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On the *Why* of Same-Sex Marriage in Cuba

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ON THE *WHY* OF SAME-SEX MARRIAGE IN CUBA

Libby Adler*

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I. INTRODUCTION

On September 25, 2022, Cubans voted by a margin of almost two-to-one in a national referendum to revise their Family Code. Under the new code, it is now legal for two persons of the same sex to marry. This change has been in the works for some time. In 2018, in the months leading up to adoption of Cuba’s 2019 constitution, a proposal to include a same-sex marriage guarantee came close to inclusion but was ultimately defeated with an understanding that the issue would be kicked down the road to the anticipated revision of the Family Code. Cuba conducted a public consultation and determined that a majority of Cubans favor the proposed code. The National Assembly voted favorably, with the support of President Miguel Díaz-Canel. The public referendum was the final step in making same-sex marriage the law of the land.

This article pushes past the assumption that same-sex marriage operates as an obviously desirable reform along Cuba’s (or any nation’s) progressive path and inquires as to the *why*.¹ In a country that is markedly less religious than its neighbors, has a low marriage rate accompanied by a high divorce rate, rarely awards alimony, allocates very little property using marriage or divorce, and distributes most public resources such as health care such that

* Professor of Law and Women’s, Gender, & Sexuality Studies, Northeastern University. My thanks go to Aziza Ahmed, Helena Alviar, Jorge Esquirol, José Gabilondo, AJ Jarrett, and Kerry Rittich, as well as to participants in the Thirty-Second Annual Conference of the Association for the Study of the Cuban Economy (ASCE) and Florida International University College of Law.

¹ This article was presented at the Thirty-Second Annual Conference of the Association for the Study of the Cuban Economy (ASCE) at Florida International University College of Law on September 15–17, 2022. See generally Karla Rivas, *Association for the Study of the Cuban Economy (ASCE) Thirty-Second Annual Conference: Introduction*, 17 FIU L. REV. 479 (2023).

they do not depend on marital ties, why is same-sex marriage a legal objective at all?

A few possible explanations present themselves. First, as Revolutionary Cuba's most ardent critics suspect, same-sex marriage might function as a diversion from an array of rights (notably expression and assembly) that Cubans lack.² In the aftermath of the 2021 demonstrations protesting shortages of food, medicine, and utilities, as well as the resultant arrests, crackdowns, and internet interruptions, the eyes of at least some Cubans hoping for the island to liberalize are meant to follow the shiny object of same-sex marriage and be temporarily satisfied that progress is afoot.

Second, while the Catholic Church wields less direct influence in Cuba than in other Latin American countries, Catholicism nonetheless echoes throughout Cuban culture, subtly shaping moral and familial ideals. While the Church might be expected to work against same-sex marriage—and it has—it might paradoxically also shape a gay desire for moral inclusion.

Third, the best explanation may be that the right to same-sex marriage is among those rights that Gayatri Spivak observes, “we cannot not want.”³ Once a right is conceptualized, felt in the ether as something one *could* have, it *must* be had. Not all rights hold this allure. The right in the U.S. to bear arms, for example, does not generate the same multinational yearning, even eliciting some scorn.⁴ Some rights, though, perhaps especially those associated with an injured minoritarian identity, engender inveterate longing. As gay identity has globalized, so has the pinnacle of its legal recognition: access to marriage.

This article makes the case for the importance of the third explanatory factor in Cuba when it comes to same-sex marriage. The right offers little of material or social significance in the Cuban system compared to that of the U.S., albeit not nothing. Same-sex marriage, as an emancipatory and egalitarian ideal for the benefit of those who hold a gay or lesbian identity, has attained so much symbolic power globally that even a country that has

² The “rights” I refer to here include those abstract, typically constitutional, rights associated with liberal legal systems, including rights related to expression, freedom of conscience, association, and privacy, as well as identity-based rights against discrimination. Cuba ostensibly offers some of these rights, but they are thoroughly subordinated to the interests of the socialist state. Cuba does, on the other hand, guarantee health care and other rights that are better described as socio-economic and are devalued in the U.S. system.

³ GAYATRI CHAKRAVORTY SPIVAK, *A CRITIQUE OF POSTCOLONIAL REASON: TOWARD A HISTORY OF THE VANISHING PRESENT* 110 (1999) (reminding readers of her call for “a persistent critique of what we cannot not want”).

⁴ See, e.g., Francis Wilkinson, *Canada's Reasonable Vision of Gun Control*, BLOOMBERG (Apr. 18, 2021), <https://www.bloomberg.com/opinion/articles/2021-04-18/gun-laws-in-canada-are-more-reasonable-than-those-in-america>.

ostentatiously eschewed liberal rights and identity-based reform was destined to fall under its captivating spell.

This third factor does not preclude some degree of co-determinacy by the first two, or by the few concrete benefits that do accompany marriage in the Cuban system, but in my view the global symbolic force of gay identity and the accompanying fantasy of marriage as the ultimate triumph of gay equality holds a large share of explanatory power. Cuba is no longer an island—in the figurative sense. It welcomes tourists from liberal democracies in Europe and North America, receives missives and visits from ex-pat family members living in Miami, New York, and elsewhere, and—however sporadically—has access to the internet. Despite the relative minimum of economic, religious, or social reasons for gay and lesbian Cubans to have a need for it, same-sex marriage has become revolutionary.

The article proceeds as follows: Part II provides an abridged history of Revolutionary Cuba's treatment of gays and lesbians, observing specifically the role played by U.S. imperialism and highlighting a few comparative points between Cuban and U.S. trajectories—namely, the impact of sexual education and tourism in the former and a steady course of neoliberalism in the latter. Part III serves up the current moment, focusing specifically on the defeat of Article 68, the same-sex marriage provision of the 2018 draft constitution, and what it reflects about the influence of anti-gay, religious culture warriors in Cuba in the first quarter of the century. It also introduces the key provisions of the new Family Code. Part IV provides an overview of heterosexual marriage and divorce in Cuba, illustrating its limited significance relative to the U.S., both legally and culturally. Part V concludes that the stories in the previous sections, viewed in concert, powerfully suggest the globalization of gay identity along with its crowning form of recognition, same-sex marriage, even where that right does little for those it is meant to benefit.

II. A BRIEF HISTORY OF REVOLUTIONARY CUBA'S TREATMENT OF GAYS

Cuba's first few years out from under Spanish rule began in 1898, when the U.S. replaced Spain as Cuba's dominant imperialist presence. The U.S. was in its Jim Crow era while it simultaneously exploited Caribbean labor (including many former slaves and their descendants) in the Cuban countryside to cut cane and produce sugar for U.S. consumption.⁵ In Havana, meanwhile, from about the time that the U.S. entered Prohibition (1920), U.S.

⁵ ADA FERRER, CUBA: AN AMERICAN HISTORY 192 (2021).

tourists started traveling to Cuba to enjoy its sun and rum.⁶ This temporarily subsided with the Great Depression.

During the New Deal and World War II, the U.S. saw significant reconfiguration of its gender arrangements as women's entrance into jobs previously held by men along with the enactment of new social insurance programs fomented alarm about declining virility and precipitated anti-gay and -lesbian witch hunts. Fears of disrupted gender relations entwined with apprehensions regarding the spread of communism and the prospect of global nuclear annihilation.⁷ By the 1950s, the figure of the homosexual came to represent the possibility of communist infiltration in the U.S. mind.

Meanwhile, U.S. tourists, flush with cash in the post-war economy, resumed travel to Havana, enticed by rum-soaked evenings of extravagant music and dance performances, as well as gambling, live sex shows, and sex with exoticized and racialized Cubans.⁸ The primary investors in the booming hotel, nightclub, and casino industry were by this time members of the U.S. mafia, with whom Cuba's president, Fulgencio Batista, cooperated to bypass legal impediments to developing a flourishing tourist scene outside the reach of the IRS and FBI.⁹ Commercial sex thrived. While homophobia in the U.S. had reached a crescendo, Cuba functioned as a playground for the widest possible range of tourist sexual desires. Desperate Cubans trying to make a living in Havana catered to the tastes of U.S. tourists as well as military and corporate personnel.

Over the course of decades, U.S. presence in Cuba inflicted deep indignities on the Cuban people. In the countryside, U.S. companies bought up Cuban land¹⁰ and abused rural labor, while in Havana U.S. dollars went to exploit workers in the tourist economy, including male and female sex workers.

Male homosexuals in particular, imagined to be bending over for the pleasure of wealthy foreigners, were closely associated in the Cuban mind with the humiliations of capitalist imperialism, no doubt influenced by Soviet rhetoric on the matter, which held homosexuality to be a distortion caused by capitalism.¹¹ The figure of the Cuban homosexual took root in the soil of

⁶ TOM GJELTEN, *BACARDI AND THE LONG FIGHT FOR CUBA: THE BIOGRAPHY OF A CAUSE* 109 (2008).

⁷ DAVID K. JOHNSON, *THE LAVENDER SCARE* 31 (2004).

⁸ MEGAN DAIGLE, *FROM CUBA WITH LOVE: SEX AND MONEY IN THE TWENTY-FIRST CENTURY* 47 (2015).

⁹ T.J. ENGLISH, *HAVANA NOCTURNE: HOW THE MOB OWNED CUBA AND THEN LOST IT TO THE REVOLUTION* 100 (2009).

¹⁰ FERRER, *supra* note 5, at 205.

¹¹ JOHNSON, *supra* note 7, at 36–37. The Bolsheviks decriminalized sodomy in 1918, but Stalin reversed that move in 1934. LINDA HIRSHMAN, *VICTORY: THE TRIUMPHANT GAY REVOLUTION* 29 (2012).

decades of U.S. imperialism.¹² The idea of the homosexual was specific—defined not by attraction to persons of the same-sex, but rather by male effeminacy and anal receptivity.¹³ It was this feminized man, manifestly unsuited to the rigors of Revolution, that represented Cuban humiliation. When Cuba's new Revolutionary era dawned, then, it was perhaps foreseeable that nationalist sentiment would manifest in part as a compulsion to win back Cuban honor by stamping out this painful reminder.

The first decade of the Revolution stressed the clean-up of vice, especially commercial sex, including that which was performed by men perceived to be homosexual.¹⁴ Bolstered by Che Guevara's appeal to the "New Man,"¹⁵ and the socialist values of austerity, work, and sacrifice, the Cuban homosexual represented U.S. consumerism and the frivolity and decadence of pre-Revolutionary Havana. The figure of the homosexual played a constitutive role in Revolutionary Cuban national identity by being an object of intolerance and exclusion.¹⁶ Just as gay and lesbian people in the U.S. were beginning to rebel against vice controls and organizing a new social movement based on sexual liberty and freedom from gender constrictions, the new Cuban regime conducted raids on homosexual hangouts, sent homosexual men to labor camps, imprisoned male homosexuals as well as lesbians, punished gender deviance against men and boys, and enacted laws restricting the positions that homosexuals could hold.¹⁷ This ferocity began to subside in the mid-1970s.

The U.S. in the 1970s witnessed the ascent of second-wave feminism, the post-Stonewall gay liberation movement, the sexual revolution, increased availability of contraception and abortion, and the advent of no-fault divorce. Change was coming to Cuba, as well, if less explosively. The Revolutionary regime's commitment to public health enabled proliferation of a progressive sex education program, much of it thanks to East German physicians and educators sharing their medicalized understanding of (among other things) male and female homosexuality.¹⁸ It was, these experts from a fellow socialist

¹² This is not to assert that there was no prior history of homophobia that can be traced back to Spanish colonialism and Catholicism.

¹³ MARVIN LEINER, *SEXUAL POLITICS IN CUBA: MACHISMO, HOMOSEXUALITY, AND AIDS* 34 (1994); IAN LUMSDEN, *MACHOS, MARICONES, AND GAYS: CUBA AND HOMOSEXUALITY* 30 (1996).

¹⁴ ENGLISH, *supra* note 9, at 310.

¹⁵ ANA SERRA, *THE "NEW MAN" IN CUBA: CULTURE AND IDENTITY IN THE REVOLUTION* 166 (2007).

¹⁶ EMILIO BEJEL, *GAY CUBAN NATION* 96 (2001).

¹⁷ *Id.* at 97, 100–02; LUMSDEN, *supra* note 13, at 71, 73.

¹⁸ EMILY J. KIRK, *CUBA'S GAY REVOLUTION: NORMALIZING SEXUAL DIVERSITY THROUGH A HEALTH-BASED APPROACH* 19–20 (2017).

nation urged, a simple human variant, which—if socialism existed to promote human happiness—ought to be understood and not criminalized.¹⁹

A government agency, el Grupo Nacional de Trabajo de Educación Sexual (the National Group for Work on Sex Education, *GNTES*) formed to promote sexual health across the island by educating the populace.²⁰ Slowly, the spread of homo-positive information facilitated attitudinal change, anti-discrimination measures, and reform of the most explicitly anti-gay provisions of the criminal law. *Contra* the U.S., the framework for progress was not in the key of *gay rights*, nor was it achieved by grassroots organizing, impact litigation, or profit-motivated corporate initiative. Instead, parts of the state apparatus gradually assumed a posture of tolerance and care.²¹

As in the U.S., legal change in Cuba came in fits and starts, with backsliding and intra-governmental discrepancies in how homosexuality was treated. Neither country's system functioned as a monolith. The 1980s was a mixed bag in both nations, not solely due to but neither least because of AIDS. In the U.S., the devastation of the AIDS epidemic, as well as the new forms of discrimination it provoked, prompted an organizing effort that built the gay rights edifice familiar in the U.S. today.²² The absence of legal ties for same-sex partners (along with its consequences for hospital visitation, health insurance, and inheritance), combined with the morally conservative view that the epidemic was attributable to gay promiscuity, was at least partly responsible for the movement's setting its sights on marriage. Marriage was foundational to the frameworks of an array of public and private distributional mechanisms, notably inheritance and employment-based medical coverage—both of which were more important than ever.

Simultaneously, the 1980s in the U.S. belonged to the Reaganites; neoliberalism was on the ascent. That decade saw the blending of sexual moralism (“family values”), intensifying stinginess in social provision, and demonization of Black single mothers for their lack of economic self-sufficiency.²³ The Reaganites pointed to marriage, and the privatizing of family responsibility, as the solution to economic problems as well as perceived moral decay. This was the political climate in which the gay advocacy community began to pursue limited forms of partnership recognition and eventually marriage.

¹⁹ ALLEN YOUNG, *GAYS UNDER THE CUBAN REVOLUTION* 78–79 (1981).

²⁰ KIRK, *supra* note 18, at 24.

²¹ Kirk describes Cuba's approach as “health-based.” *Id.* at 10.

²² JOHN D'EMILIO, *THE WORLD TURNED: ESSAYS ON GAY HISTORY, POLITICS, AND CULTURE* 76 (2002).

²³ Cathy J. Cohen, *Punks, Bulldaggers, and Welfare Queens: The Radical Potential of Queer Politics?*, 3 *GLQ J. LESBIAN & GAY STUD.* 437, 458 (1997).

For Cuba, the 1980s started with the dispiriting Mariel Boatlift, when 125,000 people fled the island. Compared with the departures at the beginning of the Revolution—mostly of white, propertied Cubans—more of the emigres in 1980 were Afro-Cuban and/or poor.²⁴ While there is no data on this point, historians believe homosexuals were overrepresented, but more than that, supporters of the Castro regime proclaimed that those who would abandon their homeland for Miami were convicts, homosexuals, and “worms” whom they were glad to see leave. The police permitted, even facilitated, their departure. The prevalence of homosexuals in flight was so widely perceived that heterosexual men reportedly affected an effeminate demeanor to ease their exits.²⁵ As Susana Peña has argued, the men that Cuban authorities were most anxious to put on boats were those who exhibited effeminacy, whose failed masculinity threatened the ideal of the Revolutionary Cuban nation.²⁶ The U.S., which still maintained a bar to homosexual immigrants, made an ostentatious exception for those seeking refuge from communism.²⁷

When AIDS arrived in Cuba, Fidel Castro instituted a quarantine system.²⁸ No grassroots organizing resembling that which was occurring in major U.S. cities took place in Cuba. As the decade progressed, however, the Revolutionary government continued to liberalize the criminal code and slackened its reign on the Cuban art scene, permitting homoerotic themes to emerge.²⁹

In addition, GNTES continued to grow in function and prestige, including on the international stage. At the outset of the 1990s, GNTES morphed into el Centro Nacional de Educación Sexual (the National Center for Sex Education, *CENESEX*) and Mariela Castro Espín took over its direction.³⁰ Mariela (as she is known) is the daughter of Raúl Castro and Vilma Espín, famed guerilla fighter and longtime head of la Federación de Mujeres Cubana (the Federation of Cuban Women, *FMC*). Castro Espín was (and continues to be) instrumental in ongoing advocacy by *CENESEX* on behalf of homosexual and transgender Cubans. She has long used her position and revolutionary pedigree to push for, among other advances, same-sex marriage.

24 SUSANA PEÑA, ¡OYE LOCA! FROM THE MARIEL BOATLIFT TO GAY CUBAN MIAMI 28 (2013).

25 *Id.* at 30.

26 *Id.* at 1–6.

27 B. Ruby Rich & Lourdes Arguelles, *Homosexuality, Homophobia, and Revolution: Notes Toward an Understanding of the Cuban Lesbian and Gay Male Experience, Part II*, 11 SIGNS: J. WOMEN CULTURE & SOC'Y 120, 128 (1985).

28 LEINER, *supra* note 13, at 117–23.

29 BEJEL, *supra* note 16, at 110.

30 KIRK, *supra* note 18, at 33.

The U.S. elected “New Democrat” President Bill Clinton in 1992, keeping up the march of neoliberal economic and social policies, including mass incarceration, welfare “reform,” and marriage promotion. Through shrewd public relations efforts and careful litigation strategy on the part of gay rights advocates, “gay family values” no longer struck the entire country as oxymoronic. In 2003, the same-sex marriage campaign won its first victory in Massachusetts.³¹ By the time the US Supreme Court emulated the Massachusetts court in 2015, hundreds of Republicans would submit an amicus brief in support of the same-sex couples, arguing that marriage privatized responsibility for the poor and infirm and would therefore be good for both personal responsibility and the public purse.³²

The U.S. has, for the time being, satisfied its mainstream gay and lesbian advocates with same-sex marriage in lieu of a robust social safety net. While the recent overruling of *Roe v. Wade*³³ has set social progressives on edge, and while the contest between same-sex couples’ equality rights and the religious and expressive rights of those who would deny them services is not yet resolved, the U.S. can nonetheless credit its liberal legal system with progress for dramatically improved gay and lesbian legal status.

This improved status also serves U.S. objectives on the international stage. In the 1950s, it was the stain of Jim Crow that embarrassed U.S. diplomats hoping to woo formerly colonized nations to cast their lots with free markets and liberal legalism instead of with communism.³⁴ In our current moment, liberal tolerance for gay and lesbian people serves as a basis for comparing the U.S. favorably to its latest antagonist: Islam. The specter of the gay communist fell away with the Cold War; U.S. gays now exemplify the virtues of liberal regimes.

For Cuba, the end of the Cold War and the break-up of the Soviet Union spelled economic calamity. Unlike the Soviet satellites of Eastern Europe,³⁵ Cuba refused to abandon its socialist identity. It was, nonetheless, forced to liberalize in some respects, mainly to procure foreign currency. Among its ideological compromises, Cuba opened itself to tourism as well as to foreign capital investment, much of which flowed into the new tourism industry.³⁶

³¹ *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 969–70 (Mass. 2003).

³² See generally *Obergefell v. Hodges*, 576 U.S. 644 (2015); Brief for Kenneth B. Mehlman et al. as Amici Curiae Supporting Petitioners, *Obergefell v. Hodges*, 576 U.S. 644 (2015) (Nos. 14-556, 14-562, 14-571, 14-574).

³³ *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022).

³⁴ DERRICK BELL, *SILENT COVENANTS: BROWN V. BOARD OF EDUCATION AND THE UNFULFILLED HOPES FOR RACIAL REFORM* 60–62 (2004).

³⁵ SCOTT NEWTON, *THE CONSTITUTIONAL SYSTEMS OF THE INDEPENDENT CENTRAL ASIAN STATES: A CONTEXTUAL ANALYSIS* 107–09 (2017).

³⁶ GJELTEN, *supra* note 6, at 322; RICHARD GOTT, *CUBA: A NEW HISTORY* 293 (2004).

Combined with economic despair among the Cuban people, this prompted an uptick in transactional sex between Cubans and foreigners (not principally from the U.S., but from Canada and Western Europe).³⁷ This uptick in turn provoked increased policing against populations suspected of sex work, including those who appear to be gay or transgender.³⁸ According to sociologist Megan Daigle, while “Mariela . . . has gained a reputation . . . as a benevolent protector of LGBT Cubans, as legends swirl . . . of her appearances in local police precincts to argue on behalf of transwomen, drag queens, and gay Cubans detained arbitrarily,” neither Mariela nor CENESEX appear to have much interest in standing up for sex workers.³⁹

In sum, while the U.S. once imagined the figment of the homosexual to pose the threat of communist espionage, Cuba’s homosexual represented the humiliations of capitalist imperialism. Sexual and gender deviancy served as a container for each nation’s fears. Gradually, the U.S. homosexual became the gay rights-bearing subject—a tribute to the possibilities of liberalism. A confluence of neoliberal privatization trends and a homonationalist narrative of liberal progress led to a teleological focus on same-sex marriage.⁴⁰ Meanwhile, tolerance of and care for the Cuban homosexual testifies to the unending nature of the Revolution, even as severe economic hardship has reproduced concerns about revived criminalization in this tourism hot spot.

III. SETTING THE TABLE FOR SAME-SEX MARRIAGE: CONSTITUTION AND CODE

The status of same-sex marriage in Cuba, including the defeat of Article 68 of the draft constitution, serves as one measure of the influence of conservative religious forces. In the early decades of the Revolution, Cuba, like the Soviet Union, was officially atheist. The Catholic Church was politically marginalized and associated with counter-revolution.⁴¹ Cuba partially legalized abortion as early as 1965 notwithstanding Church opposition. Devoted Catholics were among those most inclined to flee Cuba in the early years of the Revolution,⁴² weakening the Church as a contender

³⁷ AMALIA L. CABEZAS, *ECONOMIES OF DESIRE: SEX AND TOURISM IN CUBA AND THE DOMINICAN REPUBLIC* 117 (2009); DAIGLE, *supra* note 8, at 15.

³⁸ *Id.* at 5.

³⁹ *Id.* at 152–57.

⁴⁰ Jasbir Puar, *Rethinking Homonationalism*, 45 *INT’L J. MIDDLE E. STUD.* 336, 337 (2013).

⁴¹ José Gabilondo, *Whither the Revolution? Framing Political Antipathies Between Sexual Minorities and Churches in Cuba’s New Constitution*, 23 *HARV. LATINX L. REV.* 43, 50 (2020).

⁴² Joanne P. Cavanaugh, *Cuba’s Wedding-Go-Round Custom: What Favorite Cuban Pastime Takes 15 Minutes and Is Frequently Done More than Once? Answer: A Wedding*. *BALTIMORE SUN*, (Mar. 11, 1997, 12:00 AM), <https://www.baltimoresun.com/news/bs-xpm-1997-03-11-1997070117-story.html>.

for the people's loyalty. In addition to Catholicism, Santería and other African-influenced religious traditions were present, though they did not present the rival that a large, institutional religion presents to state authority.

According to José Gabilondo, "Fidel Castro and the Party softened their antireligious stance [in the 1980s], which dovetailed with the Church's liberalizing trends after Vatican II."⁴³ After the demise of the Soviet Union in 1992, a constitutional change took Cuba from officially atheist to secular, signaling a modicum of increased tolerance.⁴⁴ A papal visit in 1998 produced something of a détente between the Church and the Revolutionary regime, whereby Pope John Paul II moderated his human rights criticisms of Cuba while church officials in-country were extended greater freedom.⁴⁵ Then, in 2015, Pope Francis and Raúl Castro met at the Vatican where Raúl declared "I promise to go to all his Masses, and with satisfaction . . . I read all the speeches of the pope, his commentaries, and if the pope continues this way, I will go back to praying and go back to the church. I'm not joking."⁴⁶

Notwithstanding this gradual warming of relations, most Cubans do not feel obligated to follow Church doctrine when it comes to ceremonial wedlock, abortion, or the injunction against divorce (as Part IV will discuss in greater detail). According to anthropologist Heidi Härkönen, who conducted an in-depth study of life cycle events in Cuba, baptism is, by comparison to ceremonial marriage, much more prevalent, and the differential can be attributed to overlapping Santería practices as well as to a Cuban affinity for godparenting relationships.⁴⁷ In the single year 2009, Härkönen reports, Havana saw 101,755 Church-involved baptisms compared with a mere 359 Church-involved weddings.⁴⁸ The Church did perform death rituals, but Härkönen found that this, too, reflected an overlap with Santería, in which the living communicate with the dead.⁴⁹

Should the Catholic Church care to look over its shoulder, it will see Evangelical Christianity gaining on it. "An estimated seven to ten percent of

⁴³ Gabilondo, *supra* note 41, at 53.

⁴⁴ Rebecca Bodenheimer, *How American Evangelicals Helped Stop Same-Sex Marriage in Cuba*, VICE (Aug. 20, 2019, 11:12 AM), <https://www.vice.com/en/article/qvg8pw/how-american-evangelicals-helped-stop-same-sex-marriage-in-cuba>.

⁴⁵ *Id.*

⁴⁶ Jim Yardley, *Raúl Castro Meets with Pope Francis at Vatican*, N.Y. TIMES (May 10, 2015), <https://www.nytimes.com/2015/05/11/world/europe/raul-castro-meets-with-pope-francis-at-vatican.html>.

⁴⁷ HEIDI HÄRKÖNEN, KINSHIP, LOVE, AND LIFE CYCLE IN CONTEMPORARY HAVANA, CUBA: TO NOT DIE ALONE 76 (2016).

⁴⁸ *Id.* at 183.

⁴⁹ *Id.* at 184.

Cubans are Protestant or [E]vangelical.”⁵⁰ Moreover, it was Evangelical forces, with millions of dollars from U.S.-based churches, that flexed their muscle and halted inclusion of Article 68—the provision that would have eliminated the sex-specificity of partners to a civil marriage and eliminated any constitutional language restricting same-sex parenting.⁵¹

The 2018 draft had been commissioned by President Miguel Díaz-Canel; he and the Communist Party supported Article 68’s inclusion.⁵² The process for amending the constitution, set forth in Chapter XV, Article 137, requires a vote of the National Assembly in all cases and a national referendum where constitutional rights are affected. Before the votes, however, the government sent the draft out to the people for consultation; it was at this juncture, reports Gabilondo, that “conflicts between churches and sexual minorities” erupted.⁵³ According to one report, “Methodist, Baptist, and Pentecostal churches” organized a campaign that pushed the Cuban government to remove Article 68 prior to final adoption.⁵⁴ In an unusual display of grassroots effort, the Evangelicals gathered signatures, canvassed neighborhoods, and delivered “coordinated messaging” at community meetings at which the Article was discussed.⁵⁵ The Catholic Church opposed the Article, as well. Along with references to Genesis and assertions of a divine warrant for restricting marriage to heterosexual couples, the Archdiocese of Santiago “alleg[ed] that it was foreign imperialism . . . behind the support for marriage equality.”⁵⁶

Article 68 of the draft was replaced in the 2019 final version by Article 82, which punted the question of same-sex marriage down the road to the

⁵⁰ Bodenheimer, *supra* note 44. It is difficult to get a solid take on the religious data for Cuba. It seems to depend on whether one measures self-identification, baptism, or practice. According to the GroundTruth Project of the MacArthur Foundation,

[o]nly 13 percent of Cuban residents practice Santería while 27 percent identify as Catholic, according to a 2015 poll conducted by Univision and Fusion in collaboration with The Washington Post. A large proportion of Cubans—44 percent—indicate they don’t follow any religion.

But 80 percent of Cubans practice Santería in some way, said Tomás Fernández Robaina, the primary investigator of the Department of Historical Cultural Investigations at the National Library. Meanwhile, Walker said around 60 to 65 percent of the population is baptized Catholic, but less than 1 percent of Cubans attend Sunday Mass regularly.

Paxtyn Merten, *In Cuba, Santería Flourishes Two Decades After Ban Was Lifted*, GROUNDTRUTH PROJECT (July 31, 2018), <https://thegroundtruthproject.org/cuba-santeria-catholicism-religion-flourish-two-decades-freedom-granted/>.

⁵¹ Bodenheimer, *supra* note 44.

⁵² Gabilondo, *supra* note 41, at 61–62.

⁵³ *Id.* at 62.

⁵⁴ Bodenheimer, *supra* note 44.

⁵⁵ *Id.*

⁵⁶ Gabilondo, *supra* note 41, at 63.

anticipated revision of the Family Code.⁵⁷ While religious forces succeeded in preventing same-sex marriage from being guaranteed constitutionally, their influence appears to have run out as the 2022 Family Code revisions approached referendum.

The previous version of the Family Code was enacted in 1975. Among its primary objectives was to equalize women and men, avoiding the family's performance of "a counter-revolutionary role by providing the means of continuing old inequalities and impeding the acquisition of the new socialist morality and mentality."⁵⁸ Most notably, it mandated that men share in the housework and parenting.⁵⁹ Further, as Cuban family law professor Ana María Álvarez-Tabío Albo explains,

[t]he principle of absolute equality between men and women governs the personal sphere of the legal-conjugal relationship. The wife does not owe obedience to the husband, nor is she obligated to follow him wherever he establishes his residence; nor is the husband protector of the woman. Both do maintain consideration and due respect, and help each other mutually. Partnership is established in domestic roles, assigning economic value to domestic work.⁶⁰

It is widely understood that genuine equality between men and women in domestic responsibility is imperfect and largely unenforceable but nonetheless symbolically important.⁶¹

The new Family Code does much more than legalize same-sex marriage. New provisions address matters as broad-ranging as multi-parenting,⁶² progressive autonomy for youth,⁶³ domestic violence, care for the elderly and

⁵⁷ *Id.* at 64–65.

⁵⁸ Anton L. Allahar, *Women and the Family in Cuba: A Study Across Time*, 20 HUMBOLDT J. SOC. RELS. 87, 104 (1994).

⁵⁹ *Id.* at 103–04.

⁶⁰ Ana María Álvarez-Tabío Albo, *General Overview of Cuban Family Law Legislation*, 29 FLA. J. INT'L L. 17, 24 (2017). In addition, the 1975 code rendered common law (or de facto) marriages retroactively formalizable, instituted a community property rule with multiple exceptions, and made divorce available on a no-fault basis. Legal status differential based on legitimacy was eliminated by a separate Civil Registry Law. *Id.* 23–28.

⁶¹ See generally MICHELLE CHASE, *REVOLUTION WITHIN THE REVOLUTION: WOMEN AND GENDER POLITICS IN CUBA, 1952–1962* 44–76 (2015).

⁶² Liz Conde Sánchez, *Adoption or the Right to a Family*, GRANMA (Apr. 7, 2022, 10:04 AM), <https://en.granma.cu/cuba/2022-04-07/adoption-or-the-right-to-a-family>.

⁶³ Susana Antón, *A Code Consistent with the Development of the Family*, GRANMA (July 12, 2022, 12:07 PM), <https://en.granma.cu/cuba/2022-07-12/a-code-consistent-with-the-development-of-the-family>.

disabled, and the order of surnames.⁶⁴ But Article 201, authorizing same-sex marriage, garnered perhaps the most attention. Relatedly, the law makes adoption newly available to same-sex couples.⁶⁵ While gay and lesbian *individuals* were permitted to adopt under the old law, two people wishing to adopt together had to be married, effectively excluding same-sex couples.⁶⁶ (It is worth noting, however, that adoption by strangers—as opposed to step-parents—is rare in Cuba.⁶⁷) The code also sets forth new provisions to govern surrogacy⁶⁸—in general, not specifically for same-sex couples. Still, new surrogacy rules, designed to regulate the intended parent-surrogate relation, may wind up providing a significant new right for gay male couples.

IV. HETEROSEXUAL MARRIAGE AND DIVORCE IN REVOLUTIONARY CUBA

Judging by heterosexual practices, marriage is not highly valued in Cuba. It holds minimal social significance and just a handful of legal benefits.

In previous decades, weddings were not uncommon, perhaps in part because when the state had more resources, it granted a newly-wed couple a modest gift, such as a brief honeymoon in one of the hotels generally reserved for tourists, some rum or beer, a cake, or a cut-rate appliance.⁶⁹ This practice has largely disappeared as austerity has become more or less the norm.

Before the Revolution, some wealthy Cubans threw lavish Catholic weddings. Those of means and religiosity, however, were the most likely to leave the island in the early 1960s.⁷⁰ Cubans that stayed were more likely to

⁶⁴ In Spain and former Spanish colonies, the convention is to put the father's name before the mother's but then to drop the mother's name in daily use. According to Dr. Álvarez-Tabío Albo, the new version will "establish that parents determine, by mutual agreement, before civil registry authorities, the order of surnames, which once determined would be applied to all of the couple's children. Maintaining preference for the paternal surname reproduces a custom imposed by patriarchal culture." Yudy Castro Morales, *The New Families Code, Much More than Marriage*, GRANMA (Jan. 14, 2020, 3:01 PM), <https://en.granma.cu/cuba/2020-01-14/the-new-families-code-much-more-marriage>.

⁶⁵ Conde Sánchez, *supra* note 62.

⁶⁶ *Id.*

⁶⁷ That (stranger) adoption is rare in Cuba is not surprising given Cuba's relatively compressed economic strata. Adoption in general is an economically upward redistribution of children, so less pronounced stratification would be expected to result in less adoption. Cf. DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 103–04 (2002).

⁶⁸ Claudia Pis Guirola, *Cubans to Approve or Reject the Family Act in September*, HAVANA TIMES (July 28, 2022), <https://havanatimes.org/features/cubans-to-approve-or-reject-the-family-act-in-september/>.

⁶⁹ Cavanaugh, *supra* note 42; Nicolas Montano, *The Death, and Rebirth, of the Cuban Wedding Ceremony*, BROWN UNIVERSITY: BEYOND THE SUGAR CURTAIN: TRACING CUBA-US CONNECTIONS (Dec. 2017), <https://www.brown.edu/research/projects/tracing-cuba-us-connections/news/2017/12/death-and-rebirth-cuban-wedding-ceremony>.

⁷⁰ Cavanaugh, *supra* note 42.

be found in common-law marriages.⁷¹ The Revolutionary regime made early efforts to encourage formalization—holding “collective weddings” and granting wedding gifts⁷²—but eventually gave up and began recognizing “long-term consensual unions the same legal status as marriage.”⁷³ According to Álvarez-Tabío, if a “union was never legalized and one of the partners dies or abandons the relationship, . . . it falls to the other partner to make a claim urging the court to recognize that union from its beginning to the date of its termination, with the same civil effects.”⁷⁴

Among those who do undertake a ceremonial wedding, most are reluctant⁷⁵—perhaps unable—to spend the kind of money that would be required for an extravagant affair, though foreigners sometimes throw “destination weddings” in Cuba, so the extravagances are available.⁷⁶ A bare civil ceremony costs very little and takes a matter of minutes. Härkönen found that Cubans attributed no real significance to formalization.⁷⁷

Abortion occurs at a high rate,⁷⁸ as does teen pregnancy. Like divorce, single motherhood is common and not subject to social sanction.⁷⁹ Moreover, the Cuban guarantee of gender-equality in employment reduces women’s dependency on having a husband.⁸⁰ Cuban law makes no distinction between children born in and out of wedlock; a civil registry records parentage.⁸¹

Fear of divorce poses no barrier to marriage; divorce is easy and inexpensive.⁸² The divorce rate in Revolutionary Cuba has historically been quite high, with most estimates coming in above 50% (and not reflecting the incidence of multiple divorces per person).⁸³ Cuba leads Latin America in divorce and places among the highest rates of divorce in the world.⁸⁴ According to one article, it is not unusual for Cubans in their 30s to have

71 See *id.*; see also HÄRKÖNEN, *supra* note 47, at 4.

72 HÄRKÖNEN, *supra* note 47, at 4.

73 *Id.*

74 Álvarez-Tabío Albo, *supra* note 60, at 24.

75 HÄRKÖNEN, *supra* note 47, at 95.

76 Cavanaugh, *supra* note 42.

77 HÄRKÖNEN, *supra* note 47, at 5.

78 *Id.* at 53.

79 *Id.* at 70.

80 Montano, *supra* note 69; Cavanaugh, *supra* note 42.

81 Álvarez-Tabío Albo, *supra* note 60, at 23.

82 The Associated Press, *Divorce Is Easy in Cuba, but a Housing Shortage Makes Breaking Up Hard to Do*, N.Y. TIMES (Dec. 31, 2007), <https://www.nytimes.com/2007/12/31/world/americas/31cuba.html>; Cavanaugh, *supra* note 42.

83 Álvarez-Tabío Albo cites a divorce rate of 55.3% in her 2017 article. Álvarez-Tabío Albo, *supra* note 60, at 29.

84 Yudarkis Veloz Sarduy, *Getting a Divorce in Cuba is Routine*, HAVANA TIMES (Feb. 15, 2018), <https://havanatimes.org/features/getting-a-divorce-in-cuba-is-routine/>.

married and divorced three times already.⁸⁵ Some Cubans confess to having married multiple partners consecutively to take advantage of the incentives that the government used to provide—probably one of the reasons that the incentive program evaporated.⁸⁶

On death, surviving spouses (and children) *may* gain access to a survivor's pension. This is perhaps the most significant economic benefit of marriage, and it does not uniformly apply; eligibility depends on age, the spouse's own pension, and the work history of the decedent.⁸⁷ Cuban social provisions such as health care, education, and public salaries do not depend on marital ties. Officially, spouses co-own property and split it on divorce, but the law is rife with exceptions that whittle down the already slim semblance of a marital estate.⁸⁸ Cubans do not own much, so there is typically little to fight over on divorce.⁸⁹

In 2011, revisions to the housing law added new rights to the bundle of home ownership.⁹⁰ For those who have secured a title—which many have not—a home is likely to be the most valuable asset and the best reason for a non-marital partner to obtain official recognition of a relationship that is ending by death or dissolution. Housing in Cuba is, however, notoriously tight. It is not uncommon for multiple generations to occupy small apartments with makeshift “walls” to create rooms. Another consequence of the housing crunch is that while obtaining an official divorce is easy, physically separating can be difficult. “Estranged Cuban couples sometimes remain under the same roof for years or even lifetimes” because they cannot find additional housing.⁹¹

⁸⁵ Cavanaugh, *supra* note 42.

⁸⁶ Montano, *supra* note 69.

⁸⁷ *Social Security Programs Throughout the World: The Americas, 2019*, SOC. SEC. OFF. RET. & DISABILITY POL'Y, <https://www.ssa.gov/policy/docs/progdsc/ssptw/2018-2019/americas/cuba.html>.

⁸⁸ Álvarez-Tabío Albo, *supra* note 60, at 27. Article 29 of the Family Code establishes a marital community property regime, but “[s]pouses, once the marriage has been terminated, retain all property acquired before the marriage, any gifts or inheritance received during the marriage, or any lucrative title, exchange or substitution of personal property, or those acquired with their own money, or those of exclusive personal use.” *Id.*

⁸⁹ Veloz Sarduy, *supra* note 84.

⁹⁰ Prior to 2011, Cubans could not buy and sell real estate; they could only trade homes with other Cubans. A well-known film, *Se Permuta* (translated as “Housing Swap”) satirizes the system. Decree Law 288, however, enabled buying and selling of homes and in 2019, Article 29 of the new constitution secured a limited right to private ownership. Renee Monzon, *Introducing Private-Property Rights to Cuba: How Cuba's New Constitution Paves the Way for Economic Growth*, 52 CASE W. RESRV. J. INT'L L. 629, 643–44 (2020). Before the statutory change, according to one Cuban attorney, “nobody wanted to legalize their property, but now they do. The problem is, those who bought materials illegally—before the government authorized selling them—and built their homes and now have no legal document, what do they do now?” Adriel Reyes, *More Cubans Want the Deed to Their Homes*, MARTINEWS.COM (Dec. 20, 2013), <https://www.martinews.com/a/cubans-deed-homes/30258.html>.

⁹¹ The Associated Press, *supra* note 82.

Alimony on divorce is extremely limited.

If the spouses have lived together for more than one year or had children during the marriage, the tribunal will award alimony to one of them in the following cases: (1) to the spouse that does not have a paying job and lacks other means of sustenance (this type of alimony is provisional and will be payable to the other spouse for six months if there are no minor children being taken care of by the receiving spouse or for one year if there are such minor children, so that the receiving spouse can obtain a paying job); and (2) to a spouse which as a result of incapacity, age, illness or other insurmountable impediment is unable to work and lacks other means of [sustenance]. In this case, the alimony will continue as long as the obstacle persists.⁹²

Unemployment rates in Cuba are generally low, and many Cubans reside with extended families, minimizing the impact of the first case. The children of divorced couples typically remain with their mother and if a partner does move out, it is most often the father even though the apartment might belong to him.⁹³ Härkönen found that few women actually found it worth the expense and hassle of seeking a court order for support of minor children, again, reducing the incidence of the first case.⁹⁴ With regard to Cubans with disabilities, many will already be receiving a social security payment, particularly if they became disabled as a result of work or military service, obviating the alimony requirement in the second case, as well.

In sum, heterosexual marriage in Revolutionary Cuba is of limited significance. It has few implications for public benefits or private asset allocation. Its social meaning is utterly insubstantial. Divorce—even multiple times—is commonplace and without stigma. Abortion is easily accessed while single motherhood is unremarkable. Legitimacy has no bearing on children's rights. The differences between cohabitation and formalized marriage are not nothing, but neither do they seem an adequate explanation for the push for same-sex marriage.⁹⁵ How much do same-sex couples in

⁹² Ley No. 1289, CÓDIGO DE LA FAMILIA [Law No. 1289, FAMILY CODE], Feb. 14, 1975, *Gaceta Oficial*.

⁹³ HÄRKÖNEN, *supra* note 47, at 14.

⁹⁴ *Id.* at 56.

⁹⁵ A same-sex marriage enthusiast whom I met at a conference directed my attention to the matter of family reunification. I believe he was referring to emigration from Cuba and consequent confrontation with the destination country's rules regarding admittance of a partner. In the U.S., for example, while a citizen can petition for admittance of a spouse or fiancé, a permanent resident can only petition for a spouse. 8 USC § 1101(a)(15)(K)(i) (2022). This is not strictly speaking a benefit under Cuban law, but is nonetheless the only benefit of marriage of which I am aware that could not be secured to same-sex couples by Cuban law without granting access to marriage.

Cuba stand to gain by being granted access to an institution for which heterosexuals have so little regard? If the few benefits distinguishing married from unmarried couples were really the issue, Cuba has proven itself quite capable of redistributing resources without relying on the mechanism of marriage and could have done so with respect to those distinctions. Instead, it made the decision to grant same-sex couples entrance into a status that by all accounts is of little value to those who have always had it.

V. GLOBALIZATION OF GAY IDENTITY AND ITS HIGHEST FORM OF RECOGNITION

In the U.S. case of *Perry v. Schwarzenegger*,⁹⁶ plaintiffs, same-sex couples suing the state of California for permission to marry, called eminent historian Nancy Cott as an expert witness at trial. Cott told a compelling story about the evolution of marriage in the U.S.⁹⁷ The story begins with coverture, the common law doctrine according to which husbands and wives perform legally specified roles within a marriage. The husband was required to support his wife and children and represent the family in all legal matters including all contracts. The wife owed the husband a duty of obedience, was expected to take care of certain domestic responsibilities, and effectively folded her legal personality into that of her husband, so that during the marriage she could not manage her own property or exercise contractual capacity.⁹⁸

This all changed over the course of about a hundred years, beginning in the mid-to-late nineteenth century. The Married Women's Property Acts (granting married women limited authority over property derived from their families of origin) gradually led to the demise of coverture, while the agrarian homesteading economy evolved into an industrial one.⁹⁹ Later, military demands on men during World War II opened a new array of workplaces to women. Finally, there were the many legal changes ushered in during the 1960s and 70s, including passage of Title VII (prohibiting discrimination in employment on the basis of sex and other protected categories) and a cluster of constitutional cases granting women something approaching formal equality with men.¹⁰⁰

⁹⁶ *Perry v. Schwarzenegger*, No. C09-2292 VRW, 2009 U.S. Dist. LEXIS 5559 (N.D. Cal. June 30, 2009).

⁹⁷ Transcript of Trial Proceedings at 240, *Perry v. Schwarzenegger*, No. C09-2292 VRW, 2009 U.S. Dist. LEXIS 5559 (N.D. Cal. June 30, 2009).

⁹⁸ *Id.*

⁹⁹ *Id.* at 240–41.

¹⁰⁰ *Id.* at 243–44

At our current historical moment, explained Cott, while spouses remain free to organize their lives in a manner consistent with traditional gender roles, there is no longer any legal requirement that they do so. The idea of marriage in the early U.S. was effectively one of economic complementarity, but the contemporary conception is one of companionship and legal egalitarianism.¹⁰¹ Same-sex marriage would have made no sense in the era of coverture: If a couple consisted of two men, who would obey? If it consisted of two women, who would represent the couple in contract? Now, though, Cott concludes, there is no longer any reason to exclude same-sex couples from marriage because that complementarity is no longer legally required.¹⁰²

This argument could have gone differently. Instead of observing that marriage changed to eliminate legally specified gender differentiation making room for sameness between spouses, one could instead argue that same-sex partners, despite being the same-sex, were capable of performing economic complementarity. And in fact, another expert witness did effectively make this argument. The economist Lee Badgett testified in the *Perry* trial that restricting marriage to heterosexual couples unconstitutionally denied same-sex couples access to the benefits of *specialization*—that is, to the household efficiency that some economists (famously, Gary Becker)¹⁰³ attribute to an arrangement whereby one spouse specializes in market productivity and the other (guess which!) specializes in domestic activity.¹⁰⁴ Badgett claims that two women or two men, despite their sameness, could nonetheless perform this form of complementarity. That is, the one with greater earning potential could specialize in the market, while the other specializes in non-market activity.¹⁰⁵

Either argument—Cott’s or Badgett’s—brings about alignment between marriage as an economic form and the same sex couple. Either complementarity is no longer essential or same-sex spouses can perform it.

These arguments probably do not apply with equal force in the Cuban system: they are rooted in the logic of efficiency maximization rather than in egalitarian idealism. Neither economic complementarity nor its demise via law reform have much purchase in the Revolutionary Cuban story, which has—at least formally—valued sex equality at home and at work from the outset. Another form of complementarity, however, specific to gay men in Cuba, merits some consideration.

¹⁰¹ *Id.*

¹⁰² *Id.* at 244.

¹⁰³ See GARY S. BECKER, A TREATISE ON THE FAMILY 39 (1981).

¹⁰⁴ Transcript of Trial Proceedings, *supra* note 97, at 1333.

¹⁰⁵ Badgett made a meager effort to disentangle specialized roles from their gendered associations, but still posits a market specialist and a non-market specialist. *Id.*

The story told in Part II regarding the history of Revolutionary Cuba's treatment of homosexuals, mainly gay men, pertained to only a subset of the men that would be understood as *gay* in the U.S. In the U.S., for perhaps a century, gays (and lesbians) have been defined using a *sexual orientation*, as opposed to a *gender presentation*, model.¹⁰⁶ In other words, in the U.S., if a man experiences relatively consistent sexual desire and romantic affinity for other men, he is gay.¹⁰⁷ It does not matter whether he presents as effeminate or masculine, nor does it matter whether he is primarily a “top” or a “bottom” or is versatile in the performance of sexual acts. Gay identity is linked principally to same-sex desire.¹⁰⁸

Contrastingly, for most of the Revolutionary period, Cuba regarded only men who were femmes and presumed bottoms to be gay. Masculine men who were assumed to top were not considered homosexual. Such men might have girlfriends or wives, and so long as they were held to be the penetrator (not the penetrated) their heterosexuality remained intact. Surely some Cuban men were versatile in their proclivities to top or bottom, but such realities were not contemplated for definitional purposes.

The famous gay Cuban ex-pat writer Reinaldo Arenas observed this cultural difference and notoriously disparaged his experience of gay sameness in the U.S.:

[I]n exile, I found that sexual relations can be tedious and unrewarding. There are categories or divisions in the homosexual world. The queer gets together with the queer and everybody does everything.... How can that bring any satisfaction? What we are really looking for is our opposite. The beauty of our relationships then [*i.e.*, back in Cuba] was

¹⁰⁶ There is a history of changing ideas about gay identity in the U.S., too, and the gender presentation model did at one time predominate. *See generally* GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890–1940* (1995).

¹⁰⁷ Some subcultural groups in the US reject gay identity for political or identitarian reasons, preferring terms such as “men who have sex with men,” or MSM, and public health entities have accommodated men circulating in those subcultures by ratifying terminology that resists gay identity. *Men Who Have Sex with Men (MSM)*, CTRS. FOR DISEASE CONTROL AND PREVENTION (CDC) (July 22, 2021), <https://www.cdc.gov/std/treatment-guidelines/msm.htm>. Moreover, leftist politics (often opposed to gay normalization efforts) and an increase in gender variance has animated a preference for the term *queer*, the meaning of which is contested. *Queer* sometimes functions as a mere synonym for *gay* and sometimes carries a more anti-identitarian valence. *See generally* Cohen, *supra* note 23. Still, the sexual orientation conception of gay identity has predominated in mainstream US discourse since at least the 1940s, in psychology, NGO advocacy, diversity and inclusion efforts, and pop culture.

¹⁰⁸ *Sexual Orientation & Homosexuality, Introduction*, AM. PSYCH. ASS'N (2008), <https://www.apa.org/topics/lgbtq/orientation>.

that we met our opposites. We would find that man, that powerful recruit who wanted desperately to fuck us.¹⁰⁹

Lately, Cuba's gendered, butch/femme model of homosexuality seems diminished. And indeed, it would have to be. For a society to pursue a reform agenda of same-sex marriage, that society would need two gays to enter into it. They could be a top and a bottom, but then the masc/top must be reconceptualized as gay. Alternatively, one or both could be versatile, but again, that would diminish the contrast and change the concept. Two femme/bottoms—the *only* homosexuals under the fading rubric—would make no sense. *Economically*, Cuba could easily ready itself for the sameness of the same-sex marital couple by furthering its progress toward gender equality at home and in the workplace, but *sexually*, something definitional must shift. A concept of sexual orientation closer to that which predominates in the U.S. has taken hold, gradually displacing the old definitional order.¹¹⁰

It is possible that this evolution occurred organically, but more likely it reflects the globalization of gay identity—an identity no longer defined principally by failed masculinity and exclusion from the nationalist project, but rather by minoritarian injury. The gay man (lesbians, alas, are less visible in Cuba as elsewhere,) is a rights-bearing subject, a figure of what law professor Duncan Kennedy dubbed the “The Third Globalization” of legal thought.¹¹¹ This is the post-World War II proliferation of a mode of thinking that centers human rights, nondiscrimination, the liberal family, and minoritarian identity.¹¹² As Kennedy explains, “international pressure comes from the international NGOs, pressing for protection of political dissidents and for the liberalization of sexual and family legal codes.”¹¹³ The gay (and gay-friendly) Cuban diaspora, sending remittances and missives back to the island, perhaps visiting, may also play a role in this spreading conceptualization of gay identity and the legal recognition from which it is now inextricable. “On the other side are . . . traditionalist religious and

¹⁰⁹ REINALDO ARENAS, *BEFORE NIGHT FALLS: A MEMOIR* 106-07 (Dolores M. Koch trans., Viking Adult 1993). Emilio Bejel, commenting on Arenas's memoir, observes that while “the narrator-protagonist dedicates his life to rebelling against the *machista* power structure” of Revolutionary Cuba, he nonetheless “declares his uncontrollable attraction toward, his tremendous desire to have sexual relations with, a ‘real man’ . . . the prototypical representative of the oppressive system . . . In Cuban society, homoerotic relationships are often based on the masculine/feminine binary, and Arenas was unable to free himself from this mold.” BEJEL, *supra* note 16, at 149.

¹¹⁰ This is not to say that marriage or identity comes first, causing a shift in the other. Gay identity and its ultimate recognition in the form of a right to same-sex marriage are so entwined as to be mutually constitutive.

¹¹¹ Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT* 19–73, 63–71 (David Trubek & Alvaro Santos eds., 2006).

¹¹² *Id.* at 21.

¹¹³ *Id.* at 70.

nationalist organizations.”¹¹⁴ Recall that the U.S. is also exporting financial and moral support for anti-gay, Evangelical culture warriors, because a culture war requires two sides.

The despised figure of the effeminate, anally receptive homosexual, the reminder of imperialist domination who must be expelled from the Revolutionary ideal, is disintegrating. The globally legible rights-bearer is emerging in his stead—as is his religious, culture war opponent. In Cuba, he does not need marriage to obtain health coverage or protections in the event of divorce. He does not need marriage because it is a vital institution of social inclusion. He wants it and others want it for him¹¹⁵ because they “cannot not want” it. Same-sex marriage, however little it provides legally or socially, represents the zenith of gay identity recognition. Its principal value is in the register of globally transmuted meaning, not because combatting homophobia is inherently colonial or anti-colonial, but because same-sex marriage has fastened itself to an historically specific instantiation of the gay subject and full recognition of that subject is no longer possible without it.

¹¹⁴ *Id.*

¹¹⁵ According to one poll, the majority of Cubans, including those who identify as gay or lesbian, favored legalization of same-sex marriage. *El 92.2 por ciento a favor del matrimonio LGBTIQ+*: *Estos fueron los resultados de una encuesta independiente realizada en Cuba*, TREMENDA NOTA (Oct. 8, 2021), <https://www.tremendanota.com/el-92-2-por-ciento-a-favor-del-matrimonio-lgbtq-estos-fueron-los-resultados-de-una-encuesta-independiente-realizada-en-cuba/>; Karla Pérez, *Organización LGBTI: 92.2% de Cubanos Encuestados a Favor del Matrimonio Igualitario*, ADN CUBA (Oct. 6, 2021, 11:42 AM), <https://adncuba.com/noticias-de-cuba/derechos-humanos/cuba-encuesta-sobre-matrimonio-igualitario>. In addition, approximately two-thirds of voting Cubans supported the new Family Code knowing that it contained a provision legalizing same-sex marriage. Finally, media anecdotes suggest that at least some gay and lesbian Cubans want it. *See, e.g.*, Victoria Bisset, *Cuba to Hold Referendum on Same-Sex Marriage*, WASH. POST (July 23, 2022), <https://www.washingtonpost.com/world/2022/07/23/cuba-same-sex-marriage-referendum-family/>; Bodenheimer, *supra* note 44; Orlando Palma, *A New Campaign for Marriage Equality Announced*, 14 Y MEDIO (Nov. 25, 2015), https://www.14ymedio.com/englishedition/Campaign-For-Marriage-Equality-Announced_0_1898210169.html.