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The Global Struggle for LGBTQ Rights: Legal, Political, and Social Dimensions

Macarena Saez

American University Washington College of Law, msaez@wcl.american.edu

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SYMPOSIUM
**THE GLOBAL STRUGGLE FOR LGBTQ RIGHTS:
LEGAL, POLITICAL AND SOCIAL DIMENSIONS**

On Friday, April 10, 2015, activists, lawyers and scholars gathered at Rutgers Law School in Newark, New Jersey to reflect on their work in the LGBTQ movement, discuss the movement's progress and share strategies for the future. The conference brought scholars from all areas of the academe together with activists to discuss the movement on a global level. We were excited to open the conference with welcoming remarks from Mariela Castro Espin, Director of the Cuban National Center for Sex Education (CENESEX) and to close the conference with a keynote address from Manuel Vázquez Sejjido, Head of the Legal Advisory Group, Cuban National Center for Sex Education (CENESEX), and Coordinator of the Legal Services Orientation Institution.

CENESEX's work to eradicate homophobia and transphobia in Cuba and other countries in the developing world is significant. I learned about CENESEX several years ago when a Latina law student, who was active in the LGBTQ movement, joined our law school group travelling to Havana and encouraged us to visit. My students and I were immediately drawn to and excited by their work. This conference took place at an important time. It occurred just prior to President Obama's historic steps to normalize relations with Cuba and, months before the U. S. Supreme Court's historic decision in *Obergefell v. Hodges*, 576 U.S. ____ (2015).

There are many people to thank for the success of this conference. However, it certainly would not have been possible if not for the law school's support and continuing educational relationship with CENESEX and the National Association of Cuban Jurists. As always, the Law School staff did everything we asked of them and everything we forgot to ask but had to be done, including maintaining an open telephone line to Havana and arranging last minute passage for our Cuban guest. Rutgers Law students, especially the Staff of the Women's Rights Law Reporter, worked hard to ensure this conference was a success.

I must thank the staff at the U.S. Interests Section (now the US Embassy) who went above and beyond to ensure that our keynote speaker was permitted to enter the United States which ONLY happened because of their amazing efforts! I am also grateful to the leading and emerging scholars and activists who shared their work with us, enriching the lives of those in attendance. Finally, the conference took shape from the efforts of the conference organizing committee. Each of the committee members helped to mold this event and give it important substance. The committee members were: Nicole Auffant, Carlos Ball, Stuart Deutsch, Janet Donohue, Susan Feathers, Maren Greathouse, Reid Weisbord and me.

The LGBTQ movement is one of the preeminent civil rights movements of our times. I dedicated this conference to all the persons of the LGBTQ communities who have been mistreated, suffered abuse and died as a result of discrimination. You are not forgotten. . .we ALL stand on your shoulders.

In loving memory of Alexander “Corky” & Douglas “Dougie” Feig.

La Lucha Sigue!
Charles I. Auffant

TRANSCRIPT OF PROCEEDINGS

RUTGERS UNIVERSITY SCHOOL OF LAW - NEWARK

FRIDAY, APRIL 10, 2015

RONALD CHEN: Good morning, everyone. Welcome to Rutgers University and to Rutgers Law Newark. I'm Ronald Chen, Acting Dean of the Law School.¹ It's my great pleasure to welcome everyone: students, distinguished panelists, and all attendees to this event—for which we have been very excited to plan for some time now. This topic is obviously one of critical importance to lawyers, politicians, and particularly at this time in our nation's history and our world development. We all know, for instance, that the United States Supreme Court is currently considering consolidating cases on the issue of marriage equality.² A number of you may have seen Adam Botek's column a few days ago noting two briefs that were filed in that case. Although they were not consistent with the result they would reach, their theme speaks very much to the theme of this conference, which is the role of global law in the development of equality for the LGBTQ community in all aspects. I think we can learn a lot and hopefully the Court, particularly Justice Kennedy, if he is listening, will learn a lot from international global perspectives and how they should inform us on the development of our domestic rules regarding LGBTQ equality.

This is an event for which we have assembled a wide variety of highly distinguished panelists. Foreign relations being what they are, a little bit of excitement has even been injected, so we will see how the day plays out with regard to the ability of some planned panelists to be here or whether they are still in Cuba. But with that, again I want to welcome everyone. A housekeeping matter: what is usually the women's restroom on this floor, which is around here down the hallway past the exit sign, has today been designated a gender-neutral rest facility. If there are no other housekeeping matters, welcome, and I look forward to the first panel.

WHITNEY STRUB: Hello. My name is Whitney Strub. I'm the director of Women's and Gender Studies here at Rutgers Newark, and an associate professor in the History Department.³ It is my absolute delight to moderate our first panel today: Interdisciplinary Perspective on Global LGBTQ Movement. While we get set up, I will introduce our speakers.

In not quite the order on the program, first is going to be Ben Sifuentes from the Department of American Studies at Rutgers New Brunswick.⁴ Ben's research interests include Latino literature and culture, 20th Century Latin American literature and cultural studies, gender theory and sexuality

¹ Ronald K. Chen, Faculty Profile, RUTGERS SCHOOL OF LAW, <http://www.law.rutgers.edu/directory/view/ronchen> (last visited Oct. 12, 2016).

² *Obergefell v. Hodges*, 135 S. Ct. 2584 (U.S. 2015).

³ Profile: Whitney Strub, RUTGERS-NEWARK COLLEGE OF ARTS AND SCIENCES, <http://www.ncas.rutgers.edu/whitney-strub> (last visited Oct. 12, 2016).

⁴ Profile: Ben Sifuentes-Jáuregui, RUTGERS SCHOOL OF ARTS AND SCIENCES, DEPARTMENT OF AMERICAN STUDIES, <http://amerstudies.rutgers.edu/ben-sifuentes-jauregui> (last visited Oct. 12, 2016).

studies, and psycho-analysis. He is the author of *Transvestism, Masculinity, and Latin American Literature*,⁵ and the very recently published *Avowal of Difference: Queer Latino American Narratives*,⁶ which has a fantastic covering and which, by the way, you need to check out. His next research projects are going to deal with the relationship between melodrama and masochism in a series of Latino-American novels, performances, films and essays, as well as another project on the intersection between Latino literature and psycho-analysis.

Following Ben's talk, next will be Anahi Russo-Garrido, who is the Allen-Berenson postdoctoral fellow in Women's and Gender Studies at Brandeis University.⁷ She holds a Ph.D. in Women's and Gender Studies from Rutgers University, and an M.A. in Cultural Anthropology from Concordia University in Canada.⁸ She's been a visiting scholar at the National University of Mexico City.⁹ Her research currently focuses on queer intimacy in Mexico City, gender and sexuality in Latin American, change and queer and feminist theory. She's worked with women's rights organizations in Mexico, Canada, and the United States, and is the co-editor of *Building Feminist Movements and Organizations*.¹⁰ Anahi has also published articles on queer Mexico City in *Women's Studies Quarterly*, *NWSA Journal*, and the *Journal of Post-Colonial Cultures and Societies*.¹¹

Third on our panel is going to be Carlos Ulises Decena, who is an associate professor in the Department of Women's and Gender Studies at Rutgers New Brunswick.¹² He's an interdisciplinary scholar whose work straddles the humanities and social sciences, and whose intellectual projects engage and blur the boundaries of critical ethnic, queer and feminist studies in social justice.¹³ His first book, *Tacit Subjects: Belonging and Same-sex Desire Among Dominican Immigrant Men*¹⁴ was published by

⁵ BEN SIFUENTES JAUREGUI, *TRANSVESTISM, MASCULINITY, AND LATIN AMERICAN CULTURE* (2002).

⁶ BEN SIFUENTES JAUREGUI, *THE AVOWAL OF DIFFERENCE: QUEER, LATINO AMERICAN NARRATIVES* (SUNY Press, 2014).

⁷ *MSU Denver A to Z*, METROPOLITAN STATE UNIVERSITY OF DENVER, www.msudenver.edu/searchchannel/jsp/directoryprofile/profile.jsp?uName=arusso8 (last visited Oct. 4, 2016).

⁸ *Id.*

⁹ *Id.*

¹⁰ *BUILDING FEMINIST MOVEMENTS AND ORGANIZATIONS* (Anahi Russo et al. eds., 2007).

¹¹ *MSU Denver A to Z*, *supra* note 7.

¹² *Decena, Carlos Ulises*, RUTGERS SCHOOL OF ARTS AND SCIENCES, womens-studies.rutgers.edu/for-faculty/235-carlos-ulises-decena (last visited Oct. 12, 2016).

¹³ *Id.*

¹⁴ CARLOS ULISES DECENA, *TACIT SUBJECTS: BELONGING AND SAME-SEX DESIRE AMONG DOMINICAN IMMIGRANT MEN* (2011).

Duke University Press in 2011.¹⁵ He's also published in a sort of breathtaking array of journals in multiple disciplines.¹⁶

So with that, I'm very excited to present our panel. Our speakers will speak for about 15 to 20 minutes apiece, after which, there should be time for robust audience Q&A and discussion. So if you'll join me in welcoming Ben.

BEN SIFUENTES: Thank you, Whitney. Thank you all. I would also like to thank the organizers for inviting me and including me in this important conversation. I've titled my comments "Queer Latinidad and Other Subject Formations," and this borrows a lot from my recent book publication that Whitney mentioned,¹⁷ and it goes back to a passion of mine which is how subject formation happens.

1983: As a young man I remember that the process of political awareness began with my understanding of racialization.¹⁸ As an immigrant from an ever-shrinking middle class Mexican family, I discovered literally overnight that I was no longer a privileged class. Rather, upon arrival to the United States, I became a minority. Certainly, this struggle to articulate my sense of identity came at the right moment: my freshman year in college. This complex set of negotiations led me to appreciate the weight that context carries in identity formation. At times I used to long to return to Mexico to feel the comfort of a certain class position. This longing offered the promise of breaking the ever present sense of racial and ethnic difference that I experienced in the U.S., especially at a place like Yale. However, I got over that feeling and returned rather quickly. It was, after all, at that time that I became politicized around (indiscern.) and also that I discovered that I liked men.

Arriving at that place, at the queer table as a Latino, would mean that my conversation with queer identification and politics was not necessarily a collaborative act, but rather one of catching up topics. I might suggest that, generally, for queer folks of color, at least those of my generation, in their thirties (not really) there is the genealogy of their coming to terms with their identities. First and foremost, comes the language of racial formation and identity, then the vocabulary of queerness is integrated. What might this mean for queers of color? That race comes first and then queerness. I should just add a caveat: there's a younger generation where that is no longer happening. I'm just talking about a particular generation where racialization came first, and then sexuality.

How does this epistemological unfolding narrate queer Latinidad differently than plain old queer subjectivities, implicitly raced White? The

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Sifuentes Jauregui, supra* note 6.

¹⁸ *Racialization*, Calgary Anti-Racism Education, <http://www.ucalgary.ca/cared/racialization> (last visited Oct. 14, 2016).

sequence of identify formation, although seemingly elementary, might just be the strongest critique of intersectionality,¹⁹ wherein measures of identity are often imagined as a symmetrical coming together. I would argue that queer and racial identities do not always meet on equal footing, or even at the same stage of development. Rather, one identification always impinges on the other. Consider if the tendency for queers of color was to assume race first and then queerness. It might be interesting to see that white queers might do it the other way around, queerness first, and race, their “whiteness,” second.

This ordering of identity brings up a question of storytelling and politics and challenges us to consider the impact of narrative structures on identity formation. There is always a priority of how a story gets told. The deconstructive swerve is not to posit which story form is necessarily better or more authoritative than the other, but rather to appreciate how the sequencing of identification, the order of things, allows for certain forms of cultural hegemony. In my comments that follow, I would like to consider some questions that complicate the idea of Latino-American queer subject formation.

2) Language.

In my most recent book, I put forth and sketch out with some broad strokes a particular genealogy of how queer theory takes shape out of a very U.S. centered experience and intellectual scene.²⁰ I look at the practice and notion of coming out of the closet and try to gauge the degree to which this specific cultural act frames the articulation of queer theory. I'm interested in this powerful coming out narrative, especially how this narrative lies at the core of theories of queer performativity. Many critics, such as Butler²¹ and Sedgwick,²² among legions of other U.S. based scholars, have explored how this narrative not only names a subject gay, lesbian or queer, but also inaugurates intra-subjectivity of outness.

More importantly, this narrative gets mobilized as a chant, and you've all heard it: “out of the closet and into the streets,” thereby interpolating the subject into a political realm. That is, if “out of the closet” signifies the subject's coming into being, then into the streets gives him or her the desired visibility and demonstrates entrance into the political realm. So called “out of the closetness,” (indiscern.) as a category of identification and its potential for political coalition have become such an overwhelming imperative that for a long time it did not occur to me just how strange this idea

¹⁹ See, e.g., Steve Williams, *What is Intersectionality and Why is it Important?*, CARE 2 (Aug. 21, 2014), <http://www.care2.com/causes/what-is-intersectionality-and-why-is-it-important.html>.

²⁰ *Sifuentes Jauregui*, *supra* note 6.

²¹ Judith Butler, *Imitation and Gender Insubordination*, INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES (AFTER THE LAW) 13 (Diana Fuss ed., 1991).

²² EVE KOSOFKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* (Univ. of Cal. Press, 1990).

might sound outside of the United States. This practice is conceit for universality in naming a homosexual subject, denouncing ideology that promotes what Dennis Altman calls the “Americanization of the homosexual²³.” That is, the way in which male homosexual styles and statics circulate in the global sexual marketplace. There is something strange in speaking about “coming out of the closet” in places or at times where, architecturally, they have not always existed. In my project, I looked at how closets actually first came into being in homes in the late nineteenth century in Britain and the United States.

Where I “grew up in Mexico, we did not have closets, we had *armoires*. [S]omehow, no matter just how fabulous the idea of ‘coming out of the *armoire*’ might sound . . . well, it is just not the same thing. In other words, the trope of the closet is a surplus space that does not exactly allow for a global homosexual”²⁴ or global queer identification.

“So what I’m wildly advancing is that there seems to be a much more cultural affinity to talk about performativity in places where ‘coming out’ is read as a historical” and cultural event.²⁵ Now, where that experience of ‘coming out’ is not autochthonous to a given location, might there be other genealogies that “we might draw upon,” thereby giving ourselves new alternatives for sexual narratives and identifications?²⁶ “Here I am echoing Jose Quiroga’s proposal that ‘homosexual praxis is effective in [the Americas] in ways in which homosexual identity is not!’”²⁷ In other words, the practices of sexuality do not “always” eventuate into the same sexual identities- in fact, they may be different.²⁸ “Conversely, sexual identity labels do not connote the same series of practices. Uncovering how these sexual and queer practices get narrated and silenced allows us to understand how circuits of desire produce subjects differently.”²⁹ “It is worth stressing this point: the sexual narratives of [Latino-]America are not only those which are excessively visible, but also those which are unspoken, silent.³⁰ This silence around sexuality goes by many names- from repression to oppression, [a]nd how we read such silences involves putting forth a new scaffold of reading practices.”³¹

3) Translating *Locura*.

²³ DENNIS ALTMAN, *THE HOMOSEXUALIZATION OF AMERICA* (Beacon Pr. 1983).

²⁴ *Sifuentes Jauregui*, *supra* note 6 at 3.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* [Emphasis omitted].

³¹ *Id.* at 3-4.

The handout I passed out will make reference to this section. In my research I have shown that the open articulation of one sexual identity is not necessarily the predominant practice of playing or experiencing one's homosexuality.³² Rather, we find over and over again that silence, insinuation, ellipses, and other written strategies that result are more promising to capture Latino-American queer identity. Again, I have argued that the "closet" might be a historically and culturally specific phenomenon, whose universalization might be deemed a cultural imposition.

Now, in the spirit of finding more narratives of queer existence, I would like to turn to one form of naming queer Latinidad, *locura*. In a well-known and often cited chapter from his autobiography, *Before Night Falls*, Reinaldo Arenas enumerates a taxonomy of *locas*.³³ For reasons that will become clearer later, I will refrain from translating *locas* and *locura*. He begins that after noticing a great difference between these *locas* and those homosexuals, he established some categories among them.³⁴ The different forms of *locas* or queer subjects are as follows: first, he calls the "dog collar *locas*," who are so scandalous that the police just place a collar on them to make the job of arrest easier.³⁵ Then comes the "common *locas*," who are politically engaged.³⁶ Afterwards, Arenas talks about the "covered up *locas*," whom nobody knows are homosexual because they condemn other homosexuals.³⁷ Finally, "the royal *locas*," who have the privilege of being "out" publicly.³⁸ I know that Arenas is being ironic here by making up his own series of categories. However, for a moment let us take his conceptualization at face value and see what happens. Arenas links these four categories, however, if we try to trace some kind of relationship among them, it is difficult to discern what is exactly being measured. For instance, if we consider the degree of homosexual openness as a measurement, going from the most open to the least open, such a system does not work because in the end the royal *loca* is, in fact, the most open in terms of his standing and privilege. If we go from the most scandalous to the least, we are met with a similar predicament. The only possible trajectory that we can distinguish is that each category gets closer to the Castro regime.

What regulates Arenas' categorization is not sexual or cultural in nature, but rather a political attachment. Again, this idea that you start first with the dog collar who is the furthest away from the Castro regime, then the common, then the covered up, and then finally the royal *loca*. That is the only way to make sense of how he has come up with this series of cate-

³² *Id.*

³³ REINALDO ARENAS, *BEFORE NIGHT FALLS: A MEMOIR* (Dolores M. Koch trans., Penguin Books 1993) (1994).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

gories. Following his categories, being a loca is a function of how close the homosexual is to the political regime. This is a rather different conceptualization of how gays or lesbians are categorized in the U.S., or other parts of the continent.

An important issue that Arenas defines is how each loca behaves.³⁹ I would like to point out two details. First, with respect to the common loca, he writes, “[in Spanish]”—and this is the quote.⁴⁰ I’m reading in Spanish, but you can read it in English alongside me. “[In Spanish]”.⁴¹ If we look at the published English translation, I would like to point out some important discrepancies. In English, this is the type of homosexual who has his commitments, something is lost here. [In Spanish].⁴² First, the location is lost. It is not noted in the translation. Thus, the common loca is rendered as a common gay.⁴³ He is universalized in the English translation of Arenas’ autobiography. Also [in Spanish] means more than just to have a commitment, which the translation, or which the official translation gives us, sounds more like having a date in English. Whereas [in Spanish] in Spanish means to be politically engaged and committed.⁴⁴ So in fact, the English translation depoliticizes the representation of the common loca. The cultural specificity, as well as the political work of the loca, is rendered as generic and unexceptional. Also, Arenas suggests that common locas [in Spanish]. That is, they never come to know a real man.⁴⁵ In other words, common locas do not partake in sexual encounter with other self-destined heterosexual men which is, a particular sign of risk in prestige among locas. This particular relationship between the loca and the real man signifies a (indiscern.) position that a loca occupies in the social imaginery of Cuba, the Caribbean, and in parts of America. For a loca, it’s not exactly the gay man, as we understand the category in the U.S. A loca is not just a man who is sexual with other men, but rather one who assumes membership in a particular sub-culture, one whose strength is effeminate, or even slightly effeminate, role-playing and gender enactment. Moreover, what Arenas might be doing, when he says that locas have sex with other locas, is parrotting a version of U.S. male gay culture that seeks comfort in secure, non-threatening relationships between men.

Another detail I’d like to point out has to do with the translation of [in Spanish], which is translated as the “closet gay”.⁴⁶ If you consider that the word “gay” delineates a subject produced out of a relational attachment between men, and has some political history, then the term “loca” just does

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

not match up. Each category signifies a different personal and political identity. Also, it represents more than just a sight observation, but an actual act. Whereas just being veiled, [in Spanish], describes a condition of being hidden from plain sight without the relational complexities of knowingness and unknowingness, through which gay male identities are produced.⁴⁷

I do not want to discard that there are overlaps between the idea of being in the closet and being [in Spanish] or [in Spanish].⁴⁸ Let me suggest that the concept of being [in Spanish]⁴⁹ has to do with the emphasis on queer identity to bodily presence, rather than on performativity. The point I really want to make here is that *loca* cannot be translated as gay or even queer. Instead, it would suggest that the categories that we use to label (sexual) identities in Cuba, the Caribbean, or elsewhere must be framed to locate queerness. One cannot translate "locura." Rather, one must locate queerness. When we speak across cultures about sexual identifications, we can only approximate those identifications, and understand what we have come across is an ideological template that resonates as something similar, but never truly the same. Not taking into account the ways in which those templates are enabled represents an act of cultural imposition that reduces the richness of how other cultures see themselves and how they negotiate differences. Here, I would like to add that the history of racial formations in Cuba transforms this taxonomy of *locura* even further. The questions to ask are: how the concept of *locura* and *loca* subjectivities translates, and what happens when *locas* cross borders and inhabit other spaces?

In the last section, I want to point out the work of Cuban scholar Ivenicia Romalero.⁵⁰ He proposes that in Cuba, one must speak [in Spanish] Havana homoerotic context, rather than a gay community, to understand how a same-sex relationship gets framed as sexual identity.⁵¹ He explains:

In Cuba one must not speak of a homosexual community, but rather a Havana, a homoerotic context. What I mean here by homoerotic context is a spatial temporal dimension where individuals, not just those who identify with homosexuality, meet or interact. Homosexual/homoerotic contexts are spaces of cultural diversity that do not exclude out the basis of sexual orientations or identities, although those exclusions happen. Also, they are spaces where cultural processes take place, and where linguistic codes aesthetics are shared, as well as networks of friends are formed. Malero speaks of homoerotic practices as those that refer to sexual relationships or erotic encounter between people of the same sex, but that do not presuppose a foundation of a sexual identity.⁵²

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Sifuentes Jauregui, supra* note 6, at 211-12.

⁵¹ *Id.*

⁵² *Id.*

His conceptualization of this homoerotic space might serve as another perspective to theorize about how contingent homosexualities might be formed and narrated among Latino-American subjects.

My work is interested in subject foundation, and I do not want to complete the idea of context as the predominant and exclusive regulating dimension of how queer subjects come into being. The question is of the body and the many practices of agency that exist in queer Latino subject formations.

As we read gay, lesbian, queer, and male-male relations in a Latino-American cultural context, we begin to see complexities in its' unfolding. How does Latino subject formation happen not only as a differential of desires, practices, and identities, but also context? These many facets contribute to queer Latino subject formation intersectionally and asymmetrically. How we begin to impact these sexual identities and how we write a thick description of them signifies a political story of the queer Latinidad. Keeping these in mind, one final question remains: How do we proceed to respond legally to these cultural and gullible differences in gay, lesbian, and LGBTQ subject formations? Thank you.

ANAHI RUSSO-GARRIDO: Good morning. Thank you very much for having me here, and thank you to the organizers for all their hard work. Last summer I had the opportunity to attend the meeting of an organization called Red de madres lesbianas en Mexico, which is a network of lesbian minors in Mexico City who are the authors of this poster here⁵³ or this collection of posters that was presented in the Mexico City transportation system in Fall 2014. Passengers traveling across the city could see the poster which read "One mothers, Two mothers, Three mothers, all families are equal, visible, lesbian motherhoods."⁵⁴ On the posters I recognized the faces of some of my friends who were at the meeting of Red de Madres, which I attended last summer. The poster reads "one mother, two mothers, three mothers," but as you can see, in all the images that are presented here, we just see two mothers with children.⁵⁵ Where were the single mothers with children, or the three mothers with a child, as described in the title of the poster?

This poster captions some of the tensions between monogamy and polyamory, and imaginaries around new queer relationships emerging in contemporary Mexico City. My broader research investigates these tensions and their connections to the transformation of agency in the lives of three generations of women in queer communities in Mexico City. In this presentation, I explore the emergence of relationship modalities in a period

⁵³ See, e.g., Alina Vallejo Galeana, *No somos moda: madres lesbianas*, SIN ETIQUETAS, sinetiquetas.org/2014/12/15/no-somos-moda-madres-lesbianas (last visited Dec. 19, 2016).

⁵⁴ *Id.*

⁵⁵ *Id.*

of social, economic, and legal change in Mexico City. Relationships have become a site of contention in which women participating in queer spaces negotiate discourses on new relationships. Studies on same-sex sexuality in Mexico and Latin America have predominantly paid attention to gendered and sexual formation. Less attention, though, has been given to subject relations, which in my view have been central to queer politics in Mexico City since the year 2000 through public debates on same-sex unions and marriages and in queer spaces on polyamory.

The paper is based on fieldwork I conducted in Mexico City since mainly 2009, which included participant observation, 40 formal and informal interviews, and the review of newspapers. I first briefly discuss the ways in which queer politics have broadly shifted in the past decade and a half, and then focus on new queer relationships produced in the context, particularly *convivencia* and polyamory.

All of my research took place in the period following 1994. In that period, the party that had ruled for 70 years lost the 2000 election, although if you are familiar with Mexico, you will know that the [Institutional Revolutionary Party] is now back in power.⁵⁶ The youngest informants have spent half of their lives under the rule of the Partido de Accion Nacional (PAN) ("PAN") a right-wing party that first brought into action the Mexican War on Drugs in 2006.⁵⁷ It is in this context that the LGBTQ movement began shifting strategies for change. The movement increasingly made use of state channels and new anti-discrimination laws emerged in 1999 in Mexico City. In 2009, Mexico City became the first place in Latin America to legalize same-sex marriage.⁵⁸ In the Federal District, these discussions began in 2001 when a motion to pass a cohabitation law, *sociedades de convivencia*, which included same-sex couples, was proposed. Over 300 organizations, public intellectuals, and formal representatives supported *sociedades de convivencia*.⁵⁹ Two years prior to the passing of the law in 2006, local representative Enoé Uranga⁶⁰, who promoted the law, told me that the coalition who had promoted the law, had the intention to organize three separate ceremonies of *sociedades de convivencia*, on the day it would be approved. Two women, a heterosexual couple, and an elderly brother and sister who lived under the same roof, were going to *conviven-*

⁵⁶ See, e.g. Tim Padgett, *How Enrique Peña Won Himself and His Party the Mexican Presidency*, TIME (July 2, 2012), <http://world.time.com/2012/07/02/mexico-election-how-enrique-pena-nieto-won-himself-and-his-party-the-presidency/>.

⁵⁷ Jason Beaubien, *As the Drug war Rages On, Will Mexico Surrender*, NPR (Aug. 6, 2010 12:00 AM), <http://www.npr.org/templates/story/story.php?storyID=129009629>.

⁵⁸ See *Mexico City legalizes same-sex marriage, adoptions*, CNN (Dec. 21, 2009, 8:41 PM), <http://www.cnn.com/2009/WORLD/americas/12/21/mexico.gay.marriage/>.

⁵⁹ See generally Genaro Lozano, SAME-SEX MARRIAGE IN THE AMERICAS 137-47 (Jason Pierceson et al. eds., 2010).

⁶⁰ See Dip. Enoé Margarita Uranga Muñoz, H. CONGRESO DE LA UNIÓN CÁMARA DE DIPUTADOS, http://sitl.diputados.gob.mx/LXI_leg/info_diputados.php.

ciar, a term that I will later explain, which would formalize their union under the law. In this sense, *sociedades de convivencia* was meant for two or more individuals who lived together to be recognized by the law, mostly for purposes of inheritance. I next discuss how *sociedades de convivencia* in the forms of the relationship it produced were negotiated in individual's lives.

So during fieldwork, many individuals who knew I conduct research on queer cultures in Mexico City often assumed that I wanted to know more about *Sociedades de convivencia* and later the Reform of marriage. One night when I attended a soccer game with my friend, Astrid, insisted I interview Clara, Astrid's only friend who had acquired a union under *Sociedades de convivencia*. To *convivenciar* was to acquire a legal union under *Sociedades de convivencia*. It is a colloquial term I heard jokingly used in a few queer circles when I was living in Mexico City in the 2000's, before the law passed. In other words, women participating in queer spaces were negotiating and producing new forms of relationships as the context was changing. On a Saturday morning, I went to interview Clara at her home in *colonia Ampliación Piloto*, at the western edges of Mexico City. Clara and two of her friends, Sofia and Monica, picked me up at the nearest bus stop. We drove for miles through a gray landscape filled with streets, square houses made out of concrete, and small shops advertising bubble gum, chips, and cigarette brands. When we arrived to Clara's, the dogs were barking behind a metal door. Clara lived with her partner, Carina. Clara owned a local pastry shop with her extended family, while Carina took care of some of the administrative aspects of the business. Occasionally Carina also practiced law, having studied at the National University (UNAM.).

As I tried to start the interview, I was surprised to find that Carina and two of their best friends would not leave the living room. The events turned more into a talk show rather than a traditional interview. Their friend Brenda, who had known Clara since childhood, recalled how Clara and her used to flirt with girls in elementary school through *cartitas*, little letters and notes. While Clara answered most of the questions, Carina would jump in from time to time to correct her partner. The couple had met eight years ago at *Anyways*, a queer club that used to be near *La Zona Rosa*). Clara said she did not like to remember that Carina had another date that night. She continues, and says, "we began chatting and she told me that she was a lawyer, and I said to her, I have this question, because I have a problem with *hacienda*, like the IRS." Clara insisted that she was not flirting, and that she really only asked for Carina's phone number because of her tax problem. Clara further insisted that it was not until the next time she ran into Carina at *Anyways* that she began to really like her. "Ahi me flecho," "there she took my heart," recalls Clara. The couple dated for about five years before they decided to live together. When I asked why they decided to do it, Clara jokingly said "es que la quería amarrar," I

wanted to tie her up. Her words implied that she did not want her to leave. Unsatisfied with her partner's response, Carina jumped in half a second later and she told me, and I quote her here, "We have to be consistent with the rights that we fight for. We cannot say oh, the law is there, and not exercise it. Well, we are a couple who truly wanted to be together to make a family, and because I work and she works, we have things. When there wasn't this kind of protection for our ambiente, the family of the one who died would arrive and leave the other without anything, not even a pair of underwear. We are so in love that there comes a moment to say, 'if heterosexuals have a way to manifest their love in front of society, why don't we?' So we did it. A party and the whole thing, all of it."

Although the law of *convivencia* was for individuals who lived together and did not necessarily have a romantic bond, it becomes clear that Carina's explanation on why they decided to *convivenciar* involved love. In a study on two generations of Mexican women in western Mexico and Atlanta, Hirsh discusses how in the past in Mexico, individuals tended to marry for economic reasons, while new generations now mention love and companionship as their main motive.⁶¹ Carina invokes love and the desire for their union to be known by the community. Her words differ though from studies of women in heterosexual relationships, when she suggests that heterosexual women must assert their rights and protect their property. This difference is certainly not only due to the fact that Carina speaks of *convivencia* rather than marriage. Having *convivencia*, though, Clara and Carina's relationship was an exception rather than the norm. This is not surprising, considering that in 2008, a year before I started formal fieldwork, only 308 couples had celebrated *Sociedades de convivencia* across the whole city. If you are familiar with Mexico City, some numbers give 10 million inhabitants, but better numbers for the metropolitan region give 21.2 million inhabitants.⁶² Nonetheless, such relationships were well known at the time and functioned as a new possibility. The reform of marriage took place in 2010,⁶³ and to my knowledge, two interviewees got married in addition to three friends I did not interview. According to Instituto Nacional de Estadística y Geografía ("INEGI"), which is the statistical bureau, 689 marriages were celebrated between same-sex partners in 2010.⁶⁴ In 2011, 802, so a hundred more, and in 2012, 936, even more.⁶⁵

⁶¹ JENNIFER HIRSCH, *A COURTSHIP AFTER MARRIAGE: SEXUALITY AND LOVE IN MEXICAN TRANSNATIONAL FAMILIES*. BERKELEY: UNIVERSITY OF CALIFORNIA PRESS (2004).

⁶² See *Mexico City Population 2016*, WORLD POPULATION REVIEW, worldpopulationreview.com/world-cities/mexico-city-popuation/ (last visited Oct. 4, 2016).

⁶³ See, e.g., Elisabeth Malkin, *Gay Marriage Puts Mexico City at Center of Debate*, THE NEW YORK TIMES (Feb. 6, 2010), <http://www.nytimes.com/2010/02/07/world/americas/07mexico.html>.

⁶⁴ *Mexico en Cifras*, INSTITUTO NACIONAL DE ESTADISTICA Y GEOGRAFIA, <http://www.inegi.org.mx>. (last visited Dec. 18, 2016).

⁶⁵ *Id.*

At the time of this fieldwork, the reform was still very new. However dispersive same-sex marriage was, it was becoming an important relationship option in this new context, and expectations on queer live narratives were changing.

Shortly after the reform passed, my friend Nadia commented on how she had discussed with her friend Rogelio that the good thing about being gay used to be that people would not ask you and your partner, “why aren’t you married?” But recently someone had asked Rogelio, “hey, you’re 30 years old, aren’t you going to get married now that there is gay marriage?” “Los gays nos salvamos de eso, pero ahora ya no,” gays were safe from this questioning, but that is no longer the case. Nadia’s words signaled to the possibility of aligning queer lives with reproductive time. In *a Queer Time and Place*, Halberstam refers to, and I quote, “queer subcultures produce alternative temporalities by allowing their participants to believe that their futures can be imagined according to logics that lie outside of those paradigmatic markers of life experience, mainly birth, marriage, reproduction, and death.”⁶⁶ At the time of my fieldwork, that was certainly present in the lesbian polyamorous movement. However, narratives on queer marriage and reproduction being part of queer lives were certainly circulating as well. In many ways, birth, marriage, reproduction, and death formed part of the ideal course of love and life in the lives of many of the women I interviewed. By shifting scholarly attention from subject formation to relationship formation, it becomes evident, as stated in this section, that new relationships such as *convivencia* are emerging. In dialogue with new laws promoted by LGBTTT rights activists. While *Sociedades de convivencia* is a law, the colloquial term, “convivenciar,” shows that subjects are negotiating these new realities. Marriage as a relationship became a possibility for same-sex partners, too, but as Nadia’s story suggests, all individuals had to negotiate this new possibility, even if they had no intention to marry. Nonetheless, many questioned if this was the only way to organize same-sex loving relationships, which I will explore next.

So at the time of *convivencia*, certain activists and women participating in queer spaces began questioning the idea that the only and most respectable way to organize same-sex intimacy was through monogamous coupling. During fieldwork, I attended the book release of a collection of writings on polyamory launched by Latin American lesbian feminists.⁶⁷ It is called *Desobedientes: Experiences and Reflections on Polyamory, Open Relationships, Casual Sex between Lesbians in Latin America*. In the book, chapters reflect some compulsory coupling, partners as private property,

⁶⁶ J. JACK HALBERSTAM, *IN A QUEER TIME AND PLACE: TRANSGENDER BODIES, SUBCULTURAL LIVES*. NYU Press. (., 2005).

⁶⁷ NORMA MOGROVEJO AQUISE, ET. AL., *DESOBEDIENTES: EXPERIENCIAS Y RELEXIONES SOBRE POLIAMOR, RELACIONES ABIERTAS Y SEXO CASUAL ENTRE LESBIANAS LATINOAMERICANAS* (1st ed. 2009).

and the myth of “happily ever after.”⁶⁸ We also read about the everyday life of the polyamorous relationship, jealousy, complicity, and long discussions on how to keep an open relationship.⁶⁹ Discussions on polyamory were also taking place in workshops in lesbian support groups, groups such as Colectivo Poliamor.. Individuals also initiated discussion groups online on polyamory, through tools such as Facebook.

For the purpose of time, I will jump over some quotes, but when I did interviews it was very clear that some of these people were negotiating these new ideas on polyamory and considering entering relationships. In other interviews it also became very clear that some individuals were already having what would be called polyamorous relationships. However, they did not necessarily label it as such until that specific moment, when new ideas related to *Sociedades de convivencia*, marriage and the monogamous couple became the most respectable option. At the precise moment when there were conversations and law changes, some individuals who were participating in queer spaces began questioning if it was possible to think about relationships in different ways.

To go back to the first line, we have a picture here of the organization, Red de Madres Lesbianas, which is behind the poster that we had at the beginning of this talk. It was not only individuals that had to negotiate these new discourses on marriage and polyamory, but organizations did as well. As mentioned, the poster promoted in the subway system in 2014 read: “one mother, two mothers, three mothers, all families are equal.” Visible lesbian motherhoods. When I asked Ana Alejandro, one of the main group leaders, about the title, she suggested that they chose one, two, three mothers, because some children might grow up in a family with mothers in polyamorous relationships.⁷⁰ Other children might have a single lesbian mother who has a new partner that takes part in the child’s education. Ana pointed towards two women and said they are two mothers, but their niece also takes care of their son, so they are really three mothers. While the poster displays the title “One, Two, Three mothers,” all pictures depict two women with children. The title challenged public representations on parenthood, but the images reflect the idea of monogamous coupling in the reproductive family. Interestingly enough, it becomes clear that polyamory is not always at odds with queer politics centered on the domesticity and consumption. Yet the tension between the image and the text questions if the association between the monogamous couple and the reproductive family may be questioned in the public sphere.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ Rebecca Weis, *Biographical Sketch Ana Alejandro Garcia: “Our Revenge is to be Happy,”* HEINRICH BOLL STIFTUNG, https://mx_boell.org/es/2015/05/12/semblanza-de-ana-de-alejandro-garcia-nuestra-vengarza-es-ser-felices (last visited Oct. 4, 2016).

So to conclude, the things I have focused on today illustrate how queer women in Mexico City have been forming relationships after NAFTA, in a period of economic, political, cultural and legal changes. I argue that intimate relations have become a site of contestation and show how women participating in queer spaces negotiate discourses on *convivencia*, same-sex marriage and polyamory. The women are often mapping them through existing cultural meanings and practices, but are also reinventing love, relationships, and the social organization of intimacy. Thank you.

CARLOS DECENA: Good morning. I want to thank the organizers for bringing me, and also thank my co-panelists for their excellent presentations. I think, hopefully, what I am about to share with you today will contribute towards the larger discussion that we'll have in Q&A. I want to preface this by saying that this is material I am extremely uncomfortable sharing. I have never published it, and I may never publish it. So just so you know, and you'll understand why this is so uncomfortable, I've lived with this material for over a decade now.

So the title is "Towards a Queer Intersectional Analysis in Immigration Marriage and Asylum Versus Asylum Claims." The research question that I'd like to explore today is the following: How might we formulate the queer intersectional analysis of immigration marriage versus gay asylum claims? This is the ideal audience for this because there are lawyers here, critical legal scholars. Help. If you can't help me, nobody will. The last time I presented this, people wiped the floor with me, but that was another setting. You can do that again, too, but I'm old enough to deal with it.

So much has been written about immigration and sexuality in the United States, and there has also been a scholarly focus on various dimensions of sexuality-based asylum.⁷¹ This talk proposes the phasing of state officers and petitioners in dense and rich histories of such encounters as scenes of sexual and racial formation. A critique of the state that is intersectional and queer would intervene and interrogate the nature of the informal protocols used in these encounters. Epistemological and ethical issues that such critiques exposed and raised, demand accountability from state officials and policy makers. Mine is a question response to the transformative social impact of the enfranchisement of some sectors of the LGBTQ population. What you will hear is part of a project exploring how activist intellectuals, cultural workers, and policymakers addressed the interfacing of multiple situated subjects in relationship to a U.S. state that has begun to fold some sexual and gender non-norm activities into its' term circles of protection, and I'm invoking here Gayle Rubin's famous

⁷¹ Sarah Hinger, *Finding the Fundamental: Shaping Identity in Gender and Sexual Orientation Based Asylum Claims*, 19 COLUM. J. GENDER L. 367 (2010); Fadi Hanna, *Punishing Masculinity in Gay Asylum Cases*, 114 YALE L.J. 913 (2005); Alan G Bennett, *The "Cure" That Harms: Sexual Orientation Based Asylum and the Charging Definition of Persecution*, 29 GOLDEN GATE U.L. REV. 279 (1999).

phrase.⁷² This folding takes place in the orientation of the mainstream LGBTQ movement towards gay marriage, for instance.⁷³ It also takes place in the rise of homo-normative coupledness, a precondition for eligibility of some sectors of the LGBTQ population to the U.S. State.⁷⁴ Invoking “queer” in relation to marriage is intentional, beyond a possibility that gay marriage may become a path to legalization of the partners of U.S. citizens, something which appears not to be on the table in immigration reform this year.⁷⁵ Well, the last time was 2013, so that is moving forward.

Heterosexual marriage and gay asylum being seen together as crosscutting issues in sexuality and immigration politics and policy challenge us to find convergences and potential coalitions. I’m doing a juxtaposition that may appear to be very violent, but it’s also very intentional. This suggests that interrogating state protocols for the adjudication of asylum claims of either heterosexual marriage for purposes of immigration or gay marriage for purposes of immigration asylum claims that are being adjudicated on the basis of these interview protocols, both formal and informal, may potentially give a clue for how to develop innovative intentions, and also how to demand for accountability. An analysis of marriage and asylum that is queer and intersectional intends to have these mechanisms impact populations with precarious and differential standing vis-à-vis regimes of racial, class, gender, and sexual norm activity. It also highlights how the passing lines before the judge or inspector in the sexuality is what Foucault (**pho-netic**) called a dense transfer point in scenes of racial, gender, and sexual formation that impact all immigrant populations.⁷⁶

Today’s discussion comes from unpublished data collected for *Tacit Subjects*, which is my first book.⁷⁷ Marriage and asylum as legalization strategies were relegated to the margins of my research and interaction with immigrants as an interlocutor advocate and fellow traveler for two decades. Fear of doing harm by addressing these strategies held me from discussing them in print, and is still, this year holding me from discussing them in print. There was concern about the truth of gestures, body dispositions,

⁷² Gayle Rubin, *The Traffic in Women: Notes on the “Political Economy” of Sex*, in TOWARD AN ANTHROPOLOGY OF WOMEN 159 (Rayna R. Reiter ed., 1975) (defines a “sex/gender system” as “the set of arrangements by which society transforms biological sexuality into products of human activity, and in which these transformed sexual needs are satisfied”).

⁷³ See M.V. LEE BADGETT, ET. AL., THE WILLIAMS INSTITUTE, THE RELATIONSHIP BETWEEN LGBT INCLUSION AND ECONOMIC DEVELOPMENT: AN ANALYSIS OF EMERGING ECONOMIES (Nov. 2014).

⁷⁴ DIANE RICHARDSON & SURYA MONRO, SEXUALITY, EQUALITY & DIVERSITY 81 (2012).

⁷⁵ See Seung Min Kim, *Gay rights no obstacle to immigration*, POLITICO (Jun. 26, 2013, 4:14 PM), www.politico.com/story/2013/06/gay-marriage-ruling-immigration-bill-093420.

⁷⁶ MICHAEL FOUCAULT, THE HISTORY OF SEXUALITY 103 (Robert Harley, trans. Vintage Books ed., 1978).

⁷⁷ *Ulises Decena*, *supra* note 14.

knowledge, practices of friends, interlocutors, and participants. Still, my focus on truth atomized the exchange between claimants and adjudicators. It is a way of gazing, like the State, condoning protocols that should be investigated. To become an advocate and ally, one must interrogate the internalization of what (indiscern.) calls the State case. So the reason I'm trying to move not just to gay marriage, but beyond gay marriage to marriage in general, is to open up this discussion, to really query it in a way that could potentially be productive.

Pausing the internalized State case helps draw attention to the constraints, structure of violence, and possibilities that all actors involved in these transactions negotiate. The (indiscern.) turns to these apparently marginal elements in the conjunction of sexuality and immigration in the spirit of what (indiscern.) and (indiscern.) explain as the hope that has escaped or the something that's missing something. Raymond Williams characterized residual cultural norms as "[certain] experiences, meanings and values which cannot be [substantially] verified or cannot be expressed in terms of the dominant culture," but which are "nevertheless lived and practised on the basis of the residue."⁷⁸ So I'd like to dwell and gaze from that residue, which is actually marginal to the work that I carried out for my first book.⁷⁹

I'm not going to do statistics today because the ones I have here are outdated. I want to move directly into the discussion of the two cases that I (indiscern.), and then extrapolate from the cases to try to show the relevance of this queer intersectional gaze to the work that we might want to carry out in conversation, et cetera. The first case is Mauricio Dominguez's legalization through marriage, and the second is Romero Munoz's application for an asylum.⁸⁰ They illustrate the interaction of constraint and possibility in the lives of queer immigrant men.⁸¹

Mauricio Dominguez⁸² was born into a black family of West Indian heritage in a thriving town in the eastern part of the Dominican Republic.⁸³ His father was a judge and his mother holds a medical degree.⁸⁴ The high social status of his family allowed Mauricio and three siblings to each have a nanny.⁸⁵ He also enjoyed private English lessons with an American tutor, attended private schools and took six semesters of architecture courses at the University.⁸⁶ Mauricio was aware of his sexual and romantic interest in

⁷⁸ RAYMOND WILLIAMS, *CULTURE AND MATERIALISM: SELECTED ESSAYS* 40 (Verso 2005).

⁷⁹ *Ulises Decena*, *supra* note 14.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

men from an early age, but the status of Mauricio's family in the town made it risky for him to engage in activities associated with homosexuality.⁸⁷ After all, Mauricio was the son of a famous judge and a doctor. He was not alone in this situation. Mauricio befriended a girl, Elaina (indiscern.) and the two became very close. To everyone else, they were dating, until Elaina left town to pursue a medical degree, and to get away from a woman with whom she had had an affair.⁸⁸ When they met up again, Elaina told Mauricio that she would stay in town only if they got married.⁸⁹ Understanding that their situations were similar, as Elaina was the daughter of another well-known professional in town, Mauricio agreed to the proposition.⁹⁰ During the interview, Mauricio recalled "[in Spanish]".⁹¹ "Then starts a very important part of my life, because heterosexuality enters my life a little bit. In this case, bisexuality, because during the time I was married to her, even though I only slept with two or three men, I had a very heterosexual life with her."⁹² The marriage between Mauricio and Elaina lasted three and a half years and Mauricio recalled this as a happy time in his life.⁹³

Mauricio's first trip and exposure to gay life in New York City happened while he was married to Elaina.⁹⁴ In one of his outings in 1979, Mauricio met a Japanese man who became his first partner.⁹⁵ But their relationship did not begin until Mauricio and Elaina had separated definitively and Mauricio had moved to New York City.⁹⁶ Elaina, who was a U.S. citizen, came to live in New York after Mauricio's arrival.⁹⁷ When Mauricio proposed that they divorce, she offered to help him get his residence.⁹⁸ He accepted, and they married again in New York.⁹⁹ Six months later, Mauricio had his permanent residence.¹⁰⁰ Compared to the experience of other men in my study, the success of Mauricio Dominguez in changing his immigration status was remarkable. Other participants did not have the resources that Mauricio had at his disposal, allowing him access to travel outside of the Dominican Republic.¹⁰¹ Most participants were not already married to a U.S. citizen by the time they arrived in New York, let

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

alone have an offer to help them obtain papers.¹⁰² Marriage allowed Mauricio a change of legal status, but this was also an extension of the purpose for which this institution served. This institution was sort of mobilized to help Mauricio and Elaina gain access to public legitimization as distinguished citizens in their communities. There was a lot at stake in the production of a persuasive heterosexual couple. First, the recognition of their families; second the legitimization of Mauricio and Elaina as a “normal man and woman” as husband and wife; finally, the construction of a space where they explored alternative desires, including desiring each other. That’s really the kind of surprise in this case: that they find themselves doing this for expediency, but then they find themselves actually having a relationship.

Romero Munoz is the second case. The younger of two children, Romero was born in 1969. Romero’s father was the owner of a mini-market and a partner in the cattle raising business. His mother worked as a housewife. While attending high school, Romero enrolled at the Dominican-American institute in Santa Domingo. At the University, he began a career in law that he soon abandoned. He studied French at the French Alliance and eventually enrolled in a degree program in modern languages at a private university in the capital. He did not finish this degree. Romero began work life by helping in his father’s business, but after two years of this and additional time spent working as an office assistant, Romero started to make a living selling clothes abroad. Work took him to (indiscern.), Aruba, Columbia, Panama, and to the United States, where Romero sold the clothes himself and other merchandise was sold with the help of one of his cousins. He pursued this business for about six years. In 1995, he took an HIV test during one of his visits to New York. The test came back positive, but Romero continued working until 1997 when he left the Dominican Republic definitively to seek treatment. Romero arrived in the U.S. with a tourist Visa that expired in 1999. By the time he began treatment, it became clear that returning and interrupting treatment might put his life at risk. After considering various options, Romero applied for asylum based on his sexual orientation. Romero’s petition for asylum was predicated on his own experiences as well as other’s documented experiences of discrimination on the basis of sexual orientation faced by Dominicans. With the help of his sister, a lawyer, and some gay activists in the Dominican Republic who gave him access to newspaper clippings and other documentations, he built his case. The marriage option was out of the question for Romero because at the time applicants for U.S. residence were rejected if their HIV tests came back positive from their required medical examination. The only option, other than asylum, available to Romero was applying for deferred action, based on his medical condition.¹⁰³ This would have kept Romero in

¹⁰² *Id.*

¹⁰³ *Id.*

the U.S., but with a minimum of legality.¹⁰⁴ Any immigration procedures against him would be held off while his health improved, and he could access the services available to HIV positive individuals in the U.S.¹⁰⁵ We all know that this has changed a lot since all of this happened.¹⁰⁶ Although it closed off the possibility of return to the homeland, the asylum option was much more promising to him.¹⁰⁷ He tried it and his specific expedition was accepted.¹⁰⁸ In the broader context of the sample, Romero was the only man who was accepted out of a sample of twenty-five men of about the same age range.¹⁰⁹ He was the only one who tried and succeeded in making his case for asylum.¹¹⁰ Other HIV positive and documented participants applied for deferred action and lived in immigration limbo.¹¹¹ Their lives were better off than they would have been in the Dominican Republic because they had the assistance and treatment they needed. But they were unable to work and experienced continual anxieties related to their unresolved legal situations.¹¹² Those who were undocumented, HIV-negative, or who ignored their HIV status worked in whatever jobs they could while looking for a woman willing to marry them, and actually the choice legalization strategy was to get married to a woman, so that was what happened.¹¹³

So the cases of Mauricio and Romero sat in file folders for years while other situations drifted to (indiscern.): the straight couple who never got it right at the interview and were accused of fraud despite the love and commitment they had for each other; the Mulatto couple; a gay man and a woman friend who looked real and were asked no questions by the interviewer; the man who could not marry because he was too effeminate, yet was so anxious about outing himself through asylum that he sank into a deep depression and was taken back to the D.R. by his family; and, finally the gay man who married a childhood friend to help her escape single motherhood and poverty.¹¹⁴ The literature on gay marriage and gay asylum is also littered with gestures, ways of carrying oneself, and mundane data that [acquire significance before ICE]. Looking “gay enough,” for in-

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Their mean age was early 30's, so we're saying 31, 32. This is when I carried out the research in the early 2000's.

¹¹⁰ *Ulises Decena, supra* note 14.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ See generally, *Immigration Equality Asylum Manual*, IMMIGRATION EQUALITY, <http://www.immigrationequality.org/get-legal-help/our-legal-resources/immigration-equality-asylum-manual/> (last visited Oct. 4, 2016).

stance, has attained such inordinate importance that claimants in other countries began bringing in sex tapes as proof.¹¹⁵ Coaching of couples, romantic lovers of (indiscern.), includes remembering the color of the underwear, the last time they had sex, the frequency of sex, the number of bedrooms in the house, the specific layout of the bedroom, body markings, and so on.¹¹⁶ Gay marriage may be off the table in the 2013 immigration debates. Do you see how traumatizing even reading this paper has been for me? The last time I touched it was two years ago, when it was folded into immigrant legalization. However, there might be a double burden for claimants to prove that they are gay and that they are a couple.¹¹⁷ So it's not just that you must prove that you're a couple, but also that you are gay, providing sex tapes, being overly affectionate, and subscribing to the Advocate are new requirements to prove your case.¹¹⁸

What I call the scene of adjudication is the encounter between claimants and state officials, the passing line handing on the evidence of the former and indiscretion of the latter, whose judgment is based on what she or he can see in the bodies of the claimants. There is a trend in stereotypes, but the problem that both parties bring to the encounter is the absence of that which they seek to prove at the scene itself: an album of pictures taken with family, or kissing at the beach, articles about harassment, personal testimony, or knowledge about what a person likes to do in bed.¹¹⁹ All are elements used to prove a claim based on an absence, an identity or a commitment where truth is irreducible to the (indiscern.) assigns of it deployed the encounter.¹²⁰

Revisiting these cases where the scene of adjudication is also narratively absent, I am struck by the backgrounds of these men. As Chicano feminist warrior (indiscern.) put it recently when she came to visit Rutgers

¹¹⁵ See, e.g., Dan Bilefsky, *Gays Seeking Asylum in U.S. Encounter a New Hurdle*, N.Y. TIMES (Jan. 28, 2011), <http://www.nytimes.com/2011/01/29/nyregion/29asylum.html/>; see also Claire Bennett, *U.K. Authorities Routinely Humiliate LGBT Asylum Seekers*, SLATE, http://www.slate.com/blogs/outward/2015/03/05/lgbt_asylum_seekers_in_the_u_k_are_routinely_humiliated.html.

¹¹⁶ See Bennett, *supra* note 115.

¹¹⁷ See, e.g., *Cameroon asylum row man 'told to prove he is gay'*, BBC NEWS (Sept. 29, 2016), <http://www.bbc.com/news/uk-england-37505529>; Debara Singer, *How do you prove you are gay? A culture of Disbelief is traumatising asylum seekers*, THE GUARDIAN (Nov. 24, 2015, 4:00 PM), <https://www.theguardian.com/commentisfree/2015/nov/24/gay-asylum-seekers-sexuality-home-office>.

¹¹⁸ See Bilefsky, *supra* note 115; See also *Immigration Basics: Thorny Issues in LGBTH Asylum Cases*, IMMIGRATION EQUALITY, <http://www.immigrationequality.org/get-legal-help/our-resources/immigration-equality-asylum-manuel/11-immigration-basics-thorny-issues-in-lgbth-asylum-cases/>. (Last visited Oct. 4, 2016).

¹¹⁹ See HUMAN RIGHTS WATCH & IMMIGRATION EQUALITY, *FAMILY, UNVALUED: DISCRIMINATION, DENIAL, AND THE FATE OF BINATIONAL SAME-SEX COUPLES UNDER U.S. LAW 70-87* (2006).

¹²⁰ *Ulises Decena*, *supra* note 14.

a few years ago: “just because you’re queer, you’re not relieved of having been born a man.” Mauricio’s blackness aligns with his high status in his hometown, confounding the location of blackness in the Dominican Republic. Romero’s pursuit of a silent claim after his HIV positive diagnosis, and learning that a deferred action would not allow him to work, is another dimension of this. Both of the men are well educated, well-traveled, and made decisions given choices not necessarily available to men of other socioeconomic status, to women, lesbian, queer or otherwise, or to trans-identified individuals.

How might a queer intersectional analysis draw insight from experiences that do not correspond to the most precarious standing before patriarchy, hetero-norm activity, and white supremacy? The question has haunted my scholarship with self-identified gay immigrant men coming from societies where violence and the murders of women, of trans-experience or not, have become normalized. As a light skinned and gay identified U.S. (indiscern.) gender, U.S.-based Latino who has come to identify as a black feminist, this is a question that I ask of my own positionality. In some African quarters, fighting, queer violence in countries like the D.R. is carried out through recourse to the figure appearing to be most marginal, in this case trans-identified women of color who are also poor.¹²¹

The irony is that the self-identified gay men may benefit disproportionately from the denouncement of transphobic violence, but the expediency abusing the figure of trans-women of color by orientations such as (indiscern.) and others (indiscern.) needs to be questioned, especially when it serves other constituencies.¹²² Furthermore, ignoring that homosexuality and homophobia render these men vulnerable should give us pause as we interrogate their social locations. Violence and hatred are often directed at men like Mauricio and Romero.¹²³ One example in the Dominican Republic is that of producer, actor and director Micky Bretón, who was found dead in Santa Domingo Motel in late 2009.¹²⁴ The young man serving a prison sentence for the crime claimed he was justified in torturing and killing the artist because of an unwelcome sexual advance.¹²⁵ Is Bretón, a white Dominican gay male artist, not a proper subject of the queer intersectional analysis? How do we build a queer intersectional analysis that attends to the interaction of interlocking oppressions and privileges? An initial answer accounts for the claimants’ standing as men, as a precondition for accessing mobility and resources in the way they do.¹²⁶ Research on Latino lesbians, for instance, has shown that women’s socialization in-

¹²¹ See *Ulises Decena* supra note 14.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ See *id.*

volves tight family surveillance and discipline of their bodies, combined with differential access to mobility.¹²⁷ A supplement to this answer, however, points to the shifting grounds within which immigrant men travel and live.¹²⁸ Mauricio and Romero had options, but their downward class mobility, being immigrants, and being read as brown or black in the United States, would hardly place them in a position of elite. Downward class mobility was the experience of the majority of the men in my sample, and finding that health, irrespective of light skin privilege or high educational or professional accomplishment.¹²⁹ There is insight to be drawn for black/queer intersectional analysis from the exploration of the contradictions that immigrants of color bring to the mix. Interlocking oppressions are also located in shifting grounds of constraint, disadvantage and possibility.¹³⁰ Placed in a transnational frame, education helps immigrant men access resources, but several other assets are not transferrable, especially for racialized brown or black immigrant men.

Now, cases like that of Romero or Mauricio challenge us to continue to explore the boundaries of what intersectional analysis looks like. In her critique of Feminist and Black Liberation work, for instance, Kimberlé Crenshaw argues that “the praxis of both should be centered on the life chances and life situations of people who should be cared about without regard to the sources of their difficulties.”¹³¹ What might it mean to offer a friendly amendment to Crenshaw’s insight and think about difficulties and possibilities of contradictory positions at the locus of enunciation of a lot of queer voices? Thank you.

WHITNEY STRUB: Thank you all for these fantastic papers. We have some time for questions, so let me first open it up to the crowd.

PARTICIPANT: This is a question for Professor Russo-Garrido. How if at all, has the legalization of gay marriage involving two people damaged the polyamory argument?

ANAHI RUSSO-GARRIDO: So in my broader work I speak of the particular moment in time when there are different conversations happening on intimacy in Mexico City. We see these conversations crystallizing in *sociedades de convivencia* and in same-sex marriage.¹³² This is characteristic not only of Mexico City; we see this happening across the continent.¹³³ Polyamorous relationships have been happening for longer than the precise

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. OF CHI. LEGAL FOR. 134, 166 (1989).

¹³² See, e.g. Anahi Russo Garrido, *The Emergence of Lesbian Safe Places in Mexico City* (1970-2009), 4 J. POST-COLONIAL CULTURES & SOC’Y 47, 88 (2013).

¹³³ See *id.*

moment when [the publication—I shall call this (indiscern.)—is published.] But there is something about the context. There is a question about when is it necessary to theorize the ways in which we relate to each other. I see the idea of polyamory being highlighted in publications, in organizational groups, in conversations that people were having during field work as symptomatic of the moment when the monogamous couple is legitimized through (indiscern.) same sex marriage.¹³⁴ So more than same-sex marriage damaging polyamorous relationships, I see it more as sort of a moment when polyamory becomes named and becomes a discourse where people question their relationships in the context.

PARTICIPANT: I have a question for Mr. Sifuentes. I have done a lot of work on Cuba, Cuban civilization, and I have read Arenas' book—a beautiful book actually that he wrote—and at what point—and I know that in the 60's and even the 70's, the regime was really anti-gay literally. At what point did that side change in Cuba?

BEN SIFUENTES: I really cannot pinpoint a moment, but I would say it would be the 80s, right after my (indiscern.) becomes the moment of opening up, literally. So that's what I would hypothesize. Carlos, you might have more information on that.

CARLOS DECENA: I think we may have somebody later on who can talk to us a little bit about that. But my sense is, yeah, definitely post-Mejia.

BEN SIFUENTES: But what I was trying to do, at least with the reading of that chapter, is called Cuatro Categorías de Locas, the four types of gays.¹³⁵ I was just interested in the translation of the word loca and gay, because it is how he's using a kind of playful, almost ironic, "wink wink" way in which he writes this book in New York as he's done. I think that he's reflecting on how he came out and how he lived a gay life in Havana, as compared to the one he was having in New York. What I found really impressive was how in a way the translation shuts off any possibility of new categories.

I really wanted to think about the category of locas, and I think as Carlos Decena does in his work in *Tacit Subjects*, is how the notion of practices and identities do not necessarily follow as neatly as we would like them to.¹³⁶ So we can talk about a gay identity, but that gay identity might have a series of practices that go unspoken. Likewise we might be able to bless certain practices that become some kinds of gay and lesbian identities and ignore other practices. So I just wanted to give, at least in my paper, a kind of opening as well as a comparison between practices and identities.

¹³⁴ See, e.g., Mimi Schippers, *Beyond Monogamy: Polyamory and the Future of Polyqueer Sexualities* (NYU Press 2016) (analyzing the legitimization of monogamous couples in the broader context of other sexualities).

¹³⁵ Sifuentes Jauregui, *supra* note 6.

¹³⁶ Ulises Decena, *supra* note 14.

And then when you start adding other layers like race, you begin seeing a more complicated narrative.

PARTICIPANT: When moving forward with LGBTQ rights, how can you approach reform in certain countries that are super conservative or religious?

CARLOS DECENA: If I may answer that. Last year, in 2014, I had the great privilege of going to Uruguay, as part of a small Fulbright grant, to do some public programs and to take a course on diversity.¹³⁷ Uruguay is interesting due to its strong tradition of diversity actually emerging from sexual diversity.¹³⁸ Uruguay is one of the more advanced countries in the world, and that includes us; they're more advanced than we are in some fundamental issues around respect for difference, respect for diversity, etc. They have issues, of course, they have to, with their own national, "foundational fiction," of the nation state as this sort of white southern cone, the "Switzerland of the Americas,"¹³⁹ etc., which they all know is crap. But of course it's like us being the immigrant haven that we are not. That's kind of like the little fiction that we just tell ourselves. But it's just false. For me it was a very important part of what I did to have a very different attitude towards what it was that I was bringing and what it was that I was taking away. This was an exchange. I tried, of course, within what the Fulbright grant actually allows, to make it an exchange that was about learning mutually. I was not so much trying to provide a different perspective, though of course the perspective was there, but rather to also pick up on the kind of experiences that they have been having around struggles for diversity. It seems to me that we in the United States, unfortunately, continue to be very conceited about the pretense of advances, when we go elsewhere and find, oh right, so Cuba is doing much better than we're doing on health, at least they have all these other problems that allows us to maintain our sense of being more advanced. I think that it's really important for us to get a reality check on what "advanced" really looks like, and to acknowledge and be a little more self-critical about the ways in which this country is really not the bastion of liberty or the model for a lot of things. That means that our attitude towards exchanges with other countries and societies has to start from a different vantage point. This is not the vantage point of us enlightening anybody, because I think that half the time we're the ones who need to be enlightened. A friend of mine used to call this the manifest destiny of gayness; we go around saying like yeah, come out, everybody, out of the

¹³⁷ Fulbright Scholar Directory – Carlos Decena, *Council for International Exchange of Scholars*, www.cies.org/grantee/carlos-decena (last visited Oct. 26, 2016).

¹³⁸ See Michael K. Lavers, *Uruguay, Argentina ranked most LGBT-friendly Latin American Countries*, WASHINGTON BLADE (Oct. 25, 2016, 1:04 PM), <http://www.washingtonblade.com/2016/10/25/uruguay-argentina-ranked-most-lgbt-friendly-latin-american-countries/>.

¹³⁹ See *Latin America – Uruguay country profile*, BBC (Mar. 28, 2016), <http://www.bbc.com/news/world-latin-america-20041847>.

closet, into the street. Well, that may have worked here, but it doesn't even work for everybody in this population. Just look at the City of Newark—excuse me—we don't even have to go that much farther from here to know that our very American affirmative narrative of gayness, which is all about pride, visibility, and everything, it's yet another fiction. It's a very nice one, it's a beautiful one, and of course it's one that's achieved us, many of us, even the possibility of carrying out the work that we do today. So while being grateful for that, it's important to acknowledge that it's a very specific kind of narrative.

BEN SIFUENTES: Let me just add that last summer, and the last ten summers, I spent several weeks in this tiny town in Mexico called (indiscern.). Last summer was the first Pride March, which if you know the town it's rocky, the roads are rocks. To see the head of the Pride March, who were these drag queens with these super high-heeled shoes walking on these rocks, was quite an amazing feat. There was just one singular moment in the march where an older woman on the side of the road while there was this silence, and she yelled out [in Spanish], "Bravo, good for you for being so brave!" One of the drag queens started crying, which I thought was a stunning moment, and what it teaches me is that this is where those transformations are happening in those conservative places. They're happening within the domestic sphere. They're happening in new allegiance of family that Anahi is pointing to. So oftentimes we look toward the state to find categories and state mechanisms. But then if this is pressing us to look at those domestic spheres and looking at the organizations that are doing the work at different nodes or at different points where the transformative work can happen, we might learn from them. As Carlos says, and we might also intervene, because those are going to be the places where I think that you will perhaps find a more openness or more possibility for that transformation.

PARTICIPANT: So I'm glad you asked that question. My name is Edward. I'm currently doing a study with LGBT refugees from Canada, who have fled to the United States or Canada from all over the world, including the Caribbean, Middle East, parts of Europe, and Russia. When I hear the stories that have forced them to migrate, I have to ask myself how do we respond, because we do know that the U.S. is not a prime example of LGBT rights for sure. If you look closely, a lot of American evangelical groups have gone to countries in the Caribbean and Africa to help mobilize homophobic constituents. At the same time, though, when you hear these stories it's hard to then say we're not the beacon of hope. But we're definitely not the beacon of hope compared to Canada. When I speak to my LGBT course, and to my groups who have gone to Canada, it's almost like they've gone somehow over the rainbow. Here there is still so many struggles left. So what are your suggestions for dealing with that? The 76 coun-

tries that still prosecute people who engage in queer or same-sex behavior, are effectively engaging in honor killing.¹⁴⁰ Yes, I'm not saying that the United States is the best place to be, but how do we mobilize? Because it's not illegal here, but attitudes differ from place to place. I grew up in Staten Island; I would not hold hands there. What's the answer? I don't want to be a colonial. I don't want to come from that vantage point. So how do we deal with it? Because we have to be practical, too. I look to post-modern theory, but it's not giving me an answer.

ANAHI RUSSO-GARRIDO: I think about chronologies of last changings in the U.S. and see change not benefitting everyone at the same time. I think it's more useful to think about, for example, a continental chronology. When we look at years in which same-sex unions or same-sex marriage was legalized in states, the process overlaps legalization in other countries. So I'm not sure that pitting countries against each other, is more accurate than broader trans-continental or trans-national change.

CARLOS DECENA: Your question is the one that has kept me from publishing this. I struggle with this precise problem. I don't want to commit to printing something because I know that if I'm the lawyer and the advocate, and the person comes to me and this mechanism is available, I'm sure as hell going to use the mechanism to do right by this person whose life I want to support, whose survival I want to support. Irrespective of the brother message of that about the U.S., I know that there is a kind of complicity that I can live with, and I can understand why advocates will want to use people like Allie Miller, who will talk about this, this is the standing mechanism, let's use it. It's an instrument, let's use it.

One of the things that I've been thinking is how might we open up, and this is terra incognita for me, and I imagine maybe for most of the lawyers in the room. I'm really curious about the protocols and how the inspectors carry out the eddy of true versus false claims, and of course, people who study this more closely will probably know more than I do about this. But over the years, what I've learned from immigrant communities is that there is a very strong focus on actual, performance, the literal performance of authenticity before the person who is going to vet your application for something or for something else.

The narrative of the gay refugee has to be accompanied by tears. There's a whole performance that—and a whole kind of temporality to how it happens, when it happens, and et cetera. A Dominican getting an asylum claim approved, was famous at the time because there were no Dominicans getting asylum. When one did, it was published in Boston and I was in the middle or starting my research. I just kind of guffawed at the whole thing. I'm like what? Really? Dominican? What? Yeah, whatever. Most of my friends kept on saying, oh, no, that's some, crass legalization strategy. Most

¹⁴⁰ 77 countries where homosexuality is illegal, ERASING 76 CRIMES (last updated Dec. 14, 2016), <https://76crimes.com/76-countries-where-homosexuality-is-illegal/>.

of my friends were getting Dominicans, who had gotten married to women to do the same thing. Everybody, including me, was passing judgment on this guy who went to this one mechanism that seemed unprecedented for the group. And then I tried to gain access to this person. The person ultimately did not speak to me, they spoke—he sent the message to his lawyer and then the lawyer sent me the message. There was a narrative about being persecuted, etc., and that was sort of the narrative that was mediated by the lawyer. My concern is not with the narrative, whether it's true or not. I'm just curious about the protocols. For instance, how are they judged and how are folks who get to make the decisions instructed to evaluate whether two people are really a couple or not, irrespective of whether they're gay or straight or whatever.

I've had people within my circles who are straight couples, who are happy, who have been together for a long time and who are not lying, be turned away because somehow they're not producing an authentic heterosexual marriage. Clearly there is something going on here about the—not just the fact of the marriage or the authenticity, but actually the performative dimension of it that I would love to be able to pry open somehow. How we do that, I don't know, given that immigration seems to be treated in terms of the law in a different sphere where transparency around some of these things is not something that we are holding the State to. But if there could be some, this is where the potential intervention around gender normativity, transfolks and some of this other stuff might happen. Part of the judging or the education of marriage, of the claims to do with how people perform gender have of course, nobody will tell you, right.

BEN SIFUENTES: Just a footnote: It seems that what we understand as the ends of LGBT writing has changed over the last 30-40 years, we've gone looking for sexual freedom and sexual openness, such as in polyamory and so forth. It almost seems to be a throwback to the 70's and 80's, right, to think about marriage as being the standard by which LGBT rights have been achieved in this country. I think that's what is interesting about this global understanding of what LGBT rights might be, what Dennis Altman calls "The Americanization of the Homosexual"¹⁴¹, that means that we have sort of always impressed upon the world that this is a standard. There is always been a promise that it is always better than where they're leaving, whether they're refugees or sexiles. While this is happening, we seem to have forgotten that things like basic sexual rights are still desirable. All of a sudden, sexual rights have been pushed on the side for something much more normative like marriage rights. All I'm trying to say is how do we measure this in the history of LGBT rights: How do we measure our successes? I think that if there's been one valid critique of the U.S. LGBT movement, it is that we've sort of forgotten about what the openness of

¹⁴¹ DENNIS ALTMAN, *THE HOMOSEXUALIZATION OF AMERICA: THE AMERICANIZATION OF THE HOMOSEXUAL* (St. Martin's Press, 1st ed. 1982).

sexual rights were all about, and we have privileged marriage as the gold standard. Now we can get married, whoopee. Now we don't have to worry about anything else. Where at the same time, as you mentioned, there are children in this country who are still committing suicide. Women who are still being battered and killed in the streets. In some way, we have forgotten the kind of prior debates, or we have felt that we have accomplished a certain level of success. All we're saying is we can't forget the {quote} {unquote} "gangs", because those gangs probably have not been sediment as well or have been fulfilled as well as we would like to think we are.

WHITNEY STRUB: It's my unfortunate task to take note that we are out of time, unfortunately. We've got a 15-minute break here, so I think if people do want to continue the conversation, we have a fantastic budget and I do think it's probably going to resonate throughout the panels for the rest of the day, actually. But I think it is my job to sort of call this panel to an official close, so please join me in thanking our panelists for these fantastic —.

JORGE CONTESE: —We are welcoming four great speakers to our panel on Pioneering Legal Strategies in Global LGBTQ Movement. With that, as the first panel switched order, let me just introduce them in the order that the panelists will speak. Our first panelist is Macarena Saez.¹ She is a Fellow in the International Legal Studies program, and teaches at American University, Washington College of Law, in the areas of family law, comparative law, and international human rights.² She is the faculty director of the school's Impact Litigation Project, and she is also on the executive committee of the Network of Latin American Scholars on Gender, Sexuality and Legal Education, ALAS, which provides trainings and publications to help professors in Latin America on mainstreaming gender and sexuality perspectives in legal education.³ I had the privilege to work with Professor Saez as co-counsel for the Plaintiffs in the landmark case, *Atala and Daughters v. Chile*,⁴ after which sexual orientation and gender identity became protected classes in the inter-American human rights system.⁵ She has written several articles and book chapters on gender and sexuality including the co-edition of the first legal casework on Gender and Sexuality in Latin America, *La Mirada de los Jueces: Decisiones sobre Género y Sexualidad en Latino-américa*, and the edition of the upcoming book, *Same-Sex Couples: Comparing Insights on Marriage and Cohabitation*.⁶ Her latest paper on same-sex marriage, Transforming Family Law through Same-Sex Marriage: Letters from and to the Western World, will be published in the next issue of the Duke Journal of Comparative and International Law.⁷ She holds a law degree from the University of Chile School of Law and an LL.M. from Yale Law School.⁸

¹ See Faculty Directory, Macarena Saez, AMERICAN UNIVERSITY WASHINGTON COLLEGE OF LAW, <https://www.wcl.american.edu/faculty/msaez/> (last visited Oct. 3, 2016).

² *Id.*

³ *Id.*

⁴ *Atala Riffo and Daughters v. Chile*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 239 (Feb. 29, 2012).

⁵ *Id.*

⁶ CRISTINA MOTTA AND MACARENA SÁEZ, *LA MIRADA DE LOS JUECES SEXUALIDADES DIVERSAS EN LA JURISPRUDENCIA LATINOAMERICANA*(Siglo del Hombre Press 2008); MACARENA SÁEZ, *SAME SEX COUPLES: COMPARATIVE INSIGHTS ON MARRIAGE AND COHABITATION*, (Springer, 1st ed. 2015).

⁷ Macarena Saez, *Transforming Family Law Through Same-Sex Marriage: Letters From and to the Western World*, 25 DUKE J. COMP. & INT'L L. 125 (2014).

⁸ See *supra* note 1.

Our second speaker, Lisa Davis, is the Clinical Professor of Law for the International Women's Rights Clinic at CUNY School of Law.⁹ For over ten years Lisa has worked as an advocate for human rights. She has written and reported extensively on international human rights and gender issues including on women's rights and LGBTQ rights, with a focus on peace building in conflict and disaster settings.¹⁰ Lisa currently serves as the coordinator for the Lawyers' Earthquake Response Network Gender Working Group, and is a board member of the LGBT Social Science and Public Policy Center at Roosevelt House.¹¹ She is also a member of the Circle of Health International Middle East Delegation, and she serves as a human rights advocacy director for MADRE, an international women's human rights organization where she leads the advocacy and litigation strategies.¹² Prior to joining CUNY, Lisa worked as an international human rights legal consultant for various U.N. experts and international institutions on gender and human rights concerns throughout the world.¹³

Our third speaker is Zach Hudson, who is currently the Crowley Fellow at the Leitner Center for International Law and Justice at Fordham Law School.¹⁴ Previously, Zach served as head of the United States campaign to ban landmines and cluster bombs in a coalition consisting of a number of U.S. based organizations, and civil society dedicated to a total ban on landmines and cluster bombs.¹⁵ Prior to joining the United Nations Association of the USA, Zach created and implemented a workforce re-entry program in San Francisco designed to aid at-risk populations, worked for the International Red Cross in India as a rescue worker in the aftermath of an 8.0 earthquake, and lived in Dublin, Ireland, where he was the acting international business development manager for Tax Back International.¹⁶ Zach has a Bachelor's degree in sociology from Vassar College, a Master's degree from Trinity College in Dublin, Ireland, and a J.D. from Fordham Law School.¹⁷ Please join me in welcoming all of our speakers.

MACARENA SAEZ: Good morning, everyone. Thank you very much to Rutgers and the organizers of this incredible symposium. There are two things that I should say first. One is that Jorge mentioned that I

⁹ See Faculty Directory, *Lisa Davis*, CUNY SCHOOL OF LAW, <http://www.law.cuny.edu/faculty/directory/davis.html> (last visited Oct. 11, 2016).

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ See Faculty Bios, Zach Hudson, FORDHAM UNIVERSITY SCHOOL OF LAW, http://www.fordham.edu/info/23645/g_h/7962/zach_hudson (last visited Oct. 11, 2016).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

was one of the lead attorneys in the *Atala* case.¹⁸ What he didn't mention is that he was the other lead attorney in the *Atala* case, so we worked together for several years and we actually still work together for that case, because the cases before the International and Human Rights system are eternal, we could say, so they go on forever.¹⁹ The second thing that I should say is that I wish I could speak from the table because I'm so short, but I don't even know with this screen if you can even see me. I should have something so I could just be a little bit taller for you, but it is what it is. The focus of my presentation today is going to be on marriage equality, and it's a little bit more specific than most discussions or debates on marriage equality. What I've been doing in the last year is trying to focus on whether decisions that grant marriage equality by different courts mean exactly the same thing or not.

In the aftermath of a decision on marriage equality, for those of us who believe in equality between individuals regardless of their sex, gender, sexual orientation, race, and other categories that we can discuss in a different forum, that means we are very happy with them. What it really means in the long run to have a marriage equality decision may not be exactly the same given the reasoning of different judges in these decisions.

What I was trying to look for was whether in different countries, decisions that have granted marriage equality are based on the same arguments. Whether judges are using the same arguments, or using different arguments, if they reason differently, if they reasoned similarly, and what it means in the long run for the future of families in general.

There are several findings that I'm going to refer to. I've been analyzing, of course, U.S. decisions and I've also been analyzing most of the decisions that are available to the public from different countries on marriage equality, including some from Canada, South Africa, Spain, and Colombia, and even those decisions that are not granting. I'm limiting my research to those that granted marriage equality, so I'm not really discussing those decisions that did not and the reasons why those courts rejected the idea of marriage equality.

For example, Colombia does not have marriage equality yet, but the decision on marriage equality by the Constitutional Court of Colombia just fell short of granting marriage equality,²⁰ but all of the court's reasoning really was coming towards an end where marriage equality was not granted. It's almost inevitable at some point, unless they overrule their own decision that marriage equality will happen.

¹⁸ See *Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 239 (Feb. 29, 2012).

¹⁹ *Id.*

²⁰ Sibylla Brodzinsky, Jo Tuckman, *Colombia: the next battleground in the global fight for marriage equality*, THE GUARDIAN (Jul. 9, 2015, 6:00am), <http://www.theguardian.com/world/2015/jul/09/colombia-same-sex-marriage-decision-latin-america>.

Brazil has several decisions as well on marriage equality.²¹ The most important ones, of course, the ones that are more referred to, are from South Africa²² and Canada.²³ France also has a marriage equality decision.²⁴ I don't refer to that one because it's very technical and frankly, it really didn't say anything substantive about marriage equality.²⁵

What I got from these decisions is first that they are not the same in the long run, but they do refer to the same arguments. One thing that is very interesting is that while the cultural card is not there yet, marriage means different things within countries depending on the culture or idiosyncrasies. It may be true for different disciplines, but it's not being reflected in the law, though.

The arguments that both opponents and people in favor of marriage equality bring before judges are mainly the same. Thus, I didn't really analyze the arguments in the briefs, but rather what those judges brought to the table in their decisions.

Procreation is one of the briefs' somewhat repeating arguments: both the traditional procreation argument that marriage is between a man and a woman because this is required to procreate, and the novel argument – not yet exported, really accidental procreation.²⁶ Thus, gays and lesbians are not worse than heterosexual couples, in fact, because they are not subject to accidental procreation.²⁷ This argument contends that this imperfection of heterosexuality necessitates states creating a framework to control heterosexual marriage to ensure responsibility in child rearing.²⁸ This accidental actuality doesn't happen in same sex relationships. This argument may not have reached other countries, but the traditional procreation argument has.

Then you have arguments on equality, autonomy, dignity, and the concept of marriage. Each country has some form of the procreation argument,

²¹ See, e.g., Marilia Brochetto, *Brazilian judicial council orders notaries to recognize same-sex marriage*, CNN (May 15, 2013 13:28 GMT), <http://edition.cnn.com/2013/05/15/world/americas/brazil-same-sex-marriage/index.html?eref=edition>.

²² Mary Alexander, *SA Legalises gay marriage*, SOUTHAFRICA.INFO (Dec. 1, 2006), http://www.southafrica.info/services/rights/same-sex-marriage.htm#.Vvru0_krKhc

²³ Clifford Kraus, *Gay Marriage Is Extended Nationwide in Canada*, THE NEW YORK TIMES (Jun. 29, 2005), <http://www.nytimes.com/2005/06/29/world/americas/gay-marriage-is-extended-nationwide-in-canada.html>.

²⁴ See France Gay Marriage: Hollande Signs Bill into Law, BBC (May 18, 2013), <http://www.bbc.com/news/world-europe-22579093>; Stephanie Trouillard, *France's marriage equality law is less equal for some*, FRANCE 24 (Jun 27, 2013), <http://www.france24.com/en/20130627-france-gay-marriage-law-same-sex-equality-foreigners>.

²⁵ *Id.*

²⁶ See, e.g., Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUMAN (2013).

²⁷ *Id.*

²⁸ *Id.* at 3-4.

which holds that marriage is – to some extent, a static concept. Even if you have a marriage between people of the same sex, that doesn't mean that you really have a marriage because marriage is a 'natural institution.'²⁹ It has a natural form as sitting on a table; it doesn't make the table a chair, it remains a table. There is a similar idea that some legal concepts are also immutable.

The arguments in these decisions suggest a transplant of ideas. Judges in different countries are looking to what judges in other countries are saying or have said. That is interesting, of course, though in the United States, it's kind of frowned upon for the Supreme Court to use foreign or international law. It is not, however, unheard of.³⁰ The most important sodomy case, and still the segue to all current developments in marriage equality in the United States, *Lawrence* did mention foreign law.³¹ So it is something that is possible.

Outside the United States, there is a trend to mention something about foreign law and international law. I put them together because when judges refer to international law, it may not necessarily be international. I'm not referring to international law that is binding to those countries, but of international law, general principles and ideas. I will refer to these at the end, time permitting.

So, from the repeating arguments, we have three main components - dignity, equality, and autonomy. However, a fourth element, marriage, is the most important departure in these decisions. Marriage makes us better.³² Marriage is the institution that makes our society civil.³³ Without marriage, we would not be as modern and as perfect as we are and we can be.

This argument of marriage as a perfecting institution, an institution that makes us better, is not an argument present only in decisions that oppose marriage equality, or in briefs opposing marriage equality: to the contrary, this argument is present in several pro marriage equality briefs and decisions. Such an important institution surely cannot be denied to same sex couples.³⁴

²⁹ See Maggie Gallagher, *If Marriage is Natural, Why is Defending it so Hard? Taking up the Challenge to Marriage in the Pews and the Public Square*, 4 AVE MARIA L. REV. 409, 417 (2006).

³⁰ See, e.g., *The Osceola*, 189 U.S. 158 (1903). (An admiralty case where the Court drew from an English law permitting seamen to sue vessel for unseaworthiness.)

³¹ *Lawrence v. Texas*, 539 U.S. 558, 598 (2003).

³² See Ryan T. Anderson, *Marriage: What it is, Why it Matters, and the Consequences of Redefining It*, THE HERITAGE FOUNDATION (Mar. 11, 2013), <http://www.heritage.org/research/reports/2013/03/marriage-what-it-is-why-it-matters-and-the-consequences-of-redefining-it>.

³³ *Id.*

³⁴ See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2594 (2015) ("The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations.").

Out of this comes an argument of assimilation. The ‘marriage makes us better’ argument is most prevalent in the United States.³⁵ Decisions from Colombia, Mexico, South Africa, and Spain refer to other arguments based more on equality and autonomy, not on the perfectionist institution of marriage. This should be understandable because in the U.S. marriage is a Constitutional right - no question about it.³⁶ So you could say, well, what are you going to do? But just because marriage is a Constitutional right does not attach a particular reasoning behind the argument that marriage makes us better because it perfects our society, etcetera.

Marriage has been a Constitutional right for ages; decisions from the 1800’s and from the early 1900’s as well as now, reiterate that marriage is important for society as a whole. *Goodridge*, in Massachusetts, the first marriage equality decision in the United States was in 2003.³⁷ In that decision, Chief Justice Marshall stated, “[m]arriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support. It brings stability to our society.”³⁸ That is really a perfectionist argument there. He goes on to say, “[c]ivil marriage anchors an ordered society by encouraging stable relationships over transient ones.”³⁹ Basically, marriage is better than being unmarried: that is the main message in the United States. That has not been the focus of any of the decisions in Latin America, or in Europe. It was clearly not the focus in the South African decision, nor is it the focus in Canada. As you can see, for good and for bad, it’s an example of American exceptionalism, as well.

This was the argument in 2003. But then, *Windsor*⁴⁰ repeats arguments about marriage as an important institution, as do post-*Windsor* decisions. For example, *Geiger*,⁴¹ in 2014, simply says,

“[M]arriage matters. It matters not only for the individuals who decide to enter into the civil union but also for the state. This is why the state link so many rights and protections to decisions to marry. Strong stable marriages create unions in which children may be raised to become healthy and productive citizens.”⁴²

So you can see here that there is an ongoing narrative on the perfectionist institution of marriage.

Dignity is also linked to marriage, a complicated argument for unmarried families. Dignity has also been used in all decisions throughout the

³⁵ See, e.g., *Id.*

³⁶ *Id.* at 2599.

³⁷ *Goodridge v. Dep’t. of Pub. Health*, 440 Mass. 309 (2003).

³⁸ *Id.* at 312.

³⁹ *Id.* at 322.

⁴⁰ *United States v. Windsor*, 133 S. Ct. 2675 (2013).

⁴¹ *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128 (2014).

⁴² *Id.* at 1137.

world to support marriage equality. But it can be used differently, and has different meanings. One of the attached meanings is equality. South Africa has used dignity this way.⁴³ Mexico and Colombia attach autonomy to dignity,⁴⁴ but also dignity as autonomy had been used in the U.S. in the *Lawrence* decision.⁴⁵ Justice Kennedy had some ideas there on dignity as autonomy that we can choose our own lives, our own destinies, our own families.⁴⁶

But with *Windsor*, there is a shift with the narrative of dignity.⁴⁷ In the past, dignity had been used in the U.S. institutionally. *Windsor* shifts back to this old idea of institutional dignity affected by marriage.⁴⁸ So we have to allow same sex marriage. We have to allow marriage equality because it's an institution with dignity. If you looked at the decisions following *Windsor* on dignity, many of them picked up this idea. Especially Justice Kennedy's commonly cited quote, that it's humiliating for children of these couples that their parents cannot be married.⁴⁹ That picked up strongly, not only in the following decisions, but it picked up on the narratives of the marriage equality movement.

So if you go to the Freedom to Marry organization's website or you go to any of these websites, you will look at the idea of, "We are today subject to dignity," or, "We are worthy of dignity," or something, that our dignity has been recognized because we can marry.⁵⁰ So you can say that, well, this is a litigation strategy, but litigation strategies have consequences in the long run.

Look, for example, to what has happened in South Africa. In its Constitution, South Africa left almost completely aside the idea of marriage.⁵¹ Marriage really didn't matter. It was the idea of equality; the idea that people were all equal under the law.⁵² Of course, each country has its own ghosts. For the U.S., the ghost is race, for South Africa, the ghost is apartheid. So South Africa's Constitution has a strong (indiscern.) on dignity based on equality.⁵³ That has to do, of course, with its past.

However, you could have also claimed that South Africa's Constitutional Court had the possibility of saying, "well, marriage has never been in

⁴³ *National Coalition for Gay and Lesbian Equality and Another v. Minister of Justice and Others* 1998 (1) SA 6 (CC) (S. Afr.).

⁴⁴ Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 THE EUR.J. OF INT'L L. 655 (2008).

⁴⁵ *Lawrence v. Texas*, 539 U.S. 558 (2003).

⁴⁶ *Id.* at 574.

⁴⁷ *United States v. Windsor*, 133 S. Ct. 2675 (2013).

⁴⁸ *Id.* at 2692-96.

⁴⁹ *Id.* at 2694.

⁵⁰ Evan Wolfson, *Why it matters*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/pages/why-it-matters> (last visited Oct. 3, 2016).

⁵¹ S. AFR. CONST., BILL OF RIGHTS, 1996.

⁵² *Id.*

⁵³ *Id.*

our culture, and none of our culturally different groups have ever recognized marriage equality—same sex marriage. Therefore, it's for us to decide. Where people are not equal, we don't recognize it, because it's not part of our culture." They completely decided not to go that route and went with this route of equality. It's almost imperative to have marriage equality or same sex marriage to have marriage equality. It was not about marriage, it was about diverse families. So they left a huge door open for the recognition of different types of family formations. Not only families that are formed through the main entrance, the beautiful door of marriage. As I always say, societies have this huge, wonderful door called marriage where you can enter into the family, the ideal family and then you have the ugly back door, where you put the groceries and everything. That is where the rest of the families come through.

So I think that what South Africa did was a little bit like let's reduce this, let's try to put all the doors of the house in the same style. It doesn't matter what door you enter, your family will be treated equally, and all the ways that you form your family will be treated equally.

What happened with Mexico, Spain, and other countries is they really talked about dignity as autonomy. This idea that you decide your destiny and we, as a country, are here to protect the way that you decide to live your life, as long as you're not damaging anyone else. So the idea of the (indiscern.) and the Mexican—the first decision on marriage by the Mexican Supreme Court on the Constitutionality of the Federal District Bill—law on marriage, it's very rich on this idea that Mexico is not there to establish a legal family, but that families are formed socially.⁵⁴ The Supreme Court also discusses that the law is only there to make sure that they are within this framework of human rights and protection of autonomy of each individual, and I think that that creates a huge difference.

So, just to tell you what I think this will mean in the future, it will mean that you will have a region, hopefully—a huge area of difference between countries that are super conservative to countries that have been opening their doors. However, I think that the narrative that judges have been establishing in Brazil, and in Mexico, and all these countries that I've been referring to, is a narrative that lends itself to the opening of different family formations, as the region has always been, in general, the same with South Africa, and mostly in Europe, as well. It's the United States where we don't know yet, and we don't know what's going to happen next June. It would be very unfortunate if the United States continues to use these very narrow narratives that really only help married couples. There is a huge social and economic divide. People do not get married just because they are

⁵⁴ See *Mexican court upholds capital's Gay Marriage Law*, THE DAILY CALLER (Aug. 5, 2010, 3:09 PM), <http://dailycaller.com/2010/08/05/mexican-court-upholds-capitals-gay-marriage-law/>.

the same sex, they don't get married because they have a lot more things to do in their lives than think about marriage. Thank you.

LISA DAVIS: My name is Lisa Davis. I'm a Clinical Professor of Law at CUNY Law School, and it's a pleasure to be here.⁵⁵ I'm going to talk to you about the Karen Atala case, which started in Chile's domestic courts and worked its way up to the Inter-American Court.⁵⁶ It's a story about Karen Atala, who is a judge, a lesbian, and a mother who had her kids taken away from her because of her sexual orientation.⁵⁷

Before I begin, I have to say I'm grateful to have this visual presentation to share with you. It was put together by Blakeley Decktor, who was a former student of mine, and is now a human rights attorney.⁵⁸ Secondly, as you heard, we have the attorneys here with us today who litigated the *Atala* case, Jorge and Macarena. No pressure on this presentation (indiscern.), right?

All right, so Karen Atala. As I said before, the case started domestically. Once it went through the Chilean court system, it went to the Inter-American Commission and then to the Inter-American Court.⁵⁹ This case spanned, as you can see, over a decade of litigation.

In 2002, Karen and her husband, Jaime Lopez legally separated.⁶⁰ They were married for nine years, and agreed it was best that their daughters, who at that time were ages 5, 6, and 10, live with Karen.⁶¹ That is until Karen fell in love with another woman. Lopez was outraged. After learning of this in 2003, Lopez filed for custody of his daughters, claiming that the physical and emotional wellbeing of the girls was at serious risk.⁶² He argued they were in danger of facing discrimination and could become confused about their gender roles.⁶³ In his Petition to the Court, Lopez claimed that lesbians are known for their promiscuity.⁶⁴

Secondly, and more disheartening, Lopez also claimed that Karen ran the risk of passing on sexually transmitted diseases to their daughter through normal gestures of affection, such as hugging and kissing.⁶⁵ He

⁵⁵ See Lisa Davis, *supra* note 9.

⁵⁶ See generally *Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012).

⁵⁷ *Id.*

⁵⁸ See generally, *Blakeley Decktor: Seeking Gender Equality Through the World's Courts, CUNY School of Law* (Feb. 1, 2016), <http://www1.cuny.edu/mu/law/2016/02/01/blakeley-decktor-12-seeking-gender-equality-through-the-worlds-courts/>.

⁵⁹ *Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012).

⁶⁰ *Id.*

⁶¹ *Id.* at ¶30.

⁶² *Id.* at ¶31.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

claimed this put the children at imminent risk of contracting STDs, such as herpes and HIV.⁶⁶

As outrageous as this might seem, Karen was ordered by the Judge to undergo a gynecological exam to ensure that she didn't have any STDs.⁶⁷ You can imagine that the judge also awarded provisional custody to Lopez.⁶⁸ At the same time, their case was being covered by the media, so you can also imagine the kinds of wild accusations and sensationalism that was covered by the press. As the civil proceedings were playing out, the Court appointed a judge to visit the Criminal Court where Karen Atala was a judge and ordered the visiting Judge to "verify certain facts about Atala's private life" that had been publicized in various media outlets.⁶⁹

Karen was summoned to meet with the President of the Criminal Court in his chambers and he said to her, "Look, the reason for this hearing is because I understand that your husband is suing you for the girls and the reason is because you are a lesbian. You should act with dignity and decorum and avoid this scandal. I urge you to turn over your children to Jaime immediately."⁷⁰ Karen stood her ground and said, "Look, Your Honor, this is something that is absolutely personal and private, and it is between me and my ex-husband."⁷¹

Karen then filed a pleading arguing that the decision to award provisional custody to Lopez had no legal basis and was primarily on the presiding Judge's own discriminatory and patriarchal prejudgments.⁷² The presiding Judge stepped down, an acting Judge stepped in and held that Atala was more than fit to care for her children.⁷³ By the end of 2003, the acting Judge ruled that Karen Atala was to be awarded custody of her daughters and that they were to return home by the end of the year.⁷⁴

There was some more back and forth in the courts and the case made its way to the Court of Appeals, which also rules in favor of Atala. The case then went on to the Supreme Court.⁷⁵ In 2004, the Supreme Court overturned the Court of Appeals decision, granted an injunction against Atala, and awarded provisional custody to Lopez.⁷⁶ The Court found that Atala's daughters would, in fact, be subjected to psychological harm, including

⁶⁶ *Id.*

⁶⁷ *Id.* at ¶33.

⁶⁸ *Id.* at ¶31.

⁶⁹ *Id.* at ¶33.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.* at ¶42.

⁷³ *Id.* at ¶40.

⁷⁴ *Id.* at ¶50.

⁷⁵ *Id.* at ¶51-53.

⁷⁶ *Id.* at ¶52.

misconstrued conceptions of gender roles and identity, and subjected to discrimination and alienation because of their mother's sexual orientation.⁷⁷

The Supreme Court had ended in a three-to-two split decision granting the permanent custody to Lopez.⁷⁸ The three Judges who were in favor in the case added that the risk of harm could be irreversible and borrowing from the U.S. best interest of the child standard, deemed that the protection of the children "should have preference over any other consideration."⁷⁹

Now the two dissenting Judges in the case, they pointed out that there was actually zero evidence of neglect or mistreatment of the children by Atala, which is required under the Chilean Family Code.⁸⁰ The Judges further noted that depriving their mother based solely on her sexual orientation imposed on the daughters and their mother, an unnamed sanction outside the margin of the law, in addition to being discriminatory.⁸¹

Having exhausted all domestic remedies, Atala had no legal recourse except to file a Petition in the Inter-American Commission, and she did so, alleging numerous violations of her and her daughters' human rights, including the right to privacy, the right to family, the right to equality and non-discrimination.⁸² I want to particularly note the right to non-discrimination here because of its relationship to the obligations established under Article One of the American Convention on Human Rights. We are going to come back to that.⁸³ Article One lists the classes that are protected from discrimination, such as race, ethnicity, religion, nationality.⁸⁴

The Petition to the Commission was also supported by a number of amicus briefs that argued the Supreme Court of Chile had made the decision improperly based on improper negative assumptions about lesbian and gay parents.⁸⁵ So there are two different arguments that were going on.⁸⁶ First, these stereotypes are contrary to decades of psychological and social science research, and kids are fine with queer parents.⁸⁷

Second, the Supreme Court's decision was contrary to the weight of international authority.⁸⁸ Customary international law has found that sexual orientation and gender identity are protected categories from discrimination.⁸⁹ That second argument was made by CUNY Law School, MADRE,⁹⁰

⁷⁷ *Id.*

⁷⁸ *Id.* at ¶54.

⁷⁹ *Id.* at ¶56-57.

⁸⁰ *Id.* at ¶58.

⁸¹ *Id.*

⁸² *Id.*

⁸³ 1966, U.S.T. 521.

⁸⁴ *Id.*

⁸⁵ See generally *Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 239, ¶44 (Feb. 24, 2012).

⁸⁶ *Id.*

⁸⁷ *Id.* at ¶14.

⁸⁸ *Id.* at ¶27.

⁸⁹ *Id.*

the International Gay and Lesbian Human Rights Commission (IGLHRC)⁹¹ (now known as OutRight Action International), and other organizations that joined us in the amicus brief we filed.⁹² We first made this argument to the Commission and later filed another amicus in support to the Court.⁹³

First and foremost, the Commission found that the State of Chile did violate Atala's right to live free from discrimination.⁹⁴ The Commission also found that the State was in violation of a slew of other rights enshrined in the American Convention on Human Rights.⁹⁵ So what do you think the Commission ordered?

The Commissioner recommended that the State of Chile, provide reparations to Atala and that it adopt legislation and public policies and programs to prevent and eliminate discrimination based on sexual orientation.⁹⁶ For lawyers, regional and international systems provide us with an opportunity that we wouldn't normally have. When you've exhausted domestic remedies, when you have nowhere else to go, you have one more place that you can go to try and get redress.

So what do you think happened? Do you think Chile complied? You know it couldn't have completely complied since the case went on to the Court. Chile half-heartedly complied with the Commission's recommendations. For example, the Government reported on pending legislation containing measures to protect individuals from discrimination based on sexual orientation.⁹⁷ However, the Commission considered the legislation to be too vague and not developed enough to ensure that the violation in the present case wouldn't actually repeat itself. And, it was only a pending bill.

The Commission also found that the government hadn't been in contact with the petitioner to discuss the appropriate reparation. So the Commission found that the State didn't comply. The State asked for an extension of time, but the Commission declined and instead sent the matter on to the Inter-American Court.

Despite the fact that the process had already taken so long, Atala wanted to go to the Court to ensure that this never happened to anyone else. She wanted others to avoid what she suffered, as it shouldn't have hap-

⁹⁰ See generally MADRE, <https://www.madre.org> (last visited Oct. 17, 2016).

⁹¹ See generally Outright Action International, <https://www.outrightinternational.org> (last visited Oct. 17, 2016) (The International Gay and Lesbian Human Rights Commission changed its name to Outright Action International in September 2015).

⁹² See generally *Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 239, ¶59 (Feb. 24, 2012).

⁹³ *Id.*

⁹⁴ *Id.* at ¶60.

⁹⁵ *Id.* at ¶78.

⁹⁶ *Id.*

⁹⁷ Pedro Garcia, *Chilean Paradoxes: LGBT Rights in Latin America*, OUR RIGHT (2012), <https://www.outrightinternational.org/content/chilean-paradoxes-lgbt-rights-latin-america>.

pened in the first place.⁹⁸ Beyond that, she wanted recognition that what happened to her was indeed a human rights violation.⁹⁹ Regional and International human rights venues can play a big role in this. They also allow us to give a voice for victims and to raise concerns when all else fails.

In 2011, the Court for the first time in history held a hearing specifically regarding discrimination on the basis of sexual orientation and gender identity.¹⁰⁰ The same amicus briefs were submitted in support of the case that the lawyers were bringing. Again, CUNY Law, MADRE, OutRight and other organizations that joined us argued that the Court should codify sexual orientation and gender identity as protected classes from discrimination under Article 1.1.¹⁰¹

There were four main areas of contention that the Court spoke to in terms of the Chilean government's defense of the best interest of the child.¹⁰² The first was social discrimination.¹⁰³ The Supreme Court of Chile said Atala's daughters could be subjected to terrible discrimination because of their 'lesbian moms'.¹⁰⁴ The Inter-American Court agreed; however, the Court also held that fear of discrimination is not a legal basis for unequal treatment.¹⁰⁵ More importantly, it runs the risk of legitimizing such forms of discrimination.¹⁰⁶

Regarding confusion of gender roles, the Chilean Court argued that the absence of a male household member put the children's development at risk.¹⁰⁷ The Inter-American Court provided a two-part answer.¹⁰⁸ First, if there is risk of harm to a child's development, there needs to be evidence of it. Second, the extrinsic evidence presented shows no such harm.¹⁰⁹

The Chilean Court also portrayed Atala as selfish, arguing that she puts her own interest in homosexuality above the interests of her children.¹¹⁰

⁹⁸ *Id.*

⁹⁹ *Chile: UN Human Rights Committee Identifies Gaps in Protections For Trans and Intersex Persons*, OUTRIGHT ACTION INTERNATIONAL (July 8, 2014), www.outrightinternational.org/content/chile-un-human-rights-committee-identifies-gaps-protections-trans-and-intersex-persons).

¹⁰⁰ Jessica Stern, *Inter-American Court on Human Rights Hears First Ever LGBT case*, OUTRIGHT ACTION INTERNATIONAL (2011), www.outrightinternational.org/content/inter-american-court-human-rights-hears-first-ever-lgbt-case.

¹⁰¹ U.S.T. 143.

¹⁰² *Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 239, ¶3 (Feb. 24, 2012).*

¹⁰³ *Id.* at ¶115-122.

¹⁰⁴ *Id.* at ¶115.

¹⁰⁵ *Id.* at ¶122.

¹⁰⁶ *Id.* at ¶121.

¹⁰⁷ *Id.* at ¶56.

¹⁰⁸ *Id.* at ¶113.

¹⁰⁹ *Id.* at ¶113.

¹¹⁰ *Id.* at ¶39.

The Inter-American Court disagreed, finding that sexual orientation and gender identity are protected under the right to privacy.¹¹¹

Finally, the Chilean Court argued that children have a right to grow up in a traditional household. The Inter-American Court acknowledged a broader definition of family, that goes beyond marriage.¹¹²

Most notably, the Inter-American Court found that sexual orientation and gender identity are protected classes under the “other status” section of Article 1.1 of its Convention.¹¹³

Karen was ultimately offered medical and psychological treatment.¹¹⁴ The Order said that Karen and her three daughters were to be provided with free, immediate, appropriate, and effective medical and psychological care for up to four years at a health center nearest their places of residence.¹¹⁵ However, Karen and her daughters have had a difficult time receiving such treatment.¹¹⁶ The government refused to pay for a private doctor and required the use of a public doctor instead. Lopez resisted cooperating with the process.

The Court also provided monetary compensation for at least Atala and her eldest daughter.¹¹⁷ One must be eighteen years old in order to claim it and has to identify as a victim, which is problematic for Atala’s second daughter.¹¹⁸ The oldest daughter wishes to have a relationship with Karen and live with Karen in order to attend college. The second daughter was more involved in the conservative religion of her father. Her youngest daughter told Karen she hoped everyone would “move on.”

The judgment was published. In fact, the publication did not go unnoticed by the conservative right. According to Atala, women from the extreme Catholic right wrote a letter to the newspaper’s editor expressing their “disgust” that their tax dollars were at work to pay for a full-range publication of the Court’s sentence, which “validated homosexuality as a form of expression,” and can be construed as a victory.

The Court also ordered the State to conduct a public ceremony within a year of the judgment, wherein it acknowledges international liability and references the affirmed human rights violations named in the judgment.¹¹⁹ The President of the Supreme Court attended the ceremony and came with various Judges from the Supreme Court and the Court of Appeals, but the

¹¹¹ *Id.* at ¶135.

¹¹² *Id.* at ¶142.

¹¹³ *Id.* at ¶85.

¹¹⁴ *Id.* at ¶254.

¹¹⁵ *Id.* at ¶254-55

¹²³ *Id.*

¹¹⁷ *Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 239, ¶299 (Feb. 24, 2012).*

¹¹⁸ *Id.* at ¶313.

¹¹⁹ *Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 239, ¶263 (Feb. 24, 2012).*

President at all times insisted that he was only there in personal capacity.¹²⁰ So they kind of do this see-saw, right?

Finally, the Court ordered training for public officials as a form of guarantee of non-repetition. There were some trainings, but Karen does not feel like these were done adequately or effectively. Furthermore, the Office for the High Commissioner for Human Rights (“OHCHR”), which has a presence in Chile, has also been taking these issues in its curriculum of trainings of police, prosecutors, and judges. But progress remains to be seen.

However, I am happy to report that the Chilean Supreme Court does at least, on paper, treat sexual orientation as a suspect category.¹²¹

ZACH HUDSON: Hello, everyone, and thanks so much for having me and for organizing this symposium today. I am going to be speaking with you about the world of transgender rights. At the end of this, you’re going to have more questions than you started with because it is a complex landscape and there are many different levels to rights protections in this area.

To start out, transgender individuals are facing a number of challenges legally. The first is discrimination at multiple levels.¹²² The second is access to appropriate medical treatments.¹²³ The third is legal recognition: gender markers, documentation, identifications, that type of thing.¹²⁴ When we talk about this in training manuals designed for rights advocacy that fall under the umbrella of LGBTI, we talk about how all of the areas of discrimination that affect sexual orientation all apply to transgender individuals as well. There are even more rights implications that go beyond these categories. This is the floor and then adding on from there.

The way I want to structure this presentation is that I want to start local, talk about these ideas through the prism of the work we have been doing on the ground in New York State. Then I want to move out nationally and then internationally to talk about the “lay of the land” in a broader scope. Then I want to move out nationally and then internationally to talk about the lay of

¹²⁰ *Gobierno Realiza Acto de Reparacion a Jueza Karen Atala Tras Fallo de la Corte Interamericana de Derechos*, LA TERCERA (Dec. 14, 2012, 3:19 PM), <http://www.latercera.com/noticia/gobierno-realiza-acto-de-reparacion-a-jueza-karen-atala-tras-fallo-de-la-corte-interamericana-de-derechos-humanos/>.

¹²¹ See, e.g., Andrea Rosario ñiguez Manso, *La Noción de “Categoría Suspechosa” y el derecho a la igualdad ante la ley en la jurisprudencia del tribunal Constitucional*, 43 REVISTA DE DERECHO DE LA PONTIFICIA UNIVERSIDAD CATOLICA DE VALPARAISO 495 (2014).

¹²² See generally, *Issues: National Transgender Discrimination Survey*, NAT’L CTR FOR TRANSGENDER EQUALITY, www.transequality.org/issues/national-transgender-discrimination-survey (last visited Oct. 24, 2016).

¹²³ See generally, *Issues: Health & HIV*, NAT’L CTR FOR TRANSGENDER EQUALITY, www.transequality.org/issues/health-hiv (last visited Oct. 24, 2016).

¹²⁴ See generally, *Issues: Identity Documents & Privacy*, NAT’L CTR FOR TRANSGENDER EQUALITY, www.transequality.org/issues/identity-documents-privacy (last visited Oct. 24, 2016).

the land in a broader scope. First I want to talk about New York State, but before I do, I have to congratulate New Jersey. I'm going to focus on New York State because New Jersey actually isn't facing some of these issues because of several different laws passed in New Jersey over the past few years: a 2006 anti-discrimination law protecting transgender people;¹²⁵ a 2008 hate crimes legislation;¹²⁶ and a 2010 anti-bullying law.¹²⁷

New Jersey, fifteen other states, and the District of Columbia are really the only states that have these kinds of protections.¹²⁸ In New York State it's more of a patchwork. Several jurisdictions within the State provide such protections for transgender individuals: New York City is one of them, along with several other counties. However, other jurisdictions and counties do not.

About sixty percent of New York State right now is covered by these municipal ordinances.¹²⁹ That leaves forty percent of people living in parts of the State that have no protections at all. So what's the idea here? We gather here today for the purpose of looking at strategies. So I want to talk right now about legislative advocacy. We'll talk a little bit about some court cases later on and interweave them.

The strategy in New York State has been to enact a law that is called a "Gender Expression Non-Discrimination Act," or GENDA.¹³⁰ Before GENDA, what kind of protections did we have in places where there are no comparable municipal ordinances, in the forty percent of the State where these laws don't exist? We have the use of New York State Human Rights law, which protects under several categories:

New York State Human Rights law currently protects age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, or domestic violence victim status.¹³¹

So without GENDA, people in those jurisdictions with no protections can still sue under New York Human Rights law, but do so under other characteristics, right? They do it under sex or disability typically.

¹²⁵ N.J. STAT. ANN. § 10:5-4, 10:5-12 (West 2016).

¹²⁶ 2008 N.J. Sess. Law Serv. No. 2975, Ch. 303 (West).

¹²⁷ See N.J. STAT. ANN. § 18A:37-13.2 (West 2008).

¹²⁸ WILLIAM A. KAPLAN AND BARBARA A. LEE, LAW OF HIGHER EDUCATION 190-191 (5th ed. 2014).

¹²⁹ *County Legislature approves transgender anti-discrimination bill unanimously*, NEW YORK CITIZENS FOR TRANSGENDER RIGHTS, <http://www.affirmingtransgenderrights.com/nyctr-activities-continued-22.html> (last visited Oct. 25, 2016).

¹³⁰ See, *Assembly Approves Gender Expression Non-Discrimination Act*, NEWS RELEASE: ASSEMBLY SPEAKER CARL E. HEASTIE (June 2, 2015), <http://nyassembly.gov/Press/20150602a/>.

¹³¹ N.Y. EXEC. LAW § 296 (Consol. 2016).

So there are a couple of cases: *Tronetti*,¹³² *Rentos*,¹³³ *Buffong*,¹³⁴ all of which found that violations of transgender people's rights infringes this protected sex category. There are other cases like *Doe vs. Bell*¹³⁵, a 2003 case in which a court obliged a foster care facility to provide an allowance for their transgender wards to wear clothing they felt was appropriate for them, basing the ruling on their disability rights.

The theory is to use these other characteristics. But one can see how this is problematic; because it is not consistent or usable in an effective way. Someone who is transgender should not have to say their rights are being violated because they have a disability or some issue with the individual's sex. Sex and gender identity are very, very different.

In our population, we have people who are cisgender, people for whom their gender identity matches the sex they were assigned at birth. Then we have other folks who are transgender, those whose gender identity does not match their sex assigned at birth. For example, a transman is someone who was assigned female at birth, but the gender identity is male. Going beyond that, we are always thinking of this as a binary system: male/female. Some people are also just gender non-conforming, gender neutral, gender queer, a gender that doesn't necessarily line up exactly with male or female. You'll see how all of this ties in, in the way we talk about these things.

The Gender Expression Non-Discrimination Act¹³⁶ would add gender identity and gender expression, which are different things. Gender identity is how you identify, and gender expression is how you express that identity. The Act would add both of those categories to the other protected categories within the New York State Human Rights Law.

As a little history, adding gender identity/expression was originally part of another bill that has passed the New York Senate and Assembly¹³⁷, called the Sexual Orientation Non-Discrimination Act ("SONDA"). Originally, trans rights were protected in that law under gender identity and gender expression.

So what happened? Well, in 2002, SONDA passed because they stripped the sexual orientation language out of the bill.¹³⁸ So it only protects sexual orientation, which is why you heard me list that category when I listed the categories that are included. Since that time, there's been this new bill GENDA that has tried to address the situation that essentially the trans community, in a sense, was thrown under the bus in this process,

¹³² *Tronetti v. TLC Healthnet Lakeshore Hosp.*, 2003 WL 22757935 (W.D.N.Y. Sept. 26, 2003).

¹³³ *Rentos v. OCE-Office Systems*, 1996 WL 737215 (S.D.N.Y. Dec. 24, 1996).

¹³⁴ *Buffong v. Castle on the Hudson*, 824 N.Y.S. 2d 752 (2005).

¹³⁵ *Doe v. Bell*, 754 N.Y.S. 2d 846 (N.Y. Sup. Ct. 2003).

¹³⁶ A05039, 2015 Gen. Assemb. Reg. Sess. (N.Y. 2015).

¹³⁷ *But see*, NY Bill Jacket, 2002 Assembly Bill 8775.

¹³⁸ *See* 2002 N.Y. Sess. Laws (McKinney).

right? In order to get this bill to go through to protect sexual orientation as a category, gender identity and expression was stripped out.

Since then, it has been put through every single cycle. Since 2007, GENDA has passed the New York Assembly every single time¹³⁹ for the last seven years, and it can't even come to a vote in the Senate.¹⁴⁰ Every year the same thing happens. I'll talk a little bit about what is protected in the bill to understand what some of the opposition is. The bill basically would add this category to New York State Human Rights Law and would protect transgender rights in terms of employment, housing and real estate, public accommodation, which is going to a restaurant, going to a bathroom in a public place, going to the hospital, getting medical treatment, education, and credit.¹⁴¹

One of the arguments was that if we pass this then what will happen is you will have straight cisgendered men going into women's restrooms, molesting women, and then claiming that they had a right to be there because they're transgender.¹⁴² This, of course, completely ignores multiple levels of criminal law, human rights law, and practical reality. Senators could not point to one case in the history of the New York record of a cisgendered straight man pretending to be transgender in order to molest women in a ladies' restroom. This has not happened. Obviously, even a transgendered person who goes into a restroom and assaults another person is subject to criminal liability, regardless of their gender identity.

So this is really what we were working with, and these are still some of the arguments that we're dealing with. How we work with this is we go in and we educate legislators about this issue, we hold forum to talk to them about the issues and to educate them about trans rights. It is an ongoing process.

Nationally, we have a bill called the Employment Non-Discrimination Act.¹⁴³ How many of you are familiar with that? I see several of you. It's got a bit of a history, too.¹⁴⁴ It was first introduced in 1974. It still hasn't

¹³⁹ See supra note 138.

¹⁴⁰ Will Brunelle, *GENDA Passes Assembly, Squadron Starts Senate Push*, POLITICO (June 10, 2014, 6:24 PM), <http://www.politico.com/states/new-york/albany/story/2016/05/genda-passes-assembly-squadron-starts-senate-push-047175>.

¹⁴¹ Brendan Cheney, *Explaining GENDA*, POLITICO (Apr. 20, 2015, 5:35 AM), <http://www.politico.com/states/new-york/albany/story/2015/04/explaining-genda-000000>.

¹⁴² Elizabeth Nolan Brown, *We Don't Need Gender Snoops in Public Bathrooms*, NEWSWEEK (Feb. 21, 2015, 11:11 AM), <http://www.newsweek.com/we-don't-need-gender-snoops-public-bathrooms-308364>.

¹⁴³ Employment Non-Discrimination Act of 2013, <https://www.congress.gov/bill/113th-congress/senate-bill/815>.

¹⁴⁴ See Jerome Hunt, *A History of the Employment Non-Discrimination Act: It's Past Time to Pass the Law*, CENTER FOR AMERICAN PROGRESS (July 19, 2011), <http://www.americanprogress.org/issues/lgbt/news/2011/07/18/10006/a-history-of-the-employment-non-discrimination-act/>.

passed, by the way. In 1974, it only really protects for employment.¹⁴⁵ In 2007, gender identity was added to the bill and then it was dropped in order to get it to pass the House. It passed the House and then didn't pass the Senate. It was reintroduced in 2009 by Barney Frank and again in 2011 and again in 2013. It passed the Senate on November 7th of 2013. Now it's going through the House of Representatives. So that is also ongoing.

I want to talk now more broadly about gender markers and gender identification in passport documentation. Just to give a sense of where we're at in the world right now, would the two of you—I won't make you do anything—just will you stand up. If this is our world, right, these are our States. Each one of you represents a nation, the only two nations in the world that will allow you to change your gender marker identity by simple election, without surgery, without hormone therapy, without going to a doctor and getting a certificate of (indiscern.). You two are the good guys. A hand for our two States here.

Will the two of you stand up please? You and you, please. You two represent the States that will allow you to change a gender marker, but you have to go to a doctor for them to tell you there's something wrong with you first. So, you can still change it, but you've got to get that doctor's certificate.

All right, the two of you, will you stand up? These two States are going to require hormone therapy. You need hormone therapy to be able to change your gender marker.

Then I need six more people. So the three of you, two of you, and you two stand up. You're going to require sterilization or surgery of some type before that's going to happen. Okay everybody who is standing up, sit down. Everybody who's sitting down, stand up. If you're living in any of these countries, you're out of luck. There's no process at all. That's the state of the world right now. Okay, everybody can sit down. Thanks for entertaining me.

A couple minutes? Three minutes, okay. So is this the way that it has to be? Is this like an international standard? Well the International Civil Aviation Organization, which is the UN agency that determines what has to be on your passport, has said that gender marker is required.¹⁴⁶ One option would be just to eliminate gender marker altogether. It's a characteristic that doesn't have to be there. So one way to do this is just to take it out.

What the ICAO has said is okay, we've got to keep it in for right now, but we will allow you to have other, or X, so that allows countries to allow their citizens to go from male to female, female to male, or to X, other, any of those, on their gender identity cards.¹⁴⁷ There are only a couple of coun-

¹⁴⁵ *Id.*

¹⁴⁶ INT'L CIVIL AVIATION ORG., A REVIEW OF THE REQUIREMENT TO DISPLAY THE HOLDER'S GENDER ON TRAVEL DOCUMENTS (Nov. 20, 2012).

¹⁴⁷ *Id.*

tries that allow that at this point.¹⁴⁸ New Zealand and Australia are sort of the forefront of this.¹⁴⁹ You can change your passport in the U.S.¹⁵⁰ There are certain conditions that apply, but do we even need criteria at all?

Some of the debate has been about whether to take out gender markers from passports altogether. New Zealand did a report on this and found that this was something that we should eliminate eventually, because we have much more sophisticated technology right now:¹⁵¹ we have facial recognition, we have biometrics. We don't need this, but the recommendation was that right now, in 2012, when this study came forward, that the costs outweighed the benefits. Basically, when you go to the airport, the reason why it takes you as long as it does and not twice or three times as long, is because of queries where they eliminate half the people they are comparing you to based off of the binary of male or female.

So to catch all countries up to the technology, the requirement would take a lot of money and time. This should be the ultimate goal, and there is a lot of campaigns working on this. I haven't had a chance to talk to you about some of the Court cases that are going forward with this. These are some of the big issues right now.

I'll just conclude by saying that just last week on April 1st, Malta introduced—or passed a new law that is a new model for gender identity and expression protection.¹⁵² The law also has some really interesting components in that it protects intersex individuals as well.¹⁵³ It is really a model for recognition because it allows by simple election, and if we could just combine the Malta law and the Argentina law,¹⁵⁴ which allows for absolute access to medical treatments, we'd have the perfect law. Right now, all the advocacy is about creating that model law. With that, I'll answer any questions. Thanks.

JORGE CONTESSE: Okay, so we're running behind schedule, but this panel started late, so we'll have time for a few questions before we move on to lunch. Yes, please.

PARTICIPANT: Two questions (indiscern.). As somebody who was very involved with the SONDA issue back in the day, I was very much at a

¹⁴⁸ *Australian Government Guidelines on the Recognition of Sex and Gender*, AUSTRALIAN GOVERNMENT, July, 2013.

¹⁴⁹ *Id.*

¹⁵⁰ *Know Your Rights*, NATIONAL CENTER FOR TRANSGENDER EQUALITY, <https://www.transequality.org/know-your-rights/passports> (last visited Oct. 4, 2016).

¹⁵¹ Natasha Barsotti, *New Zealand: Passport Changes for trans people made easier*, DAILYXTRA (Dec. 6, 2012, 12:00 AM), <https://www.dailyxtra.com/new-zealand-passport-changes-trans-people-made-easier-48259>.

¹⁵² *Malta Adopts Ground Breaking Trans and Intersex Law*, TRANSGENDER EUROPE (Apr. 1, 2015), [TGEV.org/malta-adopts-ground-breaking-trans-intersex-law](https://www.tgev.org/malta-adopts-ground-breaking-trans-intersex-law); I don't know what this source was but it doesn't exist and I could not find the referenced bill.

¹⁵³ *Id.*

¹⁵⁴ *Argentina Gender Identity Law*, TRANSGENDER EUROPE (Sept. 12, 2013), [tgev.org/argentina-gender-identity-law](https://www.tgev.org/argentina-gender-identity-law).

place at the table where we debated the incremental approach and we ultimately did go with that, basically because we just didn't see gender expression being possible at the time and I was one of the ones who advocated for that. So I am wondering now with thirteen years of hindsight—it's hard to believe it's been that long now—if you think that we did the right thing.

The second question is my understanding in regards to the restroom issues in New York State. It was decided by a case that actually had nothing to do with transgender issues at all, but rather a biological female who used the men's room during intermission at a Broadway show. Of course, if you've been to a Broadway show recently, you know that the lines to the women's room (indiscern.) quite long, and she couldn't hold it and went into the men's room and the Broadway Theater decided to sue her. And the result of that was a ruling by the New York Courts that restrooms have nothing to do with the law, the separation of men's and women's rooms is merely a social construct, and ergo, she didn't break the law. And so if that's the case, and if so, how that could be (indiscern.) transgender community.

ZACH HUDSON: Yeah, so in answer to the first question, this is the eternal question, right, in all of these situations. And we see that it's not just in the SONDA/GENDA setup, but across the board in many other areas. Do you hold on for as long as you can to make the law as inclusive as possible and with the most robust protections or do you do the incremental approach, as you called it, to try to secure some rights now and build off of them?

Also, I think it's so difficult to answer the question about what is the best approach, because you only know in retrospect, right? If we had been able to pass SONDA five years later with gender identity and expression included in that bill, because of the pressure for the sexual orientation component, then it would have made more sense to hold out. But given that it's been so long and we still can't get gender identity and expression through, it seems likely that it wouldn't have been five years later, and that the gender identity and expression component would have made it impossible to pass any of it.

But again, without really knowing what would have happened if you held on, I think the thing here is that the trans community feels, and I'm not speaking for them on my behalf, but I have heard in coalition meetings that many people have felt like they were sacrificed in the process. I also think that many New York State based LGBTI rights organizations are especially focused on trans rights, in part because all of these other accomplishments have been made and they realize this is something that has been lagging behind. (Indiscern.), this is their number one priority is getting GENDA through. So that's a tough question.

And Senator (indiscern.), who initially proposed SONDA, I believe, right, I know also misstated mixed feelings about (indiscern.) process.

The second question refers to the issue of the bathrooms. So, yeah, under New York State Law the question of illegality goes to whether an establishment can refuse use of bathrooms by gender.¹⁵⁵ That plays in to, I think that case, and doesn't necessarily resolve the question, right? I think it is clear that when someone who goes into a restroom that is not identifying with that gender, or is identifying with that gender but is trans, that that isn't against the law. It's about what happens when the patron of the establishment kicks them out. The question is whether that a violation of human rights law, and that hasn't been resolved.

JORGE CONTESE: Yes?

PARTICIPANT: Michael Labors (phonetic) with the Washington (indiscern.). My question is for Macarena Saez and Professor Davis. I'm just curious about the *Atala*¹⁵⁶ case and my partner is from Chile so I'm very familiar with it. That said, I'm curious how that case would affect same sex marriage efforts, say, in Mexico and Colombia specifically where we have had many judgments, especially in Mexico, and this case will bolster those efforts and other efforts that might be under way in other Latin American countries?

MACARENA SAEZ: I think the *Atala* case clearly opened the door for more litigation in the Inter-American system and it also opened the door for more focused litigation on the basis of sexual orientation claiming (indiscern.)¹⁵⁷ For example, the second decision on marriage equality in Mexico refers to *Atala*.¹⁵⁸ After *Atala* it's sort of like we have to also support marriage equality or something. However, they did have a prior decision as well.¹⁵⁹

There has been a lot of other cases coming through the Inter-American system of human rights on different issues related with LGBTI rights. One of them is on marriage equality as well and it's in the Commission. I'm not involved in the case. I don't know what the status of the case is. What I think and personally what I really like is that there are two cases that have advanced to the Inter-American Court of Human Rights because this is a two-fold system, so you have to go to the Commission and then to the

¹⁵⁵ Ellen Wulforst, *New York City Lay Out Transgender Protection on Dress Codes Bathroom Use*, THOMAS REUTERS FOUNDATION (Dec. 22, 2015), news.trust.org/item/20151222052027-meufc/?source=dpMostPopular.

¹⁵⁶ *Atala Riffo and Daughters v. Chile, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 502, (Feb. 24, 2012).

¹⁵⁷ Garcia Jones Gualberto, *Chile Legalizes Homosexual Unions*, LIFESTYLE (Jan. 29, 2015), <https://www.lifesciteenews.com/news/chile-legalizes-homosexual-unions>.

¹⁵⁸ Michael K. Levers, *Mexican Supreme Court finds gay marriage ban unconstitutional*, WASH BLADE (Feb. 19, 2013 1:39 EDT), www.washingtonblade.com/2013/02/19/Mexican-supreme=court-finds-gay-marriage-bar-unconstitutional/.

¹⁵⁹ *Id.*

Court.¹⁶⁰ The two cases that have advanced to the Inter-American Court, I like that they are not of marriage and I think it's important because it gives the Court an opportunity to really provide a richer reasoning on what families are in Latin America before having to cross that bridge and we have to have marriage. What I like is that there will be a lot more to say on the constructions of families outside marriage before having to cross that bridge.

I think that there are two cases, at least one of them is going to be reviewed this fall on an unmarried couple from Colombia. I think gives a great opportunity to say more things.

LISA DAVIS: Just to be piggy back off what Macarena was saying, it's true, marriage is at the pinnacle of rights when we look at all of the types of rights that LGBTI people are discriminated against. We need to start in terms of building a foundation of rights depending on what country we're going to and we can't always just run to marriage as the starting point. It can end up limiting or backfiring how other rights are addressed or the ability to address other rights. Even in this country, there's certainly a balance in terms of marriage being more of a privilege institution versus money that might go towards that cause instead of (indiscern.), which as we know (indiscern.), 40% are made up by (indiscern.).¹⁶¹

Concerning the *Atala* case, the other thing I wanted to say is that the case really sets a precedent in the region for the codification of discrimination on the basis of sexual orientation or gender identity, and that it is pivotal in terms of creating the foundation of customary international law and the development of the idea that discrimination on this is unacceptable.¹⁶² It sets a precedent to be able to make the argument that it is accepted as customary international law, not just in Latin America, but in the rest of the world. Those of you who are following the debates, this is the fight that is currently happening in the UN and pushing for that norm.¹⁶³

JORGE CONTESSE: Before we turn to the last person, let me just say something briefly on this. I think it's not just interesting how the Court bolsters the influence of its decision, but also the opposite. The Court uses some of the decisions by the Mexican Supreme Court, by the Colombian Institutional Court in its opinion.¹⁶⁴ It kind of looks around to see what's going on in Latin America to basically advance the argument saying, well,

¹⁶⁰ Press release, Organization of American States, *IACHR Takes case involving Guatemala to the Inter-American Court*, OAS (Feb. 22, 2016), www.oas.org/en/iachr/media_center/Preleases/2016/017.asp; Press Release, Organization of American States, *IACHR Takes Case involving Costa Rica to the Inter-American Court*, OAS (Feb. 16, 2016), www.oas.org/en/iachr/media_center/Preleases?2016/013.asp.

¹⁶¹ *Id.*

¹⁶² See *Atala Riffo and Daughters v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am-Ct. H.R. (Ser. C) No. 502, Feb. 24, 2012*.

¹⁶³ See Press Release, Organization of American States, *supra* note 160.

¹⁶⁴ See *Atala Riffo and Daughters v. Chile, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 502, ¶ 283 (Feb. 24, 2012)*.

this is not just how the United Nations (indiscern.), but it's also Latin American practice nowadays.¹⁶⁵ It's a more progressive currency (indiscern.) constitutional constituents aren't understanding these issues. So it's an interesting conversation happening that's two ways, not just the Court affecting and influencing (indiscern.), but also the Court looking and being affected and influenced by (indiscern.).¹⁶⁶ Last question.

PARTICIPANT: Thank you. My question goes along the remarks Professor Davis just made. Is marriage equality it for the LGBT community? It's like the discourse of the '70s and the '80s about going (indiscern.) we want to be out and we want to be treated equal has disappeared, and in some dimensions it has narrowed down to marriage, as if that were the ultimate goal, as if everything we need as a community is going to come from that. The question is, what is going to happen after marriage equality is achieved, and how will the LGBTQ movement survive, given that in a lot of countries, it usually weakens once marriage equality has been achieved. Like you want marriage, here, you have your marriage and then everybody just goes back home even though a bunch of other issues remain at the table. So what's going to happen with those other problems that don't necessarily fall under the umbrella of marriage equality?

LISA DAVIS: Well, if we had three more days, we could have a whole symposium on that issue. I think that it's a great point that you're raising and that is the question that advocates are grappling with in terms of balancing the important right to marriage with issues. We are aware of how all of the resources in the country are going towards mobilizing around that issue. That's not to say it's not an important issue. It is, however a complex issue, because it doesn't really cover everyone.

Putting aside those complexities, taking away all those resources means that we're not going to have resources for direct services and for advocacy around some very heavy hitting issues within the LGBT community. It does run the risk that once the battle is won, the presumption may be drawn that the issue is over. We've won equality. It's over. Of course we know that's not really true.

That's the danger of what that presumption can do, particularly in this country. Other countries are also grappling with taking on the marriage issue. There's a lot of precedent setting from what the U.S. and Western countries do that other countries kind of look towards as guiding posts. I know that other countries also debate whether to look at a more holistic set of rights. Here is Ms. Saez on that particular issue

MACARENA SAEZ: That's why I don't think that every marriage equality decision weighs exactly the same. I think that there is a right direction when you use marriage as just one extra door, as one thing that happens. At the end of the day, marriage equality is one of the most conserva-

¹⁶⁵ *See id.*

tive agendas. People who are pro-marriage should be pleased that at least there is one group that still wants to get married. I think people who work on the services of marriage, specifically, should be really happy because it's an industry that economically thrives with more weddings.

At the same time, it really runs a risk and I think (indiscern.) know that in this country, there is a lot of—opposition because you can't really say out loud, "We've got it wrong." Everybody has to be happy. Everybody has to celebrate.

I think that you have a lot of people who are really frustrated with the direction that the debate took when it became this idea that we are worthy of marriage, instead of the idea that every family counts. The idea became we are worth marriage, thus we have to have marriage. Then it's not about anything but marriage. It's not about equality. It's not autonomy. That is how you leave aside the people who matter the most. At the end of the day, it's a question of what is family (indiscern.) for. What is it that you have these institutions for? Do you have them to say to people this is the ideal, this is where we're heading as a society? Or you have them to make sure that people have a minimum network? The basic discussion is what is to be expected from legal institutions. Family law is about making sure people have a safety net. That's the way it should be.

ZACH HUDSON: I've also decided that too. The way that marriage is decided in this country is going to effect all of the other rights for people who have nothing to do with marriage. There are different ways of deciding this case. Are we going to be looking at it in terms of the fundamental right to marriage? Are we going to be looking at it in terms of equality and discrimination? Are we going to be looking at Kennedy's rational basis with (indiscern.)¹⁶⁷ kind of commentary or are we going to be talking about suspect classes? If you're talking about a suspect class with the LGBT community, now all of a sudden you're talking about a whole host of other rights (indiscern.). I think here and in other jurisdictions, depending on how these cases are decided, also affects the answer to your question.

JORGE CONTESSE: Thank you all.

¹⁶⁷ See *Romer v. Evans*, 517 U.S. 620, 640-43 (1996).

MAREN GREATHOUSE: My name is Maren Greathouse. I am the director of the LGBTQ University Resource Center at the Rutgers-Newark campus, a position that results in working primarily with LGBTQ students and their allies.¹ However, we also conduct trainings in consultation with faculty and staff in departments across the university.² If you would like to speak with me directly I will see you at the reception. Please consider attending for the reception, as there will be a fabulous hors d'oeuvres menu; the reception will be held in the third floor Atrium. There will also be guides to provide directions after the keynote address.

It is my distinct pleasure to moderate our third panel: Community-Based Efforts in Global LGBTQ Movements. I will begin by introducing our panelists. Our first panelist, on the end, is Ariella Rotramel. Her research and teaching agenda reflects her inter-disciplinary training, and her commitment to merging theoretical and practical engagement of identity and social justice issues.³ Professor Rotramel has taught Feminist Approaches to Disabilities Studies, Transnational Women's Movements in Public Policy and Social Ethics, Introduction to Gender and Women's Studies, and Introduction to Queer Studies in Feminist Theory.⁴

"Her book project, *Pushing Back: Transnational Women of Color Leadership*, is an intensive study of two transnational communities of color organizations in New York City.⁵ The study demonstrates that campaigns against injustices stemming from domestic work, housing and the environment, are most effective when women of color activists rely on a wide range of political approaches. The findings support the importance of utilizing a multi-method intersectional approach to research within and across communities. The study uncovers activists, utilization of nuance borne from identity politics to build their organizations and broader alliances."⁶

Professor Rotramel is also conducting a research project in collaboration with her colleague, Dr. Ana Campos-Holland, Assistant Professor of Sociology at Connecticut College.⁷ They are exploring the continued prevalence of United States (U.S.) Anti-LGBTQ hate crimes

¹ Maren Greathouse, Vitae, THE CHRONICLE OF HIGHER EDUCATION, <http://chroniclevitae.com/people/395268-maren-greathouse/profile> (last visited Apr. 21, 2016).

² *Id.*

³ Ariella R. Rotramel, CONNECTICUT COLLEGE, www.conncoll.edu/directories/faculty-profiles/ariella-rotramel (last visited Apr. 21, 2016).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Ana Campos-Holland, CONNECTICUT COLLEGE, www.conncoll.edu/directories/faculty-profiles/ana-campos-holland/ (last visited Apr. 21, 2016).

during a period of diminishing overt governmental gender and sexual identity-based discrimination. [Estimating] anti-LGBTQ hate of the last fifteen years based on gender sexual orientation hate crime reporting in the United States situates statistical analyses of hate crime data within a socio-political context. LGBTQ advocates' range of perspectives on hate crime laws and criminal justice is included in this project. Let's welcome her today.

Our second panelist is María Mercedes Gómez, who is a Colombian academic and human rights activist.⁸ Her work explores the challenges of understanding, preventing and reducing violence based on sexual prejudices in the US and Latin America.⁹ Maria holds a Ph.D. in Political Science, as well as a Master of Arts in Gender Studies and Feminist Theory from the New School for Social Research.¹⁰ She has taught for many years at Universidad de los Andes in Bogotá, Colombia, as well as in universities in Canada.¹¹ She has served as a General Coordinator for Red ALAS¹², a group of law professors and lawyers that promote curricula in gender and sexuality in Latin American law schools. Maria served on the legal team and was a member of the Board of Directors of Proyecto Colombia Diversa, an NGO dedicated to promoting human rights of LGBTQI communities in Colombia.¹³ She has promoted awareness of LGBTQI violence amongst law professors, law enforcement agents, and representatives from the criminal justice system in Latin America, with her writings and the training workshops she conducts on prejudice based violence. Today she is representing the International Gay and Lesbian Human Rights Commission as the Regional Program Coordinator for Latin America and the Caribbean.¹⁴ Let's welcome her and thank both of our panelists for being here today.

Our third panelist, Kyle Knight, is a researcher in the LGBT Rights Program at Human Rights Watch.¹⁵ Prior to joining the LGBT Rights Program he was a fellow at the Williams Institute of the University of California at Los Angeles and a Fulbright Scholar in Nepal.¹⁶ As a journalist, he has worked for Agents France Press in Nepal and for IRIN, the United Nations' humanitarian news service reporting from Burma,

⁸María Mercedes Gómez, HUFFINGTON POST, www.huffingtonpost.com/author/maria-mercedes-gomez (last visited Apr. 21, 2016).

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Red Alas: Red latinoamericana de academica/os del derecho, *available at* www.redalas.net.

¹³ *Id.*

¹⁴ IGLHRC is now known as OutRight Action International. María Mercedes Gómez left the organization in June 2016 to take a faculty position at the Department of Criminology of Saint Mary's University in Halifax, Canada.

¹⁵ Kyle Knight, HUMAN RIGHTS WATCH, www.hrw.org/about/people/kyle-knight (last visited Apr. 22, 2016).

¹⁶ *Id.*

Papua New Guinea, Timorese, Bangladesh, Malaysia and Indonesia.¹⁷ He previously worked for the UN and IADS, the Astraea Lesbian Foundation for Justice, and the Children's Rights and Health and Human Rights Division at Human Rights Watch.¹⁸ He studied cultural anthropology at Duke University and we are so glad to welcome him here as well.¹⁹ [Applause]. So without further ado, I will hand it over to Ariella, who is going to start off the presentation. [Applause]

ARIELLA ROTRAMEL: Good afternoon. I want to thank all of the organizers of the event today and my fellow panelists. I am looking forward to the discussion that we will have for the rest of the afternoon. I think the morning sessions already introduced some key concerns, as well as interesting framework considerations that we have to consider when discussing the global movement for LGBT rights.

My presentation will seek to sketch out key dynamics that I identify as occurring across contexts globally. This will be very broad; I am just trying to map out some considerations that I think we need to examine. I want to be clear that there is always going to be a need to balance how we talk globally; to try to really identify the spaces for connection, for shared approaches and also for responding to global forms of oppression, alongside looking at regional, national, and local approaches.

Another thing is that I want to emphasize is internal diversity within the LGBTQ community and [the] "I"/intersex community. Part of what I am hoping will come out from our discussion is for us to really think about the ways in which these issues are different, depending on the mix of identities that people have. The combinations that we have already talked about: race and sexuality, nation and gender, class and immigration status and how that impacts some of the issues that I will be mentioning and other folks will be covering.

I am going to be coming at this very much as an academic. As someone who is very interested in these issues in terms of what it means for the field of gender and women's studies, but also, in terms of what it means as a person, a member of this community.

I think it is really important to start off thinking about the origins of our social movements. I may just focus on the U.S. context, mainly because that is what I am most familiar with. However, the history of the modern LGBTQ movement comes out of responses to police repression and I think we often forget that when we talk about gay marriage today.²⁰ Let us think about our roots.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Beth Sherouse, *LGBT History Month: The 1950s and the Roots of LGBT Politics*, HUMAN RIGHTS CAMPAIGN (Oct. 10, 2014), www.hrc.org/blog/lgbt-history-month-the-1950s-and-the-roots-of-lgbt-politics. See also *History of the Anti-Gay Movement Since 1977*, SOUTHERN POVERTY LAW

Responding to that issue has been the queer critique of capitalism that we saw in the 1950s with the development of the Gay Liberation Front.²¹ This was also articulated well by Queer For Economic Justice, a New York organization that has suddenly closed.²² The two issues we are dealing with, criminalization and economic [exploitation], are critical for our community because we have a continuing vulnerability in poverty.²³ It's disproportionate across the globe.²⁴ Another major gap is between financial well-being for people who are LGBT versus cisgender²⁵ and heterosexual people. The photo is the Stonewall Veterans' Association.²⁶ I think it is a nice reminder of our roots.

The connections that I think are critical are criminalization, which has already come up quite a bit today, and economic exploitation. Understanding how these two are key facets of people's experiences, both domestically and globally. Part of what I hope to walk us through is what the contributors of these challenges are across the globe. How there are both, similarities and specificities; and what is critical for this panel is how are LGBTQ communities responding to these challenges.

Part of what I think is a critical issue is to think about *why*. *Why* are these issues? *What* does it mean in our contemporary moment? We are facing a world where we have the global escalation of social and political tensions due to economic crisis, militarization and increasing LGBTQ visibility. As well as LGBTQ claims to rights. When there is a lot of cultural flux, of economic and political tension, people often look for scapegoats.

Hopefully these are familiar to folks who are working on these issues. We are familiar with the rhetoric of special rights. Wanting to be treated as an ordinary person in a country is often seen as a claim to special rights. As a result, anti-discrimination laws are suddenly looked upon as a desire to be treated special. As if they want something extra. That is something

CENTER (Apr. 28, 2005) <http://www.splcenter.org/fighting-hate/intelligence-report/2005/history-anti-gay-movement-1977>.

²¹ Gay Liberation Front (GLF), NY PUBLIC LIB, web-static.nypl.org/exhibitions/1969/liberation.html (last visited Apr. 22, 2016).

²² Maddie, *Queers of Economic Justice Closes its Doors Thanks to Lack of Economic Justice*, AUTO STRADDLE (Feb. 24, 2014, 7:00AM), www.autostraddle.com/queers-for-economic-justice-closes-its-doors-thanks-to-lack-of-economic-justice-224520.

²³ See, e.g., Katherine Wyant, *Global Connections between LGBT Communities and Poverty*, BORGEN PROJECT (Jul. 22, 2015), <https://borgenproject.org/global-connections-lgbt-communities-poverty/>; Irene Mushonz & Laura E. Ourso, *The Unfair Price: Poverty in the LGBT Community*, TALK POVERTY (Oct. 9, 2014), <https://talkpoverty.org/2014/10/09/poverty-in-the-lgbt-community/>.

²⁴ See *id.*

²⁵ Cisgender[ed]: Denoting or relating to a person whose sense of personal identity and gender corresponds with their birth sex. OXFORD DICTIONARY, <https://en.oxforddictionaries.com/definition/cisgender> (last visited Apr. 19, 2016).

²⁶ STONEWALL VETERANS AFTER STAGE APPEARANCE AT CENTRAL PARK GAY PRIDE RALLY (2016).

that we have seen, particularly in the US since the 1990s.²⁷ Sadly, it is a very effective strategy.

Another strategy, which came up this morning, referenced Uganda and this claim of foreign values or influence. It is a tricky challenge. We have a history of colonization. We have the dynamics of global capitalism and media, but there is a real comfort level to suddenly flattening history, flattening the complexity of people's sexual and gender identities and expression. Part of that, and I acknowledge this, is because of the use of "LGBTQ." That particular language does not always work. Across contexts we know that's identified with the U.S. and the West and that is a challenge. It is a challenge to think about how we name ourselves; how do we come together to create a movement when this is always going to be the fallback? This is something foreign and this is not the way things have been.

And the final issue is one that is definitely coming up a lot: religious protection. The idea that somehow one's expression of sexual identity or gender identity is a threat to the primacy of religious expression.²⁸ That these things are intentional. Especially when we are thinking about the role of the state, that is quite an interesting challenge to have.

So to go a little bit further into the two areas that I want to explore, economic vulnerability is critical. I mean, I do not think that when we look at popular media we are seeing this being discussed enough and if we look across the globe LGBTQ people have more access to education, housing, formal employment, social services, family and community support and safety. These are, I think, basics. These are things that really impact our ability to provide for ourselves to survive in the world and it is that combination of challenges that are really creating a dire situation for many people.

Discrimination practices, while obviously not the only piece of the puzzle, are a critical one. Part of what we are seeing with activism across the globe is the need to respond to the image of LGBTQ people as privileged outsiders. If you think of the language of the gay dollar or gay tourism, it is an assumption that this is really what gay people are. They are childless. They have access to resources that other people do not. Those kinds of stereotypes are really a challenge in themselves, and they flatten out the real diversity and economic diversity within the LGBTQ community.

²⁷ See Warren J. Blumenfeld, *I Don't Want 'Special Treatment,'* HUFFINGTON POST (Apr. 13, 2012, 5:22 PM), http://www.huffingtonpost.com/warren-j-blumenfeld/i-dont-want-special-treatment_b_1421699.html.

²⁸ See Eliel Cruz, *Russell Moore: "Equality Act is a threat to religious freedom,"* RELIGION NEWS (Aug. 12, 2015), <http://religionnews.com/2015/08/12/russell-moore-equality-act-is-a-threat-to-religious-freedom/>.

So some of the issues I think that have already come up and I hope we can explore further are looking at legal employment and housing nondiscrimination, to have that as a baseline kind of protection in a society. Making sure social services are available and inclusive. There is a lot of great work that has been done in New York, for example, the Sylvia Rivera Law Project²⁹; they are a law project that really advocates for access to public services for people who are transgendered.³⁰ You know, that is a major issue. And finally, educational access and support. What does it mean to be locked out of the formal educational system, to be forced out of the education system?

Moving from economic issues into issues of criminalization, some of these have already come up. There is the over-targeting of LGBTQ people through [the criminalization of] consensual sex globally.³¹ Transgender sex generalizations were already mentioned. That is a pretty huge violation of rights, and censorship in organizing. Uganda was already mentioned. This is an issue in Russia as well.³² These really limit the ability of LGBTQ people to function.

Alongside those issues we have the profiling and criminalization abuse of LGBTQ people through anti-sex work laws, and harassment. Transwomen are being perceived and assumed to be sex workers, for example, and thus being harassed.³³ Anti-HIV, anti-immigrant, anti-homeless and -poor laws and practices. Having sort of a set of policies that overtly do not seem like they are targeting LGBTQ people. Anti-homelessness is something that maybe people do not automatically see as an impediment to LGBTQ people's rights, but the way it is playing out, this is a major issue for our community.

Alongside these issues, then, we need to be thinking about what it means to pursue decriminalization. So we have already talked about this with Uganda, highlighting the sources of criminalization efforts. To be clear, these aren't even necessarily within a country. They are not originating from within a country, but the idea is that U.S.-based religious hate groups are really promoting criminalization legislation across the globe. That this is an active agenda that is being pursued.

²⁹ Sylvia Rivera Law Project, <http://srlp.org/> (last visited Apr. 22, 2017).

³⁰ See Chase Strangio, *Arrested for Walking While Trans: An Interview with Monica Jones*, ACLU (Apr. 2, 2014, 11:19 A.M.), <https://www.aclu.org/blog/arrested-walking-while-trans-interview-monica-jones>.

³¹ See Neela Ghoshal and Kyle Knight, *Rights in Transition: Making Legal Recognition for Transgender People a Global Priority*, HUMAN RIGHTS WATCH, https://www.hrw.org/world-report/2016/rights-in-transition#_ftnref1 (last visited Jul. 11, 2017).

³² Ilaria Parogni, *Transgender Russians Struggle to Take Their Movement Out of the Shadows*, THE NATION (Feb. 3, 2016), <https://www.thenation.com/article/transgender-russians-struggle-to-take-their-movement-out-of-the-shadows/>.

³³ Nihilis Rev and Fiona Maeve Geist, *Staging the Trans Sex Worker*, 4.1 TRANSGENDER STUDIES QUARTERLY 112-127 (2017).

Also, advocating for decriminalization and accountability for ensuring that LGBTQ people are able to be full participants in society is critical. So to really move beyond bans on sexual practices, and to really enable people to at least have that baseline. This should be a standard.

And finally creating supports for incarcerated LGBTQ people during and after release. We are not living in a world where this is going to be disappearing any time soon, and lots of LGBTQ people have already been pulled into the criminal justice system.³⁴ So what does it mean to advocate for people who are incarcerated in terms of the quality of treatment they receive and the supports that they should have access to upon their release?

I am very pleased to be on a panel with experts and advocates on these issues. I want to give a couple of examples to start thinking about in terms of how communities are responding to these pressures.

The first is the Pan-African Mobilizations Against Anti-Homosexuality laws.³⁵ Being clear that it is not just about national laws but also about a regional effort to have solidarity and start really defending our communities.

A second topic, that has not come up yet but is possibly of interest to folks, would be the Israeli and Palestinian anti “pinkwashing” efforts to address intersecting oppressions, to really emphasize the efforts to present Israel as a gay-friendly country³⁶; for one, it raises issues around the occupation, and it also raises the true issues around anti-LGBTQ activities both in Israel and in Palestine.

Finally, there are efforts in countries such as Nepal and Thailand demanding recognition for a third gender category.³⁷ This would allow such people to improve their treatment under the law and in employment. That is another area where people are really starting to push. Thinking about creating a real legal recognition, without merely a gender binary is a really important component. Thank you. I hope that helps lay out some of the groundwork for our speakers.

MARÍA MERCEDES GÓMEZ: First, I want to thank Rutgers-Newark Law School for this invitation. Everybody has moved with such forceful efficiency to get us here. I am very excited about the great panel that I share with my colleagues today.

³⁴ See, e.g., German Lopez, *5 ways LGBTQ people fall into the criminal justice system – and suffer the worst once in*, VOX (Feb. 23, 2016 8:10 AM), <http://www.vox.com/2016/2/23/11095980/lgbtq-gay-transgender-prison>.

³⁵ Tierney Sneed and Teresa Welsh, *What’s Driving Homophobia in Africa?*, U.S. NEWS (Oct. 16, 2014, 12:01 a.m.), <http://www.usnews.com/news/articles/2014/10/16/how-anti-lgbt-legislation-in-uganda-nigeria-and-gambia-is-shaping-africa>.

³⁶ Lourdes Garcia-Navarro, *Israel Presents Itself as Haven for Gay Community*, NPR (Jun. 4, 2012, 5:01PM), <http://www.npr.org/2012/06/04/154279534/israel-presents-itself-as-haven-for-gay-community>.

³⁷ See, e.g., Michael Bochenek and Kyle Knight, *Establishing a Third Gender Category in Nepal: Process and Prognosis*, 26 EMORY INT’L L. REV. 12 (2012).

This presentation focuses on exploring the struggle for rights of sexual orientation and gender identity and expression (SOGIE) in Latin America. However, when we talk about Latin America we talk about many different places, many different languages, and many different levels of involvement, commitment, and resources.

As such, it is hard to talk about this region as a cohesive entity. In spite of the unavoidable reduction, some days ago someone working on a paper asked me to give her a list of what I consider the most important advances for LGBTQI rights in Latin America in the last 15 years, and, the following is my account of the situation:

I have to start with the International Inter-American Court of Human Rights' decision on *Atala Riffo and Daughters v. Chile*.³⁸ It was the first decision upholding LGBT child custody rights and an incredible source of scholarship since 2012; it has influenced the high courts' decisions in Mexico and Colombia but its full potential at the national courts is still to come.

The second relevant LGBTQI issue is the struggle surrounding egalitarian marriage. In Latin America, we have moved towards the guarantee of rights either through legislatures or through constitutional courts. The decision from taking one way or the other is conditioned by the will of political elites, by the capacity of the movement in each particular occasion to impact the public sphere as well as by the particular constitutional frameworks surrounding the issues. For many of our societies, the struggle for rights depends on the presence and interests of sympathetic governments and legislators, the capacity of the movement to pursue strategic litigation and/or on the solidness of constitutional courts. In this way, the recognition of egalitarian marriage in Colombia, Brazil and Mexico has been mostly achieved or framed in jurisprudence of the high courts. In contrast, countries like Argentina and Uruguay have developed their struggle for rights mainly in the legislative realm.

The advances of the Argentinean LGBTQI rights in the last years is, without doubt, connected to the political will and commitment of the government with advancing human rights and with the agency of the civil society. This will of the political elites is not equally powerful in other countries and, sometimes, it is nonexistent or openly hostile. In Colombia, for instance, multiple government's initiatives and advances regarding anti-discrimination, political participation, education of functionaries, including the police forces, the forensic institute and the national prosecutor office contrast with a conservative congress that has opposed several bills on LGBTQI rights. So, in Colombia, the enjoyment of those rights, for instance, egalitarian marriage, comes from constitutional decisions, rather

³⁸ Case of *Atala Riffo and Daughters v. Chile*, Merits, Reparations and Costs, judgment, Inter-Am. Ct. H.R. (Ser. C) No. 239, ¶ 3 (Feb. 24, 2012).

than from the ideal source of the law, that is, the democratic will of the majority represented in the legislative. There is a clear cultural tension in this issue and in other protections granted by the constitutional court to sexual and gender minorities.

A third relevant topic, I would say, is the groundbreaking Argentinean gender identity law³⁹, which clearly materialized from the endurance of the civil society in combination with a favorable political and governmental environment. The Argentinean law guarantees citizens the right to rectify their gender identity without a pathologizing process or judicial and administrative requirements. The law also guarantees public health care to those that require it. In other countries, presidential or administrative decisions are advancing the rights of trans individuals. A contested issue though relates to the conditions for trans children to gain the right to rectify their gender identity and to received appropriate health care. We are dealing with a very sensitive issue and if we have time I would love to explore with you what we are asking for when we touch base on the rights of trans children.

Connected to this, we have witnessed for years the vicissitudes of the Chilean gender identity bill⁴⁰, that was, at the time of this presentation, in the final round. Voting was in progress and there [were] some recommendations regarding the rights for trans children still pending, but the hope was that the Chilean Senate would pass it in the following two or three months. Things had a different outcome and the bill is still under review. However, the struggle for gender identity laws are moving in Latin America, and those bills and eventually laws are not advancing without the immense commitment of grassroots organizations.

There is no way that we could have transformed any of these scenarios without the hard work of the trans communities on the ground. Facing substantial challenges, we move between fighting for constitutional rights through strategic litigation or legislative initiatives, but we also move in a different pace in many of our countries. Not always with luck, not always in the best of conditions, but with courage and endurance, with the political will of some governments or with international solidarity when hostile

³⁹ See, e.g., Emily Schmall, *Transgender Advocates Hail Law Easing Rules in Argentina*, NY TIMES (May 24, 2012), www.nytimes.com/2012/05/25/world/Americas/transgender-advocates-hail-argentina-law-html?_r0.

⁴⁰ See, e.g., Michael K. Lavers, *Chilean Transgender Rights Bill Advances*, WASH. BLADE (Jan. 21, 2014, 6:51 PM), <https://www.washingtonblade.com/2014/01/21/chilean-transgender-rights-bill-advances/> (“A bill that would allow transgender Chileans to legally change their name and sex without sex reassignment surgery advanced in the country’s Senate on Tuesday.”). As of September, 2017, the Gender identity bill is still under debate. See *Organizando Trans Diversidades*, available at <http://otdchile.org>.

conditions prevail. A lot has been happening in the LGBTQI struggle for rights in Latin America.⁴¹

The following matter in my list is the passing of some antidiscrimination laws in the region. I am not very happy with them, I must say. I am especially not happy with the Chilean one, but it is very interesting to mention the process because it shows us the combination of factors that have to be in place for this to happen. The bill spent years in Congress, and unfortunately, it turned into a law only when a young gay man was killed in the streets. There is no doubt, that a sort of popular/populist gesture mixed with recognition of the right to nondiscrimination.⁴²

Despite this type of events, there is a constant effort to fight for antidiscrimination laws in many countries; Colombia has a provision related to violence based on prejudice as well as Mexico City and Brazil.⁴³ However, some of these laws fall short in their scope and inclusiveness. The Chilean antidiscrimination law, known as the Zamudio's law, establishes an a priori hierarchy of rights that includes the primacy of the freedom of education over, for instance, the right to nondiscrimination in schools for LGBTQI children. So, there is potential conflict of rights that cannot be solved a priori but usually they are.

Among important influences on the regional LGBTQI developments, it is worth mentioning, besides the Argentinian case, the jurisprudence on LGBTQI rights of the Colombian Constitutional Court,⁴⁴ and the legislative processes in Uruguay that have been very inspiring.⁴⁵ Despite the small size of the country, Uruguay is probably one of the most advanced countries in the world in terms of LGBTQI rights.⁴⁶ With that, I go to my next point.

Many of these achievements or struggles have promoted the general idea that Latin America is remarkably advanced in granting rights to

⁴¹ See Cynthia Flores Mora, *Five key social development issues in Latin America in 2014*, WORLD BANK (Jan. 9, 2015), <http://www.worldbank.org/en/news/feature/2015/01/09/temas-desarrollo-america-latina-2014> ("Unfortunately, in Latin America, prejudices and stereotypes from the past remain and cases of harassment or street violence against women continue. Additionally, the rights of sexual minorities are not often respected, despite the enactment of several laws in their favor.").

⁴² See Jose Miguel Vivanco, *Chile: Letter to Congress on Anti-Discrimination Bill*, HUM. RIGHTS WATCH (Apr. 9, 2012, 4:13 PM), <https://www.hrw.org/news/2012/04/09/chile-letter-congress-anti-discrimination-bill> ("The recent tragic death of 24-year-old Daniel Zamudio following a brutal attack by alleged neo-Nazis has brought the scourge of homophobic violence to world attention and case a spotlight on Chile's lack of legislation to protect and defend the rights of vulnerable minorities.").

⁴³ See Rachel Glickhouse and Mark Keller, *Explainer: LGBT Rights in Latin America and the Caribbean*, AS/COA (May 24, 2012), <http://www.as-coa.org/articles/explainer-lgbt-rights-latin-america-and-caribbean>.

⁴⁴ *Id.* ("LGBT rights in Colombia have been won largely through the country's judicial system.").

⁴⁵ *Uruguay: A Global Leader for LGBTI Rights*, WORLD BANK (July 21, 2016), www.worldbank.org/en/news/feature/2016/07/21/uruguay-global-leader-lgbti-rights ("Homosexuality has been legal in Uruguay for over 80 years, but it's really within the last decade that the country has become a leader for LGBTI rights both within Latin American and on a global scale.").

⁴⁶ *Id.*

LGBTQI populations. Latin America has prosperous legal advances at some levels, that is true, but the limitation of these laws is the gap with implementation, backlash, inequality in resources and options among the countries and among urban and rural communities, right-wing politicians and religious fanatics. Parallel to the advances we still have the highest rates of anti-transgender violence in the world.⁴⁷ According to some statistics, Brazil and Mexico are at the top of the list for violence against LGBTQI individuals and groups.⁴⁸ However, of course, those numbers must be contextualized. We do not know if the numbers are higher because there is more information than in other countries. I am always very conservative when I cite this, but, even with that qualification, we have a deep problem of preventing, reporting and prosecuting anti-LGBTQI violence.

If something, we share the spread of this violence in the South, Central and North American Continent. I will get back to the question of violence in a moment, but now I want to mention two important facts that have contributed to our rights in the whole region in 2014: the creation of a Special Rapporteur for LGBT rights at Inter-American Commission of Human Rights,⁴⁹ and the powerful leadership of Latin America before the UN Human Rights Council towards the issue of a second resolution about LGBTQI communities globally.⁵⁰

The Special Rapporteur office was a special unit attached to professor Tracy Robinson's mandate as commissioner, but she took over also the rapporteurship and with her team has been working very efficiently and in a democratic way to collect information and act quickly on human rights violations.⁵¹ They work with grassroots organizations. They are outreaching people, they are creating questionnaires to record information. They are creating databases. They have done many official visits to countries and received many activists in audience. They are producing valuable regional reports on violence, because having data is knowing where and how things are happening, and what needs to be done to create international pressure that make countries accountable.

Regarding the interesting political movement that Latin America is leading at the United Nations, last September, four Latin America countries

⁴⁷ Marilia Brocchetto, *The perplexing narrative about being gay in Latin America*, CNN (Mar. 3, 2017), www.cnn.com/2017/02/26/americas/lgbt-rights-in-the-americas/.

⁴⁸ Mitch Rogers, *How Brazil's Contradictory Attitudes Foster Violence Toward the LGBT-Community*, COUNCIL ON HEMISPHERIC AFFAIRS (Mar. 22, 2017), <http://www.coha.org/how-brazils-contradictory-attitudes-foster-violence-toward-the-lgbt-community/>.

⁴⁹ *Rapporteurship on the Rights of LGBT Persons*, ORGANIZATION OF AMERICAN STATES, www.oas.org/en/iachr/lgtbi.

⁵⁰ General Assembly Resolution 27/32, *Human rights, sexual orientation and gender identity*, A/HRC/RES/27/32 (26 September 2014), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/177/32/PDF/G1417732.pdf?OpenElement>.

⁵¹ *Supra* note 12.

led by Chile were able to promote an initiative that turned into the Human Rights Council's second resolution on LGBT rights, and all Latin American countries voted unanimously to support it. This resolution mandates to collect information regarding good practices against LGBTQI discrimination around the world. The first report is due in June 2015. But what is interesting to mention here is Latin America leadership. Chile, Colombia, Uruguay and Brazil joined and everybody else voted affirmatively to support the resolution.

For all this, Latin America is forging strong international presence in the struggle for LGBTQI human rights. It does not mean that we are not in danger of losing it, but things are happening and conversations are going on in spite of the huge amount of work still ahead.

MAREN GREATHOUSE: I would imagine you might want to wrap up soon just so we have enough time for Q & A, but you're sharing such wonderful information.

MARÍA MERCEDES GÓMEZ: May I take five more minutes?

MAREN GREATHOUSE: Yeah.

MARÍA MERCEDES GÓMEZ: Okay. The last question that I want to highlight is how grassroots organizations, and I have taken part in some of them, are trying to articulate for our own contexts what we need to address regarding violence against LGBTQI individuals and communities and how.

For thirty years or more in the United States, the notion of hate crimes has been central to the scholarship and activism on violence based on prejudice.⁵² The way in which it has operated in this country, as you might know, is mainly through penalty enhancement, although some legislation address other issues - prevention for instance - in the law that President Obama signed in 2009.⁵³

My general impression regarding the struggle against this type of violence in Latin America is that, in many countries, we have enough and good laws - our problem is impunity. But then, what do we mean when we say that we need to reduce impunity? Because, again, we are at risk of jumping from asking about impunity to promote increased penalties. I would say, of course, that impunity must be reduced but it implies, for us, in Latin America, to have a serious conversation on how we can refine the way in which we collect and document violence, on how we invest resources to gain other protections prior to, and different from, condemning individual perpetrators. Impunity starts way before the crime is committed, in social prejudice, hate speech, and economic inequality.

⁵² See Jack Levin and Jack McDevitt (2002) *Hate Crimes. American War on Those who are different*, Boulder, Colorado: Westview Press, 2002. See also, Frederick Lawrence (1998), *Hate Crimes Under American Law*, Cambridge, Harvard University Press, 1999.

⁵³ See The Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009, 18 U.S.C. § 249 (2009).

I want to close with two remarks: first, I have argued elsewhere that we should find a way in which the law and provisions are able to displace motivation from a characteristic of the victim (identity) towards the prejudice in the gaze of the perpetrator. This is the logic behind eliminating infamous legal figures as the gay panic syndrome.⁵⁴ And second, we need a debate, in the legal realm, on how to use the protected categories, what categories, and why they receive special protection for violence based on prejudice? There are some elements that we need to advert when we ask about protected categories. The obvious, we know, is that the law doesn't protect groups, it protects relationships, such as race and gender. But the point I want to make here, and I'm going to use *Atala*⁵⁵ for this, is to inquiry on what we are doing when we are naming a person as a "lesbian," or a person as a "gay man" or a person as a "bisexual individual" or as a "trans individual." And what is the rationale behind this naming, especially in the legal realm?

When Karen Atala's children were taken away, she never said or talked about herself as a lesbian. It was the judge at the courts - it was really the Chilean judges and her own colleagues that called her a lesbian.⁵⁶ And my question is: what is a "lesbian?" What did Karen do to be coined as a 'lesbian' by the Courts? Was that she shared a house with another woman the reason? Oh, well, I lived with my mother for the first 24 years of my life, many women live with their female friends or their grandmothers or their roommates. So, judges at the Chilean courts had in mind a very specific content that was transformed into what a 'lesbian' is.

So, my point is, that when the Court calls Karen Atala a 'lesbian', and when Atala named herself as a 'lesbian', the meaning and the contexts of the utterance are different. Karen's affirmation was a transformative and emancipatory gesture, "I am a lesbian and I'm not doing anything that is wrong to my kids"; contrasting, the Judges' imposed identity on Karen as a 'lesbian' does not mean the same, and we know it because they use it to violate her human rights. Thank you very much.

KYLE KNIGHT: Hi. First of all, thank you to Rutgers for having Human Rights Watch here. Thank you to my panel and co-panelists here today as well. And thank you to you all for coming out on a grim Friday afternoon.

I am not a lawyer. I am not an academic. And if I make a list with more than one item on it, it doesn't get finished. So, instead, I'm going to do storytelling. At Human Rights Watch, we base a lot of our research off of

⁵⁴ "'Gay panic' refers to the situation when a heterosexual man charged with murdering a gay man claims he panicked and killed because the gay man made an unwanted sexual advance upon him." Cynthia Lee, *The Gay Panic Defense*, 42 U.C. Davis L. Rev. 471, 471 (2008).

⁵⁵ See Simon Romaro, *Chile: Landmark Gay Rights Ruling*; NY TIMES (March 21, 2012) <http://www.nytimes.com/2012/03/22/world/americas/chile-landmark-gay-rights-ruling.html?mcubz=1>.

⁵⁶ *Id.*

the stories of individuals we work with around the world; But I'll stop there in terms of describing our organization and talk about some things that I, myself, have done and stories I've heard of activists, since that's the theme of this panel.

The first story is pretty recent. It just happened last week. I found myself in a pretty grim coal mining town in Northern Kazakhstan. When we got there, to start the project on LGBT rights in Kazakhstan⁵⁷, it was a little bit different than how we operate in other parts of the world, in that there were no local partners to be partnered with. There are no registered LGBT rights NGOs in Kazakhstan, so it's a little bit different in terms of our methodology and how we go about locating people who have experienced human rights abuses on the basis of their sexual orientation or gender identity.

But one of the things we make sure to do, and especially when we're operating through these more organic, less NGO-created networks, is that our Informed Consent Policy is very clear; we're honest about what we're doing, we're honest about what we're going to ask about, and we're honest about the various types of protection we can give people when they share their stories with us and when we get the details of the various abuses that they have experienced.

The first step to this is when we're reaching out to people. So, in my case, because I don't speak Russian, it was the person I was working with, an activist from Kurdistan who was helping us out, calling people on the phone from phone numbers we've gotten from others. We make it really clear we're willing to meet them wherever they feel safe. And in my case, she was very clear: "You're going to meet with a 6'5" white American, so let's make sure you really feel safe."

We had a number of interviews. We were there for about two weeks, and on the last day we were there, we were told about this one guy we were supposed to meet: he used to own an underground gay club in this city. He knows everyone - he was the ad hoc social worker because he knew everyone that passed across his doorstep. We finally got in touch with him and he said, "[O]kay, you can come here to this restaurant and you can sit down at the booth at the back end and I'll come talk to you when I can." And it turns out he was waiting tables. That's where he worked. Whenever he had a break he'd come over and talk to us for five minutes, pour us tea very slowly and then he'd disappear.

We asked him many questions about his experience of owning the underground gay club. It turns out he went out of business after three years because all the money he earned he put into smuggling people out of the country when they were facing violence, paying medical bills when they

⁵⁷ Kyle Knight, "That's When I Realized I Was Nobody," *A Climate of Fear for LGBT People in Kazakhstan*, 6 (Human Rights Watch 2015).

couldn't afford it, and other types of things [to support] LGBT people who were facing horrendous abuses - including himself. He couldn't survive running the business that way, so he had to shut it down and start working at the restaurant.

After about two hours he returned and he allowed us to ask one last question. I responded, "You know, you've done all of this work. You've taken all of these risks. You've gone to the media when you can and it doesn't really work out. You have thrown yourself into this and yet, you're not an activist, so you say. You don't have an NGO. You're not interested in pursuing the type of the formal activism we see in other parts of the world. Well, why not? All of this work you do, all of this effort - you have bankrupted yourself doing the type of work that activists do, why not?" He sort of laughed and said, "You know, it's because the people that we're working with here don't even know that these things that they're experiencing are bad. And our government certainly is never going to change their mind on this and I can't bear sitting on my deathbed and looking back at my life and feeling like I've accomplished nothing. So I'd rather just do this. At least this way I know I'm getting people out of violence. At least this way I know that the money I can scrounge up is going to something good. There's no point in formal human rights activism. Good-bye." So we left. That is one anecdote.

The second one, goes back to 2011 when I started the project looking at the history of LGBT activism in Nepal⁵⁸, which is only half a time zone away from Kazakhstan. I was standing in the middle of a park in Kathmandu walking around as the sun was going down with a man who was essentially a living legend at the time. It was the ten-year anniversary of his founding of the country's first LGBT rights organization, and he told me what it was like back in 2001 when he registered the organization. [H]e explained what it was like when he showed up in [the same] park fresh back from getting his bachelor's degree in computer engineering, in Belarus of all places, handing out condoms and talking about South Africa's constitution protecting sexual orientation. Talking about how it's actually social prejudice, and not something sick within us, that [results in] us [being] treated this way, and convincing people to sort of gather in these groups and start doing this activism.

He told me these horrible stories of spending night after night bailing people out of jail. Of getting death threats all the time, and all of these things he'd experienced. And we talked for about an hour and then I said, "You know, you're at the ten-year mark. That seems like a significant anniversary. Looking back, what was the hardest thing about these ten years?"

⁵⁸ Kyle Knight, *How Nepal's Constitution Got Queered*, HUMAN RIGHTS WATCH (Oct. 19, 2015) www.hrw.org/news/2015/10/14/how-nepolis-constitution-got-queered.

He laughed and said, “[Y]ou know, the hardest thing - it wasn’t dealing with the perpetual sadness, it wasn’t losing people all the time, either because they got scared, they quit from the movement or because they passed away. It wasn’t even coming out to my mother, which was difficult.” He said, “[T]he hardest thing was when you do that all day, and you go to advocacy meetings and street protests and funerals and do all of these things, and you’re constantly broke and you’re constantly tired and you get back to your office and you lug up your terrible laptop that some Peace Corp volunteer left behind and you turn up the dial-up internet and look and you have an email from a donor agency that says: ‘Please just hand out condoms and don’t talk about human rights to the press.’ We don’t do LGBT rights work, therefore you don’t do LGBT rights work.” He said that was the hardest thing back then.

Now this is a slightly different story in this case, because that was 2001. By 2005, he had taken a rainbow flag and draped it over an elephant and rode it up to the gates of the palace and said “Hi” to the king. By 2006, he had been one of the signatories Jakarta Principles.⁵⁹ In 2007, he had brought back the principles before they were officially published, took them to the Supreme Court and said, “Please just copy and paste these into domestic law.” And then they did. By 2008, he was elected to the country’s first post-war parliament, making him the first openly gay federal-level elected official in all of Asia⁶⁰, and quite possibly - this is not my analysis, but I have not found anyone to prove it wrong - the only politician in the world to ever run on an explicitly and exclusively gay agenda, so to speak.

And so you have these two stories. This is part of what makes my job the best job in the world: it’s because I get to meet people like this. But you have these two stories of people campaigning for human rights in very different ways. When I sit at an organization that has a global reach, for which we have advocates in all the major capitals, who have expertise in working at the UN, and on different regions and for context, you must look at these two stories of people who are quite heroic in what they’re doing, and who are essentially fighting for very similar types of dignity in very different ways and in very different contexts.

To me, this is when we can talk about labeling. There are very different labels that go on in these two contexts, and I think we got started on some of that earlier, with the third gender developments in Nepal for example, which are incoherent in other places in the world. We can talk about the differences in it all, but I think when we look at a human rights framework of it, this is when we start to appreciate what exactly activists all over the world at their community levels are fighting for. Even if you meet someone who prefers doing the ad hoc work and says no one they interact with even

⁵⁹ *Id.*

⁶⁰ *Id.*

believes they have rights, or you meet someone who wants to ride a rainbow elephant through the streets of the capital city, these two people are essentially fighting on the same basic principles in two quite different ways.

There's a whole spectrum of different things going on out there, which is why we come together in symposia like this, and it's amazing. I think that's what we've heard all day: the different ways in which these things are being achieved. It's kind of incredible. This meeting could be three weeks long and we'd never run out of material. We could keep making lists of stuff we need to do when we leave. I'm completely serious. It's a real privilege to work in this movement, certainly from an organization with the clout that Human Rights Watch has, and we're a very small LGBT rights program within a massive global organization, which is another great privilege in terms of working with colleagues who are not particularly fluent in these issues but are really eager to pick them up and take them up where they can.

In closing, I think if this is what you work on or this is what you think about or what you might want to work on, there are so many different ways to do it. And that can go from grassroots all the way up to the UN, the creativity and the courage come together and often inspire each other. I think it's amazing to be here with a group of people and co-panelists like this. Thank you, Rutgers for putting this together, because these are the types of stories that I think keep us all going.

MAREN GREATHOUSE: [Many thanks] to all of you. Does anyone have a question they'd like to pose? Not all at once. [Laughter and mumbling]

PARTICIPANT: I go to the Rutgers School of Social Work right now. I'm working on my Master's Degree. I have a question that I've been wondering since the beginning of the morning, regarding outreach. [Sarah], you touched on outreach in different parts of the world a little bit, but I'm thinking more on a local level. We talked about how there is this narrative we sell of America being much more gay, lesbian, trans-friendly than other parts of the world, even if that may not necessarily be true in the sense we think of it. But what kind of challenges are there to outreach to people from other parts of the world who have different experiences of what being LGBT are like if we wanted to do things like advocacy and provide services coming from an American perspective? [Long pause] That was a bad question, wasn't it?

[Laughter]

KYLE KNIGHT: It was a great question.

ARIELLA ROTRAMEL: I'm clarifying, so to go as an American and be working in a different context? Or if [working with] people who are immigrants -

PARTICIPANT: Or maybe people who are immigrants here, refugees.

ARIELLA ROTRAMEL: Okay

PARTICIPANT: How do we [reach out] to them?

KYLE KNIGHT: I mean, I can give my thoughts. I think having the basic instinct to listen before making any decisions . . . I can share this from a different experience that might be a little more tangible than that kind of abstract advice. I used to work as a helpline counselor with the Trevor Project, which is a call-in crisis prevention hotline for LGBTQ youth.⁶¹ There were a number of basic principles we operated by then because we were not professional counselors. There were a lot of things that we were not able to do and we knew our limits quite well. With a hotline, we only took calls from within the States but there's obviously a lot of diversity within this country itself. We would never use a word to refer to someone until they'd use it about themselves.

That very basic rule sort of kept everything else in check. I was counseling this one young man who'd referred to himself as gay and started talking about struggles with faith. I was raised somewhere similar to a hippie commune, so I didn't know anything about religion and therefore was struggling to try to look this up. We had the resources, but I was really trying to be a good counselor and I didn't know a lot about it. One of the questions I was supposed to ask was "What denomination are you?" I asked "So what kind of Christian are you?" He said, "Well, I already told you, I'm a gay Christian." I said, "Okay." It was my own mistake in tripping up over this need to get deeper into a category that wasn't necessary for him as part of what he wanted. We all make those mistakes, but I think starting from the position of genuinely listening and using the vocabulary that the person uses is one way to do it.

ARIELLA ROTRAMEL: I think another thing is just really starting to think about building strength within communities, right? I think that part of the issue is making sure that we're supporting [LGBTQ people and their needs], for example, in social work, right? Making sure that people have the opportunity to pursue these opportunities as well.⁶² I think that's a piece of it. It's better in a lot of ways to have a range of options, right? You can have someone that you don't have a lot in common [to] work with, but to have those supporters be ripped away, organizations already exist that are based in communities, right?⁶³ They might not be LGBT-identified, but I think a lot of the time there may be ways to start to build those supports, right?⁶⁴ I think, coming from Chicago and seeing what work people have

⁶¹ The Trevor Project, *available at* thetrevorproject.org.

⁶² Ruth Allen, *The Role of the Social Worker in Adult Mental Health Services*, *The College of Social Work* 39 (2014) ("[Social Workers'] advanced relationship-based skills, and their focus on personalization and recovery, can support people to make positive, self-directed change.").

⁶³ Mordecai Holtz, MSW, *There's a Place for "Us"—How Community Fits Into Social Work*, *The New Social Worker* (last visited April 5, 2016).

⁶⁴ National Recommended Best Practices for Serving LGBT Homeless Youth, National Alliance to End Homelessness, <http://www.endhomelessness.org/library/entry/national-recommended-best-practices-for-serving-lgbt-homeless-youth> (last visited April 5, 2016).

done in Newark, there's a lot of possibilities there that we don't often understand. For example, say if we have faith-based groups that actually might want to work in support of LGBT youth from different backgrounds, right?

MARÍA MERCEDES GÓMEZ: I don't know about the States, but in Latin America, the campaigns that some of the grassroots organizations are doing with schools have been very important.⁶⁵

PARTICIPANT: I'm a postdoctoral associate here in the School of Criminal Justice⁶⁶. First, I just want to say thank you for your work globally; it's really important work. We know from a variety of disciplines that when people learn skills related to, for example, inter-cultural communication, or we have diversity trainings that apply to a broad group of people, we know that those have positive effects, not just for queer communities, but for other communities, marginalized or not.⁶⁷ I'm curious - in your experience, if you've run into groups or NGOs or other coalitions that are sort of unlikely allies, like strange bedfellows so to speak, in your work? I think there's a perception about the type of organization that works with queer organizations or that they have certain goals and again, it's not always as clear as you think, so I'm curious if you have stories about these coalitions that have occurred that you wouldn't suspect, according to the queer movement.

ARIELLA ROTRAMEL: My favorite is Domestic Workers United and Fierce in New York City⁶⁸. It's a domestic workers' group that's mostly composed of immigrant women workers, right? Filipinos, women from the Caribbean and other youth groups. For my dissertation research, I would be at events that were supportive of LGBTQ rights or domestic workers' rights and you would see the same people. I [always thought] that was really powerful, and I think that the analysis was there, right? This was about thinking about racism in New York City and you have economic issues [as well]. I think if you met these individuals on the street, right, you'd be like, "Okay this is a lovely middle-aged woman who is a nanny . . . [she] is religious and goes to church on Sundays." That might be someone you'd meet and you'd meet a teenager who likes to dance and is into hip-hop culture, right? You wouldn't necessarily see a lot of commonality, but I think it's there, and I think that's part of what I find really interesting. It's when people can actually share core values, right?

⁶⁵ Javier Corrales, *LGBT Rights and Representation in Latin America and the Caribbean: The Influence of Structure, Movements, Institutions, and Culture*, Prepared for the LGBT Representation and Rights Initiative at the University of North Carolina at Chapel Hill 40, 11.

⁶⁶ VANESSA PANTHAL, *Curriculum Vitae*, RUTGERS SCHOOL OF CRIMINAL JUSTICE, http://rscj.newark.rutgers.edu/wordpress/wp-content/uploads/2014/07/VRPanfil_CV_July2014_forSCJwebsite.pdf.

⁶⁷ Doris Boehler and Matthew Randall, *Diversity training and social work: An insight into theory, methodology and practice*, *ERIS Web Journal* 15, 17-18 (Jan. 2012).

⁶⁸ See e.g. *About FIERCE*, <http://www.fierceny.org/about>.

There are fundamental issues that they want to work on and they can see those connections, right? I do think it's fundamentally based on our favorite theme of the day, dignity—

PARTICIPANT: Yeah.

ARIELLA ROTRAMEL: It's about really having a mutual sense of respect, you know?

PARTICIPANT: Right.

MARÍA MERCEDES GÓMEZ: In Latin America, I would say that – I don't know if it's the same thing in terms of coalitions – but I didn't mention the importance of intersectionality in organizations. I mean, there is no way that we have been able to do any of the important things that we have done without the feminist movement, the indigenous movement, and other groups fighting for social justice.

However, there is one thing I'm dying to tell you, and this is something that happened to me last week: I was in Bogota because the national prosecutor's officer is rethinking the rules regarding how to research LGBTQ rights, so they organized a two-day workshops with experts and local prosecutors on anti-LGBTQI violence. This is the first time in my long years of activism and academic work that in my own country, that I don't have to prepare a presentation to convince the government on the importance of learning about violence based on prejudice and how to document it. It was the government's initiative to train the prosecutors. I mean, amazing! So, that is a 'strange bedfellows' situation, too, literally. But it's also the a positive result of the work of the civil society organizations and political will of the current government. Things happen, but it requires years and years of work. Same with Chile and the new government, LGBTQI rights came as a priority now. It's a combination of things.

KYLE KNIGHT: I don't have examples that are that good. So I'm going to pass.

PARTICIPANT: I have two questions: One is about what you said, you mentioned, what you were saying about Karen Atala becoming a lesbian when she was named by others as a lesbian, and what it means to be named, to be labeled. So, I wonder if you think that the sense of these labels created by the others, and when are those labels then appropriated by the self. And what difference does it make in terms of the agency of the individual with the others?

Because I actually, while we were walking to the law school, I was mentioning my experience as a Hispanic. Like, I never considered myself a Hispanic. And I think that you were mentioning that too. In your legal class you were who you were in your country. All of the sudden you come here and then you start becoming the other. But not because you thought that you were the other, but because somebody made you feel that you were the other. So I don't know what it means in terms of the political identity of individuals from – I would rather say it in Spanish. I don't know why, it

doesn't sound really right in English and I hate all the American acronyms, I'm so sorry. [Laughter] LGBT, LGBTAQ, I mean, let's stop it, why can't you find something more general and that you can't - you don't have to be changing every other year? [Laughter]

MARÍA MERCEDES GÓMEZ: the theory behind the difference in naming comes from the Lacanian distinction between identity and identification. The question of receiving the name, imposing an identity – that is impossible anyway, is a gesture of fixing something without your intervention. And I guess it aims to control something. That's what I'm talking about: the main issue, the meaningful issue, is like the imposition of what a lesbian is on Atala. And, in people's fantasy, what is a lesbian? I always say, you know, who do you identify as a lesbian? What are the marks of a lesbian? Are you talking about women that sleep with other women? Or what are you talking about?

Usually when you receive a name, what you must ask, is for the use of the name. Why are people using the name? So the judges with Atala wanted to say that she was probably corrupting her own kids. But what is in the lesbian that corrupts? You cannot really define it anyway. So my idea with this is really to show that there is prejudice when the name is imposed without your intervention. It's prejudice. Prejudice is what wins when that happens.

On the contrary, when you self-identify as a lesbian, I can tell you, infinite numbers of elements make my self-reference as a lesbian a joyful thing and a transformative thing. In my personal experience, I'm a lesbian because of the political work that I do. I'm not a lesbian because I live with a woman. The kind of political tasks that I want in my life are connected with what I put as a name on myself. But, it is quite different when, in the streets, someone said, "You lesbian, go and look for a real man," which is one of the utterances that you hear mainly in prejudiced attacks.

But, making emphasis on this distinction, is what the phrasing of some of the hate crime statutes do: they locate bias in the violent behavior towards a *real or perceived* characteristic of the victim. In other words, it is the gaze of the perpetrator that says, "that person is a lesbian." There are two legal cases I am aware of that implement this approach: one is from the Tribunal Supremo of Spain and the other is a Canadian case, – from Quebec. I don't have the exact references now but - in both cases, the judges condemned the attackers for violence based on prejudice. In the Canadian case, the person that was killed didn't self-identify as a gay man but he was killed because he was perceived as such. He was killed and his dead was taken on by the LGBTQI community as a landmark case. So recognizing the prejudice in the gaze of the perpetrator, is another way of distinguish between a real (self-imposed identification) or a perceived (imposed identity) . I think, this is a way of queering the law.

MAREN GREATHOUSE: I don't know if we. . . Would you guys be willing to take one more question? Okay, we'll have to make our responses brief, but I want to give you a chance—

PARTICIPANT: This is for Professor Rotramel: could you speak more to the contemporary global escalation of social tensions due to the economic crisis and increasing LGBTQ visibility?

ARIELLA ROTRAMEL: I spoke very generally, but part of what I'm thinking about is specifically the 2008 economic crisis. You're seeing an escalation in terms of domestic violence. I think there is better data - you see a rise in domestic violence in countries where there's higher unemployment and you have social instability. So I think this actually speaks to what you were just addressing: When you have men who are becoming unemployed they look to redress this. Where do they build up masculinity? One of those ways is by acting out in homophobic ways. You may be abusive to your partner because you've lost your sense of who you are.

That's speaking very generally, but I think it's a really important issue, because the real or perceived piece is about the people who are perceived as a threat, right? And I think that's one of the [issues] we've been talking about. You can see that with racist violence in the US, for example. That's something I think you are all aware of, right? I think when people feel that their civility is under attack or they don't see the promises of the American dream wherever they go, they look to blame someone, right? They want to assert their dominance over someone. Today we're talking mostly about LGBTQ issues, but I think we could easily be talking about violence against women. We could easily be talking about racist violence. We could be talking about xenophobic violence. I think all these pieces come together. And it's really important, I think, to understand that this doesn't come from within, right? But it's about socialization.