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Adam J. Kretz

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From “Kill the Gays” to “Kill the Gay Rights Movement”: The Future of Homosexuality Legislation in Africa

Adam J. Kretz*

I. INTRODUCTION

¶1 This article serves to examine three diverse ways in which African nations are currently considering and implementing legislation with regard to sexual minorities, including lesbian, gay, bisexual, transgender, and intersex individuals. At one extreme, but nearest to the median position amongst nations on the continent, sits Uganda, which has undertaken an attempt to increase criminal penalties not just for those who engage in homosexual acts, but also to criminalize activities in civil society that “aid and abet”¹ LGBT persons—defined by the aptly-named Anti-Homosexuality Bill to include renting a room to “known homosexual individuals” or participating in a demonstration advocating for gay rights.² Uganda would be the first country on the African continent to go to this extreme a form of criminalization. At the other extreme sits Malawi, in which the country’s popular President, Joyce Banda, has signaled a desire to suspend and eventually repeal its colonial-era ban on same-sex sexual activity.³ In the middle sits Zimbabwe, in which a recent push to protect the rights of LGBT persons in the nation’s new constitution instead resulted in a strengthening the country’s anti-homosexuality laws.⁴

¶2 In addition to describing the processes and phenomena that led to these three forms of legislation regarding homosexuality, this article attempts to situate how these laws fit within the broader historical context of the regulation of same-sex sexual activity.⁵ This

* J.D., Stanford Law School. I would like to thank Helen Stacy for her thoughtful suggestions, Rohan Sajani for his thorough and helpful edits, and, as always, Max Alderman for his support and encouragement.

¹ See The Anti-Homosexuality Bill, UGANDAN GAZETTE (Sept. 29, 2009), <http://nationalpress.typepad.com/files/bill-no-18-anti-homosexuality-bill-2009.pdf> (hereinafter “Anti-Homosexuality Bill,” or “AHB”).

² *Id.*

³ See *Malawi to Overturn Homosexual Ban, Joyce Banda Says*, BBC NEWS (May 18, 2012), <http://www.bbc.co.uk/news/world-africa-18118350>.

⁴ Accord, e.g., Ken Williams, *In Zimbabwe, Final Constitutional Draft Criminalizes Homosexuality and Marriage Equality*, S.D. GAY & LESBIAN NEWS (Feb. 27, 2012), <http://sdgln.com/news/2012/02/27/zimbabwe-final-constitutional-draft-criminalizes-homosexuality-and-marriage-equality>.

⁵ This article will often use the terms “pro-LGBT” and “pro-gay,” along with “LGBT rights movement” and “gay rights movement,” despite these terms having less cultural salience in the countries discussed than they do in the United States, Europe, and other nations. This is done predominantly for readability, and is in reference not to the varied (and various) forms of sexual identification, but rather to political and activist

paper articulates a framework by which homosexuality legislation around the globe can be compared. Further, it explores how the recent pushes made by the Ugandan, Malawian, and Zimbabwean governments could serve as harbingers for other attempts to legalize or more roundly criminalize homosexual activity on the African continent.

¶3 Uganda's attempt to strengthen criminal penalties, up to and including multi-year prison terms, for even minor forms of both public and private pro-LGBT activity is exceptional. Already, the immense public popularity of the country's Anti-Homosexuality Bill has resulted in the introduction of near-identical draft laws in parliaments from Nigeria to Cameroon.⁶ The criminal penalties included for those who engage in same-sex sexual activity, including acts as seemingly innocuous as a hug between two men, are insidious. However, the inclusion of heavy punishment for mere pro-LGBT sentiments and actions serves as a far more dangerous threat to long-term attempts to create the necessary structures in civil society that can foment a homegrown gay rights movement. First, it makes it difficult, if not impossible, for groups of LGBT activists to organize and advocate for fear of criminal penalties. Those who support gay rights, both in public and in private, would be severely hampered from speaking out, if not completely silenced. Second, it makes it more difficult for international organizations dedicated to LGBT activism to gain a foothold in the country. Finally, it will decrease the already limited opportunity for LGBT persons to move freely between nations when their own governments crack down on LGBT and pro-LGBT individuals.

¶4 Uganda's Anti-Homosexuality Bill may ultimately serve as the catalyst for a widespread "bootstrapping down"⁷ of LGBT rights and pro-LGBT attitudes, across Africa and abroad. This is in no small part due to the public popularity and increased stature afforded to the sponsors of the Anti-Homosexuality Bill, David Bahati and Rebecca Kadaga. Bahati, a parliamentary backbencher when the bill was first introduced, has risen rapidly through his party's ranks, and has seen financial assistance and international exposure due to his relationship with a large network of evangelical Christian ministers and preachers pushing the AHB and similar legislation across the continent and around the world. Kadaga, the lead sponsor of the bill in parliament's most recent session, has become a frontrunner to succeed President Museveni when he leaves office and has used the AHB to reach out to the myriad voters for whom cultural

movements that concern improving lives for people who are not heterosexual. Many scholars have undertaken detailed treatment of the difficulty in ascribing these terms to nations where being LGBT lacks the same characteristics as it does in the United States. For two such critiques, see Arnold Davidson, *Sex and the Emergence of Sexuality*, 14 *CRITICAL INQUIRY* 16, 17-48 (1988); Robert Padgug, *Sexual Matters: On Conceptualizing Sexuality in History*, 20 *RADICAL HISTORY REVIEW* 3 (1979).

⁶ See *Cameroon to Toughen Laws Against Gays*, *AFRICAN FREE PRESS* (Aug. 20, 2011), <http://www.news24.com/Africa/News/Cameroon-to-toughen-laws-against-gays-20110819>; see also Lucas Grindley, *Nigeria Closer to Approving Jail Time for Gay People*, *ADVOCATE* (Nov. 14, 2012), <http://www.advocate.com/news/world-news/2012/11/14/nigeria-moves-closer-approving-jail-time-gay-people>.

⁷ In contrast with the more popular concept of "bootstrapping up," where actions taken by a group of nations in a particular region or community serve as a model for nations similarly situated, encouraging such nations to adopt like practices, such as new press freedoms or improvements in the quality of life of women. Cf. HELEN STACY, *HUMAN RIGHTS FOR THE 21ST CENTURY: SOVEREIGNTY, CIVIL SOCIETY, CULTURE* (2009); see also GIANPAOLO BAIOCCHI, PATRICK HELLER, & MARCELO K. SILVA, *BOOTSTRAPPING DEMOCRACY: TRANSFORMING LOCAL GOVERNANCE AND CIVIL SOCIETY IN BRAZIL* 18-38, 142-146 (2011).

conservative positions are paramount. Their successes, and the international exposure tied to their work on the Anti-Homosexuality Bill, has already encouraged copycat legislation throughout Africa. Furthermore, the fact that their public standing has not suffered despite the failure of the Bill in several successive parliamentary sessions has only encouraged legislators to take similar positions for political advantage.

¶5 In contrast, Malawi’s now-aborted push to decriminalize homosexuality would have made it one of only a handful of nations in Africa in which same-sex sexual activity is legal, and it would have been the first state since South Africa to actively reverse an antigay law. Though its push failed, Malawi’s attempt to improve protections for its LGBT citizens mirrors myriad similar attempts around the globe, and serves as an interesting case study for future pushes in Africa and abroad.

¶6 Zimbabwe, by contrast, saw a leader of the governing coalition, Prime Minister Morgan Tsvangirai, push to include sexual orientation as a protected status in the new Zimbabwean constitution, only to be thwarted by his governing partners, resulting in the codification of criminal penalties for homosexuality in that very constitution. This leaves LGBT Zimbabweans worse off than they were before Tsvangirai’s affirmative push. These two failed attempts at providing minimal protections for LGBT persons position Malawi and Zimbabwe within the broader historical trajectory of gay rights efforts, and provide a lens by which we can better understand how legalization of same-sex activity can interact with this trajectory in complex ways.

II. BACKGROUND: THE LEGAL STATUSES OF LGBT PEOPLE IN AFRICA

¶7 The variety of legal strictures placed on LGBT persons by the fifty-seven nations in Africa could not be more disparate. At one end is South Africa, which became the first nation in the world to constitutionally ban discrimination based on sexual orientation in its post-apartheid constitution,⁸ and then, in 2006, became just the fifth nation in the world to legalize same-sex marriage.⁹ At the other end, two countries, Sudan and

⁸ See S. AFRICA CONST., 1996 at ch. 2, sec. 9(3) prohibiting discrimination “on one or more grounds, including...sexual orientation.” For a broader discussion of the drafting of the post-apartheid Constitution, and the rights-based approach taken by its adopters, see generally Jeremy Sarkin, *The Drafting of South Africa’s Final Constitution From A Human Rights Perspective*, 47 AM. J. COMP. L. 67 (1999).

⁹ *Minister of Home Affairs and Another v. Fourie and Another* 2005 (1) SA 524 (CC) (S. Afr.) (hereinafter “*Fourie*”). The *Fourie* decision, authored by Justice Albie Sachs, was handed down in 2005 but gave Parliament one year to legislatively adopt same-sex marriage rights. It did so upon passage of the Civil Union Act of 2006 (No. 17 of 2006), which passed 230 in favor to 41 opposed in the National Assembly. Sachs’ decision grounds the rights of LGBT persons within the framework of the Universal Declaration of Human Rights and other international statements of political and social inclusion of minority persons. In an oft-quoted passage of his opinion, he writes:

Indeed, rights by their nature will atrophy if they are frozen. As the conditions of humanity alter and as ideas of justice and equity evolve, so do concepts of rights take on new texture and meaning. The horizon of rights is as limitless as the hopes and expectations of humanity. What was regarded by the law as just yesterday is condemned as unjust today. When the Universal Declaration was adopted, colonialism and racial discrimination were seen as natural phenomena, embodied in the laws of the so-called civilized nations, and blessed by as many religious leaders as they were denounced. Patriarchy, at least as old as most marriage systems, defended as being based on biological fact and which was supported by many a religious leader, is no longer accepted as the norm, at least in large parts of the world. Severe chastisement of women and children was tolerated by family law and international legal instruments then, but is today considered intolerable. Similarly, though many of the values of family life have remained

Mauritania, punish homosexuality by death.¹⁰ Despite this range of legal statuses, the vast majority of African nations have legislated against homosexuality, with penalties ranging from fines,¹¹ to corporal punishment,¹² to prison terms of varying lengths,¹³ and, finally, the aforementioned death penalties.¹⁴ In all, homosexuality is illegal in thirty-five countries; six additional countries have banned male homosexual activity while legalizing same-sex sexual activity between two women.¹⁵ In only fifteen African nations is homosexual activity not explicitly barred by law: Burkina Faso, Cape Verde, Côte d'Ivoire, Guinea-Bissau, Mali, Niger, Rwanda, Madagascar, the Central African Republic, Chad, Democratic Republic of the Congo, Equatorial Guinea, Gabon, Republic of the Congo, Mozambique, and South Africa.¹⁶

¶8 Though forty-two countries have banned homosexuality, the actual codification of these antigay laws takes myriad forms. In many of these countries, the prohibition on homosexual activity dates to colonial penal codes; British colonial laws banning homosexuality remain on the books in nearly two-dozen nations.¹⁷ Though Britain itself

constant, both the family and the law relating to the family have been utterly transformed.

Fourie, at ¶¶ 99-101.

¹⁰ In Sudan, Article 148 of the nation's 1991 penal code established the punishment of death for homosexual activity – for men, the death penalty attaches after a third offense, and for women, it attaches after the fourth offense. THE PENAL CODE OF 1991, art. 148 (Sudan). For both sexes, one thousand public lashes is the punishment for a first offense, which can be for actions as minor as kissing. *Id.* In Mauritania, Article 306 of the Criminal Code criminalizes homosexual activity “for any Muslim man who commits an impudent act against nature,” which has been interpreted to include same-sex sexual activity, and for which the punishment is death by stoning. PENAL CODE OF 1984, art. 306 (Mauritania). However, a 2009 report by the United States embassy describes “[to the best of our awareness, there have been] no case ever being prosecuted under the anti-homosexual laws.” See Embassy of the United States at Nouakchott, Mauritania, *Mauritanian Law and Practice Related to Sexual Orientation and Gender Identity* (Dec. 27, 2009), <http://cables.mrkva.eu/cable.php?id=241691>. Homosexual activity has further been outlawed by regional governments throughout the continent, most notably in twelve northern states of Nigeria, which have adopted death by stoning as the penalty for male homosexual activity. See *Gay Nigerians face Sharia death*, BBC AFRICA (Aug. 10, 2007), <http://news.bbc.co.uk/2/hi/6940061.stm>.

¹¹ See, e.g., PENAL CODE ORDINANCE 66-156 OF JUNE 8, 1966, art. 338 (Algeria) (“Any person guilty of a homosexual act shall be punished with . . . a fine of between 500 and 2,000 Algerian dinars.”).

¹² See, e.g., PENAL CODE OF 1945, art. 138A (Tanzania) (amended by the SEXUAL OFFENCES SPECIAL PROVISIONS ACT OF 1998, § 138A (Tanzania)) (“[Upon commission of certain offences] the offender shall be liable on conviction to imprisonment for a term not less than ten years, with corporal punishment.”).

¹³ See, e.g., PENAL CODE OF 1913, art. 230 (Tunisia) (“[S]odomy that is not covered by any of the other previous articles is punished with imprisonment for three years.”).

¹⁴ This list of possible punishments is non-exhaustive. Several nations and governmental bodies have established other unique punishments for homosexuals. For example, a conviction for homosexual activity in Somaliland results in expulsion from the country rather than a prison sentence. See SOMALI PENAL CODE OF 1957.

¹⁵ See Lucas Paoli Itaborahy, *State-Sponsored Homophobia*, INT’L LESBIAN, GAY, BISEXUAL, TRANS & INTERSEX ASS’N (May 2012), http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2012.pdf. The six nations that criminalize male-male sexual activity without statutorily banning female-female same-sex acts are Kenya, Lesotho, Malawi, Swaziland, Zambia, and Zimbabwe.

¹⁶ *Id.*

¹⁷ For an analysis of sodomy laws in British colonies, see *This Alien Legacy: The Origins of “Sodomy” Laws in British Colonialism*, HUMAN RIGHTS WATCH 4-25 (Dec. 2008), http://www.hrw.org/sites/default/files/reports/lgbt1208_webwcover.pdf.

has repealed its sodomy statutes,¹⁸ many of its former colonies have simply retained these laws, which are generally referred to in the penal codes as moral codes or indecency laws.¹⁹ Still others have established new restrictions on homosexual activity in their criminal codes.²⁰ Few nations have gone so far as to constitutionalize bans on homosexual activity, though several nations in addition to Uganda, including Liberia, are considering such bans or have attempted to do so.²¹ A small yet significant group of nations, including Egypt and Angola, lack any express prohibition on homosexual activity, but have interpreted other statutes in a manner that establishes *de facto* criminalization.

A. A “Worsening Situation”²²: *The Present State of Gay Rights in Africa*

¶9 The various ways in which nations have legislated sexual orientation and expression makes it difficult to fully analyze questions of legalization and criminalization without first establishing a framework by which national laws can be categorized. After surveying the various legal situations facing LGBT people throughout the African continent, I have identified seven stages of LGBT legal protection (or lack thereof). Such a mechanism does not yet exist for categorizing laws affecting sexual minorities, particularly gays, lesbians, and transgender individuals. Nations can be categorized within one of these seven stages, some of which are quite heterogeneous.

¶10 *Stage 1: Total Marginalization.* The lowest stage of integration goes beyond just the criminalization of homosexuality. It attempts to ban advocacy on behalf of LGBT persons. This limits both visibility and the establishment of social and political organizations, two building blocks that have proven necessary to the passage of pro-LGBT laws in other nations.²³ Until the passage of Uganda’s Anti-Homosexuality Bill,

¹⁸ *Id.* at 7-9. This repeal occurred ten years after the publication of the Wolfenden Report, drafted by a committee led by renowned philosopher H.L.A. Hart in 1957, which recommended a repeal of all statutory bans on consensual sexual acts between adults.

¹⁹ Cf. Joshua Heppel, *Will Sexual Minorities Ever Be Equal? The Repercussions of British Colonial Sodomy Laws*, 8 EQUAL RIGHTS REV. 50, 58 (2012).

²⁰ See, e.g., Mariya Karimjee, *Nigeria Votes to Criminalize Gay Marriage*, GLOBALPOST (Nov. 29, 2011), <http://www.globalpost.com/dispatch/news/regions/africa/nigeria/111129/nigeria-senate-criminalize-gay-marriage>.

²¹ In July 2012, the Liberian Senate voted to constitutionalize a ban on same-sex marriage, though President Ellen Johnson Sirleaf, who had vowed to the international community that she would veto any legislation increasing penalties for homosexual activity, vetoed the bill. *Liberian Senate Votes to Ban Gay Marriage in Constitution*, RADIO NETHERLANDS WORLDWIDE AFRICA (July 20, 2012), <http://www.rnw.nl/africa/bulletin/liberian-senate-votes-ban-gay-marriage-constitution>.

²² Godwyns Onwuchekwa, coordinator for the UK-based group Justice for Gay Africans, ascribes some of the blame for what he terms this “worsening situation” on the continent to increased activity by United States-based evangelical Christian organizations. See Chothia, *infra* note 55; see also Kron, *infra* note 60 (discussing the U.S.-based Fellowship organization and its relationship with David Bahati, author of the Uganda Anti-Homosexuality Bill).

²³ The move from criminalization to social integration tends to occur in fits and spurts, as opposed to following a linear progression. Empirically, in nations where homosexual activity is illegal and vilified, a willingness by LGBT persons to engage in visible, identifiable advocacy—both individually and within activist organizations—has proven to be a critical impetus for legal advancement. For a discussion of the increased visibility of LGBT persons after the Stonewall Riots in the United States, and the development of early gay and lesbian political organizations such as ACT UP! and The Mattachine Society, see DAVID CARTER, *STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION* (2010). Cf. DAVID MIXNER &

no state had established *de jure* criminal bans on LGBT advocacy or assistance to LGBT persons.²⁴ Granted, in many nations, the social stigma attached to homosexuality means few, if any, members of society are willing to stand up for their rights, but it was not until the 2012 Anti-Homosexuality Bill that such social norms became part of a proposed law, creating the possibility that it could become a crime not just to be openly gay, but to be openly pro-gay.²⁵

¶11

Stage 2: Criminalization of Status and Behavior. The majority of African nations fall into this category, which is the second-most restrictive for LGBT persons. It describes any nation that makes homosexual activity or the open identification as an LGBT person a criminal act. The punishments vary, from as low as a fine²⁶ to prison terms ranging from three months²⁷ to life. Sierra Leone, Sudan, and Tanzania, among others, allow for life imprisonment for those convicted under their respective anti-homosexuality statutes.²⁸ Most of the nations that criminalize homosexual activity establish a penalty of prison terms between two and ten years.²⁹ For purposes of marginalizing sexual minorities, this codification of one's "otherness" as criminal stymies the establishment of a homegrown pro-gay rights movement by making it more

DENNIS BAILEY, BRAVE JOURNEYS: PROFILES IN GAY AND LESBIAN COURAGE (2001). A similar phenomenon occurred in the United Kingdom following the publication of the Wolfenden Report in 1957, in which prominent scholars encouraged the federal government to decriminalize homosexuality. *Criminalization to Integration in the UK*, DEUTSCHEWELLE (Aug. 6, 2012), <http://www.dw.de/from-criminalization-to-integration-in-the-uk/a-16013660>; *see also* MATTHEW COOK ET AL., A GAY HISTORY OF BRITAIN (2007) (describing the nascent, yet incredibly public, development of LGBT organizations in 1960s London).

²⁴ Some sub-national jurisdictions, however, have enacted *civil* bans on LGBT advocacy, most notably St. Petersburg, Russia, which enacted a 5,000-ruble fine (about \$160 USD) for any person found engaging in "public action aimed at propagandizing sodomy, lesbianism, bisexuality, and transgenderism among minors." Ann Tornkvist & Sven Hultberg Carlsson, *St. Petersburg's "Gay Propaganda" Law Makes LGBT Russians Wary*, CHRISTIAN SCIENCE MONITOR (Oct. 1, 2012), <http://www.csmonitor.com/World/Europe/2012/1001/St.-Petersburg-s-gay-propaganda-law-has-LGBT-Russians-wary>.

²⁵ For a broad discussion of Uganda's pending ban and its possible effects, see Part III.A, *infra*.

²⁶ A very small number of African nations that have enacted criminal penalties for homosexual activities spare prison terms for some convicted individuals, permitting judges, at their discretion, to impose a heavy fine in lieu of imprisonment. Togo is one such example. *See* CRIMINAL CODE OF TOGO, art. 88 (2000) (enacting a heavy fine for "imprudent acts or crimes against nature with an individual of the same sex"). Even this law allows a judge to impose, in addition to the fine, a prison term ranging from one to three years. No African nation, as of 2013, has enacted a criminal ban on same-sex activity without also attaching the possibility of jail time to that ban. *See generally* Itaborahy, *supra* note 15.

²⁷ Of the nations mandating prison terms for those convicted of homosexual activity, the minimum penalties in Egypt, Mauritania, and Somalia – three months—are the lowest on the continent. *See* Itaborahy, *supra* note 15, at 27, 32, 35 (describing the nations' statutes).

²⁸ *See, e.g.*, BANKOLE THOMPSON, CRIMINAL LAW OF SIERRA LEONE (1999) (describing section 61 of the 1861 Sierra Leone Offenses Against the Person Act, which includes a maximum penalty of life imprisonment for "buggery," defined to include same-sex sexual intercourse); THE PENAL CODE OF 1991, art. 148 (Sudan) (allowing for life imprisonment upon an individual's third conviction for same-sex activity); SEXUAL OFFENCES SPECIAL PROVISIONS ACT OF 1998, sec. 154(1)(c) (Tanzania) (allowing for up to life imprisonment for any male convicted under the statute).

²⁹ The full list of African countries includes: Algeria, Angola, Benin, Botswana, Burundi, Cameroon, Comoros, Egypt, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Kenya, Lesotho, Liberia, Libya, Malawi, Mauritania, Mauritius, Morocco, Mozambique, Namibia, Nigeria, São Tomé and Príncipe, Senegal, Seychelles, Sierra Leone, Somalia, South Sudan, Sudan, Swaziland, Tanzania, Togo, Tunisia, Uganda, Zambia, and Zimbabwe. *See, e.g.*, Itaborahy, *supra* note 15, at 12.

difficult to engage with those who are similarly “otherized.” The common “us versus them” rhetoric utilized by politicians attempting to garner popular support for anti-LGBT policies can be seen most clearly in the actions of Zimbabwean President Robert Mugabe and Ugandan politicians David Bahati and Rebecca Kadaga, who consistently describe LGBT people and their allies as though they are not fully human, let alone full citizens entitled to the rights and privileges afforded “normal” Africans.

¶12 *Stage 3: Decriminalization.* The United Nations and International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) describe decriminalization of homosexual behavior as the first true step toward establishing equal treatment, both under the law and within society.³⁰ For many LGBT rights advocates, decriminalization is the primary objective of current campaigns across Africa.³¹ Across much of the current decriminalization movement, international organizations are working alongside nascent domestic LGBT rights groups to foment pressure on public officials and improve visibility of and respect for sexual minorities.³²

¶13 The United Nations, under the leadership of Secretary-General Ban Ki-Moon, has launched appeals for the worldwide decriminalization of homosexuality, focusing in particular on encouraging African nations to revise the statutory prohibitions of same-sex conduct in their penal codes.³³ Such pressures have found some successes, as several African countries, including Seychelles, have agreed to take up legislation that would decriminalize homosexuality.³⁴ Other external pushes, such as those by British Prime Minister David Cameron³⁵ and American Secretary of State Hillary Clinton³⁶ have been

³⁰ *Decriminalizing Homosexuality Step to Genuine Legal Equality*, INT’L LESBIAN, GAY, BISEXUAL, TRANS & INTERSEX ASS’N (Oct. 11, 2011), <http://ilga.org/ilga/en/article/nd1dGmP1dX> (“Decriminalizing homosexuality is an essential first step towards establishing genuine equality before the law.”).

³¹ Most pushes to decriminalize homosexuality have focused on nations whose statutes are both relics of their colonial penal codes as well as rarely enforced, such as Seychelles. *See, e.g.*, Paul Canning, *Seychelles to Decriminalize Homosexuality*, CARE2 POLITICS (Oct. 5, 2011), <http://www.care2.com/causes/seychelles-to-decriminalize-homosexuality-other-countries-say-no.html> (describing the Seychelles homosexuality law as “a relic of the British Empire”). However, as of August 2013, Seychelles had not yet decriminalized male-male homosexual activity.

³² This can be seen, for example, in Cameroon, where a pro-LGBT rights organization, All Out, has taken to petitioning the government to crack down on anti-homosexuality demonstrations and commute the sentence of a gay man sentenced to three years in prison for violations of the country’s sodomy statute. Colin Stewart, *Organizing Opposition to African “Gay Hate Day”*, ERASING 76 CRIMES (Aug. 15, 2012), <http://76crimes.com/2012/08/15/organizing-opposition-to-african-gay-hate-day/>. The man, known only in the press by his first name, Roger, was convicted after sending a text message to a male acquaintance. The message read: “I am very much in love w/ u.” *Id.*

³³ *See Ban Ki-Moon Urges Respect for Gay Rights*, BBC NEWS (Jan. 29, 2012), <http://www.bbc.co.uk/news/world-africa-16780079> (quoting Ban Ki-Moon before an African Union summit meeting: “Confronting these discriminations is a challenge, but we must not give up on the ideas of the universal declaration [of human rights].”).

³⁴ *See Canning, supra* note 31.

³⁵ In 2011, British Prime Minister David Cameron’s coalition government announced, during a Commonwealth Heads of Government meeting, that LGBT rights would thereafter be considered a factor in determining the disbursement of certain forms of foreign aid. *Cameron Threat to Dock Some UK Aid to Anti-Gay Nations*, BBC NEWS (Oct. 30, 2011), <http://www.bbc.co.uk/news/uk-15511081>.

³⁶ Secretary Clinton, speaking on International Human Rights Day soon after Cameron’s announcement, stated simply, “Gay rights are human rights, and human rights are gay rights.” *Hillary Clinton Declares ‘Gay Rights are Human Rights’*, BBC NEWS (Dec. 7, 2011), <http://www.bbc.co.uk/news/world-us-canada-16062937>. Soon thereafter, the United States State Department stated that it too would consider a country’s

met with greater resistance, with vocal rejections of their calls for decriminalization coming from a number of African heads of state,³⁷ other government officials, and, most vocally, church leaders.³⁸ Even some LGBT activists have spoken out against the means of certain foreign-backed decriminalization pushes, fearing the additional backlash and violence against LGBT persons that could result from even a small cut in foreign aid packages explicitly due to the way LGBT persons are treated.³⁹ Kenyan gay rights activist David Kuria succinctly explains this fear, and his worry that such a cut could serve as yet another point for popular galvanization against LGBT persons: “Can you imagine the glee in a corrupt regime having to scapegoat their misappropriation of resources on aid cut because they have not accepted ‘men-to-marry-other-men?’”⁴⁰

¶14 *Stage 4: Codification of Anti-Discrimination Laws.* Across much of the globe, the first pro-LGBT legislation passed after decriminalization has been a law guaranteeing some form of protection against discrimination based on sexual orientation.⁴¹ Only five

treatment of LGBT persons when allotting some yet-to-be-determined types of governmental assistance. Steven Lee Meyers & Helene Cooper, *U.S. Backs Gay Rights Abroad, Obama and Clinton Say*, N.Y. TIMES (Dec. 7, 2011), at A4. For a longer discussion of aid conditionality tied to policies that affect LGBT people, see Adam J. Kretz, *Aid Conditionality as (Partial) Answer to Antigay Legislation*, 7 VIENNA J. INT’L CONST. L. ___ (forthcoming 2013) (on file with author).

³⁷ One particularly vocal critic of Cameron’s statement was Ghana’s then-President John Atta Mills, who accused Britain (whose colonial government originally wrote Ghana’s legislation prohibiting homosexuality) of a “bullying mentality.” See *Ghana Refuses to Grant Gays’ Rights Despite Aid Threat*, BBC AFRICA (Nov. 2, 2011), <http://www.bbc.co.uk/news/world-africa-15558769> (quoting Mills, who died in June 2012, as stating, “I, as President, will never initiate nor support any attempt to legalize homosexuality in Ghana.”).

³⁸ In Kenya, where U.S. President Barack Obama enjoys widespread support, rejection of his government’s position by church officials was terse, with a group of church leaders stating simply, “We don’t believe in advancing the rights of gays.” Michael Pflanz, *Africa Reacts to Obama’s Pro Gay Rights Foreign Policy*, CHRISTIAN SCIENCE MONITOR (Dec. 8, 2011), <http://www.csmonitor.com/World/Africa/2011/1208/Africa-reacts-to-Obama-s-pro-gay-rights-foreign-policy>.

³⁹ See, e.g., *Aid Conditionality: Blessing or Curse*, GAY KENYA TRUST, http://www.gaykenya.com/index.php?option=com_content&view=article&id=113:aid-conditionality-blessing-or-curse&catid=44:columnists-david-kuria&Itemid=61.

⁴⁰ *Id.*

⁴¹ The most notable exception to this rule has been the United States, which lacks a federal anti-discrimination law that would protect LGBT individuals from being fired from their job or evicted from their housing due to their sexual orientation. Though Wisconsin became the first state to ban employment discrimination based on one’s sexual orientation in 1982, nineteen states still lack any codified anti-discrimination measure that protect LGBT persons in the workplace. See WILLIAM RUBENSTEIN ET AL., *CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW* 278-299 (3d ed. 2012). Uniquely, the United States has legalized a positive right, adoption by LGBT couples, despite its failure to first ban antigay discrimination. This contrasts with Portugal, which has legalized same-sex marriage while at the same time failing to permit adoption by married gay couples, even though the votes took place on the same day. See *Portugal Parliament Votes in Favor of Gay Marriage, Rejects Gay Adoption*, LGBTQ NATION (Jan. 8, 2010), <http://www.lgbtqnation.com/2010/01/portugal-parliament-votes-in-favor-of-gay-marriage-rejects-gay-adoption/>. South Africa, whose Constitutional Court legalized gay marriage in its 2005 *Fourie* decision, had four years previously allowed adoption by same-sex couples. See *South African Gays Win Adoption Battle*, BBC NEWS (Sept. 28, 2001), <http://news.bbc.co.uk/2/hi/africa/1569061.stm>. Many couples, however, find it difficult to procure assistance from social service organizations to do so. See Justin Foxton, *Why Can’t Gays Adopt?*, TIMES AFRICA (Aug. 27, 2012), <http://www.timeslive.co.za/thetimes/2012/08/27/why-can-t-gays-adopt>. Interestingly, Tanzania, a nation that has made same-sex sexual activity punishable by life imprisonment, has not expressly banned adoption by LGBT persons, who can do so under the law if they are single.

African nations have taken an affirmative step toward granting any form of positive rights to LGBT citizens: South Africa, which by law bans all forms of discrimination based on sexual orientation and gender expression, and four countries—Mauritius, Seychelles, Botswana, and Mozambique—which ban some forms of antigay discrimination.⁴²

¶15 *Stage 5: Establishment of Positive Rights.* Though this is only the third-highest level of status conferral for LGBT people, the only nation on the African continent that can be appropriately defined as having conferred any positive rights upon its LGBT citizens is South Africa.⁴³ Such rights could include any benefits granted to a similarly situated non-LGBT person or couple, such as inheritance rights, power-of-attorney, or tax benefits.⁴⁴ The move from solely preventive legislating, which includes anti-discrimination, to the establishment of positive rights is a pivotal one, as it begins the process of fully integrating LGBT persons into the broader socio-cultural fabric of a nation.

¶16 *Stage 6: Full Legal Equality.* At this stage, legal distinctions between LGBT and non-LGBT persons are eliminated. South Africa's constitution, and its interpretation in various cases before the country's Constitutional Court permitting adoption rights, full marriage rights, and some rights for transgender persons, among myriad other rights, nearly fits it within this stage. Though South Africa comes close to this stage, it does not quite reach it—section 9 of the South African Constitution and its anti-discrimination codes do not fully protect gender identity in the same manner as sexual orientation.⁴⁵

¶17 *Stage 7: Cultural Integration.* This is a stage that no country in Africa has reached and still eludes even the most LGBT-friendly nations around the world.⁴⁶ Beyond laws on

⁴² See Itaborahy, *supra* note 15. These laws in general do not provide *de facto* protection against the day-to-day homophobia that individuals can experience in the workplace. *Id.*

⁴³ See generally Fourie, *supra* note 9; see also S. AFRICA CONST., 1996, *supra* note 8, sec. 9(3) (prohibiting discrimination based on one's sexual orientation).

⁴⁴ One type of law that straddles these two lines is hate crimes legislation, which amplifies penalties for those convicted of violent crimes against a person targeted because of his or her sexual orientation or gender identity.

⁴⁵ "Gender identity" is not explicitly protected in section 9(3) of the South African Constitution, though the document does separate out "gender" from "sex," allowing for protections for one's gender even if that gender does not line up with the manner one's sex physically presents. S. AFRICA CONST., 1996, *supra* note 8. Further, South Africa's Alteration of Sex Description and Sex Statutes Act provides a mechanism by which individuals may change names and gender identity on government identification. ALTERATION OF SEX DESCRIPTION AND SEX STATUTES ACT 49 OF 2003 (S. Afr.). Despite these legal protections, transgender individuals remain the targets of violence, harassment, and sexual assault, particularly if they publicly acknowledge their gender identity and transition. See, e.g., Isolde Raftery, *Transgender Pageant Winner Murdered in South Africa*, MSNBC (June 13, 2012), http://worldnews.nbcnews.com/_news/2012/06/13/12210454-transgender-pageant-winner-murdered-in-south-africa?lite.

⁴⁶ This definition does not mean that a single instance of antigay violence, in a nation that has otherwise given LGBT people full and equal rights under the law, would preclude a nation from being seen as having reached Stage 7. Despite its incredible progress on legal equality, much of South Africa remains virulently homophobic, with widespread evidence of hate crimes, including corrective rape, against LGBT persons, particularly outside of the major metropolitan areas. The widespread violence LGBT people face in South Africa, however, prevents it from moving from legal equality to cultural integration. See Liz Hazelton, *Raped for Being Gay*, DAILY MAIL ONLINE (Oct. 31, 2011), <http://www.dailymail.co.uk/news/article-2055289/Corrective-rape-South-Africa-women-attcked-cure-lesbians.html> (describing the horror of the phenomenon of "corrective rape" in South Africa); see also Charlayne Hunter-Gault, *South Africa*

the books, this stage is one in which LGBT people are full members of the country's social fabric.⁴⁷ This is not to say that to reach this stage a country need have no instances of prejudice against LGBT persons, but that instances of violence or marginalization would be widely decried, and those who perpetrated such actions would be both prosecuted and publicly shamed.

¶18 Most of the nations of the world fall within the first three stages⁴⁸—where LGBT persons lack any positive rights. Most of the nations in Africa fall within a smaller band, only the first two stages, where an LGBT person risks fines, corporal punishment, or jail, simply because of their identity. Further, until 2012, African nations remained relatively entrenched within their respective stages. The various attempts by Uganda, Malawi, and Zimbabwe are some of the very first endeavors by African nations to *move between stages*—Uganda and Zimbabwe downward, and Malawi upward, and serve as helpful examinations of this seven-stage framework and the relative ease of mobility between the stages.

B. Cultural Context: Pervasive Social Hostility Toward LGBT People

¶19 Vilification and social marginalization of LGBT people is commonplace across the African continent, even in nations that have decriminalized homosexuality and instituted anti-discrimination measures. Few LGBT people are open about their sexual orientation or gender identity; those that are often find themselves the targets of violence and public shaming,⁴⁹ along with, all too often, murder.⁵⁰ Many in Africa view homosexuality as a “western invention” imposed upon them by the remnants of colonizing powers.⁵¹

Confronts Corrective Rape, THE NEW YORKER (May 28, 2012),

http://www.newyorker.com/reporting/2012/05/28/120528fa_fact_huntergault (quoting the director of a transgender rights group in Cape Town who states that her organization alone responds to *thirty* cases of corrective rape *per week* in Western Cape Province. Western Cape constitutes only 11 percent of South Africa's total population.).

⁴⁷ Relatively homogenous nations that have instituted full legal equality, such as Iceland, tend to have fewer reported instances of anti-LGBT violence and marginalization. Not only did Iceland pass same-sex marriage by unanimous vote, the first nation to do so, it also has an openly lesbian prime minister and a dearth of recorded antigay crimes. *See Iceland Passes Gay Marriage Law in Unanimous Vote*, REUTERS (June 11, 2010), <http://www.reuters.com/article/2010/06/11/us-iceland-gaymarriage-idUSTRE65A3V020100611>. Further, according to a study by the Danish Institute for Human Rights, “hate crimes against LGBT [persons] are practically unknown in Iceland.” Only one case was found where a transgender woman was attacked, but that attack could not be fully attributed to her gender identity or appearance. *See STUDY ON HOMOPHOBIA, TRANSPHOBIA AND DISCRIMINATION ON BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY, SOCIOLOGICAL REPORT: ICELAND, COWI: THE DANISH INSTITUTE FOR HUMAN RIGHTS* (2010), http://www.coe.int/t/Commissioner/Source/LGBT/IcelandSociological_E.pdf. However, given that the legislation passed relatively recently (for example, Iceland only legalized same-sex marriage rights in 2011), it is difficult to discern whether Iceland or any other nation has yet reached Stage 7.

⁴⁸ *See Itaborahy, supra* note 15.

⁴⁹ This public shaming often includes explicit calls to action, not just encouraging violence, but also social marginalization. *See, e.g., Cameroon Group Urges Parents to Denounce Gays to the Police*, BANCABC NEWS ZIMBABWE, <http://www.bancabc.co.zw/news/cameroon-group-urges-parents-to-denounce-gays-to-police.aspx> (“We urge parents to publicly denounce gays, even their own children . . . [Gays] have stopped [public expressions of homosexuality] since we began a public campaign against them.”). For a discussion of the ways in which Zimbabwean President Robert Mugabe has engaged in public shaming and vilifying of LGBT people, see *infra*, Part III.C.

¶20 Disapproval of homosexuality on the continent is pervasive. A recent survey for the Pew Global Attitudes Project puts disapproval of homosexuality at greater than 90 percent for many nations on the continent, with Mali (98 percent), Senegal (97 percent), Nigeria (97 percent), Uganda (95 percent), and Egypt (95 percent) showing particularly high levels of disapproval.⁵² Even a majority of South Africans, 64 percent, agreed with the Pew Research statement that homosexuality should be disapproved of by society.⁵³ Substantial societal disapproval is the main reason why South Africa has made most of its progress on LGBT issues through its constitution and subsequent interpretations by the Constitutional Court, rather than through bills passed through parliament. Even the Civil Union Act of 2006, which passed parliament overwhelmingly, was demanded by the Constitutional Court in *Fourie* as the necessary remedy for failing to provide same-sex marriage rights. Though South Africa serves as a beacon for end-result laws affording LGBT equality, its emphasis on constitutional, rather than legislative, rights guarantees has insulated it from the populist antigay fervor that has overwhelmed LGBT activists in many other nations considering parliamentary changes.

¶21 Political leaders have also stoked antigay attitudes beyond mere legislating—antigay rhetoric imbues speeches, press statements, and discussions of all manner of public policy.⁵⁴ Factions that otherwise engage in virulent disagreement unite over what

⁵⁰ The murder of activist David Kato, an outspoken gay activist and openly gay man living in Uganda, occurred after his name, photo, and address were published in a local periodical alongside the headline “Hang Them!” The article accused the gay men of “raiding schools and recruiting children [to homosexuality],” a widespread belief in Uganda. See Jeffrey Gettleman, *Ugandan Who Spoke Up for Gays Is Beaten to Death*, N.Y. TIMES (Jan. 27, 2011), http://www.nytimes.com/2011/01/28/world/africa/28uganda.html?_r=1&. Within two months of the paper’s publication, Kato was bludgeoned to death in his home. Public activists are not the only targets, however. In South Africa, Thapelo Makuthle, an openly gay man living in Northern Cape, a province that has seen “growth and increased visibility of the gay community,” was found hacked to death, his head nearly severed, in a targeted antigay crime. Makuthle’s murder followed the shooting death of a young lesbian woman who refused the advances of a man at a local bar. Dan Littauer, *Murder Suspect of Gay South African Caught*, GAY STAR NEWS (June 26, 2012), <http://www.gaystarnews.com/article/murder-suspect-gay-south-african-caught-anti-gay-violence-continues260612>.

⁵¹ For a (brief) African critique of this view, see Eusebius McKaiser, *Homosexuality un-African? The Claim is a Historical Embarrassment*, GUARDIAN (Oct. 2, 2012), <http://www.guardian.co.uk/world/2012/oct/02/homosexuality-unafrican-claim-historical-embarrassment> (contending that the western colonial remnant is not homosexuality, but merely the codification of penal codes that criminalize homosexual behavior). See also Melissa Steffan, *Uganda Bill That Proposed Death Penalty for (Some) Gays Expected to Pass*, CHRISTIANITY TODAY (Nov. 12, 2012), <http://blog.christianitytoday.com/ctliveblog/archives/2012/11/uganda-david-bahati-homosexuality-death-penalty-bill-expected-to-pass.html> (quoting Christopher Byaruhanga, professor of historical theology at the Uganda Christian University as saying, “You see, there’s a kind of imperialism and a kind of relativism from the West . . . [T]hey don’t understand our ethics in the country of Uganda and they are trying to impose what they believe.”).

⁵² PEW GLOBAL ATTITUDES PROJECT, WORLD PUBLICS WELCOME GLOBAL TRADE BUT NOT IMMIGRATION 47 (2007), <http://pewglobal.org/files/pdf/258.pdf>. See also *Homosexuality in Nigeria*, NIGERIAN TRIBUNE (Nov. 9, 2011), <http://tribune.com.ng/index.php/features/30912-homosexuality-in-nigeria>.

⁵³ PEW GLOBAL ATTITUDES PROJECT, *supra* note 52, at 85.

⁵⁴ See David Smith, *Gay African Refugees Face Abduction, Violence and Rape in Uganda and Kenya*, GUARDIAN (May 18, 2012), <http://www.guardian.co.uk/world/2012/may/18/gay-african-refugees-violence-kenya-uganda> (“[P]ublic rhetoric demonizing homosexuality has been particularly vicious since Uganda’s anti-homosexuality bill was introduced in October 2009.”).

they view as the “problem of homosexuality.”⁵⁵ This fervor has allowed groups that otherwise focus their energy on marginalizing one another to instead work together to “otherize” a common enemy. The secrecy with which many LGBT persons feel compelled to live their lives impedes the creation of vibrant LGBT-controlled and LGBT-friendly spaces.⁵⁶ Once “out,” many are forced from their homes and communities.⁵⁷ Those able to depart, yet who remain in Africa, often find themselves in situations just as bad as those they just left. LGBT refugees, particularly in southern Africa, have been victimized by continual and extreme antigay violence, including a refugee man locked in his home and set on fire in a camp in Uganda after other refugees learned of his sexual orientation, and two women who were abducted from a refugee camp in Uganda not because they themselves were gay, but merely for assisting LGBT refugees who had recently come to the camp.⁵⁸

¶22 It is in these cultural contexts that we now turn to an analysis of legislation in three African nations—Uganda, Zimbabwe, and Malawi—to explore three possible paths that sexual orientation legislation can take on the African continent. Each presents unique challenges for LGBT persons and their allies, and each mirrors legislation that has taken place during the broader global human rights push to decriminalize homosexuality throughout the past several decades.

III. EXAMINING THREE APPROACHES TO HOMOSEXUALITY LEGISLATION IN 2012

¶23 Attempts by any African nation to regress or progress in its legal treatment of LGBT persons are unique. That three nations did so in 2012, and all in disparate manners, allows for a comparative treatment of not only the means by which those laws were discussed and undertaken, but also the ways in which such laws have served, and could serve in the future, as models for other similar pieces of legislation across the continent.

⁵⁵ Farouk Chothia, *Gay Rights: Africa, the New Frontier*, BBC NEWS (Dec. 7, 2011), <http://www.bbc.co.uk/news/world-africa-16068010> (“*The only thing that unites Christians and Muslims in Nigeria [where thousands of people have been killed in sectarian conflict] is the oppression of gay people.*”) (emphasis added); see also Jonathan Paye-Leylah, *Liberian Christians and Muslims Campaign Against Gay Marriage*, CHI. SUN-TIMES (Nov. 10, 2012), <http://www.suntimes.com/news/world/16296484-418/story.html> (quoting religious leaders extolling the “unity of purpose that both Christians and Muslims were showing against homosexuality,” despite outbreaks of violence between adherents of the two faiths across the country).

⁵⁶ The general exception to this has been, though only in large cities, the development of an underground LGBT nightclub, held discreetly in secret venues. These clubs remain rare; even in Lagos, Africa’s largest city, there is only one club, where no one is allowed to take photos or identify other individuals by name. See Tomi Oladipo, *Inside Nigeria’s Secret Gay Club*, BBC NEWS (Jan. 2, 2013), <http://www.bbc.co.uk/news/world-africa-20887170>. The existence of these secret clubs provides some respite for gay people (mostly, however, gay men), but even those who attend parties inside the club find it necessary to return to a life of hiding after walking outside. *Id.*

⁵⁷ See, e.g., Orla Ryan, *Ghana’s Secret Gay Community*, BBC NEWS AFRICA (Mar. 14, 2007), <http://news.bbc.co.uk/2/hi/africa/6445337.stm> (“When Patrick Williams told his mother he was gay, she packed his bags and threw him out of the house, disowning her son for what she saw as an evil act . . . ‘My own mother sometimes says she wishes I was dead,’ he said. *His experience is by no means unusual in the West African country.*”) (emphasis added).

⁵⁸ Smith, *supra* note 54. Some survive these attacks only through the intervention of fellow refugees. Smith describes “a gay Somali teenager in Kenya who was doused in petrol in 2010 and would have been set on fire by a crowd of teenagers . . . if not for the intervention of an older Somali woman.” *Id.*

When politicians can push these laws and improve their public standing, regardless of whether or not they actually pass, legislators in other countries take notice. In many nations, this is a one-way ratchet—leaders will improve their standing and support only by fighting against the rights of LGBT persons. Leaders fighting for LGBT equality, or even just minimal legislative improvements in the lives of LGBT persons, will have to be popular enough to withstand the public backlash attendant with taking such a position.

A. *Uganda’s “Bootstrapping Down”: Criminalizing Both the Gay and the Pro-Gay*

¶24 Between 2000 and 2012, Uganda experienced a stark regression in its legal protection for LGBT persons. What makes this regression all the more surprising is where Uganda began—prior to 2000, male-male homosexual activity was banned by law, but would result, at most, in a short prison sentence and small fines, and female-female homosexual activity was not illegal, though it was met with severe social stigma. Revisions of the nation’s penal code in 2000 made all homosexual activity illegal and punishable by life imprisonment.⁵⁹ Uganda’s full criminalization, and its attendant prison terms for LGBT persons prosecuted by the law, made the country one of the most repressive places in the world for antigay laws.

¶25 Uganda remained in this position for a mere nine years. In 2009, a backbencher parliamentarian named David Bahati, in his first term as Member of Parliament and with deep ties to conservative religious officials in Africa and the United States, introduced a private member bill that would, by its terms, make Uganda the most unwelcoming place for LGBT persons, or anyone harboring support for LGBT persons, in the world.⁶⁰ His Anti-Homosexuality Bill of 2009,⁶¹ colloquially described in the press as the “Kill the Gays Bill,”⁶² had several provisions: first, it strengthened punishments for those convicted of engaging in homosexual activity; second, the law introduced the death penalty for “aggravated homosexuality,” which included a second violation of the ban on same-sex activity and any sexual encounter with a minor, disabled person, or any sex act engaged in by a person who was HIV-positive;⁶³ third, it criminalized anyone who “aids, abets, counsels, or procures another to engage of acts of homosexuality,” punishable by up to seven years in prison.⁶⁴ Essentially, the law would have made Uganda the first

⁵⁹ See PENAL CODE AMENDMENT (GENDER REFERENCES) ACT OF 2000 (Uganda).

⁶⁰ Bahati himself stated that the bill “sprang from a conversation with members of The Fellowship [a group of conservative American pastors known for their engagement and outreach in Africa] in 2008.” Josh Kron, *Resentment Toward the West Bolsters Uganda’s New Anti-Gay Bill*, N.Y. TIMES (Feb. 28, 2012), at A6, A7.

⁶¹ Anti-Homosexuality Bill, *supra* note 1 (“This Bill aims at strengthening the nation’s capacity to deal with emerging internal and external threats to the traditional heterosexual family.”).

⁶² See, e.g., Mara Gay, *American Pundits Lambaste Uganda’s ‘Kill the Gays’ Bill*, ATLANTIC WIRE (Dec. 10, 2009), <http://www.theatlanticwire.com/global/2009/12/american-pundits-lambaste-uganda-s-kill-the-gays-bill/26155/> (compiling responses to the Bill by members of the American press).

⁶³ See Anti-Homosexuality Bill, Part II(3)(1) (a)—(g), *supra* note 1. Though many in the media focused on the “uniqueness” of this punishment, the terms of the 2009 Bill would only have aligned Uganda with the countries in Africa that already permitted the death penalty for homosexuality, and would not go as far as some nations which permit death upon the first offence.

⁶⁴ Part II(7) of the Anti-Homosexuality Bill created a seven year penalty for anyone falling under this broad definition, while Part II(14) made it a crime for any person occupying “a position of authority” for failing to disclose the offense to the police within twenty-four hours. The levels of possible regression for such a

nation in the world to codify a multiyear prison term for a straight person who espoused a pro-gay viewpoint.⁶⁵

¶26 Despite overwhelming public support⁶⁶ and what seemed to be near-unanimous support inside parliament,⁶⁷ Bahati's bill was indefinitely tabled. Many observers pointed to the widespread outcry from world leaders, including Ban Ki-Moon, David Cameron, Barack Obama, Desmond Tutu, Nelson Mandela, and others, as influencing Ugandan President Yoweri Museveni to exert private pressure amongst lawmakers in his party to kill the bill.⁶⁸ Bahati would once again bring his Bill to the floor in chambers in 2010 and 2011, but it met the same fate.

¶27 Though it failed to pass, Bahati's bill served to foment large-scale public campaigns against LGBT people and their allies. In October 2010, the Ugandan newspaper *Rolling Stone* (not to be confused with the eponymous, and far more famous, American-based periodical) published the photos and names of what it called "100 known homosexuals."⁶⁹ Those named soon found themselves victimized through public harassment and violence. Many fled the country.⁷⁰ But at least one was not as lucky. David Kato, one of the most public faces of the nascent Ugandan LGBT community, was found hacked to death in his home just three months after the newspaper published his photo.⁷¹ The *Rolling Stone* publisher responsible for the headline, Giles Muhame,

reporting requirement are large. Additionally, Parts II(11) and II(13) would penalize landlords who simply rented rooms to someone known to be homosexual.

⁶⁵ Part II(13) of the Bill outlined five ways in which a person could be found to have engaged in the "promotion of homosexuality," including "fund[ing] or sponsor[ing] homosexuality or other related activity" or "us[ing] electronic devices . . . for purposes of homosexuality or promoting homosexuality." See *Anti-Homosexuality Bill*, *supra* note 1.

⁶⁶ Even discomfort with the death penalty clause was not enough to deter support from the Bill. See *Uganda Debates Death Penalty for Gays*, MSNBC (Dec. 8, 2009), http://www.msnbc.msn.com/id/34331632/ns/world_news-africa/t/uganda-debates-death-penalty-gays/#.ULfhN5gRZSU (citing the country's ethics minister, James Buturo, who "said the death sentence clause would probably be reviewed but maintained the law was necessary," and local shopkeepers John Muwanguzi, who stated, "I feel the bill is good and necessary, but I don't think gays should be killed. They should be imprisoned for a year and warned not to do it again. The family is in danger in Uganda because the rate at which vice is spreading is appalling.").

⁶⁷ John Otekat Emile, an independent MP, stated he thought the bill had a "99 percent chance" of passing. *Uganda MP Urges Death for Gay Sex*, BBC AFRICA (Oct. 15, 2009), <http://news.bbc.co.uk/2/hi/africa/8308912.stm> ("Members of Parliament are overwhelmingly supporting this bill . . .").

⁶⁸ This is despite Museveni's consistent public statements in support of the Bill. See, e.g., Xan Rice, *Uganda Considers Death Sentence for Gay Sex Before Parliament*, GUARDIAN (Nov. 29, 2009), <http://www.guardian.co.uk/world/2009/nov/29/uganda-death-sentence-gay-sex> ("President Yoweri Museveni appeared to add his backing earlier this month, warning youths in Kampala that he had heard that 'European homosexuals are recruiting in Africa,' and saying gay relationships were against God's will. 'We used to say Mr and Mrs, but now it is Mr and Mr. What is that now?' he said.").

⁶⁹ See Gittleman, *supra* note 50 (describing the paper's publication, including the use of the phrase "Hang Them!" in large block letters next to the photos of the 100 gay and gay-friendly individuals, many of whom, as private citizens, did not engage in LGBT activism).

⁷⁰ For a personal narrative of one such escape, see Demetri Levantis, *Gay Ugandan Flees to New Zealand Over Death Threats*, GAY STAR NEWS (July 2, 2012), <http://www.gaystarnews.com/article/gay-ugandan-flees-new-zealand-over-death-threats020712> (telling the story of Steven Kasiko, one of the 100 Ugandans included in the *Rolling Stone* publication).

⁷¹ In media outside the country, the murder was called a hate crime, and the reason for the attack was outright acknowledged to be Kato's sexual orientation. In Uganda, police insisted it was a robbery. Despite

insisted that the publication was not designed to incite violence, despite the emphatic “Hang Them!”, and instead was meant to urge “authorities to investigate and prosecute people recruiting children to homosexuality.”⁷²

¶28

Bahati’s bill did not stay dead for long. Recognizing its political popularity, Uganda’s Parliament, this time under the leadership of Speaker Rebecca Kadaga, took up a version of the Anti-Homosexuality Bill in late 2011.⁷³ The bill remained substantially similar to the one introduced by Bahati in 2009, with one glaring exception—the removal of the death penalty as a possible punishment for those convicted of aggravated homosexuality.⁷⁴ The maximum penalty under the new law would instead be life imprisonment, and the draft legislation still called for varying lengths of imprisonment for the other violations included in Bahati’s original bill—including the “aiding and abetting” sections, bans on renting to LGBT people, and the mandatory reporting requirements, which demand that individuals who become aware that an acquaintance, friend, or neighbor is homosexual report that person to the authorities, or otherwise be charged themselves with a felony. Every provision that still precluded a person from taking actions that would help LGBT people, let alone advocate on their behalf, retained a criminal penalty.⁷⁵ Kadaga cited public outcry from the failure to pass the bill in previous sessions as motivating the end-of-year push, and promised to deliver its passage “as a Christmas gift” to supporters.⁷⁶ Her public support argument did not itself lack merit—thousands of antigay activists took to the streets to protest homosexuality in the

the incredibly violent rhetoric emanating from many officials, government spokespersons continuously deny that LGBT people are the victims of attacks, or even public harassment. *See* Max Delany, *Murder of Gay Activist David Kato Sends Chill in Uganda*, CHRISTIAN SCIENCE MONITOR (Jan. 27, 2011), <http://www.csmonitor.com/World/Africa/2011/0127/Murder-of-gay-activist-David-Kato-sends-chill-in-Uganda>. Kato’s murderer was eventually sentenced to 30 years in prison for the crime. *See* Sarah Paulsworth, *Controversial Uganda Anti-Gay Bill to Pay be End of 2012*, JURIST (Nov. 12, 2012, 10:35 AM), <http://jurist.org/paperchase/2012/11/controversial-uganda-anti-gay-bill-to-pass-by-end-of-2012-ap-report.php>.

⁷² *Attacks Reported on Ugandans Newspaper ‘Outed’ as Gay*, BBC (Oct. 22, 2010, 11:48 AM), <http://www.bbc.co.uk/news/world-africa-11608241>. Just two months before Kato’s death, a Ugandan court demanded the paper stop publishing photos of individuals it believed to be homosexual. Xan Rice, *Ugandan Paper Ordered to Stop Printing List of Gay People*, GUARDIAN (Nov. 1, 2010, 12:04 PM), <http://www.guardian.co.uk/world/2010/nov/01/uganda-paper-gay-list>.

⁷³ *See, e.g.,* Rodney Muhumuza, *Official: Uganda to Pass Anti-Gay Bill This Year*, TIMES HERALD (Nov. 12, 2012, 7:12 AM), <http://www.timesherald.com/article/20121112/NEWS05/121119936/official-uganda-to-pass-anti-gay-bill-this-year>.

⁷⁴ Throughout the debate in parliament, it remained difficult to ascertain whether or not the death penalty provision was in fact removed. *Compare Uganda Anti-Homosexuality Bill: MPs Drop Death Penalty*, BBC (Nov. 23, 2012, 7:19 AM), <http://www.bbc.co.uk/news/world-africa-20463887> (“In [the Bill’s] original form, those convicted of aggravated homosexuality . . . faced the death penalty. Such offenses would now be punished with life imprisonment, it is understood.”), with *Uganda Kill the Gays Bill: Ugandan Activists Confirm Death Penalty Not Removed*, ALL AFRICA NEWS (Nov. 28, 2012), <http://allafrica.com/stories/201211290868.html> (“The only version of the bill that is public today still includes the death penalty provision for ‘aggravated homosexuality,’ said Kasha Jacqueline [of Freedom and Roam Uganda, a local LGBT-focused nonprofit organization].”).

⁷⁵ *See* Andy Towle, *Uganda’s Kill the Gays Bill, Explained*, TOWLEROAD (Nov. 26, 2012, 9:42 AM), <http://www.towleroad.com/2012/11/jim-burroway-at-box-turtle-bulletin-has-done-an-excellent-job-at-parsing-ugandas-anti-homosexuality-aka-kill-the-gays-bill.html>.

⁷⁶ Elias Biryabarema, *Uganda Says Wants to Pass Anti-Gay Law as “Christmas Gift”*, REUTERS (Nov. 13, 2012, 12:22 PM), <http://www.reuters.com/article/2012/11/13/us-uganda-homosexuality-idUSBRE8AC0V720121113>.

nation and encourage action by Ugandan lawmakers.⁷⁷ Ugandan citizens questioned by the international press often expressed agreement with the general goal of the antigay legislation, invoking the widespread belief that gays were attempting to “recruit” local youths into homosexuality.⁷⁸

¶29 Kadaga’s outspoken support of the Bill moved the draft law off of the backbench and onto the fast track toward passage. Her well-founded belief that the Bill “reflects the will of a majority of the Ugandan people,”⁷⁹ combined with the public support of members of Museveni’s Cabinet and various religious leaders⁸⁰ and the dearth of organizations, both in the country and exerting pressure internationally working against the law,⁸¹ makes passage through Parliament all-but-assured. Even though the Bill failed to pass before Christmas, the Anti-Homosexuality Bill has been introduced and “fast-tracked” in each parliamentary session since 2009, making activists fear that passage could happen rapidly and at any time.⁸² This would result in devastating consequences for Uganda’s LGBT population, severely hampering the ability of activists to engage in attempts to change the views of Uganda’s population,⁸³ further entrenching antigay attitudes, and creating a framework for antigay officials in other nations, around Africa and the globe, to pass similar laws. Though actual passage of such laws would prove easier in nations with deep-seated anti-LGBT beliefs, the AHB could also be modeled in nations without an antigay majority, as Kadaga and Bahati’s experience has shown that parliamentary success is not necessary for a subsequent increase in public stature for politicians who oppose LGBT rights.

⁷⁷ Cf. Muhumuza, *supra* note 73.

⁷⁸ *Id.* (“Parliamentarian David Bahati charged . . . that wealthy homosexuals from the West were ‘recruiting’ poor children into gay lifestyles with promises of money and a better life.”).

⁷⁹ Joe Morgan, *Uganda Speaker Wants Anti-Gay Bill Passed By Tuesday*, GAY STAR NEWS (Nov. 17, 2012), <http://www.gaystarnews.com/article/uganda-speaker-wants-anti-gay-bill-passed-tuesday171112>.

⁸⁰ *Uganda Debates Death Penalty for Gays*, MSNBC NEWS (Dec. 8, 2009, 5:01 PM), http://www.msnbc.msn.com/id/34331632/ns/world_news-africa/t/uganda-debates-death-penalty-gays/ (quoting Uganda’s Ethics Minister, James Buturo, who “maintained the law was necessary to counter foreign influence [encouraging homosexuality in the country].”).

⁸¹ Though many international groups have organized protests of the law, few of those organizations have engaged on the ground in Uganda. See Todd Fernandez, *NYC Action at Uganda Mission Against “Kill the Gays” Bill*, HUFFINGTON POST (Nov. 29, 2012, 4:01 PM), http://www.huffingtonpost.com/todd-fernandez/nyc-action-at-ugandan-mission-against-kill-the-gays-bill_b_2213274.html.

⁸² See, e.g., Dyana Bagby, *Uganda’s Kill the Gays Bill Expected to Pass*, GEORGIA VOICE (Nov. 20, 2012, 2:53 PM), <http://www.thegavoice.com/news/world-news/5493-ugandas-kill-the-gays-bill-expected-to-pass>.

⁸³ A small group of brave Ugandan activists have engaged in public demonstrations, including about forty individuals who came out for the country’s first gay pride parade. See Melanie Nathan, *Ugandans Both Proud and Brave*, ADVOCATE (Aug. 8, 2012), <http://www.advocate.com/arts-entertainment/commentary/2012/08/08/see-photos-ugandans-both-proud-and-brave> (“While the Anti-Homosexuality Bill from David Bahati languishes in Uganda’s Parliament, LGBT activists dared to declare their pride in public events this weekend.”). Such public celebrations would certainly be illegal if the Anti-Homosexuality Bill were to pass. LGBT people are virtually invisible at present; the Bill would make that invisibility actual.

B. Malawi's Surprising Move Toward Decriminalization

¶30 Malawi, like Uganda, can trace its legal ban on homosexuality to its British-installed penal code.⁸⁴ Malawi has banned male-male sexual activity, and it was only recently, in 2011, that the country expanded that ban to also include female homosexual acts.⁸⁵ Three independent sections of Malawi's 1930 Penal Code have been interpreted to ban homosexuality, though the word itself is absent from statute. Section 153 prohibits "unnatural offenses," which courts now interpret to prohibit both male-male and female-female sexual activity.⁸⁶ Section 156 bans "[i]ndecent practices between males,"⁸⁷ and Section 137A criminalizes "indecent practices between females."⁸⁸ The country also bans an extensive list of printed publications that could possibly have gay-friendly content.⁸⁹

¶31 Malawi's ban came to international prominence in December 2009, when a man and transgender woman, Steven Monjeza and Tiwonge Chimbalanga, were arrested after hosting an engagement party for their upcoming wedding.⁹⁰ They were quickly tried and

⁸⁴ Malawi's British-drafted 1930 Penal Code remains in effect today, but before British rule, Malawi lacked express prohibitions on homosexual conduct. See Human Rights Watch, *Malawi: Courageous Move to Suspend Anti-Gay Laws - Other States that Criminalize Same-Sex Conduct Should Do the Same*, ALLAFRICA.COM (Nov. 6, 2012), <http://allafrica.com/stories/201211060389.html> (contextualizing the law "inherited" by Malawi and forty other Commonwealth colonies during the late 1800s and early 1900s). Nearly all of these laws use the same language, banning "carnal knowledge against the order of nature," which was widely understood in Britain to mean anal intercourse. *Id.* This definition helps explain why some former British colonies in Africa retain bans on male-male intercourse and not female-female sexual activity.

⁸⁵ One of President Mutharika's final acts in office was to sign a statutory ban on same-sex activity between two females.

⁸⁶ LAWS OF MALAWI: PENAL CODE, Cap. 7:01, § 153 (1930). Section 154 further criminalizes "attempt[s] to commit any of the [unnatural offenses]," which can be interpreted to further marginalize gay men by criminalizing activity that, while not sexual, could be interpreted as possibly leading to sexual activity. *Id.* at § 154. Thus, "attempt[ed]" homosexuality is punishable by up to seven years in prison, a sentence that includes the possibility of corporal punishment, as opposed to the fourteen-year sentence for anyone who actually commits a simple "unnatural offence." *Id.*

⁸⁷ This "gross indecency" law does not include a definition differentiating it from the "unnatural offences" provision, but we can infer that it would include any sexual activity between two males (as the law ignores female-female activity) other than anal intercourse. See *id.* at §§ 153(a), 156. Such acts are subject to up to five years imprisonment with the possibility of corporal punishment. *Id.* at § 156.

⁸⁸ *Id.* at § 137A.

⁸⁹ This list, codified under Section 46, includes both gay-friendly and sex-positive content as varied as "The Homosexual Society," a textbook by scholar Richard Houser; "Secret and Forbidden," a novel by African author Paul Tabari; "Sexual Pleasure in Marriage," a manual by Jerome and Julia Rainer; and the South African magazine *Drum*, a "weekly and celebrity magazine . . . aim[ed] to inform, alert, educate and entertain" the diverse and modern South African family, DRUM MAGAZIN, <http://drum.co.za/>. See *Prohibited Publications Order*, LAWS OF MALAWI: PENAL CODE, *supra* note 86, at § 46.

⁹⁰ See Godfrey Mapondera & David Smith, *Malawian Gay Couple Jailed for 14 Years*, GUARDIAN (May 20, 2010, 06:11 EDT), <http://www.guardian.co.uk/world/2010/may/20/malawian-gay-couple-jailed-14-years>. Monjeza and Chimbalanga did not attempt to marry, and were arrested a mere two days after making a public announcement that they would engage in a symbolic wedding ceremony in the hotel where Chimbalanga worked as a janitor. *Id.* Much of the international press surrounding the case referred to both Monjeza and Chimbalanga as gay men, referring to both as "he," however Chimbalanga identifies as a woman, and, while born a biological male, Chimbalanga was living as a woman upon her arrest. *Id.* For a critique of the press's insistence on referring to the couple as "gay," see Natacha Kennedy, *Once Again, the "T" in LGBT is Silenced*, GUARDIAN (May 22, 2010, 11:00 EDT), <http://www.guardian.co.uk/commentisfree/2010/may/22/malawian-transgender-identity/print> ("There has

convicted under Section 153.⁹¹ Both were sentenced to fourteen years in maximum-security prison, the harshest sentence possible, after the presiding judge announced in court that he wished to make an example out of them.⁹² After a strong international outcry,⁹³ then-President Bingu wa Mutharika pardoned the two young people during a visit from United Nations Secretary-General Ban-Ki Moon, but used his pardon statement to further degrade and otherize LGBT persons.⁹⁴ Despite the international outcry and subsequent pardon, the general public strongly approved of Monjeza and Chimbalanga's convictions. There were further police crackdowns not only on LGBT persons, but also on those that supported them—in January 2010, a Blantyre man, Peter Sawali, was arrested for putting a sign on his property that read “Gay rights are human rights.”⁹⁵

¶32

Mutharika unexpectedly died of a heart attack in early 2012, elevating his Vice-President, Joyce Banda, to the Presidency. Banda, who came to prominence in 1999 as the country's first Minister for Gender and Community Services while spearheading Malawi's first Domestic Violence bill,⁹⁶ was viewed by many human rights organizations as a forward-thinking reformer. Less than one month after taking office, in May 2012, Banda surprised even those who viewed her as such a reformer by calling, in her first public speech, for repeal of Malawi's ban on homosexuality.⁹⁷ From its beginning, Banda's push was path-breaking; Malawi would be the first nation to decriminalize homosexual acts since South Africa did so in 1998.⁹⁸ Other African nations where same-

rightly been an international outcry in response to the couple's barbaric treatment, but the protest has been against the perceived homophobia of Malawi's law courts. The problem is, however, that one half of this couple does not primarily identify as gay.”). As I am sympathetic to Kennedy's broader point, and for purposes of accuracy, I will refer to Chimbalanga using female pronouns.

⁹¹ Their conviction helps showcase just how broad the ban on homosexual activity can be. Monjeza and Chimbalanga were not seen engaging in any public displays of sexual activity nor did they actually attempt to marry. In court, they in fact denied having sexual intercourse, upon which the court demanded they submit to humiliating physical examinations to “prove” they had violated Section 153. See David Smith, *Malawian Gay Couple Face Test to Prove They Had Sexual Relations*, GUARDIAN (Jan. 1, 2010), <http://www.guardian.co.uk/world/2010/jan/01/malawi-gay-couple-married-test>.

⁹² Mapondera & Smith, *supra* note 90.

⁹³ The responses predominantly came from outside Africa. One exception to this was South African President Jacob Zuma, who openly condemned the verdict during a session of question time before the South African Parliament. See *South Africa's Zuma Condemns Arrest of Gays in Malawi*, REUTERS (May 27, 2010), <http://www.reuters.com/article/2010/05/27/us-malawi-gays-zuma-idUSTRE64Q46420100527>.

⁹⁴ *Malawian Gay Couple Pardoned, Released From Jail*, HUFFINGTON POST (May 29, 2010), http://www.huffingtonpost.com/2010/05/29/malawi-gay-couple-pardone_n_594451.html (quoting President Mutharika's pardon statement as saying “[t]hese boys have committed a crime against our culture, against our religion, and against our laws . . . However, as head of state, I hereby pardon them.”) (emphasis added). Amazingly this harsh rebuke of homosexuals occurred while the Secretary-General was standing next to Mutharika at the press conference announcing the pardons. *Id.*

⁹⁵ *Malawi Arrests 'Gay-Poster' Man*, BBC AFRICA (Feb. 3, 2010), <http://news.bbc.co.uk/2/hi/africa/8495229.stm>.

⁹⁶ *Cf. Malawi's One-Woman Revolution*, WASH. POST (Aug. 5, 2012), <http://www.smh.com.au/world/malawis-onewoman-revolution-20120804-23m8n.html?skin=text-only>.

⁹⁷ See *Malawi to Overturn Homosexual Ban, Joyce Banda Says*, BBC NEWS (May 18, 2012), <http://www.bbc.co.uk/news/world-africa-18118350> (“Some laws which were duly passed by [this] august house . . . will be repealed as a matter of urgency . . . these include the provisions regarding indecent practices and unnatural acts.”).

⁹⁸ Much like its legalization of same-sex marriage, South Africa decriminalized consensual sexual activity between men via a decision of the Constitutional Court. See *Nat'l Coalition for Gay & Lesbian Equality v. Minister of Justice*, 1998 1 SA 6 (S. Afr.).

sex activity is not prohibited simply lack laws against it and have not affirmatively decriminalized.

¶33 Banda's statement received substantial praise in the international community, from world leaders and human rights organizations alike.⁹⁹ Nevertheless, many within Malawi expressed outrage and the hope that she would reverse her decision. After considerable public pressure, including a concerted lobbying campaign from Malawian religious organizations, Banda later reversed herself, stating that, "anyone who has listened to the debate in Malawi realizes that Malawians are not ready to deal with that right now."¹⁰⁰ Outside observers were surprised by Banda's backtrack; despite the unpopularity of the bill with church leaders and many in the general public, reports noted that Banda had support from a majority of MPs.¹⁰¹ As of October 2012, Banda had abandoned any attempt to legislatively repeal sections 137A, 153, 154, and 156.

¶34 It therefore surprised much of the international community when reports surfaced in early November 2012 that Malawian Justice Minister Ralph Kasambara had announced a suspension of arrests and prosecutions for male homosexuality.¹⁰² The suspension, according to Kasambara, would prevent government embarrassment. He stated "If we continue arresting and prosecuting people based on the said laws and later such laws are found to be unconstitutional it would be an embarrassment to government . . . It is better to let one criminal get away with it rather than throw a lot of innocent people in jail."¹⁰³ Though the policy was consistent with President Banda's wishes, Kasambara's rationale itself made little sense. Prosecutions under the law in Malawi were already rare, and there is no evidence that those described by Kasambara as "innocent"—people not engaged in same-sex activity—had ever been tried under the statutes.¹⁰⁴ Further, Malawi's constitutional court has not been reluctant to find other laws passed by

⁹⁹ Banda received praise from LGBT and human rights organizations alike, such as Amnesty International. See *Malawi: President Announces Intention to Repeal Law Criminalising Homosexuality*, AMNESTY INTERNATIONAL (May 23, 2012), <http://www.amnesty.org.au/news/comments/28736/> (praising Banda's statement, but calling for the "immediate introduction" of a law to eliminate sections 137A, 153, 154, and 156), and Human Rights Watch, which called the statement a "bold step forward . . . [that] has given hope to thousands who risk prison sentences under such laws.").

¹⁰⁰ Scott Roberts, *Malawi: President Joyce Banda U-Turns on Gay Rights*, PINK NEWS (Oct. 1, 2012 2:36pm), <http://www.pinknews.co.uk/2012/10/01/malawi-president-joyce-banda-u-turns-on-gay-rights/>; see also Austin Kakande, *CSOs on JB's Neck Over Homosexual Laws*, MALAWI VOICE (Oct. 1, 2012), <http://www.malawivoice.com/2012/10/01/csos-on-jbs-neck-over-homosexual-laws-she-should-be-last-person-to-promote-homophobia-undule-59731/> (describing the response from Malawi's fledgling gay rights activist community, including Undule Mwakasungula, Executive Director of the Centre for Human Rights and Rehabilitation).

¹⁰¹ See *Malawi to Overturn Homosexual Ban, Joyce Banda Says*, BBC AFRICA (May 15, 2012), <http://www.bbc.co.uk/news/world-africa-18118350> ("[T]he President has the support of a majority of MPs and so should be able to get parliament to overturn the law. However . . . it will be an unpopular move with many church leaders, as well as the wider population in this conservative country.").

¹⁰² Raphael Tenthani, *Malawi Lauded on Anti-Gay Law Moratorium*, BOSTON GLOBE (Nov. 8, 2012), <http://www.bostonglobe.com/news/world/2012/11/09/malawi-lauded-anti-gay-law-moratorium/aUNg85OC0Hhzw3A7SbXdRL/story.html>.

¹⁰³ *Id.*

¹⁰⁴ See *Malawi: Courageous Move to Suspend Anti-Gay Laws*, HUMAN RIGHTS WATCH (Nov. 6, 2012), <http://allafrica.com/stories/201211060389.html> ("Arrests on the basis of Malawi's anti-gay laws have been rare—two men were convicted in 2009 and sentenced to 14 years, but were subsequently pardoned. But Human Rights Watch has found that even unenforced anti-gay laws have nefarious consequences, including blackmail, restricted access to health services, and lack of access to justice.").

Parliament to be unconstitutional, making Kasambara's fear that striking down the law would prove "embarrassing" or serve to delegitimize the government in some way seem unfounded, or at the very least something that would have already occurred.¹⁰⁵

¶35 Less than one week later, mirroring President Banda's walk-back of her first attempt to decriminalize homosexuality, the Malawian government again backtracked, this time vehemently denying Kasambara's statements to the international press.¹⁰⁶ These denials, again, were caused by pressure from the conservative Christian community, in particular one group: the Malawi Council of Churches, a group of twenty-four conservative churches with long ties to lawmakers and government officials.¹⁰⁷ Public statements of these churches, beyond merely describing homosexuality as "foreign" and "un-African," have also fomented nationalist and anti-western views among the populace by arguing that Banda's move to decriminalize homosexuality is merely another ploy to entice foreign leaders and western investors to do business in the country. Additionally, the Malawi Law Society, an organization of practicing lawyers and legal scholars, denounced the move, stating that "only parliament has the power to suspend laws . . . No minister can verbally or over a written memorandum suspend the application of the law."¹⁰⁸

¶36 For now, Malawi's laws remain on the books, with little chance for legislative repeal. It remains to be seen whether, despite confusion over Justice Minister Kasambara's statement, police will continue active prosecution of those in violation of Sections 153 and 156.

C. Zimbabwe's Constitutional Revision

¶37 Zimbabwe has various overlapping laws, all of which independently prohibit same-sex sexual activity. In its common law, Zimbabwe bans sodomy, which it
 ¶38 defines as "unlawful and intentional sexual relations . . . between two human males,"¹⁰⁹ as well as what it terms "unnatural offenses," defined as the purposeful commission of "any unnatural sex act by one person with another person,"¹¹⁰ thereby functionally prohibiting female-female sexual relationships. In 2006, the Zimbabwean national legislature introduced and passed a "Sexual Deviancy Law," which criminalizes actions that the general public could perceive as being homosexual. This law makes a prison

¹⁰⁵ Cf. *Supreme Court of Appeal: Decisions in 2010*, MALAWI LEGAL INFORMATION INSTITUTE, <http://www.malawilii.org/content/supreme-court-appeal-decisions?year=2010>.

¹⁰⁶ See, e.g., *Malawi Minister Reportedly Denies Move to Suspend Anti-Gay Law*, L.A. TIMES (Nov. 8, 2012), http://latimesblogs.latimes.com/world_now/2012/11/malawi-minister-anti-gay-law.html (quoting Kasambara himself saying, "There was no such announcement [proclaiming a moratorium].").

¹⁰⁷ See *Malawi: Churches Force U-Turn on Gay Rights*, REUTERS (Nov. 9, 2012), <http://www.reuters.com/article/2012/11/08/us-malawi-gays-idUSBRE8A70XJ20121108> ("Justice Ministry sources said pressure from the Malawi Council of Churches, a group of 24 Protestant churches, forced the U-turn."); see also Lameck Masina, *Suspension of Anti-Gay Law Draws Mixed Reaction in Malawi*, VOICE OF AFRICA NEWS (Nov. 8, 2012), <http://www.voanews.com/content/suspension-of-anti-gay-law-draws-mixed-reaction-in-malawi/1541867.html> (quoting Osborn Mbewe, general secretary of the Malawi Council of Churches).

¹⁰⁸ Masina, *supra* note 107.

¹⁰⁹ See Leane Renee, *Lesbian and Gay Rights in Zimbabwe*, AMERICAN UNIVERSITY, <http://www.wcl.american.edu/hrbrief/v5i2/html/zimbab.htm>.

¹¹⁰ *Id.*

sentence possible for anyone seen in public kissing, holding hands, or even hugging a member of the same sex.¹¹¹ This revision of the criminal code further incorporated a subjective component to the common law definition of male sodomy, expanding the realm of prohibited conduct from sexual activity to “any act involving contact between two males that would be regarded by a reasonable person as an indecent act.”¹¹² This law operates as a broad ban on any public and semi-public expression of same-sex intimacy or even friendship.¹¹³

¶39 Public persecution of openly gay individuals, and those suspected of being gay or sympathetic to the plight of gay people, is pervasive in Zimbabwe. One of the most active perpetrators of inflammatory antigay rhetoric is President Robert Mugabe, who has repeatedly stoked antigay attitudes during his twenty-five year rule.¹¹⁴ In addition to casting aspersions against gays and their allies in public speeches,¹¹⁵ Mugabe has taken to blaming LGBT people for Zimbabwe’s dire economic situation, an obfuscation that he has often fallen back on when the country’s economic situation has worsened.¹¹⁶ Mugabe’s personal vilification of gay men and lesbians has increased the already substantial public persecution of those suspected of being gay.¹¹⁷ To take just one relatively mild example, in a proclamation made during Zimbabwe’s Independence Day celebrations, Mugabe spent substantial portions of his speech attacking sexual minorities and their “western colonialist supporters.” He said, in part:

[Homosexuality] degrades human dignity. It’s unnatural, and there is no question ever of allowing these people to behave worse than dogs and

¹¹¹ ZIMBABWE CRIMINAL LAW CODIFICATION AND REFORM ACT, § 73 (2006); *see also Zimbabwe: Treatment of Sexual Minorities*, IMMIGRATION & REFUGEE BOARD OF CANADA (May 14, 2012), http://www.ecoi.net/local_link/218418/339528_de.html (noting that violators can be subjected to up to one year imprisonment, one of the shortest such sentences among African nations that criminalize same-sex sexual activity).

¹¹² Though the terms of this law could result in convictions for individuals who do not identify as LGBT, Zimbabwe has not introduced legislation similar to Uganda’s Anti-Homosexuality Bill.

¹¹³ *Cf. Same-Sex Smooch Banned in Zimbabwe Law Reform*, NEW ZIMBABWE NEWS (Nov. 12, 2009), <http://www.newzimbabwe.com/pages/gays13.14391.html> (quoting Zimbabwean law professor Geoff Feltoe, who states that “a seemingly intimate embrace *or hug* between two men would presumably be construed as a crime.”) (emphasis added).

¹¹⁴ For just one recent example, see Stephen Grey, *Robert Mugabe Attacks Gays in Birthday Rant*, PINK NEWS (Feb. 27, 2012), <http://www.pinknews.co.uk/2012/02/27/robert-mugabe-attacks-gays-in-birthday-rant/>.

¹¹⁵ In a now-infamous story, Mugabe went on a rambling rant against LGBT people during a visit to the 1995 Zimbabwe International Book Fair. Upon coming across a small booth dedicated to a group called Gays and Lesbians of Zimbabwe (GALZ), Mugabe snapped, likening gays and lesbians to drug addicts and calling them a threat to the very nature of Zimbabwean society. *See, e.g.*, HUMAN RIGHTS WATCH & INT’L GAY & LESBIAN HUMAN RIGHTS COMMISSION, *MORE THAN A NAME: STATE-SPONSORED HOMOPHOBIA AND ITS CONSEQUENCES IN SOUTHERN AFRICA* (2003), <http://www.hrw.org/reports/2003/safrica/safriglhr0303.pdf>.

¹¹⁶ *Cf., e.g.*, Angus Shaw, *Robert Mugabe, Zimbabwe President, Slams Gays, Western Values on 88th Birthday*, HUFFINGTON POST (Feb. 25, 2012), http://www.huffingtonpost.com/2012/02/25/robert-mugabe-zimbabwe-president-gays_n_1301149.html.

¹¹⁷ *See, e.g.*, Dan Littauer, *Zimbabwe Riot Police Arrest 44 Gay Activists*, GAY STAR NEWS (Aug. 12, 2012), <http://www.gaystarnews.com/article/zimbabwe-riot-police-arrest-44-gay-activists120812> (“Members of Zimbabwe’s LGBT community have been repeatedly detained, beaten, and sometimes even raped by the authorities.”).

pigs. If dogs and pigs do not do it, why must human beings? We have our own culture, and we must rededicate ourselves to our traditional values that make us human beings. What we are being persuaded to accept is sub-animal behavior and we will never allow it here. *If you see people parading themselves as lesbians and gays, arrest them and hand them over to the police!*¹¹⁸

¶40 Mugabe is not alone in his antigay rhetoric, nor in his explicit calls for individuals to further marginalize LGBT people. Mugabe's Local Government Minister, Ignatius Chombo, urged traditional chiefs¹¹⁹ in May 2012 to "banish people who support homosexuality" from their communities and take away their land.¹²⁰

¶41 Mugabe's stranglehold on power in Zimbabwe came to an end in 2008, upon his entering into a power-sharing agreement with opposition leader Morgan Tsvangirai.¹²¹ LGBT rights activists viewed this as an opportunity, as Tsvangirai had refrained from gay-bashing rhetoric, despite some public support for antigay laws,¹²² and had made statements beginning in early 2011 leading activists to infer his support for some gay rights, including anti-discrimination measures.¹²³ This belief proved correct—as Mugabe and Tsvangirai's power sharing agreement continued and their two parties agreed to a convention to rewrite the nation's constitution, Tsvangirai announced his support for constitutionalizing sexual orientation as a protected status.¹²⁴ Tsvangirai's fellow

¹¹⁸ See STEVEN VAN BREDA, *SEXUAL ORIENTATION AND THE ZIMBABWE GOVERNMENT* (Oct. 13, 1995), <http://www.qrd.org/qrd/world/africa/zimbabwe/sexual.orientation.and.the.govt-10.12.95>.

¹¹⁹ Like in neighboring South Africa, traditional chiefs in Zimbabwe have granted substantial political and legal power. The Traditional Leaders Act of 1998 governs this power-sharing arrangement. *Accord* Derek Matyszak, *Formal Structures of Power in Rural Zimbabwe*, RESEARCH AND ADVOCACY UNIT, <http://www.swradioafrica.com/Documents/Formal%20Structures%20of%20Power%20in%20Rural%20Zimbabwe.pdf>.

¹²⁰ Lance Guma, *Zimbabwe: Minister Urges Eviction of People Who Support Gays*, ALL AFRICA NEWS (May 15, 2012), <http://allafrica.com/stories/201205160217.html>.

¹²¹ Cf. Sebastien Berger, *Robert Mugabe and Morgan Tsvangirai Reach Power Sharing Deal in Zimbabwe*, TELEGRAPH (Sept. 11, 2008), <http://www.telegraph.co.uk/news/worldnews/africaandindianocean/zimbabwe/2801169/Robert-Mugabe-and-Morgan-Tsvangirai-reach-power-sharing-deal-in-Zimbabwe.html>.

¹²² *Tsvangirai Backs Mugabe in Rejection of Gay Rights*, STARAFRICA (Mar. 26, 2010), <http://en.starafrika.com/news/tsvangirai-backs-mugabe-in-rejection-of-gay-rights-35338.html> (comparing Mugabe's statements, that legalizing gay rights would be "madness, insanity," while Tsvangirai, who noted his "agreement with the president's stance," stating "why should a man seek to have a relationship with another man when women make up 52 percent of the population?").

¹²³ Cf., e.g., *Tsvangirai Statement on Gays*, NEW ZIMBABWE (July 11, 2011), <http://www.newzimbabwe.com/news-6412-Tsvangirai+statement+on+gays/news.aspx> (quoting scripture, Tsvangirai stated emphatically, "So while I may differ with them [gays], as a Christian and as a social democrat, I refuse to throw a stone at them.").

¹²⁴ Jessica Geen, *Zimbabwe Prime Minister Says Gay Rights are Human Rights*, PINK NEWS (Oct. 24, 2011), <http://www.pinknews.co.uk/2011/10/24/zimbabwe-prime-ministers-says-gay-rights-are-human-rights/> ("It is a very controversial subject in my part of the world. My attitude is that I hope the constitution will come out with freedom of sexual orientation, for as long as it does not interfere with anybody . . . To me, it is a human right."). Tsvangirai's choice of rhetoric mirrored the same used by American Secretary of State Hillary Clinton in a speech on International Human Rights Day, where she proclaimed, "Gay rights are human rights." *Hillary Clinton Declares 'Gay Rights are Human Rights'*, BBC NEWS (Dec. 7, 2011),

lawmakers did not share his beliefs,¹²⁵ and Mugabe remained intractably and vocally opposed,¹²⁶ as did several other key Zimbabwean stakeholders, including the two co-chairs of the Constitution Select Committee, Edward Mkhosi and Paul Mangwana, who were quoted as saying “We were all agreed that Zimbabwe is not a country that makes friends with gays.”¹²⁷

¶42 As the constitutional convention continued, with the debate shifting from inclusion of positive rights to a question of whether LGBT issues would be further criminalized or simply ignored,¹²⁸ the number of participants in the debate over LGBT rights increased. Some international human rights groups engaged, though many that might otherwise involve themselves were focused on blocking the Ugandan Anti-Homosexuality Bill or, later in 2012, leaning on the Malawian government and President Banda to repeal their sodomy law. The debate in Zimbabwe was somewhat quieter, perhaps because it began as a push for positive rights, and failed to become the impetus for a discriminatory measure until later in the process. Substantial international pressure was exerted, however, by United Nations High Commissioner for Human Rights Navi Pillay, who explicitly called on the Zimbabwean government to codify some rights for LGBT people, going so far as to broach the question during her first-ever trip to the country.¹²⁹ Her call, however, was rejected, and publicly so—the Zimbabwean Justice Minister, Patrick Chinamasa, meeting Pillay at the start of her trip, told her during an open meeting that the country would continue to arrest gays and lesbians for same-sex activity.¹³⁰

¶43 The draft constitution, initially seen as an opportunity to override the country’s statutory and common law bans on same-sex activity, eventually became another mechanism by which to enshrine discrimination. Rather than maintain the laws on the books, and leave the constitution silent on LGBT issues, those opposed to gay rights instead constitutionalized the criminal ban on homosexual conduct.¹³¹ Despite public

www.bbc.co.uk/news/world-us-canada-16062937. Tsvangirai may have been making a conscious choice to align himself with Clinton and other global leaders, in order to draw a contrast with Mugabe.

¹²⁵ *MPs Tackle Tsvangirai Over Gays*, NEW ZIMBABWE NEWS (Oct. 26, 2011), <http://www.newzimbabwe.com/news-6362-Tsvangirai+tackled+by+MPs+over+gays/news.aspx> (describing Tsvangirai’s speech to parliament immediately after his public statement in favor of gay rights as being met by “MPs mutter[ing] incomprehensibles, [while] others heckled” the party leader).

¹²⁶ See, e.g., John Campbell, *Mugabe Fights the Proposed Zimbabwe Constitution with Homophobia*, COUNCIL ON FOREIGN RELATIONS (Sept. 27, 2012), <http://blogs.cfr.org/campbell/2012/09/27/mugabe-fights-the-proposed-zimbabwe-constitution-with-homophobia/>; see also *Robert Mugabe Says No to Gay Rights in Zimbabwe’s Constitution*, PINK NEWS (July 19, 2010 11:33 am), <http://www.pinknews.co.uk/2010/07/19/robert-mugabe-says-no-to-gay-rights-in-zimbabwes-constitution/>.

¹²⁷ Ken Williams, *In Zimbabwe, Final Constitutional Draft Criminalizes Homosexuality and Marriage Equality*, S.D. GAY & LESBIAN NEWS (Feb. 27, 2012), <http://sdgln.com/news/2012/02/27/zimbabwe-final-constitutional-draft-criminalizes-homosexuality-and-marriage-equality> (quoting Mangwana further: “If gays and their supporters harbour hopes that homosexuality might be legalized in Zimbabwe, they should forget it. Homosexuality has been shut out of the constitution and there is no going back on that.”).

¹²⁸ *Id.*

¹²⁹ *Mugabe and Pillay Clash on Gay Rights*, RADIO NETHERLANDS WORLDWIDE (May 21, 2012), <http://www.rnw.nl/africa/article/mugabe-and-pillay-clash-gay-rights>.

¹³⁰ *Zimbabwe Rejects Calls for LGBT Rights*, THE ADVOCATE (May 21, 2012 7:21 am), <http://www.advocate.com/news/daily-news/2012/05/21/zimbabwe-rejects-calls-lgbt-rights>. This compares starkly with Secretary-General Ban Ki-Moon’s visit to Malawi, discussed *supra* note 33.

¹³¹ The draft also banned same-sex marriage, on which the prior constitution was silent. Williams, *supra* note 127.

support for some gay rights from Tsvangirai, the constitutional convention managed to further erode the legal protections of LGBT persons in Zimbabwe, leaving them in a more precarious and dangerous position than when the debate began.¹³²

IV. CONTEXTUALIZING THESE THREE PIECES OF HOMOSEXUALITY LEGISLATION

A. *Uganda's Downward Ratchet*

¶44 Uganda's Anti-Homosexuality Bill is singular, not for its inclusion of the death penalty, present in legal codes elsewhere,¹³³ but for its ban on pro-LGBT activities. The public focus on the death penalty component of the measure¹³⁴ has obfuscated a necessary analysis of the effects the Bill would have, if passed in its present form, on the political strategies of pro-LGBT groups and cultural integration by LGBT persons. Uganda's insistence on banning activities that could prove positive for nascent pro-LGBT political and social spaces creates a downward ratchet, eliminating any chance of social progress by banning the advocacy and political mechanisms by which such progress can be achieved.

¶45 Further, despite its failure to actually pass the Bill, the Ugandan parliament has succeeded, in several ways, in causing immense harm to LGBT persons in Uganda and abroad. MPs Bahati and Kadaga have helped foment widespread antigay activities within Uganda,¹³⁵ forcing many LGBT Ugandans to choose between emigration, life in refugee camps that are no more welcoming to LGBT persons than Uganda is,¹³⁶ and staying in the country with targets constantly on their backs. The mere suggestion that a person is non-heterosexual can cause violent reprisal.¹³⁷ Beyond Uganda's border, though, Bahati

¹³² Though the law merely constitutionalized the already-existing statutory bans on homosexual activity, the enshrining of such bans in the constitution makes it much more difficult for pro-LGBT political leaders to make changes to the laws in the future.

¹³³ See, e.g., *supra* text accompanying note 10.

¹³⁴ Most news outlets have colloquially referred to the legislation as the "Kill the Gays" Bill, even after public reports of the removal of the language permitting the death penalty as punishment. See, e.g., Alexis Okeowo, *Uganda "Kill the Gays" Bill Back in Limbo*, THE NEW YORKER (Dec. 18, 2012) (writing over three weeks after confirmed reports that the death penalty language had been removed from the bill). There was no discussion in this story, as in many others, of the ban on pro-LGBT activities present in the bill.

¹³⁵ Activists describe the fear caused by this widespread hatred as making it difficult to go about their everyday activities. Pepe Onziema, a transgender man who directs Sexual Minorities Uganda, writes:

I am here, still, in 2013, but I dread things as simple as shopping at a kiosk for groceries, because the owner has told me he doesn't sell to 'such people.' If I insist, he said, he will 'teach me how to be normal.' A full night's sleep is thwarted by the fear of a stranger who has followed me home or the neighbors who have formed a mob. My personal struggle is a small reflection of the entire LGBTI community's everyday apprehension.

Pepe Julian Onziema, *Living Proudly in Face of Uganda's Anti-Gay Bill*, CNN (Jan. 25, 2013), <http://www.cnn.com/2013/01/25/opinion/onziema-uganda-anti-gay/index.html>.

¹³⁶ Cf. Naomi Abraham, *Gay Africans Flee Persecution*, SALON (Oct. 29, 2011), http://www.salon.com/2011/10/29/gay_africans_flee_persecution/ (describing the terrible conditions facing LGBT refugees in camps across the continent); see also Smith, *supra* note 54 (discussing the acts of violence, rape, and murder that have affected LGBT refugees at a camp in Kenya).

¹³⁷ Cf. Rom Bhandari, *Experts Weekly: Uganda's Anti-Homosexuality Bill*, THINK AFRICA PRESS (Dec. 17, 2012), <http://thinkafricapress.com/uganda/experts-weekly-ugandas-anti-homosexuality-bill/> ("Millions of innocent persons will lose their jobs and businesses, and could face long prison sentences based on mere

and Kadaga’s newfound popularity and their rise in political prominence has encouraged politicians in countries throughout Africa to introduce their own versions of the Anti-Homosexuality Bill. This reveals an insidious and surprising modeling effect—even without securing passage for the Bill in Uganda’s parliament, Bahati and his allies, including antigay international figures,¹³⁸ have succeeded in helping pass incredibly regressive statutes limiting the rights of sexual minorities in Africa.

1. Entrenchment and Preclusion

¶46 Uganda’s Anti-Homosexuality Bill Part II, sections 7-11 proscribe up to a seven-year prison term for those who assist others in homosexual activity.¹³⁹ As noted in Part II.A of this paper, such a provision eradicates pro-LGBT activities, and perhaps even pro-LGBT *statements*, from the political and cultural commons.

¶47 Though this provision makes only three lines of the statute,¹⁴⁰ it speaks volumes of its purpose and reach. Even at its least intrusive, the threat of prison time for those who support LGBT rights will be enough to chill those supportive activities. The legislation could go so far as to prohibit sympathetic policymakers from even introducing legislation that seeks to normalize or decriminalize some forms of homosexual behavior—even behavior that does not arise to the level of sexual activity. The law’s language does not merely ban those who assist others in same-sex *sexual* activity, but, more broadly, those who support the “promotion of homosexuality,”¹⁴¹ which could be read to include nearly anything that espouses a viewpoint that does not outwardly and forcefully vilify LGBT persons. Though it remains to be seen how Ugandan courts would interpret such a statute, the threat alone is a powerful deterrent.

¶48 These provisions of the law serve as a one-way ratchet, vilifying and criminalizing the very activities that could serve to rollback the statute. Pushing a law that would remove portions of the Anti-Homosexuality Bill could violate the very terms of Part II of the Anti-Homosexuality Bill.¹⁴² Even if the courts were remiss to allow charges against legislators, any form of public advocacy for a similar rollback would similarly run afoul of the Bill’s prohibitions. The Bill serves, therefore, as a form of non-rebuttable lawmaking, entrenching such laws and binding future legislatures by the whims of the current body. Beyond the theoretical, the law and its threats serve to marginalize and stigmatize current and future pro-LGBT rights allies who would otherwise risk being ostracized, but perhaps not prison, to speak out in favor of LGBT rights. In a nation

jealousy or *politically-motivated attacks, as with the accusations of homosexuality leveled against Uganda’s famous pastor Robert Kayanja by fellow pastors.*”) (emphasis added).

¹³⁸ Accord Josh Kron, *Resentment Toward the West Bolsters Uganda’s New Anti-Gay Bill*, N.Y. TIMES (Feb. 28, 2012), at A6, A7. (“It was in the United States, Bahati contended, that he first became close with a group of influential social conservatives, including politicians, known as The Fellowship, which would later *become a base of inspiration and technical support for the anti-homosexuality bill*. Mr Bahati said the idea for the bill first sprang from a conversation with members of the Fellowship in 2008, *because it was “too late” in America to propose such legislation.*”) (emphasis added); *see also* Mary Noble, *Uganda’s Anti-Gay Bill Linked to U.S. Evangelical Leader*, POLITIX (Dec. 6, 2012), <http://politix.topix.com/homepage/3674-ugandas-anti-gay-bill-linked-to-us-evangelical-leader>.

¹³⁹ *Supra* text accompanying notes 63, 64.

¹⁴⁰ *See* Anti-Homosexuality Bill, *supra* note 1.

¹⁴¹ *Id.*

¹⁴² *Id.*

where only 5 percent of persons are willing to privately tell a pollster that they support the rights of LGBT persons to live their lives¹⁴³—in their own homes, not in public—without the threat of prison time, such a reversion could serve to push the few non-LGBT allies of sexual minority rights away from publicly supportive activism.

¶49 Lengthy prison terms for open and “aggravated”¹⁴⁴ homosexuality further serves to eliminate the nascent institutional structures built by LGBT persons and their allies. Groups such as Sexual Minorities Uganda (“SM-UG”) and others, fighting for both cultural integration and political legitimacy,¹⁴⁵ would be impeded in public and private ways. Publicly, their outspoken leaders would face jail time. Privately, even those who would rent space to groups such as SM-UG would risk their own jail sentences under Part III(11) of the Anti-Homosexuality Bill, which bans anyone from “keep[ing] a house, room, set of rooms or place of any kind for purposes of homosexuality” and which is punishable by up to seven years of imprisonment.¹⁴⁶ No matter the external forces and funding supporting advocacy groups, a fully-implemented and enforced Anti-Homosexuality Bill, as written, would prevent these organizations from openly operating within Ugandan borders.¹⁴⁷

¶50 As these organizations may be forced to take flight, so may individual LGBT Ugandans. Though other nations also have harsh punishment for violations of their so-called sexual morality statutes, the penalties will almost undoubtedly be lighter than under the AHB, and might also be less often enforced. This would mean a contraction in underground, private social spaces that serve to provide support and encouragement for LGBT persons—the underground gay bar, the quietly supportive neighbor, or the local coffee shop that serves as a “safe space” for all comers, regardless of sexual orientation or identity.

¶51 Members of the LGBT community in Uganda, however, have proven to be boldly public in their activism, despite the threat of violence and harm that could befall them, going so far as to host an LGBT Pride parade outside Kampala during debate over the Anti-Homosexuality Bill.¹⁴⁸ Some, like SM-UG Director Pepe Onziema, ascribe this fearlessness to slain activist David Kato.¹⁴⁹ Even those known for remarkable bravery,

¹⁴³ See PEW GLOBAL ATTITUDES, *supra* note 52.

¹⁴⁴ Anti-Homosexuality Bill, Part III(3)(a)—(g), *supra* note 1.

¹⁴⁵ “Sexual Minorities Uganda [SM-UG] is a non-profit, non-governmental organization that works toward achieving full legal and social equality for lesbian, gay, bisexual, transgender people in Uganda. It is the umbrella organization of all homosexual organizations in Uganda . . . SM-UG, now a network, addresses Human Rights issues based on sexual orientation. SM-UG is an integral part of the human rights advancement.” *About Us*, SEXUAL MINORITIES UGANDA, <http://www.sexualminoritiesuganda.net/>.

¹⁴⁶ Anti-Homosexuality Bill, Part III(11)(1)—(2), *supra* note 1.

¹⁴⁷ This de facto ban, while limited to organizations that work on LGBT rights issues, is not itself unique amongst African nations. In 2011, Ethiopia passed the Civic Organizations Law, which has allowed the country to ban many international NGOs from operating in the country, for what international observers consider dubious reasons. More information about the law (when in draft form) and its likely effects can be found in a report authored by the Northwestern University School of Law’s International Human Rights Clinic. CTR. FOR INT’L HUMAN RIGHTS, SOUNDING THE HORN: ETHIOPIA’S CIVIL SOCIETY LAW THREATENS HUMAN RIGHTS DEFENDERS, NORTHWESTERN UNIVERSITY SCHOOL OF LAW (Nov. 2009), <http://www.law.northwestern.edu/legalclinic/humanrights/documents/EthiopiaCSOPaper-Nov2009.pdf>.

¹⁴⁸ See Alexis Okeowo, *Gay and Proud in Uganda: The First Pride Parade*, THE NEW YORKER, (Aug. 6, 2012), http://www.newyorker.com/online/blogs/newsdesk/2012/08/gay-and-proud-in-uganda.html#slide_ss_0=1.

¹⁴⁹ Onziema, *supra* note 135.

however, have publicly stated their fear of the Anti-Homosexuality Bill, which would serve as a game-changer,¹⁵⁰ turning mere marginalization into a license to arrest and commit violence against any known or suspected sexual minority. Frank Mugisha, one of Uganda’s most publicly recognizable LGBT activists, stated emphatically that were the Bill to pass, he would be convicted of aggravated homosexuality. Before the removal of the death penalty provision, he was asked what would happen were the bill to pass. He stated, simply, “I’d be sentenced to death.”¹⁵¹

2. Failed Bill, Successful Model

¶52 As it has since Mr. Bahati first introduced it in 2009, the Anti-Homosexuality Bill failed to clear Uganda’s parliament before the end of the 2012 legislative session. In most circumstances, this continued inability to pass the AHB would denote a policymaking failure.

¶53 However, the AHB is not an ordinary policy, and its failure at home did not discourage other legislative bodies from attempting to pass similar measures in their own jurisdictions. Viewing the increase in both power and popularity that Bahati and Kadaga saw following their respective introductions of the AHB and the attendant benefits it has had in raising their international profiles amongst political figures who oppose homosexuality, other legislators in various African jurisdictions have modeled laws after Uganda’s AHB. This has marked Uganda’s failed statute as particularly uncommon—it is a bill that has proven itself a successful model abroad while simultaneously, and repeatedly, failing to pass domestically. Such a law, encouraged by its short-term political benefits for those pushing the provision without any indication of its effects post-implementation, is particularly dangerous.

¶54 Both David Bahati and Rebecca Kadaga have seen their popularity and power skyrocket following their introduction of Anti-Homosexuality Bills. Prior to his actions on the original AHB in 2009, Bahati was a backbencher in parliament who had failed to distinguish himself as a legislator or opinion leader, and has risen to become Chief Deputy Whip in parliament.¹⁵² Kadaga had similarly failed to crack the upper echelon of Uganda’s ruling elite, relegated to a disorganized Parliament but without a governing portfolio in the most recent governing administrations. Leadership on the Anti-Homosexuality Bill, however, led to several changes in each of their circumstances. For both, work on the Bill resulted in widespread public acclaim. This increased popularity transcended social issues into other realms—Bahati leading the policy arm of the National Resistance Movement (NRM), which dominates Uganda’s parliament,¹⁵³ and

¹⁵⁰ Henry Wasswa, *Uganda’s “Kill the Gays” Bill Spreads Fear*, THE NEW YORKER (Dec. 6, 2012), http://www.newyorker.com/online/blogs/newsdesk/2012/08/gay-and-proud-in-uganda.html#slide_ss_0=1 (“‘The fear for our lives is everywhere, but it has increased of late. I am now verbally attacked and last month my friend was assaulted simply because she said she was a lesbian. The attacks can happen in any scenario,’ the 35-year-old told IPS.”).

¹⁵¹ Michaelangelo Signorile, *Frank Mugisha, Uganda Gay Activist: If Anti-Gay Bill Passes, I’d Be Sentenced to Death*, HUFFINGTON POST (Dec. 2, 2012), http://www.huffingtonpost.com/2012/12/02/frank-mugisha-uganda-gay-activist-bill-death-penalty_n_2227617.html.

¹⁵² *Bahati Outlines NRM Caucus Agenda*, UGANDA RADIO NETWORK (Jan. 10, 2013), <http://ugandaradionetwork.com/a/story.php?s=48755>.

¹⁵³ *Id.*

Kadaga becoming the front-runner to replace Museveni as President.¹⁵⁴ Further, working on the Bill linked both Bahati and Kadaga to an international network of anti-homosexuality activists, including religious leaders from the United States, Europe, and Asia,¹⁵⁵ which increased their international profiles and might provide future funding and organizational capabilities.

¶155 This widespread popularity did not go unnoticed. Even before the Ugandan parliament voted on the Anti-Homosexuality Bill, backbench parliamentarians elsewhere introduced copycat legislation.¹⁵⁶ Unencumbered by the international focus directed at Uganda and reluctant national leadership, those bills managed to pass parliament and became law; these are unlikely to be the only pieces of legislation inspired by Uganda's AHB. These victories, and the popular support experienced by Uganda's politicians, are even encouraging antigay activity in the bulwark of pro-LGBT laws on the continent, South Africa. There, members of the Congress of Traditional Leaders have begun an attempt to weaken the sexual orientation provision in the Equality Clause of the South African Bill of Rights.¹⁵⁷

¶156 Antigay activists face minimal losses when introducing bills similar to the AHB. If the bill is successful, it enacts a change popular with the general public. If unsuccessful, there is little political cost, other than possible outcry from the international community. The focus on the death penalty component of Uganda's legislation and the general silence while Nigeria and Senegal passed laws virtually identical to Uganda's revised statute show that risk to be a minimal one, unless nations like the United States, United Kingdom, Sweden and Australia follow through with threats to cut international aid to countries that discriminate against sexual minorities.¹⁵⁸ Further, if unsuccessful yet popular, any proposed law could prove itself an additional model for prospective implementation in other nations. Repeated attempts at passing antigay legislation could in fact serve as laboratories, encouraging experimentation to find out what could possibly pass elsewhere. Because of widespread public disapproval of homosexuality and the various provisions that could be included in such laws—including "aiding and abetting" provisions, anti-renting provisions, mandatory disclosure rules, and myriad others not yet contemplated by the AHB—Africa has proven itself a particularly apt location to serve as a laboratory for anti-LGBT legislation.

¹⁵⁴ Giles Muhame, *Poll Sparks Fears of Kadaga's Rise to Presidency*, CHIMPREPORTS (May. 23, 2012), <http://www.chimpreports.com/index.php/news/4616-special-analysis%3A-poll-sparks-fears-of-kadaga's-rise-to-presidency.html>.

¹⁵⁵ See Kron, *supra* note 60.

¹⁵⁶ For example, Nigerian parliamentarians introduced a copycat bill that would ban any public display of same-sex affection and would allow prison terms of up to 14 years for anyone who participates in a wedding ceremony between two gay people. It passed unanimously. See *Nigerian Lawmakers Move Ahead on Anti-Gay Bill*, AFRICAN NATION (Nov. 14, 2012), <http://www.nation.co.ke/News/africa/Nigerian-lawmakers-move-ahead-on-anti-gay-bill/-/1066/1619634/-/1306f7v/-/index.html> ("It is unclear why lawmakers have made such a ban a priority other than to gain popular support since gay marriage is not known to be prevalent in Nigeria and homosexuals are already harshly discriminated against.").

¹⁵⁷ Cf. *South Africa's LGBTI Community Responds to Anti-Gay Traditional Leaders*, ILGA (May 8, 2012), <http://ilga.org/ilga/en/article/nwPmb47139>.

¹⁵⁸ Cf. Richard Mbutha, *Africa, Want Aid? Recognise Gay Rights!*, DAILY NEWS (Dec. 26, 2011), <http://www.dailynews.co.tz/feature/?n=26715&cat=feature>.

B. Malawi: Movement in Fits and Starts—But a Start Nonetheless

¶57 As noted above, were Malawi to actually decriminalize homosexuality, it would be path-breaking—the first nation since South Africa on the African continent to do so, and the first to do so by stand-alone legislation rather than in the face of a court decree.¹⁵⁹ However, the means by which it has undertaken debate over decriminalization are common to many other nations that have begun a similar transition from criminalization to legalization. The short period of time between Banda’s call for action and the proposed bill’s ultimate death showed the common traits of the legalization trajectory, including stakeholder infighting, misinformation, and opposition mobilization, all culminating in a failed first legalization attempt.¹⁶⁰ Malawi’s experience, however, serves to highlight two emerging questions in the push for same-sex rights in Africa. First, how big a role does the support of a popular politician play in pushing forward the movement for LGBT rights, despite widespread opposition to those rights among the country’s civilian population? Second, would codification of LGBT rights in Malawi allow the nation to serve as a model for similar pushes around the continent, or would observers view it as an outlier?

1. Joyce Banda’s Critical Role

¶58 A fundamental question that has yet to be answered is whether Banda’s call for legalization marks a first attempt—or the *only* attempt—at achieving some semblance of rights recognition for LGBT persons in the country. In the several months since the bill’s failure, Banda has again walked back her call for her governing majority to take up the question of LGBT rights, much to the ire of human rights activists on the ground¹⁶¹ but with little notice from the international community, which continues to praise her initial “courageous move” on behalf of LGBT Malawians.¹⁶² Banda’s initial call for decriminalization for sexual minorities was met with praise from international donors such as Britain and the United States, who had previously expressed disappointment and threatened to pull investment from the country due to former President Mutharika’s unsavory human rights record.¹⁶³ The international praise of President Banda, from

¹⁵⁹ South Africa’s Civil Union Bill, which legalized same-sex civil marriage in the country, was passed by Parliament, but only after the South African Constitutional Court demanded the passage of a bill within six months of the *Fourie* decision lest the Court mandate the legalization of same-sex marriage by judicial fiat. Cf. *South Africa Approves Same-Sex Unions*, BBC NEWS (Nov. 14, 2006), <http://news.bbc.co.uk/2/hi/6147010.stm>. This model of court decree demanding action by the legislature in a short window of time is also currently being utilized, if somewhat haphazardly, in Colombia.

¹⁶⁰ See, e.g., Masina, *supra* note 107.

¹⁶¹ *Activist Bitter with JB’s Latest Stand on Gay Rights*, MALAWI VOICE (Jan. 7, 2013), <http://www.malawivoice.com/2013/01/07/activist-bitter-with-jbs-latest-stand-on-gay-rights-bible-talks-about-life-in-heaven-we-are-talking-about-life-on-earth-undule-mwakasungula-66425/> (One of Malawi’s most vocal gay rights activists, Undule Mwakasungula, made his frustrations known in an interview with the Malawi Voice, criticizing President Banda for leaving “the fate of minority rights in the hands of the majority,” and for seemingly changing her position in the face of public pressure from voters and members of her party’s parliamentary majority.).

¹⁶² See e.g., *Malawi: Courageous Move to Suspend Anti-Gay Laws*, HUMAN RIGHTS WATCH (Nov. 6, 2012), <http://www.hrw.org/news/2012/11/06/malawi-courageous-move-suspend-anti-gay-laws>.

¹⁶³ See Faith Karimi, *U.S. Restores \$350 Million Aid Package to Malawi*, CNN (June 23, 2012), <http://www.cnn.com/2012/06/23/world/africa/malawi-us-aid/index.html>. This aid conditioning was not

foreign leaders and human rights organizations, has been continual since her announcement. But follow-through on her part is critical if Malawi's LGBT community can hope for legal recognition.

¶59 Several factors point to President Banda's statement in favor of decriminalizing homosexuality being an actual belief and goal rather than merely a giveaway to the international community.¹⁶⁴ First is the forum in which she made her statement—her first address as President, made to lawmakers and citizens rather than foreign leaders.¹⁶⁵ Second is her continual reinforcement of that statement in additional public speeches and during questions from the media. Thirdly, and most critically, is her administration's public announcement, after the bill's first failure before parliament, that it would bypass parliament and suspend all arrests for violations of the various laws impacting LGBT persons.¹⁶⁶ That the government ultimately walked back this statement a week later does not prove it was anything but a genuine expression of a policy goal (albeit a policy which lacked the support of the country's legal scholars¹⁶⁷ and Banda's own parliamentarians, who might be convinced to support a bill but were not convinced to support unilateral action by her administration).

¶60 Determining the nature of Banda's support for the underlying idea of decriminalization is critical because Banda herself is critical to some version of the law's passage. The public support of national leaders has been a necessary, though insufficient,¹⁶⁸ condition for the passage of legislation which protects sexual minorities not only in Africa,¹⁶⁹ but around the world.¹⁷⁰ This is particularly cogent when

only due to Banda's stances on LGBT rights, which were troubling, but also for the arrests of opposition political leaders, suppression of dissident voices, and various other human rights violations, including targeted killings. Malawi lost a \$350 million grant from the United States federal government in 2011, just a year before Mutharika's death, due to these circumstances. The award was reinstated upon President Banda's ascension and the reversal of several of these policies.

¹⁶⁴ George Kalungwe, *President Banda Adamant on Reforms, Debate Gay Rights*, ZODIAC ONLINE NEWS (Jan. 31, 2013), http://www.zodiakmalawi.com/index.php?option=com_content&view=article&id=6290:president-banda-adamant-on-reforms-debate-gay-rights&catid=42:banner-stories&Itemid=102 (quoting Banda herself who rejected the idea that Malawi could be pushed to act by any particular international donor or donors: "President Banda said the final say on whether to repeal laws that penalize homosexual rests with parliament. She, however, added that Malawi cannot be forced by any donor to follow any particular path on this.").

¹⁶⁵ See *supra* text accompanying notes 96, 97.

¹⁶⁶ Godfrey Mpondera, *Malawi Suspends Anti-Gay Laws as MPs Debate Repeal*, GUARDIAN (Nov. 5, 2012), <http://www.guardian.co.uk/world/2012/nov/05/malawi-gay-laws-debate-repeal>.

¹⁶⁷ See Masina, *supra* note 107.

¹⁶⁸ Zack Ford, *Former Botswana President Calls for Legalizing Homosexuality for HIV Prevention*, THINK PROGRESS (Oct. 19, 2011, 3:57 pm), <http://thinkprogress.org/lgbt/2011/10/19/348234/former-botswana-president-calls-for-legalizing-homosexuality-for-hiv-prevention/>. A prime example is Botswana, where popular former President Festus Mogae came out in favor of several policies that would protect the rights of gays and lesbians, including legalizing same-sex sexual relations. His recommendations fell on deaf ears. *Id.*

¹⁶⁹ John Campbell, *Gay Rights in Africa*, COUNCIL ON FOREIGN RELATIONS (Feb. 10, 2012), <http://blogs.cfr.org/campbell/2012/02/10/gay-rights-in-africa-2>. Both Nelson Mandela and Archbishop Desmond Tutu came out forcefully in favor of gay rights before the 2006 vote in South Africa's parliament. *Id.*

¹⁷⁰ Leaders coming out in favor of gay rights before political victories in their home countries include Barack Obama in the United States, David Cameron in the United Kingdom, Michele Bachelet in Chile,

considering the lack of public support for the bill. Decriminalization could not win a popular vote in Malawi, as it would not across much of Africa. But were Banda to exert pressure on MPs aligned with her ruling majority to support the bill, such a law could pass. Banda's experience negotiating the Malawian parliament to pass her signature domestic violence bill in 1998 provides her with critical experience in pushing a bill facing opposition from powerful lobbies.

¶61 No matter what form a law strengthening LGBT rights might take, the unpopularity of the policy across the Malawian populace requires either the intervention and support of a national figure or the use of the courts. Were Banda to give up the attempt to decriminalize, hopes for passage of a law would regress from small to virtually nonexistent.

2. A Model or an Outlier? The Possible Effects of Passage

¶62 Were Malawi to pass a decriminalization law, the question remains whether it would serve as an international model for similar legislation across the continent and the globe, perhaps serving as a check against the modeling power of Uganda's Anti-Homosexuality campaign,¹⁷¹ or establishing Malawi as an outlier and a slightly more welcoming place to be LGBT, but one that is unique amongst its neighbors. While the widespread regional unpopularity of legislation protecting sexual minorities might prevent it from serving as a direct model for similar legislation (at least in the short term), passage of any decriminalization measure would provide myriad benefits in the short- and long-terms to those pushing for similar laws in Africa and abroad—benefits that could improve the lives of tens of thousands of LGBT people.

i) The Passage of a Decriminalization Law Would Provide Proof that Legislation is Possible

¶63 The clearest and most intuitive effect that the passage of a decriminalization bill in Malawi's parliament would have is to show that such legislation is possible despite overwhelming public opposition. It is easy for many to dismiss South Africa as proof, for various reasons: the explicit recognition of sexual orientation protection in the constitution, the use of the *Fourie* case which demanded that parliament legalize same-sex marriage, and the more vibrant and public gay community present in the country. Malawi would have none of those intrinsic advantages. Yet were a decriminalization bill to pass the Parliament, it would provide a clear data point showing the possibility of legislative reform of homosexuality laws.

¶64 Passage of an actual law is not the only thing that could provide hope for sexual minorities elsewhere in Africa. Banda and Justice Minister Kasambara, or one of their successors, could fully embrace a moratorium on arrests and convictions for violations of Malawi's sex statutes. Such an act (removing the law's effect while retaining it on the

and John Key in New Zealand. The converse also rings true: countries where leaders have come out against expanding rights for LGBT persons have seen political losses. Examples include Julia Gillard in Australia, Nicholas Sarkozy in France, and, most recently, Prime Minister Lee Tsien Loong of Singapore. Sometimes, however, supportive leaders are still not enough, as Mogae in Botswana, and President Tusk in Poland have shown.

¹⁷¹ See *supra* Part IV.A.

books) would be temporary and subject to the whims of the party (and leader) in power, but would nonetheless showcase an improvement in the lives of sexual minorities and LGBT persons—the ability to live without fear of arrest. Such a moratorium could be used by human rights activists and supporters as a fallback were legislation to fail.

¶65 Perceptually, the passage of any pro-LGBT law, or the repeal of any antigay statute by legislation, would serve to change the narrative of LGBT rights on the African continent especially in the face of losses in Uganda, Senegal, and Nigeria.¹⁷² Even a brief respite from the overwhelming momentum of new antigay statutes would provide some semblance of hope for LGBT individuals, international human rights actors engaged in the work of assisting sexual minorities, and activists working on the ground.

ii) The Passage of a Decriminalization Law Would Empower Grassroots LGBT Organizations

¶66 In the face of public vitriol and continual demonization by political leaders and other public figures, nascent LGBT rights organizations continue to exist across the African continent, working to change both policy and public perception despite minimal funding and virtually non-existent public support.¹⁷³ Public leaders of such groups risk personal and professional marginalization, violence, and even death for their roles in pushing for cultural change.

¶67 The ability to point to a clear and specific victory for the rights of sexual minorities, in a country other than South Africa, would serve to empower these grassroots actors. A victory would provide a framework by which to seek positive legislative change. As a result of minimal resources, few volunteers, and public demonization, a number of LGBT grassroots organizations have been forced into playing constant defense—working to prevent the passage of antigay laws, or fighting back against the untrue and hateful public statements made against LGBT people by leaders and other officials. For many activists who sense the difficulty (if not impossibility) of passing their own protective laws, such work has become the default. Moving from this persistent defense to attempting positive legislation, even if such legislation is unlikely to pass, could reap a number of benefits, including laying the groundwork for future laws serving to protect the interests of sexual minorities.¹⁷⁴

¶68 Actual passage of a pro-LGBT law in Malawi would improve the lives of countless Malawians who live in fear of arrest and jail time simply for openly living their lives. Such a law would also provide one successful framework that activists and the international community could point to as a model for efforts to decriminalize sexual orientation or push for positive rights for LGBT people in other countries on the continent. Though it may not have a modeling effect to the same degree as the populist anti-homosexuality laws passed by Uganda and Zimbabwe, it would serve to break the chain of losses for pro-LGBT forces in Africa, serving as a minor yet fundamental shift in the way in which laws protecting sexual minorities are enacted and enforced.

¹⁷² See, e.g., Christian Purefoy & Faith Karimi, *Nigeria Passes Anti Gay Bill, Defying British Aid Threat*, CNN (Dec. 1, 2011), <http://www.cnn.com/2011/11/30/world/africa/africa-gay-rights/index.html>.

¹⁷³ Accord PEW GLOBAL ATTITUDES, *supra* note 52. Cf. Itaborahy, *supra* note 15.

¹⁷⁴ But see *infra* Part IV.C (detailing the risks of an offensive strategy).

C. Zimbabwe: Persecution in the Face of a Push for Protection

¶69 Widespread public opposition to homosexuality, fomented by institutional and political actors, caused Zimbabwe’s turn against enshrining gay rights in the constitution and made the inclusion of anti-discrimination language almost impossible. Further, the new constitution was the first document written wholly by Zimbabweans as a replacement document to the Independence Constitution of 1979,¹⁷⁵ entered into during negotiations with the British government upon Zimbabwe’s declaration of independence—negotiations that were widely seen as dominated by the British representatives.¹⁷⁶ Zimbabweans of all political stripes viewed the development of this new constitution as a chance to produce a truly Zimbabwean document, making populist statements of culture and belief particularly salient.¹⁷⁷

¶70 But what is most troubling about Zimbabwe’s rapid push to constitutionalize antigay policies is the context in which such a push arose—as a direct response to a campaign by gay and human rights activists, flanked by their several allies in government and society, to override the statutory and common law bans on same-sex activity. Though inserting sexual orientation and gender identity discrimination into national and sub-national constitutions is still remarkably common, such a ban arising in the context of a push to protect gay rights is uncommon. It requires institutional and public buy-in against the LGBT community,¹⁷⁸ along with the organizational aptitude to turn blowback against gay rights into a groundswell of support for antigay policies.¹⁷⁹ And it speaks to a broader lesson that continued engagement and diligence in defense against antigay laws, both by local activists and international organizations, is necessary even when efforts are being put into passing pro-LGBT policies.

1. Public Backlash in the Face of Pro-LGBT Victories

¶71 While broad public backlash can follow certain victories for LGBT people, particularly when courts extend protections or new positive rights when the general

¹⁷⁵ CONST. OF ZIMBABWE, available at http://www.wipo.int/wipolex/en/text.jsp?file_id=214483.

¹⁷⁶ See MUNA NDULO, ZIMBABWE’S UNFULFILLED STRUGGLE FOR A LEGITIMATE CONSTITUTIONAL ORDER 176, 181-83 (2010).

¹⁷⁷ Cf. Lloyd Sachikonye, *Constitutionalism, the Electoral System, and Challenges for Governance and Stability in Zimbabwe*, 4 AFRICAN J. CONFLICT RESOLUTION 171, 171-76 (2004) (providing an historical overview of democratic governance and populism in Zimbabwean constitutionalism).

¹⁷⁸ Such a combination of institutional homophobia and attendant public support occurred in August 2012, when the Zimbabwean police arrested 44 gay rights activists affiliated with the organization Gays and Lesbians of Zimbabwe (GALZ), who had been planning to release a public report detailing antigay physical abuse. Steve Williams, *Zimbabwe Police Arrest 44 in Anti-Gay Raid*, CARE2 (Aug. 14, 2012), <http://www.care2.com/causes/zimbabwe-police-arrest-44-in-anti-gay-raid.html> (noting that police, tipped off to the meeting of activists by members of the public, “assaulted most of the members [of GALZ] using baton sticks, open hands and clenched fists before detaining them without charge.”).

¹⁷⁹ This groundswell occurred, and rapidly. In November 2012, the spokesman for the constitutional committee noted in a public hearing that, “95 percent of Zimbabweans have rejected same-sex marriages and gay rights to be guaranteed in Zimbabwe’s constitution.” *95% of Zimbabweans Rejected Gay Rights in Constitution*, NEWS DZE ZIMBABWE (Nov. 8, 2012), <http://www.newsдзеzimbabwe.co.uk/2012/11/95-of-zimbabweans-rejected-gay-rights.html>.

public disapproves,¹⁸⁰ it is rarer to find cases where a push for an ostensibly pro-gay law, to be enacted through the legislature instead of via judicial decree, has resulted in a successful counter-attempt by antigay forces to not only defeat the law but also to pass their own anti-LGBT policy instead. Several of these examples¹⁸¹ come from jurisdictions that support vibrant forms of direct democracy, allowing an organized opposition to foment antigay attitudes into an overwhelming public vote for an antigay position.¹⁸² Still others came after decisions by international bodies that allowed opponents of gay rights to assert arguments about sovereignty and tradition in a way that compelled legislators and stoked public opinion.¹⁸³

¶72

But Zimbabwe's form—mobilizing antigay activist organizations from both within the country and abroad, including religious leaders,¹⁸⁴ while fomenting public opinion¹⁸⁵ to convince parliamentarians to reject LGBT protections and instead further codify discrimination—is particularly unique. It flies in the face of myriad countries that have taken up the question of gay rights and voted no—whether due to public opinion, personal beliefs of legislative leaders, or simply as a matter of politics—without drafting and passing a measure that would further disable LGBT persons under the law. Countries

¹⁸⁰ One such example comes from the United States. After Hawaii's Supreme Court found that precluding same-sex couples from marriage was likely a violation of the U.S. Constitution in the 1996 case *Baehr v. Miike*, antigay activists in many states began to push state constitutional bans on both same-sex marriage and domestic partnership benefits for LGBT persons. 910 P.2d 112 (Haw. 1996); see also Andrew Koppelman, *The Difference the Mini-DOMAs Make*, 38 LOY. U. CHI. L. J. 265 (2007) (exploring the various forms of state constitutional bans, as well as noting “a larger wave of statutes [banning gay marriage] was enacted after a 1993 Hawaii Supreme Court decision made it seems likely that Hawaii would shortly recognize same-sex marriages”). For a broader discussion on the effects of backlash from minority interests utilizing the courts, see Robert Post & Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373 (2007).

¹⁸¹ Due to the dearth of cases in African courts or policies passed by African governing bodies, all of these comparative examples are taken from non-African jurisdictions. The lack of African comparisons also serves to showcase how pivotal this new strategy shift could be for African countries facing circumstances similar to Zimbabwe in the future.

¹⁸² In Colorado in 2006, pro-LGBT groups convinced the state legislature to put a domestic partnership bill on the ballot, called Referendum I, which was widely expected to pass. In response, antigay forces drafted their own amendment, Amendment 43, which would constitutionally ban same-sex marriage. Amendment 43 passed, while Referendum I narrowly failed. A description of the language used in the measures, and how they conflict, is presented in Richard Jones, *Queering Marriage and Family in the 2006 Colorado Election*, in QUEER IDENTITIES, POLITICAL REALITIES 59, 66-72 (German & Drushel, eds., 2009).

¹⁸³ After the *Dudgeon* decision by the European Court of Human Rights (ECHR), in which the Commission found that Northern Ireland's law criminalizing same-sex sodomy was in violation of Article 8 of the European Commission of Human Rights, Northern Irish politicians continued to drag their feet, using arguments of public opinion and the imposition of rules from extraterritorial courts, to refuse to uphold the judgment until 1985. See generally Lisa Bloom, *We Are All Part of One Another*, 14 REV. L. & SOC. CHANGE 995 (1986) (describing *Dudgeon* and its effects).

¹⁸⁴ *Churches Against Gay Rights in Draft Constitution*, ZIMBABWE GUARDIAN (Sept. 7, 2012), <http://talkzimbabwe.com/churches-against-gay-rights-in-draft-constitution/> (“Churches have vowed to mobilize their followers countrywide to vote against the Constitution at the referendum if the document does not outlaw homosexuality and same-sex marriage.”); see also Kapyra Kaoma, *Exporting the Anti-Gay Movement*, THE AMERICAN PROSPECT (Apr. 24, 2012), <http://prospect.org/article/exporting-anti-gay-movement>.

¹⁸⁵ See *supra* note 135. This compares starkly with Secretary-General Ban Ki-Moon's visit to Malawi, discussed *supra* note 33.

as varied as South Korea,¹⁸⁶ Poland,¹⁸⁷ Italy,¹⁸⁸ Slovakia,¹⁸⁹ and Israel¹⁹⁰ all prove indicative of this model: a pro-LGBT bill comes up for vote and antigay groups marshal opposition to the bill. When defeated, the status quo remained—no new protections, but no new limitations on the rights of sexual minorities.

2. A Strategic Shift

¶73

Antigay groups in Zimbabwe rejected this approach, however, to great success. Aided by a strong public majority opposed to gay rights in any form, groups engaged in a multi-prong strategy to defeat the anti-discrimination proposition and insert instead a statutory ban on gay rights into the constitution. Though the anti-discrimination measure was not necessarily expected to pass, Tsvangirai's support and his general ability to whip votes amongst the parliamentarians in his party¹⁹¹ gave some hope. Those opposed to the new protections first moved to foment discord within the caucus¹⁹²—beginning with Edward Mkhosi, a Tsvangirai ally who served as co-chair of the Constitution Select Committee in charge of drafting and considering proposed measures.¹⁹³ These opponents encouraged Mkhosi and other committee members to engage in a “public outreach program” in which rooms packed with opponents of the draft law made their position

¹⁸⁶ See *South Korea: Anti-Discrimination Bill Excludes Many*, HUMAN RIGHTS WATCH (Nov. 7, 2007), <http://www.hrw.org/news/2007/11/05/south-korea-anti-discrimination-bill-excludes-many> (“The draft [anti-discrimination] legislation first announced on October 2, 2007 . . . included sexual orientation . . . [But] the current version of the law was changed to *exclude protection* from discrimination on the basis of sexual orientation.”).

¹⁸⁷ Jan Cienski, *Polish Parliament Rejects Gay Rights*, FINANCIAL TIMES (Jan. 25, 2013), <http://www.ft.com/intl/cms/s/0/588a70f4-6703-11e2-a83f-00144feab49a.html#axzz2JIxKUWYb> (noting that despite the support of Premier Donald Tusk, fewer than one-third of Polish citizens support recognition for same-sex couples, and parliamentarians outright rejected a fairly limited set of civil partnership protections for LGBT people).

¹⁸⁸ Julie Bolcer, *Italian Parliament Rejects Gay Rights Bill*, ADVOCATE (July 27, 2011), <http://www.advocate.com/news/daily-news/2011/07/27/italian-parliament-rejects-gay-rights-bill>.

¹⁸⁹ Martin Santa, *Slovakia Parliament Rejects Gay Partnership Law*, REUTERS (Nov. 6, 2012), <http://www.reuters.com/article/2012/11/06/us-slovakia-gay-idUSBRE8A50V520121106> (noting that, despite a lopsided vote, with only 14 of 129 deputies voting to send a limited gay partnerships bill to second reading, there was no concerted effort by opponents to instead further criminalize homosexuality).

¹⁹⁰ Dan Littauer, *Israel Parliament Rejects Gay and Inter-Faith Civil Marriage Bill*, PINKNEWS (May 16, 2012), <http://www.pinknews.co.uk/2012/05/16/israeli-parliament-rejects-gay-and-inter-faith-civil-marriage-bill/> (describing how, despite many religious organizations voting against a gay civil marriage bill, there was no attempt to roll-back protections already granted to gay and lesbian couples, such as the recognition of foreign marriages).

¹⁹¹ *Accord Tinashe Madava, MPs Face Whip*, ZIMBABWE GAZETTE, Oct. 24, 2012, <http://www.financialgazette.co.zw/top-stories/14769-mps-face-whip.html>.

¹⁹² Such discord has been commonplace, due to the tenuous relationship between Tsvangirai's and Mugabe's parties, as well as factions within the parties themselves. *Accord Martin van Willet et al., Constitutional Reform Processes and Political Parties*, AFRICAN STUDIES CENTRE 19, 33-35 (2012), http://www.constitutionnet.org/files/nimd_arp2012_english_total.pdf.

¹⁹³ *Cf. MDC-T 'Smuggle' Gay Rights Into Constitution*, ZIMBABWE GUARDIAN (Nov. 14, 2012), <http://talkzimbabwe.com/mdc-t-smuggle-gay-rights-into-constitution/> (describing Mkhosi as being “duped” by supporters of gay rights into thinking the constitutional protections were simply broad statements to protect minority rights, rather than gay rights in particular, and that “when [opponents] told [Mkhosi] of the plan, he then [withdrew] support.”).

well known,¹⁹⁴ resulting in Mkhosi and other ostensible Tsvangirai allies shifting their prior support for the proposed anti-discrimination provision to opposition. As the drafters wished the new constitution to represent the views of the Zimbabwean public, opponents of the measure encouraged their supporters to come out forcefully not just against the draft measure, but also *for* a new constitutional ban on same-sex activity. Such a ban would prevent Tsvangirai or others from changing the already-existing statutory ban in the future and ensure that any change to the constitution would need to be combined with widespread public support—something anti-LGBT actors felt, rightfully so, would be slow to materialize.¹⁹⁵

¶74 The constitutional codification came as a shock to international LGBT rights groups, who had cheered Tsvangirai's support for anti-discrimination measures and had lauded the formation of new LGBT rights organizations on the ground in the country, including GALZ and the Sexual Rights Centre, two of the central backers of the proposed pro-gay amendment.¹⁹⁶ Despite the international community watching, opponents of gay rights felt that defeating the measure alone would not be enough. Passing its own discriminatory measure in the constitutional convention would serve to silence gay rights advocates in Zimbabwe and elsewhere and provide a framework for antigay advocates in other countries to follow as laws came up for a vote that might loosen, even slightly, the limitations placed on sexual minorities. That organizations did not recognize the possibility that pushing a pro-LGBT measure in this context could make anti-LGBT entrenchment possible, or that they did recognize this possibility and did not do enough to guard against it, can only be described as failures.

3. The International Impact of the Zimbabwean Strategy

¶75 The international impact of this new strategy could be particularly stark. Antigay activists have begun coordinating their work on an international scale in the same manner

¹⁹⁴ Violet Gonda, *Zimbabwe Constitutional Draft Excludes Language Protecting Gay Rights*, VOICE OF AMERICA (Nov. 1, 2012), <http://www.voazimbabwe.com/content/new-zimbabwe-constitution-will-not-enshrine-gay-rights-137118258/1465477.html> (“Speaking for the smaller MDC formation led by Industry Minister Welshman Ncube, Edward Mkhosi confirmed that most Zimbabweans who took part in the outreach process had rejected the idea of recognizing gay rights in the new national constitution.”); *see also* Violet Gonda, *All You Need to Know About Final Draft Constitution*, NEW ZIMBABWE (July 23, 2012), <http://www.newzimbabwe.com/news-8575-New+constitution+the+key+changes/news.aspx> (interviewing Kent University Law Lecturer Alex Magaisa, who notes the link between “the anti-gay lobby” and the opposition presented during the public outreach campaign).

¹⁹⁵ This can be seen in two ways: reports of the public opinions presented during the public outreach meetings, and statements made by everyday Zimbabweans about sexual minorities, in interviews and when able to speak anonymously online. As to the first, accord *Gay Rights Thrown Out of Constitution*, ZIMBABWE SUNDAY MAIL (Feb. 26, 2012), <http://www.zimeye.org/?p=47433> (“During the outreach programme, everyone said ‘no’ to gays and lesbians and, as the drafters, we heed what people say,” he said. “Contrary to media reports that the homosexuality issue was causing infighting, the people were clear: we did not waste time on it.”); as to the second, consider the public comments to that very online news story: “[You] can do it under the cover of darkness . . . If we catch [you] even in that darkness [you] will be luck[y] to reach the police station alive . . . It is as criminal as rape [to engage in same-sex activity].” *Id.* (taken from the first comment on the page).

¹⁹⁶ The United Kingdom went so far as to send one of its foreign secretaries to visit the Sexual Rights Centre and show their support for their work on the ground. *See Second Secretary Political Visits the Sexual Rights Centre in Bulawayo*, BRITISH EMBASSY HARARE (Dec. 21, 2011), <http://ukinzimbabwe.fco.gov.uk/en/about-us/working-with-zimbabwe1/human-rights/sexual-rights-centre>.

that pro-gay groups have been for the past several decades.¹⁹⁷ With possible pro-LGBT bills coming up in a number of African states in the near future, the blowback strategy employed in Zimbabwe imparts an additional complication to the risk analysis already undertaken by LGBT rights groups when determining whether to push for legal recognition—the risk that pushing forward becomes a rallying cry for antigay forces to organize a campaign to further erode whatever meager protections do exist for sexual minorities in the country. In nations where homosexuality is not outlawed but where public support for gay rights is low, this risk is acute—a push to move gay and lesbian persons out of the cover of darkness could result in new laws that do not simply further marginalize gays, but instead makes their orientation illegal.

¶76 As such, the LGBT rights community, both in Africa and abroad, needs to view Zimbabwe’s constitutional convention as a wake-up call: the joy inherent in a home-grown gay rights group pushing for new protections quickly eroded into a sadness and fear. Zimbabwe shows the need for a new diligence previously unconsidered—the need to continue to play strong defense against antigay forces in addition to any push to move laws forward, particularly as those fighting LGBT integration in Africa become more emboldened by victories such as Zimbabwe.

V. CONCLUSION

¶77 Uganda’s 2009 Anti-Homosexuality Bill and its further iterations opened the floodgate for homosexuality legislation in Africa. What once was a relic of colonial lawmaking has taken on a populist character, with political leaders using the widespread public disapproval of homosexuality to pass laws strengthening penalties for even the most minor forms of homosexual activity.

¶78 The legislation attempted in Uganda and Malawi, along with the constitutional change ultimately enacted in Zimbabwe, allow for a comparative analysis of the present and future state of homosexuality legislation on the continent. Each illuminates the populist character of sexuality legislation, including the political gains that can be derived by opposing LGBT persons and the political penalty facing even popular politicians who stand up for minimal legal protections for the LGBT community. The laws themselves show three possible ways forward for African nations who engage in such legislation.

¶79 The Ugandan model is a deeply troubling one. By enacting and enforcing strict penalties for private sexual activity, and draconian ones for “aggravated” and public work toward LGBT equality, it vilifies and marginalizes an already vulnerable group of LGBT people. Beyond this, the law’s ban on pro-LGBT activities precludes public advocacy and even private assistance by heterosexual supporters of LGBT equality. Harsh prison sentences for those who rent rooms to LGBT persons or groups, and for those in positions of power who fail to “turn in” known homosexuals, make future progress structurally difficult. Even though the law did not pass, its populist appeal has served to model

¹⁹⁷ See Kaoma, *supra* note 184; cf. Marc Epprecht, *Constitution Process and Sexual Minority Rights in Zimbabwe*, SOLIDARITY PEACE TRUST (June 21, 2012), <http://www.solidaritypeacetrust.org/1226/the-constitution-process-and-sexual-minority-rights-in-zimbabwe/> (describing the newfound power of American evangelicals who attempt to bring reparative therapy to the African continent, and who lend, in Epprecht’s words, “a cloak of moderation or pseudo-scientific validity to the denial of human rights [to LGBT persons in Africa].”).

similar regressive legislation across the continent—a rare example of “bootstrapping down” human rights.

¶80 The Malawian model presents hope for those seeking positive legislation for LGBT persons. The support of popular leaders like Joyce Banda is necessary for the passage of both decriminalization measures and positive rights. Despite public disapproval of homosexuality and LGBT rights that neared 90 percent, Malawi’s ruling party managed a temporary majority of votes in parliament for a gay rights law. Though it resulted in no legal progress for LGBT persons, it serves as a model for other sympathetic leaders and groups of LGBT activists who hope to push for rights and recognition across the continent.

¶81 Finally, the Zimbabwean model shows the pitfalls of the strategy encouraged by Malawi’s success—LGBT rights groups, playing on offense instead of defense, pushing for gay rights and galvanizing the opposition resulting in regressive antigay legislation. Zimbabwe’s failed attempt to pass a pro-LGBT measure in 2012 serves as a wake-up call to the risks attendant to a strategy of pushing unpopular legislation. The entrenchment of antigay language in the new Zimbabwean constitution was a surprising and unfortunate result of the push to make Zimbabwe the second nation in Africa to enshrine gay rights in its constitution. The strategic shift of antigay opponents in Zimbabwe calls for pro-LGBT groups to remain zealously focused not just on those nations fighting against antigay bills, but also on those nations fighting for equality measures, as the demarcation lines between these two categories has been blurred by Zimbabwe’s experience.

¶82 The three ways forward shown by Uganda, Malawi, and Zimbabwe are by no means the only ways forward. But they are critical models for both pro-LGBT and antigay forces engaging in the current debate over homosexuality legislation in Africa. Even if they fail to pass, these laws will likely continue to percolate across the continent. They are publicly popular and have served to increase the political standing of the legislators who have introduced them. Even if the laws fail to pass, they provide minimal risk to the legislators bringing them forward, and in some cases, much reward. Stopping such laws will require a country, other than South Africa, to serve as a model. Malawi may be that model, or it may not; either way, the pervasive societal disapproval of homosexuality across Africa will demand that some political leaders take concerted positions against such laws while having the wherewithal to maintain that position in the face of popular disagreement and its attendant effects to their political standing. Until such a political leader emerges and a nation passes even a symbolically pro-LGBT law, the lesson learned from homosexuality legislation passed in Zimbabwe and Uganda will be that such bills serve as a relatively easy, risk-free way to increase one’s political standing while causing severe harm to LGBT persons already marginalized by the government and populace.