

## Sexual Orientation and Gender Identity

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This article reviews developments in sexual orientation and gender identity law during 2012.<sup>1</sup> Although significant steps towards LGBT equality were made in various areas around the globe, individuals the world over continue to be discriminated against and persecuted on the basis of their sexual orientation and gender identity. Rosa Luxemburg once remarked that “[t]hose who do not move, do not notice their chains.”<sup>2</sup> If this survey of the year’s significant developments begins with a focus on injustice, it is only because the suffering it causes is a measure of our progress and not just our pain.

### I. Discrimination and Persecution

#### A. U.N. HUMAN RIGHTS COUNCIL RESOLUTION

The United Nations continued to be a driving force for change when, following up on its first-ever resolution supporting LGBT equality,<sup>3</sup> it convened the first-ever Human Rights Council meeting focused on “discriminatory laws and . . . acts of violence” targeting sexual minorities.<sup>4</sup> Cognizant that the issue was a sensitive one for many Member-

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1. For developments during 2011, see David W. Austin, *Sexual Orientation and Gender Identity*, 46 INT’L LAW. 447 (2012). For earlier developments, see David W. Austin, Paul E. Johnson & Mark E. Wojcik, *Sexual Orientation and Gender Identity*, 44 INT’L LAW. 547 (2010).

2. *Rosa Luxemburg*, NEW WORLD ENCYCLOPEDIA (Aug. 29, 2008, 3:26 PM), [http://www.newworldencyclopedia.org/p/index.php?title=Rosa\\_Luxemburg&oldid=795080](http://www.newworldencyclopedia.org/p/index.php?title=Rosa_Luxemburg&oldid=795080).

3. See *UN Resolution a First in GLBT Recognition*, 19 GAY & LESBIAN REV. 45 (2012) (editorial highlighting the U.N. resolution as major milestone of preceding year).

4. See Office of the High Comm’r for Human Rights (OHCHR), Human Rights Council Panel on Ending Violence and Discrimination Against Individuals Based on Their Sexual Orientation and Gender Identity:

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States,<sup>5</sup> U.N. Secretary-General Ban Ki-moon opened the proceedings by acknowledging the potential for discomfort, but reminding his audience that it was the duty of the United Nations “to protect the rights of everyone, everywhere.”<sup>6</sup> He characterized discrimination against sexual minorities “as a monumental tragedy . . . and a stain on the collective conscience.”<sup>7</sup>

U.N. High Commissioner for Human Rights Navi Pillay fulfilled her mandate under the U.N. Resolution by formally presenting a report that detailed numerous examples of violence, discriminatory laws, and discriminatory practices targeting sexual minorities.<sup>8</sup> Her summary highlighted killings, torture, and violent attacks, as well as discriminatory laws in seventy-six states criminalizing same-sex relations.<sup>9</sup> Pillay noted that in at least five states, those found guilty of engaging in homosexuality could be subjected to capital punishment.<sup>10</sup> Other examples of injustice cited in the report included onerous conditions placed on transgender individuals seeking official recognition of their gender and restrictions on organizations advocating for the rights of sexual minorities.<sup>11</sup> High Commissioner Pillay emphasized that “these laws are an anachronism” and that they “breach international human rights law,” in addition to “caus[ing] enormous, unnecessary suffering.”<sup>12</sup>

Several African and Arab states resisted this initial attempt to foster constructive dialogue; their representatives walked out of the meeting rather than addressing the topic.<sup>13</sup> Those who remained expressed a number of concerns, including the need to ground LGBT equality in existing international human rights law and to respect “national and religious particularities” so as not to “breach the social and cultural rights of [local] communities.”<sup>14</sup> Several panelists pushed back against using religion or local “culture . . . as a shield” to fend off LGBT equality, while others noted with concern that “violence against [sexual minorities] was increasing in many places.”<sup>15</sup> Participants were urged to recognize that “[j]ust as no person is above the law, no person or group of person[s] should be

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Summary of Discussion 1 (Mar. 7, 2012), <http://www.ohchr.org/Documents/Issues/Discrimination/LGBT/SummaryHRC19Panel.pdf> [hereinafter U.N. Human Rights Council Panel].

5. See Steve Williams, *U.N. Approves Resolution Against Anti-Gay Discrimination*, CARE2 (June 17, 2011, 6:35 AM), <http://www.care2.com/causes/u-n-approves-resolution-against-sexual-orientation-discrimination.html> (“The United Nations . . . voted . . . 23-19 . . . with 3 abstentions to approve a historic resolution firmly condemning discrimination on the grounds of sexual orientation.”).

6. *Combating Discrimination Based on Sexual Orientation and Gender Identity*, OHCHR, <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx> (last visited Feb. 27, 2013).

7. U.N. Human Rights Council Panel, *supra* note 4, at 1.

8. To access the report, see Rep. of the U.N. Human Rights Council, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on their Sexual Orientation and Gender Identity*, 19th Sess., U.N. Doc. A/HRC/19/41 (Nov. 17, 2011).

9. *See id.*

10. *Id.* at 15.

11. *Id.* at 20, 22.

12. Navi Pillay, UN High Comm’r for Human Rights, Statement to U.N. Human Rights Council on Ending Violence and Discrimination against Individuals on the Basis of their Sexual Orientation and Gender Identity, 19th Sess. (Mar. 7, 2012), *transcript available at* <http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=11917&LangID=E>.

13. Robert Evans, *Islamic States, Africans Walk Out on U.N. Gay Panel*, REUTERS (Mar. 7, 2012, 1:35 PM), <http://www.reuters.com/article/2012/03/07/un-gays-idAFL5E8E778Z20120307>.

14. U.N. Human Rights Council Panel, *supra* note 4, at 6.

15. *Id.* at 7.

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considered beneath it either. Nobody should be excluded from the protection of international human rights law.”<sup>16</sup>

**B. VIOLENCE**

Governments and state officials in many countries continue to persecute LGBT individuals, as evidenced by the continued grants of asylum to refugees from around the world. Iraq continues to be a particularly harsh environment.<sup>17</sup> According to the Dutch Ministry of Foreign Affairs, “it was impossible to be openly gay anywhere in Iraq without being at serious risk.”<sup>18</sup> After initially halting the deportation of gay Iraqis, the Dutch government issued a blanket-order granting asylum upon proof of homosexuality.<sup>19</sup> Dutch gay rights organizations have expressed concern that some gay refugees might find it problematic “to prove something they’ve taught themselves to disguise out of fear for their entire life.”<sup>20</sup>

A Canadian court echoed similar concerns in overturning the denial of a gay Nigerian’s asylum claim.<sup>21</sup> The Nigerian claimant had produced letters from friends confirming his homosexuality and the fact that Nigerian police officers had investigated him for his “homosexual activities,” as well as letters from a boyfriend and photos showing them together.<sup>22</sup> Nevertheless, a senior immigration official denied the application after concluding that there was insufficient detail to substantiate his claim of being gay.<sup>23</sup> In overturning the decision, a federal judge cautioned immigration officials against relying on “stereotypical beliefs about how a gay person should behave.”<sup>24</sup> The judge noted, “the acts and behaviours which establish a claimant’s homosexuality are inherently private,” and “officers must be mindful of the inherent difficulties in proving that a claimant has engaged in any particular sexual activities.”<sup>25</sup> These cases highlight the need to develop guidelines and provide training that will allow immigration officers to adjudicate claims in ways that are not obsessively focused on sexual acts, but on sexual orientation and gender identity.

In the United States, two federal circuit court of appeals cases addressing asylum claims brought by LGBT individuals were of special interest. First, in *Patel v. Holder*, the Seventh Circuit denied refugee status to a gay man from India after noting that conditions in

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16. *Id.* at 8.

17. See Louise Dunne, *Gay Iraqi Asylum-Seekers Welcome in the Netherlands*, RADIO NETH. WORLDWIDE (July 13, 2012, 10:07 AM), <http://www.rnw.nl/english/article/gay-iraqi-asylum-seekers-welcome-netherlands>. According to the Office of the U.N. High Commissioner for Refugees, on World Refugee Day 2012, Iraq was the second biggest “producer” of refugees after Afghanistan. *New UN Report Shows Record 800,000 People Became Refugees in 2011*, U.N. NEWS CENTRE (June 18, 2012), <http://www.un.org/apps/news/story.asp?NewsID=42259#.USbOBOg1aCO> (pointing out that Iraq ranks second among refugee producing countries).

18. Dunne, *supra* note 17.

19. *Id.*

20. *Id.*

21. Douglas Quan, *Homosexual Refugee Claimant Allowed to Remain: Judge Overturns Immigration Officer’s Decision because it Devolved into Gay Stereotyping*, MONTREAL GAZETTE, July 12, 2012, at A11.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

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India had significantly improved with respect to the treatment of sexual minorities.<sup>26</sup> Second, in *Neri-Garcia v. Holder*, the Tenth Circuit considered whether Mexico's treatment of gay men had sufficiently improved to justify returning a victim of past persecution.<sup>27</sup> The court was impressed by the "mostly positive developments" outlined in the U.S. State Department Human Rights Reports (notably Mexico City's legalization of gay marriage and adoption by gay couples and a Mexican Supreme Court decision requiring recognition of valid same-sex marriages in states that had yet to legalize them) and concluded that petitioner could be removed.<sup>28</sup> In light of the murder of several Mexican LGBT activists in recent years, some have argued that the case sets a dangerous precedent by fostering an undue reliance on representations by the State Department that "everything is cool."<sup>29</sup>

In another asylum and immigration-related development related to LGBT persons in the United States, the National Immigrant Justice Center and Physicians for Human Rights released a study in 2012, which found that persons who identified as LGBT are often placed in "solitary confinement because [the] jail staff is unwilling to deal with their unique circumstances and/or because staff thinks solitary confinement as a 'protective' status for vulnerable populations."<sup>30</sup> Solitary confinement consists of keeping individuals "locked in their cells for 23 hours each day . . . completely isolated from all other detainees."<sup>31</sup> The study noted that "[t]he purpose of immigration detention is not to punish people who have violated immigration laws,"<sup>32</sup> and "the majority of immigration detainees have no criminal record . . . [aside from] minor crimes or traffic violations [obtained] often years before they are detained."<sup>33</sup> The use of solitary confinement for LGBT persons, even for short time periods, subjects them to "disastrous psychological and physiological consequences."<sup>34</sup> Among other recommendations, the study urges Congress to "prohibit the use of solitary confinement in immigration detention."<sup>35</sup>

European courts also addressed cases involving persecution. In *X v. Turkey*, the European Court of Human Rights (ECHR) ruled that Article III of the European Convention on Human Rights (the Convention), which prohibits torture and inhumane or degrading treatment, was violated when Turkish prison officials placed a gay inmate in solitary con-

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26. *Patel v. Holder*, 456 Fed. App'x 606, 608 (7th Cir. 2012) (discussing, among other things, how the court was influenced by a decision of the High Court of Delhi that declared a law criminalizing "consensual sex between adult homosexuals" unconstitutional).

27. *Neri-Garcia v. Holder*, 696 F.3d 1003 (10th Cir. 2012).

28. *Id.* at 1010.

29. Joe Palazzolo, *U.S. Court: Mexico Is Increasingly Accepting of LGBT Community*, WALL ST. J. L. BLOG (Oct. 3, 2012, 1:37 PM), [http://blogs.wsj.com/law/2012/10/03/u-s-court-mexico-is-increasingly-accepting-of-lgbt-community/?mod=WSJBlog&utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+wsj%2Fflaw%2Ffeed+%28WSJ.com%3A+Law+Blog%29](http://blogs.wsj.com/law/2012/10/03/u-s-court-mexico-is-increasingly-accepting-of-lgbt-community/?mod=WSJBlog&utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+wsj%2Fflaw%2Ffeed+%28WSJ.com%3A+Law+Blog%29) (quoting Neri-Garcia's attorney).

30. NAT'L IMMIGRANT JUSTICE CTR. & PHYSICIANS FOR HUMAN RIGHTS, *INVISIBLE IN ISOLATION: THE USE OF SEGREGATION AND SOLITARY CONFINEMENT IN IMMIGRATION DETENTION* 9 (2012), *available at* [http://www.immigrantjustice.org/sites/immigrantjustice.org/files/Invisible%20in%20Isolation-The%20Use%20of%20Segregation%20and%20Solitary%20Confinement%20in%20Immigration%20Detention.Sep%202012\\_7.pdf](http://www.immigrantjustice.org/sites/immigrantjustice.org/files/Invisible%20in%20Isolation-The%20Use%20of%20Segregation%20and%20Solitary%20Confinement%20in%20Immigration%20Detention.Sep%202012_7.pdf).

31. *Id.* at 3.

32. *Id.* at 8, 27.

33. *Id.* at 8.

34. *Id.* at 12.

35. *Id.* at 29.

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finement for almost a year because of his sexual orientation.<sup>36</sup> The inmate was completely isolated and forbidden to engage in outdoor activities; the conditions of his detention were found to be stricter, in certain respects, than those endured by individuals sentenced to life imprisonment.<sup>37</sup> The court rejected Turkey's argument that the prisoner was isolated out of an excess of concern for his safety.<sup>38</sup> The judgment has been described as "extremely significant" because it is the first time in the court's history that Article III has been invoked in connection with a claim based on sexual orientation discrimination.<sup>39</sup> Paul Johnson, author of *Homosexuality and the European Court of Human Rights*, provides some useful perspective: "homosexuals have been making Article III claims since 1955 about imprisonment on the grounds of sexual orientation, physical abuse whilst in confinement and forms of verbal abuse in various social contexts," yet the ECHR has remained notoriously reluctant to invoke Article III on their behalf.<sup>40</sup> Until now. *X v. Turkey* provides strong support for future claims that discrimination against individuals on the basis of their sexual orientation impairs the right to be free from inhumane or degrading treatment that is enshrined in Article III.<sup>41</sup>

The inhumane and degrading treatment to which members of the LGBT community have been subjected makes their desire to achieve greater visibility more threatening to those who wish to repress them. Unsurprisingly, homophobic governments continue to use their power to ban gay pride parades.<sup>42</sup> The legitimacy of such measures was challenged by a Moldovan LGBT-rights organization in a case filed with the ECHR, *Genderdoc-M v. Moldova*.<sup>43</sup> The Moldovan government agreed that there had been an interference with the applicant's right to freedom of peaceful assembly but argued that the interference was justified, in part because "98 [percent] of the Moldovan population was Christian Orthodox" and did not "tolerate" homosexuality.<sup>44</sup> The court rejected this justification, concluding that there had been a violation of Article 14 of the Convention because the Government's denial of the permit represented a form of sexual orientation discrimination.<sup>45</sup> The court suggested that it would go out of its way to protect LGBT equality, going so far as to note that when justifying distinct treatment based on "this

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36. *Affaire X c. Turquie [X v. Turkey]*, App. No. 24626/09, 7, 10-11 (Eur. Ct. H.R. Sept. 1, 2012), <http://hudoc.echr.coe.int/webservices/content/pdf/001-113389?TID=lhdtidibabi> (judgment available only in French).

37. See Press Release, Eur. Ct. Human Rights [ECHR], Turkish Authorities Should Not Have Placed a Prisoner in Solitary Confinement Because of His Sexual Orientation in Conditions That Did Not Respect Human Dignity 1, 2 (Sept. 10, 2012), [hudoc.echr.coe.int/webservices/content/pdf/003-4110556-4833050](http://hudoc.echr.coe.int/webservices/content/pdf/003-4110556-4833050).

38. *Id.* at 3 (noting that the court chastised authorities for failing to perform a sufficient assessment of the risk for the prisoner's safety and concluded that "the main reason for the applicant's total exclusion from prison life was his homosexuality").

39. Paul Johnson, *The Impact of X. v. Turkey: Homosexuality and the ECHR*, JURIST-HOTLINE (Oct. 9, 2012, 9:10 PM), <http://jurist.org/hotline/2012/10/paul-johnson-echr-turkey.php>.

40. *Id.*

41. *Id.* (suggesting that claims could be made that Article III is violated "every time a public official refers to homosexuality as a disease, claims that homosexuals are not fit to be parents[,] or draws parallels between homosexuality and child sexual abuse").

42. Daniel McLaughlin, *EU Criticises Serbia's Decision to Ban Gay Parade over Security Concerns*, IRISH TIMES (Oct. 6, 2012), <http://www.irishtimes.com/newspaper/world/2012/10/06/1224324956448.html>.

43. *Genderdoc-M v. Moldova*, App. No. 9106/06, 2 (Eur. Ct. H.R. Dec. 6, 2012), <http://hudoc.echr.coe.int/webservices/content/pdf/001-111394?TID=aiavpeltxw>.

44. *Id.* at 5.

45. *Id.* at 11.

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intimate and vulnerable sphere of an individual's private life, particularly weighty reasons need to be advanced before the Court to justify the measure complained of."<sup>46</sup> A senior advisor for the International Commission of Jurists applauded the decision, noting it "made clear that public disapproval of 'promoting homosexuality' may not be used as a basis to interfere with the exercise of fundamental human rights, including the right to freedom of assembly."<sup>47</sup>

C. HOMOPHOBIC LEGISLATION

Efforts to enact homophobic legislation, as well as continued enforcement of such laws against LGBT individuals, continued in 2012.

In Europe, a number of countries considered or passed laws seeking to prohibit "propaganda of homosexuality" and the promotion of tolerance for LGBT individuals.<sup>48</sup> The European Parliament responded with a clear majority adopting a resolution strongly condemning episodes of homophobia generally and homophobic laws specifically.<sup>49</sup> The resolution singled out for special condemnation a number of legislative measures adopted by or being considered in a number of Eastern European countries, including Russia, Ukraine, Moldova, Lithuania, Latvia, and Hungary.<sup>50</sup> It emphasized the fact that such laws "are already used to arrest and fine citizens, including heterosexual citizens" who are supportive of LGBT rights and regretted that they were being used to "legitimi[z]e homophobia and . . . violence."<sup>51</sup> The European Parliament also expressed "dismay [ ] that media outlets have demonstrably censored themselves, citizens are intimidated and fear expressing their opinions, and associations and companies using gay-friendly insignia, such as rainbows, may be prosecuted."<sup>52</sup>

These laws, particularly those in Russia, briefly dominated headlines in 2012 when two gay icons, Madonna and Lady Gaga, made pro-LGBT statements during their Russian concerts and were charged with illegal conduct.<sup>53</sup> The case against Madonna was eventually dismissed;<sup>54</sup> the status of Lady Gaga's case was undecided by the year's end. Nevertheless, these homophobic measures have succeeded in chilling the speech of more vulnerable members of the local population and have been linked to increases in violence

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46. *Id.*

47. Press Release, Int'l Comm'n of Jurists & ILGA-Eur., European Court: Moldova's Ban on LGBT Demonstration Violated Human Rights (Dec. 6, 2012), [http://ilga-europe.org/home/news/for\\_media/media\\_releases/european\\_court\\_moldova\\_s\\_ban\\_on\\_lgbt\\_demonstration\\_violated\\_human\\_rights](http://ilga-europe.org/home/news/for_media/media_releases/european_court_moldova_s_ban_on_lgbt_demonstration_violated_human_rights).

48. Press Release, ILGA-Eur., ILGA-Europe Extremely Concerned by Approval of Russian Law to Ban "Homosexual Propaganda" (Jan. 1, 2013), [http://ilga-europe.org/home/news/for\\_media/media\\_releases/russia\\_duma\\_draft\\_law](http://ilga-europe.org/home/news/for_media/media_releases/russia_duma_draft_law).

49. Press Release, European Parliament, Parliament Strongly Condemns Homophobic Laws and Violence in Europe (May 24, 2012), <http://www.europarl.europa.eu/news/en/pressroom/content/20120523IPR45696/html/Parliament-strongly-condemns-homophobic-laws-and-violence-in-Europe>.

50. Resolution on Fight Against Homophobia in Europe, EUR. PARL. DOC. RSP 2657 (2012).

51. *Id.*

52. *Id.*

53. See Andrew E. Kramer, *Madonna Faces Suit; Rightist Group Asserts Pop Star Broke Local Law at a Concert in Russia*, INT'L HERALD TRIB., Nov. 23, 2012, at 3; see also Liza Dobkina, *Lady Gaga Accused of Illegal Gay Rights Promotion in Russia*, REUTERS (Dec. 11, 2012, 2:07 PM), <http://www.reuters.com/article/2012/12/11/entertainment-us-russia-gaga-lawsuit-idUSBRE8BA14P20121211>.

54. Andrew E. Kramer, *Russian Judge Dismisses Suit Against Madonna*, N.Y. TIMES, Nov. 23, 2012, at A6.

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directed at LGBT individuals and their supporters.<sup>55</sup> Notwithstanding efforts by national and international organizations to have these measures repealed,<sup>56</sup> by year's end, a bill intended to criminalize "homosexual propaganda" throughout all of Russia was poised for victory,<sup>57</sup> and a similar measure had been introduced in Ukraine.<sup>58</sup>

Supporters of these measures argue that "gay activists are being supported by Western money and trying to destroy Russia."<sup>59</sup> Similar statements have fueled support for homophobic legislation in countries located on the African continent as well. In response, the European Parliament adopted a resolution condemning such measures, as well as specifically condemning violence against African lesbians.<sup>60</sup> Among the legislative measures singled out for condemnation by the European Parliament's resolution were laws that criminalize female homosexuality in twenty-seven African countries, as well as similar laws in thirty-eight African countries that criminalize male homosexuality.<sup>61</sup> In particular, the European Parliament expressed grave concern for laws in Mauritania, Sudan, and parts of Somalia and Nigeria where homosexuality is punishable by death, as well as Uganda, where renewed efforts were being made to pass legislation that would punish homosexuality with death.<sup>62</sup> Violence against African lesbians was singled out for condemnation because the Parliament recognized that "women who transgress social and cultural norms are liable to be labeled lesbian and risk becoming a target for male violent behavior and/or degrading treatment," and, this in turn "has the effect of repressing the expression of all women's sexuality and freedom of choice, including that of heterosexual women."<sup>63</sup> The resolution highlighted specific incidents of violence against African lesbians that occurred in 2012, including the arrests, beatings, and murders of women in Cameroon and Liberia; death threats against lawyer Alice Nkom for her defense of people accused of homosexuality; the torture and murders of gay activists in South Africa; as well as efforts to outlaw numerous LGBT organizations in Nigeria and Uganda.<sup>64</sup> The resolution included a number of practical measures intended to improve the plight of sexual minorities in Africa and noted with approval "the fact that some African countries, including Cape Verde, the Central African Republic, Gabon, Guinea-Bissau, Malawi, Mauritius, Rwanda, São Tomé

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55. Miriam Elder, *Gang Attack Blamed on Russia's Ban on "Gay Propaganda": Assault in Moscow Club Heightens Concern as Rights Groups Accuse Police of Tolerating Attacks*, THE GUARDIAN (Nov. 4, 2012, 1:33 PM), <http://www.guardian.co.uk/world/2012/nov/04/gang-attack-russia-gay>.

56. The city of Milan, Italy, for example, cut its ties to former sister-city St. Petersburg, Russia, in protest of the latter's homophobic law. Nick Squires & Tom Parfitt, *Milan Severs Twin City Ties with St Petersburg over 'Homosexual Propaganda' Ban*, THE TELEGRAPH (Nov. 29, 2012, 3:47 PM), <http://www.telegraph.co.uk/news/worldnews/europe/russia/9712066/Milan-severs-twin-city-ties-with-St-Petersburg-over-homosexual-propaganda-ban.html>.

57. Miriam Elder, *Russian Parliament to Consider Federal Anti-Gay Law*, THE GUARDIAN (Nov. 30, 2012, 6:13 AM), <http://www.guardian.co.uk/world/2012/nov/30/russian-parliament-federal-anti-gay-law>.

58. Associated Press, *Ukraine Bill Proposes Prison For Positive Gay Depictions*, N.Y. TIMES, Jul. 24, 2012, at A9.

59. Shaun Walker, *Gay Rights? That's Europe's Problem*, THE INDEPENDENT, Mar. 31, 2012, available at 2012 WLNR 6848151.

60. Resolution on Violence Against Lesbian Women and the Rights of Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) Persons in Africa, EUR. PARL. DOC. RSP 2701 (2012) (includes the text of the resolution).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

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and Principe, South Africa and Swaziland have made known their opposition to the criminalization of homosexuality . . . or have pledged to decriminalize homosexuality.”<sup>65</sup>

## II. Equality and Justice

As Martin Luther King, Jr., was fond of repeating, “the arc of the moral universe is long, but it bends towards justice.”<sup>66</sup> Individuals have their own moral arc as well, and in 2012, this was perhaps best reflected in U.S. President Barack Obama’s evolution on the issue of same-sex marriage. In May, after years in which he repeatedly expressed the belief that marriage should be restricted to unions between a man and a woman, he became the first U.S. President to endorse marriage equality.<sup>67</sup> Other victories, outlined below, confirm that, notwithstanding continued persecution and discrimination, “history is on our side.”<sup>68</sup>

### A. MARRIAGE EQUALITY

As of December 2012, same-sex marriages are recognized in Argentina, Belgium, Canada, Denmark, Iceland, the Netherlands (and the Caribbean island of Saba), Norway, Portugal, South Africa, Spain, Sweden,<sup>69</sup> and Mexico (where same-sex marriage is available in the Federal District, i.e., Mexico City, and in the states of Oaxaca and Quintana Roo; under Mexican law other states in Mexico must recognize same-sex marriages performed in those states).<sup>70</sup>

Progress towards marriage equality continues elsewhere. Same-sex marriage is rapidly becoming legal throughout all of Brazil. In 2011, Brazil’s Supreme Federal Court ruled that same-sex couples were entitled to recognition of their civil unions.<sup>71</sup> This court decision created a legal foundation for the recognition of same-sex marriages, and on December 7, 2011, the Corregedoria Geral de Justiça of the State of Alagoas ordered the civil registry of Alagoas to issue marriage licenses to same-sex couples in the same way as other marriages.<sup>72</sup> In November and December of 2012, three other Brazilian states also began

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65. *Id.*

66. See *How Long, Not Long (AKA Our God is Marching On)*, MLK ONLINE, <http://www.mlkonline.net/ourgod.html> (last visited Feb. 28, 2013).

67. See Mackenzie Weinger, *Evolve: Obama Gay Marriage Quotes*, POLITICO (May 9, 2012, 4:24 PM), <http://www.politico.com/news/stories/0512/76109.html> (highlighting President Obama’s evolution on the issue as reflected in his own words).

68. *But cf.* Proclamation No. 8685, 76 Fed. Reg. 32,853 (May 31, 2011) (“While progress has taken time, our achievements in advancing the rights of LGBT Americans remind us that history is on our side, and that the American people will never stop striving toward liberty and justice for all.”).

69. *Gay Marriage Legal Nationwide in 10 Countries Around the World*, HUFFINGTON POST (May 10, 2012, 12:05 PM), [http://www.huffingtonpost.com/2012/05/09/gay-marriage-legal-world\\_n\\_1504054.html#slide=more225388](http://www.huffingtonpost.com/2012/05/09/gay-marriage-legal-world_n_1504054.html#slide=more225388).

70. See Benjamin C. Rosen et al., *Mexico*, 1 ABA/SIL YIR (n.s.) \_\_\_\_ (2013).

71. Tris Reid-Smith, *Brazil Takes First Steps to Legalizing Gay Marriage*, GAY STAR NEWS (May 25, 2012), <http://www.gaystarnews.com/article/brazil-takes-first-steps-legalizing-gay-marriage250512>.

72. Provimto No. 40, de 6 de Dezembro de 2011, DIÁRIO DE JUSTIÇA DO ESTADO DE ALAGOAS [D.J.A.L.] de 7.12.2011 (Braz.).

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to issue licenses for same-sex marriage: Bahia,<sup>73</sup> Piauí,<sup>74</sup> and São Paulo.<sup>75</sup> Still, other states reportedly recognize and have registered same-sex marriages on a case-by-case basis with a judge deciding whether the marriage should be granted.<sup>76</sup> One same-sex couple that had a civil union in the United Kingdom had it converted to a marriage in Brazil.<sup>77</sup>

In the United States, the Associated Press recognized the debate on same-sex marriage as one of the top ten news stories of 2012.<sup>78</sup> The Obama administration refused to defend the constitutionality of the Defense of Marriage Act (DOMA), and both the Vice-President and the President repeatedly stated that their belief that civil unions are not equivalent substitutes for marriage and fail to offer equal protection and benefits for same-sex couples.<sup>79</sup> Also in 2012, Immigration and Customs Enforcement (ICE) issued guidance to its field officers that even though federal law under DOMA does not allow formal recognition of any same-sex marriages, “LGBT families ties should be considered in extending prosecutorial discretion to stop family separations.”<sup>80</sup>

As of January 1, 2013, same-sex marriages are performed in nine U.S. states: Connecticut, Iowa, Maine,<sup>81</sup> Maryland, Massachusetts, New Hampshire, New York, Vermont, and Washington State, as well as Washington, D.C.<sup>82</sup> Same-sex marriages are also legal within the Suquamish Indian tribe in Washington [S]tate and within the Coquille Indian tribe in

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73. Michael K. Lavers, *Brazil's Most Populous State to Allow Same-Sex Marriage*, WASH. BLADE (Dec. 21, 2012), <http://www.washingtonblade.com/2012/12/21/brazils-most-populous-state-to-allow-same-sex-marriage/>.

74. On December 14, 2012, the Court of Piauí started granting same-sex couples marriage licenses through all notaries statewide. Provimento No. 24 de 14 de dezembro de 2012, DIÁRIO DE JUSTIÇA DO PIAUÍ [D.J.P.I.] de 17.12.2012 (Braz.); see also *Corregedoria do TJ Regulamenta Casamento Gay no Piauí* [Magistrate TJ Regulates Gay Marriage in Piauí], Diário de Teresina (Dec. 15, 2012), <http://diariodeteresina.com.br/chamadas/corregedoria-do-tj-regulamenta-casamento-gay-no-piaui/#.UOnK0Y5OTwx>.

75. Lavers, *supra* note 73; see also *Tribunal Divulga Norma que Regulamenta Casamento Gay em SP* [Court Announces Standard that Regulates Gay Marriage in SP], G1 (Dec. 18, 2012, 8:20 PM), <http://g1.globo.com/sao-paulo/noticia/2012/12/tribunal-divulga-norma-que-regulamenta-casamento-gay-em-sp.html>.

76. Helena de Moura, *Same-Sex Couples in Brazil Wait and Hope*, CNN (May 22, 2011, 1:01 PM), <http://www.cnn.com/2011/WORLD/americas/05/21/brazil.gay.marriage/index.html>.

77. See Ana Cristina Rosa, *Reconhecido Casamento Entre Homens Registrado no Exterior* [Recognized Marriage Between Men Registered Abroad], JUSBRASIL (June 4, 2012), <http://tj-rs.jusbrasil.com.br/noticias/3140990/reconhecido-casamento-entre-homens-registrado-no-exterior>.

78. David Crary, *Newton Shootings Top Story of 2012: AP Editors Poll*, HUFFINGTON POST (Dec. 20, 2012, 4:29 PM), [http://www.huffingtonpost.com/2012/12/22/newtown-shootings-top-story-2012\\_n\\_2349973.html](http://www.huffingtonpost.com/2012/12/22/newtown-shootings-top-story-2012_n_2349973.html) (listing gay marriage at number nine in the poll).

79. See Mackenzie Weinger, *Evolve: Obama Gay Marriage Quotes*, POLITICO (May 9, 2012, 4:24 PM), [http://www.politico.com/news/stories/0512/76109\\_Page2.html#ixzz2JJM04joL](http://www.politico.com/news/stories/0512/76109_Page2.html#ixzz2JJM04joL) (“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.” - May 9, 2012, as [P]resident, in an interview with Robin Roberts of ABC News.”).

80. Steve Rails, *12 in 12*, IMMIGR. EQUALITY BLOG (Dec. 28, 2012), <http://immigrationequality.org/2012/12/12-in-12/>.

81. See, e.g., *A Festive Mood in Maine as Same-Sex Marriage Becomes Legal*, N.Y. TIMES, Dec. 30, 2012, at A20 [hereinafter *A Festive Mood*]. Like other states that recognize same-sex marriage, Maine will also recognize same-sex marriages performed in other states. *Id.*; see also Daniel Lovering, *Maine Greets Gay Marriage with Weddings at 12:01 a.m.: State 1 of 3 Where Voters Passed Law on Election Day*, CHI. TRIB., Dec. 30, 2012, at 33.

82. Maggie Astor, *Illinois Clergy Members Support Same-Sex Marriage in Letter Signed by 260*, N.Y. TIMES, Dec. 24, 2012, at A14.

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Oregon.<sup>83</sup> California recognizes same-sex marriages performed between the dates of June 16, 2008, and November 8, 2008 (before an amendment to the California Constitution barred further same-sex marriages).<sup>84</sup>

Significantly, several States (Maine,<sup>85</sup> Maryland, and Washington) adopted same-sex marriage by popular vote in 2012, the first time that marriage equality was achieved through the ballot box rather than by court decision or state legislative enactment.<sup>86</sup> Although the idea of allowing popular majorities to decide whether minority groups should be able to enjoy fundamental rights is problematic, one result of these elections is that “opponents will no longer be able to argue that the movement for marriage equality is something imposed by radical judges and legislators, who are out of touch with the popular will.”<sup>87</sup> A fourth state, Minnesota, rejected a voter ballot initiative to amend the state’s constitution to ban same-sex marriage.<sup>88</sup> Thirty-one U.S. states have passed similar amendments restricting marriage to opposite-sex couples.<sup>89</sup>

In December 2012, the U.S. Supreme Court announced that it would take up the issue of same-sex marriage by reviewing *Hollingsworth v. Perry*<sup>90</sup> and *United States v. Windsor*.<sup>91</sup> In *Hollingsworth*, the Court will examine two issues: (1) “whether the Equal Protection Clause of the Fourteenth Amendment prohibits California from retracting state constitutional law that had allowed same-sex couples to marry;”<sup>92</sup> and (2) whether third-party interveners had standing to defend the validity of Proposition 8 (the ballot-initiative banning same-sex marriage) after the State refused to defend it.<sup>93</sup> In *Windsor*, the Court will decide whether the denial of federal benefits to same-sex couples under DOMA, which defines marriage as a union between a man and a woman, violates the Fifth Amendment’s Due Process Clause, and will also address standing issues related to the U.S. Government’s refusal to defend the constitutionality of DOMA.<sup>94</sup> Although decisions are not

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83. Jerry Large, *With Justice and Marriage For All*, SEATTLE TIMES, Jan. 23, 2012, at B1; *A Snapshot of Same-Sex Marriage Around the World*, INT’L L. PROF. BLOG (Dec. 23, 2012), [http://lawprofessors.typepad.com/international\\_law/2012/12/same-sex-marriage.html](http://lawprofessors.typepad.com/international_law/2012/12/same-sex-marriage.html).

84. In August 2010, a federal district court declared unconstitutional the California law banning same-sex marriage. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2011). The Ninth Circuit upheld that decision on February 7, 2012. *Perry v. Brown*, 671 F.3d 1052 (9th Cir. 2012). The case was appealed to the U.S. Supreme Court on July 31, 2012, which granted review on December 7, 2012. *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012) (mem.). The Supreme Court is expected to issue a final decision by June 2013.

85. In Maine, the state legislature had previously approved same-sex marriage, but a statewide referendum in 2009 overturned that law, disappointing couples that had made wedding plans. *A Festive Mood*, *supra* note 81. Supporters then collected enough signatures to place same-sex marriage on the ballot in Maine, where it was “easily approved” in 2012. *Id.*

86. Editorial, *A Big Leap for Marriage Equality*, N.Y. TIMES, Nov. 8, 2012, at A22.

87. *Id.*

88. *Id.*

89. Loving, *supra* note 81.

90. *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012) (mem.).

91. *United States v. Windsor*, 133 S. Ct. 786 (2012) (mem.).

92. Marty Lederman, *Understanding Standing: The Court’s Article III Questions in the Same-Sex Marriage Cases (I)*, SCOTUSBLOG (Jan. 17, 2013, 11:05 AM), <http://www.scotusblog.com/2013/01/understanding-standing-the-courts-article-iii-questions-in-the-same-sex-marriage-cases-i/>.

93. *Id.*

94. *Id.*

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expected until well into 2013, some commentators are already speculating that the Court may use the standing issue to avoid a holding on the merits.<sup>95</sup>

Although not fully comparable to marriage, some U.S. states continue to provide same-sex couples with the option of entering into civil unions. In 2012, Delaware and Hawaii joined this select group.<sup>96</sup> Currently, same-sex civil unions are also available in Illinois, New Jersey, and Rhode Island.<sup>97</sup> Civil unions were previously performed in Connecticut, New Hampshire, and Vermont, but no new civil unions were allowed after these states began performing same-sex marriages.<sup>98</sup>

B. TRANSGENDER EQUALITY

LGBT advocates also made significant strides towards transgender equality during the course of 2012. Some of the most surprising, and significant, developments came from areas of the world not usually associated with liberal attitudes towards sexual minorities.

Nepal, for example, legally recognized a third gender category in 2007 when its Supreme Court ruled that sexual and gender minorities were entitled to full rights.<sup>99</sup> Implementing the Court's mandate to do away with all discriminatory laws has proved problematic at times, but the country continues to move in the right direction.<sup>100</sup> In 2012, the Home Ministry began issuing citizenship certificates that allow transgender individuals to be listed as "others."<sup>101</sup> Nepal also facilitated the transition of a post-operation transgender this year when, for the first time, it allowed new citizenship papers to be issued reflecting the reassignment.<sup>102</sup>

In Pakistan, the Supreme Court continued its amazing work of championing equality for transgendered individuals. Building on earlier court rulings that recognized the right of individuals to have their chosen gender reflected on national identity cards,<sup>103</sup> the Su-

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95. These standing issues are the subjects of a series of insightful posts by Marty Lederman, only the first of which is cited above, but all of which are well worth reading. For follow-up posts, see *Archive of Posts by Marty Lederman*, SCOTUSBLOG, <http://www.scotusblog.com/author/marty-lederman> (last visited Feb. 26, 2013).

96. Josh Levs, *Two More States Allow Same-Sex Civil Unions*, CNN (Jan. 2, 2012, 5:25 AM), <http://www.cnn.com/2012/01/01/us/civil-unions>.

97. *Id.*

98. See *Civil Unions & Domestic Partnership Statutes*, NAT'L CONF. OF ST. LEGISLATURES, <http://www.ncsl.org/issues-research/human-services/civil-unions-and-domestic-partnership-statutes.aspx> (last updated Feb. 2013).

99. Michael Bochenek & Kyle Knight, *Establishing a Third Gender Category in Nepal: Process and Prognosis*, 26 EMORY INT'L L. REV. 11, 11 (2012).

100. See Kyle Knight, *Dividing by Three: Nepal Recognizes a Third Gender*, HUFFINGTON POST (Feb. 27, 2012, 7:16 PM), [http://www.huffingtonpost.com/kyle-knight/nepal-third-gender\\_b\\_1303562.html](http://www.huffingtonpost.com/kyle-knight/nepal-third-gender_b_1303562.html).

101. Utpal Parashar, *Nepal to Recognize LGBTIs as 'Others'*, HINDUSTAN TIMES (May 24, 2012), <http://in.news.yahoo.com/nepal-recognize-lgbtis-others-183000762.html>.

102. *Govt Okays Citizenship Rights to Transsexual*, NEPAL MOUNTAIN NEWS (Sept. 28, 2012), <http://www.nepalmountainnews.com/cms/2012/09/28/govt-okays-citizenship-rights-to-transsexual/>.

103. Rabail Baig, *A First For Pakistan's Third Gender*, FOREIGN POL'Y (Mar. 30, 2012, 12:02 PM), [http://afpak.foreignpolicy.com/posts/2012/03/30/a\\_first\\_for\\_pakistans\\_third\\_gender](http://afpak.foreignpolicy.com/posts/2012/03/30/a_first_for_pakistans_third_gender) (highlighting the advocacy efforts of Dr. Mohammad Aslam Khaki, an Islamic jurist, and the courage of Chief Justice Iftikhar Muhammad Chaudhry).

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preme Court went further and ruled that transgender individuals are entitled to all the rights guaranteed to every citizen under the country's Constitution.<sup>104</sup>

In neighboring India, the Bombay High Court sent a positive message to transgender individuals when it ruled that the parents of a twenty-one year-old could not block their child's gender reassignment.<sup>105</sup> The family had threatened legal action against the doctor who had agreed to perform the surgery, leading to a highly publicized court showdown.<sup>106</sup> Doctors noted that in addition to leading to a positive resolution for the transgender individual, the case had inspired many others to overcome cultural taboos or social isolation and seek advice regarding reassignment surgery.<sup>107</sup>

U.S. courts also issued opinions that will have a lasting impact on transgender equality. In *Glenn v. Brumby*, the Eleventh Circuit held "when a defendant, while acting under color of state law, discriminates on the basis of a person's nonconformity to a gender stereotype, the conduct may constitute sex-based discrimination in violation of the Equal Protection Clause."<sup>108</sup> Some commentators have suggested that *Brumby's* greatest impact may be felt in Title VII cases in light of the "as-yet-unresolved question . . . whether firing someone because she is transgender constitutes a firing 'on the basis of sex' within the language of Title VII."<sup>109</sup> An initial attempt by the U.S. Equal Employment Opportunity Commission (EEOC) to use *Brumby* in a Title VII context failed when the trial court concluded that the gender stereotype theory required evidence of an obvious gender nonconformity missing in the case before it.<sup>110</sup>

Another opinion that may prove influential is *Kosilek v. Spencer*, in which a district court concluded that the Massachusetts Department of Corrections (Department) violated the Eighth Amendment's prohibition against cruel and unusual punishment when it refused to provide an inmate with reassignment surgery.<sup>111</sup> In an unusual twist, the surgery had been prescribed by the Department's own doctors, who viewed it as "the only form of medical care" available to treat the prisoner's severe gender dysphoria.<sup>112</sup> Predictably, the opinion generated considerable controversy for a number of reasons, including the fact that the prisoner was a convicted murderer.<sup>113</sup> Nevertheless, commentators were quick to point out that the State's decision to appeal was both costly and unwise.<sup>114</sup>

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104. Qamar Zaman, *Ensuring Equality: Transgenders Equal Citizens of Pakistan*, RULES SC, EXPRESS TRIB. (Sept. 26, 2012), <http://tribune.com.pk/story/442516/ensuring-equality-transgenders-equal-citizens-of-pakistan-rules-sc/>.

105. Malathi Iyer & Prathiba Masand, *After Bidhan Baruah Battle, Many Seek Opinion About Sex-Change Operation*, TIMES INDIA (May 13, 2012, 3:34 AM) [http://articles.timesofindia.indiatimes.com/2012-05-13/india/31689540\\_1\\_surgery-plastic-surgeon-gender](http://articles.timesofindia.indiatimes.com/2012-05-13/india/31689540_1_surgery-plastic-surgeon-gender).

106. *Id.*

107. *Id.*

108. E.E.O.C. v. McPherson Cos., Inc., \_\_\_ F. Supp. 2d \_\_\_, No. 2:10-cv-02627-WMA, 2012 WL 5511011, at \*7, (N.D. Ala. Nov. 14, 2012) (citing *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011)).

109. David S. Kemp, *Sex Discrimination Claims Under Title VII and the Equal Protection Clause: The Eleventh Circuit Bridges the Gap*, JUSTIA (Mar. 19, 2012), <http://verdict.justia.com/2012/03/19/sex-discrimination-claims-under-title-vii-and-the-equal-protection-clause>.

110. McPherson Cos., Inc., 2012 WL 5511011, at \*7.

111. *Kosilek v. Spencer*, C.A., No. 00-12455-MLW, 2012 WL 3799660, at \*44 (D. Mass. Sept. 4, 2012).

112. *Id.* at \*1.

113. *Id.* at \*50.

114. Milton J. Valencia, *Challenges to Inmates' Gender Costly to Bay State*, BOS. GLOBE (Dec. 31, 2012), <http://www.bostonglobe.com/metro/2012/12/31/state-doc-could-pay-millions-legal-fees-for-gender-identity-disor>

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A number of other countries also moved towards transgender equality during 2012. Iceland adopted comprehensive legislation with the stated purpose “to ensure that transgendered people receive equal treatment before the law, in harmony with human rights.”<sup>115</sup> Argentina passed a gender identity law that allows individuals, including those under the age of eighteen, to obtain free coverage for gender reassignment surgery under the country’s health care plan and facilitates changes to one’s legal gender without evidence of a medical disorder or reassignment surgery.<sup>116</sup> The new legislation has been described as “deeply progressive” and “cutting edge” by transgender advocates, although some transgender individuals counter that the law fails to recognize trans-identity inasmuch as it limits an individual’s choice to elect between male and female identities, rather than allowing for recognition of a third gender.<sup>117</sup> The fact that the measure passed by an overwhelming majority (fifty-five to zero) and that the nation’s president welcomed the new law by underscoring the fundamental importance of safeguarding minority rights is a sure sign of progress and sets a new standard that other countries and politicians will hopefully emulate in future years.<sup>118</sup>

C. FAMILY LAW

Although marriage equality was at the center of this year’s spotlight, other areas of LGBT family law warrant at least a brief mention. Australia adopted new rules that grant same-sex couples equal rights with respect to paid parental leave.<sup>119</sup> A high court in Northern Ireland ruled that it was unlawful to ban gay couples from adopting.<sup>120</sup> The Colombian Constitutional Court allowed a gay man from the United States to adopt a Colombian child over the objections of the country’s Family Welfare Institute, even though gay adoption is not legal in Colombia.<sup>121</sup> The Court concluded that the government agency had “taken for granted that the petitioner’s sexual orientation would have affected the outcome of the adoption process or generated a threat to the rights of chil-

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der-treatment/mE0O6TVIzESb57wXQkfUUI/story.html; see also Kelly Heard, *Murderer’s Sex Change: Cruel, or Just Unusual?*, U. MIAMI L. REV. BLOG (Sept. 11, 2012), <http://lawreview.law.miami.edu/murderers-sex-change-cruel-unusual/> (quoting various legal experts for the proposition that reassignment surgery is a “legitimate life-saving medical treatment”).

115. Paul Fontaine, *Law Protecting Transgender Rights Approved*, REYKJAVÍK GRAPEVINE (June 13, 2012), <http://www.grapevine.is/News/ReadArticle/Law-Protecting-Transgender-Rights-Approved>.

116. Emily Schmall, *Transgender Advocates Hail Law Easing Rules in Argentina*, N.Y. TIMES, May 25, 2012, at A8.

117. *Id.*

118. *Argentina Gender Rights Law: A New World Standard*, TULSA WORLD, May 11, 2012, at A6.

119. *Gay Parents in Australia Now Eligible for Paid Parental Leave, Same Rights As Heterosexuals*, HUFFINGTON POST (Oct. 1, 2012, 7:19 PM), [http://www.huffingtonpost.com/2012/10/01/gay-parents-in-australia-paid-parental-leave\\_n\\_1929857.html](http://www.huffingtonpost.com/2012/10/01/gay-parents-in-australia-paid-parental-leave_n_1929857.html).

120. *Poots To Challenge Gay Adoption Legal Move*, BBC NEWS (Oct. 18, 2012, 8:01 PM), <http://www.bbc.co.uk/news/uk-northern-ireland-19991196>.

121. “*I Decided To Speak*” - *An American’s Fight for Gay Adoption Rights in Colombia*, WORLDCRUNCH (May 24, 2012, 1:55 PM), <http://www.worldcrunch.com/i-decided-speak-americans-fight-gay-adoption-rights-colombia/culture-society/i-decided-to-speak-an-american-s-fight-for-gay-adoption-rights-in-colombia/c3s5443/>.

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dren, without ever explaining the reasons on which they based their conclusions.”<sup>122</sup> The ruling is encouraging given that the Constitutional Court is also considering a pending case brought by a Colombian lesbian couple challenging the legality of the ban.<sup>123</sup>

In a landmark ruling, the Inter-American Court of Human Rights condemned Chile for denying a lesbian judge custody of her three daughters.<sup>124</sup> The court “found that Chile not only violated [Judge] Atala’s right to equality and non-discrimination” but also affirmed “for the first time in its history that sexual orientation and gender identity are protected categories and such discrimination violates international law.”<sup>125</sup> Jessica Stern, Director of Programs at the International Gay and Lesbian Human Rights Commission (IGLHRC), noted that the decision was important because it

set a transformative precedent to which every signatory to the Inter-American Convention — 24 countries throughout the Americas — is bound. Based on both American regional standards and international jurisprudence, the Court has ruled that LGBT people must live free from discrimination, whether as parents or in any other aspect of their lives.<sup>126</sup>

**D. LGBT YOUTH AND THE FUTURE**

Although progress towards equality is being made on many fronts, sexual minorities are still far from achieving true equality. LGBT youth are the most vulnerable members of our community and certainly the least protected inasmuch as they lack the autonomy and power to act in their best interests. In 2012, some notable attempts were made to safeguard this population through various legislative measures.

California is in the vanguard with respect to protecting LGBT youth. In 2012, several new laws went into effect that will impact the quality of life for non-gender conforming and questioning children. “Seth’s Law,” named after a thirteen-year-old who committed suicide after enduring years of anti-gay bullying, requires schools to strengthen their anti-bullying policies and expressly requires personnel to take immediate action when they witness any form of bullying, including bullying based on sexual orientation, gender identity, and gender expression.<sup>127</sup> California’s public schools also will now be required to teach students about the contributions of LGBT individuals to U.S. history, and colleges

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122. Christian Leonard, *Colombian Court Allows Adoption by Gay Father*, COLOM. REPORTS (May 23, 2012, 6:37 AM), <http://colombiareports.com/colombia-news/news/24172-colombian-court-grants-custody-to-homosexual-father.html>.

123. Juan Forero, *Colombia Legal Challenge Could Set Precedent on Gay Couples’ Familial Rights in Latin America*, WASH. POST, Aug. 12, 2012, at A10.

124. Simon Romero, *Chile: Landmark Gay Rights Ruling*, N.Y. TIMES, Mar. 22, 2012, at A11.

125. Press Release, Int’l Gay & Lesbian Hum. Rts. Comm’n, LGBT Rights Upheld in Historic Inter-American Court Ruling (Mar. 22, 2012), <http://www.iglhrc.org/cgi-bin/iowa/article/pressroom/pressrelease/1502.html>.

126. *Id.* IGLHRC, along with a number of other organizations, co-authored an amicus brief in the case. For the text of the brief, see Brief for Amnesty International as Amici Curiae Supporting Karen Atala, Karen Atala v. Chile, Case No. 12.502 (Inter-Am. Ct. H.R. 2012), available at <http://www.iglhrc.org/binary-data/ATTACHMENT/file/000/000/563-1.pdf>.

127. *New Tools to Prevent Bullying in California Schools*, ACLU S. CAL., <http://www.aclu-sc.org/issues/lgbt-equality/student-rights-project/new-tools-to-prevent-bullying-in-california-schools/> (last visited Feb. 27, 2013).

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and universities will be required to designate a point-person for LGBT concerns, as well as collect data regarding sexual orientation and gender identity in order to improve conditions on campus for sexual minorities.<sup>128</sup>

Another California measure, this one banning conversion therapy performed on minors, was scheduled to go into effect at the beginning of 2013 but was put on hold by the Ninth Circuit after two district courts issued conflicting opinions with respect to its constitutionality.<sup>129</sup> In a position paper published in May, the Pan American Health Organization, the oldest public health organization in the world, concluded “[s]ervices that purport to ‘cure’ people with non-heterosexual sexual orientation lack medical justification and represent a serious threat to the health and well-being of affected people.”<sup>130</sup> The position paper recommended that governments everywhere denounce conversion therapy and sanction those who offer such services.<sup>131</sup> Some governments are taking this recommendation seriously. In Ecuador, for example, the government followed up on complaints filed by LGBT organizations regarding the existence of clinics where LGBT individuals were being tortured, raped, and victimized in connection with so-called curative therapies.<sup>132</sup> Ecuador’s Ministry of Health denounced conversion therapy as a criminal practice and “in direct conflict with the individual freedoms” of the country’s citizens; it also vowed to eradicate abusive practices “such as the supposed treatment of homosexuality.”<sup>133</sup> The current Minister of Health is openly lesbian Carina Vance; under her leadership, three torture clinics were shut down, and dozens of women were saved.<sup>134</sup>

It is ironic that advocates of conversion therapy in the United States are seeking to halt legislative bans by invoking their rights under the Constitution. As Robert Pyles, president of the American Psychoanalytic Association, points out, “[t]elling a person that his or her sexual orientation is deviant, shameful or wrong in a therapeutic setting is not free speech; it is malpractice.”<sup>135</sup> Nonetheless, it has to be viewed as a positive sign that, as 2012 ended, it was those on the wrong side of history who found it necessary to plead their case before the court. If this momentous year had to be summarized in one sentence, then I can think of no better one than this: “There are dark shadows on the earth, but its lights are stronger in the contrast.”<sup>136</sup>

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128. Larry Conley, *New California Laws Protect LGBT Residents*, AMER. CITY & COUNTY (Jan. 24, 2012), <http://americacityandcounty.com/new-laws/new-california-laws-protect-lgbt-residents>.

129. *California: State Ban on Therapy to Change Gays is Put on Hold*, N.Y. TIMES, Dec. 21, 2012, at A17.

130. Press Release, Pan Am. Health Org., “Therapies” to Change Sexual Orientation Lack Medical Justification and Threaten Health (May 17, 2012), [http://new.paho.org/hq/index.php?option=com\\_content&view=article&id=6803&Itemid=1926](http://new.paho.org/hq/index.php?option=com_content&view=article&id=6803&Itemid=1926).

131. *Id.*

132. Peter Cassels, *Ex-Gay Movement on the Rise in Latin America*, EDGE BOS. (Feb. 21, 2012), <http://www.edgeboston.com/index.php?ch=news&sc=international&sc3=&id=130139&pf=1>.

133. Jason St. Amand, *Ecuadorian “Ex-Gay Torture Clinics” Shut Down Thanks to E-Campaign*, EDGE BOS. (Jan. 25, 2012), <http://www.edgeboston.com/index.php?ch=news&sc=international&sc2=news&sc3=&id=129222>.

134. *Rights Groups Hail Ecuador’s Crackdown on Lesbian ‘Torture Clinics’*, NBC NEWS (Jan. 25, 2012), [http://worldnews.nbcnews.com/\\_news/2012/01/25/10237126-rights-groups-hail-ecuadors-crackdown-on-lesbian-torture-clinics](http://worldnews.nbcnews.com/_news/2012/01/25/10237126-rights-groups-hail-ecuadors-crackdown-on-lesbian-torture-clinics).

135. Robert L. Pyles, Letter to the Editor, *Gay “Conversion Therapy” Ban*, N.Y. TIMES (Dec. 13, 2012), <http://www.nytimes.com/2012/12/14/opinion/gay-conversion-therapy-ban.html>.

136. CHARLES DICKENS, *THE PICKWICK PAPERS* 752 (Penguin Classics ed., 1999) (1836-37).

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