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DISCRIMINATION FROM SEA TO SHINING SEA: WHO FARES BETTER UNDER THEIR RESPECTIVE COUNTRY'S ANTI-DISCRIMINATION LAWS: THE BURAKUMIN OF JAPAN OR GAYS AND LESBIANS OF THE UNITED STATES?

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DISCRIMINATION FROM SEA TO SHINING SEA: WHO FARES BETTER UNDER THEIR RESPECTIVE COUNTRY'S ANTI-DISCRIMINATION LAWS: THE BURAKUMIN OF JAPAN OR GAYS AND LESBIANS OF THE UNITED STATES?

I. INTRODUCTION

Striking similarities exist between the Burakumin of Japan and gays and lesbians of the United States. Each group is a despised and controversial minority within its own culture.[1] Each has been a victim of horrendous discrimination in areas including employment, housing, and marriage.[2] Each has faced discrimination without logical basis.[3]

The Burakumin and gays and lesbians are "invisible" minorities, outwardly indistinguishable from their fellow citizens, unlike African-Americans for example, who are identifiable by their skin color.[4] The roots of discrimination for both groups are traced to religion.[5] Each group resorted to episodes of civil disobedience to call attention to their plight seeking an

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1. *See* Yoshiharu Matsuura, *Review Essay: Law and Bureaucracy in Modern Japan*, 41 STAN. L. REV. 1627, 1633 (1989); *see* Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. DET. MERCY L. REV. 189, 203 (1999).

2. *See* Matsuura, *supra* note *1*, at 1633; *See* Lori J. Rankin, *Ballot Initiatives and Gay Rights: Equal Protection Challenges to the Right's Campaign Against Lesbians and Gay Men*, 62 U. CIN. L. REV. 1055, 1060 (1994).

3. *See What is Buraku Discriminiation?, Origin of the Discrimination*, p.1, *at* http://blhrri.org/blhrri_e/blhrri/buraku.htm; *see* Rankin, *supra* note 2, at 1083.

4. *See What is Buraku Discriminiation?*, *supra* note 3, at p. 1; *see* Allen D. Madison, *The Context of Employment Discrimination in Japan*, 74 U. DET. MERCY L. REV. 187, 193 (1997); *see* Battaglia, *supra* note 1, at 328.

5. *See What is Buraku Discriminiation?*, *supra* note 3, *at* p. 1; *see* Emily A. Su-lan Reber, *Buraku Mondai in Japan: Historical and Modern Perspectives and Directions for the Future*, 12 HARV. HUM. RTS. J. 297, 301 (1999); *see* Battaglia, *supra* note 1, at 199 and 327-28.

end to the discrimination they bear.[6] Finally, Japan and the United States passed legislation aimed at ending the discrimination.[7]

No simple explanation exists as to the origins of the discrimination against the Burakumin.[8] However, the main points are that "(1) the status of outcast existed over the course of several centuries in Japan, (2) the vestiges of discrimination against these outcasts remain, and (3) none of the historical explanations of why the status of outcast existed in the past justify the continuance of this status in Japan today."[9] Gays and lesbians in the United States are subject to formal inequality in a nation where few laws protect them from discrimination in employment, housing, and access to public accommodations.[10] Except Vermont, states bar gays and lesbians from marrying.[11] Most states have restricted parenting rights,[12] and almost half the states criminalize consensual sexual activity.[13] Gays and lesbians may not serve in the military and suffer many other restrictions because of overt discrimination.[14]

This article compares discrimination against Japanese Burakumin with that of gays and lesbians in the United States. Following the Introduction, Part II analyzes the history and development of Burakumin discrimination, focusing on the areas of employment, housing, and marriage. Also, this Part examines Japanese legislation passed to combat discrimination. Part III examines the same areas for gays and lesbians in the United States, including legislative history. Part IV evaluates each country's legislation in terms of its effectiveness. Part V, the Conclusion, compares the two groups to determine who fares better under their respective laws.

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6. *See* Madison, *supra* note 4, at 206; *See* Patricia A. Cain, *Litigating For Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1564 (1993).

7. *See* Madison, *supra* note 4, at 193; *See* Cathy A. Harris, *Outing Privacy Litigation: Toward A Contextual Strategy for Lesbian and Gay Rights*, 65 GEO. WASH. L. REV. 248, 253 (1997).

8. *See* Reber, *supra* note 5, at 305.

9. *Id.* at 304.

10. *See* Jane Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HAR. C.R.-C.L. L. REV. 283, 298 (1994). This discrimination is based solely on the basis of their sexual orientation. *See id.*

11. *See generally* Baker v. State, 744 A.2d 864 (Vt. 1999).

12. *See* Schacter, *supra* note 10, at 298.

13. *See id.*

14. *See id.*

II. THE BURAKUMIN OF JAPAN

A. Early Origins

Burakumin descend from outcasts of the Tokugawa period (1600-1867)[15] and make up approximately one to three percent of the Japanese population.[16] Burakumin do not differ from other Japanese in terms of ethnicity, language, or race.[17] Instead, they became outcasts because of their occupations.[18] They were thought to be unclean due to Shinto and Buddhist concepts of filth and the stigma attached to their killing of animals.[19] Because of this perceived pollution, they were banned from religious ceremonies.[20] Often subject to local discriminatory regulations, they were limited to the areas they could live.[21]

Japanese society also forbade Burakumin from: wedding commoners, working as servants for commoners, sitting, eating, or smoking with commoners, traditionally fixing their hair, and wearing the common wooden sandals of the day.[22] This discrimination continued throughout the Tokugawa period.[23]

B. Post-Tokugawa Period: The Meiji Restoration

The collapse of the Tokugawa period led to the Meiji Restoration, which brought about the Emancipation Edict of 1871, marking "the formal liberation of the Burakumin from their feudal status as outcastes and 'non-humans.'"[24] However, this did little for the Burakumin, and discrimination

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15. *See* Reber, *supra* note 5, at 299.

16. *See* FRANK K. UPHAM, LAW AND SOCIAL CHANGE IN POSTWAR JAPAN 79 (1987).

17. *See* Reber, *supra* note 5, at 299, 300.

18. *See* UPHAM, *supra* note 16, at 79. These occupations consisted of begging, acting or juggling, which were considered degrading. *See id.* Particular anathemas were butchers, leather tanners, executioners, body handlers, grave-diggers, and other occupations that had to do with death. *See id.*

19. *See* Reber, *supra* note 5, at 300.

20. *See id.* at 304.

21. *See id.* at 300.

22. *See* UPHAM, *supra* note 16, at 79.

23. *See id.* at 79, 80.

24. *See id.* at 80.

against them increased.[25] The government failed to provide them with financial assistance, although it provided assistance to former samurai who also lost their social status at this time.[26]

The Government started registering the Burakumin as "new commoners" "in the family registries maintained at each citizen's place of origin.[27] The registries were open to the public, and thus it was simple for other Japanese to determine whether a potential spouse or employee was of outcaste origin."[28] Therefore, Japanese citizens could easily identify Burakumin by simply looking at these registries and seeing who was labeled as a "new commoner."[29]

During this time, social hostility increased towards the Burakumin.[30] Roving bands (pogroms) attacked them and local governments excluded them from commonly held village land, a practice supported by the Meiji courts.[31] Furthermore, non-traditional groups started practicing trades once considered only Buraku professions, such as shoe manufacturing.[32] This created competition for the Burakumin and reduced what little economic status they might have retained.[33] In reality, therefore, the result of their "emancipation" was "enhanced legal status at the cost of intensified social discrimination and loss of economic privileges."[34] It was at this point that the Ministry of Justice referred to Burakumin as "the lowliest of people, resembling animals."[35]

C. After World War I

At the end of World War I, rice riots occurred in Japan and spurred Burakumin militancy.[36] The Burakumin participated in the riots and became

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25. *See id.*
26. *See* Reber, *supra* note 5, at 304.
27. *See* UPHAM, *supra* note 16, at 80.
28. *See id.*
29. *See id.*
30. *See id.*
31. *See id.*
32. *See id.* at 81.
33. *See id.*
34. *See id.*
35. *See* Reber, *supra* note 5, at 306.
36. *See* UPHAM, *supra* note 16, at 81.

less willing to blame themselves for their status.[37] They more aggressively demanded immediate action from their government, both for economic support and for an end to discrimination in areas such as employment, education and the military.[38] The government responded and allocated funds to improve Burakumin ghettos and formed organizations to deal with Buraku problems.[39]

The Suiheisha, a leftist group founded in the early 1920's by young militant Burakumin, soon became the leading Burakumin organization.[40] It devised a strategy called "denunciation," which was characterized by anger and violence[41] This policy directed discriminators to publicly apologize for their discriminatory actions and promise to end the discrimination.[42] However, this strategy often had an opposite effect; while decreasing overt discrimination, it increased hostility towards the Burakumin and made the Suiheisha appear to be a violent and frightening organization.[43]

The 1930's brought a strategical shift away from the denunciations.[44] Instead, changes were sought in the institutions themselves, including the judiciary, military, education, penal, and cultural systems.[45] This campaign was much more successful.[46] It brought the Suiheisha greater respect and motivated them to direct their denunciations toward a more politically significant purpose of societal integration.[47] These successes culminated in 1936 with the election of Matsumoto Jiichiro, chairman of the Suiheisha, to the Imperial Diet.[48]

D. The 1940's and 1950's

Unfortunately, all these successes came to an end with the coming of World War II because "all efforts were subordinated to helping Japan win the

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37. *See id.*
38. *See id.*
39. *See id.*
40. *See id.*
41. *See id.*
42. *See id.* at 82.
43. *See id.*
44. *See id.*
45. *See id.*
46. *See id.* at 83.
47. *See id.*
48. *See* Reber, *supra* note 5, at 306.

war and the Suiheisha was dissolved."[49] Following the decimation of Japan at the end of World War II, a new Japanese Constitution[50] stressed the people's sovereignty over that of the Emperor and included principles of democracy and human rights.[51] Accordingly, the Suiheisha regrouped and pursued their political and social efforts for equality.[52] Renamed the Buraku Liberation League (BLL), they elected Matsumoto Jiichiro as chairman, who was later elected Vice President of the House of Councilors (Upper house of the Diet).[53] By 1955, "membership skyrocketed, and massive efforts began to induce the government to improve the conditions of the Burakumin."[54]

E. Modern Actions

In 1961, the government created the Deliberative Council for Buraku Assimilation, a committee appointed by the Prime Minister for the express purpose of studying the Buraku situation and recommending actions to be taken.[55] It consisted of Burakumin, bureaucrats, politicians, and other

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49. *Id.* at 307.

50. *See The Constitution of Japan*, (November 3, 1946) *at* http://www.ntt.com/japan/constitution/english-Constitution.html.
Among those articles that could be applied to the Burakumin's struggle are:

> Article 11: The people shall not be prevented from enjoying any of the fundamental human rights.
> Article 13: All of the people shall be respected as individuals. Their right to life, liberty, and the pursuit of happiness shall, to the extent that it does not interfere with the public welfare, be the supreme consideration in legislation and in other governmental affairs.
> Article 14: All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.
> Article 17: Every person may sue for redress as provided by law from the State or public entity, in the case he has sufffered damage through illegal act of any public official.

Id. Moreover, other Articles grant the right to choose one's residence and occupation, the right to an education, the right to work, the right to own property, and the right of access to the courts, among others. *See id.*

51. *See id.; See* Reber, *supra* note 5, at 307.

52. *See* UPHAM, *supra* note 16, at 84.

53. *See* Reber, *supra* note 5, at 307.

54. *See id.*

55. *See id.* at 308.

societal experts.[56] In August 1965, the Council issued its report, "Fundamental Measures for the Solution of Social and Economic Problems of Buraku Areas."[57] With this document, the government acknowledged publicly for the first time that Burakumin discrimination existed.[58]

This report struck down the ideas that the Burakumin were racially or ethnically different from other Japanese.[59] It also acknowledged that the problem would not naturally disappear through economic and social change because Burakumin discrimination was deeply ingrained in Japanese society.[60] The report described the society as "still pre-modern in many respects, where individual freedom of action is often shackled by irrational and superstitious traditions, customs, and beliefs, and where feudal concepts of social status, family background, and group orientation are still the basis of social order."[61] Such discrimination led to denying the Burakumin the freedoms of choice of employment, equal opportunities in education, liberty to move around, and the freedoms of marriage and interaction in society.[62]

Realizing that it was the state's duty to address these problems "fundamentally and promptly", the Report recommended special legislation.[63] The only legislation that existed at the time covered Burakumin welfare programs but did not address ending discrimination.[64] In 1969, the national government passed the Special Measures Law for [Dowa] Assimilation Projects (SML).[65] The Burakumin viewed this with high importance because it allowed them to become more activist and militant.[66] This law allocated funds for Dowa projects to improve conditions in

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56. *See id.*

57. *See id.*

58. *See id.*

59. *See* UPHAM, *supra* note 16, at 85.

60. *See id.*

61. *See id.*

62. *See id.* at 86. The Burakumin were forced to live under terrible conditions. *See id.* Such conditions included: ghettos that often flooded because of their geographical locations, substandard or absent public services (i.e., fire, sewer, water, street lights, public offices), substandard housing, educational levels below national averages, limited employment opportunities, prohibition of marriage outside the caste, and limited social interaction with the Japanese majority. *See id.* According to the report, all of these conditions were a direct result of overt discrimination. *See id.*

63. *See id.*

64. *See id.*

65. *See id.*

66. *See id.*

Burakumin areas.[67] Also, the law allowed local bodies (most often branches of the BLL) to provide scholarships, offer low interest loans, and reduce taxes for small to medium Buraku businesses.[68]

In 1982, the Law on Special Fiscal Measures for Regional Improvement was passed.[69] This law remained in effect for five years, but it neglected to specifically refer to the Burakumin.[70] Furthermore, the government "ceased recognizing buraku that had not yet been recognized as dowa chiku, and thus no new communities were eligible to receive government improvement assistance."[71] Following the expiration of this law in 1987, the Law for Special Fiscal Measures for Area Improvement Projects was enacted for a 5-year period.[72] On March 31, 1992, it was extended for another 5 years, and then in 1997, it was amended and extended again for another 5 years.[73] This law significantly differs from the earlier two laws.[74] It failed to lay the responsibility on the Japanese government to end Buraku discrimination.[75] Furthermore, areas that were improved under the prior two laws were now excluded, and loans replaced secondary education grants offered to Burakumin students.[76]

During the 1960's, a split developed between the BLL and the Japanese Communist Party, which had been a supporter of the BLL and its causes up to that time.[77] Some of the causes of this rift were the death of Matsumoto Jiichiro, the BLL leader, a shift in the organization's leadership, and the adoption of the 1969 SML.[78] With the passage of this law, the BLL began working more closely with the government's Liberal Democratic Party, especially in the area of the allocation of funds for the Burakumin.[79] The JCP saw this as co-opting the liberation movement.[80]

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67. *See* Reber, *supra* note 5, at 308.
68. *See id.*
69. *See id.* at 309.
70. *See id.*
71. *See id.*
72. *See id.*
73. *See id.*
74. *See id.*
75. *See id.*
76. *See id.*
77. *See* UPHAM, *supra* note 16, at 91.
78. *See id.*
79. *See id.*
80. *See id.*

This instigated communist sympathizers to form a rival Burakumin organization, whose view of Buraku discrimination was quite different than that of the BLL.[81] They saw discrimination "as a remnant of feudalism currently exploited by monopoly capitalists which will eventually be destroyed by the further development of Japanese capitalism."[82] The group further believed that the government used affirmative action to have the Burakumin become lazy dependents on the government, rather than the champions of leftist causes that they once were.[83] The Zenkairen formed in March 1976 and consisted of members of the former group and those individuals that were excluded from the BLL.[84] This group exists today, but its policies and goals differ sharply from the BLL, seeking to organize the poor (not solely Burakumin) to fight against government oppression.[85]

In May of 1996, for the first time since the 1965 Report, the Consultative Council on Regional Improvement Measures (organized by an agency of the National Government) issued its opinion of the Burakumin.[86] It found continued discrimination against the Burakumin, that this had not fallen from the important topics in Japanese society, and that Japan had an obligation to abolish this discrimination as a human rights violation.[87] It further stated that legislation, as well as human rights, education, and enlightenment, must be undertaken to reach the solution of ending discrimination, as well as a required system of redress for those whose human rights were violated.[88]

In December 1996, the Diet enacted the Law for the Promotion for Measures of Human Rights Protection, which established the Council for Promoting Human Rights Protection.[89] This Council recommended policy on human rights education and remedies of relief for the victims of human rights violations.[90] Implementation in a 5-year framework was also suggested.[91] Furthermore, in March 1997, the Law Regarding the Special Fiscal Measures of the Government for Regional Improvement Projects was

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81. *See id.*
82. *Id.* at 91–92.
83. *See id.* at 92.
84. *See* Reber, *supra* note 5, at 310–11.
85. *See id.*
86. *See id.* at 314.
87. *See id.*
88. *See id.*
89. *See id.*
90. *See id.*
91. *See id.*

extended for another 5 years, with a slight revision.[92] The trend of these laws, however, is a focus on general human rights and not the Burakumin specifically.[93]

III. GAYS & LESBIANS OF THE UNITED STATES

Documentation by court opinions, surveys, and legal literature all attest to the fact that gays and lesbians in the United States are discriminated against.[94] "It is a matter of fact beyond dispute that gays, lesbians and bisexuals have suffered a history of discrimination based on inaccurate, stereotyped notions of their sexual orientation."[95] They face discrimination in areas such as housing and education.[96] Historically religion justified discrimination against gays and lesbians.[97] Even today, religious beliefs are "used to justify active opposition to laws and policies designed to protect gay people from discrimination."[98]

A. Early Origins

Discrimination against gays and lesbians appears at the inception of the United States.[99] In 1625, Virginia colonists hanged Richard Cornish, a shipmaster, for sodomizing one of his stewards.[100] A witness at the trial described the homosexual act as an overthrow of both soul and body.[101] Furthermore, Reverend John Cotton, a legislator from the colonies, reinterpreted the English sodomy laws to define lesbianism and applied the death penalty to lesbians.[102]

By the 1800's, the medical profession began to convert this discrimination into treatment values, recording such in the treatment of males

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92. *See id.*

93. *See id.* at 315.

94. *See* Battaglia, *supra* note 1, at 200.

95. *See id.* at 199 (quoting Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati, 860 F. Supp. 417, 437 (S.D.Ohio 1994)).

96. *See* Battaglia, *supra* note 1, at 200.

97. *See id.* at 203.

98. *See id.* at 204.

99. *See* Elvia R. Arriola, *Faeries, Marimachas, Queens, and Lezzies: The Construction of Homosexuality Before the 1969 Stonewall Riots*, 5 COLUM. J. GENDER & L. 33, 39 (1995).

100. *See id.*

101. *See id.*

102. *See id.*

and females struggling with same-sex attraction in a world dominated by heterosexual relationships.[103] For instance, in 1884, Dr. James G. Kiernan, in treating a female whose interest was in other females, suggested that she be committed to an asylum because society should not waste sympathy on such people. Lesbians could use such sympathy to further their own perverted ideas.[104]

B. Early 20th Century

From the 1880's to the 1930's, the medical profession categorized homosexuals as sexual perverts.[105] In comparison to "healthy heterosexuals," homosexuals were considered corrupt, with low mental ability and best treated by psychiatry, castration, or imprisonment.[106] The medical profession thought of same-sex attraction as either lunacy or abnormalcy.[107] Under a degeneracy theory, physicians believed that homosexuality could be inherited, and because of its depravity, they supported treatments such as aversion therapy and castration.[108] The courts also became involved in this area, and enforced laws aimed at sexual deviancy.[109] Sodomy statutes were adopted and codes were enforced to promote sexual mores and social decency.[110]

In the early 1920's, Henry Gerber formed the first gay rights organization in the United States, the Society for Human Rights.[111] Its goal was to promote and protect the interests of the abused and to combat

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103. *See id* at 42.

104. *See id* at 43.

105. *See id.*

106. *See id.*

107. *See id* at 44.

108. *See* Cain, *supra* note 6, at 1555.

109. *See* Arriola, *supra* note 99, at 47. For example, in 1910, a South Dakota judge, in a sodomy statute prosecution, opened his opinion "with an apology for actually discussing the matter of abnormal sex." *See id.* (quoting State v. Whitmarsh, 128 N.W. 580, 581 (S.D. 1910)). He wrote that he "regretted 'soiling the pages of our reports with a discussion of a subject so loathsome and disgusting as the one confronting us.'" *Id.* These judicial expressions were a reflection of the attitudes shared by most of society, that homosexuality must be abhorred, feared and repressed at all costs.

110. *See id.*

111. *See* Cain, *supra* note 6, at 1556.

discrimination.[112] However, this group did not last long.[113] It failed to gain support because of societal reluctance to associate with presumed criminals such as homosexuals.[114] Several members, including Gerber, were arrested and jailed, although the charges were ultimately dismissed.[115] Repression and censorship were standards of the day.[116] By 1929, one of the most famous lesbian novels, *The Well of Loneliness*, was listed on the United States Customs banned books list.[117] In the 1930's, the Catholic Church announced its long list of indecent and proscribed literature involving homosexual themes, and the movie industry banned the slightest depiction of homosexuality in its films.[118]

C. World War II and the 1950's

At the entrance to World War II, the nation's values, including medical, religious, legal and cultural, formed a collective opinion complete with negative attitudes about homosexuality.[119] It construed heterosexuality as the norm and homosexuality as criminal, immoral, or sick.[120] This attitude was reflected in the military as well, with any transgression of traditional male/female behaviors resulting in a swift discharge under Section 8.[121] "The Section 8 discharge, which indicated insanity, was part of the military's program to keep out people whose habits and traits were deemed unsuitable for military service, including homosexuals."[122] After the war, however, gays and lesbians in the cities started to create a sense of community by socializing in gay bars and private clubs.[123] Upon returning from the war, however, they were still up against the danger of the "crimes against nature" laws still in force.[124]

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112. *See id.*
113. *See id.*
114. *See id.*
115. *See id.*
116. *See id* at 1557.
117. *See id.*
118. *See* Arriola, *supra* note 99, at 48.
119. *See id.* at 49.
120. *See id.*
121. *See id* at 50.
122. *See id.*
123. *See id.* at 51.
124. *See id.*

Around 1950, gay organizations in the United States started forming, one of them being the Mattachine Society in Los Angeles.[125] Their mission was to "liberate the homosexual minority from the oppression of the majority and to call on other minorities to fight with them against oppression."[126] The Society backed legal cases, including one in 1952.[127] A man was arrested in a park for lewd behavior.[128] The incident was described as entrapment, however, and ended in a hung jury.[129] This case was historically significant because it was one of the first times that a gay man stood up in court, admitted that he was gay, and also demanded his rights.[130]

The 1950's brought a sense that America should be returning to its prewar state of normalcy.[131] This included the procreative heterosexual values that encouraged men to take back the jobs that women had during the war.[132] Women were encouraged to once again become dependent wives and mothers.[133] Consequently, as the United States gained back its strength, homosexuals came to be seen as grave threats to the country.[134]

Against the backdrop of a culture that televised such idealized family images as "Leave it to Beaver," "Ozzie and Harriet," and "Father Knows Best"—all-American, clean living families—, Americans came to see gays and lesbians as socially and sexually deviant.[135] Homosexuals, "deserved neither the status of federal employee nor the privileges of basic American citizenship."[136] Gays and lesbians were barred from government employment during this time.[137] A Senate subcommittee found them "unsuitable" for

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125. *See* Cain, *supra* note 6, at 1558.

126. *See id.* at 1559.

127. *See id.*

128. *See id.*

129. *See id.*

130. *See id.*

131. *See* Arriola, *supra* note 99, at 52.

132. *See id.*

133. *See id.*

134. *See id.* This was also when Joseph McCarthy added fuel to his Communist-routing fire by making claims that homosexuals were threatening national security by infiltrating the government. *See id.* at 53.

135. *See id.* at 54.

136. *See id.*

137. *See* Cain, *supra* note 6, at 1566.

employment by the government and felt that they were security risks because they indulged in acts of sexual perversion that weakened their moral fiber.[138]

In addition, homosexuals were regarded as being vulnerable to blackmail because they had to hide their behavior because of its perceived criminal and immoral character.[139] Shortly after the 1953 election, President Eisenhower, issued Executive Order 10,450 that called for the firing of all government employees who were "sex perverts."[140] This, and similar pronouncements that gays and lesbians were unfit and of weak moral character, only encouraged police to increase harassment of gay and lesbian bars.[141] Yet, this only served to bring gays and lesbians to the beginning of self-awareness, of a gay minority consciousness, because these bars were where gays and lesbians sought each other out for support and comfort.[142]

During the 1950's and early 1960's, the nation's courts were rife with cases that involved shutting down of gay bars or revoking of these bars' liquor licenses.[143] One of the earliest of these cases was *Stoumen v. Reilly*.[144] The dispute was whether California's Board of Equalization could suspend the liquor license of a restaurant/bar that allowed homosexuals to congregate there.[145] The California Supreme Court held it unconstitutional to revoke a gay bar's liquor license only because homosexuals congregated there.[146] This early victory,[147] however, was extremely short-lived because the California legislature immediately passed a law that said a bar could be shut down upon proof that gays and lesbians were engaging in conduct such as kissing, dancing, touching, or hugging.[148] The law also forbade a bar from catering to sexual perverts, clearly meaning gays and lesbians.[149] These and similar laws were passed and enforced from California to New Jersey and New York to Florida.[150]

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138. *See id.*

139. *See id.*

140. *See id.*

141. *See id* at 1567.

142. *See* Arriola, *supra* note 99, at 55.

143. *See generally* Cain, *supra* note 6. at 1567-70; *See* Arriola, *supra* note 99, at 55-7.

144. *See* Stoumen v. Reilly, 234 P.2d 969 (Cal. 1951).

145. *See* Cain, *supra* note 7, at 1567.

146. *See id.* at 1568.

147. *See id.*

148. *See* Arriola, *supra* note 86, at 56.

149. *See id.*

150. *See* Cain, *supra* note 6, at 1571-72. These laws, combined with the laws that made consensual homosexual sodomy a crime in most states, effected gays' and lesbians' rights to

Subsequently, federal employees who challenged their dismissals in court started to win. The allegations against them were too vague, or in the case of *Norton v. Macy,* the court finally demanded proof of some causal connection between the "immoral, indecent, and disgraceful" homosexual behavior in question and the unfitness for the job itself.[151] This marked a beginning of court protection against discrimination based on status and private conduct.[152]

D. The 1960's

The early 1960's were a time of extreme harassment against gays and lesbians, primarily at their places of congregation the gay bars.[153] Police frequently raided the bars and arrested the patrons, whom were often in various states of cross-dressing.[154] Also, standard practice during this period was the widespread use of vice officers in public places where homosexuals were known to congregate.[155] The officers used standard "decoy" behavior to trap homosexuals into responding, resulting in the homosexual's arrest.[156]

By the mid 1960's, many radical liberation movements in the United States arose, such as black civil rights activism, anti-Vietnam War protests, and feminism.[157] At the 1968 Democratic Convention in Chicago, police severely beat protesters, illustrating an era of resistance, protest, and challenge to governmental authority.[158] It is within this context that the Stonewall Riots of 1969 marked the beginning of the modern fight for gay and lesbian liberation.[159] The riots were a response to a standard police raid on a gay bar and the arrest of its patrons. Those about to be arrested fought

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congregate and express an essential part of their nature. *See id.*

151. *See* Cain, *supra* note 6, at 1577. The homosexual behavior in question here occurred away from the job in the privacy of the employee's car and the advances were rebuffed. *See id.* Thus, no activity occurred. *See id.*

152. *See generally id.* at 1577-79.

153. *See generally* Arriola, *supra* note 99, at 58-60.

154. *See id.* at 63.

155. *See id.* at 65. One 1966 study showed that the City of Los Angeles deployed fifty percent of its vice officers to regulate homosexual "cruising" and areas of congregation. *See id.*

156. *See id.*

157. *See* Cain, *supra* note 6, at 1581.

158. *See id.*

159. *See id.* at 1580.

the police. Frustrated onlookers joined the riot in support of the harassed patrons of the bar.[160]

The riots lasted all weekend, and as word spread throughout the country, those in gay solidarity throughout the nation enacted similar demonstrations of gay pride.[161] "A rare moment of anarchy created the opportunity for dozens of men and women to protest state oppression.[162] United, they took a forceful step towards awakening the dormant homophile movement and overthrowing the tyrannical heterosexual value system."[163] Two important groups rose from this movement: the Gay Liberation Front and the Gay Activists Alliance.[164] These groups demonstrated against anti-gay policies and employers and questioned candidates on their stance on issues of homosexuality.[165] The most important factor attributed to this activism was the successful challenge to the American Psychiatric Association to remove homosexuality from its list of mental disorders, which it did in 1973.[166]

E. The 1970's

During the 1970's, gay rights organizations were organized, such as the American Civil Liberty's Gay and Lesbian Rights Project and the Lambda Legal Defense and Education Fund.[167] The Lambda Legal Defense and Education Fund still operates today and provides free legal services to homosexuals substantially effecting their legal rights.[168] It also provides legal services and information concerning the rights of gays and lesbians.[169]

In 1973, the Florida sodomy statute was challenged when Florida prisoners claimed that the statute was unconstitutional.[170] The Supreme Court ruled that the statute, "which prohibited the 'abominable and detestable crime against nature,' was not unconstitutionally vague because

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160. *See* Arriola, *supra* note 99, at 75.
161. *See* Cain, *supra* note 6, at 1580.
162. Arriola, *supra* note 99, at 76.
163. *Id.*
164. *See* Cain, *supra* note 6, at 1582.
165. *See id.*
166. *See id.*
167. *See id* at 1584.
168. *See id* at 1585.
169. *See id.*
170. *See id* at 1589.

the Florida courts had specified the content of the crime by construing the statute to prohibit oral and anal sex."[171]

Two years later, Virginia's sodomy law was challenged in *Doe v. Commonwealth's Attorney.*[172] The court rejected the unconstitutionality challenge, citing *Griswold v. Connecticut,*[173] which differentiated homosexuality and adultery from marital intimacy.[174] The Supreme Court affirmed.[175] Despite this decision, other sodomy statute challenges proved more successful. Courts in New York and Pennsylvania, for example, held that their respective state sodomy statues violated the federal constitution.[176] Nevertheless, *Doe's* affirmance by the Supreme Court denied gays and lesbians constitutional protection for the most essential expression of their nature, engaging in consensual sexual conduct.[177] Lower courts frequently cited *Doe* in support of other anti-gay discrimination situations.[178]

F. Modern Actions

Governmental policies and the law continue to discriminate against gays and lesbians through state sodomy laws, prohibitions of marriage and adoption, restrictions on serving in the military, and initiatives and referenda prohibiting anti-discrimination protection.[179] Sodomy remains a crime in almost half the United States.[180] One of the most renowned sodomy statute challenges, that reached the Supreme Court, was the 1986 decision of *Bowers V. Hardwick.*[181]

The Supreme Court stated in a five to four decision that private consensual homosexual sodomy was not included in a constitutional right to privacy.[182] Justice White, in writing for the court, stated, "Proscriptions

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171. *Id.*

172. *See* Doe v. Commonwealth's Attorney for City of Richmond, 403 F. Supp. 1199 (E.D.Va. 1975), *aff'd*, 425 U.S. 901 (1976).

173. *See generally* Griswold v. Connecticut, 381 U.S. 479 (1965).

174. *See id.*

175. *See* Cain, *supra* note 7, at 1590.

176. *See id* at 1591.

177. *See id.*

178. *See id.* at 1592.

179. *See* Battaglia, *supra* note 1, at 207-8.

180. *See id.* at 208.

181. Bowers v. Hardwick, 478 U.S. 186 (1986).

182. *See* Cain, *supra* note 6, at 1612.

against that conduct have ancient roots."[183] In actuality, the Georgia statue was gender-neutral, applying to sodomy committed in any sexual situation.[184] Yet the majority said that the issue was whether there was a fundamental right given by the United States Constitution for homosexuals to engage in sodomy.[185] 'The Court held that the 'presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable' constituted a rational basis for the sodomy statute."[186]

Commentators criticize the *Hardwick* decision for many reasons.[187] One reason is that the Court went too far in its decision because the only issue before it was what level of scrutiny should be applied to privacy claims for intimate sexual behavior between same sex couples.[188] The Court held that a rational basis review was all that was required, rather than the heightened scrutiny standard.[189] Justice Blackmun's dissent noted that the Court's obsessive focus on homosexuality reinforced the sodomy law's stigmatizing effects on gays and lesbians and suggested that the law could unconstitutionally punish the status of being gay, as well as the conduct of sodomy.[190] The dissent also noted that miscegenation laws had failed under the Due Process Clause for justifications that were similarly posed in this case.[191]

After this case, challenges to sodomy laws were made on the basis of privacy rights contained in state constitutions. A number of states, such as Kentucky, held that their sodomy statutes violated their own state constitutions.[192] The Kentucky Supreme Court found in *Commonwealth v. Wasson*[193] that the behavior conducted in private by consenting adults was not beyond protections given by the Kentucky Constitution for guarantee of individual liberty merely because "proscriptions against that conduct have ancient roots."[194]

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183. *See id.*

184. *See* Battaglia, *supra* note 1, at 209.

185. *See id.*

186. *See id.* quoting *Bowers*, 478 U.S. at 196.

187. *See* Cain, *supra* note 6 at 1615.

188. *See id.*

189. *See id.*

190. *See* Battaglia, *supra* note 1, at 210.

191. *See id.* at 211.

192. *See id.* at 212.

193. Commonwealth v. Watson, 842 S.W.2d 487, 493 (Ky. 1992).

194. *See* Battaglia, *supra* note 1, at 212; *see also* Cain, *supra* note 6, at 1615.

Sodomy laws effect gays and lesbians in many ways. Sodomy laws are frequently used to deny gays and lesbians the right to parent and the right to visit with their children, even though there is evidence that they are good parents.[195] For instance, in a recent Virginia Supreme Court case,[196] using the reasoning that lesbian conduct was a felony under Virginia law,[197] the court denied a lesbian mother custody of her 3-year-old son.[198] The court maintained that even though a lesbian mother would not be unfit per se, the daily living conditions would afflict the child.[199]

Service in the military is another area where gays and lesbians still face continuing discrimination.[200] *Norton v. Macy* established the principle that the government could not dismiss its employees simply for homosexuality, without showing some rational connection between homosexuality and job performance.[201] Yet, this principle did not extend to military service.[202] Numerous challenges were brought to reverse dismissal from military service based on homosexuality. Though the courts "were willing to recognize some sort of privacy right in consensual homosexual conduct, they nonetheless consistently held that the military's interest in regulating homosexual conduct outweighed the privacy rights of the individual service member."[203]

Under the Clinton Administration, a modification of the military's exclusion policy was introduced in the "don't ask, don't tell, don't pursue" policy.[204] Under this policy, homosexual orientation, per se, is not a bar to military service. Homosexual conduct, however, is a bar. Therefore, a mere statement by a service member or applicant could show a propensity or intent to engage in homosexuality, requiring separation from the service.[205]

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195. *See* Battaglia, *supra* note 1, at 212.

196. *See* Bottoms v. Bottoms, 457 S.E.2d 102 (Va. 1995).

197. *See id.* at 108.

198. *See* Battaglia, *supra* note 1, at 213.

199. *See id.* The court referred to the daily living conditions that the mother lived with her lesbian partner and showed signs of affection with her partner in front of her son. *See id.*

200. *See* Cain, *supra* note 6 at 1596.

201. *See* Battaglia, *supra* note 1, at 113.

202. *See* Cain, *supra* note 6, at 1596.

203. *See id.* at 1597.

204. *See* Battaglia, *supra* note 1, at 219.

205. *See id.*

This policy was challenged in *Abel v. United States*[206] where the district court held that "the new policy violated free expression guarantees of the First Amendment and the equal protection component of the Fifth Amendment."[207] The district court stated that the hatred directed at homosexuals had as its basis nothing more than irrational prejudice.[208] The court also stated that while others may find an idea repugnant, the First Amendment would not allow the proscription of the expression of that idea.[209]

On appeal, the Second Circuit rejected the district court's First Amendment based holding, and found instead that where military personnel were concerned, free speech rights were diminished and deference to Congress and the military was needed to uphold military discipline and readiness.[210] Subsequently, the case was remanded to determine whether discharge for homosexual acts was constitutional, and the district court struck down the homosexual act aspect of the policy.[211] The court held the policy discriminatory because there was no sanction against a heterosexual who engaged in the same type of acts with someone of the opposite sex.[212] In addition, the policy's justifications were based on heterosexual service members' private prejudices, which was not a legitimate justification for discrimination against gays and lesbians.[213] The court "concluded that the policy's unequal treatment of homosexuals was invalid under the equal protection component of the Fifth Amendment and that the presumption and homosexual acts provisions were invalid under the First and Fifth Amendments."[214]

G. The Emergence of Gay and Lesbian "Rights"

Based on the numbers of advances that gays and lesbians have made toward equal rights, both in legislative and judicial forums, the 1990's have

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206. *See* Abel v. United States, 880 F. Supp. 968 (E.D.N.Y. 1995), *vacated* 88 F.3d 1280 (2d Cir. 1996).

207. *See* Battaglia, *supra* note 1, at 220.

208. *See id.*

209. *See id.*

210. *See id.*

211. *See id.* at 221.

212. *See id.*

213. *See id.* at 222.

214. *See id.*

been termed the "decade of gay rights."[215] There has been a slow and steady progress, although historically statutory bans on discrimination based on sexual orientation existed primarily at the local level.[216] For instance, a big victory occurred in February 1972, when then New York Mayor John Lindsey issued an executive order banning discrimination based on sexual orientation in city employment.[217] Also in 1972, Lansing, Michigan enacted a statutory ban on private employment discrimination against gays and lesbians.[218]

Over the next two decades, many municipalities in the nation followed suit, making substantial the number of cities with ordinances banning employment discrimination on the basis of sexual orientation.[219] Some of those cities included Atlanta, Boston, Chicago, Los Angeles, San Francisco, and Washington, D.C.[220] Moreover, passage of statewide anti-discrimination statutes protecting gays and lesbians in private employment have been transformative for gay and lesbian rights in the United States.[221]

"Today, more than one-third of all Americans live in jurisdictions in which discrimination against gays and lesbians in private employment is illegal, and the vast majority of these jurisdictions are covered by statewide laws."[222] As good as that may seem, inclusion of language within some of these state statutes seems to go against the very idea that it's trying to protect.[223] For instance, Connecticut, Minnesota and Rhode Island all include language that insists their states do not in any way condone homosexuality as an acceptable lifestyle. Someone would be hard-pressed to find such similar language in a state law prohibiting racial discrimination stating that the state disapproved of being black or the promotion of a black lifestyle.[224] Furthermore, two states go even further and suggest in their anti-

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215. *See* Rankin, *supra* note 2, at 1055.

216. *See generally* Harvard Law Review, *Development in the Law, Employment Discrimination: IV. Statutory Protection for Gays and Lesbians in Private Employment*, 109 HARV. L. REV. 1625 (1996).

217. *See* William Eskridge, Jr., *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961-1981*, 25 HOFSTRA L. REV. 817, 926 (1997).

218. *See* Harvard Law Review, *supra* note 216, at 1625.

219. *See id.*

220. *See* Eskridge, *supra* note 217, at 926.

221. *See* Harvard Law Review, *supra* note 216, at 1625.

222. *See id.* at 1626.

223. *See id.* at 1628.

224. *See id.*

discrimination statutes for employment, that they in no way authorize the recognition of same-sex marriage.[225] One could argue that these conflicting and confusing statements could inhibit the effectiveness of the statutes to do what they are supposed to do, and could confuse the courts, as to their interpretation.[226]

The 1990's have seen a different picture emerging with respect to same-sex marriage on the state level. In *Baehr v. Lewin*,[227] the Supreme Court of Hawaii held that "the State had established a sex-based classification that was subject to strict scrutiny under the equal protection guarantee of the Hawaii Constitution by restricting marriage to opposite-sex couples."[228] The trial court found on remand that the state had failed to demonstrate a compelling interest for the discrimination.[229]

Arguments for same-sex marriage are increasing, since failure to accord full legal status to marriage between two gay men or two lesbians contributes to the discrimination and stigmatization of them.[230] A major victory in this area was seen at the very end of the 1990's when in December 1999, the Supreme Court of Vermont heard *Baker v. Vermont*[231] and declared that:

> under the Common Benefits Clause of the Vermont Constitution...plaintiffs may not be deprived of the statutory benefits and protections afforded persons of the opposite sex who choose to marry. We hold that the State is constitutionally required to extend the same-sex couples the common benefits and protections that flow from marriage under Vermont law. Whether this ultimately takes the form of inclusion within the marriage laws themselves or a parallel "domestic partnership" system or some equivalent statutory alternative, rests with the Legislature. Whatever system is chosen, however, must conform with the

225. *See id.*

226. *See id.*

227. *See* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

228. *See* Battaglia, *supra* note 1, at 214.

229. *See id.*

230. *See id.* at 215.

231. *See Baker, supra* note 11.

> constitutional imperative to afford all Vermonters the common benefit, protection, and security of the law.[232]

There are ten states and the District of Columbia that prohibit employment discrimination against gays and lesbians, in addition to prohibiting discrimination by non-governmental persons and entities.[233] Except for one, they also provide discrimination protection in housing and public accommodation.[234] However, this is where the similarities end, and then the state laws vary greatly in scope.[235] In addition, in at least three of the jurisdictions with anti-discrimination laws, statutes criminalizing sodomy coexist with anti-discrimination laws.[236]

It is important to note here that, on a federal level, Congress has repeatedly failed to adopt any legislation that would protect against sexual orientation discrimination in public and private workplaces, public accommodations, and housing.[237] Similar to racial anti-discrimination, the states' anti-discrimination laws regarding gays and lesbians are better than that of the federal government.[238] Therefore, "the only meaningful protections for gays and lesbians...exist at the state level."[239]

IV. EVALUATION AND ANALYSIS

A. The Picture in Japan

Japan's current legal, political, and sociological states neither present an able picture for elimination of discrimination against the Burakumin, nor

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232. *See id.* at 5. While the Vermont legislature actually chose to legalize "domestic partnerships" in a parallel legal structure to marriage, the victory comes in the form of being able to receive all the benefits that married heterosexuals are entitled to under the Vermont Constitution. *See id.* Furthermore, this decision will have immense ramifications throughout the nation regarding same-sex marriages—ramifications that have not begun to make themselves known. *See id.*

233. *See* Battaglia, *supra* note 1, at 224.

234. *See id.* at 225. Hawaii does not. *See id.*

235. *See id.* at 224-5.

236. *See id.* at 225. Many of these anti-discrimination laws also contain various exemptions aimed at such areas as religion and privacy/intimacy concerns, such as religious organizations' ability to hire based solely on the applicant's religion, or a small landlord excluding certain borders or roommates. *See id.*

237. *See* Eskridge, *supra* note 217, at 927.

238. *See* Harvard Law Review, *supra* note 216, at 1625.

239. *See id.*

offer an improvement of their socioeconomic conditions.[240] The federal law does not protect them, as there are no anti-discrimination laws existing on that level.[241] Furthermore, government documents that would show prospective employers and marriage partners the Burakumin status are not adequately restricted.[242] Discrimination continues, for instance, because those that are interviewing for jobs or marriage partners are asked to produce copies of their family registries, which note Burakumin status.[243] The practice of hiring a private detective is still used to find out whether a potential spouse is Burakumin, and there are reports of some companies still investigating suspicious applicants.[244]

Since the Emancipation Edict, the Japanese Government has acted to rid official policies of discrimination and to adopt measures, similar to welfare laws, for physically improving Burakumin living areas. But with regard to actual human rights legislation, however, there has been no action.[245] Rather than mandate specific public and private conduct, like the American anti-discrimination statutes, Japanese measures are more like political statements in the form of a statute, thereby proving ineffective as a means of getting a discrimination case into court.[246]

In the absence of any legislation regarding anti-discrimination against Burakumin, the Japanese court system allowed the BLL to adopt the denunciation process as an alternative to the process of litigation. But denunciation could not exceed socially reasonable bounds that the legal order sets.[247] This, however, allows the BLL to determine the definition of discrimination, and it makes the BLL the organization that judges acts of

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240. *See* Reber, *supra* note 5, at 297.

241. *See id.*

242. *See id.*

243. *See* Taimie Bryant, *For the Sake of the Country, For the Sake of the Family: The Oppressive Impact of Family Registration on Women and Minorities in Japan*, 39 UCLA L. REV. 109, 121 (1991).

244. *See id.*

245. *See* Reber, *supra* note 5 at 315.

246. *See* UPHAM, *supra* note 16, at 86. For instance, the 1969 Special Measures Law for Assimilation Projects "gives broad authority for governmental action while mandating virtually nothing...the language of the SML is extremely broad and aspirational; it creates no legal duties on the part of governmental agencies and no new legal rights for individuals, either in the form of private causes of action against other individuals or administrative causes of action against public entities." *Id.*

247. *See id.* at 100.

discrimination and carries out solutions, or punishments, for them.[248] This often has repercussions that are the antithesis of the Burakumin's goals. In the long run it is really the government and the courts' responsibility to establish and ensure legitimacy, control, and consistency in taking actions against those who discriminate.[249] This will bring Buraku discrimination into an open and official forum to be addressed legally.[250]

The Japanese Constitution guarantees the Burakumin a whole host of human rights that were previously denied to them, yet the BLL states:

> the direct application of the Constitution only to governmental discrimination and the failure to provide clear statutory redress for discrimination make it impossible for the BLL to use the legal system to enforce the rights granted by the Constitution.[251]

Therefore, denunciation becomes the justified means of enforcing pre-existing constitutional rights.[252] The BLL reasons that all the rights guaranteed by the Constitution can only come to pass by denunciation, since both private and public legal remedies are assumed to be unavailable.[253]

This lack of direct legislation and legal remedies was particularly illuminated in 1976 when a Minister of Justice said that discrimination was a matter of the heart, not suitable for legal attention.[254] By legitimizing denunciation as the vehicle for realization of constitutional and statutory rights, the government keeps these controversies out of the courts, and prevents the BLL from realizing the goals of legally redressing the wrongs that originate from discrimination.[255]

Welfare benefits and urban renewal projects are easier for the Japanese government to handle than actually changing a deeply entrenched social order.[256] Keeping the Burakumin out of the court system by refusing to pass any legislation actually enables the government to control the

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248. *See* Reber, *supra* note 5, at 344.

249. *See id.*

250. *See id.*

251. *See* UPHAM, *supra* note 16, at 105.

252. *See id.* at 106.

253. *See id.*

254. *See id.* at 117.

255. *See id.* at 120-21.

256. *See id.* at 123.

Burakumin's liberation agenda.[257] The government's goal, however, seems to be providing some level of economic security for the Burakumin, while keeping them from liberation and denying them access to majority society.[258]

B. The Picture in America

Across the sea, since the Stonewall uprising, gay and lesbian activists have achieved some important legal, political, and cultural victories.[259] Their efforts continue today by lobbying for enactment of gay and lesbian civil rights laws.[260] For the first time, a floor debate was held in the United States Senate.[261] However, in many areas, including housing, military, family, and employment, gays and lesbians remain legally and formally unequal.[262] This inequality is reflected in governmental commands.[263]

One of the most highly debated areas in modern times has been in the area of family law, where gays and lesbians continue to be treated with formal inequality.[264] There is not a state in the union that permits gays and lesbians to marry (Vermont permits domestic unions),[265] and this ban in turn implicates rights in several areas including tort, inheritance, tax, criminal, immigration, and benefits, among others.[266] Fearing that Hawaii might soon legitimize same sex marriage and start a national trend toward this end, Congress, by an overwhelming majority, enacted legislation "to proactively relieve states of any obligation that the Full Faith and Credit Clause might impose upon them to recognize actions taken by another state."[267]

The "Defense of Marriage Act," while denying recognition of same-sex marriage under federal law, gives license to the states to refuse to recognize same-sex marriages performed in other states.[268] It remains to be seen how this law will hold up now that Vermont has decided in favor of

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257. *See id.*

258. *See id.*

259. *See* Jane Schacter, *Romer v. Evans and Democracy's Domain*, 50 VAND. L. REV. 361, 365-66 (1997).

260. *See id.*

261. *See id.*

262. *See id.* at 366.

263. *See id.*

264. *See id.* at 367.

265. *See generally Baker, supra* note 11.

266. *See Schacter, supra* note 259, at 367.

267. *See id.*

268. *See id.*

same-sex unions. Furthermore, many states continue to limit the rights of gays and lesbians to be parents, not allowing them to be foster parents, prohibiting them from adopting children, and penalizing them by applying restrictive rules for custody and visitation.[269]

In the social sphere, gays and lesbians remain the objects of intense hostility.[270] Surveys indicate that gays and lesbians register among the lowest groups as compared to other social groups (i.e., Blacks, Jews) in terms of society's feelings towards them.[271] This is displayed by the high rates of anti-gay hate crimes and continued harassment.[272]

In spite of this, positive legal reforms have been made. Some states have repealed or invalidated their sodomy laws.[273] Some states reformed their adoption, visitation, and custody laws and enacted domestic partnership laws.[274] The most recent Vermont decision regarding same-sex unions extended these couples the common benefits and protections that flow from marriage.[275] ederal immigration laws were repealed that expressly banned immigration of gays and lesbians from other countries.[276] And laws were enacted that banned "discrimination based on sexual orientation in various public and private arenas."[277]

It is against the background of hate, harassment, and discrimination that one begins to understand the importance of enactment of laws banning discrimination based solely on sexual orientation in areas such as employment, housing, public accommodations, education, credit, insurance, real estate, and others.[278] These laws have long been the paramount focal point in the organized struggle for gay and lesbian equality because of the areas of life that can be encompassed and because these laws can encourage gays and lesbians to freely self-identify.[279]

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269. *See id.*
270. *See id.* at 368.
271. *See id.*
272. *See id.*
273. *See id.* at 369.
274. *See id.*
275. *See generally Baker, supra* note 11.
276. *See* Schacter, *supra* note 259, at 369.
277. *See id.*
278. *See id.* at 371.
279. *See id.*

C. The Anti-gay and Anti-lesbian Political Backlash

Perhaps the most important and ironic consequence of sexual orientation nondiscrimination laws was that they triggered anti-gay political backlash.[280] This contributed to a new politic of traditional values.[281] In 1977 in Dade County, Florida, Anita Bryant formed a coalition to repeal by popular referendum a county law that gave broad protection against sexual orientation discrimination.[282] Voters approved repeal.[283] This was followed by referendum repeals of anti-discrimination laws covering gays and lesbians in Wichita, Kansas, St. Paul, Minnesota, and Eugene, Oregon.[284]

The first anti-gay initiative appeared statewide on the 1978 California ballot, inspired by Ms. Bryant's Florida campaign.[285] Known as the "Briggs Amendment," it targeted gay and lesbian teachers and empowered schoolboards to fire or refuse to hire teachers who promoted or encouraged homosexual conduct in any way.[286] While the Amendment enjoyed popular support, it was ultimately defeated by a wide margin.[287]

In 1988, Oregon voters approved Measure 8, overturning an executive order from their Governor that protected state employees from discrimination on the basis of sexual orientation.[288] This was the first of many sustained attempts at enacting by referendum anti-gay legislation in Oregon.[289] In 1990, a similar attempt to repeal a 1989 gay civil rights law was turned back by the Massachusetts Supreme Judicial Court.[290] The court blocked the measure from reaching the voters and based its decision on a state constitutional provision that barred religious questions from appearing on the ballot.[291]

An important turning point was marked in 1992, when both Colorado's Amendment 2 and Oregon's Measure 9 appeared before the

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280. *See* Eskridge, *supra* note 217, at 928.
281. *See id.*
282. *See id.*
283. *See id.*
284. *See id.* at 929.
285. *See* Schacter, *supra* note 10, at 288.
286. *See id.*
287. *See id.*
288. *See id.*
289. *See id.*
290. *See id.*
291. *See id.*

voters.[292] These states shared the important characteristic that neither had a statewide gay civil rights law.[293] Both measures, however, sought to repeal existing local gay civil rights measures and proactively sought to stop their state legislatures from enacting any statewide anti-discrimination laws in the future.[294] The measures differed in their language. Oregon's Measure 9 required government entities to teach homosexuality as "wrong, unnatural, and perverse."[295] Colorado's Amendment 2 used a different approach.[296] It stated that the State of Colorado in no way, through any of its branches would enact any kind of legislation on any level that would entitle gays and lesbians in any way to have any protected status as a minority or have a claim of discrimination.[297]

This "no special rights" theme has become the principal agenda for opponents of gay civil rights law.[298] They stress illegitimacy of anti-discrimination laws for gays and lesbians.[299] They argue that statutory protection is unwarranted because gays and lesbians are not like other legally protected groups.[300] Sexual orientation is not sufficiently like other widely protected aspects of identity.[301] This idea holds that gays and lesbians, unlike other legitimate groups protected by anti-discrimination laws, neither need nor deserve protection and their attempt to get legislative protection is merely a grab for privilege and advantage.[302]

Shortly after Colorado citizens approved Amendment 2, its constitutionality was challenged.[303] Amendment 2 was struck down at the trial level, and the Colorado Supreme Court upheld the decision because the initiative unconstitutionally infringed "the fundamental right to participate equally in the political process," by keeping out an identifiable class of

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292. *See* Schacter, *supra* note 259, at 372.
293. *See id.*
294. *See id.*
295. *See id.* at 373.
296. *See id.*
297. *See id.*
298. *See id.*
299. *See id.*
300. *See id.*
301. *See id.*
302. *See id. at 374.*
303. *See id.*

people.[304] This decision was eventually affirmed by the United States Supreme Court in *Romer v. Evans*.[305]

Romer, at its core, firmly and loudly rejected the legal attempt to force and confine gays and lesbians to the fringes of society on a legal and social level.[306] A discriminatory amendment that espouses the view that gays and lesbians are intrinsically less worthy than others will be judged upon "the core principles of the Equal Protection Clause."[307] *Romer* has significant implications for future discriminatory laws that single out gays and lesbians.[308] Although gays and lesbians have started to regionally organize and politically voice their positions, their actions simply do not equate with holding political power.[309]

V. CONCLUSION

Gays and lesbians of the United States fare better under their anti-discrimination laws than do the Burakumin of Japan. The main reason for this is entirely due to the fact that the Japanese have never passed significant legislation on either a federal or local level that directly addresses discrimination against the Burakumin. "The rights to equal protection under the law and the right to freedom from discrimination have not been protected by the Japanese government."[310] Therefore, because anti-discrimination laws fail to exist, the Burakumin have no recourse to the court system of Japan.

Gays and Lesbians have recourse to the court system of the United States if they live in localities or states that have laws prohibiting

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304. *See id.* at 375.

305. *See generally* Romer v. Evans, 517 U.S. 620 (1996). Justice Kennedy, in writing for the majority, stated that the Colorado amendment could not put homosexuals into a class that would have them unequal compared to everyone else. *See* Battaglia, *supra* note 1, at 234. Justice Kennedy also wrote that the amendment identified homosexuals by that single trait and denied them protection across the board. *See id.* The amendment made it more difficult for one group of citizens to seek aid from the government than all others, which in its most literal sense was a denial of equal protection of the law. *See id.*

306. *See* Schacter, *supra* note 259, at 383.

307. *See* Joseph Jackson, *Persons of Equal Worth: Romer v. Evans and the Politics of Equal Protection*, 45 UCLA L. REV. 453, 501 (1997).

308. *See id.*

309. *See* Schacter, *supra* note 10, at 300.

310. *See* Reber, *supra* note 5, at 350. The Japanese Government needs to establish laws that deter acts of discrimination, punish discrimination when it is committed, and act to form a standard of non-discrimination and respect for human rights to which the Japanese may adhere. *See id.* at 359.

discrimination based on sexual orientation. However, these areas of the nation are very few. There are some state and local governments that have anti-discrimination laws on the books, and the number continues to grow, albeit slowly. Gays and lesbians in the United States have the ability to seek redress from discrimination when it is directed towards them (in those local areas), whereas the Burakumin of Japan lack this ability completely.

However, while gays and lesbians in the United States fare better in their country than the Burakumin in Japan, the situation for them is not that much better than the Burakumin. For the most part, they still lack legal redress for discrimination in employment, housing, and public accommodations,[311] as well as facing discrimination in marriage laws and the military. In Japan, however, the Government chooses to handle discrimination against the Burakumin in an economic way, similar to the welfare laws of the United States.

On the federal level, gays and lesbians of the United States and the Burakumin of Japan are equal. No federal laws exist in either country that prohibit discrimination against either group. Although federal laws in the United States prohibit discrimination on the basis of race, color, gender, religion, national origin, and disabilities,[312] Congress has failed to pass anti-discrimination legislation that includes sexual orientation as a protected class.[313] As in Japan, the need exists for federal legislation that protects against discrimination. Gays and lesbians who live in jurisdictions without anti-discrimination laws[314] can be legally fired from jobs, not hired for jobs, denied housing, evicted from housing, and refused goods and services simply on the basis of their status as homosexuals.[315]

The ability to discriminate against gays and lesbians encourages society to continue to see them as people who are less than others, as second class citizens not worthy of legal protection. This belief system inevitably results in continued, increased harassment and violence against them.[316] The situation is even worse for the Japanese Burakumin, because they are less protected than gays and lesbians of the United States. Many Americans continue to harbor extraordinary negativity towards gays and lesbians, and

311. *See* Rankin, *supra* note 2, at 1060.

312. *See id.*

313. *See id.*

314. *See id.*

315. *See id.*

316. *See id.*

these attitudes translate into overt discrimination and bad treatment.[317] The same holds true for the Burakumin of Japan. The Japanese Government is still studying whether a need exists for laws to prohibit discrimination against the Burakumin. The government's indecisiveness only contributes to the impossible conditions that the Burakumin continue to endure. Therefore, both groups need anti-discrimination laws to help them overcome these attitudes and treatments and to give them legal protection and redress. Without the ability to redress discrimination, gays and lesbians are helpless in the face of intolerance, prejudice, and discrimination that permeates so many areas of their lives.[318] The same thing can be said of the Burakumin of Japan. Gays and lesbians can be said to fare better under their country's anti-discrimination laws than do the Burakumin of Japan, this much is true, but the degree is slight.

Discrimination, based on hate and prejudice, shows itself in both Japan and the United States, forcing groups like the Burakumin and gays and lesbians in their respective countries to lead lives as second class citizens. This hate, prejudice, and discrimination surely is not limited to Japan and the United States. It rears its ugly head across the globe, affecting every country of the world. Is this a natural part of human nature? That debate is for another time and place. Until discrimination is eradicated and every citizen everywhere can enjoy the same legal and human rights as everyone else, this entire planet and its inhabitants will continue to be infected with the ravages of discrimination and will be forced to face its consequences.

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317. *See* Jackson, *supra* note 307, at 457.

318. *See* Rankin, *supra* note 2, at 1061.