

Starting the Cascade

**An exploration into the progressive international
normalization of gay rights in The Netherlands, South Africa,
Argentina, France, and the United States**

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Introduction

The recognition of gay rights is one of the most controversial and salient topics in public discourse today. As protections for gay individuals have increased in nations such as the United States, international gay rights movements have seen equal, and in many cases, more progress. While the bulk of the current research focuses on national support for gay rights, more can be done to assess the international normalization of gay rights. Despite the fact that homosexuality is illegal in seventy-six countries, punishable by death in five, and widely opposed by conservative and religious groups around the world, the movements to legalize same-sex marriage, allow second parent adoption for same-sex couples, and enact anti-discrimination laws regarding sexual orientation have all seen exponential progress within the last thirty years. Analyzing the increased support for the rights of gay and lesbian individuals through the lens of normalization theory, specifically in comparison to the women's rights movement, will demonstrate historically effective methods for changing public opinion and enacting anti-discrimination legislation. This analysis will then focus on five states where support for gay rights has significantly evolved, and is continuing to evolve: the Netherlands, South Africa, Argentina, France, and the United States. These case studies as well as survey data on public opinion regarding gay rights issues will be examined to illuminate the scope of the international normalization of gay rights.

Normalization Theory

A close analysis of the existing literature on normalization theory points to the stage where gay rights are currently located in the process of becoming a norm. Finnemore and Sikkink (1998) define a norm as a “standard of appropriate behavior for actors with a given idea” that typically transitions through a normalization life cycle in three stages: emergence, cascade, and internalization. The first of these stages, the emergence stage, relies on the work of “norms entrepreneurs” to challenge the status quo and redefine what is deemed socially appropriate by appealing to the empathy and altruism of others.

Keohane (1984) refers to the former as empathy interdependence, where actors “are interested in the welfare of others for its own sake, even if this has no effect on their own material well-being or security.” This support can be attributed to what Monroe (1996) describes as an altruistic “recognition that we all share certain characteristics and are entitled to certain rights, merely by virtue of our common humanity.” In recent years, norms entrepreneurs in the form of advocacy organizations and activists have challenged instances of homophobia and legal discrimination against gay and lesbian individuals, especially in terms of marriage equality. These entrepreneurs’ strategies appeal to the public by demonstrating that discrimination against gay and lesbian individuals denies them their rights, such as the right to marriage, as a human being.

The second stage of normalization requires a tipping point, in which a critical mass (typically states) recognizes the norm. Using the example of women’s suffrage, Ramirez, Soysal, and Shanahan (1997) loosely define this critical mass as one-third of the total states in the system. While it may be appealing, even helpful, to think about

normalization in concrete terms, it is reasonable to conceptualize the tipping point of a norms cascade less literally. For one, the criteria for determining what constitutes a state, and how it fits into international networks of legitimacy, varies based on geographic, historic, and national terms. Further, by limiting the tipping point to a numerical calculation, the risk emerges of undercounting the progress that has been made.

In the United States, thirty of the thirty-one measures put to the voters have banned same-sex marriage in the past decade.¹ In this environment, the recent success of the initiatives in Washington, Maryland, and Maine to legalize same-sex marriage, and the rejection of a proposal re-establishing the principle that marriage is restricted to a relationship between a man and a woman in Minnesota in the November 2012 elections seem surprising. By looking closely at the percentage of the popular vote in favor of and opposed to proposals supporting gay marriage over time, however, one can more clearly see the evolution of the societal recognition of gay rights. Same-sex marriage rights were approved in Maryland, for instance, by the same percentage of the state's population that rejected those rights in California in 2008, 52%.² Although the one-third figure posited by Ramirez, Soysal, and Shanahan may be overly rigid, it is clear that the United States and other states around the world have not yet recognized gay rights to the extent that one could view their normalization as being at a tipping point. Still, the margins are small in the shift towards normalization, and it may not be long before a critical mass of states supports gay rights.

¹ "Gay Marriage Scores Victories In All Four States That Considered It, But Tough Road Lies Ahead - Forbes." *Forbes*. Accessed December 11, 2012. <http://www.forbes.com/sites/deborahljacobs/2012/11/07/gay-marriage-scores-victories-in-all-four-states-that-considered-it-but-tough-road-lies-ahead/>.

² Ibid.

Societal normalization would see behavior that would previously have been deemed inappropriate (e.g. two men marrying one another) as appropriate, while at the same time constituting what was formerly appropriate (laws criminalizing homosexuality) as inappropriate. While homosexuality continues to be criminalized and stigmatized around the world, the gay rights movement has been increasingly successful, especially over the last thirty years. It is by recognizing the criteria for the second stage of normalization that we may locate gay rights as being in the first stage of the life cycle, but at the cusp of starting the second.

Women's Rights Movement v. Gay Rights Movement

When tracing the trajectory of the gay rights movement since the 20th century, it is useful to contextualize its process and progressive internationalization by comparing it to a similar movement. The women's rights movement serves this purpose well, as similarities and differences between the two movements reflect effective methods for changing public opinion and enacting legislation to prevent discrimination and to insure further equality. While the start of the concerted effort for the equal status of women can be traced to the end of the 19th century, this analysis will focus on the period starting in the 1960s with the so-called "Second Wave of Feminism" through the present. This period not only coincides temporally with the progression of the gay rights movement, but also demonstrates a shift in focus from the fight for suffrage to the fight for social equality through activism and consciousness-raising efforts, strategies that both movements have relied on heavily. The rates of success have differed between the two movements, though each has realized important gains.

The Second Wave of Feminism began in the mid-1960s as women around the world challenged their societal roles and expectations, and fought for reproductive rights and equal pay. The publication of Betty Friedan's "The Feminine Mystique" in the United States in 1963 is widely credited for sparking this movement. Friedan called attention to "the problem that has no name," specifically women's unhappiness in their roles as housewives (Friedan, 57). The book's widespread popularity led to the establishment of various women's groups dedicated to consciousness-raising efforts and the attainment of equal rights for women. In 1966 the National Organization for Women (NOW) was founded with the initial goal of petitioning to stop the segregation of want ads, soon becoming an important actor in the fight to legalize abortion. Groups such as the New York Radical Women, Redstockings, and Chicago Women's Liberation Union gathered to create bonds between female members and frame the societal problems they faced in terms of women's oppression as opposed to individual struggle. With the support of advocacy groups the push to support an Equal Rights Amendment (ERA) to the Constitution saw its first real progress in over fifty years when it was passed by Congress in 1972, then sent to the states for ratification.

Meanwhile, reproductive rights were increasingly coming into the fore during this period as a means of guaranteeing equality for women. They include the right to: decide the timing and spacing of children, gain access to gynecological and contraceptive information, make the choice between different birth control methods, and terminate a pregnancy if desired.³ In 1960 the United States Food and Drug Administration (FDA) approved the birth control pill, which became a widespread means for women to

³ Paul, Chandrika. "Women's Reproductive Rights Movements." In *Berkshire Encyclopedia of World History*, edited by William H. McNeill, Jerry H. Bentley, David Christian, Ralph C. Croizier, J. R. McNeill,

determine when they began to reproduce. Another important component of reproductive rights included the right for a woman to terminate a pregnancy if desired through a safe and legalized abortion. Between the years of 1968 and 1980 a mass movement in the United States and other parts of the world saw women's groups calling for and succeeding in obtaining the right to an abortion. In 1973 the landmark *Roe v. Wade* case nationally legalized abortion in the United States. Abortion was also legalized during this time in Canada in 1969, Tunisia in 1973, Austria and France in 1975, New Zealand in 1977, Italy in 1978, and the Netherlands in 1980, though it had already been legal in states such as Iceland in 1934, and the Soviet Union, the first country to legalize abortion in 1920 before banning it in 1936, only to legalize it again in 1955.⁴

Meanwhile, 1975 marked the First International Women's Year, the beginning of the United Nations Decade for Women, and the first global UN Women's Conference in Mexico City. These movements created an international forum through which women could voice their concerns and organize advancement towards equality. In 1979 the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) established the first comprehensive list of international legal standards for women. The convention represented the achievement of the goals set forth at the Global Conference in Mexico City to hold states accountable to the continued promotion of women's rights.

The second wave of feminism however, faced several setbacks. Despite the fact that Congress had passed the ERA ten years earlier, in 1982 it failed to be ratified by the thirty-eight necessary states, and was stridently opposed by conservative campaigns such

⁴ Bullough, Vern L. *Encyclopedia of Birth Control*. ABC-CLIO, 2001.

as Phyllis Shafly's STOP ERA. Though there have continued to be international conferences and declarations dedicated to the furthering of women's rights, there are wide disparities around the world (including the "Western World") with regards to pay for female workers versus their male counterparts, access to birth control and legalized abortion, and security. Still, while the attainment of equal rights for women continues to be a goal the international community strives for, the success seen since the 1960s demonstrates marked progress for the women's rights movement. Women are increasingly represented in government, gaining access to reproductive rights, and moving towards equality in employment. Their position within both national and international contexts continues to improve, no matter how incrementally.

The sixties were a turning point for the women's movement and a starting point for the gay rights movement. 1965 marked the founding of the first gay student organization at Columbia University in New York City, and the first public protests for gay rights at the White House in April of that year. Four years later, on June 28, 1969, a police raid on a small gay bar in Greenwich Village, New York soon escalated into violent protests. The "Stonewall Riots" are seen as the spark of the gay rights movement not only in the United States, but around the world. Organizations such as the Gay Liberation Front and the Gay Activists Alliance were formed almost immediately in their wake, and helped organize consciousness-raising efforts about the inequalities gay and lesbian individuals faced. Though gay civil rights organizations such as COC Netherlands, the world's oldest of such organizations, had been in existence since 1946, the riots gave rise to questions of equality for the gay community like never before. Pride parades to commemorate the anniversary of the Stonewall Riots took place in 1970 in

New York, Los Angeles, Chicago, and San Francisco.⁵ Today these parades occur in cities all over the world, and serve as a means to increase social awareness, fight discrimination, and demand marriage equality. The movement to legalize same-sex marriage saw an early but ill-fated attempt in 1970, when Jack Baker and Michael McConnell became the first gay couple in the world to apply for a marriage license in Hennepin County, Minnesota, which they were denied. Their appeal made it all the way to the United States Supreme Court before the judges refused to hear the case. However, the men were able to obtain a license from another county and were married the following year.

Despite the increased awareness surrounding the gay rights movement, there were and continue to be a number of setbacks. The 1980s saw the start of the AIDS epidemic and the subsequent ostracism of gay men who were blamed for the spread of the disease, casting members of the gay community on the whole in a negative light. It should be noted, however, that the AIDS crisis also spurred the creation of Act Up in 1987, an organization dedicated to bring public awareness to the issues facing members of the gay community affected by AIDS. While the organization started in New York City, there are now international chapters in Kenya, India, Paris, and Kathmandu, demonstrating the success the movement has achieved in gaining widespread recognition of the need to improve the lives of individuals living with the disease.⁶

⁵ Wasserman, Fred. "Stonewall Riots." In *Encyclopedia of Lesbian, Gay, Bisexual and Transgendered History in America*, edited by Marc Stein, 3:155–159. Detroit: Charles Scribner's Sons, 2004.

⁶ "Act Up NY." *Act Up: AIDS Coalition to Unleash Power*, n.d.
<http://www.actupny.org/indexfolder/links.html>.

In 1993, the establishment of the Don't Ask Don't Tell policy in the United States barred discrimination against gay and lesbian military personnel while requiring that they not be openly gay while in service. Although it reversed an executive order that excluded gays and lesbians from serving in the military, it forced individuals to keep their sexuality hidden, thus continuing the very discrimination it had been intended to eliminate. For a country that was the starting point of the gay rights movement, this law was a sincere setback in light of the states that had already or were starting to reform their military policies to allow gay and lesbian individuals to enlist openly in their forces without discrimination, such as the Netherlands (1986), Canada (1992), Australia (1992), and Israel (1993).⁷ In 1996, legal rights for gay individuals took another downward turn in the United States with the passage of the Defense of Marriage Act (DOMA), stating that the federal government and states are not required to recognize marriages between same-sex couples. These measures pale, however, in comparison to the conditions gay individuals face in the seventy-six countries where homosexuality is illegal and the five where it is punishable by death.

The last twenty years however, have seen far more positive momentum for the gay rights movement than negative. In 1989, Denmark became the first country in the world to enact registered partnership laws for same-sex couples. In 2001, the Netherlands became the first country to legalize both same-sex marriage and second parent adoption for same-sex couples. Meanwhile, civil unions and partnerships were legalized in Germany and Finland in the same year, in the UK, South Africa, New Zealand, Israel, and Canada in 2004, and in the states of New Hampshire, Oregon, and

⁷ Rimmerman, Craig A. *Gay Rights, Military Wrongs: Political Perspectives on Lesbians and Gays in the Military*. Taylor & Francis, 1996: 21-22.

Washington in 2007 in the United States. As of today Belgium, Canada, Spain, South Africa, Sweden, Norway, Argentina, Iceland, Portugal, Denmark, Uruguay, and New Zealand have all joined the Netherlands in nationally legalizing same-sex marriage. In the United States, Massachusetts, Iowa, Vermont, Maine, New Hampshire, Connecticut, New York, Maryland, Maine, Washington, and the District of Columbia have also recognized marriage between same-sex individuals, though as of April 2013 the federal government under the Defense of Marriage Act did not recognize these marriages. Same-sex marriage is also recognized in the Brazilian province of Alagoas, and in Mexico same-sex marriages and civil unions are performed in Mexico City and the state of Quintana Roo, and are recognized throughout the country. Same-sex couples are also allowed to adopt children in all of the countries that have legalized same-sex marriage, as well as the United Kingdom, Brazil, and most states within the United States. The proliferation of legal protections for gay individuals in terms of marriage, second parent adoption, and anti-discrimination has shown marked progress within the last ten years, and reflects increased societal recognition of gay rights.

The women's and gay rights movements have approached their goals in some markedly similar ways. Grassroots organizations emerged for each during the 1960s that were instrumental in both raising awareness about the inequalities each group, and in advocating for social change. One shared goal of the two movements is the end of discriminatory laws and practices such as unequal pay for women and unequal access to job opportunities for openly gay individuals. Each movement has attempted to fight discrimination through consciousness-raising efforts within their respective communities of women and gay individuals, which in turn affects public opinion surrounding the

issues and brings together those with a shared identity around a common cause. Social equality has become the focus of both movements over the last half-century as opposed to a fight for political rights such as suffrage. These social rights include equal pay and reproductive rights for women, and same-sex marriage and access to second-parent adoption for gay individuals. Though each movement has experienced setbacks over the years, they have also been increasingly successful in effecting the necessary societal change for normalization.

For all their similarities, however, there are significant differences in the evolution of the women's rights movement versus the gay rights movement. Most significantly, the women's rights movement has utilized an international forum to advance the normalization process far more than the gay rights movement has. International non-governmental organizations such as the United Nations and various global conferences have been an important feature of the women's rights movement, and have been practically nonexistent over the course of the gay rights movement. Despite a 2011 United Nations resolution to look into violence inspired by discrimination based on sexual orientation, there are no concrete international forums for gay communities to voice their concerns and to advocate for an improved status based on their human rights. The recognition of "gay rights as human rights" has instead seen much more national progress than international, whereas the women's rights movement has seen the reverse in many cases.

By comparing the gay rights movement to the women's rights movement, their similarities and differences reflect effective methods for societal change and normalization. Both have found success in changing public opinion through grassroots

campaigns and consciousness-raising efforts. Norms entrepreneurs in each movement framed their goals in terms of social equality, allowing for broader empathy and increased acceptance. The ability of the women's rights movement to achieve a norms cascade through an international forum indicates that the gay rights movement may be heading towards a similar process in the near future. This shift from the national to the international stage in the promotion of gay rights has in fact already begun, though at a slower rate than it occurred for the women's rights movement. Still, national cases illuminate important changes in societal acceptance of gay rights, and how these changes may develop in other states around the world.

Chapter 1: The Netherlands

On April 1, 2001 the Netherlands became the first country in the world to legalize same-sex marriage. This historic legislation was important though not revolutionary for a country that has consistently been a vanguard for gay rights. From general non-distinction between unmarried heterosexual and homosexual couples in the realm of cohabitation law, to the inclusion of sexual orientation as a protected class in anti-discrimination measures, same-sex couples in the Netherlands have seen their legal rights expanding far before they achieved the legal right to marry. This chapter seeks not only to trace the historical background of these developments, but also to discuss the ways in which Dutch society and gay and lesbian individuals themselves have reacted since the legalization of same-sex marriage in 2001. While recognizing the progress the Netherlands has made, this chapter will also address the difficulties Dutch gay men and lesbians face in the area of parenting. Despite the progress that can continue to be made, there is no doubt that the Netherlands is one of the most accepting countries in the world when it comes to one's sexual orientation.

The Road to Same-Sex Marriage

The first signs of societal acceptance of Dutch same-sex couples began in the 1970s. In 1971, a law was enacted to change the age of consent for homosexual individuals from twenty-one to sixteen years old, the same as that for heterosexual individuals. Compared to other European countries such as Spain (1822), Italy (1889), and Poland (1932), who upon decriminalization of homosexuality had never established laws that distinguished the minimum age of consent for homosexuals from that for heterosexuals, the

Netherlands were at first glance a bit behind in this area of change.⁸ A closer look, however, reveals that the total ban against homosexuality itself was removed much later in the cases of Scotland (1980), Ireland (1993), and Cyprus (1998), and that the Netherlands was the first European country to equalize the age of consent for homosexuals since making a distinction when they first decriminalized homosexuality in 1811.⁹ They were therefore one of the world leaders when it came to removing distinctions between individuals based solely on their sexual orientation.

The Netherlands continued their role as one of the most liberal countries in regards to gay rights as their anti-discrimination policies expanded throughout the decade. In 1974 the Dutch government changed their policy regarding military enlistment for gays and lesbians, establishing that it would be taken into consideration as a “medical rather than a moral factor in the evaluation of the recruit, and would not by itself disqualify a recruit from service.”¹⁰ Though this new policy remained problematic in its classification of homosexuality as a medical problem, it was significant as the first military policy in the world to be relaxed in terms of the enlistment of gay and lesbian recruits. In 1975 the Dutch passed their first Equal Pay Act, establishing that all employers are subject to anti-discrimination law. While there was no explicit mention of sexual orientation as a protected class at the time, this legislation was one of the first anti-discrimination measures in the country, and would be an important precedent for the

⁸ Graupner, Helmut. “Sexual Consent: The Criminal Law in Europe and Overseas.” *Archives of Sexual Behavior* 29, no. 5 (October 1, 2000): 415–461.

⁹ Waaldijk, C., and Faculteit der Rechtsgeleerdheid. “Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands.” Article / Letter to editor. *Legal Recognition of Same - Sex Partnership. A Study of National, European and International Law*, 2001. 438.

¹⁰ Rimmerman, Craig A. *Gay Rights, Military Wrongs: Political Perspectives on Lesbians and Gays in the Military*. Taylor & Francis, 1996: 22.

coming years. Same-sex couples also benefited from the non-discriminatory policies of Dutch cohabitation law, which allowed for a broad scope of benefits for both married and unmarried couples. In 1979, “changes were introduced in rent law, in social security and income tax, in the rules on immigration, state pensions and death duties, and in many other fields...[with no] distinction made between heterosexual and homosexual cohabitation.”¹¹ These benefits, however, were not as generous in the domain of parenting. While unmarried and same-sex couples were allowed to foster children as early as the 1970s, it was not until 1986 that unmarried partners were legally able to have joint authority over their children and not until 1998 that adoptions were made available to individuals and unmarried couples (including same-sex partners).¹²

There continued to be success in the movement for equal rights for Dutch same-sex individuals and couples throughout the end of the 20th century. 1985 survey data on attitudes towards homosexual relations showed that 55% of the population had a “positive attitude toward cohabitation of gay or lesbian couples,” making the Netherlands one of the first countries to demonstrate majority societal support for gay rights.¹³ In 1986 the Ministry of Defense went further in their military policy changes of the preceding decade and announced that recruits’ sexual orientation would not be taken into consideration when they enlisted for service.¹⁴ The Dutch were decades ahead of fellow NATO members and nations such as Canada (1992), Australia (1992), and Israel (1993)

¹¹ Waaldijk, 441.

¹² Ibid, 442.

¹³ Lubbers, Marcel, Eva Jaspers, and Wout Ultee. “Primary and Secondary Socialization Impacts on Support for Same-Sex Marriage After Legalization in the Netherlands.” *Journal of Family Issues* 30, no. 12 (December 1, 2009): 1716.

¹⁴ Rimmerman, 22.

that were among the earliest countries in the world to allow gays and lesbians to serve openly in their military forces.¹⁵

In the 1990s, the momentum changed drastically for the rights of Dutch gay and lesbian individuals. 1990 saw an initial setback for the movement when the Supreme Court ruled that the exclusion of same-sex couples (in this specific case, two women) from marriage was “not unjustified...because one of the legal consequences of marriage was that the spouse of a woman giving birth was legally considered to be the father of her child.”¹⁶ This case would serve to be one of the last major obstacles to the road to same-sex marriage in the Netherlands.

In 1992, after a great deal of political pressure from gay rights activists and media coverage of the issue, an Advisory Committee for Legislation was formed and soon released a report recommending the introduction of registered partnerships for same-sex couples, modeled after the Danish legislation enacted in 1989. Such a bill was introduced to the Parliament in 1994, as well as a bill expanding the scope of same-sex parental rights by granting partners joint authority and custody over each other’s children. Meanwhile, in that same year the passage of the Equal Treatment Act established that “unequal treatment is explicitly prohibited on the grounds of gender, marital status, race, nationality, religion, belief, political opinion, and hetero- or homosexual preference...[the act] applies to all aspects of employment and professions, supply of goods and services, and providing advice about educational/career opportunities.”¹⁷ Thus all Dutch employers, including the military, were explicitly prohibited from discrimination against

¹⁵ Ibid, 21-22.

¹⁶ Waaldijk, 443.

¹⁷ Havinga, Tetty. “The Effects and Limits of Anti-discrimination Law in The Netherlands.” *International Journal of the Sociology of Law* 30, no. 1 (March 2002): 76.

employees based on their sexual orientation, an important step towards the recognition of gay and lesbians' equal rights as citizens. By 1995, 60.4% of the population favored gay cohabitation or marriage, increasing the percentage of majority support for the issue since the mid-1980s.¹⁸ In 1997, bills granting joint parental authority and registered partnerships for same-sex couples both passed, taking effect on January 1, 1998. While joint authority and custody allowed couples to expand their parental rights, especially vis-à-vis foster children, non-biological parents were excluded from second parent adoption. Domestic partnerships conferred most of the same juridical rights and duties as marriage to couples, making the difference between the two statuses largely lexical and symbolic.

Almost immediately after domestic partnerships were legalized for same-sex couples, it became clear that marriage was soon to follow. The Kortmann Commission, established in 1997, recommended the legalization of same-sex marriage and the ability of same-sex couples to adopt in their report to the government in February 1998.¹⁹ Much debate ensued over the parental rights and duties that should be extended, and the Dutch Cabinet initially failed to prepare legislation for same-sex marriage. By August 1998, however, a new coalition government came into power, and committed itself to opening up both marriage and adoption to same-sex partners.²⁰ On July 8, 1999 bills were introduced in support of both. After over a year of debate and deliberation, the lower house of Parliament approved the legislation on September 12, 2000 with a vote of 190 to 33 in favor, and in the upper house of Parliament with a vote of 49 to 26.²¹ In that same

¹⁸ Lubbers, Jaspers, and Ultee, 1716.

¹⁹ Waaldijk, 447.

²⁰ Ibid, 449.

²¹ Patterson, Nicholas J. "The repercussions in the European Union of the Netherlands' same-sex marriage law." *Chicago Journal of International Law* 2, no. 1 (Spring 2001): 301–307.

year, survey data showed that 68.4% of the population believed “homosexuals should have equal rights regarding marriage” (Lubbers, Jaspers, and Ultee, 1716). On April 1, 2001 the laws allowing same-sex marriage and second-parent adoption in the Netherlands took effect.

Life Since Legalization

The opening of marriage and adoption to same-sex couples not only changed the law – it changed lives. Formal recognition by the state led to increased general acceptance of lesbian, gay, and bisexual individuals, but it also had a significant effect on the individuals’ feelings of social inclusion themselves. Research and statistics from the past decade combine to demonstrate the direct influence this legislation had on Dutch society, and to an extent help countries that are considering legalizing same-sex marriage and

Society by the Numbers*



- In 2007 a Gallup Poll found that **83% of Dutch respondents** said their city or area was a good place to live for gay or lesbian people, the highest percentage of the surveyed countries
- During the 6 months after same-sex marriage was legalized, **849 lesbian and 1053 gay couples got married**, a majority of them converting from their previous registered partnership status
- As of May 2011 there have been **14,813 same-sex marriages** performed in the Netherlands and **6,600 same-sex registered partnerships**
- Over the past decade **the number of homosexual couples in a registered partnership has remained stable**, between 200 and 300
- Since 2001 the **total number of registered partnerships has increased fivefold** (~2,000 in 2001 to ~10,000 in 2010) while there has been a **10% drop in marriages****
- Partner Adoptions have surged since legalization with **8/10 partner adoptions involving adoption by a partner in a lesbian relationship in 2010** (total number 366/443)

*These figures come from the 3/15/2011 Statistics Netherlands: Security and Justice report and the May 2011 iMapp Research Brief

** Total number includes both hetero- and homosexual couples

second-parent adoption know what they can expect over time.

The number of same-sex couples that have decided to get married since 2001 seems surprisingly low. Considering that about 80% of heterosexual couples in the country are married versus 20% of homosexual couples, one would assume that gay men and lesbians are either more often opting for registered partnerships or are not legally formalizing their relationships at all.²² A look at Dutch marriage trends on the whole, however, tells a more complicated story. While the yearly number of same-sex registered partnerships has remained relatively stable at around 200 to 300, the total number of registered partnerships has soared from 2,000 to 10,000 while the number of marriages has dropped 10% (see above chart). This shift is perhaps more advanced in same-sex couples who have only recently been able to marry let alone register their relationships. Analysis over the next few decades may show Dutch heterosexual couples following a similar trend, with a split between marriage, registered partnerships, and no legal formalization of their relationship.

While a large number of homosexual couples have decided not to get married in the Netherlands, they are still positively affected by the opportunity to do so. In her qualitative study on the psychological benefits of marriage equality, M.V. Lee Badgett (2011) found “gaining the right to marry created feelings of social inclusion for same-sex couples, whether married or not” through the positive reactions of friends and family members to their relationship and the perception of a more equal position within the Netherlands (Badgett, 323-4). As gay rights became normalized, homosexual individuals

²² Duncan, William C. “The Tenth Anniversary of Dutch Same-Sex Marriage: How Is Marriage Doing in The Netherlands?” *Institute for Marriage and Public Policy* 4, no. 3 (May 2011): 1–3.

felt the effects both within their close networks of family and friends, and society on the whole. This interaction between close and extended networks was explored in a study by Lubbers, Jaspers, and Ultee (2009), which evaluated socializing agents' impacts on support for same-sex marriage after its legalization in the Netherlands. The authors found a strong correlation between the respondents' religious practice, their mother's attitude toward homosexuality, highest educational level completed, sex, and their own attitude towards homosexuality. The study found that the more often the respondent practiced their religion (e.g. attending church, engaging in prayer, etc) the more likely they were to object to same-sex marriage as that is the proscribed norm of most religious denominations. This factor was the most significant in explaining opposition to same-sex marriage. The respondent was also more likely to hold the same opinion as that of his or her mother if she was either strongly opposed to or in support of homosexuality, though they were less likely to be swayed by a more neutral maternal stance.

Following the aforementioned factors in level of significance were the study respondents' highest level of education completed and their sex. The study found that those respondents who had attained a higher level of education and were female were more likely to support same-sex marriage. This research highlights the complicated factors that come into play as a society's norms change. While religious practice and maternal attitudes had a strong impact on the respondents' feelings on same-sex marriage, it is important to remember that a majority of 65% disagreed with the statement in favor of abolishing same-sex marriage (Lubbers et al, 1723). These results help explain attitude formation in countries where same-sex marriage is not already legalized

while demonstrating how opposition to the institution persists in places where it is already in place.

Setbacks for Parenting Law

While the opening of second-parent adoptions to gay Dutch couples in 2001 provided for a number of expansions in their rights and duties as parents, they also created some significant legal inconsistencies. In 2009 the law was liberalized to address the problems lesbian couples had faced when trying to adopt, but it left many of the other issues regarding parental obligations unaltered. An examination of the 2001 law and the changes made in 2009 shows both the progress and the limitations of parenting law for same-sex couples in the Netherlands.

On April 1, 2001 same-sex couples were legally permitted to adopt for the first time. These adoptions were and continue to be regulated by the courts, to whom individuals or couples must make a request. One limitation for same-sex couples seeking to adopt is that they are excluded from international adoptions. This provision was justified by the fact that at the time the law came into effect, the Netherlands was the only country in the world to recognize same-sex marriage, and the Dutch government did not wish to violate the laws of another country. Changes to this particular aspect of the law should be taken into consideration as more countries have and continue to legalize same-sex marriage both within and outside of the European Union.

For cases involving a biological parent whose partner (co-parent) is seeking to adopt their child, the couple faces numerous challenges. Another of the more complicated inconsistencies in Dutch adoption law involves durational requirements, which specify that:

...A single adopter must have been caring for the child and raising it for the three years prior to the request being submitted to the court. The Article also specifies that a couple making a joint adoption request must have been caring for the child for at least one year prior to making their request, except in the case of a lesbian couple composed of the natural mother and the adoptive parent, in which case, there is no durational requirement.²³

Additionally, a couple or the partner of the child's parent must have been living with that parent for at least three years. These durational requirements are unusually favorable to the potential co-parent in a lesbian relationship; the partner in a male gay relationship of three years is not entitled to the same adoption rights of the biological parent's child as a female partner in a lesbian relationship is. Prior to adoption, both gay and lesbian partners are able to petition for parental authority. As Maxwell and Forder (2004) demonstrate, however, maintenance duties for same-sex co-parents are far less straightforward. On August 10th 2001 the Dutch Supreme Court held that "a lesbian partner could not be sued for maintenance by the birth mother in respect of the child whose conception they had planned together."²⁴ Given the liberal recognition of the partner in a lesbian relationship's ability to adopt, this court decision makes neither legal nor practical sense.

Maxwell and Forder find two additional inconsistencies in the adoption law of 2001 regarding sperm donors and putative biological fathers. Dutch adoption law places a disproportional weight on an attempt to limit a child to only two legal parents.

Therefore it must be established before an adoption that either the father who has not

²³ Seufert, Scott C. "Going Dutch: A Comparison of the Vermont Civil Union Law to the Same-Sex Marriage Law of the Netherlands." *Dickinson Journal of International Law* 19 (2001 2000): 464.

²⁴ Maxwell, Nancy G., and Caroline J. Forder. "Inadequacies in U.S. and Dutch Adoption Law to Establish Same-Sex Couples as Legal Parents: A Call for Recognizing Intentional Parenthood, The." *Family Law Quarterly* 38 (2005 2004): 646.

recognized the child, or the sperm donor, cannot or should not be expected to perform their parental duties. The definition of “parent,” however, is murky in the Netherlands. If the father can be found to have a relationship qualifying as “family life” with the child, including as a sperm donor, then they are entitled to petition for custody rights to the child. According to Maxwell and Forder (2004), factors that are used to determine a lack of family life include:

1. Brevity or absence of cohabitation
2. Lack of stability in the relationship
3. Ambivalence of intention regarding the relationship or regarding the birth of the child
4. Absence of congruence of intention of the partners

If the father or sperm donor is involved in the life of the child after birth, therefore, they can be held responsible as a parent, impeding the procedure for a partner (in this case, same-sex or not) seeking to adopt. Biological fathers who have recognized the child may also impede the adoption process by refusing to allow the biological mother’s partner to become a co-partner.

To address some of the problems with the adoption legislation of 2001, on January 1, 2009 a new law came into effect that drastically liberalized the durational requirements for lesbian couples. According to the new law,

If two women are engaged in a lesbian relationship and one of them gives birth, the partner can promptly submit a request for adoption, irrespective of the type of cohabitation. If the request is submitted prior to the moment of delivery and the court approves, the adoption becomes legal on the day the baby is born. If the request is submitted within six months after the baby is born, the adoption becomes legal on the day the request is submitted.²⁵

²⁵ “CBS - Legislation Regarding Partner Adoption.” Accessed January 16, 2013. <http://www.cbs.nl/en-GB/menu/methoden/toelichtingen/alfabet/l/legislation-regarding-partner-adoption.htm>.

The partner in a lesbian relationship is therefore able to become a co-parent far more easily than before. The durational requirements - already less stringent than those for other forms of partner adoptions - became even more flexible. This recent change combined with the 2001 legislation account for why on April 24, 2012 Statistics Netherlands reported on their website that “more than eight in ten partner adoptions involved adoption by a partner in a lesbian relationship in 2010.” Unfortunately, the 2009 legislation failed to address the convoluted problems surrounding the definition of parenthood, and the ways in which putative fathers, sperm donors, or biological fathers can impede the adoption process for partners by objecting to the application of the partner.

Conclusion

Much has changed in the Netherlands and in the world since the country first legalized same-sex marriage and partner adoptions. An interesting comparison can be made between the numbers of registered partnerships versus marriages for heterosexual and homosexual couples. Gay and lesbian individuals, married or not, report increased feelings of social inclusion, while a majority of the Dutch population is supportive of gay rights. And same-sex partners are now able to adopt children, a right that is important, yet faces significant inconsistencies with the law, especially in regards to father’s rights. The process by which the Netherlands became one of the most accepting countries in the world of gay rights demonstrates how normalization can occur in a positive and progressive manner.

Chapter 2: South Africa

Just twenty years ago, it would have been nearly impossible to imagine that South Africa would become the first African country, not to mention just the fifth country in the world, to legalize same-sex marriage. The end of decades of apartheid and struggle led not only to racial equality in the country, but a sincere desire by the new government to support the rights and identities of their citizens in as inclusive a manner as possible. This intent led to collaboration between advocates from a wide array of minority advocacy groups, culminating in the creation of the 1996 Constitution. This landmark document enshrined human rights on an unprecedented level and became the first constitution in the world to include a provision against discrimination based on an individual's sexual orientation. Following a series of court decisions in favor of redefining legislation to address the Constitution's provision, the Civil Union Act was passed in 2006, allowing homosexual and heterosexual couples to legally enter into either a civil union or marriage.

While this legislation gave South African same-sex couples the freedom to marry, they still face a number of challenges. The enactment of the Civil Union Act separately from the Marriage Act of 1961 has led many to criticize it as furthering real and perceived inequalities between heterosexual and homosexual married couples. Furthermore, continued opposition to homosexuality is prevalent and well-recognized throughout South African society, contributing to serious safety and security concerns such as corrective rape targeted against lesbian individuals. Despite these challenges to the recognition and normalization of gay rights in South Africa, the significant juridical and legislative steps the country has taken since 1994 are nothing short of remarkable.

The history of South Africa and homosexuality can be traced back to long before the country's colonization. The complicated effects colonization and Christian missionaries had on previously held views of sexuality and sexual orientation in particular, and how the present day opinions of black South Africans on homosexuality were shaped by those interactions, should be acknowledged. This analysis will focus on the country's treatment of gay men and lesbians both during and post-apartheid.

Homosexuality and Apartheid

Apartheid was the system of racial segregation and discriminatory policies put into place in South Africa by the ruling National Party from 1948 until the election of a new government led by the African National Congress in 1994. While there has been a great deal of historical research on the legally enforced racial inequality and notions of white supremacy that prevailed during this time, less literature has been dedicated towards examining the effects of these policies on minorities such as gays and lesbians.

Starting in the 1950's, legislation originally geared towards prohibiting interracial sexual relations was eventually broadened to include provisions against male and female homosexual behavior. The Immorality Act of 1950 penalized miscegenation with three years of imprisonment as well as public humiliation.²⁶ In 1957 the Immorality Amendment Act (also know as the Sexual Offences Act 23) was passed, criminalizing sodomy and "unnatural sexual acts."²⁷ This amendment demonstrates the desire of the

²⁶ Byrd, Stephanie. "Lesbian Life Under Apartheid." *The Harvard Gay & Lesbian Review* 3, no. 1 (January 31, 1996): 45.

²⁷ Jones, Tiffany F. "Averting White Male (Ab)normality: Psychiatric Representations and Treatment of 'Homosexuality' in 1960s South Africa." *Journal of Southern African Studies* 34, no. 2 (2008): 399; Louw,

National Party not only to legislate racial interactions, but also to prohibit sexual behavior they deemed to be abnormal or threatening to what were imagined to be the norms of sexual behavior. In 1966, the law was once again amended to apply more specifically to gay and lesbian individuals by prohibiting “female homosexuality and men [from] having sex with other men at ‘parties...’ defined as more than two persons.”²⁸ Tiffany F. Jones (2008) views these actions as being a reaction to “ideas about homosexuality [that] threatened the Christian-nationalist procreative ideals of the apartheid government and increased fears about the perceived moral degeneration of society” (Jones, 398). According to Glen Retief (1994), this fear stemmed from the state’s “need to keep the white nation sexually and morally pure so that it had the strength to resist the black communist onslaught” (Retief, 100). Thus sexuality and race were intertwined legislatively in an attempt to control each and provide for a social and political order that supported white male heterosexual dominance.

More attention was brought to the issue of homosexuality through the actions of psychiatrists under the South African Defense Force, particularly from 1969 to 1987. Robert M. Kaplan (2004) describes some of the more atrocious psychiatric practices that were used as cures for homosexuality discovered in military conscripts during this time, including: shock aversion therapy, hormone therapy, and non-consensual gender reassignment surgery. He explains these forced sex changes in particular as being “based on the simplistic belief that male homosexuals were sissies, female homosexuals were tomboys, and surgery would end their preference for the same sex by allowing them to

Ronald. “Advancing Human Rights Through Constitutional Protection for Gays and Lesbians in South Africa.” *Journal of Homosexuality* 48, no. 3–4 (2005): 145.

²⁸ Byrd, 45.

fulfill their projected role in the opposite sex” (Kaplan, 1416). Abuses such as these reflect the extremely harsh environment gay and lesbian individuals faced in apartheid-era South Africa with the continuous threat of legal detection and punishment, and the physical and mental torture of military conscripts who were discovered to be homosexual. There remained a racial component to the South African Defense Force’s approach towards homosexuality in particular, as some psychiatrists of the period believed “that sexual deviance was the monopoly of the white population, and Africans, while predisposed to more serious crimes, rarely partook in homosexual activities.”²⁹ Sexuality then, remained something to be regulated and purified within the white population, whereas sexual deviance within the black South African population was either unexpected or less scrutinized by psychiatrists and the government who were interested in a higher (white) moral order.

Homosexuality did exist, however, within all corners of South African society whether black or white, gay or lesbian. Many of the racial segregation policies created during apartheid directly prohibited interracial homosexual individuals from occupying the same social spaces. According to Stephanie Byrd (1996), in the 1950’s and 60’s:

...Gay men in South Africa began to assert their presence by taking over hotel bars and restaurants...there was a pervasive absence of blacks and gay lesbians in sport clubs, hotel bars, and in cliques that provided social outlets. This was due to the ‘colour bar’ which was started in 1809 and codified by the Mines and Works Act in 1911 (Byrd, 46).

These policies of segregation combined with the governmental targeting of white homosexuality in particular contributed to the perception that homosexuality was not “black.” Furthermore, Byrd shows how organizations such as the Gay Association of

²⁹ Jones, 408.

South Africa (GASA) focused on the advancement of gay rights within the apartheid regime, thus alienating black activists at the time. By the end of the decade, however, increasing challenges to segregation, and the recognition that white and black gay activists could find success through solidarity, led to the formation of organizations such as the racially mixed group Gay and Lesbian Organization of the Witwatersrand (GLOW).³⁰ What the existence of these organizations demonstrates is that South African gay rights activists were beginning to find a voice during a moment of rapidly changing politics throughout the country. Combined with the support for gay rights by the future ruling party of the African National Congress as early as 1989³¹, the trajectory towards the 1996 constitutional protection of sexual orientation and the subsequent pro-gay legislation is understood through the increased visibility of gay and lesbian individuals at the time.

Post-Apartheid and Equal Recognition

With the election of the African National Congress in 1994, South Africa's regime of apartheid ended and a new government came into power with the goal of supporting the equal rights of every citizen. This desire led to the adoption of a democratic constitution in 1996, whose Bill of Rights included an equality provision that would significantly change the course of gay rights in the country:

The state [or any individual] may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.³²

³⁰ Byrd, 46.

³¹ Lee. "Lesbianism in apartheid South Africa." *Gay Community News*, July 16, 1989.

³² Section 9(2) of the Bill of Rights

South Africa thus became the first country in the world to prohibit discrimination based on sexual orientation in their constitution. While this was an important step for the advancement of the rights of gay and lesbian South Africans, the provision needed to be followed by independently created legislation to reverse some of the country's more blatant discriminatory laws against homosexual individuals. The means by which this change was achieved was predominantly juridical.

The first case to approach a high court regarding discrimination based on sexual orientation was related to the decriminalization of sodomy. The National Coalition for Gay and Lesbian Equality, together with the South African Human Rights Commission, applied to the Witwatersrand High Court to declare the law offenses of sodomy and unnatural sexual acts contained in the previously mentioned Immorality Amendment Act (Sexual Offenses Act 23) of 1957 as inconsistent with the equality provision in the Bill of Rights in the Constitution.³³ The court struck down the sodomy offenses in their entirety, holding that “neither religious belief nor popular opinion could constitute justification in the face of explicit constitutional protection.”³⁴ The court felt that there was however a justification for the unnatural sexual acts offense to remain in place, as there “are undoubtedly some acts which are so repugnant to and in conflict with human dignity as to amount to perversion of the natural order.”³⁵ Though this offense was kept in place, the court did find that the crime should be stripped of its homosexual content, constituting a step forward for gay rights. With these holdings the case was passed to the Constitutional Court for ratification, where they considered the common law offense of sodomy and

³³ Louw, 145.

³⁴ Ibid.

³⁵ National Coalition for Gay and Lesbian Equality v. Minister of Justice 1998 (6) BCLR 726 (W) at 127E.

invalidated it in its entirety. Hence the first challenge to discriminatory laws against homosexuality was successful in a court setting.

With the decriminalization of homosexuality followed a series of cases that enhanced gay and lesbian couples' standing within family law. These successes emerged in the wake of a ruling from the year before the end of the apartheid era policies. In the custody case of *Van Rooyen v. Van Rooyen* (1993), the judge ruled against a divorced mother seeking custody rights to the children she had had with her former husband because of her relationship with another woman. The judge felt that their relationship would give "confusing signals" to the children, and that as long as the women were living together and sharing a bedroom, the children should not be allowed to stay overnight with their mother.³⁶ Five years later, and two years after the adoption of the equality provision of the Bill of Rights, in *Langemaat v. Department of Correctional Services, Safety, and Security* (1998) the High Court ruled in favor of a lesbian policewoman seeking the extension of spousal benefits to her same-sex partner.³⁷

A series of court cases regarding family law and same-sex couples soon followed. One of the more significant of these cases was *Du Toit v. Minister of Population and Welfare Development* (2002), in which a lesbian couple sought to jointly adopt two children. In its final judgment, the Constitutional Court found that family care "as contemplated in the Constitution can be provided for in different ways and that legal conception of family and what constitutes family life should change as social practices

³⁶ Louw, 144; Reddy, Vasu. "Decriminalisation of Homosexuality in Post-apartheid South Africa: A Brief Legal Case History Review from Sodomy to Marriage." *Agenda* 20, no. 67 (2006): 148.

³⁷ Reddy, 148.

and traditions change.”³⁸ This case set the precedent for same-sex couples to have the ability to jointly adopt children in South Africa. The decriminalization of homosexuality, followed by the ability of gay and lesbian couples to receive partner benefits and adopt children, were what eventually led the Constitutional Court to its landmark case on the question of same-sex marriage, *Fourie v. Minister of Home Affairs* (2006).

Fourie was the final step towards South Africa’s recognition of same-sex couples’ right to marry, a right that is viewed by many as the culmination of success for national gay rights movements. In this case, a lesbian couple sought to challenge the common law definition of marriage as limited to a relationship between a man and a woman. The court found in their judgment that the exclusion of same-sex couples from the institution of marriage:

...Represents a harsh if oblique statement by the law that same-sex couples are outsiders, and that their need for affirmation and protection of their intimate relations as human beings is somehow less than that of heterosexual couples. It reinforces the wounding notion that they are to be treated as biological oddities, as failed or lapsed human beings who do not fit into normal society, and, as such, do not qualify for the full moral concern and respect that our Constitution seeks to secure for everyone. It signifies that their capacity for love, commitment and accepting responsibility is by definition less worthy of regard than that of heterosexual couples.³⁹

The strong emotional language used in the court’s written decision demonstrates how aware they were of the implications of their finding. Homosexuality, viewed just a little over a decade earlier as a criminal offense under South African law, was now viewed as a legally protected freedom. Though the decision in *Fourie* demonstrated legislative support, however, South African society still showed a majority of public disapproval for

³⁸ Louw, 151.

³⁹ *Fourie v. Minister of Home Affairs*, 2006(3) BCLR 355 (CC), par 71.

same-sex marriage. Anticipating criticism, the court directly addressed the concern that their judgment was disconnected from public opinion:

It might well be that negative presuppositions about homosexuality are still widely entertained in certain sectors of our society. The ubiquity of a prejudice cannot support its legitimacy.⁴⁰

With their ruling, the Constitutional Court decided to place the responsibility for same-sex couples' equal recognition of their relationships under law on the South African Parliament. The Court gave Parliament one year to "address the unconstitutional exclusion of same-sex couples from enjoying the status and entitlements coupled with responsibilities that are accorded to heterosexual couples by the common law and by the Marriage Act [of 1961]."⁴¹ Following the court's orders, the Parliament passed the Civil Union of Act of 2006, under which heterosexual and homosexual couples were allowed to enter into a marriage or a civil partnership. Same-sex marriage was officially legal in South Africa.

A Separate But Equal Act?

While the passage of the Civil Union Act was and continues to be lauded by supporters of the gay rights movement around the world, it has also received justifiable criticism.

Nicola Barker (2011) and Pierre de Vos (2008) challenge the notion that same-sex marriage necessitates equal recognition for gay and lesbian couples both by the state and by society. Advocates for the legalization of same-sex marriage often point to the institution's symbolic importance, especially in the context of states that have recognized registered partnerships/civil unions for same-sex couples, bestowing upon them most if

⁴⁰ Ibid, par. 92.

⁴¹ De Vos, Pierre. "Judicial Revolution - A Court-Led Achievement of Same-Sex Marriage in South Africa, A." *Utrecht Law Review* 4 (2008): 166.

not all of the legal benefits of being married. Barker is mindful of the context in which same-sex marriage is legalized, and asserts that in South Africa “whilst the intention of the legislature was quite clearly to accord equal respect... same-sex marriage [has] been introduced in a legal structure that simultaneously reinforces the primacy of heterosexual civil marriage” (Barker, 448). Both Barker and de Vos point to two important differences between the Civil Union Act and the Marriage Act of 1961 as signifying the inherently lesser status of same-sex married couples.

The first difference between the Civil Union Act and the Marriage Act of 1961 is that the former allows heterosexual and homosexual couples to enter into civil unions or marriage, whereas the latter only allows for marriage. The introduction of the Civil Union Act, as opposed to amending the language of the preceding Marriage Act to allow both hetero- and homosexual couples to be married is confusing. It has created an unnecessary situation by which heterosexual couples may choose whether or not marry under the Marriage Act of 1961 or the Civil Union Act, whereas same-sex couples are limited to marriage under the Civil Union Act. There is now a symbolic separation of the two forms of marriage that appears to contradict the intention of the Constitutional Court when requiring Parliament to provide an equal status for married same-sex couples.

A second more serious difference between the two marriage acts in South Africa relates to the solemnization of marriages. Under the Marriage Act civil servants are required to officiate marriages, whereas religious marriage officers “may object to conducting marriages which do not conform to the rites, formularies, tenets, doctrines or disciplines of their religions” (de Vos, 171). This ability of religious officers to object is an understandable requirement in terms of religious freedom. The Civil Union Act differs in that not only religious officers, but also civil servants may “refuse to conclude a civil union marriage on the ground of conscience, religion and belief” (de Vos, 172). This additional provision in the Civil Union Act allows for outright discrimination by civil servants who are required to officiate all marriages performed under the Marriage

Society by the Numbers



- In the year following the enactment of the Civil Union Act **1,070 same-sex couples got married** (Pierre de Vos, 2008)
- Since 2003, yearly attitude surveys by the Human Sciences Research Council have recorded that **more than 80% of the South Africans polled believed that same-sex relationships are “always wrong”** (van Zyl, 2011, p. 341)
- **31 women have been killed in the last 10 years after being attacked through “corrective rape”** in South Africa. Of these murders, the only case to result in a conviction was that of Eudy Simelane (*Time*, March 8, 2011)
- **More than 10 lesbians per week are raped or gang-raped in Cape Town alone** according to the charity group Luleki Sizwe (*BBC*, June 30, 2011)

Act as a part of their civil duties. Enabling civil servants to object to officiating a marriage on the grounds of a couple's sexual orientation is a clear violation of the Constitution's equal rights provision.

Societal discrimination against LGBT individuals

It is sadly ironic that South Africa is one of the leading voices on the international stage for gay rights, yet faces a domestic environment that demonstrates extreme forms of homophobia. While South Africa has taken a large and important step towards protecting gay and lesbian individuals through the provisions of its 1996 Constitution, there is no legal framework to ensure that crimes that target an individual's sexual orientation, such as corrective rape, are actively prohibited.

Eudy Simelane was a professional soccer player for South Africa's national women's team and an openly gay activist for LGBT rights. While walking home on the night of April 28, 2008 in her hometown of Kwa-Thema, she was gang raped and murdered by four men, sparking international outrage and a call for justice. Of the attackers only one, Thato Mpithi, plead guilty and was sentenced to thirty-two years in prison. The other men were acquitted on the grounds that there was a lack of evidence against them. The attention given to the Eudy Simelane case led to the coining of the term "corrective rape" by activist and humanitarian groups as the sexual violence perpetrated for the purpose of supposedly "curing" a person of their real or perceived sexual orientation and/or gender identity (Anguita, 489). While scholars have criticized the connotations of the expression, it has persisted as the most common term to describe the systematized violence against gay and lesbian individuals in South Africa.

The legal system has failed to define corrective rape and other forms of violence against gay and lesbian individuals in South Africa as a hate crime, and court cases involving rape very rarely see convictions (Anguita, 493). The low rate of convictions in cases of rape, the legacy from the apartheid era of the police as an untrustworthy organization, and other societal factors such as shame have led to the low rate of one in nine rapes being reported by South African women.⁴² The Eudy Simelane case in particular gave greater visibility not only to the problem of homophobia in South Africa, but also to the threat to the security of women through sexual violence. As homosexual individuals became more visible in society, so too did their victimization.

In a study on the social values that influence homosexual identities, Mikki van Zyl (2011) conducted interviews with twenty self-identified gay and lesbian South African individuals. Among other findings, the results of the interview “indicated that participants living in townships felt less safe than those in the suburbs...and in five of the interviews the killing of black lesbians was mentioned” (van Zyl, 343). These findings show that gay and particularly lesbian individuals in South African have grim safety and security concerns in a country where their sexual orientation is theoretically protected from the threat of discrimination. Until public opinion has more fully evolved, and violent crimes such as corrective rape are legally prohibited as hate crimes, their fear is well-founded.

Conclusion

South Africa has become an international example in the field of gay rights. Their 1996 Constitution was the first in the world to include a provision against discrimination based

⁴² “Corrective Rape’: Fighting a South African Scourge.” *Time*, March 8, 2011, sec. World. <http://www.time.com/time/world/article/0,8599,2057744,00.html>

on sexual orientation. Same-sex couples are allowed to jointly adopt children, and as of 2006 South Africa became the fifth country in the world to allow for same-sex marriages. Despite these monumental changes, symbolic separation between hetero- and homosexual marriages, combined with public opinion that continues to be unfavorable towards gay rights, limits South Africa from being the shining beacon of equality it has strived to be. Still, in a region where a majority of the countries have an outright ban on homosexuality, the importance of the South African example cannot be understated. For all the legal and societal change surrounding the rights of gay and lesbian individuals to come, the progress that has been made is monumental.

Chapter 3: Argentina

Argentina is widely recognized as one of the most progressive states in the world in terms of its recognition of gay rights. Although other Latin American countries such as Uruguay and Brazil have demonstrated support for gay and lesbian individuals since their democratization in the 1980s, a combination of social, political, and economic factors have allowed Argentina to become the first country in the region to legally recognize same-sex marriage and adoption on July 22, 2010. The expansion of marriage and adoption rights, as well as increased protection against discrimination based on sexual orientation, have been made possible largely through the impressive mobilization of gay rights activists from within and outside of the country. These gains were successfully achieved even against opposition from the hierarchy of the Catholic Church, although Catholic citizens and legislators were themselves divided on the issue of opening marriage to same-sex couples. While public opinion shows general support for gay rights within the country, instances of violence based on individuals' sexual orientation highlight the need for Argentina to expand its anti-discrimination laws, a step some activists had hoped to achieve before the legalization of same-sex marriage. The recent successes of the gay rights movement in Argentina suggest future progress in the country, in the region, and around the world.

The Historical Context of Activism

Political activism surrounding gay rights began relatively early in Argentina during the late 1960s and early 1970s. In 1967 activists founded the first homosexual organization in Latin America, Our World (Nuestro Mundo). This group was succeeded by the Homosexual Liberation Front (Frente para la Liberación Homosexual) and the more

radical Homosexual Liberation Front (Frente de Liberación Homosexual). As Omar G. Encarnación (2011) explains, these groups emerged during a period of political openness that raised questions about “the nature of sexual identity and the value of assimilating gays into mainstream society (Encarnación, 106). Gay rights activists were effective in bringing visibility to the challenges homosexual individuals faced, and to the existence of the population themselves. Their efforts were crushed, however, when a military dictatorship took power in Argentina from 1976 to 1983. The infamous “Dirty War” ensued, creating policies that in their attempt to prevent subversion led to the extermination or disappearance of as many as 30,000 thousand citizens, at least four hundred of them homosexual.⁴³ As a result, gay and lesbian citizens were forced to hide their sexual identities, and any political power they may have gained through social mobilization in the early 1970s was lost.

In 1983, Argentina returned to representative democracy, and gay rights activism slowly began to resurface. On April 1984, a police raid on a gay bar whose subsequent protests harkened back to the 1969 Stonewall Riots in the United States, led to over two hundred arrests and the inception of the Argentine Homosexual Community (Comunidad Homosexual Argentina, CHA) just one month later.⁴⁴ In 1992 this group would become the first officially recognized gay rights organization in the country. Throughout the 1980s activists within CHA sought to combat discrimination and

⁴³ Friedman, Elisabeth Jay. “Constructing ‘The Same Rights With the Same Names’: The Impact of Spanish Norm Diffusion on Marriage Equality in Argentina.” *Latin American Politics and Society* 54, no. 4 (2012): 42; Romero, Simon, and William Neuman. “Francis Begins Reign as Pope Amid Echoes of Argentina’s Dirty War.” *The New York Times*, March 17, 2013, sec. World / Americas. <http://www.nytimes.com/2013/03/18/world/americas/francis-begins-reign-as-pope-amid-echoes-of-argentinass-dirty-war.html>.

⁴⁴ Encarnación, Omar G. “Latin America’s Gay Rights Revolution.” *Journal of Democracy* 22, no. 2 (2011): 106.

violence against gay and lesbian individuals by police forces and society as a whole. The impetus for much of their action stemmed from the devastating effects of HIV/AIDS in the country, leading to an impressive organizational strategy to mobilize funds and lobby for the rights of gay and lesbian partners of the deceased, who were often denied inheritance rights given to their heterosexual counterparts. Activists relied upon language that would serve to be instrumental in their future achievements, framing gay rights as a human right.

In the 1990s, as a wave of democratization spread throughout Latin America and other parts of the world, the CHA focused their efforts on the promotion of anti-discriminatory policies for homosexual individuals. This goal was achieved in the progressive capital of Buenos Aires in 1996, when the city council approved the inclusion of sexual orientation in its anti-discrimination charter following strong pressure from activists and media representatives (Encarnación, 109). The city upheld this provision when in 1998 they struck down edicts the police had used to detain gay and lesbian citizens (Friedman, 42). At the turn of the century, the CHA started to focus its efforts on the legal recognition of Argentine same-sex couples.

Recognizing the unequal status of same-sex couples vis-à-vis legal benefits, the CHA campaigned for the enactment of civil unions in Buenos Aires in the early 2000s. The organization drafted a bill proposal, submitted it to the city council, and quickly obtained support from legislators and public actors (Jordi Díez, 220). The intense lobbying efforts of CHA activists were the main reason for the bill's eventual success:

CHA members undertook an intense campaign to meet every city councilor to convince them of their case and to present them with scientific, legal, and academic arguments in favor of the bill...activists approached each lawmaker

with journalists allied to their cause who would report in the media on the councilors that refused to take a position (Díez, 221).

In addition to the CHA's persistent social organization, Díez (2013) pointed to two other explanations for the group's success. The first was the instability in elite alignments after the economic crisis of 2001 that left citizens disenchanted with politicians they viewed as ineffective. CHA members seized upon this chance to obtain support from politicians seeking popularity and political realignment. They were able to achieve this support by framing gay rights as a human right, the second factor Díez identified as contributing to their success. For decades, gay activists "crafted a collective action frame around the importance of human rights to the deepening of democracy and as a fundamental right to equality" (Díez, 222). In a country that continues to recognize the harmful effects of its dictatorial past, this strategy was highly effective in convincing legislators to support the bill to demonstrate their commitment to the ideals of democratic equality. On December 13, 2002 the bill passed the city council by a vote of 29 in favor versus 11 in opposition.

Throughout the 1990s and early 2000s, most of the success in the Argentine gay rights movement was on a local level in Buenos Aires. After the city's legalization of same-sex civil unions, gay activists began to seek the expansion of their rights at the federal level. It was at this point that a split emerged in the movement between the established CHA and the newly created Argentine Federation of Gays, Lesbians, Bisexuals, and Trans (FALGBT). The former was focused on expanding the availability of civil unions to the national level while continuing the fight against the discrimination toward gay and lesbian individuals. The FALGBT was decidedly pro-marriage, and wanted to skip the national legalization of civil unions in favor of same-sex marriage,

following the model of Spain. Elisabeth Jay Friedman (2012) discusses the influence of Spanish gay activists on the success of the FALGBT in terms of its role as a norms entrepreneur. According to Friedman, Spain viewed Argentina as a country that was ready to receive the norm of gay rights, which they had already been promoting domestically through the aforementioned movements. In this context, Spanish activists supported the norm of gay rights – specifically same-sex marriage – through a transnational system of strategic consulting and resource transfer (Friedman, 29). Funding from the Triangle Foundation allowed the FALGBT to organize more effectively. Advocacy efforts from two prominent Spanish politicians who openly supported gay rights, Beatriz Gimeno and Pedro Zerolo, led to FALGBT meetings with important political figures, especially President Cristina Fernández de Kirchner, who later came out in support of same-sex marriage for Argentina (Friedman, 48). Modeled heavily after the Spanish legislation of 2005, on April 30, 2007 a bill to legalize marriage and adoptions for gay and lesbian Argentine couples was introduced. After an initial failure, the bill was reintroduced in 2009 and finally approved on July 15, 2010. While the influence of Spanish norms entrepreneurs was, as demonstrated by Friedman, instrumental to the passage of this historic legislation, the previous efforts of domestic activists cannot be understated as a significant factor contributing to the relative success of the gay rights movement in Argentina.

The Catholic Church and Sexuality

The Catholic Church is one of the most established and vocal opponents of support for gay rights in Argentina. Juan Marco Vaggione (2011) traces the role of the Catholic Church in politics and family law, and how the Catholic identities of the Argentine

legislators influenced their votes on the same-sex marriage bill. He identifies the Second Vatican Council (1962-1965) as the turning point at which the Church affirmed the duty of its hierarchy and believers to promote the Church's definition of moral justice in the political realm (Vaggione, 937). As social movements and legal change supporting sexual and reproductive rights expanded, the Church voiced its opposition to abortion and homosexuality in particular. In 1986, former Pope John Paul II classified homosexual tendencies as an "objective disorder" and in a document instructed bishops "not to allow the existence of organizations with homosexual members if the organizations [did] not clearly affirm that homosexual activity is immoral" (Vaggione, 939).

The Church's increasingly firm stance against homosexuality led to the creation of two more documents over the span of a decade instructing believers on how to react to legal change that favors homosexual individuals. The first, issued by the Congregation for the Doctrine of the Faith in 1992, was entitled *Some Considerations Concerning the Response to Legislative Proposals on the Non-Discrimination of Homosexual Persons* and drew many of its assertions from its 1986 predecessor.⁴⁵ The document holds that sexual orientation "does not constitute a quality comparable to race, ethnic background, etc. in respect to non-discrimination" and furthermore that "there are areas in which it is not unjust discrimination to take sexual orientation into account, for example, in the placement of children for adoption or foster care, in employment of teachers or athletic

⁴⁵ Vatican. "Some Considerations Concerning the Response to Legislative Proposals on the Non-Discrimination of Homosexual Persons." Congregation for the Doctrine of the Faith on Homosexuals, July 24, 1992. http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_19920724_homosexual-persons_en.html.

coaches, and in military recruitment.”⁴⁶ While the Congregation also recognized the dignity of homosexual individuals as human beings, it reasserted that homosexuality itself is not a human right.⁴⁷

A little over a decade later, in 2003, the Congregation released another document, *Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons*, in direct reaction against the actions of states such as the Netherlands (2001) and Belgium (2003), which in particular legalized same-sex marriage just two days before the document was made public. The Congregation reaffirmed their stance in opposition to the opening of marriage to same-sex couples, calling upon legislators to vote against any such legal recognition of “immoral” behavior.”⁴⁸ The document went even further in providing talking points of a kind that Catholics could use to reasonably argue against same-sex marriage. As Vaggione points out, these were classified as being of a rational, biological/anthropological, social, and juridical order (Vaggione, 940). The hierarchy of the Catholic Church had made it clear that believers were to reject marriage between homosexual individuals on both religious and secular grounds.

In Argentina, a country with a projected 70%⁴⁹ of its population identifying as Catholic whether practicing or not, the influence of the Catholic Church had the potential to halt the legalization of same-sex marriage. A number of factors, however, contributed

⁴⁶ Ibid para. 10, 11.

⁴⁷ Ibid para. 12, 13.

⁴⁸ Vatican. “Considerations Regarding Proposals To Give Legal Recognition To Unions Between Homosexual Persons.” Congregation for the Doctrine of the Faith on Homosexuals, June 3, 2003. http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html. ¶ 5.

⁴⁹ Bureau of Democracy, Human Rights, and Labor. “Argentina: International Religious Freedom Report 2005.” Governmental. *U.S. Department of State*, 2005. <http://www.state.gov/j/drl/rls/irf/2005/51624.htm>.

to a weakened position of the Church at this time. Díez (2013) pointed to the saliency of sexual abuse scandals, including the arrest on October 24, 2002 of the priest Julio César Grassi for the sexual abuse of three minors (Díez, 228). Critics of the Church called attention to the hypocrisy of the Church's justification for its position against homosexuality as being for the protection of children. Vaggione (2011) focused on the influence of prominent Catholics both opposed to and in support of the proposed same-sex marriage bill. One individual who had a significant impact on the debate was Cardinal Jorge Mario Bergoglio, who as of March 13, 2013 is Pope Francis of the Catholic Church. As Cardinal, in June 2010 he addressed a letter to the Carmelite Nuns of Buenos Aires to implore their rejection of same-sex marriage:

...It is not about a simple political fight; it is the hope to destroy God's plan. It is not about a mere legislative project (this is only a tool) but rather a "move" by the father of lies who seeks to confuse and trick the children of God (Vaggione, 943).

When the letter became public, it elicited strong opposition from the media, citizens, and many legislators. Ironically, the letter led some Catholics formerly opposed to same-sex marriage to distance themselves from the Church's position, and it was cited by some Senators as the justification for their votes in favor of the legislation (Vaggione, 943). These justifications by Catholic legislators for their votes either for or against same-sex marriage fell into separate religious and secular categories. Catholic legislators who voted against the legislation either identified the religious arguments of the Catholic Church's stance as influencing their decision, or emphasized secular factors that tended to be legal and scientific (Vaggione, 948). On the other hand, Catholic legislators who voted in favor of same-sex marriage either argued that their religious identification was separate from their roles as public legislators, or dissented from the Church's position by

asserting that there was a religious argument to be made in support of marriage between gay and lesbian individuals. The weakened position of the Church amidst sexual abuse scandals, the missteps of its leadership, and the divided opinion of Catholic citizens and legislators in Argentina all contributed to the successful passage of the same-sex marriage bill in spite of the Church's opposition.

Society by the Numbers



- A survey taken in 2007 found that **over 70% of Buenos Aires residents approved of same-sex marriage legislation** (Friedman, 45)
- The 2008 AmericasBarometer Survey of the Latin American Public Opinion Project (LAPOP) found **over 50% of Argentina's population have a high tolerance towards homosexuality**
- In 2010, the same survey found that **57.7% of Argentinians supported same-sex marriage** versus a high of 63.9% in Canada and a low of 3.5% in Jamaica
- c • **2,697 same-sex Argentine couples got married** in the first year of its legalization (*The Independent*, March 9, 2012)

Conclusion

Argentina is one of the most progressive nations in Latin America and the world in terms of gay rights. It is the only country in the region to recognize same-sex marriages on a federal level, and is joined only by Brazil, Uruguay, and Mexico City in allowing joint adoption for gay and lesbian couples. The success of its gay rights movement was achieved through organized and sustained activism, specifically after the country's return to democracy, and despite the opposition of the Catholic Church. While the fight for

marriage equality and parenting rights have been achieved, there remains a lack of concrete legal protection against discrimination based on individuals' sexual orientation. As aforementioned, the city of Buenos Aires' constitutional reform in 1994 included protection for individuals against discrimination on the basis of sexual orientation (Friedman, 42). Although the country has a similar law prohibiting discrimination on the basis of gender expression or identity, gender is reasonably viewed as being separate from sexual orientation. In light of a history of violent suppression from military and police forces against homosexual individuals that continues to affect contemporary Argentine society, a provision should be included protecting citizens from discrimination based on their sexual orientation. Still, recent figures show that there is a general acceptance of homosexuality within Argentina. The majority support from the public and continued efforts from gay activists in the country put Argentina in a prime position to continue to be a leader in the international normalization of gay rights.

Chapter 4: France

France has had a long and sluggish history with the normalization of gay rights. In 1791, they became the first country in the world to formally decriminalize homosexuality, only for it to be recriminalized by the Vichy regime in 1942. In more recent years, French gay and lesbian individuals have gained increased societal acceptance through anti-discrimination legislation and their ability to enter into a Pacte Civil de Solidarité (PACS), France's unique form of a civil union. As of the date of this publication, the French National Assembly (Assemblée Nationale) and Senate have both approved a bill that would legalize same-sex marriage and adoption. The bill is supported by President François Hollande, who promised to legalize same-sex marriage during his campaign for office.

While a majority of 66% of French citizens⁵⁰ support same-sex marriage, there has been a large and well-organized opposition movement. Led largely by Catholic groups, numerous protests have been held in Paris to call for the rejection of the bill to legalize same-sex marriage on the grounds that it destroys the traditional definition of marriage. Religious and moral reasons aside, many protestors and even some gay activists themselves have insisted that they believe the current system, the PACS, is sufficient for gay and lesbian couples who wish to have the same benefits as heterosexual married couples. Meanwhile, a provision in the bill that would give gay and lesbian couples the ability to adopt has become highly controversial in the past few months.

⁵⁰ "Les Français Et Les Droits Des Couples Homosexuels." *Ifop*. Accessed March 28, 2013. http://www.ifop.fr/?option=com_publication&type=poll&id=2147&utm_source=feedburner&utm_medium=twitter&utm_campaign=Feed%3A+Ifop2+%28Ifop%29.

Despite this strong and vocal opposition, it appears that France is well on its way to becoming the fourteenth country in the world to legalize same-sex marriage.

Decriminalization and Increased Recognition

Although France had a comparatively early start in the decriminalization of homosexuality, its progress towards the recognition of gay rights has been relatively slow. Homosexuality was recriminalized in 1942 by the Vichy government, making the age of consent twenty-one versus fifteen years old for homo- and heterosexual individuals respectively.⁵¹ France would not fully decriminalize homosexuality again for another forty years, far after the states mentioned previously in this analysis: Spain (1822), Italy (1889), and Poland (1932).

It was not until the late 1960s and throughout the 1970s that gay activism in France came to the fore with the advent of the sexual liberation movement. It was at this time that two prominent and radical gay rights groups emerged: the Revolutionary Homosexual Action Front (FHAR) in 1971 and the Homosexual Liberation Group (GLH) in 1973.⁵² The members of these groups believed that the best way to fight the oppression of their sexuality was to challenge the norms of discretion and integration; gay and lesbian individuals were encouraged to “come out” and provoke the authorities that enforced their societal exclusion (Jackson, 88). Their strident messages and at times, violent methods, led to each group’s demise by the 1980s, though their actions did increase the visibility of gay and lesbian individuals in French society.

⁵¹ Richards, Claudina. “The Legal Recognition of Same-Sex Couples: The French Perspective.” *The International and Comparative Law Quarterly* 51, no. 2 (April 1, 2002): 305.

⁵² Jackson, Julian. “Sex, Politics and Morality in France, 1954-1982.” *History Workshop Journal* 61, no. 1 (2006): 77–102.

The subsequent years saw gay activist groups pursuing a far more successful strategy of assimilation, whereby they attempted to show how gay and lesbian individuals could respectfully fit into French society as normalized citizens. This approach developed at the same time that gay and lesbian individuals saw their legal rights largely expanded. One of the first changes came in 1980, when the government repealed a law that had doubled the penalty for public indecency between same-sex individuals.⁵³ In 1982 the newly elected Socialist government under President Mitterrand went even further, and enacted a law that equalized the age of consent for hetero- and homosexual individuals at 15 years old.⁵⁴ It was at this point that the decriminalization of homosexuality was achieved in France.

While homosexuality was no longer a criminal offense, gay rights groups recognized the continued need to advocate for full social acceptance and assimilation (Martel, 20; Gunther, 330). The government continued their recognition of gay and lesbian individuals when on July 26, 1985 an anti-discrimination law included sexual orientation as a protected class for the first time.⁵⁵ Each of these laws could be interpreted as relegating sexual identity to the private sphere, excluding gay and lesbian individuals from public censorship and scrutiny simply on the basis of their orientation. This separation between private and public identity relates directly to the French notion of republicanism, which will be explored further in the following section.

What is worth noting about these legal changes is that while individuals increasingly found success through societal acceptance and indifference to their sexual

⁵³ Gunther, Scott Eric. "Building a More Stately Closet: French Gay Movements Since the Early 1980s." *Journal of the History of Sexuality* 13, no. 3 (2004): 326–347.

⁵⁴ Richards, 306.

⁵⁵ *Code De Procédure Pénale - Article 2-6. Code De Procédure Pénale*, 1985.

orientation, same-sex couples continued to be denied the benefits given to their heterosexual counterparts. With the spread of AIDS throughout the 1980s and 90s, same-sex couples found themselves at a unique disadvantage when facing the legal and financial consequences of the death of their partner (Gunther, 344). Their discrimination was exacerbated as individuals were evicted from the apartments they had shared with their now deceased partner and denied health insurance, tax exemptions, inheritance, and joint ownership of property.⁵⁶ AIDS thus became the catalyst for the gay rights movement in France to push for the legal recognition of same-sex couples.

In 1989 two judicial cases ruled against same-sex couples seeking to obtain cohabitation benefits. The first, *X v. Air France*, involved two men seeking travel benefits offered to both married and cohabitating heterosexual partners. The Cour de Cassation, France's largest national court, found that the partner of the company's employee was not entitled to the benefits he sought.⁵⁷ The second case, *Mme X v. Caisse primaire d'assurance maladie de Nantes*, involved two women who wished to obtain social security benefits. In keeping with their previous decision, the court denied the women access to the benefits.⁵⁸ Finally, in *Vilela v. Mme Weil* (1997) just two years before the passage of the PACS, the Cour de Cassation once again found that benefits given to cohabiting couples "could only result from a stable and continuous relationship, having the appearance of marriage, thus between a man and a woman" (Richards, 312).

These cases were decided in the context of a long history of legal preference for married versus unmarried couples when determining the allocation of benefits.

⁵⁶ Fassin, Eric. "Same Sex, Different Politics: 'Gay Marriage' Debates in France and the United States." *Public Culture* 13, no. 2 (April 1, 2001): 225.

⁵⁷ *X v Air France*, Cass. 11 juillet 1989, D. 1990, II, 582.

⁵⁸ *Mme v Caisse primaire d'assurance maladie de Nantes et autre*, Cass. 1989, D. 1990, II, 382.

Unmarried heterosexual French couples have been able to enter into a status called concubinage since the 1970s, expanding their rights in the realm of welfare law, taxation, and leases. However, up until the end of the 1990s, they were excluded from a wide array of rights given to married couples, especially in terms of inheritance.⁵⁹ Same-sex couples increasingly sought to be recognized as cohabiting couples, finding some success: by 1996 around 250 mayors were issuing concubinage certificates (certificates de concubinage) to same-sex couples around the country.⁶⁰ Despite increased local recognition, the rights of cohabiting same-sex couples were not acknowledged on a national level. With the AIDS crisis and the continued denial of the concubinage status, a campaign was initiated to establish a new form of legal recognition of unmarried couples that included same-sex couples. In 1999 the creation of the Pacte Civil de Solidarité (PACS) did just that.

French Republicanism and the PACS

After being proposed in many forms, and despite facing strong opposition from all sides of the political spectrum, on November 15, 1999 the quintessentially French Pacte Civil de Solidarité (PACS) was signed into law. Similar in form to what other nations refer to as a civil union or a registered partnership, the PACS allows same-sex couples to obtain many of the same rights as married couples, though there are some significant limitations. French politicians and supporters hailed its creation not as an achievement of equality for gay and lesbian couples, but as a universal status that all unmarried couples, regardless of their sexual orientation, could enter into. This emphasis on the universal application of the law derived from the Revolutionary era notion of republicanism in France.

⁵⁹ Richard, 311.

⁶⁰ Richards, 314.

Carl F. Stychin defines republicanism as:

The dominant ideology in France that privileges the nation state and its direct relationship to individual citizens, and which is founded on the principles of equality and universality. The individual communes directly with the nation state, leaving little space within the public sphere for groups within civil society to become politicized entities. Theoretically, there is no space for an officially recognized multiculturalism, differentiated citizenship claims or a right to ‘difference’” (Stychin, 351).

Within this framework, minority groups such as gays and lesbians are seen as a threat to republican universalism and the cohesion of the state by claiming rights based solely upon their difference from the rest of the nation (i.e. their sexual orientation). This fear of politicization is part of the reason why the assimilation tactics of gay rights groups from the 1980s were so successful. By fighting discrimination on the grounds that it enhanced their difference as citizens, gay and lesbian individuals instead fought for societal indifference to their sexual orientation. According to this ideology, a French individual’s sexual orientation, or any other ‘differentiated citizenship claim,’ is therefore meant to be kept private so that their public identity is on equal footing with everyone else and they do not receive special treatment.

The debate over the PACS centered on this question of differentiation of minority group rights, with both sides highlighting the principle of republicanism to support their view. Opponents of the PACS asserted that it would focus on protecting gay and lesbian couples as a group, only heightening their inequality by allowing them to gain second-class legal recognition through an institution outside of marriage. Others felt that the law would privilege gay and lesbian individuals at the expense of the social norm of heterosexual marriage and family (Stychin, 356). According to this view, gay and lesbian individuals could not enter into a PACS as a couple seeking a symbolic equivalent to

marriage for two reasons. First, same-sex couples were seen as inherently non-procreative, thus unable to “make the same sort of contribution to the public good as the heterosexual family” that, according to this view, is inherently procreative (Stychin, 357). Second, this supposed separation of children from same-sex couple families would mean that the primary motivation for same-sex couples seeking a PACS would be to obtain fiscal benefits, reducing the value of recognized relationships. These opponents felt that while individuals’ sexual orientation should be tolerated, following the principle of indifference, recognizing the rights of same-sex couples would require making a public distinction of their status vis-à-vis heterosexual couples.

Supporters of the PACS also drew heavily on the notion of republicanism to support their claims. Rather than create a separate status that was exclusive to same-sex couples, they argued, the PACS would be available to all unmarried couples regardless of their sexual orientation, allowing for the equal integration of all members of society. In response to the claim that same-sex (and unmarried) couples were interested solely in material gains from a partnership status, supporters of the PACS highlighted the social benefit of solidarity between two individuals who showed commitment and affection for one another (Stychin, 361). Instead of addressing the question of whether same-sex couples should raise children through adoption, in vitro fertilization, or surrogacy, supporters claimed that the PACS status was separate from the institution of marriage and had no bearing on family life or filiation. By establishing that the PACS would accrue neither marriage nor family rights to unmarried and same-sex couples, supporters were able to frame their argument in terms that were highly appealing to the French public and other lawmakers.

In 1997, the Socialist party gained a majority in the National Assembly and came into power with the promise to create a legal status for same-sex and unmarried couples. Though an initial form of the bill was defeated in October of 1998 after a preliminary vote at which most of the Socialist deputies were not present, a new version of the bill was soon drafted and passed by the National Assembly on December 9, 1998. The bill underwent a few changes in the Senate, specifically with the addition of an article that included same-sex couples in the legal definition of cohabitation (concubinage) as an alternative to the PACS.⁶¹ When the bill returned to the house the following year all of the original provisions were restored, while retaining the inclusion of same-sex couples in the definition of cohabitation. On October 13, 1999 the National Assembly passed the bill, and after a challenge by legislators opposed to the PACS, it was sent to the Conseil Constitutionnel (Constitutional Council) for an evaluation of its constitutionality. The council upheld the bill with two important reservations. First, two individuals entering into a PACS must have been living as a couple (thus excluding family members or acquaintances from the pact). Second, the couple is required to provide “mutual assistance” to one another and “one party can be found liable to the other in the event of a unilateral decision to terminate the contract” (Stychin, 365). This measure was meant as a deterrent for individuals who may wish to enter into a PACS for short-term fiscal benefits, and then terminate the contract regardless of the other partner’s position. It was with these reservations that the bill was passed into law by President Jacques Chirac on November 15, 1999.

⁶¹ Richards, 315.

Since 1999, the PACS has allowed both unmarried and same-sex couples to enter into a contract that designates the terms of their life together with a few obligations from the state. Each contract must be registered with a tribunal d'instance (district court) of the jurisdiction where the couple lives. This court is intentionally separate from the mairie (town hall) where all marriages are registered to reinforce the symbolic distinction of the PACS from marriage. Once they have entered into the PACS, each partner has a number of obligations toward the other including: owing each other mutual and material aid, a presumption of joint ownership for property obtained after the PACS was made, liability for debts, and shared housing expenses.⁶² In regards to taxation, the couple is subject to joint income taxation three years after the registration of their PACS, also allowing for a joint declaration on wealth tax.⁶³ The PACS also entitles couples to health and life insurance, social security protection if the partner is on welfare, employee's leave entitlement, and housing tenure.⁶⁴ Still, these benefits are limited in terms of widow's pensions and family allowance, and couples are able to dissolve a PACS without judicial divorce proceedings, making the pact less binding than a marriage. While the PACS was instrumental to recognizing the rights of same-sex and unmarried couples, its limited provisions reflect the unequal status of same-sex couples who continue to be excluded from the institution of marriage.

⁶² Richards, 318.

⁶³ Ibid.

⁶⁴ Johnson, Paul. "Adoption, Homosexuality and the European Convention on Human Rights: Gas and Dubois v France." *The Modern Law Review* 75, no. 6 (2012): 1137.

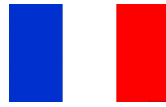
Same-Sex Marriage and the Controversy over Parenting

As of the date of this publication, a bill to legalize same-sex marriage and adoption has passed both the French National Assembly by a vote of 329 in favor versus 229 in opposition, and the Senate by a vote of 331 to 225. It will be sent to the Constitutional Council for review in the coming weeks where it is expected to pass. While the PACS has been a popular option for French couples regardless of their sexual orientation, the legalization of same-sex marriage has been continuously debated since its enactment. One of the more contentious moments in the movement came in 2004, when Mayor Noël Mamère of Bègles approved a civil marriage between two men.⁶⁵ Although the marriage was later annulled, the moment garnered a great deal of attention and support from all corners of French society. Over the subsequent years, President Chirac and his successor, Nicolas Sarkozy, wavered on the question of same-sex marriage, shifting from outright opposition to support, as long as it did not entail allowing gay or lesbian families to adopt. This view is shared by many of those opposed to legalizing same-sex marriage in France; while they acknowledge the unequal position of gay and lesbian couples

⁶⁵ McCaffrey, Enda. "The Sexual and Theological Ethics of Gay Marriage in France: a Dialectic Between Autonomy and Universalism." *Theology & Sexuality* 12, no. 3 (My 2006): 266.

prohibited from marriage, they justify this exclusion on the grounds that marriage is a procreative institution with the purpose of creating a family. Following the logic that

Society by the Numbers



- As of November 1999 **48% of the French opposed the PACS**, while 46% spoke in favor of it (Raissiguier, 88)
- By October 2000 an opinion poll commissioned by the gay and lesbian magazine *Têtu* found **70% approval of the PACS** (Fassin, 224)
- Of the **173, 045 PACS** signed in 2009, **95% were between heterosexual couples**. (NYT, December 15, 2010)
- While 66% of the French public supports same-sex marriage, only **46% support adoption by gay or lesbian couples** (Ifop, January 9, 2013)
- There has been a **steady decline in marriage in France** over the past few decades: just 250,000 French couples married in 2009; in 1970, almost 400,000 French couples wed.

only the traditional family with two heterosexual parents can successfully raise a child, opponents of same-sex marriage and adoption argue that their legalization will be harmful to children. Recent protest movements have gathered crowds as large as 300,000 people, such as the one on March 24, 2013, where marchers expressed fear over the legalization of adoption as well as artificial insemination and surrogate mothers for lesbian and gay couples.⁶⁶

⁶⁶ Sayare, Scott. "Same-Sex Marriage Opponents March in France." *The New York Times*, March 24, 2013, sec. World / Europe. <http://www.nytimes.com/2013/03/25/world/europe/same-sex-marriage-opponents-march-in-france.html>.

Despite strong and persistent opposition, the adoption provision of the bill has remained intact. In 2008 the European Court of Human Rights ruled that the denial of the opportunity for a French woman and her partner to adopt a child based solely on the fact that she was “unmarried and cohabiting with a female partner” was an infringement on her right to family life under the European Convention on Human Rights (EB v. France, 2008). This set the precedent for future adoption cases within the country and the rest of the European Union by explicitly stating that by not allowing a gay individual or their partner to adopt, states are discriminating against them. The current President François Hollande included support for both same-sex marriage and adoption in his election platform and has since reiterated this position since the draft of the marriage equality bill emerged in November 2012. Now that the bill has progressed through the French cabinet it is largely expected that President Hollande will sign it into law by June 2013.

Conclusion

France has experienced a fluctuation in its national recognition of gay rights. While it was one of the first countries in the world to decriminalize homosexuality, a reversal of this policy during the Vichy regime persisted through 1982, after many other nations had equalized the age of consent for both heterosexual and homosexual individuals. As gay and lesbian individuals were increasingly protected under anti-discrimination legislation, same-sex couples were excluded from many of the partner benefits accorded to their heterosexual counterparts, a situation that was exacerbated by the AIDS crisis in the country and around the world. By the end of the 1990s, the creation of the Pacte Civil de Solidarité (PACS) allowed both unmarried and same-sex couples to obtain many of the same legal benefits as heterosexual married couples. Today, the debate has turned

toward the legalization of same-sex marriage and adoption with a great deal of controversy surrounding the latter. As the country is on the verge of formally legalizing same-sex marriage, the progression of the recognition of gay rights in contemporary French society is clear.

Chapter 5: The United States

The gay rights movement in the United States has made unprecedented progress since the Stonewall Riots of 1969. With increased legislation protecting individuals from discrimination and inequality based on their sexual orientation, widespread policy changes over the past few decades reflect increased societal acceptance of gay rights. While only nine of the fifty states and the District of Columbia have legalized same-sex marriage at the time of this publication, six allow for civil unions, which afford same-sex couples many of the rights given to traditional spouses, and many more offer partial benefits in the form of domestic partnerships.⁶⁷

While it is the most widely discussed topic, same-sex marriage is not the only important gay rights issue that has seen recent progress in the United States. Second parent and joint adoption is explicitly allowed in some capacity in twenty states and the District of Columbia.⁶⁸ Furthermore, increased federal anti-discrimination legislation, such as the Matthew Shepard Act and the repeal of the “Don’t Ask Don’t Tell” military policy, have provided for the protection of individuals based on their sexual orientation. These statewide and national protections have proliferated as gay rights continue to be normalized. All of these developments have been made within the last twenty years, reflecting recent changes in public support and acceptance of gay rights issues.

⁶⁷ National Conference of State Legislatures, “Same Sex Marriage,” 21 March 2013. <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx>

⁶⁸ “Second Parent Adoption.” *American Civil Liberties Union*, n.d. <https://www.aclu.org/blog/tag/second-parent-adoption>.

(Anti-) Discrimination of Gay and Lesbian Individuals

On June 28, 1969 the Stonewall Riots brought immediate attention to the inequalities gay and lesbian individuals faced. From pride parades to a sharp rise in the number of gay activist organizations, a grassroots political movement emerged, calling for an end to discriminatory practices that targeted individuals' sexual orientation. One year after Stonewall, Jack Baker and Michael McConnell became the first gay couple to apply for a marriage license in Hennepin County, Minnesota, which they were denied. After their appeal made it to the United States Supreme Court, the judges refused to hear the case. However, the men were able to obtain a license from another county and were married the following year. Though an early success story in the progression towards the recognition of same-sex couples' rights, Jack and Michael's story was exceptional. The ensuing decade saw a great deal of activism working to increase social awareness of gay rights issues. A significant legislative gain was made in 1977 when the District of Columbia passed a law prohibiting discrimination based on sexual orientation.⁶⁹ That same year also saw the election of the now iconic Harvey Milk, an openly gay politician who served as a city supervisor in San Francisco until his assassination by a fellow supervisor on November 27, 1978. His death triggered a strong and emotional response across the country and to this day serves as an inspiration for activists fighting discrimination and violence against the gay community.

The 1980s saw a number of setbacks as well as increased awareness surrounding gay rights. The start of the AIDS epidemic and the subsequent ostracism of gay men who

⁶⁹ "Nondiscrimination Laws Map," January 20, 2012.
http://www.thetaskforce.org/reports_and_research/nondiscrimination_laws.

were blamed for the spread of the disease cast members of the gay community on the whole in a negative light. As in other countries, however, the crisis also created an impetus for political activism to remove the stigma surrounding the sexual practices of gay men in particular, and to recognize same-sex couples' rights who as surviving partners of the deceased were denied benefits given to their heterosexual counterparts. In 1987 the organization Act Up emerged, dedicating itself to bringing public awareness to the issues facing members of the gay community affected by AIDS. While the societal impact of AIDS was devastating, its effects were not entirely detrimental to the gay rights movement.

There were also a number of legal developments in this decade that had a significant impact on both state and federal treatment of gay rights. In 1982, Wisconsin became the first state after the District of Columbia to prohibit discrimination on the basis of sexual orientation, with Massachusetts following suit in 1989.⁷⁰ While this was an important step towards increased recognition of the rights of gay and lesbian individuals, this legislation was followed by the infamous 1986 Supreme Court case *Bowers v. Hardwick*. The case centered on the challenge to a sodomy conviction of a Georgian man who had been engaging in oral sex with another man in the privacy of his bedroom, when a policeman coming to serve a parking violation entered his residence. The Georgia law provided that "any sexual act involving the sex organs of one person and the mouth or anus of another" was a felony punishable by up to twenty years of imprisonment.⁷¹ Mr. Hardwick challenged the law on the grounds that it violated the Constitution's due

⁷⁰ Ibid.

⁷¹ Dynia, Philip A. "Bowers v. Hardwick, 478 U.S. 186 (1986)." In *Encyclopedia of the Supreme Court of the United States*, edited by David S. Tanenhaus, 1:175–180. Detroit: Macmillan Reference USA, 2008.

process clause and his right to privacy. The court ruled in favor of the state, justifying their decision on the basis that Georgia's sodomy statutes were "rationally related to the state's interest in upholding morality."⁷² *Bowers* was a considerable setback for the gay rights movement in the United States as it reflected a moral judgment of nontraditional sexual practices rather than a careful analysis of the constitutionality of the law.

Some of the most important legislation affecting gay and lesbian individuals was passed during the 1990s. In 1992 Bill Clinton came into office with the intention of reversing an executive order that barred gay and lesbian individuals from serving in the military. After a series of compromises and controversy, in 1993 the "Don't Ask Don't Tell" policy was established, prohibiting discrimination against gay and lesbian military personnel, while also requiring that they were not openly gay while in service. The new policy forced individuals to keep their sexuality hidden, thus continuing the very discrimination it had been intended to eliminate. That same year, however, the gay rights movement saw success on the state-level when the Supreme Court of Hawaii ruled in *Baehr v. Miike* that a law prohibiting same-sex marriage violated the state's constitution. At the time, many opponents to same-sex marriage expressed fear that the ruling would lead to its legalization in the state, while gay rights activists hailed the case as an example of evolving legal recognition of the inequality gay and lesbian couples faced.

In 1996, gay and lesbian couples once again saw their legal situation change in ambiguous and important ways. It was during this year that President Clinton signed the Defense of Marriage Act, providing for the federal non-recognition of same-sex marriages, excluding same-sex couples from tax, insurance, social security, and

⁷²Ibid.

immigration benefits available to heterosexual married couples. Passed at a time when other countries were enacting civil union and domestic partnership legislation to accord same-sex couples essentially the same rights as spouses, this legislation was an attempt by Congress to pre-empt similar movements in the United States. That same year the Supreme Court demonstrated a shift in opinion since *Bowers* with their ruling in *Romer v. Evans*. The case involved a challenge to a recently successful ballot initiative in Colorado, Amendment 2, which “prohibited state and local governments from enacting any law, regulation, or policy that would, in effect, protect the civil rights of gays, lesbians, and bisexuals.”⁷³ The majority opinion found the amendment to be unconstitutional on the grounds that it violated the Equal Protection Clause by explicitly imposing a “broad and undifferentiated disability on a single named group.”⁷⁴ While this ruling did not mean that states were obliged to include sexual orientation as a protected class in anti-discrimination provisions, it was an important step towards preventing gay and lesbian individuals’ exclusion from basic civil rights.

In 2003 the Supreme Court set the precedent for the official decriminalization of sodomy with its decision in *Lawrence v. Texas*, overturning the ruling from *Bowers v. Hardwick*. In circumstances similar to the preceding case, two men were found to be having sexual intercourse when a police officer entered the apartment and charged them with violating Texas’s sodomy law, which prohibited couples from engaging in anal and oral sex. The men appealed the charges on the grounds that the law violated the Dual Process and Equal Protection clauses of the Constitution. In a 6-3 decision the court

⁷³ Batten, Donna, ed. “Romer v. Evans.” In *Gale Encyclopedia of American Law*, 8:421–423. 3rd ed. Detroit: Gale, 2010.

⁷⁴ *Ibid.*

sided against the state and overturned the *Bowers* decision. Justice Anthony Kennedy, writing for the majority opinion, stated: “The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.”⁷⁵ The court had therefore shifted their discourse from a moral judgment of the sexual conduct of homosexual couples to the recognition of their right to privacy in the home.

The recognition of the legal rights of gay and lesbian individuals has continued to evolve at the state level. While there remains no national legislation to prohibit discrimination on the basis of sexual orientation, various laws of this nature have been enacted in the following nineteen states: Connecticut (1991), Hawaii (1991), California (1992), New Jersey (1992), Vermont (1992), Minnesota (1993), Rhode Island (1995), New Hampshire (1997), Nevada (1999), Maryland (2001), New York (2002), New Mexico (2003), Illinois (2005), Maine (2005), Washington (2006), Iowa (2007), Oregon (2007), Colorado (2007), and Delaware (2009).⁷⁶ As will be discussed later in this chapter, the changing policies towards gay and lesbian individuals under the Obama administration have had significant effects on the national stage. Meanwhile, the proliferation of state recognition of gay rights has not been limited to anti-discrimination legislation. At the turn of the century, legal measures have emerged within various states to address the rights of same-sex couples in terms of civil unions/domestic partnerships, marriage, and parenting.

⁷⁵ Batten, Donna, ed. “Lawrence V. Texas.” In *Gale Encyclopedia of American Law*, 6:245–246. 3rd ed. Detroit: Gale, 2011.

⁷⁶ “Nondiscrimination Laws Map,” January 20, 2012.
http://www.thetaskforce.org/reports_and_research/nondiscrimination_laws.

Civil Unions, Same-Sex Marriage, and Adoption Law

From civil unions to marriage, gay and lesbian couples have seen their rights expand in an increasing number of states in the past decade. While a majority of states (38) have established bans on same-sex marriage, these laws are not exclusive of some form of legal recognition of same-sex relationships, whether in the form of civil unions or domestic partnerships. Changing public opinion and the saliency of gay rights has led to a shift towards legislative reform that recognizes same-sex couples. Same-sex marriage is currently legal in Massachusetts, Connecticut, New Hampshire, Iowa, Vermont, New York, Washington, Maryland, Maine, and the District of Columbia.⁷⁷ An additional eleven states have varying degrees of relationship recognition laws either in the form of civil unions or domestic partnerships. The legalization of civil unions in Vermont and same-sex marriage in Massachusetts highlight some of the key factors that influence legislative reform surrounding gay and lesbian couples' rights in the United States.

On July 1, 2000 a law went into effect to legalize civil unions for same-sex couples in Vermont while continuing to exclude them from the institution of marriage. This legislation emerged in response to the Vermont Supreme Court case, *Baker v. Vermont* in 1999. Three same-sex couples that had applied for, and subsequently been denied, marriage licenses sued the state for withholding from them the rights and privileges accorded to married heterosexual couples. The court held that under the Common Benefits Clause of the state's constitution, same-sex couples were entitled to receive the same legal benefits as married heterosexual couples. Vermont therefore

⁷⁷ "Relationship Recognition Map for Same-sex Couples in the United States," January 23, 2013. http://www.thetaskforce.org/reports_and_research/relationship_recognition.

became the third state to offer some form of partnership recognition that included same-sex couples after Hawaii (1997) and California (1999), and the first state to offer these rights on a broad scale.

As was the case in the Netherlands and various other states around the world, the opening of civil unions to same-sex couples with the same legal benefits as those given to married couples eventually only highlighted the inequality of the institution. By 2009 Vermont had legalized same-sex marriage, following a trend that may hold true for other states that have already allowed for civil unions or domestic partnerships for gay and lesbian couples. This appears to be the case in states such as Illinois and Rhode Island, both of whom offer full recognition of partnership benefits through civil unions and domestic partnerships respectively, and are currently debating bills that would legalize same-sex marriage. While Vermont initially recognized civil unions for same-sex couples before marriage, Massachusetts became the first state in the country to achieve marriage equality without the creation of a system of civil unions or domestic partnerships.

In 2004, Massachusetts became the first U.S. state to legalize same-sex marriage. This legislation stemmed from a 2003 ruling in the case of *Goodridge v. Department of Public Health*. Similarly to *Baker*, seven same-sex couples that had been denied marriage licenses filed complaints asserting that their rights under the due process provision of the Massachusetts Constitution had been violated. The majority opinion of the court held that limiting civil marriage to opposite-sex couples “lacked a rational basis and violated the basic premises of individual liberty and equality under law protected by

the Massachusetts Constitution.”⁷⁸ The court then gave the Massachusetts legislature 180 days to take the necessary steps to implement their holding. The Senate soon asked the court for an advisory opinion on whether a bill to legalize civil unions for same-sex couples while prohibiting same-sex marriage would comply with the Massachusetts Constitution.⁷⁹ In a 4-3 decision the court found this option to be void on the grounds that it would create a second-class status for same-sex couples, thus violating the Massachusetts Constitution. After considerable debate and deliberation, the Massachusetts legislature passed a bill to legalize same-sex marriage on May 17, 2004. As previously mentioned, an additional eight states and the District of Columbia have followed suit, with even more states currently debating bills in their legislature or providing partner benefits to same-sex couples through civil unions or domestic partnerships. Beyond partnership and marriage recognition, same-sex couples have also seen an evolution in adoption law over the years. Twenty states and the District of Columbia all have laws granting either second-parent or joint adoption for same-sex couples, with many other states allowing courts to decide whether to grant adoption on a case-by-case basis.⁸⁰ There is no federal legislation recognizing the adoptive rights of same-sex couples, though it appears that same-sex families are recognized as legitimate barring the benefits that they are excluded from under the Defense of Marriage Act. While opponents of same-sex marriage often cite the interests of children and the

⁷⁸ Ireland, Roderick L. “In Goodridge’s Wake: Reflections on the Political, Public, and Personal Repercussions of the Massachusetts Same-Sex Marriage Cases.” *New York University Law Review* 85 (2010): 1420.

⁷⁹ Ibid 1423.

⁸⁰ “Second Parent Adoption.” *American Civil Liberties Union*, n.d. <https://www.aclu.org/blog/tag/second-parent-adoption>.

supposed procreative nature of marriage as reasons why same-sex couples should be excluded from the institution, it appears that American same-sex couples seeking to adopt children experience less obstacles than their counterparts in nations where this right is explicitly withheld on the basis of sexual orientation, such as France. Under the Obama administration in particular there appears to be a proliferation of legislation in support of gay rights, each with important implications for gay and lesbian individuals across the country.

A National Tipping Point: Gay Rights Under the Obama Administration

On May 9, 2012 just six-months before he was elected to his second term as President, Barack Obama came out in support of same-sex marriage during an interview with Robin Roberts of ABC News. This declaration came just a few days after Vice President Joe Biden expressed his comfort with same-sex marriage and one day after North Carolina became the thirtieth state to ban gay and lesbian couples from getting married. It was the first statement of its kind by a sitting U.S. president and was made in the context of President Obama's purported "evolution" on the subject of same-sex marriage since his initial opposition:

I have to tell you, as I've said, I've been going through an evolution on this issue. I've always been adamant that gay and lesbian Americans should be treated fairly and equally...at a certain point I've just concluded that for me personally, it is important for me to go ahead and affirm that I think same-sex couples should be able to get married (President Barack Obama).

Barack Obama's presidency has seen a number of significant legal changes in the realm of gay rights. In 2009, eleven years after it was initially proposed, the United States Congress passed the Matthew Shepard Act to designate crimes committed on the basis of individuals' sexual orientation as hate crimes. Just two years later, on February

23, 2011 the Obama administration declared that they would no longer defend the constitutionality of the Defense of Marriage Act, signifying a major policy reversal. While the government no longer defends the law to justify the non-recognition by the federal government of same-sex marriages performed in states where it is legal, as of the date of this publication the legislation remains in place pending the decision of a recent Supreme Court case challenging its constitutionality. That same year, on September 20, 2011, the administration took another significant step towards the recognition of gay rights by officially repealing the military policy of Don't Ask, Don't Tell. Gay and lesbian Americans are now allowed to serve openly in the U.S. military without fear of dismissal on the basis of their sexual orientation. On the same night that President Obama was re-elected in 2012, initiatives in Washington, Maryland, and Maine legalized same-sex marriage and rejected a proposal to re-establish that marriage is restricted to a relationship between a man and a woman in Minnesota. These successes in the gay rights movement occurred in the context of a history where 30 out of 31 measures put to voters had banned same-sex marriage in the past decade.⁸¹

The recent support for gay rights in the United States has not been limited to its national borders. During a speech in Geneva on Human Rights Day in December 2011, Hillary Clinton highlighted the United States' dedication to the defense of the human rights of gay and lesbian individuals around the world as a part of their comprehensive human rights policy, and as a priority of their foreign policy. This speech signified a

⁸¹ "Gay Marriage Scores Victories In All Four States That Considered It, But Tough Road Lies Ahead - Forbes." *Forbes*. Accessed December 11, 2012. <http://www.forbes.com/sites/deborahljacobs/2012/11/07/gay-marriage-scores-victories-in-all-four-states-that-considered-it-but-tough-road-lies-ahead/>.

decision by the Obama administration for the United States to take on a leadership role in the international progression of the gay rights movement.

In addition to the Obama administration's shift from previous presidencies' treatment of gay rights, the Supreme Court has recently heard two cases that could have an even more dramatic effect on the legal rights of same-sex couples in the United States. On March 26th and March 27, 2013 the Supreme Court respectively considered the constitutionality of California's Proposition 8 and the federal Defense of Marriage Act (DOMA). The former is a popularly approved ballot initiative to ban same-sex marriage in California after its short-lived legalization. If the court rules the ban unconstitutional, it would overturn similar bans that exist in other states, as well as pave the road toward the legalization of same-sex marriage both at the state and the federal level. As previously discussed, DOMA prohibits married same-sex couples from receiving the same federal benefits as their heterosexual counterparts. If ruled unconstitutional, same-sex couples who are married in states where it is legal would be entitled to the same benefits that their heterosexual counterparts currently receive. While at the time of this publication the Court has not released their ruling for either case, there is some evidence to suggest that they will find both Proposition 8 and the Defense of Marriage Act to be unconstitutional.



- As of November 2013, a Gallup Poll found that **53% of Americans support the legalization of same-sex marriage**. In 2005 this percentage was 37% with 59% opposed
- The 2010 U.S. Census found that there were **131,729 same-sex married couple households** and **514,735 same-sex unmarried partner households** in the United States
- According to the same census, there are **115,064 same-sex couple households in the United States with children**
- In a CNN/ORC International Poll released on March 25, 2013 **57% of respondents said they had a family member or close friend who is gay or lesbian**
- Approximately **3.5% of Americans identify as lesbian, gay or bisexual** according to the Williams Institute at UCLA
- A CNN March 26, 2013 report found that **married same-sex couples are currently excluded from 1,100 federal benefits** under the Defense of Marriage Act.

Conclusion

The United State has seen exponential progress in the realm of gay rights over the last forty years, and in the past decade in particular. From Stonewall to the repeal of Don't Ask, Don't Tell, gay and lesbian individuals have witnessed an expansion of their rights on a state and federal level. As public opinion shifts, both Democratic and Republican congressmen have come out in favor of same-sex marriage, and individuals identifying as lesbian, gay, and bisexual are increasingly visible in society. It appears that the United States is on the cusp of normalizing gay rights. While the coming months will have a significant impact on the legal rights afforded to same-sex couples, it may be the case that American society has already reached the tipping point toward normalizing gay rights.

Conclusion

National movements in support of the legal recognition of gay and lesbian individuals have had an increasingly significant impact on the international normalization of gay rights. Starting in the 1960s, and continuing throughout the 1970s, the politicization of gay rights movements around the world highlighted the need for change in the recognition of gay and lesbian individuals. During the 1980s, anti-discrimination legislation emerged and proliferated in various states, most significantly in the cases highlighted throughout this analysis. Although the AIDS crisis led to the social stigmatization of gay men in particular, as well as the exclusion of partners of the deceased from the benefits that their heterosexual counterparts were afforded, the gay rights movement was not overcome by the negative effects of the disease. Various advocacy organizations emerged in its wake and made important gains in anti-discrimination legislation to protect the rights of gay and lesbian individuals.

While a majority of countries still criminalize homosexuality, the norm of gay rights is increasingly spreading. Though each differs in terms of historical background and legislative process, the gay rights movements in the Netherlands, South Africa, Argentina, France, and the United States experienced important similarities that suggest a process of normalization is taking place beyond the national level. In 2001, the Netherlands became the first country in the world to legalize same-sex marriage and adoption. With the legalization of same-sex marriage and adoption in eleven states, particularly in South Africa in 2006 and Argentina in 2010, it is clear that equality is not limited to a particular region or cultural context. Gay and lesbian individuals around the world are increasingly being recognized as equal citizens with protected rights through

anti-discrimination policies. These rights are further expanded as the option of a civil union, domestic partnership, and marriage is given to same-sex couples who were previously excluded from social and fiscal benefits that heterosexual couples were entitled to. France, the United States, and numerous other states appear to be on the verge of recognizing same-sex marriage and adoption. Adoption, perhaps the most controversial right that gay rights norms entrepreneurs are advocating for, has been granted to homosexual partners and couples in many states that recognize the legitimacy of gay and lesbian families, and is legal in every state that has already legalized same-sex marriage. On the international stage, the United States under the Obama administration has dedicated itself to taking a leadership role in support of the legal protection of the rights of gay and lesbian individuals around the world. Norms entrepreneurs in the form of advocacy organizations and activists have solidified the international emergence of support for gay rights, even in countries where these rights continue to be denied. The norm of gay rights may not yet have reached a tipping point, but it certainly appears to be starting the cascade.

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