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## The Evolution of Sodomy Decriminalization Jurisprudence in Transnational and Comparative Constitutional Perspective

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# THE EVOLUTION OF SODOMY DECRIMINALIZATION JURISPRUDENCE IN TRANSNATIONAL AND COMPARATIVE CONSTITUTIONAL PERSPECTIVE

Ayodeji Kamau Perrin\*

## ABSTRACT

In this Article, I demonstrate that legal mobilization by activist litigants combined with a comparative methodological jurisprudence has been central to the “transnational legal process” of the generation and diffusion of the sodomy decriminalization norm since the 1950s. My analysis of the transnational comparative jurisprudence relies on a comprehensive legal survey of seven decades of decriminalization jurisprudence (1954–2022), primarily using successful cases. Although the scholarship on the well-known *Dudgeon*, *Toonen*, and *NCGL* cases often asserts the influence that these cases had on subsequent domestic court constitutional jurisprudence, I suggest that it is the domestic privacy jurisprudence of lobbyists, legislators, claimants, and judges from the United Kingdom and United States in the 1950s through 1970s that shaped the claims-making in *Dudgeon* and *Toonen*. Conversely, I argue that the difference between the outcomes in *Bowers v. Hardwick* and *Lawrence v. Texas* can be explained in part by developments in transnational equality and human dignity jurisprudence that resulted in a shift from the privacy legal frame to the equality and human dignity legal frame and a shift from a spatial conception of privacy to a decisional (personal choice) conception of privacy. Additionally, I move beyond scholarship centered on European and U.S. case law to include the jurisprudence from the Global South (2005 to present) that, to my knowledge, has yet to be analyzed systematically and comparatively. My Article is among the first to analyze the five landmark decriminalization cases decided in

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2022, and one of the few that discusses judicialized sodomy decriminalization in transnational and comparative constitutional perspective.

This inquiry is retrospective: how has legal mobilization and comparative methodological jurisprudence contributed to understandings of sexual freedom and the justifications for sexual freedom? But it is prospective as well. Sixty-six countries retain sodomy prohibitions; will the sodomy decriminalization trend continue, and if so, what role(s) will legal mobilizations play? There is also the question of backlash and retrenchment—whether homosexual conduct will be recriminalized in jurisdictions that have decriminalized. In 2022, in *Dobbs v. Jackson Women’s Health Organization*, Justice Clarence Thomas essentially invited reactionary and regressive forces in society to bring to the U.S. Supreme Court cases that would overturn *Griswold v. Connecticut* and its progeny in the LGBTQ rights space—*Lawrence* and *Obergefell v. Hodges*. I recommend activists and their allies begin the work of upholding *Griswold*, *Lawrence*, and *Obergefell* by exploring not only U.S. domestic jurisprudence but also transnational jurisprudence—in international human rights law and comparative constitutional law—to support the continued legalization of adult, consensual, same-sex sexual conduct and same-sex marriage.

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## INTRODUCTION

In the United States, the narrative surrounding the decriminalization of homosexual sex<sup>1</sup> often begins and ends with the U.S. Supreme Court issuing two judgments—*Bowers v. Hardwick*<sup>2</sup> and *Lawrence v. Texas*.<sup>3</sup> Such parochial, legalist narratives obscure as much as they reveal. In the legalist version of legal change, Justice Anthony Kennedy—the author of the Supreme Court’s pro-LGBTQ+ decisions *Romer v. Evans*,<sup>4</sup> *Lawrence*, and *Obergefell v. Hodges*<sup>5</sup>—plays the role of enlightened or even heroic jurist. In such narratives, it is Kennedy whose magnanimity, courage, and legal genius deserves credit for reversing the obvious legal error that

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<sup>1</sup> In this Article, the phenomenon of interest I am concerned with is the decriminalization of adult consensual same-sex sexual conduct. I will use this term interchangeably with a number of variations—particularly sodomy decriminalization and decriminalization of homosexual sex—to describe decriminalization of any non-penile-vaginal sex act between people of the same sex. Anti-sodomy laws have been enforced almost exclusively against gay men, lesbians, and bisexual people engaging in same-sex sexual conduct. This reality is reflected in the self-titled organizations and agendas of activists who have led challenges to these laws over the years—such as the Homosexual Law Reform Society in England in the 1950s. See NEIL MILLER, OUT OF THE PAST: GAY AND LESBIAN HISTORY FROM 1869 TO THE PRESENT 283–85 (1995). For a copycat organization of the same name in New Zealand in the 1960s and the Homosexual Law Reform Act in New Zealand in 1986, see *Homosexual Law Reform*, NZ HISTORY, <https://nzhistory.govt.nz/culture/homosexual-law-reform/setting-the-scene> [<https://perma.cc/MQY8-NR6Z>] (last visited Oct. 2, 2023) and the Tasmanian Gay Law Reform Group Nicholas Toonen and Rodney Croome founded in 1988, *infra* note 176.

<sup>2</sup> 478 U.S. 186 (1986).

<sup>3</sup> 539 U.S. 558 (2003).

<sup>4</sup> 517 U.S. 620 (1996).

<sup>5</sup> 576 U.S. 644 (2015).

was the Supreme Court's conservative *Bowers v. Hardwick* decision.<sup>6</sup> Kennedy's opinion becomes a battle between two jurists; an almost interpersonal rebuke to Justice Byron White, the author of *Bowers v. Hardwick*. The Court wrote in *Lawrence*: "*Bowers* was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled."<sup>7</sup> As much as this landmark turn of phrase is powerful rhetoric, such parochial, legalist narratives obscure the social and political realities that made *Lawrence* possible.

In this Article, I demonstrate that legal mobilization by activist litigants,<sup>8</sup> combined with comparative jurisprudence, has been central to the transnational legal process of the generation and diffusion of the sodomy decriminalization norm (and LGBTIQ+ human rights more broadly)<sup>9</sup> since the 1950s.<sup>10</sup> For the purposes of this Article, I define sodomy decriminalization legal mobilization as legal challenges against domestic criminal codes that claimants submitted to courts. The Supreme Court is often positioned to newly define constitutional rights only because of the efforts of activists—everyday people who take a stand against injustices as they perceive them.<sup>11</sup> Individual criminal defendants, activist plaintiffs, civil society organizations, LGBTIQ+ rights organizations, social movement organizations (SMOs), public health organizations, and public interest litigation organizations (PILOs) all

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<sup>6</sup> See *Lawrence*, 539 U.S. 558.

<sup>7</sup> *Id.* at 578.

<sup>8</sup> See Lisa Vanhala, *Legal Mobilization*, in OXFORD BIBLIOGRAPHIES ONLINE, <https://www.oxfordbibliographies.com/view/document/obo-9780199756223/obo-9780199756223-0031.xml> [<https://perma.cc/YW7A-6V6A>] (last visited Oct. 2, 2023); cf. Lisa Vanhala, *Legal Opportunity Structures and UK Environmental Legal Mobilization*, 46 LAW & SOC'Y REV. 523 (2012) [hereinafter Vanhala, *Legal Opportunity Structures*] (examining how environmental organizations use litigation to pursue policy goals, even within a hostile legal opportunity structure).

<sup>9</sup> See Harold Hongju Koh, *The 1994 Roscoe Pound Lecture: Transnational Legal Process*, 75 NEB. L. REV. 181, 199–205 (1996); Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 YALE L.J. 2599, 2645–58 (1997). See generally Harold Hongju Koh, *Bringing International Law Home (The 1998 Frankel Lecture)*, 35 HOUS. L. REV. 623 (1999); Harold Hongju Koh, *How Is International Human Rights Laws Enforced? (Addison C. Harris Lecture)*, 74 IND. L.J. 1397 (1999); Gregory Shaffer, *Transnational Legal Process and State Change*, 37 LAW & SOC. INQUIRY 229 (2012); Regina Jefferies, *Transnational Legal Process: An Evolving Theory and Methodology*, 46 BROOK. J. INT'L L. 311 (2021).

<sup>10</sup> Cf. Giulia Dondoli, *LGBTI Activism Influencing Foreign Legislation*, 16 MELB. J. INT'L L. 124 (2015) (highlighting the transnational advocacy of lesbian, gay, bisexual, transgender, and intersexual non-governmental organizations).

<sup>11</sup> See, e.g., DAVID COLE, *ENGINES OF LIBERTY: THE POWER OF CITIZEN ACTIVISTS TO MAKE CONSTITUTIONAL LAW* 9 (2016) ("[H]ow did these changes happen? Ask any American citizen, and she will almost surely tell you: the Supreme Court handed down a decision changing the law . . . . To focus on federal judges and courtroom lawyers is to miss much of the story—and probably the most important part.").

must be reinscribed and centered, not only in the conventional historical narrative but in the epistemology and methodology of legal analysis.

The core question driving my research across many projects asks how human rights norms spread or diffuse internationally, with a focus on the roles that litigants, domestic and international court judges, members of quasi-judicial bodies, and authors of amicus briefs (typically lawyers and law scholars) play in this process of international norm diffusion. To what extent is there evidence of comparative jurisprudence, comparative constitutional law,<sup>12</sup> or transnational judicial dialogue<sup>13</sup> on LGBTIQ+ human rights issues? What are the key mechanisms facilitating the diffusion of ideas about LGBTIQ+ human rights across domestic legal systems?

In the present Article, my analysis of the transnational comparative jurisprudence relies on a comprehensive legal survey of seven decades of decriminalization jurisprudence (1954–2022), primarily (but not only) using successful pro-LGBTQ rights cases. I move beyond scholarship centered on European and U.S. case law<sup>14</sup> to include the jurisprudence from the Global South (2005 to present) that, to my knowledge, has yet to be analyzed systematically and comparatively.<sup>15</sup> The analysis

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<sup>12</sup> See generally RAN HIRSCHL, *COMPARATIVE MATTERS: THE RENAISSANCE OF COMPARATIVE CONSTITUTIONAL LAW* (2016); VICKI C. JACKSON, *CONSTITUTIONAL ENGAGEMENT IN A TRANSNATIONAL ERA* (2010); Rosalind Dixon & Vicki Jackson, *Hybrid Constitutional Courts: Foreign Judges on National Constitutional Courts*, 57 COLUM. J. TRANSNAT'L L. 283 (2019); Vicki C. Jackson, *Progressive Constitutionalism and Transnational Legal Discourse*, in *THE CONSTITUTION IN 2020* (Jack M. Balkin & Reva B. Siegel eds., 2009); Christopher McCrudden, *A Common Law of Human Rights? Transnational Judicial Conversations on Constitutional Rights*, 20 OXFORD J. LEGAL STUDS. 499–501 (2000).

<sup>13</sup> See generally, e.g., Anne-Marie Slaughter, *A Typology of Transjudicial Communication*, 29 RICH. L. REV. 99 (1994); Laurence R. Helfer & Anne-Marie Slaughter, *Toward a Theory of Effective Supranational Adjudication*, 107 YALE L.J. 273 (1997); Anne-Marie Slaughter, *Judicial Globalization*, 40 VA. J. INT'L L. 1103 (2000); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER*, ch. 2, at 65 (2004); Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487 (2005); David S. Law & Wen-Chen Chang, *The Limits of Global Judicial Dialogue*, 86 WASH. L. REV. 523 (2011); Vicki C. Jackson, *Transnational Discourse, Relational Authority, and the U.S. Court: Gender Equality*, 37 LOY. L.A. L. REV. 271 (2003); Laurence R. Helfer & Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 HARV. HUM. RTS. J. 61 (1996).

<sup>14</sup> E.g., ROBERT WINTERMUTE, *SEXUAL ORIENTATION AND HUMAN RIGHTS: THE UNITED STATES CONSTITUTION, THE EUROPEAN CONVENTION, AND THE CANADIAN CHARTER* (1995); PAUL JOHNSON, *HOMOSEXUALITY AND THE EUROPEAN COURT OF HUMAN RIGHTS* (2013) [hereinafter JOHNSON, *HOMOSEXUALITY AND THE EUROPEAN COURT OF HUMAN RIGHTS*]; Robert Wintermute, *European Law Against Discrimination on Grounds of Sexual Orientation*, in *SAME-SEX RELATIONSHIPS AND BEYOND: GENDER MATTERS IN THE EU* 179, 179–204 (Katharina Boele-Woelki & Angelika Fuchs eds., 3d ed. 2017); Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT'L ORG. 77 (2014); Laurence R. Helfer & Clare Ryan, *LGBT Rights as Mega-Politics: Litigating Before the ECtHR*, 84 L. & CONTEMP. PROBS. 59 (2021).

<sup>15</sup> Cf. generally INT'L COMM'N OF JURISTS, *SEXUAL ORIENTATION, GENDER IDENTITY*

provides robust evidence of transnational judicial dialogue and comparative constitutional law on the issue of sodomy decriminalization, demonstrating that judges rendering opinions in domestic and international court cases looked to judges in other countries for ideas and reasoning.

This is not to say that sodomy decriminalization as an idea and as a public policy did not exist before the 1950s. As I discuss in more depth elsewhere,<sup>16</sup> the sodomy decriminalization norm and policy has historical roots in the French National Assembly in 1791.<sup>17</sup> German proto-sexologists and psychoanalysts between the 1860s and 1930s espoused a global decriminalization agenda alongside their scientific research, for which they were able to gather support amongst a transnational elite.<sup>18</sup>

Nor is it to say that litigation is the dominant mode of decriminalization. Most jurisdictions have decriminalized sodomy through legislative reform without activist legal mobilization and resultant judicial intervention—a fact that world society and state socialization theorists have attributed to larger global phenomena of modernization and democratization, processes of isomorphism and mimicry, and a social psychological desire among state actors for esteem.<sup>19</sup>

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AND JUSTICE: A COMPARATIVE LAW CASEBOOK (2011) [hereinafter COMPARATIVE LAW CASEBOOK]; ANGIOLETTA SPERTI, CONSTITUTIONAL COURTS, GAY RIGHTS AND SEXUAL ORIENTATION EQUALITY 19 (2017); James D. Wilets, *The Human Rights of Sexual Minorities: A Comparative and International Law Perspective*, 22 HUM. RTS. 22, 22 (1995).

<sup>16</sup> See generally Ayodeji Kamau Perrin, *LGBTQ Rights Legal Mobilization as a Human Rights Norm Diffusion Mechanism: Agency, Opportunity Structures, Innovation, Alliances and Institutionalization* (Law & Soc’y Ann. Meeting, 2022) (on file with author); Ayodeji K. Perrin, *Sodomy Decriminalization Legal Mobilization and the Origins of LGBTQ Human Rights Norms* (Am. Pol. Sci. Ass’n Ann. Meeting, 2022) (on file with author); Ayodeji K. Perrin, *Litigation and the Lifecycle of the Sodomy Decriminalization Norm: Norm Entrepreneurs, Legal Mobilization, and Norm Crystallization, 1791–2006* (unpublished manuscript) (on file with author) [hereinafter Perrin, *Litigation and the Lifecycle of the Sodomy Decriminalization Norm*].

<sup>17</sup> Perrin, *Litigation and the Lifecycle of the Sodomy Decriminalization Norm*, *supra* note 16, at 9.

<sup>18</sup> *Id.* at 16–21.

<sup>19</sup> See David John Frank et al., *The Reform of Sodomy Laws from a World Society Perspective*, in QUEER MOBILIZATIONS: LGBT ACTIVISTS CONFRONT THE LAW 123, 130–31 (Scott Barclay et al. eds., 2009) (arguing that state-level, movement-centered explanations are insufficient to explain global sodomy reform beginning in the 1960s, which “occurred in all sorts of countries. Changes in sodomy laws, that is, transpired with little sensitivity to nation-state-level characteristics”); *id.* at 133 (“[L]iberalizing reforms began well before politically viable LGB movements developed anywhere in the world, and they occurred in many countries where domestic LGB movements even now barely exist . . . . On the flip side, in countries where LGB social movements first gathered steam in the postwar era, sodomy-law reforms were not especially prevalent.”). See also generally Udi Sommer et al., *Institutional Paths to Policy Change: Judicial Versus Nonjudicial Repeal of Sodomy Laws*,

However, my goal is to recover the role(s) that sodomy decriminalization legal mobilizations have played in the evolution of understandings of the rights to privacy, equality, and human dignity, and are currently playing in redefining the rights to life and judicial protection and the freedoms of expression and association. I survey nearly seven decades worth of legal mobilization (1954–2022) in pursuit of sodomy decriminalization and the legal, moral-philosophical, and policy rationales advanced by the litigants on both sides and those of intervening parties, amici, and the judges, and thus the transnational jurisprudence that results from this activity.

The criminalization of homosexual sex in the United States originated with the earliest colonists. Settler colonists transplanted their norms and laws from their mother country—namely England.<sup>20</sup> The criminalization of homosexual sex happened throughout the British colonies and not just in the North American ones.<sup>21</sup> Indeed, the criminalization of homosexual sex happened in not only Great Britain and its colonies, but also in every region of the world. All but approximately twenty of the countries currently in existence criminalized homosexual sex.<sup>22</sup> Consequently, *decriminalization* has also happened outside the United States, and that too should be part of the narrative.

The legal change that occurred in the United States in 2003 via the Supreme Court's landmark *Lawrence v. Texas* judgment was the culmination of more than a century of activism by gay and lesbian people and their allies (and almost certainly people that today identify as trans, nonbinary, and possibly intersex).<sup>23</sup> Even more concretely, it was the culmination of nearly fifty years of legal mobilization through strategic litigation. Sodomy decriminalization in the United States was not merely a battle between Justice Byron White, a conservative jurist opposed to substantive due process, and Justice Anthony Kennedy, an enlightened jurist seeking to write LGBTQ equality into U.S. jurisprudence; White and Kennedy represented a struggle over law and society that originated in earnest in the late 1940s with the publication of Alfred Kinsey's *The Homosexual Male*.<sup>24</sup> The struggle included, in the early 1950s, the lawyers and politicians of the American Law Institute<sup>25</sup> and London's

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47 LAW & SOC'Y REV. 409 (2013); VICTOR ASAL & UDI SOMMER, LEGAL PATH DEPENDENCE AND THE LONG ARM OF THE RELIGIOUS STATE: SODOMY PROVISIONS AND GAY RIGHTS ACROSS NATIONS AND OVER TIME (2016).

<sup>20</sup> Perrin, Litigation and the Lifecycle of the Sodomy Decriminalization Norm, *supra* note 16, at 7–8.

<sup>21</sup> *Id.* at 12–16.

<sup>22</sup> *Id.* at 7.

<sup>23</sup> 539 U.S. 558 (2003).

<sup>24</sup> WILLIAM ESKRIDGE, JR., DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA 1861–2003, at 124–25 (2008); *see* ALFRED KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE (1948).

<sup>25</sup> *See generally* MODEL PENAL CODE: PROPOSED OFFICIAL DRAFT (AM. L. INST. 1962) (proposed May 23–26, 1962).

Wolfenden Committee,<sup>26</sup> who recommended decriminalization of homosexual sex.<sup>27</sup> It included the activists of the Mattachine Society, who mobilized legally in 1952 to fight the solicitation arrest of one of their members—Dale Jennings.<sup>28</sup> And it included the activism of the International Coalition for Sexual Equality (ICSE), a transnational coalition of national homophile organizations, which included sodomy decriminalization in its platform, and promoted throughout Europe the Wolfenden Committee's 1957 report urging decriminalization.<sup>29</sup>

Indeed, as my reference to the Wolfenden Report and to the ICSE show, White and Kennedy were mere representatives of not only the contesting worldviews of individual Americans, but also individuals and activist groups in societies the world over. Kennedy acknowledged as much in his *Lawrence* opinion by citing foreign legislation and jurisprudence.

This inquiry is retrospective: how has legal mobilization and comparative jurisprudence contributed to understandings of sexual freedom and the justifications for sexual freedom? But it is prospective as well. Sixty-four countries retain sodomy prohibitions: will the sodomy decriminalization trend continue, and if so, what role(s) will legal mobilizations play?<sup>30</sup> What role(s) will transnational decriminalization litigation networks play in identifying and supporting potential local plaintiffs? What role(s) will international human rights courts and quasi-judicial mechanisms play—namely the Inter-American and African human rights commissions and courts; UN treaty bodies such as the Human Rights Committee and Committee on Elimination of Discrimination Against Women Committee (CEDAW); and subregional courts such as the Economic Community of West African States (ECOWAS), East African, and Caribbean courts of justice? What role(s) are likely for the Judicial Committee of the Privy Council in London, a colonial institution that still stands as the final appellate body for criminalizing jurisdictions such as Brunei, Cook Islands, Grenada, Jamaica, Kiribati, Mauritius, St. Lucia, and Tuvalu, and which is currently hearing the Attorney General's appeal of the 2018 decriminalization judgment in Trinidad and Tobago? What will the decriminalization process look like in countries or subnational jurisdictions that apply *shari'a* law and for which there is no regional human rights judicial mechanism?

There is also the question of backlash and retrenchment—whether homosexual sexual conduct will be recriminalized in jurisdictions that have decriminalized it. In

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<sup>26</sup> See generally THE WOLFENDEN REPORT: REPORT OF THE COMMISSION ON HOMOSEXUAL OFFENCES AND PROSTITUTION (1957). The Secretary of State for the Home Department and the Secretary of State for Scotland presented the report to Parliament. *Id.*

<sup>27</sup> Cf. generally MODEL PENAL CODE: PROPOSED OFFICIAL DRAFT, *supra* note 25; Michael Kirby, *Lessons from the Wolfenden Report*, 34 COMMONWEALTH L. BULL. 551 (2008).

<sup>28</sup> See ESKRIDGE, *supra* note 24, at 128.

<sup>29</sup> See Leila J. Rupp, *The Persistence of Transnational Organizing: The Case of the Homophile Movement*, 116 AM. HIST. REV. 1014, 1032–34 (2011).

<sup>30</sup> Reality Check Team, *Homosexuality: The Countries Where It Is Illegal to Be Gay*, BBC (Mar. 21, 2023), <https://www.bbc.com/news/world-43822234> [<https://perma.cc/EB6X-XZ2U>].

2022, Indonesia adopted a criminal prohibition on sex outside of marriage, which, by default, criminalizes homosexual sex.<sup>31</sup> States such as Hungary,<sup>32</sup> Poland,<sup>33</sup> and Russia<sup>34</sup> appear to be on a path to explicit recriminalization.

Quite possibly, the United States is as well. In 2022 in *Dobbs v. Jackson Women's Health Organization*,<sup>35</sup> six justices on the Supreme Court voted to overturn the landmark *Roe v. Wade* decision, which limited the ability of U.S. states to restrict access to abortion. In a concurring opinion long in the making, Justice Clarence Thomas essentially invited reactionary and regressive forces in society to bring to the U.S. Supreme Court cases that would overturn *Griswold v. Connecticut*<sup>36</sup> and its progeny in the LGBTQ rights space—*Lawrence v. Texas* (sodomy decriminalization)<sup>37</sup> and *Obergefell v. Hodges* (same-sex marriage).<sup>38</sup>

This Article proceeds as follows: in Part I, I present an overview of sodomy decriminalization from the 1790s through the 1990s, in order to demonstrate that, while the sodomy decriminalization norm has ancient roots, the decriminalization norm cascade begins in earnest in the late 1960s.<sup>39</sup> I discuss “first wave” (1950s–1990s) criminal defendants’ and activists’ innovative frame alignment<sup>40</sup>

<sup>31</sup> See Michael K. Lavers, *Indonesia Lawmakers Criminalize Sex Outside of Marriage*, WASH. BLADE (Dec. 6, 2022), <https://www.washingtonblade.com/2022/12/06/indonesia-law-makers-criminalize-sex-outside-of-marriage/> [https://perma.cc/GZA7-DZW2]; Akarshi Narain & Apoorv Vats, *Indonesia's New Criminal Code and Article 411: A Step Backwards for Individual Liberties*, JURIST (Jan. 30, 2023, 8:07 AM), <https://www.jurist.org/commentary/2022/01/Akarshi-Narain-and-Apoorv-Vats-Indonesia-criminal-code/> [https://perma.cc/GM6G-CXDA].

<sup>32</sup> Ryan Thoreson, *LGBT Rights Under Renewed Pressure in Hungary*, HUM. RTS. WATCH (Feb. 15, 2022, 12:04 PM), <https://www.hrw.org/news/2022/02/15/lgbt-rights-under-renewed-pressure-hungary> [https://perma.cc/JE9R-BXZG]; Graeme Reid, *Hungary's Path Puts Everyone's Rights in Danger*, HUM. RTS. WATCH (Oct. 6, 2021, 10:57 AM), <https://www.hrw.org/news/2021/10/06/hungarys-path-puts-everyones-rights-danger> [https://perma.cc/PCG7-SQMY].

<sup>33</sup> See generally Reid, *supra* note 32 (discussing Poland); Bénédicte Jeannerod & Philippe Dam, *French Minister Rightly Shocked by Poland's Anti-LGBT Zones*, HUM. RTS. WATCH (Mar. 10, 2021, 12:30 AM), <https://www.hrw.org/news/2021/03/10/french-minister-rightly-shocked-polands-anti-lgbt-zones> [https://perma.cc/8THJ-FWP7].

<sup>34</sup> *Russia: Man 'Disappeared,' Apparently for His Sexual Orientation*, HUM. RTS. WATCH (Feb. 27, 2023, 1:00 AM), <https://www.hrw.org/news/2023/02/27/russia-man-disappeared-apparently-his-sexual-orientation> [https://perma.cc/SX3X-K86A].

<sup>35</sup> *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2242 (2022).

<sup>36</sup> *Id.* at 2301 (Thomas, J., concurring) (“[I]n future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.”).

<sup>37</sup> 539 U.S. 558 (2003).

<sup>38</sup> 576 U.S. 644 (2015).

<sup>39</sup> See *infra* Figure 1.

<sup>40</sup> See David A. Snow et al., *Frame Alignment Processes, Micromobilization, and Movement Participation*, 51 AM. SOCIO. REV. 464 (1986); ELLEN ANN ANDERSEN, *OUT OF THE CLOSETS AND INTO THE COURTS: LEGAL OPPORTUNITY STRUCTURE AND GAY RIGHTS*

processes and the substantive legal frames<sup>41</sup> (rights, laws, and persuasive precedents) that gay law reform proponents relied upon in their claims-making—especially privacy and equality. The broad outlines of “first wave” privacy jurisprudence in the 1980s and 1990s—*Dudgeon v. United Kingdom*, *Bowers v. Hardwick*, *Norris v. Ireland*, *Modinos v. Cyprus*, *Toonen v. Australia*, and *National Coalition for Gay & Lesbian Equality v. Minister of Justice (NCGLE)*—are well known among international and comparative constitutional legal scholars and among transnational activists attuned to LGBTIQ+ human and constitutional rights jurisprudence.<sup>42</sup> I supplement this outline by considering the mostly *unsuccessful* claims-making and jurisprudence of criminal defendants, their defense attorneys, activists, cause lawyers, state court judges, and European Commission of Human Rights members as early as the 1950s in Massachusetts, West Germany, Austria, Ohio, Washington, Alaska, Florida, and Virginia. I then consider the mostly *successful* vagueness and privacy claims and jurisprudence in the 1980s and 1990s that decriminalization activists raised, and that U.S. state court judges and European Human Rights Court justices ratified.

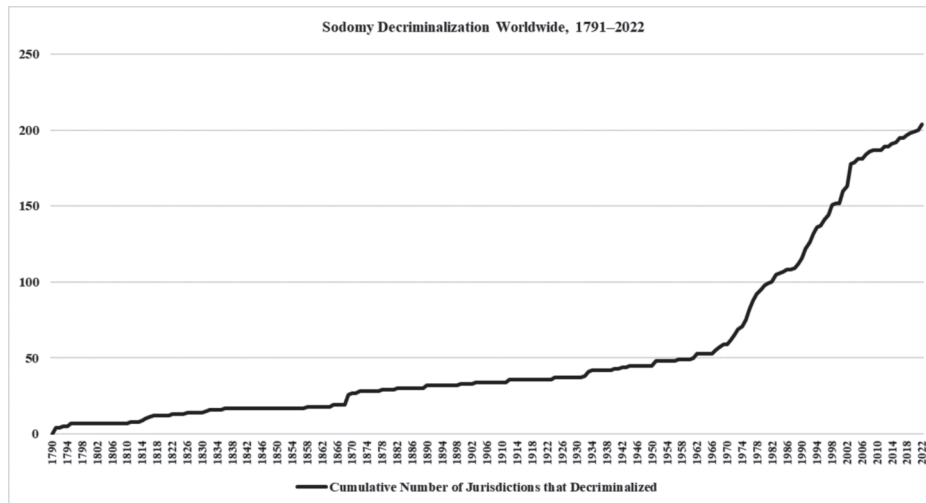
Although the scholarship on *Dudgeon*, *Toonen*, and *NCGLE* often asserts the influence that these cases had on subsequent domestic court constitutional jurisprudence, I suggest that it is the *domestic* privacy jurisprudence of lobbyists, legislators, claimants, and judges from the United Kingdom and the United States that shaped the claims-making, and thus the European Court of Human Rights jurisprudence, in *Dudgeon* and *Toonen*.

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LITIGATION 7–8 (2006) (discussing frame alignment processes in the context of the U.S. gay rights movement); cf. Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 ANN. REV. SOCIO. 611, 615, 618–19 (2000) (discussing other frames such as “master frames” and “injustice frames”).

<sup>41</sup> See ANDERSEN, *supra* note 40, at 12–14 (defining cultural and legal frames).

<sup>42</sup> See, e.g., SPERTI, *supra* note 15.

**Figure 1. Sodomy Decriminalization Worldwide, 1791–2022**

In Part II, I discuss the evolution of the transnational jurisprudence on equality and human dignity in the 1990s marriage equality, entitlements, and age of consent cases, and the way in which equality and dignity supplemented, expanded, and ultimately supplanted privacy and equality as the dominant legal frames in sodomy decriminalization cases in the twenty-first century.<sup>43</sup> In 2003, Justice Kennedy’s majority opinion in *Lawrence* effectively conflated the privacy, equality, and human dignity rationales for overturning Texas’ sodomy prohibition.<sup>44</sup> Kennedy’s opinion demonstrates the expansion from a *spatial* conception of the right to privacy conceived as protecting behavior physically located away from public view, to a *decisional* conception of privacy—based on notions of liberty and equal worth inherent in human dignity—that places personal choices beyond the purview of the state.<sup>45</sup>

I argue that the difference between the outcomes in Michael Hardwick and the ACLU’s failed challenge to Georgia’s sodomy prohibition<sup>46</sup> and John Lawrence, Tyron Garner, and Lambda Legal’s successful challenge to Texas’ sodomy prohibition

<sup>43</sup> *Id.* See generally COMPARATIVE LAW CASEBOOK, *supra* note 15.

<sup>44</sup> Cf. Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 776 (2011) (describing *Lawrence* as “a liberty case with undertones of equality”); *id.* (“*Lawrence* was ultimately not a group-based equality case about gays, but rather a universal liberty case about the right of all consenting adults to engage in sexual intimacy in the privacy of their homes.”); Laurence Tribe, *Lawrence v. Texas: The “Fundamental Rights” That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1955 (2004) (“[T]he decision’s unmistakable heart is an understanding that liberty is centered in equal respect and dignity for both conventional and unconventional human relationships.”).

<sup>45</sup> *Lawrence v. Texas*, 539 U.S. 558, 562 (2003).

<sup>46</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

can be explained in part by developments in *transnational* equality and human dignity jurisprudence from Canada, the United Kingdom, Australia, and especially South Africa, not just domestic law and politics, that resulted in a shift from the privacy legal frame to the equality and human dignity legal frame and a shift from a spatial conception of privacy to a decisional (personal choice) conception of privacy.

In Part III, I discuss decriminalization legal mobilization in the Global South. My main focus in this section is on the *innovative* jurisprudence that the most recent claimants have generated by framing their grievances in terms of the right to life and liberty, freedom of movement, right to humane treatment, freedom of expression, freedom of association, and the right to judicial protection. Although, as I demonstrate in Part II, there were criminal defendants, activists, and cause lawyers who grounded their decriminalization rationales in these legal frames as early as the 1950s, it is primarily in the Global South cases of the last seven years (2016–2022) that judges from Belize,<sup>47</sup> Trinidad and Tobago,<sup>48</sup> India (again),<sup>49</sup> Botswana,<sup>50</sup> Antigua and Barbuda,<sup>51</sup> St. Kitts and Nevis<sup>52</sup> and Barbados,<sup>53</sup> as well as human rights experts on the Inter-American Commission on Human Rights<sup>54</sup> and the CEDAW Committee,<sup>55</sup> have finally begun to ratify these creative and expansive justifications for overturning sodomy prohibitions. My Article is among the first to analyze the five landmark decriminalization cases decided in 2022, and one of the few that discusses judicialized sodomy decriminalization in a comparative constitutional perspective.<sup>56</sup>

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<sup>47</sup> See generally *Orozco v. Att’y Gen.* (2016) 90 WIR 161 (Belize); *Att’y Gen. v. Orozco*, Civ. App. No. 32 of 2016 (Ct. App. 2019) (Belize).

<sup>48</sup> See generally *Jones v. Att’y Gen.*, Claim No. CV2017-00720 (High Ct. Just. 2018) (Trin. & Tobago), <https://www.humandignitytrust.org/wp-content/uploads/resources/Judgment-Jason-Jones-v-AG.pdf> [<https://perma.cc/3D6M-L2VK>].

<sup>49</sup> See generally *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321 (India).

<sup>50</sup> See generally *Motshidiemang v. Att’y Gen.*, MAHGB-000591-16 (High Ct. 2019) (Bots.); *Att’y Gen. v. Motshidiemang*, Civ. App. No. CACGB-157-19 (Ct. App. 2021) (Bots.).

<sup>51</sup> See generally *David v. Att’y Gen.*, Claim No. ANUHCv2021/0042 (E. Caribbean Sup. Ct. 2022) (Ant. & Barb.), <https://www.eccourts.org/judgment/orden-david-et-al-v-the-attorney-general-of-antigua-and-barbuda> [<https://perma.cc/PKV5-K4HE>].

<sup>52</sup> See generally *Jeffers v. Att’y Gen.*, Claim No. SKBHCV2021/0013 (E. Caribbean Sup. Ct. 2022) (St. Kitts & Nevis), <https://www.eccourts.org/judgment/jamal-jeffers-et-al-v-the-attorney-general-of-st-christopher-and-nevis> [<https://perma.cc/733E-N6VS>].

<sup>53</sup> See generally *Holder-McClean-Ramirez v. Att’y Gen.*, No. CV-004 (High Ct. 2023) (Barb.), <https://www.humandignitytrust.org/wp-content/uploads/resources/RAMIREZ-final.pdf> [<https://perma.cc/Z2LT-3ABE>].

<sup>54</sup> See, e.g., *Henry & Edwards v. Jamaica*, Case 13.637, Inter-Am. Comm’n H.R., Report No. 400/200, OEA/Ser.L/V/II, doc. 418 (2020).

<sup>55</sup> See, e.g., *Flamer-Caldera v. Sri Lanka*, Comm. on the Elimination of Discrimination Against Women Comm’n CEDAW/C/81/D/134/2018 (Mar. 24, 2022).

<sup>56</sup> But see ANDREW NOVAK, *TRANSNATIONAL HUMAN RIGHTS LITIGATION: CHALLENGING THE DEATH PENALTY AND CRIMINALIZATION OF HOMOSEXUALITY IN THE COMMON-WEALTH* 115 (2020).

In the Conclusion, I discuss how this historical and comparative study might aid the work that remains for activists in the Global South. While some activists face relatively open legal opportunity structures,<sup>57</sup> less promising political,<sup>58</sup> legal, and discursive opportunity structures<sup>59</sup> face most aggrieved individuals, groups, and cause lawyers in Islamic *shari'a* law countries in Asia and North Africa. I also return to the question of the possible recriminalization in the United States following Justice Thomas' call to arms.<sup>60</sup> I recommend for activists, cause lawyers, and their allies to begin the work of upholding *Griswold*, *Lawrence*, and *Obergefell* by exploring not only U.S. domestic jurisprudence but also *transnational* jurisprudence—in international human rights law and comparative constitutional law—to support the continued legalization of adult, consensual, same-sex sexual conduct and same-sex marriage.

#### I. "FIRST WAVE" LEGAL FRAMES AND FRAME ALIGNMENT PROCESSES AS JURISPRUDENTIAL INNOVATIONS

The broad outlines of "first wave" privacy jurisprudence in the 1980s and 1990s—*Dudgeon*, *Bowers v. Hardwick*, *Norris*, *Modinos*, *Toonen*, and *NCGLE*—are well known among international and comparative constitutional legal scholars and among transnational activists attuned to LGBTIQ+ human and constitutional rights jurisprudence.<sup>61</sup> In this Part, I supplement this outline by considering the mostly *unsuccessful* claims-making and jurisprudence of criminal defendants, their defense attorneys, activists, cause lawyers, state court judges, and European Commission of Human Rights members as early as the 1950s in Massachusetts, West Germany, Austria, Ohio, Washington, Alaska, Florida, and Virginia. I then consider the mostly *successful* vagueness and privacy claims and jurisprudence in the 1980s and 1990s

<sup>57</sup> Legal Opportunity Structure (LOS) is a multidimensional framework for studying legal mobilization. The four dimensions are (1) access, (2) configuration of power (elite alignment), (3) balance of alliance and conflict systems, and (4) cultural and legal frames. See ANDERSEN, *supra* note 40; see also Vanhala, *Legal Opportunity Structures*, *supra* note 8.

<sup>58</sup> See DOUG MCADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY 1930–1970*, at 36 (2d ed. 1982); see also Doug McAdam, *Conceptual Origins, Current Problems, Future Directions*, in *COMPARATIVE PERSPECTIVES ON SOCIAL MOVEMENTS: POLITICAL OPPORTUNITIES, MOBILIZING STRUCTURES, AND CULTURAL FRAMINGS* (Doug McAdam et al. eds., 1996); David S. Meyer & Debra C. Minkoff, *Conceptualizing Political Opportunity*, 82 SOC. FORCES 1457 (2004).

<sup>59</sup> Cf. Gwendolyn M. Leachman, *From Protest to Perry: How Litigation Shaped the LGBT Movement's Agenda*, 47 U.C. DAVIS L. REV. 1667, 1692–93 (2014) ("Legal norms and ideas derived from constitutional texts, court decisions, and statutes constitute many of the ideas and values that dominate political discourse and become privileged social movement rhetoric. Social movement actors 'draw upon critical concepts emphasized in the legal domain' to produce 'claims [that] are more likely to resonate, and thus to persuade potential supporters.'").

<sup>60</sup> *Id.* at 2301 (Thomas, J., concurring).

<sup>61</sup> See, e.g., SPERTI, *supra* note 15, at 19, 41.

that decriminalization activists raised, and that U.S. state court judges and European Human Rights Court justices ratified.

Although the scholarship on *Dudgeon*, *Toonen*, and *NCGLE* often asserts the influence that these cases had on subsequent domestic court constitutional jurisprudence, I suggest that it is the *domestic* privacy jurisprudence of lobbyists, legislators, claimants, and judges from the United Kingdom and the United States that shaped the claims-making, and thus the European Court of Human Rights jurisprudence, in *Dudgeon* and *Toonen*.

**Table 1. “Sodomy” or “Buggery” Decriminalization Legal Mobilization, 1950s Through 2000s**

	Europe	United States	Africa	Asia & Oceania	Latin America & Caribbean
1950s	W.B. E.G. K.H.W. X A.S. H.K.	Jaquith	N/A	N/A	N/A
1960s	H.S. X W.R. X	Sharpe Rhinchart Buchanan Harris	N/A	N/A	N/A
1970s	Dudgeon Norris	Franklin Balthazar Doe [Bland] Ciuffini	N/A	N/A	N/A
1980s	Norris Modinos	Onofre Bonadio Baker Hardwick	N/A	N/A	N/A
1990s	N/A	MOHR Wasson Campbell Gryczan Powell Williams Lawrence & Garner Cogshell	Kanane Banana NCGLE	Toonen & Croome ABVA	Loayza
2000s	N/A	Doe Picado GLAD	N/A	Naz Foundation Nadan & McCoskar Yau Pant & Others	N/A

This Table depicts selected sodomy decriminalization legal mobilizations<sup>62</sup> between 1954 and 2007 in Europe,<sup>63</sup> the United States,<sup>64</sup> Africa,<sup>65</sup> Asia & Oceania,<sup>66</sup> and

Latin America & the Caribbean.<sup>67</sup> The below citations organized in chronological order refer to the legal judgments that resulted from each legal mobilization.

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<sup>62</sup> This Table only contains a sample of U.S. sodomy decriminalization legal mobilization, primarily early cases and those that led to decriminalization. For a more thorough examination of U.S. sodomy decriminalization legislation and case law, see ESKRIDGE, *supra* note 24, at app. 387–404. For more on the activist litigants in this Table who participated in decades worth of legal mobilization, see generally Perrin, *Litigation and the Lifecycle of the Sodomy Decriminalization Norm*, *supra* note 16.

<sup>63</sup> For discussion on the cases from the 1950s and 1960s, see JOHNSON, *HOMOSEXUALITY AND THE EUROPEAN COURT OF HUMAN RIGHTS*, *supra* note 14, at 23–34, 97, 126, 198, 200–01. *See also* W.B. v. Federal Republic of Germany, No. 104/55, Commission Decision (Dec. 17, 1955); E.G. v. Federal Republic of Germany, No. 135/55, Commission Decision (May 31, 1956); K.H.W. v. Federal Republic of Germany, No. 167/56, Commission Decision (Sept. 28, 1956); X. v. Federal Republic of Germany, No. 261/57, Commission Decision (Dec. 16, 1957); A.S. v. Federal Republic of Germany, No. 530/59, Commission Decision (Jan. 4, 1960); H.K. v. Federal Republic of Germany, No. 600/59, Commission Decision (Apr. 2, 1960); H.S. v. Federal Republic of Germany, No. 704/60, Commission Decision (Aug. 4, 1960); X. v. Federal Republic of Germany, No. 986/61, Commission Decision (May 7, 1962); W.R. v. Austria, No. 1138/61, Commission Decision (June 18, 1961); X. v. Austria, No. 1593/62, Commission Decision (Apr. 4, 1964); *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981); *Norris v. Att’y Gen.*, [1984] IR 36 (SC) (Ir.); *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988); *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A) (1993).

<sup>64</sup> *Jaquith v. Commonwealth*, 120 N.E.2d 189 (Mass. 1954); *State v. Sharpe*, 205 N.E.2d 113 (Ohio Ct. App. 1965); *State v. Rhinehart*, 424 P.2d 906 (Wash. 1967); *Harris v. State*, 457 P.2d 638 (Alaska 1969); *Buchanan v. Batchelor*, 308 F. Supp. 729 (N.D. Tex. 1970), *rev’d on other grounds sub nom. Wade v. Buchanan*, 401 U.S. 989 (1971) (mem.); *Franklin v. State*, 257 So. 2d 21 (Fla. 1971); *Commonwealth v. Balthazar*, 318 N.E.2d 478 (Mass. 1974). The plaintiff in *Doe v. Commonwealth’s Att’y*, 403 F. Supp. 1199 (E.D. Va. 1975), *aff’d mem.*, 425 U.S. 901 (1976), was Bill Bland, the partner of Bruce Voeller, one of the co-founders of the National Gay Task Force. *See* ESKRIDGE, *supra* note 24, at 186. *State v. Ciuffini*, 395 A.2d 904 (N.J. Super Ct. App. Div. 1978); *People v. Onofre*, 415 N.E.2d 936 (N.Y. 1980); *Commonwealth v. Bonadio*, 415 A.2d 47 (Pa. 1980); *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982); *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Mich. Org. for Hum. Rts. v. Kelley (MOHR)*, No. 88-815820 CZ (Mich. Cir. Ct. Wayne Cnty. July 9, 1990); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996); *Gryczan v. State*, 942 P.2d 112, 115–16 (Mont. 1997); *Powell v. State*, 510 S.E.2d 18 (Ga. 1998); *Williams v. Glendening*, No. 98036031/CL-1059, 1998 WL 965992 (Cir. Ct. Md. Oct. 15, 1998); *State v. Cogshell*, 997 S.W.2d 534 (Mo. Ct. App. 1999); *Doe v. Ventura*, No. MC 01-489, 2001 WL 543734 (Minn. Dist. Ct. Hennepin Cnty. May 15, 2001) (plaintiffs in *Doe v. Ventura* included three anonymous plaintiffs (John Doe, Mark Roe, and Jane Doe), four named plaintiffs (Kim Nyhus, Phil Duran, Erin Krebs, and Jared Frandson), and an organizational plaintiff (the Minnesota Lavendar Bar Association), on behalf of its members); *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002); *Gay & Lesbian Advocs. & Defs. v. Att’y Gen. (GLAD)*, 763 N.E.2d 38 (Mass. 2002); *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>65</sup> *Nat’l Coal. for Gay & Lesbian Equal. v. Minister of Just. (NCGLE)* 1998 (12) BCLR 1517 (CC) (S. Afr.); *Banana v. State*, (2000) 4 LRC 621 (Zim.); *Kanane v. State*, (2003) (2) BLR 64 (CA) (Bots.).

### *A. Evolution of the Transnational Jurisprudence on LGBTQ Privacy Rights*

Privacy arguments against the criminalization of same-sex sexual conduct go back at least as far as the eighteenth century.<sup>68</sup> A *modern* transnational revolution in privacy law began in the 1950s and had its most significant impact on LGBTQ rights beginning in the 1980s.<sup>69</sup> From the 1960s forward, domestic and transnational sodomy decriminalization legal mobilization capitalized on the text-based and judicially created right to privacy—expanding the protections of the privacy right beyond physical spaces to personal choices.<sup>70</sup> Activist legal mobilization was thus essential to this evolution in the very scope of the right to privacy.

#### 1. 1950s and 1960s: Privacy Codified in International Human Rights Treaties

First, it is important to note that the codification of human rights in international declarations and treaties after World War II provided a textual basis for placing some items, decisions, and behaviors—objects or aspects of “private and family life”<sup>71</sup> or objects or aspects of “privacy, family, home”—beyond the reach of the state.<sup>72</sup> However, litigation—reactive, opportunistic, and strategic—and social

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<sup>66</sup> Toonen v. Australia, U.N. GAOR Hum. Rts. Comm., 50th Sess., U.N. Doc. CCPR/C/50/D/488/1992 (1994); see Geetanjali Misra, *Decriminalising Homosexuality in India*, 17 REPROD. HEALTH MATTERS 20, 22–23 (2009) (describing how ABVA filed suit at the Delhi High Court in 1994); Nadan & McCoskar v. State, (2005) F.J.H.C. 500 (Fiji); Yau Yuk Lung Zigo & Lee Kam Chuen, [2006] 4 H.K.L.R.D. 196 (CFA); Pant & Others v. Nepal, Writ No. 917 of the year 2064 (BS) (2007 AD) (translation at 2 NAT’L JUD. ACAD. L.J. 261 (2008)); Naz Found. v. Gov’t of NCT of Delhi, (2009) DLT 277 (India).

<sup>67</sup> Constitutional Tribunal of Ecuador, Nov. 17, 1997, No. 111-97-TC, <https://www.icj.org/sogicasebook/case-no-111-97-tc-constitutional-tribunal-of-ecuador-27-november-1997/> [<https://perma.cc/4VWZ-VPX2>] (discussing the claim of the lead Plaintiff, Christian Polo Loayza).

<sup>68</sup> See *A History of LGBT Criminalisation*, HUM. DIGNITY TR., <https://www.human.dignitytrust.org/lgbt-the-law/a-history-of-criminalisation/> [<https://perma.cc/63EW-XHFS>] (last visited Oct. 2, 2023).

<sup>69</sup> See generally *id.* (discussing the impact of the landmark decision, *Dudgeon v. United Kingdom*, made in the 1980s).

<sup>70</sup> To see how the privacy right expanded over this time, compare *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (centering the right to privacy within the marital relationship), with *Lawrence v. Texas*, 539 U.S. 558, 576–77 (2003) (centering the right as “an integral part of human freedom” and a “personal choice”).

<sup>71</sup> See Organization of American States, American Declaration of the Rights and Duties of Man, art. V (Apr. 30, 1948) (adopted by the Ninth Int’l Conf. of Am. States) [hereinafter OAS, American Declaration of Rights]; Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms art. 13, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 221 [hereinafter ECHR].

<sup>72</sup> See G.A. Res. 217A, Universal Declaration of Human Rights, art. 12 (Dec. 12, 1948) [hereinafter UDHR].

movement legal mobilization were essential to determining what exactly the scope of this textual right would be. Rationales put forward by aggrieved individuals and groups, cause lawyers, amici, and judges were necessary for expanding beyond a concept of privacy as mainly protective of a zone of physical *space* (“home”),<sup>73</sup> other tangible *property* (“communication” or “correspondence”),<sup>74</sup> and intangible property (“honor” and “reputation”)<sup>75</sup> to privacy as protective of personal *decisions*.

In 1949, the Council of Europe (the intergovernmental body that adopted the European Convention on Human Rights) consisted of ten states, and of the original ten member states, only three—Ireland, Norway, and the United Kingdom—maintained sodomy prohibitions.<sup>76</sup> A text-based right to privacy, then, initially existed only amongst a minuscule group of states where it was least needed as a buttress against sodomy prohibitions. However, another nine states joined the Council of Europe prior to the European Court’s 1981 judgment in the *Dudgeon* case, and of these, six—Greece, Cyprus, Malta, Portugal, Spain, and Lichtenstein—maintained sodomy prohibitions.<sup>77</sup> Although Greece (1951), Malta (1973), and Spain (1979) decriminalized legislatively before *Dudgeon*, Portugal (1982) decriminalized homosexual sex after *Dudgeon*, and Lichtenstein (1989)<sup>78</sup> decriminalized homosexual sex after *Norris*, which the Court decided in 1988.<sup>79</sup> Cyprus decriminalized homosexual sex in 1998 after Alecos Modinos won his European Court claim in 1993.<sup>80</sup>

Already by the 1950s, West Germans were submitting *domestic* court claims arguing for decriminalization as an important step in repudiating the Nazi Regime, which had relied upon an expanded Paragraph 175 of the German Criminal Code to justify involuntary scientific experimentation upon, and the internment and ultimately the mass murder of, sexual minorities living under Nazi rule.<sup>81</sup> Shortly after ratification of the European Convention of Human Rights (ECHR) in 1950, West Germans and Austrians submitted a variety of complaints to the European Commission,

<sup>73</sup> See OAS, American Declaration of Rights, *supra* note 71, art. IX (“Every person has the right to the inviolability of his home.”).

<sup>74</sup> See *id.* art. X (“Every person has the right to the inviolability and transmission of his correspondence.”).

<sup>75</sup> International Covenant on Civil and Political Rights art. 17, *adopted* Dec. 19, 1966, 999 U.N.T.S. 171 (ratified with reservations by the United States Senate on Apr. 2, 1992) [hereinafter ICCPR].

<sup>76</sup> *A Convention to Protect Your Rights and Liberties*, COUNCIL OF EUR., <https://www.coe.int/en/web/human-rights-convention> [<https://perma.cc/83L3-LXQE>] (last visited Oct. 2, 2023); *A History of LGBT Criminalisation*, *supra* note 68.

<sup>77</sup> *A History of LGBT Criminalisation*, *supra* note 68.

<sup>78</sup> *Id.*

<sup>79</sup> *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988).

<sup>80</sup> *A History of LGBT Criminalisation*, *supra* note 68; see *Modinos v. Cyprus*, 16 Eur. H.R. Rep. 485, 495 (1993); Cyprus Crim. Code § 171 (repealed by legislative action in 1988).

<sup>81</sup> Robert Moeller, *Private Acts, Public Anxieties, and the Fight to Decriminalize Male Homosexuality in West Germany*, 36 FEMINIST STUD. 528, 530–31 (2010).

effectively appealing these adverse domestic court rulings.<sup>82</sup> Facing a closed domestic political and legal opportunity structure,<sup>83</sup> aggrieved West Germans threw legal or litigation “boomerangs” outside the state by “jumping” to the global level in order to alter domestic politics,<sup>84</sup> but the *transnational* legal opportunity structure remained closed. The European Commission consistently rejected all but one of these claims, deeming them “manifestly ill-founded.”<sup>85</sup> East and West Germany and Austria decriminalized legislatively between 1969 and 1971.<sup>86</sup> Although I have not yet uncovered strong evidence to support the influence of the failed transnational litigation on legislative decriminalization in these states, it is difficult to imagine that the steady stream of domestic constitutional claims played no role in breaking the taboo around homosexual sex and forcing the state to address this public policy issue—what sociologists term shifting the domestic discursive opportunity structure.<sup>87</sup>

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<sup>82</sup> See JOHNSON, HOMOSEXUALITY AND THE EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 14, at 22–31; PAUL JOHNSON, GOING TO STRASBOURG: AN ORAL HISTORY OF SEXUAL ORIENTATION DISCRIMINATION AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS 11–12 (2016) [hereinafter JOHNSON, GOING TO STRASBOURG].

<sup>83</sup> For more on political and legal opportunity structures, see *supra* note 57.

<sup>84</sup> Cf. MARGARET KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 12–13 (1998) (presenting the “boomerang pattern” of transnational advocacy, which occurs when “a government violates or refuses to recognize rights,” and “individuals and domestic groups . . . have no recourse within domestic political or judicial arenas”); KAREN ALTER, THE NEW TERRAIN OF INTERNATIONAL LAW: COURTS, POLITICS, RIGHTS 55–56, fig.2.5 (2014) (inserting international courts into mobilization theory by observing how international court litigation alters domestic politics); Ari Shaw, *Claiming International Rights: Tactical Forms of Human Rights Mobilization in Colombia and Kenya* 18 (Aug. 2015) (Ph.D. dissertation, Northwestern University) (ProQuest) (“Where local activists exhaust domestic remedies or experience a closure in the DOS [domestic opportunity structure], they pursue subsequent forms of RBM [rights-based mobilization] by “jumping” to regional or global levels.”); NOVAK, *supra* note 56, at 15 (“Human rights litigation operates in a similar boomerang pattern.”); *id.* at 19 (“Strategic human rights litigation using courts and judiciaries is an attempt to alter the behavior of states to comply with their international obligations.”).

<sup>85</sup> See JOHNSON, HOMOSEXUALITY AND THE EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 14, at 24, 31; see also JOHNSON, GOING TO STRASBOURG, *supra* note 82, at 11–12. In 1975, the Commission declared *X v. United Kingdom* partially admissible with regard to the claims under Articles 8, 10, and 14. It was the first complaint to reach the merits stage. See *id.* at 18–21; JOHNSON, HOMOSEXUALITY AND THE EUROPEAN COURT OF HUMAN RIGHTS, *supra* note 14, at 36–39.

<sup>86</sup> A History of LGBT Criminalisation, *supra* note 68.

<sup>87</sup> See Holly McCammon, *Discursive Opportunity Structure*, in THE WILEY-BLACKWELL ENCYCLOPEDIA OF SOCIAL AND POLITICAL MOVEMENTS (David A. Snow, Donatella della Porta, Bert Klandermans, & Doug McAdam eds., 2013) (“In 1999, Koopmans and Statham introduced the term “discursive opportunity structure” (DOS) to identify ideas in the broader political culture believed to be “sensible,” “realistic,” and “legitimate” and whose presence would thus facilitate reception of specific forms of collective action framing—forms, that is, that would align well with these pre-existing ideational elements.”).

Meanwhile, it is important to note that states *outside* of the Council of European Human Rights system lacked any binding legal obligation to respect the right to privacy during this period—the American and Universal Declarations being non-binding and aspirational in form. A universally binding (that is, globally applicable) right to privacy did not exist until 1976, when the International Covenant on Civil and Political Rights (ICCPR) gained the minimum requisite number of ratifications.<sup>88</sup> In language more specific than the American Declaration and the Universal Declaration, reflecting the legal standards and tests that had been applied in litigation to balance the individual right to privacy against the public interest, the ICCPR prohibited “arbitrary or unlawful interference with . . . privacy, family, home or correspondence” and “unlawful attacks on [a person’s] honour and reputation.”<sup>89</sup> Furthermore, the UN Human Rights Committee, the quasi-judicial mechanism envisioned to enforce the ICCPR, lacked universal jurisdiction over all states parties to the treaty to receive complaints from aggrieved individuals residing inside member states.<sup>90</sup> Only individuals residing inside those states ratifying a separate treaty—the First Optional Protocol to the ICCPR—had access to the transnational legal opportunity structure.<sup>91</sup> The UN Human Rights Committee did not receive a complaint against the criminalization of same-sex sexual conduct until Nicholas Toonen filed an individual complaint on behalf of Rodney Croome and the Tasmania Gay Law Reform Group in December 1991.<sup>92</sup>

At the regional level, the American Convention on Human Rights was not adopted until 1969 and did not come into force until 1978.<sup>93</sup> In language almost identical to that of the ICCPR adopted three years earlier, it prohibited “arbitrary or *abusive* interference with . . . privacy, family, home or correspondence” and prohibited “unlawful attacks on [a person’s] honor and reputation.”<sup>94</sup> The African Charter on Human and Peoples’ Rights was not adopted until 1981 and did not come into force until 1986, in any event, it lacked a provision on the right to privacy.<sup>95</sup>

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<sup>88</sup> ICCPR, *supra* note 75, art. 49.

<sup>89</sup> *Id.* art. 17, § 1.

<sup>90</sup> See *Individual Communications: Human Rights Committee*, UNITED NATIONS, <https://www.ohchr.org/en/treaty-bodies/ccpr/individual-communications> [<https://perma.cc/U8QJ-JLTG>] (last visited Oct. 2, 2023) (discussing U.N. treaty bodies and individual complaint mechanisms).

<sup>91</sup> *Id.* On legal opportunity structures, see *supra* notes 57–59 and accompanying text.

<sup>92</sup> See *Toonen v. Australia*, U.N. GAOR Hum. Rts. Comm., 50th Sess., U.N. Doc. CCPR/C/50/D/488/1992 (1994).

<sup>93</sup> *History*, INTER-AM. CT. OF HUM. RTS., <https://www.corteidh.or.cr/historia.cfm> [<https://perma.cc/3UUA-J6TR>] (last visited Oct. 2, 2023).

<sup>94</sup> Organization of American States, American Convention on Human Rights, art. 11, Nov. 22, 1969, 1144 U.N.T.S. 144 [hereinafter ACHR] (emphasis added). The term “abusive” persisted from the American Declaration of 1948, which required “protection of the law against abusive attacks upon [a person’s] honor, . . . reputation, and . . . private and family life.” See OAS, American Declaration of Rights, *supra* note 71, art. V.

<sup>95</sup> See Organisation of African Unity, African Charter on Human and Peoples’ Rights art. 2, *adopted* June 27, 1981, 1520 U.N.T.S. 218 [hereinafter ACHPR].

In short, from the immediate postwar period until well into the 1970s, the only binding international legal obligations for the protection of privacy existed among nineteen Council of Europe member states. Criminal defendants and activist litigants within the Council of Europe that could use that mechanism did so—from unnamed claimants against West Germany, Austria, and the UK in the 1950s and 1960s,<sup>96</sup> to Jeffrey Dudgeon in the 1970s, and David Norris and Alecos Modinos in the 1980s.<sup>97</sup> Outside of the Council of Europe, at least in the United States, criminal defendants as well as activist litigants foreclosed in legislative reform efforts made innovative forays using constitutional law. Before discussing these innovations in privacy doctrine, I next discuss the existence of a privacy-based rationale for legislative decriminalization in the 1960s and 1970s.

## 2. Privacy in U.S. Constitutional Rights Jurisprudence and Domestic Sodomy Decriminalization Litigation

In the United States, the Constitution does not contain a “right to privacy” in its text. The closest the Constitution comes to a text-based privacy right is the Fourth Amendment’s “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . .”<sup>98</sup> There is not an intuitive link between the Fourth Amendment and sexual activity. However, as early as 1952, even before the criminal justice revolution of the Warren Court, Harry Hay, founder of the Mattachine Society, saw the potential for expanding Fourth Amendment jurisprudence to bring an end to police entrapment operations, surveillance of public restrooms, and bar raids that ensnared gay men.<sup>99</sup>

This was always one of the major shortcomings of criminal defendant-centered decriminalization challenges: defendants were never arrested in the privacy of their homes.<sup>100</sup> For numerous reasons related to personal shame, ostracization by family, and social exclusion by hotels and innkeepers, gay men frequently engaged in sexual activity—from holding hands, to dancing and kissing, to oral and anal sex—in quasi-public settings such as bars and restaurants, train station restrooms, phone booths, parked cars, and public parks.<sup>101</sup> State authorities could always argue

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<sup>96</sup> Perrin, *Litigation and the Lifecycle of the Sodomy Decriminalization Norm*, *supra* note 16, at 32–33.

<sup>97</sup> *A History of LGBT Criminalisation*, *supra* note 68.

<sup>98</sup> U.S. CONST. amend. IV.

<sup>99</sup> JOHN D’EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940–1970*, at 70 (2d ed. 1998); ESKRIDGE, *supra* note 24, at 128–30.

<sup>100</sup> Cf. George Selvanera, *Gays in Private: The Problems with the Privacy Analysis in Furthering Human Rights*, 16 ADEL. L. REV. 331, 336–38 (1994). The other major shortcoming, which will become clear in the following discussion, is that many defendants were prosecuted under the sodomy or gross indecency provisions for *non-consensual* sex acts—sexual assaults against women and adolescent boys and girls. *See id.*

<sup>101</sup> *See* Regan Lynch, *Cruising: Public Sex and the Queer Resistance to Gay Assimilation*,

legitimately that sodomy statutes were necessary to police *public* rather than private sexual conduct.<sup>102</sup> Nevertheless, when feminist activists prevailed in arguing that the constitution protects a fundamental right to privacy, that right would constitute a crucial shift in the available domestic legal stock, paving the way for an ACLU pivot on the issue of decriminalization.<sup>103</sup>

The 1965 U.S. Supreme Court decision in *Griswold v. Connecticut* concerned whether the right to marital privacy could serve as a buttress against the state's refusal to allow doctors to provide a married couple with contraceptives.<sup>104</sup> It was in *Griswold* that the U.S. Supreme Court first announced a constitutional right to privacy.<sup>105</sup> Estelle Griswold, the executive director of the Planned Parenthood League of Connecticut, and Dr. C. Lee Buxton, the League's medical director, were feminist activists determined to overturn the state's prohibition on contraception.<sup>106</sup> Alongside Yale Law Professor Fowler Harper and aided by Catherine Roraback,<sup>107</sup> Griswold and Buxton first coordinated *Poe v. Ullman*—a failed challenge to Connecticut's contraception prohibition by a married couple (under the pseudonym Poe) whose three children each died shortly after birth; a married woman (under the pseudonym Jane Doe) who suffered life-threatening medical complications during pregnancy; and Buxton himself.<sup>108</sup> Arrested in 1961 for distributing contraception to a married couple, *Griswold* and *Buxton* challenged the constitutionality of Connecticut's ban—an act of intentional civil disobedience not unlike Homer Plessy's and Rosa Parks' intentional non-compliance with Jim Crow segregation laws.<sup>109</sup>

Justice William O. Douglas, authoring the majority opinion for seven of the Court's nine justices, held the Connecticut contraception ban unconstitutional on the basis of the right to privacy found in the “penumbras” and “emanations” of the Bill of Rights of the U.S. Constitution—specifically the First, Third, Fourth, and Ninth Amendments.<sup>110</sup> The First Amendment protects the free exercise of religion and

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ARCHER (Feb. 15, 2018), <https://archermagazine.com.au/2018/02/cruising-public-sex-queer-assimilation/> [<https://perma.cc/26XT-Q7WN>] (“Simply put, when sex is deemed inappropriate for the home, it will be pushed out into the public.”).

<sup>102</sup> See, e.g., Selvanera, *supra* note 100, at 337.

<sup>103</sup> ESKRIDGE, *supra* note 24, at 131.

<sup>104</sup> 381 U.S. 479, 480–84 (1965).

<sup>105</sup> *Id.* at 484–86.

<sup>106</sup> See generally Gary Gross, *The Buxton Griswold History of Legalizing Contraception in the State of Connecticut at the Massachusetts State House* (Mar. 2006) (unpublished manuscript), [https://medicine.yale.edu/obgyn/about/yogs/gross\\_griswold\\_ct\\_179528\\_284\\_1958\\_v1.pdf](https://medicine.yale.edu/obgyn/about/yogs/gross_griswold_ct_179528_284_1958_v1.pdf) [<https://perma.cc/98EJ-9GD7>].

<sup>107</sup> See generally Jonathan Weisberg, *In Control of Her Own Destiny: Catherine G. Roraback and the Privacy Principle*, 51 YALE L. REP. 41 (2004), <https://ylr.law.yale.edu/pdfs/v51-1/Roraback.pdf> [<https://perma.cc/5A2G-D55X>].

<sup>108</sup> 367 U.S. 497, 498–500 (1961).

<sup>109</sup> *Griswold*, 381 U.S. at 480.

<sup>110</sup> *Id.* at 484 (citing *Poe*, 367 U.S. at 516–22 (Douglas, J., dissenting)).

freedom of speech.<sup>111</sup> The Third Amendment protects a homeowner against involuntarily quartering soldiers inside their home.<sup>112</sup> The Fourth Amendment protects against unreasonable and warrantless searches and seizures of one's person, houses, papers, and effects.<sup>113</sup> And the Ninth Amendment explains that there are unenumerated constitutional rights.<sup>114</sup> Justices Potter Stewart and Hugo Black each filed a dissenting opinion and joined each other's dissents.<sup>115</sup>

Justices Arthur Goldberg, John Marshall Harlan II, and Byron White each authored a concurrence.<sup>116</sup> Justice Goldberg, who was joined by Justices Earl Warren and William Brennan, located the privacy right in the Ninth and Fourteenth Amendments,<sup>117</sup> and Justice Harlan located the privacy right in only the Fourteenth.<sup>118</sup> Justice White, however, while finding Connecticut's contraception ban unconstitutional as a violation of the Fourteenth Amendment's Due Process Clause, could not join in the reasoning of the majority opinion or of the dissents that the Constitution contained substantive due process rights such as the right to privacy.<sup>119</sup>

The theory advanced by *Griswold* and Buxton is that whether to have a child or to use contraception to ensure that sex does not produce a child is no business of the state.<sup>120</sup> It is a private matter between sex partners, or more specifically in the case of *Griswold v. Connecticut*,<sup>121</sup> a matter protected by the sacred privacy of the marital bedroom. Justice William O. Douglas wrote in the majority opinion:

The foregoing cases suggest that specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance. Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one, as we

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<sup>111</sup> U.S. CONST. amend. I.

<sup>112</sup> U.S. CONST. amend. III.

<sup>113</sup> U.S. CONST. amend. IV.

<sup>114</sup> U.S. CONST. amend. IX.

<sup>115</sup> *Griswold*, 381 U.S. at 507, 527 (Black & Stewart, JJ., dissenting). Eight years later, Justice Stewart would join the majority opinion in *Roe v. Wade*, overturning Texas's ban on abortion on the basis of the right to privacy. 410 U.S. 113, 115 (1973).

<sup>116</sup> *Griswold*, 381 U.S. at 486 (Goldberg, J., concurring); *id.* at 499 (Harlan, J., concurring); *id.* at 502 (White, J., concurring).

<sup>117</sup> *Id.* at 486–87 (Goldberg, J., concurring).

<sup>118</sup> *Id.* at 500 (Harlan, J., concurring).

<sup>119</sup> *Id.* at 502–03 (White, J., concurring). Thus (although somewhat ironically), eight years later, White would dissent from the majority holding in *Roe v. Wade*, 410 U.S. at 113, and thirteen years after that, White would author the majority opinion in *Bowers v. Hardwick*, 478 U.S. 186, 191–92 (1986), denying that gay people had a fundamental right to same-sex sexual conduct and ignoring the privacy interest that he had helped to create in *Griswold*.

<sup>120</sup> *Griswold*, 381 U.S. at 485–86.

<sup>121</sup> *Id.*

have seen. The Third Amendment, in its prohibition against the quartering of soldiers “in any house” in time of peace without the consent of the owner, is another facet of that privacy. The Fourth Amendment explicitly affirms the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” The Fifth Amendment, in its Self-Incrimination Clause, enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.”<sup>122</sup>

The centrality of *Griswold* in unlocking the domestic legal opportunity structure should not be underestimated. The ACLU did not change its formal position on supporting gay and lesbian rights until 1967, although as early as 1952, Harry Hay had begged the Los Angeles ACLU for assistance in Dale Jennings’ solicitation case, and Frank Kameny had pleaded for the ACLU’s assistance in 1957.<sup>123</sup> However, at least some segments of ACLU leadership, it seems, wanted to put the organization’s weight behind the gay rights movement, but thought that the legal opportunity structure was closed. Frank Kameny kept pushing the issue within the National Capital Area Civil Liberties Union, which could table the issue within the national organization.<sup>124</sup> In 1962, as John D’Emilio has detailed, Alan Reitman, the associate director of the national office of the ACLU, wrote to Frank Kameny and other correspondents about the pending *Griswold* case to indicate that a favorable outcome on sexual privacy would clear the path for the ACLU to support gay rights as a civil liberties issue:

I expect that the Union in the coming years will be more actively involved in this area . . . . Once we have the high court’s opinion in this area, we will be in a position to determine our policy on the civil liberties aspect of a variety of sexual practices, including homosexuality.<sup>125</sup>

Five months after the Supreme Court decided the case, the ACLU Due Process Committee recommended that the ACLU adopt the ALI’s position that the state should not interfere in the private sexual behavior of consenting adults.<sup>126</sup> The

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<sup>122</sup> *Id.* at 484 (citing *Poe v. Ullman*, 367 U.S. 497, 516–22 (1961) (Douglas, J., dissenting)).

<sup>123</sup> D’EMILIO, *supra* note 99, at 155.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 212.

<sup>126</sup> See ESKRIDGE, *supra* note 24, at 153.

ACLU's governing board agreed.<sup>127</sup> Although it took another two years, the ACLU declared its change of policy in an "ACLU Statement on Homosexuality" in 1967 (the year England and Wales implemented the Wolfenden Committee recommendation): "Griswold's 'right of privacy should extend to all private sexual conduct, heterosexual or homosexual, of consenting adults. The judgment of such conduct, including its morality, is the province of conscience and religion, but is not a matter for invoking the penal statutes of the secular state.'"<sup>128</sup>

Activist litigators brought other cases to the Supreme Court relying on the privacy right in *Griswold*, and between 1969 and 1973 the justices in the majority in a variety of cases relied on the privacy right to protect the rights of individuals to possess obscene materials,<sup>129</sup> the right of a woman to make reproductive choices,<sup>130</sup> and in a case technically decided under the Equal Protection Clause, the right of unmarried persons to access contraceptive devices.<sup>131</sup> Even some prisoners and prisoners' wives relied on the privacy right in *Griswold* to argue, albeit unsuccessfully, for a right to conjugal visitation.<sup>132</sup>

The impact of *Griswold* on LGBTQ legal mobilization was immediate. Reverend Keith Milton Rhinehart—the founder of a small religious sect called the Aquarian Foundation—was arrested in April 1965 and charged under the sodomy statute for performing oral sex on a fifteen-year-old boy.<sup>133</sup> The Washington sodomy statute read in part:

Every person who shall carnally know in any manner any animal or bird; or who shall carnally know any male or female person by the anus or with the mouth or tongue; or who shall voluntarily submit to such carnal knowledge; or who shall attempt sexual intercourse with a dead body, shall be guilty of sodomy . . . .<sup>134</sup>

In 1966, the Dorian Society in the state of Washington<sup>135</sup> and an influential attorney, Malcolm L. Edwards, helped contest Rhinehart's prosecution. Rhinehart and Edwards

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *See Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

<sup>130</sup> *See Roe v. Wade*, 410 U.S. 113, 129 (1973).

<sup>131</sup> *See Eisenstadt v. Baird*, 405 U.S. 438, 445–46 (1972).

<sup>132</sup> *See, e.g., Lyons v. Gilligan*, 382 F. Supp. 198, 199–200 (N.D. Ohio 1974).

<sup>133</sup> *See State v. Rhinehart*, 424 P.2d 906, 907–08 (Wash. 1967); *see also The Journey*, KEITH MILTON RHINEHART, <https://www.keithmiltonrhinehart.com/the-journey.html#> [https://perma.cc/98GD-XJ97] (last visited Oct. 2, 2023).

<sup>134</sup> WASH. REV. CODE § 9.79.100 (1974), *repealed by* WASH. REV. CODE § 9A.92.010 (1976), *quoted in Rhinehart*, 424 P.2d at 910.

<sup>135</sup> *See ESKRIDGE, supra note 24*, at 154; GARY L. ATKINS, *GAY SEATTLE: STORIES OF EXILE AND BELONGING* 102–03 (2003).

argued that his prosecution violated equal protection of the law;<sup>136</sup> that the sodomy statute was an unconstitutional invasion of private, consensual acts; and that the sodomy statute should be held void for vagueness.<sup>137</sup> The Washington Supreme Court rejected Rhinehart's defenses and legal claim, including his contention that the sodomy laws violated his constitutional right to privacy.<sup>138</sup>

In 1969, Alvin Buchanan challenged Texas' gender-neutral sodomy prohibition alongside another gay man—Dallas activist Travis Strickland—and a heterosexual married couple—Janet and Michael Gibson.<sup>139</sup> Dallas police had arrested Buchanan twice for violating Texas Penal Code by engaging in sodomy with another male in a public restroom.<sup>140</sup> Article 524 of the Texas Penal Code read:

Whoever has carnal copulation with a beast, or in an opening of the body, except sexual parts, with another human being, or whoever shall use his mouth on the sexual parts of another human being for the purpose of having carnal copulation or who shall voluntarily permit the use of his own sexual parts in a lewd or lascivious manner by any minor, shall be guilty of sodomy, and upon conviction thereof shall be confined in the penitentiary not less than two (2) nor more than fifteen (15) years.<sup>141</sup>

Buchanan was convicted at trial and filed for relief from the United States District Court for the Northern District of Texas.<sup>142</sup> However, the statute was worded broadly enough that Texas, theoretically, could have prosecuted Strickland and the Gibsons for consensual sex acts under the sodomy prohibition at the time. The North American Conference of Homophile Organizations, a coalition of gay and lesbian rights and support organizations co-founded by Frank Kameny, filed a motion to intervene as amicus curiae.<sup>143</sup> The motion, authored by attorneys and University of New Mexico law faculty Hugh Muir and Walter E. Barnett, centered the right to privacy in advocating for the Supreme Court to invalidate the statute.<sup>144</sup>

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<sup>136</sup> This odd equal protection claim was that police were targeting Rhinehart while failing to prosecute "known homosexuals . . . participat[ing] in sexual activities in public bars and clubs in Seattle under the supervision and control of the police department." *Rhinehart*, 424 P.2d at 909. In other words, Rhinehart and Edwards did not argue that the sodomy statute unconstitutionally discriminated on the basis of sex or sexual orientation.

<sup>137</sup> *Id.* at 909–10.

<sup>138</sup> *Id.* at 908–10.

<sup>139</sup> ESKRIDGE, *supra* note 24, at 154–55.

<sup>140</sup> *Buchanan v. Batchelor*, 308 F. Supp. 729, 730 (N.D. Tex. 1970), *rev'd on other grounds sub nom.* *Wade v. Buchanan*, 401 U.S. 989 (1971) (mem.).

<sup>141</sup> *Id.*; TEX. PENAL CODE ANN. § 10.524 (1948).

<sup>142</sup> *Buchanan v. Batchelor*, 308 F. Supp. at 730.

<sup>143</sup> Motion of North American Conference of Homophile Orgs. for Leave to File Brief as Amicus Curiae & Brief Amicus Curiae, *Wade v. Buchanan*, 401 U.S. 989 (1971) (No. 290).

<sup>144</sup> *Id.*

Citing *Griswold*, as well as a Seventh Circuit case *Cotner v. Henry*, Judge Sarah Hughes, writing for a three-judge panel of the District Court, struck down the entire statute because of its application to married couples (overbreadth).<sup>145</sup> *Cotner*, in turn, noted that the American Law Institute's Model Penal Code had adopted the view that adult consensual sexual conduct in private should not be subject to criminal sanction.<sup>146</sup>

Dallas District Attorney Henry Wade appealed the District Court's judgment to the U.S. Supreme Court.<sup>147</sup> On appeal, the Supreme Court vacated and remanded the case,<sup>148</sup> and the statute ultimately survived. Ignoring the constitutional equality arguments advanced by Buchanan's legal team (and by the North American Conference of Homophile Organizations in an amicus brief), the Supreme Court vacated the District Court's judgment on the grounds that the statute need not be invalidated when judges were capable of adjudicating the constitutionality of actual arrests and remanded the case back to the Texas courts.<sup>149</sup>

A Texas appellate tribunal vacated one of Buchanan's arrests on Fourth Amendment grounds but upheld the other.<sup>150</sup> Buchanan appealed to the United States Supreme Court, which, in 1972, declined to hear the case.<sup>151</sup> Ultimately, Buchanan went to prison for sodomy, and ironically, Texas rewrote its sodomy prohibition to criminalize homosexual sex only.<sup>152</sup> Subsequently, it was the judicially created (or at least judicially expressed) right to privacy of married couples in *Griswold*, which the Supreme Court expanded to include *unmarried* couples right to contraception in 1972's *Eisenstadt v. Baird*, and expanded further to include an *individual* woman's right to an abortion in 1973's *Roe v. Wade*, that opened the door for sodomy decriminalization claims grounded in that right to privacy.

In the 1970s and 1980s, activists flipped the script on the state-society litigation dynamic and asserted legal standing as *plaintiffs* in civil rights litigation in the United States and as "victim" complainants in European Court of Human Rights litigation, generating jurisprudence around a reasonable fear of prosecution as sufficient to grant legal standing. As criminal defense cases in the late 1960s in the United States had failed to generate any legal precedents favoring decriminalization, Philip Hirschkop, the co-founder of the ACLU of Virginia in 1969, was looking for a plaintiff to challenge Virginia's sodomy prohibition on privacy grounds (the same

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<sup>145</sup> *Buchanan v. Batchelor*, 308 F. Supp. at 732.

<sup>146</sup> 394 F.2d 873, 875 n.3 (7th Cir. 1968), *cert. denied*, 393 U.S. 847 (1968).

<sup>147</sup> *Wade v. Buchanan*, 401 U.S. at 989.

<sup>148</sup> *Id.*

<sup>149</sup> *See id.* (citing *Younger v. Harris*, 401 U.S. 37 (1971)).

<sup>150</sup> *Buchanan v. State*, 471 S.W.2d 401, 404 (1971), *cert. denied*, 405 U.S. 930 (1972).

<sup>151</sup> *See Buchanan v. Texas*, 405 U.S. 930 (mem.).

<sup>152</sup> TEX. PENAL CODE ANN. § 21.06 *invalidated by* *Lawrence v. Texas*, 539 U.S. 538 (2003). It was this rewritten statute specifically targeting "homosexual conduct" that Texas activists challenged unsuccessfully in *Baker v. Wade*, 553 F. Supp. 1121 (N.D. Tex. 1982) and challenged successfully in *Lawrence v. Texas*, 539 U.S. 558 (2003).

legal basis he had used to overturn Virginia's law criminalizing interracial marriage in the landmark 1967 *Loving v. Virginia* case).<sup>153</sup>

Hirschkop and the National Gay Task Force (NGTF, founded in 1973), decided to take the innovative step of filing a class action lawsuit under Rule 23 of the Federal Rules of Civil Procedure.<sup>154</sup> After struggling to build a class, ultimately, Bill Bland, the head of NGTF and the partner of Bruce Voeller, agreed to stand in—albeit anonymously as John Doe—as one of two plaintiffs representing all of the individuals whose lifestyles and identities made them subject to Virginia's sodomy ban.<sup>155</sup>

In 1975, in *Doe v. Commonwealth's Attorney of Richmond*, Hirschkop and Bland lost their claim in federal district trial court.<sup>156</sup> Judge Robert R. Merhige Jr. dissented and held that the appropriate standard of review was not rational basis but strict scrutiny, under which the state must show a compelling interest to justify a restriction of the right to privacy.<sup>157</sup> In support of his reasoning, Judge Merhige cited academic work which in turn cited a wealth of academic jurisprudence supporting decriminalization that had emerged in the early 1970s.<sup>158</sup> Judge Merhige thus became one of the earliest jurists anywhere in the world to give credence to the argument that sodomy prohibitions violate constitutional civil rights (and thus human rights) of gay and lesbian people by building on the arguments of the activist litigators and their cause lawyers—Hirschkop and Voeller—and of scholars in the legal academy. The U.S. Supreme Court summarily affirmed the district court judgment in 1976.<sup>159</sup>

### 3. Privacy in International Human Rights Jurisprudence and Transnational Legal Mobilization

#### a. Dudgeon, Norris, and the European Court of Human Rights

In Ireland in the early 1970s, Mary McGee, a mother of four who had had life-threatening complications in her previous pregnancies, was advised by her doctors that she could die if she were ever again to become pregnant.<sup>160</sup> Her doctor prescribed a diaphragm and spermicidal jellies.<sup>161</sup> However, McGee was denied the

<sup>153</sup> See 388 U.S. 1, 12 (1967).

<sup>154</sup> *Doe v. Commonwealth's Att'y*, 403 F. Supp. 1199, 1200 n.1 (E.D. Va. 1975).

<sup>155</sup> Michael Bedwell, *In 1976, The Supreme Court Slapped Down A Sodomy Law Challenge With Just Four Words*, LGBTQ NATION (Oct. 8, 2019), <https://www.lgbtqnation.com/2019/10/1976-supreme-court-slapped-sodomy-law-challenge-just-4-words/> [<https://perma.cc/9FUZ-APMG>].

<sup>156</sup> See generally *Doe*, 403 F. Supp. 1199.

<sup>157</sup> See *id.* at 1203–04 (Merhige, J., dissenting) (discussing the right of privacy as set out in *Griswold*, *Eisenstadt*, and *Roe*).

<sup>158</sup> See *id.* at 1205 n.4 (citing Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613 (1974)).

<sup>159</sup> *Doe v. Commonwealth's Att'y*, 425 U.S. 901 (1976) (mem.).

<sup>160</sup> *McGee v. Att'y Gen.*, [1973] IR 284, 284 (SC) (Ir.).

<sup>161</sup> See *id.*; Sandra McAvoy, *Reproductive Rights in Ireland: Remembering the McGee*

diaphragm and the jellies when customs officers seized them from the post under a provision of the criminal code.<sup>162</sup> McGee took her case all the way to the Irish Supreme Court and prevailed.<sup>163</sup> Irish Supreme Court Justice Brian Walsh, who would later, as a justice on the European Court of Human Rights, dissent in the *Dudgeon* case and join Justice Valticos's dissenting opinion in the *Norris* case,<sup>164</sup> concluded that it was critical that McGee's rights be protected to make choices about family planning.<sup>165</sup> In that way, the 1973 *McGee* case was very much like *Griswold*. And although the *McGee* court took pains to foreshadow the decriminalization of abortion,<sup>166</sup> *McGee* proved similar to a case that the United States Supreme Court decided in the same year—1973's *Roe v. Wade*—which, like *Griswold*, relied on the right to privacy to expand women's access to abortion.

In 1981, fifteen judges of the European Court of Human Rights (ECtHR), the Court tasked with enforcing the European Convention of Human Rights against the member states of the Council of Europe, concluded that Northern Ireland's prohibition on adult consensual homosexual sex violated the Convention.<sup>167</sup> Four judges dissented from that view.<sup>168</sup> The majority concluded that Article 8 of the Convention, which provides protection for private and family life, prohibited Northern Ireland from continuing to criminalize homosexual sex.<sup>169</sup> Fourteen of the nineteen judges of the Court declined to determine whether Northern Ireland's homosexual sex prohibition also violated the equality provision of Article 14 of the Convention's prohibition on discrimination, which, read in conjunction with Article 8, would prohibit Northern Ireland from limiting the scope of the right to privacy to protect only heterosexual sexual activity.<sup>170</sup> Several judges—including the Irish Judge

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*Case, 1973, in the Context of the 2013 Abortion Legislation*, SIBEAL BLOG (Feb. 12, 2014), <https://sibealnetwork.blogspot.com/2014/02/reproductive-rights-in-ireland.html> [https://perma.cc/6A2W-7CXH].

<sup>162</sup> *McGee*, [1973] IR at 284.

<sup>163</sup> *Id.* at 284–85.

<sup>164</sup> See *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 39 (1981); *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) at 19–21 (1988).

<sup>165</sup> *McGee*, [1973] IR at 285 (Walsh, J.).

<sup>166</sup> *Id.* at 298 (Griffin, J.).

<sup>167</sup> See *Dudgeon*, 45 Eur. Ct. H.R. (ser. A) at 27.

<sup>168</sup> See *id.* Judge Cremona from Malta authored the majority opinion. The dissenting judges were Judge Zekia of Cyprus, *id.* at 29–30 (arguing that deeply religious societies like Northern Ireland and Cyprus may legitimately legislate their moral views); Judge Matscher, *id.* at 35 (arguing that *Dudgeon* was not a victim); Judge Pinheiro Farinha, *id.* at 38 (arguing that *Dudgeon* was not a victim, and emphasizing that “some degree of regulation of male homosexual conduct . . . can be justified as ‘necessary in a democratic society’”); and Judge Brian Walsh, *id.* at 40, 44 (arguing that *Dudgeon* was not a victim and that there was no violation of the right to privacy because “the State has a valid interest in the prevention of corruption and in the preservation of the moral ethos of its society”).

<sup>169</sup> See *id.* at 17, 24.

<sup>170</sup> *Id.* at 26; *id.* at 47 (Walsh, J., dissenting) (concurring with the majority's holding on

Walsh—did not believe that Dudgeon was a “victim” within the meaning of the Convention, and thereby the Court should not have addressed the merits of his complaint.<sup>171</sup> Judge Walsh was simultaneously a judge on the Irish Supreme Court (1961–1990), and thus was familiar with the judicialized decriminalization campaign there.<sup>172</sup>

In 1988, the ECtHR again ruled in a challenge to a Council of Europe member state’s prohibition on homosexual sex, ruling that Ireland’s sodomy prohibition, like that of Northern Ireland, violated the right to private life in Article 8 of the European Convention on Human Rights.<sup>173</sup> Norris did not raise a claim under Article 14, the prohibition on discrimination. He did raise a claim under Article 13, the right to an effective remedy, but the European Commission ruled that claim inadmissible.<sup>174</sup>

*b. Toonen, Croome, Morgan, and the UN Human Rights Committee*

In 1991, Nicholas Toonen faxed a complaint to the UN Human Rights Committee on behalf of his organization, the Tasmania Gay and Lesbian Rights Group (TGLRG).<sup>175</sup> Rodney Croome of the TGLRG and law professor Wayne Morgan were the principal drafters of the complaint.<sup>176</sup> The complaint challenged Sections 122(a) and (c) and 123 of the Tasmanian Criminal Code.<sup>177</sup> Section 122 criminalized “unnatural sexual intercourse” and “intercourse against nature,”<sup>178</sup> and Section 123

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the Article 14 claim). Judges Evrigenis and Garcia de Enterría argued that the Court should have addressed the merits of the Article 14 claim. *Id.* at 32.

<sup>171</sup> *Id.* at 35, 38, 40.

<sup>172</sup> See generally Gerard Hogan, *Mr. Justice Brian Walsh: The Legacy of Experiment and the Triumph of Judicial Imagination*, 57 IRISH JURIST 1 (2017).

<sup>173</sup> Norris v. Ireland, 142 Eur. Ct. H.R. (ser. A) at 18 (1988).

<sup>174</sup> Norris v. Ireland, App. No. 10581/83, 8 Eur. H.R. Rep 75, 76 (1988).

<sup>175</sup> See Toonen v. Australia, U.N. GAOR Hum. Rts. Comm., 50th Sess., U.N. Doc. CCPR/C/50/D/488/1992 (1994); Wayne Morgan, *Sexuality and Human Rights: The First Communication by an Australian to the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights*, 14 AUSTL. YEARBOOK INT’L L. 277, 277–78 (1992). Toonen, Rodney Croome, Richard Hale, Paul Thomas, and six others founded what became the Tasmania Gay and Lesbian Rights Group in 1988. The original name of the group was the Tasmania Gay Law Reform Group. The group changed the name to the Tasmania Gay and Lesbian Rights Group in appreciation and recognition of the efforts lesbian women had made in the decriminalization effort in the SMOs earliest days of activism. Author’s interview with Nicholas Toonen, in Phila., Pa. (July 5, 2021) [hereinafter Toonen Interview]; cf. Rodney Croome, “Out and About”: *The Public Rights of Lesbians and Gays in Tasmania*, 2 AUSTL. GAY & LESBIAN L.J. 63, 64–66 (1992).

<sup>176</sup> Toonen Interview, *supra* note 175; cf. Morgan, *supra* note 175.

<sup>177</sup> See Toonen, ¶ 2.2, U.N. Doc. CCPR/C/50/D/488/1992.

<sup>178</sup> *Criminal Code Act 1994* (Tas.) §§ 122(a), (c) (Austl.) cited in Toonen, ¶ 2.3, U.N. Doc. CCPR/C/50/D/488/1992.

criminalized “indecent practice[s] between male persons.”<sup>179</sup> The TGLRG complained that because the Australian state of Tasmania had a criminal prohibition on homosexual sex, Australia was in violation of its obligations under the ICCPR.<sup>180</sup> Specifically, TGLRG alleged that Australia was failing to protect Toonen’s right to privacy under Article 17 of the ICCPR, the prohibition on discrimination under Article 2(1), and the right to equality under Article 26.<sup>181</sup>

Toonen, Croome, and Morgan argued that the Tasmania Criminal Code failed to distinguish between sexual conduct in private and sexual conduct in public, permitting law enforcement to invade the physical privacy of one’s home.<sup>182</sup> They also argued that Tasmania’s Criminal Code discriminates against (homosexual) men in that it does not outlaw lesbian sexual conduct, and it discriminates against gay and lesbian people in that it only outlaws certain forms of heterosexual sexual conduct.<sup>183</sup> At the time of the filing of their complaint, neither the UN Human Rights Committee nor the ECtHR had determined whether sexual orientation could be included within the ambit of the ICCPR or the European Convention on Human Rights as an “other status,” though Morgan was convinced that the ECtHR had intimated as much in the *Dudgeon* case.<sup>184</sup>

Australia put forward a feeble defense of Tasmania’s Criminal Code, as all of Australia’s other states and territories had already decriminalized sodomy<sup>185</sup> and the federal government of Australia was a proponent of LGBTQ human rights at the national and international level.<sup>186</sup> The Australian government nevertheless represented to the Human Rights Committee that interference with the right to privacy is permissible if it is not arbitrary or unlawful, which Australia, citing the Human Rights Committee’s General Comment 17, interpreted to mean unreasonable.<sup>187</sup> Australia thus argued that “domestic social mores may be relevant to the reasonableness of an interference with privacy.”<sup>188</sup> In addition to noting that Tasmanian authorities had not prosecuted anyone under the sodomy prohibition since 1984 (seven years at the time of filing and ten years at the time of judgment),<sup>189</sup> this is almost entirely the extent of Australia’s defense of Tasmania’s Criminal Code before the Human Rights Committee.

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<sup>179</sup> *Criminal Code Act 1994* (Tas.) § 123 (Austl.) cited in *Toonen*, ¶ 2.3, U.N. Doc. CCPR/C/50/D/488/1992.

<sup>180</sup> See *Toonen*, ¶ 1, U.N. Doc. CCPR/C/50/D/488/1992.

<sup>181</sup> *Id.* ¶¶ 3.1, 8.1.

<sup>182</sup> *Id.* ¶ 3.1(a).

<sup>183</sup> *Id.* ¶ 3.1(c).

<sup>184</sup> See Morgan, *supra* note 175, at 282–83.

<sup>185</sup> *Id.* at 288.

<sup>186</sup> See *id.*

<sup>187</sup> See *Toonen v. Australia*, U.N. GAOR Hum. Rts. Comm., 50th Sess., ¶ 6.4, U.N. Doc. CCPR/C/50/D/488/1992 (1994).

<sup>188</sup> *Id.* ¶ 6.6.

<sup>189</sup> See *id.* ¶ 6.3.

The UN Human Rights Committee agreed with the TGLRG on the Article 17 claim: Tasmania's criminal law violated Toonen's right to privacy.<sup>190</sup> The Committee, having found a violation of privacy under Article 17, declined to address the merits of the Article 26 claim of discrimination.<sup>191</sup> However, the Committee did state that in its interpretation, the reference to sex in Article 26 includes sexual orientation.<sup>192</sup>

One member of the Committee wrote separately to address the Article 26 equality claim.<sup>193</sup> Mr. Bertil Wennergren wrote:

In my opinion, a finding of a violation of article 17, paragraph 1, should rather be deduced from a finding of violation of article 26 . . . . [T]he criminalization of certain behaviour operating under Sections 122(a), (c) and 123 of the Tasmanian Criminal Code must be considered incompatible with article 26 of the Covenant . . . these provisions of the Tasmanian Criminal Code prohibit sexual intercourse between men and between women, thereby making a distinction between heterosexuals and homosexuals. Secondly, they criminalize other sexual contacts between consenting men without at the same time criminalizing such contacts between women.<sup>194</sup>

The Human Rights Committee is a body of eighteen legal experts, tasked with monitoring and enforcing the ICCPR; it is not a court.<sup>195</sup> The views expressed by the Committee are in the nature of a legal opinion rather than a binding judgment. The Committee stated: "an effective remedy would be the repeal of Sections 122(a), (c) and 123 of the Tasmanian Criminal Code."<sup>196</sup> It instructed Australia to report back to the Committee within ninety days on the measures taken to implement the Committee's views.<sup>197</sup> After the Committee issued its opinion, Australia's national parliament passed the Human Rights (Sexual Conduct) Act, which read: "Sexual conduct involving only consenting adults acting in private is not to be subject, by or under any law of the Commonwealth, a State or a Territory, to any arbitrary interference with privacy within the meaning of Article 17 of the International Covenant on Civil and Political Rights."<sup>198</sup>

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<sup>190</sup> See *id.* ¶ 9.

<sup>191</sup> See *id.* ¶ 11.

<sup>192</sup> See *id.* ¶ 8.7.

<sup>193</sup> See *id.* app. (Wennergren, dissenting).

<sup>194</sup> *Id.*

<sup>195</sup> See *Introduction to the Committee*, U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, <https://www.ohchr.org/en/treaty-bodies/ccpr/introduction-committee> [<https://perma.cc/8RJX-6ZZM>] (last visited Oct. 2, 2023).

<sup>196</sup> *Toonen*, ¶ 10, U.N. Doc. CCPR/C/50/D/488/1992.

<sup>197</sup> See *id.* ¶ 12.

<sup>198</sup> *Human Rights (Sexual Conduct) Act 1994* § 4.1 (Austl.).

The Act did not repeal or automatically void the Tasmania criminal prohibition, but it created a clear conflict between the state and federal statutes.<sup>199</sup> Notable, for my purposes here, is the explicitly narrow scope of the Human Rights (Sexual Conduct) Act—limited as it is to prohibiting “arbitrary interference with privacy” rather than requiring non-discrimination on the basis of sexual orientation and equal protection of the law for sexual minorities.

## II. EVOLUTION OF THE TRANSNATIONAL JURISPRUDENCE ON EQUALITY AND HUMAN DIGNITY OF LGBTIQ+ PERSONS

In this Part, I argue that the difference between the outcomes in Michael Hardwick and the ACLU’s failed challenge to Georgia’s sodomy prohibition<sup>200</sup> and John Lawrence, Tyron Garner, and Lambda Legal’s successful challenge to Texas’ sodomy prohibition<sup>201</sup> can be explained in part by developments in *transnational* equality and human dignity jurisprudence from Canada, the United Kingdom, Australia, and especially South Africa—not just domestic law and politics—that resulted in a shift from the privacy legal frame to the equality and human dignity legal frame and a shift from a spatial conception of privacy to a decisional (personal choice) conception of privacy.

For example, as I discussed in the previous section, in 1994, Nicholas Toonen, Rodney Croome, and the TGLRG filed an individual complaint with the UN Human Rights Committee under the ICCPR.<sup>202</sup> In *Toonen*, the Human Rights Committee determined that the Australian state of Tasmania’s criminalization of homosexual sex violated the right to privacy (Article 17) in the ICCPR.<sup>203</sup> Subsequent activism, including the filing of a case in the High Court of Australia in 1997, resulted in the Tasmanian parliament conceding to the activists that year.<sup>204</sup>

Since the right to privacy had already been the basis of the ECtHR’s judgments in *Dudgeon*, *Norris*, and *Modinos*, it was another portion of the opinion that has received the most attention: dicta that the ICCPR prohibited discrimination on the basis of sexual orientation.<sup>205</sup> Other activist litigants challenging discriminatory laws and policies—James Egan and his partner John Norris Nesbitt,<sup>206</sup> and Delwin Vriend

<sup>199</sup> Compare *Criminal Code Act 1994* (Tas.) §§ 122(a), (c), 123 (Austl.), cited in *Toonen*, ¶ 2, U.N. Doc. CCPR/C/50/D/488/1992, with *Human Rights (Sexual Conduct) Act 1994* § 4 ¶ 14.1 (Austl.).

<sup>200</sup> See *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>201</sup> See *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>202</sup> See *supra* note 199 and accompanying text.

<sup>203</sup> *Toonen*, ¶ 9, U.N. Doc. CCPR/C/50/D/488/1992.

<sup>204</sup> See Alexandra Purvis & Joseph Castellino, *A History of Homosexual Law Reform in Tasmania*, 16 U. TAS. L. REV. 12, 19–20 (1997).

<sup>205</sup> See *Toonen*, ¶ 11, U.N. Doc. CCPR/C/50/D/488/1992.

<sup>206</sup> See generally *Egan v. Canada*, [1995] 2 S.C.R. 513. Egan is widely considered to be the first LGBTQ rights activist in Canada for the newspaper letter writing campaign he

and his co-plaintiffs in Canada,<sup>207</sup> as well as Richard G. Evans, Jean Dubofsky, and others in the United States—also made important developments on the equality front at this time.<sup>208</sup>

This is not to say that the domestic legal frames were irrelevant to Justice Kennedy and that the transnational jurisprudence was determinative. In the 1960s and 1970s, *Griswold*, *Eisenstadt*, and *Roe* all reflected a decisional conception of privacy.<sup>209</sup> In the early 1990s, lesbian and gay couples including Ninia Baehr and Genora Dancel in Hawaii and Jay Brause and Gene Dugan in Alaska combined a decisional privacy legal frame (the notion of intimate personal choice of a life partner) and a homosexual equality legal frame (sex and sexual orientation non-discrimination) in their pursuit of the legalization of same-sex marriages.<sup>210</sup> And it was Justice Kennedy himself who authored *Romer v. Evans*, invalidating Colorado's Amendment 2 on the basis that it reflected majority and legislative "animus" toward gay and lesbian people, creating a stigma around sexual orientation that was not rationally related to any legitimate interest or purpose.<sup>211</sup>

But unsuccessful U.S. sodomy decriminalization cases from that era as well as the ECtHR trifecta *Dudgeon*, *Norris*, and *Modinos* reflect a more spatial conception of privacy. It was in the Australian and South African contexts—the latter building from the domestic experience of apartheid and from German and Canadian jurisprudence linking liberty and autonomy with human dignity—that sodomy decriminalization jurisprudence centers the decisional zone of privacy.<sup>212</sup> Using the language of liberty and autonomy and of dignity and equality, it is this decisional zone that Justice Kennedy reflects in his majority opinion in *Lawrence*.<sup>213</sup>

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undertook between 1949 and 1964. Robert Champagne, *Introduction to JIM EGAN: CANADA'S PIONEER GAY ACTIVIST 1* (1987); *Jim Egan: Canada's First Public LGBTQ Activist*, THE ARQUIVES, <https://digitalexhibitions.arquives.ca/exhibits/show/jim-egan/early-years> [<https://perma.cc/4V59-UJPQ>] (last visited Oct. 2, 2023); see also Don McLeod, *Preface to JIM EGAN, CHALLENGING THE CONSPIRACY OF SILENCE: MY LIFE AS A CANADIAN GAY ACTIVIST* 10–11 (1998).

<sup>207</sup> See generally *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (Can.). Along with Vriend, the other plaintiffs were organizations: Gala-Gay and Lesbian Awareness Society of Edmonton, Gay and Lesbian Community Centre of Edmonton Society, and Dignity Canada Dignité for Gay Catholics and Supporters. A number of organizations also intervened in the case in support of the plaintiffs. See *id.*

<sup>208</sup> See generally, e.g., *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>209</sup> *Griswold v. Connecticut*, 381 U.S. 479, 481–86 (1965); *Eisenstadt v. Baird*, 405 U.S. 438, 452–55 (1972); *Roe v. Wade*, 410 U.S. 113, 147–64 (1973).

<sup>210</sup> *Brause v. Bureau of Vital Statistics*, No. 3AN-95-6562 CI, 1998 WL 88743, at \*3–6 (Alaska Super. Ct. Feb. 27, 1998) (describing the claims for same-sex marriage under the rights to both privacy and equality). See generally *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (summarizing the claims that refusing to grant a marriage license to a couple of the same sex violated the state's guarantees of privacy and equality).

<sup>211</sup> 517 U.S. 620, 632 (1996).

<sup>212</sup> See *infra* Section II.B.

<sup>213</sup> See 539 U.S. 558, 574 (2003).

*A. Codification of Equality and Non-Discrimination Principles and the Right to Human Dignity in International and Constitutional Law*

The American Declaration of 1948 required states to enforce its provisions “without distinction as to race, sex, language, [and] creed . . . .”<sup>214</sup> Drafters signified their intent for the list to be non-exhaustive by also prohibiting discrimination on the basis of “any other factor.”<sup>215</sup> Article 2 of the Universal Declaration of Human Rights (UDHR) was much more expansive, prohibiting distinction on the basis of “political or other opinion, national or social origin, property, birth or other status.”<sup>216</sup> The European Convention on Human Rights prohibits discrimination on the basis of “sex, race, colour, language, religion, political or other opinions, national or social origin, association with a national minority, property, birth or other status.”<sup>217</sup> Article 2 of the ICCPR requires the state parties to recognize the rights of the Covenant “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>218</sup> Like the American and Universal Declarations and the European Convention, drafters communicated the non-exhaustive nature of the list by prohibiting discrimination on the basis of “other status.”<sup>219</sup> The American Convention on Human Rights likewise bids parties “to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.”<sup>220</sup> The African Charter on Human and Peoples’ Rights prohibits discrimination on the basis of “race, ethnic group, color, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.”<sup>221</sup> Thus the principle of equality and non-discrimination is well established in international law. It is also clear that international law assumes that there are other “statuses” and “social conditions” upon which basis states are prohibited to discriminate.

At the domestic constitutional level, gay and lesbian activists in South Africa achieved the codification of a prohibition on sexual orientation in the Interim Constitution (1993) and in the Constitution of South Africa (1997)—the first anywhere in the world to explicitly prohibit sexual orientation discrimination.<sup>222</sup> In

<sup>214</sup> OAS, American Declaration of Rights, *supra* note 71, art. II.

<sup>215</sup> *See id.*

<sup>216</sup> UDHR, *supra* note 72, art. 2.

<sup>217</sup> *See* ECHR, *supra* note 71, art. 14.

<sup>218</sup> ICCPR, *supra* note 75, art. 2.

<sup>219</sup> *Id.*

<sup>220</sup> ACHR, *supra* note 94, art. 1.1.

<sup>221</sup> ACHPR, *supra* note 95, art. 2.

<sup>222</sup> Eric C. Christiansen, Note, *Ending the Apartheid of the Closet: Sexual Orientation in the South African Constitutional Process*, 32 N.Y.U. J. INT’L L. & POL. 997, 997–98 (2000).

1997, Fiji adopted a new constitution that explicitly prohibited sexual orientation discrimination.<sup>223</sup> After a successful challenge to Ecuador's sodomy prohibition in 1997, Ecuador amended its constitution in 1998 to prohibit sexual orientation discrimination.<sup>224</sup> In 2000, the Charter of Fundamental Rights and Freedoms of the European Union became the first multilateral treaty to expressly prohibit discrimination based on sexual orientation rather than implicitly prohibiting sexual orientation discrimination by defining the terms sex or other status to be so inclusive.<sup>225</sup>

In terms of human dignity, the very first article of the 1948 Universal Declaration of Human Rights reads: "All human beings are born free and equal in dignity and rights."<sup>226</sup> The text of the International Covenant on Civil and Political Rights, which UN committees began drafting shortly after the founding of the United Nations in 1945, but which was not adopted by the UN General Assembly until 1966, reads: "All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."<sup>227</sup> Consequently, there is no overarching right to human dignity specified under the ICCPR, but given that the UDHR arguably has the status of customary law, the global human rights regime includes this right via the Declaration.

The American Convention on Human Rights references dignity only within the context of other rights—specifically the prohibition on torture and cruel treatment in situations of detention, the prohibition on slavery and forced labor, and the right to privacy.<sup>228</sup> With regard to privacy, the American Convention reads: "Everyone has the right to have his honor respected and his dignity recognized."<sup>229</sup> Consequently, there is no overarching right to human dignity specified under the Inter-American human rights regime.

The Preamble of the African Charter (1981) references "the Charter of the Organisation of African Unity, which stipulates that 'freedom, equality, justice and dignity are essential objectives for the achievement of the legitimate aspirations of the African peoples.'"<sup>230</sup> Article 5 of the Charter then binds states parties as follows: "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and

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<sup>223</sup> See FIJI CONST. (1997) ch. 4, § 38(2).

<sup>224</sup> See ECUADOR CONST. (1998) ch. 2, art. 23.

<sup>225</sup> Charter of Fundamental Rights of the European Union, ch. III, art. 21, ¶ 1, 2000 O.J. (C 364).

<sup>226</sup> UDHR, *supra* note 72, art. 1.

<sup>227</sup> See ICCPR, *supra* note 75, art. 10, ¶ 1.

<sup>228</sup> ACHR, *supra* note 94, art. 5, ¶ 1 ("All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person."); *id.* art. 6.2 ("Forced labor shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner."); *id.* art. 11.1.

<sup>229</sup> *Id.* art. 11.1.

<sup>230</sup> ACHPR, *supra* note 95, pmb. (citing Charter of the Organization of African Unity, May 25, 1963, 479 U.N.T.S. 39) (footnote omitted).

degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.”<sup>231</sup> It is unclear from the text itself whether the right to human dignity should be interpreted only within the context of exploitation, slavery, torture, and the like—as in the American Convention, or independent of these—as in the Universal Declaration.

This amorphous concept of human dignity, despite having ancient and diverse philosophical, religious, and legal roots, required operationalization by extensive domestic and international court jurisprudence.<sup>232</sup> By the turn of the century, human dignity was the center of Justice Ackermann’s majority opinion in the *National Coalition for Gay & Lesbian Equality v. Minister of Justice (NCGLE)* case in South Africa in 1998,<sup>233</sup> as well as of Justice Kennedy’s majority opinion in the U.S. Supreme Court’s *Lawrence v. Texas* case in 2003.<sup>234</sup> As Paola Carozza argues: “This idea of human dignity serves as the single most widely recognized and invoked basis for grounding the idea of human rights generally, and simultaneously as an exceptionally widespread tool in judicial discourse about the content and scope of specific rights.”<sup>235</sup>

#### *B. Judicial Decision-Making Under Domestic and Transnational Legal Frames*

Despite the international and constitutional textual bases for challenging sodomy prohibition on the basis of equality and non-discrimination and human dignity principles—particularly those regimes that specifically criminalized male-male sexual conduct—the equality prong of first wave sodomy decriminalization challenges did not gain much traction prior to the late 1990s. In this Section, I discuss developments within and beyond the sodomy decriminalization space in order to demonstrate how the discursive opportunity structure<sup>236</sup> shifted so dramatically in

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<sup>231</sup> *Id.* art. 5.

<sup>232</sup> *Cf. generally* Aryeh Neier, *Between Dignity and Human Rights*, 60 *DISSENT* 60, 63–64 (2013) (comparing the dignity and liberty-based approaches to human rights when the concepts conflict); Christopher McCrudden, *Dignity, Rights, and the Comparative Method*, in *MODERN CONSTITUTIONS* 111, 112–13, 115, 122 (Rogers M. Smith et al. eds., 2020) (discussing judiciaries and the role of constitutional rights to secure human dignity); ERIN DALY, *DIGNITY RIGHTS: COURTS, CONSTITUTIONS, AND THE WORTH OF THE HUMAN PERSON* 26–53 (2021) (examining constitutional jurisprudence on dignity); Michele Finck, *The Role of Human Dignity in Gay Rights Adjudication and Legislation: A Comparative Perspective*, 14 *INT’L J. CONST. L.* 26, 51–53 (comparing how dignity has justified gay rights without a prescribed judicial application); Doron Shulztiner & Guy E. Carmi, *Human Dignity in National Constitutions: Functions, Promises and Dangers*, 62 *AM. J. COMP. L.* 461, 461–62 (2014).

<sup>233</sup> *NCGLE* 1998 (12) BCLR 1517 (CC) ¶ 28 (S. Afr.).

<sup>234</sup> 539 U.S. 558, 574 (2003).

<sup>235</sup> Paolo G. Carozza, *Human Dignity and Judicial Interpretation of Human Rights: A Reply*, 19 *EUR. J. INT’L L.* 931, 932 (2008).

<sup>236</sup> *Cf. Myra Marx Ferree, Resonance and Radicalism: Feminist Framing in the Abortion*

the 1990s, symbolized neatly in the juxtaposition of *Bowers v. Hardwick* in 1986 and *Lawrence v. Texas* in 2003.

Prior to *Bowers v. Hardwick*, there were a few instances where state court and district court judges ratified the decriminalization claims of criminal defendants and activist plaintiffs that were grounded in equality and non-discrimination principles. In *State v. Lair*,<sup>237</sup> the Supreme Court of New Jersey considered a constitutional challenge to the criminal statute advanced by a male defendant charged with raping a female victim. Concurring in the judgment, Chief Justice Weintraub wrote separately to express his opinion that, as applied to *consensual* rather than to non-consensual, private conduct, New Jersey's sodomy statute was an unconstitutional violation of the principle of equal treatment:

I concur in the result although I have reservations as to the constitutionality of the application of the sodomy statute to a consensual act between adults committed in private. As to a homosexual act thus committed, I doubt the existence of a public interest sufficient to justify an edict that the homosexual shall behave as a heterosexual or not at all. The failure to recognize a status within which homosexuals may lawfully follow the dictates of their nature makes the application of punitive measures still more questionable. And I doubt that in dealing criminally with extramarital sexual relations between heterosexuals the Legislature may deal differently with a deviant act or may in any event authorize the same punishment for a deviant act whether consented to or not. That the punitive approach is futile seems evident. Consenting adults are prosecuted rarely if at all.<sup>238</sup>

In the 1990s, LGBTIQ+ rights activists advanced innovative and expansive interpretations of the non-discrimination provisions of constitutional and international treaty texts. In the late 1980s and early- to mid-1990s, several countries created same-sex domestic partnerships and civil union regimes accessible to same-sex couples.<sup>239</sup> In the United States, applicants for same-sex marriage, Ninia Baehr

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*Debates of the United States and Germany*, 109 AM. J. SOCIO. 304, 309 (2003) ("As institutionally anchored patterns of interpretation, discursive opportunity structures in modern democracies can be found in major court decisions, as well as in the prior constitutional principles they invoke and in subsequent legislation written to be consistent with these principles.").

<sup>237</sup> 301 A.2d 748, 750–51 (N.J. 1973).

<sup>238</sup> *Id.* at 754 (Weintraub, J., concurring).

<sup>239</sup> See Am. Bar Ass'n Section Fam. L., *A White Paper: An Analysis of the Law Regarding Same-Sex Marriage, Civil Unions, and Domestic Partnerships*, 38 FAM. L.Q. 339, 407–08 (2004). These states included Denmark (1989), Norway (1993), Sweden (1995), Iceland (1996), and Belgium (1998). *Cf. id.*

and Genora Dancel in Hawaii,<sup>240</sup> Jay Brause and Gene Dugan in Alaska,<sup>241</sup> and Stan Baker and Peter Harrigan in Vermont,<sup>242</sup> raised equality arguments. These developments and efforts resulted in Vermont adopting same-sex civil unions in 2000,<sup>243</sup> and the Netherlands extending full marriage equality to same-sex couples in 2001.<sup>244</sup>

In Canada, James Egan and Delwin Vriend—gay Canadian applicants for pension benefits and for administrative protection under employment discrimination statutes—also raised equality arguments.<sup>245</sup> In 1995, Canada's first gay rights activist, James Egan,<sup>246</sup> and his partner, John Norris Nesbit, convinced a majority of Canada's Supreme Court justices to interpret Section 15 of the Canadian Charter of Rights and Freedoms as prohibiting discrimination on the basis of sex orientation.<sup>247</sup> It is perhaps fitting that Egan would have filed one of the claims that led to this result. Unfortunately for Egan and Nesbit, there were not enough justices who agreed on the question of whether to read into the Old Age Security Act's definition of spouse the inclusion of same-sex spouses. The Court declined to award Nesbit the Old Age Security benefits that were the basis for Egan and Nesbit's suit.<sup>248</sup>

In 1998, Delwin Vriend, Gala-Gay and Lesbian Awareness Society of Edmonton, Gay and Lesbian Community Centre of Edmonton Society, and Dignity Canada Dignité for Gay Catholics and Supporters convinced the Supreme Court of Canada to rule that the Alberta legislature's intentional omission of sexual orientation from the list of prohibited categories of discrimination in its Individual Rights Protection Act (IRPA) violated Section 15 of the Canadian Charter of Rights and Freedoms, which the Court had interpreted in Egan and Nesbit's challenge prohibited discrimination on the basis of sexual orientation.<sup>249</sup> That is, the Canadian Charter prohibited both discrimination by positive acts and discrimination by omission. This was the year that police arrested John Lawrence and Tyron Garner.<sup>250</sup>

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<sup>240</sup> *Baehr v. Lewin*, 852 P.2d 44, 48–50 (Haw. 1993).

<sup>241</sup> *Brause v. Bureau of Vital Stat.*, No. 3AN-95-6562 CI, 1998 WL 88743, at \*3–6 (Alaska Super. Ct. Feb. 27, 1998).

<sup>242</sup> *Baker v. State*, 744 A.2d 864, 869–70 (Vt. 1999).

<sup>243</sup> Am. Bar Ass'n Section Fam. L., *supra* note 239, at 393.

<sup>244</sup> *Id.* at 410.

<sup>245</sup> *Egan v. Canada*, [1995] 2 S.C.R. 513, 528 (holding that the Canadian Charter on Fundamental Freedoms prohibits sexual orientation discrimination); *Vriend v. Alberta*, [1998] 1 S.C.R. 493, 553, 562 (Can.) (holding that the omission of sexual orientation from the Alberta anti-discrimination statute violates the Canadian Charter on Fundamental Freedoms).

<sup>246</sup> See McLeod, *supra* note 206, at 10–11; JIM LOVES JACK: THE JAMES EGAN STORY (David Adkin Productions 1996); Jennifer Yang, 'I Am a Homosexual': Gay Rights Pioneer James Egan Celebrated in First LGBTQ2 Heritage Minute, *TORONTO STAR* (June 13, 2018), <https://www.thestar.com/news/gta/2018/06/13/i-am-a-homosexual-gay-rights-pioneer-james-egan-celebrated-in-first-lgbtq2-heritage-minute.html> [<https://perma.cc/6U44-FLCN>].

<sup>247</sup> *Egan*, 2 S.C.R. at 528.

<sup>248</sup> *Id.*

<sup>249</sup> See *Vriend*, 1 S.C.R. at 553, 562.

<sup>250</sup> Petition for Writ of Certiorari at 5, *Lawrence v. Texas*, 539 U.S. 558 (No. 02-102).

As a result of this case, the Alberta Human Rights Commission was obligated to hear sexual orientation discrimination complaints like Vriend's who had been fired from his position at King's College, a private religious college, on account of his sexual orientation.<sup>251</sup> It was the Alberta Human Rights Commission's refusal to hear Vriend's complaint that led the gay and lesbian community in Alberta to organize; thus, the complaint was about sexual orientation being omitted from the IRPA rather than about Vriend's termination.<sup>252</sup>

Developments in Canada overlapped with similar developments in the United States. In 1996, Richard Evans, a gay public official, Angela Romero, a lesbian police officer, and several other plaintiffs convinced U.S. Supreme Court justices Anthony Kennedy, Sandra Day O'Connor and four of their colleagues that a Colorado amendment that prohibited any governmental entity within the state from passing any laws prohibiting sexual orientation discrimination violated the Fourteenth Amendment of the U.S. Constitution.<sup>253</sup> That same year, South Africa's Interim Constitution became permanent, and it retained the prohibition on sex orientation discrimination. It became the first country anywhere in the world with a constitutional provision prohibiting sex orientation discrimination.<sup>254</sup>

In 1997, the year after officials in Ecuador prosecuted several hundred gay men, a group of plaintiffs initiated a class action lawsuit challenging the constitutionality of the penal code.<sup>255</sup> They won the lawsuit, but not on the basis of privacy or equality. Instead, the Constitutional Tribunal ruled that homosexuality was a mental illness and should be treated as such, rather than being subjected to criminal sanctions.<sup>256</sup> In 1998, however, Ecuador became the third country in the world to have a constitutional provision specifically prohibiting discrimination on the basis of sexual orientation.<sup>257</sup> The previous year, the Pacific Island state of Fiji had become the second state, following South Africa.<sup>258</sup>

### 1. *Toonen's* Separate Views Regarding Equality and Non-Discrimination

As I discussed above, the UN Human Rights Committee declined to resolve whether the Tasmanian Criminal Code placed Australia in violation of Article 26 of the ICCPR.<sup>259</sup> Mr. Bertil Wennergren wrote separately to address the Article 26 equality claim, however:

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<sup>251</sup> See *Vriend*, 1 S.C.R. at 508.

<sup>252</sup> *Id.*

<sup>253</sup> See generally *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>254</sup> S. AFR. CONST., 1996, ch. 2.

<sup>255</sup> Corto Constitucional del Ecuador [Constitucional Tribunal, Ecuador] Sentencia No. 111-97-TC, Registro Oficial (Official Registry), Supp., No. 203, 27 Nov. 1997 (Ecuador).

<sup>256</sup> *Id.*

<sup>257</sup> See ECUADOR CONST. (1998) ch. 2, art. 23.

<sup>258</sup> FIJI CONST. (1997) ch. 3, § 38.

<sup>259</sup> See generally *Toonen v. Australia*, U.N. GAOR Hum. Rts. Comm., 50th Sess., ¶ 11, U.N. Doc. CCPR/C/50/D/488/1992 (1994).

In my opinion, a finding of a violation of article 17, paragraph 1, should rather be deduced from a finding of violation of article 26 . . . . [T]he criminalization of certain behaviour operating under Sections 122(a), (c) and 123 of the Tasmanian Criminal Code must be considered incompatible with article 26 of the Covenant . . . these provisions of the Tasmanian Criminal Code prohibit sexual intercourse between men and between women, thereby making a distinction between heterosexuals and homosexuals. Secondly, they criminalize other sexual contacts between consenting men without at the same time criminalizing such contacts between women.<sup>260</sup>

Wennergren's rationale went one step further, pointing out the limitations of the right to privacy in Article 17.<sup>261</sup> For Wennergren, the ICCPR did not codify a fundamental privacy right. Instead, it prohibited arbitrary and unlawful interference with privacy.<sup>262</sup> The question remains what makes such interference unlawful. For Wennergren, it was the fact that Tasmania's interference discriminated on the basis of sex and sexual orientation, which was prohibited under Article 26.<sup>263</sup>

## 2. *NCGLE*: Sodomy Decriminalization in South Africa

In 1996, a coalition of seventy organizations in South Africa—the National Coalition for Gay and Lesbian Equality—challenged South Africa's common law and statutory prohibitions of homosexual sex.<sup>264</sup> Zackie Achmat formed the National Coalition of Gay and Lesbian Equality in 1994 to lobby for maintaining the prohibition on sexual orientation discrimination in South Africa's post-apartheid constitution, and he directed the strategic litigation effort that brought about decriminalization in 1998 and the legalization of same-sex marriages in 2006.<sup>265</sup> NCGLE decided to pursue decriminalization of homosexual sex by challenging the common law proscriptions inherited from Roman-Dutch law and perpetuated by common law jurisprudence during and after British rule, as well as Section 20A of the Sexual Offences Act.<sup>266</sup>

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<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *NCGLE* 1998 (12) BCLR 1517 (CC) (S. Afr.).

<sup>265</sup> See Ruth M. Pettis, *Achmat, Zackie*, GLBTQ, INC. (2015), [http://www.glbqtarchive.com/ssh/achmat\\_z\\_S.pdf](http://www.glbqtarchive.com/ssh/achmat_z_S.pdf) [<https://perma.cc/67H4-478H>] (detailing Achmat's life); see also Pierre De Vos, *The 'Inevitability' of Same-Sex Marriage in South Africa's Post-Apartheid State*, 23 S. AFR. J. HUM. RTS. 432, 439–48 (analyzing the legal strategy of the National Coalition for Gay and Lesbian Equality).

<sup>266</sup> See De Vos, *supra* note 265, at 444; Gregory R. Kilpatrick, *The National Coalition for*

From 1994 to 2000, shifts in the transnational legal stock established the principle that discrimination on the basis of sexual orientation was a violation of the rights to equal protection of the law and equality under the law. First, as a domestic matter, in 1993, LGBTQ rights activists and groups in South Africa including Simon Nkoli, Edwin Cameron, and Navi Pillay, and anti-apartheid groups including the ANC got the ruling National Party to agree to an Interim Constitution whose text explicitly prohibited discrimination on the basis of sexual orientation.<sup>267</sup>

Remarkably, South Africa's Interim and Final Constitutions contained provisions governing constitutional adjudication that call on adjudicators to consider international and foreign law.<sup>268</sup> Sections 39 and 232 of the Final Constitution compel consultation of foreign and international sources in certain circumstances and also address whether and when customary international law carries the binding force of law in South Africa.<sup>269</sup> Section 39(1) reads: "When interpreting the Bill of Rights, a court, tribunal or forum (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law."<sup>270</sup> Section 232 reads: "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."<sup>271</sup>

In a decision by Justice Ackermann, the Constitutional Court affirmed the High Court's decision, declaring the common law prohibition and the challenged statutes unconstitutional and invalidating the common law crime of sodomy and several

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Gay and Lesbian Equality v. The Minister of Justice: *A New Era in South African Sexual Orientation Protection*, 24 N.C. J. INT'L L. & COM. REG. 699, 724 nn.196–98 (1999); see also Mary Patricia Byrn, *Same-Sex Marriage in South Africa: A Constitutional Possibility*, 87 MINN. L. REV. 511, 521–24 (2003).

<sup>267</sup> See SEX AND POLITICS IN SOUTH AFRICA 82–83, 130 (Neville Hoad et al. eds., 2005). See generally SAM NAIDU, NAVI PILAY: REALISING HUMAN RIGHTS FOR ALL (2010).

<sup>268</sup> Compare S. AFR. (INTERIM) CONST., 1993, ch. 3, § 35, with S. AFR. CONST., 1996, ch. 2, § 39, ch. 14, § 231. See generally Hoyt Webb, *The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law*, 1 U. PA. J. CONST. L. 205 (1999).

<sup>269</sup> S. AFR. CONST., 1996, ch. 2, § 39, ch. 14, § 231.

<sup>270</sup> *Id.* ch. 2, § 39(1). Section 35(1) of the Interim Constitution used slightly different language: "In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law." S. AFR. (INTERIM) CONST., 1993, ch. 3, § 35(1). The Interim Constitution did not include the reference to "human dignity" that was added to the Final Constitution, and its language was narrower than that of the Final Constitution, referring, for example to "comparable foreign case law" rather than simply "foreign law."

<sup>271</sup> S. AFR. CONST., 1996, ch. 14, § 232. Section 231(4) of the Interim Constitution used slightly different language: "The rules of customary international law binding on the Republic shall, unless inconsistent with this Constitution or an Act of Parliament, form part of the law of the Republic." S. AFR. (INTERIM) CONST., 1993, ch. 14, § 231(4).

legislative provisions outlawing male homosexual activities.<sup>272</sup> Because complying with Section 39 of the Constitution requires justices to consider international law and permits justices to consider foreign law, the High Court had performed a “thorough review” of equal protection jurisprudence in Canada and the United States,<sup>273</sup> and distinguished the present case from the infamous *Bowers v. Hardwick* decision by noting that the United States lacked a specific constitutional provision prohibiting sexual orientation discrimination.<sup>274</sup>

Justice Ackermann’s opinion declared that the common law prohibition violated constitutional principles of equality, dignity, and privacy.<sup>275</sup> His treatment of the scope of the right to privacy echoes the by then conventional understanding that there is a decisional zone of privacy, grounded in liberty and autonomy, in addition to a spatial zone:

Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.<sup>276</sup>

To understand Justice Ackermann’s equality jurisprudence, it is worth considering the Constitutional Court’s earlier decision in *Brink v. Kitshoff NO*,<sup>277</sup> where it examined American, Indian, and Canadian law to demonstrate that equality is a matter of national histories. The *Brink* Court posited that the national history of apartheid in South Africa required applying the equality principle “with equal force to all groups.”<sup>278</sup> Thus, in contrast to the United States, where the history and severity of discrimination against a group determines what level of scrutiny to apply to a challenged provision, the South African Constitutional Court would “apply equal scrutiny to any policy that served directly or indirectly to discriminate based on a protected ground.”<sup>279</sup>

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<sup>272</sup> *NCGLE* 1998 (12) BCLR 1517 (CC) ¶ 106 (S. Afr.); see also De Vos, *supra* note 265, at 447–48.

<sup>273</sup> Nat’l Coal. for Gay and Lesbian Equal. et al. v. Minister of Just., No. 97/023677, 1998 SACLR LEXIS 6, at \*50–53 (High Court, Witwatersrand Local Division, Aug. 5, 1998). For discussion, see Kilpatrick, *supra* note 267, at 703–04.

<sup>274</sup> 478 U.S. 186 (1986); see Kilpatrick, *supra* note 267, at 704.

<sup>275</sup> Kilpatrick, *supra* note 267, at 704.

<sup>276</sup> *NCGLE* 1998 (12) BCLR 1517 ¶ 32 (CC) (S. Afr.).

<sup>277</sup> 1996 (4) SA 197 (CC) at 21–22 paras. 35–38 (S. Afr.).

<sup>278</sup> Kilpatrick, *supra* note 267, at 713–14.

<sup>279</sup> *Id.* at 714.

Under U.S. Supreme Court Equal Protection Clause jurisprudence, a gay or lesbian person bears the burden of proving that a challenged law lacks even a rational basis.<sup>280</sup> In South Africa, the inscription of sexual orientation protection into the Constitution assigns the burden of proof to the government to justify a policy that is presumed unconstitutional if it discriminates against sexual minorities. It is a high bar, and Justice Ackermann found that the government failed to clear it.<sup>281</sup> Justice Ackermann instead turned to a 1998 decision of the Canadian Supreme Court to support his contention that the constitutional guarantee of equality foreclosed subordination—not the elimination of difference, but the protection from oppression on the grounds of difference.<sup>282</sup> Because treating individuals differently would produce subordination, equality aims at prohibiting such subordination of social groups.<sup>283</sup>

Although the fact that sexual orientation was enumerated in the post-apartheid constitution obviated the need for comparing discrimination against sexual minorities to racial discrimination, Justice Ackermann proceeded to assess whether anti-sodomy laws were unfair. *Brink* established that the analysis for discrimination on non-enumerated grounds required determining whether the impact of the law is unfair by considering “(1) the position of the complainants in society; (2) the history of past discrimination against the complainants; (3) the nature of the law and its purpose; and (4) any other relevant factors that show the law impaired the complainant’s fundamental human dignity.”<sup>284</sup> Justice Ackermann concluded that the concept of human dignity was elaborated on in the Court’s previous holding in *State v. Makwanyane*,<sup>285</sup> which had relied on U.S. constitutional law to conclude that the death penalty was problematic because it dehumanized humans by discarding them.<sup>286</sup> For Justice Ackermann, “if a law attacks and degrades a person in the society simply for who he is and what he represents, the law would violate the concept of the right to dignity.”<sup>287</sup> Justice Ackermann further noted the recent trend of decriminalizing sodomy in most of Europe by 1995, and in Australia, New Zealand, and Canada; he held that there was “no justification in the ‘jurisprudence of other open and democratic

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<sup>280</sup> *Id.* at 720–21. *But see* *Obergefell v. Hodges*, 576 U.S. 644 (2015) (avoiding the tiers of scrutiny); *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020) (holding that the word “sex” in Title VII includes discrimination based on sexual orientation).

<sup>281</sup> *De Vos*, *supra* note 265, at 447–48.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.* at 448; Kilpatrick, *supra* note 267, at 723–24 (discussing the role of the Clean Hands Doctrine in the post-apartheid context, tasking the court with protecting unpopular minorities from discrimination: “[T]he Court was unwilling to rationalize unequal treatment for homosexuals, even though most religions and the majority of the nation were prejudiced against them.”).

<sup>284</sup> Kilpatrick, *supra* note 267, at 717 (citing *Harksen v. Lane* NO 1998 (1) SA 300 (CC) at 714–15 ¶ 51 (S. Afr.)).

<sup>285</sup> *See generally* 1995 (3) SA 391 (CC) (S. Afr.).

<sup>286</sup> Kilpatrick, *supra* note 267, at 718.

<sup>287</sup> *Id.* (citing *NCGLE* 1998 (12) BCLR 1517 (CC) ¶ 30 (S. Afr.)).

societies based on human dignity, equality and freedom to continue the prohibition on sodomy.”<sup>288</sup>

Pierre De Vos notes that in Justice Sachs’s concurring opinion, he argued that in the post-apartheid state, accepting difference is elemental in distancing the present South Africa from a past where group membership was a determining factor in advantage and disadvantage.<sup>289</sup> De Vos suggests that, taken with Ackermann’s opinion, the “power of the rhetoric” in the case is to reject “the very notion of heteronormativity that has been deeply entrenched in South Africa’s legal culture . . . . [T]he state may not impose orthodoxies of belief systems on the whole of society . . . .”<sup>290</sup> Or in Sachs’ words, “what is statistically normal ceases to be the basis for establishing what is legally normative.”<sup>291</sup> *NCGLE* had established the first pillar in the edifice of sexual orientation equality; South Africa became the second of only nine African countries to decriminalize sodomy.<sup>292</sup>

In conjunction with 1994’s *Toonen*, these legal frames were available to South Africa’s National Coalition on Gay and Lesbian Equality as it constructed its strategy for making LGBT rights claims, beginning with decriminalization in its 1997 claim filed in the Witwatersrand Local Division of South Africa’s High Court.<sup>293</sup> The national and local state defendants did not oppose the claim, which, in substance, asked the court to invalidate the common law offenses of sodomy and unnatural sex and to invalidate the inclusion of sodomy in the Criminal Procedure Act and Security Officers Act.<sup>294</sup>

The High Court’s initial opinion referenced *Dudgeon* (it also referenced U.S. Supreme Court case, *Bowers v. Hardwick*),<sup>295</sup> and Justice Ackermann’s Constitutional Court opinion confirming the High Court judgment contained a thorough examination of foreign and international judgments (and state *compliance* with these judgments), including *Dudgeon*, *Norris*, and *Toonen*.<sup>296</sup> Justice Ackermann also approvingly cited jurisprudence from Canada,<sup>297</sup> and he distinguished the adverse Supreme Court holding in *Bowers v. Hardwick* while noting its inconsistency with *Romer v. Evans*.<sup>298</sup>

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<sup>288</sup> *Id.* at 704.

<sup>289</sup> De Vos, *supra* note 265, at 448.

<sup>290</sup> *Id.* at 449.

<sup>291</sup> *Id.* (quoting *NCGLE* 1998 (12) BCLR 1517 (CC) ¶ 134 (S. Afr.) (Sachs, J., concurring)).

<sup>292</sup> INT’L LESBIAN, GAY, BISEXUAL, TRANS & INTERSEX ASS’N, STATE-SPONSORED HOMOPHOBIA 90–93 (13th ed. 2019).

<sup>293</sup> *See generally* Nat’l Coal. for Gay and Lesbian Equal. et al. v. Minister of Just., No. 97/023677, 1998 SACLR LEXIS 6 (High Court, Witwatersrand Local Division, Aug. 5, 1998).

<sup>294</sup> *Id.* at \*24.

<sup>295</sup> *Id.* at \*40 (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that criminalization of sodomy does not violate the Constitution)).

<sup>296</sup> *NCGLE* 1998 (12) BCLR 1517 (CC) ¶¶ 42, 46, 54 (S. Afr.).

<sup>297</sup> *Id.* ¶¶ 49 n.72, 112 n.122 (first citing *Vriend v. Alberta*, [1998] 1 S.C.R. 493 (Can.); and then citing *Egan v. Canada*, [1995] 2 S.C.R. 513).

<sup>298</sup> *Id.* ¶¶ 54 n.79, 55 (first citing *Romer v. Evans*, 517 U.S. 620 (1996); and then citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

By providing this synthesis of the emerging transnational jurisprudence on LGBTQ equality and non-discrimination in the sodomy decriminalization context, Justices Ackermann and Sachs provided U.S. Justices Anthony Kennedy and Sandra Day O'Connor with an expanded legal frame for adjudicating John Lawrence and Tyron Garner's challenge against Texas's sodomy prohibition. Justices Ackermann and Sachs also ushered in the "second wave" of decriminalization legal mobilization in the Global South.

### 3. Autonomy and Human Dignity in *Lawrence v. Texas*

The background facts in the *Lawrence* case are not quite as they appear in the Court's short summary. The Court tells us that police, responding to a call about a "weapons disturbance," entered John Lawrence's apartment, and found him engaging in "a sexual act" with Tyron Garner.<sup>299</sup> As Dale Carpenter has demonstrated, the real story is *much* more interesting.<sup>300</sup> Limiting myself to the barest of facts, Lawrence and Garner pleaded no contest to the charges. Consequently, instead of a criminal defendant case, Lawrence and Garner were plaintiffs in a civil suit against the state of Texas. Although *Lawrence* overrules *Bowers v. Hardwick*, in which the Court declined to find that the right to privacy was a fundamental right, in Justice Kennedy's majority opinion, dignity does much of the heavy lifting. Multiple conceptions of dignity appear to inform Kennedy's analysis of the privacy and liberty interests at stake in the case. On the one hand, the first conceptualization of dignity overlaps with equality in the sense that every human being is entitled to dignity. If, as stated in the international legal and constitutional texts that I discussed in Section III.A, everyone is entitled to human dignity, then policies that target one subset of society but not others deny the targeted person their human dignity by denying them their equal rights. This sense of dignity is most closely related to the idea of dignity as concerning a person's *self-worth*.

A second conceptualization of dignity relates to liberty and autonomy—the ability each individual has to make their own decisions—from the most trivial to the most fundamental. Liberty might be understood in a narrow sense of freedom from government intrusion, which relates to the spatial zone of privacy. The broader sense of liberty is autonomy. Thus, Kennedy writes: "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."<sup>301</sup>

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<sup>299</sup> See 539 U.S. 558, 562–63 (2003).

<sup>300</sup> See DALE CARPENTER, FLAGRANT CONDUCT: THE STORY OF *LAWRENCE V. TEXAS* (2012); see also ESKRIDGE, *supra* note 24, at 299–301, 310–14, 317–24.

<sup>301</sup> *Lawrence*, 539 U.S. at 574 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 851 (1992)). For discussion, see, for example, Maxine D. Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 761–62 (2006) (situating

To support this claim, Kennedy refers to the jurisprudence of the European Court of Human Rights in *Dudgeon*, *Norris*, and *Modinos*.<sup>302</sup> Kennedy also cites the amicus brief that comparative and international law scholars Robert Wintemute and Harold Koh wrote on behalf of David Norris' attorney and former UN High Commissioner for Human Rights Mary Robinson and several human rights NGOs.<sup>303</sup> By citing the Wintemute, Koh, and Robinson amicus brief, Kennedy incorporated, via reference, *Toonen*, *NCGLE*, and dozens of other foreign precedents the amici cited.<sup>304</sup>

As a general matter, whether to rely on foreign and international sources in U.S. constitutional reasoning emerged as a debate among constitutional (and international) law scholars well before Justice Kennedy authored the Court's majority opinion in *Lawrence*. Justice Breyer's opinion six years earlier in *Printz v. United States* is often held out to encapsulate the comparativist ethic, but comparative constitutional law is anything but new.<sup>305</sup> And arguments in favor of relying on the concept of human dignity might go back to the 1950s. As Stephen Wermiel argued twenty-five years ago in the pages of this very journal, it was Justice William

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Justice Kennedy's reliance on human dignity in *Lawrence* in a broader comparative context). See also Paolo G. Carozza, *Human Dignity in Constitutional Adjudication*, in RESEARCH HANDBOOK IN COMPARATIVE CONSTITUTIONAL LAW 459, 464 (Tom Ginsburg & Rosalind Dixon eds., 2011); Luis Roberto Barroso, *Here, There, and Everywhere: Human Dignity in Contemporary Law and in the Transnational Discourse*, 35 B.C. INT'L & COMPAR. L. REV. 331, 346–50 (2012) (discussing U.S. Supreme Court human dignity jurisprudence and noting the signal importance of Kennedy's opinion in *Lawrence*).

<sup>302</sup> *Lawrence*, 539 U.S. at 576 (first citing *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981); then citing *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A) (1993); and then citing *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988)).

<sup>303</sup> See *id.* at 576–77 (citing Brief Amici Curiae of Mary Robinson et al. in Support of Petitioners at 10–12, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102)).

<sup>304</sup> See Brief Amici Curiae of Mary Robinson, et al. in Support of Petitioners at 12 & n.16, *Lawrence v. Texas*, 539 U.S. 558 (2003) (No. 02-102). Other legal frames incorporated in the amicus brief include the constitutions of South Africa and Fiji, which expressly prohibit sexual orientation discrimination. *Id.* at 28 nn.59–60. It also included the European Court of Human Rights discriminatory age of consent and military decriminalization cases (e.g., *Smith & Grady v. United Kingdom*, 29 Eur. H.R. Rep. 493 (1999)), *id.* at 19 n.29 (citing *Dudgeon*, 45 Eur. Ct. H.R. 23). The Brief also cited *Egan v. Canada*, which resulted in a prohibition on sexual orientation discrimination being read into the Canadian Charter of Fundamental Freedoms. *Id.* at 27 n.55 (citing [1995] 2 S.C.R. 513, 603). Cf. Vicki C. Jackson, *Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse*, 65 MONT. L. REV. 15, 16–19, 39–40 (2004) (exploring the relationship between comparativism, the shift in the Court's human dignity jurisprudence in Justice Kennedy's *Lawrence* opinion, and subnational jurisprudence of U.S. state courts).

<sup>305</sup> See generally *Printz v. United States*, 521 U.S. 898 (1997) (Breyer, J., dissenting) (proposing comparativism in constitutional jurisprudence). For another example, see also Charles Fried, *Scholars and Judges, Reason and Power*, 23 HARV. J.L. & PUB. POL'Y 807, 819 (2000) (discussing Justice Breyer's proposal).

Brennan who encouraged his colleagues to center the concept of dignity in their analyses of the rights contained in the Bill of Rights.<sup>306</sup> Thus, when Kennedy authored the opinion in *Lawrence* relying on human dignity and looking to foreign legislation and jurisprudence, he was channeling his Supreme Court colleagues William Brennan and Stephen Breyer.

Daniel Conkle looks to *Lawrence* as an example of a “nascent” logic in substantive due process jurisprudence—that of evolving national values.<sup>307</sup> What is important here is that Kennedy’s discussion of the “recent developments in the legal treatment of consensual sodomy” included discussion of developments in Europe before and after the Court’s upholding of Georgia’s anti-sodomy statute in *Bowers v. Hardwick*.<sup>308</sup> Kennedy’s analysis suggests that the evolutions of American values should be assessed transnationally—comparatively—rather than parochially.

Kennedy’s expansive rationale in *Lawrence* might be the natural outgrowth of his reasoning in *Romer v. Evans*, but his reference to foreign and international court jurisprudence raised eyebrows and ruffled feathers.<sup>309</sup> Alongside the debates regarding the constitutionality of the death penalty under the Eighth Amendment, Kennedy’s *Lawrence* judgment (and Scalia’s scathing dissent) generated several symposium articles on the topic.<sup>310</sup>

### III. JURISPRUDENTIAL INNOVATIONS IN THE GLOBAL SOUTH, 1994 THROUGH 2022

In this Part, I discuss judicial decriminalization in the Global South. Sodomy decriminalization in the Global South began in earnest in the 1990s.<sup>311</sup> Global South criminal defendants, activist plaintiffs, attorneys, and judges in these cases built upon the earlier, first wave privacy, equality, and human dignity legal frames, and I demonstrate how the Global South jurisprudence adopts or adapts what came

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<sup>306</sup> See generally Stephen J. Wermiel, *Law and Human Dignity: The Judicial Soul of Justice Brennan*, 7 WM. & MARY BILL RTS. J. 233 (1998).

<sup>307</sup> See Daniel O. Conkle, *Three Theories of Substantive Due Process*, 85 N.C. L. REV. 63, 121, 123 (2006).

<sup>308</sup> *Id.* at 121–22.

<sup>309</sup> See, e.g., Joan L. Larsen, *Importing Constitutional Norms from a “Wider Civilization”*: *Lawrence and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283 (2004). See generally Roger P. Alford, *Misusing International Sources to Interpret the Constitution*, 98 AM. J. INT’L L. 57 (2004) (taking a pragmatic view of some of the potential abuses of comparativism).

<sup>310</sup> See, e.g., Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on Atkins and Lawrence*, 98 AM. J. INT’L L. 69 (2004); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT’L L. 82 (2004); T. Alexander Aleinikoff, *International Law, Sovereignty, and American Constitutionalism: Reflections on the Customary International Law Debate*, 98 AM. J. INT’L L. 91 (2004).

<sup>311</sup> See *infra* Table 2.

before. I begin with a discussion of the jurisprudence from Fiji,<sup>312</sup> Nepal,<sup>313</sup> India,<sup>314</sup> and Singapore,<sup>315</sup> before turning to the *innovative* jurisprudence that the most recent claimants have generated by framing their grievances in terms of the right to life and liberty, freedom of movement, right to humane treatment, freedom of expression, freedom of association, and the right to judicial protection. These cases have emerged from the Commonwealth Caribbean, where activists such as Maurice Tomlinson, Westmin James, and Kenita Placide, and organizations such as Jamaica Forum for Lesbians, All-Sexuals, and Gays (J-FLAG); University of the West Indies Rights Advocacy Project (U-RAP); AIDS Free World; Human Dignity Trust (HDT); and Eastern Caribbean Alliance for Diversity and Equality (ECADE) have been leading the charge.<sup>316</sup>

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<sup>312</sup> *Id.*

<sup>313</sup> See *Pant & Others v. Nepal Gov't*, Writ No. 917 of the year 2064 (BS) (2007 AD) (translation at 2 NAT'L JUD. ACAD. L.J. 261–86 (2008)).

<sup>314</sup> See *Naz Found. v. Gov't of NCT of Delhi*, (2009) DLT 277 (India); *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321 (India).

<sup>315</sup> *Tan Eng Hong v. Att'y Gen.*, (2012) S.G.C.A. 45 (Sing.) (resolving the appeal of Tan Eng Hong (Ivan Tan)).

<sup>316</sup> See NOVAK, *supra* note 56, at 128–33.

**Table 2. “Sodomy” or “Buggery” Decriminalization Legal Mobilization, 1990s Through 2020s**

	United States	Africa	Asia & Oceania	Latin America & Caribbean
<b>1990s</b>	MOHR Wasson Campbell Gryczan Powell Williams Lawrence & Garner Cogshell	Kanane Banana NCGLE	Toonen & Croome ABVA	Loayza
<b>2000s</b>	Doe Picado GLAD	N/A	Naz Foundation Nadan & McCoskar Yau Pant & Others	N/A
<b>2010s</b>	N/A	Gitari JM & 7 Others Motshidiemang	Johar & Others Tan Lim Flamer-Caldera Ong Choong Tan	Orozco Henry & Edwards Jaghai Tomlinson Jones
<b>2020s</b>	N/A	Dausab	N/A	Hoffmann Anonymous Johnson Macleish David Jeffers Gill & Holder- McClean-Ramirez

This Table depicts selected sodomy decriminalization legal mobilizations<sup>317</sup> between 1990 and 2022 in the United States,<sup>318</sup> Africa,<sup>319</sup> Asia & Oceania,<sup>320</sup> and Latin America & the Caribbean.<sup>321</sup> The below citations organized in chronological order refer to the legal judgments that resulted from each legal mobilization.

*A. Discrimination on the Basis of Sexual Orientation*

In 2005, in the criminal appeal *Nadan & McCoskar v. State*,<sup>322</sup> the High Court of Fiji held that Sections 175(a) and (c) and Section 177 violated Fiji's express constitutional prohibition against sexual orientation discrimination.<sup>323</sup> The Fiji case

<sup>317</sup> See *supra* note 63.

<sup>318</sup> Mich. Org. for Hum. Rts. v. Kelley (*MOHR*), No. 88-815820 CZ (Wayne Cnty. Cir. Ct. July 9, 1990); Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992); Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. Ct. App 1996); Gryczan v. State, 942 P.2d 112 (Mont. 1997); Powell v. State, 510 S.E.2d 18 (Ga. 1998); Williams v. Glendening, No. 98036031/CL-1059, 1998 WL 965992 (Cir. Ct. Md. Oct. 15, 1998); State v. Cogshell, 997 S.W.2d 534 (Mo. Ct. App. 1999); Doe v. Ventura, No. MC 01-489, 2001 WL 543734 (Minn. Dist. Ct. Hennepin Cnty. May 15, 2001); Jegley v. Picado, 80 S.W.3d 332 (Ark. 2002); Gay & Lesbian Advocs. & Defs. v. Att'y Gen. (*GLAD*), 763 N.E.2d 38 (Mass. 2002); Lawrence v. Texas, 539 U.S. 558 (2003).

<sup>319</sup> *NCGLE* 1998 (12) BCLR 1517 (CC) (S. Afr.); Banana v. State, (2000) 4 LRC 621 (Zim.); Kanane v. State, (2003) (2) BLR 64 (CA) (Bots.); Gitari v. Non-Governmental Organisations Co-ordination Board & 4 Others, (2015) K.L.R. (H.C.K.) (Kenya); EG & 7 Others v. Att'y Gen., (2019) K.L.R. (H.C.K.) (Kenya) (consolidated with JM & 7 Others); Motshidiemang v. Att'y Gen., MAHGB-000591-16 (High Ct. 2019) (Bots.); see *Namibia, HUM. DIGNITY TR.*, <https://www.humandignitytrust.org/country-profile/namibia/> [<https://perma.cc/CPN8-6KHP>] (last visited Oct. 2, 2023) (discussing Friedel Dausab's claim).

<sup>320</sup> Toonen v. Australia, U.N. GAOR Hum. Rts. Comm., 50th Sess., U.N. Doc. CCPR/C/50/D/488/1992 (1994); see Geetanjali Misra, *Decriminalising Homosexuality in India*, 17 REPROD. HEALTH MATTERS 20, 22–23 (2009) (describing how ABVA filed suit at the Delhi High Court in 1994); *Nadan & McCoskar v. State*, (2005) F.J.H.C. 500 (Fiji); Yau Yuk Lung Zigo & Lee Kam Chuen, [2006] 4 H.K.L.R.D. 196 (CFA); Pant & Others v. Nepal, Writ No. 917 of the year 2064 (BS) (2007 AD) (translation at 2 NAT'L JUD. ACAD. L. J. 261 (2008)); Naz Found. v. Gov't of NCT of Delhi, (2009) DLT 277 (India); Tan Eng Hong v. Att'y Gen., (2012) S.G.C.A. 45 (Sing.); Lim Meng Suang v. Att'y Gen., (2014) S.G.C.A. 53 (Sing.); Navtej Singh Johar v. Union of India, AIR 2018 SC 4321 (India); Ong Ming Johnson v. Att'y Gen., (2020) S.G.H.C. 63 (Sing.), <https://globalfreedomofexpression.columbia.edu/cases/ong-ming-johnson-v-attorney-general/> [<https://perma.cc/FV62-W7U4>] (last visited Oct. 2, 2023); Flamer-Caldera v. Sri Lanka, Comm. on the Elimination of Discrimination Against Women Comm'n CEDAW/C/81/D/134/2018 (Mar. 24, 2022); Tan Seng Kee v. Att'y Gen., (2022) S.G.C.A. 16 ¶ 18 (Sing.).

<sup>321</sup> Constitutional Tribunal of Ecuador, Nov. 17, 1997, No. 111-97-TC, <https://www.icj.org/sogicasebook/case-no-111-97-tc-constitutional-tribunal-of-ecuador-27-november-1997/> [<https://perma.cc/4VWZ-VPX2>] (discussing the claim of the lead Plaintiff, Christian Polo Loayza); Michael K. Lavers, *Gay Jamaican Man Drops Lawsuit Against Anti-Sodomy Law*, WASH. BLADE (Sept. 2, 2014), <https://www.washingtonblade.com/2014/09/02/gay-jamaica-man-drops-lawsuit-against-anti-sodomy-law/> [<https://perma.cc/5FTN-T2KJ>] (discussing Jaghai's withdrawn claim for concerns for personal safety); Maurice Arnold Tomlinson v. Att'y Gen., (2015) HCV 05731 (Jam.); Orozco v. Att'y Gen. (2016) 90 WIR 161 (Belize); Jones v. Att'y Gen., Claim No. CV2017-00720 (High Ct. Just. 2018) (Trin. & Tobago), <https://www.humandignitytrust.org/wp-content/uploads/resources/Judgment-Jason-Jones-v-AG.pdf> [<https://perma.cc/3D6M-L2VK>]; Johnson & Macleish v. Att'y Gen., Claim No. SVGH

involved an Australian tourist named Thomas McCoskar, who went to the police to file a criminal complaint against an Indo-Fijian citizen named Dhirendra Nandan for theft of AUD 1500.<sup>324</sup> Nandan informed police that McCoskar had taken nude and sexually explicit photos of Nandan for sale on the internet.<sup>325</sup> Police arrested both men and charged them with violating the sodomy prohibition. Nandan and McCoskar initially plead guilty to violating Fiji's criminal prohibitions against anal sex and homosexual sex acts, but they then successfully appealed their convictions and invalidated Fiji's sodomy ban in doing so.<sup>326</sup>

Section 175(a) of the Fijian penal code prohibited a male person from having "carnal knowledge against the order of nature" (performing anal sex on a man or woman).<sup>327</sup> Section 175(c) prohibited men and women from permitting a "male person to have carnal knowledge of him or her" (receiving anal sex).<sup>328</sup> And Section 177 prohibited male persons from committing "any act of gross indecency with another male person" (non-penetrative sex acts).<sup>329</sup> Authorities had selectively applied to homosexual men only the gender-neutral Section 175.<sup>330</sup> Section 177 was facially discriminatory.

Fiji's 1997 Constitution had followed South Africa in expressly prohibiting discrimination on the basis of sexual orientation.<sup>331</sup> The High Court of Fiji held that both sections violated Fiji's express constitutional prohibition against sexual orientation

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CV2019/0110 (E. Caribbean Sup. Ct. 2019) (St. Vincent), <https://www.eccourts.org/judgment/the-attorney-general-of-saint-vincent-and-the-grenadines-v-javin-kevin-vinc-johnson-et-al> [<https://perma.cc/J9DC-BA6H>]; Henry & Edwards v. Jamaica, Case 13.637, Inter-Am. Comm'n H.R., Report No. 400/200, OEA/Ser.L/V/II, doc. 418 (2020); Hoffmann v. Barbados, Petition 1081-18, Inter-Am. Comm'n H.R., Report No. 239/22, OEA/Ser.L./L/V/II, doc. 242 (2022); Rob Salerno, *New Legal Victories Give Hope to Caribbean Queer People Whose Sex Lives Remain Criminalized*, XTRA MAG. (Aug. 31, 2022), <https://xtramagazine.com/power/caribbean-legal-victories-235062> [<https://perma.cc/563Q-S748>] (discussing the anonymous claim filed in Dominica in 2021); David v. Att'y Gen., Claim No. ANUHCv2021/0042 ¶ 6 (E. Caribbean Sup. Ct. 2022) (Ant. & Barb.), <https://www.eccourts.org/judgment/orden-david-et-al-v-the-attorney-general-of-antigua-and-barbuda> [<https://perma.cc/PKV5-K4HE>]; Jeffers et al. v. Att'y Gen., Claim No. SKBHCv2021/0013 ¶ 133 (E. Caribbean Sup. Ct. 2022) (St. Kitts & Nevis), <https://www.eccourts.org/judgment/jamal-jeffers-et-al-v-the-attorney-general-of-st-christopher-and-nevis> [<https://perma.cc/733E-N6VS>]; Holder-McClean-Ramirez v. Att'y Gen., No. CV-004 (High Ct., May 25, 2023) (Barb.), <https://www.humandignitytrust.org/wp-content/uploads/resources/RAMIREZ-final.pdf> [<https://perma.cc/Z3MK-RLGM>].

<sup>322</sup> (2005) F.J.H.C. 500 (Fiji).

<sup>323</sup> *Id.*

<sup>324</sup> *Id.*

<sup>325</sup> *Id.*

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.*

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> FIJI CONST. (1997) ch. 4, § 38(2)(a).

discrimination.<sup>332</sup> The Fiji Constitution also required judges to consider international human rights law when adjudicating constitutional rights claims.<sup>333</sup> The London-based human rights NGO, Interights, had been on the ground in Fiji since 2002 conducting human rights trainings of Fiji lawyers and judges and looking for a plaintiff to bring a decriminalization test case.<sup>334</sup> Interights met with the defendants' lawyers and instructed them on human rights case law that the lawyers could use in the case.<sup>335</sup> Consequently, in addressing the defendants' privacy claims, the High Court referenced the jurisprudence of the United Kingdom's Wolfenden Committee, the European Court of Human Rights (*Dudgeon*), the UN Human Rights Committee (*Toonen*), and the courts of Canada (*Egan*), the United States (*Lawrence v. Texas*), and South Africa (*NCGLE v. Minister of Justice*).<sup>336</sup>

#### *B. Human Dignity as Third Gender Equality: Pant v. Nepal*

In 2007, in *Sunil Babu Pant & Others v. Nepal*, a two-judge bench of the Supreme Court of Nepal held that sexual orientation and gender identity are natural rather than mental perversions or psychological disorders, and that Nepal's laws and policies discriminated on the basis of sex and sexual orientation and violate the right to privacy in contravention of the *Yogyakarta Principles* and international human rights treaties.<sup>337</sup> Human rights activist and *Yogyakarta Principles* signatory Sunil Babu Pant was the lead plaintiff in the case, which was a reaction to efforts to use the 1963 Country Code's criminal prohibition against any "unnatural sex acts" to close down Pant's LGBTQ+ rights organization, Blue Diamond Society.<sup>338</sup> The court concluded that Articles 32 and 107 of Nepal's Interim Constitution gave liberal standing for human rights organizations to initiate public interest lawsuits to enforce fundamental rights.<sup>339</sup>

However, rather than addressing primarily decriminalization, the case centered around claims, grounded in Articles 12 and 13 of the Interim Constitution, concerning trans and third gender (*metis*) rights including access to third gender citizenship

<sup>332</sup> *Nadan & McCoskar*, F.J.H.C. 500.

<sup>333</sup> FIJI CONST. (1997) ch. 4, § 43(2).

<sup>334</sup> See The Int'l Ctr. for the Legal Prot. of Hum. Rts., *About Us*, INTERIGHTS, <https://www.interights.org/about-us/index.html> [<https://perma.cc/3V8S-TGUL>] (last visited Oct. 2, 2023).

<sup>335</sup> The Int'l Ctr. for the Legal Prot. of Hum. Rts., *Landmark Fiji High Court Case Invalidates Laws Criminalising Homosexual Sex*, INTERIGHTS, [https://interights.org/page-  
-php\\_dir\\_about\\_page\\_equalityprogrammeactivities.html](https://interights.org/page-<br/>-php_dir_about_page_equalityprogrammeactivities.html) [<https://perma.cc/292L-ZG8M>] (last visited Oct. 2, 2023).

<sup>336</sup> *Nadan & McCoskar*, F.J.H.C. 500 ¶¶ 63–71, 74, 76, 86, 89, 93.

<sup>337</sup> See *Pant & Others v. Nepal*, Writ No. 917 of the year 2064 (BS) (2007 AD) (translation at 2 NAT'L JUD. ACAD. L.J. 261, 285–86 (2008)).

<sup>338</sup> *Id.* at 265.

<sup>339</sup> *Id.* at 266.

cards and protection from homophobic and anti-trans violence. Article 12 provides the right to live with dignity, which prohibited deprivation of liberty and expressly protected freedom of expression, freedom of movement and residence, and freedom to practice any profession—rights impeded by deprivation of government documents recognizing a third gender.<sup>340</sup> Article 13 guarantees the right to equality before the law and equal protection of the law, prohibiting discrimination on the basis of sex and other characteristics, but allowing for affirmative action for the benefit of socially or culturally “backward” classes.<sup>341</sup>

In arriving at its holdings, the Supreme Court of Nepal referred to the standing doctrine, transgender rights jurisprudence, and decriminalization jurisprudence of India, the European Court of Human Rights (*Goodwin v. United Kingdom*, *Van Kuck v. Germany*), the UN Human Rights Committee (*Toonen v. Australia*), South Africa (*NCGL v. Minister of Justice*), and the United States (*Lawrence v. Texas*).<sup>342</sup>

### C. Right to Life as Human Dignity

In 2009, in *Naz Foundation India v. Government of the National Capital Territory of Delhi*,<sup>343</sup> Chief Justice Shah of the Delhi High Court ruled in favor of Naz, holding that Section 377 violated the rights to privacy, autonomy, and dignity inherent in Article 21 of the Indian Constitution, which provided the right to life and liberty, and holding that Section 377 violated the principles of equality and non-discrimination in Articles 14 and 15 of the Indian Constitution.<sup>344</sup> Justice Shah rejected Naz Foundation’s freedom of expression claim.<sup>345</sup>

The original legal mobilization took place in 2001, when Anand Grover of Lawyers Collective—which frequently represented people living with HIV/AIDS in socioeconomic rights litigation—and Anjali Gopalan, executive director of the public health NGO Naz Foundation India, agreed to challenge Section 377 of the Indian Penal Code.<sup>346</sup> India’s constitutional order, like Nepal’s, grants liberal standing to claimants to raise public interest petitions, granting standing to Naz Foundation (a public health NGO) and their public interest law firm (Lawyers Collective) to argue that criminalization impeded their work with populations vulnerable to HIV/AIDS such as men who have sex with men.<sup>347</sup>

In support of his reasoning, Justice Shah cited the privacy, equality, decriminalization, and age of consent jurisprudence of the European Court of Human Rights

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<sup>340</sup> *Id.* at 284.

<sup>341</sup> *Id.* at 276–78.

<sup>342</sup> *See id.* at 274, 275, 277.

<sup>343</sup> *See Naz Found. v. Gov’t of NCT of Delhi*, (2009) DLT 277 (India).

<sup>344</sup> *Id.* ¶ 132.

<sup>345</sup> *Id.* ¶ 126.

<sup>346</sup> *See generally* Geetanjali Misra, *Decriminalising Homosexuality in India*, 17 REPROD. HEALTH MATTERS 20, 22–24 (2009).

<sup>347</sup> *Naz Found.*, DLT 277 ¶ 1.

(*Dudgeon v. United Kingdom*, *Norris v. Ireland*, and *Modinos v. Cyprus*), the UN Human Rights Committee (*Toonen v. Australia*), Canada (*Egan v. Canada* and *Vriend v. Alberta*), South Africa (*NCGLE v. Minister of Justice*), and the United States (*Griswold v. Connecticut*, *Eisenstadt v. Baird*, *Roe v. Wade*, *Bowers v. Hardwick*, *Planned Parenthood v. Casey*, *Romer v. Evans*, and *Lawrence v. Texas*).<sup>348</sup> He also cited Asia-Pacific decriminalization jurisprudence from Fiji (*Nadan & McCoskar v. State*), Nepal (*Sunil Babu Pant & Others v. Nepal*), and Hong Kong (*Leung v. Secretary of Justice* and *Yau Yuk Lung Zigo & Lee Kam Chuen*), and the 2006 *Yogyakarta Principles*, which systematically applied human rights law to sexual minorities.<sup>349</sup>

#### *D. Transformative Constitutionalism: Navtej Singh Johar in India*

In 2018, a five-judge constitutional bench of the Indian Supreme Court decriminalized same-sex sexual activity in India.<sup>350</sup>

When the federal government declined to appeal the ruling in *Naz Foundation India v. NCT of Delhi*, a coalition comprised primarily of religious actors and groups intervened, seeking to overturn Chief Justice Shah's holding.<sup>351</sup> In 2013, a two-judge bench ruling of the Supreme Court overruled Chief Justice Shah.<sup>352</sup> The judges referred to American legal treatises for the doctrine of severability and the power of courts to invalidate or to read down statutes, and referred to *Black's Law Dictionary* to define sodomy.<sup>353</sup> However, they referred to almost no comparative jurisprudence in their rationale on the merits regarding the constitutionality of Section 377 in light of the right to life and liberty, including the rights of privacy, dignity and autonomy.

Grover filed a curative petition on behalf of Naz, seeking to have a constitutional bench review the two-judge ruling.<sup>354</sup> While the curative petition was pending, between 2016 and 2018, activist litigants filed five separate petitions, including a petition filed jointly by out Indian celebrities and quasi celebrities—dancer Navtej Singh Johar, journalist Sunil Mehra, chef Ritu Dalmia, hoteliers Aman Nath and Keshav Suri, and business executive Ayesha Kapur.<sup>355</sup> In a procedural irregularity,

<sup>348</sup> *Id.* ¶ 58.

<sup>349</sup> *Id.*

<sup>350</sup> *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321 (India).

<sup>351</sup> *Suresh Kumar Koushal v. Naz Found.*, (2014) 1 SCC 1 ¶ 15 (2013) (India).

<sup>352</sup> *Id.*

<sup>353</sup> *Id.* ¶¶ 26, 35.

<sup>354</sup> Author's interview with Anand Grover, in Phila. Pa. (June 11, 2021) [hereinafter Grover Interview]; see also *Briefing Paper on Navtej Singh Johar et al v. Union of India and Others*, INT'L COMM'N ON JURISTS 1, 3 (2018), <https://www.icj.org/wp-content/uploads/2018/07/India-Briefing-Paper-Navtej-Advocacy-Analysis-2018-Eng.pdf> [https://perma.cc/88UH-GU5T] (last visited Oct. 2, 2023).

<sup>355</sup> Shreya Biswas, *Faces Behind the Fight Against Section 377 in Court*, INDIA TODAY (Sept. 7, 2018, 9:22 AM), <https://www.indiatoday.in/india/story/faces-behind-the-fight-against-section-377-in-court-1333406-2018-09-06> [https://perma.cc/LU3T-K5CB].

the Supreme Court listed the new writ petitions for oral argument, but not the curative petition.<sup>356</sup> Grover, whose petition for the Supreme Court to convene a constitutional bench to review the two-judge bench's *Koushal* decision was still pending, filed new petitions on behalf of Arif Jafar—director of the sexual health NGO Bharosa Trust and of the Naz Foundation International liaison office in Lucknow, who had been arrested during a police raid on his office headquarters in 2001 and held 47 days—and Ashok Row Kavi, founder of Bombay Dost and Humsafar Trust and one of the revered elders of India's gay movement.<sup>357</sup>

In 2018, in *Navtej Singh Johar v. Union of India*, the Supreme Court, sitting as a five-judge constitutional bench, consolidated all of the pending petitions, and held in a landmark 2018 judgment that Section 377 was unconstitutional, effectively upholding Chief Justice Shah's 2009 Delhi High Court judgment.<sup>358</sup> The Supreme Court justices, in four separate opinions, referred to India's principle of transformative constitutionalism (modernizing Indian society by making it more inclusive of all segments of society) and to the priority of "constitutional morality" (protecting individual rights) over "public morality" (legislation upholding the moral sentiments of the majority).<sup>359</sup> The Indian Supreme Court was also the second court anywhere (after Belize in 2016) to hold that freedom of expression protects one's sexual identity and choice of sexual partner.<sup>360</sup> The opinions cited every leading privacy, equality, and decriminalization case to that point, including from Caleb Orozco's case from Belize<sup>361</sup> and Jason Jones' case from Trinidad and Tobago,<sup>362</sup> as well as other "jurisprudence" such as the UK Wolfenden Committee Report and the Hart-Devlin debates in the 1950s.<sup>363</sup>

### *E. Freedom of Expression in the Caribbean*

Before 2016, no court had upheld the claim that anti-sodomy law violated freedom of expression. Indeed, judges hearing this claim, such as Justice Shah in the Delhi High Court hearing *Naz Foundation India*, had held instead that expression means speech or speechlike acts, such as dress and mannerisms.<sup>364</sup> Sexual intimacy

<sup>356</sup> Grover Interview, *supra* note 354; see also *Briefing Paper on Navtej Singh Johar et al v. Union of India and Others*, *supra* note 354, at 3–4.

<sup>357</sup> Grover Interview, *supra* note 354; see also *Briefing Paper on Navtej Singh Johar et al v. Union of India and Others*, *supra* note 354, at 8, 12 n.38.

<sup>358</sup> *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321 (India).

<sup>359</sup> *Id.*

<sup>360</sup> *Id.* ¶ 247.

<sup>361</sup> See *Orozco v. Att'y Gen.* (2016) 90 WIR 161 (Belize).

<sup>362</sup> See *Jones v. Att'y Gen.*, Claim No. CV2017-00720 (High Ct. Just. 2018) (Trin. & Tobago), <https://www.humandignitytrust.org/wp-content/uploads/resources/Judgment-Jason-Jones-v-AG.pdf> [<https://perma.cc/3D6M-L2VK>].

<sup>363</sup> See, e.g., *Johar*, AIR 2018 SC 4321 at 37 ¶ 113; *id.* at 42 ¶ 132.

<sup>364</sup> See generally *Naz Found.*, DLT 277.

as a form of expression appeared to be inconceivable. But activist plaintiffs had been pressing the claim since the 1960s.<sup>365</sup> It is in the Commonwealth Caribbean that open-minded judges would finally ratify this innovative claim.

In 2016, Chief Justice Kenneth Benjamin of Belize's Supreme Court (the court of first instance) sustained Caleb Orozco's challenge to Section 53 of Belize's criminal code, which prohibited homosexual sex ("carnal intercourse against the order of nature").<sup>366</sup> Orozco argued that Section 53 violated the rights to dignity, privacy, equality before the law, non-discrimination on grounds of sex, and freedom of expression in the Belizean Constitution.<sup>367</sup> The Attorney General appealed the ruling on the limited grounds that Chief Justice Benjamin's findings based on freedom of expression and non-discrimination on the grounds of sex were in error.<sup>368</sup> In December 2019, a three-judge panel of justices of the Court of Appeals upheld the Supreme Court ruling. The Attorney General did not appeal the three-judge panel ruling to a full constitutional bench.

On July 5, 2022, the High Court of Justice for Antigua and Barbuda in the case *Orden David v. Attorney General*, declared unconstitutional its buggery and gross indecency laws.<sup>369</sup> On August 29, 2022, Justice Trevor Ward of the High Court of Justice of the tiny Caribbean nation of Saint Christopher and Nevis (known as St. Kitts and Nevis) ruled in the case *Jeffers et al. v. Attorney General* that Sections 56 and 57 of the St. Kitts Offences Against the Person Act each violate the right to protection of personal privacy (Section 3) and the right to freedom of expression (Section 12) in the St. Kitts Constitution.<sup>370</sup>

Justice Ward's decision in *Jeffers* was welcomed by Tynetta McKoy, founder and co-director of the local LGBTQ rights organization Saint Kitts and Nevis Alliance for Equality (SKNAFE),<sup>371</sup> which was a co-plaintiff in the case, as well as by Kenita Placide, director of the Eastern Caribbean Alliance for Diversity and Equality (ECADE), a leading LGBTQ rights organization in the region.<sup>372</sup> Placide

<sup>365</sup> See ESKRIDGE, *supra* note 24, at 188–89 (describing constitutional challenges to state sodomy laws, including those brought under a theory that the laws violated the right to freedom of thought and expression).

<sup>366</sup> *Orozco v. Att'y Gen.* (2016) 90 WIR 161 ¶ 67; Belize Crim. Code, chap. 101, § 53 (2000), *invalidated by* *Orozco v. Att'y Gen.* (2016) 90 WIR 161.

<sup>367</sup> See *Orozco v. Att'y Gen.* (2016) 90 WIR 161 ¶ 2.

<sup>368</sup> *Id.* ¶ 3(1).

<sup>369</sup> See Claim No. ANUHCv2021/0042 ¶ 2 (E. Caribbean Sup. Ct. 2022) (Ant. & Barb.), <https://www.eccourts.org/judgment/orden-david-et-al-v-the-attorney-general-of-antigua-and-barbuda> [<https://perma.cc/PKV5-K4HE>].

<sup>370</sup> See Claim No. SKBHCv2021/0013 ¶ 133 (E. Caribbean Sup. Ct. 2022) (St. Kitts & Nevis), <https://www.eccourts.org/judgment/jamal-jeffers-et-al-v-the-attorney-general-of-st-christopher-and-nevis> [<https://perma.cc/733E-N6VS>].

<sup>371</sup> See Michael K. Lavers, *St. Kitts and Nevis Sodomy Law Struck Down*, WASH. BLADE (Aug. 30, 2022), [https://www.washingtonblade.com/2022/08/30/st-kitts-and-nevis-sodomy-law-struck-down/?utm\\_source=rss&utm\\_medium=rss&utm\\_campaign=st-kitts-and-nevis-sodomy-law-struck-down](https://www.washingtonblade.com/2022/08/30/st-kitts-and-nevis-sodomy-law-struck-down/?utm_source=rss&utm_medium=rss&utm_campaign=st-kitts-and-nevis-sodomy-law-struck-down) [<https://perma.cc/277R-5FRU>].

<sup>372</sup> See 'Null and Void': Judge Strikes Down Saint Kitts Anti-Gay Law, AL JAZEERA

and ECADE had been instrumental in coordinating the challenge to the St. Kitts law as well as court-based legal challenges to similar sodomy prohibitions in the Eastern Caribbean by other decriminalization activists across the region.<sup>373</sup>

Lastly, in conjunction with the five-nation strategy coordinated by ECADE, René Holder-McClean-Ramirez; Raven Gill, founder of Butterfly Barbados; the NGOs Equals (Barbados); and ECADE challenged Sections 9 and 12, Chapter 154, of the Sexual Offences Act of Barbados.<sup>374</sup> Section 9 criminalizes penile-anal sex—both male-male “buggery” and male-female “buggery.”<sup>375</sup> Section 12, which criminalizes “serious indecency,” is gender neutral, although similar provisions in the Caribbean and elsewhere almost exclusively target same-sex sexual conduct.<sup>376</sup> Holder-McClean-Ramirez, Gill, and their legal team<sup>377</sup> argued, and Justice Michelle Weekes held, that these sections violated the rights to freedom of expression and protection of personal privacy.<sup>378</sup>

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(Aug. 30, 2022), <https://www.aljazeera.com/news/2022/8/30/null-and-void-judge-strikes-down-saint-kitts-anti-gay-law> [<https://perma.cc/W3RV-8KAJ>].

<sup>373</sup> See *Justice Is Never Given, It Is Won: How Eastern Caribbean Activists Developed the Successful Strategy to Defeat the Laws Which Criminalised LGBT People.*, UNAIDS (Aug. 31, 2022), [https://www.unaids.org/en/resources/presscentre/featurestories/2022/august/20220831\\_decriminalization-strategy-eastern-caribbean](https://www.unaids.org/en/resources/presscentre/featurestories/2022/august/20220831_decriminalization-strategy-eastern-caribbean) [<https://perma.cc/P4TG-ADL5>]; *Eastern Caribbean: Constitutional Challenges to Multiple Laws Criminalising Same-Sex Activity*, HUM. DIGNITY TR., <https://www.humandignitytrust.org/what-we-do/cases/eastern-caribbean/> [<https://perma.cc/BB85-Q6CT>] (last visited Oct. 2, 2023).

<sup>374</sup> Holder-McClean-Ramirez v. Att’y Gen., No. CV-004 ¶ 1 (High Ct., May 25, 2023) (Barb.), <https://www.humandignitytrust.org/wp-content/uploads/resources/RAMIREZ-final.pdf> [<https://perma.cc/Z3MK-RLGM>].

<sup>375</sup> See Request by Petitioners Hoffmann et al. for a Decision Recommending Repeal of Sections 9 and 12 of Barbados’ *Sexual Offences Act* at 8, Hoffmann v. Barbados, Petition 1081-18, Inter-Am. Comm’n H.R., Report No. 239/22, OEA/Ser.L./L/V/II, doc. 242 (2022) [hereinafter Request by Hoffmann] (citing Hunte v. The Queen, BB 2002 CA 39 ¶ 16 (Barb.)) (“‘Buggery’ has been defined by the Barbados courts as ‘sexual intercourse (a) committed against the order of nature (i.e. *per anum*) by man with man or in the same unnatural manner by man with woman or (b) by man or woman in any manner with beast.’”), [https://ihrp.law.utoronto.ca/sites/default/files/media/Hoffman%20et%20al%20v%20Barbados\\_Petition%20to%20IACHR\\_6June2018\\_FULLVERSION-REDACTED.pdf](https://ihrp.law.utoronto.ca/sites/default/files/media/Hoffman%20et%20al%20v%20Barbados_Petition%20to%20IACHR_6June2018_FULLVERSION-REDACTED.pdf) [<https://perma.cc/CS3J-5F53>].

<sup>376</sup> Sexual Offences Act, 1 L.R.O. 2002, ch. 154 § 12; see also Request by Hoffmann, *supra* note 375, at 10 (“An act of ‘serious indecency’ is an act, whether natural or unnatural by a person involving the use of the genital organs for the purpose of arousing or gratifying sexual desire.”).

<sup>377</sup> See generally Holder-McClean-Ramirez, No. CV-004. The team included Westmin James, Kashka Hemans, and Douglas L. Mendes, and Veronica S.P. Cenac, who is a member of the Faculty of Law Rights Advocacy Project (U-RAP), and Human Dignity Trust (HDT). See generally *id.*; *Republic of Barbados Latest to Strike Down Buggery Laws*, ST. LUCIA STAR (Dec. 14, 2022), <https://stluciarstar.com/republic-of-barbados-latest-to-strike-down-buggery-laws/> [<https://perma.cc/4AS5-HMHV>].

<sup>378</sup> Holder-McClean-Ramirez, No. CV-004 ¶ 196.

Orden David, Alexandrina Wong, and Women Against Rape, Inc. in Antigua and Barbuda adopted and adapted the freedom of expression legal frame first ratified by Chief Justice Benjamin in Caleb Orozco's claim against Belize. David, Wong, and their legal team<sup>379</sup> argued that Sections 12 and 15 of the Act offended their constitutional rights. Section 12 criminalized "buggery," defined as "sexual intercourse per anum by a male person with a male person or by a male person with a female person."<sup>380</sup> As such, Section 12, like most sodomy or buggery provisions, is gender neutral. Section 15 criminalized "serious indecency" defined as "an act, other than sexual intercourse (whether natural or unnatural), by a person involving the use of the genital organ for the purpose of arousing or gratifying sexual desire."<sup>381</sup> It is likewise gender neutral. David argued that Sections 12 and 15 violate Sections 3, 5, 12, and 14 of the Antigua and Barbuda Constitution.<sup>382</sup>

Sections 3(a) and 5 protect the rights to life, liberty, security of the person, and the protection of the law.<sup>383</sup> David argued that the very risk of prosecution, conviction, and imprisonment impeded one's liberty.<sup>384</sup> Section 3(c) protects family life, personal privacy, and privacy of the home from state intrusion.<sup>385</sup> David argued that adult consensual sexual conduct in private fell within the realm of personal privacy.<sup>386</sup> As we have seen, the liberty and privacy claims are distinct but related. Privacy in a previous era primarily concerned a spatial zone of the home or of personal communications; the liberty of a previous era primarily concerned physical detention by the state. But liberty has come to mean autonomy, self-determination, and freedom to choose. Likewise, privacy has come to include personal choices and even one's very identity that informs those choices.

Citing *NCGLE*, *Navtej Singh Johar*, and the Inter-American Court of Human Rights case *Atala Riffo & Daughters v. Chile*,<sup>387</sup> Justice Marissa Robertson concluded: "This court accepts the submission of Senior Counsel for the Claimants that 'the right to privacy extends beyond the right to be left alone and includes the concept of dignity of the individual, aspects of physical and social identity, and the right to develop and establish relationships with other human beings.'"<sup>388</sup>

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<sup>379</sup> David v. Att'y Gen., Claim No. ANUHCv2021/0042 ¶ 6 (E. Caribbean Sup. Ct. 2022) (Ant. & Barb.), <https://www.eccourts.org/judgment/orden-david-et-al-v-the-attorney-general-of-antigua-and-barbuda> [<https://perma.cc/PKV5-K4HE>]. The attorneys representing David and Wong and Women Against Rape, Inc. were Andrew O'Kola and Douglas Mendes. See generally *id.*

<sup>380</sup> *Id.* ¶ 7.2.

<sup>381</sup> *Id.* ¶ 7.

<sup>382</sup> *Id.* ¶ 6.

<sup>383</sup> *Id.* ¶ 11.2.a.

<sup>384</sup> *Id.*

<sup>385</sup> *Id.* ¶ 11.2.c.

<sup>386</sup> *Id.*

<sup>387</sup> *Id.* ¶¶ 67–69.

<sup>388</sup> *Id.* ¶ 70.

Section 14 of the Constitution prohibits discrimination on the basis of sex, which, David, Wong, and their legal team argued, includes discrimination on the basis of sexual orientation.<sup>389</sup> Citing *Toonen* and CEDAW Committee jurisprudence,<sup>390</sup> Justice Robertson held that “the reference to ‘sex’ ought not to merely reference a physical gender. Such an approach would be too linear and restrictive. The reference to ‘sex’ would necessarily encompass concepts such as gender identity, sexual character, and sexual orientation.”<sup>391</sup>

Thus far, the claims and Justice Robertson’s holdings track the twin pillars of privacy and equality ratified nearly twenty-five years ago by Justice Ackermann and Sachs in *NCGLE*. My main purpose in highlighting the case in this Section, however, is to note how Sections 3(b) and 12 of the Constitution of Antigua and Barbuda guarantee freedom of expression. David, Wong, and their legal team argued that one’s sexuality, sexual identity, and private consensual sexual acts are forms of expression protected by Section 3(b).<sup>392</sup>

#### *F. Freedom of Movement, Humane Treatment, and Judicial Protection*

In this Section, I discuss three innovative claims that activist plaintiffs have made and that judges have ratified: freedom of movement, humane treatment, and judicial protection.

Two of these cases—*Henry & Edwards v. Jamaica* and *Flamer-Caldera v. Sri Lanka*—present the opportunity to consider the dynamic between savings clauses in domestic constitutions and the justiciability question of exhaustion of local remedies, which is a hurdle that plaintiff litigants must clear before international courts and tribunals and quasi-judicial mechanisms hear their complaints. But savings clauses also interact with a claim on the merits—the right to judicial protection—which I discuss below.

The *Henry & Edwards v. Jamaica* and *Flamer-Caldera v. Sri Lanka* cases also present an opportunity to consider transnational legal mobilization before quasi-judicial mechanisms and the comparative methodology that is inherent in these forums. As I have demonstrated, domestic constitutional court and high court jurists addressing sodomy decriminalization claims almost universally adopt a comparative methodology.<sup>393</sup> But the comparative methodology takes on an added dimension in the context of a proceeding before an *international* human rights tribunal, where the

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<sup>389</sup> *Id.* ¶ 11.2.e.

<sup>390</sup> *Id.* ¶ 77.

<sup>391</sup> *Id.* ¶ 75.

<sup>392</sup> *Id.* ¶ 11.2.b.

<sup>393</sup> See generally *Henry & Edwards v. Jamaica*, Case 13.637, Inter-Am. Comm’n H.R., Report No. 400/200, OEA/Ser.L/V/II, doc. 418 (2020); *Flamer-Caldera v. Sri Lanka*, Comm. on the Elimination of Discrimination Against Women Commc’n CEDAW/C/81/D/134/2018 (Mar. 24, 2022).

jurists themselves hail from diverse domestic traditions. As a general matter, the reasoning of jurists on international human rights courts and quasi-judicial bodies such as the Inter-American Commission on Human Rights is grounded in global or comparative understandings of rights rather than in parochial understandings of rights.<sup>394</sup> Thus, the judgment is made against the backdrop of state sovereignty, the voluntarism of the international legal order, and concepts such as the margin of appreciation. And the findings in each case are the cumulative output of judges from different jurisdictions and legal traditions.

### 1. *Henry & Edwards v. Jamaica*: Freedom of Movement and Judicial Protection

In 2011, Jamaicans Gareth Henry, who was living in Canada, and Simone Edwards, who was living in the Netherlands, filed with the Inter-American Commission on Human Rights their petition challenging Jamaica's buggery laws—Sections 76, 77 and 79 of the Offences Against the Person Act (OAPA, 1864).<sup>395</sup>

These provisions penalize “the abominable crime of buggery,” attempted buggery, “assault with intent to commit” buggery, “indecent assault” against a male, and “gross indecency” between males.<sup>396</sup> In Section 76 (under the title “Unnatural Offences”), buggery is undefined, but is a common law offense understood to mean anal sex.<sup>397</sup> Section 76 is gender neutral, prohibiting consensual anal sex between men as well as anal sex between a man and a woman.<sup>398</sup> Section 79 (under the title “Outrages on Decency”), meanwhile, vaguely captures a range of non-procreative sexual activities—which it names “any act of gross indecency”—aside from anal sex, but only prohibits these between men.<sup>399</sup>

Section 77 criminalizes the inchoate crime of attempted buggery, which is gender neutral, but it also specifically criminalizes *non*-consensual buggery: “assault with intent to commit [buggery]” (gender neutral) and “indecent assault upon any male person.”<sup>400</sup> The inclusion of *non*-consensual anal sex within the portion of the OAPA that deals with *consensual* anal sex and *consensual* same-sex sexual conduct as “Unnatural Offences” and “Outrages on Decency” suggests that buggery and same-sex sexual conduct—whether voluntary or involuntary—are particularly egregious offenses.<sup>401</sup> The penalty for conviction under these statutes ranges from

<sup>394</sup> See generally Inter-Am. Comm’n H.R. arts. 1, 4(1).

<sup>395</sup> *Henry & Edwards*, Case 13.637, Inter-Am. Comm’n H.R., Report No. 400/20, ¶ 28.

<sup>396</sup> *Id.* ¶ 35.

<sup>397</sup> *Id.* ¶ 11.

<sup>398</sup> *Id.* ¶ 35.

<sup>399</sup> *Id.*

<sup>400</sup> *Id.*

<sup>401</sup> A separate Sexual Offences Act of 2011 criminalizes, among other things, rape, grievous sexual assault, marital rape, and statutory rape (sexual offenses against children and non-consensual sexual intercourse with persons suffering from mental or physical disabilities). Sexual Offences Act, 1 L.R.O. 2011. But the Sexual Offences Act does not address

two years (with or without hard labor) for gross indecency to seven years (with or without hard labor) for attempted buggery, assault, and indecent assault upon a male; and ten years (at hard labor) for buggery.<sup>402</sup> In other words, the maximum penalty for assault with intent to commit buggery and for indecent assault upon any male is *less* than the maximum penalty for *consensual* anal sex.

The NGO Human Dignity Trust and attorneys from the law firms Freshfields Bruckhaus Deringer and Doughty Street Chambers assisted Henry and Edwards in submitting their complaint.<sup>403</sup> Henry and Edwards and their legal team argued in their complaint that Jamaica's buggery laws violated the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man, particularly the right to privacy, the right to family life, and freedom of expression.<sup>404</sup> They also argued that the collateral consequences of Jamaica's buggery laws violated freedom of association, freedom of thought and expression, freedom of movement and residence, the right to humane treatment, and the right to health and well-being.<sup>405</sup> Henry and Edwards also argued that Jamaica violated the Convention by failing to eliminate these discriminatory measures and failing to provide judicial protection from violations of fundamental human rights (by foreclosing court challenges through the savings clause).<sup>406</sup>

Agreeing with most, though not all, of Henry and Edwards's claims,<sup>407</sup> the Inter-American Commission recommended that Jamaica repeal Sections 76, 77, and 79

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non-consensual penile-anal penetration. Under this law, rape is defined as non-consensual penile-vaginal penetration; only a "man" can commit a rape, and only a "woman" can be raped. *See id.* at Part I, art. 2 (defining "sexual intercourse"); *id.* at Part II, art. 3 (defining "rape" as non-consensual sexual intercourse by a man against a woman). The Act defines grievous sexual assault as non-consensual anal and vaginal penetration (by a body part or object *other than* a penis) and as giving or receiving non-consensual oral sex. *Id.* at Part II, art. 4. In contrast with the definition of rape, grievous sexual assault is gender neutral. *See id.* The offense of "sexual touching" of a child is gender neutral and outlaws touching a child "for a sexual purpose" which is vague enough to include (statutorily) non-consensual anal and oral sex with a child. *Id.* Part IV, art. 8. Only an adult, defined as a person above the age of eighteen, may commit the two offenses against a child, defined as a person under the age of sixteen. *See* Part I, art. 2; Part IV, art. 8 (criminalizing non-consensual sexual intercourse with a person suffering from mental or physical disability).

<sup>402</sup> *Henry & Edwards*, Case 13.637, Inter-Am. Comm'n H.R., Report No. 400/20, ¶ 35.

<sup>403</sup> *Id.* ¶ 8.

<sup>404</sup> *Id.* ¶¶ 20–21, 23.

<sup>405</sup> *Id.* ¶¶ 19, 21–22, 24, 26.

<sup>406</sup> *See id.* ¶¶ 94–99.

<sup>407</sup> Specifically, "the Inter-American Commission concludes that the State is responsible for the violation of Articles 5.1 (Right to Humane Treatment), 11 (Right to Privacy), 22.1 (Freedom of Movement and Residence) 24 (Right to Equal Protection), and 25.1 (Right to Judicial Protection) of the American Convention." *Henry & Edwards*, Case 13.637, Inter-Am. Comm'n H.R., Report No. 400/20, ¶ 120. The Commissioners apparently did not agree with Henry and Edwards's claims regarding freedom of thought and expression, freedom of association, the right to family life, and the right to health. *See id.*

of the OAPA; compensate Henry and Edwards; pass anti-discrimination laws; and conduct trainings of public health, police, prosecutorial, and judicial officials.<sup>408</sup> The merits judgment of September 2019 remained confidential, as the Commission provided Jamaica with an opportunity to resolve its violations before the Commission publicized its findings.<sup>409</sup> Jamaica took no remedial action, and the Commission thus published its findings in December 2020.<sup>410</sup>

The Commission found Jamaica to be in violation of the right to privacy and the right to equal protection—reading the two rights in conjunction with each other.<sup>411</sup> Sections 76 and 77 prohibiting buggery (anal sex) and attempted buggery are gender-neutral provisions, applying equally to same-sex and to different-sex conduct.<sup>412</sup> Section 79 (gross indecency) is facially discriminatory; it applies only to male-male sexual conduct.<sup>413</sup> The Commission held Jamaica to be in violation of the principle of equality and non-discrimination, which, it reasoned, is “inseparable from the essential dignity of the person,”<sup>414</sup> and involves both a negative prohibition on arbitrary differences in treatment (those not objectively and reasonably justified) and a positive obligation to create real equality.<sup>415</sup> The Commission cited the jurisprudence of the Inter-American Court of Human Rights for the proposition that the American Convention on Human Rights prohibits discrimination on the basis of sexual orientation.<sup>416</sup> The Commission thus held that, because Section 79 of Jamaica’s Offenses Against the Person Act interferes specifically with the sexual privacy rights of gay men (or men who have sex with men), it violates the American Convention.<sup>417</sup>

The freedom of movement claim in *Henry & Edwards v. Jamaica* is in some ways specific to the background context of a case in which the claimants have fled the country and are living abroad as asylees. In 2008, Edwards, a lesbian woman who was shot outside her home by well-known members of a homophobic gang, fled to the Netherlands.<sup>418</sup> Henry, an activist member of the organization Jamaica

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<sup>408</sup> *Id.*

<sup>409</sup> *Jamaica: Case Decided by the Inter-American Commission on Human Rights*, HUM. DIGNITY TR., <https://www.humandignitytrust.org/what-we-do/cases/jamaica-petition-before-the-inter-american-commission-on-human-rights-2/> [<https://perma.cc/3B3Z-2W8V>] (last visited Oct. 2, 2023).

<sup>410</sup> *Henry & Edwards*, Case 13.637, Inter-Am. Comm’n H.R., Report No. 400/20, ¶ 121.

<sup>411</sup> *Id.* ¶ 60.

<sup>412</sup> *Id.* ¶ 78.

<sup>413</sup> *Id.* ¶ 80.

<sup>414</sup> *Id.* ¶ 52.

<sup>415</sup> *Id.* ¶ 53.

<sup>416</sup> *Id.* ¶ 55.

<sup>417</sup> *Id.* ¶¶ 52–57 (citing *Atala Riffo & Daughters v. Chile*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 239, ¶¶ 91, 93, 133, 134, 161–62 (Feb. 24, 2012)).

<sup>418</sup> *Id.* ¶¶ 48–49.

Forum for Lesbians, All-Sexuals and Gays (J-FLAG), had also fled the island.<sup>419</sup> In fact, the freedom of movement, humane treatment, and judicial protection claims all centered around the fact that they were unwilling to accept the risks that came with living in a country where the law condoned both state and non-state violence.<sup>420</sup>

This is not the only case where this has occurred, however. Maurice Tomlinson, probably the best-known LGBTQ rights activist in Jamaica and throughout the Caribbean, also filed a claim against Jamaica.<sup>421</sup> Tomlinson travels internationally to conferences and appears frequently in the media.<sup>422</sup> But returning to Jamaica is always a risk for him. Likewise, the plaintiffs in the St. Vincent and the Grenadines case are two gay men—Javin Johnson and Sean Macleish—who filed their claims in the country's High Court in July 2019.<sup>423</sup> Johnson applied for asylum in the United Kingdom in 2017.<sup>424</sup> Macleish has been a resident of Chicago in the United States for more than thirty years.<sup>425</sup>

In *Henry & Edwards v. Jamaica*, the Commissioners relied heavily on a comparative legal methodology. The Commissioners' opinion cited the European Court and UN Human Rights Committee judgments in *Dudgeon*, *Norris*, *Modinos*, and *Toonen*, as well as the South Africa (*NCGLE*), United States (*Lawrence*), and India (*Navtej Singh Johar*) decriminalization judgments.<sup>426</sup> Crucially, the Commission also cited recent jurisprudence from *within* the region—the decriminalization judgments from Belize (*Orozco*) and Trinidad and Tobago (*Jones*).<sup>427</sup> The domestic rulings undermine ahistorical and ideological arguments that homosexuality and gay rights norms are foreign colonial and neocolonial impositions.<sup>428</sup>

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<sup>419</sup> *Id.* ¶ 15.

<sup>420</sup> *See id.* ¶ 120.

<sup>421</sup> *See generally* Maurice Arnold Tomlinson v. Att'y Gen., (2015) HCV 05731 (Jam.).

<sup>422</sup> *See generally id.*

<sup>423</sup> *See generally* Johnson & Macleish v. Att'y Gen., Claim No. SVGHCV2019/0110 (E. Caribbean Sup. Ct. 2019) (St. Vincent), <https://www.eccourts.org/judgment/the-attorney-general-of-saint-vincent-and-the-grenadines-v-javin-kevin-vinc-johnson-et-al> [<https://perma.cc/J9DC-BA6H>].

<sup>424</sup> Rebecca Speare-Cole, *Two Gay Men Exiled from St Vincent Challenge Old British Colonial Laws Criminalising Homosexuality*, EVENING STANDARD (Aug. 24, 2019), <https://www.standard.co.uk/news/world/two-gay-men-exiled-from-st-vincent-challenge-old-british-colonial-laws-criminalising-homosexuality-a4220366.html> [<https://perma.cc/7YM9-NJMS>].

<sup>425</sup> *See* Michael K. Lavers, *Lawsuits in Four Caribbean Countries Challenge Colonial-Era Sodomy Laws*, WASH. BLADE (Aug. 8, 2019), <https://www.washingtonblade.com/2019/08/08/lawsuits-in-four-caribbean-countries-challenge-colonial-era-sodomy-laws/> [<https://perma.cc/7CQJ-M3Y9>].

<sup>426</sup> *Henry & Edwards*, Case 13.637, Inter-Am. Comm'n H.R., Report No. 400/20, ¶¶ 64, 69–70, 72–74.

<sup>427</sup> *Id.* ¶¶ 75–76.

<sup>428</sup> *See generally* Orozco v. Att'y Gen. (2016) 90 WIR 161; *Jones v. Att'y Gen.*, Claim No. CV2017-00720 (High Ct. Just. 2018) (Trin. & Tobago), <https://www.humandignitytrust.org/wp-content/uploads/resources/Judgment-Jason-Jones-v-AG.pdf> [<https://perma.cc/3D6M-L2VK>].

## 2. The Right to Judicial Protection and Savings Clauses

One of the most significant innovations from this mobilization arises from Henry and Edwards's claim regarding the right to judicial protection under the American Convention on Human Rights. In resorting to an international human rights mechanism, Henry, Edwards, and their legal team grounded their legal claims in the American Convention on Human Rights, rather than in the Charter of Fundamental Rights and Freedoms in the Constitution of Jamaica—a bill of rights enacted in April of 2011.<sup>429</sup> The Jamaican Charter of Fundamental Rights and Freedoms specifically declared the constitutionality (compatibility) of Jamaica's extant sexual offenses law, including the laws prohibiting homosexual sex.<sup>430</sup> Via a savings law clause of the type common throughout the Commonwealth Caribbean, the Charter provides:

(12) Nothing contained in or done under the authority of any law in force immediately before the commencement of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, relating to—

- (a) sexual offences;
- (b) obscene publications; or
- (c) offences regarding the life of the unborn,

shall be held to be inconsistent with or in contravention of the provisions of this Chapter.<sup>431</sup>

Thus, Henry, Edwards, and their legal team raised claims grounded in Jamaica's international treaty obligations. The Commission held Jamaica to be in violation of the requirement of judicial protection because a savings law clause in the amended constitution attempted to shield the buggery laws from constitutional challenge.<sup>432</sup>

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<sup>429</sup> An activist named Javed Jaghai withdrew such a claim in 2014 due to fears of retaliatory violence against him and his family. *See id.* ¶ 50; Lavers, *supra* note 321.

<sup>430</sup> The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, Apr. 7, 2011 (Jam.).

<sup>431</sup> *Id.* art. 13(12). The Charter actually contains at least one other savings law clause, which saves from challenge under the prohibition on torture any acts that were legal before the Charter came into effect. *Id.* art. 13(7). Two other articles operate similarly to savings law clauses by specifying parliament's intent regarding the scope (limitations) of Charter rights. Article 13(18) shields same-sex marriage bans and civil union bans from constitutional challenge. Article 13(9) shields from constitutional challenge derogations from the freedom of movement, right to liberty, and due process that are taken during public emergencies and public disasters. *Id.* arts. 13(9), (18).

<sup>432</sup> *See Henry & Edwards*, Case 13.637, Inter-Am. Comm'n H.R., Report No. 400/20, ¶¶ 95–99.

Savings clauses are common throughout Commonwealth Caribbean constitutions. For example, there are general savings law clauses in the constitutions of Jamaica, Trinidad and Tobago, Barbados, the Bahamas, and Guyana, and specific or partial savings law clauses in those already mentioned (except for Trinidad and Tobago) and in Antigua and Barbuda, Belize, and St. Lucia.<sup>433</sup> These legal devices allow colonial-era statutes to remain in effect after the transition from colonial rule, or they allow legislation to remain in place after the adoption of constitutional bills of rights or other constitutional provisions. They merit analytical scrutiny in the specific instance of decriminalization of homosexual sex and as a general matter given the potential expansion of other rights in the Commonwealth Caribbean. For example, the anti-death penalty norm has been the subject of conflicting and controversial jurisprudence from the United Kingdom's Judicial Committee of the Privy Council, which continues to serve as the final court of appeal for several former British colonies.

It is worth noting that plaintiffs in domestic courts, such as Jason Jones of Trinidad and Tobago,<sup>434</sup> and the authors of individual complaints in international quasi-judicial mechanisms, such as Edwards and Henry of Jamaica, have successfully advanced two different and *contradictory* admissibility arguments about savings clauses. On the one hand, Jones and his attorney Richard Drabble (of Human Dignity Trust) argued successfully in the *domestic* High Court of Trinidad and Tobago that savings clauses did not bar challenges to sodomy/buggery laws.<sup>435</sup> On the other hand, Henry and Edwards and their attorneys argued successfully that the existence of savings clauses *ipso facto* satisfied the local exhaustion requirement typical of *international* courts and tribunals.<sup>436</sup> The Inter-American Commission ruled admissible Henry and Edwards's claims on July 2, 2018.<sup>437</sup> Like Henry and Edwards, Rosanna Flamer-Caldera, who submitted a complaint to the CEDAW Committee against Sri Lanka's anti-sodomy laws in 2018, also argued successfully that the savings clause in Sri Lanka's constitution made it impossible to obtain a domestic remedy.<sup>438</sup> At the domestic level, despite the existence of a savings clause, the High Court of Antigua and Barbuda addressed the merits of Orden David and Alexandrina Wong's claim that the existence of anti-sodomy statutes created an environment conducive to inhuman and degrading treatment.<sup>439</sup> Thus, ironically,

<sup>433</sup> Margaret A. Burnham, *Saving Constitutional Rights from Judicial Scrutiny: The Savings Clause in the Law of the Commonwealth Caribbean*, 36 U. MIA. INTER-AM. L. REV. 249, 250–52 (2004).

<sup>434</sup> See Jones v. Att'y Gen., Claim No. CV2017-00720 (High Ct. Just. 2018) (Trin. & Tobago), <https://www.humandignitytrust.org/wp-content/uploads/resources/Judgment-Jason-Jones-v-AG.pdf> [<https://perma.cc/3D6M-L2VK>].

<sup>435</sup> See *id.* ¶ 68.

<sup>436</sup> See generally Henry & Edwards, Case 13.637, Inter-Am. Comm'n H.R., Report No. 400/20.

<sup>437</sup> *Id.* ¶ 1.

<sup>438</sup> Flamer-Caldera v. Sri Lanka, Comm. on the Elimination of Discrimination Against Women Comm'n CEDAW/C/81/D/134/2018 (Mar. 24, 2022) ¶¶ 7.1, 8.3.

<sup>439</sup> David v. Att'y Gen., Claim No. ANUHCv2021/0042 ¶ 6 (E. Caribbean Sup. Ct. 2022)

judges on domestic courts in Trinidad and Antigua and Barbuda held that the savings law clauses did not shield the anti-sodomy statutes from challenge, while judges on international quasi-judicial bodies accepted that they did, thus satisfying the local exhaustion requirement.

The domestic-international distinction with regard to savings law clauses should not be drawn too sharply, however. In *René Holder-McClean-Ramirez and Raven Gill's* challenge, the High Court of Barbados deemed the savings law clause in Barbados's constitution not to shield from challenge Barbados anti-sodomy law and resolved the case on the merits. The Court, citing the Caribbean Community Court of Justice (CCJ), in a challenge to Guyana's cross-dressing law, held that savings law clauses are to be interpreted extremely narrowly, only saving those statutes that remain in their "pristine" form from prior to independence. Because Barbados's anti-sodomy law had been amended, it was not the same as the pre-independence clause and could not be saved.<sup>440</sup> Under CCJ jurisprudence, then, an international court or quasi-judicial body could dismiss an individual complaint by reasoning that an anti-sodomy law has changed and thus is not saved, forcing LGBTQ-rights plaintiffs back to the domestic court.

### 3. Lesbian Plaintiffs, "Stigma," and Humane Treatment

The other remarkably innovative development from this mobilization regards the claims that Henry and Edwards made regarding both public and private anti-LGBTQ violence in Jamaica as outgrowths of the buggery laws. They argued that the laws imposed on their freedom of movement and residence and their rights to life and humane treatment for which the state bore responsibility. Arguably, Edwards's role as a lesbian plaintiff most accentuates the validity of this claim, given that neither Sections 76 or 77 nor Section 79 targeted female-female sex. The case was not the first successful decriminalization case featuring a lesbian plaintiff,<sup>441</sup> but it was the first at the national and international levels.

Both Henry and Edwards were asylees—Henry in Canada and Edwards in the Netherlands.<sup>442</sup> In Edwards's case, she fled Jamaica after being shot in a homophobic

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(Ant. & Barb.), <https://www.eccourts.org/judgment/orden-david-et-al-v-the-attorney-general-of-antigua-and-barbuda> [<https://perma.cc/PKV5-K4HE>].

<sup>440</sup> See generally *Holder-McClean-Ramirez v. Att'y Gen.*, No. CV-004 ¶¶ 39(1)(b), 47–71 (High Ct., May 25, 2023) (Barb.), <https://www.humandignitytrust.org/wp-content/uploads/resources/RAMIREZ-FINAL.pdf> [<https://perma.cc/Z3MK-RLGM>].

<sup>441</sup> See generally *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996) (lead plaintiff Penny Campbell); *Gryczan v. State*, 942 P.2d 112, 115–16 (Mont. 1997) (three lesbian plaintiffs); *Williams v. Glendening*, No. 98036031/CL-1059, 1998 WL 965992, at \*1 (Cir. Ct. Md. Oct. 15, 1998) (lesbian co-plaintiff Brennan); *Jegley v. Picado*, 80 S.W.3d 332, 333 (Ark. 2002) (lead plaintiff Elena Picado).

<sup>442</sup> In addition, Gareth Henry's mother and Simone Edwards's daughter also received

attack.<sup>443</sup> Thus, although Sections 76, 77, and 79 of the Offences Against the Person Act (OAPA) did not criminalize lesbian activity, Edwards argued that it created a social environment generally hostile to lesbians and not just to gay men, resulting in the attack against her and forcing her to flee.<sup>444</sup> The Inter-American Commission held Jamaica's buggery laws responsible for the homophobic violence in society that prompted Edwards and Henry to seek asylum outside the country—violations of humane treatment and freedom of movement.<sup>445</sup>

While Edwards's complaint was pending before the Inter-American Commission, the lesbian Sri Lankan activist Rosanna Flamer-Caldera in 2018 submitted an individual complaint to the UN Committee on the Elimination of Discrimination against Women, arguing that Section 365A of the Sri Lanka Penal code violated the Convention on the Elimination of All Forms of Discrimination against Women.<sup>446</sup> It was the first solo complaint by a lesbian woman to an international tribunal challenging anti-sodomy laws.<sup>447</sup> Section 365A holds: "Any person who, in public or private, commits, or is a party to the commission of, or procures or attempts to procure the commission by any person of, any act of gross indecency with another person, shall be guilty of an offence."<sup>448</sup>

This is the "gross indecency" provision that originated with the United Kingdom's Labouchere Amendment of 1885.<sup>449</sup> Unlike most gross indecency provisions, but common with the provisions in approximately forty jurisdictions, the Sri Lanka provision is neutral with regard to gender, thus criminalizing female-female sexual conduct.<sup>450</sup> Initially, Section 365A criminalized male-male sexual conduct only.<sup>451</sup> But, in 1995, debate over decriminalization resulted in the Sri Lanka parliament expanding the statute to include lesbian sex rather than eliminating the statute altogether.<sup>452</sup>

Flamer-Caldera and her Human Dignity Trust legal team argued that Section 365A of the Sri Lankan penal code violated Articles 2(a), 2(c)–(g), 5(a), and 16 of

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asylum in Canada and the Netherlands, respectively. *Henry & Edwards v. Jamaica*, Case 13.637, Inter-Am. Comm'n H.R., Report No. 400/200, OEA/Ser.L/V/II, doc. 418 ¶ 15 (2020).

<sup>443</sup> *See id.* ¶ 16.

<sup>444</sup> *See id.* ¶ 48.

<sup>445</sup> *Id.* ¶ 88.

<sup>446</sup> *See Flamer-Caldera v. Sri Lanka*, Comm. on the Elimination of Discrimination Against Women Commc'n CEDAW/C/81/D/134/2018 (Mar. 24, 2022) ¶ 3.1.

<sup>447</sup> *A History of LGBT Criminalisation*, *supra* note 68.

<sup>448</sup> Penal Code § 365A (Sri Lanka).

<sup>449</sup> *1885 Labouchere Amendment*, UK PARLIAMENT, <https://www.parliament.uk/about/living-heritage/transformingsociety/private-lives/relationships/collections1/sexual-offences-act-1967/1885-labouchere-amendment/> [<https://perma.cc/BV9H-J76T>] (last visited Oct. 2, 2023).

<sup>450</sup> Penal Code § 365A (Sri Lanka).

<sup>451</sup> *Id.*

<sup>452</sup> *Id.*

CEDAW.<sup>453</sup> The CEDAW Committee permitted Professor Dianne Otto to intervene in the proceeding, where she argued that Section 365A violated Articles 7 and 15.<sup>454</sup>

Under CEDAW Article 2(a): “States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women.”<sup>455</sup> Articles 2(c)–(g) obligate states to establish judicial protection of women on an equal basis with men; to refrain from discrimination against women by state actors; to eliminate discrimination against women by *non*-state actors; to abolish laws that discriminate against women; to adopt laws that end discrimination against women; and to repeal criminal laws that discriminate against women.<sup>456</sup> Article 16 concerns the equal right to marry; the equal rights within marriage—including parental, labor, and property rights; and the equal right to dissolve marriage.<sup>457</sup>

Article 5—in many ways the heart of the complaint—reads:

States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.<sup>458</sup>

Additionally, Article 7(c) prohibits discrimination against women in engaging in political and public life—specifically obligating states to ensure that women have rights equal to men in participating in NGOs and political associations.<sup>459</sup> Article 15 mandates that women be granted equality with men under the law, including contract and property rights and in civil proceedings, as well as freedom of movement, residence, and domicile.<sup>460</sup>

The resolution of these lesbian plaintiff cases sets the stage for domestic and international courts, tribunals, and quasi-judicial mechanisms to take up the plight

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<sup>453</sup> See *Flamer-Caldera v. Sri Lanka*, Comm. on the Elimination of Discrimination Against Women Commc’n CEDAW/C/81/D/134/2018 (Mar. 24, 2022) ¶ 1 (noting the communication was submitted by Rosanna Flamer-Caldera, represented by counsel, the Human Dignity Trust; Christine Chinkin, of the London School of Economics; Karon Monaghan QC, of Matrix Chambers; Keina Yoshida, of Doughty Street Chambers; and Olivia Clark, of DLA Piper).

<sup>454</sup> *Id.* ¶ 7.3.

<sup>455</sup> Convention on the Elimination of All Forms of Discrimination Against Women art. 2, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).

<sup>456</sup> *Id.* art. 2(c)–(g).

<sup>457</sup> *Id.* art. 16.

<sup>458</sup> *Id.* art. 5.

<sup>459</sup> *Id.* art. 7(c).

<sup>460</sup> *Id.* art. 15.

of trans women. In one such case, Alexa Hoffmann, a trans activist, filed an individual complaint against Barbados with the Inter-American Commission on Human Rights in 2018.<sup>461</sup> The Inter-American Commission asked Barbados to respond in 2019.<sup>462</sup> However, as discussed above, the High Court of Barbados invalidated Barbados's anti-sodomy laws in December 2022 in Holder-McLean-Ramirez and Gill's challenge.<sup>463</sup> Whether Hoffmann's complaint to the Inter-American Commission is rendered moot by the High Court of Barbados's judgment in that case will depend on whether the Attorney General of Barbados, Dale Marshall, decides to appeal Justice Michelle Weekes's ruling.

### *G. The Future of Decriminalization in the Global South*

Since 1990, thirty-nine jurisdictions in the Global South have decriminalized sodomy; thirteen of those have done so via litigation.<sup>464</sup> Consider the implications of this research for decriminalization in the nearly seventy countries where homosexual sexual conduct remains prohibited. All of the sixty-six countries that retain sodomy prohibitions are located in the developing world: 59% (32 of 54) of African jurisdictions, 50% (6 of 12) of independent Commonwealth Caribbean jurisdictions, 50% (21 of 42) of Asian jurisdictions, and 43% (6 of 14) of Oceanic jurisdictions criminalize sodomy or "buggery."<sup>465</sup> By comparison, no European or North and South American jurisdiction (out of 80 total) retains criminal prohibitions on homosexual sex (though some retain partial prohibitions through discriminatory age of consent laws and through prohibitions on same-sex sexual conduct in police, security forces, and the military).<sup>466</sup>

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<sup>461</sup> See *Barbados: LGBT Activists to Fight Buggery Laws at IACHR*, TELESUR (June 5, 2018), <https://www.telesurenglish.net/news/Barbados-LGBT-Activists-to-Fight-Buggery-Laws-at-IACHR-20180605-0018.html> [<https://perma.cc/7NPS-7892>].

<sup>462</sup> *IACHR Reports on Outcomes of Its Work in 2019 and Presents Progress Report for the Third Year of the Strategic Plan 2017–2021*, OAS (Feb. 10, 2020), [https://www.oas.org/en/iachr/media\\_center/PReleases/2020/033.asp](https://www.oas.org/en/iachr/media_center/PReleases/2020/033.asp) [<https://perma.cc/F46B-8EZE>].

<sup>463</sup> See *Republic of Barbados Latest to Strike Down Buggery Laws*, ST. LUCIA STAR (Dec. 14, 2022), <https://stluciarstar.com/republic-of-barbados-latest-to-strike-down-buggery-laws/> [<https://perma.cc/2JUY-4WVW>].

<sup>464</sup> See *infra* Table 3.

<sup>465</sup> #Outlawed: "The Love That Dare Not Speak Its Name," HUM. RTS. WATCH, [http://internap.hrw.org/features/features/lgbt\\_laws/](http://internap.hrw.org/features/features/lgbt_laws/) [<https://perma.cc/CZ56-QGFL>] (last visited Oct. 2, 2023).

<sup>466</sup> 67 Countries Where Homosexuality Is Illegal, 76CRIMES, <https://76crimes.com/76-countries-where-homosexuality-is-illegal/> [<https://perma.cc/YGW8-BUFC>] (last updated Apr. 2023).

**Table 3. Decriminalization in the Global South, 1990s Through 2020s**

	Latin America	Asia Oceania	Africa	Commonwealth Caribbean
<b>1990s</b>	Paraguay (1990) <b>Ecuador (1997)</b> <sup>467</sup> Chile (1999)	N/A	Guinea Bissau (1993) <b>South Africa (1998)</b> <sup>468</sup>	Bahamas (1991) Bermuda (1994)
<b>2000s</b>	<b>Puerto Rico (2003)</b> <sup>469</sup> South Georgia & South Sandwich (2001)* Nicaragua (2008) Panama (2008)	Pitcairn Islands (2001)* <b>Fiji (2005)</b> <sup>470</sup> Marshall Islands (2005) <b>Nepal (2007)</b> <sup>471</sup> <b>India (2009)</b> <sup>472</sup>	Cape Verde (2004)	Anguilla (2001)* British Virgin Islands (2001)* Cayman Islands (2001)* Montserrat (2001)* Saint Helena, Ascension & Tristan de Cunha (2001)* Turks & Caicos (2001)*
<b>2010s</b>	N/A	Palau (2014) Nauru (2016) <b>India (2018)</b> <sup>473</sup>	Sao Tome & Principe (2012) Lesotho (2012) Mozambique (2015) Seychelles (2016) <b>Botswana (2019)</b> <sup>474</sup>	<b>Belize (2016)</b> <sup>475</sup> <b>Trinidad (2018)</b> <sup>476</sup>
<b>2020s</b>	N/A	Singapore (2022)	Gabon (2020) Angola (2021)	<b>Antigua (2022)</b> <sup>477</sup> <b>St. Kitts (2022)</b> <sup>478</sup> <b>Barbados (2023)</b> <sup>479</sup>

\*Decriminalized sodomy via the United Kingdom. The countries that appear in bold in the above Table decriminalized via litigation, as indicated in the corresponding footnotes.

Because the vast majority of jurisdictions that retain criminal prohibitions on adult consensual same sex activity are in Africa, the Commonwealth (or Anglophone) Caribbean, and in Muslim majority countries of the Middle East and West Asia, in my ongoing research I consider the importance of South-South transnational judicial dialogue and South-South transnational network linkages in fomenting decriminalization legal mobilization and as a factor in decriminalization outcomes, i.e., in judges' reasoning.

Additionally, in my research, I examine aspects of the legal opportunity structure<sup>480</sup> that constrain and enable legal mobilization. One aspect of the legal opportunity structure that arises in former colonies of the British Commonwealth is savings law clauses.<sup>481</sup> Savings law clauses are common throughout Commonwealth Caribbean constitutions.<sup>482</sup> These legal devices allow colonial-era statutes to remain in effect after the transition from colonial rule,<sup>483</sup> or they allow legislation to remain in place after the adoption of constitutional bills of rights or other constitutional provisions.<sup>484</sup>

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<sup>467</sup> ECUADOR CONST. (1998) ch. 2, art. 23; Constitutional Tribunal of Ecuador, Nov. 17, 1997, No. 111-97-TC, <https://www.icj.org/sogicasebook/case-no-111-97-tc-constitutional-tribunal-of-ecuador-27-november-1997/> [<https://perma.cc/4VWZ-VPX2>].

<sup>468</sup> *NCGLE* 1998 (12) BCLR 1517 (CC) (S. Afr.).

<sup>469</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>470</sup> *Nadan & McCoskar v. State*, (2005) F.J.H.C. 500 (Fiji).

<sup>471</sup> *Pant & Others v. Nepal Gov't*, Writ No. 917 of the year 2064 (BS) (2007 AD) (translation at 2 NAT'L JUD. ACAD. L.J. 261 (2008)).

<sup>472</sup> *Naz Found. v. Gov't of NCT of Delhi*, (2009) DLT 277 (India).

<sup>473</sup> *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321 (India).

<sup>474</sup> *Motshidiemang v. Att'y Gen.*, MAHGB-000591-16 (High Ct. 2010) (Bots.).

<sup>475</sup> *Orozco v. Att'y Gen.* (2016) 90 WIR 161 (Belize).

<sup>476</sup> *Jones v. Att'y Gen.*, Claim No. CV2017-00720 (High Ct. Just. 2018) (Trin. & Tobago), <https://www.humandignitytrust.org/wp-content/uploads/resources/Judgment-Jason-Jones-v-AG.pdf> [<https://perma.cc/3D6M-L2VK>].

<sup>477</sup> *David v. Att'y Gen.*, Claim No. ANUHCv2021/0042 (E. Caribbean Sup. Ct. 2022) (Ant. & Barb.), <https://www.eccourts.org/judgment/orden-david-et-al-v-the-attorney-general-of-antigua-and-barbuda> [<https://perma.cc/PKV5-K4HE>].

<sup>478</sup> *Jeffers v. Att'y Gen.*, Claim No. SKBHCV2021/0013 (E. Caribbean Sup. Ct. 2022) (St. Kitts & Nevis), <https://www.eccourts.org/judgment/jamal-jeffers-et-al-v-the-attorney-general-of-st-christopher-and-nevis> [<https://perma.cc/733E-N6VS>].

<sup>479</sup> *Holder-McClean-Ramirez v. Att'y Gen.*, No. CV-004 (High Ct. 2023) (Barb.), <https://www.humandignitytrust.org/wp-content/uploads/resources/RAMIREZ-final.pdf> [<https://perma.cc/Z2LT-3ABE>].

<sup>480</sup> For more on legal opportunity structures, see *supra* note 57.

<sup>481</sup> *Commonwealth Caribbean Constitutions and Savings Law Clauses*, DBW, <https://dbwlegal.com/constitutions-and-savings-law-clauses/> [<https://perma.cc/2SPC-9R7N>] (last visited Oct. 2, 2023).

<sup>482</sup> Burnham, *supra* note 433, at 249.

<sup>483</sup> *Id.* at 249–52.

<sup>484</sup> *Id.*; see also, e.g., Charter of Fundamental Rights and Freedoms (Constitutional

The challenge of sodomy decriminalization in jurisdictions governed by religious law deserves special mention. Examination of the Fiji High Court judgment in *Nadan & McCoskar*, in which the Court reconciles Article 38 of the Constitution (prohibition on sexual orientation discrimination) with Article 5 (“the people of the Fiji Islands acknowledge that worship and reverence of God are the source of good government and leadership”),<sup>485</sup> allows for comparison with decriminalization litigation and jurisprudence from the Commonwealth Caribbean and Oceania, where the Christian religion predominates, and in some cases, is institutionalized in the national constitution.<sup>486</sup>

A February 2021 Malaysia judgment—invalidating, on federal preclusion grounds, a state *shari’a* prohibition against sodomy (*liwat*) but leaving in place a harsher federal prohibition—allows for an exploration of sodomy prohibitions in majority-Muslim countries, particularly culturally pluralistic federalist states such as Malaysia and Nigeria, which have dual civil law–*shari’a* law court systems.<sup>487</sup>

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Amendment) Act (Act No. 12/2011) (Jam.), <https://jamaicansforjustice.org/download/the-charter-of-freedom-of-right-constitutional-amendment-act-2011/> [<https://perma.cc/54JC-8XA2>] (“Nothing contained in or done under the authority of any law in force immediately before the commencement of the Charter . . . relating to—(a) sexual offences; (b) obscene publications; or offences regarding the life of the unborn shall be held to be inconsistent with . . . the provisions of this Chapter.”).

<sup>485</sup> *Nadan & McCoskar v. State*, (2005) F.J.H.C. 500 ¶¶ 43, 46 (Fiji) (“It is also important to note that while Christianity underpins much of value in Fiji we are a secular State influenced by Christianity but not predominated by it.”); FIJI CONST. 1997 arts. 5, 38.

<sup>486</sup> The constitutions of Antigua & Barbuda, Barbados, Belize, Dominica, Grenada, St. Lucia, St. Vincent & the Grenadines, Trinidad and Tobago all “acknowledge the supremacy of God.” ANT. & BARB. CONST. 1981 pmbl. § (a); BARB. CONST. 1966 pmbl. § (a); BELIZE CONST. 1981 pmbl. § a; DOMINICA CONST. 1978 pmbl. § (a). In the case of Grenada, it “acknowledge[s] the fatherhood and supremacy of God.” GREN. CONST. 1973 pmbl. In the case of St. Lucia, it “affirm[s] their faith in the supremacy of the Almighty God.” ST. LUCIA CONST. 1978 pmbl. § a. In the case of St. Vincent & the Grenadines, it “affirm[s] that the Nation is founded on the belief in the supremacy of God.” ST. VINCENT CONST. 1979 pmbl. § (a). None of these constitutions formally establish or specify a preference for a particular religion or denomination, though, in practice, Christianity is the dominant religion in the Caribbean region. *Cf. Many Countries Favor Specific Religions, Officially or Unofficially*, PEW RSCH. CTR. (Oct. 3, 2017), <https://www.pewresearch.org/religion/2017/10/03/many-countries-favor-specific-religions-officially-or-unofficially/> [<https://perma.cc/J6T8-L2KK>] (classifying all Commonwealth Caribbean countries as preferring no religion).

<sup>487</sup> See Vincent Zhang, *Malaysia Federal Court Rules Anti-Sodomy Law Unconstitutional*, THE CARAVEL (Mar. 4, 2021), <https://www.thecaravelgu.com/blog/2021/3/4/malaysia-federal-court-rules-anti-sodomy-law-unconstitutional> [<https://perma.cc/R43C-V2YH>]; Ida Lim, *Federal Court Unanimously Declares Selangor Shariah Law Criminalising ‘Unnatural Sex’ Void, Unconstitutional*, MALAYMAIL (Feb. 25, 2021, 10:00 AM), <https://www.malaymail.com/news/malaysia/2021/02/25/federal-court-unanimously-declares-selangor-shariah-law-criminalising-unnat/1952701> [<https://perma.cc/SG24-6BPT>].

Malaysia retains Sections 377 and 377A in its Penal Code.<sup>488</sup> But in addition to the federal law, the Malaysian state of Selangor had, since 1995, prohibited “sexual intercourse against the order of nature” under Section 28 of Selangor’s Islamic *shari’a* penal code, which codifies the Islamic offense of *liwat* and only applies to Selangor Muslims.<sup>489</sup> In November 2019, however, a Selangor criminal defendant challenged his prosecution under Section 28 on the grounds that Selangor lacks the authority to make criminal law in this area, as that power lies within the exclusive jurisdiction of the federal legislature.<sup>490</sup> The anonymous defendant, represented by attorneys Datuk Malik Imtiaz Sarwar and Surendra Ananth, also argued that Section 28 violated his individual constitutional rights—individual dignity, the right to self-determination, and the right to privacy under Article 5(1) (right to life and personal liberty) and Article 8 (equality before the law and equal protection of the law).<sup>491</sup>

Nine judges of the Federal Court unanimously invalidated Section 28 on federal preclusion grounds (analogous to federal preemption in U.S. law) without addressing the individual rights claims.<sup>492</sup> However, Chief Judge of Malaya Tan Sri Azahar Mohamed, in an opinion joined by the other eight judges, argued that Section 28 could not stand because it would entail a discriminatory result against *non*-Muslims, who are subject to a harsher penalty than Muslims were subject to under the dual regimes.<sup>493</sup> In the instant case, the anonymous defendant was arrested and prosecuted alongside four non-Muslims.<sup>494</sup> The ironic result of invalidating Section 28 is that Selangor’s gay Muslims are now only subject to the harsher regime, but because federal law enforcement rarely, if ever, arrests and prosecutes alleged violators of Sections 377 and 377A, LGBTQ+ communities are celebrating the Selangor case outcome.<sup>495</sup>

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<sup>488</sup> *Malaysia*, HUM. DIGNITY TR., <https://www.humandignitytrust.org/country-profile/malaysia/> [https://perma.cc/GBZ2-JEM6] (last visited Oct. 2, 2023).

<sup>489</sup> Syariah Crim. Offenses Enactment 1995 § 28 (Malay.).

<sup>490</sup> *Iki Putra Mubarrak v. Kerajaan Negeri Selangor & Majlis Agama Islam Selangor*, (2021) 3 M.L.R.A. 384 ¶¶ 3–4.

<sup>491</sup> *Id.* ¶ 30.

<sup>492</sup> Ida Lim, *After Landmark Ruling on Selangor ‘Unnatural Sex’ Offence, Lawyers Say Now Clear Parliament Has Primacy*, YAHOO NEWS (Feb. 24, 2021), <https://malaysia.news.yahoo.com/landmark-ruling-selangor-unnatural-sex-044741058.html> [https://perma.cc/52ZY-T659].

<sup>493</sup> *Id.* (discussing penalties of up to twenty years imprisonment or fine or whipping under Section 377 versus up to three years imprisonment, up to RM5,000 fine, or whipping up to six strokes under Section 28).

<sup>494</sup> See Neela Ghoshal, *Malaysia’s Highest Court Strikes Down State Gay Sex Ban*, HUM. RTS. WATCH (Feb. 25, 2021, 5:20 PM), <https://www.hrw.org/news/2021/02/25/malaysias-highest-court-strikes-down-state-gay-sex-ban> [https://perma.cc/HC8R-33KT].

<sup>495</sup> *Cf. id.* (noting that the state religious officials persecute LGBT people while federal police rarely enforce the federal laws); *The Federal Court Decision on Selangor’s Section 28 Upholds Constitutional Protection for All*, QUEER LAPIS (Feb. 25, 2021) (quoting activists and members of civil society who view the outcome as “very exciting,” “absolutely

On the other hand, it would be irresponsible not to acknowledge that sodomy decriminalization legal mobilization does not guarantee the decriminalization of homosexual sexual conduct—neither in court nor even following a favorable judgment. In May of 2019, in *EG & 7 Others*,<sup>496</sup> a three-judge bench of the High Court of Kenya unanimously rejected petitioners' challenge to Kenya's sodomy and homosexual sexual conduct prohibitions. The petitioners, led by LGBTQ rights activist Eric Gitari, made constitutional rights claims grounded in equality and non-discrimination, human dignity, freedom and security of the person, privacy, the right to health, and the principle of legality (a procedural due process claim of vagueness).<sup>497</sup>

The High Court upheld the constitutionality of Kenya's anti-sodomy statute even though the High Court had issued a pro-LGBTQ+ ruling in Gitari's previous effort to register his organization in 2015.<sup>498</sup> In 2018, a Court of Appeal had invalidated police use of anal examinations of gay men prosecuted for sodomy.<sup>499</sup> Even here, the comparative methodology was central. Interestingly, Gitari and his co-petitioners urged the Court to consider the *Yogyakarta Principles* and the global trend of decriminalization in former British colonies, and to follow the comparative law methodology of the Indian Supreme Court in *Navtej Singh Johar*.<sup>500</sup> On the other hand, the Attorney General urged the Court to ignore comparative jurisprudence, and, in the end, the Court eschewed the fairly robust jurisprudence favoring decriminalization from the European Court of Human Rights and from Asian and Central American courts.<sup>501</sup> But, the High Court referred to social security, trust and estates, and customary law of inheritance case law from the European Court of Human Rights,<sup>502</sup> the South African Constitutional Court,<sup>503</sup> and the High Court of Botswana<sup>504</sup> for the idea that the Constitution only prohibits unfair discrimination or differentiation that

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empowering," and "an ounce of justice"), <https://www.queerlapis.com/the-federal-court-decision-on-selangor-section-28-upholds-constitutional-protection-for-all/> [<https://perma.cc/3TLM-VBFN>]; *Malaysia*, *supra* note 488 (referring to the Selangor case outcome as "landmark" and "monumental").

<sup>496</sup> See *EG & 7 Others v. Att'y Gen.*, (2019) K.L.R. ¶¶ 405–08 (H.C.K.) (Kenya).

<sup>497</sup> See *id.* ¶ 59.

<sup>498</sup> See *Gitari v. Non-Governmental Organisations Co-ordination Board & 4 Others*, (2015) K.L.R. ¶¶ 136–37, 142, 145–48 (H.C.K.) (Kenya).

<sup>499</sup> *Kenya: Court Finds Forced Anal Exams Unconstitutional*, HUM. RTS. WATCH (Mar. 22, 2018, 3:04 PM), <https://www.hrw.org/news/2018/03/22/kenya-court-finds-forced-anal-exams-unconstitutional> [<https://perma.cc/H2KQ-KUYT>].

<sup>500</sup> See *EG & 7 Others*, K.L.R. ¶¶ 137, 229 (citing *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321 (India)).

<sup>501</sup> See *id.* ¶ 398.

<sup>502</sup> See *Willis v. United Kingdom*, App. No. 36042/97 (June 11, 2002), [https://www.equalrightstrust.org/ertdocumentbank/Microsoft%20Word%20-%20Willis%20v%20UK%20-health\\_.pdf](https://www.equalrightstrust.org/ertdocumentbank/Microsoft%20Word%20-%20Willis%20v%20UK%20-health_.pdf) [<https://perma.cc/CFH5-T3WK>].

<sup>503</sup> See *Harksen v. Lane* NO 1998 (1) SA 300 (CC) (S. Afr.).

<sup>504</sup> See *Mmusi v. Ramantele*, Case No. MAHLB-00088836-10 (High Ct. 2012) (Bots.).

is demeaning; where there is a legitimate reason for differentiation, it is not demeaning. The Kenyan High Court thus demonstrated the prevalence of comparative constitutional law methodology, and thus transnational, judicial dialogue. Ironically, the cases referenced all involved findings of unfair, unreasonable, or illegitimate discrimination on the basis of sex or gender.

That said, I must also emphasize that legal mobilization can be fruitful, especially when part of a multipronged approach that includes legislative lobbying and grassroots mobilization. The case of Malaysia's neighbor, Singapore, is instructive. The first Singapore decriminalization challenge filed in 2010, *Tan Eng Hong v. Attorney-General*, resulted from the prosecution, conviction, and appeal by a Singaporean man arrested for having oral sex in a public bathroom.<sup>505</sup> The second case, filed in 2012, was initiated by a same-sex couple, Lim Meng Suang and Kenneth Chee Mun-Leon.<sup>506</sup> Justice Quentin Loh of the Singapore High Court rejected both constitutional challenges in 2013.<sup>507</sup> Lim and Chee appealed Loh's judgment and obtained the assistance of Peter Goldsmith of the Human Dignity Trust legal panel.<sup>508</sup> Tan likewise appealed Loh's ruling.<sup>509</sup> They argued that Section 377A violated their constitutional rights to life and personal liberty and equality before the law and equal protection of the law.<sup>510</sup> The Singapore Court of Appeal consolidated the two cases, and in 2014, held that Section 377A was consistent with Singapore's Constitution.<sup>511</sup> The court rejected arguments that Section 377A was meant to criminalize male prostitution and only prohibited non-penetrative sex, holding instead that it criminalized private, non-commercial, penetrative sex.<sup>512</sup>

Three subsequent challenges to Section 377A were consolidated and decided by the High Court in March 2020. Inspired by decriminalization in India in 2018, a celebrity disc jockey named Ong Ming Johnson, an LGBT rights activist named Choon Chee Hong of the organization Oogachaga, and a retired physician and longtime activist named Dr. Tan Seng Kee each filed challenges to Section 377A, alleging violations of their rights to life and personal liberty, equality before the law and equal protection of the law, and freedom of expression under Articles 9, 12, and

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<sup>505</sup> See generally *Tan Eng Hong v. Att'y Gen.*, (2011) S.G.H.C. 56 (Sing.).

<sup>506</sup> *Singapore: Two Separate Cases Before the Court of Appeals*, HUM. DIGNITY TR., <https://www.humandignitytrust.org/what-we-do/cases/singapore-two-separate-cases-before-the-court-of-appeal/> [<https://perma.cc/EW7E-U28P>] (last visited Oct. 2, 2023).

<sup>507</sup> Kelly Ng, *Apex Court Rejects Constitutional Challenges Against Section 377A*, TODAY (Oct. 30, 2014), <https://www.todayonline.com/singapore/apex-court-rejects-constitutional-challenges-against-section-377a> [<https://perma.cc/4M8Q-7ZWQ>].

<sup>508</sup> See generally *Lim Meng Suang v. Att'y Gen.*, (2014) S.G.C.A. 53 (Sing.); *Re Lord Goldsmith Peter Henry PC QC*, (2013) S.G.H.C. 181 (Sing.).

<sup>509</sup> *Singapore: Two Separate Cases Before the Court of Appeals*, *supra* note 506.

<sup>510</sup> See *Lim Meng Suang*, S.G.C.A. 53 ¶ 2 (raising claims under Articles 9 and 12).

<sup>511</sup> See *id.* ¶¶ 181, 185.

<sup>512</sup> See *id.* ¶¶ 131–32, 136–37.

14 of the Singapore Constitution.<sup>513</sup> The High Court considered itself bound by the holdings of the Court of Appeal in the *Tan Eng Hong* and *Lim Meng Suang* cases despite the availability of new historical evidence.<sup>514</sup> The High Court also held that there was no scientific consensus on whether homosexuality was biologically based.<sup>515</sup> And the High Court held that, Article 14, which guarantees “freedom of speech and expression,” did not protect same-sex sexual conduct. The court reasoned that, given that the marginal note contained no indication that the inclusion of the term “expression” was to mean something different than speech, Article 14(1)(a) was to be interpreted as protecting verbal communication rather than such nonverbal conduct as sexual conduct.<sup>516</sup> The Court of Appeal upheld the High Court on this claim.<sup>517</sup>

On August 21, 2022, however, Singapore Prime Minister Lee Hsien Loong announced the government’s plan to repeal Section 377A of the Criminal Code, which criminalized “gross indecency” between males.<sup>518</sup> The Prime Minister was informed that inevitably the courts would strike down Section 377A.<sup>519</sup> Parliament acted expeditiously to implement the Prime Minister’s directive.<sup>520</sup> In October 2022,

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<sup>513</sup> See Heather Cassell, *Out in the World: Singapore High Court Rules to Keep Law Criminalizing Gays*, BAY AREA REP. (Mar. 2, 2022), [https://www.ebar.com/story.php?ch=n&sc=w&sc2=n&sc3=&id=313504&out...world:\\_singapore\\_high\\_court\\_rules\\_to\\_keep\\_law\\_criminalizing\\_gays\\_](https://www.ebar.com/story.php?ch=n&sc=w&sc2=n&sc3=&id=313504&out...world:_singapore_high_court_rules_to_keep_law_criminalizing_gays_) [https://perma.cc/GDH7-9LAJ].

<sup>514</sup> See *Tan Seng Kee v. Att’y Gen.*, (2022) S.G.C.A. 16 ¶ 18 (Sing.).

<sup>515</sup> *Id.* ¶¶ 42–43.

<sup>516</sup> *Ong Ming Johnson v. Att’y Gen.*, (2020) S.G.H.C. 63 ¶¶ 249, 255 (Sing.), <https://globalfreedomofexpression.columbia.edu/cases/ong-ming-johnson-v-attorney-general/> [https://perma.cc/FV62-W7U4] (last visited Oct. 2, 2023).

<sup>517</sup> See *Tan Seng Kee*, S.G.C.A. 16 ¶ 279–85.

<sup>518</sup> See Tessa Wong, *377A: Singapore to End Ban on Gay Sex*, BBC NEWS (Aug. 22, 2022), <https://www.bbc.com/news/world-asia-62545577> [https://perma.cc/R25L-8CTJ]; Rebecca Ratcliffe, *Singapore to Repeal Law That Criminalises Sex Between Men*, THE GUARDIAN (Aug. 21, 2022, 12:23 PM), <https://www.theguardian.com/world/2022/aug/21/singapore-to-repeal-law-that-criminalises-sex-between-men> [https://perma.cc/P8RB-T8S9]; Joshua Boscaini, *Singapore’s LGBT Community Welcomes Move to Repeal ‘Suffocating’ Law Banning Sex Between Men*, ABC NEWS (Aug. 25, 2022, 8:41 PM), <https://www.abc.net.au/news/2022-08-26/singapore-repeals-section-377a-anti-sex-between-men-law/101360236> [https://perma.cc/S7AE-GBHG].

<sup>519</sup> Mr. K. Shanmugam, Minister for Home Affairs and Minister for Law, Second Reading of Penal Code (Amendment) Bill (Nov. 28, 2022) [hereinafter Shanmugam Speech], <https://www.mha.gov.sg/mediaroom/parliamentary/second-reading-of-penal-code-amendment-bill/> [https://perma.cc/U3TK-HJCY].

<sup>520</sup> See Chen Lin, *Singapore Repeals Gay Sex Ban but Limits Prospect of Legalising Same-Sex Marriage*, REUTERS (Nov. 29, 2022, 6:13 AM), <https://www.reuters.com/world/asia-pacific/singapore-repeals-gay-sex-ban-limits-prospect-legalising-same-sex-marriage-2022-11-29/> [https://perma.cc/4Q6N-FEQH].

Law and Home Affairs Minister K. Shanmugam tabled the gay law reform bill.<sup>521</sup> In November 2022, ninety-three of ninety-six parliamentarians voted to pass the bill.<sup>522</sup>

Gay law reform in Singapore involved a compromise with conservative forces in society. In addition to repealing Section 377A, the new law amended the Constitution of Singapore to define marriage as the union between one man and one woman.<sup>523</sup> This development reflects the phenomena of backlash and retrenchment that is in evidence elsewhere—the so-called globalization of the culture wars. Defenders of the status quo and proponents of a return to the status quo *ante* (e.g., criminalization of sodomy, restriction of marriage to opposite- or different-sex couples), can and do export the so-called U.S. culture wars to other sites,<sup>524</sup> but it is

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<sup>521</sup> Dewey Sim, *Singapore Tables Bills to Repeal Section 377A, Preserve Status Quo on Marriage*, THIS WEEK IN ASIA (Oct. 20, 2022, 3:04 PM), <https://www.scmp.com/week-asia/politics/article/3196598/singapore-tables-bills-repeal-section-377a-preserve-status-quo-marriage> [<https://perma.cc/G8NP-V4XS>]; see also Ng Wei Kai, *Repealing 377A Is Right Thing to Do; Duty of MPs, Not Courts, to Act on the Law: Shanmugam*, THE STRAITS TIMES (Nov. 28, 2022, 2:58 PM), <https://www.straitstimes.com/singapore/politics/repealing-377a-is-the-right-thing-to-do-mps-duty-to-act-on-the-law-and-not-the-courts-shanmugam> [<https://perma.cc/Y4Y2-A4V3>] (summarizing Shanmugam's November 28, 2022 speech in support of the gay law reform bill); Shanmugam Speech, *supra* note 519.

<sup>522</sup> Tessa Wong, *377A Repeal: Singapore Turns Page on Dark LGBT History*, BBC (Dec. 4, 2022), <https://www.bbc.com/news/world-asia-63832825> [<https://perma.cc/RW9J-H5NL>]; Goh Yah Han, *Parliament Repeals Section 377A, Endorses Amendments Protecting Definition of Marriage*, THE STRAITS TIMES (Nov. 29, 2022, 6:16 PM), <https://www.straitstimes.com/singapore/politics/parliament-repeals-section-377a-endorses-amendments-protecting-marriage-definition> [<https://perma.cc/84YT-S3J7%5D>].

<sup>523</sup> See Tessa Wong, *377A: Gay Marriage Looms as New Frontline in Singapore Battle for LGBT Rights*, BBC (Aug. 23, 2022), <https://www.bbc.com/news/world-asia-62628494> [<https://perma.cc/48EH-2X5Y>]; Philip Heijmans, *Singapore Repeals Ban on Sex Between Men in a Cautious Step*, BLOOMBERG (Nov. 29, 2022, 9:09 PM), <https://www.bloomberg.com/news/articles/2022-11-29/singapore-parliament-repeals-colonial-era-ban-on-sex-between-men> [<https://perma.cc/M5T7-NTGV>]; Sebastien Strangio, *Singapore Repeals Archaic Law Criminalizing Sex Between Men*, THE DIPLOMAT (Nov. 30, 2022), <https://thediplomat.com/2022/11/singapore-repeals-archaic-law-criminalizing-sex-between-men/> [<https://perma.cc/B6FU-TLYR%5D>].

<sup>524</sup> See generally KAPYA KAOMA, *GLOBALIZING THE CULTURE WARS: U.S. CONSERVATIVES, AFRICAN CHURCHES, AND HOMOPHOBIA* (2009); KAPYA JOHN KAOMA, *COLONIZING AFRICAN VALUES: HOW THE U.S. CHRISTIAN RIGHT IS TRANSFORMING SEXUAL POLITICS IN AFRICA* (2012); Jeff Sharlet, *Straight Man's Burden: The American Roots of Uganda's Anti-Gay Persecutions*, HARPER'S MAG., Sept. 2010, at 36; John Anderson, *Conservative Christianity, the Global South and the Battle over Sexual Orientation*, 32 THIRD WORLD Q. 1589 (2011); Kristen Cheney, *Locating Neocolonialism, "Tradition," and Human Rights in Uganda's "Gay Death Penalty,"* 55 AFR. STUD. REV. 77 (2012); Rebecca Sanders, *Norm Proxy War and Resistance Through Outsourcing: The Dynamics of Transnational Human Rights Contestation*, 17 HUM. RTS. REV. 165 (2016); Adriaan van Klinken, *Culture Wars*,

also possible to spread conservative legal reasoning through transnational judicial dialogue and in the persons of particular judges moving from one location and role to other locations and roles.

### CONCLUSION

In this Article, I have argued that legal mobilization resulting in judicialized decriminalization of adult consensual same-sex sexual conduct has also resulted in a robust and innovative jurisprudence on the rights that criminal defendants and activists have claimed and that judges have ratified. The jurisprudential output of this transnational community has been startling, if not revolutionary.

Privacy and equality were the twin prongs of decriminalization challenges from the 1960s through the 1990s when European and North American activist litigants were the main norm entrepreneurs.<sup>525</sup> The norm entrepreneurs of the Global South, who are on the frontlines of norm generation, norm diffusion, and norm internalization efforts in the twenty-first century, have made many substantive doctrinal innovations through their activism.

Examples include *NCGLE* and *Sunil Babu Pant* expanding the scope and viability of human dignity arguments in South Africa and Nepal (notably on third gender or *metis* rights in the Nepal case);<sup>526</sup> *Anand Grover and Naz Foundation* in India expanding the scope of the right to life and the right to health;<sup>527</sup> *Caleb Orozco* and the *Navtej Singh Johar* plaintiffs advancing freedom of expression claims in Belize and India;<sup>528</sup> and lesbian plaintiffs *Simone Edwards and Rosanna Flamer-Caldera* advancing the scope of the right to freedom of movement and the right to humane treatment.<sup>529</sup>

This study, and like-minded studies adopting a transnational jurisprudence and comparative constitutional law lens, has significant implications for activists' strategic decision-making. This historical and comparative study might aid the work

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*Race, and Sexuality: A Nascent Pan-African LGBT Affirming Christian Movement and the Future of Christianity*, 5 J. AFR. RELIGIONS 217 (2017).

<sup>525</sup> Cf. Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 896–99 (1998) (conceptualizing “norm entrepreneurs”).

<sup>526</sup> See *Pant & Others v. Nepal*, Writ No. 917 of the year 2064 BS (2007 AD) (translation available in 2 NAT'L JUD. ACAD. L.J. 261–86 (2008)).

<sup>527</sup> See *Naz Found. v. Gov't of NCT of Delhi*, (2009) DLT 277 (India).

<sup>528</sup> See generally *Orozco v. Att'y Gen.* (2016) 90 WIR 161 (Belize); *Navtej Singh Johar v. Union of India*, AIR 2018 SC 4321 (India).

<sup>529</sup> See generally *Henry & Edwards v. Jamaica*, Case 13.637, Inter-Am. Comm'n H.R., Report No. 400/200, OEA/Ser.L/V/II, doc. 418 (2020); *Flamer-Caldera v. Sri Lanka*, Comm. on the Elimination of Discrimination Against Women Commc'n CEDAW/C/81/D/134/2018 (Mar. 24, 2022).

that remains for aggrieved individuals and groups—for activists, social movement organizations, cause lawyers, human rights NGOs, and state and non-state allies—in the Global South. In the former British colonies of Africa and the anglophone Caribbean, aggrieved individuals, groups, and cause lawyers face relatively open legal opportunity structures, with common law legal systems, bills of rights, domestic access to judicial review, and access to transnational human rights mechanisms. Less promising political, legal, and discursive opportunity structures face most aggrieved individuals, groups, and cause lawyers in Islamic *shari'a* law countries in Asia and North Africa.

Decriminalization of same-sex sexual conduct is, in and of itself, an important goal for self-identifying gay, lesbian, bisexual, trans, nonbinary, and intersex people. Decriminalization is also important for strategic mobilization reasons relevant to wider LGBTQ communities. On the one hand, criminalizing same-sex sexual conduct chills sexual expression. It limits personal growth as well as bodily autonomy. In this way, decriminalization is not just important for LGBTQ communities but for all human beings. For example, some people who do not identify as gay, lesbian, or bisexual but who are trans, nonbinary, intersex, men who have sex with men (MSM), or women who have sex with women (WSW) might engage in behaviors that fall within law enforcement's interpretation of the criminal statutes. More broadly are slippery-slope considerations that are not at all fanciful but present in the historical record—criminalization of oral and anal sex and other non-penile-vaginal sex acts regardless of the sex of the participants, criminalization of group sex, and criminalization of sexual relations between people of different races or nationalities. On the other hand, criminalization works to justify other limitations on LGBTQ human rights. For example, the existence of a domestic law prohibiting same-sex sexual conduct may provide a spurious justification for an administrative agency's refusal to register LGBTQ support groups and rights groups. This has been a familiar pattern in decriminalization cases, notably in Kenya and Uganda.<sup>530</sup>

A transnational and comparative constitutional law lens might be central to future LGBTIQ+ activism in the United States. In *Dobbs v. Jackson Women's Health Organization* in 2022,<sup>531</sup> six justices on the Supreme Court voted to overturn

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<sup>530</sup> See, e.g., *Att'y Gen. v. Thuto Rammoge*, CACGB-128-14 (Ct. App. 2016) (Bots.); *Gitari v. Non-Governmental Organisations Co-ordination Board & 4 Others*, (2015) K.L.R. (H.C.K.) (Kenya). The Uganda Registration Services Bureau and Ugandan courts have prevented the preeminent LGBTI organization in Uganda, Sexual Minorities Uganda (SMUG), from registering. In August 2022, the National Bureau of Non-Governmental Organizations (NGO Bureau) closed SMUG. See *Uganda: Enable Sexual Minorities Uganda to Operate and Protect LGBTI Rights*, AMNESTY INT'L (Aug. 29, 2022), <https://www.amnesty.org/en/documents/afr59/5951/2022/en/> [<https://perma.cc/7MQ7-ELDW>]; see also J. Oloka-Onyango, *Debating Love, Human Rights and Identity Politics in East Africa: The Case of Uganda and Kenya*, 15 AFR. HUM. RTS. L.J. 28, 48–49, 53–57 (2015).

<sup>531</sup> See generally *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2279 (2022).

the landmark *Roe v. Wade* decision, limiting the United States' ability to restrict access to abortion. In a concurring opinion long in the making, Justice Clarence Thomas essentially invited reactionary and regressive forces in society to bring U.S. Supreme Court cases that could overturn *Griswold v. Connecticut*, which announced the constitutional right to privacy grounded in substantive due process.<sup>532</sup> *Roe*, as I discussed above, is based on the privacy right announced in *Griswold*. If the U.S. Supreme Court overturns *Griswold*, not only the right to contraception will fall, but the right to privacy itself likely will fall, and thus also *Griswold*'s progeny in the LGBTQ rights space—*Lawrence v. Texas* and *Obergefell v. Hodges*.

A consequence of the historical, comparative, and transnational survey that I undertake in this Article is to reveal the many other legal bases that have been advanced, successfully and unsuccessfully, in justification of the decriminalization of homosexual sexual conduct—from equality and human dignity to the right to health, freedom of expression, the right to humane treatment, and freedom of movement—that must be part of any efforts to save sexual freedom from the gauntlet laid down by Justice Clarence Thomas.<sup>533</sup> These rights show the fiction in a conception of many constitutional and human rights as “negative rights,” and a concern for the policy implications of anti-sodomy laws that would, on the surface, appear to have very little to do with the right to health or freedom of movement. Consequently, activists, cause lawyers, and their allies should begin the work of upholding *Griswold*, *Lawrence*, and *Obergefell* by exploring not only U.S. domestic jurisprudence, but also *transnational* jurisprudence in international human rights law and comparative constitutional law to support the continued legalization of adult, consensual, same-sex sexual conduct, and same-sex marriage.

I end, then, with former Chief Justice of the U.S. Supreme Court William Rehnquist, who dissented in *Lawrence*, but who had said in 1989 words that still ring true three decades hence:

When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process. The United

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<sup>532</sup> *Id.* at 2301 (Thomas, J. concurring) (“[I]n future cases, we should reconsider all of this Court’s substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*.”).

<sup>533</sup> *Cf. generally* James D. Wilets, *Pressure from Abroad: U.N. Human Rights Ruling Strengthens Hopes for U.S. Gays and Lesbians*, 21 HUM. RTS. 22 (1994); Elizabeth McDavid Harris, *Intercourse Against Nature: The Role of the Covenant on Civil and Political Rights and the Repeal of Sodomy Laws in the United States*, 18 HOUS. J. INT’L L. 525 (1996).

States courts, and legal scholarship in our country generally, have been somewhat laggard in relying on comparative law and decisions of other countries. But I predict that with so many thriving constitutional courts in the world today . . . that approach will be changed in the near future.<sup>534</sup>

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<sup>534</sup> William Rehnquist, *Constitutional Courts: Comparative Remarks*, in *GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993).