tit. 15, § 1204 (West 2010); Johnson, *supra* note 14, at 15.

92. Johnson, *supra* note 14, at 16; VT. STAT. ANN. tit. 15, § 1204.

93. VT. STAT. ANN. tit. 15, § 1204.

94. "Marriage is the legally recognized union of two people." *Id.* § 8.

95. Josh Levs, *Two More States Allow Same-Sex Civil Unions*, CNN.COM (Jan. 1, 2012), http://articles.cnn.com/2012-01-01/us/us_civil-unions_1_civil-unions-marriage-licenses-hawaii-and-delaware?_s=PM:US.

96. 750 ILL. COMP. STAT. 75 (2011); HAW. REV. STAT. § 572 (2012). The Illinois law states that, "[c]ivil union' means a legal relationship between 2 persons, of either the same or opposite sex, established pursuant to this Act." 750 ILL. COMP. STAT. 75/10. The Hawaii statute states that a "[c]ivil union' means a union between two individuals established pursuant to this chapter." HAW. REV. STAT. § 572B-1.

97. Phil Reese, *Illinois Civil Unions Go into Effect Today*, WASH. BLADE (June 1, 2011), <http://www.washingtonblade.com/2011/06/01/illinois-civil-unions-go-into-effect-today/>.

98. See Colin M. Stewart, *Long-Overdue Union*, HAW. TRIB. HERALD (Jan. 10, 2012), <http://www.hawaiitribune-herald.com/sections/news/local-news/long-overdue-union.html> (noting that Hawaii's new civil union law took effect at midnight on New Year's Eve).

statute also took effect on January 1, 2012,⁹⁹ it was more traditional in applying to only same-sex couples.¹⁰⁰ As of February 2012, Colorado was considering becoming the latest state to approve civil unions, but the measure has yet to pass through the legislature.¹⁰¹

These hospital rights can also be more complicated in practice, since civil unions can reinforce same-sex couples' inferiority. This was illustrated in *Reed v. ANM Health Care*, in which a female partner was told to stay out of her partner's room when she was in the hospital.¹⁰² Ms. Reed brought suit since she took all the appropriate legal steps with her partner, including signing advanced medical directives, which were to control at a time of incapacity or illness.¹⁰³ The court denied the hospital's motion for summary judgment,¹⁰⁴ but no decision has been made on the merits.

Civil unions and domestic partnerships, while granting a multitude of rights to same-sex couples, have the inherent effect of separating these couples from heterosexual couples and making them feel inferior.¹⁰⁵ A civil union is defined as a marriage-like relationship,¹⁰⁶ while a domestic partnership is defined as a non-

99. Ethan Cole, *Delaware to Be Eighth State to Allow Civil Unions*, CHRISTIANPOST.COM (Apr. 16, 2011), <http://www.christianpost.com/news/delaware-to-be-eighth-state-to-allow-civil-unions-49853/>.

100. DEL. CODE ANN. tit. 13, § 201 (2012); The Delaware statute stated that a "[c]ivil union" means a legal union between 2 individuals of the same sex established pursuant to this chapter." *Id.*

101. *Colorado Civil Union Bill Advances Toward Showdown*, CBSDENVER.COM (Feb. 15, 2012), <http://denver.cbslocal.com/2012/02/15/colorado-civil-union-bill-advances-toward-showdown/>.

102. *Reed v. ANM Health Care*, 225 P.3d 1012, 1012-13 (Wash. App. Div. 1 2008).

103. *Id.* at 1012; Craig A. Conway, *Discrimination or Patient Privacy? Federal Court in Florida Dismisses Suit Brought by Gay Woman Denied Access to Her Dying Partner*, HEALTH LAW PERSPECTIVES 1, 5 (Jan. 2010), <http://www.law.uh.edu/healthlaw/perspectives/2010/%28CC%29%20Langbehn.pdf>.

104. *Reed*, 225 P.3d at 1016; Conway, *supra* note 103, at 6.

105. *Kerrigan*, 957 A.2d at 417. The court in *Kerrigan* commented that "consigning same-sex couples to civil unions . . . relegated them to an inferior status . . . declaring them to be unworthy of the institution of marriage . . . [b]y excluding same-sex couples from civil marriage, the [s]tate declares that it is legitimate to differentiate between their commitments and the commitments of heterosexual couples." *Id.* Civil unions send the message that the relationship same-sex couples share is not as significant as that shared between opposite-sex couples. David G. Savage, *Conn. Gays Allowed to Wed; Top Court Says Civil Unions Not Enough*, CHI. TRIB. (Oct. 11, 2008), http://articles.chicagotribune.com/2008-10-11/news/0810100432_1_civil-unions-same-sex-couples-lesbian-couples.

106. BLACK'S LAW DICTIONARY 281 (9th ed. 2009) (emphasis added).

marital relationship.¹⁰⁷ Representative Jamie Pedersen, who worked towards the Washington Domestic Partnership Statute, commented, “although we view this [domestic partnership statute] as an improvement that provides real and concrete protections to same-sex partners, it’s an inadequate substitute for marriage.”¹⁰⁸ These civil unions and domestic partnerships have a positive goal, but are inadequate in making same-sex couples truly equal.

There is a parallel to the civil rights struggle litigated under *Brown v. Board of Education*.¹⁰⁹ It can be argued that giving rights such as hospital visitation to same-sex couples through civil unions only gives an inferior status to these couples.¹¹⁰ The use of a different name for same-sex relationships only serves as a reminder of the past discrimination these men and women have had to endure,¹¹¹ and the portion of our society which has a repugnant opinion of same-sex couples.¹¹² Civil unions place an inferior status on same-sex couples,¹¹³ and there is still no consistent public support for same-sex marriage.¹¹⁴

C. Visitation Through Specified Statutes

A final category of states has passed specific statutes that either allow a form of hospital visitation for same-sex couples or do not grant this right.

North Carolina is an example of a state that utilizes an

107. *Id.* at 558 (emphasis added).

108. *Out Washington legislators introduce comprehensive gay rights legislation*, GAY POLITICS, <http://www.gaypolitics.com/2009/01/28/out-washington-legislators-introduce-comprehensive-gay-rights-legislation/> (last visited March 28, 2012) (emphasis added). At the time this Comment was written, Washington had recently approved same-sex marriage. Rachel La Corte, *Same-Sex Marriage Becomes Law in WA*, TIME.COM (Feb. 13, 2012), <http://www.time.com/time/nation/article/0,8599,2106754,00.html>.

109. *See generally* *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (abolishing the standard of “separate but equal” and desegregating schools). In *Brown*, a group of nonwhite plaintiffs sued a number of school districts that mandated separate schools for whites and nonwhites. *Id.* The nonwhite students challenged the precedent in *Plessy v. Ferguson*, 163 U.S. 537 (1896), where the court held that separate facilities were not discriminatory as long as they were equal. *Brown*, 347 U.S. at 488. The Supreme Court found that separate accommodations for the different races are inherently unequal because of the stigma of inferiority that it placed upon nonwhites. *Id.* at 494-95.

110. Courtney Megan Cahill, *(Still) Not Fit to Be Named: Moving Beyond Race to Explain Why ‘Separate’ Nomenclature for Gay and Straight Relationships Will Never Be ‘Equal’*, 97 GEO. L.J. 1155, 1159 (2009).

111. *Id.* at 1160.

112. *Id.*

113. *Id.*

114. *See Same-Sex Marriage, Gay Rights*, *supra* note 82 (noting poll results that found that 30 percent of respondents believed that same-sex couples should be allowed to form civil unions).

expansive Patients' Bill of Rights to ensure hospital visitation.¹¹⁵ In 2008, North Carolina added a provision to the state's Patients' Bill of Rights which allows a hospital patient to designate visitors outside of family and spouses.¹¹⁶ This rule applies to all North Carolina hospitals, and requires patients to specify which persons are acceptable for visitation.¹¹⁷ While this law is applauded as a powerful step towards equality,¹¹⁸ it still treats same-sex couples as inferior to "traditional" married couples. Laws such as this force same-sex partners to designate each other as acceptable visitors,¹¹⁹ but this should not be necessary. Again, this requirement of specifying visitors places same-sex partners at a disadvantage to traditional spouses. Additionally, this statute does not account for tragic accidents, which leave a patient unconscious or worse.

Florida, unlike North Carolina, is a state that is sometimes considered, in Jacksonville particularly, "anti-gay" by the media.¹²⁰ It is also the setting for *Langbehn v. Public Health Trust of Miami-Dade County*, in which the Florida court found that there was no cause of action against a hospital for failure to allow visitation for a female partner of a patient.¹²¹ As evidenced in *Langbehn*, Florida does not grant a statutory hospital visitation right, instead only giving "[a] close friend of the patient" the ability to make healthcare decisions if another close relative is not available to make those decisions.¹²² The statute does not acknowledge same-sex couples, choosing instead to only refer to a friend of the patient.¹²³ It appears that Florida would prefer to stretch and find some blood relative before considering the outside possibility of a friend or same-sex partner.¹²⁴ It is important to note also that the

115. 10A N.C. ADMIN. CODE 13B .3302 (2011).

116. *State ensures Gay Hospital Visitation Rights*, GOQNOTES.COM (Apr. 22, 2008), <http://goqnotes.com/89/state-ensures-gay-hospital-visitiation-rights/>.

117. *Id.*

118. Mohanty, *supra* note 30, at 369.

119. *Id.*

120. Michael A. Jones, *The Anti-Gay Problem in Jacksonville, Florida*, CHANGE.ORG (Jun. 11, 2010), http://gayrights.change.org/blog/view/the_anti-gay_problem_in_jacksonville_florida; *We Hate Gays: Anita Bryant's Florida Legacy Lives On*, COMING OUT 101 (July 19, 2008), <http://blog.comingout101.com/2008/07/19/we-hate-gays-anita-bryants-florida-legacy-lives-on.aspx>;

121. *See Langbehn*, 661 F. Supp. 2d at 1331-32 (describing a woman who was refused access to her dying partner in the hospital, who slipped into a coma and died without the comfort of her partner).

122. *See* FLA. STAT. ANN. § 765.401 (West 2010) (stating that a friend of a patient may make health care decisions only if the following are unavailable: a judicially appointed guardian, the patient's spouse, an adult child of the patient, a parent of the patient, the adult sibling of the patient, or an adult relative of the patient).

123. *Id.*

124. *Id.* The statute cites a preference to find a number of blood relatives before the state hospitals would allow a "friend" to make healthcare decisions

statute makes no reference to hospital visitation at all.¹²⁵

While these individual statutes can achieve hospital visitation rights for same-sex couples and others, it becomes troublesome for those who have visitation rights within their home state, but lose this right when in other states. This is the problem Janice Langbehn suffered when her family traveled to Miami, Florida,¹²⁶ unaware that the law would not protect their choice of hospital visitors in the event of a tragedy. Due to this problem, as well as the issue of states that refuse to create this right statutorily, individual state statutes do not adequately remedy the problem of hospital visitation.

D. National Measures Concerning Hospital Visitation

The issue of hospital visitation took the national stage when President Obama issued his Memorandum concerning the rights of hospital patients to choose and receive visitors.¹²⁷ On April 15, 2010, President Obama asked for legislation that would require all participating Medicare and Medicaid hospitals to respect the rights of a patient to choose his or her visitors.¹²⁸ He highlighted how all American citizens deserve the ability to have the loved ones they choose nearby when they are in the hospital.¹²⁹ This is a step in the right direction, but it has not been made into a nationwide law passed by Congress.

The Centers for Medicare and Medicaid Services (CMS) acted, however, in response to President Obama's call by proposing a new rule for hospital visitation.¹³⁰ The proposed rule would require all Medicare and Medicaid funded hospitals to have written policies and procedures concerning hospital visitation.¹³¹ This new rule also gives hospitals several instances where visitation may be restricted due to clinical needs.¹³² Yet, as recently as September

or visitations. *Id.* This Florida statute makes no mention of same-sex partners or domestic partnerships. *Id.*

125. *Id.*

126. *Langbehn*, 661 F. Supp. 2d at 1331.

127. Memorandum, *supra* note 11.

128. *Id.*; Christi Parsons & Kathleen Hennessey, *Obama Orders Most Hospitals to Grant Gays Visitation Rights*, L.A. TIMES (Apr. 16, 2010), <http://articles.latimes.com/2010/apr/16/nation/la-na-gay-couples-hospitals16-2010apr16>; Michael D. Shear, *Obama Extends Hospital Visitation Rights to Same-Sex Partners of Gays*, WASH. POST (Apr. 16, 2010), <http://www.washingtonpost.com/wp-dyn/content/article/2010/04/15/AR2010041505502.html>.

129. Memorandum, *supra* note 11.

130. News Release, U.S. Dept. of Health & Human Services, Medicare Proposes New Rules to Ensure Equal Visitation Rights for All Hospital Patients (June 23, 2010), <http://www.hhs.gov/news/press/2010pres/06/20100623a.html>.

131. *Id.*

132. *Id.*

2010, the American Hospital Association (AHA) challenged President Obama's call for hospital visitation.¹³³ The AHA argued that the measures undertaken by the CMS were premature, and the states should be consulted before any further action is taken for nationwide hospital visitation.¹³⁴ Even with this resistance, the CMS ultimately revised the Medicare and Medicaid Programs to comply with President Obama's memorandum.¹³⁵ This does, however, only apply to Medicare and Medicaid participating hospitals, and not all hospitals.¹³⁶

IV. THE NEED FOR NATIONAL LEGISLATION

The issue of hospital visitation, while seemingly less pressing than other gay rights such as marriage and federal recognition of same-sex couples' legal rights, is one that is equally as important. This reaches beyond the complex moral objections to recognition of same-sex couples. Rather, this concerns the right of all people to have their wishes honored in the scariest moments of life, and a lack of open hospital visitation for non-familial loved ones can lead to a lack of information for doctors and nurses about a patient's medical history or background.¹³⁷

When looking for a remedy to this problem, it is important to note that Congress has already demonstrated its willingness to pass statutes concerning both gay rights as well as healthcare rights.¹³⁸ A national piece of legislation is the best means of giving

133. *Hospital Visitation Rule in Trouble?*, OCCUPATIONAL HEALTH & SAFETY, <http://ohsonline.com/Articles/2010/09/02/Hospital-Visitation-Rule-in-Trouble.aspx> (last visited Dec. 17, 2010).

134. *Id.*

135. Conditions for Participation for Hospitals, 42 C.F.R. § 482 (2011); Brian Bond, *Hospital Visitation Regulations Go into Effect Today*, OFF. OF PUB. ENGAGEMENT BLOG (Jan. 18, 2011, 5:41 PM), <http://www.whitehouse.gov/blog/2011/01/18/hospital-visitiation-regulations-go-effect-today>.

136. Conditions for Participation for Hospitals, *supra* note 135.

137. Memorandum, *supra* note 11. Obama noted in his Memorandum numerous negative impacts resulting from forbidding a patient from choosing his or her visitors in the hospital. *Id.* This includes a possible lack of pertinent medical information when family members are not as knowledgeable about the patient as others who are not related. *Id.*

138. The most prevalent federal statute concerning gay rights is the Defense of Marriage Act. This statute says that no state has to honor a same-sex marriage granted in another state, and also defines marriage as between one man and one woman. Defense of Marriage Act, 110 Stat. at 2419; GLAD, *supra* note 27, at 1–2. While not a pro-gay rights statute, it illustrates that Congress is willing to address the issue of gay rights nationally. As for healthcare, while Congress has passed a wide variety of statutes, one of the most recent is the nationwide health care overhaul passed in early 2010. Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010). This bill extended healthcare coverage to millions of Americans who would be without. *Id.*; Alan Silverleib, *House Passes Health*

a patient the right to choose and/or designate his or her own visitors. It is certainly the ideal means since it is evident that the other methods the states have utilized to grant hospital visitation rights fail to provide any real peace of mind for non-married couples.¹³⁹

One cannot rely on same-sex marriage to achieve this change, as it is entirely too polarizing an issue among the individual states.¹⁴⁰ There is no telling how long it may take for there to be same-sex marriage nationwide, and therefore the fate of hospital visitation cannot be dependent on the granting of same-sex marriage. Additionally, the passage of DOMA illustrates Congress's own hesitation about marriage recognition for same-sex couples.¹⁴¹ Regardless of the progress of same-sex marriage, hospital visitation is not solely a problem for same-sex couples.¹⁴² Therefore, the solution needs to keep hospital visitation distinct from the debate over homosexuality and gay rights generally. The two rights are not interdependent, and therefore keeping them separate will make it more likely to garner a majority of public support for a bill allowing designated hospital visitors.

Other states have chosen to use domestic partnership

Care Bill on 219-212 Vote, CNN.COM (Mar. 21, 2010), http://articles.cnn.com/2010-03-21/politics/health.care.main_1_health-care-entire-house-democratic-caucus-pre-existing-conditions?_s=PM:POLITICS. This bill is simply one example of Congress's power and willingness to legislate healthcare issues and needs.

139. See generally *Langbehn*, 661 F. Supp. 2d 1326 (discussing a suit which arose when Janice Langbehn and her partner, Lisa Marie Pond, traveled from their home state of Washington where a patient can designate visitors regardless of their familial status, to Miami which did not have the same protections for same-sex couples in regards to visitations).

140. Gelman, Lax & Phillips, *supra* note 10. The amount of support for same-sex marriage varies greatly among the states. *Id.* While many of the most supportive states have legalized same-sex marriage, there are several other states that, as of 2010, have more than 50 percent approval of same-sex marriage. *Id.* These states include: California (56 percent); Colorado (52 percent); Maryland (51 percent); and New Hampshire (55 percent). *Id.* This support is encouraging, but by no means consistent among all of the states. There are also a number of states with significantly lower levels of support, which include: Idaho (33 percent); Mississippi (27 percent); Oklahoma (26 percent); and Utah (22 percent). *Id.*

141. Congress passed the Defense of Marriage Act due to fears that Hawaii's decision that same-sex marriage was legal under the state constitution would impact other states to decide the same. *Federal Defense of Marriage Act (DOMA)*, DOMAWATCH.ORG, <http://www.domawatch.org/about/federaldoma.html> (last visited Feb. 16, 2012). This would theoretically lead to an affront on traditional values and principles of marriage. *Id.*

142. This can also affect heterosexual couples who are not married. Memorandum, *supra* note 11. It also impacts those who do not have close family, or those who share very close bonds with friends, and would prefer those friends be present at the hospital. *Id.*

statutes to grant rights such as hospital visitation to same-sex couples.¹⁴³ These statutes carry the same problems as gay marriage laws in regards to hospital visitation. Domestic partnerships have about the same level of support as same-sex marriage,¹⁴⁴ and support for these unions does not prevail across the country. Only a handful of states grant hospital visitation through this medium, and though this is a positive change, it will not remedy the problem on a national level.

Some have suggested that the public should vote concerning rights for same-sex couples.¹⁴⁵ However, the lack of public support for this lifestyle makes individual ballot initiatives among the states ineffective as a solution to hospital visitation. Some states attempt to poll their own citizens' views on controversial issues by utilizing voter referendums.¹⁴⁶ However, ballot initiatives put the majority in control of the rights of the minority.¹⁴⁷ This allows an

143. Surdin, *supra* note 89. See also NATIONAL CENTER FOR LESBIAN RIGHTS, MARRIAGE, DOMESTIC PARTNERSHIPS, AND CIVIL UNIONS: AN OVERVIEW OF RELATIONSHIP RECOGNITION FOR SAME-SEX COUPLES IN THE UNITED STATES, http://www.nclrights.org/site/DocServer/Relationship_Recognition_Update_-_09_03_08.pdf?docID=881 (last visited Nov. 9, 2010) (outlining the various states that use domestic partnerships and civil unions, rather than same-sex marriage statutes, in order to provide *nearly* the same rights and privileges of a legal marriage).

144. *Same-Sex Marriage, Gay Rights, supra* note 82. A Fox News poll conducted in August 2010 asked respondents, “[d]o you believe gays and lesbians should be allowed to get legally married, allowed a legal partnership similar to but not called marriage, or should there be no legal recognition given to gay and lesbian relationships?”. *Id.* Thirty-seven percent chose legal marriage, 29 percent chose legal partnership, and 28 percent felt there should be no legal recognition of the same-sex relationships. *Id.*

145. The 2010 midterm election results in Iowa illustrate this viewpoint. Three Iowa Supreme Court Justices lost their election for retention, as voters chose to remove them from their seats. Many voters stated they voted against the judges because of their decision to legalize same-sex marriage in Iowa the year before. Grant Schulte, *Iowans Dismiss Three Justices*, DES MOINES REGISTER (Nov. 3, 2010), <http://www.desmoinesregister.com/article/20101103/NEWS09/11030390/Iowan-s-dismiss-three-justices>. They also commented that the Judges overstepped their roles by ruling in favor of same-sex marriage, and that they felt the public should have the choice to decide issues like this in the future. *Id.*

146. See generally Sylvia R. Lazos Vargas, *Judicial Review of Initiatives and Referendums in Which Majorities Vote on Minorities' Democratic Citizenship*, 60 OHIO ST. L.J. 399, 402-03 (1999) (discussing how a number of states have used direct voter consideration to decide controversial issues). The types of issues that states have allowed voters to decide include: limitations on affirmative action, elimination of rights and benefits for illegal immigrants, enforcement of English-only workplaces, and discrimination protection for gay men and lesbians. *Id.* at 403.

147. See generally *id.* at 519-26 (analyzing the actual impact that direct voter initiatives have on a wide variety of minorities due to the fact that their rights are in the hands of the majority).

anti-gay majority to continually vote against progress for same-sex couples.

The issue of visitation could readily be resolved with a statute. This would need to be a national statute in order to guarantee that the right applies across the United States, rather than on a state-by-state basis. A national act or statute of this kind has been used to achieve civil rights in the past,¹⁴⁸ and would be successful here. This Comment has already explored the efforts by the states to address hospital visitation through individual state statutes. It is effective within that individual state, but does not create a secure right from one state to the next.¹⁴⁹ This proposal would grant all persons of the United States a right to designate their own visitors while in the hospital.

The appropriate means to achieve this end is an act drafted by the members of Congress, which would pass through the typical legislative process. This statute would concern hospital visitation policy, and could be passed separately or could be encompassed with other reforms. Yet, in order to create the least amount of controversy, the hospital visitation act should be isolated.

President Obama's solution to the issue of hospital visitation improves on the current methods. He felt that there should be some federal regulation granting a person in the hospital the right to choose his or her own visitor regardless of the relationship with that person.¹⁵⁰ While it is a step towards equal hospital visitation policies nationwide, there are some aspects that could be improved. President Obama's plan only affects public hospitals, or those that receive Medicare and/or Medicaid funding.¹⁵¹ It is understandable why President Obama suggested only these hospitals, since they are mostly dependent on government funding.

148. Rebecca E. Zietlow, Article, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 948-49 (Spring, 2005). One of the most notable examples of using a statute to grant individual rights is the Civil Rights Act of 1964. *Id.* Although the Act met tremendous opposition since the majority of Southerners opposed all racial integration, Congress and the President felt it was necessary to disregard the extremely negative feedback and create equality through statutory means. *Id.* at 962-71. The Civil Rights Act of 1964 was a pivotal piece of legislation that protected, at the time it was passed, only racial minorities from several forms of common discrimination they had faced for generations. *Id.* at 959, 974-76; The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

149. *Langbehn*, 661 F. Supp. 2d at 1331-33. Janice Langbehn and her partner, Lisa Marie Pond, took all of the legal precautions under a Washington statute to designate each other as permitted hospital visitors in case of an emergency. *Id.* While these legal documents protected the couple in their home state of Washington, the documents were not effective when the partners and their children traveled out of state to Florida for a family cruise where Lisa fell ill and was treated in a Florida hospital. *Id.* at 1326.

150. Memorandum, *supra* note 11.

151. *Id.*

Although understandable, the President's suggestion leaves same-sex couples without protection at private hospitals and clinics. This creates problems because same-sex couples still do not have a guarantee of visitation outside of their home states in case of an emergency. If one were to fall ill while out of state and be transferred to a private hospital, there would be no legal means to grant visitation.

The ideal statute would apply to more hospitals, besides those that receive Medicare and Medicaid assistance. This statute could be drafted to say:

This act requires any and all hospitals that receive any amount of government funding or benefits, regardless of how small, or any accreditation from a government entity, in the United States to give all adult patients the option to designate visitors upon entry into the facility. "Adult" is defined as any patient over the age of seventeen. This also requires the hospital to allow visitors under the age of eighteen if accompanied by an acceptable adult as defined under this statute. This designation can be given orally or in writing, and hospital staff should note these names in the patient's information. These designated visitors can include any person of the patient's choosing, and need not be related through blood relation or legal marriage. In the case of unconscious patients, who are rendered medically unable to give consent to visitation at the time of admission, the hospital shall allow blood relatives, legal spouses, same-sex partners, and/or any other adult who can demonstrate a long-term connection to the patient. This can include friends of the patient. "Long-term connection" is defined as a sustained or committed relationship of eighteen months or longer. These visitors may visit with a patient as long as it does not interfere with the patient's care. If the presence of visitors would interfere with any type of critical care, the hospital can ask the visitor to wait until the patient is stable enough to accept visitors. The hospital must be able to document why said visitor would be interfere with the patient's care. The hospital shall not deny access to a visitor solely on the basis of race, sex, gender, or sexual orientation.

V. CONCLUSION

Several states have addressed the issue of hospital visitation, but their various actions have not provided a secure fundamental right for same-sex hospital visitation nationwide. This led to Lisa sitting in her hospital room alone and scared without the support of her long-term partner and children. This problem is far too important to leave to the individual states for resolution. A federal statute is the best solution to give patients the right to choose their own visitors regardless of relation.

Since the nation is unwilling to make a sweeping statement on gay rights, a specific hospital visitation statute is more appropriate. Most people have never been in a life threatening tragedy like Janice Langbehn and Lisa Pond, but it is safe to

assume that anyone would want a loved one, regardless of their "status," to hold their hand and tell them they have support. Hospital visitation is too important a right to get lost in the fray and must be kept separate from the moral complexities that surround the same-sex marriage debate.