

FROM DIVERGENCE TO CONVERGENCE? A COMPARATIVE AND INTERNATIONAL LAW ANALYSIS OF LGBTI RIGHTS IN THE CONTEXT OF RACE AND POST-COLONIALISM

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INTRODUCTION

Understanding diverging and converging state approaches towards lesbian, gay, bisexual, transgender, and intersexual¹ (“LGBTI”) rights is

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1. The terms “gay” or “lesbian” refer to those individuals who have adopted a conscious social identity reflecting a desire to enter into predominantly or exclusively same-gender relationships. The term “bisexual” refers to individuals who engage in, or have an inclination to engage in, both heterosexual and homosexual relations. The term “transgenderism” will refer to activity or identity that conflicts with established societal norms of gender construction, such as transvestism and transsexualism. “Intersexual” refers to individuals with a combination of male and female physical sexual characteristics.

particularly important in the international and comparative law context. International law is based on values, traditions, standards, and norms accepted globally, although not necessarily by *every* culture or country.² The process by which international human rights law recognizes certain rights as fundamental is a relatively slow dialectical process. This approach is appropriate for a legal system that seeks a consensus before determining which rights are fundamental to human beings in all parts of the world, inuring to individuals because of their status as human beings and not because they are citizens of a specific country. The Preamble of the Universal Declaration of Human Rights proclaims that the international community's "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."³ The legal justification under international law for extending legal recognition of same-sex unions becomes more compelling once it is noted that accepting sexual minorities as equal members of society is not specific to only a small number of countries. The arguments for cultural relativism in the context of LGBTI rights are shorn of their power when it is understood that much of the contemporary opposition to gender nonconformity and homosexuality comes not from indigenous practice but largely from modern and predominantly Western phenomena.

Many of contemporary societies are simply remedying the damage wrought by the advent of historically aberrational virulent homophobia associated with Judaism, Christianity, and Islam, imposed on large sections of the world through conquest or colonialism. In large sections of the United States, Christian denominations developed and promulgated a particularly vicious hierarchical view of racial and gender relations to theologically justify the institutions of slavery and apartheid.

Diverging and converging state approaches to LGBTI rights are also important in the comparative law context. Many commentators on LGBTI issues tend to conceptualize LGBTI rights as a linear development flowing from an enlightened Western sociopolitical approach to human rights. This view is inaccurate and undermines both domestic and global battles for LGBTI rights. It undermines the domestic battle for such rights because it locates the struggle for LGBTI rights in opposition to those who view such rights as the recent invention of a secular, humanist human rights

2. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), Preamble, U.N. Doc. A/6316 (Mar. 23, 1976).

3. Universal Declaration of Human Rights, G.A. Res. 217A (III), UN Doc A/810 at 71 (Dec. 10, 1948).

movement.⁴ It undermines the global battle for human rights because LGBTI rights are incorrectly viewed as a Western construct, hegemonically imposed on the rest of the world. To the extent that people generally perceive homosexuality and sexual minorities as strictly a product of contemporary Western society,⁵ people are unlikely to accept that sexual minorities deserve protection in their legal system or in the legal system of the international community of which they are a part.⁶

This Article begins by discussing the attitudes and relative tolerance of the world's indigenous and pre-Judeo-Christian-Islamic societies towards same-sex relationships, with the caveat that societies' tolerance or acceptance of same-sex relationships historically did not necessarily mean tolerance or acceptance of gender-nonconforming relationships.⁷ The Article then discusses the expansion of a virulent Judeo-Christian-Islamic and Marxist-Leninist homophobia across much of the world. In the United States, slavery further aggravated this dynamic, which created unique American Christian denominations with a racist theology in order to support the institutions related to slavery or racism. As might be expected, these U.S. religions also adopted a hierarchical view towards gender relations, consistent with the close correlation between racism, sexism, and homophobia.

4. For example, the Hawaii Supreme Court specifically mentioned Hawaii's custom and practice with respect to recognition of same-sex unions in reaching its decision on same-sex marriage in *Baehr v. Lewin*, which ruled that Hawaii's ban on same-sex marriages presumptively violated the State Constitution's prohibition of sex discrimination. *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). See also *Same Sex Unions Were Accepted in Hawaii*, HONOLULU ADVERTISER, June 13, 1993, at B3. Hawaii's Constitution provides that lawmakers and courts give deference to traditional Hawaiian usages, customs, practices and language:

The State reaffirms and shall protect all rights, customarily and traditionally exercised for subsistence, cultural and religious purposes and possessed by ahupua'a [land area] tenants who are descendants of native Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the right of the State to regulate such rights.

HAW. CONST. art. XII, § 7. Hawaiian custom thus provided additional support for the Court's decision beyond its reliance on the statute's violation of prohibition of sex discrimination. See generally Robert J. Morris, *Configuring the Bo(unds) of Marriage: The Implications of Hawaiian Culture & Values for the Debate About Homogamy*, 8 YALE J.L. & HUMAN. 105 (1996); see also J. Van Dyke, M. Chung & T. Kondo, *The Protection of Individual Rights Under Hawaii's Constitution*, 14 U. HAW. L. REV. 311 (1992).

5. In Zimbabwe President Robert Mugabe's response to a letter from seventy U.S. Congresspersons criticizing his anti-gay tirade at the International Book Fair in Harare, he wrote "[l]et the Americans keep their sodomy, bestiality—stupid and foolish ways. . . . Let the gays be gays in the United States and Europe. . . . But they shall be sad people here." Ironically, there is an indigenous Shona word for homosexuality: *ngochani*, which is not considered particularly pejorative. Donald G. McNeil, Jr., *For Gay Zimbabweans, a Difficult Political Climate*, N.Y. TIMES, Sept. 10, 1995, at 3; James Roberts, *Mugabe's Ill-Fitting Suit of Moral Outrage*, THE INDEPENDENT (U.K.), Aug. 27, 1995, at 12.

6. See *Human Rights Yes, Gay Rights No: Mugabe*, GAY TIMES (U.K.), Sept. 1995, at 38.

7. As will be discussed at greater length below, same-sex relationships were frequently accepted when the participants adopted a socially acceptable gender role.

After the end of colonialism, attitudes towards LGBTI people gradually diverged, with Christian Europe becoming relatively tolerant since it never suffered the effects of institutionalized slavery or colonialism, except as the perpetrators. Meanwhile, the objects of slavery, racism, and colonialism perpetuated, to varying degrees, the uniquely homophobic theology of the Christian European colonizers and Islamic conquerors. The United States gradually became bifurcated, with some states, dominated by apartheid, holding on to their religiously dictated hierarchical views on race and gender, while the rest of the United States largely converged with the societal attitudes of much of Christian Western Europe.

As the twenty-first century enters its second decade, we see a renewed convergence of attitudes towards LGBTI individuals and their relationships. Former colonies such as India cast off their British sodomy laws and South Africa has recognized same-sex relationships. Furthermore, at least some regions of the United States appear to be converging in some respects on issues of LGBTI rights, just as younger generations in the region are also converging, to some extent, with the rest of the industrialized world on issues of race and gender generally.

Rather than simply providing an empirical discussion of those differences that do exist, this comparative analysis will further the understanding of the intersection of race, sex, and gender by identifying those variables that account for divergences and convergences in sociopolitical attitudes towards LGBTI communities. This Article will also explore how converging state approaches to LGBTI rights have been impacted by different “federal” legal systems such as those of the European Union and the United States.

I. A BRIEF HISTORICAL AND ANTHROPOLOGICAL ANALYSIS

There is substantial evidence that same-sex relationships have existed, and continue to exist, in almost all, if not all, cultures.⁸ Perhaps more relevant for the purposes of this analysis, however, is that *societal* recognition of same-sex relationships has substantial precedent cross-culturally and historically. In a seminal anthropological study in 1951,

8. See, e.g., David Gelman, *Born or Bred?*, NEWSWEEK, Feb. 24, 1992, at 46 (“‘If you look at all societies,’ says Frederick Whitam, who has researched homosexuality in cultures as diverse as the United States, Central America and the Philippines, ‘homosexuality occurs at the same rates with the same kinds of behavior.’”); CLELLAN S. FORD & FRANK A. BEACH, PATTERNS OF SEXUAL BEHAVIOR 143 (1951) (“The cross-cultural and cross-species comparisons presented . . . combine to suggest that a biological tendency for inversion of sexual behavior is inherent in most if not all mammals including the human species.”).

Yale professors Clellan S. Ford and Frank A. Beach found that “[i]n 49 (64 per cent) of the 76 societies other than [the United States] for which information is available, homosexual activities of one sort or another are considered normal and socially acceptable for certain members of the community.”⁹ Yale historian John Boswell provides extensive documentation that homosexual unions were present, and even sanctioned, in medieval Christian Europe until the Twelfth Century.¹⁰ Same-sex unions and transgendered unions have existed at various times in history in a wide variety of societies, including nineteenth-century Nigerian society; pre-Columbian Native-American societies; nineteenth-century Zuni society; ancient Egyptian, Greek, Roman, and Mesopotamian societies; the African societies of Azande, Siwah, el Garah, Basotho, Venda, Meru, Phalaborwa, Nuer, Bantu, and Lovedu; the Asian societies of Paleo-Siberia, China, Vietnam, India, Japan, Burma, Korea, and Nepal; and in the pre-colonization society in what is now New Zealand and the Cook Islands.¹¹

Homosexual relationships have been documented in other ancient societies. Societally sanctioned homosexual relationships existed in ancient Mesopotamian (for example, Hittite, Assyrian, Babylonian), Chinese, Mayan, Incan, Aztec, Egyptian, Etruscan, Indian, Greek, and Roman cultures.¹² Ford and Beach, Greenberg, and other scholars have also documented widespread recognition of same-sex relationships among Native American peoples in North,¹³ Central, and South America.¹⁴ The existence of socially accepted transgendered individuals and same-gender sexual relationships in Polynesia has also been documented.¹⁵

9. FORD & BEACH, *supra* note 8, at 130.

10. *See generally* JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY (1980); JOHN BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE (1994).

11. William N. Eskridge, Jr., *The History of Same-Sex Marriage*, 79 VA. L. REV. 1419, 1437–46, 1453–69, 1510 (1993).

12. DAVID F. GREENBERG, THE CONSTRUCTION OF HOMOSEXUALITY 124, 127–35, 141–51, 152–71 (1988).

13. *See id.* at 41.

14. *See, e.g.*, FORD & BEACH, *supra* note 8, at 131 (“In many cases this [homosexual] behavior occurs within the framework of courtship and marriage, the man who takes the part of the female being recognized as a *berdache* and treated as a woman. In other words, a genuine mateship is involved.”); *see also* GREENBERG, *supra* note 12, at 163–68.

15. *See* Niko Besnier, *Polynesian Gender Liminality Through Time and Space*, in THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY 285 (Gilbert Herdt ed., 1994).

In China, “male homosexuality has a long and documented history,” as does societal recognition of such relationships.¹⁶ A third century B.C. text, *Chronicles of the Warring States*, describes one of the literary terms for homosexuality:

One of the expressions for male love, *longyang*, stems from the well-known homosexual relationship between Longyang Jun, a fourth-century B.C. minister, and the prince of Wei. From the *Chronicles*, too, we know about the affection between Duke Ling of Wei and his minister, Ni Xia. Once, when the two men were taking a stroll in an orchard, Ni picked a peach off one of the trees and took a bite off it. The fruit was so delicious that he offered the rest of it to the duke; a common euphemism for male homosexual love, *fen tao zhi ai* (literally, “the love of shared peach”), is derived from this account.¹⁷

The broad and open acceptance of homosexuality in Western antiquity came to an end with the spread of ascetic philosophies such as the Judeo-Christian-Islamic faiths.¹⁸ This was especially true in the context of Catholicism, which has traditionally prohibited all sex outside of procreation.

However, two considerations must be kept in mind when thinking about gender roles both historically and cross-culturally. The first is that a society’s conception of gender may not always consist of the rigid, bi-polar “male” and “female” construct prevalent in modern Western society. The Native-American berdaches and Indian hijras documented in the work of Professor

16. Vivien W. Ng, *Homosexuality and the State in Late Imperial China*, in HIDDEN FROM HISTORY 76 (Martin Bauml Duberman et al. eds., 1989). Ng also describes the origin of another traditional Chinese term for homosexuality:

[W]e learn from *The History of the Former Han* that the last emperor of the Former Han dynasty, Aidi (r. 6-1 B.C.), had a number of male lovers, and that he was especially fond of one of them, a certain Dong Xian. One day, as the two men were napping together on a couch, with Dong's head resting on the emperor's sleeve, the latter was called away to grant an audience. He cut off the sleeve rather than to awaken his beloved. From this episode is derived another common literary term for male homosexual love, *duanxiu*, literally, “the cut sleeve.”

Id. at 77. See also BRET HINSCH, PASSIONS OF THE CUT SLEEVE: THE MALE HOMOSEXUAL TRADITION IN CHINA 178 (1990), in which he documents lesbian “marriages” from the Qing Dynasty:

After an exchange of ritual gifts, the foundation of the Chinese marriage ceremony, a feast attended by female companions served to witness the marriage. These married lesbian couples could even adopt female children, who in turn could inherit family property from the couple’s parents.

Id.

17. Ng, *supra* note 16, at 77.

18. GREENBERG, *supra* note 12, at 184. See also HUMAN RIGHTS WATCH, THIS ALIEN LEGACY at II (2008), available at <http://www.hrw.org/ja/node/77014/> (noting that Colonial sodomy can be traced, in part “to an old strain in Christian theology that held sexual pleasure itself to be contaminating, tolerable only to the degree that it furthered reproduction (specifically, of Christians)”).

Francisco Valdes appear to a Western observer to be transsexuals, when really their identity and “gender” are more complex, consisting of more than four separate gender identities.¹⁹ The second consideration to keep in mind is the role power relationships have in determining a society’s definition of gender.²⁰ For example, a persistent theme in anthropologic evidence regarding same-gender sexual unions is that many cultures treat differentials in class, age, and power as analogous to gender differentiation.

Past recognition of same-sex unions has generally, although not always, occurred within relatively narrow gender constructs that mimicked the dominant-passive construct of “traditional” heterosexual relationships.²¹ Thus, those societies that recognized same-sex unions did so only when gender roles were not threatened. Therefore, to the extent societies are uncomfortable with homosexuality, it is usually because such activity is perceived as crossing gender rather than sexual boundaries.²² Eskridge

19. See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CALIF. L. REV. 3, 216 (1995). For instance, Berdaches were somewhat akin to transsexuals in that they combined gender indicia from both sexes. *Id.* at 237. They differed greatly, however, in that berdaches did not perceive in themselves any disharmony between sex and gender, and thus were unconcerned with surgical or other procedures to effect a conformance between gender and sex. *Id.* Berdaches may still be seen as akin to transvestites in that they typically donned some of the garb of the other sex. *Id.* Yet, the berdache’s appearance did not necessarily strive to pantomime the fashions of the other sex; typically, berdaches combined items of male and female costuming to create personalized styles that signified their distinction from both male and female genders. *Id.* For a description of how the Native American sex/gender system was initially misinterpreted, see *id.* 211–42 (internal citations omitted):

This egalitarian empowerment was not limited to cross-sex couplings, however: “Erotic behavior in its myriad forms (heterosexuality, homosexuality, bisexuality) knew no boundaries of sex or age. Many of the great gods . . . were bisexual, combining the potentialities of male and female into one—a combination equally revered among humans.” The reverence for this type of “combining” among humans contributed to the rise of the *berdache*, a unique type of person and institution explained in detail below. At this juncture, however, the important point is that same-sex sexual unions were not singled out for cultural problematization; in fact, they were sometimes valorized and played a potentially important role in personal empowerment. Thus, non-conflationary indigenous arrangements regarding sexuality were relatively free of heterosexist biases as well as androsexist biases.

This brief comparative outline of sexuality reveals several remarkable points of convergence and divergence: even though Native Americans determined sex through external genitalia as observed at birth and relied on this construct as the foundation of social order, native arrangements did not rationalize or essentialize hetero-patriarchal power relations. Other such dissimilarities carried over to the respective constructions of gender by and under each system.

20. See, e.g., GREENBERG, *supra* note 12, at 157 (noting that among “most [ancient] Romans, it was the social status of the partner that made a homosexual act unacceptable”).

21. See generally Eskridge, *supra* note 11. For example, Eskridge notes that “[a]ncient cultures (Egypt, Mesopotamia, Greece and Rome) maintained strict patriarchal lines of authority over women yet also tolerated same-sex [male-male] unions . . .” Eskridge, *supra* note 11, at 1510.

22. For an extensive and illuminating discussion of the connection between homosexuality and transgender identity, see THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY (Gilbert Herdt ed., 1994).

notes that “[m]ore recent experience reveals a connection between intolerance of same-sex unions and suppression of women”²³ The Hawaii Supreme Court recognized this correlation when it applied strict scrutiny to the Hawaii marriage law prohibiting same-sex marriage in *Baehr v. Lewin*.²⁴ The majority held that Hawaii’s marriage law constituted sex discrimination under the State Equal Rights Amendment because it created a classification based on gender and, consequently, prohibited women from doing something (marrying a woman) that men were entitled to do, and vice versa.²⁵ The Court made an analogy to similar reasoning in the context of race in *Loving v. Virginia*,²⁶ involving a miscegenation statute that, on its face, discriminated equally between blacks and whites by prohibiting either race from marrying the other. The court in *Baehr* conceded that the Hawaii marriage statute was similarly neutral, but because it created a sex-based classification, it triggered strict scrutiny under the Hawaii equivalent of the Fourteenth Amendment.²⁷ The court implicitly recognized that discrimination against sexual minorities is ultimately based on sex discrimination in that usually the “objectionable” conduct is the gender of the person conducting the act, rather than the act itself. Thus, how a society views gender roles often determines how it treats sexual minorities.²⁸

This correlation between discrimination against sexual minorities and societal attitudes towards women is one of the most distinctive patterns emerging from contemporary comparative legal evidence. For example, “Romania [was] one of the last European countries . . . to criminalize homosexual relations. It also had a law that absolves all the individuals

23. Eskridge, *supra* note 11, at 1510.

24. 852 P.2d 44, 68 (Haw. 1993).

25. *Id.* at 67–68. For a discussion of sexual minority discrimination as gender discrimination, see Andrew Koppelman, *The Miscegenation Analogy: Sodomy Law as Sex Discrimination*, 98 YALE L.J. 145 (1988); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 218–21, 230–33 (1988).

26. 388 U.S. 1 (1967).

27. *Baehr*, 852 P.2d at 67. The *Baehr* court noted in its analogy with *Loving* that “[s]ubstitution of ‘sex’ for ‘race’ and [the Hawaii equivalent of the Equal Rights Amendment] for the fourteenth amendment yields the precise case before us together with the conclusion that we have reached.” *Id.* at 68.

28. As used in this essay, the term “sexual minorities” includes all individuals who have traditionally been distinguished by societies because of their sexual orientation, inclination, behavior, or nonconformity with gender roles or identity. The term “sex” will refer to the biological designation of an individual as a male or female (as genitally defined) and the term “gender” will refer to the socially constructed roles of “female,” “male,” or combination thereof. The term “homosexual” (when used as an adjective) or “homosexuality” will refer to same-sex desire or sexual activity by either sex, whether a single instance or over a lifetime. When used as a noun, however, “homosexual” will refer to an individual of either sex with a predominant or exclusive attraction to members of the same sex.

participating in a gang rape of a woman if one of the rapists later marries the victim.”²⁹ Similarly, in the United States, Hamilton County Municipal Judge Albert Mestemaker, citing “traditional American values” (which are frequently used in U.S. political discourse to attack sexual minorities), sentenced a man convicted of domestic violence to marry the woman he physically abused.³⁰ “On January 29, 1993, Canada granted asylum to a Saudi feminist³¹ who, more than coincidentally, comes from a country in which gays and lesbians may be legally sentenced to death simply for their sexual orientation.”³² The Southern Baptist Convention, one of the most stridently anti-gay religious bodies in the United States, has also formalized the submissive role of women.³³

In some cultures, women who took on stereotypically male roles were treated like men. This was the case for Ifeyinwa Olinke, a wealthy nineteenth century woman of the Igbo tribe, situated in what is now Eastern Nigeria:

She was an industrious woman in a community where women, who thereby came to control much of the Igbo tribe’s wealth, seized most of the entrepreneurial opportunities. Ifeyinwa socially overshadowed her less prosperous male husband. As a sign of her prosperity and social standing, Ifeyinwa herself became a female husband to other women. Her epithet “Olinke” referred to the fact that she had nine wives.³⁴

29. James D. Wilets, *Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective*, 60 ALB. L. REV. 989, 1010 (1997).

30. *Ohio Judge Orders Abuser to Marry Woman He Punched*, MIAMI HERALD, July 15, 1995, at 11A (“I happen to believe in traditional American values: Boy meets girl, boy asks girl out, boy and girl go steady, boy and girl get married, and then boy and girl start raising a family.”).

31. See Clyde H. Farnsworth, *Saudi Woman Who Fled Predicts Crackdown*, N.Y. TIMES, Feb. 7, 1993, at A19. See also Jennifer Bingham Hull, *Battered, Raped and Veiled: The New Sanctuary Seekers*, L.A. TIMES, Nov. 20, 1994, at A26:

Under the Canadian guidelines, women who fear persecution for failing to obey gender-biased laws and those persecuted for opposing discrimination against women are eligible for asylum. . . . Women who flee domestic violence after authorities fail to help are also eligible, as well as those who refuse to participate in certain traditions, such as arranged marriages and veiling.

32. Wilets, *supra* note 29, at 1010–11.

33. Mike Baker, *Southern Baptists Back Palin Despite View on Women’s Role*, USA TODAY (Oct. 3, 2008), <http://www.usatoday.com/news/religion/2008-10-02-palin-baptists.htm>. In the United States, for example, the anti-sexual minority rhetoric of the fundamentalist right is inextricably linked to the fundamentalists’ view of the appropriate role for women. Randall Terry, co-founder of Operation Rescue, a conservative anti-choice organization, has called for the death penalty for practicing homosexuals, has “called homosexuals criminals and [has] said they should be forced to wear a badge identifying their sexual orientation so that heterosexuals can avoid any physical contact with them.” *Go Home, Yankee, Gay Activists Yell*, THE EDMONTON JOURNAL, Apr. 23, 1995, at A4.

34. Eskridge, *supra* note 11, at 1420–21 (citing IFI AMADIUME, MALE DAUGHTERS, FEMALE HUSBANDS: GENDER AND SEX IN AN AFRICAN SOCIETY 48–49 (1987)).

Just as homosexual relations have been historically contextualized within traditional gender concepts, in some societies, male homosexual activity was sanctioned only so long as it occurred between individuals of different classes or generations. In ancient Greece, for instance, “[p]reoccupation with status pervaded sexual culture to the point where the Greeks could not easily conceive of a relationship based on equality. Sex always involved superiority.”³⁵ There is thus considerable documentation of what we would currently call bisexuality in societies where it was considered appropriate to engage in either sexual relations with women *or* members of a subaltern class or younger generation,³⁶ as long as the individual in the socially superior position did the “penetrating.”³⁷ In the second century A.D., Greek philosopher Artemidorus Daldianus explained this sentiment in his book *The Interpretation of Dreams*:

[H]aving sexual intercourse with one’s servant, whether male or female, is good; for slaves are possessions of the dreamer, so that they signify, quite naturally, that the dreamer will derive pleasure from his possessions If a man is possessed by a richer, older man, it is good. For it is usual to receive things from such people. But to be possessed by someone who is either younger than oneself or destitute is unlucky. For it is usual to give things to such people. The same holds true if the possessor is older but a beggar.³⁸

This view of same-sex relationships mirrored the Athenian view of women generally:

Gender considerations had much to do with this contempt for passivity. The upper-class Athenian family in the classical age was highly patriarchal. Though women managed the household, they were also restricted to it. They lacked all legal personality, were subjected to forced marriage, and were vulnerable to male violence. The relationship between husbands and wives was one of unambiguous domination. In Greek thinking, the family served as a model for all

35. GREENBERG, *supra* note 12, at 147.

36. *E.g., id.* at 155–58.

37. For example, Greenberg explains:

Even [in those instances] when it was considered socially inappropriate, homosexual desire was not considered abnormal as long as it took the active form As in Greece, the Romans tended to consider the passive or receptive role incompatible with the honor and dignity of a free citizen, especially when it continued into adulthood. Sexual submission to a powerful patron was, seemingly, a familiar way of building a career, but it left the client vulnerable to potentially ruinous denunciations. A man’s failure to live up to the standard of masculinity expected of someone in his rank was especially disturbing in a society that was attempting the systematic subjugation of the entire known world.

Id. at 158 (citations omitted).

38. *Id.* at 147.

sexual relationships. If in heterosexual couples, the male was active and the wife responsive, then in homosexual couples, the active, insertive partner was male, the passive, receptive partner, female. And to be female was to be inferior to men. For a male to submit to another man sexually was thus to declare himself unworthy of manhood. Aristophanes' complaint about *adult* men who engage in passive homosexuality *is they act like women, something real men should not do.*³⁹

In the Renaissance and Baroque periods of European history (circa 1400–1650 A.D.), the “powerful tended to prefer their sexual objects subordinated by gender, age, or socioeconomic status.”⁴⁰ A homosexual “identity” was avoided by many men in the Renaissance and Baroque periods through categorizing sexual acts “not only by the gender of one’s object-choice, but also by the role one performed. As part of a broader effort to demarcate male and female social roles and appropriate gender constructs, contemporary theory drew a sharp distinction between active (masculine) and passive (feminine) sexual roles.”⁴¹ However, “[w]hile adult-youth sex clearly predominated, recent research calls for reexamination of the older assertion that it was the exclusive model, sanctified by Greek precedent.”⁴²

A similar call for reexamination of the more traditional assertions regarding the lack of egalitarian homosexual models appears in writings by the Chinese scholar Shen Defu (1578–1642). They indicate that homosexuality among equals was commonplace in, at the very least, the province of Fujian, China: “The Fujianese especially favor male homosexuality. This preference is not limited to any particular social or economic class, but the rich tend to cavort with the rich, and the poor with the poor.”⁴³

Earlier discussion in this Article focused on the extent to which societies viewed homosexuality as violating gender role expectations, the history of the elimination of gender role expectations in some societies also deserves attention. As we have seen in Greek, Roman, and other examples, accepting homosexual activity may be highly conditional. Those engaging in homosexual activity may be required to adopt different gender role norms; thus, persons of the same socially constructed gender (and class) may not

39. *Id.* at 149 (emphasis added) (footnotes omitted).

40. James M. Saslow, *Homosexuality in the Renaissance: Behavior, Identity, and Artistic Expression*, in *HIDDEN FROM HISTORY* 90, 92 (Martin Bauml Duberman et al. eds., 1989).

41. *Id.* at 98.

42. *Id.* at 93.

43. Vivien W. Ng, *Homosexuality and the State in Late Imperial China*, in *HIDDEN FROM HISTORY* 76, 85 (Martin Bauml Duberman et al. eds., 1989).

engage in homosexual activity. This model of homosexual relations does little to validate contemporary same-sex relationships among socioeconomic equals nor does it provide much relief for those individuals who are oppressed because they violate gender norms independent of sexual orientation. For example, there may be a growing acceptance of homosexuality in some contemporary societies based on a growing feeling that homosexuals are “really just like everyone else.” However, if that acceptance only extends to gender conforming gays and lesbians, the ultimate value of that acceptance is lessened. Society then resembles the classical Greek situation where homosexual relationships are only acceptable within very constrained gender roles.

II. THE EFFECT OF COLONIALISM

Many historians now recognize that much of the contemporary hostility towards sexual minorities in non-Western nations is a direct result of Western—particularly British—colonialism,⁴⁴ Judeo-Christian-Islamic homophobia, and anti-sexuality in general, none of which is rooted in indigenous tradition.⁴⁵ For example, Tielman and Hammelburg argue that:

From a historical perspective, the English legislation against homosexuality has had (and unfortunately still has) appalling consequences for the legal position of homosexual men, and, to a lesser extent, lesbians in the former British colonies. The effects of the former French, Dutch, Spanish, and Portuguese colonial legislation against homosexuality are less severe. In general, nevertheless, Christian-based homophobia has damaged many cultures in which sexual contacts and relationships between men and between women used to be tolerated or even accepted.⁴⁶

The generally anti-sexual attitude of these Western-derived ideologies, and their tendency to view genitally-based sexual classifications as the principal determinant of sexual boundaries, seems to be at odds with the manner in which most societies have tended to construct sexuality.

44. See generally HUMAN RIGHTS WATCH, *supra* note 18.

45. See *Worldwatch*, GAY TIMES (U.K.), May 1995, at 46 (“As in so many countries in the former British Empire, India’s ban on male homosexuality is an unpleasant left-over from the days of colonial rule.”); I Wachirianto, *Adat Nusantara - Gemblakan de Ponorogo*, GAYA NUSANTARA, June 1993, at 23–26 (discussing the acceptance of homosexuality among certain Borneo cultures). See generally Jomar Fleras, *Reclaiming Our Historical Rights: Gays and Lesbians in the Philippines*, in THE THIRD PINK BOOK 66 (Aart Hendriks et al. eds., 1993) (discussing the ritualization of homosexual, bisexual, transgender and transvestite behavior among Philippine cultures in the pre-colonial period).

46. Rob Tielman & Hans Hammelburg, *World Survey on the Social and Legal Position of Gays and Lesbians*, in THE THIRD PINK BOOK 249, 251 (Aart Hendriks et al. eds., 1993).

The anti-LGBTI effects of colonialism are most pronounced in British colonies.⁴⁷ In fact, as of December 2008, over half the countries in the world with sodomy laws were former British colonies, and all of those countries' sodomy laws were imposed by the British.⁴⁸ India, a former British colony and now populated by over one billion people, only recently eliminated vestiges of its British-imposed sodomy law when the Delhi High Court invalidated Section 377,⁴⁹ which had been introduced by the British in 1860 in response to what they deemed the excessive tolerance of traditional Indian culture.⁵⁰ In absolute terms, the recent decriminalization of sodomy in India represents an enormous convergence in law with respect to LGBTI individuals. Nepal also recently threw off vestiges its British colonial past when the country took steps to legalize same-sex marriage.⁵¹ Despite these progressive developments, the British colonial legacy remains particularly potent in Africa and the Caribbean, where most former British colonies continue to retain their colonial-era sodomy laws.⁵² In recent years, at least some of this anti-gay animus in Africa and elsewhere in the world has been fuelled by Western anti-gay groups,⁵³ as discussed below.

47. See, e.g., The Hon. Michael Kirby, *Homosexuality: A Commonwealth Blind Spot on Human Rights*, 14 NEWSLETTER 4 (Commonwealth Human Rights Initiative, New Delhi, India) (Winter 2007), available at http://www.humanrightsinitiative.org/publications/nl/newsletter_winter_2007/article4.htm (“[M]ost of the Commonwealth countries inherited from Britain criminal laws that still penalise consenting adult same-sex conduct, even when occurring in private. These laws were repealed in Britain itself 40 years ago and throughout most of the original members of the Commonwealth (Canada, Australia, New Zealand and South Africa). But they remain steadfastly in place in virtually all of the developing countries of the Commonwealth.”).

48. HUMAN RIGHTS WATCH, *supra* note 18, at 2.

49. Manoj Mitta, *Will Delhi HC Gay Order Apply Across India?*, THE TIMES OF INDIA (July 3, 2009), <http://timesofindia.indiatimes.com/India/Will-Delhi-HC-gay-order-apply-across-India/articleshow/4731089.cms> (explaining nationwide effect of New Delhi High Court ruling).

50. See, e.g., *Judge Strikes Down India Sodomy Law*, XTRA! (July 3, 2009), http://www.xtra.ca/public/National/Judge_strikes_down_India_sodomy_law-7068.aspx; see also HUMAN RIGHTS WATCH, *supra* note 18, at 2.

51. Achal Narayanan, *Nepal's Supreme Court OKs Same-Sex Marriage*, RELIGION NEWS (Nov. 21, 2008), <http://pewforum.org/news/rss.php?NewsID=17001>.

52. See Jeffrey Gettleman, *Americans' Role Seen in Uganda Anti-Gay Push*, N.Y. TIMES (Jan. 3, 2010), <http://www.nytimes.com/2010/01/04/world/africa/04uganda.html> (“Many Africans view homosexuality as an immoral Western import, and the continent is full of harsh homophobic laws. In Northern Nigeria, gay men can face death by stoning. Beyond Africa, a handful of Muslim countries, like Iran and Yemen, also have the death penalty for homosexuals.”); see also Lydia Polgreen & Laurie Goodstein, *At Axis of Episcopal Split, an Anti-Gay Nigerian*, N.Y. TIMES (Dec. 25, 2006), <http://www.nytimes.com/2006/12/25/world/africa/25episcopal.html?pagewanted=print>; see generally Amnesty International, *LGBT Legal Status Around the World*, <http://www.amnestyusa.org/lgbt-human-rights/country-information/page.do?id=1106576> (last viewed May 20, 2011); HUMAN RIGHTS WATCH, *supra* note 18.

53. See Gettleman, *supra* note 52. Last year three American evangelical Christians, presented as expert on homosexuality, spoke to “thousands of Ugandans, including police officers, teachers and

III. DIVERGENCE AND CONVERGENCE IN THE INDUSTRIALIZED DEMOCRATIC WORLD⁵⁴

The country case studies examined below suggest that most industrialized democracies, and some less industrialized nations, have viewed the recognition of at least some same-sex couple rights as a logical requisite of applying non-discrimination and equal protection principles, even if some of those countries are unwilling to extend those principles to full legal recognition of same-sex unions.

Presently, much of the Western industrialized world recognizes full marriage, or full marriage rights in the form of civil unions or registered partnerships. Those countries that grant full marriage rights in form and substance are Argentina, Belgium, Canada, Iceland, the Netherlands, Norway, Portugal, South Africa, Spain, Sweden, several states in the United States, and Mexico City in Mexico.⁵⁵ Those countries that grant the substantive equivalent of marriage in the form of civil unions or registered partnerships (but reject the nomenclature of “marriage”) are Denmark, Greenland, New Zealand, Uruguay, and the United Kingdom.⁵⁶ These partnership laws are notable in that they simply transfer the bulk of existing marriage law to registered partners, rather than creating a separate body of law. In that sense, the difference is nominal rather than substantive. Several of these countries are considering abandoning the semantic distinction and adopting full marriage for same-sex couples. Israel recognizes same-sex marriages performed in other jurisdictions, although it does not recognize those marriages performed in Israel,⁵⁷ as do several other jurisdictions, including several U.S. states such as New York and Maryland. A number of other countries provide for civil unions, registered partnerships, or another legal status with substantively less rights than full marriage, including: Andorra, Australia, Austria, Colombia, Croatia, the Czech

national politicians,” discussing “how to make gay people straight, how gay men often sodomized teenage boys and how ‘the gay movement is an evil institution’ whose goal is ‘to defeat the marriage-based society and replace it with a culture of sexual promiscuity.’” *Id.*

54. Some of the analysis contained in Part III of this Article is based upon empirical observations contained in a previous article by the author. See James Wilets, *A Comparative Perspective on Immigration Law for Same-Sex Couples: How the United States Compares to Other Industrialized Democracies*, 32 NOVA L. REV. 327 (2008).

55. *Marriage and Partnership Rights for Same-Sex Partners: Country-by-Country*, ILGA EUROPE, available at, http://www.ilga-europe.org/europe/issues/lgbt_families/marriage_and_partnership_rights_for_same_sex_partners_country_by_country (last visited May 22, 2011).

56. *Id.*

57. See Associated Press, *Israeli High Court Orders Gay Marriage Recognition*, USA TODAY (Nov. 21, 2006), http://www.usatoday.com/news/world/2006-11-21-israel-gay-marriage_x.htm?csp=34.

Republic, Ecuador, France, Germany, Hungary, Ireland, Israel, Luxembourg, Portugal, Slovenia, and Switzerland.⁵⁸

In this comparison, the United States stands out from a great many other countries, which otherwise exhibit similar socioeconomic conditions and cultural heritage as the United States. This is not to say that the United States is not making enormous progress in this area, but rather that there has been a very pronounced regional differentiation in that progress. The Southern United States, in particular, stand out as bulwarks of resistance to the recognition of same-sex relationships. This Article would accept the uniqueness of the United States approach and argues that, United States exceptionalism is rooted in the interrelationship between racism and religion.

This divergence occurs for many reasons, and is largely the result of the United States' unique history with race. This Article explores specific developments in different parts of the world, the particular reasons that could account for those developments, and the unique aspects of United States' history and society that could account at least in part for the United States' divergence from other countries.

An analysis of the countries that recognize substantial LGBTI rights on a national level demonstrates that they all share a great many socioeconomic similarities with the United States. The central difference that explains the inconsistency between the United States and those countries is the effect of religions unique to the United States that were formed with hierarchical views toward race and gender and with a corresponding hostility to any kind of LGBTI rights. Much of that empirical analysis can be found in an earlier article published by this author,⁵⁹ but a relatively brief summary of its conclusions are helpful in understanding the reasons for the divergences and convergences among the world's different countries towards LGBT legal rights.

Israel provides an interesting case study of a country with at least as strong a fundamentalist influence on its political process as the United States. Moreover, Israeli religious fundamentalists are theologically very hostile to LGBTI rights. Nevertheless, Israel recognizes LGBTI rights on a national level to a greater extent than the United States. Israel is the exception that proves the rule that the history of the United States, with slavery and apartheid and the unique U.S. fundamentalism that arose from

58. INTERNATIONAL LESBIAN & GAY ASSOCIATION (ILGA-EUROPE), EQUALITY FOR LESBIANS AND GAY MEN: A RELEVANT ISSUE IN THE CIVIL AND SOCIAL DIALOGUE 48 (1998), <http://www.ilga-europe.org/content/download/409/1857/file/1998%20Equality%20in%20EU%20English.pdf> [hereinafter EQUALITY FOR LESBIANS AND GAY MEN].

59. See generally Wilets, *supra* note 54.

that experience, is the central factor that can explain the markedly different approach between large regions of the United States and other industrialized and even non-industrialized countries that recognize LGBTI rights to a greater extent.

Another contributing factor to the greater receptiveness of many European countries to LGBTI rights may be the experience of those countries with unbridled racist hatred in the form of Nazi Germany and its associated movements. This factor would also apply to South Africa, which consciously embraced tolerance on various levels after the fall of apartheid, despite the opposition of much of its population to LGBTI rights.⁶⁰

This factor, however, cannot fully explain the divergence between the United States and much of the rest of the world's industrialized democracies, since countries such as Australia, Canada, and New Zealand did not experience the full impact of Nazi Germany's institutionalization of hatred.

In summary, the diversity of historical, cultural, and socioeconomic variables in those countries that recognize LGBTI rights on a national level and the singular experience of the United States with slavery and apartheid, provide a central explanation for this divergence in attitudes towards LGBTI rights. Analyzing how these variables play out in these countries illustrates this point further.

A. The Cases of those Countries with Civil Union or Registered Partnerships: Australia and New Zealand, France, Germany, and Switzerland

Australia and New Zealand provide analogous case studies of countries that share many of the sociopolitical and legal attributes of the United States, with Australia in particular exhibiting many of these characteristics. A 2001 study of attitudes towards homosexuality in twenty-nine countries noted that, in Australia, “[e]ducation strongly increases tolerance towards homosexuals”⁶¹ and “[r]icher countries, as indicated by their level of gross domestic product per capita, tend to be more tolerant of

60. Themba Radebe, *Homophobia Still Prevalent in South Africa*, THE STAR (Gauteng, S. Afr.) (Apr. 28, 2003), at 2, available at http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20030428064823734C780900 (“Commission on Gender Equality (CGE) commissioner Dr Sheila Meintjes told the gathering that what had emerged at this launch was the fact that homophobia was deeply embedded.”).

61. Jonathan Kelley, *Attitudes Towards Homosexuality in 29 Nations*, AUSTRALIAN SOCIAL MONITOR, June 2001, at 18, available at http://www.international-survey.org/A_Soc_M/Homosex_ASM_v4_n1.pdf (last visited Mar. 23, 2011).

homosexuals.”⁶² Australia, in the recent past, has had a conservative government that has not been supportive of legal recognition of same-sex unions.⁶³ Its predominantly urban and suburban and largely middle class socioeconomic structure closely mirrors the United States,⁶⁴ and it has a body politic that is somewhat skeptical towards immigration in general.⁶⁵ It also has an active Christian fundamentalist movement that is, nevertheless, a less powerful force in Australian politics than anti-gay religious movements in the United States.⁶⁶

Despite these similarities between Australia and the United States, Australia bears more similarity to those industrialized democracies that share a less anti-LGBT religious and political culture.⁶⁷ The less powerful impact of fundamentalist religious groups in Australia may partially explain its more tolerant approach to LGBTI rights on the national and local level. Consistent with this approach, Australia has enacted anti-gay discrimination laws on the federal and state level.⁶⁸

In 2004, New Zealand enacted civil unions for opposite-sex and same-sex couples. These civil unions provide essentially the same rights as marriage to same-sex couples, and heterosexual couples who choose to enter into a civil union.⁶⁹ The socio-economic characteristics of Australia and New Zealand are similar, although New Zealand has gone somewhat farther than even Australia in providing protection to its LGBT citizens.⁷⁰ Perhaps the relatively homogenous and smaller population of New Zealand

62. *Id.* at 19.

63. *See Australia Overrules Gay Union Law*, BBC NEWS, June 13, 2006, <http://news.bbc.co.uk/2/hi/asia-pacific/5074294.stm>. *See also* Media Release, *Gay Fears Attacks from New Howard Government*, ILGA, Nov. 10., 2004, <http://ilga.org/print.asp?LanguageID=1&FileCategory=10&FileID=335&ZoneID=1&>.

64. *See* Joshua Drucker, *American and Australian Urban Forms: A Comparison of Structure, Determinants, and Consequences 3* (April 2000) (unpublished Masters Project, University of North Carolina at Chapel Hill).

65. *See id.* at 7.

66. *See generally* Jill Rowbotham, *Piety Not Much of a Vote-Winner*, AUSTRALIAN, June 17, 2006.

67. M.D.R. EVANS & JONATHAN KELLEY, AUSTRALIAN ECONOMY AND SOCIETY 2002: RELIGION, MORALITY, AND PUBLIC POLICY IN INTERNATIONAL PERSPECTIVE 4 (2004), *available at* http://www.international-survey.org/AES_2_E&K_2004_Intro.pdf (“Other comparative data show that patterns of religious belief and church attendance in Australia are similar to many other Western nations, and so probably explained by factors common to all, not by factors unique to Australia.”).

68. *See generally* PARLIAMENT OF AUSTRALIA, SENATE LEGAL AND CONSTITUTIONAL AFFAIRS COMMITTEE, INQUIRY INTO SEXUAL DISCRIMINATION Ch. 4 (1997), *available at* http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/1996-99/citizens/report/c04.htm.

69. *See NZ recognizes Same-Sex unions*, BBC NEWS (Dec. 9, 2004), *available at* <http://news.bbc.co.uk/2/hi/asia-pacific/4081089.stm>.

70. *See* Amnesty International, *supra* note 52.

may explain this slight divergence.⁷¹ An argument could be made that homogenous and smaller populations are more prone to enact policies benefiting even citizens unrelated to the individual voter since New Zealanders sense of common interest is increased by their homogeneity and insularity.

France, Germany, and Switzerland, like the United States and the other industrialized democracies, have strong democratic traditions and relatively large, educated middle classes. Nevertheless, France, Germany, and Switzerland, like the other industrialized countries discussed in this Article, do not have strong fundamentalist Christian movements and generally do not recognize the more moralistic tenets of Protestant or Roman Catholic denominations.⁷² Because of this, the French and Germans tend to be less moralistic or ascetic with respect to sexuality in general. Indeed, Germany was one of the first countries to develop a gay rights movement.⁷³ Significantly, Quebec, with a smaller fundamentalist Protestant population, exhibits a less moralistic attitude towards sexuality, in contrast with those provinces of Canada with a more fundamentalist Christian population.⁷⁴

France passed the Pacte Civil de Solidarité (PACS) law, a civil partnership act for same-sex couples, in 1999⁷⁵ and Germany passed the Lifetime Partnership Act (*Lebenspartnerschaftsgesetz*)⁷⁶ in 2001, the Act permits same-sex couples in Germany to enter into registered partnerships

71. See *New Zealand Information and History*, NATIONAL GEOGRAPHIC, http://www3.nationalgeographic.com/places/countries/country_newzealand.html (last visited May 15, 2011).

72. See Pierre Bréchon, *Influence of Religious Integration on Attitudes: A Comparative Analysis of European Countries*, 45 REVUE FRANÇAISE DE SOCIOLOGIE (FR.), SUPPLEMENT 2004, at 26, 31–32, available at http://www.cairn.info/load_pdf.php?ID_ARTICLE=RFS_455_0026.

73. See generally JAMES KOLLENBROICH, *OUR HOUR HAS COME: THE HOMOSEXUAL RIGHTS MOVEMENT IN THE WEIMAR REPUBLIC* (2007). In regards to matters of sexuality in France, see EQUALITY FOR LESBIANS AND GAY MEN, *supra* note 58, at 48. In regards to matters of sexuality in Germany, see, for example, Patricia Sannie Lee, *Pornography and the Sexual Revolution: A Comparative Study Between West Germany and the United States* (2007), <http://dspace.nitlle.org/bitstream/handle/10090/813/s10intl2007lee.pdf?sequence=1>.

74. Press Release, The Dominion Institute et al., *The Canadian Values Study: A Joint Project of Innovative Research Group, the Dominion Institute & the National Post, Social Conservatives Own Reluctance to Politicize Moral Issues Key Hurdle for This Political Minority* (Sept. 25, 2005), available at http://www.innovativeresearch.ca/Canadian%20Values%20Study_Factum%20260905.pdf [hereinafter *The Canadian Values Study*].

75. *Id.*

76. *Lebenspartnerschaftsgesetz* [LPartG] [Lifetime Partnership Act], Aug. 1, 2001, BUNDESGESETZBLATT, TEIL I [BGBl I] at 1696 (Ger.), available at <http://bundesrecht.juris.de/bundesrecht/lpartg/gesamt.pdf>.

(*Eingetragene Lebenspartnerschaft*), which carries many, but not all the rights of marriage.⁷⁷

Not surprisingly, Switzerland, a confederation of the predominant German, French, and Italian linguistic and cultural groups, bears similar socioeconomic characteristics as Germany and France. In 2004, Switzerland enacted registered partnerships for same-sex couples.⁷⁸ The law extends immigration rights to registered same-sex partners of Swiss citizens and recognized same-sex marriages and civil unions entered into in other countries would be recognized in Switzerland.⁷⁹

Denmark, Finland, and the United Kingdom have adopted registered partnerships that grant the substantive rights of marriage without using the terminology of marriage.⁸⁰ These registered partnerships have the same effect as marriage, and instead of creating a new body of law, the partnership laws simply apply existing family law to the countries' gay and lesbian citizens.

The United Kingdom, however, should be distinguished from the Scandinavian countries that have adopted registered partnerships. The United Kingdom shares a cultural and legal heritage with the United States that includes a reputation as being somewhat more ascetic with respect to issues of sexuality than many of the other countries discussed herein that have recognized same sex union.⁸¹ Nevertheless, the United Kingdom has recognized same-sex unions⁸² in a roughly analogous manner to the way in

77. The Life Partnership Act of 2001 was a compromise between proponents of marriage equality for gays and conservatives from the Christian parties, whose interpretation of marriage exclude gays. The act grants a number of rights enjoyed by married, opposite-sex couples. It was drafted by Volker Beck from the Greens and was approved under the Green/Social Democratic coalition government. Less than a year later, the Constitutional Court of Germany upheld the act, finding that, "[t]he introduction of the legal institution of the registered civil partnership for same-sex couples does not infringe . . . the Basic Law. The particular protection of marriage . . . the Basic Law does not prevent the legislature from providing rights and duties for the same-sex civil partnership that are equal or similar to those of marriage. The institution of marriage is not threatened by any risk from an institution that is directed at persons who cannot be married to each other." 1 BvF 1/01 vom 17.7.2002, Absatz-Nr. (1-147), [BVerfGE] (Federal Constitutional Court July 17, 2002) http://www.bverfg.de/entscheidungen/fs20020717_1bvff00101en.html. For a lengthy and more complete analysis of the enactment of the German legislation, see generally Stephen Ross Levitt, *New Legislation In Germany Concerning Same-Sex Unions*, 7 ILSA J. INT'L & COMP. L. 469 (2001).

78. Loi Fédérale sur le Partenariat Enregistré Entre Personnes du Même Sexe [LPart] [Federal Partnership Act], June 18, 2004, RS 211.231 (Switz.), available at <http://www.admin.ch/ch/f/ff/2004/2935.pdf> [hereinafter Federal Partnership Act].

79. See, e.g., *id.* (amending Loi Fédérale du 18 Décembre 1987 sur le Droit International Privé [LDIP], Dec. 18, 1987, RS 291, art. 45 (Switz.), available at <http://www.admin.ch/ch/fr/rs/2/291.fr.pdf>).

80. See Amnesty International, *supra* note 52.

81. See generally EQUALITY FOR LESBIANS AND GAY MEN, *supra* note 58, at 91–99.

82. See generally Civil Partnership Act, 2004, c. 33 (Eng.), available at <http://www.equalities.gov.uk/pdf/Civil%20Partnership%20Act%202004.pdf>.

which civil unions have been created in Vermont, Connecticut, New Hampshire, Oregon, Washington, and, to a lesser extent, California.⁸³ Moreover, the United Kingdom did so through legislative means, rather than judicial order.⁸⁴

The United Kingdom, which is in many ways the most similar of the European countries to the United States, nevertheless took such a markedly different path than the federal government of the United States and most of its states. The explanation for this apparent paradox lies in the same reason for the differences between the United States and almost all other industrialized democracies: the extraordinary influence of fundamentalist religion on the cultural and political debate in the United States.⁸⁵ Unlike the United States, a recent poll indicated that a majority of Britons do not practice any religion.⁸⁶ The Guardian newspaper editorialized: “This Christmas, for perhaps the first time ever, Britain is a majority non-religious nation. Most of us have probably seen this moment coming, but it is a substantial event nonetheless.”⁸⁷

B. The Case of Israel

Israel constitutes an important country case study because unlike other industrialized democracies, there *are* politically influential fundamentalist religious groups in Israel and its body politic.⁸⁸ A conservative coalition has also ruled the country for the better part of thirty years, and the fundamentalist Jewish political parties have participated in that coalition.⁸⁹ Thus, though the governments of France, Germany, Israel and other democracies have been dominated by conservatives, religion has played a much greater role in the politics of the Israeli government.

83. Compare *id.* with CAL. FAM. CODE § 297.5 (2007); CONN. GEN. STAT. ANN. § 46b-38bb (2007); N.H. REV. STAT. ANN. § 457-A:1 (2008); and VT. STAT. ANN. tit. 15, § 1202 (2007).

84. See Civil Partnership Act, *supra* note 82; see generally Mark E. Wojcik, *The Wedding Bells Heard Around the World: Years from Now, Will We Wonder Why We Worried About Same-Sex Marriage?*, 24 N. ILL. U. L. REV. 589 (2004).

85. See Wojcik, *supra* note 84, at 597.

86. According to the 2009 Social Attitudes survey from the National Centre for Social Research found that 51 percent of respondents have no religion and 42 percent say they are Christian. Just 25 years ago, 63 percent were Christian and only 34 percent had no religion.

87. Editorial, *Respecting the Minority*, THE GUARDIAN (Dec. 24, 2010), available at <http://www.guardian.co.uk/commentisfree/2010/dec/24/religion-respecting-the-minority?INTCMP=SRCH>.

88. See David Margolis, *Israeli Political Parties*, MYJEWISHLARNING, http://mobile.myjewishlearning.com/history_community/Israel/Israeli_Politics/IsraeliElectoralSystem/IsraeliPoliticalParties.htm (last visited Oct. 26, 2009).

89. See *Facts About Israel: History*, ISRAEL MINISTRY OF FOREIGN AFFAIRS (Apr. 1, 2008), <http://www.mfa.gov.il/MFA/Facts%20About%20Israel/History/Facts%20About%20Israel-%20History>.

Nevertheless, Israel recognizes common law marriage for same-sex couples, which grants many, but not all, of the rights of marriage.⁹⁰ It also fully recognizes legal same-sex marriages performed outside the country.⁹¹

One possible reason for Israel's relatively supportive approach to same-sex partner rights may be the government's active encouragement of Jewish solidarity in Israel.⁹² Thus, it could follow that LGBT supportive civil rights laws and immigration rules may keep an LGBT Jewish citizen living in Israel. This desire on the part of the Israeli government to maintain its Jewish population may trump religious hostility towards LGBT individuals.⁹³ The Israeli Interior Ministry's grant of residency status to the same-sex partners of two Israeli citizens illustrates this desire for cohesiveness.⁹⁴ The ministry did so under the theory of *yedu'a ba-tzibur* (common-law spouse).⁹⁵ This status is, however, only relevant for non-Jewish partners of Israeli citizens since all Jews enjoy the "right of return" entitling them to Israeli citizenship.⁹⁶

C. European Full Marriage Rights: the Cases of Belgium, Iceland, the Netherlands, Norway, Portugal, Sweden, and Spain

In 2001, the Netherlands became the world's first country to grant full marriage rights, in terminology and substance, to same-sex couples.⁹⁷ This unprecedented change can at least partially be explained by its historically tolerant approach to religiously oppressed groups such as Jews,⁹⁸ and is consistent with this Article's discussion of the correlation between attitudes

90. See Amnesty International, *supra* note 52.

91. See Israeli High Court Orders Gay Marriage Recognition, *supra* note 57.

92. See Yuval Merin, *The Right to Family Life and Civil Marriage Under International Law and Its Implementation in the State of Israel*, 28 B.C. INT'L & COMP. L. REV. 79, 104 (2005).

93. See *id.*; see generally Einat Fishbein, *Two Foreigners Recognized as Residents of Israel Based on Same-Sex Relationship*, HA'ARETZ, (Lee Walzer trans., Feb. 14, 2000), http://www.geocities.com/WestHollywood/Heights/4262/foreignres_art.htm.

94. James D. Willets, *The Inexorable Momentum Toward National and International Recognition of Same-Sex Relationships: An International, Comparative, Historical and Cross-Cultural Perspective*, in MARRIAGE & SAME-SEX UNIONS: A DEBATE 350, 356 (Lynn D. Wardle et al. eds., 2003).

95. *Id.*

96. See Bradley Burston, *The Right of Return of the Jewish People*, HAARETZ (Isr.) (Aug. 12, 2009), <http://www.haaretz.com/hasen/spages/885657.html>.

97. Associated Press, *Dutch Law Allowing Same-sex Marriage in Effect*, USA TODAY (June 19, 2001), <http://www.usatoday.com/news/world/2001-03-31-dutch-samesex.htm>.

98. See, e.g., Edward Van Voolen, *Ashkenazi Jews in Amsterdam*, BEIT HATFUTSOT: THE MUSEUM OF THE JEWISH PEOPLE, <http://www.bh.org.il/database-article.aspx?48205> (last visited Apr. 14, 2011) ("Although the freedom enjoyed by Amsterdam's Jews was not unlimited, their position during the Dutch Golden Age of the seventeenth century was remarkable—certainly when compared to that of Jews almost anywhere else in Europe, where persecution, discrimination, and ghettos were commonplace.").

towards LGBTI individuals and attitudes towards other minorities. The Netherlands shares many of the cultural, socioeconomic, and progressive political characteristics of the Scandinavian European countries and other countries that have recognized same-sex marriage. It could also be argued that one reason for the progressive Dutch policies towards sexual minorities mirrors a possible reason for the Canadian legal support of its LGBT citizens. The Netherlands and Canada each share borders with vastly more powerful countries that have had histories marked by extreme racism and intolerance in general.

The history of the Netherlands during World War II helps to explain the Netherlands' groundbreaking progress in LGBT rights.⁹⁹ Like Canada, the Netherlands maintains a pronounced distinction between itself and Germany, its more powerful neighbor. The Dutch desire to distinguish themselves from their powerful neighbor was heightened by German atrocities during World War II during its occupation of the Netherlands and the Nazi extermination of more than 100,000 citizens of the Netherlands.¹⁰⁰ This Dutch self-consciousness with respect to Germany was heightened by the higher Jewish extermination rates in the Netherlands compared to other Western European countries.¹⁰¹ It would be impossible to attribute the high Jewish extermination rate in the Netherlands to any particularly anti-Semitic Dutch attitudes. Rather it was more attributable to Hitler's desire to make an example of the Netherlands, a country known for its tolerance.¹⁰² Nevertheless, the Dutch are well aware that virtually no Danish Jews died during World War II because of the protective actions of the Danish government and people.¹⁰³

Belgium exhibits many of the socioeconomic characteristics of the other European countries that recognize same-sex marriage. Indeed, the population of the country is split between a Flemish majority, which speaks a dialect of Dutch, and a large minority of French speaking Walloons.¹⁰⁴ It is therefore not surprising that Belgium followed the Netherlands in recognizing same-sex marriage.

99. See Ralf Michaels, *Same-Sex Marriage: Canada, Europe and the United States*, AM. SOC'Y INT'L L., (Jun. 2003), <http://www.asil.org/insights/insigh111.htm>.

100. See Linda M. Woolf, *Survival and Resistance: The Netherlands Under Nazi Occupation* (Apr. 6, 1999) (unpublished paper, available at <http://www.webster.edu/~woolfm/netherlands.html>).

101. See *id.*

102. See *id.*

103. See *id.*

104. Belgian Tourist Office, *Facts and Figures*, <http://web.archive.org/web/20080213224021/http://www.visitbelgium.com/factsfigures.htm> (last visited May 15, 2011).

The other geographical region of Europe that is strongly supportive of the legal rights of its LGBT citizens is Scandinavia, along with neighbouring Finland.¹⁰⁵ The Scandinavian countries have relatively few fundamentalist Christians and exhibit a high degree of gender equality.¹⁰⁶

Spain is, in some ways, one of the more surprising cases of full same-sex marital recognition, given its Catholic tradition, and therefore constitutes a particularly important case study. The simple explanation for Spain's relatively early recognition of same-sex marriage is that Spain is a very polarized country, a lasting result of its bitter civil war. It is historically a very Catholic country and continues to have a large nominally Catholic population. However, it is also a country with a large portion of the population that is disaffected with the Catholic Church, an attitude that was strengthened by the close bonds between the Catholic Church and the Franco regime during its early years.¹⁰⁷

The political tide in Spain turned dramatically when Jose Luis Zapatero was elected as Prime Minister by a narrow margin in 2004. Zapatero's victory was largely due to his reaction to his conservative predecessor's handling of a terrorist attack.¹⁰⁸ Despite his narrow mandate, Zapatero pursued a progressive agenda on various fronts, with gay marriage and adoption being among his early initiatives. Despite his bold and controversial initiatives, Zapatero won re-election in 2008 before the full impact of the global recession was felt in Spain.¹⁰⁹

Spain may be an instance where a dramatic increase in LGBTI rights was accomplished by the unusual courage of a political leader, rather than as an inevitable result of long-term political trends.¹¹⁰ The test will be whether Spain reverses direction if the Socialists are voted out of power.

105. See Birna Bjornsdottir & Nicholas Vinocur, *Iceland Passes Gay Marriage Law in Unanimous Vote*, REUTERS (Jun. 11, 2011), available at <http://www.reuters.com/article/2010/06/11/us-iceland-gaymarriage-idUSTRE65A3V020100611>; *Sweden allows same-sex marriage*, <http://news.bbc.co.uk/2/hi/7978495.stm>; *Norway Passes Law Approving Gay Marriage*, L.A. TIMES (Jun. 17, 2008), available at <http://www.latimes.com/news/local/la-on-norwaymarriage18-2008jun18,0,402614.story>.

106. See Bréchon, *supra* note 72, at 32, 42.

107. See *The Franco Years*, COUNTRY STUDIES, <http://countrystudies.us/spain/22.htm> (last visited Mar. 23, 2011).

108. See *What is the Impact of the Spanish Election?*, TIME (Mar. 17, 2004), available at <http://www.time.com/time/question/20040317.html>.

109. See Giles Tremlett, *Spanish Voters Reject Zapatero Party in European Elections*, THE GUARDIAN (U.K.) (June 7, 2009), <http://www.guardian.co.uk/politics/2009/jun/07/european-elections-spain>.

110. See generally *Jose Luis Rodriguez Zapatero*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/z/jose_luis_rodriguez_zapatero/index.html (last updated June 2, 2010) (describing how Zapatero embraced a "narrow mandate" to "propel a country once gripped by religious conservatism into the liberal vanguard of Europe").

Hopefully, Spain will confirm the axiom that it is easier to give rights than to take them away, particularly when the global momentum is towards expanding rather than limiting LGBTI rights.

The case of Portugal is similar to that of Spain, and much of the analysis for Spain also applies. Portugal, like Spain, endured years of right-wing dictatorships that sharply polarized the society. Unlike Spain, however, the Socialist Party's influence in Portugal emerged stronger at an earlier period and has remained more pronounced than in Spain. In this respect, Portugal was an even more probable candidate for recognition of full marriage rights than Spain. Needless to say, progressive developments in Spain had an enormous impact on Portugal, since Portugal did not want to be viewed as a laggard to Spain in recognition of human rights.

D. The Case of Canada

Canada also shares many of the socioeconomic characteristics of other industrialized countries that have recognized same-sex marriage.¹¹¹ Similar to those other countries and unlike the United States, Canada has extended the principle of legal equality to its LGBT citizens. Explanations for Canada's greater recognition of same-sex rights than either Australia or the United States could arguably be found in Canada's conscious or subconscious effort to differentiate itself from the United States. Indeed, those Canadian provinces that bear the greatest similarity to the American "heartland," such as Alberta, Manitoba, and Saskatchewan, were also those provinces most resistant to enacting marriage equality.¹¹²

The similarities between Canada and the United States, although far from complete as discussed above, may lead to Canada serving as a useful model for the United States. Canada's close geographic proximity to the United States and strong cultural and economic ties between the two countries, suggest that Canada's example of full LGBT legal equality may provide a particularly helpful comparative example for United States equality activists.

111. See Todd H. Girshon, Comment, *Wrongful Discharge Reform in the United States: International & Domestic Perspectives on the Model Employment Termination Act*, 6 EMORY INT'L L. REV. 635, 652 (1992).

112. See B.A. Robinson, *Same Sex Marriage Opinion Polls 1996–2002*, RELIGIOUS TOLERANCE (Feb. 12, 2005), http://www.religioustolerance.org/hom_marz.htm (last visited Mar. 19, 2010) (noting that "[r]esidents of the Prairie Provinces are much less supportive" of same-sex marriage).

E. The Unique History of the United States and Its “Peculiar”¹¹³ Religious and Social Institutions

This Article’s comparative analysis leads to a number of conclusions about the divergence of the United States from other industrialized democracies with which it otherwise shares numerous political and socioeconomic characteristics. First, those countries that have recognized LGBTI rights to the greatest extent also tend to be those countries that have exhibited legal and political gender equality at least equal to, and in most cases, greater than that found in the United States. This correlation is consistent with the historical and sociological research evidencing a high correlation between legal equality based on gender and legal equality based on sexual orientation or gender identity.

Second, countries with Anglo-Saxon common law systems and countries with civil law legal systems do not appear to vary appreciably in their approaches to LGBT equality. Third, although religion *is* a critical factor in the differing approaches of the United States and other industrialized democracies towards LGBT equality, it is not the role of religion in isolation that is as important as the interrelationship between religion and race. This factor will be discussed at greater length below.

Some preliminary observations are warranted about the role of religion in these divergent approaches. First, except for Israel, all of the countries discussed in this Article, are predominantly Christian. Second, whether a country is Catholic or Protestant appears to have little effect on the country’s approach to LGBT legal rights. Predominantly Catholic jurisdictions such as Spain, Portugal, Belgium, Quebec were among the first jurisdictions to recognize same-sex marriage. However, predominantly Finland and the predominantly Protestant countries of Scandinavia were the world’s leaders in granting civil unions to its gay and lesbian citizens.

The only single variable that distinguishes the United States from other industrialized countries, but what it shares with apartheid era South Africa, is the involvement of its largest American-developed Christian denominations with that history of slavery and apartheid.¹¹⁴ The United States experienced over 200 years of slavery and another near century of apartheid. No other variable explains the divergence of the United States from the other industrialized democracies. Canada and Australia have also

113. “Peculiar” was a very frequent historical and almost literary reference to the U.S. institution of slavery. See *The Peculiar Institution*, U.S. HISTORY, <http://www.ushistory.org/us/27.asp> (last visited Apr. 7, 2011).

114. This helps explain why Israel—with a very strong fundamentalist Jewish influence in its Parliament and government—is relatively progressive in its policies towards LGBTI rights for reasons that are more fully described in the Israel case study. See Margolis, *supra* note 88.

had histories characterized by a frontier culture and brutally subjugating the indigenous people living in it. Almost all major Western European countries engaged in military conquest and colonialism. Indeed some of the more progressive countries, such as the Netherlands, were some of the more brutal colonizers.

It is even possible to argue that, taken as a whole, the U.S. states that did not institutionalize slavery and apartheid, would resemble much of the rest of the industrialized democracies with respect to their legal approach to their LGBT citizens. Some of those states are conservative, as are some countries or regions of the industrialized world, but the legal policies on a national level would be similar to those in effect in these other industrialized countries.

To illustrate this point in greater depth, it is helpful to look more deeply at the two largest protestant denominations that were created in the United States: the Southern Baptist Convention (“SBC”)¹¹⁵ and the Church of Jesus Christ of Latter Day Saints, commonly referred to as the Mormon Church. The Southern Baptist Convention is the largest protestant denomination in the United States by far, and was created explicitly over race, specifically a conflict between Northern and Southern Baptists over the issues of slavery and segregation.¹¹⁶ In fact, in its 1995 Resolution on Racial Reconciliation on its 150th Anniversary, the SBC declared,

WHEREAS, Our relationship to African-Americans has been hindered from the beginning by the role that slavery played in the formation of the Southern Baptist Convention; and

WHEREAS, Many of our Southern Baptist forbearers defended the right to own slaves, and either participated in, supported, or acquiesced in the particularly inhumane nature of American slavery; and

WHEREAS, In later years Southern Baptists failed, in many cases, to support, and in some cases opposed, legitimate initiatives to secure the civil rights of African-Americans; and . . .

WHEREAS, Many of our congregations have intentionally and/or unintentionally excluded African-Americans from worship, membership, and leadership; and

WHEREAS, Racism profoundly distorts our understanding of Christian morality, leading some Southern Baptists to believe that

115. Lillian Kwon, *Southern Baptists Discuss Identity, Controversy*, CHRISTIAN POST (Feb. 16, 2007), <http://www.christianpost.com/article/20070216/southern-baptists-discuss-identity-controversy/index.html>.

116. The Northern Baptists ultimately formed the American Baptist Convention.

racial prejudice and discrimination are compatible with the Gospel. . .¹¹⁷

The United States' racial and religious experience with slavery was not just unique to the Western world, but arguably in world history as well. As noted by the report of the Brown University Steering Committee on Slavery and Justice ("Brown Report"),

[i]f American slavery has any claims to being historically "peculiar," its peculiarity lay in its rigorous racialism, the systematic way in which racial ideas were used to demean and deny the humanity of people of even partial African descent. This historical legacy would make the process of incorporating the formerly enslaved as citizens far more problematic in the United States than in other New World slave societies.¹¹⁸

This explanation helps clarify the distinction in legal attitudes between the United States and other countries such as Brazil, which has an even longer history of slavery than the United States.¹¹⁹ The United States' racialization of slavery is perhaps unique in the history of the world. As noted by the Brown Report, "[f]ew if any societies in history carried this logic further than the United States, where people of African descent came to be regarded as a distinct 'race' of persons, fashioned by nature for hard labor."¹²⁰

Obviously, the effects of slavery and apartheid were not limited to slaveholding states.¹²¹ Every colony in pre-independence United States had slavery in at least point in its history. Massachusetts enjoys the dubious distinction of being the first state to legalize slavery.¹²²

This larger social effect of slavery and apartheid in American society can be seen in Mormonism, the other American religion. Its membership lies largely outside the previous slave states. Until 1978, individuals of

117. SOUTHERN BAPTIST CONVENTION, RESOLUTION ON RACIAL RECONCILIATION ON THE 150TH ANNIVERSARY OF THE SOUTHERN BAPTIST CONVENTION (Jun. 1995), available at <http://www.sbc.net/resolutions/amresolution.asp?id=899>.

118. SLAVERY AND JUSTICE: REPORT OF THE BROWN UNIVERSITY STEERING COMMITTEE ON SLAVERY AND JUSTICE 8 (2006), available at http://www.brown.edu/Research/Slavery_Justice/documents/SlaveryAndJustice.pdf [hereinafter BROWN REPORT].

119. See generally Herbert S. Klein, AFRICAN SLAVERY IN LATIN AMERICA AND THE CARIBBEAN 217-41 (1986).

120. BROWN REPORT, *supra* note 118, at 8.

121. See *id.* at 8-9 (describing slavery in early New England).

122. Public Broadcasting Service, From Indentured Servitude to Racial Slavery, THE TERRIBLE TRANSFORMATION, <http://www.pbs.org/wgbh/aia/part1/1narr3.html> (last visited Mar. 25, 2011). ("In 1641, Massachusetts became the first colony to legally recognize slavery.")

African descent were prohibited from serving as priests in the Mormon religion, basing this prohibition on the alleged inferiority of Africans.¹²³ Brigham Young, in his *Journal of Discourses*, explained the Mormon theology with respect to black Africans:

Shall I tell you the law of God in regard to the African Race? If the White man who belongs to the chosen seed mixes his blood with the seed of Cain, the penalty, under the law of God, is death on the spot. This will always be so.

Cain slew his brother . . . and the Lord put a mark upon him, which is the flat nose and black skin.

You see some classes of the human family that are black, uncouth, uncomely, disagreeable and low in their habits, wild, and seemingly deprived of nearly all the blessings of the intelligence that is generally bestowed upon mankind. The first man that committed the odious crime of killing one of his brethren will be cursed the longest of any one of the children of Adam. Cain slew his brother. Cain might have been killed, and that would have put a termination to that line of human beings. This was not to be, and the Lord put a mark upon him, which is the flat nose and black skin. Trace mankind down to after the flood, and then another curse is pronounced upon the same race—that they should be the “servant of servants;” and they will be, until that curse is removed.¹²⁴

It would appear that God removed the “curse of Cain” upon black Americans in 1978 when God made his divine revelation to Spencer Kimball that blacks could become priests.¹²⁵ It is no coincidence that both the Southern Baptist Convention and the Mormon religion also endorse strictly defined gender roles and eschew gender equality.¹²⁶ These positions, as noted above, are very tightly correlated with opposition to legal rights for sexual minorities.

123. See Mary Jordan, *The New Face of Global Mormonism*, WASH. POST, Nov. 19, 2007, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/story/2007/11/18/ST2007111801409.html> (last visited May 9, 2011). See also *Mormon Racism in Perspective: An Example for Possible Future Changes in Policy Relating to Women and Gays*, LDS-MORMON.COM, <http://www.lds-mormon.com/racism.shtml> (last visited May 10, 2011).

124. *Mormon Racism in Perspective*, supra note 123.

125. See Jordan, supra note 123.

126. Barbara L. Bernier, *Unholy Troika: Gender, Race and Religiosity in the 2008 Presidential Contest*, 15 DUKE J. GENDER L. & POL’Y 275, 283 (2008) (“Some religious based organizations such as the Promise Keepers, the Southern Baptist Convention, and the Church of Latter Day Saints among others take the stance that women should be subservient to their husbands and that men should take back their families.”).

It could be argued that the unique religious experience of the United States may be because there was something unique about the founders of the United States themselves that contributed to a particularly hostile theological approach to homosexuality and gender equality. For example, the Puritans exhibited notably strict theological views on a number of issues, and were brutal in dealing with dissent. Their approach to theological dissent was evidenced by the Puritans' forcible ejection of Roger Williams from Massachusetts Bay Colony. Subsequently, Williams founded Rhode Island as a safe haven for people of all faiths.¹²⁷ However, even the Puritans, over time, evolved into Presbyterians, Congregationalists and Northern Baptists. Presbyterians and the descendent denominations of Congregationalists have evolved into mainstream Protestant faiths that are generally supportive of gender and racial equality, and tolerant with respect to issues of sexual orientation. Moreover, the founders of the United States at the time of the Constitutional Convention were predominantly Deists, the predecessors of modern day Unitarians,¹²⁸ one of the world's most progressive religions with respect to racial and gender equality, and sexual orientation.

The Baptist faith itself was not particularly intolerant, at least until the split between Northern and Southern Baptists over slavery and apartheid. Indeed, a founder of American Baptism, Roger Williams, as discussed above, was known for his tolerant theology and was considered an advocate of amicable relations with Native Americans.¹²⁹ Today, Northern Baptists are not viewed as particularly intolerant with respect to social issues.¹³⁰ Thus, it does not appear that there was anything inherent in the Baptist religion itself that created intolerant views of the Southern Baptist Convention with respect to gender, race and sexual orientation. In the United States, as elsewhere in the world, theology has followed the existing sociopolitical and cultural realities rather than the reverse.

This again suggests that it is not the history of the United States in general, but rather its history with slavery and apartheid in particular, that accounts for the emergence of large Christian sects that supported discrimination based on race, gender, and sexual orientation.

The unique connection between race and religion was not simply about theologically justifying the institution since other countries have had

127. Jimmy D. Neff, *Roger Williams: Pious Puritan and Strict Separationist*, 8 J. CHURCH & ST. 529, 533–35 (1996).

128. *See generally* DAVID L. HOLMES, *THE FAITHS OF THE FOUNDING FATHERS* (2006).

129. *Id.* at 535.

130. *See generally* WILLIAM H. BRACKNEY, *BAPTISTS IN NORTH AMERICA: AN HISTORICAL PERSPECTIVE* (2006).

slavery or been involved in the slave trade. Rather, the United States arguably viewed itself as morally superior to the rest of the world, as encapsulated in the idea of “American exceptionalism,” and therefore had a particularly difficult task in reconciling slavery with its religiosity and sense of moral exceptionalism. In contrast, “the plantation colonies of Spain and Portugal inherited legal definitions of slavery through the Catholic Church” and the Roman-Dutch legal traditions.¹³¹ Thus, the United States colonies had very little moral or legal framework with which to view the institution of slavery.¹³²

Because many of the original United States settlers viewed themselves as morally distinct and superior to the Europeans, the issue remained of reconciling their moral exceptionalism with enslaving human beings.¹³³ The answer, of course, was to theologically relegate persons of African descent to sub-human status, a theological development that was arguably unique in history to those United States religions that condoned slavery. As noted by the Brown Report, “the laws [southern Americans] fashioned, beginning in Virginia in the 1620s and continuing through the Civil War, were historically unprecedented in their complete denial of the legal personality of the enslaved. Slaves in North America were chattel, no different in law from horses, handlooms, or other pieces of disposable property.”¹³⁴ In this sense, the United States’ sense of moral exceptionalism and religiosity directly contributed to the unique debasement of African-Americans to chattel status in connection with slavery.

The case studies discussed in this Article suggest a correlation among racial, gender, and sexual orientation discrimination, and this correlation has been demonstrated by polling studies.¹³⁵ It is beyond the scope of this Article to explore the reasons for this correlation, but the available evidence suggests that all forms of discrimination share a hierarchical worldview.¹³⁶ This hierarchical worldview is consistent with the

131. BROWN REPORT, *supra* note 118, at 8

132. *See id.* at 8.

133. *See generally* LARRY WITHAM, A CITY UPON A HILL: HOW SERMONS CHANGED THE COURSE OF AMERICAN HISTORY (2007); *see also* Royal C. Gardner, *Exporting American Values: Tenth Amendment Principles and International Environmental Assistance*, 22 HARV. ENVTL. L. REV. 1, 1 n.1 (1998) (citing HENRY KISSINGER, DIPLOMACY 45–46 (1994)).

134. BROWN REPORT, *supra* note 118, at 8.

135. *See, e.g.*, GILL VALENTINE & IAN McDONALD, STONEWALL, UNDERSTANDING PREJUDICE: ATTITUDES TOWARDS MINORITIES 6 (2004), http://www.stonewall.org.uk/documents/pdf_cover_content.pdf (“[N]ationwide polling . . . found objective evidence of substantial links between different sorts of prejudices. It established a strong correlation, for example, between people who hold racist views and those who are homophobic.”).

136. *See, e.g.*, JIM SIDANIUS & FELICIA PRATTO, SOCIAL DOMINANCE: AN INTERGROUP THEORY OF SOCIAL HIERARCHY AND OPPRESSION (2001). A substantial literature has explored the “Social

comparative evidence in this Article demonstrating that religious justifications for slavery, apartheid, and racial inferiority have been highly correlated with hierarchical views with respect to gender and sexual orientation.

F. The United States and the Rest of the Industrialized Democratic World: From Divergence to Convergence?

Does the unique racial history of the United States mean that there is little relevance for the United States in the progress made on LGBTI rights in otherwise similarly situated countries? Despite the uniquely racialized history of the United States, there is reason for optimism that a convergence is not only possible, but is in the process of occurring. It is true that the greatest gains in LGBTI rights have been primarily in those states that distinguished themselves as opponents of slavery. Vermont, for example—the first state to recognize civil unions and the first state to legislatively enact full marriage equality—was also the first U.S. state to abolish slavery.¹³⁷ New Hampshire,¹³⁸ Iowa, Massachusetts, and Maine¹³⁹ also distinguished themselves as sources of abolitionist sentiment.¹⁴⁰

Despite the continued existence of widespread racism, a generational shift appears to be occurring in the United States with respect to race, gender, and LGBTI rights. Because racial hatred in the United States has been highly correlated with gender and sexual orientation discrimination, a reduction in the most obvious forms of racial hatred should, presumably,

Dominance Orientation” as a psychological or personality variable that can predict political and social attitudes. See, e.g., Chris G. Sibley, Andrew Robertson & Marc S. Wilson, *Social Dominance Orientation and Right-Wing Authoritarianism: Additive and Interactive Effects*, 27 *POLITICAL PSYCHOLOGY* 755 (2006).

137. See *Abolition of Slavery in Vermont*, ANTI-SLAVERY SOC’Y, <http://www.anti-slaverysociety.addr.com/hus-vermont.htm> (last visited Nov. 22, 2009) (noting that Vermont was the first sovereign state and the first state in the Union to abolish slavery).

138. See *New Hampshire on the Abolition of Slavery*, N.Y. TIMES, Jun. 17, 1864, http://query.nytimes.com/mem/archive-free/pdf?_r=1&res=9505E0DD103CE63ABC4F52DFB066838F679FDE. But cf. J. Dennis Robertson, *Whittier’s Anti-Slavery Ode to New Hampshire*, <http://seacoastnh.com/blackhistory/whittier.html> (suggesting that New Hampshire’s anti-slavery reputation may be somewhat overblown).

139. See *The Maine Women Writers Collection*, <http://faculty.une.edu/admin/cgurley/blackhist.html> (“Nineteenth Century Maine claims a proud tradition of the expression of abolitionist beliefs.”).

140. It is interesting to note, although I would not argue a causal relationship, that Rhode Island, the only New England state not to legalize same-sex marriage, is also the New England state with the deepest historical involvement with slavery. See BROWN REPORT, *supra* note 118, at 9. I would not argue a causal relationship since the interrelationship between Rhode Island and slavery did not result in the dominant religion in Rhode Island being explicitly racist.

also correlate with less hierarchical views towards issues related to gender and sexual orientation.

The principal obstacle to such recognition of gender and LGBTI legal equality in the United States is the existence of powerful fundamentalist Christian groups with an unusual degree of political influence. However, those groups have themselves radically altered their own position on some of their most strongly held beliefs regarding discrimination. For example, the Southern Baptist Convention has apologized for its theological endorsement of slavery and apartheid,¹⁴¹ and the Mormon faith came to accept persons of African descent into the priesthood. More people were opposed to mixed race marriages in 1948 than are currently opposed to same-sex marriage.¹⁴²

Thus, although the recognition of gay and lesbian identity and rights may be predominately a modern phenomenon, it is important to recognize the short timeframe in which the rights of other minorities have been recognized. Moreover, the correlations between racism, sexism, and homophobia suggest that any effort to separate the political struggle for sexual minority rights from the larger battle for the rights of other historically oppressed minorities misses the many similarities between the evolution of the rights of sexual minorities and other minorities.

IV. DIVERGENCE AND CONVERGENCE IN THE WESTERN HEMISPHERE: LATIN AMERICA AND THE CARIBBEAN

The principal division in the Western Hemisphere with respect to state approaches to LGBTI rights is the growing divergence between the Caribbean, on the one hand, and Latin America, North America, Europe and Oceania, on the other. As discussed below, the divergence between the United States and the rest of the industrialized world appears to be reversing itself slowly, particularly in those parts of the United States not dominated by historically racist religions. Understanding the reasons for the divergence between Latin America and the Caribbean can help to explain the reasons for divergent approaches of developing nations towards LGBTI rights.

141. *SBC Renounces Racist Past*, 112 CHRISTIAN CENTURY 671, 671 (1995).

142. Gail Mathabane, *Gays Face Same Battle Interracial Couples Fought*, USA TODAY (Jan. 25, 2004), http://www.usatoday.com/news/opinion/editorials/2004-01-25-couples_x.htm ("In 1948, when California became the first state to strike down a ban on interracial marriage, nine out of 10 Americans opposed such unions."). See also Peggy Pascoe, *Why the Ugly Rhetoric Against Gay Marriage Is Familiar to this Historian of Miscegenation*, HISTORY NEWS NETWORK (Apr. 19, 2004), <http://hnn.us/articles/4708.html>.

The English speaking Caribbean and Latin America reflect, to some extent, the divergence between the regions of the world colonized by the British and the areas colonized by the Spanish and the Portuguese. For much of colonial and post-colonial history, many Caribbean and Latin America nations have been characterized as having high levels of anti-LGBTI animus and violence.¹⁴³ Both regions have had a “machista”¹⁴⁴ culture, in which gender nonconformity has often been violently suppressed. Nevertheless, in the last decade, there has been a growing divergence in the implementation of LGBTI rights between English-speaking Caribbean countries and Latin American countries.

Although generalizations about a region as diverse and large as Latin America and the Caribbean are difficult, much of Latin America, with some notable exceptions, has made substantial, albeit uneven, progress in implementing LGBTI rights,¹⁴⁵ or at least decriminalizing homosexuality. The English speaking Caribbean, on the other hand, is characterized by extraordinarily high levels of anti-LGBTI social animus and repressive legislation.¹⁴⁶

The simple explanation for this divergence would seem to be the difference between English colonial laws and those imposed by Spain and Portugal. But such an explanation, however true, neglects other similarly important factors influencing LGBTI rights in the regions. In addition to the different approaches of Iberian colonialism versus British colonialism, this divergence can be explained by the following: (1) the role of religion; (2) the role of women in the respective religions in the two regions; (3) the effects of slavery; (4) attitudes towards domestic incorporation of international human rights norms; and (5) geopolitical perspectives, location, and the effects of United States hegemony.

143. For example, the high number of asylum cases granted from Latin American and Caribbean countries by various countries attests to the documented historically high level of violence in the great majority of Latin American and Caribbean countries. *See, e.g.*, Country Specific Meritorious Claims/Confidentiality Warnings, POLITICAL ASYLUM RESEARCH AND DOCUMENTATION SERVICE, <http://pards.org/meritorious.html> (last visited Oct. 26, 2009).

144. The “machista” image is one of hyper-maleness. Berta Esperanza Hernández-Truyol, *The Gender Bend: Culture, Sex, and Sexuality-A Critical Human Rights Map of Latina/o Border Crossings*, 83 IND. L.J. 1283, 1314 (2008).

145. *See* LGBT World Legal Wrap Up Survey, INTERNATIONAL LESBIAN AND GAY ASSOCIATION, http://www.ilgaeurope.org/europe/issues/international/lgbt_world_legal_wrap_up_survey_november_2006 (last visited May 10, 2011).

146. *See* Amnesty International, *supra* note 52.

A. The Role of Religion

At the risk of stating the obvious, religion is a determining factor in defining societal attitudes towards homosexuality in almost all countries. For example, there is generally a high correlation between religious attendance (as opposed to mere membership) and animus towards LGBTI rights.¹⁴⁷ Nevertheless, not all religions are equal with respect to this correlation, even when the religions share an underlying theological opposition to homosexuality. For example, Latin American Catholicism and Caribbean Fundamentalist Protestantism share a strong anti-LGBTI theological perspective. Religion itself is frequently a simple expression of underlying societal attitudes that may exist independently of the theological tenets of the particular religion.

The correlation between the mere degree of Catholic affiliation of a country's populace and the country's implementation of LGBTI rights is negligible. Belgium, Spain, and Quebec, which are all characterized by the populations of Catholic, were among the first jurisdictions in the world to legally recognize same-sex unions. Spain and Belgium even preceded the traditionally tolerant and overwhelming Protestant countries of Scandinavia in recognizing same-sex marriage. Thus, although the Catholic Church has frequently taken a strong stance against pro-LGBTI legislation in various Latin American countries, it has been less successful in such efforts than similar Protestant efforts in the English-speaking Caribbean.

This divergence can be partially explained by the degree to which adherents of the different religions consider the theological positions of their religions determinative of their own personal approaches to those issues. It should not be surprising that fundamentalist or evangelical Protestantism has had greater success in shaping individuals' personal approaches to social issues since evangelical Protestantism is predicated upon a much closer relationship between one's acceptance of the religion's specific tenets and personal salvation. Catholicism, on the other hand, is often experienced by its adherents as more of a cultural institution. As the default religion for much of Latin America's history, Catholicism arguably did not require the same degree of personal affirmation of the religion's specific tenets or active attendance in religious services by Catholic parishioners. Thus, Catholic religious affiliation in many countries is not necessarily correlated with consistent church attendance, which is more

147. See, e.g., Brian Reinhardt, *Examining Correlates of Homophobia in Heterosexual College Students* (1997), available at http://www.eric.ed.gov/ERICWebPortal/custom/portlets/recordDetails/detailmini.jsp?_nfpb=true&_ERICExtSearch_SearchValue_0=ED412445&ERICExtSearch_SearchType_0=no&accno=ED412445 (finding a correlation between homophobia and church attendance, but not church affiliation).

closely correlated to anti-LGBTI attitudes.¹⁴⁸ Moreover, the phenomenon of “cafeteria Catholicism,” selective religious beliefs or practices,¹⁴⁹ has been well documented, although repeatedly condemned by the Catholic Church itself.¹⁵⁰

Lack of strict adherence to doctrine does not, however, fully explain the divergence in gender approaches to homosexuality in the predominantly fundamentalist Protestant Caribbean and Catholic Latin America. One of the distinguishing characteristics between the two regions is the Caribbean’s more hostile view of homosexuality by women. To better understand this apparent phenomenon, it is helpful to understand the role of women within the religious institutions of the Caribbean and Latin America.

B. The Role of Women in the Two Regions¹⁵¹

Women have a vested interest in the religious institutions in much of the Caribbean, for the evangelical Protestant churches in the Caribbean play a critical role in holding the family together. Less so than in Latin America, women in the Caribbean are deeply involved in churches and view the strong moral tenets of their religions as critical to holding their families and societies together. In Latin America, on the other hand, women have relatively less vested interest in the Catholic Church and have been historically marginalized within the power structure of the Church. A socioeconomically successful woman in Latin America will frequently distance herself from the Church and its strictest mores, whereas many successful women in the Caribbean remain closely tied to the churches and their religious and social mores. This is, admittedly, somewhat counterintuitive since many evangelical Protestant denominations subscribe to a gender-conformist view of societal relations.

In the Caribbean, women are often the primary breadwinners and heads of households, and men can sometimes be marginalized, both

148. *Id.*

149. Sometimes, albeit somewhat inaccurately, referred to as “latitudinarianism,” “cafeteria Catholicism” is defined herein as the selective adherence to various religious beliefs or practices.

150. *Pope Benedict Declares ‘Cafeteria Catholicism,’* CATHOLIC NEWS AGENCY (July 6, 2005), <http://www.catholicnewsagency.com/new.php?n=4314> (“In 1987, John Paul told a gathering of the U.S. bishops that, “[i]t is sometimes reported that a large number of Catholics today do not adhere to the teaching of the Catholic Church on a number of questions, notably sexual and conjugal morality, divorce and remarriage. . . . It is sometimes claimed . . . that dissent from the magisterium is totally compatible with being a “good Catholic,” and poses no obstacle to the reception of the Sacraments. This is a grave error that challenges the teaching of the Bishops in the United States and elsewhere.””).

151. The information in this section is based on the author’s personal experience as Co-Director of the American Caribbean Law Initiative.

economically and in terms of socioeconomic position.¹⁵² Gender nonconformity, particularly by males, may be sometimes viewed as harmful by diminishing, from a heterosexual female perspective, a primary social utility of males as participants in the family unit.¹⁵³

The sometimes-tenuous socioeconomic position of men in the Caribbean also fuels homophobia and anti-feminism, as men respond, sometimes violently, to their perception of diminished status. As Rhoda Reddock notes,

[i]n my own research I have argued that for Caribbean men, whose manhood has always been fractured as they struggle to live up to European notions of hegemonic masculinity, these feelings of loss have been even greater. The increase in violence against women in the region, the brutality of it and the defence of it by many men and some women suggests to me that we may be in the middle of the civil war of sorts between the sexes. And women and children are losing their lives.¹⁵⁴

Arguably, in the more patriarchal society of Latin America, a “weakened” male, as represented by male gender nonconformity, has fewer negative repercussions for the female population, since patriarchy in religion and economics is itself more pronounced.

152. See, e.g., Rhoda Reddock, *History of the Women’s Movement in the Caribbean (Part I)*, Address to the HIVOS/UNIFEM Meeting of Women’s Organizations (Dec. 1, 1998), available at <http://www.cafra.org/spip.php?article681>. In her address, Reddock notes that:

In the 1980s a new discourse on “male marginality” emerged, led by Errol Miller . . . who argued that colonial policy had facilitated the elevation of women over men due to the colonialists fear of “black men.” This resulted in a situation where black men were increasingly educationally and economically marginalized in the Anglophone Caribbean. This thesis, concretized the concerns by many men over the apparent improvement in women’s status and their willingness to act autonomously and challenge accepted forms of male privilege. This concern was fueled by women’s predominance in institutions of higher learning and representation in the higher echelons of the public sector, a situation often contrasting with young male criminality and violence. *Id.*

As a result of this phenomenon, Reddock argues that:

Greater attention needs to be paid to issues such as gender socialization of boys and girls—at home and in the education system working with parents and teachers . . . to new attitudes to men as economic providers and women as dependents; attitudes to male violence and men as ‘macho’ figures; values placed on dominance attitudes towards sexuality including same-sex relations and values of positive anti-racism. *Id.*

153. Interview by author with anonymous minister in The Bahamas, (Feb. 4, 2002) (stating “life is hard enough for women in the Caribbean, and a male who is not a ‘strong’ male is but one more burden”).

154. Reddock, *supra* note 152.

C. The Effects of Slavery

Although slavery was widely practiced in many regions of Latin America,¹⁵⁵ particularly in Brazil, Guyana, and Suriname, the effects of slavery differed between Latin America and the Caribbean. In non-Caribbean Latin America, post-colonial countries were dominated by populations whose descendants were not enslaved. Without minimizing the brutality of slavery in Latin America, slavery in the British colonies also tended to be more racialized, and thus the racial consequences of slavery tended to be more pronounced in the post-slavery, colonial societies of the English-speaking Caribbean. In regards to manumission—the act of freeing a slave—“[e]very slave society in Latin America permitted slaves to be manumitted from the very beginning. All such regimes accepted the legitimacy of manumission, since it was the norm in Roman law and was deeply embedded in Christian piety and practice.”¹⁵⁶

Under slavery, a male slave was powerless to protect family members from physical harm and assaults on their dignity by white overlords.¹⁵⁷ As a result, some post-slavery black communities strongly resisted perceptions of male “subservience,” either to women or to men, resulting in a hostility to gender nonconformity.¹⁵⁸ An extensive body of literature has explored the effect of this phenomenon in the United States’ African-American community to help explain the elevated levels of anti-LGBTI attitudes and hostility to male gender nonconformity in the African-American

155. See generally HERBERT S. KLEIN, *AFRICAN SLAVERY IN LATIN AMERICA AND THE CARIBBEAN* (1986).

156. *Id.* at 217.

157. See James Corbett David, *The Politics of Emasculation: The Caning of Charles Sumner and Elite Ideologies of Manhood in the Mid-Nineteenth-Century United States*, 19 *GENDER & HIST.* 324, 330 (2007).

158. Devon Carbado, in *The Construction of O.J. Simpson as a Racial Victim*, 32 *HARV. C.R.-C.L. L. REV.* 49, 83 (1997), writes critically of the role the belief in black male emasculation plays in the black community, but notes that “[t]his sense of Black male emasculation is very real in the Black community; ‘almost everyone [in the Black community] buys into it on a certain level.’” *Id.* For a discussion of how anti-racist and anti-slavery discourse has frequently been shaped by male resentment against male subordination, thereby perpetuating male dominance within some parts of the anti-racist movements, see Lisa A. Crooms, “*To Establish My Legitimate Name Inside the Consciousness of Strangers*”: *Critical Race Praxis, Progressive Women-of-Color Theorizing, and Human Rights*, 46 *HOW. L.J.* 229, 259 n.108 (2003). See also Darren Hutchison, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 *BUFF. L. REV.* 1, 40–41 (1999) (“Despite the reality of homophobic racial oppression, anti-racist legal theorists and political activists have generally failed to engage in a substantial critique of heterosexism. Manifestations of the marginalization of homosexuality in anti-racism range from outright homophobia to a general lack of commitment to sexual equality. The ambivalence or opposition toward ‘gay rights’ among anti-racists reflects the heterosexism that exists inside and outside of communities of color.” (citations omitted)).

community.¹⁵⁹ Though this critique of the alleged dysfunctionality of slave families has been subject to widespread criticism, the alleged effects of male powerlessness in the face of the white power structure have been much less contested.¹⁶⁰

D. Approaches to Domestic Incorporation of International Human Rights Norms

Whereas the level of acceptance of LGBTI rights and other internationally accepted human rights norms has been increasing in much of Latin America,¹⁶¹ the English-speaking Caribbean has been far more resistant. One of the more visible manifestations of such resistance is the bitter fight of much of the English-speaking Caribbean against the growing international movement for banning capital punishment.¹⁶² Indeed, this resistance to abolishing the death penalty provided much of the support for the creation of the Caribbean Court of Justice by the Caribbean Community (“CARICOM”)¹⁶³ to replace the Commonwealth’s Privy Council in London as a court of last appeal.¹⁶⁴ The Privy Council’s rulings had

159. See sources cited *supra* note 158.

160. In the context of post-slavery United States society, sociologists Norman L. Day-Vines and Beth O. Day-Hairston have argued that:

Historically, the church and the family have served as strong socializing agents within the African American community, which have deterred youngsters from certain maladaptive behaviors. Regrettably, (a) the declining significance of the family and church . . . (c) ineffectual adult male role models resulting from the historical emasculation of many African American males, (d) the impersonal nature of urban environments, (e) economic distress, (f) decreasing access to legitimate opportunities, and (g) dwindling school and community resources jeopardize the psychological well-being of many adolescents, leaving an alarming number of young men to construct their own misguided definitions of African American manhood.

Norman L. Day-Vines & Beth O. Day-Hairston, *Culturally Congruent Strategies for Addressing the Behavioral Needs of Urban, African American Male Adolescents*, PROFESSIONAL SCHOOL COUNSELING (Feb. 2005), available at http://findarticles.com/p/articles/mi_m0KOC/is_3_8/ai_n10301217/?tag=content;coll.

161. See Juan Luis Sánchez, *Matrimonio Homosexual en América Latina: La Cosa Se Mueve*, PERIODISMO HUMANO (Sept. 27, 2010), available at <http://periodismohumano.com/sociedad/discriminacion/matrimonio-homosexual-en-america-latina-la-cosa-se-mueve.html>. See, e.g., Gaceta Oficial del Distrito Federal (official Gazette for the Federal District), Dec. 29, 2009, 525–26 (Mex.).

162. See Nancy Anderson & Gillian Burgess, *Capital Punishment — Is the Caribbean Out of Step?*, CARIBBEAN RIGHTS (Mar. 26, 2009), <http://ijchr.org/archives/30>.

163. CARICOM is a relatively advanced example of an integrated common market with efforts at free movement of people, goods and services throughout the Caribbean region.

164. Anderson & Burgess, *supra* note 162 (“Several leading Caribbean politicians had attacked the Privy Council as being an abolitionist court and represented that that was a reason for advocating the abolition of appeals to the Privy Council and the establishment of the Caribbean Court of Justice (CCJ) as the final court of appeal for the region.”). It is true that another rationale for the creation of the Caribbean Court of Justice resided in a perception of the Privy Council’s role as a remnant of British colonialism. Nevertheless, the rationale of the Court of Justice as a means of permitting the death

repeatedly created insurmountable obstacles to the effective implementation of the death penalty, and there was a belief that the Caribbean Court of Justice would be much more amenable to imposing the death penalty, although it is not clear that this will be the case.¹⁶⁵

Similarly, much of the discourse in the Caribbean regarding decriminalizing homosexuality may be in resistance to the imposition of perceived European norms on the Caribbean; this is true particularly in light of the United Kingdom's quantum leap in recognizing internationally accepted norms of non-discrimination and privacy, particularly with respect to LGBTI individuals. The irony in such a reaction, also witnessed in former British colonies in Africa and Asia, is that the original source for those anti-LGBTI laws was British colonialism itself, not indigenous pre-colonial antipathy to homosexuality.¹⁶⁶

Much of the progress in human rights protections for LGBTI citizens in South America, as opposed to the Caribbean, may be due to the closer identification of political elites in Latin America with the culture and legal norms of continental Europe¹⁶⁷ and with the other non-U.S. countries that have accepted international human rights for sexual minorities. Many of the political elites in Latin America trace their familial lineage to Europe, unlike the political elites in the English-speaking Caribbean.¹⁶⁸ The greater receptiveness of some Latin American elites to the expansive pro-LGBTI jurisprudence developing in Europe may be because of Latin America's greater distance from the United States, with its historically more anti-LGBTI legal tradition and its support of conservative, repressive local regimes in the Western Hemisphere.

A look at the explicit incorporation of legal references to international human rights law is helpful to illustrate this greater receptiveness in South America. In Argentina, for example, international law and Spain's previous recognition of same-sex marriage had an enormous impact on legalizing same-sex marriage. On July 21, 2010, Argentina enacted Ley 26.618

penalty presented a dilemma for those jurists who agreed with the rationale for the replacement of the Privy Council as an expression of regional sovereignty, but were opposed to the death penalty.

165. See *id.* ("Ironically, the CCJ [Caribbean Court of Justice] in an appeal by the Government of Barbados, *A-G of Barbados and others v. Jeffrey Joseph and Lennox Ricardo Boyce* . . . reaffirmed the principles established by the Privy Council in relation to the unconstitutionality of long delays in the execution of the death penalty and of the mandatory imposition of capital punishment.").

166. Rob Tielman & Hans Hammelburg, *World Survey on the Social and Legal Position of Gays and Lesbians*, in *THE THIRD PINK BOOK* 249, 251 (Aart Hendriks et al. eds., 1993). See also generally Wilts, *supra* note 29.

167. See generally *ELITES AND DEMOCRATIC CONSOLIDATION IN LATIN AMERICA AND SOUTHERN EUROPE*, (John Higley & Richard Gunther eds., 1991).

168. *Id.*

legalizing same-sex marriages.¹⁶⁹ As a result, Argentina became the first country in Latin America to recognize same-sex marriages.¹⁷⁰ When the law was presented to the parliament, the proposed bill (*Proyecto de Ley*) contained the scope and purpose of the law and grounds for its enactment. The draft incorporated numerous references to international law as a legal foundation (*fundamento*) for the law.¹⁷¹ In addition, it referenced other countries' recognition of same-sex marriage, including reference to Spain.¹⁷² The references to Spain are all the more relevant because of the long colonial influence and contemporary cultural influence of Spain on Argentina.¹⁷³

169. See Law No. 26.618, July 21, 2010, [CXVIII] B.O. 31949 (Arg.).

170. See Alexei Barrionuevo, *Argentina Approves Gay Marriage, in a First for Region*, N.Y. TIMES, July 16, 2010, at A3, available at <http://www.nytimes.com/2010/07/16/world/americas/16argentina.html>.

171. See Law No. 26.618, July 21, 2010, [CXVIII] B.O. 31949 (Arg.). The draft recognized that "sexual identity is one of the substantive human rights protected both by the Constitution of Argentina and by several International treaties." ("El de la identidad sexual . . . forma parte . . . de derechos humanos sustanciales . . . protegidos en nuestra Constitución Nacional y en diversos tratados internacionales de derechos humanos incorporados a la misma.") *Id.* The draft then listed some of the International authorities, like the American Convention on Human Rights ("Convención Americana de DDHH, art. 3, 5, 11, and 24) and the principles of Yogyakarta, presented in 2007, that defined "sexual identity" as "the individual internal gender that a person feels, and that may or may not correspond to the gender assigned at birth, and other expressions of the same, including dressing, speech and manners." ("[Los] Principios de Yogyakarta . . . definen: la 'identidad de género' se refiere a la vivencia interna e individual del género tal como cada persona la siente profundamente, la cual podría corresponder o no con el sexo asignado al momento del nacimiento, incluyendo la vivencia personal del cuerpo . . . y otras expresiones de género, incluyendo la vestimenta, el modo de hablar y los modales.")) *Id.* In particular, the third of the latter principles expressly recognized the right to the sexual identity:

Principle 3. Right to Recognition Before the Law. Everyone has the right to recognition everywhere as a person before the law. Persons of diverse sexual orientations and gender identities shall enjoy legal capacity in all aspects of life. Each person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom. No one shall be forced to undergo medical procedures, including sex reassignment surgery, sterilization or hormonal therapy, as a requirement for legal recognition of their gender identity. No status, such as marriage or parenthood, may be invoked as such to prevent the legal recognition of a person's gender identity. No one shall be subjected to pressure to conceal, suppress or deny their sexual orientation or gender identity.

Id. (translation by author).

172. See *id.* ("Regarding the comparative law, several countries made progress on the theme. The grounds for the legislation in countries such as in Norway, Italy, Germany, Sweden, Austria, Denmark, South Africa, The Netherlands, Panama, some state in the U.S., and some Canadian provinces, have a common thread that allows establishing a link among them. This common thread is the preeminence of the psychological sex - or socio psychological- over the biologic sex in the shaping process of the sexual identity of a person, and consequently, in the response to the transsexual problem.") (translation by author)).

173. H. Cámara de Diputados de la Nación, Proyecto De Ley, *Ley de Identidad de Genero*, Expediente n. 5259-D-2007, Trámite Parlamentario 153 (Nov. 16, 2007), available at <http://www.l.hcdn.gov.ar/proyxml/expediente.asp?fundamentos=si&numexp=5259-D-2007>. Eduardo Di Pollina, one of the proposers of the same sex marriage bill, expressly declared that he took the Spanish

On January 2008, Uruguay became the first Latin American country to enact a national civil union law, titled *Ley de Unión Concubinaria*.¹⁷⁴ In its *Exposicion de Motivos*, roughly translated as Explanation of Rationales, the proposed bill provided explicit reference to similar legislation in Europe.¹⁷⁵ Efforts are also underway to introduce legislation to provide for full marriage equality.¹⁷⁶

In Bolivia, the 2009 Constitution explicitly prohibits discrimination based on sexual orientation and gender identity.¹⁷⁷ This anti-discrimination provision in the constitution is immediately preceded by an article recognizing international norms.¹⁷⁸ It is possible that this may open a door for legalizing same-sex marriage in the future, particularly given the strong logical nexus between the rights of non-discrimination and equal protection and the right to marriage for gay and lesbian couples.¹⁷⁹

Although not normally considered a bastion of progressive political developments, Colombia has nevertheless seen its supreme court repeatedly affirm the rights of same-sex partners to many of the rights of marriage. In 2009, the Constitutional Court of Colombia reiterated that the Colombian

experience as an example. *España, ejemplo del matrimonio gay para Argentina*, ANODIS, May 4, 2007, available at <http://anodis.com/nota/9148.asp>. According to the National Spanish Federation of Lesbians, Gays, Transsexuals and Bisexuals, the law contains many of the historical battles fought in the legal field. The law will allow transsexuals to change the gender assigned at birth thanks to a simple administrative proceeding, rather than through a long and expensive lawsuit, and regardless they have already undertaken surgery or planned to do so. *See Argentina es el primer país de América Latina que autoriza el matrimonio gay*, EL MUNDO (Jul. 15, 2010), available at <http://www.elmundo.es/america/2010/07/15/argentina/1279178537.html>. (“It must be noted that Spain was taken as an example in the majority of states that have recognized the civil unions between person of the same sex.” (translation by author)).

174. See Law No. 18.246, Jan. 10, 2008, [10 ene/008] D.O. 27402 (Uru.).

175. See Republica Oriental del Uruguay, *Diario de Sesiones de la Cámara de Senadores*, vol. 425, Mar. 16, 2005, pp.128–29, that states in relevant part:

The proposed bill is in conformity with a substantial part of the comparative law and with the world trend consisting of recognizing rights and benefits to those situations. The same observation was realized by Deputy Diaz Maynard in the statement of the grounds for the law, when he stated that almost all the European and Latin American legislations contain provisions regulating the concubinage, some of them even present in the state Constitution.

Id. (translation by author).

176. Senator Margarita Percovich announced that “Frente Amplio” party will start a debate regarding the legalization of gay marriage. AG MAGAZINE (May 26, 2009), <http://www.agmagazine.info/2009/05/26/ahora-uruguay-va-por-el-matrimonio-gay/>.

177. BOL. CONST., art. 14. (“The State prohibits and punishes any kind of discrimination, whether it is based on sex, race, age, sexual orientation, sexual identity” (translation by author)).

178. BOL. CONST., art. 13 (noting that international treaties and conventions ratified by the Asamblea Legislativa Plurinacional recognizing the human rights and prohibiting their limitation in the State are supreme in the internal hierarchy of the law).

179. See Sánchez, *supra* note 161.

constitution repealed discrimination based upon sexual orientation.¹⁸⁰ The court applied a test akin to the American rational basis test, but declared that the law did not have sufficient reasons to discriminate between homosexual and heterosexual couples:

It was for the Constitutional Court to decide whether the challenged provisions, which establish rights and duties in several matters, violated the principle of equality by treating differently heterosexual and homosexual couples.¹⁸¹

Mexico, although not part of South America, appears to be following a similar trajectory as South America. Although Mexico is geographically part of North America and a neighbor of the United States, its history has been more one of opposition to United States' political influence than of cooption by conservative elements supported by the United States as in much of Central America.¹⁸² As of February 2010, same-sex marriages are now legal in Mexico, but only when contracted within the territory of Mexico City.¹⁸³ The effect of international law was evident in the legislative history of the law¹⁸⁴ as was the effect of Spanish legislation.¹⁸⁵

180. See Corte Constitucional [C.C.][Constitutional Court], Enero 28, 2009, Sentencia C-029/09, Gaceta de la Corte Constitucional [G.C.C.](Colom.).

181. The original text provided as following: "Le correspondió a la Corte Constitucional resolver, si las disposiciones legales acusadas, las cuales establecen beneficios y cargas en diversas materias, vulneran el principio de igualdad de trato entre las parejas heterosexuales y las conformadas por personas del mismo sexo." *Id.*

182. *But see* Sánchez, *supra* note 161 ("Far from the domino effect in the south and with an eye to the contradictions in the U.S., Mexico is growing in fits and starts. On one hand, the same sex marriage is recognized, although only in Mexico City, and the Constitutional Tribunal had declared that adoptions are not unconstitutional. On the other hand, the Social Security had stated that it would not consider same sex couples as deserving benefits." (translation by author)).

183. See Gaceta Oficial del Distrito Federal [Official Gazette for the Federal District], Dec. 29, 2009, 525–26 (Mex.).

184. See Comisiones Unidas de Administración y Procuración de Justicia, de Derechos Humanos y de Equidad y Género, Asamblea Legislativa del Distrito Federal, Dec. 16, 2009, Legislatura (Mex.). Passing the law recognizing same-sex marriages, the Legislative Assembly of the Federal District thoroughly discussed the rationales behind the legislation. Here there are some excerpts from the proposed bill that make clear the relevance of the international law to the issue:

International human rights legislation imposes an absolute prohibition from any discrimination affecting the full enjoyment of all human, civil, cultural, economic, political and social rights; it acknowledges that the respect of the sexual rights, the sexual orientation and the sexual identity is essential to achieve equality between men and women, and that the States shall adopt all proper means to eliminate the prejudices and usages grounded on the idea of inferiority or superiority of any role or stereotype.

The draft went on by citing other treaties and instruments of International law, and listing the states that recognized same-sex marriage laws:

The present initiative is consistent with a substantial number of international treaties and instruments that Mexico had recognized. Those are, the Human Rights Universal Declaration,

E. Geopolitical Perspectives, Location, and the Effects of United States Hegemony

The proximity of the United States to the regions of the Caribbean and Central America has had a mixed effect on the realization of LGBTI rights. On the one hand, the proximity and influence of the United States—with its history of relatively limited LGBTI rights, particularly in the South—arguably has served to diminish the progress of LGBTI rights in both Central America and the Caribbean, particularly to the extent it serves as an alternative legal model to the more progressive European model. In contrast to the negative influence of the United States on LGBTI rights in the Caribbean and Central America, the European model of rights recognition has been enormously helpful in the development of LGBTI rights for South American elites.

On the other hand, a marginally greater tolerance for LGBTI individuals exists in the Bahamas than in many of the other islands of the Caribbean. This is arguably because of the intense commercial and personal ties between the Bahamas and the United States.¹⁸⁶ Although the United States has historically been less receptive to LGBTI rights than Europe, the Bahamian population's exposure to the relatively open LGBTI

the Declaration of the Rights and Duties of Men and Women, the Convention about consent in marriages of 1962, the American Convention on Human Rights and more recently, the Resolution of the Organization of the American Nations on June 4, 2009 and the Declaration on sexual orientation and sexual identity on December 19, 2008.

Just to give some examples, the Netherlands permitted same sex marriages since April 1, 2001; Belgium recognizes same sex marriages since January 30, 2003. Spain legalized same sex marriages at a national level in 2005, and a lot of Spanish Communities recognized civil unions. Norway approved same sex marriages on July, 2008 with a law that became effective in 2009; Sweden followed in late 2008 by using a neutral language that makes no reference of sex in marriage related laws. On the other hand, South Africa declared unconstitutional and discriminatory the fact that the law did not allow same sex marriages. ON December, 2005, the Constitutional Tribunal gave the Government a 12 months deadline to modify the legislation to the extent that would permit same sex couples to get married. In the United States, four states had legalized gay marriages: Massachussets, Connecticut, Iowa and Vermont. Canada follows the same direction since 2005.

Id. (translations by author).

185. *México DF Promulgó el Matrimonio Gay Lésbico*, AG MAGAZINE (Dec. 29, 2009), <http://www.agmagazine.info/2009/12/29/mexico-df-promulgo-el-matrimonio-gay-lesbico/> (last visited Mar. 23, 2011). (“It is Zapatero’s fault.’ The president of Mexican catholic lawyers blamed the President of Spain for the approval of the same-sex marriage legislation in Mexico City, as guilty of an ‘ideological intromission’ and the ‘imposition of the socialist agenda regarding abortion and same-sex marriages.’” (translation by author)).

186. See Bureau of Western Hemisphere Affairs, U.S. Department of State, *Background Notes: The Bahamas*, <http://www.state.gov/t/pa/ei/bgn/1857.htm> (last visited Mar. 23, 2011) (“The United States historically has had close economic and commercial relations with The Bahamas. The countries share ethnic and cultural ties, especially in education, and The Bahamas is home to approximately 30,000 American residents. In addition, there are about 110 U.S.-related businesses in The Bahamas and, in 2008, 85% of the 4.6 million tourists visiting the country were American.”).

communities of southern Florida and other United States metropolises arguably has had an ameliorative effect on the otherwise hostile attitudes of the population to LGBTI rights.

The effect of United States hegemony in Central America, in contrast, has been decidedly negative with respect to human rights, particularly in El Salvador, Honduras, and Guatemala. Historically, United States hegemony has frequently resulted in the overthrow of Central American political leaders and their replacement by dictators friendly to the United States.¹⁸⁷ These dictators were normally very conservative on most social issues, as right-wing dictators tend to be. This process has led to enormous economic and political polarization in many Central American societies, with dire consequences for LGBTI communities in those countries.¹⁸⁸ The dire results for LGBT people are caused by at least three factors.

First, human rights abuses against sexual minorities occur in a context of relatively recent civil wars, conflict, or prolonged oligarchic dictatorships that deeply polarized Central American societies on both a social and political level. Thus, any challenge to the social order would be perceived as a political threat as well. Because LGBTI individuals in those countries challenge deeply felt assumptions held by many people about the proper gender roles of men and women, sexual minorities have frequently been considered a threat to the stability of those societies. As such, LGBTI identity, which in most Latin American countries would normally be considered a largely social transgression, takes on a political dimension, vastly augmenting the danger of violent persecution beyond the kinds of anti-gay violence otherwise documented in Latin America.¹⁸⁹

187. See generally STAFF OF H. COMM. ON FOREIGN AFFAIRS, 82D CONG., BACKGROUND INFORMATION ON THE USE OF UNITED STATES ARMED FORCES IN FOREIGN COUNTRIES (Comm. Print 1951); WILLIAM BLUM, KILLING HOPE: U.S. MILITARY AND CIA INTERVENTIONS SINCE WORLD WAR II (1995).

188. Of course, the United States has also participated in the overthrow of democratically elected regimes in South America, but United States involvement was somewhat more indirect, the dictatorships were of shorter duration, and the dictatorships did not create socioeconomically polarized societies to the same extent as in Central America, where the purpose of the United States intervention was essentially to preserve a plantation economy.

189. See, e.g., U.S. DEP'T OF STATE, 2006 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES: EL SALVADOR (2007), available at <http://www.state.gov/g/drl/rls/hrrpt/2006/78891.htm> (last visited Mar. 23, 2011) ("[T]here were reports of violence and discrimination by public and private actors against persons with HIV/AIDS, and against homosexual, lesbian, and transgender persons, including denial of legal registration for a homosexual rights advocacy group"); James Wilets, *Conceptualizing Private Violence against Sexual Minorities as Gendered Violence: an International and Comparative Law Perspective*, 60 ALB. L. REV. 989 (1997); James Wilets, *International Human Rights Law and Sexual Orientation*, 18 HASTINGS INT'L & COMP. L. REV. 1 (1994). With respect to Honduras, see Immigration and Refugee Board of Canada, *Honduras: Update to HND25191.E of 6 January 1997 on the Treatment of Gays and Lesbians and the Availability of State Protection (1997-September 2004)*, available at

Second, as a result of these social upheavals and political polarization, rule of law has become severely compromised.¹⁹⁰ The social conflicts and their resultant polarization mean that law and security became subordinate to political concerns and the goal of subordinating non-conforming sections of society. Without rule of law, societal groups that are subject to persecution have little or no recourse to the state for protection, particularly when state actors share the same prejudices as the society at large.

Third, the breakdown of rule of law has greater implications for sexual minorities than simply making them more vulnerable to anti-gay violence. For example, many gay and heterosexual Salvadorans, Hondurans, and Guatemalans experience a real threat from physical violence at the hands of organized gangs for various motives.¹⁹¹ For gay individuals, however, the risk is exponentially greater since perpetrators of that violence understand that sexual minorities can be physically assaulted and even killed largely without facing state prosecution. The widespread social acceptance of anti-gay discrimination and anti-gay violence that is particularly prevalent in organized gangs aggravates this already deadly situation.¹⁹² From a

<http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=country&docid=42df60f23&skip=0&category=COI&publisher=IRBC&coi=HND&rid=4562d94e2&querysi=homosexual&searchin=fulltext&display=10&sort=date> (last visited Mar. 23, 2011); *see also* U.S. DEP'T OF STATE, 2008 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES: HONDURAS (2009), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119164.htm> (last visited Mar. 23, 2011) (documenting “multiple killings or attacks on persons presumably because of their sexual orientation...[a] sexual diversity rights organization... asserted that between January and March, unknown actors killed seven homosexuals because of their sexuality and that a number of gay persons had fled the country out of fear of social and security-force persecution”).

190. “Rule of law” is usually defined as the existence and implementation of law independent of corruption, political partisanship or irrelevant biases.

191. *See, e.g.*, U.S. DEP'T OF STATE, 2008 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: EL SALVADOR (2009), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119159.htm> (last visited Mar. 23, 2011). Although the government generally respected the rights of its citizens, protection of human rights was undermined by widespread violent crime, including gang-related violence . . .); U.S. DEP'T OF STATE, 2008 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: GUATEMALA (2009), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119161.htm> (last visited Mar. 23, 2011) (“Societal violence was rampant. Nonstate actors, with links to organized crime, narcotics trafficking, gangs, private security companies, and alleged ‘clandestine’ or ‘social cleansing’ groups, committed hundreds of killings during the year.”); U.S. DEP'T OF STATE, 2008 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: HONDURAS (2009), *available at* <http://www.state.gov/g/drl/rls/hrrpt/2008/wha/119164.htm> (last visited Mar. 23, 2011) (“The NGO Washington Office on Latin America estimated that gangs were responsible for 15 percent of violent crime in the country.”).

192. Documentation by the U.S. government and other human rights organizations demonstrates the record of anti-gay persecution by state actors, and the very close nexus between “vigilante” groups that target gays and lesbians and members of the police force. As just one example, the traditionally very circumspect and cautious U.S. Department of State Report of 2007 documents that “[t]here were reports of violence and discrimination by public and private actors against persons with HIV/AIDS, and against homosexual, lesbian, and transgender persons, including denial of legal registration for a

practical perspective, it is not difficult to appreciate that a person who can be robbed, assaulted, or killed with impunity is much more likely to be a victim of such crimes than a citizen who has recourse to state security forces to protect her or him.

The United States has essentially operated as a processing center for gang members as Hondurans and Salvadorans come to the United States, join gangs, and return to their former countries to join or form their own gangs.¹⁹³ Many of those returning gang expatriates are even primarily English speaking. In this sense, the United States has exported at least part of its criminal gang culture to these countries of Central America.

F. The Case of Brazil: A Metaphor for Latin America?

Brazil, which represents almost half the population of South America and is relatively geographically distant from the United States, constitutes an important case study for distinguishing much of Latin America from both the English-speaking Caribbean and the United States. Brazil is a particularly interesting case study because it shares many characteristics with United States and the Caribbean while retaining equally important differences. As one of the larger developing countries in the world, and as the largest developing country in the Western Hemisphere, its steps towards recognizing same-sex unions¹⁹⁴ and same-sex couple immigration have important ramifications for the developing world in general, and Latin America in particular.

First, like the United States, Brazil experienced a long history of slavery, even longer than that of the United States, ending only in 1888. Like the United States and unlike the Caribbean, Brazil continued to enslave its African population long after the country's independence in 1822. The case of Brazil would therefore seem to contradict the analysis contained in the rest of this article—that slavery and racism are frequently integral components to systematic and legalized oppression of LGBTI communities. However, as discussed above, the system of slavery in Brazil, although longer and no less brutal than that of the United States, was not

homosexual rights advocacy group.” U.S. DEP’T OF STATE, 2007 COUNTRY REPORT ON HUMAN RIGHTS PRACTICES: EL SALVADOR (2008), available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100639.htm>.

193. See, e.g., Clare M. Ribando, *Gangs in Central America*, CRS REPORT FOR CONGRESS, Jan 3, 2011 available at <http://www.fas.org/sgp/crs/row/RL34112.pdf>; FREEDOM HOUSE, *Countries AT THE CROSSROADS 2007 – HONDURAS* (2007), available at <http://www.freedomhouse.org/modules/publications/ccr/modPrintVersion.cfm?ccrcountry=157&ccrpage=37&edition=8>.

194. *Brazilian Go-Ahead for Gay Unions*, BBC NEWS (Mar. 5, 2004), available at <http://news.bbc.co.uk/2/hi/americas/3534959.stm>.

accompanied by a theology of racism like the United States.¹⁹⁵ The United States theology of racism was buttressed by the lack of a pre-existing legal framework with which to legally conceptualize slavery and slaves.¹⁹⁶ Although this background helps to explain why Brazil might be more progressive than the United States with respect to hierarchical views towards LGBTI citizens, it does not alone provide an adequate basis for distinguishing Brazil, and Latin America generally, from the Caribbean, except that Brazil has not experienced the emasculating effects of colonialism and its attendant racism as recently as the Caribbean.

Second, Brazil is only now developing a body politic that is well-educated and increasingly middle class, a phenomenon that arguably can serve to moderate intolerance and anti-LGBTI legislation and rhetoric.¹⁹⁷ Argentina and Uruguay, which do have much more substantial middle classes, have gone farther than Brazil in guaranteeing LGBTI rights, with Uruguay granting civil unions to gay couples.¹⁹⁸ Moreover, to the extent Brazilian elite identifies with Europe more than the elites in the Caribbean do, Brazil has tended to follow the more progressive paths of some of the other South American nations.

Third, Brazil, like other Latin-American countries, has an increasing number of fundamentalist Christian churches, although Roman Catholicism continues to remain the dominant religion.¹⁹⁹ Nevertheless, the population of fundamentalist Protestants in Brazil is vastly lower than the population of fundamentalist Protestants in the English-speaking Caribbean, providing a critical difference that can help explain Brazil's, and Latin America's, differences from the Caribbean. Fourth, Brazil inherited Portugal's relatively tolerant approach to homosexuality and generally less austere view of sexuality in general.²⁰⁰

195. See BROWN REPORT, *supra* note 118, at 8.

196. See *supra* Part IV for a discussion indicating lack of legal framework for slavery in the United States as opposed to Portuguese and Spanish colonies.

197. See Drucker, *supra* note 64, at 2–3.

198. *Uruguay Approves Gay Civil Unions*, BBC NEWS, Dec. 19, 2007, available at <http://news.bbc.co.uk/2/hi/americas/7151669.stm>.

199. See Monte Reel, *In Brazil, Pope to Face a Church Losing Hold*, WASH. POST, May 9, 2007, at A1. For example, in June 2006 more than three million evangelicals marched in Sao Paulo, the largest city in Brazil. Alan Clendenning, *'March for Jesus' Draws 3 Million Evangelicals in Brazil*, CHRISTIAN POST (June 16, 2006), <http://www.christianpost.com/news/march-for-jesus-draws-over-1-million-evangelicals-in-brazil-27858/>.

200. See John Ross, *Gay and Lesbian Spain and Portugal*, <http://spainforvisitors.com/sections/gayandlesbian.htm> (last visited May 30, 2011). Cf. GLBTQ, Social Sciences, Portugal, <http://www.glbtq.com/social-sciences/portugal.html> (“Compared to other countries Portugal was considered relatively lenient in its treatment of people denounced for sodomy.”). *But see id.* at 2 (“It

Brazil and much of Latin America thus possess many of the socioeconomic characteristics of the Caribbean, but the differences are critical enough to make a substantial divergence in the two regions' approaches to LGBTI rights.

G. Looking to the Future: Continued Divergence or Convergence?

Although as a generalization the divergence between Latin America and the English-speaking Caribbean is real, this reality does not mean that the prognosis for progress in LGBTI rights in the Caribbean is entirely bleak. Although the relative differences in progress between Latin America and the Caribbean are likely to remain for the near future, some progress in accepting LGBTI individuals there arguably has been some progress in at least the elites in some English-speaking Caribbean countries. What is notably lacking in the English-speaking Caribbean is any significant progress in the realization of *legal* rights for LGBTI individuals. The Caribbean press has discussed LGBTI rights, although such discussion has frequently been highly controversial and predominantly negative. As other countries have experienced, however, the old cliché that “it’s better to be spoken about negatively than not at all” may be applicable. Usually the first step to recognizing LGBTI rights is simply recognizing that LGBTI individuals exist. This discussion is well under way in the Caribbean, even if it frequently occurs in the form of anti-LGBTI discussions, and it has engendered some discourse in defense of LGBTI rights.

The progress in Latin America is largely due to the same trends affecting much of the rest of the world. That the English-speaking Caribbean is less receptive to such trends does not mean that such trends have had no impact on the Caribbean at all. Indeed, the political elites themselves are subject to some of the same transnational, legal, and cultural influences contributing to greater LGBTI tolerance in other countries, even if they are being met with greater resistance among the general populace. History has demonstrated that the first steps toward legal recognition of LGBTI equality result from a complicated dialectic between elite norm creation and popular sentiment. This Article has explored the varied reasons why the obstacles to that successful dialectic in the English-speaking Caribbean are greater, but its beginnings can be found in public discussions in the political and academic elites. History has also shown that once the dialectic has begun its effect in ultimately realizing fundamental human rights for LGBTI individuals is inexorable.

was not until the 1990s, however, that the glbtq rights movement really gained momentum in Portugal.”).

V. APPLYING THE LESSONS OF THE COUNTRY CASE STUDIES TO THE REST OF THE WORLD

It may seem presumptuous to attempt to extrapolate the experiences of the countries discussed in this Article to the rest of the world. Nevertheless, the impacts of race, racism, religion, and colonialism that contributed strongly to attitudes towards LGBT individuals in the countries discussed in this article appear to have had similar impacts on many other areas of the world as well.

A. Africa

It is impossible to speak of Africa in monolithic terms since this vast continent exhibits a vast cultural and sociological diversity. Indeed, continents are geological constructs rather than true geopolitical constructs. What the countries of the continent do share, with the notable exception of South Africa,²⁰¹ is an almost universal opposition to recognition of any kinds of gay rights. Nevertheless, Africa does provide a microcosm of developments that have occurred in the recent past in regions discussed elsewhere in this Article.

First, the universal legal condemnation of homosexuality and criminalization of same-sex relations throughout Muslim North Africa, the Maghreb, and the Sahel reflect the effects of Islamic doctrine and the Muslim conquest of the region centuries earlier. This opposition to gay rights in the Maghreb and the Sahel can be attributed to a long Islamic tradition shared by most Middle Eastern countries. Nevertheless, the complexities of Islam and Islamic countries' attitudes towards homosexuality are enormous and are difficult to simply dismiss as products of Islam. After all, Christianity and Judaism have shared the scriptural denunciations of homosexuality, but that religious view has not necessarily been reflected in the societies in which those countries are dominant. With respect to societal attitudes, the Maghreb bears more similarity to the rest of the Middle East than to the rest of Africa.

The situation in Northern Africa should thus be distinguished from that in sub-Saharan Africa. Much of sub-Saharan Africa, to varying degrees, exhibits many of the socio-political tendencies that have been observed with respect to the English-speaking Caribbean. As in the Caribbean, the countries of sub-Saharan Africa endured centuries of colonialism by white European colonizers, and that complex relationship has informed much of the discourse about same-sex relations in the region.

201. See Amnesty International, *supra* note 52.

First, the history of racialized colonialism has had residual effects in Africa similar to those experienced by victims of similar subjugation in the Western Hemisphere. This history of racialized colonialism has, to some extent, led to a pronounced resistance to perceived imposition of “European” norms as simply another form of colonialism. Second, the most pernicious laws against homosexuality in Africa are disproportionately found in former English colonies, similar to the phenomenon in the Caribbean and Central America, where Belize notably stands out for its legalized anti-gay positions, in contrast to its former Spanish colonial neighbors. Third, the effect of particularly anti-gay sects of Christianity has had a tremendous influence in sub-Saharan Africa, much like what has occurred in the Caribbean. Some of this effect is due to the efforts of fundamentalist evangelical U.S. religions; these religions share a strong anti-gay theological basis and a strong commitment to expanding their base of believers, spreading their message in a region seen, incorrectly, as a religious vacuum.²⁰² The debate in Uganda over criminalizing or even discussing homosexuality is just one example of this phenomenon.²⁰³

Nevertheless, the relationship between religion, race, and colonialism complicates the analysis considerably. Much as we observed in the English-speaking Caribbean, determining which aspects of a pronounced anti-LGBT culture can be attributed to the residual effects of colonialism alone, religion alone, or the residual effects of colonialism on religion.

As is very well documented, this evangelical influence has contributed to a growing hostility to LGBTI individuals, even as much of the world has seen a decrease in such hostility.²⁰⁴ In Uganda, for example, a proposed bill would vastly increase the penalties for homosexuality, including death for

202. Sudarsan Raghavan, *Africa's Gays Facing More Persecution; Attacks on Rise Across Continent*, B.GLOBE (Dec. 25, 2010), http://articles.boston.com/2010-12-25/news/29300905_1_gay-couple-homosexual-acts-gays-and-lesbians. (“Persecution of gays is intensifying across Africa, fueled by fundamentalist preachers, intolerant governments, and homophobic politicians. Gay people have been denied access to health care, detained, tortured, and even killed, human rights activists and witnesses say”). *The Religious Right in East Africa: Slain by the Spirit, the Rise of Christian Fundamentalism in the Horn of Africa*, THE ECONOMIST (Jul. 1, 2010), available at <http://www.economist.com/node/16488830> (last visited May 10, 2011).

203. See Raghavan, *supra* note 202. (“In recent years, conservative American evangelical churches have had a profound influence on society in Uganda and other African nations. They send missions and help fund local churches that share their brand of Christianity. Sermons and seminars by American evangelist preachers are staples on local television and radio networks across the continent”). See also National Public Radio (NPR), Show: Fresh Air, *Finding the Roots of Anti-Gay Sentiment in Uganda*, NPR (Aug. 25, 2010 12:00 PM EST).

204. Raghavan, *supra* note 202.

some acts, and garnered little vocal opposition from American evangelicals,²⁰⁵ at least initially.

But this connection is not limited to Uganda. Nigeria, for example, provides an almost perfect illustration of the nocent consequences of both Islamic and Christian fundamentalism on LGBTI rights.²⁰⁶ Northern Nigeria, a predominantly Islamic region of the country,²⁰⁷ follows many of the Sharia-based precepts against LGBTI people shared by its Islamic Maghreb neighbors to the north.²⁰⁸ Anglicans in Southern Nigeria—which is predominately Christian—broke with North American and European Anglicans/Episcopalians over the Episcopal Church’s tolerance of LGBT clerics.²⁰⁹

Like in Nigeria and Uganda, a similar phenomenon exists in Zimbabwe, also a former British colony, as President Mugabe attempts to

205. Barbara Bradley Hagerty, NPR, U.S. Exports Cultural War to Uganda (Jan. 15, 2010), available at <http://www.npr.org/templates/story/story.php?storyId=122572951> (last visited May 10, 2011).

206. See Human Rights Watch, *Nigeria: Anti-Gay Bill Threatens Democratic Reforms* (Feb. 28, 2007) available at <http://www.hrw.org/en/news/2007/02/27/nigeria-anti-gay-bill-threatens-democratic-reform> (last visited Mar. 21, 2011) (“A sweepingly homophobic bill being fast-tracked through Nigeria’s National Assembly threatens human rights and Nigeria’s democratic progress, Human Rights Watch said today in a letter to lawmakers. Human Rights Watch called on legislators to reject the bill, which would imprison anyone who speaks out or forms a group supporting lesbian and gay people’s rights, and would silence virtually any public discussion or visibility around lesbian and gay lives.”).

207. Nigeria is approximately 50% Muslim, 40% Christian and 10% of indigenous faiths. CIA, *The World Factbook -Nigeria*, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html> (last visited March 23, 2011).

208. Karin Brulliard, *In Nigeria, Sharia Fails to Deliver*, WASH. POST (Aug. 12, 2009), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/08/11/AR2009081103257.html> (“As military rule ended in Nigeria a decade ago, an Islamic legal system was swept into place on a wave of popular support in the country’s desperately poor and mostly Muslim northern states.”).

209. See, e.g., Lydia Polgreen & Laurie Goodstein, *At Axis of Episcopal Split, an Anti-Gay Nigerian*, N.Y. TIMES (Dec. 25, 2006), available at http://www.nytimes.com/2006/12/25/world/africa/25episcopal.html?_r=2 (“Archbishop Akinola, the conservative leader of Nigeria’s Anglican Church . . . has emerged at the center of a schism over homosexuality in the global Anglican Community. . . . Archbishop Akinola, a man whose international reputation has largely been built on his tough stance against homosexuality, has become the spiritual head of 21 conservative churches in the United States. They opted to leave the Episcopal Church over its decision to consecrate an openly gay bishop and allow churches to bless same-sex unions. Among the eight Virginia churches to announce they had joined the archbishop’s fold last week are The Falls Church and Truro Church, two large, historic and wealthy parishes.”).

See also Bruce Wilson, *Warren-Endorsed Nigerian Archbishop Backed Anti-Gay Laws Worse Than Pre-WWII Third Reich’s*, HUFFINGTON POST (Dec. 24, 2008), http://www.huffingtonpost.com/bruce-wilson/warren-endorsed-nigerian_b_153412.htm (“... a number of political bloggers have noted Rick Warren’s support for the virulently anti-gay Archbishop of Nigeria, Peter Akinola...Warren publicly lionized...Akinola three months after the Archbishop had endorsed legislation more draconian than comparable anti-gay statutes passed prior to World War Two under the Third Reich. . . .”).

equate tolerance of homosexuality with Western religious norms. In one of a string of anti-gay tirades, President Mugabe stated that

[t]oday, the Anglican Church condones marriages between men and the same for women. The Archbishop of Canterbury is blessing such marriages—that is similar to dog behavior At some point, I realised that I was reprimanding blameless dogs and pigs, which are aware that marriage is for procreation.

We say no to gays! We will not listen to those advocating the inclusion of their rights in the constitution.²¹⁰

Nonetheless, as is the case of the English-speaking Caribbean, there is some hope in the otherwise generally bleak situation in much of sub-Saharan Africa. Nigeria, after delivering a blistering, largely religious-based attack against homosexuality at the UN Human Rights Council on March 22, 2011, nevertheless endorsed the position that “laws that criminalize sexual orientation should be expunged.”²¹¹ While this seems like scant consolation for those supportive of LGBT rights, it does reflect the slow, piecemeal acceptance by even otherwise anti-LGBT members of the international community that basic human rights norms are applicable to LGBT individuals.

Moreover, not every country in Africa shares the same anti-LGBT policies. South Africa was one of the first countries in the world to recognize same-sex marriages, and it was the first country in the world to prohibit discrimination based on sexual orientation in its constitution.²¹² South Africa accomplished this through successive judicial rulings, progressively expanding upon the rights of equal protection and non-discrimination explicitly granted to its LGBT citizens in its Constitution.²¹³

210. *Zimbabwe President Mugabe Pours Fuel on Debate Over Homosexual Rights*, VOICE OF AMERICA NEWS (July 19, 2010), available at <http://www.voanews.com/zimbabwe/news/Gay-Advocates-Protest-Mugabe-Comments-98773104.html>.

211. Human Rights Council, Sixteenth Session at the Palais des Nations in Geneva, Switzerland, 28 February January - 25 March 2011 (Mar. 25, 2011), available at <http://www.un.org/webcast/unhrc/>.

212. See Amnesty International, *supra* note 52.

213. Well before the grant of full marriage, on December 2, 1999, the South African Constitutional Court ruled that section 25(5) of the Aliens Control Act 96 of 1991, which did not permit immigration of same-sex partners, was unconstitutional. *Nat'l Coal. for Gay & Lesbian Equal. & Others v Minister of Home Affairs & Others*, 1999 (3) BCLR 280 (C), 1999 SACLR LEXIS 13, at *38 (S. Afr.). See also *id.* The court found that section 25(5) reinforced harmful stereotypes of gays and lesbians relating to the rights of equality and dignity to this case. In a later case, the Court further stated that it was an invasion of gays' and lesbians' dignity to convey the message that gays and lesbians lack the inherent humanity to have their family lives in same-sex relationships respected or protected. *Minister of Home Affairs & Another v Fourie & Others*, 2006 (3) BCLR 355 (CC), 2005 SACLR LEXIS 34, at *158 (S. Afr.).

The national struggle against the apartheid regime has imbued its leaders with a strong commitment to non-discrimination and equal protection under the law. The leaders have done so even though a majority of the South African population is not supportive of LGBT rights.²¹⁴

Finally, some sub-Saharan countries—including the Central African Republic, Rwanda, Sierra Leone, and South Africa—have signed a joint Human Rights Council resolution calling on countries to end violence, criminal sanctions, and related human rights violations based on sexual orientation and gender identity.²¹⁵ Although only a minority of sub-Saharan countries endorsed the resolution, it is a far cry from the time when no nations would address LGBT issues in an international forum such as the UN.

B. Asia

As with Africa, it is difficult to make broad generalizations about such an enormous and diverse continent as Asia. However, many of the same patterns witnessed in the other countries discussed in this Article are also present in Asia. Before the advent of the monotheistic faiths promulgated by colonialism and conquest, there was considerable acceptance of homosexuality throughout Asia. China, a country without a strong Christian, Muslim, or Jewish history, experienced societal acceptance of homosexuality in the past.²¹⁶ This acceptance changed markedly under Communist rule, when the government began to perceive homosexuality as a degenerate product of “bourgeois capitalism.”²¹⁷ Nevertheless, with the decline of rigid Communist ideology and with little fundamentalist religious ideology to replace it, China’s policies, though not supportive of homosexuality, have become markedly less anti-gay. Homosexuality, for example, is not criminalized in the Chinese penal code.

In India, currently the second most populous country in Asia, homosexuality was originally criminalized by the British. Only recently was the colonial era law criminalizing sodomy repealed.²¹⁸ Again we see the pattern of homophobic laws imposed through conquest or

214. See Robinson, *supra* note 112.

215. Human Rights Council, Sixteenth Session at the Palais des Nations in Geneva, Switzerland, 28 February January - 25 March 2011.

216. See *supra* notes 16-17 and accompanying text.

217. See Mageswary Ramakrishnan, *Homosexuality is a Crime Worse Than Murder*, TIMEASIA (Sept. 26, 2000 12:40 PM), available at <http://cgi.cnn.com/ASIANOW/time/features/interviews/2000/09/26/int.malay.gay2.html>.

218. *Naz Foundation v. Gov’t of NCT of Delhi* (2009), WP(C) No. 7455/2001 (Delhi H.C.) par. 132.

colonialism, particularly in former British colonies, by the essentially Western ideologies of Communism, Christianity and Islam.

Islamic countries in Asia are not only generally anti-LGBT, but several countries such as Saudi Arabia and Iran even impose the death penalty for homosexual acts. In Japan, although homosexuality was historically accepted to some extent,²¹⁹ U.S. forces' occupation of Japan following World War II contributed to a strong societal bias against homosexuality. Nevertheless, Japan and other Asian countries not strongly affected by Western religious fundamentalism or colonialism are, to varying degrees, following in the footsteps of the international community at large in recognizing the fundamental human rights of sexual minorities.

CONCLUSION

This Article has demonstrated a correlation among discriminatory attitudes with respect to race, sex, and sexual orientation. Indeed, the divergences among state approaches to LGBTI rights discussed in this article largely track divergences among state approaches to racial and gender discrimination as well.

There also seems to be a correlation between the legal approach towards LGBTI rights of independent, former colonies and the approach in their respective former colonizing countries. Nevertheless, the divergences between the former colonies and their former colonizers and the rest of the industrialized world can also be expected to diminish as the impact of colonialism itself recedes. India is the most recent and dramatic indication that colonial anti-LGBTI laws themselves are gradually being eliminated.

Thus, convergence in state approaches on race and gender discrimination in a post-colonial and post-apartheid era should be reflected in substantial gains in LGBTI rights as well. To a large extent this has happened, with a growing convergence in state policies towards LGBTI rights in South America, Europe, Oceania, and North America.

219. See, e.g., Gary Leupp, *MALE COLORS: THE CONSTRUCTION OF HOMOSEXUALITY IN TOKUGAWA JAPAN* 52 (1995) ("The list of shoguns, hegemon, and principal daimyo thought to have been sexually involved with boys reads like a Who's Who of military and political history ..."). See also Suzanne M. Sable, *Pride, Prejudice and Japan's Unified State*, 11 *UDC/DCSL L. REV.* 71,71 (2008) ("During the Tokugawa period, male homosexuality was celebrated. Historical records of male homosexuality, referred to as nanshoku, appeared in the late tenth century; however, accounts date back as far as the sixth century. Nanshoku was thought of as a tendency or sexual desire that men could not resist. It was extremely common during the Tokugawa period and was 'formally organized in such institutions as samurai mansions, Buddhist monasteries, and male brothels linked to the kabuki theater.' Principles of Japanese Shintoism also perpetuated nanshoku--its doctrine dealt with proprietary rights and ceremonies, whereas sex was believed to be a "natural phenomenon to be enjoyed with few inhibitions." (internal citations omitted)).

Even the markedly divergent approaches towards LGBTI issues between the United States and many of the world's industrialized democracies appear to be diminishing to some extent. However, it remains an open question whether the resistance to LGBTI rights of those U.S. states that institutionalized slavery and apartheid will continue to be sufficient to deny LGBTI rights on a national level.

There continues to be a divergence in the legal approach to same-sex relationships among those states that were once British colonies and, to a lesser extent, colonies of other European powers. As noted previously, India has only recently rid itself of its colonial-era laws criminalizing homosexuality, but many former colonies in Asia, Africa and the Caribbean continue to maintain and enforce such laws. This pattern is particularly pronounced in the English-speaking Caribbean and the former British colonies of Africa. This divergence is a product of numerous factors, including the lingering effects of race-based colonialism and the efforts of fundamentalist religious groups in the United States, particularly in states with racist histories, to spread their anti-feminist and anti-gay ideologies.

Nevertheless, the debate in the international community itself suggests that the momentum is on the side of convergence. As UN Secretary General Ban Ki Moon stated in January of 2011, "I understand that sexual orientation and gender identity raise sensitive cultural issues. But cultural practice can not justify any violation of human rights. . . . When our fellow humans are persecuted because of their sexual orientation or gender identity, we must speak out. . . . Human rights are human rights everywhere, for everyone."²²⁰ And as the High Commissioner stated to the Council during the same session, "[w]e are not trying to create new or special rights. We are simply trying to address the challenges that prevent millions of people from enjoying the same human rights as their fellow human beings just because they happen to be lesbian, gay, bisexual or transgender."²²¹

220. Remarks by UN Secretary General Ban Ki-moon to the UN Human Rights Council (Jan. 25, 2011), *available at* <http://www.arc-international.net/global-advocacy/generalassembly/un-sg-statement-to-hrc-on-sogi-issues-.htm>.

221. Interactive Dialogue with the UN High Commissioner for Human Rights, Navi Pillay, Item 3, 16th session of the HRC.