

2-2022

Rice and Beans with a Side of Queer: Socio-Legal Developments in the Cuban LGBTQ+ Community

Carlos A. Figueroa

Follow this and additional works at: <https://scholarship.law.wm.edu/wmjowl>



Part of the [Comparative and Foreign Law Commons](#), and the [Sexuality and the Law Commons](#)

Repository Citation

Carlos A. Figueroa, *Rice and Beans with a Side of Queer: Socio-Legal Developments in the Cuban LGBTQ+ Community*, 28 Wm. & Mary J. Race, Gender, & Soc. Just. 421 (2022), <https://scholarship.law.wm.edu/wmjowl/vol28/iss2/6>

RICE AND BEANS WITH A SIDE OF QUEER: SOCIO-LEGAL DEVELOPMENTS IN THE CUBAN LGBTQ+ COMMUNITY

CARLOS A. FIGUEROA*

ABSTRACT

Over the last century, the LGBTQ+ community has occupied a peculiar space in Cuba that has both resisted and acclimated to the ever-changing sociopolitical dynamics on the Island. This Article examines the Cuban queer community's socio-legal history in pre- and post-Revolution Cuba along with its tumultuous synthesis into U.S. culture.

INTRODUCTION

TERMINOLOGY

I. QUEER LIFE & THE LAW IN CUBA

A. *Pre-Revolution Cuba*

B. *Post-Revolution Developments*

II. UNITED STATES-CUBAN RELATIONS GET A LITTLE QUEER

A. *An Exodus and Shifting Attitudes Towards Queer Cubans*

B. *Immigrant Queer Cubans as a Recognized Social Group*

III. MODERN LEGAL DEVELOPMENTS

A. *Reflections on Recent Cuban Movements*

B. *Comparative Study of Queer Rights in Latin America*

CONCLUSION

INTRODUCTION

When the Cuban community is mentioned in conversation, many people are reminded of fictional Cuban refugee Tony Montana wreaking havoc in 1980s Miami,¹ Russia's deployment of nuclear weapons on Cuban soil during conflicts with the United States in 1962,² or the Fidel Castro-led "Cuban Revolution" that cemented communist

* JD 2021, Tulane University Law School; AB 2016, Brown University. Thank you to Professor José R. Cot for helping me develop this topic. I am equally grateful to my immigrant Cuban family for their hard work and immense support.

1. See Gregory Jaynes, *Miami Official Objects to Cuban Refugee Film*, N.Y. TIMES, Aug. 24, 1982, at A12.

2. See, e.g., Arnold L. Horelick, *The Cuban Missile Crisis: An Analysis of Soviet Calculations and Behavior*, 16 WORLD POL. 363, 363, 370–89 (1964).

politics for the nation since 1959.³ However, none of these historic markers directly emphasizes the social and legal experiences of the Cuban LGBTQ+ community reported on as early as the 1800s by literary figures like José Martí.⁴ While other nations are finally shedding light on the marginalization of queer experiences with their increased visibility in mainstream culture,⁵ this form of recognition lags in places like Cuba. Given the incredible amount of violence toward the LGBTQ+ community in most Latin American countries, it's no surprise queer Latinx people feel unsafe sharing their experiences or fighting for better legal rights⁶ despite postmillennial glimmers of socio-legal progress largely left unfinished in Cuba.⁷

This Article acknowledges that the queer community's historic place as an obscure or disregarded part of Cuban culture requires further attention. Throughout, and where appropriate, comparisons between queer rights in other Latin American nations are described. Part I scrutinizes various pre- and post-revolution constitutional documents, laws and other legal practices affecting queer people in Cuba, along with a review of certain personal experiences under these regimes. Part II considers United States-Cuban relations with respect to progressing queer rights in Cuba that develops at odds with both Cuban assimilation in the United States and legal implications affecting queer Cuban immigrants following the Mariel Boatlift. Part III provides a reflection on modern constitutional and social developments affecting the Cuban queer community to this day. The persistence of queer Cubans—despite a tumultuous relationship with law and society—indicates there is hope for their gradual acceptance even if shrouded in a nation's problematic system.

3. See, e.g., Eduardo Moisés Peñalver, *Redistributing Property: Natural Law, International Norms, and the Property Reforms of the Cuban Revolution*, 52 FLA L. REV. 107, 119–20 (2000).

4. See Kristie Soares, *Traveling Queer Subjects: Homosexuality in the Cuban Diaspora*, 45 REVISTA DE ESTUDIOS HISPANICOS 635, 635–36 (2011) (detailing the relationship between “[h]omosexual bodies” and “male effeminacy” in Jose Martí's nineteenth century writings concerning Cuba).

5. See, e.g., Erica Ruff, Note, *Straight Actors in LGBT Roles: Creative Casting or Employment Discrimination?*, 25 CARDOZO J. EQUAL RTS. & SOC. JUST. 550, 567–68 (2019) (commenting on increasing “small victories” for LGBT stories in the U.S. entertainment industry).

6. See Marilia Brocchetto, *The Perplexing Narrative About Being Gay in Latin America*, CNN (Mar. 3, 2017, 7:04 PM), <http://www.cnn.com/2017/02/26/americas/lgbt-rights-in-the-americas/index.html> [<https://perma.cc/2AKV-XPSY>].

7. See Jasmine Garsd, *On Being Gay, And Socialist, In Cuba Today*, NPR (June 26, 2014, 3:46 PM), <http://www.npr.org/sections/parallels/2014/06/26/325801573/on-being-gay-and-socialist-in-cuba-today> [<https://perma.cc/EGM4-K2R8>] (noting progressing attitudes towards the LGBTQ+ population in Cuba despite the country's lack of “concrete laws” protecting the queer community).

TERMINOLOGY

Members of the Cuban LGBTQ+ community are referred to as “queer” interchangeably throughout this Article.⁸ Labeling any particular movements described in this Article as solely gay or lesbian in nature, for example, would be diminishing the importance of the transgender community’s contribution to these experiences, and perpetuate the societal erasure of many transgender people in Cuba and other Latinx cultures.⁹ This is not to promote the idea that different parts of the queer community are all the same, as each “othered” experience can feel or look different depending on whether one identifies as lesbian, gay, bisexual, transgender, intersex, asexual or any other non-heteronormative sexual or gender identity.¹⁰

I. QUEER LIFE & THE LAW IN CUBA

A. *Pre-Revolution Cuba*

During the early to mid-twentieth century, the LGBTQ+ community in Cuba gathered itself in the most populated area on the island—Havana.¹¹ This kind of queer “metronormative” exodus was considered common to many cultures internationally,¹² as it could allow for “a more liberated life-style” that contrasted with the “interior of the [Cuban] island.”¹³ Although a significant portion of the Cuban queer community did thrive in rural parts of the island,¹⁴ these

8. See *General Definitions*, UNIV. CAL. S.F. LESBIAN, GAY, BISEXUAL & TRANSGENDER RES. CTR., <http://lgbt.ucsf.edu/glossary-terms> [<https://perma.cc/5SDX-JJXR>] (last visited Dec. 6, 2021).

9. See TRANS LATIN@ COALITION, TRANS VISIBLE: TRANSGENDER LATINA IMMIGRANTS IN U.S. SOCIETY 9–10 (2013) (identifying various Latinx cultures that “marginaliz[e]” and “persecut[e]” the transgender community).

10. See Brenda Cossman, *Queering Queer Legal Studies: An Unreconstructed Ode to Eve Sedgwick (and Others)*, 6 CRITICAL ANALYSIS L. 23, 27 (2019) (arguing against the use of “queer” as “synonymous with LGBT identity” due to varied, often clashing experiences).

11. Lourdes Arguelles & B. Ruby Rich, *Homosexuality, Homophobia, and Revolution: Notes Toward an Understanding of the Cuban Lesbian and Gay Male Experience, Part I*, 9 SIGNS 684, 685 (1984).

12. See Bud W. Jerke, *Queer Ruralism*, 34 HARV. J. L. & GENDER 259, 270–72 (2011) (recognizing contentious scholarship that focuses on queer people feeling forced to leave rural areas to avoid being “oppressed, persecuted, unaccepted, and isolated”).

13. Arguelles & Rich, *supra* note 11, at 685.

14. Legal and social scholarship identifying the movement of queer Cubans to Havana is likely accurate to an extent, but this does not account for the considerable population of satisfied queer people living in rural areas that have likely been unstudied by virtue of not living somewhere more accessible and “metropolitan.” See Jerke, *supra* note 12, at 271–73 (explaining that the “assumption” of queer communities historically moving to urban areas is harmful given the growing scholarship identifying dynamic queer life that existed and continues to exist in rural areas).

smaller areas—characterized mostly by “prerevolutionary villages”—made rural living more “intimate” and convenient to police queer-ness.¹⁵ This made it easier to simply identify the one or two seemingly LGBTQ+ community members and led to their ostracization from the Cuban village.¹⁶

The machismo-dominated culture that promoted the idea that heterosexuality was “compulsory” was particularly felt in these rural areas, although the same idea nevertheless emerged in city centers, like Havana, increasingly populated and visited by capitalist Americans that brought their own patriarchal influences by the 1940s.¹⁷ Still, there were certain accounts of mainstream LGBTQ+ acceptance documented by Cuban writers, such as Ana María Simó and Reinaldo García Ramos, who remembered “openly or discreetly homosexual lifestyles” in pre-revolutionary Cuba and described “an evident homosexual sensibility” in local 1950s and 1960s music.¹⁸ But these moments of acceptance have largely been eclipsed by more turbulent legal and historical accounts.¹⁹

For example, the pre-revolutionary government enacted the Public Ostentation Law in 1938 as part of Cuba’s Penal Code, which did not explicitly outlaw the existence of homosexuals in its language, but made it illegal to display “public homosexual behavior” anywhere in the country, implicitly putting many in the queer community at risk for persecution merely for their existence.²⁰ Cuba’s 1940 Constitution, the final one before the revolutionary government’s takeover,²¹ similarly harmed and marginalized its queer community by failing to consider the inclusion of any positive rights—whether through affirmations of their equality or rights to same-sex marriage.²²

15. Arguelles & Rich, *supra* note 11, at 686.

16. *See id.*

17. *See id.* at 685–87.

18. Rafael Ocasio, *Gays and the Cuban Revolution: The Case of Reinaldo Arenas*, 29 *LATIN AM. PERSPS.* 78, 91–92 (2002) (quoting Ana María Simó & Reinaldo García Ramos, *Hablemos claro*, *MARIEL*, Spring 1984, at 9–10) (internal quotations omitted).

19. *See id.* at 78; *see also* CODIGO DEF. SOC. VIGENTE REPÚBLICA CUBA, CUBA CODIGO PENAL, art. 384–85 (1938) [hereinafter CUBA CODIGO PENAL].

20. CUBA CODIGO PENAL, art. 384–85 (1979) [Current Social Defense Code of the Cuban Republic, art. 384–85] (listing “pública ostentación de su condición de homosexual” as illegal); *see also* Kimberly Gonzalez, *Civil Marriage and Gay Union Law in the Americas*, 16 *L. & BUS. REV. AM.* 285, 294 (2010) (summarizing the landscape for queer rights in Cuba).

21. Matias F. Travieso-Diaz, *Some Legal and Practical Issues in the Resolution of Cuban Nationals’ Expropriation Claims Against Cuba*, 16 *UNIV. PA. J. INT’L BUS. L.* 217, 227–28 (1995).

22. *See* CONST. CUBA (available from HeinOnline World Constitutions Illustrated, edited by Jefri Jay Ruchti and translated by Anna I. Vellvé Torras) (for instance, marriage refers to a man and a woman in Article 43).

Members of queer subcommunities—like homosexuals—are mentioned explicitly in the country's Penal Code yet never referenced in its 1940 Constitution.²³

The only remotely beneficial law to the LGBTQ+ community during this time period was the impression that the community's criminal liability could *technically* never lead to death, as the 1940 Constitution only allowed the death penalty for "crimes of a military character . . . [and] treason or of espionage."²⁴ Beyond the implied freedom to simply avoid death,²⁵ the Constitution ignored queer people. Article Forty-Three of the 1940 Constitution, defines marriage as the "legal foundation of the family" that depends on the "absolute equality of rights for both spouses."²⁶ Moreover, the marriage "can [only] be dissolved by agreement of the spouses."²⁷ The only other reference to marriage in the 1940 Constitution occurs in Article Sixteen, which indicates "spouses or their children" do not have their nationality threatened after a divorce.²⁸ Because neither of these articles discuss the existence of a marriage or family without necessitating both a husband and wife, many queer Cubans were prevented from seeking same-sex marriage during this time period.²⁹

Although this was not a discriminatory scheme unique to Cuba or the worst to exist internationally even by today's standards,³⁰ erasure of the queer existence in law outside of criminal liability illustrates the caution queer Cubans had to take just to exist.³¹ And caution is exactly what they took while attempting to integrate into Havana's culture just before the Revolution further complicated their relatively underground lifestyle.³² Queer Cubans in 1950s Havana remained difficult below the surface, too, given the intensifying levels of unemployment affecting the country.³³

23. Compare *id.*, with CUBA CODIGO PENAL, art. 384–85.

24. CONST. CUBA, art. 25.

25. See *id.*

26. CONST. CUBA, art. 43.

27. *Id.*

28. CONST. CUBA, art. 16.

29. See CONST. CUBA, art. 16, 43.

30. Netherlands, the first nation to recognize same-sex marriage, did not do so until 2001. See Johanna Kalb, *Human Rights Proxy Wars*, 13 STAN. J. CIV. RTS. & C.L. 53, 65 (2017). Seventy countries still criminalize "same-sex conduct" in 2021, and seven nations maintain the death penalty for such conduct. See #OUTLAWED: "The Love That Dare Not Speak Its Name," HUM. RTS. WATCH, http://internap.hrw.org/features/features/lgbt_laws [https://perma.cc/M43G-XBZE] (last visited Dec. 6, 2021).

31. See CUBA CODIGO PENAL, art. 384–85.

32. See Arguelles & Rich, *supra* note 11, at 686 ("everyday life was not easy for the working-class . . . homosexual").

33. See *id.* (explaining the difficult employment situation for the queer community).

This demanded queer people in the workplace to remain “closeted” simply to maintain their livelihood.³⁴ Their protection from employment discrimination was arguably non-existent, as the Ministry of Labor, pursuant to the Constitution, only prohibited “discriminatory practices” in the scope of “sex, race, color, class, and any other [kind of discrimination] damaging human dignity.”³⁵ The 1940 Constitution’s reference to “sex” and “any other kind of discrimination” could seemingly encapsulate concepts like sexual orientation and gender identity, but the nearly one hundred signatories in mid-twentieth century Cuba likely did not consider that given the explicit criminalization for homosexual behavior.³⁶ Let alone the fact that a textualist interpretation of the word “sex” to include sexual orientation and gender identity in the mid-twentieth by leaders opposing the LGBTQ+ community would be highly unlikely, even if it eventually happened many years later.³⁷ Thus, fabricating heterosexual romances to deceive suspicious co-workers in the workplace was common and necessary for many in the queer community to avoid poverty or incarceration in pre-revolutionary Cuba.³⁸

Although Fulgencio Batista’s successful “military coup d’état” to seize the Cuban government in 1952 meant that the previously adopted Constitution lost much of its enforcement,³⁹ the new and short-lived regime did not protect the queer community. Batista’s initial leadership garnered positive reception from U.S. leaders,⁴⁰ which bled into the way queer people interacted with Americans on Cuban soil. A gradual shift had occurred, where “American organized crime” found its way to Havana involving the sex, drug, gambling, and tourism industries through “Batista’s political apparatus.”⁴¹ Even frequented queer-friendly bars came to be “owned” through “organized

34. *Id.*

35. CONST. CUBA, art. 20, 74.

36. CONST. CUBA, art. 20; see CUBA CODIGO PENAL, art. 384–85 (1938).

37. See Neil H. Buchanan & Michael C. Dorf, *A Tale of Two Formalisms: How Law and Economics Mirrors Originalism and Textualism*, 106 CORNELL L. REV. 591, 594–95 n.12, 637–38 (2021) (explaining that U.S. Supreme Court Associate Justice Neil M. Gorsuch’s apparent textualist interpretation of the word “sex” in *Bostock v. Clayton County* does not signify a pattern of “Justices subordinating their ideological priors to their methodological priors”); *Neil Gorsuch Has an Unacceptable, Hostile Record Towards LGBT People*, LAMBDALEGAL (Jan. 31, 2017), http://www.lambdalegal.org/blog/20170131_no-to-neil-gorsuch [<https://perma.cc/LSZ7-GGMN>] (describing Justice Gorsuch’s patterned “anti-LGBT rulings”).

38. See Arguelles & Rich, *supra* note 11, at 686.

39. Ignacio E. Sánchez, *Cuban Property Rights and the 1940 Constitution*, 3 J. TRANS-NAT’L L. & POL’Y 135, 135 (1994) (describing the brief shift to a Batista-led government in 1950s Cuba).

40. Thomas Carothers, *Backing the Wrong Tyrant*, N.Y. TIMES, June 12, 1994, at BR34.

41. Arguelles & Rich, *supra* note 11, at 686–87.

crime.”⁴² The existence of the LGBTQ+ community was shrouded in secrecy; queer life could only thrive with the presence of American tourists demanding “homoerotic experiences” from local Cuban queer employees in isolated instances.⁴³ Queer Cubans during the pre-revolution era could never truly be themselves, as the government harmed or erased their identities through laws while the same government benefitted by exploiting queer bodies as “a profitable commodification of sexual fantasy.”⁴⁴

B. Post-Revolution Developments

After Fidel Castro’s rise to power in the 1959 Communist Revolution, constitutional protections defining Cuba’s twentieth century—including private property rights—vanished.⁴⁵ Historically, marginalized communities—often located in more rural areas of the island—did not share in much of Cuba’s success.⁴⁶ In addition to organized crime, independent farming, land ownership, and the sugar industries all exploited the less privileged people of color and queer communities.⁴⁷ The Revolution had inspired many people in these Cuban communities to expect “racial unity” as soon as Castro’s leadership ousted the capitalist influence and their constitutional regime.⁴⁸ Yet these expectations went largely unfulfilled, as “equity” for these marginalized communities in Cuba would only progress minimally once “protection of political minorities” in a “climate of [counter-revolutionary] fear” resulted in a ban on freedom of expression for many minorities, including queer people.⁴⁹

Castro’s Cuba brought with it the notion that the government should be policing queer people exploring their sexual and gender identities just as much, if not more so, than under the nation’s

42. *Id.* at 687.

43. *Id.* at 686–87.

44. *Id.* at 687–88.

45. See, e.g., Jon Mills & Daniel Ryan Koslosky, *Whither Communism: A Comparative Perspective on Constitutionalism in a Postsocialist Cuba*, 40 GEO. WASH. INT’L L. REV. 1219, 1224 (2009).

46. See TEISHAN A. LATNER, CUBAN REVOLUTION IN AMERICA: HAVANA AND THE MAKING OF A UNITED STATES LEFT, 1968–1992 2–3 (Univ. N.C. Press 2018) (explaining that various people hoped racial equality would follow the Revolution); Mills & Koslosky, *supra* note 45, at 1226–27 (describing the lineage of property owners in pre-revolutionary Cuba).

47. See Mills & Koslosky, *supra* note 45, at 1223–24; Arguelles & Rich, *supra* note 11, at 686–88.

48. See LATNER, *supra* note 46, at 3.

49. *Id.* at 5–6. This is not to say progress for racial minorities was non-existent in Cuba, but a significant portion of post-revolutionary focus on assisting minorities seemed to result in merely protecting *foreign* minorities—both racial and political—holding socialist views to strategically advance Cuba’s place as a foreign power and develop “allies.” *Id.* at 5.

previous constitutional regime; a product of the new government's promulgation of dynamic independence and martial strength of "machismo" culture defined in its idea of communism.⁵⁰ Queer Cubans continued in their place of being legally and culturally unwanted.⁵¹ To post-revolution Cuba, the very same capitalist regime that exploited the queer community's labor, sexualized their bodies in the 1940s and 1950s during the bourgeoisie's prime,⁵² and simultaneously imprisoned them for "behaving" homosexually⁵³ was *also* to blame for the existence of queer people in the first place.⁵⁴ The new Cuban government reasoned the malignant queer community itself was "a product of bourgeois decadence" that was not organically grown from within Cuba's true population.⁵⁵ In Fidel Castro's own words, he explained his government's antagonism towards the queer community as a means of protecting their communist society:

[W]e would never come to believe that a homosexual could embody the conditions and requirements of conduct that would enable us to consider him a true Revolutionary, *a true Communist militant*. A deviation of that nature clashes with the concept we have of what a militant communist should be. . . . But I will be frank and say that homosexuals should not be allowed in positions where they are able to exert influence upon young people . . . [who be must indoctrinated] with the spirit of discipline, of struggle, of work.⁵⁶

Just as the new post-revolution government's perspective largely demonized the queer population, their new sets of morality laws and regulations did so as well—to a startlingly worse degree.⁵⁷ Law enforcement legally apprehended international public figures, such as poet Virgilio Piñera, throughout the 1960s and 1970s for alleged morality crimes and those public figures even saw their previously acceptable artistic works "refused publication" or entirely discarded by law enforcement because their "overt homosexuality" was egregious

50. See SUSANA PEÑA, ¡OYE LOCA!: FROM THE MARIEL BOATLIFT TO GAY CUBAN MIAMI 3–4 (Univ. Minn. Press 2013) [hereinafter ¡OYE LOCA!].

51. See *id.* (detailing the various cultural and legal structures that stifled queer Cubans).

52. See Arguelles & Rich, *supra* note 11, at 687.

53. See CUBA CODIGO PENAL, art. 384–85.

54. See ¡OYE LOCA!, *supra* note 50, at 2–3.

55. See *id.* at 3 (internal quotations omitted).

56. MARVIN LEINER, SEXUAL POLITICS IN CUBA: MACHISMO, HOMOSEXUALITY, AND AIDS 26 (Routledge 2019) (citing LEE LOCKWOOD, CASTRO'S CUBA, CUBA'S FIDEL (New York: Vintage Books 1967) (emphasis added)).

57. See CUBA CODIGO PENAL, art. 384–85 (1938); Arguelles & Rich, *supra* note 11, at 687–94.

to Cuban Communism.⁵⁸ Vital figures in the government, including attorneys, government leaders, and judges had become tools to “silence dissident[.]” behavior that became synonymous with policing social behavior beyond just common crimes or instances of overzealous political expression.⁵⁹

With the adoption of the National Assembly of People’s Power’s adoption of 1970 Penal Code, queer behavior could be criminalized both for public displays of homosexuality—like the penal code of the late 1930s—along with mere private acts of intimacy between people of the same sex that the public could potentially view.⁶⁰ This demonstrated Cuba’s ability and willingness to invade the queer community’s private spaces, as merely being caught in the act by police could be interpreted as “public.”⁶¹ Furthermore, the strict liability nature of criminal prosecution as a queer Cuban seemed entirely at odds with post-revolution Cuba’s alleged willingness to approach potential criminal behavior through motivational indicators much like the *mens rea* element required of many crimes in the United States.⁶²

For example, in the government’s adoption of the 1979 Cuban Penal Code, legislators included indicators to describe various felonies, like “delito intencional” (intentional crimes), “delito por imprudencia” (negligence crimes), and “actos preparatorios” (preparatory crimes) as a way to differentiate culpability and the severity of any penalties.⁶³ After Castro admitted his uncertainty concerning the cause of queer behavior and the importance of examining it, the idea that there would be new respect for queer Cubans seemed possible.⁶⁴ Yet forcing the queer community into a box of finite motivational indicators⁶⁵ within the Cuban Penal Code destroyed any possibility that a sense of empathy would occur in Cuba. How could the Cuban government take the time to understand a seemingly misunderstood community’s intentions that merely wanted to be accepted, if manifesting a certain feminine, butch, or non-binary behavior or disposition externally could be policed under the Cuban Penal Code?⁶⁶

58. MARK WEISS, *THE WHOLE ISLAND: SIX DECADES OF CUBAN POETRY* 566 (Univ. Cal. Press 2009); see also Arguelles & Rich, *supra* note 11, at 691–94.

59. See Erik Luna, *Cuban Criminal Justice and the Idea of Good Governance*, 14 *TRANSNAT’L L. & CONTEMP. PROBS.* 529, 531–32 (2004).

60. See CUBA CODIGO PENAL, art. 359 (1979).

61. See *id.*

62. Max Azicri, *Crime and Law Under Socialism: The 1979 Cuban Penal Code*, 6 *REV. SOCIALIST L.* 5, 16–18 (1980) (discussing felonious behavior and sanctions under the nation’s updated penal code).

63. *Id.* at 17.

64. See LEINER, *supra* note 56.

65. See Azicri, *supra* note 62, at 17.

66. See *id.*

Certain accounts of Cuban life have implied that law enforcement considered “long hair, tight pants, colorful shirts, effeminate mannerisms” to be “visible markers of male homosexuality” in the context of arrest.⁶⁷

If this is true, that meant the Cuban government could arbitrarily rationalize the decision to put on a pair of fitted pants as sufficient “intent” to commit the crime of public homosexuality under the Cuban Penal Code.⁶⁸ Equally troubling, law enforcement could arrest a male Cuban citizen for negligent homosexual behavior if the queer person should have “anticipated the consequences” of styling their hair in a less masculine-seeming way—irrespective of their actual sexuality and merely on the presentation of perceived gender norms.⁶⁹ The country’s “Ley de Peligrosidad” became embedded in the government’s culture and “pre-criminality” defined the treatment of queer people.⁷⁰

The post-revolution government promulgated further discriminatory provisions against the queer community in the Constitution of 1976—the most recent update since 1940 and the first to incorporate the “socialist ownership of property” along with government-based “powers” to oversee the nation’s communist economy.⁷¹ Unsurprisingly, even the communist-driven 1976 Constitution shared one thing in common with the diametrically opposed 1940 Constitution: omitting positive rights of any kind to queer people or making mention of them at all.⁷² Article Thirty-Five of the 1976 Constitution’s discussion of marriage yet again explicitly outlined that there could only be a “union [between] a man and a woman” to share “absolute equality of rights.”⁷³ Importantly, Article Forty-One’s explanation of forbidden discrimination on the basis of “race, color, sex, religious creeds, national origin, or any other type offending human dignity” largely remained unchanged as well, except for qualifications to what can offend “human dignity.”⁷⁴ Rather than leave “human dignity” as a non-exhaustive list for other identities like those in the queer community, Article Forty-Two specified nine instances that constituted discrimination to human dignity.⁷⁵

Because Article Forty-Two specifies that illegal discrimination occurs when a person is not given a job despite being qualified, not

67. ¡OYE LOCA!, *supra* note 50, at 6.

68. See Azicri, *supra* note 62, at 17.

69. See ¡OYE LOCA!, *supra* note 50, at 6; Azicri, *supra* note 62, at 17.

70. See ¡OYE LOCA!, *supra* note 50, at 5.

71. Mills & Koslosky, *supra* note 45, at 1224–27; see also CONST. CUBA (1976).

72. Compare CONST. CUBA (1976), with CONST. CUBA (1940).

73. CONST. CUBA, art. 35 (1976).

74. CONST. CUBA, art. 41 (1976).

75. CONST. CUBA, art. 42 (1976).

able to choose where they want to live freely, or not able to use all “social centers[;]” thus, queer people are impliedly unincorporated from Article Forty-Two’s “human dignity” catch-all for social equality.⁷⁶ When Fidel Castro expressly called for the exclusion of queer people from any positions of influence over Cuba’s youth population,⁷⁷ he suggested that queer people were an exception to the “human dignity” definition.⁷⁸ How could someone perceived as homosexual by the Cuban government be allowed to use any “social center” of their choosing without discrimination, if places like parks, beaches, and gyms prescribed children the right to use those same facilities?⁷⁹ How could a queer person exercise their rights under the Constitution to “access” an employment position at an elementary school despite meeting all “merits and capacities” professionally required of the position?⁸⁰

Being punished for existing as queer alone distressed these communities, but the *kind* of punishment they endured was an entirely different level of pain in post-revolution Cuba.⁸¹ The idea that queer-ness was a capitalist-inspired social illness meant that the Cuban government thought they could “treat it”—a prescription of physical labor was even ordered to “treat” queerness in the late 1960s.⁸² Castro penalized Cuba’s queer people—along with other socially undesirable community members like Jehovah’s Witnesses—by placing them in “Unidades Militares de Ayuda a la Producción (UMAP)[,]” a set of internment camps where the government forced “undesirable” community members into agricultural labor.⁸³ Cuban townspeople even expressed gratitude and approval of the idea—signaling the undeniably negative perception of queer bodies:

It’s good for them to work [in the camps] . . . A man is biologically born a man, so why can he not function as a man? What is to keep him from it but vice? Artists, especially dancers, almost have to be homosexuals, I understand that, but why cannot they keep it to

76. *See id.*

77. LEINER, *supra* note 56, at 26.

78. *See* CONST. CUBA, art. 42 (1976).

79. *See id.*

80. *See id.*

81. *See* CUBA CODIGO PENAL, art. 384–85 (1938); Arguelles & Rich, *supra* note 11, at 691–92; ¡OYE LOCA!, *supra* note 50, at 4.

82. *See* ¡OYE LOCA!, *supra* note 50, at 4; *see also* James N. Green, *Queers in Revolutionary Cuba*, 7 GLQ: J. LESBIAN & GAY STUD. 649, 650–51 (2001) (describing these policies as a form of “antihomosexual prejudice” advanced by Castro early in post-revolution Cuba).

83. *See* Lillian Guerra, *Gender Policing, Homosexuality and the New Patriarchy of the Cuban Revolution, 1965–70*, 35 SOC. HIST. 268, 268 (2010); IAN LUMSDEN, *MACHOS, MARICONES, AND GAYS: CUBA AND HOMOSEXUALITY* 55–81 (Phila: Temple Univ. Press 1996).

themselves? . . . Anyway, what do homosexuals do for production?—they become shop assistants and interior decorators!⁸⁴

Official Cuban law promulgated these camps under the “Servicio Militar Obligatorio[,]” which indicated that any citizens “unfit” for the armed forces had to be relegated to UMAP camps, which led to roughly 35,000 internees.⁸⁵ Many of the internees were gay men and hundreds were murdered through torture or forced into suicide.⁸⁶ Teams of psychologists attempting to experiment and “correct” queerness forced some gay internees to undergo hormone therapy.⁸⁷ The goal to correct their queerness simply masked the ulterior motive for why the government shipped these “undesirables” to rural farms in the first place: harvesting yucca, fruit, and sugar cane to feed the larger community, which refused to support the queer people back.⁸⁸

II. UNITED STATES-CUBAN RELATIONS GET A LITTLE QUEER

A. *An Exodus and Shifting Attitudes Towards Queer Cubans*

By the time Castro disbanded the UMAP camps and egregious government violence against the queer community diminished throughout the 1970s, social ostracization⁸⁹ and formal discriminatory practices—such as lacking positive legal rights with respect to sexual orientation and gender identity—continued for several more decades in post-revolution Cuba.⁹⁰ These negative sentiments against the queer community were not unique to the Cuban nation; however, many foreign observers were “shocked” that a leftist country would be so focused on enhancing the inequity of a group in its citizenry.⁹¹

84. LEINER, *supra* note 56, at 30 (internal quotations omitted).

85. See Joseph Tahbaz, *Demystifying Las UMAP: The Politics of Sugar, Gender, and Religion in 1960s Cuba*, DEL. REV. LAT. AM. STUD., 2013, <https://udspace.udel.edu/bitstream/handle/19716/19725/Vol14-2Tahbaz.pdf?sequence=1&isAllowed=y> [<https://perma.cc/5S6X-HY2T>].

86. See *id.* (“Two former Cuban intelligence agents have estimated that . . . about 500 [internees] ended up in psychiatric wards, 70 died from torture, and 180 committed suicide.”).

87. See Giovanni Bravo, *The Cuban Government’s Treatment of LGBTQ+ Cubans Since the Revolution*, COW LAT. AM. VOICES WOOSTER (May 2, 2020), <http://cowlatinamerica.voices.wooster.edu/2020/05/02/the-cuban-governments-treatment-of-lgbtq-cubans-since-the-revolution> [<https://perma.cc/BWZ5-FY2G>].

88. See *id.*

89. See LEINER, *supra* note 56, at 31 (“Although the UMAP camps were completely phased out by 1969 . . . coming out of the closet could be extremely disadvantageous. Even to be accused of effeminate behavior could carry the same stigma.”).

90. See LATNER, *supra* note 46, at 66 (“The Cuban government’s morality drives against gay and gender nonconforming individuals, peak[ed] in the 1960s but persist[ed] in milder forms for two decades.”).

91. *Id.*

Even with Castro's gradual cooling against the queer community, the government encouraged both formerly incarcerated and socially "undesirable" citizens to leave Cuba altogether during the Mariel Boatlift beginning in May 1980.⁹² The government did not outright police the existence of queer Cubans at the same level as in previous decades, but the government metaphorically stared at the queer community—who understood the hint and left Cuba.⁹³ Much of the island's LGBTQ+ community sought their next home and sense of safety in Florida.⁹⁴ Like certain other Marielitos, the police subjected queer people seeking passage to the United States to interviews that assessed whether they were legally undesirable enough to leave the country permanently.⁹⁵ Queer Cubans were targeted for removal partially because of their "gender transgressive" style choices; a floral shirt with light jewelry on a man raised a lavender flag that he was a "counterrevolutionary homosexual" unfit for Cuban society.⁹⁶ Some queer people even performed an exaggerated level of perceived femininity for the opportunity to leave in the early 1980s,⁹⁷ eventually leading to roughly 20,000 "Marielita[s]" resettling across the United States during this period.⁹⁸

Yet these movements proved to be bittersweet, as Cuba developed increasingly progressive attitudes towards the queer community at around the same time its queer population was leaving after decades of government harm.⁹⁹ In 1979, Cuba became one of the last Latin American countries to decriminalize consensual intimate acts between people of the same sex¹⁰⁰ although, technically before the United

92. See Wendy R. St. Charles, Note, *Recognizing Constitutional Rights of Excludable Aliens: The Ninth Circuit Goes Out on a Limb to Free the "Flying Dutchman"—Dispensing with a Legal Fiction Creates an Opportunity for Reform*, 4 J. TRANSNAT'L L. & POL'Y 145, 147–48 (1995).

93. See Susana Peña, "Obvious Gays" and the State Gaze: Cuban Gay Visibility and U.S. Immigration Policy During the 1980 Mariel Boatlift, 16 J. HIST. SEXUALITY 482, 484 (2007) (Queer Cubans faced stigmatization by "official discourses and state policies.").

94. See *id.* at 495–96.

95. See *id.* at 482 (explaining how one queer Marielito "wore the gayest outfit he could find" on the day of his police interview).

96. *Id.* at 482, 501.

97. *Id.* at 482.

98. Gary L. Day, *The Saga of the Gay Mariel Boatlift Refugees*, PHILA. GAY NEWS (Jan. 31, 2019, 8:10 PM), <http://epgn.com/2019/01/31/the-saga-of-the-gay-mariel-boatlift-refugees> [<https://perma.cc/E6HN-R6UW>] (emphasis added). The "pejorative" version of "Marielitos" became synonymous with immigrating queer Cubans.

99. See *id.* (A "large number of gay Cubans" participated in the "mass migration.").

100. EDDIE BRUCE-JONES & LUCAS PAOLI ITABORAHY, STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAWS CRIMINALISING SAME-SEX SEXUAL ACTS BETWEEN CONSENTING ADULTS, 9 (INT'L LESBIAN, GAY, BISEXUAL, TRANS & INTERSEX ASS'N 2011). Only Chile, Ecuador, Nicaragua, and Panama had yet to decriminalize this behavior while Argentina, El Salvador and Venezuela had all done so during the 1800s. *Id.*

States did so formally in 2003 with *Lawrence v. Texas*.¹⁰¹ Similarly, Cuban law recognized that people could self-identify as transgender during the 1990s—yet again before the United States.¹⁰² Not long after, in the late 1990s, Cuba also equalized its age of consent laws for same-sex couples to those of heterosexual couples under Article 310 of the Cuban Penal Code.¹⁰³ However, remnants of othering queer communities still existed in the legal text despite this progress; Article 310 did not merely make it legal for *all* Cubans to have sex at a specific age and, instead, the Cuban government made a conscious effort to mention “homosexual[lity]” and “prostitution” as specific legal “practice[s]” above the age of consent.¹⁰⁴

Regardless of these shifts, the Marielitas and other exiled Cubans fashioned themselves new lives in the United States with the expectation that they would never go back—even if Cuba did change for the better.¹⁰⁵ Their inability to return as citizens of Cuba meant these changes were permanent and recognized as such under the Wet Foot-Dry Foot Policy.¹⁰⁶ These new identities both assimilated into American culture and also retained a sense of home with places like “Little Havana” in Miami, Florida.¹⁰⁷ Certain queer Cubans even had their lives cut short upon realizing that the AIDS crisis affecting the international community had impacted their own bodies even before immigrating to the United States¹⁰⁸ and many others realized the

101. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (holding that homosexual “private sexual conduct” may not be criminalized). Although a formal decision did not occur until 2003, actual acts of this nature between homosexuals were not strictly policed across the United States, though, it was at least possible. See *Why Sodomy Laws Matter*, ACLU, <http://www.aclu.org/other/why-sodomy-laws-matter> [<https://perma.cc/Q4AD-HE3R>] (last visited Dec. 6, 2021).

102. LATNER, *supra* note 46, at 271.

103. See CUBA CÓDIGO PENAL, art. 310 (1997).

104. See *id.* Scrutinizing these moments of progress in Cuban social equality does not diminish the fact that its achievements occurred well in advance of other Latin American countries or even certain jurisdictions in the United States. See BRUCE-JONES & ITABORAHY, *supra* note 100, at 10–11.

105. See *Cuban Exiles in America*, PBS, <http://www.pbs.org/wgbh/americanexperience/features/castro-cuban-exiles-america> [<https://perma.cc/FTR2-496Y>] (last visited Dec. 6, 2021); Horacio N. Roque Ramírez, *Borderlands, Diasporas, and Transnational Crossings: Teaching LGBT Latina and Latino Histories*, 20 OAH MAG. HIST. 39, 41 (2006) (discussing the immigrant journey leading to “full enfranchisement” of migrant minorities, including Cubans).

106. Annasofia A. Roig, Comment, *No Way, USA!: The Lack of a Repatriation Agreement with Cuba and Its Effects on U.S. Immigration Policies*, 13 FIU L. REV. 875, 886–87 (reviewing repatriation procedures between the United States in Cuba following mass immigration movements of the 1980s and 1990s).

107. See *Cuban Exiles in America*, *supra* note 105 (explaining the influence of Cuban culture in Miami).

108. Day, *supra* note 98.

expected acceptance of their queer identities would not be tolerated in Florida and even stigmatized.¹⁰⁹

B. Immigrant Queer Cubans as a Recognized Social Group

With the influx of Cuban immigrants throughout the late twentieth and early twenty-first centuries, courts in the United States adjudicated several cases involving the Cuban queer community who all hoped they would be allowed to stay given their unique tensions with the Cuban government.¹¹⁰ Castro may have encouraged his “undesirable” people to leave, but whether the United States legitimized each of their reasons for political asylum—and for how long—was a different story.¹¹¹

The greater queer community specifically earned this legitimacy in U.S. immigration courts as “homosexuals” for the first time in 1990—a full decade after the Mariel Boatlift began.¹¹² Marielito, Toboso-Alfonso, explained to immigration judges in this seminal case that his identity as a homosexual in Cuba made him a target for “persecution” throughout his life.¹¹³ The Cuban government had been compiling and maintaining folders “on all [suspected] homosexuals” including one on him, which required that he “appear for a hearing” multiple times a year since the government began creating these files in 1967.¹¹⁴ Despite progressive attitudes towards the queer community in Cuba, Toboso-Alfonso testified that these hearings occurred as recently as 1980 and involved examinations of his body, interrogations concerning his sexual history, and detainment by police for several days without cause purely because of his homosexual identity.¹¹⁵

After being identified as a homosexual and harassed in his workplace by the Union of Communist Youth, Cuban law enforcement notified him to either flee the country or be imprisoned for up to four years for being homosexual.¹¹⁶ The Board of Immigration Appeals upheld the “immigration judge’s withholding of deportation to Cuba[.]”

109. See ¡OYE LOCA!, *supra* note 50, at 178–79 (“[T]he stigma of the Mariel gay generation contributed to its systematic erasure.”).

110. See *id.* at x; see also *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990).

111. See ¡OYE LOCA!, *supra* note 50, at x, 178–79.

112. *Matter of Toboso-Alfonso*, 20 I. & N. at 819; Heather Kolinsky, *The Shibboleth of Discretion: The Discretion, Identity, and Persecution Paradigm in American and Australian LGBT Asylum Claims*, 31 BERKELEY J. GENDER L. & JUST. 206, 221–22 (2016) (confirming *Matter of Toboso-Alfonso* as the establishing case for recognition of the homosexual identity in the immigration context).

113. *Matter of Toboso-Alfonso*, 20 I. & N. at 820.

114. *Id.* at 820–21.

115. *Id.*

116. *Id.* at 821.

despite the Immigration and Naturalization Service's appeal.¹¹⁷ The Board acknowledged that "government threat[s]" to the homosexual identity indicated a threat to freedom that was recognizable under the Immigration and Nationality Act.¹¹⁸

But willingness from the U.S. judicial system to protect people like Toboso-Alfonso,¹¹⁹ who fled Cuba on the basis of their queer identity, became short-lived once it recognized that the Cuban government had developed a sufficient amount of equality for queer people—at least superficially.¹²⁰ The U.S. Court of Appeals for the Second Circuit denied a queer person's petition for deferral of removal back to Cuba partially because they found his "likelihood of . . . arrest to be speculative."¹²¹ Despite evidence that the Cuban government still targeted and fined the queer community for having "homosexual meetings", the court found these instances "isolated."¹²² Instead, the court focused on Fidel Castro's public acceptance of "responsibility for past mistreatment of gay men" along with recently progressive Cuban legislation to be more reflective of the true queer experience.¹²³

Curiously, this level of firmness against similarly situated queer communities worldwide has not been equally applied by U.S. courts.¹²⁴ Utilizing sexual orientation as a Particular Social Group for valid asylum cases continues to be viable for queer people internationally, and the scope of this social group has even widened beyond just homosexuality—this is even for countries providing only modest protections for queer people like Cuba.¹²⁵ So what makes the gradual, yet uncertain Cuban tolerance of its queer community any safer and less demanding of attention?

III. MODERN LEGAL DEVELOPMENTS

A. Reflections on Recent Cuban Movements

To an extent, recognition of this progress in Cuba by federal U.S. courts was accurate.¹²⁶ Yet beyond the previously described advance

117. *Id.* at 820, 823.

118. *Id.* at 823.

119. *Matter of Toboso-Alfonso*, 20 I. & N. at 823.

120. *See Roig v. Holder*, 580 F. App'x 4, 7 (2d Cir. 2014) (denying a queer Cuban named Pedro Rafeael Roig's petition for deferral of removal to his native country).

121. *Id.* at 6.

122. *See id.*

123. *Id.*

124. *See Kolinsky, supra* note 112, at 228, 235 (explaining how the U.S. courts have approached issues involved the LGBTQ+ community).

125. *See, e.g., id.* at 228–29 (describing why the Bureau of Immigration Affairs shifted from "social visibility" to "social distinction" when defining a particular social group).

126. *See James D. Wilets, International Human Rights Law and Sexual Orientation,*

ments for the queer community in Cuba and an increasing level of acceptance for the queer community among Cubans,¹²⁷ significant constitutional changes providing better protections have barely occurred.¹²⁸ At the very least, the 2019 Constitution updated its language in Articles Eighty-One and Eighty-Two to refer to families and the institution of marriage in a vague fashion by not specifying sex or gender,¹²⁹ a welcome change from the 1940 and 1976 versions.¹³⁰ Instead, the Constitution now reads “[a]ll people have the right to start a family . . . regardless of their structure”¹³¹ and marriage is ambiguously a “social and legal institution . . . of spouses.”¹³²

Mentioning the institution of same-sex marriage explicitly in future revisions of the Constitution is not an argument of semantics, but necessary due to continued vacillations of queer empowerment throughout Cuba.¹³³ For instance, impactful endorsements for equality from figures like current President Miguel Díaz-Canel¹³⁴ and Mariela Castro—daughter of Raul Castro, the previous leader of the Communist Party of Cuba—have drastically helped the queer community gain protections and positive attention,¹³⁵ yet legislators still removed same-sex marriage-affirming language from a recent constitutional draft amidst political tensions.¹³⁶

Modern resistance to queer rights in Cuba seems to hinge on the discrepancy of acceptance between the nation’s conservative voting

18 HASTINGS INT’L & COMP. L. REV. 1, 42 (1994) (noting that progress for sexual minorities has improved considerably even before the millennium).

127. Jose Gabilondo, *Whither the Revolution? Framing Political Animosities Between Sexual Minorities and Churches in Cuba’s New Constitution*, 23 HARV. LATINX L. REV. 43, 58 (2020).

128. See *Draft of Cuba’s New Family Code Opens Door for Gay Marriage*, AP NEWS (Sep. 16, 2021, 8:10 PM), <https://apnews.com/article/cuba-marriage-dc8ae3cda134e8d90d32ec593c2340e9> [<https://perma.cc/V8M7-LFN2>] (a draft of Constitutional changes included recognition of same-sex marriage; however, this draft faced opposition within Cuba).

129. CONST. CUBA 2019, art. 81, 82.

130. See CONST. CUBA 1940, art. 43; CONST. CUBA 1976, art. 36.

131. CONST. CUBA 2019, art. 81.

132. CONST. CUBA 2019, art. 82.

133. See *Draft of Cuba’s New Family Code Opens Door for Gay Marriage*, *supra* note 128 (explaining the political landscape for explicitly including same-sex marriage in a revised Constitution).

134. John Walsh, *Cuban President Miguel Diaz-Canel Becomes the Country’s First Leader to Support Same-Sex Marriage*, BUS. INSIDER (Sept. 17, 2018, 10:39 PM), <http://www.businessinsider.com/cuban-president-miguel-diaz-canel-announces-support-of-same-sex-marriage-2018-9> [<https://perma.cc/8A6G-YESF>] (reporting the leader’s wishes to allow “marriage between people, without limitation”).

135. Gabilondo, *supra* note 127; Vanessa Chesnut, *Raul Castro’s Daughter to Push for Gay Marriage in Cuba*, NBC NEWS (May 7, 2018, 5:57 PM), <http://www.nbcnews.com/feature/nbc-out/raul-castro-s-daughter-push-gay-marriage-cuba-n872026> [<https://perma.cc/6P4K-FAHA>] (describing Castro’s efforts to intensify “sanctions for anti-LGBTQ violence”).

136. Gabilondo, *supra* note 127, at 65.

majority deciding legal referendums and perhaps those of the more tolerant Cuban judges.¹³⁷ For example, a three-judge panel with the Popular Municipal Court Boyeros recently granted a Cuban woman, Eumnice Violeta Cardoso Pérez, custody of her children that she would continue raising with her same-sex partner.¹³⁸ This contrasts with sentiments concerning the National Assembly's awaited constitutional revisions for Cuba in 2022.¹³⁹ Affirmative language granting queer people the right to marry during these expected revisions next year is uncertain,¹⁴⁰ but it is unsurprisingly reflective of the Cuban Catholic Church's conservative influence on government decisions¹⁴¹ and the fact that only one Cuban legislator is openly gay.¹⁴²

It is difficult to acknowledge Cuba's progress in the context of queer rights with much objectivity solely because of its inherently restrictive government structure.¹⁴³ The safest advancement of queer Cubans' rights thus far has been dependent upon the centralized Communist government acting first or recognizing its prior mistakes after marginalizing or outright torturing them.¹⁴⁴ Even then, the queer community's dynamic and sometimes conflicting interests from within its subpopulations demand that society not treat the community homogeneously.¹⁴⁵ Strategies for advancement of any set of rights are complicated, and there is necessarily never one right answer—conflict is expected.

Not every queer person in Cuba, for example, has agreed with Mariela Castro's perspective on advancing LGBTQ+ rights in Cuba,

137. See *id.* at 67 (explaining how judicial review could operate in this context).

138. Eumnice Violeta Cardosa Perez v. Guillermo Gomas Vera, No. 541 Fam. Expediente No. 344 (Tribunal Mun. Popular Boyeros Cuba 2017).

139. See Gabilondo, *supra* note 127, at 67 (indicating little optimism for queer rights in the upcoming Cuban referendum).

140. Tremenda Nota, *Cuba Could Have Marriage Equality in 2022*, WASH. BLADE (Dec. 24, 2019), <http://www.washingtonblade.com/2019/12/24/cuba-could-have-marriage-equality-in-2022> [<https://perma.cc/W9UL-RU3P>].

141. Gabilondo, *supra* note 127, at 67 (explaining the Catholic Church's success "in bending secular law to its religious doctrine" in Cuban constitutional law).

142. Tris Reid-Smith, *Gay Politician Asks Cuba to Pass Same-Sex Marriage Without A Referendum*, GAY STAR NEWS (June 1, 2020), <http://www.gaystarnews.com/article/gay-politician-asks-cuba-to-pass-same-sex-marriage-without-a-referendum> [<https://perma.cc/MC75-QQ5N>]; Nota, *supra* note 140.

143. See Hugh Williamson, *Cuba Events of 2020*, HUM. RTS. WATCH (June 3, 2020, 8:27 AM), <https://www.hrw.org/world-report/2021/essay/hrw-grapples-with-covids-challenges> [<https://perma.cc/79LR-7MDV>] (detailing the repressive tactics of the Cuban government).

144. See LEINER, *supra* note 56, at 28; Tahbaz, *supra* note 85.

145. See Libby Adler, *T: Appending Transgender Equal Rights to Gay, Lesbian and Bisexual Equal Rights*, 19 COLUM. J. GENDER & L. 595, 598–99 (recognizing that lawmakers have detrimentally conflated gay, lesbian and bisexual issues with transgender issues in certain contexts).

which has led to the detainment of certain citizens merely differentiating their views.¹⁴⁶ Is her way the *only* way? This variety is interpreted as public criticism of the government—a “violation.”¹⁴⁷ Inflamed by the shortage of resources during the COVID-19 Pandemic,¹⁴⁸ queer Cubans’ frustration with their nation’s treatment of the LGBTQ+ population has grown even louder in 2021, despite the inevitably violent outcomes law enforcement carried out against them.¹⁴⁹ For example, the Cuban transgender community has been particularly vocal about being targeted by law enforcement for baseless arrests and the increased difficulty they face in obtaining employment while being trans amidst “economic collapse” in the nation’s current climate.¹⁵⁰ This “variety” of opinions is not merely unacceptable but also subjects the queer community to detainment and “quick trial” convictions without any right to counsel, which has become more common during the 2021 protests.¹⁵¹

B. Comparative Study of Queer Rights in Latin America

Furthermore, the current government’s refusal to participate with international organizations, like the Inter-American Court of Human Rights, also means that any efficiently recognized advancements of queer rights are not automatically applied in Cuba; the nation moves at its own pace to a detriment, even when other countries officially recognized same-sex marriage in bulk after this organization’s 2017 decision.¹⁵² Various Latin American countries’ participation in the Inter-American Court of Human Rights meant these freedoms automatically extended to countries like Peru, Bolivia, and Paraguay.¹⁵³

146. See Michael K. Lavers, *Cuban LGBT Activist Prevented from Leaving Country*, WASH. BLADE (Jan. 9, 2017), <http://www.washingtonblade.com/2017/01/09/cuban-lgbt-activist-prevented-leaving-country> [https://perma.cc/HSJ2-U38R].

147. *Id.*

148. See Ernesto Londoño & Daniel Politi, “Terror”: Crackdown After Protests in Cuba Sends a Chilling Message, N.Y. TIMES (July 28, 2021), <http://www.nytimes.com/2021/07/28/world/americas/cuba-protests-crackdown-arrests.html> [https://perma.cc/6HYV-VKJ9] (explaining the development of Cuba’s July 11 protests and the negative treatment of participating citizens).

149. Tremenda Nota, *LGBTQ Cubans Participate in July 11 Protests*, WASH. BLADE (July 17, 2021), <http://www.washingtonblade.com/2021/07/17/lgbtq-cubans-participate-in-july-11-protests> [https://perma.cc/2AWD-7ARB].

150. *Id.*

151. See Londoño & Politi, *supra* note 148.

152. See, e.g., Cristian González Cabrera, *Costa Rica’s Progress on Marriage Equality Should Inspire the Region*, HUM. RTS. WATCH (June 3, 2020, 8:27 AM), <http://www.hrw.org/news/2020/06/03/costa-ricas-progress-marriage-equality-should-inspire-region#> [https://perma.cc/NX3D-CH67]; see Lavers, *supra* note 146.

153. See Nico Lang, *Venezuela President Urges Legalization of Same-Sex Marriage After*

Cuba is not the only Latin American country grappling with the advancement of queer rights, or lack thereof, addressing these issues uniquely.¹⁵⁴ Each Latin American country has its own branches of government with varying strengths and influences.¹⁵⁵ Certain governments like those of Mexico, Argentina, and Uruguay depend on legal progress “from the legislature, political parties, interest groups, and the executive branch” whereas Colombia and Brazil strictly utilize “legislative and executive branches.”¹⁵⁶

Argentina’s most significant moment in the passage of same-sex marriage occurred after a same-sex couple’s attempt to get married in Buenos Aires failed, which led to massive international media attention—funneling activism for change in the country’s congress.¹⁵⁷ Despite various forms of protests by both sides on the issue—including the Catholic Church—the Senate passed queer rights-affirming language in Argentinian legislation.¹⁵⁸ The legislation changed the country’s matrimonial law—modeled after similar language and strategies borrowed from Spain’s earlier recognition of same-sex marriage¹⁵⁹—to indicate “contracting parties” could get married more generally rather than just “husband” and “wife” specifically.¹⁶⁰ This form of advancement highlights the limitations Cuba would have if its people attempted a similar approach.¹⁶¹ If discriminatory behavior against same-sex couples occurs publicly, any public discourse that could garner international attention or serious forms of activism would become impossible given the regime’s explicit bar on Cuban people expressing dissatisfaction with government choices.¹⁶²

Brazil’s more gradual approach to providing equality for queer people may be more illuminating for a place as conflicted as Cuba.¹⁶³

Pope’s Comments, THEM (Oct. 23, 2020), <http://www.them.us/story/venezuela-president-nicolas-maduro-pope-francis-same-sex-marriage-legalization> [https://perma.cc/T6RS-DUG9]. However, Latin American countries’ application of this verdict has not been scrutinized and is likely being applied more divisively than suggested.

154. See Alyssa Julian, Note, *Redefining LGBTQ and Abortion Rights in Latin America: A Transnational Toolkit*, 53 VAND. J. TRANSNAT’L L. 275, 296–97 (2020).

155. See *id.* at 296.

156. *Id.* at 296–97.

157. See *id.* at 298–99.

158. See *id.* at 299, 303, 327.

159. *Id.* at 299–300.

160. Cód. CIV. (2010) (Arg.) (modified by Law No. 26.618, July 21, 2010, *Matrimonio Civil*).

161. See *id.*; see also Williamson, *supra* note 143 (explaining that “[t]he Cuban government represses and punishes dissent and public criticism. Tactics against critics include beatings, public shaming, travel restrictions, short-term detention, fines, online harassment, surveillance, and termination of employment.”).

162. See *id.*

163. See Daniel De La Cruz, Comment, *Explaining the Progress of the Right Of Same-Sex*

More conservative Brazilian legislators during the early 2010s rationalized the Brazilian Civil Code's exclusion of same-sex couples because upholding or creating a "family" necessitated marriage between a man and a woman.¹⁶⁴ In a bittersweet move, the Brazilian appeals court system then undercut the legislators' interpretation of the law to allow for same-sex unions to exist on a case-by-case basis but not marriage specifically; extending the exact rights of marriage to same-sex couples merely without the phrasing of "marriage" being applied.¹⁶⁵ Within just a few years, the entire Brazilian government began allowing same-sex couples to receive these benefits under the more traditional "marriage" phrasing.¹⁶⁶ This progression underscores the pathway the queer community in Cuba might consider turning to if the phrasing of "marriage" will not be amended in future revisions to include them.¹⁶⁷ Supporters of queer rights in Cuba may decide to compromise on the usage of same-sex "unions" temporarily until Cuban leaders can reconcile some of their religious biases and simply extend "marriage" to all in the years to come.¹⁶⁸

Yet the ultimate signal of positive change for queer Cubans seems to come from potential shifts within Venezuela.¹⁶⁹ Often tied together in international social and political commentary due to the close socialist alliance Fidel Cruz and Hugo Chávez Frías began developing in the 1990s,¹⁷⁰ current Venezuelan President Nicolas Maduro's comments concerning the LGBTQ+ community may inspire Cuba to do the same.¹⁷¹ Given the Roman Catholic Church's recent support for same-sex civil unions through Pope Francis, President Maduro indicated his hope that the government's National Assembly would

Couples in South America, 14 SAN DIEGO INT'L L.J. 323, 330–31 (2013) (summarizing the Brazilian judicial landscape on queer equality).

164. *See id.* at 330 ("The legislature . . . indicat[ed] that a 'family' could *only* be created through the marriage of one man and one woman.").

165. *See id.* at 331.

166. *See Brazil Judicial Panel Clears Way for Gay Marriage*, FRANCE 24 (May 14, 2013), <http://web.archive.org/web/20130609172419/http://www.france24.com/en/20130514-brazil-judicial-panel-clears-way-gay-marriage> ("A top judicial panel cleared the way for same-sex marriage in Brazil Tuesday, ruling that gay couples could not be denied marriage licenses.").

167. *See id.*

168. *See id.* (explaining the progression from unions to marriages in Brazil).

169. BRIAN FONSECA & JOHN POLGA-HECIMOVICH, *THE TIES THAT BIND: I. TWO NATIONS, ONE REVOLUTION: THE EVOLUTION OF CONTEMPORARY CUBA-VENEZUELA RELATIONS*, LAT. AM. PROGRAM 1 (2020).

170. *Id.*

171. *Venezuela's Maduro, Citing Pope, Asks Congress to Consider Same-Sex Marriage*, REUTERS (Oct. 22, 2020, 6:56 PM), <http://www.reuters.com/article/us-venezuela-politics-lgbt/venezuelas-maduro-citing-pope-asks-congress-to-consider-same-sex-marriage-idUSKBN27737E> [<https://perma.cc/D8WJ-CPPY>].

positively address same-sex marriage benefits in 2021.¹⁷² If the similar religious and political convictions making up Venezuela and Cuba are any indication, Cuba's skepticism to formalize marriage equality for the queer community might be quelled by this kind of universal interpretation of Pope Francis' comments in Catholic-heavy nations.¹⁷³ The mutual dependence between Venezuela and Cuba suggests the former's recognition of queer rights may necessitate the latter's recognition of it as well.¹⁷⁴ Although hopeful, one must wonder why the reverse is not true about Cuban rights extending similarly across the border to Venezuela.¹⁷⁵ Currently, Venezuela's only legal protections for the queer community include the decriminalization of intimate same-sex conduct, an equalized age of consent law for same-sex couples that matches that of heterosexual couples, and an employment discrimination prohibition on sexual orientation—quite a bit less than what Cuba has already achieved itself.¹⁷⁶ If recent Cuban leadership can emphasize rights and utilize government funds for queer people in nuanced areas like gender confirmation surgery¹⁷⁷ or in family law matters,¹⁷⁸ why has Venezuela not reciprocated a similar level of acceptance if the two countries are truly that similar?

CONCLUSION

Although Cuba's progress has advanced beyond those of other nations and is commendable in context, the fact that protesting ideals and the encouragement of useful conflict is, by its nature, not tolerable inhibits Cuba's ability to be taken seriously as a nation that cares about its queer community.¹⁷⁹ This conflict is a consistent observation from this Article's review of social and legal histories in Cuba throughout the twentieth and twenty-first centuries. Perhaps the nation needs to address its own existential conflict before it is capable of discerning those that exist between its people. Cuba has

172. *Id.*

173. *See id.* (noting that "[t]he Pope's comments were the clearest language yet he has used on the rights of gay people.").

174. *See* FONSECA & POLGA-HECIMOVICH, *supra* note 169, at 11 (describing a relationship of "interdependence.").

175. *See, e.g.,* BRUCE-JONES & ITABORAHY, *supra* note 100, at 9, 11 (providing an overview of changes in the laws criminalizing consensual same-sex conduct).

176. *See id.*

177. Jessica Geen, *Cuba Pays for Gender Reassignment Surgery*, PINK NEWS (Mar. 10, 2010), <http://www.pinknews.co.uk/2010/03/10/cuba-pays-for-gender-reassignment-surgery> [<https://perma.cc/WT7M-JFLK>].

178. *See* CONST. CUBA 2019, art. 81.

179. *See* Gabilondo, *supra* note 127, at 68–69.

always held back from fully endorsing socially progressive attitudes historically promulgated by Marxism¹⁸⁰ partially because it has been unsure of what to do with its ties to religion-fueled capitalist ideals.¹⁸¹ Queer Cubans have experienced similarly complex feelings about the nation: a sense of pride in where they came from and disappointment in not being recognized by a country they have worked so hard to keep alive.¹⁸²

180. *See id.* at 69.

181. *See* The Americas, *Fidel, the Church and Capitalism*, *ECONOMIST* (Aug. 16, 1997), <http://www.economist.com/the-americas/1997/08/14/fidel-the-church-and-capitalism> [<https://perma.cc/LT2D-K3FG>].

182. *See* 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* 120, 135–36 (1985).