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The Great Debate:

Lessons to be Learned from an International Comparative Analysis on Same-Sex Marriage

Sarah K. Mazzochi*

INTRODUCTION

In most international English language dictionaries, marriage is defined as: “1. the legal union of a man and a woman in order to live together and often to have children. 2. an act or ceremony establishing this union.”¹ In the American Webster’s Dictionary, marriage is similarly defined, but adds that marriage is “the institution whereby men and women are joined in a special kind of social and legal dependence for the purpose of founding and maintaining a family.”²

Marriage took on a third definition around the beginning of

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1. See, e.g., THE AUSTRALIAN CONCISE OXFORD DICTIONARY 692 (2d ed. 1992).

2. WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1384 (2002).

the twenty-first century: same-sex marriage. According to the Merriam-Webster's Dictionary, same-sex marriage is defined as "the state of being united to a person of the same sex in a relationship like that of a traditional marriage."³

Despite what some have claimed, same-sex marriage has historical roots. Same-sex marriage existed among many Native American tribes including the Kwakiutl Indians, the Navajo, the Illinois, the Nadouessi, and the Lakota.⁴ In certain parts of China like Fujian, young men could marry each other and even adopt and raise children together.⁵ Parts of Africa also recognized same-sex marriages for women.⁶ Furthermore, same-sex coupling has been historically accepted in many cultures and societies all over the world. The Ancient Greeks were well known to have practiced homosexuality.⁷ Another lesser-known example is the widespread practice of homosexuality among the Japanese Samurai.⁸

Comparative study of same-sex marriage, however, is a field that has been relatively neglected in queer theory and in the great debate on same-sex marriage in the United States. This Article seeks to change that. This Article does not debate the merits of using some terminology, like "civil unions," in place of the word "marriage" or any related concepts on equality or dignity. This Article seeks only to find the root causes of same-sex marriages tolerance or intolerance worldwide. Only by understanding the reasons why same-sex marriage and gay rights have, or have not, been tolerated in other parts of the world will advocates here in the United States, and abroad, better combat the obstacles in the way to realizing full equality for all.

Part I of this Article will recount the history of same-sex marriage in the United States and where it stands currently. It

3. *Marriage*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/marriage>.

4. Bijal Shah, *Gay American "Deviance:" Using International Comparative Analysis to Argue for a Free Speech and Establishment Clause Approach to Furthering Gay Marriage in the United States*, 26 WIS. INT'L L.J. 1, 55-56 (2008).

5. *Id.* at 56.

6. *Id.*

7. See Mark Golden, *Slavery and Homosexuality in Athens* 38 PHOENIX 308, 309 (1984).

8. GARY P. LEUPP, *MALE COLORS: THE CONSTRUCTION OF HOMOSEXUALITY IN TOKUGAWA JAPAN* 53-54 (1999).

will also detail the common arguments for and against same-sex marriage. Part II will lay out the comparative law of same-sex marriage by looking at states in North America, Europe, Oceania, Asia, and Africa. Part III will chronicle the common themes and differences found in the states surveyed in this Article. Part IV will offer some reasons why same-sex relations have either been tolerated or not tolerated globally. This Article will conclude with some lessons to be learned from the comparative experience and will describe challenges that advocates for gay rights will have to overcome in the future.

I. HISTORY OF SAME-SEX MARRIAGE IN THE UNITED STATES

We are mindful that our decision marks a change in the history of our marriage law. Many people hold deep-seated religious, moral, and ethical convictions that marriage should be limited to the union of one man and one woman, and that homosexual conduct is immoral. Many hold equally strong religious, moral, and ethical convictions that same-sex couples are entitled to be married, and that homosexual persons should be treated no differently than their heterosexual neighbors. Neither view answers the question before us ‘Our obligation is to define the liberty of all, not to mandate our own moral code.’⁹

The true legal beginning of same-sex marriage in the United States came with the Supreme Court decision in *Loving v. Virginia* in 1967, which was a case involving a Virginia law that prohibited marriage between different races.¹⁰ Chief Justice Earl Warren, who wrote the majority opinion, ruled that laws denying marriage licenses on the basis of race violated the Equal Protection Clause of the United States Constitution.¹¹ The Court also wrote:

9. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (quoting *Lawrence v. Texas*, 539 U.S. 558 (2003)). For an excellent timeline of same-sex marriage around the world, see *Timeline: Same Sex Marriage*, CBC NEWS (Aug. 4, 2010), available at <http://www.cbc.ca/world/story/2009/05/26/f-same-sex-timeline.html>.

10. 388 U.S. 1 (1967).

11. *Id.* at 12; see U.S. CONST. AMEND. XIV, § 1.

The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodies in these statutes . . . is surely to deprive all the State's citizens of liberty without due process of law.¹²

The Supreme Court furthered its marriage analysis in the 1978 case of *Zablocki v. Redhail*.¹³ The Court applied its holding in *Loving* to invalidate a state law that did not allow people with outstanding child or spousal support duties the right to marry.¹⁴ Justice Thurgood Marshall wrote that no restriction on the basis of the "freedom of personal choice in matters of marriage and family life" can be supported unless a state can prove the restriction is narrowly tailored to serve a compelling social purpose.¹⁵

In 1986, the Supreme Court heard *Bowers v. Harwick*.¹⁶ There, the Court dealt with a Georgia statute that criminalized sodomy equally for men and women.¹⁷ Harwick argued the law was unconstitutional on Ninth Amendment grounds and Fourteenth Amendment due process grounds.¹⁸ The Court, however, narrowly defined the issue in this case as to whether there is a right of homosexual¹⁹ conduct ingrained in the Constitution.²⁰ The Court held there was not and upheld the statute criminalizing sodomy.²¹ The decision was widely unpopular with both academics and practioners alike.²²

The Court overturned *Bowers* in 2003 with *Lawrence v. Texas*,

12. *Loving*, 388 U.S. at 12.

13. 434 U.S. 374 (1978).

14. *Id.* at 377.

15. *Id.* at 385-87 (quoting *Cleveland Bd. of Edu. v. LaFleur*, 414 U.S. 632, 639-40 (1974)).

16. 478 U.S. 186 (1986).

17. *Id.* at 189-90.

18. *Id.* at 189.

19. This author uses the terms homosexual, gay, and lesbian interchangeably.

20. *Bowers*, 478 U.S. at 190.

21. *Id.* at 189.

22. William N. Eskridge, *Yale Law School and the Overruling of Bowers v. Harwick*, YALE L. REP., Winter 2004, at 36-39, available at <http://www.law.yale.edu/ylr/pdfs/v51-1/Eskridge.pdf>.

by holding a Texas anti-sodomy statute was unconstitutional on substantive due process grounds.²³ Interestingly, the Court also stated that *Bowers* was wrong the day it was decided,²⁴ which is very unusual language for the Supreme Court of the United States.

After these Supreme Court decisions, states then entered the debate on marriage. The first state supreme court to enter a decision in favor of same-sex marriage was the 1993 Hawaii Supreme Court case of *Baehr v. Lewin*.²⁵ There, the Hawaii Supreme Court held that denying a same-sex couple a marriage license is discriminatory on the basis of sex the same way the U.S. Supreme Court found denying a marriage license to a mixed-race couple is discrimination on the basis of race.²⁶ The Hawaii Supreme Court further determined that the state had no justification for denying same-sex couples the right to marry on the basis of “natural” gender roles, nor did it serve a valid public goal.²⁷ The state then quickly passed a constitutional amendment limiting marriage to opposite-sex couples.²⁸

Baehr v. Lewin produced a significant backlash in the United States.²⁹ Many law makers and experts believed the Full Faith and Credit Clause of the U.S. Constitution, which provides that all states should give “full faith and credit” to the laws and judicial decisions of other states, would force all states to recognize same-sex marriages.³⁰ Therefore, in 1996, Congress passed the federal Defense of Marriage Act (DOMA).³¹ Although its constitutionality has recently been questioned, and the issue will almost certainly be heard at some point by the Supreme Court, DOMA declared that, for federal purposes, other states would not be required to recognize same-sex marriage performed outside their

23. 539 U.S. 558, 578-79 (2003).

24. *Id.* at 578.

25. See 852 P.2d 44, 60-63 (Haw. 1993).

26. *Id.* at 68.

27. See *id.*

28. See HAW. REV. STAT. ANN. §572-1 (LexisNexis 2005).

29. Danielle Johnson, *Same-Sex Divorce Jurisdiction: A Critical Analysis of Chambers v. Ormiston and Why Divorce is an Incident of Marriage That Should Be Uniformly Recognized Throughout the States*, 50 SANTA CLARA L. REV. 225, 227 (2010).

30. *Id.*

31. See 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006).

jurisdiction.³² This prompted several states to enact so-called “mini-DOMAs” where state legislatures passed their own bans on same-sex marriage on the grounds of public policy.³³ Some states went even further and adopted legislation that expressly allows that state not to recognize out-of-state same-sex marriages.³⁴

However, in 2003, Massachusetts became the first state in the United States to recognize same-sex marriage in the landmark case *Goodridge v. Department of Public Health*.³⁵ Currently, same-sex marriage is recognized in Massachusetts,³⁶ Connecticut,³⁷ Iowa,³⁸ Vermont,³⁹ New Hampshire,⁴⁰ the District of Columbia,⁴¹ and New York.⁴² Moreover, many other states have some type of legal same-sex partnership, but fail to call it “marriage.”⁴³ Other states, like California, are on the brink of

32. See 28 U.S.C. § 1738C (“No State . . . shall be required to give effect to any . . . judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State.”); Denise Lavoie, *US appeals Mass. rulings on gay marriage*, BOSTON GLOBE, Oct. 12, 2010, at 7, available at http://www.boston.com/news/local/massachusetts/articles/2010/10/12/feds_appeal_mass_rulings_against_us_marriage_law/.

33. Johnson, *supra* note 29, at 228.

34. *Id.*

35. 798 N.E.2d 941, 948 (Mass. 2003).

36. *Id.*

37. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 482 (Conn. 2008).

38. *Varnum v. Brien*, 763 N.W.2d 862, 907 (Iowa 2009).

39. Abby Goodnough, *Rejecting Veto, Vermont Backs Gay Marriage*, N.Y. TIMES, Apr. 8, 2009, at A1. The Vermont legislature overrode the governor’s veto to become the fourth state to legalize same-sex marriage in the United States. *Id.* It was the first state to legalize same-sex marriage through legislative means and not through the court system. *Id.*

40. See Abby Goodnough, *New Hampshire Legalizes Same-Sex Marriage*, N.Y. TIMES, June 4, 2009, at A19, available at <http://www.nytimes.com/2009/06/04/us/04marriage.html>. Only a few months after the Vermont legislature overrode a governor’s veto, the New Hampshire legislature passed a same-sex marriage bill, which the Governor quickly signed into law. *Id.* The bill went into effect in January 2010. *Id.*

41. Bill Mears, *D.C. Same-Sex Marriage Law Takes Effect This Week*, CNN, Mar. 2, 2010, available at http://articles.cnn.com/2010-03-02/politics/dc.same.sex.marriage_1_same-sex-chief-justice-john-roberts-high-profile-issue?_s=PM:POLITICS.

42. Nicholas Confessore & Michael Barbaro, *New York Allows Same-Sex Marriage, Becoming Largest State to Pass Law*, N.Y. TIMES, June 24, 2011, at A1, available at <http://www.nytimes.com/2011/06/25/nyregion/gay-marriage-approved-by-new-york-senate.html?pagewanted=all>.

43. Johnson, *supra* note 29, at 229.

legalizing same-sex marriage.⁴⁴

A. Common Arguments Against Same-Sex Marriage

As stated previously, *Goodridge* was the first judicial decision in the United States to legalize same-sex marriage. The Supreme Judicial Court in *Goodridge* dealt with some of the most common arguments against same-sex marriage. The state argued three main reasons why Massachusetts should not recognize same-sex marriage. The reasons were: “(1) providing a ‘favorable setting for procreation,’ 2) ensuring the optimal setting for child rearing, which the department defines as ‘a two-parent family with one parent of each sex;’ and (3) preserving scarce State and private financial resources.”⁴⁵ Arguments relating to the welfare of children are often repeated globally, most notably with France’s recent decision to not permit same-sex marriage for reasons relating to the best interests of the child.⁴⁶

In the United States, commentators have noted several arguments, very similar to the three in *Goodridge*, used against permitting same-sex marriage. Traditional opponents consider that marriage has historically been between one man and one woman, and therefore same-sex marriage should not be allowed.⁴⁷ Another argument is that marriage between a man and a woman exists because those two people can, at least theoretically, engage in procreative sex.⁴⁸ Also mentioned is the strong Judeo-Christian ethic in the United States that condemns homosexuality in general.⁴⁹

Conservatives argue that recognizing same-sex marriage would promote homosexuality and in essence approve this wicked behavior, especially for adolescents who would otherwise go on to

44. *Id.*

45. *Goodridge*, 798 N.E.2d at 961.

46. LOUIS DESERRES, REPORT ON THE FAMILY AND THE RIGHTS OF CHILDREN: EXECUTIVE SUMMARY, FRENCH NATIONAL ASSEMBLY (Mar. 8, 2006), available at http://www.vtmarriage.org/resources/french_rpt_summary.pdf (the Report was submitted on Jan. 25, 2006, in Paris, France).

47. William N. Eskridge, Jr., *Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 MCGEORGE L. REV. 641, 644 (2000).

48. *Id.*

49. Shah, *supra* note 4, at 45.

marry, have families, and raise children.⁵⁰ They also point to assimilating gays into mainstream American society should same-sex marriage be made legal, which is unwanted because homosexuals lead wicked, amoral lives - or so the argument goes.⁵¹ Furthermore, conservatives, who often portray homosexuals as voracious sexual deviants out to harm your bodily self, your society, and your children, recount the parade of horrors pro-gay measures would supposedly have.⁵² Conservatives argue that these measures would promote flagrant promiscuity, lewdness, predation against children, erosion of the traditional family, and erosion of marriage as an institution.⁵³

One of the most infamous objections to same-sex marriage found in the United States is the so-called "slippery slope" argument. For example, in April of 2003, U.S. Senator Rick Santorum invoked the slippery slope metaphor in discussing the consequences of decriminalizing sodomy: "If the Supreme Court says that you have the right to consensual [gay] sex within your home, then you have the right to bigamy, you have the right to polygamy, you have the right to incest, you have the right to adultery. You have the right to anything."⁵⁴ Essentially, if the whole of the United States were to give in to erasing one taboo - legitimizing same-sex relations - it would erase a whole host of other taboos like incest and bestiality, which society says cannot be borne.⁵⁵

In addition to religious or moral objections, underlying some of these so-called rational arguments could be simple homophobia.⁵⁶ This homophobia may be triggered by the disgust that many Americans continue to feel towards oral or anal sex.⁵⁷ Another driving force underlying these arguments is sexism.⁵⁸

50. Eskridge, *supra* note 47, at 646.

51. *Id.*

52. *See id.*

53. *Id.* at 653.

54. Suzanne Gamboa, *Texas leaders back Pennsylvania senator Criticized for remarks*, ASSOCIATED PRESS ST. & LOC. WIRE, available at http://www.usatoday.com/news/washington/2003-04-23-santorum-excerpt_x.htm.

55. Courtney Cahill, *Same-Sex Marriage, Slippery Slope Rhetoric, and the Politics of Disgust: A Critical Perspective on Contemporary Family Discourse and the Incest Taboo*, 99 NW. U. L. REV. 1543, 1544 (2005).

56. Eskridge, *supra* note 47, at 645.

57. *Id.*

58. *Id.* at 645-46.

Some opponents have argued that same-sex marriage threatens traditional gender roles because it flips the stereotype of the male-breadwinner and female-domestic caretaker on its head in male-male or female-female relationships.⁵⁹

B. Rebuttal Arguments Supporting Same-Sex Marriage

On the other side of the debate are those who argue for legalizing same-sex marriage. To bolster their views, those who support same-sex marriage point to the fact that there is no evidence that legal recognition of same-sex marriage has in any way devalued the institution of marriage.⁶⁰ In fact, at least in Denmark, the opposite may be true. For example, in the first ten years after homosexual couples were able to register in that state, the divorce rate for same-sex couples actually declined.⁶¹ Moreover, after the passage of same-sex marriage, there are no reports in Denmark, Sweden, or the Netherlands that family life has been weakened or that there has been an increase in promiscuity or sexually transmitted diseases.⁶²

Furthermore, regarding the procreative argument where marriage should be between two people who, at least theoretically, could produce children, the argument is undercut by the fact that no state in the United States has ever banned the elderly or the infertile from getting married.⁶³ This suggests, at the least, that marriage in America is not principally about procreation. In fact, the U.S. Supreme Court held that marriage is not centrally about procreation, but instead “[marriage is an] expression[] of emotional support and public commitment.”⁶⁴ The Supreme Judicial Court in *Goodridge* also agreed with this interpretation of the marriage-procreation argument and disregarded it.⁶⁵

As for the argument that opposite-sex couples raise children in the “optimal setting,” the *Goodridge* decision further discounted that position. The court reasoned that Massachusetts had been supportive of evolving family norms, and the state did not present

59. See *id.* at 645.

60. *Id.* at 660.

61. *Id.*

62. *Id.*

63. See *id.* at 645.

64. *Turner v. Safley*, 482 U.S. 78, 95 (1987).

65. 798 N.E.2d at 961.

any evidence that same-sex couples did not make "excellent" parents.⁶⁶ Preventing children of same-sex couples from having parents who are legally married has negative consequences including a less stable home environment.⁶⁷ However, as will be shown *infra*, this is one of the most popular arguments for banning same-sex marriage internationally.

The last argument found in *Goodridge* for why same-sex couples should be denied the right to marry is perhaps the most outlandish.⁶⁸ The state argued that, because same-sex couples are wealthier than opposite-sex couples, the state would be wasting scarce state resources on those who need state assistance the least.⁶⁹ The idea that same-sex couples are better-off financially is not a new one, but the Massachusetts Supreme Judicial Court rightfully discounted the argument.⁷⁰ Moreover, marital benefits were not, and have never been, conditioned on financial need.⁷¹

As for the "slippery slope" argument, many commentators have dismissed the idea that same-sex relations will lead to bestiality or incest as absurd. For example, Andrew Sullivan writing for *The New Republic* wrote:

If you want to argue that a lifetime of loving, faithful commitment between two women is equivalent to incest or child abuse, then please argue it. It would make for fascinating reading. But spare us this bizarre point that no new line can be drawn in access to marriage—or else everything is up for grabs⁷²

66. *Id.* at 962-63.

67. *Id.* at 963-64.

68. *Id.* at 964.

69. *Id.*

70. *Id.*

71. *Goodridge*, 798 N.E.2d at 964.

72. Andrew Sullivan, *Gay Marriage*, SLATE (Mar. 21, 1997, 3:30 AM), <http://slate.com/id/3642/entry/2384>.

II. COMPARATIVE ANALYSIS: EXAMPLES IN NORTH AMERICA, EUROPE, OCEANIA, ASIA, AND AFRICA⁷³

Having laid the foundation for the same-sex marriage debate in the United States, it is now necessary to examine how same-sex marriage has been treated throughout the rest of the world. This next section will generally progress from the most accepting states to the least accepting states.

A. North America

The Canadian judiciary first recognized same-sex marriage in the 2003 case of *Halpern v. Canada (Attorney-General)*.⁷⁴ The decision was based on the equality principle in the Canadian Charter of Rights and Freedoms.⁷⁵ The court based its decision on the fact that prohibiting same-sex marriage continued a belief that homosexuals and same-sex couples were somehow less worthy of recognition or value as human beings.⁷⁶ Moreover, religious beliefs or the fact that marriage had historically been between one man and one woman was not enough to justify continued discrimination.⁷⁷

Other Canadian provinces followed suit and the Canadian Supreme Court upheld the ability of the Dominion Parliament to establish same-sex marriage in *Reference re Same-Sex Marriage*, which was an advisory opinion decided in 2004.⁷⁸ Parliament then quickly passed legislation that gave effect to the court's decision and legalized same-sex marriage in the *Civil Marriage Act* 2005.⁷⁹

At least one scholar has explained Canada's decision was partly based on the large upheaval of public opinion on same-sex

73. See generally DANIEL OTTOSSON, STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAW PROHIBITING SAME SEX ACTIVITY BETWEEN CONSENTING ADULTS (2010), available at http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2010.pdf (discussing the legal status of states that prohibit same-sex activity across the world).

74. [2003] D.L.R. 4th 529 (Can).

75. *Id.*

76. *Id.* at 554-562, para. 77-108.

77. *Id.* at 553, para. 71.

78. [2004] 246 D.L.R. 4th 193.

79. Civil Marriage Act, S.C. 2005 ch.33 (Can.).

marriage between 1997 and 2004.⁸⁰ One recent study suggests that, between those years, Canadian public opinion dramatically changed towards majority support of same-sex marriage because of a significant shift in positive attitudes towards homosexuals in the state.⁸¹

The largest opposition to same-sex marriage came from religious groups. Eighty percent of Canada's religious population is comprised of Christians, Muslims, or Jews.⁸² Catholics make up the single largest denomination in Canada representing 43.6% of the total population.⁸³ The Catholic Church in Canada, along with the Vatican, protested legalizing same-sex marriage in the state.⁸⁴ Nevertheless, the Catholic Church was relatively quiet until 2004 when two Bishops came out strongly against same-sex marriage.⁸⁵ The Bishop of Calgary called homosexual activity "an evil act" in a pastoral letter to Catholics and protested the legislation.⁸⁶ Interestingly, the largest Protestant denomination, the United Church of Canada, as well as the Unitarian Universality Church and the Quakers, all supported same-sex marriage.

B. Europe

1. Netherlands

Same-sex marriage was debated in the Netherlands as early as the 1980s, and on January 1, 1998, the Dutch legally recognized registered partnerships, or *geregistreerd partnerschap*, of same-sex couples.⁸⁷ Interestingly, both same-sex couples and

80. Mark Warren Lehman, *Affect Change: The Increased Influence of Attitudinal Factors on Canadian's Support For Legal Same-Sex Marriage* (Mar. 2006) (Master of Arts unpublished thesis, University of Toronto).

81. *Id.*

82. *Census: Statistics on Population by Religion, by Province and by Territory*, CANADIAN GOV'T (2001) available at <http://www40.statcan.gc.ca/101/cst01/demo30b-eng.htm>.

83. *Id.*

84. Religious Tolerance, *Same-Sex Marriages in Canada*, available at http://www.religioustolerance.org/hom_marb45.htm (last visited Dec. 12, 2010).

85. *Id.*

86. *Id.*

87. Kees Waaldijk, *Major legal consequences of marriage, cohabitation, and registered partnership for different-sex and same-sex partners in the Netherlands*, <https://same-sex.web.ined.fr/pdf/DocTrav125/05Doc125The>

opposite sex couples were eligible for registered partnerships.⁸⁸

The Netherlands also became one of the first states in the world to legally recognize same-sex marriage.⁸⁹ The process towards same-sex marriage began in 1996 when the Dutch government's executive cabinet created a special commission on same-sex marriage.⁹⁰ Worth noting is the fact that, at the time, the Christian Democrats were not part of the ruling party for the first time since the Netherlands became a full democracy.⁹¹ The special commission concluded its work in 1997 and determined that equity dictated that marriage should be available to both opposite-sex and same-sex couples.⁹² The final legislative draft of the Dutch same-sex marriage bill was presented to Parliament in September 2000 for debate.⁹³ The only real opposition to the bill came from the Christian parties, but the bill passed by a vote of 109 to 33.⁹⁴ Commentators have noted that the Dutch were driven by notions of equality in their passage of the bill.⁹⁵ The issue also polled very highly among voters with 62% of the population having no objection to same-sex marriage.⁹⁶

2. France

Currently, same-sex marriage is not legal in France, although in a recent poll same-sex marriage was supported by 61% of the population.⁹⁷ Moreover, France was the first state in Europe to

Netherlands.pdf.

88. *Id.*

89. *Dutch Legislators Approve Full Marriage Rights for Gays*, N.Y. TIMES, Sept. 13, 2000, at A4, available at <http://www.nytimes.com/2000/09/13/world/dutch-legislators-approve-full-marriage-rights-for-gays.html?scp=2&sq=Norway+Gay+Marriages&st=nyt>.

90. Scott C. Seufert, *Going Dutch? A Comparison of the Vermont Civil Union Law to the Same-Sex Marriage Law of the Netherlands*, 19 DICK. J. INT'L L. 449, 459-460 (2001) (also known as the Kortmann Commission).

91. *Id.*

92. *Id.* at 460.

93. See Waaldijk, *supra* note 87.

94. *Dutch Legislators Approve Full Marriage Rights for Gays*, *supra* note 89.

95. Seufert, *supra* note 90, at 450.

96. *Netherlands legalises gay marriage*, BBC NEWS (Sept. 12, 2000, 15:26 GMT), <http://news.bbc.co.uk/2/hi/europe/921505.stm>.

97. Regis Bigot, *L'opinion defend a la fois la liberete individuelle et la cohesion sociale*, Credoc Consommation et Modes de Vie, July 23, 2010, available at <http://www.credoc.fr/pdf/4p/231.pdf>.

protect homosexuals in the workplace.⁹⁸

Same-sex marriage has become a popular topic in France over the past six years. For example, same-sex marriage was a political issue raised in the 2007 elections. Additionally, the first case that challenged the same-sex marriage ban occurred in 2004, with local and intermediate courts upholding that marriage is between one man and one woman.⁹⁹ This ruling was upheld by the French Court of Cassation, France's highest court of appeals, in 2007.¹⁰⁰ However, in November 2010, the French Court of Cassation ordered the State's Constitutional Council to decide whether the ban on same-sex marriage is constitutional after a complaint was made on the grounds that the ban violated same-sex couples' personal freedoms.¹⁰¹

Perhaps due to the current flurry of activity over same-sex marriage in France, in 2006 the French National Assembly commissioned a report on same-sex marriage.¹⁰² A thirty-member coalition of the French National Assembly submitted its report and declined to find in favor of supporting same-sex marriage for reasons mostly having to do with child-rearing.¹⁰³ Specifically, the report mentions the Convention on the Rights of the Child in relation to the best interests of the child, and that same-sex couples are not seen as being in a child's best interest.¹⁰⁴ Moreover, the report links marriage, adoption, and medically assisted reproduction as indivisible.¹⁰⁵ Lastly, the long-term effect of being raised by same-sex couples is not known in France, and

98. Paul L. Spackman, *Grant v. South-West Trains: Equality for Same-Sex Partners in the European Community*, 12 AM. U. J. INT'L L. & POL'Y 1063, 1101 (1997).

99. Brandon Smith, *France's first same-sex marriage performed by mayor*, JURIST (June 5, 2004, 1:11 PM), <http://jurist.org/paperchase/2004/06/frances-first-same-sex-marriage.htm>.

100. *France High Court Rules Same-Sex Marriage Invalid*, JURIST (Mar. 13, 2007, 1:47 PM), <http://jurist.org/paperchase/2007/03/france-high-court-rules-same-sex.php>.

101. *French Court to Examine Legality of same-sex marriage ban*, TIMES OF INDIA (Nov. 17, 2010, 12:16 IST), <http://timesofindia.indiatimes.com/world/europe/French-court-to-examine-legality-of-same-sex-marriage-ban/articleshow/6938061.cms#ixzz15eLrbzI5>.

102. DeSerres, *supra* note 46.

103. *Id.*

104. See U.N., *Convention on the Rights of the Child* art. 3, 7, 9, 18, 21 (Nov. 20, 1989); DeSerres, *supra* note 46.

105. DeSerres, *supra* note 46.

therefore, it chose the avenue of precaution for the best interests of the child.¹⁰⁶

C. Oceania

1. Australia

Australia does not currently permit same-sex marriage, and the issue has been hotly debated as of late. After an amendment in 2004, the *Marriage Act 1961* has defined marriage as “the union between a man and a woman.”¹⁰⁷ Then Attorney-General Philip Ruddock, along with other Liberals, argued that the bill was essential to protecting the institution of marriage so that it could not be weakened by judicial challenges.¹⁰⁸ He also said that prohibiting same-sex marriage is “. . . vital to the stability of our society and provides the best environment for the raising of children” and “children have the right, all other things being equal, to have the opportunity to be raised by a mother and a father.”¹⁰⁹

Ultimately, the bill was not approved.¹¹⁰ Senator Andrew Bartlett even called the legislation “extraordinarily upsetting.”¹¹¹ Anthony Albanese, a Roman Catholic and Labor MP for Grayndler, later said “[t]his bill is a result of 30 bigoted backbenchers who want to press buttons out there in the community.”¹¹² According to this bill, Australia also does not

106. *Id.*

107. *Marriage Amendment Bill 2004* (Austl.), available at http://parlinfo.aph.gov.au/parlInfo/download/legislation/bills/r2123_first/toc_pdf/04143b01.pdf;fileType=application%2Fpdf.

108. See News Release, Attorney-General Hon. Phillip Ruddock MP, *Government Defends Marriage* (May 27, 2004), available at http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Source:%22ATTORNEY-GENERAL%22%20MajorSubject_Phrase:%22marriage%22%20Author_Phrase:%22ruddock,%20philip,%20mp%22;rec=3; see Geoffrey Lindell, *Constitutional Issues Regarding Same-Sex Marriage: A Comparative Survey – North America and Australasia*, 30 SYDNEY L. REV. 27, 42-43 (2008).

109. News Release, *supra* note 108.

110. Greg Ansley, *Australian Greens force gay marriage back on agenda*, N.Z. HERALD, Nov. 23, 2010, available at http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=10689425.

111. *Coalition, Labor Pass same-sex marriage ban*, ABC NEWS ONLINE, Aug. 13, 2004, <http://www.abc.net.au/news/newsitems/200408/s1176303.htm>.

112. Anthony Albanese, *Marriage Legislation Amendment Bill 2004: Second Reading* (June 16, 2004), available at <http://www.anthony>

recognize same-sex marriages lawful in foreign states.

Nevertheless, same-sex couples who cohabit with each other are recognized as *de facto* couples in Australia and are entitled to many of the same legal rights of cohabitating opposite-sex couples, including tax benefits, social security, health care, and employment.¹¹³ Australia also permits domestic partnerships in some locations such as in New South Wales, Tasmania, and Victoria. The Australian Capital Territory allows civil partnerships.¹¹⁴ Again, the biggest protests over these gay rights have come from Christian lobby groups in Australia.¹¹⁵

The Australian Greens introduced a same-sex marriage bill in 2009 citing the fact that the majority of Australians support same-sex marriage.¹¹⁶ However, the proposed bill drew one of the largest protests and rallies in Australian history on the issue of same-sex marriage with some 8,000 attendees.¹¹⁷ The *Marriage Equality Bill 2009* did not pass in the Australian Senate by a vote of forty-five to five on February 25, 2010.¹¹⁸ Moreover, only the Greens, the party that introduced the bill, voted in its favor.¹¹⁹

2. New Zealand

New Zealand does not have a federal constitution, but civil

albanese.com.au/news/407/index.html.

113. *Sweeping gay law reform finally passes*, THE AGE, Nov. 27, 2008, <http://www.theage.com.au/national/sweeping-gay-law-reform-finally-passes-20081127-6jgd.html>; *Your Rights Checklist*, GAY & LESBIAN RIGHTS LOBBY, available at <http://glrl.org.au/index.php/Rights/Rights/Your-Rights-Checklist>.

114. *Domestic Relations Act 1994* (ACT) (Austl.), available at http://www.austlii.edu.au/au/legis/act/consol_act/dra1994253/; *Commonwealth accepts gay ceremonies*, ABC NEWS (Nov. 26, 2009), <http://www.abc.net.au/news/stories/2009/11/26/2754283.htm>.

115. *Gay ceremony laws 'break election promise'*, ABC NEWS (Nov. 27, 2009), <http://www.abc.net.au/news/stories/2009/11/27/2755036.htm>.

116. *Rees told listen and legalise gay marriage*, CENTRAL SYDNEY (Aug. 12, 2009), <http://sydney-central.wherelive.com.au/news/story/rees-told-listen-and-legalise-gay-marriage/>.

117. Christian Taylor, *8000 Come Out For Gay Marriage*, SAME SAME (Aug. 3, 2009), <http://www.samesame.com.au/news/local/4354/8000-Come-Out-For-Gay-Marriage.htm>.

118. *Senate votes down same-sex marriage bill*, AUSTL. BROADCAST CORP. (Feb. 25, 2010, 6:27 PM), <http://www.abc.net.au/news/stories/2010/02/25/2830454.htm?site=news>; Misha Schubert, *Senate rejects gay marriage bill*, AGE, Feb. 26, 2010, at News 5, available at <http://www.theage.com.au/national/senate-rejects-gay-marriage-bill-20100225-p5zv.html>.

119. Schubert, *supra* note 118.

rights are still protected legislatively in the *Bill of Rights Act 1990*.¹²⁰ Because the *Bill of Rights Act 1990* was based on the International Covenant on Civil and Political Rights, New Zealand law grants great deference to international human rights norms.¹²¹

Nonetheless, New Zealand does not permit same-sex marriage despite a vigorous struggle in recent years.¹²² New Zealand does permit civil unions.¹²³ *The Marriage Act 1955* (NZ), which limits marriage to one man and one woman, was held to not constitute unlawful discrimination against homosexuals despite not recognizing same-sex marriage in *Quilter v. Attorney-General* (1998).¹²⁴ However, this was stated in *dicta*.¹²⁵ Moreover, the court found that freedom from sex or sexual orientation discrimination alone is not enough to justify recognizing same-sex marriages for many of the same reasons unsuccessfully argued in *Goodridge* and its progeny.¹²⁶

D. Asia

When I came out to my mother, a traditional Indian woman who considers herself financially well off, she stated with confusion, indignity, and disgust that lesbianism does not occur in India except in poor communities. She could not conceive of homosexuality except among the prominent community of Indian male-to-female transsexuals [the Hijra] known for their ancient mysticism and present-day status as beggars and dancers hired for baby showers. The concept of an upper middle-class, educated gay person is not one that she understands or accepts, and she sees my queer identity as the result of unfortunate Western influence.¹²⁷

120. See Lindell, *supra* note 108, at 54.

121. See *id.* at 54-55.

122. Civil Unions Act 2004 (N.Z.).

123. See Lindell, *supra* note 108, at 57.

124. [1998] 1 NZLR 523 (CA).

125. *Id.*

126. *Id.* at 560-63 (accepting that same-sex couples are not in the best interests of the child).

127. Shah, *supra* note 4, at 2.

India does not permit legal same-sex marriage.¹²⁸ However, in 2009, India decriminalized homosexuality, which came from a hold-over statute from British colonial rule.¹²⁹ India, unlike in some parts of the Western world, views homosexuality through a caste-based, socio-economic lens. For example, the *Hijra* in Indian society are a religious and sexual minority who embrace gender-bending sexual norms and often live in ghettos.¹³⁰ They are part of a lower caste and now predominately serve as entertainers at youth birthday parties partly because they are forbidden from taking regular jobs.¹³¹

India's laws about homosexuality partially reflect the idea that homosexuality is a Western import that is "targeting Indian youth and stripping them of the secure mantle of Indian cultural values."¹³² For all the above reasons, homosexuality is not truly considered "natural" in India today.¹³³

Lastly, in parts of the world like India where a class or caste system is especially strong, anti-gay rhetoric takes on a different flavor. As many have noted, deteriorating social hierarchy is often a positive step towards greater civil rights, but it is likewise met with violent backlash and "intense social conflict between status groups . . . during [the] decline" of the social hierarchy.¹³⁴ This was certainly true in the post-slavery era in the United States and continues to be a struggle in the present day. India, which has struggled with its caste system for decades if not centuries, is similarly going through a transition phase, especially regarding the *Hijra*. Some of the anti-gay activity coming from this state, therefore, may be in reaction to changing social norms.

E. Africa

Perhaps the most radical anti-homosexual laws in recent

128. *See id.* at 38-39.

129. Mansi Podar, *India Decriminalizes Gay Sex*, HUFFINGTON POST (July 2, 2009, 8:37 AM), http://www.huffingtonpost.com/2009/07/02/india-decriminalizes-gay_n_224656.html.

130. Shah, *supra* note 4, at 26.

131. *Id.* at 26, 29, 35.

132. Ratna Kapur, *Postcolonial Erotic Disruptions: Legal Narratives of Culture, Sex, and Nation in India*, 10 COLUM. J. GENDER & L. 333, 377 (2001).

133. Shah, *supra* note 4, at 38.

134. J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2334 (1997).

memory have come from the African continent, especially from Uganda and Nigeria. Both states have recently sought measures to introduce the death penalty for certain homosexual acts. Because of this radical form of anti-homosexuality, these states are worthy of special consideration.

1. Uganda

Uganda constitutionally bans same-sex marriage.¹³⁵ Homosexuality, as in many other parts of Africa, is seen as a Western-import. The tolerance level for homosexuality in Uganda is one of the lowest in the world, and any acceptance of homosexuality has been viewed as a way "... European nations are promoting and recruiting homosexuals."¹³⁶ For instance, in 1999, the President of Uganda, Yoweri Museveni, ordered the arrest of suspected homosexuals.¹³⁷ In contrast to the current intolerance, there is evidence suggesting that homosexuality was widely accepted in the state during its pre-colonial history.¹³⁸ In fact, King Mwanga of Uganda was commonly known to have practiced homosexuality and kept a large harem of boys for the task.¹³⁹

Uganda made international headlines in 2009 for trying to pass the controversial *Anti-Homosexuality Bill*.¹⁴⁰ This bill would allow the death penalty under certain aggravating circumstances such as if a participant is HIV positive or engages in homosexual

135. *Uganda: Same-Sex Marriage Ban Deepens Repression*, HUM. RTS. WATCH (July 12, 2005), available at <http://www.hrw.org/en/news/2005/07/11/uganda-same-sex-marriage-ban-deepens-repression>.

136. Saeed Ahmed, *Why is Uganda attacking homosexuality?*, CNN, Dec. 8, 2009, available at <http://www.cnn.com/2009/WORLD/africa/12/08/uganda.anti.gay.bill/index.html?iref=allsearch>; *World Publics Welcome Global Trade – But Not Immigration*, The Pew Global Attitudes Project, Oct. 4, 2007, <http://pewglobal.org/files/pdf/258.pdf>.

137. Paul Busharizi, *Ugandan president orders arrest of gays*, REUTERS NEWS, Sept. 28, 1999, available at http://www.mask.org.za/SECTIONS/AfricaPerCountry/ABC/uganda/uganda_6.htm.

138. Stephen O. Murray, *Homosexuality in "Traditional" Sub-Saharan Africa and Contemporary South Africa*, LE SEMINAIRE GAI, 3 (Dec. 9, 2006 11:18 PM), http://semgai.free.fr/doc_et_pdf/africa_A4.pdf.

139. *Id.* at 29.

140. The Bill is also known as the Bahati bill. See Josh Kron, *Uganda Panel Gives Setback to Antigay Bill*, N.Y. TIMES, May 8, 2010, at A12, available at <http://www.nytimes.com/2010/05/09/world/africa/09uganda.html>.

sexual activity with a minor.¹⁴¹ As it now stands, homosexuality is illegal in Uganda and punishable by up to seven years imprisonment.¹⁴² Due to threats of international sanctions, Uganda softened some of the bill's language, and, as of May 2010, there are discussions to withdraw the bill entirely.¹⁴³

Religious fundamentalism played a very important role in driving the *Anti-Homosexuality Bill*. For instance, there were also reports that the bill was pushed by Uganda's evangelical churches, some of which are financially backed by evangelicals in the United States.¹⁴⁴ However, the bill was criticized by other religious groups in Uganda like the Roman Catholics.¹⁴⁵

Among those engaged in the anti-gay discourse found in Uganda are an unusually high number of people equating homosexuality to pedophilia. For example, one of the bill's main concerns was that there "are the many male homosexuals coming in to the country and abusing boys who are on the streets."¹⁴⁶ Nonetheless, according to those who proposed the bill, the bill was introduced to combat threats to the traditional family and protect the culture of Uganda from those wishing to impose sexual promiscuity on the state.¹⁴⁷ Disturbingly, there were also instances in 2009 of Ugandan newspapers publishing the names of suspected homosexuals and public calls for their hangings.¹⁴⁸

2. Nigeria

Homosexuality is illegal in Nigeria and the death penalty is

141. See *id.*; Uganda's Anti Homosexuality Bill 2009, art.2 § 3 (2009), available at <http://wthrockmorton.com/wp-content/uploads/2009/10/anti-homosexuality-bill-2009.pdf>.

142. OTTOSSON, *supra* note 73, at 20.

143. Kron, *supra* note 140, at A12.

144. *Id.*

145. *Right-wing evangelicals challenge Ugandan President over anti-gay bill*, EKKLESIA (Nov. 19, 2009), <http://www.ekklesia.co.uk/node/10640>.

146. John-Henry Westen, *Int'l Pressure on Uganda to Accept Homosexuality Caused Over-the-Top Sanctions: Christian Activist*, LIFESITENEWS (Nov. 27, 2009), <http://www.lifesitenews.com/news/archive/ldn/2009/nov/09112708>.

147. See *id.*; Uganda's Anti Homosexuality Bill 2009, art. 2 § 3 (2009), available at <http://wthrockmorton.com/wp-content/uploads/2009/10/anti-homosexuality-bill-2009.pdf>.

148. Ahmed, *supra* note 136; Faith Karimi, *Uganda newspaper publishes 'gay list,' calls for their hanging*, CNN, Oct. 20, 2010, available at <http://edition.cnn.com/2010/WORLD/africa/10/20/uganda.gay.list/index.html>.

imposed in some parts of the state under Shari'a law.¹⁴⁹ The laws all came into effect in the early 2000s.¹⁵⁰ In parts of Nigeria not under Shari'a law, the penalty for homosexuality is imprisonment for up to fourteen years.¹⁵¹ There is also legislation pending that would ban same-sex marriage in the state and would punish anyone participating in a same-sex marriage service in any capacity with up to five years imprisonment.¹⁵²

More so than in other states, this bill was fueled to help combat HIV in a nation where 3.6 million people are infected with the disease – the third largest population in the world.¹⁵³ Anti-homosexual legislation was also endorsed by the Nigerian Anglican Church and former Nigeria politicians who declared that homosexuality is “un-biblical, unnatural and un-African.”¹⁵⁴

III. COMMON THEMES AND DIFFERENCES

A. Themes

1. *The Focus on Children: Similarities Around the World*

The emphasis on children when discussing same-sex rights occurs in many parts of the world. In Australia, prohibiting same-sex marriage is seen as necessary for a stable home life, and the best interest of the child is to be raised by one mother and one father.¹⁵⁵ In France, one reason the state does not accept same-sex marriage is because it is not viewed within the best interests of the child. The state even goes so far as to cite to an international human rights treaty to support its position.¹⁵⁶

149. OTTOSSON, *supra* note 73, at 17. The death penalty is imposed for male-male sex, but not female-female sex in 12 regions of Nigeria: Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe, and Zamfara. *Id.*

150. *Id.*

151. *Id.*

152. *Nigeria's Proposed Ban on Same-Sex Partnerships An Assault on Human Rights*, AMNESTY INT'L, Jan. 28, 2009, available at <http://www.amnesty.org/en/news-and-updates/news/nigerias-proposed-ban-same-sex-partnerships-assault-human-rights-20090128>

153. *The HIV/AIDS Epidemic in Nigeria*, KAISER FAMILY FOUNDATION (Oct. 2005), available at <http://www.kff.org/hiv/aids/upload7363.pdf>.

154. *Obasanjo backs bishops over gays*, BBC NEWS (Oct. 27, 2004, 16:51 GMT), available at <http://news.bbc.co.uk/2/hi/africa/3955145.stm>.

155. News Release, *supra* note 108.

156. See Convention on the Rights of the Child, *supra* note 104.

France also links marriage to procreation, and, because homosexuals cannot naturally have children, they do not need to be married. In Uganda, homosexuality has been strongly linked with pedophilia and the corruption and conversion of children to immoral ways.¹⁵⁷ Likewise, in India, homosexuality is seen to be targeting the youth.¹⁵⁸

It is worth noting that the *Goodridge* court considered these same arguments in turn and found nothing in this reasoning to support keeping two consenting adults from getting married.¹⁵⁹

2. *Blaming Homosexuality on Foreigners*

As in Africa and other post-colonial societies like India, the United States at one time also blamed homosexuality on the corrupt influence of foreigners. For example, in the early 1900s, the United States faced a deluge of immigrants – especially Catholic and Jewish immigrants – and, for the first time, homosexuality was seen as a foreign importation that “offered a real danger to the American way.”¹⁶⁰ The perception of homosexuality as being foreign or imported into the United States lasted until the mid-20th century.¹⁶¹

B. Differences

1. *Gay Identity*

Experts who study sexual identity across the globe point to the idea of a “gay personhood” in much of the Western world.¹⁶² In the United States, same-sex marriage is often aligned with notions of dignity, identity, and love.¹⁶³ Moreover, an expression of identity – religious, sexual, or otherwise – is integral to personhood in the United States in a way not truly seen elsewhere.¹⁶⁴

157. Westen, *supra* note 146.

158. Shah, *supra* note 4, at 38.

159. See 798 N.E.2d at 941.

160. BYRNE FONE, *HOMOPHOBIA: A HISTORY* 386-88 (Picador 2000).

161. Shah, *supra* note 4, at 41.

162. See Sonia K. Katal, *Sexuality and Sovereignty: The Global Limits and Possibilities of Lawrence*, 14 WM. & MARY BILL RTS. J. 1429, 1442 (2006); Shah, *supra* note 4, at 4.

163. See *Goodridge*, at 948.

164. See Fadi Hanna, *Gay Self-Identification and the Right to Political*

This gay identity is not, however, part of the dialogue taking place over gay rights in many other places.¹⁶⁵ A type of “third-sex” is applied to homosexuals in cultures such as the Thai *Kathoey*, the Indian *Hijra*, and the Brazilian *Travesti*.¹⁶⁶ Some have even said that it is male supremacy that is chiefly driving anti-homosexual actions to a much greater extent than in other parts of the world.¹⁶⁷

This is directly contrasted to older states with more of a socio-economic or even class-based notion of sexuality, such as in India.¹⁶⁸ In the United States, to be gay is not synonymous with race, ethnicity, or class. In fact, this idea was rejected by the *Goodridge* court when it did not accept the argument that homosexuals are more financially well-off and thus less deserving of public benefits afforded to married couples.¹⁶⁹ The idea that homosexuals are wealthier than heterosexuals is actually in direct contrast to other states.¹⁷⁰ Moreover, there is an idea that sexuality in the United States is somehow changeable, or a choice.¹⁷¹ This idea is not present in many other cultures where sexuality could be literally what someone was born in to, such as a caste.¹⁷²

Like India, the Middle East has no real concept of a gay identity. “For many Saudis, the fact that a man has sex with another man has little to do with ‘gayness.’ The act may fulfill a desire or a need, but it doesn’t constitute an identity.”¹⁷³ In Afghanistan, there is some recent evidence that men engage in homosexuality more often than in the United States, although they are considered uneducated and of a lower class.¹⁷⁴ In the Middle East, “homosexual behavior remained just that – an act, not an orientation. That is not to say that Middle Eastern men

Legibility, 2006 WIS. L. REV. 75, 102 (2006).

165. Shah, *supra* note 4, at 4.

166. *Id.* at 22.

167. *Id.* at 23.

168. *Id.* at 5.

169. *Goodridge*, 798 N.E.2d at 964.

170. Shah, *supra* note 4, at 17.

171. *Id.* at 6-7.

172. *Id.* at 6-8.

173. Nadya Labi, *The Kingdom in the Closet*, ATLANTIC MONTHLY, May 2007, at 74.

174. Shah, *supra* note 4, at 50.

who had sex with other men were freely tolerated. But they were not automatically labeled deviant."¹⁷⁵ This is in contrast to Western sexuality where homosexuality is seen as more an identity, not just a behavior.¹⁷⁶

Where there has been same-sex marriage in other, non-Western cultures, it is not about expressing a gay identity; rather, it is about increasing social, political, or economic status.¹⁷⁷ Examples of this are found in Native American, African, and Chinese practices where same-sex marriage is used to access wealth and power.¹⁷⁸ Same-sex marriage among the Kwakiutl Indians was viewed as a way of inheriting privileges from the tribal chief.¹⁷⁹ The Navajo, Illinois, Nadouessi, and the Lakota tribes all viewed transgendered people as a gift and permitted same-sex marriages.¹⁸⁰ In China, young men in Fujian could marry each other and sometimes adopt and raise children together.¹⁸¹ In some parts of Africa like Nigeria, female same-sex marriages were a way to protect succession and a way for women to achieve economic independence.¹⁸² None of these reasons have to do with gay identity or some other expression of love, which is more often seen in the West, especially the United States.¹⁸³

2. *Let Them Be Gay in the US of A: Homosexuality as a Western Import*

Around the world, homosexuals are seen as mostly white, wealthy, well-educated, and Western.¹⁸⁴ In some places, anti-Western sentiment and anti-colonialism seem particularly virulent.¹⁸⁵ For example, many parts of the African continent believe that homosexuality was actually imported by the immoral, foreign colonists and is not native to Africa.¹⁸⁶ Homosexuality

175. Labi, *supra* note 173, at 78.

176. *Id.*

177. Shah, *supra* note 4, at 55.

178. *Id.*

179. *Id.*

180. *Id.* at 55-56.

181. *Id.* at 56.

182. *Id.*

183. *Id.* at 56-57.

184. *Id.* at 2-3.

185. *Id.* at 24.

186. *Id.* at 24-25.

later spread through the missionaries to the local communities.¹⁸⁷ The resulting contempt over homosexuality is not so much religiously motivated in Africa (as elsewhere), but is seen as a foreign contamination of the pure African pre-colonialist society.¹⁸⁸ For example, Robert Mugabe, the current President of Zimbabwe, has said that the homosexuality was the “decadent product[] of a corrupt West” and “Un-African.”¹⁸⁹ Moreover, after receiving a letter from the United States criticizing his use of anti-gay speech, Robert Mugabe wrote back, “[l]et the American’s [sic] keep their sodomy, bestiality, stupid and foolish ways to themselves, out of Zimbabwe Let them be gay in the United States, Europe and elsewhere. They shall be sad people here.”¹⁹⁰

Although homosexuality was most certainly not imported into Africa, homophobia may have been. In Zambia, for instance, anti-gays laws were non-existent or not enforced before colonial rule, and have become increasingly harsh ever since.¹⁹¹ Outside of Africa the same is true. In 772 BCE, for example, homosexual activity was also seen as “[an] unexceptional and accepted component of the sex life of the rulers in many [Chinese] states.”¹⁹²

3. *The Focus on Children: Differences Around the World*

As for children in much of the Western world, contact between homosexuals and children is met with repugnance and scorn. In fact, the *Lawrence v. Texas* decision aptly mentioned that many Americans do not want homosexuals to be teachers.¹⁹³ Even Denmark, the first state in the world to legalize same-sex marriage, does not allow a same-sex couples the right to adopt

187. *Id.* at 24.

188. *Id.* at 24-25.

189. Shah, *supra* note 4, at 38.

190. Robert Mugabe, Zimbabwe International Book Fair (Aug. 1, 1995), *quoted in* Larry Cata Backer, *Emasculated Men, Effeminate Law in the United States, Zimbabwe, and Malaysia*, 17 YALE L.J. & FEMINISM 1, 13 (2005).

191. Shah, *supra* note 4, at 25.

192. ERICK LAURENT, SEXUALITY AND HUMAN RIGHTS: AN ASIAN PERSPECTIVE, IN SEXUALITY AND HUMAN RIGHTS: A GLOBAL OVERVIEW 163, 179 (Helmut Garupner & Phillip Tahmindjis eds. 2000).

193. Shah, *supra* note 4, at 35-36.

children.¹⁹⁴ This is also one of the most common arguments to justify prohibiting same-sex marriage: it is bad for children.

This is not true in other parts of the globe. In India, the *Hijra* are specifically invited to child birthday parties because their blessings are seen as especially valuable for children.¹⁹⁵ Additionally, the Native American *Berdache*, or transsexuals, often participate in child-rearing and are viewed as good luck in the tribe.¹⁹⁶

IV. REASONS FOR SAME-SEX MARRIAGE'S TOLERANCE OR INTOLERANCE GLOBALLY

From the above section, three general conclusions can be drawn as to why same-sex marriage has been tolerated in some places but not others. Those reasons are urbanization, religion, and anti-Westernism.

A. Urbanization

A quick glance at the aforementioned states leads to the conclusion that urbanization plays some role in the acceptance of same-sex marriage. Generally, the states with a large rural population or a population with many smaller localities are less open to gay rights than their urbanized counterparts.

Urbanization has a causal relationship with gay equality for a number of reasons. First, sexual minorities often have greater freedom in large cities.¹⁹⁷ This freedom can be manifested in forming subcultures, which is one reason homosexuals may be attracted to larger, urban areas to begin with.¹⁹⁸ Living in an urban setting also discourages large families, and women are often afforded more opportunities for work and recreation outside the traditional home.¹⁹⁹ This helps undermine traditional gender roles, which is a root cause of anti-gay sentiment in much of the

194. See Ingrid Lund-Anderson, *The Danish Registered Partnership Act*, in LEGAL RECOGNITION OF SAME-SEX COUPLES IN EUROPE 13, 215-17 (Katharina Boele-Woelki & Angelika Fuchs eds., 2003) (reprinting the Danish Registered Partnership Act and discussing its implications.)

195. Shah, *supra* note 4, at 35.

196. *Id.* at 27, 35.

197. Eskridge, *supra* note 47, at 655.

198. *Id.*

199. *Id.*

world.²⁰⁰ Moreover, in large, urban areas, procreation is often declining while, at the same time, there are increasing social opportunities.²⁰¹ Casual sex is also more often tolerated in large cities than in rural communities.²⁰² It is no surprise, therefore, that same-sex marriage was first legalized in the United States in the highly-populated, urban Northeast corridor.²⁰³

Urbanization, however, does not fully explain why some states such as those in Scandinavia, which are not extremely urbanized or highly populated, have led the way toward legalizing same-sex marriage. Consequently, religious attitudes may be another important factor in same-sex tolerance.

B. Religion

Another important reason same-sex marriage has been accepted in some locations is due to religion. In states where religion has become politically domesticated, same-sex marriage has been more widely accepted.²⁰⁴ This is true in the Netherlands and in Scandinavia in general.²⁰⁵ States where a religious connection to politics is viewed with distrust often have intermediate policies providing a mixture of rights and prohibitions, such as in France with its prohibition on same-sex marriage while concurrently providing workplace protection for homosexuals.²⁰⁶ Lastly, states that have a robust association between religion and politics often have anti-gay agendas.²⁰⁷ This is evident in the United States. For example, states with a strong Southern Baptist or Church of Jesus Christ of Latter-Day Saints (Mormon) presence are often less tolerant of same-sex marriage and gay rights than states without those two religious groups.²⁰⁸ This helps explain why states like Mississippi, with a large Southern Baptist population, often prohibit gay marriage, and it could also explain why a traditionally liberal state like California,

200. *Id.* at 645, 655.

201. *Id.* at 655.

202. *Id.*

203. *Id.* at 655-56.

204. *Id.* at 657.

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.* at 656-57.

which has a large Mormon population, would also pass a ban on same-sex marriage.²⁰⁹

C. Anti-Westernism

Homosexuality has often been called a Western-import in many parts of the world.²¹⁰ An increase in anti-homosexuality activity took place in Africa in the late 1990s. For example, in 1999, Robert Mugabe made news for his anti-homosexual speech.²¹¹ Daniel arap Moi, Kenya's former President, also referred to homosexuality as against African and Christian traditions.²¹² In the early 2000s, parts of Nigeria even implemented the death penalty, and Uganda has considered introducing the death penalty for certain homosexual acts in a 2009 bill.²¹³ Many in India, likewise, view homosexuality as a Western-import and not natural to its society.²¹⁴

Homosexuality and Westernism seem inextricably linked in many parts of the world. History, however, suggests otherwise, and although homosexuality is most certainly not something that can be imported, perhaps homophobia can be imported. This is evident in the fact that many places did not have specific laws criminalizing homosexual behavior until their colonizers introduced the legislation.²¹⁵ Some have said Africa's anti-homosexual rhetoric is actually because "homosexuals' serve as a

209. See Nicholas Riccardi, *Mormons feel the backlash over their support of Prop. 8*, L.A. TIMES, Nov. 17, 2008, available at <http://articles.latimes.com/2008/nov/17/nation/na-mormons17>; *Same-sex marriage bans winning on state ballots*, CNN (Nov. 3, 2004), http://articles.cnn.com/2004-11-02/politics/ballot.same.sex.marriage_1_heterosexual-institution-marriage-amendments-marriage-licenses?_s=PM:ALLPOLITICS; The Largest Southern Baptist Communities, Miscellaneous Statistics, available at http://www.adherents.com/largecom/com_sbc.html.

210. See e.g., *supra* Part II(D)-(E) (discussing India and parts of Africa).

211. See Grant Ferrett, *Fighting for gay rights in Zimbabwe*, BBC NEWS (Oct. 23, 1999, 13:22 GMT), available at http://news.bbc.co.uk/2/hi/programmes/from_our_own_correspondent/482471.stm.

212. *Moi condemns gays*, BBC NEWS, (Sept. 30, 1999, 10:03 GMT), available at <http://news.bbc.co.uk/2/hi/africa/461626.stm>.

213. OTROSSON, *supra* note 73; Uganda's Anti Homosexuality Bill 2009, art.2 § 3 (2009), available at <http://wthrockmorton.com/wp-content/uploads/2009/10/anti-homosexuality-bill-2009.pdf>.

214. Shah, *supra* note 4, at 38.

215. See e.g., *supra* Part II(D)(i) and (E)(i)(India and Uganda, respectively).

convenient scapegoat for the variety of social and economic ills largely caused or exacerbated by leaders and their ruling parties.”²¹⁶

1. For Every Action: The Equal and Opposite Reaction of Parts of Africa to North America and Europe

For the most part, Africa has been decolonized since the end of World War II, meaning anti-colonialism is not exactly a new concept in the region, and yet there is this striking increase in anti-homosexual rhetoric in the late 20th and early 21st century.²¹⁷ Urbanization, religion, and anti-Westernism cannot alone explain this phenomenon. In other words, what has changed?

The simple explanation is that same-sex marriage was introduced, and there was an overall increase in gay rights in parts of Europe and North America during the late 1990s and into the first decade of the 21st century. The language coming from parts of Africa during the same time called homosexuality “un-African” and an immoral import from a lusty, decadent West. This could easily be a reaction to parts of Europe and North America that legalized same-sex marriage around the same time. For instance, Denmark, the first state in the world to recognize same-sex partnerships, passed its law in 1989.²¹⁸ The Netherlands first recognized same-sex general partnerships in 1998 and later passed its same-sex marriage bill in 2000.²¹⁹ Massachusetts, the first state in the United States to legalize same-sex marriage, did so in 2003.²²⁰ This was quickly followed by other states such as Connecticut, Iowa, and New Hampshire.²²¹

Africa’s increasingly virulent stance on same-sex relations can therefore be seen in its general anti-Western, anti-colonial context.²²² One of the most potent ways to stand against so-called

216. Sebastian Maguire, *The Human Rights of Sexual Minorities in Africa*, 35 CAL. W. INT’L L. J. 1, 4 (2004).

217. Importantly, this is not true in all parts of Africa. South Africa, for example, became the fifth state in the world to legalize same-sex marriage in 2006. See *Timeline: Same Sex Marriage*, *supra* note 9.

218. *Id.*

219. Waaldijk, *supra* note 87.

220. *Goodridge*, 798 N.E.2d at 941.

221. *Timeline: Same Sex Marriage*, *supra* note 9.

222. Africa’s reaction, however, does not explain India’s increasing tolerance for same-sex relations although it has a similar colonial past.

Western ideology is to do the exact opposite of what is being seen in many parts of Europe and North America today. In Uganda and Nigeria's case, that would be introducing the death penalty for certain homosexual acts.²²³ In this way, there is a unique push-pull reaction going on in parts of Africa due to the increasing gay rights in parts of the Western world.

CONCLUSIONS AND LESSONS TO BE LEARNED

A comparative analysis of same-sex marriage and gay rights around the world shows some surprising results. For example, in many states like Australia, France, and Uganda, prohibiting same-sex marriage is justified because it is not in the best interests of children, or homosexuals are cast as sexual deviants looking to corrupt and convert the youth to their immoral ways. This is similar to the rhetoric found today in the United States as one justification for not allowing gays the right to marry.

Moreover, in other places, homosexuality is seen as a Western-import looking to undermine the pure, moral, pre-colonial society. A gay identity is also not found in other parts of the world the way it exists in the United States. In fact, historically same-sex marriage was a way to combat unequal social, political, and economic realities, especially for women and other marginalized groups.

The causes of homosexual tolerance or intolerance can be traced to several factors including urbanization, religion, and how strong anti-Western sentiment is in a particular region. Likewise, the decreasing tolerance found in parts of Africa like Uganda and Nigeria in the late 1990s and 2000s has a direct relationship to the increase of gay rights found in parts of Europe and North America during the same time. At the least, this suggests Africa currently has a reactionary relationship with parts of the Western world concerning homosexual rights.

It is deeply unfortunate that, while gay rights increase in the United States and in Europe, parts of Africa react by becoming even more radical, something of which those who advocate for same-sex marriage in the United States and abroad should be

223. See OTTOSSON, *supra* note 73; Uganda's Anti Homosexuality Bill 2009, art. 2 § 3 (2009), available at <http://wthrockmorton.com/wp-content/uploads/2009/10/anti-homosexuality-bill-2009.pdf>.

made aware. A comparative analysis sheds a unique light on the same-sex marriage debate. Looking towards the future, lawyers, policy makers, and advocates must find a way to disassociate marriage with children and procreation as well as combat anti-Westernism for true equality to take root both in the United States and abroad.