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CIVIL MARRIAGE AND GAY UNION LAW IN THE AMERICAS

Kimberly Gonzalez

I. INTRODUCTION

CALIFORNIA voters, widely viewed as liberal, surprised the rest of the country by approving an amendment to the California Constitution, which declared that “[o]nly marriage between a man and a woman is valid or recognized in California.”¹ Many people speculated that a religious campaign drove that outcome. The amendment was especially surprising coming after a California Supreme Court ruling that the state constitution guaranteed the right to marriage regardless of sexual orientation.² While the popular consensus is that California voters and courts are liberal, the same conventional wisdom casts Latin Americans as socially conservative voters, especially because Catholicism and *machismo* play important roles in their culture. Yet five Latin American countries permit gay marriage, civil unions, or grant rights to gay couples in at least one city, while these couples cannot marry in California.³

This paper argues that political systems and views of civil rights are more likely to influence gay marriage and civil union laws than Catholicism or culture. The discussion will start with the current state of the law in several Latin American countries. This legal review begins with Uruguay, the country most supportive of gay couples and will end with a discussion of Chile, the Latin American country most hostile to these couples. Next, the state of the law in Canada, the United States, and international law will be discussed. Analysis of public opinion and the enforcement of laws are interwoven throughout this discussion because the law has little meaning if it is not enforced. After the review on the

1. CAL. CONST. art. I, § 7.5.

2. *In re Marriage Cases*, 183 P.3d 384, 433-34 (Cal. 2008).

3. The entire country or parts of the country of Uruguay, Mexico, Argentina, Brazil, and Colombia all provide gay and lesbian couples with some of the legal benefits enjoyed by married couples. See UNION CONCUBINARIA [C. CIV.] No. 18.246 (Uru.); Taylor Holt, *The Hemisphere's State of Same-Sex Partnership Recognition: Canada Very Much in the Lead*, COUNCIL ON HEMISPHERIC AFFAIRS, July 21, 2008, <http://www.coha.org/2008/07/the-hemisphere%E2%80%99s-state-of-same-sex-partnership-recognition-canada-very-much-in-the-lead/>; Indira A.R. Lakshmanan, *Colombia Court Backs Rights for Gay Couples: Ruling in Case on Inheritance Buys Activists*, BOSTON GLOBE, Feb. 9, 2007, at 10A; Tom Watkins, *Argentina Grants Gay Couples Partner Pensions*, CNN.COM, Aug. 19, 2008, <http://www.cnn.com/2008/WORLD/americas/08/19/argentina.gay/index.html?iref=newssearch>. Existing laws that support gay couples will be discussed further in Section II.

state of the law, Catholicism, *machismo*, and rural versus urban attitudes will be ruled out as drivers of the current law. The paper will then shift to discuss real drivers of this law including historical development of civil rights and national political systems. Finally, this paper will predict which countries will grant national marriage rights for same-sex couples next.

II. RIGHTS EXTENDED TO GAY COUPLES

A. URUGUAY

Uruguay is the first Latin American country to legalize same-sex unions with many of the same legal rights as heterosexual couples⁴ despite a less visible gay population than Brazil, its neighbor to the North/Northeast, or Argentina, its Eastern neighbor. The country passed a bill legalizing gay unions effective January 1, 2008.⁵ The bill requires same sex couples to “maintain a relation affective of sexual nature, of exclusive, singular, stable[,] and permanent character.”⁶ Additionally, the couple must cohabitate for five years without interruption and must “contribute to the expenses of the home according to his [or her] respective economic situation.”⁷ Once an eligible couple registers, they are entitled to rights such as inheritance, pension, and parenting.⁸ The bill also allows for dissolution of the marriage by death, judicial sentence of dissolution without cause, and by declaration of absence.⁹ In 2009, the government passed another gay-friendly law allowing gay couples to adopt.¹⁰ This law passed despite opposition from the Catholic Church and comes behind a decision by the government to allow homosexuals to attend military schools.¹¹

Uruguay's political and economic climate facilitated the current gay-friendly laws. Uruguay never outlawed sodomy, and even though its capital is not among the largest in Latin America, it still ranks number one on the Gay-Friendliness Index of World Cities.¹² Despite this high ranking, as recently as 1999, human rights activists characterized Uruguayan citizens as homophobic.¹³ These activists cite a transcript posted on a website in 2001 by Jorge Battle, a former Uruguayan president, of an

4. Holt, *supra* note 3.

5. C. Civ. No. 18.246 (Uru.).

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. Yanina Olivera, *Uruguay Approves Latin America's First Gay Adoption Law*, AFP, Sept. 9, 2009, http://www.google.com/hostednews/afp/article/ALeqM5gu1QYorSnG_WrGpbQ-ic2fMpxObg.

11. *Uruguay Approves Sex Change Bill*, BBC NEWS, Oct. 13, 2009, <http://news.bbc.co.uk/2/hi/americas/8304123.stm>.

12. Holt, *supra* note 3.

13. Immigration and Refugee Board of Canada, Uruguay: Update to URY32841.E of 14 October 1999 on the Situation and Treatment of Gays, Lesbians, Transvestites and Cross-dressers, Including Whether There is State Protection Available to Them (May 30, 2001), *available at* <http://www.unhcr.org/refworld/topic,4565c22547,45a51a312,3df4bebf18,0.html>.

interview he had with the New York Times where he insisted that “homosexuality was a ‘pathology’ that should be ‘corrected.’”¹⁴ And although sodomy was not prohibited, other laws penalized gays and lesbians.¹⁵ One law outlawed public indecency that could be applied to any public affection between same-sex couples, and another law banned gays and lesbians from donating blood.¹⁶

B. BRAZIL

With the exception of Uruguay, the legal system in Brazil is more supportive of gay couples than other systems in Latin America. Despite this, gays and lesbians are victims of violence and discrimination. The only state to approve civil unions in Brazil is Rio Grande do Sul.¹⁷ Uruguay is to the south of this state, and Argentina is to the west.¹⁸ Although Rio Grande do Sul is a wealthy state, it is not the most populated in Brazil.¹⁹ In 2004, the Supreme Court of Rio Grande do Sul issued an administrative order that same-sex couples be granted the right to the same legal protection granted to heterosexual couples.²⁰ The decision came after a complaint that a university would not pay the sabbatical travel expenses of a lesbian partner when it would pay for the same expenses for married heterosexual partners.²¹ The Court held that if the same-sex couple registered the marriage with a notary public in the state, then the couple was entitled to the legal rights of inheritance, child custody, insurance benefits, and pension.²² The court based its decision on the Brazilian Constitution, which states in part that one of the fundamental objectives of the country is to “promote the well being of all, without prejudice as to origin, race, . . . and any other forms of discrimination.”²³ Under Brazilian law, the state court’s decision can only be overcome by a constitutional amendment.²⁴

Since the decision, courts in the state have continued to support gay civil unions. For example, in 2005, a family judge in the state issued a divorce to a same-sex couple.²⁵ And in March of 2008, the Court of Justice in the state ordered a married American man to split the proceeds

14. *Id.*

15. *Id.*

16. *Id.*

17. Holt, *supra* note 3.

18. *Brazil*, CENTRAL INTELLIGENCE AGENCY, Dec. 18, 2008, <https://www.cia.gov/library/publications/the-world-factbook/geos/br.html>.

19. Gwillim Law, *States of Brazil*, STATOIDS, July 9, 2008, <http://www.statoids.com/ubr.html>.

20. Alan Clendenning, *Gays in Brazilian State Quietly Tie the Knot as Controversy Rages Over Gay Marriages in United States*, A.P., May 28, 2004.

21. *Id.*

22. *See id.*

23. CONSTITUIÇÃO FEDERAL [C.F.] art. 3, available at <http://www.helpline1aw.com/law/brazil/constitution/constitution01.php>.

24. Clendenning, *supra* note 20.

25. Roberto Arriada Lorea, *Sexual Rights in Brazil: Social Movement and Legal Literacy*, SIYANDA.ORG, www.siyanda.org/docs/lorea_socialmovement.doc (last visited Feb. 1, 2009).

from a farm, two apartments, and a house in Brazil with his partner.²⁶ Although civil partnerships are only legal in the state of Rio Grande do Sul, the political and legal systems in Brazil are more supportive of homosexuals than many other countries in Latin America.

Although the Brazilian Constitution only recently outlawed discrimination against homosexuals and lesbians, sodomy has been legal in Brazil since 1831.²⁷ And states other than Rio Grande do Sul have legislation or court precedent supportive of homosexual families, including a 2006 decision by a Sao Paulo court that granted same-sex couples the right to adopt.²⁸ In addition to these cases, Sao Paulo courts are aggressive in combating homophobia in the state. One court went as far as ordering several internet providers to remove postings from their sites that the court viewed as homophobic.²⁹ Additionally, several pieces of pending legislation would expand the rights of gay couples. The Brazilian Congress is reviewing national legislation to grant gay couples the right to marriage³⁰ and another bill would make it a crime, punishable by three to five years in prison, to condemn homosexuality.³¹ Under the law, it would be illegal for Catholic priests to teach that homosexuality is a sin.³²

The legislation in the Brazilian Senate carries the strong support of the current president, Luiz Lula.³³ Additional gay-friendly legislation that Lula introduced includes a "National Day of Fight Against Homophobia."³⁴ Lula created a program "Brazil Without Homophobia" and has termed homophobia perhaps "the most perverse disease impregnated in the human head."³⁵ Other federal support includes a Human Rights Special Office of the Presidency, forty-seven Human Rights Reference Centers that address homophobia, and the first ever National Homosexual Conference.³⁶ Lula is also instrumental in carrying the fight for

26. Adam Lake, *Married American Man Ordered to Pay Gay Lover*, PINKNEWS.CO.UK, Mar. 26, 2008, <http://pinknews.org/news/articles/2005-7223.html>.

27. *Immigration and Refugee Board of Canada*, Brazil: The Situation of Homosexuals; Availability of Support Groups and State Protection (2008), available at <http://www.unhcr.org/refworld/topic,4565c22547,4565c25f56f,492ac7c72d,0.html>.

28. *Brazil President Calls for Action on Same-sex Unions*, 365GAY NEWSCENTER, Sept. 19, 2008, <http://www.365gay.com/news/brazil-president-calls-for-action-on-same-sex-unions>.

29. Matthew Cullinan Hoffman, *Brazilian Government Seeks Identities of "Homophobic" Bloggers: Uses Secret Court Decision, Intimidation to Block Access to Thousands of Sites*, LIFESITENEWS.COM, Apr. 15, 2008, <http://www.lifesitenews.com/ldn/2008/apr/08041508.html>.

30. BRAZIL: THE SITUATION OF HOMOSEXUALS; AVAILABILITY OF SUPPORT GROUPS AND STATE PROTECTION, *supra* note 27.

31. Meg Jalsevac, *Brazilian Priests Could Face Jail-time for Saying that Homosexuality is a Sin*, LIFESITENEWS.COM, Mar. 19, 2007, <http://www.lifesitenews.com/ldn/2007/mar/07031904.html>.

32. *Id.*

33. BRAZIL: THE SITUATION OF HOMOSEXUALS; AVAILABILITY OF SUPPORT GROUPS AND STATE PROTECTION, *supra* note 27.

34. *Id.*

35. *Id.*

36. BRAZIL: THE SITUATION OF HOMOSEXUALS; AVAILABILITY OF SUPPORT GROUPS AND STATE PROTECTION, *supra* note 27; *Brazilian Gay Activists and Political Lead-*

homosexual rights to the international stage.³⁷ But the President is clearly more committed than the Brazilian Congress, which has held on to legislation to grant rights to same-sex couples for years.³⁸

Although states and the federal government in the country generally enforce laws to protect same-sex couples and homosexual rights, the public is still adamantly opposed to gay marriage despite the economic contributions of gay businesses or the country's hosting of the world's largest gay pride parade in 2008.³⁹ Gays and lesbians are also victims of violence in the country,⁴⁰ but perhaps that is not surprising in a country with the most firearm homicides in the world.⁴¹

A soccer scandal in the country illustrates the contradictions between the country's legal system and public opinion. The sport of soccer is a macho game in Brazil and many believe that if a homosexual player comes out of the closet, the team will fire him.⁴² Soccer fans and a director decided a player was homosexual after he performed a field goal dance on the sidelines.⁴³ The soccer director implied on television that the player was gay, and the player subsequently sued the director for slander.⁴⁴ A judge dismissed the case, noting that if the player was gay he could play soccer but "must form his own team and federation, setting up matches with those want to play against him."⁴⁵ After federal pressure, the judge reversed his decision and abruptly held that he lacked jurisdiction.⁴⁶ Interestingly, famous players have posed nude in gay magazines, but none of the players publicly acknowledged they were gay.⁴⁷

C. ARGENTINA

Although Argentina arguably provides less legal support for gay unions than its neighbors, Uruguay and Brazil, the country's laws and public opinion are evolving towards accepting gay marriage. In 1992, the President signed a decree granting gays and lesbians legal protection under Argentinean law.⁴⁸ By 2003, Buenos Aires was the first Latin American

ers Meet to Strategize on UN Gay Rights Resolution, LIFESITENEWS.COM, May 20, 2004, <http://www.lifesitenews.com/ldn/2004/may/04052003.html>.

37. See e.g., Jalsevac, *supra* note 32 (Brazilian ambassadors led a 2006 effort to add sexual orientation as an inalienable right to the Organization of American States).

38. *Brazil President Calls for Action on Same-sex Unions*, *supra* note 29.

39. BRAZIL: THE SITUATION OF HOMOSEXUALS; AVAILABILITY OF SUPPORT GROUPS AND STATE PROTECTION, *supra* note 27.

40. *Id.*

41. FREEDOM HOUSE, FREEDOM IN THE WORLD 2008—BRAZIL (July 2, 2008), available at <http://www.unhcr.org/refworld/topic,4565c2254d,46556ce92,487ca1f66e,0.html>.

42. Tales Azzoni, *Brazilian Soccer Thrown into Turmoil over Insinuation That Player is Gay*, ASSOCIATED PRESS, Aug. 14, 2007.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. Alexei Barrionuevo, *Macho Argentina Warms to Gay Dollars and Euros*, N.Y. TIMES, Nov. 29, 2007, available at <http://www.nytimes.com/2007/11/29/world/americas/29iht-journal.4.8532361.html>.

city to allow gay couples the right to a civil union that granted health and insurance benefits.⁴⁹ But the civil union provided no inheritance or parental rights.⁵⁰ Many credit the influence of Buenos Aires for the passage of the national gay union bill in Uruguay.⁵¹ Within Argentina, both the Province of Rio Negro and the cities of Villa Carlos Paz and Rio Cuarto also allow gay unions.⁵²

While Argentines only permit civil unions in pockets of the country, gay rights are still evolving. For example, in 2006 Argentina allowed gays in the military and modernized the code of military justice.⁵³ Then in 2008, same-sex couples who cohabitated for five years or longer received national pension benefits.⁵⁴ The gay and lesbian community is now working on securing adoption rights for gay couples.⁵⁵ Although single parents, even those who are openly gay in some cases, may adopt children, both individuals in the couple do not legally adopt the child.⁵⁶ Therefore, if the legal parent dies, the state may take the child.⁵⁷

In Argentina, same-sex couples may have the best long-term prognosis of these first three neighboring countries because Argentina has the strongest consistent history of increasing same-sex couple rights and the cause garners public support. A poll in Buenos Aires revealed that most people want to grant gay and lesbian couples the right to marry.⁵⁸ And the gay community in Buenos Aires is increasingly sophisticated. In 1983, the city opened its first gay bar and in 2007 the first luxury hotel to cater to gay men opened, only the second hotel of its kind in the world.⁵⁹

Four factors have contributed to increased public support of gay and lesbian families in the country. First, gay tourism contributes significantly to the economy.⁶⁰ Twenty percent of tourists in Buenos Aires are gay.⁶¹ Second, for many Argentines, a profound economic crisis softened attitudes towards humanity in general.⁶² Third, gays have become more visible in popular culture with several gay men appearing in Argentinean

49. *World Briefing Americas: Argentina: First Gay Union*, N.Y. TIMES, July 19, 2003, available at <http://query.nytimes.com/gst/fullpage.html?res=9D00E1DF1E3CF93AA25754C0A9659C8B63&fta=y>.

50. Eric Campbell, *Two to Tango—Gay Argentina*, Feb. 22, 2005, <http://www.abc.net.au/foreign/content/2005/s1305268.htm>.

51. See, e.g., Holt, *supra* note 3.

52. Monique Blanco, *Argentine Same-Sex Marriage Debate Returns*, SCOOP WORLD, Dec. 21, 2009, <http://www.scoop.co.nz/stories/WO0912/S00539.htm>; Holt, *supra* note 3.

53. *Argentina to Repeal Gay Military Ban*, PINKNEWS.CO.UK, Sept. 1, 2006, <http://www.pinknews.co.uk/news/articles/2005-2400.html>.

54. Watkins, *supra* note 3.

55. Marcela Valente, *Argentina: The 'Final Battle' for Gay and Lesbian Rights*, INTER PRESS SERVICE, Aug. 26, 2005, <http://ipsnews.net/news.asp?idnews=30038>.

56. *Id.*

57. *Id.*

58. Watkins, *supra* note 3.

59. Barrionuevo, *supra* note 49.

60. *Id.*

61. *Id.*

62. *Id.*

soap operas.⁶³ Finally, the country is evolving towards a more open society after military rule.⁶⁴

D. MEXICO

Mexico, like Brazil and Argentina, permits civil union in parts of the country, but most Mexicans do not accept homosexuals. Mexico City legalized same-sex domestic partnerships.⁶⁵ The bordering state of Coahuila followed by extending rights that are more comprehensive for same-sex couples.⁶⁶ The change can be attributed to the left-leaning assembly, which passed other progressive laws including a law allowing the terminally ill to discontinue medical procedures and the elimination of some penalties for early abortions.⁶⁷ The Federal District also banned discrimination based on sexual orientation.⁶⁸ The law, passed in 1999, provides for a prison term of one to three years for provoking or inciting "hatred or violence," refusing "to provide an individual with a service. . . offered to the general public," harassing or excluding "an individual or group," or denying or restricting employment based on "sexual orientation."⁶⁹

Despite the recent progress, Mexico has a history of homophobia. When gay rights activists tried to introduce legislation that would allow civil unions in Jalisco, a state that is home to Guadalajara, a gay-friendly city, the governor refused to discuss the legislation, and in the past, the governor even commented that condoms should be distributed only to homosexuals, who he believes are responsible for the spread of HIV. Additionally, prosecutors enforce murder laws less aggressively when homosexuals are victims, and courts punish homosexuals with stricter sentences than those imposed on heterosexuals.⁷⁰ But the government is now more accepting of homosexuals. Two of three of the major political parties are at least tolerant of homosexuals, even though they do not all advocate civil unions.⁷¹ Some limited diversity of sexual orientation exists in government positions. A bisexual man served in the capacity of Secretary of Tourism, Governor of the state of Quintana Roo, where Cancun is located, and as Ambassador to Cuba,⁷² and a lesbian served in the Federal Chamber of Deputies.⁷³

63. *Id.*

64. *See id.*

65. *In Mexico, Beyond Gay and Straight*, N.Y. TIMES, Dec. 7, 2008, available at http://www.nytimes.com/slideshow/2008/12/07/weekinreview/1207-MUXE_index.html.

66. Holt, *supra* note 3.

67. *Mexico City Transsexuals Can Get New IDs*, EFE WORLD NEWS SERVICE, Nov. 24, 2008.

68. Andrew A. Reding, *Mexico: Update on Treatment of Homosexuals*, May 2000, at 27, available at <http://www.uscis.gov/files/nativedocuments/QAMEX00.pdf>.

69. *Id.*

70. *Id.* at 5.

71. *Id.* at 1.

72. *Id.* at 25.

73. *Id.* at 30.

The best proof that gays are still not widely accepted in Mexico is the number of homosexuals that hide their sexual preference. Outside of certain indigenous groups that accept a third gender,⁷⁴ most homosexuals, even in large cities, remain in the closet.⁷⁵ In Guadalajara, which has a larger gay population than Mexico City, there are charges that the police extort money from homosexuals they identify by threatening to expose them on a local television show.⁷⁶ There has also been some pressure for gay businesses to move out of the center of the city to the outskirts.⁷⁷ Even men who are out of the closet to their immediate families will hide their sexual preference at large family gatherings by dancing with women.⁷⁸ Although acceptance is still low in the country, murders of gay men are down from their high numbers in the 1990s.⁷⁹

E. COLOMBIA

Colombia provides some national benefits for same sex-couples by Constitutional Court precedent. But with the exception of the wealthy, it is dangerous for same-sex couples to acknowledge their homosexuality. Colombia outlawed discrimination based on sexual orientation for access to schools, work, accommodations, and granted same-sex couples rights to conjugal visits in prison.⁸⁰ An early decision recognizing same-sex couple's rights came in 2004 when the Court ruled that the island of San Andres could not treat same-sex couples different from heterosexuals when making residency decisions.⁸¹ Then in 2007, the Court granted rights to same-sex couples. First, the court extended rights to common assets, and next, both health and social security benefits were extended to same-sex couples.⁸² In April 2008, the court extended pension benefits to same-sex couples.⁸³ In January 2009, Columbia's Constitutional Court held that gay couples are *de facto* unions if they cohabitate for two

74. See *id.* at 17-24.

75. *Id.* at 6.

76. IMMIGRATION AND REFUGEE BOARD OF CANADA, MEXICO: SITUATION OF HOMOSEXUALS IN GUADALAJARA AND WHETHER THERE ARE SUPPORT OR ADVOCACY GROUPS ACTING ON THEIR BEHALF, (June 5, 2008), available at <http://www.unhcr.org/refworld/country,QUERYRESPONSE,MEX,,48a3028933,0.html>.

77. *Id.*

78. Reding, *supra* note 69, at 11.

79. *Id.* at 5.

80. Immigration and Refugee Board of Canada, Colombia: Treatment of Homosexuals and Lesbians and Available State Protection (2002-2005) (Apr.4, 2005), <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=42df60d320&skip=0&advsearch=y&process=y&allwords=Colombia:%20Treatment%20of%20homosexuals&exactphrase=&atleastone=&without=&title=&monthfrom=&yearfrom=&monthto=&yearto=&coa=&language=&citation=>

81. *Id.*

82. Posting of Andres Duque to Blabbeando, <http://blabbeando.blogspot.com/2008/10/colombia-senate-rejects-same-sex.html>, Colombia: Senate Rejects Same-Sex Partnership Bill Again; Gay-Friendly Notary Public Shot to Death in Bogota (Oct. 11, 2008, 12:23 CST).

83. *Id.*

years.⁸⁴ The Colombian Constitution provides that de facto unions have the same legal protection as marriages.⁸⁵ But other conditions in the country significantly mitigate these gains.

The legislature and the public view homosexual rights differently than the country's top court. The legislature refused to pass legislation to provide the same type of benefits that the Constitutional Court already granted same-sex couples.⁸⁶ And homosexuals in the country are in danger. Paramilitary groups kill homosexuals in the name of "social cleansing."⁸⁷ *Desechables*, meaning disposable, is a term that is used in connection with homosexual activists.⁸⁸ Even gay politician's lives are threatened.⁸⁹ Even so, the visibility of gay characters in movies and on television coupled along with campaigns aimed at decreasing homophobia, have improved public tolerance.⁹⁰ The name of such a 2004 campaign to combat homophobia was tellingly titled "Kiss Me. . . Don't Kill Me."⁹¹

F. VENEZUELA

While discrimination based on sexual orientation is illegal in Venezuela, same-sex couples still lack legal rights. Like many Latin American countries, recent legislation prohibiting discrimination came only after a history of using the laws against homosexuals. *Ley de Vagos y Maleantes*, the Law on Vagrants and Crooks, was previously used to prosecute homosexuals.⁹² Recent attempts to gain legal rights by same-sex couples were thwarted by a Supreme Court of Justice decision, the country's top constitutional court, which held that same-sex marriages are not protected by the Constitution.⁹³ Homosexuals do not face the same violence

84. Helda Martinez, *Equal Rights for Same-Sex Partners*, INTER PRESS SERVICE, Mar. 2, 2009, <http://ipsnews.net/news.asp?idnews=45944>.

85. *Id.*

86. Blabbeando, *supra* note 83.

87. COLOMBIA: TREATMENT OF HOMOSEXUALS AND LESBIANS AND AVAILABLE STATE PROTECTION, *supra* note 81.

88. Immigration and Refugee Board of Canada, Colombia: Information on the Treatment of Homosexuals by State Authorities and the General Public, and on the Protection Available to Homosexuals who are Physically Abused (Feb. 1, 1995), *available at* <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=3ae6ad1358&skip=0&query=Colombia:%20Information%20on%20the%20treatment%20of%20homosexuals%20by%20state>.

89. COLOMBIA: TREATMENT OF HOMOSEXUALS AND LESBIANS AND AVAILABLE STATE PROTECTION, *supra* note 81.

90. *See id.*

91. *Id.*

92. Immigration and Refugee Board of Canada, Venezuela: Information Regarding the Situation of Homosexuals: Interview with a Representative of the Venezuelan Section of Amnesty International (Jan. 1, 1998), *available at* <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=3ae6ad8430&skip=0&query=Venezuela%20homosexuals%201998>.

93. Although the court noted that same-sex couples can protect their assets through social contracts, the dissenting opinion argued that because the contracts would not be established by family law they would not be legally binding. Posting of Andres Duque to Blabbeando, <http://blabbeando.blogspot.com/2008/03/venezuela->

that they do in Colombia, but homosexuals are still largely closeted outside of the city of Caracas.⁹⁴ And the public still links homosexuality with the AIDS virus.⁹⁵ In the interior of the country, there are either no gay bars or they are shut down quickly after they open due to public pressure.⁹⁶ Inside the city of Caracas, the public accepts gay men despite gay jokes, at least in the arts community.⁹⁷ For example, homosexuals, heterosexuals, and even police officers patronize the same bar without conflict.⁹⁸

G. CUBA

Despite the open support of rights for same-sex couples by members of all three branches of the federal government, it is unlikely the government will grant rights to same-sex couples in the near future given Cuba's history and the state of current public opinion. Homophobia is closely tied to the Cuban revolution. Fidel Castro and Che Guevara, leaders of the socialist revolution, were admired for their "swaggering macho virility."⁹⁹ Originally, homosexuals were either forced to work for the state or pushed out of the country.¹⁰⁰ If a man's homosexuality became publicly known, he was sent to work on a rural farm or sent to a work camp designed to rehabilitate delinquents.¹⁰¹ The Public Ostentation Law, which outlawed public homosexual behavior, granted the government the legal right to punish homosexuals.¹⁰² Castro eventually took an alternate approach and encouraged homosexuals to leave the country in the 1980 Mariel boatlift.¹⁰³

Despite leading abuse of homosexuals in the past, modern government leaders support gay rights and even gay marriage for same-sex couples. The most visible leader advocating these rights is Mariela Castro, director of the Cuban National Center for Sexual Education and the daughter of Defense Minister Raul Castro.¹⁰⁴ In the legislative branch, Ricardo Alarcon, president of Cuba's National Assembly publicly stated, while referring to homosexuals, "[s]ocialism should be a society that does not

top-court-says-no-to-same-sex.html, Venezuela: Top Court Says No to Same-Sex Marriages (Mar. 5, 2008, 12:18 CST).

94. See Immigration and Refugee Board of Canada, Venezuela: Information on the Situation of Homosexuals: Interview with the Director of Movimiento Ambiente de Venezuela (Jan. 1, 1998), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=3ae6aac540&skip=0&query=Venezuela%20homosexuals%201998>.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.*

99. Ann Marie O'Connor, *Stigma Easing for Cuba Gays*, PALM BEACH POST, Mar. 20, 1995, at 1A.

100. See *id.*

101. Larry R. Oberg, *How Criminal Was Castro?*, 8 GAY & LESBIAN REV. 1, 4 (2001).

102. *Id.*

103. See O'Connor, *supra* note 100.

104. Mary Lamey, *Cuba: Cuban Gays Find Support in Fidel's Niece*, MIAMI HERALD, July 29, 2006, at A13.

exclude anybody.”¹⁰⁵ The judicial branch also reflects the new gay-friendly position of the Communist government. Ruben Remigio Ferrer, President of Cuba’s Supreme Court noted, “there has been a change in thinking. We are developing a program to educate people about sexual orientation.”¹⁰⁶

Cuban law has also progressed. There are no longer anti-sodomy laws in Cuba.¹⁰⁷ Further, the penal code was updated in 1997 and no longer includes discriminatory provisions against homosexuals.¹⁰⁸ Despite this change, even though the legislature is considering a gay marriage or a civil union bill,¹⁰⁹ there are no positive laws prohibiting discrimination against homosexuals.¹¹⁰ The state of civil rights in the country and public opinion suggest that it is unlikely such a law will be passed soon. For example, Cubans are still not allowed to travel unrestricted within their own country, and they are not allowed to visit state-run hotels available to tourists.¹¹¹ Police, who are recruited from rural areas, still hold traditional views of homosexuality.¹¹² The state controls any expression of public protest about treatment of homosexuals.¹¹³ A non-state sponsored gay parade was cancelled at the last minute because two of the activists were detained by the state the day before the parade,¹¹⁴ but perhaps an event in Canada attended by Mariela Castro best illustrates the treatment of homosexuals in Cuba. She attended the first Outgames in Canada and gave a speech announcing her approval of gay rights.¹¹⁵ But when asked why there were no Cubans entered in the contest, she claimed it was because Cuba has no strong gay athletes and that it was not because gay men were afraid to come out of the closet or that the state refused to allow them to participate.¹¹⁶

105. DeWayne Wickham, *When it Comes to Gay Rights, is Cuba Inching Ahead of USA?*, USA TODAY, Feb. 27, 2007, at 11A.

106. *Id.*

107. This occurred in 1979. Lamey, *supra* note 105.

108. Immigration and Refugee Board of Canada, Cuba: Treatment of Homosexuals, Including Protection Offered by the State and the Attitude of the Population (Jan. 11, 2007), available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=469cd6c71e&skip=0&query=cuba&querysi=cuba&searchin=title&display=10&sort=date>.

109. Andrea Rodriguez, *Cuba Holds Large Gay Rights Rally*, A.P., May 17, 2008, available at <http://www.msnbc.msn.com/id/24685283/>.

110. Immigration and Refugee Board of Canada, Cuba: Treatment of Homosexuals, Including Protection Offered by the State and the Attitude of the Population, *supra* note 108.

111. The laws restricting travel are designed to prevent citizens in rural areas from flooding cities in search of jobs. Andrea Rodriguez, *Gay Marriage? Unrestricted Travel? Cubans Are Increasingly Speaking Their Minds*, A.P., Feb. 6, 2008, available at <http://www.advocate.com/article.aspx?id=41615>.

112. Oberg, *supra* note 102.

113. *Cuba's 1st Gay Pride Parade is Scrapped*, CHICAGO TRIBUNE, June 26, 2008, available at http://articles.chicagotribune.com/2008-06-26/news/0806251397_1_gay-pride-parade-mariela-castro-president-raul-castro.

114. *Id.*

115. Lamey, *supra* note 105.

116. *Id.*

Although it is unlikely the government will pass a gay marriage or civil union bill soon, public opinion suggests that over time gay couples may gain this right. This shift started with the inclusion of gays in the movies. In 1993, *Fresa y Chocolate*, a movie about a homosexual and his straight friend, was released.¹¹⁷ The movie was popular in Cuba and homosexuals were soon featured in other art forms such as music and television. A Cuban singer released a song, *El Pecado Original*, the Original Sin, and it too was widely popular with the heterosexual population in the country.¹¹⁸ More recently, a Cuban-sponsored television station ran a soap opera featuring a married man, who falls in love with another man.¹¹⁹ Even though there were no scenes where the lovers touched, the *telenovela* was widely watched.¹²⁰ As Cubans see homosexuals more widely in art forms, gay men hope that the population will become more open to rights for same-sex couples.¹²¹

H. CHILE

Chile, frequently called the most conservative country in Latin America,¹²² will not grant rights to gay couples for at least a decade. Divorce was not legal in Chile until 2004.¹²³ One Chilean law, the removal of a judge, and one court decision illustrate the legal barriers to the rights of gay couples in Chile. First, the legal age of consent for consensual sex differs for heterosexual and homosexual couples.¹²⁴ Twelve is the age of consent for heterosexuals, but the age is eighteen for same-sex couples.¹²⁵ Prosecutors argued that a conviction that involved consensual sex between an adult man and another man just shy of his eighteenth birthday was appropriate because the boy's morality was corrupted.¹²⁶ Second, the removal of a judge illustrates the consequences of being gay in the country. An appellate judge was fired for visiting a steam bath known for its gay patrons even though the judge insisted he was heterosexual.¹²⁷

Last, the most publicized case involving gay rights is a family law case

117. Oberg, *supra* note 102.

118. *Id.*

119. Gary Marx, *Helping Cubans Realize 'What it Means to be Gay,'* CHICAGO TRIBUNE, May 28, 2006, available at http://articles.chicagotribune.com/2006-05-28/news/0605280275_1_soap-opera-homosexuality-cuban-institute.

120. *Id.*

121. *See id.*

122. Larry Rohter, *Lesbian Judge Fights Chilean Court for Taking Her Children*, N.Y. TIMES, July 20, 2006, at A6, available at <http://www.nytimes.com/2006/07/20/world/americas/20chile.html>.

123. Freedom House, *Freedom in the World 2008–Chile* (July 2, 2008), available at <http://www.unhcr.org/refworld/country,,FREEHOU,,CHL,4562d94e2,487ca1fd91,0.html>.

124. Gemma Pritchard, *Chilean Court Delivers Controversial Sodomy Conviction*, PINKNEWS.CO.UK, Aug. 21, 2007, <http://www.pinknews.co.uk/news/articles/2005-5229.html>.

125. *Id.*

126. *Id.*

127. Daniela Estrada, *Human Rights: Gays Label Chilean Supreme Court 'Homophobic,'* INTER PRESS SERVICE, Feb. 2, 2005.

decided by the Supreme Court, the highest appellate court in Chile.¹²⁸ Judge Karen Atala was divorced from her husband and living with her two children and her lesbian partner.¹²⁹ When her husband learned of the situation, he sued for custody and won temporary custody of the children.¹³⁰

He complained to the court that the children were in danger of herpes and HIV infection.¹³¹ In Chile, courts normally award custody to the mother unless it can be proven that she is a drug addict, alcoholic, or prostitute.¹³² In the next two appeals, the courts, after reviewing testimony from psychologists and social workers who reported that Judge Atala provided her children with a safe and healthy home, awarded custody to Judge Atala.¹³³ But the father of the children filed a disciplinary action against the last appellate court with the Supreme Court.¹³⁴ The Court found that Judge Atala's lifestyle would result in discrimination against the children and awarded custody to the girls' father.¹³⁵ Judge Atala filed a case with the Inter-American Commission on Human Rights, a branch of the Organization of Human States.¹³⁶ Among her complaints, Judge Atala alleged the ruling was a due process violation because the Supreme Court applied a pure disciplinary remedy and opened a third way of appellate review that was not valid under the Chilean procedural system.¹³⁷ One of the legal concerns about the ruling was that it carried an administrative penalty that threatened to affect the independence of individual judges.¹³⁸ The Inter-American Commission agreed to hear the case.¹³⁹ Initially, the parties discussed negotiations for a friendly settlement but were unable to come to an agreement.¹⁴⁰ The case is still pending.¹⁴¹

Despite the country's conservative past, the current Socialist president, Michelle Bachelet, provides some hope to the country's gay citizens. In a speech, she declared a desire for "a Chile for everyone" that "doesn't discriminate and which doesn't forget those who have been left be-

128. See Rohter, *supra* note 122.

129. Karen Atala & Daughters, Admissibility Petition 12.502, Inter-Am. C.H.R., Report No. 42/08, ¶¶ 14-15, July 23, 2008, available at <http://www.cidh.org/annualrep/2008eng/Chile12502eng.htm>.

130. *Id.* ¶¶ 16-17.

131. *Id.* ¶ 16.

132. Rohter, *supra* note 122.

133. Karen Atala & Daughters, *supra* note 129, at ¶¶ 17, 18.

134. *Id.* ¶ 19.

135. *Id.* ¶¶ 19-20.

136. *Id.* ¶ 1.

137. *Id.* ¶ 22.

138. *Id.*

139. *Id.* ¶ 4.

140. *Id.* ¶¶ 8, 10

141. "Not Worth a Penny": *Legal Precedents Relating to Sexual Orientation and Gender Identity*, HUMAN RIGHTS WATCH, May 29, 2009, <http://www.hrw.org/ja/node/83447/section/10>.

hind.”¹⁴² Public opinion is also swinging in favor of gay couples. In a 2004 poll, sixty-four percent of Chileans approved of civil marriage.¹⁴³ Yet sixty-six percent did not believe that gay couples should enjoy the same rights as heterosexual couples, such as the right to adopt.¹⁴⁴

I. UNITED STATES

The environment in most states in the United States is more hostile to same-sex couples than it is in at least a handful of Latin American countries. The District of Columbia¹⁴⁵ and the following states provide some form of legal rights to same-sex couples: Massachusetts,¹⁴⁶ New Hampshire,¹⁴⁷ New Jersey,¹⁴⁸ Rhode Island,¹⁴⁹ Connecticut,¹⁵⁰ Vermont,¹⁵¹ Iowa,¹⁵² Nevada,¹⁵³ Washington,¹⁵⁴ Oregon,¹⁵⁵ Hawaii,¹⁵⁶ and California.¹⁵⁷ Although voters passed Proposition 8, an amendment that alters the constitution to prohibit gay marriage, gay couples may still register in California.¹⁵⁸ Among the U.S. Supreme Court’s important decisions related to homosexuals is *Romer v. Evans*, where the court found state sodomy laws unconstitutional.¹⁵⁹ The majority cast its opinion in terms of

142. Lygia Navarro, *Socially Conservative Chile Reconsiders Treatment of Gays*, A.P., July 11, 2008.

143. *Most Chileans Approve of Gay Civil Marriage*, EFE INGLES, July 31, 2004.

144. *Id.*

145. Keith L. Alexander & Ann E. Marimow, *D.C. Begins Licensing Same-Sex Marriages*, THE WASH. POST, Mar. 4, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/03/03/AR2010030300654.html>.

146. Massachusetts recognizes same-sex marriage. *Same-sex Marriage, Civil Unions, and Domestic Partnerships*, N.Y. TIMES, Mar. 4, 2010, http://topics.nytimes.com/topics/reference/timestopics/subjects/s/same_sex_marriage/index.html.

147. New Hampshire allows same-sex registration of civil unions. *Id.*

148. In New Jersey, same sex-couples are also allowed to register a civil union. *Id.*

149. While Rhode Island does not allow civil unions or gay marriages in the state, it does recognize marriages from same-sex couples that are obtained out-of-state. National Conference of State Legislatures, *Same-sex Marriage, Civil Unions and Domestic Partnerships*, <http://www.ncsl.org/programs/cyf/samesex.htm> (last visited Jan. 29, 2009).

150. Connecticut is one of the four states that allows civil unions. *Id.*

151. Vermont permits civil unions provides the same rights granted to married couples. *Id.*

152. Maria Godoy, *State by State: The Legal Battle over Gay Marriage*, NPR, Dec. 15, 2009, <http://www.npr.org/templates/story/story.php?storyId=112448663>.

153. *Id.*

154. Same-sex partners enjoy some rights in Washington, such as hospital visitation rights and some property rights. National Conference of State Legislatures, *supra* note 149.

155. The Oregon Family Fairness Act, Public Law Number 99, grants same-sex couples the same rights as married couples. *Id.*

156. Hawaii’s Supreme Court held that a Hawaii law prohibiting same sex marriage is unconstitutional. James D. Wilets, *Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective*, 60 ALB. L. REV. 989, 1008 (1997).

157. Christine Vestal, *Calif. Gay Marriage Ruling Sparks New Debate*, STATELINE.ORG, May 16, 2008, <http://www.stateline.org/live/details/story?contentId=310206>.

158. See Maura Dolan & Jessica Garrison, *Battle Over Prop. 8 Goes to High Court*, LOS ANGELES TIMES, Nov. 20, 2008, <http://articles.latimes.com/2008/nov20/local/me-prop8-supreme-court20>.

159. *Romer v. Evans*, 517 U.S. 620, 635-36 (1996).

equality, whereas Scalia, writing the dissent, framed the decision around morality.¹⁶⁰ U.S. law does not provide explicit federal protection against discrimination due to sexual orientation.¹⁶¹

A cursory review of the position of the last three American presidents provides further support that the United States advances a more conservative approach to rights for same-sex couples than some Latin American countries. President Clinton signed the Defense of Marriage Act, defining marriage as the legal union between a man and a woman, after it easily passed both houses of Congress.¹⁶² President George W. Bush, who received strong evangelical support in both his bids for the presidency, endorsed an amendment to the U.S. Constitution that would prohibit same-sex marriage.¹⁶³ President Obama has a different view of same-sex couples. In 1996 when Obama was running for the Illinois State Senate, he approved of same-sex marriage.¹⁶⁴ In his bid for the presidency, he changed his position, defining marriage as between a man and a woman and now supports civil unions.¹⁶⁵ This change is not surprising given the contribution of evangelicals to his campaign. Thirty-two percent of white evangelicals between eighteen and thirty-one are believed to have voted for Obama.¹⁶⁶ Obama, perhaps in a spirit of inclusion towards conservatives, invited Reverend Rick Warren to pray to kick-off his inauguration.¹⁶⁷ The invitation caused some to question Obama's support for gay rights because of Reverend Warren's statements—including a comment relating gay marriage to pedophilia.¹⁶⁸ Recently, gay activists praised Obama's announcement that he will work towards eliminating the American military's "Don't Ask, Don't Tell" policy.¹⁶⁹

The American public's opinion of gay marriage differs by state; it has been characterized as a "battle between the heartland and the coastland."¹⁷⁰ Many were surprised that Proposition 8 passed in Califor-

160. *Id.* at 636-53.

161. *See, e.g., Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757 (6th Cir. 2006).

162. Remarks Calling for a Constitutional Amendment Defining and Protecting Marriage, 1 PUB. PAPERS 263 (Feb. 24, 2004).

163. *Bush Calls for Ban on Same-sex Marriages*, CNN.COM, Feb. 25, 2004, <http://www.cnn.com/2004/ALLPOLITICS/02/24/elec04.prez.bush.marriage/>.

164. Bret Baier, *Obama's Record on Gay Marriage*, FOXNEWS.COM, Jan. 16, 2009, <http://www.foxnews.com/story/0,2933,480288,00.html>.

165. *Id.*

166. Joe Garofoli, *Obama, Warren and the New Evangelicals*, SFGATE.COM, Jan. 18, 2009, http://articles.sfgate.com/2009-01-18/news/17197808_1_white-evangelicals-same-sex-marriage-rev-jim-wallis.

167. *Id.*

168. *Id.*

169. David S. Morgan, *Obama to DNC: We Kept Our Promises, We're Moving Forward*, CBS NEWS, Feb. 6, 2010, http://www.cbsnews.com/8301-503544_162-6180742-503544.html.

170. Guy Kovner, *Gen Y Turns on Gay Marriage*, THE PRESS DEMOCRAT, May 29, 2008, available at http://www.pressdemocrat.com/article/20080529/NEWS/805290334/1350&title=Younger_generation_for_gay_marriage.

nia¹⁷¹ because some polls predicted that Proposition 8 would fail. For example, a field poll reported that voters favored same sex marriage.¹⁷² This result may have occurred because people participating in the poll gave the politically correct answer—rather than how they would actually vote.¹⁷³ Nationally, more voters oppose than support gay marriage, with fifty-five percent of voters opposing it.¹⁷⁴

J. CANADA

Canada was the first country in the Americas to legalize gay marriage, and the fourth in the world.¹⁷⁵ Unlike many Latin American countries, Canada has a steady tradition of recognizing gay rights. In 1969, sodomy became legal in Canada.¹⁷⁶ In 1981, the Canadian Charter of Rights and Freedoms (the Charter) forbid discrimination based on sexual orientation.¹⁷⁷ A decade later, the Supreme Court in British Colombia gave gay partners the right to Medicare coverage—reasoning that it is discrimination under the Charter not to extend coverage.¹⁷⁸ The most recent and full recognition of same-sex couple rights occurred in 2005 under the Civil Marriage Act, which granted homosexual couples the same rights as traditional couples under Canadian law.¹⁷⁹ By the time the bill passed, most of Canada's provinces and territories already granted same-sex couples the same rights.¹⁸⁰

In the “most socially liberal nation in North America,” it is not surprising that Canadian public opinion is tolerant¹⁸¹ Unlike the United States—where the Supreme Court has ruled that the Boy Scouts can exclude gay troop leaders¹⁸²—there was little to no controversy when the first gay Boy Scout troop was formed in Toronto in 1999.¹⁸³ Further,

171. *California Gay Marriage Banned as Proposition 8 Passes*, THE HUFFINGTON POST, Nov. 5, 2008, available at http://www.huffingtonpost.com/2008/11/05/california-gay-marriage-b_n_141429.html.

172. Kovner, *supra* note 171 (sixty-eight percent of voter respondents under thirty years-old reported they approved of same-sex marriage).

173. *Id.*

174. Press Release, Quinnipiac Polling Inst., American Voters Oppose Same-Sex Marriage Quinnipiac University National Poll Finds, But They Don't Want Government To Ban It (July 17, 2008), available at <http://www.quinnipiac.edu/x1295.xml?ReleaseID=1194> (on file with author).

175. *See Canada is 4th to Legalize Gay Marriage*, PHILADELPHIA INQUIRER, July 21, 2005, at A07; Holt, *supra* note 3.

176. *A Timeline of the Homosexual "Rights" Juggernaut*, CATHOLIC INSIGHT, July-August 2006, at 18, available at <http://catholicinsight.com/artman/uploads/homosexualitytimeline.pdf>.

177. *Id.*

178. *Id.*

179. Holt, *supra* note 3.

180. *Canada is 4th to Legalize Gay Marriage*, *supra* note 176.

181. Holt, *supra* note 3.

182. Charles Bierbauer & Reuters, *Supreme Court Says Boy Scouts Can Bar Gay Troop Leaders*, CNN.COM, June 28, 2000, <http://archives.cnn.com/2000/LAW/06/28/scotus.gay.boyscouts/>.

183. Steve Pearlstein, *Gay Boy Scouts Quietly Assemble Canada Troop*, SEATTLE TIMES, Nov. 16, 1999, at A14.

when the military decided to allow gay members, the policy change was quickly accepted in the military ranks.¹⁸⁴ High-ranking military officials immediately adopted a policy of prohibiting discrimination against gays and lesbians and used training to enforce tolerant attitudes.¹⁸⁵

Despite a modern history of the Canadian government granting rights to gays and same-sex couples, homosexuals may not have achieved true equality in Canada. For example, a study by the Canadian Journal of Economics reported that gay men earn twelve percent less than heterosexual men and women.¹⁸⁶ This disparity occurred despite gay men being more educated and more likely to live in urban areas.¹⁸⁷ These patterns are consistent with similar patterns in the United States and the United Kingdom.¹⁸⁸ Additionally, a Health Canada regulation effective in December 2007 bans sexually active gay men from donating organs.¹⁸⁹ Like blood-donor guidelines, sexually active gay men, intravenous drug users, and those infected with hepatitis are automatically disqualified from donation.¹⁹⁰

K. UNITED NATIONS RESOLUTION

In 2003, Brazil first proposed a controversial resolution, Human Rights and Sexual Orientation, which was the first resolution at the United Nations to address sexual orientation.¹⁹¹ Canada and European nations supported the bill.¹⁹² Another group—consisting primarily of the Organization of the Islamic Conference, Vatican states, and the United States—adamantly opposed the resolution.¹⁹³ Ultimately, the vote was postponed to the following year; in 2004, Brazil finally abandoned the resolution.¹⁹⁴

The resolution included controversial references to adoptions and gay families.¹⁹⁵ At other times, countries have made similar alliances. Late in 2008, a statement was introduced in the General Assembly confirming international human rights protections—regardless of sexual orientation

184. Anne Swardson, *Canada's End to Military Gay Ban Sparks Little Controversy*, DALLAS MORNING NEWS, July 18, 1993, at 30A.

185. *Id.*

186. *Homosexual Men Have Significantly Lower Personal Incomes Than Heterosexual Individuals*, OBESITY, FITNESS & WELLNESS WEEK, Nov. 29, 2008, at 180, available at <http://esciencenews.com/articles/2008/10/29/homosexual.men.have.significantly.lower.personal.incomes.heterosexual.individuals>.

187. *Id.*

188. *Id.*

189. Joseph Hall, *Most Gays Ruled Out As Organ Donors: Health Canada Ban Goes Too Far to Guard Against HIV, Doctors Say*, TORONTO STAR, Jan. 9, 2008, available at <http://www.thestar.com/news/article/292289>.

190. *Id.*

191. Pratima Narayan, *Somewhere Over the Rainbow. . . International Human Rights Protections for Sexual Minorities in the New Millennium*, 24 B.U. INT'L L.J. 313, 341 (2006).

192. *Id.*

193. *Id.*

194. *Id.* at 341-42.

195. *Id.* at 346.

and gender identity.¹⁹⁶ Brazil helped draft the statement and Argentina read the statement in front of the General Assembly.¹⁹⁷ The statement, unlike the resolution proposed by Brazil previously at the United Nations, did not refer to adoption rights or family.¹⁹⁸ Sixty-six nations signed the statement,¹⁹⁹ including Mexico and many other Latin American countries.²⁰⁰ But the United States refused to sign the statement and Egypt actively opposed the statement.²⁰¹ The Vatican originally opposed the statement, but after heavy criticism, the Vatican announced that it called for repeal of criminal penalties for homosexual conduct.²⁰² Almost sixty states signed an alternate text.²⁰³ Neither of the two statements is legally binding.²⁰⁴

III. FACTORS DRIVING GAY RIGHTS LAWS

A. CATHOLICISM

The Catholic Church strongly opposes recognition of civil unions and gay marriage, but despite the strength of the Church in Latin America, no significant correlation exists between the (1) strength of the Church in an individual Latin American country and (2) existing civil union or gay marriage laws in the country.

The Catholic Church generally supports human rights. Pope John Paul II was vocal in urging governments to follow the Universal Declaration of Human Rights, even calling the document “one of the highest expressions of the human conscience of our time.”²⁰⁵ But the Church very publicly opposes any legislation to grant same-sex couples the right to marry.²⁰⁶ The Bible’s text²⁰⁷ and the Church’s evolutionary history help explain the opposition.

196. *U. N.: General Assembly Statement Affirms Rights for All*, HUMAN RIGHTS WATCH, Dec. 18, 2008, <http://www.hrw.org/en/news/2008/12/18/un-general-assembly-statement-affirms-rights-all>.

197. *Id.*

198. *See id.*

199. *Vatican Denounces Violence Against Homosexuals but Won’t Back UN “Sexual Orientation” Resolution*, LIFESITENEWS.COM, Dec. 19, 2008, <http://www.lifesitenews.com/ldn/2008/dec/08121912.html>.

200. *U. N.: General Assembly Statement Affirms Rights for All*, *supra* note 198.

201. *Id.*

202. *Vatican Denounces Violence Against Homosexuals but Won’t Back UN “Sexual Orientation” Resolution*, *supra* note 201.

203. Piero A. Tozzi, *UN General Assembly Receives Dueling Declarations on “Sexual Orientation,”* LIFESITENEWS.COM, Dec. 19, 2008, <http://www.lifesitenews.com/ldn/2008/dec/08121902.html>.

204. *Id.*

205. Paolo G. Carozza, “*They Are Our Brothers, and Christ Gave His Life for Them*”: *The Catholic Tradition and the Idea of Human Rights in Latin America*, 6 LOGOS: J. CATHOLIC THOUGHT & CULTURE 81, 83 (2003).

206. *Vatican Denounces Violence Against Homosexuals but Won’t Back UN “Sexual Orientation” Resolution*, *supra* note 202.

207. Narayan, *supra* note 191, at 343 (noting that the Bible directly forbids homosexuality).

St. Thomas Aquinas's development of natural law is partly responsible for the Church's opposition to laws permitting gay marriage. Under natural law—through the use of intellect, reason, and free will—humans should decipher right from wrong.²⁰⁸ Because sodomy cannot lead to reproduction, homosexual relations are wrong according to St. Thomas Aquinas, who unequivocally said that sodomy is “a violation of natural, canon, civil, and scriptural laws.”²⁰⁹ Latin American church leaders adopted this view. One influential primer, written by the first bishop of Mexico, preached to the primer's intended audience of Indians, priests, and colonists that there was a hierarchy of lustful sins and that the *pecado contra natura*, sodomy, was the most severe sin, even more prohibited than adultery, rape, or incest.²¹⁰ *Recto vaso, recta positione*, “in the proper vessel and in the proper position,” was the Church mantra and in 1655 when Juan de Enriquez wrote a treatise on the subject, sodomy continued to be viewed as a sin against God.²¹¹ When the inquisition reached Latin America, sodomy was prosecuted.²¹² The Vatican continues to oppose gay marriage, civil unions, and rights protecting homosexuals in general. The Catholic Church joined the Organization of Islamic states and the United States in opposing a resolution declaring equal rights regardless of sexual orientation.²¹³

The number of Catholics in Latin America, the political and social influence of the Church, and a comparison of the influence of Protestants in the United States helps illustrate why many believe that there are few countries in Latin America that grant same-sex couples rights, but no strong correlation exists between these factors and gay couple-friendly laws. First, there are a large number of Catholics in Latin America. In Paraguay, Latin America's most Catholic nation, over ninety-one percent of the population identify themselves as Catholics.²¹⁴ Even Cuba, a country where over fifty percent of the population identifies themselves as Catholic, has far more Catholics than in the United States, where less than twenty-three percent of the population identifies themselves as Catholics.²¹⁵ While the political power of the Catholic Church varies per country, the Church has significant political power in the region. The Church gained preeminence in many countries through alliances with the political elite,²¹⁶ but the role of the Church varies per country. In Colombia, Catholicism is the official religion of the country.²¹⁷ Other countries

208. *Id.*

209. Martin Nesvig, *The Complicated Terrain of Latin American Homosexuality*, 81 *HISP. AM. HIST. REV.* 689, 694 (2001).

210. *Id.* at 693-94.

211. *Id.* at 694-95.

212. *Id.* at 696.

213. Narayan, *supra* note 191, at 343.

214. David M. Cheney, Statistics by Country by Percentage Catholic, <http://www.catholic-hierarchy.org/country/sc3.html> (last visited Feb. 1, 2009).

215. *Id.*

216. Ivan Vallier, *The Roman Catholic Church: A Transnational Actor*, 25 *INT'L ORG.* 479, 496 (1971).

217. *Id.* at 486.

merely agreed to protect the Church in exchange for restricting the power of the Church.²¹⁸ One way that countries can restrict the Church is to elect the Church leadership within the country rather than allowing selection by the Vatican.²¹⁹ With or without political influence, the Church's goal is to influence people through spiritual and moral leadership.²²⁰

Although the religious right in the United States lacks the number and official power of the Catholic Church, the religious right is still a formidable foe of same-sex couples.²²¹ In fighting to preserve the traditional family, the religious right opposed sex education in such a manner that the conservative governments of the Philippines and Iran complained that the religious right hijacked the U.S. government.²²²

Despite the power of the Catholic Church in Latin America, there is not a correlation between the strength of the Catholic Church and laws that protect same-sex couples. First, a correlation does not exist between the number of Catholics in the country and the laws granting rights to same-sex couples. The percentage of Catholics in Chile, the country most hostile to same-sex couple rights, is a little more than seventy-one percent, lower than the countries of Argentina and Mexico, who provide rights in parts of their countries to homosexual couples.²²³ Although the power of the Catholic Church varies by country, both Brazil, which grants some legal protection for gay couples, and Chile, with no protection for gay couples, have similar structures in that they effectively restrict the power of the Church because they "established and institutionalized the principle of separation between church and state."²²⁴ While the lack of correlation between the power of the Catholic Church and gay-friendly laws is clear, the reason is not. Perhaps Catholic Church members simply form their views of homosexuality without giving weight to the position of the Church. Abortion studies have shown that despite the Church's strong view of the immorality of abortion, in some areas in Latin America, Catholic women are more likely to have abortions than their non-Catholic counterparts.²²⁵

B. MACHISMO

While history and culture provide some support for the theory that *machismo* accounts for some of the lack of same-sex couple rights in Latin America, there is no empirical evidence or substantial studies to support

218. *Id.* at 487.

219. *Id.*

220. *Id.* at 483.

221. The religious right only constitutes ten percent of the adult population in the United States. Susan Rose, *Going Too Far? Sex, Sin and Social Policy*, 84 Soc. FORCES 1207, 1209 (2005).

222. *Id.* at 1212.

223. Cheney, *supra* note 216. Over eighty-nine percent of the population in Argentina is Catholic and over eighty-six percent in Mexico are Catholic. *Id.*

224. Vallier, *supra* note 218, at 487.

225. Nora Scott Kinzer, *Priests, Machos and Babies: Or, Latin American Women and the Manichean Heresy*, 35 J. MARRIAGE & FAM. 300, 305 (1973).

a correlation between the law and *machismo*. The Iberian knights that settled many Latin American countries were bachelors who came to win their fortune.²²⁶ Once in the Americas they raped Indian women.²²⁷ Scholars argue that it is out of this tradition that the current cultural ideal of the macho Hispanic man evolved. While women in Mexican culture should be virgins until married, adolescent boys are encouraged to lose their virginity to prostitutes and are chastised not to cry *como una nina*, like a girl.²²⁸ Scholars continue to debate whether or not Latin Americans accept homosexuals as long as they are not passive partners during sex. While the *machismo* culture might be a driver behind violence against homosexuals, it is another question, to be addressed *infra*, whether politicians and judges creating law have *machismo* attitudes. Although Catholicism and *machismo* culture might be compatible with a system that does not grant same-sex couple rights, they are not necessarily drivers of the law. For example, Latin America's high birth rate has been attributed to Catholicism and *machismo*, but studies have shown that it is the unemployment rate and illiteracy rate of women that drives birth rates.²²⁹

C. URBAN VS. RURAL ATTITUDES

While urban areas are more tolerant of gays and lesbians, the gay population alone is not enough to predict which countries will extend additional rights to gay couples. Although gay men and women are more likely to come out of the closet in large urban cities than in more conservative rural areas,²³⁰ this distinction is not an accurate predictor of gay-friendly laws. For example, while Mexico City is a large urban area, the state of Coahuila, which also recognizes civil unions for gay couples, is a rural area.²³¹ The entire nation of Uruguay has a much smaller homosexual population than Argentina or Brazil, which suggests that the mere presence of a homosexual population does not control the rate at which the government passes laws protecting gay rights.²³²

D. REAL DRIVERS OF GAY RIGHTS LAW: POLITICAL SYSTEMS AND VIEWS ON CIVIL RIGHTS

Modern political systems in the Americas are a better predictor of same-sex couple rights than the drivers previously discussed and discarded. These political systems should be viewed in a historical context to explain why more Catholics and *machismo* cultures granted same-sex couple rights at a time when less religious, more liberal California voters overrode a previous granting of rights. The United States' views and laws

226. Ilan Stavans, *The Latin Phallus*, 65 *TRANSITION* 48, 49 (1995).

227. *Id.*

228. *Id.* at 52, 54.

229. Kinzer, *supra* note 227, at 300.

230. *Venezuela: Information Regarding the Situation of Homosexuals*, *supra* note 93.

231. Holt, *supra* note 3.

232. Barrionuevo, *supra* note 49.

related to same-sex couples are best understood by examining British influence while Latin American culture is better viewed as a blend of Indian and Spanish culture,²³³ which are both more hospitable to gay couples. Historically, English legislation had a much more profound and negative effect on gay rights in its former colonies than did Spanish or Portuguese legislation.²³⁴ Despite these differences, Spain and England both now recognize gay couples.²³⁵ Spain was the second country to grant gay couples the same legal rights as heterosexual unions,²³⁶ whereas the United Kingdom followed by permitting civil unions only months later.²³⁷ Different American Indians viewed homosexuality in different ways. While the Aztecs looked down upon men who were passive in homosexual sex²³⁸ the Mayans, like other cultures, found it acceptable for privileged men to have sex with young boys provided the adult was the aggressor.²³⁹

The values embodied in the constitutions, the reality of the country's political system, and the viewpoint with which Latin American countries view international rights also sheds light on the way laws towards gay couples have evolved. First, in U.S. history, we have had only one constitution and we view it as the ultimate law of the land. In contrast, Latin American countries regularly adopt new constitutions.²⁴⁰ The constitutions in Latin America are more elaborate than the U.S. Constitution but are more aspirational than binding.²⁴¹ Some of the values embodied in the constitutions are similar but the focus of each constitution differs.

Early Latin American constitutions did borrow concepts from the U.S. Constitution. For example, the 1812 Colombian Constitution acknowledged specific inalienable rights.²⁴² But the Latin American countries were also strongly influenced by the French Constitution. Although the French Declaration of the Rights and Duties of Man was forbidden, it was distributed in Latin America and its principles found a home in many Latin American constitutions.²⁴³ The Latin American conception of human rights is more focused on equality and fraternity versus the U.S. conception, which focuses more on Lockean, libertarian, and property-based principles.²⁴⁴ One explanation for the adoption of the French val-

233. See Wilets, *supra* note 147, at 1020.

234. *Id.*

235. 'Gay Weddings' Become Law in UK, BBC NEWS, Dec. 5, 2005, http://news.bbc.co.uk/2/hi/uk_news/4493094.stm; Renwick McLean, *Spain Legalizes Same-sex Marriage*, N.Y. TIMES, June 30, 2005, <http://www.nytimes.com/2005/06/30/international/europe/30cnd-spain.html>.

236. McLean, *supra* note 237.

237. 'Gay Weddings' Become Law in UK, *supra* note 237.

238. Nesvig, *supra* note 211, at 701.

239. *Id.*

240. J. Lloyd Mecham, *Latin American Constitutions: Nominal and Real*, 21 J. OF POL. 258, 258 (1959).

241. *Id.*

242. Carozza, *supra* note 207, at 96.

243. *Id.* at 91.

244. *Id.* at 94, 96.

ues over those of the United States, a closer neighbor, is that the French conception of rights mirrored the values already being taught at public universities in Latin America.²⁴⁵ In recent years, many Latin American countries have embraced human rights on an international level.²⁴⁶ Latin American activists lobbied for international human rights laws in part because they viewed the laws as one way to protect their countries sovereignty from countries such as the United States.²⁴⁷

V. CONCLUSION

Now, a discussion of these factors as they relate to individual countries helps predict the future evolution of same-sex couples rights in each of these countries. First, Uruguay already provides national legal rights for homosexual couples. In looking at the political system in Uruguay and comparing it to the United States, it is clear why Uruguay beat even California in granting significant rights to same-sex couples. Uruguay, an established democracy, had the best reputation in Latin America for protecting human rights.²⁴⁸ There was only a brief interruption of the democracy when a president gave power to the Uruguayan military, who "engaged in far-reaching arrests, routine torture of prisoners, and complete surveillance of the population."²⁴⁹ Uruguayan citizens, accustomed to airing their complaints in court, turned to the international legal system, which resolved grievances in their favor.²⁵⁰ Uruguay's proximity to Buenos Aires and the political system sheds light on why the country was the first in Latin America to grant national rights to same-sex couples.

When viewing the political system in Brazil, it is likely that Brazil's political system will support the granting of additional same-sex couple rights at a national level before the United States does. Because there are three strong branches of government in the United States, public opinion will have to evolve further in support of such rights before the rights are extended. But in Brazil, the executive branch is stronger than it is in the United States and the executive strongly supports the expansion of rights for gay couples.²⁵¹ Similarly, Argentina law is likely to continue its evolution towards more gay rights. As previously discussed, Argentina is becoming a more open society after military rule.²⁵²

Mexico is a country whose future is more difficult to predict. The gains that gay couples have made in the country are not due to strong executive support. Instead, left-leaning city and state governments have provided

245. *Id.* at 92.

246. Ellen L. Lutz & Kathryn Sikkink, *International Human Rights Law and Practice in Latin America*, 54 INT'L ORG. 633, 639 (2000).

247. *Id.* at 639.

248. *Id.* at 642.

249. *Id.*

250. *Id.* at 643.

251. Gary W. Cox & Scott Morgenstern, *Latin America's Reactive Assemblies and Proactive Presidents*, 33 COMP. POL. 171, 172 (2001).

252. Barrionuevo, *supra* note 49.

the rights. Unless the leftist movement in Mexico gains national momentum, it is unlikely that there will be quick evolution of national rights. Without popular support or support from political elites, it is more likely that the United States will grant rights, at least in pockets, to same-sex couples before Mexico meaningfully extends additional rights. In locations, such as California, where younger votes are more tolerant of differences, rights are likely to be granted in the future whereas in Mexico many gay men hide their sexual orientation in public, even in large cities.

Although the highest court in Colombia supported same-sex couples, it is difficult to imagine that there will be a further sustainable evolution of gay rights. The legislature and the public both disagree with the current grant of rights. Because of the violence in the country against gays, any granting of rights remains practically unenforceable and meaningful legal evolution is unlikely.

While Venezuela, like the United States, is unlikely to grant the right for same-sex couples to marry in the near future, Venezuela will likely allow gay couples some form of a civil union, at least in the city of Caracas. The violence against homosexuals is less prevalent than in Mexico or Colombia and heterosexuals patronize the same businesses without violence.

Cuba, despite its violent history of treatment towards homosexuals, may be the next country in the Americas to grant gay couples the right to civil unions or even marriage. Once Fidel Castro dies, President Raul Castro may feel more at ease publicly supporting gay rights. Further, public opinion is already moving towards greater acceptance of gays and lesbians.

Chile's conservative values mirror those of the religious right in the United States and any immediate granting of gay rights is unlikely. Unlike in the United States where some courts, such as the Supreme Court in California, have supported gay rights despite lack of public support, the judicial branch in Chile supports traditional families. There are also still laws in Chile that proactively discriminate against homosexuals, such as different ages at which consensual sex becomes legal for homosexual couples versus heterosexual couples.

The gay community will undoubtedly continue to fight for the rights of same-sex couples. In addition to property rights and adoption rights, gay couples winning the legal right to marry may enjoy other benefits. While it is unclear if the same benefits apply to homosexual couples as heterosexual couples, marriage has been credited for improving "physical health and longevity, mental health and happiness, economic well-being, and the raising of children."²⁵³ But to achieve these goals gay rights activists have a two-front battle to fight in Latin America. Gay activists must not only win battles in the legal system but must also change public opinion to

253. Linda J. Waite & Evelyn L. Lehrer, *The Benefits from Marriage and Religion in the United States: A Comparative Analysis*, 29 *POPULATION & DEV. REV.* 255, 256 (2003).

accept or at least tolerate same-sex couples. A strategy to do that based on past success would include targeting local lawmakers before national ones, portraying homosexuality in art forms to gain public support, and making key intellectual allies in the university community.

