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

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James D. Wilets *

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ABSTRACT

This article discusses the consequences of slavery, colonialism, racism and religious hegemony to better understand contemporary developments in comparative and international law with respect to extending legal equality to sexual minorities. The arguments for cultural relativism in the context of LGBTI rights are shorn of their power when it is understood that much of the contemporary opposition to gender nonconformity and homosexuality comes not from indigenous practice but from largely Western phenomena. Many of the world’s societies are simply remedying the damage wrought by the advent of historically aberrational virulent homophobia associated with Judaism, Christianity, and Islam. In large sections of the United States, religions developed and promulgated a particularly vicious hierarchical view of racial and gender relations to theologically justify the institutions of slavery and apartheid. This article refutes the idea that LGBTI rights are a linear development flowing from an enlightened Western socio-political approach to human rights, and in fact argues that this approach undermines both domestic and global battles for LGBTI rights.
I. Introduction

Understanding the divergence and convergence of state approaches towards Lesbian, Gay, Bisexual, Transgender, and Intersexual (LGBTI) rights are particularly important in the international and comparative law context. International law is based on values, traditions, standards and norms accepted globally, although not necessarily by every culture or country. The process by which international human rights law recognizes certain rights as fundamental is a relatively slow dialectical process. This is appropriate for a legal system that seeks a consensus before determining which rights are fundamental to human beings in all parts of the world, inuring to individuals because of their status as human beings and not because they are citizens of a specific country. The Preamble of the Universal Declaration of Human Rights proclaims the international community's "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world." The legal justification under international law for extending legal recognition of same-sex unions becomes more compelling once it is noted that acceptance of sexual minorities as equal members of society is not specific to only a small number of countries. The arguments for cultural relativism in the context of LGBTI rights are shorn of their power when it is understood that much of the

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


3 Id.
contemporary opposition to gender nonconformity and homosexuality comes not from indigenous practice but from modern, and largely Western, phenomena.

Many of the world’s societies are simply remediying the damage wrought by the advent of historically aberrational virulent homophobia associated with Judaism, Christianity, and Islam. Conquest spread Christian and Islamic homophobias, while colonialism further spread Christian homophobia. In large sections of the United States, religions developed and promulgated a particularly vicious hierarchical view of racial and gender relations to theologically justify the institutions of slavery and apartheid.

Divergence and convergence of state approaches to LGBTI rights are also important in the comparative law context. Many commentators on LGBTI issues tend to conceptualize LGBTI rights as a linear development flowing from an enlightened Western socio-political approach to human rights. This is inaccurate and undermines both domestic and global battles for LGBTI rights. It undermines the domestic battle for such rights because it locates the struggle for LGBTI rights in opposition to those who view such rights as the recent invention of a secular, humanist human rights movement.4 It undermines the global battle for human rights because LGBTI rights are incorrectly

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

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

viewed as a Western construct, hegemonically imposed on the rest of the world. To the extent that people generally perceive homosexuality and sexual minorities as strictly a product of contemporary Western society, people are unlikely to accept that sexual minorities deserve protection in their legal system or in the legal system of the international community of which they are a part.

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

After the end of colonialism, there gradually arose a divergence of attitudes towards LGBTI people, with the original Christian Europe becoming relatively tolerant since it never suffered the effects of institutionalized slavery or colonialism, except as the perpetrators. Meanwhile, the objects of slavery, racism and colonialism (to varying

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


7 As will be discussed at greater length below, same-sex relationships were frequently accepted when the participants adopted a socially acceptable gender role.
degrees) perpetuated the uniquely homophobic theology of the original Christian European colonizers and Islamic conquerors. The United States gradually became bifurcated, with some states, dominated by apartheid, holding on to their religiously dictated hierarchical views on race and gender, while the rest of the United States largely converged with the societal attitudes of much of Christian Western Europe.

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

Rather than simply providing an empirical discussion of those differences that do exist, this comparative analysis will further the understanding of the intersectionality of race, sex and gender identity by identifying those variables that account for divergences and convergences in socio-political attitudes towards the LGBTI communities. This article will also explore how the convergence of state approaches to LGBTI rights has been impacted by different “federal” legal systems such as those of the European Union and the United States.
II. A Very Brief Historical and Anthropological Analysis

There is substantial evidence that same-sex relationships have existed, and continue to exist, in almost all, if not all, cultures.\(^8\) Perhaps more relevant for the purposes of this analysis, however, is that societal recognition of same-sex relationships has substantial precedent cross-culturally and historically. In 1951, Yale professors Clellan S. Ford and Frank A. Beach found in a seminal anthropological study that “[i]n 49 (64 per cent) of the 76 societies other than [the United States] for which information is available, homosexual activities of one sort or another are considered normal and socially acceptable for certain members of the community.”\(^9\) Yale historian John Boswell provides extensive documentation that homosexual unions were present, and even sanctioned, in medieval Christian Europe until the Twelfth Century.\(^10\) Yale professor William Eskridge has written of the existence of same-sex and/or transgendered unions in nineteenth-century Nigerian society, pre-Columbian Native-American societies, nineteenth-century Zuni society, ancient Egyptian, Greek, Roman, and Mesopotamian societies, the Azande, Siwah, el Garah, Basotho, Venda, Meru, Phalaborwa, Nuer, Bantu, and Lovedu societies of Africa, the Paleo-Siberian, Chinese, Vietnamese, Indian, Japanese, Burmese, Korean, and Nepalese societies of Asia, and in what is now New Zealand and the Cook Islands.\(^11\)

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

\(^9\) FORD & BEACH, supra note 8, at 130.

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

New York University Sociology Professor David Greenberg has documented the existence of societally-sanctioned homosexual relationships in ancient Mesopotamian (e.g., Hittite, Assyrian, Babylonian), Chinese, Mayan, Incan, Aztec, Egyptian, Etruscan, Indian, Greek, and Roman cultures.\(^\text{12}\) Ford and Beach, Greenberg, and other scholars have documented widespread recognition of same-sex relationships among Native American peoples in North,\(^\text{13}\) Central, and South America.\(^\text{14}\)

Vivien Ng, Professor of History and Women’s Studies at the University of Oklahoma, notes that “male homosexuality has a long and documented history in China,” as does societal recognition of those relationships.\(^\text{15}\) Ng cites from the third


\(^{13}\) See id. at 41.

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

\(^{15}\) Vivien W. Ng, *Homosexuality and the State in Late Imperial China,* in *Hidden from History* 76 (Martin Bauml Duberman et al. eds., 1989). Ng also describes the origin of another traditional Chinese term for homosexuality:

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

_Id._ at 77. See also Bret Hinsch, in which he documents lesbian “marriages” from the Qing Dynasty:

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

century B.C. text, *Chronicles of the Warring States*, to describe one of the literary terms for homosexuality:

One of the expressions for male love, *longyang*, stems from the well-known homosexual relationship between Longyang Jun, a fourth-century B.C. minister, and the prince of Wei. From the *Chronicles*, too, we know about the affection between Duke Ling of Wei and his minister, Ni Xia. Once, when the two men were taking a stroll in an orchard, Ni picked a peach off one of the trees and took a bite off it. The fruit was so delicious that he offered the rest of it to the duke; a common euphemism for male homosexual love, *fen tao zhi ai* (literally, “the love of shared peach”), is derived from this account.¹⁶

Niko Besnier, an anthropology professor at Yale University, has documented the existence of socially accepted transgendered individuals and same-gender sexual relationships in Polynesia.¹⁷

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

However, two considerations must be kept in mind when thinking about the concept of gender roles historically and cross-culturally. The first is that a society’s conception of gender may not always consist of the rigid, bi-polar “male” and “female” construct prevalent in modern Western society. The Native-American berdaches and Indian hijras discussed above appear to a Western observer to be transsexuals, when really their identity and “gender” are more complex, consisting of more than four separate gender identities.

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¹⁶ Ng, *supra* note 15, at 77.
¹⁸ Greenberg, *supra* note 12, at 184. See also Human Rights Watch, *This Alien Legacy* (Dec. 17, 2008), at II, http://www.hrw.org/ja/node/77014/ (Colonial sodomy can be traced, in part “to an old strain in Christian theology that held sexual pleasure itself to be contaminating, tolerable only to the degree that it furthered reproduction (specifically, of Christians).”).
The second consideration to keep in mind is the role of power relationships within a culture in defining gender.\(^19\) For example, a persistent theme in anthropologic evidence regarding same-gender sexual unions is that many cultures treat differentials in class, age and power as analogous to gender differentiation.

As William Eskridge and other authors have amply demonstrated, past recognition of same-sex unions has generally, although not always, occurred within relatively narrow gender constructs that mimicked the dominant-passive construct of "traditional" heterosexual relationships.\(^20\) Thus, those societies that recognized same-sex unions did so only when gender roles were not threatened. Therefore, to the extent societies are uncomfortable with homosexuality, it is usually because such activity is perceived as crossing gender, rather than sexual boundaries.\(^21\) Eskridge notes that "[m]ore recent experience reveals a connection between intolerance of same-sex unions and suppression of women . . . ."\(^22\) The Hawaii Supreme Court recognized this correlation when it applied strict scrutiny to the Hawaii marriage law prohibiting same-sex marriage in *Baehr v. Lewin*.\(^23\) The majority held that Hawaii's marriage law constituted sex discrimination under the State Equal Rights Amendment because it created a classification based on gender, and by doing so, prohibited women from doing

\(^{19}\) See, for example, GREENBERG, *supra* note 12, at 157, wherein Greenberg notes that among “most [ancient] Romans, it was the social status of the partner that made a homosexual act unacceptable.”

\(^{20}\) See generally Eskridge, *supra* note 11. For example, Eskridge notes that “[a]ncient cultures (Egypt, Mesopotamia, Greece and Rome) maintained strict patriarchal lines of authority over women yet also tolerated same-sex [male-male] unions . . . .” Eskridge, *supra* note 11, at 1510.

\(^{21}\) For an extensive and illuminating discussion of the connection between homosexuality and transgender identity, see *Third Sex, Third Gender: Beyond Sexual Dimorphism in Culture and History* (Gilbert Herdt ed., 1994).

\(^{22}\) Eskridge, *supra* note 11, at 1510.

something (marrying a woman) that men were entitled to do, and vice versa.\textsuperscript{24} In doing so, the Court made an analogy with the racial classification in \textit{Loving v. Virginia}, involving a miscegenation statute that, on its face, discriminated equally between blacks and whites by prohibiting either race from marrying the other. The \textit{Baehr} court conceded that the Hawaii marriage statute was similarly neutral as between lesbians and gay men, but because it created a sex-based classification it triggered strict scrutiny under the Hawaii equivalent of the federal Equal Rights Amendment.\textsuperscript{25} The \textit{Baehr} court implicitly recognized that discrimination against sexual minorities is ultimately based on sex discrimination in that usually the “objectionable” conduct is the gender of the person conducting the act, rather than the act itself. Thus, how a society views gender roles often determines how it treats sexual minorities.\textsuperscript{26} This correlation is one of the most distinctive patterns emerging from contemporary comparative legal evidence. “Romania [was] one of the last European countries . . . to criminalize homosexual relations. It also has a law that absolves all the individuals participating in a gang rape of a woman if one of the rapists later marries the victim.”\textsuperscript{27} Similarly, in the United States, Hamilton County Municipal Judge Albert Mestemaker, citing "traditional American values" (which


\textsuperscript{25} \textit{Baehr}, 852 P.2d at 67. The \textit{Baehr} court noted in its analogy with \textit{Loving} that “[s]ubstitution of ‘sex’ for ‘race’ and [the Hawaii equivalent of the Equal Rights Amendment] for the fourteenth amendment yields the precise case before us together with the conclusion that we have reached.” \textit{Baehr}, 852 P.2d at 68.

\textsuperscript{26} As used in this essay, the term “sexual minorities” includes all individuals who have traditionally been distinguished by societies because of their sexual orientation, inclination, behavior, or nonconformity with gender roles or identity. The term “sex” will refer to the biological designation of an individual as a male or female (as genitally defined) and the term “gender” will refer to the socially constructed roles of “female,” “male,” or combination thereof. The term “homosexual” (when used as an adjective) or “homosexuality” will refer to same-sex desire or sexual activity by either sex, whether a single instance or over a lifetime. When used as a noun, however, “homosexual” will refer to an individual of either sex with a predominant or exclusive attraction to members of the same sex.

are frequently used in U.S. political discourse to attack sexual minorities), sentenced a man convicted of domestic violence to marry the woman he physically abused.28 "On January 29, 1993, Canada granted asylum to a Saudi feminist29 who, more than coincidentally, comes from a country in which gays and lesbians may be legally sentenced to death simply for their sexual orientation."30 The Southern Baptist Convention, one of the most stridently anti-gay religious bodies in the United States, recently formalized the submissive role of women.31

Eskridge, for example, provides a description of Ifeyinwa Olinke, a wealthy nineteenth century woman of the Igbo tribe, situated in what is now Eastern Nigeria:

She was an industrious woman in a community where women, who thereby came to control much of the Igbo tribe’s wealth, seized most of the entrepreneurial opportunities. Ifeyinwa socially overshadowed her less prosperous male husband. As a sign of her prosperity and social standing, Ifeyinwa herself became a female husband to other women. Her epithet "Olinke" referred to the fact that she had nine wives.32

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


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

30 Wilets, supra note 27, at 1010–11.

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

32 Eskridge, supra note 11, at 1420–21 (citing IFI AMADIUME, MALE DAUGHTERS, FEMALE HUSBANDS: GENDER AND SEX IN AN AFRICAN SOCIETY 48–49 (1987)).
In some societies, male homosexual activity has been sanctioned only so long as it occurred between individuals of different classes or generations. Greenberg notes that in ancient Greece, "[p]reoccupation with status pervaded sexual culture to the point where the Greeks could not easily conceive of a relationship based on equality. Sex always involved superiority." There is thus considerable documentation of what we would call bisexuality in societies where it was considered appropriate to engage in either sexual relations with women or members of a subaltern class or younger generation, as long as the individual in the socially superior position did the "penetrating." Greenberg cites from "The Interpretation of Dreams" by the second century A.D. Greek philosopher Artemidorus Daldianus:

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

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

33 GREENBERG, supra note 12, at 147.
34 E.g., GREENBERG, supra note 12, at 155–58.
35 For example, Greenberg explains:

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

GREENBERG, supra note 12, at 158 (footnotes omitted).
36 GREENBERG, supra note 12, at 147.
Gender considerations had much to do with this contempt for passivity. The upper-class Athenian family in the classical age was highly patriarchal. Though women managed the household, they were also restricted to it. They lacked all legal personality, were subjected to forced marriage, and were vulnerable to male violence. The relationship between husbands and wives was one of unambiguous domination. In Greek thinking, the family served as a model for all sexual relationships. If in heterosexual couples, the male was active and the wife responsive, then in homosexual couples, the active, insertive partner was male, the passive, receptive partner, female. And to be female was to be inferior to men. For a male to submit to another man sexually was thus to declare himself unworthy of manhood. Aristophanes’ complaint about adult men who engage in passive homosexuality is they act like women, something real men should not do.\footnote{GREENBERG, supra note 12, at 149 (emphasis added) (footnotes omitted).}

In discussing homosexuality in the Renaissance and Baroque periods of European history (ca. 1400–1650 AD), Art History Professor James M. Saslow notes that the "powerful tended to prefer their sexual objects subordinated by gender, age, and/or socioeconomic status."\footnote{James M. Saslow, Homosexuality in the Renaissance: Behavior, Identity, and Artistic Expression, in HIDDEN FROM HISTORY 90, 92 (Martin Bauml Duberman et al. eds., 1989).} Saslow argues that a homosexual “identity” was avoided by many men in the Renaissance and Baroque periods through categorizing sexual acts "not only by the gender of one's object-choice, but also by the role one performed. As part of a broader effort to demarcate male and female social roles and appropriate gender constructs, contemporary theory drew a sharp distinction between active (masculine) and passive (feminine) sexual roles."\footnote{Id. at 98.} However, the author notes that "[w]hile adult-youth sex clearly predominated, recent research calls for reexamination of the older assertion that it was the exclusive model, sanctified by Greek precedent."\footnote{Id. at 93.}

In the same vein as Saslow’s call for reexamination of the more traditional assertions regarding the lack of egalitarian homosexual models, Ng cites from the scholarly work of Shen Defu (1578–1642) that homosexuality among equals was commonplace in at least the
province of Fujian, China: "The Fujianese especially favor male homosexuality. This preference is not limited to any particular social or economic class, but the rich tend to cavort with the rich, and the poor with the poor."\(^{41}\)

Whereas the earlier discussion focused on the extent to which societies viewed homosexuality as violating gender role expectations, another focus should be on societies' elimination of gender role expectations. As we have seen in the Greek, Roman, and other examples, the acceptance of homosexual activity may be highly conditional. Those engaging in homosexual activity may be required to adopt different gender role norms; thus, persons of the same socially constructed gender (and class) may not engage in homosexual activity. This model of homosexual relations does little to validate contemporary same-sex relationships among socioeconomic equals nor does it provide much relief for those individuals who are oppressed because they violate gender norms independent of sexual orientation. For example, there may be a growing acceptance of homosexuality in some contemporary societies based on a growing feeling that homosexuals are "really just like everyone else." However, if that acceptance only extends to gender conforming gays and lesbians, the ultimate value of that acceptance is questionable. Society then resembles the classical Greek situation where homosexual relationships are only acceptable within very constrained gender roles

### III. The Effect of Colonialism

Most historians now recognize that much of the contemporary hostility towards sexual minorities in non-Western nations is a direct result of Western, particularly British

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\(^{41}\) Vivien W. Ng, *Homosexuality and the State in Late Imperial China*, in *Hidden From History* 76, 85–86 (Martin Bauml Duberman et al. eds., 1989).
colonialism, Judeo-Christian-Islamic homophobia, and anti-sexuality in general, none of which is rooted in indigenous tradition. For example, Tielman & Hammelburg argue that:

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

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

The anti-LGBTI effects of colonialism are most pronounced in British colonies. In fact, as of December 2008, over half the countries in the world with sodomy laws were former British colonies, and all of those countries’ sodomy laws were imposed by the British. India, consisting of over one billion people and the great majority of the former British Empire’s population, is just now eliminating vestiges of its British-imposed sodomy laws.

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42 See generally Human Rights Watch, supra note 18.
43 See Worldwatch, GAY TIMES (U.K.), May 1995, at 46 ("As in so many countries in the former British Empire, India's ban on male homosexuality is an unpleasant left-over from the days of colonial rule."); I Wachirianto, Adat Nusantara - Gemblakan de Ponorogo, GAYA NUSANTARA, June 1993, at 23–26 (discussing the acceptance of homosexuality among certain Borneo cultures). See also Jomar Fleras, Reclaiming Our Historical Rights: Gays and Lesbians in the Philippines, in THE THIRD PINK BOOK 66 (Aart Hendriks et al. eds., 1993) (discussing the ritualization of homosexual, bisexual, transgender and transvestite behavior among Philippine cultures in the pre-colonial period).
45 See, e.g., The Hon. Michael Kirby, Homosexuality: A Commonwealth Blind Spot on Human Rights, 14 NEWSLETTER 4 (Commonwealth Human Rights Initiative, New Delhi, India), Winter 2007, available at http://www.humanrightsinitiative.org/publications/ni/newsletter_winter_2007/article4.htm ("[M]ost of the Commonwealth countries inherited from Britain criminal laws that still penalise consenting adult same-sex conduct, even when occurring in private. These laws were repealed in Britain itself 40 years ago and throughout most of the original members of the Commonwealth (Canada, Australia, New Zealand and South Africa). But they remain steadfastly in place in virtually all of the developing countries of the Commonwealth.").
46 Human Rights Watch, supra note 18, at 2.
law. On July 2, 2009, the Delhi High Court invalidated Section 377, introduced by the British in 1860 in response to what they deemed the excessive tolerance of traditional Indian culture. Nepal, also in opposition to its British colonial past, recently took steps to legalize same-sex marriage. In absolute terms, the recent decriminalization of sodomy in India represents an enormous convergence in law with respect to LGBTI individuals. Nevertheless, despite these progressive developments, the colonial legacy remains particularly potent in Africa and the Caribbean, where most former British colonies continue to retain their colonial era sodomy laws.

IV. Divergence and Convergence in the Industrialized Democratic World

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

Presently, much of Western Europe recognizes full marriage or full marriage rights in the form of civil unions or registered partnerships. Those countries that grant full marriage rights in form and substance are: Belgium, The Netherlands, Norway,  

Spain, and Sweden.\textsuperscript{51} Those countries that grant the substantive equivalent of marriage in the form of civil unions or registered partnerships are: Denmark, Finland, Greenland, Iceland, New Zealand, and the United Kingdom.\textsuperscript{52} These partnership laws are notable in that they simply transfer the bulk of existing marriage law to registered partners, rather than creating a separate body of law. In that sense the difference is nominative rather than substantive. Several of these countries are considering abandoning the semantic distinction and adopting full marriage for same-sex couples. Israel recognizes same-sex marriages performed in other jurisdictions, although it does not recognize those marriages performed in Israel.\textsuperscript{53}

Andorra, Australia, Austria, Croatia, the Czech Republic, France, Germany, Hungary, Israel, Luxembourg, Portugal, Slovenia, and Switzerland provide civil unions, registered partnerships, or another legal status with less than full marriage rights.\textsuperscript{54}

An analysis of those countries that recognize substantial LGBTI rights on a national level demonstrates that they all share a great many socioeconomic similarities with the United States. The only difference that can explain the inconsistency between the United States and those countries is the effect of religions unique to the United States that were formed with a hierarchical view toward race and gender, and with a corresponding hostility to any kind of LGBTI rights.

\textsuperscript{52} Id.
\textsuperscript{54} ILGA Europe, supra note 51.
Israel provides an interesting case study of a country with at least as strong a fundamentalist influence on its political process as the United States. Moreover, the religious fundamentalists are theologically very hostile to LGBTI rights. Nevertheless, Israel recognizes LGBTI rights on a national level to a greater extent than the United States. As the discussion below illustrates, Israel is the exception that proves the rule that the history of the United States, with slavery and apartheid, and the unique U.S. fundamentalism that arose from that experience, is the only factor that can explain the markedly different approach between large regions of the United States and other industrialized and even non-industrialized countries that recognize LGBTI rights to a greater extent.

It is also possible that a contributing factor to the greater receptiveness of many European countries to LGBTI rights is the experience of those countries with unbridled racist hatred in the form of Nazi Germany and its associated movements. This factor would also apply to South Africa, which consciously embraced tolerance on various levels after the fall of apartheid, despite the opposition of much of its population to LGBTI rights.\(^5\)

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

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\(^5\) Themba Radebe, *Homophobia Still Prevalent in South Africa*, THE STAR (Gauteng, S. Afr.), Apr. 28, 2003, at 2, available at http://www.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20030428064823734C780900 (“Commission on Gender Equality (CGE) commissioner Dr Sheila Meintjes told the gathering that what had emerged at this launch was the fact that homophobia was deeply embedded.”).
In summary, the diversity of historical, cultural, and socioeconomic variables in those countries that recognize LGBTI rights on a national level, and the singular experience of the United States with slavery and apartheid, provide the only explanation for this divergence in attitudes towards LGBTI rights.

A. Australia and New Zealand

Australia and New Zealand provide analogous case studies of countries that share many of the socio-political and legal attributes of the United States, with Australia in particular exhibiting many of these characteristics. As noted in a 2001 study of attitudes towards homosexuality in Australia as part of a study of twenty-nine countries, the author noted that “[e]ducation strongly, increases tolerance towards homosexuals” and “[r]icher countries, as indicated by their level of gross domestic product per capita, tend to be more tolerant of homosexuals.” Until recently, Australia, like the United States, has had a conservative government for over eleven years, which has been resolutely and vocally opposed to same-sex unions. It also has a relatively “macho” social culture, with a historical and ongoing national identification with a frontier culture. It has a strong suburban and largely middle class socio-economic structure, which closely mirrors the United States, and a body politic that is somewhat skeptical towards immigration in

57 Id. at 19.
general. It also has an active Christian fundamentalist movement that is, nevertheless, a less powerful force in Australian politics than anti-gay religious movements in the United States.

Australia shares this less potent political impact of anti-gay religious sentiment with almost all other industrialized democracies. This factor may at least partially account for this differing legal approach to LGBTI rights on the national level, even among otherwise conservative political parties. This generally less anti-gay, conservative political and social culture is also reflected in far-reaching federal and state anti-discrimination laws that protect gays and lesbians from discrimination.

The New Zealand Parliament created civil unions for both same-sex and opposite-sex couples in 2004, “giving the same rights as marriage [to same-sex couples.]” New Zealand shares many of the same socioeconomic characteristics of Australia, but has evidenced an even more progressive approach to the equal protection rights of its gay citizens than even the relatively progressive policies of Australia. This approach could be explained, in part, by the relatively homogenous nature of New Zealand’s society and its much smaller population of just over 4,000,000.

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61 See id. at 7.
63 M.D.R. EVANS & JONATHAN KELLEY, AUSTRALIAN ECONOMY AND SOCIETY 2002: RELIGION, MORALITY, AND PUBLIC POLICY IN INTERNATIONAL PERSPECTIVE, 1984–2002, at 5 (2004), available at http://www.international-survey.org/AES_2_E&K_2004_Intro.pdf (“Other comparative data show that patterns of religious belief and church attendance in Australia are similar to many other Western nations, and so probably explained by factors common to all, not by factors unique to Australia.”).
65 LONG ET AL. supra note 54, app. B at 163.
66 See Amnesty International, supra note 50.
unrelated members of the population since the sense of commonality shared by New Zealanders is heightened by their relative insularity and lack of diversity. One could also argue that this sense of commonality is not entirely dissimilar to the sense of common interests exhibited by Israel towards all of its Jewish citizens, whether gay or heterosexual. It can further be argued that New Zealand shares with Canada and, to a lesser degree, The Netherlands, a desire to differentiate itself from its much larger Australian neighbor.

B. The Cases of France, Germany, and Switzerland

France, Germany, and Switzerland, like the United States and the other industrialized democracies, contain large, well-educated middle classes and relatively strong political democracies. France has also been dominated by politically conservative parties for over a decade. France and Germany, however, differ from the United States in some very significant ways.

France and Germany, like the other industrialized countries discussed in this article, have had a very weak fundamentalist Christian movement and do not generally subscribe to the more conservative or moralistic tenets of the Roman Catholic or Protestant denominations. Because of this, the French and Germans tend to be significantly less ascetic or moralistic in matters of sexuality in general, and Germany

was one of the first countries to develop a gay rights movement. Significantly, Quebec is similarly noted for its more open attitudes towards sexuality and less hostile attitudes towards homosexuality, in contrast with those provinces of Canada with a more American-style, fundamentalist protestant religious population. It is interesting to note, however, that France and Germany have not gone as far as the United Kingdom in granting marriage rights to same-sex couples, which is surprising given the British reputation for asceticism in matters of sexuality. Part of the explanation may lie in the simple fact that the Labour Party has been in power in the United Kingdom during the last decade. France and Germany, however, have promulgated civil partnerships for same-sex couples that do provide some of the same rights of marriage.

France passed, the Pacte Civil de Solidarité law (PACS), a civil partnership act for same-sex couples, in 1999. The act defines the PACS as “a contract concluded between two physical persons who have reached the age of majority, of different or the same gender, for the purposes of organizing their life in common.”

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74 EQUALITY FOR LESBIANS AND GAY MEN, supra note 70, at 47–48, 51.
75 EQUALITY FOR LESBIANS AND GAY MEN, supra note 70, at 91.
77 Id.
78 Id. However, there are obstacles in the path to obtaining these rights. See id. In order to be taxed jointly, there is “a three-year waiting period before” they may take advantage of this benefit. Id. Additionally, there are conditions that must be met by the partners “in order to obtain a residenc[y] permit.” Id.
couple for purposes of social security benefits; 2) legal recognition of the partnership; and 3) naturalization of a same-sex foreign partner.\textsuperscript{79}

On August 1, 2001, the German Parliament passed the Lifetime Partnership Act \textit{(Lebenspartnerschaftsgesetz)}.\textsuperscript{80} The Act “allow[s] same-sex couples throughout Germany to enter a new legal status [of] \textit{Eingetragene Lebenspartnerschaft}, ‘registered life partnership,’ [which] carr[ies] most, [but not all], of the rights enjoyed by married heterosexual couples.”\textsuperscript{81}

Switzerland shares many of the socioeconomic characteristics of France and Germany. This is unsurprising since it is a confederation of four national groups, the German, French, and Italian national groups being dominant. The Swiss Federal Parliament passed a bill in 2004 creating registered partnerships for same-sex couples.\textsuperscript{82} The bill became law in 2007, extending the same immigration rights “to registered partners as to heterosexual spouses and mandated that marriages and civil partnerships between people of the same sex validly entered into in other countries would be recognized in Switzerland.”\textsuperscript{83}

\textsuperscript{79} \textit{Id.}


\textsuperscript{81} LONG ET AL., \textit{supra} note 54, app. B at 159.


C. The Case of Israel

Israel provides a somewhat unique and important case study for precisely the opposite reasons of most other industrialized democracies discussed herein. Unlike the other industrialized democracies, Israel does have various politically powerful conservative religious groupings that exert significant influence over a wide variety of national policies.\(^84\) It also has been under the leadership of a conservative coalition for approximately thirty years, in which the religious parties have exerted a political influence far greater than their already considerable share of the Israeli electorate.\(^85\)

Nevertheless, Israel recognizes common law marriage for same-sex couples, which grants many, but not all, of the rights of marriage.\(^86\) It also fully recognizes legal same-sex marriages performed outside the country.\(^87\) Part of the explanation for Israel’s encouraging approach to same-sex partner rights can be seen in the government’s active encouragement of maintaining solidarity among the Jewish population in Israel.\(^88\) To the extent that the relatively gay-friendly civil rights laws and immigration rules keep a gay Jewish citizen living in Israel, the desire to retain Jewish individuals in Israel appears to override religious hostility towards homosexuality.\(^89\)

An analogy to South Africa is somewhat instructive. During the apartheid era, the South African government was led by a very socially and politically-conservative white

\(^{86}\) See Amnesty International, supra note 50.
\(^{87}\) See Israeli High Court Orders Gay Marriage Recognition, supra note 53.
Nevertheless, the government’s attitude towards homosexuality, while far from benevolent, was less hostile than its virulent racism would suggest, perhaps reflecting the government’s concern with keeping white, gay citizens from immigrating to other countries. To some extent, this could have reflected a trumping of race over religious objections to homosexuality, much as Jewish religious identity arguably trumps religious objections to homosexuality in Israel. As noted below, the current South African government, which is politically the opposite of the former apartheid regime, is among the most legally progressive countries in the world, recognizing full equality of its gay citizens with respect to marriage.  

The Israeli Interior Ministry granted residency status to two same-sex partners of Israeli citizens. It did so under the theory of yedu’a ba-tzibur (common-law spouse). This status is, however, only relevant for non-Jewish partners of an Israeli citizen, since all Jews enjoy the “right of return” entitling them to Israeli citizenship.

D. European Full Marriage Rights: the Cases of Belgium, The Netherlands, Norway, Sweden, and Spain

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90 Kelly Cogswell, Property of the State: The Torture of Queer Soldiers in the Apartheid Military, THE GULLY, Aug. 25, 2000, available at http://thegully.com/essays/africa/000825aversion.html. See also Blake Williams, Apartheid in South Africa: Calvin’s Legacy?, http://www.ucumberlands.edu/academics/history/upsilonian/files/vol3/BlakeWilliams91.htm (“Afrikaner Calvinism, though theologically similar to European Calvinism, differed from its European counterpart in that it helped ultimately to create an ultra-conservative society. European Calvinism became much more liberalized during the Enlightenment. On the other hand, South African Calvinists were isolated and, thus, were not affected by the cross-currents of change which occurred elsewhere. Afrikaner Calvinism, therefore, matured in somewhat of a cultural vacuum.”).


93 Id.

In April, 2001, The Netherlands was the world’s first country to grant full marriage equality to same-sex couples, both in terminology and substance.\textsuperscript{95} This is consistent with The Netherlands’ historically welcoming approach to religiously oppressed groups such as Jews,\textsuperscript{96} and is consistent with this article’s discussion of the correlation between attitudes towards LGBTI individuals and attitudes towards other minorities. It could be argued that although The Netherlands is not technically a Scandinavian country, it shares many of the socio-economic, cultural and progressive political characteristics of those countries. It could also be argued that a contributing reason for Dutch progressive policies towards racial and sexual minorities is related to the reasons for Canadian tolerance of those same minorities: both countries share a common border with a much more powerful neighbor with histories of intolerant policies towards racial and/or ethnic minorities.

This article is not intended to be a treatise on World War II. Nevertheless, some discussion of that history is helpful to understand why The Netherlands went even further than its Scandinavian neighbors by being the first country in the world to recognize same-sex marriage.\textsuperscript{97} The Netherlands, like Canada, maintains a self-conscious distinction between itself and its more powerful neighbor (which, in the case of The Netherlands, is Germany).


\textsuperscript{96} See, e.g., Edward Van Voolen, \textit{Ashkenazi Jews in Amsterdam}, http://www.jhm.nl/jhm/documenten/InleidingEvV\%20cd.eng.pdf (“Although the freedom enjoyed by Amsterdam’s Jews was not unlimited, their position during the Dutch Golden Age of the seventeenth century was remarkable—certainly when compared to that of Jews almost anywhere else in Europe, where persecution, discrimination, and ghettos were commonplace.”).

This self-conscious desire to distinguish itself from its neighbor was heightened by the German occupation of The Netherlands and the extermination of more than 100,000 Jewish Dutch citizens. 98 This desire to differ itself from Germany is further heightened by Dutch consciousness of the extraordinary rates of Jewish extermination in The Netherlands as compared to other Western European countries. 99 It is important, however, to note that the high rate of extermination was attributable more to Hitler’s desire to make an example of The Netherlands, rather than a particularly anti-Semitic attitude on the part of the Dutch. 100 Nevertheless, the Dutch are keenly aware that in Denmark virtually no Jew died at the hands of Hitler because of specific resistance activities undertaken by the Danish government and people. 101 This distinction is all the more striking because, as noted above, The Netherlands shares many cultural, socio-economic, and political characteristics with Denmark.

Belgium is divided between a Flemish majority, which speaks a dialect of Dutch, and a large Walloon minority, which speaks French. 102 As such, Belgium shares many of the socio-economic characteristics of both France and The Netherlands. Thus, it should not be surprising that Belgium was the second country in the world, after The Netherlands, to recognize full marriage equality for gay couples.

It is also not surprising that Scandinavian countries have gone further than many other European countries in recognizing same-sex couple rights since Scandinavia is characterized by a low incidence of fundamentalist Christians and a correspondingly very

99 Id.
100 Id.
101 Id.
high level of gender equality.\textsuperscript{103} Norway and Sweden, along with the rest of Scandinavia and Finland, were pioneers in granting registered partnerships that granted the substantive rights of marriage without using the terminology of marriage. Recently, Norway and Sweden took the next step of granting full marriage rights, following in the footsteps of The Netherlands, Belgium, Spain and Canada.

Spain is, in some ways, one of the more surprising cases of full same-sex marital recognition, given its Catholic tradition, and therefore constitutes a particularly important case study. The simple explanation for Spain’s relatively early recognition of same-sex marriage is that Spain is a very polarized country, a lasting result of its bitter civil war. It is historically a very Catholic country, and continues to have a large nominally Catholic population. However, it is also a country with a large portion of the population that is disaffected with the Catholic Church, an attitude that was strengthened by the close bonds between the Catholic Church and the Franco regime during its early years.\textsuperscript{104}

The political tide in Spain turned dramatically when Jose Luis Zapatero was elected as Prime Minister by a narrow margin in 2004. Zapatero’s victory was largely due to his reaction to his conservative predecessor’s handling of a terrorist attack.\textsuperscript{105} Despite his narrow mandate, Zapatero pursued a progressive agenda on various fronts, gay marriage and adoption being the earlier of his initiatives. Despite his bold and controversial initiatives, Zapatero won re-election in 2008 before the full impact of the global recession was felt in Spain.\textsuperscript{106}

\textsuperscript{103} See Bréchon, supra note 69, at 32, 42.
Spain may be an instance where a dramatic increase in LGBTI rights was accomplished by the unusual courage of a political leader, rather than as an inevitable result of long-term political trends. The test will be whether Spain reverses direction if the Socialists are voted out of power. One can hope that Spain will be confirmation of the axiom that it is easier to give rights than to take them away, particularly when the global momentum is towards expanding, rather than limiting LGBTI rights.

E. The Case of Canada

Canada, along with Australia, is the country that most resembles the United States from a socio-economic perspective. However, like most industrialized democracies, Canada has demonstrated a much more progressive policy than the U.S. has in extending the principles of non-discrimination and equal protection to its gay citizens, including the recognition of same-sex couple immigration rights. It should not be surprising that analysis of the reasons for Canada’s progressive position towards same-sex partner equality is largely the same analysis as presented above with respect to Australia. In many respects, Australia resembles the United States even more than Canada. As discussed, Australia has a somewhat “macho” culture like the United States that differs significantly from Canada. Explanations for Canada’s less “macho” culture, and correspondingly greater recognition of same-sex rights than either Australia or the United States, could arguably be found in Canada’s self-conscious differentiation from

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108 See discussion supra Part IV.A.
the United States, particularly with respect to certain foreign and domestic policies with which it would prefer not to be associated. Further distinguishing Canada from the United States is the existence of Quebec, which, as discussed above in the discussion of France, is particularly open-minded with respect to full equality for sexual minorities. Indeed, Quebec was the first Canadian province to recognize full same-sex marriage rights. It is interesting to note that those Canadian provinces that are the most similar to the American heartland, such as Alberta, Manitoba and Saskatchewan, were also the most resistant to implementation of full marriage rights for same-sex couples.\textsuperscript{110} Canada’s 2005 Civil Marriage Act, which provides full marriage rights for same-sex couples, in both terminology and substance, completely eliminated any legal discrimination between heterosexual and same-sex couples.\textsuperscript{111}

Despite the differences between Canada and the United States, the similarities between them are significant enough that Canada may be a useful model for the United States. Important similarities include Canada’s close geographic proximity to the United States, strong cultural and economic ties between the two countries, and Canada’s similar level of economic development to the United States. All of these similarities suggest that Canada could provide a particularly useful example for the United States when considering how to eliminate discrimination in the area of LGBTI rights.

\begin{footnotesize}
\textsuperscript{110} ReligiousTolerance.org, \textit{Same Sex Marriage Opinion Polls 1996–2002}, http://www.religioustolerance.org/hom_marz.htm (“Residents of the Prairie Provinces are much less supportive” of same-sex marriage.).

\textsuperscript{111} Girshon, supra note 109, at 635, 652 (defining “marriage” in Canada as “the lawful union of two persons to the exclusion of all others”).
\end{footnotesize}
F. European Civil Unions: the Cases of Denmark, Finland, Iceland, and the United Kingdom

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

The United Kingdom, however, should be distinguished from the Scandinavian countries that have adopted registered partnerships. The United Kingdom not only shares a common legal and cultural heritage with the United States, but it also has a historical reputation as being somewhat more ascetic and conservative with respect to issues of sexuality than many of its continental European counterparts. This is reflected in the legal framework by which it recognizes same-sex couples’ rights. It did so in the framework of a registered partnership act, roughly analogous to the legal civil unions that were created in Vermont, Connecticut, New Hampshire, and, to a lesser extent, California. The United Kingdom, like California, Connecticut, New Hampshire, Belgium, and The Netherlands, recognized same-sex couples’ rights by legislative, rather than judicial action.

112 See Amnesty International, supra note 50.
113 See generally EQUALITY FOR LESBIANS AND GAY MEN, supra note 70, at 91–99.
Nevertheless, the discussion above begs the question why the United Kingdom, which is the most similar of the European countries to the United States in cultural, socio-economic and legal terms, took such a markedly different path than the United States with respect to same-sex unions and even earlier with respect to same-sex immigration rights. The answer is the same one that is applicable to the differences between the United States and almost all other industrialized democracies: fundamentalist religious forces exercise a particularly strong influence on the political debate in the United States.\textsuperscript{117} Seen this way, the United Kingdom’s approach is very consistent with the approach of the other countries that are most similar to the United States, Canada and Australia.\textsuperscript{118} Put differently, neither the United Kingdom, Australia, or Canada have a strong fundamentalist religious force dominating its political debate. This difference trumps the similarities shared between those countries and the United States.\textsuperscript{119}

**G. The Case of South Africa**

South Africa is the only country on the African Continent to fully recognize same-sex marriages in substance and terminology.\textsuperscript{120} It has done this through a series of legislative enactments and judicial rulings, progressively expanding the rights of non-discrimination and equal protection to its gay and lesbian citizens.\textsuperscript{121} For example, South Africa was the first country in the world to contain explicit references in its constitution

\textsuperscript{117} See Wojcik, supra note 116, at 597.
\textsuperscript{118} See Drucker, supra note 60, at 9; Girshon, supra note 109, at 652.
\textsuperscript{119} See Bréchon, supra note 69, at 31; Press Release, The Canadian Values Study, supra note 73, at 2–3; Rowbotham, supra note 62.
\textsuperscript{120} See Amnesty International, supra note 50.
\textsuperscript{121} See id.
to non-discrimination based on “sexual orientation.”\textsuperscript{122} Although the South African populace is not particularly supportive of gay rights, the national struggle against the apartheid regime has imbued its leaders with a strong commitment to non-discrimination and equal protection of the laws.\textsuperscript{123}

Well before the grant of full marriage, the South African Constitutional Court ruled on December 2, 1999, that section 25(5) of the Aliens Control Act 96 of 1991, which did not permit immigration of same-sex partners, was unconstitutional.\textsuperscript{124} The Court found that section 25(5) reinforced harmful stereotypes of gays and lesbians relating to the rights of equality and dignity to this case.\textsuperscript{125} In a later case, the Court further stated that it was an invasion of gays’ and lesbians’ dignity to convey the message that gays and lesbians lack the inherent humanity to have their family lives in same-sex relationships respected or protected.\textsuperscript{126}

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

The comparative analysis contained in this section permits a number of conclusions regarding the reasons for the divergence between the United States and other industrialized democracies with which it shares many other socio-economic and political characteristics.

\textsuperscript{122} Id.
\textsuperscript{123} See Robinson, \textit{supra} note 91.
\textsuperscript{124} Nat’l Coal. for Gay & Lesbian Equal. & Others v Minister of Home Affairs & Others, 1999 (3) BCLR 280 (C), 1999 SACLR LEXIS 13, at *38 (S. Afr.).
\textsuperscript{125} LONG ET AL., \textit{supra} note 54, app. B at 167–68; see also Nat’l Coal. for Gay & Lesbian Equal., 1999 SACLR LEXIS 13 at *37.
\textsuperscript{126} Minister of Home Affairs & Another v Fourie & Others, 2006 (3) BCLR 355 (CC), 2005 SACLR LEXIS 34, at *158 (S. Afr.).
First, as an empirical matter, those countries that historically have recognized LGBTI rights to the greatest extent are arguably characterized by a level of legal and political gender equality at least equal to, and in most cases, greater than that found in the United States. This is consistent with the comparative, anthropological, and historical research demonstrating a very high correlation between legal and political gender equality and legal equality for LGBTI individuals.

Second, there does not appear to be a notable difference in approach between those countries sharing an Anglo-Saxon common law legal heritage and those with civil law systems. There are examples of countries from both systems that recognize full marriage equality in substance and terminology, as well as the more limited marriage rights associated with civil unions and registered partnerships.

Third, the role of religion appears to be a critical factor in the differing approaches of the United States and other industrialized democracies towards same-sex partner immigration. However, it is the interrelationship between religion and race that is significant, not the role of religion in isolation. The interrelated factors of religion and race will be discussed after some preliminary empirical observations about the role of religion itself in explaining the divergent approaches exhibited by the case studies herein.

The first empirical observation with respect to religion is that all of the countries discussed herein, with the exception of Israel, are predominantly Christian countries. The second empirical observation is that there is little correlation between a country’s legal approach to LGBTI rights and whether that country is Catholic or Protestant. The only countries to grant full marriage equality in substance and terminology in Europe are countries such as Spain, with a strong and longstanding Catholic tradition, and Belgium.
and The Netherlands, also with sizable Catholic populations. Moreover, Quebec, a strongly Catholic Canadian province, was the first Canadian province to recognize civil unions for its gay and lesbian citizens, well before the granting of full marriage equality in predominantly Protestant Canada. On the other hand, the first countries in the world to grant civil unions to its gay and lesbian citizens were the predominantly Protestant countries of Scandinavia and Finland.

The critical difference in the approach of countries towards LGBTI rights, from a religious perspective, is the prominence of fundamentalist religious influence in the body politic. It is interesting to note, however, that Israel—with a very strong fundamentalist Jewish influence in its Parliament and government—is relatively progressive in its policies towards LGBTI rights for reasons that are more fully described in the Israel case study.  

However, noting the influence of fundamentalist religious influence in the body politic only begs the deeper question of why the United States differs in that respect from other industrialized democracies. After accounting for all possible variables that could explain this difference, the answer appears to be the unique American history with race, and the involvement of some of its largest Christian denominations with that history. The only significant difference between the United States and its fellow industrialized democracies is the United States’ unique historical experience. The United States went through over 200 years of slavery and almost 100 additional years of apartheid. No other variable distinguishes the United States so significantly from the other industrialized democracies. Australia and Canada also had frontier histories as well as a history of forcefully subjugating an indigenous people. Every major Western European country has

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127 Margolis, supra note 84.
had a history of militarization and colonialism and some of the more progressive
countries have had some of the most brutal histories as colonizers. Almost all other
socio-economic, political, cultural, and economic variables are largely similar among the
United States and other industrialized democracies, with the critical exception of the
United States’ experience with over 200 years of slavery and almost 100 additional years
of apartheid.

Indeed, if one were to carve out those U.S. states that had institutionalized slavery
and/or apartheid for almost 300 years, the United States would likely resemble the rest of
the industrialized democracies in its legal and political approach towards equal protection
and non-discrimination rights for its gay and lesbian citizens. Some areas of the United
States would still be conservative, as are certain areas of all countries, but social attitudes
and state legislation would be broadly similar to those of Europe, Canada, Australia and
New Zealand.

The difference between the United States and other Western, industrialized
countries, but what the United States shares with apartheid era South Africa, is the
involvement of the largest U.S. Christian denominations with the history of slavery and
apartheid. For example, the largest protestant denomination in the United States is the
Southern Baptist Convention (“SBS”). The Convention was created through a split
between southern and northern Baptists over the issues of slavery and their doctrinal
differences continued over segregation. Indeed, in 1995, the Southern Baptist
Convention formally expressed its regret over the role slavery and race has played in its
creation and development.

128 Lillian Kwon, Southern Baptists Discuss Identity, Controversy, CHRISTIAN POST, Feb. 16, 2007,
In its 1995 Resolution On Racial Reconciliation On The 150th Anniversary Of The Southern Baptist Convention, the SBC declared:

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

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

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

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

WHEREAS, Racism profoundly distorts our understanding of Christian morality, leading some Southern Baptists to believe that racial prejudice and discrimination are compatible with the Gospel.  

The northern Baptists ultimately formed the American Baptist Convention. The areas of the United States where fundamentalist Christian theology is the strongest, with some significant exceptions, are those states that institutionalized slavery and apartheid.

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

If American slavery has any claims to being historically “peculiar,” its peculiarity lay in its rigorous racialism, the systematic way in which racial ideas were used to demean and deny the humanity of people of even partial African descent. This historical legacy would make the process of

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incorporating the formerly enslaved as citizens far more problematic in the United States than in other New World slave societies.  

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

Nevertheless, just because this correlation is most evident in states that institutionalized slavery and apartheid, this does not mean that these attitudes did not affect other parts of the United States. Indeed, every United States colony has had legalized slavery, and Massachusetts actually became the first state to legally enshrine slavery.

For example, Utah has historically shown strong opposition to non-discrimination laws based on race, gender, and sexual orientation. Much of that discrimination is connected to Mormonism, which is most predominant in Utah and other Western states that never had slavery. As late as 1978, persons of African descent were forbidden to participate as priests in the Mormon religion, and Mormon theologians have based these

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132 Brown Report, supra note 130, at 8.
133 See Brown Report, supra note 130, at 8.
134 PBS, From Indentured Servitude to Racial Slavery, http://www.pbs.org/wgbh/aia/part1/1narr3.html (“In 1641, Massachusetts became the first colony to legally recognize slavery.”).
restrictions on priesthood on the alleged inferiority of blacks. Brigham Young, in his

*Journal of Discourses*, explained the Mormon theology with respect to black Africans:

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

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

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

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

It could be argued that the religious experience of the United States with respect to race, gender equality, and sexual orientation may be unique because the founders of

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137 See Mary Jordan, supra note 135.

138 Barbara L. Bernier, *Unholy Troika: Gender, Race and Religiosity in the 2008 Presidential Contest*, 15 DUKE J. GENDER L. & POL’Y 275, 283 (2008) (“Some religious based organizations such as the Promise Keepers, the Southern Baptist Convention, and the Church of Latter Day Saints among others take the stance that women should be subservient to their husbands and that men should take back their families.”).
the United States had a pre-existing ascetic and fundamentalist theological outlook hostile to gender equality and homosexuality. The Puritans, for example, were notable for their narrow or “pure” theological views on a wide variety of issues, and for their harsh measures in dealing with those who disagreed with them. They demonstrated this approach to theological dissent by forcibly ejecting Roger Williams from Massachusetts Bay Colony. Williams subsequently founded the colony of Rhode Island as a haven for people of all faiths. 139 Even the ascetic Puritans, however, ultimately evolved into Congregationalists, Presbyterians, and Baptists. Congregationalists and Presbyterians are currently considered mainstream Protestant faiths that tend to be relatively moderate on issues of gender equality, sexual orientation, and progressive on issues of race.

Moreover, until the break between the southern and northern Baptists over slavery, the Baptist faith was not particularly associated with intolerance. Roger Williams, considered the founder of American Baptism, strongly advocated for tolerance and amicable relations with Native Americans, 140 and northern Baptists are not currently considered notably immoderate on social issues. 141 It is thus difficult to argue that there was something inherent in the Baptist faith that created this link between the conservative views of the Southern Baptist Convention on race, gender and sexual orientation. As is usually the case, theology followed the existing cultural and socio-political realities, rather than the other way around.

140 Id. at 535.
Moreover, the founders of the United States were predominantly Deists, the antecedents of modern day Unitarianism. Unitarianism is currently arguably one of the most progressive religions in the world on matters of gender equality, race, and sexual orientation. This again suggests that nothing unique in the history of the United States, other than its history with slavery and apartheid, can account for the emergence of large Christian sects that supported discrimination based on race, gender, and sexual orientation.

It could be argued that the unique connection between race and religion was not simply about theologically justifying the institution, since other countries have had slavery or been involved in the slave trade. Rather, the United States arguably viewed itself as morally superior to the rest of the world, as encapsulated in the idea of “American exceptionalism,” and therefore had a particularly difficult task in reconciling slavery with its religiosity and sense of moral exceptionalism. “[T]he plantation colonies of Spain and Portugal inherited legal definitions of slavery through the Catholic Church” and the Roman-Dutch legal traditions. In contrast, the United States colonies had very little moral or legal framework with which to view the institution of slavery.

Moreover, since many of the original United States settlers viewed themselves as morally distinct and superior to the Europeans, there still remained the issue of reconciling their moral exceptionalism with the enslavement of human beings. The

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143 See Brown Report, supra note 130, at 8 (“In contrast to the plantation colonies of Spain and Portugal, which inherited legal definitions of slavery through the Catholic Church and the tradition of Roman-Dutch law, settlers in mainland North America were left to fashion their own slave codes.”).
144 See Brown Report, supra note 130, at 8.
answer, of course, was to theologically relegate persons of African descent to sub-human status, a theological development that was arguably unique in history to those United States religions that condoned slavery. As noted by the Brown Report, “[T]he laws they fashioned, beginning in Virginia in the 1620s and continuing through the Civil War, were historically unprecedented in their complete denial of the legal personality of the enslaved. Slaves in North America were chattel, no different in law from horses, handlooms, or other pieces of disposable property.”¹⁴⁶ In this sense, the United States’ sense of moral exceptionalism and religiosity directly contributed to the unique debasement of African-Americans to chattel status in connection with slavery.

The case studies discussed herein suggest a correlation among racial, gender, and sexual orientation discrimination, and this correlation has been demonstrated by polling studies.¹⁴⁷ It is beyond the scope of this article to explore the reasons for this correlation, but the available evidence suggests that all forms of discrimination share a hierarchical worldview. This hierarchical worldview is consistent with the comparative evidence in this article demonstrating that religious justifications for slavery, apartheid, and/or racial inferiority have been highly correlated with hierarchical views with respect to gender and sexual orientation.

¹⁴⁶ Brown Report, supra note 130, at 8.
¹⁴⁷ See, e.g., GILL VALEN'TINE & IAN MCDONALD, STONEWALL, UNDERSTANDING PREJUDICE: ATTITUDES TOWARDS MINORITIES 6 (2004), available at http://www.stonewall.org.uk/documents/pdf_cover__content.pdf (“[N]ationwide polling . . . found objective evidence of substantial links between different sorts of prejudices. It established a strong correlation, for example, between people who hold racist views and those who are homophobic.”).
I. The United States and the Rest of the Industrialized Democratic World: From Divergence to Convergence?

Does the unique racial history of the United States mean that there is little relevance for the United States in the progress made with respect to LGBTI rights in otherwise similarly situated countries? Despite the uniquely racialized history of the United States, there is reason for optimism that a convergence is not only possible, but is in the process of occurring. It is true that the greatest gains in LGBTI rights have been primarily in those states that distinguished themselves as opponents of slavery. Vermont, the first state to recognize civil unions, and the first state to legislatively enact full marriage equality, was also the first U.S. state to abolish slavery.148 New Hampshire,149 Iowa, Massachusetts, and Maine150 also distinguished themselves as sources of abolitionist sentiment.151

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

151 It is interesting to note, although I would not argue a causal relationship, that Rhode Island, the only New England state not to legalize same-sex marriage, is also the New England state with the deepest historical involvement with slavery. See Brown Report, supra note 130, at 9. I would not argue a causal relationship since the interrelationship between Rhode Island and slavery did not result in the dominant religion in Rhode Island being explicitly racist.
obvious forms of racial hatred should, presumably, also correlate with less hierarchical views towards issues related to gender and sexual orientation.

As demonstrated in the discussion above, the principal obstacle to such recognition of gender and LGBTI legal equality in the United States is the existence of powerful fundamentalist Christian groups with an unusual degree of political influence. However, those groups have themselves radically altered their own position on some of their most strongly held beliefs regarding discrimination. For example, the Southern Baptist Convention has apologized for its theological endorsement of slavery and apartheid,\(^{152}\) and the Mormon faith came to accept persons of African descent into the priesthood. More people were opposed to mixed race marriages in 1948 than are currently opposed to same-sex marriage.\(^{153}\) In 1948, when California became the first state to strike down a ban on interracial marriage, nine out of 10 Americans opposed such unions.

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


\(^{153}\) Gail Mathabane, Gays Face Same Battle Interracial Couples Fought, 1/25/2004. Available at \url{http://www.usatoday.com/news/opinion/editorials/2004-01-25-couples_x.htm} (“In 1948, when California became the first state to strike down a ban on interracial marriage, nine out of 10 Americans opposed such unions.” \textit{See also} Peggy Pascoe, \textit{Why the Ugly Rhetoric Against Gay Marriage Is Familiar to this Historian of Miscegenation}, \textit{History News Network}, Apr. 19, 2004, \url{http://hnn.us/articles/4708.html}
V. DIVERGENCE AND CONVERGENCE IN THE WESTERN HEMISPHERE: LATIN AMERICA AND THE CARIBBEAN

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

The English speaking Caribbean and Latin America reflect, to some extent, the divergence between those regions of the world colonized by the British, and those areas colonized by the Spanish and the Portuguese. For much of colonial and post-colonial history, many Caribbean and Latin America nations have been characterized as having high levels of anti-LGBTI animus and violence.\(^{154}\) Both regions have had a “machista”\(^{155}\) culture in which gender nonconformity has often been violently suppressed. Nevertheless, in the last decade, there has been a growing divergence in the implementation of LGBTI rights between English-speaking Caribbean countries and Latin American countries.

\(^{154}\) For example, the high number of asylum cases granted from Latin American and Caribbean countries by various countries attests to the documented historically high level of violence in the great majority of Latin American and Caribbean countries. See, e.g., Country Specific Meritorious Claims, http://pards.org/meritorious.html (last visited Oct. 26, 2009).

Although generalizations about a region as diverse and large as Latin America and the Caribbean are difficult, it can nevertheless be stated that, with some notable exceptions, much of Latin America has made substantial, albeit uneven, progress in implementing LGBTI rights,\(^{156}\) or at least decriminalizing homosexuality. The English speaking Caribbean, on the other hand, is characterized by extraordinarily high levels of anti-LGBTI social animus and repressive legislation.\(^{157}\)

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

A. The Role of Religion

At the risk of stating the obvious, religion is a determining factor in defining societal attitudes towards homosexuality in almost all countries. For example, there is generally a high correlation between religious attendance (as opposed to mere


\(^{157}\) See Amnesty International, supra note 50.
membership) and animus towards LGBTI rights. Nevertheless, not all religions are equal with respect to this correlation, even when the religions may share an underlying theological opposition to homosexuality. For example, Latin American Catholicism and Caribbean Fundamentalist Protestantism share a strong anti-LGBTI theological perspective. Moreover, as this article will illustrate, religion itself is frequently a simple expression of underlying societal attitudes that may exist independently of the theological tenets of the particular religion.

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

This divergence can be partially explained by the degree to which adherents of the different religions consider the theological positions of their religions determinative of their own personal approaches to those issues. It should not be surprising that fundamentalist or evangelical Protestantism has had greater success in shaping individuals’ personal approaches to social issues, since evangelical Protestantism is predicated upon a much closer relationship between one’s acceptance of the religion’s

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158 See, e.g., BRIAN REINHARDT, EXAMINING CORRELATES OF HOMOPHOBIA IN HETEROSEXUAL COLLEGE STUDENTS (1997), available at http://www.eric.ed.gov/ERICWebPortal/custom/portlets/recordDetails/detailmini.jsp?_nfpb=true&_&ERICExtSearch_SearchValue_0=ED412445&ERICExtSearch_SearchType_0=no&accno=ED412445 (finding a correlation between homophobia and church attendance, but not church affiliation).
specific tenets and personal salvation. Catholicism, on the other hand, is often experienced by its adherents as more of a cultural institution. As the default religion for much of Latin America’s history, Catholicism arguably did not require the same degree of personal affirmation of the religion’s specific tenets or active attendance in religious services by Catholic parishioners. Thus, Catholic religious affiliation in many countries is not necessarily correlated with consistent church attendance, which is more closely correlated to anti-LGBTI attitudes.\footnote{Id.} Moreover, the phenomenon of “cafeteria Catholicism”\footnote{Sometimes, albeit somewhat inaccurately, referred to as “latitudinarianism,” “cafeteria Catholicism” is defined herein as the selective adherence to various religious beliefs or practices.} in Catholic practice has been well-documented, although repeatedly condemned by the Catholic Church itself.\footnote{Pope Benedict Decrees “Cafeteria Catholicism,” Catholic News Agency, July 6, 2005, http://www.catholicnewsagency.com/new.php?n=4314 (“In 1987, John Paul told a gathering of the U.S. bishops that, “It is sometimes reported that a large number of Catholics today do not adhere to the teaching of the Catholic Church on a number of questions, notably sexual and conjugal morality, divorce and remarriage.” “It is sometimes claimed”, he said, “that dissent from the magisterium is totally compatible with being a ‘good Catholic,’ and poses no obstacle to the reception of the Sacraments. This is a grave error that challenges the teaching of the Bishops in the United States and elsewhere.”}).

Lack of strict adherence to doctrine does not, however, fully explain the divergence in gender approaches to homosexuality in the predominantly fundamentalist Protestant Caribbean and Catholic Latin America. As discussed further below, one of the distinguishing characteristics between the two regions is the apparently more hostile view of homosexuality by women in the Caribbean with anti-LGBTI animus firmly entrenched in the two genders. To better understand this apparent phenomenon, it is helpful to understand the role of women within the religious institutions of the Caribbean and Latin America.
B. The Role of Women in the Two Regions\textsuperscript{162}

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

In the Caribbean, women are often the primary breadwinners and heads of households, and men can sometimes be marginalized, both economically and in terms of socio-economic position.\textsuperscript{163} It can be argued that gender nonconformity, particularly by

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{162} The information in this section is based on the author’s personal experience as Co-Director of the American Caribbean Law Initiative.
\item \textsuperscript{163} See, e.g., Rhoda Reddock, History of the Women’s Movement in the Caribbean (Part I), Address to the HIVOS/UNIFEM Meeting of Women’s Organizations (Dec. 1, 1998), \textit{available at} http://www.cafra.org/spip.php?article681. In her address, Reddock notes that:

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

\textit{Id}. As a result of this phenomenon, Reddock argues that:

\end{itemize}
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males, is sometimes viewed as harmful by diminishing, from a heterosexual female perspective, a primary social utility of males as participants in the family unit.\textsuperscript{164}

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

In my own research I have argued that for Caribbean men, whose manhood has always been fractured as they struggle to live up to European notions of hegemonic masculinity, these feelings of loss have been even greater. The increase in violence against women in the region, the brutality of it and the defence of it by many men and some women suggests to me that we may be in the middle of the civil war of sorts between the sexes. And women and children are losing their lives.\textsuperscript{165}

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

\section*{C. Effect of Slavery}

Although slavery was widely practiced in many regions of Latin America,\textsuperscript{166} particularly in Brazil, Guyana and Suriname, the effect of slavery differed between Latin America and the Caribbean. In non-Caribbean Latin America, the post-colonial countries

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

\textit{Id.}
\textsuperscript{164} Interview by author with anonymous minister in The Bahamas, Feb. 4, 2002 (minister stating “life is hard enough for women in the Caribbean, and a male who is not a ‘strong’ male is but one more burden”).
\textsuperscript{165} Reddock, \textit{supra} note 163.
\textsuperscript{166} See \textit{generally} HERBERT S. KLEIN, AFRICAN SLAVERY IN LATIN AMERICA AND THE CARIBBEAN (1986).
were dominated by populations whose descendents were not enslaved. As noted above, without minimizing the brutality of slavery in Latin America, slavery in the British colonies also tended to be more racialized, and thus the racial consequences of slavery tended to be more pronounced in the post-slavery, colonial societies of the English-speaking Caribbean. As Herbert Klein notes, “every slave society in Latin America permitted slaves to be manumitted from the very beginning. All such regimes accepted the legitimacy of manumission, since it was the norm in Roman law and was deeply embedded in Christian piety and practice.”167

167 Id. at 217.
Under slavery, a male slave was powerless to protect family members from physical harm and assaults on their dignity by the white overlords.\textsuperscript{168} As a result, there has been a pronounced resistance in some post-slavery black communities to perceptions of male “subservience,” either to women or to men, resulting in a hostility to gender nonconformity.\textsuperscript{169} There has been extensive literature on the effect of this phenomenon in the African-American community in the United States to help explain the elevated levels of anti-LGBTI attitudes and hostility to male gender nonconformity in the African-American community.\textsuperscript{170}

It must be noted, however, that the traditional historiography critiquing the alleged dysfunctionality of slave families has been subject to widespread criticism, but the alleged effects of male powerlessness in the face of the white power structure have been much less contested.\textsuperscript{171}


\textsuperscript{169} Devon Carbado, in \textit{The Construction of O.J. Simpson as a Racial Victim}, 32 HARV. C.R.-C.L. L. REV. 49, 83 (1997), writes critically of the role the belief in black male emasculation plays in the black community, but notes that “This sense of Black male emasculation is very real in the Black community; ‘almost everyone [in the Black community] buys into it on a certain level.’” \textit{Id.} For a discussion of how anti-racist and anti-slavery discourse has frequently been shaped by male resentment against male subordination, thereby perpetuating male dominance within some parts of the anti-racist movements, see Lisa A. Crooms, \textit{“To Establish My Legitimate Name Inside the Consciousness of Strangers”: Critical Race Praxis, Progressive Women-of-Color Theorizing, and Human Rights}, 46 HOW. L.J. 229, 259 n.108 (2003). \textit{See also} Darren Hutchison, \textit{Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics}, 47 BUFF. L. REV. 1, 40–41 (1999) (“Despite the reality of homophobic racial oppression, anti-racist legal theorists and political activists have generally failed to engage in a substantial critique of heterosexism. Manifestations of the marginalization of homosexuality in anti-racism range from outright homophobia to a general lack of commitment to sexual equality. The ambivalence or opposition toward ‘gay rights’ among anti-racists reflects the heterosexism that exists inside and outside of communities of color.” (footnotes omitted)).

\textsuperscript{170} See sources cited \textit{supra} note 169.

\textsuperscript{171} In the context of post-slavery United States society, sociologists Norman L. Day-Vines and Beth O. Day-Hairson have argued that:

Historically, the church and the family have served as strong socializing agents within the African American community, which have deterred youngsters from certain maladaptive behaviors. Regrettably, (a) the declining significance of the family and church . . . (c) ineffectual adult male role models resulting from the historical emasculation of many African American males, (d) the impersonal nature of urban environments, (e) economic distress, (f) decreasing access to legitimate
D. Approaches to Domestic Incorporation of International Human Rights Norms

Whereas the level of acceptance of LGBTI rights and other internationally accepted human rights norms has been increasing in much of Latin America, the English speaking Caribbean has been far more resistant. One of the more visible manifestations of such resistance can be seen in the bitter resistance of much of the English speaking Caribbean to the growing international movement for banning capital punishment.\(^{172}\) Indeed, this resistance to the abolishment of the death penalty provided much of the support for the creation of the Caribbean Court of Justice by the Caribbean Community (CARICOM)\(^{173}\) to replace the Commonwealth’s Privy Council in London as a court of last appeal.\(^{174}\) The Privy Council’s rulings had repeatedly created insurmountable obstacles to the effective implementation of the death penalty, and there was a belief that

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opportunities, and (g) dwindling school and community resources jeopardize the psychological well-being of many adolescents, leaving an alarming number of young men to construct their own misguided definitions of African American manhood.


\(^{173}\) CARICOM is a relatively advanced example of an integrated common market with efforts at free movement of people, goods and services throughout the Caribbean region.

\(^{174}\) Anderson & Burgess, supra note 172 (“Several leading Caribbean politicians had attacked the Privy Council as being an abolitionist court and represented that that was a reason for advocating the abolition of appeals to the Privy Council and the establishment of the Caribbean Court of Justice (CCJ) as the final court of appeal for the region.”). It is true that another rationale for the creation of the Caribbean Court of Justice resided in a perception of the Privy Council’s role as a remnant of British colonialism. Nevertheless, the rationale of the Court of Justice as a means of permitting the death penalty presented a dilemma for those jurists who agreed with the rationale for the replacement of the Privy Council as an expression of regional sovereignty, but were opposed to the death penalty.
the Caribbean Court of Justice will be much more amenable to the imposition of the
death penalty, although it is not clear that this will be the case.  

Similarly, it is possible to view much of the discourse in the Caribbean with respect to decriminalization of homosexuality as a resistance to imposition of perceived European norms on the Caribbean, particularly in light of the United Kingdom’s quantum leap in such recognition of internationally accepted norms of non-discrimination and privacy, particularly with respect to LGBTI individuals. The irony in such a reaction, also witnessed in former British colonies in Africa and Asia, is that the original source for those anti-LGBTI laws was British colonialism itself, not indigenous pre-colonial antipathy to homosexuality.

It could be argued that part of the reason for this resistance to internationally recognized human rights norms in the Caribbean as opposed to Latin America, is that the political elites in Latin America themselves much more closely identify with the culture and legal norms of continental Europe. Many of the political elites in Latin America trace their familial lineage to Europe, as opposed to the political elites in the English speaking Caribbean. It could also be argued that the greater receptiveness of some Latin American elites to the expansive pro-LGBTI jurisprudence developing in Europe is because of Latin America’s greater distance from the United States, with its historically more anti-LGBTI legal tradition and its support of conservative, repressive local regimes.

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175 See Anderson & Burgess, supra note 172 (“Ironically, the CCJ [Caribbean Court of Justice] in an appeal by the Government of Barbados, A-G of Barbados and others v. Jeffrey Joseph and Lennox Ricardo Boyce . . . reaffirmed the principles established by the Privy Council in relation to the unconstitutionality of long delays in the execution of the death penalty and of the mandatory imposition of capital punishment.”).

176 See generally Rob Tielman & Hans Hammelburg, World Survey on the Social and Legal Position of Gays and Lesbians, in THE THIRD PINK BOOK 249, 251 (Aart Hendriks et al. eds., 1993); Wilets, supra note 27.


178 Id.
in the Western Hemisphere. It is therefore helpful to explore the effects of location in
terms of geopolitical perspective, and the effects of United States hegemony in the
Caribbean and Central America.

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

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

On the other hand, one can witness a marginally greater tolerance for LGBTI
individuals in The Bahamas than in many of the other islands of the Caribbean. This is
arguably because of the intense commercial and personal ties between The Bahamas and
the United States. 179 Although the United States has historically been less receptive to
LGBTI rights than Europe, the exposure of the Bahamian population to the relatively
open LGBTI communities of Southern Florida and other United States metropolises

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179 *See* U.S. Department of State, Background Notes: The Bahamas,
http://www.state.gov/r/pa/ei/bgn/1857.htm (“The United States historically has had close economic and
commercial relations with The Bahamas. The countries share ethnic and cultural ties, especially in
education, and The Bahamas is home to approximately 30,000 American residents. In addition, there are
about 110 U.S.-related businesses in The Bahamas and, in 2008, 85% of the 4.6 million tourists visiting the
country were American.”).
arguably has had an ameliorative effect on the otherwise hostile attitudes of the population to LGBTI rights.

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

First, it can be argued that human rights abuses against sexual minorities occur in a context of relatively recent civil wars, conflict, or prolonged oligarchic dictatorships that deeply polarized Central American societies and created a perception of any challenge to the social order as a political threat as well. Because LGBTI individuals in those countries challenge deeply felt assumptions held by many people about the proper gender roles of men and women, sexual minorities have frequently been considered a threat to the stability of those societies. As such, LGBTI identity, which in most Latin American countries would normally be considered a largely social transgression, takes on

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181 Of course, the United States has also participated in the overthrow of democratically elected regimes in South America, but United States involvement was somewhat more indirect, the dictatorships were of shorter duration, and the dictatorships did not create socio-economically polarized societies to the same extent as in Central America, where the purpose of the United States intervention was essentially to preserve a plantation economy.
a political dimension, vastly augmenting the danger of violent persecution beyond the kinds of anti-gay violence otherwise documented in Latin America.\textsuperscript{182}

Second, as a result of these social upheavals and political polarization, rule of law\textsuperscript{183} has become severely compromised. The social conflicts, and their resultant polarization, meant that law and security became subordinate to political concerns and the goal of subordinating non-conforming sections of society. Without rule of law, societal groups that are subject to persecution have little or no recourse to the state for protection, particularly when state actors share the same prejudices as the society at large.

Third, the breakdown of rule of law has greater implications for sexual minorities than simply making them more vulnerable to anti-gay violence. For example, many Salvadorans, Hondurans and Guatemalans, gay and heterosexual, experience a real threat


There were multiple killings or attacks on persons presumably because of their sexual orientation. The sexual diversity rights organization, Lesbian-Gay Rainbow Association of Comayaguela, asserted that between January and March, unknown actors killed seven homosexuals because of their sexuality and that a number of gay persons had fled the country out of fear of social and security-force persecution."

\textsuperscript{183} Rule of law is usually defined as the existence and implementation of law independent of corruption, political partisanship or irrelevant biases.
from physical violence at the hands of organized gangs for various motives.\textsuperscript{184} For gay
individuals, however, it can be argued that the risk is exponentially greater since
perpetrators of that violence understand that sexual minorities can be physically assaulted
and even killed largely without facing state prosecution. The widespread social
acceptance of anti-gay discrimination and anti-gay violence, which is particularly
prevalent in organized gangs, aggravates this already deadly situation.\textsuperscript{185} From a
practical perspective, it is not difficult to appreciate that a person who can be robbed,
assaulted or killed with impunity is much more likely to be a victim of such crimes than a
citizen who has recourse to state security forces to protect her or him.

The United States has essentially operated as a processing center for gang
members as Hondurans and El Salvadorans come to the United States, join gangs, and
return to their former countries to form their own gangs or join existing gangs.\textsuperscript{186} Many
of those returning gang expatriates are even primarily English speaking. It could be

\textsuperscript{184} See, e.g., U.S. DEP’T OF STATE, 2008 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: EL SALVADOR
(“Although the government generally respected the rights of its citizens, protection of human rights was
undermined by widespread violent crime, including gang-related violence . . .”); U.S. DEP’T OF STATE,
2008 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: GUATEMALA, available at
http://www.state.gov/g/drl/rls/hrprt/2008/wha/119161.htm (“Societal violence was rampant. Nonstate
actors, with links to organized crime, narcotics trafficking, gangs, private security companies, and alleged
“clandestine” or “social cleansing” groups, committed hundreds of killings during the year.”); U.S. DEP’T
OF STATE, 2008 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: HONDURAS, available at
America estimated that gangs were responsible for 15 percent of violent crime in the country.”)
\textsuperscript{185} Documentation by the U.S. government and other human rights organizations demonstrates the record of
anti-gay persecution by state actors, and the very close nexus between “vigilante” groups that target gays
and lesbians and members of the police force. As just one example, the traditionally very circumspect and
cautious U.S. Department of State Report of 2007 documents that “[t]here were reports of violence and
discrimination by public and private actors against persons with HIV/AIDS, and against homosexual,
lesbian, and transgender persons, including denial of legal registration for a homosexual rights advocacy
group.” U.S. DEP’T OF STATE, 2007 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: EL SALVADOR § 5
\textsuperscript{186} See, e.g., Clare M. Ribando, Congressional Research Service, CRS Report for Congress.  Gangs in
Central America, August 2, 2007; Freedom House. COUNTRIES AT THE CROSSROADS 2007 – HONDURAS. 25
September 2007. Perez, Orlando J. UNHCR Refworld, Accessed on June 1, 2008 at
argued that the United States has exported at least part of its criminal gang culture to these countries of Central America.

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

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

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

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slavery was justified by a theology of racism by religions native to the United States.\footnote{See Brown Report, supra note 130, at 8.} The United States theology of racism was, however, buttressed by the lack of a pre-existing legal framework with which to legally conceptualize slavery and slaves.\footnote{See supra text accompanying notes 143–144 for a discussion indicating lack of legal framework for slavery in the United States as opposed to Portuguese and Spanish colonies.} This helps to explain why Brazil might be more progressive than the United States with respect to hierarchical views towards LGBTI citizens, but it doesn’t provide a fully adequate basis for distinguishing Brazil (and Latin America generally) from the Caribbean, except that Brazil has not experienced the emasculating effects of colonialism and its attendant racism as recently as the Caribbean.

Third, unlike the United States and the Western democracies discussed herein, Brazil does not have a large middle class, well-educated body politic that often serves as a moderating force on populist, anti-gay political rhetoric and legislation.\footnote{Compare Drucker, supra note 60, at 2–3, with LONG ET AL., supra note 54, app. B at 154.} Argentina and Uruguay, for example, which do have much more substantial middle classes, have gone further than Brazil in guaranteeing LGBTI rights, with Uruguay granting civil unions to gay couples.\footnote{Uruguay Approves Gay Civil Unions, BBC NEWS, Dec. 19, 2007, http://news.bbc.co.uk/2/hi/americas/7151669.stm.} Moreover, to the extent the Brazilian elite identifies with Europe more than the elites in the Caribbean do, Brazil has tended to follow the more progressive paths of some of the other South American nations discussed above.

Fourth, like many countries in Latin America, Brazil has a growing fundamentalist Christian movement, although the majority of the population continues to be Roman Catholic.\footnote{See Monte Reel, In Brazil, Pope to Face a Church Losing Hold, WASH. POST, May 9, 2007, at A1. For example, in June 2006 more than three million evangelicals marched in Sao Paulo, the largest city in}
vastly lower than the population in the English-speaking Caribbean, providing a critical difference that can help explain Brazil’s (and Latin America’s) differences with the Caribbean.

Fifth, there is a general perception that, unlike those countries that share a British colonial heritage, Brazil inherited Portugal’s tolerance of homosexuality and generally less ascetic view of sexuality in general, although the evidence regarding this argument is contradictory.¹⁹³

Brazil, and much of Latin America, thus possesses many of the socio-economic characteristics of the Caribbean, but the differences are critical enough to make a substantial divergence in the two regions’ approaches to LGBTI rights.

The best way to reconcile the continued pattern of anti-gay violence in Brazil with the progressive recent legislation on same-sex unions and other LGBTI rights is to acknowledge that the level of violence in Brazil is very high. Thus, gays and lesbians, although disproportionately targeted by that violence, are targeted not just because of anti-gay societal attitudes, but also because they are easy targets due to the relative impunity with which people can commit crimes against gays and lesbians without fear of reprisal.

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¹⁹³ See John Ross, *Gay and Lesbian Spain and Portugal*, http://spainforvisitors.com/sections/gayandlesbian.htm (last visited Mar. 30, 2008). Cf. GLBTQ, Social Sciences, Portugal, http://www.glbtq.com/social-sciences/portugal.html (“Compared to other countries Portugal was considered relatively lenient in its treatment of people denounced for sodomy.”). But see id. at 2 (“It was not until the 1990s, however, that the glbtq rights movement really gained momentum in Portugal.”).
G. Looking to the Future: Continued Divergence or Convergence?

Although, as a generalization, the divergence between Latin America and the English speaking Caribbean is real, this does not mean that the prognosis for progress in LGBTI rights in The Caribbean is entirely bleak. Although the relative difference in progress between Latin America and the Caribbean is likely to remain for the near future, some progress in acceptance of LGBTI individuals can nevertheless be witnessed among at least the elites in some English-speaking Caribbean countries. What is notably lacking in the English-speaking Caribbean is any significant progress in the realization of legal rights for LGBTI individuals. There has been more discussion of LGBTI rights in Caribbean press, even though such discussion has frequently been highly controversial and the coverage is predominantly negative. As other countries have experienced, however, the old cliché that “it’s better to be spoken about negatively than not at all” may be applicable. Usually the first step to recognition of LGBTI rights is simply the recognition that LGBTI individuals exist, and this discussion is well under way in the Caribbean, even if frequently in the form of anti-LGBTI discussions. Nevertheless, that discussion has also engendered some discourse in defense of LGBTI rights.

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

VI. CONCLUSION

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

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

It can therefore be expected that convergence in state approaches on race and gender discrimination in a post-colonial and post-apartheid era should be reflected in substantial gains in LGBTI rights as well. To a large extent this has happened. There has been a growing convergence in state policies towards LGBTI rights in South America, Europe, Oceana, and North America.

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