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## COMITY OF ERRORS: FOREIGN SAME-SEX MARRIAGES IN NEW YORK

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### INTRODUCTION

Same-sex marriage continues to prompt heated debate both nationally and locally. In New York, the Court of Appeals' decision in *Hernandez v. Robles*<sup>1</sup> incited, rather than resolved, this debate. *Hernandez* led to sharp intrastate dissonance over whether New York should recognize foreign same-sex marriages. While some New York courts have broadly construed the scope of *Hernandez*,<sup>2</sup> others have been critical, even while complying with it.<sup>3</sup> The division

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<sup>1</sup> 855 N.E.2d 1 (N.Y. 2006).

<sup>2</sup> *E.g.*, *Funderburke v. New York State Dep't of Civ. Servs.*, 822 N.Y.S.2d 393 (Nassau County Sup. Ct. 2006). *See also* *Martinez v. Monroe Comty. Coll.*, No. 05-00433 (Monroe County Sup. Ct. July 13, 2006), *available at* <http://www.prof-clark.net/samesexconflicts/library/places/nor-am/us/states/ny/cases/martinez/2006-07-31%20-%20NYSup%20-%20Martinez%20v.%20Monroe%20Community%20College.pdf>.

<sup>3</sup> *See, e.g.*, *Cytron v. Malinowitz*, No. 02-25093, 2006 WL 2851622, at \*1 (Kings County Sup. Ct. Oct. 5, 2006). In an action for partition and division of assets between domestic partners, the Kings County Supreme Court stated:

This court is sympathetic to the rights of same-sex couples, and indeed believes that the time has come that they should be afforded the full rights and protection of the law, and echoes Chief Justice Kaye's dissent calling the *Hernandez* decision "an unfortunate misstep." Nonetheless, in dividing the parties' assets herein, it is compelled to uphold the law of this state as interpreted by the Court of Appeals.

*Id.* at \*13 (quoting *Hernandez*, 855 N.E.2d at 34 (Kaye, C.J., dissenting)). *See* *Lewis v. New*

among trial courts is most clearly demonstrated by contrasting *Funderburke v. New York State Department of Civil Service*<sup>4</sup> and *Martinez v. County of Monroe*<sup>5</sup> with *Godfrey v. Spano*.<sup>6</sup> The former cases deny comity to same-sex Canadian marriages while the latter grants it.

This Comment argues that, despite *Hernandez*, New York jurisprudence compels recognition of same-sex Canadian marriages under the doctrine of comity. Part I provides the appropriate background and explains the *Hernandez* decision. Part II examines the ensuing ramifications—the conflicting *Funderburke*, *Martinez*, and *Godfrey* decisions. Part III canvasses the doctrine of comity and its exceptions. Part IV articulates and applies the rule of *lex loci*. Part V expounds the scope and limits of public policy. Part VI concludes that comity should be afforded to foreign same-sex marriages despite *Hernandez*.

## I. *HERNANDEZ V. ROBLES*

In July 2006, the New York Court of Appeals decided *Hernandez v. Robles*, which denied forty-four same-sex couples marriage licenses. The *Hernandez* court, in a plurality opinion, held “the New York Constitution does not compel recognition of marriages between

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York State Dep’t of Civ. Servs., No. 4078/07 (Albany County Sup. Ct. Mar. 3, 2008) (rejecting plaintiffs’ contention that *Hernandez* precluded recognition of foreign same-sex marriages); *Beth R. v. Donna M.*, No. 350284/07, 2008 WL 615031, at \*1, 4 (N.Y. County Sup. Ct. Feb. 25, 2008), (sustaining an action for divorce by a same-sex couple married in Canada despite the defendant’s argument “that the parties’ Canadian marriage [wa]s void under New York law”); *Godfrey v. Spano*, 836 N.Y.S.2d 813 (Westchester County Sup. Ct. 2007).

<sup>4</sup> *Funderburke*, 822 N.Y.S.2d at 393.

<sup>5</sup> 850 N.Y.S.2d 740 (App. Div. 4th Dep’t Feb. 1, 2008).

<sup>6</sup> *Godfrey*, 836 N.Y.S.2d at 813.

members of the same sex.”<sup>7</sup> The court rejected the plaintiffs’ arguments that the matter triggered either strict scrutiny or intermediate/heightened scrutiny and found that the New York Domestic Relations Law withstood rational basis review with respect to limiting marriage to opposite-sex couples.<sup>8</sup>

In so finding, the court premised its decision on two suppositions. The first was that “the Legislature could rationally decide that, for the welfare of children, it is more important to promote stability, and to avoid instability, in opposite-sex [relationships] than in same-sex relationships.”<sup>9</sup> The second was that the “Legislature could rationally believe that it is better, other things being equal, for children to grow up with both a mother and a father.”<sup>10</sup> The plurality opinion conceded both reasons “are derived from the undisputed assumption that marriage is important to the welfare of children.”<sup>11</sup> However, the plurality did not rebut Chief Judge Judith Kaye’s dissenting opinion, in which she pointed out that the United States Supreme Court has held that “procreation is not the sine qua non of marriage.”<sup>12</sup> Instead, the plurality stressed the degree of deference afforded to the legislature when rational basis is the appropriate standard of review.

*Hernandez*’s viability as precedent is seriously questionable because on April 27, 2007, former Governor Eliot Spitzer introduced a marriage-equality bill that would eliminate the denial of a marriage

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<sup>7</sup> *Hernandez*, 855 N.E.2d at 5.

<sup>8</sup> N.Y. DOM. REL. LAW § 10 (McKinney 2006); *Hernandez*, 855 N.E.2d at 5-7.

<sup>9</sup> *Hernandez*, 855 N.E.2d at 7.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 31 (Kaye, C.J., dissenting) (citing *Turner v. Safley*, 482 U.S. 78, 95-96 (1987)).

license “on the ground that the parties are of the same, or a different, sex,”<sup>13</sup> which the New York State Assembly passed. Governor Spitzer declared, “Strong, stable families are the cornerstones of our society. The responsibilities inherent in the institution of marriage benefit those individuals and society as a whole.”<sup>14</sup>

## II. CONFLICT AMONG THE COURTS

Less than one week after *Hernandez* was decided, the Nassau County Supreme Court decided *Funderburke v. New York State Department of Civil Service*, holding same-sex Canadian marriages should not be afforded comity in New York. When recently confronted with the same issue in *Martinez v. County of Monroe*, the Appellate Division, Fourth Department, granted comity to a same-sex Canadian marriage, as did the Westchester County Supreme Court in *Godfrey v. Spano*. The *Martinez* and *Godfrey* courts distinguished *Hernandez* while the *Funderburke* court purported to follow it.

### A. *Funderburke v. New York State Department of Civil Service*

Duke Funderburke and Bradley Davis are same-sex partners who have been living together for more than forty years.<sup>15</sup> In 1995, seven years after retiring as a teacher for the Uniondale Union Free School District, Funderburke “requested domestic partner health care

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<sup>13</sup> Press Release, Governor Eliot Spitzer, Proposed Legislation Would Create Civil Marriage Equality (Apr. 27, 2007), <http://www.ny.gov/governor/press/0427071.html>.

<sup>14</sup> *Id.* See also Nicholas Confessore, *With New Bill, Spitzer Reopens Heated Debate on Gay Marriage*, N.Y. TIMES, Apr. 28, 2007, at B1.

<sup>15</sup> *Funderburke*, 822 N.Y.S.2d at 394.

coverage from the District for his partner,”<sup>16</sup> which was denied. Funderburke filed suit, alleging the “District’s denial of health insurance benefits to his domestic partner was discriminatory.”<sup>17</sup> Ultimately, the Nassau County Supreme Court found in favor of the school district and the Appellate Division, Second Department, affirmed.<sup>18</sup>

On October 27, 2004, Funderburke and Davis married in Canada. Thereafter, Funderburke again applied for health care coverage, this time for his husband.<sup>19</sup> Again, the school district denied the request, and informed Funderburke it would not “provide coverage to such individuals.”<sup>20</sup> Funderburke then commenced a second action in the Nassau County Supreme Court, arguing “the marriage recognition rule should apply and that New York must therefore recognize his Canadian marriage.”<sup>21</sup>

The court held same-sex Canadian marriages do not “trigger[] entitlement to spousal health insurance coverage in New York” and denied Funderburke’s motion for summary judgment.<sup>22</sup> The court reasoned that “plaintiff and his partner are not considered spouses” and their “union is not a ‘marriage’ as [it] has now been defined by the Court of Appeals [under *Hernandez*].”<sup>23</sup> Notably, the court believed itself “constrained to follow the recent holding of the Court of Appeals in *Hernandez v. Robles*,” and erroneously characterized

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Funderburke v. Uniondale Union Free Sch. Dist. No. 15*, 660 N.Y.S.2d 659, 662 (Nassau County Sup. Ct. 1997), *aff’d*, 676 N.Y.S.2d 199, 201 (App. Div. 2d Dep’t 1998).

<sup>19</sup> *Funderburke*, 822 N.Y.S.2d at 394.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 394.

*Hernandez* as defining marriage, which *Hernandez* neither did nor purported to do.<sup>24</sup>

**B. *Godfrey v. Spano***

Andrew J. Spano, the Westchester County Executive, issued an Executive Order on June 6, 2006 directing every governmental unit of the county to “recognize same sex marriages lawfully entered into outside the State of New York in the same manner as they currently recognize opposite sex marriages for the purposes of extending and administering all rights and benefits belonging to these couples, to the maximum extent allowed by law.”<sup>25</sup>

Two months later, Margaret Godfrey and others challenged Spano’s action by commencing a “taxpayer action” pursuant to section fifty-one of the New York General Municipal Law, which essentially gives standing to taxpayers in a cause of action against public “officers, agents, [and] commissioners . . . .”<sup>26</sup> In sum, the plaintiffs’ claims amounted to an allegation that Spano’s Executive Order constituted an unlawful act warranting prosecution because it compelled recognition of foreign same-sex marriages. The court granted non-parties Michael Sabatino and Robert Voorheis, “a same-sex couple who reside in Westchester County and who were validly married in

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<sup>24</sup> *Funderburke*, 822 N.Y.S.2d at 394 (citation omitted).

<sup>25</sup> Exec. Order No. 3 (June 6, 2006), available at [http://www.westchestergov.com/pdfs/LGBT\\_Exec\\_Order\\_Same\\_Sex\\_Marriage.pdf](http://www.westchestergov.com/pdfs/LGBT_Exec_Order_Same_Sex_Marriage.pdf).

<sup>26</sup> N.Y. GEN. MUN. LAW § 51 (McKinney 2007) provides:

[A]n action may be maintained against them to prevent any illegal official act on the part of any such officers, agents, commissioners or other persons, or to prevent waste or injury to, or to restore and make good, any property, funds or estate of such county, town, village or municipal corporation . . . .

Canada,” leave to intervene.<sup>27</sup>

The Westchester County Supreme Court upheld the Executive Order and found the plaintiffs’ contentions meritless. In so concluding, Justice Joan B. Lefkowitz stated, “I am not persuaded by the reasoning in *Funderburke* . . . that the Court of Appeals in *Hernandez v. Robles* . . . changed the law with respect to comity . . . .”<sup>28</sup> The *Godfrey* court reasoned that New York has afforded recognition to out-of-state marriages in a host of contexts, although such marriages would have been void or invalid in New York.

Such contexts, the court explained, have included recognition of a remarriage, by an adulterous spouse, which took place “on the high seas while the innocent spouse was still alive.”<sup>29</sup> Even more specifically, New York courts have recognized Canadian marriages that would have been otherwise invalid under New York law. For example, in *Donohue v. Donohue*,<sup>30</sup> the Erie County Supreme Court held a lawful Canadian marriage between persons under the age of eighteen, which would have been voidable in New York, “was lawful there, and, therefore, is valid in this State.”<sup>31</sup> The *Donohue* court reasoned that recognition for such a marriage was not only consistent with “a proper sense of justice, but also [with] the well settled rule that a marriage, valid where it is entered into, is valid here.”<sup>32</sup>

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<sup>27</sup> N.Y. C.P.L.R. 1013 (McKinney 2007); *Godfrey*, 836 N.Y.S.2d at 814.

<sup>28</sup> *Godfrey*, 836 N.Y.S.2d at 818-19 (internal citations omitted).

<sup>29</sup> *Id.* at 816 (citing *Fisher v. Fisher*, 165 N.E. 460 (N.Y. 1929)). New York Domestic Relations Law formerly prohibited remarriage for a divorced spouse found guilty of adultery. *Godfrey*, 836 N.Y.S.2d at 816.

<sup>30</sup> 116 N.Y.S. 241 (Erie County Sup. Ct. 1909).

<sup>31</sup> *Donohue*, 116 N.Y.S. at 241.

<sup>32</sup> *Id.*

The *Godfrey* court also cited an example of where comity was granted to a Canadian marriage, despite what would necessarily have been an inconsistent result under New York law. In *In re White*, a Jewish couple “entered into a ceremonial marriage” known as a “stille chuppe” in Toronto, Ontario.<sup>33</sup> Whereas New York would have found such a ceremony valid, Canada would not have. However, subsequent to the ceremony, the couple “cohabited as man and wife for three years thereafter.”<sup>34</sup> In contrast to the laws of New York, but pursuant to the laws of Ontario, that cohabitation “ripened [the relationship] into a valid marriage . . . .”<sup>35</sup> The *White* court held “the validity of the ceremonial [sic] must be tested, not by the laws of any church, nor by the laws of this State, but by the laws of the place where the ceremony took place, which was the Province of Ontario, Dominion of Canada.”<sup>36</sup>

Therefore, in New York the validity of a marriage is governed by the law of the situs. The *Godfrey* court’s application of *Donohue* and *White* was by no means contrived. Both Canadian marriages would have been invalid if they had been solemnized in New York. Regardless, New York granted comity in *Donohue* and in *White*, and accordingly, the *Godfrey* court followed suit.

### C. *Martinez v. County of Monroe*

Maria Martinez was employed by Monroe Community College (“MCC”), the defendant. In July 2004, after marrying Lisa Ann

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<sup>33</sup> *In re White*, 223 N.Y.S. 311, 312-13 (Erie County Sur. Ct. 1927).

<sup>34</sup> *Id.* at 313-14.

<sup>35</sup> *Id.* at 313.

<sup>36</sup> *Id.*



Golden in Ontario, Canada, Martinez applied to MCC for spousal health care benefits. She was denied even while MCC “admittedly provided health care benefits for the opposite-sex spouses of its employees.”<sup>37</sup> Accordingly, Martinez filed suit in the Monroe County Supreme Court and argued the denial violated her right to equal protection under the New York State Constitution.<sup>38</sup> The trial court disagreed and granted summary judgment in MCC’s favor. Martinez appealed on the grounds that “her valid Canadian marriage [was] entitled to recognition in New York” and the Appellate Division, Fourth Department, agreed.<sup>39</sup>

The appellate division reversed and held that the marriage was entitled to comity. The court reasoned that neither the “positive law” exception, nor the “natural law” exception to the “marriage recognition rule” applied.<sup>40</sup> Further, the *Martinez* court rejected the defendants’ contention that same-sex marriage is contrary to New York’s public policy, relying on *Hernandez*, which “noted that the Legislature *may* enact legislation recognizing same-sex marriages . . . .”<sup>41</sup> Until such time, the court explained, “such marriages are entitled to recognition in New York.”<sup>42</sup>

### III. COMITY

Comity is the doctrine by which a tribunal affords recogni-

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<sup>37</sup> *Martinez*, 850 N.Y.S.2d 741-42.

<sup>38</sup> *Id.* at 742. See N.Y. CONST. art. I, § 11 provides, in pertinent part: “No person shall be denied the equal protection of the laws of this state or any subdivision thereof.”

<sup>39</sup> *Martinez*, 850 N.Y.S.2d 742.

<sup>40</sup> *Id.* at 742-43.

<sup>41</sup> *Id.* at 743 (citing *Hernandez*, 855 N.E.2d at 7).

<sup>42</sup> *Martinez*, 850 N.Y.S.2d 743.

tion, reciprocity, and respect to foreign judgments. The New York Court of Appeals has described comity as parallel to the Full Faith and Credit Clause,<sup>43</sup> “The comity doctrine is . . . pragmatically necessary to deal properly and fairly with the millions of relational and transactional decrees and determinations that would otherwise be put at risk, uncertainty and undoing in a world of different people, Nations and diverse views and policies.”<sup>44</sup>

Historically, however, comity and full faith and credit have mistakenly been used synonymously and interchangeably. As a result, the scope of comity has been obscured. For example, in *City of Philadelphia v. Cohen*,<sup>45</sup> the New York Court of Appeals substantively applied the Full Faith and Credit Clause, but referred to its application as comity. “It is an attribute of [each] State’s sovereignty that it may determine for itself whether under its concepts of comity a particular foreign law should or should not be enforced.”<sup>46</sup> Still, *Cohen* did not address the extent to which comity is obligatory rather than permissive.

Since *Cohen*, in *Greschler v. Greschler*,<sup>47</sup> the New York Court of Appeals has distinguished comity from full faith and credit. “Although not required to do so, the courts of this State generally will accord recognition to the judgments rendered in a foreign country . . .

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<sup>43</sup> U.S. CONST. art. IV, § 1 states, in pertinent part: “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.”

<sup>44</sup> *Gotlib v. Ratsutsky*, 635 N.E.2d 289, 291 (N.Y. 1994).

<sup>45</sup> 184 N.E.2d 167 (N.Y. 1962), *cert. denied*, 371 U.S. 934 (1962) (refusing to entertain a Pennsylvania tax claim in a New York venue).

<sup>46</sup> *Cohen*, 184 N.E.2d at 169.

<sup>47</sup> 414 N.E.2d 694 (N.Y. 1980).

.<sup>48</sup> The Appellate Division, Second Department, has strictly adhered to the doctrine and, in citing *Greschler*, found “New York State courts *must* recognize the judgments rendered in a foreign country under the doctrine of comity, absent some showing of fraud in the procurement of the judgment or that recognition of the judgment would do violence to some strong public policy of this State.”<sup>49</sup>

The New York Court of Appeals has unequivocally and repeatedly held that public policy exceptions to comity are “rare” and are only warranted when the foreign judgment “ ‘is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.’ ”<sup>50</sup>

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<sup>48</sup> *Greschler*, 414 N.E.2d at 697.

<sup>49</sup> *Fickling v. Fickling*, 619 N.Y.S.2d 749, 750 (App. Div. 2d Dep’t 1994) (granting comity to an Australian divorce judgment for child support) (emphasis added). *But see* *Santamaria v. Santamaria*, 345 N.Y.S.2d 906, 910 (Nassau County Sup. Ct. 1973) (“Whereas another state’s divorce judgment entitlement to full faith and credit in New York is a profound principle upon which the federal system in this country rests, the court orders of foreign nations are respected only in so far as comity requires.”). However unclear the general scope of comity may be, the same is not true for its exceptions. Once comity is afforded to an extraterritorial decree, the substantive value of the judgment is nearly unassailable. Only two exceptions recognized: (1) a “challenge [to the] validity of the foreign judgment, i.e., lack of jurisdiction or extrinsic fraud,” *Fickling*, 619 N.Y.S.2d at 750; or (2) a contention that enforcement of the foreign judgment “would result in the recognition of a ‘transaction which is inherently vicious, wicked or immoral, and shocking to the prevailing moral sense.’ ” *Greschler*, 414 N.E.2d at 698 (quoting *Intercontinental Hotels Corp. v. Golden*, 203 N.E.2d 210, 212 (N.Y. 1964)).

<sup>50</sup> *Greschler*, 414 N.E.2d at 698 (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 117 cmt. c (1971)). *See also* *J. Zeevi & Sons, Ltd. v. Grindlays Bank (Uganda) Ltd.*, 333 N.E.2d 168 (N.Y. 1975).

Laws of foreign governments have extraterritorial jurisdiction[] [only] by comity. The principle which determines whether we shall give effect to foreign legislation is that of public policy and, where there is a conflict between our public policy and application of comity, our own sense of justice and equity as embodied in our public policy must prevail.

*Id.* at 173 (citations omitted). Likewise, the same is true for the fraud exception, which requires that plaintiffs seeking denial of comity “plead[] with sufficient detail to withstand” dismissal. *Greschler*, 414 N.E.2d at 697. *See also* N.Y.S. Bar Ass’n, *Fickling v. Fickling*, 24 FAM. L. REV. 37, 38 (1992) (“[F]oreign judgments are entitled to full faith and credit or

**IV. LEX LOCI**

The cases relied upon in *Godfrey—Donohue* and *White*—exemplify the deeply-rooted general rule of *lex loci celebrationis*, which provides that

the validity of a marriage contract is to be determined by the law of the State where it is entered into. If valid there, it is to be recognized as such in the courts of this State, *unless contrary to the prohibitions of natural law or the express prohibitions of a statute.*<sup>51</sup>

*In re May's Estate*<sup>52</sup> is perhaps the leading New York case exemplifying the application of *lex loci*. In *May*, the surrogate court refused to recognize a marriage between an uncle and his “niece by the half blood,” which was valid in Rhode Island, because “such marriage was not only void in New York as opposed to natural law but is [also] contrary to [New York Domestic Relations Law].”<sup>53</sup> The statutory provision relied upon by the surrogate court not only declared

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comity and serve as *res judicata* in the absence of fraud or collusion, even if obtained upon default.” (citing *Parker v. Hoefer*, 142 N.E.2d 194 (N.Y. 1957)).

<sup>51</sup> *Thorp v. Thorp*, 90 N.Y. 602, 605 (1882) (emphasis added). “[A marriage that is] valid according to the laws of [another] State must be regarded as valid here; and to each party thereto every right and privilege growing out of the relation so established must attach.” *Id.* at 607. See also *Van Voorhis v. Brintnall*, 86 N.Y. 18, 26 (1881) (“[O]ne rule in these cases should be followed by all countries; that is, the law of the country where the contract is made.”). But see *Cunningham v. Cunningham*, 99 N.E. 845 (N.Y. 1912).

[T]he marriage of the plaintiff to the defendant in the state of New Jersey, while she was under the age of legal consent, without the knowledge or consent of her parents, was repugnant to our public policy and legislation, and in view of the fact that the parties were, and ever since have been, residents of this state, our courts have the power to relieve the plaintiff by annulling the marriage.

*Id.* at 848.

<sup>52</sup> 114 N.E.2d 4 (N.Y. 1953).

<sup>53</sup> *May*, 114 N.E.2d at 5.

marriages between “[a]n uncle and niece” incestuous, and thus void,<sup>54</sup> but also “impose[d] penal measures upon the parties thereto . . . .”<sup>55</sup> The New York Court of Appeals disagreed, and held that section five of the Domestic Relations Law “does not expressly declare void a marriage of its domiciliaries solemnized in a foreign State where such marriage is valid . . . .”<sup>56</sup> The Court of Appeals refused to invalidate the marriage between the uncle and niece despite clear statutory provisions that not only would have made the marriage invalid, but, if consummated in New York, criminal. In other words, absent an express prohibition (“positive law”) there was no offense “to the public sense of morality . . . [or] abhorrence” that would have constituted an “inhibition[] of natural law.”<sup>57</sup> In short, the *May* court set a tremendously high threshold for the applicability of the public policy exception to comity.

## V. PUBLIC POLICY

Judge Charles S. Desmond’s dissent in *May* posited that New York’s statutory and jurisprudential scheme *did* amount to a strong public policy against a marriage between an uncle and niece, and thus warranted denial of comity. Desmond’s dissent focused on historical “condemn[ation] by public opinion for centuries” while acknowledging such prohibitions were “not within the Levitical forbidden degrees of the Old Testament . . . .”<sup>58</sup> Whereas the majority in *May* dis-

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<sup>54</sup> N.Y. DOM. REL. LAW § 5(3) (McKinney 2006).

<sup>55</sup> *May*, 114 N.E.2d at 6.

<sup>56</sup> *Id.* at 7.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 8 (Desmond, J., dissenting).

tinguished a statutory prohibition for such marriages performed within New York from a statute that would refuse to recognize such a marriage solemnized elsewhere, Judge Desmond would have found the former sufficient to deny comity.

Judge Desmond's reliance on history is an insufficient justification that predates the landmark case of *Loving v. Virginia*<sup>59</sup> by nearly fifteen years and *Lawrence v. Texas*<sup>60</sup> by half a century. In *Loving*, the United States Supreme Court invalidated Virginia's miscegenation statute for violating the Due Process Clause and Equal Protection Clause of the United States Constitution.<sup>61</sup> The Court recognized a fundamental right to marriage despite the deeply-rooted prohibition against interracial marriages.

If ever a state had a strong historical public policy against certain marriages, it was Virginia. Virginia's miscegenation statute had two particularly relevant provisions, one that imposed felony status and criminal sanctions upon a violator, and another that expressly applied these punishments to persons marrying outside the state of Virginia in an attempt to evade the prohibition. The penal provision read as follows:

Punishment for marriage. —If any white person intermarry with a colored person, or any colored person intermarry with a white person, he shall be guilty of a felony and shall be punished by confinement in the penitentiary for not less than one nor more than five

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<sup>59</sup> 388 U.S. 1 (1967).

<sup>60</sup> 539 U.S. 558 (2003).

<sup>61</sup> U.S. CONST. amend. XIV provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."; *Loving*, 388 U.S. at 2.

years.<sup>62</sup>

The evasion provision provided, in relevant part:

Leaving State to evade law. –If any white person and colored person shall go out of this State, for the purpose of being married, and with the intention of returning, and be married out of it, and afterwards return to and reside in it, cohabiting as man and wife, they shall be punished as provided in § 20-59, and the marriage shall be governed by the same law as if it had been solemnized in this State.<sup>63</sup>

Historically, the statute “arose as an incident to slavery” and dated back to “the colonial period.”<sup>64</sup> Regardless, the United States Supreme Court was not persuaded by the history of these prohibitions. Just as the historical traditions and clear public policy against interracial marriage were unpersuasive to the Supreme Court in *Loving*, so were the historical and purported public policy concerns (set forth by Judge Desmond) unpersuasive to the majority of the New York Court of Appeals in *May*. It follows that any extent to which the *Hernandez* plurality relied on history, explicitly or implicitly, is equally unpersuasive.<sup>65</sup> Any such reasoning by the *Hernandez* court

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<sup>62</sup> VA. CODE ANN. § 20-59 (West 1950) (repealed 1968).

<sup>63</sup> *Id.* at § 20-58 (repealed 1968).

<sup>64</sup> *Loving*, 388 U.S. at 6.

<sup>65</sup> *Hernandez*, 855 N.E.2d at 8. The plurality stated:

But the traditional definition of marriage is not merely a by-product of historical injustice. Its history is of a different kind.

The idea that same-sex marriage is even possible is a relatively new one. Until a few decades ago, it was an accepted truth for almost everyone who ever lived, in any society in which marriage existed, that there could be marriages only between participants of different sex.

is likewise undercut by *Lawrence*, where the Supreme Court held the liberty interest of the Due Process Clause prohibits states from imposing criminal penalties for consensual homosexual sodomy.<sup>66</sup> The *Lawrence* Court reasoned, “ ‘History and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.’ ”<sup>67</sup> As Chief Judge Judith Kaye observed in *Hernandez*, “ ‘Sadly, many of the arguments then raised in support of the antimiscegenation laws were identical to those made today in opposition to same-sex marriage.’ ”<sup>68</sup>

#### A. Question: What is Public Policy?

The nebulous nature of “public policy” compels the question, “What is the public policy of a state and where do we look to find it?”<sup>69</sup> The superficial and apparent answer is that which is “repugnant” or “offensive” to the state or runs contrary to the state’s public policy.<sup>70</sup> In *Glaser v. Glaser*, a unanimous New York Court of Appeals, in an opinion authored by Chief Judge Frederick E. Crane, defined public policy as “the law of the State, whether found in the Constitution, the statutes or judicial records.”<sup>71</sup> The court flatly rejected the argument that a Nevada divorce decree should not be recognized in New York merely on the grounds that the “main purpose

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<sup>66</sup> *Lawrence*, 539 U.S. at 572.

<sup>67</sup> *Id.* (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

<sup>68</sup> *Hernandez*, 855 N.E.2d at 24-25 (Kaye, C.J., dissenting).

<sup>69</sup> *Glaser v. Glaser*, 12 N.E.2d 305, 306 (N.Y. 1938).

<sup>70</sup> *Kraham v. Kraham*, 342 N.Y.S.2d 943, 947, 948 (Nassau County Sup. Ct. 1973) (explaining that public policy is the “prime factor to be considered . . . [when determining whether to grant] recognition of such a decree on the basis of comity”).

<sup>71</sup> *Glaser*, 12 N.E.2d at 307 (citations omitted).



of [the] husband in going to the foreign State was to procure the divorce” and circumvent New York public policy. Evasion is irrelevant, the court reasoned, and “main purpose” is not a factor in determining whether the “policy of this State [i]s infringed.”<sup>72</sup>

Five years after *Glaser*, but ten years before *May*, Judge Desmond echoed Chief Judge Crane in *In re Rhinelanders' Estate*.<sup>73</sup> Here, Judge Desmond’s perspective and analysis differed significantly from the positions he took in *May*. With Judge Desmond writing for the majority, the *Rhinelanders* court held

It is no part of the public policy of this State to refuse recognition to divorce decrees of foreign states when rendered on the appearance of both parties, *even when the parties go from this State to the foreign state for the purpose of obtaining the decree and do obtain it on grounds not recognized here*.<sup>74</sup>

When one compares *Rhinelanders* to *May*, it would seem that Judge Desmond would distinguish evasion for the purpose of marriage from evasion for the purpose of divorce. Yet, such a reading of his dissent in *May* is implausible and unpersuasive because there is not so much as an insinuation of a divorce-marriage distinction in either opinion.

The public policy exception to the doctrine of comity is only intended to prevent seriously detestable conduct, such as that demonstrated by *People v. Ezeonu*.<sup>75</sup> There, defendant Gregory Ezeonu was

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<sup>72</sup> *Id.* at 306.

<sup>73</sup> 47 N.E.2d 681 (N.Y. 1943).

<sup>74</sup> *Rhinelanders*, 47 N.E.2d at 684 (citing *Glaser*, 12 N.E.2d at 305) (emphasis added).

<sup>75</sup> 588 N.Y.S.2d 116 (Bronx County Sup. Ct. 1992).

indicted for raping a thirteen-year-old. Ezeonu essentially wanted to raise marriage as an affirmative defense to rape. He contended the court should recognize, under the doctrine of comity, that the girl was “his ‘second’ or ‘junior’ wife, given to him by her parents in Nigeria pursuant to the laws and tribal customs of that country.”<sup>76</sup> However, Ezeonu’s specious “marriage” to the thirteen-year-old was also admittedly polygamous. He “acknowledge[d] that he already was legally married under both New York and Nigerian law at the time he entered into the purported second marriage, but assert[ed] that the laws and tribal customs of Nigeria allow[ed] one man to have multiple wives.”<sup>77</sup> The court refused to grant comity to Ezeonu’s second marriage, reasoning that when New York “is called upon to recognize either an incestuous or bigamous marriage, it will assert its strong public policy of condemnation thereof and refuse recognition even if that marriage was valid where consummated. Consequently, a polygamous marriage legally consummated in a foreign country will be held invalid in New York.”<sup>78</sup>

## B. Answer: The Constitution, Laws, and

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<sup>76</sup> *Ezeonu*, 588 N.Y.S.2d at 117.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* (quotations and citations omitted). Contentions that granting comity to same-sex marriages would eventually result in legalization of polygamy are without merit. The public policy considerations respecting polygamy are not applicable to same-sex marriages because

[t]he history of plural marriage in the United States reveals a pattern of sexual abuse, incest, child-brides, poverty, and discrimination against women. These social policy concerns do not arise in same-sex unions, but are prevalent in plural lifestyles, revealing that prohibiting polygamous marriages would be justified notwithstanding the legalization of same-sex marriages.

Hema Chatlani, *In Defense of Marriage: Why Same-Sex Marriage Will Not Lead Us Down a Slippery Slope Toward the Legalization of Polygamy*, 6 APPALACHIAN J. L. 101, 133 (2006).

### Jurisprudence

If “public policy” is defined as the constitution, laws, and jurisprudence of a state, then the question becomes: To what extent is silence tantamount to condemnation? In other words, what dictates public policy in the absence of an explicit reference? This was the issue in *Fisher v. Fisher*,<sup>79</sup> where the New York Court of Appeals upheld the remarriage of a divorced adulterer, which took place at sea while it would have been prohibited in New York. The *Fisher* court’s rationale was that “although [there is] no law of any state, territory or district of the United States, *sanctioning* the marriage of the parties to this action . . . in the absence of any such law which *condemned* the marriage, we think that they were lawfully married.”<sup>80</sup> The *Martinez* and *Godfrey* courts followed *Fisher*’s line of reasoning and held, “because no law *condemned* such marriage performed out-of-state[.]” comity should be granted to same-sex Canadian marriages.<sup>81</sup>

Likewise, the Appellate Division, Second Department, addressed this concern in *De Pena v. De Pena*.<sup>82</sup> The court reasoned that, where there is statutory silence and an absence of case law, it is a reviewing court’s duty to “look for guidance to the general spirit

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<sup>79</sup> 165 N.E. 460 (N.Y. 1929).

<sup>80</sup> *Fisher*, 165 N.E. at 461-62.

<sup>81</sup> *Godfrey*, 836 N.Y.S.2d at 816.

<sup>82</sup> 298 N.Y.S.2d 188 (App. Div. 1st Dep’t 1969). The *De Pena* court refused to grant comity to a foreign ex parte divorce decree that relieved the plaintiff-husband of his child support obligations. Enforcement, the court held, would have been contrary to New York’s public policy because the foreign court lacked in personam jurisdiction over the defendant wife. *Id.* at 192.

and purpose of our laws and the trend of our judicial decisions.”<sup>83</sup> Consistently, the *Kraham* court explained that “a state’s public policy does not remain constant, but is subject to change depending upon the mores and needs of its residents and, in the final analysis, the then current public policy is what the Court of Appeals determines it to be.”<sup>84</sup>

Constitutionally, New York is silent on recognition of foreign same-sex marriages. Statutorily, there is no prohibition in New York that forbids recognition of foreign same-sex marriages.<sup>85</sup> Jurisprudentially, the *Hernandez* decision explicitly “emphasize[d] once again that we are deciding only this constitutional question. It is not for us to say whether same-sex marriage is right or wrong.”<sup>86</sup> Therefore, the spirit of New York laws must guide this matter.

Long before *Hernandez*, the New York Constitution had been interpreted to demonstrate the spirit of New York law supports the rights of lesbian, gay, bisexual, and transgender persons. This was true in *People v. Onofre*,<sup>87</sup> where the New York Court of Appeals was far ahead of its time in pioneering the rights of homosexuals on state constitutional grounds. Twenty-three years before the United States Supreme Court’s “resounding fiat of the liberty interest”<sup>88</sup> in

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<sup>83</sup> *Id.* at 191. *But see* *D’Arcangelo v. D’Arcangelo*, 102 N.Y.S.2d 100 (App. Div. 4th Dep’t 1951) (per curiam). The *D’Arcangelo* court strictly construed the statutory prohibition on remarriage for adulterers, holding that “if the public policy of this State is to be further relaxed, the remedy rests with the legislature and not with the courts.” *Id.* at 103.

<sup>84</sup> *Kraham*, 342 N.Y.S.2d at 945.

<sup>85</sup> Compare incest, for example, which is a class E felony. Parties to an incestuous marriage may be subject to six months imprisonment. N.Y. PENAL LAW § 255.25 (McKinney 2006); N.Y. DOM. REL. LAW § 5 (McKinney 2006).

<sup>86</sup> *Hernandez*, 855 N.E.2d at 12.

<sup>87</sup> 415 N.E.2d 936 (N.Y. 1980).

<sup>88</sup> Gennaro Savastano, Note, *Hernandez v. Robles*, 23 TOURO L. REV. 515, 526 (2007).

*Lawrence v. Texas*, the *Onofre* court invalidated New York's statutory prohibition of sodomy<sup>89</sup> for infringing on the "right of privacy and the right to equal protection . . . ."<sup>90</sup> This trend to support individual sexual orientation and gender identity matters is consistent with the New York State Legislature's enactment of the Sexual Orientation Non-Discrimination Act ("SONDA"), which prohibits discrimination, among other things, on the basis of sexual orientation.<sup>91</sup> Former Governor Spitzer, in his previous capacity as New York State Attorney General, issued an opinion echoing this trend, stating "New York law presumptively requires that parties to [foreign same-sex] unions must be treated as spouses for the purposes of New York law."<sup>92</sup>

Moreover, New York courts have followed this trend set by the constitution, legislature, and executives. For example, in *Braschi v. Stahl Associates Co.*,<sup>93</sup> the New York Court of Appeals broadly construed the definition of "family" respecting the Codes, Rules & Regulations of the State of New York to include same-sex partners.<sup>94</sup> The *Braschi* court rejected the appellate division's finding that "family" should be construed according to "traditional, legally recognized

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<sup>89</sup> N.Y. PENAL LAW § 130.38 (McKinney 2007), *invalidated by Onofre*, 415 N.E.2d 936.

<sup>90</sup> *Onofre*, 415 N.E.2d at 938-39.

<sup>91</sup> N.Y. EXEC. LAW § 296 (McKinney 2007). The state's Human Rights Law generally prohibits discrimination based on "age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, or marital status . . . ." *Id.*

<sup>92</sup> Op. Att'y Gen. (Mar. 3, 2004), *available at* [http://www.oag.state.ny.us/press/2004/mar/mar3a\\_04\\_attach2.pdf](http://www.oag.state.ny.us/press/2004/mar/mar3a_04_attach2.pdf).

<sup>93</sup> 543 N.E.2d 49 (N.Y. 1989).

<sup>94</sup> N.Y. COMP. CODES R. & REGS. tit. 9, § 2204.6 (2007).

familial relationships.”<sup>95</sup> Instead, the court interpreted the code in a manner that reflected “the reality of family life” which included same-sex partners.<sup>96</sup>

Similarly, in *Cannisi v. Walsh*, the Kings County Supreme Court employed its equitable powers to ensure a just remedy for a lesbian couple. In an action for partition, defendant Maureen Walsh sought to compel discovery of certain documents from her former domestic partner—plaintiff Joann Cannisi. The court found the documents discoverable. “It is clear that had the parties been able to marry . . . [the documents] would [have] be[en] discoverable because the partition of the property would not have been decided apart from the rest of the marital assets.”<sup>97</sup> The court went on to say that “had the parties entered into an express separation agreement . . . such [an] agreement would [have] be[en] enforceable even though it was a same-sex domestic partnership.”<sup>98</sup> Not only was the *Cannisi* court unpersuaded by *Hernandez*, but boldly defied any negative implication *Hernandez* may have had on the issue before it by essentially treating the parties as a married couple.

Clearly, the spirit of New York law safeguards citizens with respect to matters of sexual orientation, rendering public policy arguments to the contrary untenable.

## CONCLUSION

New York jurisprudence compels recognition of foreign

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<sup>95</sup> *Braschi v. Stahl Assocs. Co.*, 531 N.Y.S.2d 562, 563 (App. Div. 1st Dep’t 1988).

<sup>96</sup> *Braschi*, 543 N.E.2d at 53.

<sup>97</sup> *Cannisi v. Walsh*, 13 Misc.3d 1231(A), at \*3 (Kings County Sup. Ct. Oct. 30, 2006).

<sup>98</sup> *Id.*

same-sex marriages under the doctrine of comity despite *Hernandez*. Comity is liberally granted unless there is fraud or a strong public policy exception. Unlike rape or polygamy, there is no public policy exception in the State of New York respecting sexual orientation matters. If a state's public policy is not addressed in its constitution, statutes, or jurisprudence, then courts must look to the spirit of the law generally. *Hernandez* did close some doors, but not all of them.<sup>99</sup> The spirit of New York law still safeguards matters pertaining to sexual orientation, and recognition should be afforded to foreign same-sex marriages, lest there be comity of errors.

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<sup>99</sup> See *supra* note 13 and accompanying text.