

## Sexual Orientation and Gender Identity

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This article surveys developments in sexual orientation and gender identity law during 2013. The year was described variously as “the gayest year in gay history,”<sup>1</sup> because of historic advances in marriage equality in Western democracies, and “one of the worst,”<sup>2</sup> because many other countries have promoted continued violence against sexual minorities and their allies. By juxtaposing the progress and the persecution that have characterized this year, it is easier to see that “the advances that are being made in some parts of the world encourage a backlash in other parts of the world.”<sup>3</sup> Lawyers who have helped further equality in their own countries bear a special responsibility for assisting and aiding vulnerable populations who may end up paying a high cost for that success. As President Obama emphasized at the beginning of the year, in the first State of the Union address to expressly reference the struggle for LGBT equality, “[o]ur journey is not complete until our gay brothers and sisters are treated like anyone else under the law. For if we are truly created equal, then surely the love we commit to one another must be equal as well.”<sup>4</sup>

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1. David Crary, *Gay Rights Gains Piling Up; Battles Still Ahead*, PITT. POST-GAZETTE, Nov. 5, 2013, at A3 (quoting Fred Sainz, Vice President of Communications and Marketing of the Human Rights Campaign).

2. J. Lester Feder, *Was 2013 a Good Year For LGBT Rights?*, BUZZFEED (Dec. 21, 2013, 10:42 AM), <http://www.buzzfeed.com/lesterfeder/was-2013-a-good-year-for-gay-rights> (quoting Ken Kero-Metz, foreign policy fellow with the U.S. Congressional LGBT Equality Caucus).

3. Emine Saner, *Gay Rights Around the World: The Best and Worst Countries for Equality*, THE GUARDIAN, July 30, 2013, at 6 (quoting Alistair Stewart, assistant director of the Kaleidoscope Trust, a UK-based organization that supports international LGBT rights).

4. Peter Baker, *Obama Offers a Liberal Vision in Inaugural Address: ‘We Must Act’: Inaugural Stresses Theme of Civil and Gay Rights—Safety Net Praised*, N.Y. TIMES, Jan. 22, 2013, at A1.

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**I. Advances in Equality**

A. MARRIAGE

The United States Supreme Court issued its much-anticipated rulings regarding same-sex marriage in June; the timing of the decisions coincided with Gay Pride events being held throughout the country and participants certainly had reason to celebrate.<sup>5</sup>

In *Hollingsworth v. Perry*, the court was asked to address the question of whether a state's initial decision to recognize marriage equality can be reversed through a popular referendum, in this case California's Proposition 8.<sup>6</sup> The court concluded that it did not have authority to decide the case on the merits because the ballot initiative sponsors who took on the task of defending Proposition 8 after the state refused to do so lacked standing.<sup>7</sup> As a result, same-sex marriages were allowed to resume in California, and the court put off for another day the question of whether marriage equality is required under the federal Constitution.<sup>8</sup>

In *United States v. Windsor*, the court addressed a challenge to Section 3 of the federal Defense of Marriage Act (DOMA), which—for purposes of all federal law—defined marriage to mean “only a legal union between one man and a woman.”<sup>9</sup> Edith Windsor, a widow whose same-sex marriage was recognized as lawful in her home state of New York, claimed that it was unconstitutional for the federal government to deny her an estate tax exemption available to surviving spouses.<sup>10</sup> The court held that DOMA violated “basic due process and equal protection principles applicable to the Federal Government”<sup>11</sup> because it degraded and demeaned legally married same-sex couples “by refusing to acknowledge a status the State finds to be dignified and proper.”<sup>12</sup> The court's holding, while rooted in federalism concerns, also noted that DOMA was invalid because it was “motivated by an improper animus” and, therefore, impliedly could not survive a rational basis review.<sup>13</sup> Although the outcome cheered advocates of LGBT equality, critics were disappointed that the decision failed to recognize gays and lesbians as a suspect class, a conclusion that would have had further-reaching consequences on a multitude of issues.<sup>14</sup>

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5. Brad Knickerbocker, *Gay Pride 2013: Supreme Court Gives Extra Reason to Celebrate*, CHRISTIAN SCI. MONITOR (June 30, 2013), <http://www.csmonitor.com/USA/Society/2013/0630/Gay-Pride-2013-Supreme-Court-gives-extra-reason-to-celebrate-video>.

6. *Hollingsworth v. Perry*, 133 S.Ct. 2652, 2659 (2013).

7. *Id.* at 2668.

8. Jennifer Medina, *Gay Couples Who Sued In California Are Married*, N.Y. TIMES, June 29, 2013, at A10.

9. *U.S. v. Windsor*, 133 S.Ct. 2675, 2678 (2013).

10. *Id.* at 2679.

11. *Id.* at 2681.

12. *Id.* at 2695–96.

13. *Id.* at 2693 (“The Constitution's guarantee of equality must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot justify disparate treatment of that group.”) (internal quotation marks and citation omitted).

14. See, e.g., Daniel O. Conkle, *Evolving Values, Animus, and Same-Sex Marriage*, 89 IND. L.J. 27, 42 (2014) (concluding that the Court's reliance on “animus” was “seriously flawed” and that “the strongest, most candid, and most judicious rationale would rest on equal protection, with the Court concluding that classifications based on sexual orientation are quasi-suspect”).

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Taken together, *Perry* and *Windsor* have already been recognized as landmark cases.<sup>15</sup> As Justice Scalia noted in his dissenting opinion in *Windsor*, “the majority [opinion] arms well any challenger to a state law restricting marriage to its traditional definition . . . it’s just a matter of listening and waiting for the other shoe [to drop].”<sup>16</sup> In the months that followed the Supreme Court’s decision, the other shoe did, in fact, drop; *Windsor* and it progeny have left footprints all across the U.S. legal landscape.

Courts in New Jersey, New Mexico, and Utah relied heavily on the *Windsor* decision to conclude that bans on same-sex marriage were impermissible.<sup>17</sup> In Ohio, a federal judge concluded that the state was obligated to recognize same-sex marriages performed in other states.<sup>18</sup>

Other states legalized same-sex marriage as a result of legislative enactments. In November, same-sex marriage finally became legal in Hawaii, the state where the battle for marriage equality was born.<sup>19</sup> In Illinois, same-sex marriage became legal after the passage of Senate Bill 10, which was signed into law after being ratified by the General Assembly in November.<sup>20</sup> Although the bill is not scheduled to become effective until June 2014, Illinois has already celebrated its first legally-recognized same-sex marriage as a result of a judicial order granting injunctive relief to a same-sex couple who persuasively argued that the state would suffer little or no harm if they were allowed to marry prior to the effective date.<sup>21</sup> Other states that started performing same-sex marriage or legalized them in 2013 include Washington, Maryland, Rhode Island,<sup>22</sup> Delaware,<sup>23</sup> Minnesota,<sup>24</sup>

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15. See, e.g., Kenji Yoshino, *Why the Court Can Strike Down Marriage Restrictions Under Rational-Basis Review*, 37 N.Y.U. REV. L. & SOC. CHANGE 331 (2013).

16. *U.S. v. Windsor*, 133 S.Ct. 2675, 2710 (2013) (Scalia, J., dissenting).

17. *Garden State Equality v. Dow*, 79 A.3d 1036, 1038–45 (N.J. 2013) (concluding that New Jersey’s Civil Union Act failed to provide equal treatment to same-sex couples and requiring state officials to “permit same-sex couples, who are otherwise eligible, to enter into civil marriage beginning on October 21, 2013”); *Griego v. Oliver*, 316 P.3d 865, 889 (N.M. 2013) (“Denying same-gender couples the right to marry and thus depriving them and their families of the rights, protections, and responsibilities of civil marriage violates the equality demanded by the Equal Protection Clause of the New Mexico Constitution.”); *Kitchen v. Herbert*, 961 F. Supp. 2d 1181, 1181 (D. Utah 2013) (“Utah’s prohibition on same-sex marriage conflicts with the United States Constitution’s guarantees of equal protection and due process under the law.”).

18. *Obergefell v. Wymyslo*, No. 1:13-cv-501, 2013 WL 6726688, at \*21 n.22 (S. D. Ohio Dec. 23, 2013) (noting that the decision was limited to the narrow question of whether the state had an obligation to recognize same-sex marriages on death certificates but emphasizing that “the logical conclusion to be drawn from the evidence, arguments, and law presented here is that Ohio’s violation of the constitutional rights of its gay citizens extends beyond the bounds of this lawsuit”).

19. Erik Eckholm, *Battle Nears End In First Front Line on Gay Marriage*, N.Y. TIMES, Nov. 9, 2013, at A11 (noting that at the time Justice Levinson, of the Hawai’i Supreme Court, authored a judicial opinion recognizing that the right of same-sex couples to marry was protected under the State Constitution, “such marriages existed nowhere”).

20. See *Gray v. Orr*, No. 13-C-8449, 2013 WL 6355918, at \*3 (N.D. Ill. Dec. 5, 2013).

21. *Id.* On February 21, 2014, the Cook County Clerk’s Office began issuing marriage licenses to same-sex couples after a federal court ruled that Cook County residents did not have to wait until Illinois’s marriage equality bill became law in June. *Memo Op., Lee v. Orr*, No. 13-cv-8719 (N.D. Ill. Feb. 21, 2014).

22. Katharine Q. Seelye, *Rhode Island Joins States That Allow Gay Marriage*, N.Y. TIMES, May 3, 2013, at A15 (noting that same-sex marriages became legal in Rhode Island on August 1, 2013).

23. Erik Eckholm, *Delaware, Continuing a Trend, Becomes the 11th State to Allow Same-Sex Unions*, N.Y. TIMES, May 8, 2013, at A14.

24. Monica Davey, *Minnesota Senate Clears Way for Same-Sex Marriage*, N.Y. TIMES, May 14, 2013, at A12 (noting that at the time, Minnesota was the sixth state to pass marriage equality in a six-month period); Lisa

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and Maine.<sup>25</sup> This means that there are now eighteen states and the District of Columbia in which some form of same-sex marriage is now legal (“states that account for 228 electoral votes and 123 million people, nearly 40 percent of the U.S. population”).<sup>26</sup>

Progress towards marriage equality was reflected elsewhere around the globe. In 2013, same-sex marriage became legal in France,<sup>27</sup> New Zealand,<sup>28</sup> Uruguay,<sup>29</sup> Brazil,<sup>30</sup> Colombia,<sup>31</sup> and England and Wales.<sup>32</sup>

Several legal challenges by opponents of same-sex marriage are, however, worth noting. Following the legalization of same-sex marriage in France, a group of mayors argued that the government could not force public officials opposed to gay marriage to conduct such weddings.<sup>33</sup> In June, France passed a law intended to do just that; the measure imposed sanctions against “any public official who refused to conduct marriages on the basis of sexual orientation.”<sup>34</sup> The country’s highest court rejected the mayors’ argument, noting that “public officials ‘must apply the [same-sex marriage] law and guarantee the proper functioning and neutrality of the civil service.’”<sup>35</sup> The court concluded that “[f]reedom of conscience is not violated by the officiating of weddings.”<sup>36</sup>

In Colombia, some same-sex couples obtained marriage licenses after the country’s Congress failed to meet a deadline for implementing full family equality set by the Constitutional Court in a 2011 ruling.<sup>37</sup> Opponents of gay marriage brought suit to have the licenses invalidated, and these challenges have been met with mixed success. One court annulled a same-sex couple’s marriage license and another dismissed the action after con-

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Keen, *Minnesota Senate Gives Final Approval to Marriage Equality*, WINDY CITY TIMES, May 13, 2013, at 4, available at <http://www.windycitytimes.com/APP/article.php?AID=42762&i=38&s=National>.

25. Reid Wilson, *Gay Marriage Fight Shifts to Federal Courts, 2014 Set to be Tipping-Point Year*, WASH. POST (Dec. 24, 2013, 11:08 AM), <http://www.washingtonpost.com/blogs/govbeat/wp/2013/12/24/gay-marriage-fight-shifts-to-federal-courts-2014-set-to-be-tipping-point-year/>.

26. *Id.*

27. France had civil solitary pacts since 1999, which provided same-sex couples with some rights and protections but fell short of marriage. Steven Erlanger & Scott Sayare, *Protests Against Same-Sex Marriage Bill Intensify in France*, N.Y. TIMES, Apr. 22, 2013, at A8. Polls showed that most French citizens favored marriage equality. *Id.*

28. *Politics This Week, Lords of the Rings*, ECONOMIST, Apr. 20, 2013, at 7, available at <http://www.economist.com/news/world-week/21576454-politics-week>. The legislation was passed in April and came into effect in August. *Id.* New Zealand had allowed civil unions since 2005, but same-sex couples did not have the right to jointly adopt children. *New Zealand Passes Marriage Equality*, WINDY CITY TIMES, Apr. 24, 2013, at 5.

29. *Uruguay: Same Sex Marriage Legalized*, N.Y. TIMES, Apr. 10, 2013, at A8.

30. Simon Romero, *Brazil Court Council Removes a Barrier to Same-Sex Marriage*, May 15, 2013, at A4.

31. J. Lester Feder, *Tussle Over Gay Marriage in Colombia Heats Up*, BUZZFEED (Oct. 9, 2013, 10:21 AM), <http://www.buzzfeed.com/lesterfeder/tussle-over-gay-marriage-in-colombia-heats-up>.

32. *Britain: Gay Marriage Is Given Seal of Approval by Queen Elizabeth II*, N.Y. TIMES, July 17, 2013, at A10.

33. *France’s Mayors ‘Cannot Block Gay Marriage’*, THE TELEGRAPH (Oct. 18, 2013, 4:02 PM), <http://www.telegraph.co.uk/news/worldnews/europe/france/10389316/Frances-mayors-cannot-block-gay-marriage.html>.

34. *Id.*

35. *Id.*

36. Conseil constitutionnel [CC] [Constitutional Court] decision No. 2013-353QPC, Oct. 18, 2013 (Fr.), available at <http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank/download/cc2013353qpc.pdf>.

37. Feder, *supra* note 31.

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cluding that third-party interveners lacked standing to disrupt marriages.<sup>38</sup> Those couples whose marriages were annulled will appeal the ruling, thereby forcing the court to clarify whether marriage equality is mandated or whether the state retains the option of offering same-sex couples equivalent rights through civil unions.<sup>39</sup>

Marriage equality has also resulted in lawsuits being filed by or against representatives of the wedding industry and other commercial businesses. In *Elane Photography, LLC v. Willock*, the owners of a wedding photography business argued that their First Amendment speech and free exercise rights were violated after the New Mexico Human Rights Commission found them guilty of discrimination for refusing to photograph a same-sex wedding.<sup>40</sup> The New Mexico Supreme Court rejected the free speech claim because it concluded that the state's Human Rights Act did not compel speech but merely required a business subject to public accommodation laws to "perform the same services for a same-sex couple as it would for an opposite-sex couple."<sup>41</sup> The court also rejected the argument that enforcement of the Human Rights Act risked chilling creative and expressive speech. The court emphasized, "Elane Photography's choice to offer its services to the public is a business decision, not a decision about its freedom of speech."<sup>42</sup> With respect to the free exercise claims, the court concluded that the act was a neutral law of general applicability and, therefore, its enforcement was not unconstitutional.<sup>43</sup>

The Supreme Court of the United Kingdom dealt with a similar issue in *Bull v. Hall*.<sup>44</sup> That case involved Christian hotelkeepers who had adopted a policy of offering double accommodations (two people sharing a single bed) only to heterosexual married couples. On this basis, the hotelkeepers refused to provide services to a gay couple. The court noted that the case involved two social values in tension—the right of individuals to manifest their religion without unjustified limitation by the state and the right of gay couples to respect for their private lives without unjustified discrimination because of their sexual orientation.<sup>45</sup> Citing the "continuing legacy of . . . centuries of discrimination, persecution even," that homosexuals have endured throughout the ages and that "is still going on in many parts of the world," the court concluded that prohibiting hotelkeepers from discriminating against gay couples did not amount to "a disproportionate limitation on their right to manifest their religion."<sup>46</sup>

There have also been setbacks on the road to marriage equality. Among the more notable are the rejection of same-sex marriage legislation by the Northern Ireland Assembly (albeit in a very close fifty-three to forty-two vote);<sup>47</sup> a voter referendum in Croatia ap-

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38. J. Lester Feder, *Same-Sex Couple Wins Legal Challenge To Their Marriage in Colombia*, BUZZFEED (Oct. 16, 2013, 5:53PM), <http://www.buzzfeed.com/lesterfeder/same-sex-couple-wins-legal-challenge-to-their-marriage-in-co>.

39. *Id.*

40. *Elane Photography, LLC v. Willock*, 309 P.3d 53, 59–60 (N.M. 2013).

41. *Id.* at 65–66.

42. *Id.* at 67.

43. *Id.* at 75.

44. *Bull v. Hall*, [2013] UKSC 73, [1]–[4] (appeal taken from Eng.), available at <http://www.bailii.org/uk/cases/UKSC/2013/73.html>.

45. *Id.* para. 4–5.

46. *Id.* para. 53.

47. *Same-sex Marriage Motion is Defeated at NI Assembly*, BBC NEWS (Apr. 29, 2013, 1:03 PM), <http://www.bbc.co.uk/news/uk-northern-ireland-22344006>.

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proving a constitutional amendment restricting marriage to opposite-sex couples;<sup>48</sup> and the High Court of Australia's decision to dissolve the marriages of same-sex couples who had wed under a local law passed by the Australian Capital Territory.<sup>49</sup> This last example, however, is emblematic of the bigger picture; as one commentator noted "[a]lthough Australian Marriage Equality lost this battle, the High Court decision will enable it to win the war. It is now clear that the Australian constitution allows marriage to change over time to include people of the same sex."<sup>50</sup>

**B. ADOPTION**

The past year brought positive developments with respect to adoption. A few months after France legalized same-sex marriage, a French court formally recognized the right of a lesbian to adopt the biological children of her same-sex partner.<sup>51</sup> Progress in adoption rights was also made in countries where same-sex marriage is still not legal. Germany's Constitutional Court expanded the adoptive rights of LGBT persons in civil unions by striking down laws that made it impossible for civil partners to adopt each other's stepchildren or previously adopted children.<sup>52</sup> Prior to the ruling, civil partners were only allowed to adopt each other's biological children; they are still prohibited from jointly adopting.<sup>53</sup>

The European Court of Human Rights also weighed in on the subject.<sup>54</sup> The Grand Chamber concluded that Austrian law improperly differentiated between unmarried heterosexual and homosexual couples by allowing only the former to adopt the child of a partner.<sup>55</sup> Although the judgment suggests that all contracting states will be required to extend to same-sex civil partners the same rights enjoyed by unmarried opposite-sex couples, the judgment reaffirmed the court's view that "the Convention does not impose an obligation on the Contracting States to grant same-sex couples access to marriage."<sup>56</sup>

As noted, the progress made in some parts of the world has provoked a backlash in others. The most notorious example comes from Russia, where the Duma passed a law

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48. Dan Bilefsky, *Croats Vote Against Same-sex Marriage: Government to Support Law to Allow Protections for Gay Partners Anyway*, INT'L HERALD TRIB., Dec. 3, 2013, at 5 (noting, however, that the Croatian Prime Minister expressed his disappointment at the referendum results and that the government planned to move forward with proposed legislation that would confer many legal rights via a civil partnership scheme).

49. Gwynne Dyer, *Gay Rights Suffer Major Defeats: But Despite Setbacks in Africa, Asia, Europe, the Clock Will Not Be Turned Back*, HAMILTON SPECTATOR, Dec. 31, 2013, at A11, available at <https://www.thespec.com/opinion-story/4293561-gay-rights-suffer-major-defeats/>.

50. George Williams, *High Court Ruling Did Not Rule Out Same-Sex Marriage*, CANBERRA TIMES, Dec. 17, 2013, at 4.

51. Sarah Begley, *First Gay Adoption Approved in France*, TIME (Oct. 18, 2013), <http://world.time.com/2013/10/18/first-gay-adoption-approved-in-france/>.

52. *Court Ruling: Germany Strengthens Gay Adoption Rights*, SPIEGEL ONLINE INT'L (Feb. 19, 2013, 1:02 PM), <http://www.spiegel.de/international/germany/german-court-strengthens-gay-and-lesbian-adoption-rights-a-884278.html>.

53. *Id.*

54. *See generally*, X v. Austria, App. No. 19010/07, Eur. Ct. H.R. (2013), available at [http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-116735#{"itemid":\["001-116735"\]}](http://hudoc.echr.coe.int/sites/fra/pages/search.aspx?i=001-116735#{).

55. *Id.* para. 153.

56. *Id.* para. 106.

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banning the adoption of Russian children by same-sex couples, as well as unmarried individuals who reside in countries where same-sex marriage has been legalized.<sup>57</sup>

C. GENDER IDENTITY EQUALITY

Continuing a remarkable trend, 2013 brought increased legal recognition for gender non-normative persons.<sup>58</sup> In Bangladesh, the government announced that it would allow individuals to identify as a third gender on official documents such as passports and identity cards.<sup>59</sup> In India, the Supreme Court heard oral arguments and reserved judgment in its first case expressly addressing the legal rights of “third gender” persons, specifically “the right to freely express their gender identity,” to be recognized as a “third gender” on official documents, the right to marry and adopt, and the right to welfare and social benefits.<sup>60</sup> Nepal began issuing “third gender” citizenship certificates this year, and Germany became the first country in Europe to allow a third gender option on birth certificates of children born of indeterminate gender.<sup>61</sup>

According to Mara Kiesling, Executive Director of the National Center for Transgender Equality, 2013 “will be remembered as a year that put [the transgender community in the United States] right to the edge of the tipping point” of equality.<sup>62</sup> Notable highlights include expansion of the Violence Against Women Act to eliminate previous restrictions prohibiting federal funding for LGBT-related domestic violence efforts.<sup>63</sup> California became the first state to enact legislation protecting the right of transgender students to “participate in sex-segregated school programs and activities, including athletic teams and competitions, and use facilities consistent with his or her gender identity, irrespective of the gender listed on the pupil’s records.”<sup>64</sup> Delaware became the seventeenth state to enact legislation that includes gender identity as a protected category for purposes of employment, housing, and other settings.<sup>65</sup>

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57. Harvey Fierstein, *Russia’s Anti-Gay Crackdown*, N.Y. TIMES, July 22, 2013, at A19.

58. Dipika Jain & Kimberly Rhoten, *A Comparison of the Legal Rights of Gender Non-Conforming Persons in South Asia*, 48 ECON. & POL. WKLY 10 (2013).

59. *Id.*

60. Murali Krishnan, *Supreme Court Reserves Its Judgment in PIL Seeking Recognition of Transgenders as a Third Gender; Raju Ramachandran Appears for Nalsa*, B. & BENCH (Oct. 31, 2013, 7:03 AM), <http://barandbench.com/content/supreme-court-reserves-its-judgment-pil-seeking-recognition-transgenders-third-gender-raju#Uy2-5pNesfl>.

61. Amanda Scherker, *Germany to Offer Third Party Gender Option on Birth Certificates*, HUFFINGTON POST (Aug. 29, 2013, 2:30 PM), [http://www.huffingtonpost.com/2013/08/17/germany-third-gender\\_n\\_3769055.html](http://www.huffingtonpost.com/2013/08/17/germany-third-gender_n_3769055.html).

62. Mara Kiesling, *10 Transgender Wins of 2013 You Should Know About*, HUFFPOST BLOG (Dec. 30, 2013, 9:03AM), [http://www.huffingtonpost.com/mara-keisling/10-transgender-wins-of-2013\\_b\\_4505453.html](http://www.huffingtonpost.com/mara-keisling/10-transgender-wins-of-2013_b_4505453.html).

63. Darrick Ing & Tiffany Woods, *Why Talking About Domestic Violence in the Transgender Community Matters*, TRANSGENDER L. CENTER, <http://transgenderlawcenter.org/archives/9392> (last visited Mar. 24, 2014) (describing reauthorization of VAWA as “an enormous victory for the transgender community”).

64. CAL. EDUC. CODE, § 221.5 (effective Jan. 1, 2014).

65. *Delaware Enacts Gender Identity Nondiscrimination Act to Extend Employment Discrimination Protections Based on Gender Identity*, DUANE MORRIS (June 24, 2013), [http://www.duanemorris.com/alerts/delaware\\_gender\\_identity\\_nondiscrimination\\_act\\_employment\\_discrimination\\_protections\\_4921.html](http://www.duanemorris.com/alerts/delaware_gender_identity_nondiscrimination_act_employment_discrimination_protections_4921.html) (“In addition to Delaware and the District of Columbia, these states are: Minnesota, Rhode Island, New Mexico, California, Illinois, Maine, Hawaii, New Jersey, Washington, Iowa, Oregon, Vermont, Colorado, Connecticut, Nevada and Massachusetts.”).

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In other actions designed to protect gender non-conforming and LGBT youth, New Jersey became the second state, after California, to pass a law banning “conversion therapy” on minors.<sup>66</sup> The New Jersey law has already survived an initial constitutional challenge.<sup>67</sup> The Ninth Circuit reached a similar conclusion when the California law was challenged on First Amendment grounds.<sup>68</sup> Similar bills have been introduced in Pennsylvania, Massachusetts, and New York.<sup>69</sup> A member of the British Parliament has also introduced a measure designed to ban “conversion therapy” that is even more expansive; the proposed ban would outlaw the practice altogether, not just as practiced on minors.<sup>70</sup>

## II. Discrimination and Violence

Discrimination and violence against LGBT persons is still a global phenomenon.<sup>71</sup> At the end of 2013, consensual sex between adults of the same gender could lead to criminal penalties in more than seventy-six countries.<sup>72</sup> These laws foster a climate of violence against LGBT persons and have led to an increasing recognition of the need to grant asylum to those fleeing persecution on the grounds of their sexual orientation or gender identity.<sup>73</sup> Discrimination against LGBT persons is still prevalent in many parts of the world, and this survey does not pretend to be exhaustive. Instead, it focuses on those areas of the world that dominated discussions of LGBT oppression during the course of the year (Eastern Europe, India, and Africa).

### A. EASTERN EUROPE

In June 2013, the Russian Duma overwhelmingly approved a ban on “homosexual propaganda.”<sup>74</sup> President Putin signed the bill into law, notwithstanding the fact that the measure was widely understood to be in violation of international human rights norms.<sup>75</sup>

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66. Tina Susman, *N.J. Gov. Christie Signs Ban on Gay Conversion Therapy*, WASH. POST, Aug. 20, 2013, at A3.

67. *King v. Christie*, 86 Fed. R. Serv. 3d 1581 (D. N.J. Nov. 8, 2013).

68. *Pickup v. Brown*, 728 F.3d 1041 (9th Cir. 2013).

69. Lila Shapiro, *Conversion Therapy Ban in Pennsylvania Gaining Support*, HUFFINGTON POST (Sept. 18, 2013, 1:51 PM), [http://www.huffingtonpost.com/2013/09/18/conversion-therapy-pennsylvania\\_n\\_3948815.html](http://www.huffingtonpost.com/2013/09/18/conversion-therapy-pennsylvania_n_3948815.html).

70. *Swansea MP Geraint Davies Seeks to Outlaw Gay “Conversion Therapy”*, SO. WALES EVENING POST, Dec. 12, 2013, at 2.

71. *At UN Meeting, Countries Commit to Protect Gay Rights, Combat Discrimination*, UN NEWS CENTRE (Sept. 26, 2013), <http://www.un.org/apps/news/story.asp?NewsID=46036#Uvq9umJdXT0>.

72. The exact number varies depending on how one defines “country.” See *82 Countries Where Homosexuality is Illegal*, ERASING 76 CRIMES, <http://76crimes.com/76-countries-where-homosexuality-is-illegal> (last visited Mar. 24, 2014) (providing a comprehensive list, current as of January 2014).

73. See, e.g., S. JANSEN & T. SPIJKERBOER, *FLEEING HOMOPHOBIA: ASYLUM CLAIMS RELATED TO SEXUAL ORIENTATION AND GENDER IDENTITY IN EUROPE 14–15* (2011), available at [http://www.rechten.vu.nl/nl/Images/Fleeing%20Homophobia%20report%20EN\\_tcm22-232205.pdf](http://www.rechten.vu.nl/nl/Images/Fleeing%20Homophobia%20report%20EN_tcm22-232205.pdf).

74. In the lower house, the bill passed by a vote of 436 to 0, with one abstention. *Khristina Narizhnaya, State Duma OKs Ban on Teaching Homosexuality*, CHI. TRIB., June 12, 2013, at 17.

75. Editorial, *Mr. Putin’s War on Gays*, N.Y. TIMES, July 28, 2013, at SR10.



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The enactment of this law is particularly disheartening because it is similar to measures that had been defeated in the Russian parliament multiple times in the recent past<sup>76</sup> and because it reflects a much larger crackdown on civil rights generally.<sup>77</sup> In addition, the law followed on the heels of decisions by the European Court of Human Rights and the United Nations Human Rights Committee that highlighted the inconsistency between similar bans and Russia's obligations under international human rights standards, as well as its own Constitution.<sup>78</sup> The fact that the measure passed is indicative of the willingness of political parties to scapegoat LGBT persons for political gain.<sup>79</sup> It also reflects the degree to which homophobia is deeply rooted among broad segments of the general population.<sup>80</sup>

Ironically, the Russian "homosexual propaganda" ban does not expressly refer to homosexuality or homosexuals. Perhaps the excision of these terms from the legislative language is symbolic of the law's goal of rendering LGBT persons invisible. In order to achieve this objective, the law criminalizes "the act of distributing information among minors that 1) is aimed at . . . creating nontraditional sexual attitudes, 2) makes nontraditional sexual relations attractive, 3) equates the social value of traditional and nontraditional sexual relations, or 4) creates an interest in nontraditional sexual relations."<sup>81</sup>

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76. HUMAN RIGHTS FIRST, CONVENIENT TARGETS: THE ANTI-PROPAGANDA LAW AND THE THREAT TO LGBT RIGHTS IN RUSSIA 9 (2013), available at <http://www.humanrightsfirst.org/uploads/pdfs/HRF-russias-anti-gay-ban-SG.pdf> ("Before 2009, the Kremlin made significant, if selective, strides toward fulfilling its international human rights obligations [for example by opposing three prior attempts to pass federal anti-"homosexual propaganda" bans]. The turnaround on these commitments—the calculated political decision to clamp down on opposition, fundamental rights, and minorities—grew out of the political turbulence triggered by the 2011 parliamentary elections. Allegations of fraud sent tens of thousands of people into the streets—the largest post-Soviet protests—which, in turn, sent shivers through the political establishment. That's why people . . . who strongly opposed [the earlier bills] voted for the federal 'propaganda' bill . . .").

77. See, e.g., AMNESTY INT'L, FREEDOM UNDER THREAT: CLAMPDOWN ON FREEDOMS OF EXPRESSION, ASSEMBLY AND ASSOCIATION IN RUSSIA 5 (Apr. 2013), available at <http://www.amnesty.org/en/library/asset/EUR46/011/2013/en/d9fb0335-c588-4ff9-b719-5ee1e75e8ff5/eur460112013en.pdf> (detailing "a long list of human rights violations that collectively testify to the shrinking of fundamental freedoms in Russia").

78. HUMAN RIGHTS FIRST, *supra* note 76 (citing *Alekseyev v. Russia*, Eur. Ct. H.R. (2010), available at [\) and \*Fedotova v. Russian Federation\*, Communication No. 1932/2010 \(U.N. Human Rights Comm. Oct. 31, 2012\), available at <http://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.106.D.1932.2010.doc>\).](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-101257#{)

79. See, e.g., Nikolai Alexseev, *This Russian Anti-Gay Bill Is Nothing Short of Medieval Barbarity*, THE GUARDIAN (Nov. 26, 2011, 5:00 EST), <http://www.theguardian.com/commentisfree/2011/nov/26/russian-anti-gay-bill-medieval-barbarity>.

80. See, e.g., Cai Wilkinson, *Russia's Anti-Gay Laws: The Politics and Consequences of a Moral Panic*, THE DISORDER OF THINGS (June 23, 2013), <http://thedisorderofthings.com/2013/06/23/russias-anti-gay-laws-the-politics-and-consequences-of-a-moral-panic/> (citing statistics showing that 71 percent of Russian men had a negative attitude towards gays and more than 40 percent of respondents disagreed with the statement that "[h]omosexuals should enjoy the same rights as others in Russia").

81. Federal'nyi Zakon ot 29.06.2013 No. 135-FZ "O Vnesenii Izmenenij v Statyuu 5 Federal'nogo Zakona "O Zashchite Detej ot Informatsii, Prichinyayushtej Vred ih Zdorovyyu i Razvitiyu" i Otdelynuje Zakonodatelnyje akt? Rossijskoj Federatsii v Tselyah Zashchiti Detej ot Informatsii, Propagandiruyushtej Otrisanie Traditsionnyh Semejnyh Tsennostej" [Federal Law of 29.06.2013 No. 135-FZ "On Amending Article 5 of the Federal Law" On Protection of Children From Information Harmful to Their Health and Development "and Some Legislative Acts of the Russian Federation in Order to Protect Children from Information that Promotes Traditional Family Denial Values"] SOBRANIE ZAKONODATEL'STVA ROSSIJSKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2013, No. 135, available at <http://pravo.gov.ru:8080/>

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Russia's ban on "homosexual propaganda" is one example of the backlash against LGBT rights in other Eastern European countries. Similar measures were or are being considered in Ukraine, Hungary, and Lithuania.<sup>82</sup> In May of 2013, Moldova secretly enacted its own ban on "homosexual propaganda," prohibiting the distribution of information regarding any "other relations than those related to marriage and family."<sup>83</sup> The measure was overturned, however, in an effort to facilitate Moldova's goal of acceding to the European Union.<sup>84</sup>

The Council of Europe's advisory body on constitutional matters, the European Commission for Democracy through Law (also known as the Venice Commission), has strongly condemned bans on "homosexual propaganda," concluding that "the aim of these measures is not . . . to advance and promote traditional values and attitudes towards family and sexuality but rather to curtail non-traditional ones by punishing their expression and promotion."<sup>85</sup>

**B. INDIA**

In what has been described as "an astonishing kind of reversal,"<sup>86</sup> the Supreme Court of India reinstated an 1861 law (Section 377 of the Indian Penal Code) that imposes a ten-year sentence for homosexual conduct.<sup>87</sup> The Delhi High Court had declared the law unconstitutional as applied to private, consensual adult sex in 2009, but the Supreme Court concluded, "only Parliament had the power to change that law."<sup>88</sup>

Notably, the judgment rejected the argument that the homophobic law was an outdated vestige of the colonial era and embraced it as reflecting the will of India's people.<sup>89</sup> The

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page.aspx?50556; see also Innokenty Gregov, *Russia's Anti-Gay Law, Spelled Out in Plain English*, POLICYMIC (Aug. 8, 2013), <http://www.policymic.com/articles/58649/russia-s-anti-gay-law-spelled-out-in-plain-english>.

82. Press Release, Int'l Lesbian, Gay, Bisexual, Trans and Intersex Assoc. Eur., NGO Statement to Council of Europe: Parliamentary Assembly Must Robustly Condemn Bans on "Homosexual Propaganda" (June 27, 2013), available at [http://www.ilga-europe.org/home/guide\\_europe/country\\_by\\_country/russia/joint\\_ngo\\_statement\\_russia\\_pace](http://www.ilga-europe.org/home/guide_europe/country_by_country/russia/joint_ngo_statement_russia_pace); Drew F. Cohen, *The Nonsense Used to Justify Bigotry*, U.S. NEWS & WORLD REP. (Aug. 14, 2013), <http://www.usnews.com/opinion/blogs/world-report/2013/08/14/russia-the-winter-olympics-and-laws-against-gay-propaganda>.

83. Press Release, Int'l Lesbian, Gay, Bisexual, Trans and Intersex Assoc. Eur., Moldova Must Strike Down Law Banning 'Homosexual Propaganda' (July 17, 2013), available at [http://ilga-europe.org/home/news/for\\_media/media\\_releases/moldova\\_must\\_strike\\_down\\_law\\_banning\\_homosexual\\_propaganda](http://ilga-europe.org/home/news/for_media/media_releases/moldova_must_strike_down_law_banning_homosexual_propaganda).

84. James Nichols, *Moldova Overturns "Gay Propaganda" Ban In Anticipated EU Membership Move*, HUFFINGTON POST (Oct. 14, 2013, 12:03 PM), [http://www.huffingtonpost.com/2013/10/14/moldova-gay-propoganda\\_n\\_4096947.html](http://www.huffingtonpost.com/2013/10/14/moldova-gay-propoganda_n_4096947.html).

85. Eur. Comm'n for Democracy Through Law (Venice Comm'n), *Opinion On the Issue of the Prohibition of So-called "Propaganda of Homosexuality" In the Light of Recent Legislation In Some Member States of the Council of Europe*, CDL-AD(2013)022, at 21 (June 18, 2013), available at [http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2013\)022-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2013)022-e).

86. Vaibhav Vats, *A Conversation With: Lawyer and Activist Gautam Bhan*, INDIA INK (Dec. 11, 2013, 6:35 AM), <http://india.blogs.nytimes.com/2013/12/11/a-conversation-with-lawyer-and-activist-gautam-bhan/>.

87. Gardiner Harris, *India's Supreme Court Restores an 1861 Law Banning Gay Sex*, N.Y. TIMES, Dec. 11, 2013, at A6. See Koushal v. NAZ Foundation, (2013) 10972 S.C.C 1 (India), available at <http://judis.nic.in/supremecourt/imgs1.aspx?filename=41070>.

88. *Koushal*, (2013) 10972 S.C.C. at paras. 32–33. For more on this case, see the India Committee's Year in Review contribution in this issue.

89. *Id.* But see G. Ananthpadmanabhan, *A Body Blow to Human Rights*, DAILY NEWS & ANALYSIS (Dec. 11, 2013, 10:32 PM), <http://www.dnaindia.com/analysis/report-a-body-blow-to-human-rights-1933524>. ("The

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court lambasted the lower court's reliance on foreign jurisprudence, emphasizing that "[i]n its anxiety to protect the so-called rights of LGBT persons[,] the Delhi High Court had erred in placing undue reliance "upon the judgments from other jurisdictions."<sup>90</sup> The Supreme Court reiterated its "grave doubts about the expediency of transplanting Western experience in our country."<sup>91</sup> Nevertheless, the court concluded that Parliament remained free to delete Section 377 from the Penal Code, or to amend the law as it saw fit.<sup>92</sup>

If there is a silver lining to the court's judgment, it is this: the decision galvanized LGBT persons and their allies into action and sparked a debate on the rights of sexual minorities and the responsibilities of the judiciary that will have important repercussions in the future. As Leila Seth, a former judge on the Delhi High Court and former Chief Justice of the Himachal Pradesh High Court, as well as mother of openly gay writer Vikram Seth, noted,

[w]hat makes life meaningful is love. The right that makes us human is the right to love. To criminalize the expression of that right is profoundly cruel and inhumane. To acquiesce in such criminalization or, worse, to recriminalize it, is to display the very opposite of compassion. To show exaggerated deference to a majoritarian Parliament when the matter is one of fundamental rights is to display judicial pusillanimity, for there is no doubt, that in the constitutional scheme, it is the judiciary that is the ultimate interpreter.<sup>93</sup>

C. AFRICA

What is happening in certain areas of the African continent gives LGBT advocates great cause for concern. As detailed in Amnesty International's April 2013 report, *Making Love A Crime: Criminalization of Same-Sex Conduct in Sub-Saharan Africa*,<sup>94</sup> LGBT persons continue to be persecuted, imprisoned, and murdered in many African countries. Although there have been positive developments in this area of the world,<sup>95</sup> the dangers to which LGBT persons are exposed are perhaps at their highest in Nigeria and Uganda, both of which passed legislation in December that would allow the state to imprison or execute individuals found guilty of engaging in same-sex conduct.<sup>96</sup>

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introduction of Section 377 was not a reflection of the existing Indian values and traditions; rather it was imposed upon the Indian society by the colonisers due to their moral values.").

90. *Koushal*, (2013) 10972 S.C.C. at para. 52.

91. *Id.* (quoting *Jagmohan Singh v. State of U.P.* (1973) 1 S.C.C. 20) (India).

92. *Id.* para. 56.

93. Leila Seth, *A Mother and a Judge Speaks Out On Section 377*, THE TIMES OF INDIA, Jan 27, 2014, available at <http://timesofindia.indiatimes.com/home/stoi/deep-focus/A-mother-and-a-judge-speaks-out-on-section-377/articleshow/29383723.cms>.

94. AMNESTY INT'L, *MAKING LOVE A CRIME: CRIMINALIZATION OF SAME-SEX CONDUCT IN SUB-SAHARAN AFRICA* (2013).

95. *See id.* at 17-18.

96. *See* Mona Chalabi, *State-Sponsored Homophobia: Mapping Gay Rights Internationally*, THE GUARDIAN (Dec. 11, 2013, 5:11 AM), <http://www.theguardian.com/news/datablog/2013/oct/15/state-sponsored-homophobia-gay-rights> (noting that, at the end of 2013, Mauritania, Sudan, Iran, Yemen, and Saudi Arabia had laws sanctioning the death penalty); *see also* Doug Sanders, *Let's Be Clear: The World's Not Split Over Gay Rights*, GLOBE & MAIL, May 4, 2013, at F2, available at <http://www.theglobeandmail.com/globe-debate/lets->

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The Nigerian legislation, known as the Same-Sex Marriage Prohibition Bill, not only bans gay marriage, but also outlaws LGBT organizations altogether.<sup>97</sup> Those found guilty of entering into a same-sex union are subject to terms of imprisonment of fourteen years; those found guilty of witnessing such unions or aiding LGBT organizations can be imprisoned for a decade.<sup>98</sup> The law has been roundly criticized by human rights advocates around the world, with the United Nations Human Rights Chief, Navi Pillay, noting that it was rare to see “a piece of legislation that in so few paragraphs directly violates so many basic, universal human rights.”<sup>99</sup>

The Ugandan law is even more draconian.<sup>100</sup> It has the objective of criminalizing “the promotion or recognition of homosexuality” and can result in life imprisonment for those convicted of “aggravated homosexuality.”<sup>101</sup> The bill has been described as “the worst in the world” and was condemned by leaders such as President Obama, who described it as “odious,” and Archbishop Desmond Tutu, who likened it to apartheid.<sup>102</sup> The Center for Constitutional Rights cautioned that the measure would place “the lives of countless Ugandans at risk” and urged the international community to recognize that it had a “legal and moral obligation to prevent this law from being implemented.”<sup>103</sup>

As this article was being prepared, the Nigerian bill was signed into law by President Jonathan Goodluck, and Uganda’s President Yoweri Museveni indicated he would do the same.<sup>104</sup> And homophobic mobs were given a license to kill.<sup>105</sup>

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be-clear-the-worlds-not-split-over-gay-rights/article11713775/ (noting that Ethiopia is “facing strong pressure to introduce the death penalty for homosexuality”).

97. Kevin Childs, *Into the Heart of Darkness? Uganda and Nigeria Pass Anti-Homosexuality Laws*, HUFFPOST BLOG (Dec. 20, 2013, 12:14 PM), [http://www.huffingtonpost.com/kevin-childs/into-the-heart-of-darknes\\_b\\_4479343.html](http://www.huffingtonpost.com/kevin-childs/into-the-heart-of-darknes_b_4479343.html). For the text of the legislation, see Same Sex Marriage (Prohibition) Act (2013) (Nigeria), available at <http://www.aidsfreeworld.org/Newsroom/Press-Releases/2014/-/media/Files/Nigeria%20Same%20Sex%20Law%202014.pdf>.

98. Nick Cumming Bruce, *Nigeria: Rights Chief Assails Law as Roundup of Gays Begins*, N.Y. TIMES, Jan. 15, 2014, at A6, available at [http://www.nytimes.com/2014/01/15/world/africa/nigeria-rights-chief-assails-law-as-roundup-of-gays-begins.html?\\_r=0](http://www.nytimes.com/2014/01/15/world/africa/nigeria-rights-chief-assails-law-as-roundup-of-gays-begins.html?_r=0).

99. *Id.*

100. Anti-Homosexuality Bill, 2009, Bill 18 (Uganda), available at <http://parliamentwatchuganda.org/anti-homosexuality-bill/>.

101. David Smith, *Ugandan MPs Rush Through Draconian Laws Against Homosexuality*, THE GUARDIAN (Dec. 20, 2013, 1:39 PM), <http://www.theguardian.com/world/2013/dec/20/uganda-mps-laws-homosexuality>. A transcript of the Parliamentary proceedings that accompanied discussion of the bill can be found at <http://parliamentwatchuganda.org/3rd-session-8th-sitting-2nd-meeting-december-20-2013/> (evidencing the courageous opposition to the bill expressed by more than a few Ugandan Parliamentarians).

102. Erin Conway-Smith, *Anti-gay Bill is New Form of Apartheid, Says Tutu*, IRISH INDEP., Dec. 21, 2013, at 36, available at <http://www.independent.ie/world-news/africa/antigay-bill-is-new-form-of-apartheid-says-tutu-29857237.html>.

103. Nicholas Kulish, *Ugandan President Says He Will Sign Tough Antigay Measure*, N.Y. TIMES, Feb. 16, 2014, at A8, available at <http://www.nytimes.com/2014/02/16/world/africa/after-review-ugandan-president-will-sign-antigay-legislation.html>.

104. *Id.*

105. Adam Nossiter, *Mob Attacks More Than a Dozen Gay Men in Nigeria’s Capital*, N.Y. TIMES, Feb. 16, 2014, at A8, available at <http://www.nytimes.com/2014/02/16/world/africa/mob-attacks-gay-men-in-nigerias-capital.html>.

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The state-sanctioned violence to which LGBT persons are being subjected to in Uganda and elsewhere has been described as a “war on gays.”<sup>106</sup> In the frontlines of this fight one often finds American fundamentalists who, having lost the “culture wars” at home, are now exporting their brand of hatred abroad.<sup>107</sup> Their active role in promoting violence against LGBT persons is at the heart of a lawsuit brought by Ugandan LGBT advocates against Scott Lively, an American pastor who has repeatedly taken credit for inspiring anti-gay legislation in Russia, Uganda, and elsewhere.<sup>108</sup> The lawsuit, which alleges Lively conspired to persecute LGBT persons in Uganda in violation of international and domestic law, is in its preliminary stages but has already survived a motion to dismiss.<sup>109</sup> Importantly, the court concluded that the allegations in the complaint were sufficient to establish jurisdiction under the Alien Tort Statute because, if true, Lively’s actions amounted to a crime against humanity.<sup>110</sup>

D. ASYLUM

Not surprisingly, the increased persecution of LGBT persons described above has resulted in an increase in those seeking asylum.<sup>111</sup> Africans are among the most vulnerable of LGBT refugees because severe economic restraints limit their ability to escape to countries that recognize LGBT equality. The majority of African countries criminalize same-sex conduct,<sup>112</sup> making it highly probable that those escaping across borders would face continued persecution. Refugees who have been raped, beaten, and abducted find it difficult to report these crimes in host countries that criminalize LGBT persons.<sup>113</sup>

Difficulties also exist for LGBT refugees seeking asylum in the West. Unofficial reports from the United Kingdom suggest that 98 percent of claims brought by individuals fleeing persecution based on sexual orientation or gender identity are initially rejected, in

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106. *Strange Bedfellows: American Christian Zealots Are Fighting Back Against Gay Rights-Abroad*, ECONOMIST, May 4, 2013, at 61, available at <http://www.economist.com/news/international/21577043-american-christian-zealots-are-fighting-back-against-gay-rightsabroad-strange-bedfellows>.

107. *Id.*; see also GOD LOVES UGANDA, [www.godlovesuganda.com](http://www.godlovesuganda.com) (last visited Mar. 27, 2014).

108. Meredith Bennett-Smith, *Scott Lively, American Pastor, Takes Credit For Inspiring Russian Anti-Gay Laws*, HUFFPOST BLOG (Sept. 19, 2013, 6:34 PM), [http://www.huffingtonpost.com/2013/09/19/scott-lively-russian-anti-gay-laws\\_n\\_3952053.html](http://www.huffingtonpost.com/2013/09/19/scott-lively-russian-anti-gay-laws_n_3952053.html).

109. *Sexual Minorities Uganda v. Lively*, 960 F. Supp.2d 304 (D. Mass. 2013).

110. *Id.* at 316–18.

111. See, e.g., Doug Stanglin & Anna Arutanyan, *Gays in Russia Fear Return of Reprisals*, USA TODAY, Feb. 18, 2014, at 7A (noting that in 2013 Immigration Equality opened more cases involving LGBT asylum seekers from Russia than in any previous year); *US Grants Asylum to Gay Couple From India*, HINDUSTAN TIMES (Jan. 3, 2014, 1:50 PM), <http://www.hindustantimes.com/world-news/us-grants-asylum-to-gay-couple-from-india/article1-1169176.aspx> (underscoring fact that asylum was granted in December 2013, after India recriminalized same-sex conduct).

112. AMNESTY INT’L, *supra* note 94.

113. Robbie Corey-Boulet, *Stranded: Gambian Gays Flee Persecution At Home Only To Face Discrimination In Senegal*, FOX NEWS (Oct. 24, 2013), <http://www.foxnews.com/world/2013/10/24/gambian-gays-flee-persecution-in-home-country-only-to-face-discrimination-in/> (citing a report by Human Rights First, HUMAN RIGHTS FIRST, THE ROAD TO SAFETY: STRENGTHENING PROTECTION FOR LGBTI REFUGEES IN UGANDA AND KENYA (2012), available at [http://www.humanrightsfirst.org/wp-content/uploads/pdf/RPP-The\\_Road\\_to\\_Safety.pdf](http://www.humanrightsfirst.org/wp-content/uploads/pdf/RPP-The_Road_to_Safety.pdf)).

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part because immigration judges there lack appropriate training to deal with LGBT asylum seekers or are themselves homophobic.<sup>114</sup>

For these reasons, one of the most important developments of the year regarding LGBT asylum law was the European Court of Justice's ruling in *Minister voor Immigratie en Asiel v. X, Y, and Z*.<sup>115</sup> The judgment was praised for providing needed clarity regarding asylum claims based on sexual orientation and gender identity.<sup>116</sup> The case involved asylum claims brought by refugees from Sierra Leone, Uganda, and Senegal and required the court to address three questions, (1) whether, under European Union law, homosexuals formed a "particular social group"; (2) whether homosexuals could be expected to conceal their orientation in the country of origin in order to escape persecution; and (3) whether the existence of laws criminalizing same-sex conduct was sufficient to establish persecution by the country of origin.<sup>117</sup>

The court answered the first question in the affirmative because it is "common ground that a person's sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it"<sup>118</sup> and the existence of laws targeting homosexuals "supports a finding that those persons form a separate group which is perceived by the surrounding society as being different."<sup>119</sup>

In the most important part of the judgment, the court clarified that in deciding whether asylum is justified, "the competent authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation."<sup>120</sup>

On a less satisfactory note, the court concluded that the mere existence of laws criminalizing homosexual acts was not sufficient to establish persecution.<sup>121</sup> The court recognized, however, that criminal laws imposing a term of imprisonment for same-sex conduct would suffice if accompanied by evidence that the discriminatory law was actually applied in the country of origin.<sup>122</sup> Nevertheless, this conclusion has been criticized by a number of human rights organizations because it ignores the fact that, even when not applied, laws criminalizing same-sex conduct "provide state actors with the means to perpetrate human rights violations and contribute to an atmosphere of state-supported homophobia."<sup>123</sup>

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114. Jerome Taylor, *'Gay? Prove It Then – Have You Read Any Oscar Wilde?': Judges Accused Of Asking Lesbian Asylum Seekers Inappropriate Questions*, THE INDEP. (Apr. 4, 2013), <http://www.independent.co.uk/news/uk/home-news/gay-prove-it-then—have-you-read-any-oscar-wilde-judges-accused-of-asking-lesbian-asylum-seekers-inappropriate-questions-8558599.html>.

115. Cases C-199/12, C-200/12 & C-201/12, *Minister voor Immigratie en Asiel v. X, Y, and Z*, [2013] ECR I-0000, available at <http://curia.europa.eu/juris/liste.jsf?num=C-199/12&language=EN>.

116. Fiona Gartland, *European Judgments Look To Address Anti-Gay Discrimination*, IRISH TIMES, Dec. 2, 2013, at 16, available at <http://www.irishtimes.com/news/crime-and-law/european-judgments-look-to-address-anti-gay-discrimination-1.1610427>.

117. *Minister voor Immigratie en Asiel*, [2013] ECR I-0000, at para. 37.

118. *Id.* para. 46.

119. *Id.* para. 48.

120. *Id.* para. 76.

121. *Id.* para. 55.

122. *Id.* para. 61.

123. *EU Court Ruling a Setback For Refugees*, AMNESTY INT'L (Nov. 7, 2013), <http://www.amnesty.org/en/news/eu-court-ruling-setback-refugees-2013-11-07> (citing lawyers from Amnesty International and the International Commission of Jurists).

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Last year's survey ended with a quote by Charles Dickens,<sup>124</sup> so it seems appropriate to resort once again to his words in closing this recap of some notable developments from 2013. To the extent that this year energized those who fight for equality and polarized those who are threatened by it, these twelve months were truly divided into disparate seasons. May the "the best of times" be yet to come and "the worst of times" already passed; and somewhere between "the spring of hope" and "the winter of despair,"<sup>125</sup> may we find time to celebrate another summer of love.

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124. See David W. Austin, *Sexual Orientation and Gender Identity*, 47 INT'L LAW 469, 483 (2012).

125. CHARLES DICKENS, A TALE OF TWO CITIES 3 (Huber Gray Buehler ed., London, Macmillan 1922) (1859).

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