



PROJECT MUSE®

A Latin American Puzzle: Gay Rights Landscapes in Argentina
and Brazil

Omar G. Encarnación

Human Rights Quarterly, Volume 40, Number 1, February 2018, pp. 194-218
(Article)

Published by Johns Hopkins University Press

DOI: <https://doi.org/10.1353/hrq.2018.0007>



➔ *For additional information about this article*

<https://muse.jhu.edu/article/685702>

A Latin American Puzzle: Gay Rights Landscapes in Argentina and Brazil

Omar G. Encarnación*

ABSTRACT

Why did Latin America's most famously sexually liberated country, Brazil, fall behind one of its most socially conservative societies, Argentina, in expanding LGBT equality? This essay examines this puzzling question through the lens of the divergent landscapes of gay rights that have erupted in Argentina and Brazil since both countries became liberal democracies in the mid-1980s. Looking beyond differences in support for LGBT legislation by the executive branch, the religious context, the composition of the party system, and levels of social and economic development, this study focuses on the gay rights campaign. While in Brazil the campaign for gay rights followed the model of a conventional political struggle for civil rights, in Argentina it was framed as a human rights crusade, a strategy that, among other things, resonated profoundly with the country's search for justice, equality and the deepening of democracy.

I. INTRODUCTION

An intriguing puzzle in contemporary Latin America is the divergent speed and scope at which "gay rights" have erupted across the region.¹ Despite

* Omar G. Encarnación is Professor of Political Studies at Bard College, where he teaches comparative politics and Latin American and Iberian studies. He is the author of four books, including, *Democracy without Justice in Spain: The Politics of Forgetting* (University of Pennsylvania Press, 2014) and *Out in the Periphery: Latin America's Gay Rights Revolution* (Oxford University Press, 2016), and more than a dozen peer-reviewed articles and reviews. This essay draws from his current research on the origins of divergent "gay rights landscapes" in liberal democracies.

1. Despite its apparent exclusionary nature, the term "gay rights" is employed in this study as a short hand for legislation intended to advance the welfare of the gay, lesbian, bisexual, and transgender (LGBT) population.

all that Latin American countries have in common, such as the prominence of Catholicism in the culture at large, relatively-advanced levels of social and economic development, and a late but ultimately successful transition from authoritarian to democratic rule, individual countries are developing distinct gay rights landscapes. Neighbors and rivals Argentina and Brazil are a case in point.

In 2010, Argentina enacted Latin America's first same-sex marriage law. It was one of the first of its kind to allow, simultaneously, all the privileges and responsibilities of marriage to homosexual couples, including adoption. Post-gay marriage, Argentina has enacted a host of LGBT legislation that leaves little doubt about the country's standing as Latin America's gay rights champion. Since 2012, Argentine law allows for a change in gender identity without permission from a doctor or a judge, as is customary in most countries; it also bans "ex-gay" conversion therapy intended to overcome same-sex attraction and grants access for gay families to fertility treatment, such as in vitro fertilization, under the national health system.²

Brazil, by contrast, is a gay rights laggard, having struggled mightily to pass any LGBT legislation at the federal level. Whatever progress the country has made, it has come mainly via judicial fiat, especially the 2011 ruling by the Federal Supreme Court that opened the way for same-sex marriage. More revealing, perhaps, is the conservative gay rights backlash currently underway in Brazil. Not only has this backlash effectively prevented the post-same-sex marriage gay rights boom witnessed in Argentina, but also it threatens gay rights gains already made, including same-sex marriage. Unsurprisingly, Brazilian gay activists cite the country's struggles to enact LGBT legislation, including a federal ban on anti-gay discrimination, as the main culprit behind an epidemic of gay killings that since the late 1980s has claimed more than 3,000 lives.³ Brazilian gay activists commonly refer to these killings as the "Homocaust."

Making the contrasting gay rights landscapes of Argentina and Brazil more compelling still is that they appear to be downright counterintuitive. Brazil's LGBT movement is Latin America's largest and most resourceful, and Brazilian gay activists have enjoyed a level of access to the political system envied by their Latin American counterparts.⁴ Brazilian culture is also

-
2. See OMAR G. ENCARNACIÓN, *OUT IN THE PERIPHERY: LATIN AMERICA'S GAY RIGHTS REVOLUTION 2* (2016).
 3. As reported by the newspaper *O Globo* on 24 May 2013 based on data from GGB between 1980 and 2009, Brazil registered 3,100 gay homicides or 110 per year. Carolina Benevides & Rafael Galdo, *Número de assassinatos de gays no país cresceu 62% desde 2007, mas tema fica fora da campanha*, *O GLOBO*, 16 Oct. 2010, available at <https://oglobo.globo.com/brasil/eleicoes-2010/numero-de-assassinatos-de-gays-no-pais-cresceu-62-desde-2007-mas-tema-fica-fora-da-campanha-4984070>.
 4. See Edward MacRae, *Homosexual Identities in Transitional Brazilian Politics*, in *THE MAKING OF LATIN AMERICAN SOCIAL MOVEMENTS: IDENTITY, STRATEGY, AND DEMOCRACY 185* (Arturo Escobar & Sonia Álvarez eds., 1992); Rafael de la Dehesa, *Global Communities and Hybrid Cultures: Early Gay and Lesbian Activism in Brazil and Mexico*, 42 *LAT. AM. RES. REV.* 29, 37–39 (2007).

world-renown for celebrating sexual diversity and gender non-conformity.⁵ According to Luiz Mott, Brazil's best-known activist-scholar, Brazil "enjoys the international reputation of being the New World country with greatest freedom for homosexuals."⁶ Support for this assertion comes from popular depictions of Brazil as an "Erotic Eden" dating back to the colonial era; the absence of any legislation criminalizing homosexuality since Brazil gained its independence from Portugal in 1825; the annual debauchery of carnival in Rio de Janeiro; and the popularity of gay pride parades. Brazil's first pride parade was staged in 1995, on Rio de Janeiro's fabled Copacabana Beach. By 2009, pride parades had become so popular in Brazil that the Guinness World of Records ranked São Paulo's pride parade as the world's largest, with an estimated attendance of some 3 million people.

Argentina presents a starkly different scene. The country has a long history of state repression of homosexuality that, according to one study, exhibits a "viciousness hardly equaled anywhere else in Latin America."⁷ Lowlights of this history include state-assisted efforts by the psychiatric community in the early part of the twentieth century to cure homosexuality that led to hundreds of homosexuals being tortured at state hospitals and jails; morality campaigns by the Peronist and Onganía regimes during the 1950s and 1960s that strictly enforced hetero-normativity as the standard for all Argentines; and the targeting of homosexuals during the country's infamous Dirty War between 1976 and 1983.⁸ Last, but not least, Argentine culture worships masculinity. Indeed, Argentina radiates machismo—from the mythical figure of the Gaucho, the rough and tough horseman of the Pampas, to the national dance of the tango, to its high testosterone military generals.

There is no shortage of compelling explanations behind the seemingly paradoxical gay rights landscapes between Argentina and Brazil, starting with important differences in the political environment. Among these differences, the level of support for gay rights by the executive branch stands out. Peronist President Cristina Fernández de Kirchner did not come to power as a gay rights crusader, but during her tenure in office (2007–2015) she was a staunch ally of the gay community. Indeed, she staked her political

-
5. See Charles Klein, *The Ghetto is Over, Darling: Emerging Gay Communities and Gender and Sexual Politics in Contemporary Brazil*, 1 CULTURE, HEALTH & SEXUALITY 239 (1999); RICHARD PARKER, BENEATH THE EQUATOR: CULTURES OF DESIRE, MALE HOMOSEXUALITY, AND EMERGING GAY COMMUNITIES IN BRAZIL (1999).
 6. Luiz Mott, *The Gay Movement and Human Rights in Brazil*, in LATIN AMERICAN MALE HOMOSEXUALITIES 221, 221 (Stephen O. Murray ed., 1995).
 7. Sam Larson, *Argentina: Shrouded in Silence*, in COMING OUT: AN ANTHOLOGY OF INTERNATIONAL GAY AND LESBIAN WRITINGS 71, 71 (Stephan Likosky ed., 1992).
 8. See Jorge Salessi, *The Argentine Dissemination of Homosexuality, 1890–1914*, 4 J. HIST. SEXUALITY 337 (1994); Omar Acha & Pablo Ben, *Dossier: Género y Peronismo: Amoraless, Patoteros, Chongos y Pitucos: La Homosexualidad Masculina Durante el Primer Peronismo, 1943–1955*, TRABAJOS Y COMUNICACIONES 217 (2004–2005); OSVALDO BAZÁN, HISTORIA DE LA HOMOSEXUALIDAD EN LA ARGENTINA: DE LA CONQUISTA DE AMÉRICA AL SIGLO XXI (2004).

reputation on legalizing same-sex marriage. Brazil presents the very opposite situation. Luiz Inácio “Lula” da Silva of the Workers’ Party (PT), president of Brazil between 2003 and 2011, ran for office preaching LGBT equality, a first for a Latin American presidential candidate. As president, however, Lula proved to be a fair-weather friend to the LGBT community, routinely willing to throw LGBT issues under the bus in his attempt to gain the support of powerful Evangelical leaders.

Less apparent are the differences in the configuration of the party system and the impact of these differences on the law-making process. Despite the shock to the political system of the 2001 economic crash, Argentina retains a relatively orderly party system. Historically, two parties have been dominant: the center-right Radical Party and the populist Justicialista Party, better known as the “Peronist” Party. For decades, both parties have commanded internal discipline, and neither one makes social issues, like gay rights and abortion, a defining institutional feature. In contrast, the Brazilian party system is highly fragmented (there are some three dozen parties represented in the current Congress) and operates mostly on secret, backroom deals. In addition, small but influential parties make social issues like abortion and gay rights their *raison d’être*. In fact, some of these parties, like the Brazilian Republican Party, are veto players when it comes to gay rights, making any LGBT legislation an uphill struggle in Brazil.

Additional explanations can be found in the cultural, social, and economic environments. First, and foremost, is the issue of “religiosity,” an important sign of opposition to gay rights. According to Gallup, Brazil is a more religious country than Argentina: 87 percent of the public in Brazil profess that “religion [is] an important part of [my] daily life” versus 61 percent for Argentina.⁹ There are also important differences in the composition of the religious landscape: Catholics dominate in both cases with 71 percent for Argentina and 61 percent for Brazil. However, Brazil has a higher percentage of Protestants than Argentina: 26 percent versus 15 percent. According to the Pew Research Center, Protestants, especially Evangelicals (the most popular Protestant sect in Brazil), are more likely to harbor negative attitudes toward homosexuality and gay rights than Catholics.¹⁰ On the socioeconomic front, although both countries are upper-middle-income countries, with similar per capita incomes, Argentina bests Brazil on the United Nations Human

9. Steve Crabtree, *Religiosity is Highest in the World’s Poorest Countries*, GALLUP, 31 Aug. 2010, available at <http://www.gallup.com/poll/142727/religiosity-highest-world-poorest-nations.aspx>.

10. *Religion in Latin America: Widespread Change in a Historically Catholic Region*, PEW RESEARCH CENTER, 13 Nov. 2014, available at <http://www.pewforum.org/2014/11/13/religion-in-latin-america/>.

Development Index (2015). This includes educational attainment, another key determinant of gay rights identified by Pew.¹¹

Ultimately, however, this analysis contends that the puzzle of gay rights in Argentina and Brazil is best explained by unpacking the nature of the gay rights campaign. This argument, which places strategizing front and center in the debate about gay rights, takes its inspiration from the social movement scholarship known as “framing.” In keeping with the desire to highlight the role of ideas in the study of social movement politics, framing helps social movements “render events or occurrences meaningful and thereby function to organize experience and guide action.”¹² This occurs through the construction of “interpretative packages that activists develop to mobilize potential adherents and constituents, appeal to authorities, and demobilize antagonists.”¹³ Framing is most effective when it evokes the local culture, a point conveyed in the notion of “frame resonance.” As noted by one review of the literature on framing: “[t]he key to framing . . . is finding evocative cultural symbols that resonate with potential constituents and are capable of motivating them to collective action.”¹⁴

As will be seen shortly, the campaign for gay rights in Argentina and Brazil diverged with regards to the overarching vision of “gay equality” guiding the gay rights movement, the messages conveyed by gay activists to rationalize and promote gay rights, especially same-sex marriage, and the institutional means that gay activists employed to advance their agenda through the political system. These divergences impacted a whole host of issues related to the evolution of gay rights politics in both countries, such as the nature of the demands made by gay activists, the level of societal support for gay rights, and the risks that politicians were willing to take to support LGBT legislation.

In Argentina, gay activists waged a “human rights crusade,” animated by a very expansive, even idealistic, notion of gay equality, especially in connection to the issue of same-sex marriage. It regarded the freedom of sexuality as a fundamental human right. Argentina’s influential human rights community served as the campaign’s political anchor. This grounding in the human rights movement helped boost the framing of the campaign for gay rights as a human rights crusade and as part of a larger struggle by civil society for justice, citizenship, and democracy. It also enhanced the cam-

11. UNITED NATIONS DEVELOPMENT PROGRAMME (UNDP), HUMAN DEVELOPMENT REPORT 2015: WORK FOR HUMAN DEVELOPMENT 208–09 (2015).

12. Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOCIOL’Y 611, 614 (2000).

13. Francesca Polletta & M. Kai Ho, *Frames and Their Consequences*, in THE OXFORD HANDBOOK OF CONTEXTUAL POLITICAL ANALYSIS 187, 190 (Robert E. Goodin & Charles Tilly eds., 2006).

14. John A. Noakes & Hank Johnson, *Frames of Protest: A Road Map to a Perspective*, in FRAMES OF PROTEST: SOCIAL MOVEMENTS AND THE FRAMING PERSPECTIVE 1, 11 (Hank Johnson & John A. Noakes eds., 2005).

paign's success in mutually-supporting ways, such as prioritizing changing hearts and minds about homosexuality over enacting LGBT legislation; giving the campaign tremendous resonance within the culture at large (given the prominence of human rights in Argentine politics); and affording the advocacy of gay activists a rare moral significance that worked to undercut societal opposition to gay rights.

Brazilian gay rights activists, by contrast, engaged for the most part in a "civil rights struggle." Its overarching goal was to legitimize gay rights under Brazilian law. For instance, there was no marriage equality campaign in Brazil. Instead, gay activists demanded "stable unions," which are recognized under the Brazilian Constitution. For its political anchor, Brazilian gay activists depended upon an alliance with the Workers' Party (PT), the first party in Latin America to embrace gay rights. This alliance was a mixed blessing for the gay rights movement. On the one hand, it gave Brazilian activists visibility, organizational expertise, and access to state resources unparalleled in all of Latin America. On the other hand, the close affiliation of gay activists with the PT undermined the ambition of the gay rights movement; discouraged building support for gay rights within civil society by focusing the struggle for gay rights squarely within the legislature and the courts; and solidified opposition to gay rights by foes of the gay community, who were quick to label gay rights as "special rights."

II. A HUMAN RIGHTS CRUSADE IN ARGENTINA

In 1983, at the time of democracy's return to Argentina, the social and political climate for gay rights was downright inauspicious. The military regime in place between 1976 and 1983 decimated all existing gay rights organizations, including the *Frente de Liberación Homosexual* (FLH). Many of its members were tortured, murdered, and disappeared as part of the Dirty War. Those lucky enough to escape the repression unleashed by the military, left for Europe and other parts of Latin America. Formed in 1971, as an offshoot of New York's Gay Liberation Front (GLF), the FLH was Latin America's foremost gay rights group of its time. Like the GLF, the FLH worked to advance civil rights for the gay community even as it questioned the nature of sexual identity and the value of the assimilation of gays into the mainstream of society. "We don't have to liberate the homosexual, we must liberate the homosexual in everyone," was the motto of Eros, one of the groups behind the FLH.¹⁵

During the first post-transition administration, headed by Raul Alfonsín of the Radical Party (1983–1989), homosexuals were routinely denied the most

15. ENCARNACIÓN, *supra* note 2, at 88.

basic of civil rights. Between 20 December 1983 and 21 March 1984, under the *Ley de Antedecentes* (Criminal Records Act), 21,343 people were arrested for background checks, the majority of whom were homosexual males.¹⁶ This repression prompted the birth of the *Comunidad Homosexual Argentina* (CHA) in April 1984, after the police arrested 200 gay males during a *razzia* (a raid) of a Buenos Aires bar the month before. Understandably, fighting the state's brutal treatment of the gay community was CHA's most urgent priority. This treatment, according to Cesar Cigliutti, a founding member of the CHA and its current president, informed in significant ways how gay activists would construct their sense of equality in the new democracy. He notes that "a very expansive idea of LGBT equality reappeared in Argentina during the restoration of democracy against a backdrop of widespread repression and a discourse about sexual orientation that defined homosexuality as a sickness and a deviance."¹⁷

The exclusion of gays in the new democracy extended to the political arena. According to Cigliutti, "the political establishment was hostile towards gay activism. Not a single electorally-important party provided space for addressing our demands for basic rights."¹⁸ Among these parties was the Peronist Party, historically the home for Argentina's most prominent social movements, such as the women's movement and the trade union movement. Peronist President Carlos Saúl Menem, in office between 1989–1999, was openly hostile toward the gay community. In 1991, he denied the CHA *personería jurídica* (legal recognition). The Argentine Supreme Court upheld the decision on grounds that the state's duty to preserve public morals trumped the constitutional right of freedom of expression.¹⁹ Unsurprisingly, as recently as the mid-1990s, Argentina's gay rights community consisted of a handful of activists with very little means to support itself. The CHA's first media campaign was "paid for with money raised from passing a cup in places where gays congregated, like clandestine bars," according to Cigliutti.²⁰

A. Embracing Human Rights

From the very inception of their activism, CHA leaders framed their advocacy for gay rights as a human rights campaign intended to deepen democratic

-
16. Diego Sempol, *Violence and the Emergence of Gay and Lesbian Activism in Argentina, 1983–1990*, in *THE SEXUAL HISTORY OF THE GLOBAL SOUTH: SEXUAL POLITICS IN AFRICA, ASIA, AND LATIN AMERICA* 99,102–03 (Saskia Weiringa & Horacio Sívori eds., 2013).
 17. Electronic communication with Cesar Cigliutti, Founding Member and President, *Comunidad Homosexual Argentina* (CHA), (13 Sept. 2017).
 18. *Id.*
 19. On the struggle for the CHA's recognition see HORACIO VERBITSKY, *HACER LA CORTE: LA CONSTRUCCIÓN DE UN PODER ABSOLUTO SIN JUSTICIA NI CONTROL* (1993).
 20. Electronic communication with Cesar Cigliutti (3 July 2013).

citizenship. The CHA's motto suggestively reflected this: "The Free Exercise of Sexuality is a Human Right."²¹ This conjoining of gay rights and human rights was an important departure from human rights politics in Latin America. Prior to the 1980s, Latin American human rights discourses were the exclusive domain of those fighting torture, kidnappings, and disappearances. More importantly, however, was the boldness of the claim that gay rights are human rights. The 1948 Universal Declaration of Human Rights is mum on the issue of sexual orientation. Nevertheless, for Argentine gay activists, several articles in the Declaration that reference the "dignity" and "equality" of all persons provided ample justification for making the freedom of sexuality a basic human right, a claim now widely accepted by the human rights community.²²

Tellingly, the early focus of gay activism in the new democracy was not legislation but rather humanizing homosexuals in the eyes of Argentine society. To that end, Carlos Jáuregui, the CHA's first president, and Raúl Soria, a "fake boyfriend," were the subject of a 23 May 1984 cover story of the magazine *Siete Días* with the title of "The Risks of Being Homosexual in Argentina." Further, "[a]mong the subjects in the article were the harassment of gays by the police and the discrimination that gays faced in the workplace, universities, and housing [] for no other reason than whom they chose to love."²³ This unprecedented act of self-outing galvanized the gay community prompting many gays and lesbians to declare their homosexuality. It also encouraged the media to focus on the issue of homosexuality, including a May 1984 article "in *Clarín* about gay rights, human rights, and democracy. It was one of the first sympathetic treatments of homosexuality in Argentina to appear in a mainstream publication."²⁴

In the absence of support from the political parties, gay activists sought refuge in the Argentine human rights community. Throughout the 1980s, this community was mobilized by the successful prosecution of the Argentine military for crimes against humanity. This prosecution represented the first time in Latin American history that the military had been held accountable for its human rights transgressions. Folding their struggles into those of the human rights community allowed gay activists to link ending anti-gay discrimination to Argentina's human rights aspirations. Gaining admission into the human rights community, however, proved to be a struggle in and of itself.

Journalist and feminist activist Mabel Bellucci recalls that while some human rights leaders embraced the CHA on a personal level—such as Laura Bonaparte of Las Madres de la Plaza de Mayo, the human rights organization

21. ENCARNACIÓN, *supra* note 2, at 100.

22. Universal Declaration of Human Rights, adopted 10 Dec. 1948, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., pmb, arts. 1 & 22, U.N. Doc. A/RES/3/217A (1948).

23. ENCARNACIÓN, *supra* note 2, at 114.

24. *Id.*

famous for its activism on behalf of the disappeared—this was not the case of the human rights community as a whole. Most human rights organizations saw gay activists “as extra-terrestrial” and regarded working with gay issues “detrimental to their own cause.”²⁵ However, gay activists persevered and in time they became an integral part of Argentina’s vast and influential human rights community.

During the 1990s, gay activists joined the human rights community in some of the most important battles of the human rights movement in Argentina. None was more consequential for both human rights and gay rights than the reformation of the Argentine Constitution that took place in 1994. The reforms with the greatest impact were the expansion of individual rights, such as the introduction of the principle of *amparo* (or injunction), which provided any person with the ability to request that a judge declare unconstitutional an act or ruling that caused damages or restricted a right recognized by the Argentine Constitution; the creation of the Autonomous City of Buenos Aires, which extended self-rule to the Argentine capital city; and the granting of the status of “supreme law” to all international treaties signed by Argentina, especially the 1948 Universal Declaration of Human Rights and the 1969 American Convention on Human Rights.

B. Employing the Human Rights Playbook

Argentine gay activists employed a wide array of strategies to further their cause. Most of them were borrowed from the playbook of human rights activists, starting with the promotion of the victimization of gays at the hands of the military. The CHA’s first paid advertisement, published in *Clarín* on 28 May 1984, with the headline of “With Discrimination and Repression there is no Democracy,” invited readers to “identify with gay men and lesbians and consequently back their struggle for a democracy without discrimination or repression.”²⁶ The advertisement noted “that more than 1.5 million Argentine gays are preoccupied with the national situation” and that “they experienced with the rest of the nation the hard years of dictatorial rule.”²⁷ Moreover, it argued that: “[t]here will never be a true democracy if society permits the existence of marginalized sectors and the methods of repression are still in place.”²⁸

With an eye toward including gay repression into the work of the *Comisión Nacional sobre la Desaparición de las Personas*, or CONADEP,

25. Interview with Mabel Bellucci Journalist and Feminist Activist, in Buenos Aires, in Argentina (7 June 2012).

26. Stephen Brown, *Con Discriminación y Represión no Hay Democracia: The Lesbian and Gay Movement in Argentina*, 29 *LAT. AM. PERSP.* 119, 124–25 (2002).

27. ENCARNACIÓN, *supra* note 2, at 114.

28. *Id.*

the governmental commission in charge of tracking down those who disappeared during the Dirty War, gay activists made much of Jáuregui's unconfirmed claim that the military regime was responsible for the murder of 400 homosexuals.²⁹ This ultimately proved unsuccessful, since there is no mention of the repression of homosexuals in *Nuncas Más* (Never Again), the official report of the Commission. Nevertheless, gay activists made much of this exclusion. It prompted Jáuregui to complain that: "the gays are the disappeared among the disappeared."³⁰ It also helped to promote the notion of the Argentine state as "genocidal," a popular claim for human rights activists to justify their demands for justice and accountability against the military regime.³¹ That claim traces the "genocidal" actions of the Argentine state to the extermination of indigenous cultures by the founders of the Argentine Republic, such as Julio Argentino Roca, the military hero who tamed Patagonia's wilderness in the mid-1800s.³²

Argentine gay activists also relied on "shaming" to advance their goals, another human rights strategy. During Menem's first official visit to the United States, in 1991, the CHA, working in tandem with the AIDS Coalition to Unleash Power (ACT UP), staged protests against Menem practically everywhere he went. For instance, at a press conference in New York City, Menem was confronted by gay activists carrying blown-up photographs of AIDS patients chained to their beds at a hospital in Buenos Aires, of homosexuals murdered or tortured by the Argentine police, and of three Argentine gay males who had been given asylum in Canada after claiming that, because of their sexuality, they feared for their lives.³³ Bowing to pressure from the activists, before arriving in Washington to address a joint session of the US Congress, Menem threw in the towel and announced that he "intended to legalize the CHA" upon his return to Buenos Aires.³⁴

Last, but not least, was the use of *escraches* (literally screeching, figuratively accosting). The most successful employment of this strategy took place in 1996, after the City of Buenos Aires approved a new constitution that excluded a ban on discrimination based on sexual orientation. In response to this exclusion, "gay activists stormed the building where city officials

29. ENCARNACIÓN, *supra* note 2, at 92; Santiago Joaquín Insausti, *Los Cuatrocientos Homosexuales Desaparecidos: Memorias de la Represión Estatal a las Sexualidades Disidentes en Argentina*, in DESEO Y REPRESIÓN: SEXUALIDAD, GÉNERO Y ESTADO EN LA HISTORIA ARGENTINA RECIENTE 63 (Debora D'Antonio ed., 2015).

30. ENCARNACIÓN, *supra* note 2, at 92.

31. Electronic communication with Pablo Ben, Former Member, CHA (25 Jan. 2015).

32. Rory Carroll, *Argentinian Founding Father Recast as Genocidal Murderer*, THE GUARDIAN, 13 Jan. 2011, available at <https://www.theguardian.com/world/2011/jan/13/argentinian-founding-father-genocide-row>.

33. ENCARNACIÓN, *supra* note 2, at 111; See M. Alfredo González, *Latinos ACT-UP: Transnational AIDS Activism in the 1990s*, 41 NACLA REPORT ON THE AMERICAS 35 (2008).

34. ENCARNACIÓN, *supra* note 2, at 111.

were meeting” armed with blown-up photos of Jáuregui, who had died of AIDS one week earlier as Argentina’s most prominent gay rights activist.³⁵ Gay activists tracked down those who wrote the new constitution, calling them out for failing to protect the human rights of the gay population. The strategy paid off handsomely; “on 30 August 1996, unanimously and in homage to Jáuregui,” the Buenos Aires City Council amended the City’s constitution to ban discrimination on the basis of sexual orientation.³⁶ This was Latin America’s first gay rights ordinance.

A civil union law for Buenos Aires residents that was open to same-sex couples was the next big triumph for the CHA. Enacted in December 2002, this was the first law of its kind for any locality in Latin America. It granted gay couples “living together for at least two years marriage-like benefits like such as pension benefits, health insurance, and hospitalization visitation rights.”³⁷ Propelling the law was the economic crash of 2001–2002, which unleashed a massive social justice movement, especially in Buenos Aires. But making the law a reality also hinged on pressure and clever strategizing and messaging on the part of gay activists.

CHA Secretary Marcello Sunthein recalls that: “We did *escraches* and the legislators got so scared that they had one of the longest sessions in recent history—almost 18 hours, uninterrupted, from 1:00 PM to 6:00 AM the following day.”³⁸ During the hearings, gay activists testified about the need for legislation that was respectful of human rights and tolerant toward different ideas, ideologies, sexual orientation, and ethnic and racial differences. They also stressed that the issues at stake were not about sexuality but about protecting the human rights of the homosexual population. These arguments appear to have persuaded even the most devout Catholics in the Council. Recalling her vote, Buenos Aires Councilor Alicia Pierini noted that: “I have long been linked with the Church. . . . But for me it was a question of dignity, equality and rights. These people are asking for a human right, and we have to give it to them.”³⁹

C. Fighting for Marriage Rights

Leading Argentina’s battle for marriage equality was the *Federación Argentina LGBT* (FALGBT), a new organization laser-focused on legalizing same-sex

35. *Id.* at 125.

36. *Id.*

37. *Id.* at 127.

38. Interview with Marcello Sunthein, Secretary, CHA, in Buenos Aires, Argentina (14 June 2012).

39. Jordi Díez, *Explaining Policy Outcomes: The Adoption of Same-Sex Unions in Buenos Aires and Mexico City*, 46 *COMP. POL. STUD.* 212, 224 (2013).

marriage. This was by all signs a quixotic quest. Prior to Argentina, no country in Latin America had ever entertained a national law extending marriage rights to same-sex couples. There was no commitment from the governing coalition to same-sex marriage and Argentina's Catholic hierarchy, led by Buenos Aires Archbishop Cardinal Jorge Mario Bergoglio (the present-day Pope Francis), quickly denounced same-sex marriage as "a destructive pretension on God's plan."⁴⁰ Aware of all of this, Bruno Bimbi, the FALGBT's media strategist, observed in his memoirs of the battle for same-sex marriage in Argentina that in deciding whether to push for civil unions or marriage, the activists' mindset was: "Let's be realistic and ask for the impossible."⁴¹

Spain provided the roadmap to marriage equality for Argentine activists. In 2005, Spain became the first Catholic-majority nation to legislate same-sex marriage and the first country to endow same-sex couples with all the privileges and responsibility of marriage, including adoption. According to FALGBTs' founder, LGBT and feminist activist Maria Rachid, "[w]e learned everything from the Spaniards, especially not settling for second best."⁴² She adds that, "[i]t was non-negotiable that there would be two different kinds of institutions recognizing homosexual and heterosexual relationships."⁴³ To stress the discriminatory nature of same-sex civil unions, Rachid's testimony to the Argentine Senate contended that proponents of civil unions for same-sex couples "have the same mindset as those who accepted Apartheid."⁴⁴ This uncompromising stance on marriage equality is reflected in the slogan that anchored the campaign for marriage equality in both Spain and Argentina: *Los mismos derechos con los mismos nombres* (The same rights with the same names).

In search of marriage equality, the FALGBT, assisted by the CHA, which had previously pushed for a national civil union law, pursued several simultaneous tracks. Efforts began in 2009 with a same-sex marriage bill introduced in the National Congress by deputies Silvia Augsburgberger of the Socialist Party and Vilma Ibarra of the Popular and Social Encounter Party, two small left-wing parties with ties to gay activists. Following Spain's example, the bill entailed a small alteration in the portion of the civil code regulating marriage: changing of the words "man and woman" to the gender-neutral "persons."

40. Mariano Obarrio, *La Presidenta Lleva a China a Opositoras del Matrimonio Gay: Subió al Avión a Dos Senadoras Que Objetan el Proyecto, Para Que no lo Rechacen en el Recinto*, LA NACIÓN, 10 July 2010, available at <http://www.lanacion.com.ar/1283380-la-presidenta-lleva-a-china-a-oppositoras-del-matrimonio-gay>.

41. BRUNO BIMBI, *MATRIMONIO IGUALITARIO: INTRIGAS, TENSIONES Y SECRETOS EN EL CAMINO HACIA LA LEY 15, 15* (2010).

42. Interview with FALGBT President Maria Rachid, in Buenos Aires, Argentina (20 July 2012).

43. *Id.*

44. *Organizaciones a favor del Matrimonio Gay Disertaron en el Senado*, LA NACIÓN 10 June, 2010, available at <http://www.lanacion.com.ar/1270766-organizaciones-a-favor-del-matrimonio-gay-disertaron-en-el-senado>.

Concurrent with the effort to legislate same-sex marriage, gay activists began to approach the courts armed with the argument that denying gays and lesbians access to the institution of marriage was a violation of universal human rights principles. This strategy capitalized upon the arrival of a number of justices in the Supreme Court after 2003, such as Eugenio Raúl Zaffaroni, with ties to the human rights community and the new human rights provisions incorporated into the Argentine Constitution. It began to bear fruit on 12 November 2009, when Buenos Aires Judge Gabriela Seijas ordered the City of Buenos Aires to recognize the marriage of two men, Alejandro Freyre and José María Di Bello, who had sued the city for failing to recognize their union as a marriage. Mauricio Macri, the mayor of Buenos Aires and current president of Argentina, chose not to appeal the ruling thereby allowing same-sex marriage in Buenos Aires before it became legal for the rest of the nation.

Gay activists also mobilized civil society like never before. In an unprecedented act of solidarity, seventy-three human rights organizations, headed by Las Madres de la Plaza de Mayo, came together to support same-sex marriage. In a joint letter to congressional legislators, these groups argued that: “[t]he new law needed to be adopted in order to end the restrictions of rights derived from marriage, like inheritance, the treatment of conjugal assets, custody of children, adoption and widow’s pensions and other benefits.”⁴⁵ For this reason, the human rights groups rejected civil unions as an alternative to marriage contending that “[d]enying marriage on the grounds of sexual preference is a form of discrimination prohibited by the national constitution, and creating a separate institution is a flagrant violation of human rights.”⁴⁶

To boost their efforts on behalf of marriage equality, gay activists unveiled a massive public relations campaign intended to *ganar la calle* (to win the street).⁴⁷ A key message of this effort was that the gay community’s demand for marriage was rooted not only in a desire for equality under the law, but also in love and commitment—just like heterosexuals justify their desire for marriage. Such universal messages about marriage equality were promoted by Argentina’s top celebrities and public figures, many of whom recorded television advertisements in support of gay marriage, such as former Buenos Aires mayor Aníbal Ibarra, dancer Julio Bocca, and singer Liliana Herrero; a cascade of articles in favor of gay marriage in the nation’s leading newspapers; and a same-sex marriage storyline in a top-rated television show, *Botineras*, a sports comedy.

45. Omar G. Encarnación, *International Influence, Domestic Activism, and Gay Rights in Argentina*, 128 POL. SCI. Q. 687, 710 (2014).

46. *Id.*

47. BIMBI, *supra* note 41, at 79.

D. The Presidential Endorsement

A big boost for the same-sex marriage bill came with the endorsement by Peronist President Fernández de Kirchner, whose views on gay marriage, prior to March 2010, were mostly unknown. Why Kirchner and her late husband, former President Néstor Kirchner, decided to support the bill is a source of intense debate in Argentina. Some theories stress political opportunism over moral conviction. According to Fernando Laborda, a columnist for *La Nación*, the Kirchners' "militant attitude in favor of homosexual marriage" was a naked political ploy since "in their many years in power they had never concerned themselves with this issue and did not even raise it during the 2009 electoral campaign."⁴⁸ It is also the case that Kirchner may have wanted to get ahead of a positive ruling on same-sex marriage by the Argentine Supreme Court, on grounds that denying same-sex couples the right to marry was a violation of the Argentine Constitution's human rights provisions, and claim a big legislative victory for herself and her parliamentary coalition just prior to the national elections.

In the end, however, the most compelling explanation for Kirchner's support for same-sex marriage lies in public opinion polls suggesting approval for same-sex marriage approaching 70 percent. According to Analía del Franco, general director of the polling firm *Analogías*, this extraordinary support for same-sex marriage was a testament to the effectiveness of gay activists in humanizing gays and linking gay rights to Argentina's human rights aspirations.⁴⁹ She observes that: "a turning point in people's perception of gays (which traditionally has veered toward a caricature), was when they began to view them as ordinary people, with jobs, feelings, etc."⁵⁰ She adds that "once people began to relate to gays as ordinary people they concluded that they are just like me." She also linked the vote in congress legalizing same-sex marriage to "the country's strong human rights tradition," a clear reference to the work of gay activists.⁵¹

Whatever the reason for her support of same-sex marriage, Kirchner spared no political resource available to her to see same-sex marriage enacted into law. She used the bully pulpit to criticize those opposing the bill, most notably Archbishop Cardinal Bergoglio, whom she characterized as possessing "attitudes reminiscent of the Inquisition."⁵² She instructed Peronist

48. Fernando Laborda, *Matrimonio Homosexual: Las Razones de los Kirchners*, LA NACIÓN, 13 July 2010, available at <http://www.lanacion.com.ar/1284232-matrimonio-homosexual-las-razones-de-los-kirchner>.

49. Interview with Analía del Franco, General Director, Analogías, in Buenos Aires, Argentina (29 June 2012).

50. *Id.*

51. *Id.*

52. *Cristina Comparó la campaña de la Iglesia contra el Matrimonio Homosexual con la Inquisición*, El País 12 July 2010, available at <http://www.eldia.com/nota/2010-7-12-cristina-comparo-campana-de-la-iglesia-contra-el-matrimonio-homosexual-con-la-inquisicion>.

leaders not to fall for attempts by conservative politicians to put the issue of marriage equality to a national referendum or to compromise on the issue by agreeing to the creation of same-sex civil unions. She contended that putting the fate of the rights of minorities in the hands of the majority was unbecoming for a democracy, and that civil unions would stigmatize homosexuals as second-class citizens. More than anything else, however, Kirchner advanced the cause of marriage equality in Argentina by reinforcing the view of gay activists that marriage equality would not be a victory for the homosexual community but rather a victory for equality in Argentina.

In defending her support for same-sex marriage, Kirchner stressed that her support was in line with her advocacy for equality for all Argentines. "Minorities should have the same rights as everybody else," she noted while addressing the issue of marriage equality on Argentina's Independence Day, on 9 July 2010.⁵³ She re-affirmed this theme upon signing the same-sex marriage bill on 21 July 2010. She intoned: "We are a more equitable society this week than last week," adding that: "thousands of Argentines have conquered rights I already had."⁵⁴

III. A CIVIL RIGHTS STRUGGLE IN BRAZIL

A gay rights movement began to organize in Brazil before the end of military rule in 1985 greatly facilitated by the relative openness of the military regime in place since 1964. Although during military rule in Brazil it was routine for the police to arrest gays at popular cruising spots of major metropolitan areas, the military was tolerant of homosexuality and transvestism, viewing them as part of Brazilian culture. By the late 1970s, the military's "liberal" attitude towards homosexuality had helped make Brazil's gay community the largest and best organized in all of Latin America.⁵⁵ The country had the region's most important gay newspaper, *Lampião*, which began publishing in 1976, and the most prominent gay organization, *Grupo Gay da Bahia* (GGB), the first Latin American gay organization to be granted state recognition, in 1980.⁵⁶ "It is legal to be homosexual," became the unofficial slogan of the still-nascent Brazilian gay rights movement.

53. San Miguel de Tucumán *Cristina Defendió al Matrimonio Gay tras los Ataques de la Iglesia*, 9 July 2010, LE BLOG DE TRANS-LATINAS available at <http://trans-latinas.over-blog.com/article-cristina-defendio-el-matrimonio-gay-tras-los-ataques-de-la-iglesia-53723144.html>.

54. Gisele Sousa Dias, *Cristina Promulgó la ley de Matrimonio Homosexual en un Clima de Festejos*, CLARÍN, 22 July 2010, available at https://www.clarin.com/sociedad/titulo_0_ry-BoW11APQx.html.

55. See Klein, *supra* note 5.

56. Mott, *supra* note 6, at 222–23.

Brazilian gay rights activists found a political home in the PT, a party founded in 1980 by Lula, the then leader of the São Paulo metalworkers' union, to harness the richness of civil society activism prevalent in Brazil during the late 1970s. This made the Brazilian gay rights movement the first in Latin America to be formally linked to a major political party. From the outset, the PT committed itself to advancing the rights of the gay community. The party's first platform stated: "We will not accept that homosexuality [*sic*] be treated as a disease or a matter for the police [. . .] [and we] will defend the respect that these people deserve, calling them to the greater mission of constructing a new society."⁵⁷ By the mid to late 1980s, with the PT in control of cities like Porto Alegre, Belém, Recife, and São Paulo, the nation's largest metropolis and its economic engine, gay issues rose to the forefront of state and national politics in Brazil.

A notable legacy of the incorporation of gay activists into the PT was the opportunity it granted gay activists to influence the making of Brazil's anti-discrimination laws, including a new federal constitution, enacted in 1988. This approach of using domestic legal structures to legitimize gay rights stands in stark contrast to what transpired in neighboring Argentina, where, as seen already, gay activists relied upon universal human rights principles as the basis for the legitimacy of gay rights. Oddly enough, the attempt to legitimize gay rights under civil rights in Brazil proved to be a more arduous and complicated proposition than the seemingly utopian effort by Argentine gay activists to legitimize gay rights under universal human rights principles.

A. Pursuing "Gay" Civil Rights

Fittingly enough, the endeavor to make gay rights into civil rights in Brazil began after the 1985 elections returned the country to civilian rule. That election voted in a brand-new national legislature tasked with drafting a new constitution to replace the one enacted by the military regime in 1967. This was a rare political opportunity structure for Brazil's budding gay rights movement to have a direct impact in shaping the legal institutions of the state. As part of the constitutional drafting process, the priority for gay activists was to incorporate sexual orientation as a category for legal protection, alongside race, gender, and age. Had this effort been successful, Brazil would have been the first country in the world to ban anti-gay discrimination, explicitly, by means of a constitutional provision; this honor eventually went to South Africa's post-Apartheid constitution, enacted in 1997.

57. FUNDAÇÃO PERSEU ABRAMO & DIRETÓRIO NACIONAL DO PT, RESOLUÇÕES DE ENCONTROS E CONGRESSOS: PARTIDO DOS TRABALHADORES (1979–1998) 111 (1998).

The attempt to ban anti-gay discrimination in the new constitution reflected the growing political clout of gay rights leaders in Brazil's new democracy. In particular, the mere possibility that the new federal constitution would reflect a concern for the rights of the homosexual community reflected the political connections of gay activists, such as the late João Antonio Mascarenhas of *Triângulo Rosa*. Along with Mott, Mascarenhas is credited with devising the "interest group" approach to gay politics in Brazil's new democracy.⁵⁸ At the heart of the strategy was securing support from those political forces most willing to press for gay rights in the national congress.

Despite the valiant efforts of gay activists, the anti-gay discrimination ban was soundly defeated, with only 23.2 percent of members of the Chamber of Deputies, mainly PT representatives, supporting the ban.⁵⁹ Accounting for this defeat, Mascarenhas noted that gay activists were unable to overcome "opposition to the rights of sexual minorities in the federal legislature" posed by "conservatism, *machismo*, homophobia and religion."⁶⁰ The fight for a constitutional ban on anti-gay discrimination was not for naught, however. It put the issue of gay rights on the national political agenda and inspired similar bans in state constitutions across Brazil, starting with the constitutions of the states of Mato Grosso and Sergipe.

Since the enactment of the 1988 Brazilian Constitution, gay activists, with the assistance of the PT, have introduced an avalanche of LGBT bills in the Brazilian Congress. Among these were bills to amend the Constitution to ban anti-gay discrimination, to recognize same-sex couples as "stable unions," to include sex-reassignment operations under the national healthcare system, to establish 28 June as National Gay Pride Day, to make it illegal to reject blood donations from homosexuals, and to criminalize homophobia. These legislative proposals were all defeated; most of them were not even put to a vote. The last bill, the anti-homophobia bill, which gay activists have traditionally targeted as their biggest legislative priority, was defeated under the Dilma Rousseff administration in 2013.

Echoing Mascarenhas, Mott attributes the travails of gay legislation in the Brazilian Congress since 1988 to "a brew of religion, *machismo*, and homophobia."⁶¹ There is little doubt about this assessment. Gay rights are anathema to the so-called "bullets, beef, and bible" caucus, the conservative cluster of national security, agrarian, and religious interests that controls the lower house of the Brazilian Congress. Its power is magnified by the fragmentation of the Brazilian party system; this requires that any major

58. de la Dehesa, *supra* note 4, at 34–37.

59. Juan P. Pereira Marsiaj, *Political Parties, Culture and Democratization: The Gay, Lesbian, and Travesti Movement in the Struggle for Inclusion in Brazil*, Paper presented at the Annual Meeting of the American Political Science Association, 1–4 Sept. 2005, at 9.

60. *Id.* at 9–10.

61. Electronic communication with Luiz Mott (21 June 2013).

legislation in the Brazilian Congress have the support of a broad inter-party alliance. However, even before conservative and religious opposition to gay rights began to consolidate in the National Congress, the gay activists' strategy of working primarily through official political channels fell short in many respects.

B. Mixed Blessings

One consistent problem has been a lack of steady support from the PT. A great virtue of the PT was its ideological heterogeneity; it incorporated virtually all of the major social movements of the democratic transition and its aftermath including the trade union movement, the feminist movement, and the Afro-Brazilian movement. However, this heterogeneity also made for deep disagreements within the party about how hard to push for gay rights. This undercut a coherent stance on gay issues within the PT and the ability of PT leaders to strike compromises with other parties from the left on behalf of the gay community. A case in point was the clash of cultures within the PT between gay activists and the Catholic left, a key force in the founding of the party.⁶² PT Catholic leaders, such as Hélio Pereira Bicudo, Lula's vice-gubernatorial candidate in the PT's first electoral campaign in São Paulo in 1982, have traditionally been contemptuous of the gay rights movement believing that homosexuality is at odds with their religious values.

A bigger problem was that the agenda of gay activists was often at odds with the political ambitions of the PT. By the mid-1990s, with Lula's viability as a presidential candidate on the rise, the PT underwent a make-over from a radical left-wing party to a catchall party that, according to anthropologist Peter Fry, a longtime observer of gay politics in Brazil, made "the gay community an inconvenient ally."⁶³ The inflection point in the PT's transformation came during the 1994 presidential campaign, which pitted Lula against Fernando Henrique Cardoso of the center-right Brazilian Social Democratic Party (PSDB). In a desperate attempt to defeat Cardoso, the PT began to shore up support among Catholic voters by rescinding its support for abortion and same-sex civil unions. Many gay activists felt betrayed by the PT, but others believed that a Lula presidency compensated for any sacrifices. According to historian James Green, "[w]hile its tepid support for gay and lesbian rights discouraged some activists who had looked at the PT as an electoral alternative, the strengthening of the party through the 1990s propelled activists into closer relationships with this sector of the Brazilian left which continued to be the only political force willing to offer legislative alliance to the movement."⁶⁴

62. See MARGARET E. KECK, *THE WORKERS' PARTY AND DEMOCRATIZATION IN BRAZIL* 97–98 (1992).

63. Electronic communication with Peter Fry, *Anthropologist* (5 June 2013).

64. Electronic communication with James Green, *Historian* (28 June 2014).

Lula's rise to the presidency in 2003 sent expectations about a gay rights revolution in Brazil to an all-time high. Yet Lula pointedly declined to use his massive political capital to push for gay rights. Supporting gay rights ran contrary to his desire to expand the PT electorate. This desire peaked during the 2006 reelection campaign that found Lula determined to avoid a run-off election. After 2003, the main order of business was to court, assiduously, the growing Evangelical vote, much of it Afro-Brazilian, which Lula had failed to capture in 2002. To that end, and to the dismay of gay activists who felt dismissed and disrespected, Lula made alliances with some of the most prominent foes of the gay community, such as Evangelical pastor and Republican Senator Marcelo Bezerra Crivella.

It was not until June 2008, that Lula fully re-engaged with gay issues and the gay community at the National Conference of Gays, Bisexuals, Transvestites and Transsexuals, an event that highlighted the federal government's national plan for promotion of the citizenship and human rights of the LGBT community. It incorporated fifty-one policies, including civil unions for gay couples, legalization of gay adoptions, sexual diversity educational programs for the military and the police, lifting restrictions for homosexuals wishing to donate blood, and adding discussion of homosexual families in educational textbooks. "In remarks that drew the ire of profamily groups and that delighted an audience of some seven hundred people, Lula declared homophobia 'the most perverse disease impregnated in the human head' and pledged to do 'all that is possible to criminalize homophobia.'"⁶⁵ Curiously, the conference did not call for same-sex marriage, something already in the agenda of many gay rights organizations, including those of Argentina, Spain, and the United States. Nonetheless, the conference was all mostly for naught with Lula already a lame duck president and the Congress and the political class already looking forward to the 2010 presidential race.

C. Weak Societal Outreach

Brazilian gay activists also fell short in their efforts to reach outside of the PT to build societal support for gay rights, at least relative to their Argentine counterparts. Part of this reflected the peculiarities of Brazil. It is certainly harder to shape public opinion in Brazil, a vast country of some 200 million people, than in Argentina, a smaller country of 43.4 million, with its population heavily concentrated in and around the capital city of Buenos Aires. There is also the difficulty of mobilizing the Brazilian public around the issue of homosexuality, including the gay community itself. Mott notes that many Brazilians, including many in the gay community, do not think

65. ENCARNACIÓN, *supra* note 2, at 180.

that homophobia is a serious issue in Brazil, believing that “discrimination against homosexuals is antithetical to Brazilian culture, and that if you are discreet you will be fine.”⁶⁶

Arguably, a bigger problem for gay activists was trying to impact society and the culture at large by operating almost exclusively through the political system and the structures of the state. The most comprehensive educational campaign undertaken by Brazilian gay activists was *Brasil sem homofobia* (Brazil without homophobia), launched under the Lula administration, in 2004, to curb anti-gay violence. However, the program was poorly financed, since Lula was worried about upsetting conservative voters, especially Evangelicals. Moreover, some of the program’s provisions that required congressional approval, such as one compelling the state to keep track of anti-gay crimes, were never implemented. Another campaign, *Escola sem homofobia* (Schools without homophobia), to teach tolerance toward homosexuals to school children devised by gay activists and the Rousseff administration, was canceled by Rousseff herself in 2013, after Evangelical leaders complained that it was too sexually suggestive. Rousseff argued that “her government would not make ‘propaganda of sexual preferences,’ a statement that shocked and angered gay activists.”⁶⁷

Ironically, societal outreach fared better in the Cardoso era. Working in collaboration with gay activists, the Cardoso administration developed the *Programa Nacional DST/AIDS* (PNDA), a policy that “guarantees free and universal access to anti-retroviral therapy through the national healthcare system to anyone infected with the HIV virus.”⁶⁸ The policy’s success in curbing the ravages of the epidemic is undeniable. By 2007, Brazil’s AIDS caseload stood at about 800,000, half of what the World Bank had predicted in 1994. Nevertheless, the program also resulted in the virtual “NGO-ization” of the Brazilian gay movement, with the emergence of hundreds of new gay organizations involved in HIV/AIDS, most of them state-funded. Eventually, these organizations began to coalesce around the *Associação Brasileira de Gays, Lésbicas, Bissexuais, Travestis e Transexuais* (ABGLT), a national network of some 300 LGBT groups formed in 1995 that claims the title of Latin America’s largest gay rights organization.

From its inception, the close relationship between the ABGLT and the state extended beyond HIV/AIDS policy. ABGLT leaders were incorporated into the Cardoso administration’s *Programa Nacional de Direitos Humanos* (PNDH), a human rights initiative intended to remedy the failure of the 1988 Brazilian Constitution to ban anti-gay discrimination. But little came of this

66. Electronic communication with Luiz Mott (5 June 2013).

67. Electronic communication with Paulo Iotti, Legal Scholar and current President, Group of Lawyers for Sexual Diversity (GADvS) (8 May 2017).

68. ENCARNACIÓN, *supra* note 2, at 173–74; João Biehl, *The Activist State: Global Pharmaceuticals, AIDS, and Citizenship in Brazil*, 22 *SOCIAL TEXT* 105 (2004).

effort. Although the PNDH's final report recognized gays, lesbians, and transvestites as among Brazil's most vulnerable minorities, no steps were taken to remedy the situation. For instance, Cardoso had endorsed same-sex civil unions during his re-election campaign, but he did nothing to advance this goal while in office. Nevertheless, the ABGLT was hesitant to even criticize the Cardoso administration, giving rise to criticism from other gay groups, such as GGB, that the ABGLT was "privileging the health concerns of the gay community over its civil rights."⁶⁹ ABGLT president Toni Reis, however, is unapologetic about his organization's collaboration with the government and the lack of mobilization against the Cardoso government noting that: "emergency issues needed urgent solutions."⁷⁰

D. A Gay Rights Backlash

Having failed to make much headway through the legislature, in recent years Brazilian gay activists have shifted their attention to the courts, believing that the Brazilian Constitution is elastic enough to legitimate gay rights. Paulo Iotti, a legal scholar and current president of Group of Lawyers for Sexual Diversity, or "GADVs," a São Paulo-based LGBT advocacy organization, observes that even though the Brazilian Constitution recognizes "the stable union of a man and a woman as a family entity, this does not preclude recognition of same-sex couples as a stable union and even the right of same-sex couples to petition a marriage license."⁷¹ In making this argument, gay activists and legal scholars such as Maria Berenice Dias draw on the theory of "homo-affection," which suggests that same-sex couplings are not only sexual but also based on affection (much like heterosexual couplings), and thus deserving of constitutional protection as a family unit.⁷²

On 6 May 2011, Brazil's Federal Supreme Court, in a 10–0 decision (one justice abstained from voting since he had previously spoken publicly in favor of same-sex marriage), recognized same-sex couples as "stable unions," and compelled the state to treat homosexual families in the same manner it treated heterosexual families.⁷³ The ruling originated in a suit filed by Rio de

69. Electronic communication with Luiz Mott, *supra* note 66. See also REGINA FACCHINI, *SOPA DE LETRINHAS? MOVIMENTO HOMOSSEXUAL E PRODUÇÃO DE IDENTIDADES COLETIVAS NOS ANOS* (2005), available at <https://repositorio.ufsc.br/bitstream/handle/123456789/1232/facchini-regina.pdf?sequence=1>.

70. Electronic communication with Tonia Reis, President, ABGLT (20 Feb. 2015).

71. Electronic communication with Paulo Iotti, (21 Apr. 2017).

72. Chico Felitti, *Maria Bernice Dias Foi Pioneira em Defender Direitos Gays*, FOLHA DE S. PAULO, 1 Aug. 2012, available at <http://www1.folha.uol.com.br/serafina/1066438-maria-berenice-dias-foi-pioneira-em-defender-direitos-gays.shtml>; see also PAULO ROBERTO IOTTI VECCHIATTI, *MANUAL DA HOMOAFETIVIDADE: DA POSSIBILIDADE JURÍDICA DO CASAMENTO CIVIL, DA UNIÃO ESTÁ VEL E DA ADOÇÃO POR CASAS HOMOAFETIVOS* 244–54 (2d ed. 2013).

73. Adilson Jose Moreira, *We are a Family!: Legal Recognition of Same-Sex Unions in Brazil*, 60 AM. J. COMP. L. 1004 (2012).

Janeiro governor Sergio Cabral and attorney general Roberto Gurgel. They argued that the Brazilian Constitution did not bar state recognition of same-sex relationships. In 2013, a subsequent ruling by the National Judicial Council, a body that supervises the judiciary branch in Brazil, compelled all notary publics to issue marriage certificates to those same-sex couples seeking one.

Nonetheless, the shift in gay activism from the legislature to the court has only made the political environment for gay rights in Brazil more toxic. As in the United States, where the courts have also played a very prominent role in advancing gay rights, especially same-sex marriage, judicial decisions favoring gay rights in Brazil have triggered a vigorous political backlash. There are at least three manifestations of this backlash in Brazil, involving actions by the general public, the courts, and the political elite. The first one is a vigorous societal mobilization against gay rights.

Every year, just days ahead of São Paulo's famed gay pride parade, Evangelical leaders organize the *Marcha para Jesus*, or "March for Jesus," an event infamous for its over-the-top denunciations of atheism, abortion, and homosexuality. The march's 2016 edition, which drew close to half a million people, featured Brazil's most homophobic politicians, religious leaders, and entertainers, including Pastor Silas Malafaia, a leader of the *Pentecostal church Assembleia de Deus Vitória em Cristo* (Assembly of God Victory in Christ), and a self-declared "public enemy number one" of the Brazilian gay movement. He once remarked that: "I love homosexuals like I love criminals and murderers."⁷⁴

A judicial pushback is the second manifestation of the gay rights backlash. Among those leading the backlash are conservative jurists who contend that judges are legislating from the bench "special rights" for the gay community. Nelson Nery Junior, a former Appellate Prosecutor for the State of São Paulo, has argued that the courts' recognition of same-sex marriage amounts to "a frontal violation of article 1514 of the Civil Code," and of the Brazilian Constitution, both of which recognize marriage to be the union of a man and a woman.⁷⁵ Such stances have emboldened members of the judiciary to block gay rights advances, such as notaries public refusing to obey the Federal Supreme Court's decision legalizing same-sex marriage, and judges seeking to undo the progressive gains by the LGBT movements in recent years. In September 2017, a federal judge overturned a 1999 ban on "ex-gay" conversion therapy, causing consternation and outrage among gay activists and health care professionals. The Brazilian Federal Council on Psychology, which instituted the ban, is appealing the decision.

74. ENCARNACIÓN, *supra* note 2, at 158; Simon Romero, *Evangelical Leader Rises in Brazil's Culture Wars*, N.Y. TIMES, 25 Nov. 2011, available at <http://www.nytimes.com/2011/11/26/world/americas/silas-malafaia-tv-evangelist-rises-in-brazils-culture-wars.html>.

75. Nelson Nery Junior, *Prefacio*, in JURISDIÇÃO CONSTITUCIONAL E DIREITOS FUNDAMENTAIS 20 (Georges Abboud ed., 2011).

Third and last is the political counter-reaction to gay rights. In recent years, the Brazilian Congress has rejected a law banning anti-gay discrimination and tabled a gender identity law modeled on Argentina's gender identity law, and entertained a host of patently homophobic legislation intended primarily to please the Evangelical movement. Among the proposed legislation are the creation of a national holiday to celebrate "hetero-pride," a ban on "Christ-phobia" or the desecration of Christian symbols (that ban targets gay pride parades, which traditionally have featured controversial floats that mix sexuality and religious imagery), and the *Estatuto da Família* (Family Statute), a proposed law to define the family for federal purposes as "a social nucleus formed by the union of a man and a woman." If enacted, this law would undermine same-sex marriage, homosexual stable unions, and gay adoptions by denying rights to non-heterosexual unions, such as inheritance rights and custody rights in case of divorce.

To protect existing gay rights from the current backlash, gay activists such as Reis stress the need for actual LGBT laws such as those that have been enacted in Argentina. However, this seems less likely now than at probably any other time in the new democracy. The Congress elected in 2014 is the most socially conservative since the democratic transition, in no small part due to the growing clout of the Evangelical bloc. At the present time, this bloc controls almost fifteen per cent of seats of the lower house of the Brazilian Congress. However, others, like Bruno Bimbi, one of the veterans of Argentina's gay rights battles, now living in Brazil, where he is advising Federal Deputy Jean Wyllys, the only openly gay member of the Brazilian Congress, see a greater need in Brazil for engaging civil society and the culture at large about the need to end anti-gay discrimination and violence. In Bimbi's view, what makes the Brazilian's struggle for gay rights radically different from that of Argentina is that Argentine activists understood the need to transform the culture rather than to simply outlaw homophobia.⁷⁶

IV. CONCLUSION

The paucity of comparative research on gay rights politics, especially in Latin America, where even the social movement literature has traditionally ignored LGBT organizations and where gay rights advances have arisen in earnest only recently, limits the extent to which we can generalize about the importance of the gay rights campaign in determining the outcomes of gay rights struggles relative to other variables drawn from the socio-economic environment and the political-institutional context. This being said, our

76. Bruno Bimbi, *Hannah Arendt y el Matrimonio Igualitario: La Lucha por los Derechos LGBT en Argentina*, 251 *NUOVA SOCIETÀ* 113, 122–23 (2014).

analysis affords at least two lessons that resonate well beyond the cases of Argentina and Brazil.

First among these lessons is the need to look beyond conventional measures of social movement strength to understand the outcomes of social movement struggles. So much of our understanding of social movement politics remains conditioned by the “resource mobilization” paradigm, a body of work which has guided the study of social movement politics since the 1970s, if not earlier.⁷⁷ As originally employed in the study of the trade union movement, the anti-war movement, and the women’s movement, this paradigm emphasizes the importance of a large membership base, financial assets, political expertise, and access to the political system to the success of any social movement by, among other things, facilitating collective action and solidifying the movement’s demands.⁷⁸ It is not clear, however, that this theorizing transfers to the gay rights movement.

The main reason why Argentine gay activists have been more successful than their Brazilian counterparts is not because they are organizationally richer, but rather because they have done a better job at framing and articulating their demands. Above all, perhaps, Argentine activists had the better campaign message, by conjoining gay rights to the broader struggle for human rights, citizenship, and democratization. Brazilian gay activists, to the extent to which they actually had a cohesive message, limited their activism to arguing for equality under Brazilian law. Making more ambitious and universal claims tying gay rights to human rights and the deepening of democratic citizenship was less important.

To be sure, gay rights campaigns do not exist in a vacuum. They are intimately tied to a wide-range of contextual factors. Several of them can be teased out from this analysis, starting with the political environment. In Argentina, the prominence of human rights in the country’s politics provided a compelling framework for articulating gay rights demands and for constructing outreaches to civil society. Human rights rhetoric and strategies also helped gay activists to ground their struggle into the local political environment given the unusually deep resonance of human rights in Argentine political culture. This suggests the importance of modeling the campaign for gay rights in ways that connect with local political realities.

A less obvious factor is the state’s history of homosexual repression. At least based on the Argentine experience, it appears that a dark history of repression of homosexuality can itself become the inspiration for the construction of a bold and ambitious notion of gay equality. State-sponsored repression of homosexuality in Argentina, especially under the most recent

77. John D. McCarthy & Mayer N. Zald, *Resource Mobilization and Social Movements: A Partial Theory*, 82 *AM. J. SOCIO’Y* 1212 (1977).

78. SIDNEY TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS* (2d ed. 1998).

period of military rule, added a sense of urgency, courage, and righteousness to the activists' endeavors that was for the most part absent in Brazil. Indeed, in Brazil greater state tolerance of homosexuality seems to have created less urgency among gay activists as well as more willingness to adjust their goals according to prevailing political conditions.

Last but not least is the institutional development of the gay movement relative to the political system. In Argentina, the gay rights movement developed independently of the political system; and quite in striking contrast to Brazil, where the gay rights movement was nurtured within the structures of the PT. This resulted in a more autonomous gay rights movement in Argentina and a more corporatized one in Brazil. There was no political party in Argentina dictating how far and how fast the movement could go in making gay rights demands upon the state, unlike the situation in Brazil, where the gay rights movement was continually pressured to sacrifice or modify its goals for the good of the party.

The second lesson is that regardless of the nature and outcomes of the gay rights campaign, it is important to recognize the agency of gay activists in shaping their own revolutions. This should be self-apparent, but it is not. Much of the social science literature on the evolution of social rights tends to overlook the role of activism in shaping social change in favor of more structural factors, such as economic development and political modernization.⁷⁹ More recently, opponents of same-sex marriage have set forth the argument that same-sex marriage is not the fruit of societal demands or even of gays themselves, but rather a project of a liberal elite hell bent on using gay rights to crush traditional values and mores.⁸⁰ Intended to de-legitimize gay rights, this view is hard to square with the historical evidence of the struggle for gay rights by the gay community in Latin America and elsewhere.

79. T. H. MARSHALL & TOM BOTTOMORE, *CITIZENSHIP AND SOCIAL CLASS* (1987).

80. Sherif Girgis, Robert P. George, & Ryan T. Anderson, *What is Marriage?*, 34 *HARV. J.L. & PUB. POL'Y* 246 (2010).