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STATE REGULATION OF SEXUALITY IN INTERNATIONAL HUMAN RIGHTS LAW AND THEORY

AARON XAVIER FELLMETH*

ABSTRACT

In Part I, this Article presents the first published, worldwide survey of international practice in interpreting and applying various international human rights norms to the issue of sexual freedom, with a special emphasis on the rights to privacy, family life, and freedom from arbitrary discrimination based on sexual orientation. Although progress toward general recognition of such rights by international authorities and states has been extremely rapid over a very short period, such recognition continues to vary geographically and according to the subject matter. For example, some rights, such as the right to consensual, adult, private intercourse have achieved more widespread recognition than others, such as equal rights to nondiscrimination in employment or equal access to marriage. The respective roles of legislative and judicial reforms in these developments are explored in this part as well. In Part II, the Article analyzes the rationales adopted by state elites for accepting or denying equal rights to sexual minorities and discerns a trend toward a complex approach of sometimes applying libertarian theories of human rights law, sometimes applying increasingly nuanced nondiscrimination norms, and sometimes using both approaches at once. Countervailing pressures, especially widespread

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religious opposition to the recognition of equal human rights, as well as the problems of using libertarian theories, are explored. The Article further discusses the limits of the role that international human rights law has played in the evolution of state practice on this subject and explains how international human rights law is balanced unstably between the incomplete application of human rights to sexual minorities and the disadvantages of logical and theoretical inconsistency in human rights doctrine. It concludes by observing how the case of evolving human rights in this field illustrates the potential power of ideational norms in shaping state expectations and behavior.

TABLE OF CONTENTS

I. THE TROUBLED RELATIONSHIP BETWEEN SEXUALITY AND HUMAN RIGHTS LAW	800
A. <i>Decriminalization of Unconventional Sexual Behavior</i>	814
B. <i>Nondiscrimination</i>	825
1. <i>Comprehensive Prohibitions</i>	825
2. <i>Limited Prohibitions</i>	835
3. <i>Military Service</i>	841
4. <i>Protection Against Persecution</i>	843
C. <i>Moves Toward Family Law Rights</i>	847
1. <i>Same-Sex Marriage</i>	847
2. <i>Equal Parental Rights</i>	864
II. INTERNATIONAL HUMAN RIGHTS THEORY AND SEXUALITY	873
A. <i>Sexual Minority Group Discrimination Theories</i>	875
B. <i>Legal Moralism, the Harm Principle, and Privacy</i>	890
1. <i>The Harm Principle in State Practice</i>	890
2. <i>Social Benefits of Punishing Immorality</i>	906
3. <i>Sexuality, Religion, and Human Rights</i>	911
C. <i>Intimate Exceptionalism and Opinio Iuris</i>	920
CONCLUSIONS	930

I. THE TROUBLED RELATIONSHIP BETWEEN SEXUALITY AND HUMAN RIGHTS LAW

A large part of the international community continues to deny many of the protections of human rights law to homosexuals, bisexuals, and other sexual minorities. Few states do so in the conviction that sexual minorities lack the same basic human needs as everyone else. Nor, if they are forthright, do states deny them human rights because they believe sexual minorities undermine national security, economic prosperity, or other legitimate state interests. Nor yet do they do so because sexual minorities infringe on the human rights of others by their intimate personal choices and conduct. They do so primarily because political elites or their constituents, or both, are offended by unconventional sexuality for cultural and religious reasons.

It may seem strange that most of the world's states systematically deny millions of individuals equal treatment and vigorously force them into the position of an underclass, causing them humiliation and material disadvantage in life, because of preferences so minutely affecting anyone but themselves. Unraveling the mystery of how so many states have arrived at the conclusion that the perceived evils caused by the unconventional sexuality of a few outweigh that minority's fundamental human rights to freedom of conscience and speech, public and intimate association, privacy, and family life teaches much about the underlying theories of international human rights law that states practice within their own borders. Additionally, a close view of the conflict between majority prejudices and minority claims for equal rights in this case offers lessons about how states cope with opposition in their internal power structures against evolving norms of the international community.

Part of the explanation may be implicit in the rationales offered by the states that have recently reversed longstanding positions on the human rights of sexual minorities. The acceptance within the international community that some, if not all, international human rights laws should protect sexual minorities specifically, and unconventional sexual practices generally, is both recent and

radical. While the decriminalization of homosexual intercourse spread throughout most of western Europe in the nineteenth century, it remained widely illegal elsewhere until the end of the twentieth century. Most laws taking the further step of prohibiting discrimination against sexual minorities and recognizing equal rights to family life date back less than twenty years almost everywhere they have been adopted. Why, then, the sudden change of attitude? Does it merely reflect changing social perceptions of sexual minorities in some geographical regions? If so, are international human rights sufficiently flexible to accommodate the sacrifice of minority group interests in every case of majority disapproval, so long as that disapproval is framed in moral or cultural terms? Or is international law evolving toward requiring principled limitations on lawmaking by states whenever their laws and policies threaten human rights? If so, are sexuality and intimacy treated differently, and should they be treated differently, than other human interests? A study of the rapid expansion of human rights to sexual minorities in the international community offers important insights into the answers to these questions.

This study is complicated by the lack of specificity on sexual matters in the major international human rights instruments. Far from offering clear guidance on the content of human rights law relating to sexuality, these documents merely state general norms of personal and familial privacy and free association intended to protect individuals from arbitrary government intrusion into intimate relations. Most of these instruments include express guarantees of freedom of association,¹ rights against arbitrary or unlawful interference with privacy,² and protection of family life

1. See, e.g., African Charter on Human and Peoples' Freedoms, OAU Doc. CAB/LEG/67/3 rev. 5, art. 10(1), 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986 [hereinafter African Charter]; International Covenant on Civil and Political Rights art. 22(1), *opened for signature* Dec. 9, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention for the Protection of Human Rights and Fundamental Freedoms art. 11, *opened for signature* Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter ECHR]; Universal Declaration of Human Rights, G.A. Res. 217 A(III), art. 20(1), U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR]; Charter of Fundamental Rights and Freedoms of the European Union art. 12(1), 2000 O.J. (C 364) 1 [hereinafter European Charter].

2. See, e.g., American Convention on Human Rights art. 11, *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter ACHR]; ICCPR, *supra* note 1, art. 17; ECHR, *supra* note 1, art. 8; UDHR, *supra* note 1, art. 12; American Declaration of the Rights and Duties

and the right to marry.³ In this context, the right to privacy is usually construed not merely as the freedom to maintain secrecy, but as freedom of intimate conduct, association, and expression without fear of arbitrary state interference.⁴ These rights have

of Man art. V, O.A.S. Res. XXX, May 2, 1948, *translated in* INTER-AMERICAN COMM'N ON HUMAN RIGHTS, ORG. OF AM. STATES, HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS (1979) [hereinafter American Declaration]; European Charter, *supra* note 1, art. 7. In a 1989 advisory opinion, the Inter-American Court of Human Rights held that the American Declaration could be "a source of international obligation." *See Interpretation of the American Declaration*, Inter-Am. Ct. H.R. (ser. A), No. 10, para. 45 (July 14, 1989).

The African Charter does not clearly specify a right to privacy. It does, however, provide: "Human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right." African Charter, *supra* note 1, art. 4.

Unlike the European Court of Human Rights (ECtHR), which has interpreted Article 8 of the ECHR very broadly to encompass a general right to freedom from state interference in one's private life, the U.N. Human Rights Committee has tended to interpret the right to privacy guaranteed by ICCPR Article 17 in the very narrow sense of the right to secrecy of information. *See* U.N. Hum. Rts. Comm., General Comment No. 16: The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art. 17), ¶¶ 7, 10 (Apr. 8, 1988).

3. African Charter, *supra* note 1, art. 18; ACHR, *supra* note 2, art. 17; ICCPR, *supra* note 1, art. 23; ECHR, *supra* note 1, art. 12; American Declaration, *supra* note 2, art. VI; European Charter, *supra* note 1, arts. 9, 33(1); *see also* *Loving v. Virginia*, 388 U.S. 1, 12 (1967) ("The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

4. *See* Emma Henderson, *Of Signifiers and Sodomy: Privacy, Public Morality and Sex in the Decriminalisation Debates*, 20 MELB. U. L. REV. 1023, 1030 (1996); Derek McGhee, *Persecution and Social Group Status*, 14 J. REFUGEE STUD. 20, 25 (2001). There is a tension between these approaches in both national practices and in decisions of regional and international human rights authorities. For example, although the ECtHR's holdings on these issues tend to be premised on violations of Article 8 of the ECHR (a right to privacy), the UN Human Rights Committee has found similar state discrimination to violate Articles 2(1) and 26 of the ICCPR (relating to discrimination) rather than Article 17 (privacy). Invoking a narrow view of privacy, as the ECtHR has sometimes done in this context in the past (but rarely does today), may be inimical to the human rights of sexual minorities—the concession typically granted by homophobic societies to such minorities is typically framed as tolerance so long as their conduct remains private, and the state and public remain free to vilify it. As the Supreme Court of Canada aptly observed in *Vriend v. Alberta*, "[C]on- cealment of true identity ... must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection." *Vriend v. Alberta*, [1998] 1 S.C.R. 493, ¶ 102 (Can.); *accord In re Marriage Cases*, 183 P.3d 34 (Cal. 2008); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008). This was the case with respect to the Finnish broadcasting regulations in 1982, some Australian refugee cases, and elsewhere. *See, e.g.,* *Hertzberg v. Finland*, U.N. GAOR, Hum. Rts. Comm., 37th Sess., U.N. Doc. A/37/40 (1982); Catherine Dauvergne & Jenni Millbank, *Applicants S396/2002 and S395/2002, A Gay Refugee Couple from Bangladesh*, 25 SYDNEY L. REV. 97, 105-07 (2003); Meredith Weiss,

obvious, but as yet largely unrealized, implications for sexual minorities and others who practice unconventional sexuality.

Another accepted norm of international human rights law is nondiscrimination in the protection of human rights or grant of state benefits based on specific intellectual, cultural, or physical attributes of a class of persons, such as race or sex. The major human rights instruments do not necessarily guarantee uniformly the same kinds of rights or interests from the same kinds of discrimination, but they contain catch-all protected categories requiring state parties to guarantee all of the human rights set forth in the respective instruments without distinction based on sex, birth, or "other status."⁵ With the notable exception of the ECHR, these instruments extend the nondiscrimination obliga-

Who Sets Social Policy in Metropolis? Economic Positioning and Social Reform in Singapore, 27 NEW POL. SCI. 267, 272 (2005) (quoting the Singaporean Prime Minister as warning that "the more [homosexuals] lobby for public space, the bigger the backlash they will provoke from the conservative mainstream. Their public space may then be reduced."); Alex Rodriguez, *Russia Gays Hear Call: Go Back to the Closet*, CHI. TRIB., May 25, 2006, at 13 (quoting a "prominent member" of Russia's Motherland Party as saying that, if homosexuals seek public rights and recognition, "that encroaches on our rights—our right to a normal life"); Gary Younge, *Troubled Island*, THE GUARDIAN, Apr. 27, 2006, available at <http://www.guardian.co.uk/world/2006/apr/27/gayrights.comment/print> (quoting a member of parliament of Jamaica as saying, "At the same time there is a general homophobia against people who exhibit homosexual tendencies.... Nobody cares unless they openly exhibit it. That's when they take offence.").

Until recently, the United Kingdom commonly denied refugee status to sexual minorities on the theory that they could avoid persecution by hiding their sexual orientation, apparently in the belief that being forced to spend one's life hiding one's sexual orientation is not a form of severe persecution. See Jenni Millbank, *A Preoccupation with Perversion: The British Response to Refugee Claims on the Basis of Sexual Orientation, 1989-2003*, 14 SOC. & LEG. STUD. 115, 116, 118, 133 (2005). The United Kingdom has, moreover, even recently held that prosecution and punishment (including such punishments as one hundred lashes or a year in prison) for homosexuality was not "persecution" for refugee status purposes and was, indeed, "lenient." See *id.* at 126.

Some courts, such as the South African Constitutional Court, have expressly interpreted the right to privacy more broadly, finding it to extend to the right to "private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community." *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice*, 1998 (12) BCLR 1517 (CC) ¶ 32 (S. Afr.), available at 1998 SACLX LEXIS 36; see also *Bowers v. Hardwick*, 478 U.S. 186, 205-14 (1985) (Blackmun, J., dissenting), *overruled* by *Lawrence v. Texas*, 539 U.S. 558 (2003). "Privacy" in this sense means something more akin to a general freedom to act privately without unnecessary government interference.

5. African Charter, *supra* note 1, art. 2; ACHR, *supra* note 2, art. 1; ICCPR, *supra* note 1, arts. 2(1), 3; ECHR, *supra* note 1, art. 14; UDHR, *supra* note 1, art. 2; American Declaration, *supra* note 2, art. II.

tion beyond the rights enumerated in each respective instrument to encompass unequal treatment under any law.⁶ Like the guarantees of privacy, association, and family life, this guarantee would seem to offer sound protection against arbitrary discrimination based on sexual orientation or sexual minority status, but it has been interpreted this way only recently and not uniformly.⁷

A single major human rights instrument—the European Charter of Fundamental Rights and Freedoms of the European Union (European Charter)—grants explicit rights to nondiscrimination based on sexual orientation or sexual minority status.⁸ Sexual minorities get cold comfort even from this concession; the European

6. African Charter, *supra* note 1, art. 19; ACHR, *supra* note 2, art. 24; ICCPR, *supra* note 1, art. 26; UDHR, *supra* note 1, art. 7; *see* U.N. Hum. Rts. Comm., General Comment No. 18: Non-discrimination, ¶ 12 (Nov. 10, 1989).

The ECHR, unlike the ICCPR and other human rights instruments, has not usually been read by the ECtHR to comprehensively prohibit discrimination based on sex, birth, or other status. Instead, it is thought to permit arbitrary discrimination unless one of the specific guarantees in the ECHR is violated. *See Willis v. United Kingdom*, App. No. 36042/97, Eur. Ct. H.R. ¶ 29 (2002). The ECtHR has asserted, however, that the “application of Art. 14 does not necessarily presuppose the violation of one of the substantive rights protected by the Convention. It is necessary but it is also sufficient for the facts of the case to fall within the ambit of one or more” articles of the Convention. *E.B. v. France*, 47 Eur. H.R. Rep. 21, ¶ 47 (2008). The ECtHR has sometimes accordingly interpreted the ECHR to provide a guarantee against arbitrary discrimination based on something that is not guaranteed by a the Convention as a human right but that falls within the same general subject matter as the human right. Optional Protocol No. 12 to the Convention (CETS No. 177), signed in April 2000, addresses this problem, but it has only been ratified by sixteen states as of 2008, which number excludes almost all of the major European powers. Article 3 of the Protocol effectively treats Articles 1 and 2 as an amendment to the Convention to preclude any arbitrary discrimination based on prohibited grounds.

7. Even the ECtHR itself has sometimes signaled that discrimination against unconventional sex is permissible, at least in a commercial context. In *F. v. Switzerland*, the court held that a law that criminalized homosexual but not heterosexual prostitution did not violate the ECHR because prostitution falls outside of one’s “private life” protected by Article 8. App. No. 11680/85, 55 Eur. Comm’n H.R. Dec. & Rep. 178, 180-81 (1988); *cf.* *People v. Onofre*, 415 N.E.2d 936, 941 (N.Y. 1980) (“Absent is the factor of commercialization with the attendant evils commonly attached to the retailing of sexual pleasures”); *see also* *Reiss v. Austria*, 20 Eur. H.R. Rep. C.D. 90 (1995) (determining that the display of a homosexual pornography videotape in a bar was not protected by Article 8). The right to free expression may protect some sexual conduct in a commercial context, however. *See, e.g., Scherer v. Switzerland*, 18 Eur. H.R. Rep. 276, 284-87 (1994) (finding a violation of Article 10 where the appellant was convicted for showing a pornographic film privately in a commercial establishment). The applicant in *Reiss v. Austria* might have had more success had he invoked Article 10 instead of, or in addition to, Article 8.

8. European Charter, *supra* note 1, art. 21.

Charter applies only to the limited membership of the EU⁹ and is not legally binding even there.¹⁰ At best, it may be used as an interpretive resource for other EU sources of law. Nonetheless, together, the norms of free intimate association, privacy, family life, and nondiscrimination might be thought to suggest that states bear a heavy burden to justify singling out a specific class of persons and regulating their private sexual behavior, or basing legal and political restrictions or advantages on specific sexual or gender characteristics. Today, a minority of states continue to criminalize homosexual intercourse and, while state-sponsored or tolerated discriminatory treatment against sexual minorities remains rampant, it has become much rarer and often less virulent in form. Doors formerly closed to sexual minorities, such as state-recognized relationships carrying some of the benefits of marriage, have cracked open.¹¹

9. As of 2008, the EU will have twenty-seven members. *See* Member States of the EU, http://europa.eu/abc/european_countries/eu_members/ (last visited Nov. 20, 2008). In contrast, the Council of Europe, which is bound by the ECHR, boasts forty-seven members. *See* About the Council of Europe, http://www.coe.int/T/e/com/about_coe/ (last visited Nov. 20, 2008).

10. The European Charter was incorporated in the draft Treaty establishing a Constitution for Europe submitted to the European Council in 2003. *See* European Convention Draft Treaty Establishing a Constitution for Europe art. 7, CONV 848/03 (July 18, 2003). Although the Treaty to establish a constitution was signed by twenty-five heads of state, it ultimately failed to achieve ratification and was abandoned in favor of the Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, signed Dec. 13, 2007, 50 O.J. (C 306)01 (2007), and which is expected to enter into force on January 1, 2009. *See* A Constitution for Europe, http://europa.eu/scadplus/constitution/introduction_en.htm. The Treaty of Lisbon incorporates norms of nondiscrimination and tolerance into the Treaty on European Union in a new Article 1a, but does not mention sexual orientation.

11. *See infra* Part I.C.1. Perhaps the most telling indicator of public acceptance of homosexuality is its political representation. The first openly homosexual U.S. congressional representative (Gerry Studds) was elected in 1972 (although his homosexuality may not have been widely known until after the election). *See First Openly Gay Congressman Dies*, CBS NEWS, Oct. 15, 2006, <http://www.cbsnews.com/stories/2006/10/14/politics/printable2089735.shtml>. In Japan, transsexual and openly homosexual politicians were elected in 2003. *See* Hiroko Tabuchi, *Japan's Transsexuals Emerge from the Dark*, L.A. TIMES, June 11, 2006, at A34. The European Parliament has several gay and lesbian members, such as Michael Cashman, the president of the Parliament's Lesbian, Gay, Bisexual and Transgender Rights Intergroup. *See* European Parliament's Intergroup on Gay and Lesbian Rights, Our Officers, <http://www.lgbt-ep.eu/plugins/content/content.php?cat.8> (last visited Nov. 20, 2008). That said, homosexuals remain exceedingly underrepresented in positions of political power worldwide. *See generally* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 446-47 (Conn.

The source of contention may be traced to a qualification to many human rights expressed in the relevant treaties that include explicit exceptions for measures taken by the state to maintain public morals and welfare. The ICCPR allows states to restrict the exercise of association by any laws that "are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others."¹² Article 11 of the ECHR and Article 16 of the ACHR contain virtually identical language.¹³ This same exception qualifies the right to privacy, as in Article 8 of the ECHR,¹⁴ although none of the other major international human rights instruments contains a similar explicit exception to privacy. The UDHR does, however, provide generally that the rights set forth therein may be limited by state action necessary for "meeting the just requirements of morality, public order and the general welfare in a democratic society."¹⁵ Even where textually absent, however, these same exceptions are typically and understandably considered implicit in both privacy rights and the right against discrimination. In interpreting the ICCPR, for example, the U.N. Human Rights Committee has concluded that discrimination may be justified "if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant."¹⁶

Thus, although the philosophical underpinnings of international human rights treat liberty as the basic condition, they permit state regulation when justified for the protection and enrichment of the public.¹⁷ The necessity of regulatory exceptions is evident, for example, when the human right of familial privacy is invoked to preclude state action that would otherwise prevent domestic violence or child abuse. Several U.N. Human Rights bodies and

2008) (describing the exceeding rarity of open homosexuals in positions of high political and economic power in the United States).

12. ICCPR, *supra* note 1, art. 22.

13. Compare ACHR, *supra* note 2, art. 16(2), with ECHR, *supra* note 1, art. 11(2).

14. See ECHR, *supra* note 1, art. 8.

15. UDHR, *supra* note 1, art. 29(2).

16. U.N. Hum. Rts. Comm., General Comment No. 18, *supra* note 6, ¶ 13.

17. See UDHR, *supra* note 1, art. 3. See generally GERALD F. GAUS, JUSTIFICATORY LIBERALISM 162-66 (1996).

state authorities have also thought it necessary to prevent polygamy and other variations on family choices in societies in which such arrangements are thought to demean women, lead to child abuse, or attenuate the benefits of supportive intimate relationships.¹⁸

On the other hand, there is always a risk that states will rely on these broadly drawn exceptions to intrude into interpersonal relations unnecessarily. The flexibility inherent in the *ordre public* and morality exceptions has long been used by states to justify the systemic oppression of and discrimination against classes of persons defined as sexual “deviants” and repression of masturbation, fornication, oral or anal intercourse,¹⁹ and other sexual practices.²⁰ For example, the state may claim that outlawing the use of contraceptives in private sexual relations advances an important public policy of maintaining population growth²¹ or preventing condemned fornication,²² and thereby constitutes permissible state

18. See Comm. on Econ., Soc. & Cultural Rts., U.N. GAOR, 13th Sess., 46th mtg, ¶¶ 44-50, U.N. Doc. E/C.12/1995/SR.46 (Dec. 5, 1995); U.N. Hum. Rts. Comm., General Comment No. 28: Equality of Rights Between Men and Women, ¶ 24, CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000) (“Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist.”); Comm. on the Elimination of Discrimin. Against Women, Gen. Recommendation No. 21: Equality in Marriage and Family Relations, ¶ 14, U.N. Doc. HRI/GEN/1/Rev.1, at 90 (July 29, 1994); see also *Regina v. Butler*, [1992] 1 S.C.R. 452, 454 (Can.) (restrictions on free speech justified as necessary to protect women from degrading and dehumanizing pornographic treatment).

19. The term “sodomy” in the laws of U.S. states and elsewhere is often applied to oral and anal intercourse. In the common law, the term reportedly referred only to anal intercourse between men, see *Commonwealth v. Wasson*, 842 S.W.2d 487, 491 (Ky. 1993), but its modern meaning has come to encompass any oral or anal intercourse, homosexual or heterosexual. See 15 OXFORD ENGLISH DICTIONARY 925 (2d ed. 1989). This Article will avoid the use of the term “sodomy” because of its negative connotation and confused history.

20. This is obviously not intended to be a complete list of unconventional sexual practices relevant to the subject matter of this Article, but it should be noted that certain unconventional sexual practices, such as pederasty and bestiality, will not be discussed here, as they raise complicating issues of social policy (e.g., issues of consent, health, and cruelty to animals).

21. See, e.g., Lucian Turcescu & Lavinia Stan, *Religion, Politics and Sexuality in Romania*, 57 EUR.-ASIAN STUD. 291, 291 (2005).

22. See, e.g., N.J. STAT. ANN. § 2A:110:1 (West 1977) (prohibiting fornication), *repealed, found unconstitutional* by *State v. Saunders*, 381 A.2d 333 (N.J. 1977); Islamic Penal Code of Iran art. 637 (1996) (fornication punished with ninety-nine lashes), *available at* http://mehr.org/Islamic_Penal_Code_of_Iran.pdf; Offence of Zina (Enforcement of Hudood) Ordinance (Ordinance VII of 1979), Feb. 10, 1979, P.L.D. 1979 Central Statutes 51 (Pak.),

regulation of sexuality and other intimate relations. The European Court of Human Rights (ECtHR) consistently interprets the limitation on the morality exception—"necessary in a democratic society"—to require that the impugned measure must answer "a pressing social need and, in particular, [be] proportionate to the legitimate aim pursued."²³ But its judgments are binding only among the forty-seven Council of Europe states, and in any case they leave open for debate critical and relatively subjective decisions about what kind of regulation is necessary, what social needs are pressing, and what kind of regulation is proportionate to the aim pursued. As a result, the ECtHR's judgments respecting discrimination based on sexual orientation have sometimes suffered from troubling inconsistencies.

Although the ICCPR contains no specific limitation on the privacy right based on "morality" or *ordre public*, in 1985, the Sub-Commission on Prevention of Discrimination and Protection of Minorities of the U.N. Economic and Social Council (ECOSOC) adopted the Siracusa Principles on the Limitation and Derogation of Provisions in the ICCPR (Siracusa Principles),²⁴ which interpret the term "public order" as limited to the rules that "ensure the functioning of society or the set of fundamental principles on which society is founded."²⁵ The Sub-Commission interpreted "public morals" somewhat more expansively as "essential to the mainte-

available at http://www.sindhpolice.gov.pk/PDFs/offence_of_zina_ordinance_1979.pdf, cited in Jeffrey A. Redding, *Constitutionalizing Islam: Theory and Pakistan*, 44 VA. J. INT'L L. 759, 808 n.160 (2004); U.N. Hum. Rts. Comm., Concluding Observations of the Human Rights Committee, Sudan, ¶ 8, U.N. Doc. CCPR/C/79/Add.85 (Nov. 19, 1997) (noting that Sudan imposes the death penalty for "illicit sex"); Ann Elizabeth Mayer, *The Shar'ah: A Methodology or a Body of Substantive Rules?*, in ISLAMIC LAW AND JURISPRUDENCE 177, 193, 195 (Nicholas Heer ed., 1990) (Libya, Pak. & Sudan); Ann Elizabeth Mayer, *Libyan Legislation in Defense of Arabo-Islamic Sexual Mores*, 28 AM. J. COMP. L. 287, 297 (1980) (Libya).

23. See, e.g., *Smith & Grady v. United Kingdom*, 29 Eur. H.R. Rep. 493, ¶¶ 87-89 (2000); *Lustig-Prean & Beckett v. United Kingdom*, 29 Eur. H.R. Rep. 548, ¶ 80 (1999); *Norris v. Ireland*, 13 Eur. H.R. Rep. 186, ¶¶ 41, 44 (1989); *Dudgeon v. United Kingdom*, 4 Eur. H.R. Rep. 149, ¶ 53 (1982).

24. U.N. Econ. & Soc. Council, Comm'n on H.R., *Status of the International Covenants on Human Rights*, U.N. Doc. E/CN.4/1985/4 (Sept. 28, 1984) [hereinafter *Siracusa Principles*].

25. *Id.* ¶ 22.

nance of respect for fundamental values of the community.”²⁶ This interpretation, besides suggesting that universal human rights are not universal at all (unless by “community” the Sub-Commission intended the world community), leaves undefined what kind of communal “fundamental values” are worthy of respect and justify derogation of human rights, what kind of regulation is essential to ensure the maintenance of those values, and so forth. For example, it says nothing about whether a society in which undeviating adherence to a state-sponsored religion is a “fundamental value” that could justify the expulsion or execution of apostates, much less the systematic denial of public sector jobs to them, in derogation of principles of freedom of religion, conscience, and speech. The answer to these questions suggested by the Siracusa Principles reminds us that even the core principles supporting international human rights law remain contested by many states.

There is, in short, an inherent tension in these rules and their exceptions that authorities interpreting international human rights law must struggle to resolve on a more or less case-by-case basis. This leaves politically unpopular groups such as sexual minorities vulnerable to a restrictive reading of the human rights instruments by states and international authorities. Until recently, the morality and public order exceptions in ECHR Articles 8 and 11 were consistently invoked to justify interference in unconventional sexuality in a highly discriminatory manner.²⁷ Recently, the ECtHR has come to assess these factors more strictly in cases involving private sexual conduct: “[W]hen the relevant restrictions concern ‘a most intimate part of an individual’s private life,’ there must exist ‘particularly serious reasons’ before such interferences can satisfy the requirements of Article 8(2) of the Convention.”²⁸ Many states have similarly adopted this position either in legislative session or through judicial interpretation of their constitutions, statutes, and common law.²⁹

26. *Id.* ¶ 27.

27. *See, e.g.*, *A. v. United Kingdom*, 6 Eur. H.R. Rep. C.D. 354, ¶ 3 (1984); *X. v. United Kingdom*, 3 Eur. H.R. Rep. 63, ¶¶ 127-30 (Eur. Comm’n on Hum. Rts. 1978).

28. *Smith & Grady*, 29 Eur. H.R. Rep. at ¶ 89 (quoting *Dudgeon*, 4 Eur. H.R. Rep. at ¶¶ 52, 59).

29. *See, e.g.*, *Karner v. Austria*, 38 Eur. H.R. Rep. 24, ¶ 37 (2004).

But to say that many states have come to accept and even protect sexual minorities in limited ways does not necessarily mean that they recognize a fundamental or unrestrained human right to freedom of sexuality and family life. Two observations demonstrate the problem of imputing the trend toward acceptance and protection of sexual minorities with recognition of international human rights to complete freedom of sexuality and nondiscrimination based on sexual orientation. The first, noted above, is that no major international human rights treaty clearly provides that homosexual behavior, transsexuality, or other unconventional practices are protected by the norms of privacy, intimate association, or nondiscrimination. Indeed, as will be discussed, the states accepting sexual minority rights have done so for domestic political reasons or pursuant to regional human rights treaties or declarations rather than universal human rights treaties or *opinio iuris sive necessitatis*.³⁰ The second is that there remains a significant number of states that dispute that international human rights law encompasses rights for sexual minorities, and these states behave accordingly in their domestic and international conduct. They actively discriminate against sexual minorities *in extremis*, in some cases to the point of imposing capital punishment for same-sex intercourse.³¹

Probably the most telling demonstration of the international schism on the question of sexual minority human rights is the fate of the joint Brazil/European Union 2003 draft resolution in the U.N. Commission on Human Rights.³² The resolution, entitled "Human Rights and Sexual Orientation," was the first draft Human Rights Commission resolution to call on "all States to promote and protect the human rights of all persons regardless of their sexual orientation."³³ After a brief but intense debate on the draft, Pakistan, on behalf of the Organization of the Islamic Conference, proposed a motion of no action, which was barely rejected (twenty-two votes in

30. See *infra* Part II.C.

31. See *infra* Part I.A.

32. Comm'n on H.R., Draft Resolution: Human Rights and Sexual Orientation, 59th Sess., U.N. Doc. E/CN.4/2003/L.92 (Apr. 16, 2003).

33. *Id.* ¶ 3; see also Johann Hari, *At Last the UN Recognises the Need for Gay Rights*, THE INDEP. (U.K.), Apr. 25, 2003, at 17.

favor, twenty-four against, six abstentions).³⁴ The Commission then voted on a motion to postpone the resolution until the next (sixtieth) session, which succeeded with a vote of twenty-four to seventeen, with ten abstentions.³⁵ During this sixtieth session, Brazil refrained from reintroducing the motion due to ongoing negotiations, and the Commission decided by consensus to defer a vote on the resolution until the sixty-first session.³⁶ Brazil declined to reintroduce the motion at the sixty-first session for lack of support in the Commission. The U.N. decision to replace the Commission with the U.N. Human Rights Council does not appear to have altered the disposition of the issue, as it was not raised in the Council's June 2006 draft agenda and is, to all appearances, now dead in the water.³⁷

Yet, there has been an undeniable, if gradual, trend toward recognition of freedom from state interference in sexual conduct and nondiscrimination based on sexual orientation in the corpus of international human rights law through state domestic practices. The momentum has accelerated recently and shows signs of general acceptance in the foreseeable future among the world's most politically, economically, and culturally influential states. Although purely domestic and unilateral acts in many states are creating a consensus to recognize such human rights, several important international events have reinforced and accelerated the trend. This is far from saying that a mature set of norms of international law has fully developed, but, as will be discussed, customary international law is in the process of expanding to encompass human rights to liberty, privacy, and nondiscrimination in the realm of sexuality and intimate association for all persons, including sexual minorities.³⁸

34. Press Release, U.N. Comm'n on Human Rights, Commission on Human Rights Approves Measures on Promotion and Protection of Human Rights, Other Issues (Apr. 24, 2003), available at <http://www2.unog.ch/news2/documents/newsen/cn0355e.htm>.

35. Comm'n on H.R., Decision 2003/118, U.N. Doc. E/CN.4/DEC/2003/118 (Apr. 25, 2003).

36. Comm'n on H.R., *Report to the Economic and Social Council on the Sixtieth Session of the Commission*, Decision 2004/104, Annex at 72, U.N. Doc. E/CN.4/2004/L.11/Add.6 (Apr. 21, 2004).

37. See Hum. Rts. Council, *Adoption of the Agenda and Organization of Work: Note by the Secretary-General*, U.N. Doc. A/HRC/1/1 (June 22, 2006).

38. See *infra* Part I.C.

Among the most fundamental violations of the human rights of sexual minorities are the repression of free speech and political association. Nicaragua, for example, broadened its antisodomy laws in 1992 to penalize “inducing, promoting or propagandizing” same-sex intercourse,³⁹ a rather blatant infringement on the right to free political speech. Even the ECtHR has inexplicably upheld laws criminalizing blasphemy—properly called religious dissent—as consistent with the right to freedom of speech when religious icons have been portrayed as homosexual or bisexual.⁴⁰ The denial of these rights not only prevents sexual minorities from engaging in peaceful advocacy to persuade the public and political elites of the legitimacy of their claims to human rights. It also shuts down their ability to organize in order to support and assist one another in dealing with legal disadvantages and detrimental social prejudices by criminalizing their organization. Even limited restrictions on “obscene” or “immoral” speech may be oppressively used to obstruct the rights of sexual minorities and their advocates to try to persuade the public of the need for legal reform.⁴¹ The most sterile and tactful advocacy of gay rights may be labeled obscene or immoral by homophobic governments. Numerous countries have systematically denied sexual minorities this most fundamental of human rights in blatant violation of treaties to which they are parties.⁴² In these states, the possibility of free expression and

39. See Martha I. Morgan, *The Bitter and the Sweet: Feminist Efforts to Reform Nicaraguan Rape and Sodomy Laws*, 26 U. MIAMI INTER-AM. L. REV. 439, 446, 460-61 (1995).

40. See *Wingrove v. United Kingdom*, 24 Eur. H.R. Rep. 1 (1997) (upholding U.K. refusal to grant a distribution license to a “blasphemous” video work portraying St. Teresa of Avila kissing another woman); see also *Gay News Ltd. v. United Kingdom*, 5 Eur. H.R. Rep. 123 (Eur. Comm’n Hum. Rts. 1983) (upholding U.K. criminal prosecution of a magazine that published a poem representing Jesus Christ as homosexual). But see *Burstyn v. Wilson*, 343 U.S. 495 (1952) (holding that a New York law prohibiting “sacrilegious” motion pictures was in violation of the First Amendment to the Constitution).

41. Cf. DAVID A. J. RICHARDS, *THE CASE FOR GAY RIGHTS* 31-32 (2005) (opining that sexual minorities in the United States considered the narrowing of the category of “obscene speech” by the Supreme Court to be “much the most important ... development” in their progress toward nondiscrimination).

42. See generally DANIEL OTTOSSON, INT’L LESBIAN & GAY ASS’N REPORT, STATE-SPONSORED HOMOPHOBIA: A WORLD SURVEY OF LAWS PROHIBITING SAME-SEX ACTIVITY BETWEEN CONSENTING ADULTS (Apr. 2007), available at http://www.ilga.org/statehomophobia/State_sponsored_homophobia_ILGA_07.pdf; Int’l Lesbian & Gay Ass’n, World Legal Survey, available at <http://www.ilga.org> (last visited Oct. 10, 2008) [hereinafter World Legal Survey]. Sexual minorities and their advocates frequently encounter government

political association for sexual minorities remains hypothetical, as any attempt to organize or advocate for group rights is likely to be met with state repression or public violence.⁴³ The inconsistency of such repression with international human rights law is sufficiently evident to preclude any need for elaboration.⁴⁴ It is, in any case, becoming increasingly rare. The more difficult legal issue, and the one addressed here, is how states have applied (or not applied) the more protean rights to privacy, freedom of association, family life, and nondiscrimination with respect to unconventional sexuality.

Specifically, states discriminating against sexual minorities or unconventional sexuality in one way or another have had to justify

discrimination and harassment when attempting to form associations or advocate for gay legal rights. See, e.g., Decision 21/1996, Hung. Const. Ct. (May 17, 1996), *discussed in* YUVAL MERIN, *EQUALITY FOR SAME-SEX COUPLES* 133 n.16 (2002) (Hungary); Resolution on Homophobia in Europe, EUR. PARL. DOC. P6_TA(2006)0018, ¶ 3 (unnamed European countries); INT'L GAY & LESBIAN HUM. RTS. COMM'N, VIOLATIONS OF THE RIGHTS TO FREEDOM OF EXPRESSION, ASSEMBLY, AND ASSOCIATION RELATED TO SEXUAL ORIENTATION, GENDER IDENTITY AND GENDER EXPRESSION 4-7 (Oct. 30, 2007), available at http://www.iglhr.org/files/iglhr/program_docs/IGLHRC-Rep-to-UN-SRs30Oct2007.pdf (Argentina, Georgia, Ghana, Indonesia, Moldova, Russia, Singapore, Turkey, Uganda); Stephen Brown, *The Lesbian and Gay Movement in Argentina*, 29 *LATIN ANN. PERSP.* 119, 124 (2002); Keith Goddard, *A Fair Representation: GALZ and the History of the Gay Movement in Zimbabwe*, 16 *J. GAY & LESBIAN SOC. SERV.* 75, 79, 93 (2004) (Zimbabwe); Douglas Sanders, *Getting Lesbian and Gay Issues on the International Human Rights Agenda*, 18 *HUM. RTS. Q.* 67, 77 (1996) (Turkey); Weiss, *supra* note 4, at 278-83 (Singapore). Nigeria even proposed legislation to criminalize political associations and free expression of sexual minorities. See Amnesty Int'l, *Nigeria: Same Sex Bill Negates Nigeria's Obligations to Fundamental Human Rights*, AI Index: AFR 44/013/2006 (May 3, 2006), available at <http://www.amnestyusa.org/document.php?lang=e&id=ENGAFR440132006>.

43. In much of Eastern Europe and Africa, parts of Latin America, and the entire Middle East, sexual minorities are still commonly denied rights to free expression and association. See OTTOSSON, *supra* note 42; see also Council of Eur. Parl. Ass., Situation of Lesbians and Gays in Council of Europe Member States, Draft Recommendation Explanatory Mem., Doc. No. 8755, ¶¶ 17-19 (2000) [hereinafter Council of Europe Doc. 8755] (Romania); Amnesty Int'l, *Poland: LGBT Rights Under Attack*, AI Index: EUR 37/002/2005 (Nov. 25, 2005), available at <http://web.amnesty.org/en/library/asset/EUR37/002/2005/en/dom-EUR370022005en.html> (reporting that Polish homosexuals were denied the right to organize a parade in Warsaw, but homophobes were permitted to parade); *Poland to Probe if Teletubbies Are Gay*, REUTERS NEWS, May 29, 2007, available at <http://www.reuters.com/article/entertainmentNews/idUSL2832037420070528>; Rodriguez, *supra* note 4, at 13 (Russian homosexuals denied the right to organize a parade in Moscow); Press Release, Eur. Parl., MEPs Urge Member States to Ensure Respect for Same-Sex Partnerships (Jan. 18, 2006) [hereinafter MEPs Urge Member States] (condemning the recent "banning of gay pride and equality marches" in "a number of EU member states").

44. See generally *Baczowski v. Poland*, App. No. 1543/06, Eur. Ct. H.R. (Sept. 24, 2007).

this discrimination to their domestic populations and to the international community as consistent with the exceptions in human rights instruments for public morality and *ordre public*. The most difficult forms of regulation to justify are criminal prohibitions on unconventional sexual behavior, as these entail the most intrusive form of state regulation into the most private and personal of behaviors. Criminal prohibitions consequently represent the fastest receding area of state discrimination against sexual minorities. Other forms of discrimination have, however, proven more tenacious. Among these are discrimination in the age of legal consent to sex, bans on military enlistment, and state tolerance of private persecution of sexual minorities. When sexual minorities seek state license on equal terms for benefits provided freely to heterosexuals, such as marriage and parental rights, states have shown the most recalcitrance.

The present study uses the evolution of human rights law in the field of sexuality generally and the rights of sexual minorities specifically as a platform for analyzing the evolution of human rights legal theories as understood by state and international elites themselves. Before examining the reasoning upon which political and legal elites have relied in denying or granting relief from discrimination to sexual minorities, then, it will be helpful to summarize state practice. Only with a clear picture of the trends in state practices can we understand the role of justifications for these practices under customary international law.

A. Decriminalization of Unconventional Sexual Behavior

On August 1, 2003, Europe became totally free of laws criminalizing same-sex, adult, consensual intercourse for the first time in over a millennium.⁴⁵ This achievement was accomplished largely through the influence of the Council of Europe's Parliamentary Assembly; the EU Parliament; the governments of the Netherlands, Belgium, and the Nordic states; and the increasingly progressive

45. Douglas Sanders, *Human Rights and Sexual Orientation in International Law*, INT'L LESBIAN & GAY ASS'N, July 17, 2005, http://www.ilga.org/news_results.asp?FileCategory=44&ZoneID=7&FileID=577 (last visited Nov. 20, 2008). On August 1, 2003, Armenia became the last country in Europe to repeal its prohibition on same-sex intercourse. *Id.*

ECtHR. But Europe's policies are not yet representative of the global attitude toward unconventional sexuality. As of 2008, same-sex intercourse remains subject to criminal penalties in 41 of the 192 United Nations member states for women and in 81 states and 3 sub-state provinces for men, including almost all of Africa and the Middle East, and much of Asia.⁴⁶ This number includes some states that have no laws forbidding homosexual intercourse *eo nomine* but that nonetheless prosecute it under nebulous prohibitions on "immorality," "debauchery," "obscenity," or "hooliganism."⁴⁷ In these countries, homosexuality is as illegal *de facto* as it is in countries that formally forbid homosexual conduct.⁴⁸ As of 2008, laws and

46. See OTTOSSON, *supra* note 42; World Legal Survey, *supra* note 42. I have verified, corrected, and updated this information through the following sources: Council of Europe Doc. 8755, *supra* note 43, Recommendation ¶ 4 & Explanatory Mem. ¶ 16 (Andorra, the Czech Rep., Malta); Edwin Cameron, *Constitutional Protection of Sexual Orientation and African Conceptions of Humanity*, 118 S. AFRICAN L.J. 642 (2001) (Zimbabwe); Goddard, *supra* note 42, at 88 (Zimbabwe); Dianne Hubbard & Elizabeth Cassidy, *Namibia: Family Law Reform in Namibia: Work in Progress*, in INTERNATIONAL SURVEY OF FAMILY LAW, 2002 EDITION 255, 264 (A. Bainham ed., 2002) [hereinafter 2002 INTERNATIONAL SURVEY] (Namibia); Weiss, *supra* note 4, at 268, 274-75 (Singapore); Donna Abu-Nasr, *Gay Arabs Venture Out*, TORONTO STAR, Oct. 15, 2005, at M07 (Lebanon, Saudi Arabia); *British Man on Trial for Sodomy in Ghana*, INT'L HERALD-TRIB., Nov. 6, 2007, available at <http://www.iht.com/bin/printfriendly.php?id=8214858>; *Gays Arrested in Dubai Could Face Punishment*, NEWSDAY, Nov. 27, 2005, at A61 [hereinafter *Gays Arrested in Dubai*] (United Arab Emirates); Andrea Huncar, *A Subtle Struggle in Africa*, TORONTO STAR, Aug. 29, 2004, at F2 (Uganda); Stephanie Nolen, *Gays Take Cautious Steps to Come Out in Africa*, GLOBE & MAIL (Toronto), Apr. 22, 2006, at A15 (Botswana, Cameroon, Nigeria & Uganda); Jeremy Seabrook, *It's Not Natural*, THE GUARDIAN (U.K.), July 3, 2004, at 21 (Zambia, Nigeria, Uganda, Botswana, Tanzania); *The Denial of Sexual Rights in Botswana: A Threat of the Health of Sexual Minorities*, HUM. RTS. TRIB., Jan. 31, 2005, 2005 WLNR 23190655 (Botswana); Younge, *supra* note 4, at 6 (Jamaica); Behind the Mask, <http://www.mask.org.za> (last visited Nov. 20, 2008) (penal laws in Africa); News Release, Human Rights Watch, Morocco: Overturn Verdicts for Homosexual Conduct, Dec. 12, 2007, available at <http://hrw.org/en/news/2007/12/11/morocco-overtturn-verdicts-homosexual-conduct>; Press Release, Int'l Gay & Lesbian Hum. Rts. Comm'n, Singapore Update: Law Against Homosexuals to Remain, Oct. 24, 2007, available at <http://www.iglhrc.org/site/iglhrc/section.php?id=pos=0&print=1&detail=792>.

47. Especially in many African states, homosexual intercourse may go unmentioned in the criminal laws, but social pressures and police harassment combine to create a *de facto* prohibition. See Huncar, *supra* note 46, at F2 (citing Eritrea and Egypt as examples). States may further seek to reinforce or inflame social stereotypes of and prejudice toward sexual minorities by publicizing information about the sexual orientation or private sexual conduct of citizens identified as homosexuals. See Caroline Hawley, *Anger Over Egypt Gay Trial*, BBC NEWS, Aug. 15, 2001, http://news.bbc.co.uk/2/hi/middle_east/1493041.stm (last visited Nov. 29, 2008).

48. See Concluding Observations of the Comm. Against Torture: Egypt, U.N. Doc.

policies in countries prohibiting homosexual intercourse directly or indirectly regulate the behavior of some 2.5 billion of the world's 6.7 billion people, more than a third of the world's population.⁴⁹

Penalties for homosexual conduct in most of these countries are disproportional to whatever harm the crime is imagined to cause, and range from long terms of imprisonment (up to life) to physical punishment to execution.⁵⁰ At least seven countries are known to prescribe the death penalty for homosexual conduct—Afghanistan, Iran, Mauritania, Pakistan, Saudi Arabia, Sudan, and Yemen.⁵¹ Other forms of unconventional sexuality may receive lesser but still harsh punishments. For example, in addition to capital punishment for sodomy, the Iranian penal code prescribes a punishment of one hundred lashes for the offense of *Tafhiz* ("the rubbing of the thighs or buttocks" between two men), sixty lashes for male kissing, and one hundred lashes for the first three convictions for the offense of *Mosaheqeh* (lesbianism) and death for the fourth.⁵² While reliable calculations of actual executions do not exist, Iran has reportedly imposed the death penalty on homosexuals numerous times.⁵³ Capital punishment clearly violates ICCPR's Article 6 prohibition on the imposition of the death penalty for any but "the most serious

CAT/C/CR/29/4, ¶ 5(e) (Dec. 12, 2002); Comm'n on H.R., *Opinions Adopted by the Working Group on Arbitrary Detention*, Opinion No. 7/2002 (Egypt) (Sept. 3, 2001), ¶¶ 28-29; HUMAN RIGHTS WATCH, *IN A TIME OF TORTURE: THE ASSAULT ON JUSTICE IN EGYPT'S CRACKDOWN ON HOMOSEXUAL CONDUCT* 13-16 (2004).

49. Calculations performed based on populations given by the CENTRAL INTELLIGENCE AGENCY, *WORLD FACTBOOK 2008 EDITION*, available at <https://www.cia.gov/library/publications/the-world-factbook/> [hereinafter *WORLD FACTBOOK 2008*].

50. See, e.g., *Gays Arrested in Dubai*, *supra* note 46, at A61 (noting that punishment for homosexuality in the UAE includes lashing, up to five years imprisonment, and forced hormone treatments).

51. U.N. Hum. Rts. Comm., Concluding Observations of the Human Rights Committee, Sudan, ¶ 8, U.N. Doc. CCPR/C/79/Add.85 (1997) (noting that Sudan imposes the death penalty for "committing a third homosexual act"); OTTOSSON, *supra* note 42, at 6, 17, 23, 32, 35, 42; World Legal Survey, *supra* note 42; Nazila Fathi, *Despite President's Denials, Gays Insist They Exist, if Quietly, in Iran*, N.Y. TIMES, Sept. 30, 2007, at A11 (execution of gay teenagers in Iran); *Homosexuality in Pakistan*, UNITED NATIONS IRIN NEWS SERV., May 23, 2005, available at http://www.ilga.org/news_results.asp?FileCategory=9&ZoneID=38&FileID=604. Nigeria and the United Arab Emirates may be an eighth and ninth. See OTTOSSON, *supra* note 42, at 27, 40.

52. Islamic Penal Code of Iran, *supra* note 22, arts. 108-10, 121-22, 124, 127, 129, 131; James D. Wilets, *International Human Rights Law and Sexual Orientation*, 18 HASTINGS INT'L & COMP. L. REV. 1, 28 (1994).

53. See Wilets, *supra* note 52, at 28-29 nn.93-94.

crimes,"⁵⁴ but the fact that over one-third of the states in the world impose criminal punishment for unconventional sexuality with impunity seems to indicate very significant disagreement about the limitations that international human rights law imposes on the state's power to dictate how individuals behave in their private and intimate associations.

Perhaps what is most surprising about international human rights law relating to sexuality is not the number of states that continue to criminalize unconventional sexuality, but rather the rapidity with which a majority of the world's states have decriminalized it. A handful of states stopped penalizing homosexual intercourse before the twentieth century,⁵⁵ but most of the remainder, including almost all of the politically and economically powerful states of the world, have decriminalized unconventional sexual conduct in the past fifty years. Until 1982, decriminalizations trickled along. Denmark, Poland, Switzerland, and Sweden decriminalized homosexual intercourse in the 1930s and 1940s.⁵⁶ Most of greater Europe followed in the 1960s and 1970s.⁵⁷ In 1963, the Supreme Court of Israel nullified the provisions of the Israeli criminal law prohibiting homosexual intercourse,⁵⁸ and it was formally abolished from the criminal laws in 1988.⁵⁹ England and

54. ICCPR, *supra* note 1, art. 6(2); see also U.N. Hum. Rts. Comm., Concluding Observations of the Human Rights Committee, Sudan, *supra* note 22, ¶ 8 ("The imposition in [Sudan] of the death penalty for offences which cannot be characterized as the most serious, including ... committing a third homosexual act, illicit sex, [etc.] ... is incompatible with article 6 of the Covenant.").

55. France and the Netherlands decriminalized homosexual intercourse in 1810, Belgium in 1867, and Italy in 1889. See MERIN, *supra* note 42, at 328-29 tbl.4. The International Lesbian & Gay Association reports that Brazil decriminalized homosexual intercourse in 1823. See Int'l Lesbian & Gay Ass'n, World Legal Survey: Brazil, available at <http://www.ilga.org>. Spain followed much later, decriminalizing homosexual intercourse in 1932. See MERIN, *supra* note 42, at 328-29 tbl.4.

56. See Sanders, *supra* note 42, at 70-71.

57. See, e.g., Sexual Offences Act 1967 (c.60), § 1(1) (U.K.); Smith & Grady v. United Kingdom, 29 Eur. H.R. Rep. 493, 511-12, ¶ 44 (2000); MERIN, *supra* note 42, at 328-29 tbl.4; Sanders, *supra* note 42, at 71; Judit Szakacs, *Hungarian Politics: A Gay Old Time*, TRANSITIONS ONLINE, Apr. 21, 2005; BUNDESGESETZBLATT, June 30, 1969, pt.I, at 653 (W. Ger.).

58. See *El Al Isr. Airlines Ltd. v. Danilowitz*, [1994] IsrSC 48(5) 749 (Isr. Sup. Ct.) (Dorner, J., concurring), available at <http://www.tau.ac.il/law/aeyalgross/Danilowitz.htm> (citing *Yosef Ben Ami v. Attorney General*, 18 P.D. 225, 238 (1963) (Isr.)).

59. See *id.* ¶ 9.

Wales decriminalized sodomy in 1967,⁶⁰ with Canada following in 1969,⁶¹ and Scotland in 1980.⁶²

Beginning in 1982, the trend toward decriminalization of unconventional sexuality was buttressed and accelerated by two European developments. The first was the Parliamentary Assembly of the Council of Europe's Resolution 924, which urged member states to decriminalize homosexual intercourse and to ensure equality of treatment between heterosexuals and homosexuals.⁶³ This was followed in 1984 by the European Parliament's adoption of recommendations to eliminate workplace discrimination based on sexual orientation.⁶⁴ These resolutions established the first Europe-wide public policy of treating some kinds of discrimination based on sexual orientation as inconsistent with state policies respecting personal freedoms and the limits of governmental regulation.

The second development was the ECtHR's 1981 decision in *Dudgeon v. United Kingdom*.⁶⁵ In *Dudgeon*, the court heard a challenge to Northern Ireland's criminal prohibition on oral and anal intercourse, described in the statutes at issue as "buggery" and "gross indecency."⁶⁶ In considering whether this invasion of the private life of the applicant could be justified for the protection of morality, the court found that none of the various social and political factors it considered could qualify the legislation as "necessary or appropriate" in a democratic society.⁶⁷ Instead, the court held:

Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own

60. Sexual Offenses Act 1967 (c.60), § 1(1) (U.K.).

61. Robert Wintemute, *Sexual Orientation and the Charter: The Achievement of Formal Legal Equality (1985-2005) and Its Limits*, 49 MCGILL L.J. 1143, 1149 (2004).

62. Criminal Justice (Scotland) Act 1980 (c.62), § 80(1); see Millbank, *supra* note 4, at 122.

63. Council of Eur., Parl. Ass., Recommendation on Discrimination Against Homosexuals, Recommendation 924 (1981), available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta81/EREC924.htm>.

64. EUR. PARL. RES. 1-1358/83, O.J. (C 104), at 46 (1984).

65. 4 Eur. H.R. Rep. 149 (1982).

66. *Id.* ¶ 17.

67. *Id.* ¶ 60.

warrant the application of penal sanctions when it is consenting adults alone who are involved.⁶⁸

The basis of the decision—a violation of the Article 8 right of privacy without reference to Article 14 (discrimination)—evidences an approach concerned with protecting sexual liberty in general from unjustified state interference. The ECtHR has reiterated the *Dudgeon* holding on this point several times since, striking down statutes in Ireland and Cyprus criminalizing adult, consensual homosexual intercourse.⁶⁹ The court's decision on the matter binds all forty-seven member states of the Council of Europe.⁷⁰

A steady stream of liberalizations followed *Dudgeon* over the next two decades. Domestic courts and legislatures around the world began striking down prohibitions on adult, consensual homosexual conduct with great rapidity. Northern Ireland was the first following *Dudgeon* in 1982 to decriminalize homosexual intercourse,⁷¹ while France repealed its law making homosexuality an aggravating circumstance in the offense of public indecency.⁷² In 1984, Cuba decriminalized same-sex intercourse, and in 1986, New Zealand did as well.⁷³ In 1991, Hong Kong decriminalized oral and anal intercourse.⁷⁴ After liberation from communist dictatorship in the early 1990s, almost all of the former Soviet republics of Eastern Europe, the Baltics, and several in Central Asia decriminalized homosexual intercourse as well.⁷⁵

68. *Id.*

69. See *Modinos v. Cyprus*, 16 Eur. H.R. Rep. 485 (1993); *Norris v. Ireland*, 13 Eur. H.R. Rep. 186 (1989).

70. Ireland did not comply with the judgment until 1993, however. Criminal Law (Sexual Offences) Act 1993, No. 20, §§ 2-4 (July 7, 1993) (Ire.).

71. Sanders, *supra* note 42, at 71.

72. Loi de 4 août 1981, Journal officiel (5 août 1982) (Fr.).

73. Sanders, *supra* note 42, at 71.

74. Phil C.W. Chan, *The Lack of Sexual Orientation Anti-Discrimination Legislation in Hong Kong: Breach of International and Domestic Legal Obligations*, 9 INT'L J. HUM. RTS. 69, 71 (2005).

75. Latvia decriminalized homosexual intercourse in 1993. See Katrina Z.S. Schwartz, *Gay Rights: United In Hostility*, TRANSITIONS ONLINE, Sept. 22, 2005. Russia, Belarus, Georgia, Moldova, and Ukraine decriminalized homosexual intercourse soon after liberation, followed in 1997 and 1998 by Kazakhstan and Kyrgyzstan, respectively. See Mark Ungar, *State Violence and Lesbian, Gay, Bisexual, and Transgender (LGBT) Rights*, 22 NEW POL. SCI. 61, 62 n.1 (2000).

In 1994, the U.N. Human Rights Committee put an international spin on these mostly isolated events. In *Toonen v. Australia*,⁷⁶ the U.N. Human Rights Committee found that prohibitions on homosexual intercourse constituted a violation of Articles 17(1) (privacy), 26 (equal protection of the laws) and 2(1) (nondiscrimination) of the ICCPR.⁷⁷ After acknowledging that adult, consensual sexual activity conducted in private falls within the scope of Article 17 privacy, the Committee stated that interference in such a right could only be justified if "reasonable in the circumstances"—a phrase the Committee interpreted in harmony with the ECtHR's interpretation of Article 7 of the ECHR⁷⁸ to mean "proportional to the end sought and ... necessary in the circumstances of any given case."⁷⁹ The Committee rejected Tasmania's proffered justification for the legislation as necessary to secure public morality on the ground that such a rationale could justify virtually any invasion of privacy.⁸⁰ The Committee found that, because the criminal law prohibiting homosexual intercourse went mostly or entirely unenforced, it could not be deemed "necessary" or "essential" to protect morality.⁸¹ In concluding, the Committee opined that discrimination based on sexual orientation was forbidden by Articles 26 and 2(1) under the rubric of discrimination based on "sex."⁸² The

76. U.N. GAOR, Hum. Rts. Comm., 50th Sess., Commc'n No. 488/1992, at 226, U.N. Doc. A/49/40 (Sept. 21, 1994) [hereinafter *Toonen*].

77. *Id.* ¶¶ 6.14, 7.1, 73.

78. See *supra* text accompanying notes 27-28.

79. *Toonen*, *supra* note 76, ¶¶ 8.3-8.4.

80. *Id.* ¶¶ 8.4-8.6.

81. *Id.* ¶ 8.6.

82. *Id.* ¶ 8.7. As noted by Helfer and Miller, the more common classification seems to be "other status." See Laurence R. Helfer & Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 HARV. HUM. RTS. J. 61, 70-71 (1996). The author is aware of only one other case in which a tribunal (a U.S. state court) classified the issue as sex discrimination rather than sexual orientation discrimination. See *Deane v. Conaway*, 2006 WL 148145, at *5 (Md. Cir. Ct. Jan. 20, 2006); accord *Baker v. State*, 744 A.2d 864, 905 (Vt. 1999) (Johnson, J., concurring); see also SUZANNE PHARR, *HOMOPHOBIA: A WEAPON OF SEXISM passim* (1988); Andrew Koppelman, *Why Discrimination against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 255-57 (1994). But see *In re Marriage Cases*, 183 P.3d 384, 438 (Cal. 2008) (holding that "judicial decisions in a variety of contexts similarly have concluded that statutes, policies, or public or private actions that treat the genders equally but that accord differential treatment either to a couple based upon whether they are persons of the same sex or of opposite sexes, or to a person based upon whether he or she generally is sexually attracted to persons of the same gender rather than the opposite gender, do not constitute instances of sex

Human Rights Committee now often includes prohibitions on homosexual intercourse among the state measures condemned in its reports.⁸³ More recently, it has broken a new barrier, calling for the United States to outlaw employment discrimination based on sexual orientation altogether.⁸⁴

Neither the *Toonen* guidance nor the HRC's subsequent practice, however, further accelerated the trend toward decriminalization. Decriminalization proceeded on an individual state basis largely as before. In 1994, Australia reacted to the *Toonen* guidance by enacting a blanket prohibition on provincial laws prohibiting "[s]exual conduct involving only consenting adults acting in private."⁸⁵ Also in 1994, the European Parliament called expressly for the decriminalization of homosexual intercourse in all EU member states.⁸⁶ In 1995, Albania, Cyprus, Macedonia, and Moldova repealed their bans on homosexual intercourse.⁸⁷ In 1996, the Colombian Constitutional Court struck down that country's laws criminalizing adult, consensual homosexual sex,⁸⁸ and Iceland repealed a similar law.⁸⁹ In the following year, the People's Republic of China repealed its laws forbidding "hooliganism,"⁹⁰ which had often been used to

discrimination").

83. See, e.g., Concluding Observations of the U.N. Human Rights Committee: El Salvador, July 22, 2003, U.N. Doc. CCPR/CO/78/SLV, ¶ 16; Concluding Observations of the U.N. Human Rights Committee: United Republic of Tanzania, Aug. 18, 1998, U.N. Doc. CCPR/C/79/Add.97, ¶ 23.

84. Concluding Observations of the Human Rights Committee: United States, Dec. 18, 2006, U.N. Doc. CCPR/C/USA/CO/3/Rev. 1, ¶ 25, available at <http://www.unhchr.ch/>. Representative Barney Frank (D-Mass.) tried to answer the call by introducing just such a law, see Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong., 1st Sess. (2007), but it was never reported to the House by the Committee on Education and Labor despite having 184 cosponsors. See H.R. 2015: Employment Non-Discrimination Act of 2007 (GovTrack.us), <http://www.govtrack.us/congress/bill.xpd?bill=h110-2015>.

85. Human Rights (Sexual Conduct) Act, 1994 AUSTL. ACTS P., § 4(1) (Austl.). For an account of the dynamic between Tasmania and Australia, see Helfer & Miller, *supra* note 82, at 68-69.

86. EUR. PARL. RES. A3-0028/94 (Feb. 8, 1994), ¶¶ 5-6.

87. Int'l Gay & Lesbian Ass'n, *Euroletter* No. 44, Sept. 1996 (Albania and Cyprus); Int'l Gay & Lesbian Ass'n, *Euroletter* No. 41, Apr. 1996 (Macedonia); Int'l Gay & Lesbian Ass'n, *Euroletter* No. 34, July 1995 (Moldova).

88. Sentencia No. C-098/96, ¶ 4 (Const. Ct. 1996), available at <http://web.minjusticia.gov.co/jurisprudencia/CorteConstitucional/1996/Constitucionalidad/C-098-96.htm>.

89. Int'l Gay & Lesbian Ass'n, *Euroletter* No. 44, Sept. 1996.

90. CHOU WAH-SHAN, TONGZHI: POLITICS OF SAME-SEX EROTICISM IN CHINESE SOCIETIES 110 (2000).

persecute homosexuals,⁹¹ while the Constitutional Court of Ecuador struck down that state's antisodomy law.⁹² In 1998, the South African Constitutional Court, referring to the U.N. Human Rights Committee's decision in *Toonen*,⁹³ struck down a similar law on constitutional grounds.⁹⁴

Beginning in 2000, the Council of Europe's Parliamentary Assembly formalized the trend by announcing a policy of accepting for membership only those states that had abolished criminal prohibitions on homosexual intercourse.⁹⁵ This pushed the last of the Eastern European holdouts into liberalization. Romania soon thereafter decriminalized homosexual intercourse after threats of sanctions from the Council of Europe overcame strident church opposition.⁹⁶ The United States is a relatively late bloomer. Until 1961, every U.S. state outlawed homosexual conduct between consenting adults; that number was halved by 1986 when the Supreme Court decided in *Bowers v. Hardwick*⁹⁷ that adult homosexuals had no constitutional right to engage in "sodomy."⁹⁸ In the 2003 decision in *Lawrence v. Texas*,⁹⁹ the Supreme Court overruled *Bowers*, finding state statutes criminalizing homosexual conduct to be an unconstitutional intrusion on freedom and privacy. India may be the next state to decriminalize homosexual intercourse,¹⁰⁰ which

91. See Junling Cui, *China's Cracked Closet*, FOR. POL'Y, May 1, 2006, at 90.

92. Sentencia No. 111-97-TC, Registro Oficial, Supp., No. 203, at 6-7 (Nov. 27, 1997).

93. See *supra* notes 76-82 and accompanying text.

94. Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice, 1998 (12) BCLR 1517 (CC) (S. Afr.), available at 1998 SACLX LEXIS 36; Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice, 1999 (1) SA 6 (CC) (S. Afr.).

95. See Council of Europe Doc. 8755, *supra* note 43, ¶ 4 & Explanatory Mem. ¶ 1.

96. See Turcescu & Stan, *supra* note 21, at 292-94.

97. 478 U.S. 186 (1986).

98. *Id.* at 192-94; accord *State v. Walsh*, 713 S.W.2d 508, 511-12 (Mo. 1986).

99. 539 U.S. 558 (2003).

100. India's Supreme Court recently ordered a lower court to reconsider a nongovernmental organization's (NGO) challenge to Section 377 of the Indian Penal Code, which criminalizes same-sex intercourse between males. See Damayanti Datta, *Libido and the Law*, INDIA TODAY MAG., Apr. 22, 2006, at 60, available at http://59.92.116.99/website/DOCPST/Legal_Rights/may06/May06-legal-rights/RF60-libido%20and%20the%20law.pdf. Soon after the court order, an Indian government agency, the National AIDS Control Organisation, filed an affidavit with the Delhi High Court siding with the NGO. See *Govt's AIDS Cell Pushes To Legalise Homosexuality*, TIMES OF INDIA, July 20, 2006, available at <http://timesofindia.indiatimes.com/articleshow/msid-1779097,prtpage-1.cms>. The outcome of the litigation remains uncertain as of the publication of this Article, although the Indian government is currently considering recommendations by several expert groups to

would at one stroke nearly cut in half the world's male population being subjected to laws criminalizing same-sex intercourse (homosexual intercourse between females is not illegal in India).¹⁰¹ Very few of these states have bucked the trend and recriminalized homosexual intercourse after decriminalizing it.¹⁰²

Several interesting trends are evident from this changing state practice. First, the *primum mobile* for decriminalization in Europe seems to be legislation, but outside of Europe most reforms have resulted from decisions of domestic constitutional courts (Australia and China being important exceptions). This may indicate that the main push for decriminalization in Europe is changing culture, while the main thrust elsewhere (including Canada, South Africa, Latin America, and the United States) originates in changing attitudes of legal and political elites. In other words, recognition of a human right to unconventional sexuality seems mainly judicially motivated outside of Europe, although it has been accelerated worldwide by judicial support.

Second, in most of the cases overturning state restrictions on unconventional sexuality, the tribunals emphasized the intimacy of sexual behavior and the centrality of sexual conduct to one's identity and personality as a reason for treating the matter as falling within a right to privacy.¹⁰³ There is a definite trend in the cases toward treating sexuality as in some ways *sui generis*, which may be intended to set sexuality apart from other forms of state regulation of private conduct, giving it a privileged status based on its importance to individual identity and self-actualization.

Third, although a few of the courts in states that have decriminalized same-sex intercourse referenced international human rights treaties and declarations, as well as occasional ECtHR decisions

decriminalize same-sex intercourse.

101. India's population as of July 2008 is estimated at just under 1.1 billion. See WORLD FACTBOOK 2008, *supra* note 49.

102. The lone exception seems to be Nicaragua, see Sanders, *supra* note 42, at 71, but, as noted, this legislation was struck down as unconstitutional.

103. See, e.g., Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice, 1998 (12) BCLR 1517 (CC) ¶ 32 (S. Afr.) (Sachs, J., concurring) ("Respect for human rights requires the affirmation of self, not the denial of self."), available at 1998 SACLX LEXIS 36; Dudgeon v. United Kingdom, 4 Eur. H.R. Rep. 149, ¶ 60 (1982) ("The Convention right affected by the impugned legislation [prohibiting oral and anal intercourse] protects an essentially private manifestation of the human personality.").

or U.N. Human Rights Committee observations, not one of them expressly relied on international law as a basis of authority for striking down criminal prohibitions on such intercourse. For example, in overturning the Texas prohibition on oral and anal intercourse in *Lawrence v. Texas*, the U.S. Supreme Court relied not on a perceived obligation arising under international human rights law, but rather on constitutional principles of "substantive due process."¹⁰⁴ The Court did make passing reference to the ECtHR's decisions on the matter as well as several foreign court decisions,¹⁰⁵ but the Court did not postulate that a new rule of human rights law had arisen, much less that one dictated the outcome of the case before it. Although the term "fundamental human rights" sometimes made its appearance in the opinion,¹⁰⁶ the liberalization was justified as necessitated by the internal constitutional law of the United States rather than an obligation arising under international law.¹⁰⁷ The South African Constitutional Court similarly used the *Toonen* guidance¹⁰⁸ to affirm what it characterized as a domestic constitutional decision.¹⁰⁹

As discussed in Section II.C below, this is typical of those domestic courts that have overturned laws prohibiting homosexual intercourse. In some cases, the courts have struck down the prohibitions on purportedly constitutional grounds, referencing "human rights" but defining these as domestic rather than international concepts. In other cases, state courts have referenced the practices of other states and international or regional legal authorities, but always to supplement rather than supplant domestic constitutional analysis. Some courts display an interest in and belief in the relevance of international practice for interpreting domestic law, but none relies on international human rights law as a central, much less the primary, basis for recognizing the right of all persons to express and define themselves sexually with other consenting adults.

104. *Lawrence v. Texas*, 539 U.S. 558 (2003).

105. *Id.* at 573, 576-77.

106. *E.g., id.* at 565.

107. *See id.* at 578-79.

108. *See supra* text accompanying notes 76-82.

109. *See Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice*, 1998 (12) BCLR 1517 (cc) ¶¶ 46-47 (S. Afr.), available at 1998 SACLX LEXIS 36.

*B. Nondiscrimination**1. Comprehensive Prohibitions*

The decriminalization of unconventional sex removes a fundamental barrier to the enjoyment of the human rights to privacy and association, but it does not ipso facto lead to the full equal treatment of sexual minorities. Even in many states that do not prohibit unconventional sex, discrimination against sexual minorities is abundant and takes diverse forms. The next major trend in state practice following decriminalization has been, first, the abolition of laws explicitly discriminating against sexual minorities, and, second, the promulgation of laws forbidding state and private discrimination. Often these liberalizations have proceeded incrementally, beginning with the elimination of discrimination in the age of consensual sex, or with the enactment of laws prohibiting employment discrimination or extending housing benefits to the same-sex partner of a renter, and later expanding to encompass other kinds of discrimination. In other cases, more general anti-discrimination legislation has been adopted.

As of 2008, twenty-two states, as well as numerous municipalities and other sub-state regions, have adopted legislation comprehensively prohibiting discrimination based on sexual orientation.¹¹⁰ As with the decriminalization of same-sex intercourse, the Parliamentary Assembly of the Council of Europe and the European Union have led the charge. In 1981, the Assembly urged its member states to assure equal treatment between heterosexuals and homosexuals in employment matters and child custody and visitation rights¹¹¹—a call it has repeated more recently labeling discrimination based on sexual orientation as “one of the most odious forms of discrimination.”¹¹² Many members of the Council of Europe continued nonetheless to discriminate against sexual

110. See *infra* note 142 and accompanying text.

111. Council of Eur. Parl. Ass., Recommendation on Discrimination Against Homosexuals, Recommendation 924 (1981), ¶ 7(iii)(b),(d).

112. Council of Eur. Parl. Ass., Situation of Lesbians and Gays in Council of European Member States, Recommendation 1474 (2000), ¶¶ 7, 11(i),(iii)(a).

minorities and same-sex couples in employment, housing, immigration, and other areas throughout the 1990s.¹¹³

This uneven response provoked further pressure from the Council. In 2000, the Parliamentary Assembly sought to have Protocol No. 12 to the ECHR¹¹⁴ amended to forbid discrimination "by any public authority" on grounds of sexual orientation,¹¹⁵ but the recommendation was not accepted by the Committee of Ministers. The Explanatory Report suggests, however, that the reason for the omission of any direct reference to sexual orientation was not disagreement with the Assembly but rather a sense that such a reference would be gratuitous and might cause misinterpretation:

The list of non-discrimination grounds in Article 1 is identical to that in Article 14 of the Convention. This solution was considered preferable over others, such as expressly including certain additional non-discrimination grounds (for example, physical or mental disability, sexual orientation or age), not because of a lack of awareness that such grounds have become particularly important in today's societies as compared with the time of drafting of Article 14 of the Convention, but because such an inclusion was considered unnecessary from a legal point of view since the list of non-discrimination grounds is not exhaustive, and because inclusion of any particular additional ground might give rise to unwarranted *a contrario* interpretations as regards discrimination based on grounds not so included. It is recalled that the European Court of Human Rights has already applied Article 14 in relation to discrimination grounds not explicitly mentioned in that provision (see, for example, as concerns the ground of sexual orientation, the judgment of 21 December 1999 in the case of *Salgueiro da Silva Mouta v. Portugal*).¹¹⁶

113. See, e.g., *A. v. United Kingdom*, 11 Eur. H.R. Rep. C.D. 49, ¶¶ 4-5 (1989) (upholding the United Kingdom's refusal to grant immigration benefits to a same-sex partner of a U.K. citizen).

114. Protocol (No. 12) to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 2000, C.E.T.S. No. 177 [hereinafter ECHR Protocol No. 12].

115. Council of Eur. Parl. Ass'n, Opinion No. 216 on Draft Protocol No. 12 to the European Convention on Human Rights (2000).

116. ECHR Protocol No. 12, *supra* note 114, Explanatory Report ¶ 20 (June 26, 2000), available at <http://conventions.coe.int/Treaty/en/Reports/Html/177.htm>.

Similar calls for comprehensive antidiscrimination legislation have originated in the EU. In 1984, the European Parliament first expressly condemned workplace discrimination based on sexual orientation.¹¹⁷ Recurrently since that time, the EU Parliament has called for nondiscrimination legislation in member states encompassing equal ages of consent for heterosexual and homosexual intercourse; equal social benefits, inheritance rights, and housing rights; and antidiscrimination legislation generally, including access to marriage or an “equivalent” for same-sex couples.¹¹⁸ By the 1997 Treaty of Amsterdam,¹¹⁹ the (then fifteen) member states of the European Community inserted a new Article 13 into the Treaty Establishing the European Community. Article 13(1) now authorizes the Council, acting on a proposal from the Commission and in consultation with the European Parliament, to “take appropriate action to combat discrimination based on sex, ... or sexual orientation.”¹²⁰ In January 2006, the EU Parliament made clear that it “[s]trongly condemns any discrimination on the basis of sexual orientation” and urged member states to end discrimination of all kinds based on sexual orientation.¹²¹ Later that year, the Parliament called again on the member states to implement its antidiscrimination directives with an emphasis on eliminating discrimination based on race, sex, and sexual orientation by criminal prohibitions if necessary.¹²²

117. EUR. PARL. RES. 1-1356/83 (Sexual Discrimination in the Workplace), 1984 O.J. (C 104) 46, ¶ 5.

118. EUR. PARL. RES. A3-0028/94 (Equal Rights for Homosexuals and Lesbians in the EC), 1994 O.J. (C 61) 40, ¶¶ 5-10; see EUR. PARL. RES. A4-0223/1996 (Respect for Human Rights in the European Union in 1994), 1996 O.J. (C 320) 36, ¶¶ 78, 83-84. In 2001, the European Parliament called on the Commission to study ways to decrease discrimination based on sexual orientation in the EU and called on member states both to combat such discrimination. Resolution on the Situation Concerning Basic Rights in the European Union, 2001/2014(INI), EUR. PARL. DOC. P5_TA (2003)0012, ¶¶ 99-100.

119. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340)01, art. 2, ¶ 7.

120. Consolidated Versions of the Treaty on European Union and of the Treaty Establishing the European Community, Dec. 24, 2002, 2002 O.J. (C 325) 1, 43.

121. See Resolution on Homophobia in Europe, EUR. PARL. DOC. P6_TA(2006)0018, ¶¶ 1, 11.

122. Press Release, Eur. Parl., MEPs Adopt Resolution on the Increase of Racist and Homophobic Violence in Europe, June 15, 2006; MEPs Urge Member States, *supra* note 43.

Despite these tentative moves toward legislated equality, the European Court of Justice was slow to recognize a comprehensive human right against discrimination based on sexual orientation. In the controversial 1998 case *Grant v. South-West Trains Ltd.*,¹²³ the ECJ found that Article 119 of the Treaty of Rome and the Council's Equal Pay Directive,¹²⁴ both of which prohibit employment discrimination with regard to access to employment, training, promotion, and working terms and conditions "on grounds of sex," do not prohibit discrimination based on sexual orientation.¹²⁵ In the case, Ms. Grant's employer granted travel privileges to the spouse or "common law opposite sex spouse" of staff members while precluding Grant's female partner from benefitting from travel privileges.¹²⁶ Citing the ECtHR's conclusion that homosexuals have no right to a family life with unrelated members of the same sex under Article 8 of the ECHR, the ECJ decided that "in the present state of the law within the Community, stable relationships between two persons of the same sex are not regarded as equivalent to marriage or stable relationships outside marriage between persons of opposite sex."¹²⁷ Dismissing the relevance of the U.N. Human Rights Committee's guidance in *Toonen*, the court concluded that "Community law as it stands at present does not cover discrimination based on sexual orientation, such as that in issue in the main proceedings."¹²⁸

Partly in reaction to this decision, in 2000, the EU authorized the Charter of Fundamental Rights of the European Union, which prohibits in Article 21(1) discrimination on grounds of sexual orientation.¹²⁹ Although the Charter is not legally binding, Council Directive 2000/78/EC, also adopted that year, established a "general framework" for preventing discrimination on the grounds of sex or sexual orientation in employment.¹³⁰

123. Case C-249/96, 1998 E.C.R. 621.

124. Council Directive 75/117/EEC, 1975 O.J. (L 45) 19, art. 1.

125. *Grant*, 1998 E.C.R. at 652, ¶ 50.

126. *Id.* at 639-40, ¶¶ 4-8.

127. *Id.* at 648, ¶ 35.

128. *Id.* at 651, ¶ 47.

129. Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 13.

130. Council Directive 2000/78/EC, 2000 O.J. (L 303) 16. The directive was required to be implemented by national laws of Member States by the end of 2003. *Id.* art. 18.

Also noteworthy among regional precatory declarations, the Parliamentary Assembly of the Organization for Security and Co-operation in Europe (OSCE) called on member states in 1995 to "ensure that all persons belonging to different segments of their population be accorded equal respect and consideration in their constitutions, legislation, and administration and that there be no subordination, explicit or implied, on the basis of ... sex, sexual orientation, [etc.]."¹³¹ Although the OSCE Assembly has not repeated the call in any of its declarations since that time, neither has repudiated it.

Universal, as opposed to regional, efforts to advance the cause of the human right to nondiscrimination for sexual minorities have been made by several U.N. committees. Most prominent among these is the U.N. Human Rights Committee (HRC). The HRC has not always supported nondiscrimination for sexual minorities. In 1982, the HRC considered whether the Finnish ban on favorable portrayals of homosexuality in broadcast media constituted prohibited discrimination.¹³² The HRC, finding no violation of nondiscrimination, accepted Finland's invocation of the Article 19(3) exception for measures necessary to preserve public morality.¹³³ The opinion seems to imply that the mere portrayal of homosexuality could somehow present a threat to public morals, as if homosexuality were such an irresistible concept that the mere positive public portrayal might cause men and women to leave their families and abandon themselves to lives of debauchery.¹³⁴ On the other hand, the HRC's more recent observations stating or implying that legislation discriminating against homosexuals is inconsistent with the ICCPR indicates a maturation in its thinking on the subject.¹³⁵

131. Org. for Sec. & Co-operation in Eur., Ottawa Declaration of the OSCE Parliamentary Assembly, July 8, 1995, ¶ 29, available at http://www.osce.org/documents/pa/1995/07/171_en.pdf.

132. *Hertzberg v. Finland*, U.N. GAOR Hum. Rts. Comm., Comm. No. 14/61, 37th Sess., Supp. No. 40, at 161, U.N. Doc. A/37/40 (1982).

133. *Id.* ¶ 11.

134. While doctrinally this decision may be reconciled with the much later decision in *Toonen* based on invocation in the former of the public morality exception, Laurence Helfer and Alice Miller are undoubtedly correct in asserting that the Committee's maturing view of unconventional sexuality between 1982 and 1994 better explains the divergent flavors of the two decisions. See Helfer & Miller, *supra* note 82, at 73-74.

135. See, e.g., U.N. Hum. Rts. Comm., Concluding Observations of the Human Rights

Indeed, in *Young v. Australia*, the Committee extended its holding in *Toonen* to find that Australia's refusal to provide the homosexual partner of a veteran the same pension that it would have provided to a heterosexual spouse violated Article 26 of the Convention.¹³⁶ Australia chose not to argue that the distinction between homosexual partners (who cannot marry under Australian law) and heterosexual spouses could be justified on a reasonable and legitimate policy basis.¹³⁷ In an individual concurring opinion, two Committee members emphasized this fact to imply that in future, similar cases the Committee might come to a different conclusion if confronted with "reasonable and objective" arguments to justify discrimination based on sexual orientation.¹³⁸ That the other ten members of the Committee declined to join in this opinion indicates either that they disagreed and concluded that such discrimination on the basis of sexual orientation could never be reasonable and objective, or that they considered the emphasis on Australia's failure to justify its policy to be gratuitous. Given the trend of the Commission's interpretation of the Convention, however, the former conclusion seems more likely than the latter.¹³⁹

Finally, four U.N. Committees—the Committee on Economic, Social and Cultural Rights; the Committee on Torture; the Committee on the Elimination of Discrimination Against Women; and the Committee on the Rights of the Child—as well as the U.N. Working Group on Arbitrary Detention have so far taken the official position that various forms of discrimination against sexual minorities violate human rights obligations under the treaties respectively

Committee, Zimbabwe, ¶ 24, U.N. Doc. CCPR/C/79/Add.89 (1998) (expressing "concern that homosexuals are subjected to discrimination").

136. *Young v. Australia*, U.N. Hum. Rts. Comm., Comm'n No. 941/2000, ¶¶ 10.4-11 (Sept. 18, 2003), U.N. Doc. No. CCPR/C/78/D/941/2000 [hereinafter *Young*].

137. *Id.* app. (Wedgwood & DePasquale, concurring).

138. *Id.* app.

139. *Compare, e.g.*, U.N. Hum. Rts. Comm., Concluding Observations of the Human Rights Committee on the Hong Kong Special Administrative Region, Hong Kong (China), ¶ 15, U.N. Doc. CCPR/C/79/Add.117 (Nov. 4, 1999) (determining that the lack of individual remedies available to redress discrimination on grounds of sexual orientation violated Article 26 of the Convention), with U.N. Hum. Rts. Comm., Concluding Observations of the Human Rights Committee, Hong Kong, ¶ 4, U.N. Doc. CCPR/C/HKG/CO/2 (Mar. 31, 2006) (expressing appreciation for initiatives undertaken to counter discrimination based on sexual orientation).

administered by them.¹⁴⁰ The U.N. Committee on the Rights of the Child specifically opined that discriminatory age of consensual sex laws violate international human rights law, although it left the basis for this conclusion unstated.¹⁴¹

The trend toward individual state recognition of a general human right to protection against discrimination based on sexual orientation is, as a factor in the development of customary international law, potentially as influential as the opinions of the Council of Europe, OECD, Human Rights Committee, and other supranational agencies. As noted, a growing number now unilaterally prohibit discrimination against sexual minorities comprehensively, including in government action and services, housing and real estate, employment, education, and public accommodations such as the provision of goods and services.¹⁴² A few states—Ecuador, Fiji, Portugal, South Africa, and Switzerland—have expressly incorpo-

140. U.N. Hum. Rts. Comm., Working Group on Arbitrary Detention, Opinion No. 7/2002 (Sept. 3, 2001) ¶¶ 27-28 (Egypt); see Holning Lau, Note, *Sexual Orientation: Testing the Universality of International Human Rights Law*, 71 U. CHI. L. REV. 1689, 1701-02 & n.84 (2004).

141. Comm. on the Rts. of the Child, Concluding Observations of the Committee on the Rights of the Child (Isle of Man): United Kingdom of Great Britain and Northern Ireland—Isle of Man, U.N. Doc. CRC/C/15/Add.134, ¶ 22 (Oct. 16, 2000).

142. These include federal and provincial legislation in Buenos Aires, Australia, Brazil, Canada, Costa Rica, Denmark (as early as 1987), Finland, France, Hungary, Iceland, Ireland, Israel, Luxembourg, Mexico, Namibia, the Netherlands, New Zealand, Norway, Slovenia, South Africa, Spain, Sweden, and some states and municipalities of the United States. See LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS app.II at 782-87 (Robert Wintemute & Mads Andenaes eds., 2001); see also, e.g., Anti-Discrimination Act 48 of 1977, Part 4C (Australia); São Paulo Lei No. 10.948, de 5 nov. 2001, art. 1 (Brazil); Loi de 6 nov. 2001 (France); Loi de 1 août 2000 (France); Human Rights Act 1993, § 21(1)(m) (New Zealand); El Al Isr. Airlines Ltd. v. Danilowitz, [1994] IsrSC 48(5) 749 (Isr. Sup. Ct.), available at <http://www.tau.ac.il/law/aeyalgross/Danilowitz.htm>; OTTOSSON, *supra* note 42; World Legal Survey, *supra* note 42; Brown, *supra* note 42, at 119; Maria Berenice Dias, *Brazil: Same-Sex Couples*, in INTERNATIONAL SURVEY OF FAMILY LAW, 2003 EDITION 69, 71 (Andrew Bainham ed., 2003) [hereinafter 2003 INTERNATIONAL SURVEY] (Brazil); Hubbard & Cassidy, *supra* note 46, at 264, 274 (Namibia); Ranata Uitz, *Hungary: Mixed Prospects for the Constitutionalization of Gay Rights*, 2 INT'L J. CONST. L. 705, 712-13 (2004) (Hungary); Wilets, *supra* note 52, at 56-57 (Australia, Denmark, France, & the Netherlands); Wintemute, *supra* note 61, at 1152 & n.39; Paul Gerber, Case Comment, *South Africa: Constitutional Protection for Homosexuals—A Brave Initiative, But Is It Working?*, 2000 AUSTRAL. GAY & LESBIAN L.J. 37, 50-51 (South Africa); Szakacs, *supra* note 57, at *2 (Hungary).

A proposal to prohibit discrimination based on sexual orientation was adopted by the Justice Commission of Turkey in 2004, but was eliminated from the law by the Justice Minister, Cemil Cicek. See Sebnem Arsu, *For Gays in Turkey, A Slow Road to Equality*, INT'L HERALD TRIB., Feb. 6, 2006, at 3.

rated a right to protection from discrimination based on sexual orientation into their new constitutions.¹⁴³

Where a state has adopted no national prohibition on discrimination, governmental subdivisions such as provinces or territories may adopt such protections. For example, while the United States has no federal legislation prohibiting some kinds of discrimination based on sexual orientation, twenty states (including the two most populous) plus the District of Columbia,¹⁴⁴ as well as numerous municipalities,¹⁴⁵ covering *in toto* more than a quarter of the U.S. population,¹⁴⁶ have adopted legislation to prohibit discrimination on the basis of sexual orientation (and in some states based on appearance, "gender identity and expression," or domestic partnership status). Such legislation may cover varied fields of legal regulation, including employment and professions, housing and real estate transactions, licensing, financial credit, business and commercial transactions generally, and public accommodations and services.¹⁴⁷ Similarly, although Germany lacks general

143. *E.g.*, Constitución Política de 1998, art. 23, § 3 (Ecuador), available at <http://pdba.georgetown.edu/Constitutions/Ecuador/ecuador98.html>; Constitution of Fiji (1998) sec. 38(2)(a), available at http://www.oefre.unibe.ch/law/icl/fj00000_.html; Constituição da República Portuguesa (2005) art. 13, § 2, available at <http://www.parlamento.pt/Legislacao/Paginas/ConstituicaoRepublicaPortuguesa.aspx> (Portugal); Constitution of South Africa (1996), ch. 2, § 9(3), available at <http://www.info.gov.za/documents/constitution/index.htm>; Federal Constitution of the Swiss Confederation (2002) art. 8(2), available at <http://www.admin.ch/org/polit/00083/index.html?lang=en> (Switzerland).

144. As of 2008, these states are: California, Colorado, Connecticut, the District of Columbia, Hawai'i, Illinois, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin. As of 2008, only the District of Columbia has incorporated a right to nondiscrimination based on sexual orientation into its state constitution or bill of rights. See D.C. CONST. art. I, § 3 (equal protection and nondiscrimination).

145. See Wilets, *supra* note 52, at 57.

146. See MERIN, *supra* note 42, at 325.

147. See CAL. CIV. CODE § 51(b) (public accommodations) (West 2007); CAL. GOV'T CODE §§ 12940, 12944, 12955 (West 2005) (employment, licensing, housing and real estate); COLO. REV. STAT. ANN. §§ 5-3-210, 8-3-102, 8-17-101, 10-3-1104, 10-4-626, 12-5-102, 12-12-114 *et al.* (West 2008) (credit, employment, licensing, juror eligibility); CONN. GEN. STAT. ANN. §§ 4a-60a, 4a-81b to -81k (2007) (government contracts, licensing and professions, employment, public accommodations, housing and real estate, credit transactions, training, state services); D.C. CODE §§ 2-1402.11, -.31, -.41, -.73, 32-408 (2008) (employment, public accommodations, education, government services); HAW. REV. STAT. §§ 378-2, 515-3 to -5 (2007) (employment, housing and real estate, real estate financing); 775 ILL. COMPILED STAT. pt.5 (2007) (employment, real estate, financial credit, public accommodations); ME. REV. STAT. ANN. tit. 5, §§ 4572, 4582, 4592, 4596, 4602 (2007) (employment, housing and real estate, financial

antidiscrimination laws, in 1992, Brandenburg adopted a new constitution prohibiting discrimination based on sexual orientation, and a few *Länder* eventually followed the example.¹⁴⁸

credit, educational opportunity, public accommodations); MD. CODE ANN. art. 49B, §§ 5, 8, 16, 23 (2008) (public accommodations, employment, housing and real estate); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 2007) (employment, housing and real estate, real estate finance); MINN. STAT. ANN. §§ 363A.08, 363A.09, 363A.11 to .18 (West 2007) (employment, housing and real estate, education, public accommodations and services, financial credit); NEV. REV. STAT. §§ 281.370(2), 338.125, 613.330, 613.340(2) (2007) (employment); N.H. REV. STAT. ANN. §§ 21-I:52, 354-A:7, 354-A:10 (West 2008) (employment, housing); N.J. STAT. ANN. §§ 10:2-1, 10:5-12, 10:5-33 (West 2008) (employment, public accommodations, housing and real estate, business transactions, financial credit); N.M. STAT. ANN. § 28-1-7 (West 2008) (employment, housing and real estate); N.Y. EDUC. LAW § 313 (McKinney 2008) (education); N.Y. EXEC. LAW §§ 296, 296-a (McKinney 2008) (employment, public accommodations, licensing, housing and real estate, commercial transactions, financial credit); OR. REV. STAT. §§ 10.030, 93.270, 179.750, 659.850, 659.870, 659A.006, 659A.009, 659A.030 *et al.* (West 2008) (juror eligibility, public accommodations, employment, education, municipal laws generally, housing and real estate); R.I. GEN. LAWS §§ 28-5-7, 28-5.1-4, 28-5.1-7 to -9, 28-5.1-14, 34-37-2, 34-37-4, 34-37-5.4 (2007) (employment, public services, education, licensing, housing and real estate); VT. STAT. ANN. tit. 3, §§ 961(b), 963 (2007) (employment); VT. STAT. ANN. tit. 8, § 10403 (2007) (financial credit); VT. STAT. ANN. tit. 9, §§ 4502-03 (2007) (housing and real estate, real estate financing, public accommodations); VT. STAT. ANN. tit. 21, §§ 495, 1621(a)(7) (2007) (employment); WASH. REV. CODE ANN. §§ 48.30.300, 48.150.020 & ch. 49.6 (West 2008) (financial credit, housing, employment); WIS. STAT. §§ 16.765, 106.52(3)(a), 111.36(1)(d) (2005-06) (employment, public accommodations). As with national nondiscrimination legislation in some countries, *see, e.g.*, Szakacs, *supra* note 57, at *4 (Hungary), and in some cases judicial decisions, *see, e.g.*, *Trinity W. Univ. v. British Colum. Coll. of Teachers*, [2001] 1 S.C.R. 772 (Can.) (holding that a private religious college that required students to refrain from homosexual behavior and other "Biblically condemned" sins did not discriminate against homosexuals), some of these statutes make exceptions for religious organizations and small scale lessors of real estate and employers. *See, e.g.*, ME. REV. STAT. ANN. tit. 5, § 4553(G) (2007); MINN. STAT. ANN. § 363A.20 (2007); N.M. STAT. ANN. §§ 28-1-7(A), 28-1-9 (2008); N.Y. EXEC. LAW § 296(5)(a) (McKinney 2008). Minnesota explicitly exempts any "nonpublic service organization" that provides "occasional services to minors" from the nondiscrimination duty, *see* MINN. STAT. ANN. §§ 363A.20, 363A.24 (2007), apparently on the theory that the attractions of homosexuality are so compelling that otherwise-heterosexual minors will prove unable to resist its charms once exposed to a practicing homosexual. Alternatively, the Minnesota legislature may assume that sexual minorities are pedophiles.

148. Kees Waaldijk, *The Legal Situation in the Member States, in* HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE 71, 78 & n.15 (Kees Waaldijk & Andrew Clapham eds., 1993) [hereinafter HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE]; Wilfried Schlüter, Jasmin Heckes & Sonja Stommel, *Die Gesetzliche Regelung von Außerehelichen Partnerschaften Gleichen und Verschiedenen Geschlechts im Ausland und Die Deutschen Reformvorhaben*, 2000 DEUTSCHES UND EUROPÄISCHES FAMILIENRECHT 1, 6. The German Grundgesetz does not prohibit discrimination on the basis of sexual orientation as such. *See* Greg Taylor, *The New Gay and Lesbian Partnerships Law in Germany*, 41 ALTA. L. REV. 573, 585 (2003).

This is not to say that substate legislation creates a general atmosphere of equality for sexual minorities. It is true that, in a few states lacking national antidiscrimination legislation based on sexual orientation, local antidiscrimination laws may be promoted pursuant to a national policy. Brazil, for example, lacks comprehensive federal legislation of this kind, but it has recently begun a national program entitled "Brazil without Homophobia" designed to counter persecution of homosexuals and foster equality on the federal, state, and municipal levels.¹⁴⁹ Nonetheless, regional laws often have been enacted based on local sensibilities that run counter to homophobic tendencies in other regions of the same country, as in the United States, where discrimination based on sexual orientation is prohibited in some states and counties and quite common in others.¹⁵⁰

At the antipodes of the discrimination spectrum is the majority of the world's states—including almost all of Africa, Asia, the Middle East, and much of Latin America—which continues to lack any legislation to protect sexual minorities from public or private

149. See Maria Berenice Dias, Judge, Tribunal of Justice of Rio Grande do Sul, Brazil, Speech at the First World Games, Montréal, Canada: Brazil without Homophobia? (July 25, 2006), available at <http://www.mariaberenicedias.com.br> [hereinafter Dias, *Brazil Without Homophobia?*].

150. This point refers to national policy rather than toleration of private acts of discrimination. There is an important difference between permitting private individuals and organizations to discriminate and adopting a governmental policy of discrimination. Nonetheless, in recognition of the role of the state in countering atavistic social tendencies toward racism, sexism, and other forms of discrimination, many states prohibit private discrimination on various grounds. In some states, this extends to at least some forms of private discrimination based on sexual orientation. In the United States, this is accomplished through various national laws such as Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and similar laws. See, e.g., Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, 78 Stat. 241 (codified as amended at 42 U.S.C. §§ 2000e-1 to -3) (prohibiting private employment discrimination based on race, sex, religion, color, or national origin). This has been unevenly extended, however, to private discrimination based on sexual orientation. See, e.g., *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000) (finding unconstitutional a law prohibiting a private association of Boy Scouts from excluding homosexual scout masters); *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (finding unconstitutional the application of a Massachusetts statute forbidding discrimination based on sexual orientation to require St. Patrick's Day parade organizers to allow GLIB to march in the parade). There is sufficient variation in state approaches to private discrimination that a trend toward prohibiting such discrimination cannot be called a recognized state duty imposed by international human rights law. See Robert Wintemute, *Religion vs. Sexual Orientation: A Clash of Human Rights?*, 1 J.L. & EQUALITY 125, 142-47 (2002).

discrimination.¹⁵¹ In some of these countries, general antidiscrimination legislation proposed on behalf of sexual minorities has met with rebuffs.¹⁵² It remains clear that there is no consensus that sexual minorities are entitled under international human rights law to freedom from arbitrary discrimination. More generally, no major international human rights instrument other than the European Charter expressly forbids discrimination based on sexual orientation, and the U.N. General Assembly has never expressed a definite position on the issue, leaving a telling lack of explicit recognition of a human right to be free from arbitrary discrimination based on sexual orientation. There is, nonetheless, a clear trend toward the expansion of the right against discrimination to encompass sexual orientation, sexual identity, and other aspects of sexuality.

2. *Limited Prohibitions*

The most rapidly disappearing discrimination relates to unequal ages of consent to sexual intercourse. In many states, even those that do not prohibit same-sex intercourse, persons can legally consent to heterosexual (or vaginal) intercourse at a younger age than that at which they can legally consent to homosexual (or, in some cases, oral or anal) intercourse. Violations of these provisions are typically considered statutory rape and carry criminal penalties, including fines and imprisonment. They are usually designed, as in a recently repealed Austrian law, "in order to protect ... a young, maturing person from developing sexually in the wrong way," on the theory that "homosexual influence endangers maturing males to a significantly greater extent than girls of the same age."¹⁵³

151. See, e.g., Brown, *supra* note 42, at 123-24 (Argentina). Hong Kong SAR prohibits discrimination by the government but not private entities or individuals. See Chan, *supra* note 74, at 70, 74.

152. See generally OTTOSSON, *supra* note 42; World Legal Survey, *supra* note 42; see also, e.g., Press Release, Human Rights Watch, South Korea: Anti-Discrimination Bill Excludes Many (Nov. 6, 2007), available at <http://hrw.org/>.

153. See Wolfmeyer v. Austria, 42 Eur. H.R. Rep. 3, ¶ 21 (2006); L. & V. v. Austria, 36 Eur. H.R. Rep. 55, ¶ 24 (2003). Other states may phrase their homophobia in more neutral terms, as in Hong Kong: "The reasons [for the age discrimination] are that men between 16 and 21 often have only a limited and possibly distorted knowledge of homosexual activity; they might be curious about and inclined to experiment with new activities and consequently be easily led into committing homosexual acts" Chan, *supra* note 74, at 72.

The equalization of the ages of consent for heterosexual intercourse and homosexual intercourse is an important first step toward eliminating discrimination more generally, because differential ages of consent are based on two homophobic assumptions illustrated in the Austrian law quoted above. The first is that a homosexual experience during the teen years can "convert" someone who would have been heterosexual into a homosexual or bisexual. That there is no scientific evidence for this belief exemplifies the kind of alarmism that often surrounds state treatment of the issue. The second assumption is that the state has legitimate reasons for using its most extreme tool of social control—the criminal law—to prevent such a conversion.

With the waning of homophobia among both the public and political elites in Europe came pressure on European states to abandon discriminatory ages of consent for sexual intercourse. The European Parliament persistently called on EU member states to equalize their age of consent laws beginning in 1994¹⁵⁴ and again in 1996,¹⁵⁵ 1997,¹⁵⁶ and 1998.¹⁵⁷ The Parliamentary Assembly of the Council of Europe similarly urged in 1981¹⁵⁸ and again in 2000¹⁵⁹ that all member states abolish discriminatory ages of consent. They encountered resistance from member states and even the European Human Rights Commission,¹⁶⁰ which consistently refused to recognize privacy and nondiscrimination rights for sexual minorities against discriminatory ages of consent until the 1996 case *Sutherland v. United Kingdom*.¹⁶¹ In that case, the Commission

154. EUR. PARL. RES. A3-0028/94, 1994 O.J. (C 61) 40, 41, ¶ 6.

155. EUR. PARL. RES. A4-0223/96, 1996 O.J. (C 320) 36, 45, ¶ 84.

156. EUR. PARL. RES. A4-0112/97, 1997 O.J. (C 132) 31, 41, ¶ 136.

157. EUR. PARL. RES. A4-0034/98, 1998 O.J. (C 80) 43, 50, ¶ 136.

158. Council of Eur. Parl. Ass., Recommendation 924, 1981 Y.B. EUR. CONV. ON H.R. 78, ¶ 7(ii).

159. Council of Eur. Parl. Ass., Recommendation 1474, 2000 Y.B. EUR. CONV. ON H.R. 429, ¶ 11(iii)(d).

160. See, e.g., *Zukrigl v. Austria*, App. No. 17279/90, Eur. Comm'n H.R. Dec. & Rep. (1992); *X. v. United Kingdom*, 3 Eur. H.R. Rep. 63, ¶ 158 (Eur. Comm'n on Hum. Rts. 1978); *X. v. Fed. Rep. of Ger.*, App. No. 5935/72, 3 D.R. 46 (1975); *X. v. Fed. Rep. of Ger.*, App. No. 530/59, 1960 Y.B. EUR. CONV. ON H.R. 184; *H. F. v. Austria*, 20 Eur. H.R. Rep. C.D. 68 (1995); *Johnson v. United Kingdom*, 9 Eur. H.R. Rep. C.D. 386 (1987); *A. v. United Kingdom*, App. No. 9721/82, 7 Eur. H.R. Rep. CD 145 (1985); *Dudgeon v. United Kingdom*, 3 Eur. H.R. Rep. 40, ¶ 120 (Eur. Comm'n on Hum. Rts. 1980).

161. 22 Eur. H.R. Rep. C.D. 182 (1996).

ultimately found a lower heterosexual age of consent (sixteen for heterosexual sex versus eighteen for homosexual sex) violated Article 14 of the ECHR taken in conjunction with Article 8.¹⁶²

Soon after the Commission's change of posture, the ECtHR agreed that states holding homosexuals to a different age of consent violate Articles 8 and 14 of the ECHR in the parallel cases *L. & V. v. Austria* and *S.L. v. Austria*.¹⁶³ The court required Austria to provide "weighty reasons" to justify the discrimination¹⁶⁴—a burden Austria could not sustain given the absence of empirical support for assumptions underlying such laws. In a more recent case, the ECtHR emphasized the private nature of the conduct, and required Austria to compensate an applicant who had been prosecuted and acquitted of sex with adolescents due to the recent repeal of the discriminatory criminal law under which the applicant had been prosecuted.¹⁶⁵ The applicant's subsequent acquittal, observed the court, could not "make undone the suffering associated with the public exposure of most intimate aspects of the applicant's private life or the loss of his employment."¹⁶⁶ It is now firmly established in the ECtHR's jurisprudence that discriminatory age of consent laws violate Article 14 taken in conjunction with Article 8 of the ECHR.¹⁶⁷

It is interesting that many states lacking comprehensive antidiscrimination legislation nonetheless have abolished discriminatory age of consent laws or declined to adopt them in the first place. At present, all Council of Europe member states and twenty additional

162. *Id.*

163. *L. & V. v. Austria*, 36 Eur. H.R. Rep. 55, ¶¶ 50-54 (2003); *S.L. v. Austria*, 37 Eur. H.R. Rep. 39, ¶¶ 41-46 (2003). The ECtHR reaffirmed this decision in *B.B. v. United Kingdom*, 39 Eur. H.R. Rep. 30, ¶¶ 23-25 (2004), and further found that persons with past convictions under the Austrian law suffered a remediable injury in spite of the fact that Austria had repealed the law in 2003. See *Woditschka & Wifling v. Austria*, 41 Eur. H.R. Rep. 32, ¶¶ 26-27 (2005).

164. *Woditschka & Wifling*, 41 Eur. H.R. Rep. at ¶ 28.

165. *Wolfmeyer v. Austria*, 24 Eur. H.R. Rep. 3, ¶¶ 31-34 (2006).

166. *Id.* ¶ 45.

167. See *S.L.*, 37 Eur. H.R. Rep. at ¶ 17; *L. & V.*, 36 Eur. H.R. Rep. at ¶¶ 52-54; *B.B. v. United Kingdom*, 39 Eur. H.R. Rep. 30, ¶ 25 (2004). Several Council members equalized ages of consent long before the ECtHR required it, however. The Dutch parliament, for example, did so in 1971. See Maarten Salden, *The Dutch Penal Law and Homosexual Conduct*, in *INTERDISCIPLINARY RESEARCH ON HOMOSEXUALITY IN THE NETHERLANDS* 155, 161 (A.X. van Naerssen ed., 1987).

states outside of Europe (plus, most recently, Hong Kong SAR)¹⁶⁸ are known not to discriminate in the age of consent.¹⁶⁹ Nonetheless, the count of states having discriminatory age of consent laws greatly outnumbers those that do not discriminate. At present, only eleven states and some parts of Australia and the United States have decriminalized homosexual intercourse but kept in place discriminatory age of consent laws.¹⁷⁰

When states undertake to reduce or eliminate arbitrary discrimination against sexual minorities and unconventional sexuality, equal age of consent laws are typically the first of several increasingly liberal steps. Sometimes comprehensive antidiscrimination legislation has followed immediately, but more often other forms of discrimination based on sexual orientation have been prohibited in a fragmented fashion as cultural or political pressure slowly overcomes entrenched homophobia. Until its abolition in 1998, the Council of Europe's Human Rights Commission persistently declined to recognize a nondiscrimination right to family life for homosexual couples deprived of immigration, housing, public employment, and other benefits available to heterosexuals.¹⁷¹ The Parliamentary Assembly, as noted above, has taken precisely the opposite view of discrimination in several areas of state regulation,¹⁷² having urged the member states to grant sexual

168. *Court in Hong Kong Invalidates Anti-Sodomy Law from British Era*, N.Y. TIMES, Aug. 25, 2005, at A9 [hereinafter *Court in Hong Kong*].

169. The non-European states are Argentina, Australia, Brazil, Canada, Cambodia, the Central African Republic, Chad, Colombia, Congo, Costa Rica, the Dominican Republic, Egypt, Israel, New Zealand, Paraguay, the Philippines, South Korea, Taiwan, Thailand, and Vietnam. See OTTOSSON, *supra* note 42; World Legal Survey, *supra* note 42; Wintemute, *supra* note 61, at 1149.

170. These states are Albania, the Bahamas, Belarus, Bermuda, Bulgaria, Burkina Faso, Chile, Gabon, Rwanda, Suriname, and the Former Republic of Yugoslavia. See Smith & Grady v. United Kingdom, 29 Eur. H.R. Rep. 493 (2000); Lustig-Prean & Beckett v. United Kingdom, 29 Eur. H.R. Rep. 548 (1999); OTTOSSON, *supra* note 42; World Legal Survey, *supra* note 42; Chan, *supra* note 74, at 71-72; *Court in Hong Kong*, *supra* note 168, at A9; Szakacs, *supra* note 57, at *3. But see State v. Limon, 122 P.3d 22, 38 (Kan. 2005) (finding that a state statute imposing heavier penalties for underage homosexual intercourse than for heterosexual intercourse violates the Equal Protection Clause of the U.S. Constitution).

171. See, e.g., X. & Y. v. United Kingdom, App. 9369/91, 32 Eur. Comm'n H.R. Dec. & Rep. 220, 222 (1983) (immigration); Simpson v. United Kingdom, App. 11716/85, 47 Eur. Comm'n H.R. Dec. & Rep. 274, 277-80 (1986) (housing); Marangos v. Cyprus, 23 Eur. H.R. Rep. C.D. 192, 197 (1997) (public employment).

172. Council of Eur. Parl. Ass., Recommendation 1474, 2000 Y.B. EUR. CONV. ON H.R. 429, ¶ 11.

minorities nondiscrimination rights in public employment and asylum, and a status comparable to heterosexual couples with respect to immigration generally.¹⁷³ Ultimately following the Assembly's view rather than the Commission's, the ECtHR has reversed the trend established by the Commission in a very short period. In its 2004 decision in *Karner v. Austria*, the court recognized a violation of Article 14 taken in combination with Article 8 where tenancy rights typically granted to the survivor of a heterosexual couple were denied to the survivor in a same-sex relationship.¹⁷⁴ In the case, the court concluded that Austria was unable to meet the proportionality test because it could not show how denying such benefits to same-sex couples was necessary to promote "the family in the traditional sense."¹⁷⁵ The ECtHR has, nonetheless, never interpreted Article 14 to grant sexual minorities a comprehensive right against arbitrary discrimination by Council of Europe member states.

The Inter-American Commission on Human Rights is another regional authority to have held that rights against arbitrary discrimination extend to sexual minorities. In the 1998 case *Giraldo v. Colombia*, it heard and declared admissible a complaint by a lesbian prisoner in Colombia who was denied the right to "intimate visits" from her partner based solely on her sexual orientation.¹⁷⁶ The Commission was unpersuaded by Colombia's defense based on "security, discipline, and morality in penitentiary institutions" and "a deeply rooted intolerance in Latin American culture of homosexual practices."¹⁷⁷ In a laconic opinion, the Commission concluded that the claim was admissible because Colombia's policy "could constitute an arbitrary or abusive interference" with the petitioner's "private life" under Article 11(2) of the ACHR.¹⁷⁸ Although the Commission decided to continue analyzing the merits of the

173. Council of Eur. Parl. Ass., Recommendation 1470, 2000 Y.B. EUR. CONV. ON H.R. 426, ¶ 7.

174. 38 Eur. H.R. Rep. 528, ¶¶ 34-43 (2004). The case is procedurally remarkable because the court declined to strike the case as moot when the applicant died prior to judgment. See *id.* ¶ 28.

175. See *id.* ¶¶ 39-43.

176. *Giraldo v. Colombia*, Case No. 11.656, Inter-Am. C.H.R., Rep. No. 71/99, OEA/Ser.L/V/II.106, doc. 6 rev., ¶¶ 2, 14-23.

177. *Id.* ¶¶ 11-12.

178. *Id.* ¶¶ 21, 23.

case, the Colombian government has refused to change policies and no resolution is recorded almost a decade later.¹⁷⁹ *Giraldo* is in any case an isolated instance and not part of a pattern of ACHR jurisprudence on this issue.

Many states have introduced legislation prohibiting specific kinds of discrimination beyond equalizing ages of consent. In most countries, this is typically accomplished through legislation or judicial decisions prohibiting discrimination on a case-by-case basis. The United Kingdom, for example, prohibits discriminatory eviction of the same-sex partner of a homosexual tenant in compliance with the ECtHR's *Karner* decision,¹⁸⁰ and several countries outlaw discrimination based on sexual orientation in housing leases generally.¹⁸¹ Others prohibit discrimination in public education or public employee benefits¹⁸² or inheritance.¹⁸³ Australia, Canada, New Zealand, the United States, and most of Europe allow citizens to sponsor their same-sex partners for immigration purposes.¹⁸⁴ In Brazil, some courts have recognized same-sex couples as *de facto* partners and granted divisions of assets following breakup accordingly; similarly, the federal National Institute for Social Security determined in 2000 that bereaved same-sex partners could collect

179. See IGLHRC, *In Colombia: Lesbian Inmate Subjected to Punitive Sanctions and Inhuman Treatment, In Response to Petition Claiming Her Rights*, Dec. 18, 1999, available at <http://www.iglhrc.org/site/iglhrc/section.php?id=5&detail=349>.

180. *Fitzpatrick v. Sterling Housing Ass'n*, [1999] 3 W.L.R. 1113 (H.L.) (U.K.); accord *Braschi v. Stahl Assoc. Co.*, 543 N.E.2d 49, 55 (N.Y. 1989).

181. See, e.g., Lilla Farkas, *Nice on Paper: The Aborted Liberalisation of Gay Rights in Hungary*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS, *supra* note 142, at 563, 570 (Hungary); Angelo Pantazis, *Home and the World: Lesbian and Gay Places in the Law*, 119 S. AFRICAN L.J. 305, 310 (2002) (South Africa).

182. See, e.g., Farkas, *supra* note 181, at 563-64 (Hungary). In addition, in some Australian states, employment tribunals are empowered to hear complaints of discrimination based on sexual orientation. Michael Kirby, *Same-Sex Relationships: An Australian Perspective on a Global Issue*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS, *supra* note 142, at 7, 12, 20.

183. See Yuaval Yoaz, *Justice Min. Retreats on Move To Bar Gays from Inheritance Law*, HAARETZ.COM, May 9, 2007, <http://www.haaretz.com/hasen/spages/901141.html> (Israel).

184. See Immigration and Refugee Protection Act, S.C.1, ch. 27 (2001) (Can.); Immigration & Refugee Protection Regulations, SOR/2002-227 (Can.); JOHN HART, *STORIES OF GAY AND LESBIAN IMMIGRATION* 26, 29, 32-33 (2002); Wilets, *supra* note 52, at 104. For a history and analysis of the history of Canadian same-sex immigration laws, see generally OTTOSSON, *supra* note 42; World Legal Survey, *supra* note 42; Nicole LaViolette, *Coming Out in Canada: The Immigration of Same-Sex Couples Under the Immigration and Refugee Protection Act*, 49 MCGILL L.J. 969 (2004).

social security benefits on similar terms to different-sex couples in long-term extramarital relationships.¹⁸⁵

These examples cannot be said to illustrate a powerful trend toward the adoption of even a limited right to be free from all discrimination based on sexual orientation. They do evidence a growing recognition, however, that some forms of discrimination based on sexual orientation are arbitrary and unjustified. Taken together with the increasing number of states that have enacted comprehensive prohibitions on discrimination based on sexual orientation and the pronouncements of human rights authorities, there does appear to be a definite if still incipient movement toward the recognition that arbitrary discrimination based on sexual orientation in its most conservative interpretation contravenes some state or regional policy protecting national constitutional rights. In Europe, it is clear that the view that such discrimination violates internationally recognized human rights has achieved a critical mass of consensus and will continue to develop.

3. *Military Service*

The armed forces of most of the world's states have long discriminated against sexual minorities. Even those states relatively sympathetic to claims of equal rights by sexual minorities have refused to admit they are as qualified as heterosexuals to work in defense of their country. Several states have recently come to admit sexual minorities into the armed services. Europe, as elsewhere in the human rights law relating to sexual orientation, has stood at the forefront of this trend. Yet, what few steps have been taken did not come easily. The European Commission of Human Rights¹⁸⁶ was slow to recognize a right against discrimination in admission to participate in the armed forces.¹⁸⁷ The Commission found as recently as 1984 that military regulations in

185. See Dias, *supra* note 142, at 73-74.

186. The Commission was established as an advisory body to the Court of Human Rights in Section II of the ECHR. It was, however, abolished with the adoption of a permanent European Court of Human Rights in 1998. Council of Eur. Parl. Ass., Protocol (No. 11) to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby, E.T.S. No. 155 (1994), available at <http://conventions.coe.int/treaty/en/Treaties/Html/155.htm>.

187. See, e.g., *Marangos v. Cyprus*, 23 Eur. H.R. Rep. C.D. 192, 195-97 (1997).

a member state criminalizing homosexual but not heterosexual intercourse were "objectively and reasonably justified" for the "prevention of disorder" and the "protection of morals."¹⁸⁸ The ECtHR has reversed this position since 1999, however, and condemned discrimination against homosexuals seeking to enlist or remain in the armed services of the United Kingdom.¹⁸⁹ Although in each case the state proposed a legitimate aim to justify the discrimination (again, "national security" and "the prevention of disorder" being typical),¹⁹⁰ the court found the United Kingdom had failed to justify the measures as proportional, because the U.K. had produced no sound evidence that sexual minorities constituted a threat to military discipline, morale, or operational effectiveness.¹⁹¹ At most, the court found, the evidence that the government produced represented a "predisposed bias on the part of a heterosexual majority against a homosexual minority," which could not, in itself, justify discrimination.¹⁹² The ECtHR accordingly found a violation of Article 8 (though not, interestingly, taken in combination with Article 14).¹⁹³

Homosexuals are currently required to be admitted to serve in the armed forces in Australia, the Bahamas, Canada, Israel, Japan, New Zealand, South Africa, and the Council of Europe states.¹⁹⁴ Thus, nondiscrimination in the armed services is the norm in fifty-four of the world's most influential states. The trend continues, as other states are also considering revising enlistment rules to allow sexual minorities to serve.¹⁹⁵

188. *A. v. United Kingdom*, 6 Eur. H.R. Rep. C.D. 354, 357 (1984).

189. *See, e.g.*, *Beck v. United Kingdom*, 2002 Eur. Ct. H.R. 48535/99, ¶¶ 51-53; *Perkins v. United Kingdom*, 2002 Eur. Ct. H.R. 43208/98, ¶¶ 38-41; *Smith & Grady v. United Kingdom*, 29 Eur. H.R. Rep. 493, 493-98 (2000); *Lustig-Prean & Beckett v. United Kingdom*, 29 Eur. H.R. Rep. 548, 548-50, 552-53 (1999).

190. *See Lustig-Prean*, 29 Eur. H.R. Rep. at ¶ 67; *Smith & Grady*, 29 Eur. H.R. Rep. at ¶ 74.

191. *Lustig-Prean*, 29 Eur. H.R. Rep. at ¶ 78; *Smith & Grady*, 29 Eur. H.R. Rep. at ¶¶ 99, 105.

192. *Smith & Grady*, 29 Eur. H.R. Rep. at ¶¶ 99, 105.

193. *Id.* ¶ 97.

194. U.S. GEN. ACCOUNTING OFFICE, DEFENSE FORCE MANAGEMENT: DoD's POLICY ON HOMOSEXUALITY, GAO/NSIAD-92-98, June 1992, App. II, at 54; OTTOSSON, *supra* note 42; World Legal Survey, *supra* note 42. For a discussion of the Canadian decision in 1992, see generally Aaron Belkin & Jason McNichol, *Homosexual Personnel Policy in the Canadian Forces*, 56 INT'L J. 73, 73-77 (2000-01).

195. *See, e.g.*, Jung Sung-Ki, *Military to Revise Rules on Homosexuals*, KOREA TIMES, Apr.

Those states that continue to prohibit homosexual intercourse obviously make no exception for members of their armed forces. Wherever homosexuality is a crime, states uniformly do not admit homosexuals to their armed forces. Even those states that do not prohibit homosexual intercourse, however, may continue to discriminate against homosexuals who seek to enlist. These states include Argentina, Brazil, Belarus, Croatia, North Korea, Peru, the United States, and Venezuela.¹⁹⁶ Thus, homosexuals are denied the equal right to enlist in the armed forces of at least 90 of the U.N.'s 192 member states. This represents a significant but limited recent movement toward recognition of equal rights.

4. Protection Against Persecution

Systematic private and public persecution of sexual minorities remains common worldwide.¹⁹⁷ Even in states in which homosexuality has been decriminalized, harassment of and attacks on

5, 2006, available at 2006 WLNR 6034512.

196. See OTTOSSON, *supra* note 42; World Legal Survey, *supra* note 42; Park Yoon-Bae, *Legal Framework for Transsexuals*, KOREA TIMES, June 29, 2006, available at 2006 WLNR 11294607 (Korea).

In the United States, homosexuals and bisexuals have long been denied the right to participate in military combat positions. 10 U.S.C. § 654(b)(1) (2006); see Remarks Announcing New Policy on Homosexuals in the Military (July 19, 1993), 1 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES, WILLIAM J. CLINTON, 1993, at 1111 (1994); News Release, U.S. Dep't of Def., Off. of the Assist. Sec'y of Def. (Pub. Affairs), No. 605-93: Secretary Aspin Releases New Regulations on Homosexual Conduct in the Armed Forces (Dec. 22, 1993). U.S. federal courts have upheld the DoD policy as consistent with human rights as conceived in the U.S. Constitution. See *Turner v. Dep't of the Navy*, 325 F.3d 310 (D.C. Cir. 2003); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1136 (9th Cir. 1997); *Beller v. Middendorf*, 632 F.2d 788, 808-09 n.20 (9th Cir. 1980). As a result, several hundred U.S. military personnel are discharged every year in the United States because of homosexuality. See DAVID F. BURRELLI & CHARLES V. DALE, CONG. RES. SERV., *HOMOSEXUALS AND U.S. MILITARY: CURRENT ISSUES* 11 (2006), available at <http://digital.library.unt.edu/govdocs/crs/permalink/meta-crs-8572:1>.

197. Although the examples could be multiplied indefinitely, for a few illustrations see, for example, HUMAN RIGHTS WATCH & INT'L GAY & LESBIAN H.R. COMM'N, *MORE THAN A NAME: STATE-SPONSORED HOMOPHOBIA AND ITS CONSEQUENCES IN SOUTHERN AFRICA passim* (2003), available at <http://www.hrw.org/sites/default/files/reports/safrighlrc0303.pdf> (chronicling official persecution of homosexuals in Zimbabwe, Namibia, Zambia, and Botswana); HUMAN RIGHTS WATCH, *supra* note 48, *passim* (Egypt); Brown, *supra* note 42, at 121, 123 (Argentina); Younge, *supra* note 4, at 6 (Jamaica); News Release, Human Rights Watch, Jamaica: Shield Gays from Mob Attacks (Jan. 31, 2008), available at <http://www.hrw.org/en/news/2008/01/31/jamaica-shield-gays-mob-attacks>.

sexual minorities by private individuals or gangs, often in a manner abetted or tolerated by police, is far from rare.¹⁹⁸ Occasionally, it is the state government itself that foments homophobic persecution, most commonly in Africa, where governments have the most reason to wish to distract the public from the serious issues of corruption and poverty. Open and explicit calls by public officials, even heads of government, for the arrest, harassment, deportation, or murder of sexual minorities still occasionally occur without eliciting sanctions or even strong condemnation from the international community.¹⁹⁹ Yet, there has been a countervailing trend of state recognition of a duty to prevent and punish persecution of sexual minorities. The general positive obligation on the state to take reasonable and appropriate measures to protect peaceful assembly from foreseeable private violence is well established,²⁰⁰ as is the obligation to protect individuals from private discriminatory

198. See Ungar, *supra* note 75, at 66-67, 70-72; see also, e.g., U.N. Comm'n on Human Rights, *Civil and Political Rights, Including the Questions of Disappearances and Summary Executions* ¶ 66, U.N. Doc E/CN.4/2003/3 (Jan. 13, 2003) (prepared by Asthma Jahangir) (noting the failure of the Venezuelan government to investigate the murders of transsexuals); *Homosexuals Tricked into Sterilization in Peru—Report*, AGENCE FRANCE PRESSE WIRE, July 6, 1998 (alleging a government program of deceiving homosexuals into sterilization in Peru); Rodriguez, *supra* note 4, at 13 (describing police indifference to mob attacks on homosexuals in Russia); Schwartz, *supra* note 75 (chronicling police verbal and physical abuse of homosexuals in Latvia); News Release, Human Rights Watch, Poland: Official Homophobia Threatens Basic Freedoms (June 4, 2006), available at <http://www.hrw.org/en/news/2006/06/04/poland-official-homophobia-threatens-basic-freedoms>; News Release, Human Rights Watch, South Africa: Lesbians Targeted for Murder, Aug. 9, 2007, available at <http://www.hrw.org/en/news/2007/08/07/south-africa-lesbians-targeted-murder>; Ian Martin, Rep. of the U.N. High Comm'r for Human Rights in Nepal, Address to the Blue Diamond Society on Sexual Orientation/Gender Identity, Nepal (May 17, 2006), available at <http://nepal.ohchr.org> (noting police persecution of sexual minorities in Nepal).

Strangely, the Prime Minister of Singapore, which continues to criminalize homosexual intercourse, has welcomed homosexuals into government service so long as they disclose their sexual orientation. Weiss, *supra* note 4, at 267.

199. See, e.g., Goddard, *supra* note 42, at 89, 95 (quoting the Minister of Home Affairs of Zimbabwe and the President of Zimbabwe); Hubbard & Cassidy, *supra* note 46, at 273 (quoting the Minister of Home Affairs of Namibia and the Namibian President); Letter from Human Rights Watch to Congressional Caucus About U.S. Support for Ugandan Homophobia (Oct. 11, 2007), available at <http://www.hrw.org/en/news/2007/10/10/letter-congressional-caucus-about-us-support-ugandan-homophobia>; News Release, Human Rights Watch, Uganda: State Homophobia Threatens Health and Human Rights (Aug. 21, 2007), available at <http://www.hrw.org/en/news/2007/08/21/uganda-state-homophobia-threatens-health-and-human-rights> [hereinafter Uganda: State Homophobia].

200. See, e.g., United Macedonian Org. Ilinden v. Bulgaria, 44 Eur. H.R. Rep. 4, ¶ 115 (2007).

violence and to investigate and punish those responsible for such violence, at least when the discrimination is based on forbidden grounds.²⁰¹ The development of positive obligations of the latter category has been buttressed by the position recently taken by the U.N. Human Rights Commission, which condemned the failure to investigate and punish attacks on and murders of sexual minorities as a violation of the right to life.²⁰² Some intergovernmental organizations, such as the World Health Organization, have reinforced this position by defining harassment to include persecution based on sex or sexual orientation.²⁰³

Regional and state efforts to combat such persecution have increasingly assumed the form of official policy. More recently, in its Recommendation 1474, the CoE Parliamentary Assembly proposed that the European Commission Against Racism and Intolerance incorporate homophobia into its portfolio.²⁰⁴ In 2006, the European Parliament similarly called on EU member states to combat homophobia in their relations with each other as well as in their bilateral relations with other countries.²⁰⁵ In addition, several states—almost all in Europe, North America, and Oceania—forbid, sometimes under threat of criminal penalty, harassment or hate speech based on sexual orientation.²⁰⁶ Many, including Australia,

201. See, e.g., *Nachova v. Bulgaria*, 39 Eur. H.R. Rep. 37, ¶¶ 165, 169 (2004) (ethnic grounds); *Velásquez Rodríguez Case*, 1988 Inter-Am. Ct. H.R. (ser. C.) No. 4 (July 29), at ¶ 166.

202. See U.N. Comm'n on Human Rights, Decision 2005/34, ¶ 5, U.N. ESCOR, 61st Sess., Supp. No. 3, U.N. Doc. E/2005/23 (Apr. 19, 2005); U.N. Comm'n on Human Rights, *Civil and Political Rights*, *supra* note 198, ¶¶ 66-67.

203. World Health Organization, Office of the Exec. Director, *WHO Policy on Harassment*, Cluster Note 2001/9, Mar. 23, 2001, ¶ 4, available at <http://www.un.org/womenwatch/osagi/pdf/who.pdf>.

204. Council of Eur. Parl. Ass., Recommendation 1474, ¶ 11(ii) (2000).

205. See Resolution on Homophobia in Europe, EUR. PARL. DOC. P6_TA(2006)0018, ¶¶ 2-3; MEPs Urge Member States, *supra* note 43.

206. These include state or federal legislation in Australia, Canada, Denmark, Iceland, Ireland, Luxembourg, Namibia, the Netherlands, Norway, South Africa, Spain, Sweden, and the United States. See CRIM. CODE, R.S.C., ch. C-46, §§ 318(4)-19 (1985) (Can.); OTTOSSON, *supra* note 42; World Legal Survey, *supra* note 42; Hubbard & Cassidy, *supra* note 46, at 264 (Namibia); Pantazis, *supra* note 181, at 312 (South Africa).

Several U.S. states have adopted legislation criminalizing harassment or persecution based on sexual orientation. See MD. CODE ANN. art. 49B, § 37 (2003); MASS. GEN. LAWS ANN. ch. 151B, § 4, ¶ 4A (2007); N.Y. CIV. RIGHTS LAW § 40-c (Consol. Supp. 2008). Although the U.S. federal government has not adopted hate crime legislation, it has directed the consideration of hatred based on sexual orientation as an aggravating factor in the federal

Canada, New Zealand, South Africa, the United States, and most of Europe,²⁰⁷ have followed the lead of the U.N. High Commissioner for Refugees in defining persecution based on sexual orientation or transsexualism as a legitimate basis for granting asylum.²⁰⁸ In some cases, state courts have taken the position that, where homosexuals could live a life of secrecy and intrigue, hiding their sexuality from the world to avoid abuse and possibly imprisonment or execution, they are not persecuted,²⁰⁹ but these appear to be the exception rather than the rule in these countries.²¹⁰ On the other hand, the large number of states from which asylum based on homophobic persecution has been granted demonstrates the schism in state perceptions of their duties under international law toward sexual minorities. Host states have granted asylum based on persecution of sexual minorities in dozens of countries, including seven countries in each of Africa, Asia, and Europe, three in the Middle East, and thirteen in the Americas.²¹¹

On one hand, protection against persecution based on sexual orientation represents a significant step toward a general recognition among the most influential states that at least the most virulent forms of discrimination violate human rights. On the other, state toleration of persecution in many countries indicates that the

sentencing guidelines. See Pub. L. 103-322, tit. 28, § 280003 (Sept. 13, 1994), 108 Stat. 1997 (U.S.). Nonetheless, hate crime based on sexual orientation is far from rare in the United States, accounting for nearly 1200 reported (and undoubtedly many more unreported) incidents and more than 1400 reported offenses in 2004. See FED. BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES 65-66 (2004).

207. See, e.g., *In re Toboso-Alfonso*, Att'y Gen. Order No. 1895-94, June 19, 1994, 20 I. & N. Dec. 819, 820-23 (B.I.A. 1990) (U.S.); Council of Europe Doc. 8755, *supra* note 43, Explanatory Mem. ¶¶ 37-38 (Belgium, the Czech Rep., Hungary, the Netherlands, Spain, Sweden); OTTOSSON, *supra* note 42 (most of Europe, New Zealand, Canada); Pantazis, *supra* note 181, at 309 (South Africa); Kristen L. Walker, *Sexuality and Refugee Status in Australia*, 12 INT'L J. REFUGEE L. 175, 180-84 (2000) (Australia, Canada, New Zealand, U.K., U.S.); Wilts, *supra* note 52, at 109-10 (Australia, Austria, Netherlands, Germany, Finland, Sweden).

208. U.N. High Refugee Agency, *Guidelines on International Protection, Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, ¶¶ 16-17, U.N. Doc. HCR/GIP/02/01 (May 7, 2002); EUR. PARL. RES. A 3-16/89, ¶ 10, 1989 O.J. (C 256) 33.

209. See Dauvergne & Millbank, *supra* note 4, at 105-07.

210. See *id.* at 115 (noting that Canada, New Zealand, and the United States have come to contrary conclusions).

211. OTTOSSON, *supra* note 42; World Legal Survey, *supra* note 42.

global recognition of these rights has not advanced to the point of widespread practice.

C. Moves Toward Family Law Rights

The most contentious sphere of state regulation relating to sexual minorities from a human rights perspective has been in the field of family law. Despite the treaty-based guarantees of protection from arbitrary state interference in the right to privacy, association, and family life, the overwhelming majority of states deny any right to same-sex marriage and systematically discriminate against sexual minorities where parental rights are concerned. This subject remains the one in which state justifications for such measures are most staunchly defended as necessary for the preservation of *ordre public* or public morality. Yet, here too the writing is on the wall. A handful of influential states have now granted full rights to same-sex marriage and parental rights, and many others have taken decisive steps in this direction by granting partnership rights in most ways akin to marriage.

1. Same-Sex Marriage

Sexual minorities may be motivated to claim a human right to same-sex marriage for several reasons. Most pragmatically, marriage is a highly subsidized institution in most countries.²¹² Beyond the support that the law requires spouses to bestow on each other (e.g., mutual aid, maintenance or alimony, contributions to child care), the state typically grants many benefits to the married couple in the form of rights to community property, pensions, tenancy rights, inheritance, immigration rights, tax benefits, prison and hospital visitation rights, and the right to refuse to testify against one's spouse in a criminal prosecution. In the United States, for example, the federal government grants over a thousand benefits to married couples that are denied to unmarried couples (which

212. See generally, e.g., Marlene Schmidt, *Employment, The Family, and The Law: Current Problems in Germany*, 27 COMP. LAB. L. & POL'Y J. 451, 485 n.128 (2006) (discussing subsidization of marriage in German law); Leslie Whittington, *Manipulating Marriage? Federal Income Taxes and the Household Structure Decision*, 16 N.Y.L. SCH. J. HUM. RTS. 129 (1999) (discussing tax benefits given to married couples under U.S. federal law).

includes all same-sex couples).²¹³ In federal states, these benefits may be exclusive of provincial, state, or municipal benefits for married couples, which may be substantial (as they are in the United States). Denials of these benefits to same-sex couples create a systematic transfer of wealth and privileges from same-sex couples wishing to marry to heterosexual couples wishing to marry based primarily if not entirely on their choice of intimate partners.

Second, marriage creates legal rights and obligations that balance the needs of the couple regardless of the economic contribution (if any) they make to the relationship. This may be desirable as a means of reaffirming each spouse's love for and support of the other, thereby creating or strengthening socially supportive relationships.²¹⁴ Marriage may also appeal to the state itself as a means for reducing the burdens of the welfare system.²¹⁵ Marriage in most states constitutes a legally binding commitment by each to care for the other as well as any of their children financially, and so creates a formal duty of mutual aid and protection.²¹⁶ If one spouse becomes unable to support himself or his children, due to job loss or a health problem, marriage requires the other spouse rather than the state to assume the obligation to provide for the couple.²¹⁷

Third, marriage is a form of self-definition. Changing status from single or married alters one's identity fundamentally. In a purely personal sense, through marriage, one's self-perception may change due to the recognition that one has made a binding, intimate,

213. Letter from Dayna K. Shah, Assoc. Gen. Counsel, U.S. Gen. Accounting Office, to U.S. Sen. Bill Frist (Jan. 23, 2004) (Doc No. GAO-04-353R).

214. See MERIN, *supra* note 42, at 33. The German registered partnership law, for example, obligates partners to form a relationship "of mutual support and consideration for each other's needs." See Taylor, *supra* note 148, at 590, 598.

215. See *In re Marriage Cases*, 183 P.3d 384, 423-24 (Cal. 2008) (discussing the ways in which marriage promotes mutual support among family members and child rearing to reduce the burden on the state's welfare system); Kerri Harper, *Stereotypes, Childcare, and Social Change: How the Failure to Provide Childcare Perpetuates Public Perception of Welfare Mothers*, 4 N.Y.U. J. LEGIS. & PUB. POL'Y 387, 400 (2000-01) (discussing the burden that children born out of marriage place on the social welfare system).

216. See WILLIAM ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE* 66-70 (1996); MERIN, *supra* note 42, at 34-35.

217. In enacting its civil union law, the Vermont General Assembly expressly invoked its "strong interest in promoting stable and lasting families, including families based upon a same-sex couple." Act 91, An Act Relating to Civil Unions, § 1(8), 15 VT. STAT. ANN. § 1201(8) (Supp. 2000).

purportedly lifelong promise to love and support the other person and any preexisting or future children. This is a commitment not everyone can make, and the realization that one is capable (or, for that matter, incapable) of making it may profoundly affect one's self-perceptions and can be critical to one's feelings of fulfillment of his or her human potential, place in society, and relationship to others generally. The ubiquity of references in most societies to marital status (e.g., on job applications, driver's license, financial accounts and mortgages, automobile insurance forms, hospital admission forms, etc.) reinforces the importance of this aspect of identity by constant reminders of its relevance to society and, by extension, to one's place in that society.

Finally and perhaps relatedly, marriage constitutes a major, if not the ultimate, societal endorsement of lifestyles sought by the married couple.²¹⁸ Certainly, not all sexual minorities consider same-sex marriage to be the holy grail of public recognition of their freedom to define their own familial associations and sexual identity.²¹⁹ But for those who do, same-sex marriage, once formally recognized by the state, may be construed as a public recognition of their equal rights and equal autonomy to that of heterosexuals.

Until very recently, even the most progressive human rights authorities were unreceptive to claims to equal rights to marriage for sexual minorities. As with other kinds of discrimination, the judicial organs of the European Union and Council of Europe have lagged behind the legislative organs in the application of traditional human rights principles to sexual minorities. Throughout the 1980s, the ECtHR and the European Commission on Human Rights denied that homosexuals had any right to family life at all by virtue of the sex of their chosen partners.²²⁰ As late as 2001, the European Court of Justice (ECJ) decided a case brought by an official of the

218. See Douglas Louw, *Gay and Lesbian Partner Immigration and the Redefining of Family*, 16 S. AFR. J. HUM. RTS. 313, 320 (2000).

219. See, e.g., Charles R.P. Pouncy, *Marriage and Domestic Partnership: Rationality and Inequality*, 7 TEMP. POL. & CIV. RTS. L. REV. 363, 365-74 (1998); Judith Rauhofer, *The Possibility of a Registered Partnership Under German Law*, in LEGAL QUEERIES 68, 73-78 (Leslie J. Moran et al. eds., 1998).

220. See, e.g., *A. v. United Kingdom*, 11 Eur. H.R. Rep. C.D. 49, ¶ 4 (1989) ("The Court and the Commission have previously held that homosexual relationships do not fall within the ambit of family life, but rather fall within the notion of private life under Art. 8 of the Convention.").

European Community whose Swedish registered partnership—a partnership explicitly made equivalent to marriage under Swedish law, with specific listed exceptions—the EU Council refused to treat as equivalent to marriage for purposes of EU employee household allowance.²²¹ The court held that these regulations could not be construed as discriminatory on the basis of sex, because the sex of the employee was irrelevant to the Staff Regulations policy²²²—a course of reasoning sometimes called the “equal application theory” because it treats all laws having equal application to both sexes as nondiscriminatory regardless of the context or consequences. The ECJ further noted that “according to the definition generally accepted by the Member States, the term marriage means a union between two persons of the opposite sex” and found it “clear” that registered partnerships are regarded by EU member states as being distinct from marriage.²²³ From this, the court concluded that the EU Staff Regulations must be interpreted literally to exclude from the household allowance any legal arrangement other than “marriage.”²²⁴ Finally, the court rejected the plea that the discriminatory policy infringed the employee’s right to respect for private and family life under Article 8 of the ECHR, interpreting “private life” narrowly to mean the transmission of personal information (inapplicable to the case at hand), and interpreting “family life” even more narrowly as relating to the employee’s “civil status” only, rendering Article 8 irrelevant to the situation of an employee discriminated against based on the sex of his or her legally recognized life partner.²²⁵

As with most judicial decisions, the result in this one was not preordained. The ECJ could have taken a different approach, considering the sex of the employee’s partner as well. It could have defined sex discrimination more broadly to include discrimination against the *couple* based on their relative sexes instead of focusing atomistically on the employee alone.²²⁶ Similarly, it could have

221. *D. & Sweden v. Council of the Eur. Union*, [2001] E.C.R. I-4319, ¶¶ 2-5.

222. *Id.* ¶¶ 46, 52.

223. *Id.* ¶¶ 34, 36, 48-51.

224. *Id.* ¶¶ 37-38.

225. *Id.* ¶¶ 58-59.

226. In an interesting contrast, the Circuit Court of Maryland County held in 2006 that the refusal to allow same-sex couples to marry violated Maryland’s constitutional prohibition on sex discrimination (as opposed to discrimination based specifically on sexual orientation)

analogized registered partnerships to marriage. The ECtHR has long interpreted Article 8 to encompass not merely the right to withhold personal information from the public but a more general liberty of choice in one's intimate actions and associations. The ECJ could have cited this policy to find discrimination based on his intimate choice of association. In any case, the EU Council apparently disagreed on policy grounds, as it decided in 2002 to adopt regulations treating same-sex marriages on equal terms as different-sex marriages for purposes of EU employment benefits and other staff regulations.²²⁷

Although the ECtHR has never recognized a right to same-sex marriage under Articles 8, 12, or 14 of the ECHR, it has begun to shift its jurisprudence toward recognition of a right to family life for sexual minorities. In 1998 the court found no violation of Article 12 in member state refusals to permit transsexuals to marry persons of their birth sex,²²⁸ but only four years later, the court reversed itself decisively. In *Goodwin v. United Kingdom*, the court held that states that permit sex reassignment surgery must treat post-operative transsexuals as if they had changed sex for all legal purposes, including marriage.²²⁹ Overcoming the technical objections of the respondent state, the court noted:

with reference to the sex of the spouses: "The relative genders of the two individuals are facts that lie at the very center of the matter." There is sex discrimination in the refusal to permit same-sex marriages, the court reasoned, because a man is barred from marrying a male partner "when a woman would enjoy the right to marry that same male partner. As compared to the woman, the man is disadvantaged solely because of his sex.... [I]n any given instance the [prohibition] 'will always be applied to a particular sex.'" *Deane v. Conaway*, No. 24-C-04-005390, 2006 WL 148145, at **3, 5 (Md. Cir. Ct. Jan. 20, 2006) (quoting *Burning Tree Club, Inc. v. Bainum*, 501 A.2d 817 (Md. 1985) (Rodowsky, J., concurring)).

227. See Aude Fiorini, *New Belgian Law on Same-Sex Marriage and Its PIL Implications*, 52 INT'L & COMP. L.Q. 1039, 1047-48 (2003).

228. *Sheffield & Horsham v. United Kingdom*, 27 Eur. H.R. Rep. 163, 195, ¶ 66 (1998). The court had earlier stated regarding Article 12 that "whether a person has the right to marry depends not on the existence in the individual case of such a partner or a wish to marry, but on whether or not he or she meets the general criteria laid down by law." *Cossey v. United Kingdom*, 13 Eur. H.R. Rep. 622, 638, ¶ 32 (1990). This reading of Article 12 is tantamount to reducing the "human right" guaranteed by that Article 12 to a right not to be denied a marriage license arbitrarily and absent applicable law (i.e., it becomes a narrow right to due process of law where marriage is concerned).

229. *Goodwin v. United Kingdom*, [2002] E.C.H.R. 28957/95.

The applicant in this case lives as a woman, *is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so.* In the Court's view, she may therefore claim that the very essence of her right to marry has been infringed.²³⁰

The respondent state replied by arguing that the decision to permit or deny such marriages should be left to its own discretion because many Council of Europe member states deny transsexuals the right to marry persons of their birth sex.²³¹ To this, the court rejoined: "This would be tantamount to finding that the range of options open to a [member state] *included an effective bar on any exercise of the right to marry.* The margin of appreciation cannot extend so far."²³² While it is clear that the court intended to limit its holding to the facts before it, its reasoning applies by analogy to other same-sex marriages. Homosexuals, by the nature of their sexual orientation, are also typically in a relationship with someone of their own sex and would only wish to marry someone of their own sex. To deny homosexuals the right to same-sex marriage is equally an "effective bar on any exercise" of their right to marry.²³³ Nonetheless, the ECtHR has not yet gone so far, partly because it considers that there is no human right to marry *in abstracto*. Until the court takes this additional step, Article 12 confers only a right to marry persons of the "opposite" sex.

The legislative organs of the Council of Europe (CoE) and the EU have been still more proactive. The CoE Parliamentary Assembly in 2000 urged member states to adopt legislation providing for "registered partnerships" for same-sex couples.²³⁴ Similarly, in 2001, the EU Parliament called on member states "to recognise unmarried partnerships—between both couples of different sexes and same-sex couples—and to link them to the same rights as apply to marriage" and urged the EU to put same-sex marriage on the

230. *Id.* ¶ 101 (emphasis added).

231. *Id.* ¶ 102.

232. *Id.* ¶ 103 (emphasis added).

233. See *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008) ("[T]his state's bar against same sex marriage *effectively* precludes gay persons from marrying; to conclude otherwise would be to blink at reality.").

234. Council of Eur. Parl. Ass., Recommendation 1474, ¶ 11(iii)(i) (Sept. 2000).

agenda.²³⁵ It repeated the call in January 2006, noting that some EU member states give unequal benefits to different-sex couples (notably by denying same-sex couples full marriage rights) and urging the Commission to propose a prohibition on discrimination against same-sex couples, either married or in a registered partnership.²³⁶ It further urged the Commission to guarantee the free movement of EU citizens and their family members regardless of sexual orientation.²³⁷

This call has been partly answered, although not by the universal adoption of same-sex marriage. As of this writing, only five states—Belgium, Canada, the Netherlands, Spain, and South Africa—now permit full same-sex civil marriages on terms substantially identical to those of different-sex marriages. The Netherlands adopted full same-sex marriage in 2001, only three years after approving registered partnerships for same-sex couples.²³⁸ The Belgian parliament opened marriage to such couples in 2003.²³⁹ Canada legalized same-sex marriage through the 2005 Civil Marriage Act²⁴⁰ after court decisions had already validated same-sex marriage in eight provinces and one territory.²⁴¹ The Spanish parliament approved full same-sex marriage in June 2005 as well.²⁴² Finally, in December 2005, the South African Constitutional Court ruled the common law prohibition on same-sex marriage

235. Resolution on the Situation Concerning Basic Rights in the European Union, 2001/2014(INI), EUR. PARL. DOC. P5_TA(2003)0012, ¶¶ 102-03.

236. See Resolution on Homophobia in Europe, EUR. PARL. DOC. P6_TA(2006)0018, ¶¶ E, 11; Resolution on Non-Discrimination and Equal Opportunities for All—A Framework Strategy, 2005/2191(INI), EUR. PARL. DOC. P6_TA(2006)0261, ¶ 30.

237. MEPs Urge Member States, *supra* note 43.

238. See Act of 21 December 2000 Amending Book 1 of the Civil Code, Concerning the Opening Up of Marriage for Persons of the Same Sex (Act on the Opening up of Marriage), 2001 Staatsblad van het Koninkrijk der Nederlanden (Official Gazette) nr.9 (Jan. 11, 2001) (Nether.).

239. See *Loi ouvrant le mariage à des personnes de même sexe et modifiant certaines dispositions du Code civil de 13 fév. 2003*, Moniteur Belge (Official Gazette), Feb. 28, 2003 ed 3, at 9880, available at <http://www.ejustice.just.fgov.be> (“Deux personnes de sexe différent ou de même sexe peuvent contracter mariage.”).

240. See C-38, 38th Parliament, 1st Sess. (2005) (codified at 33 STAT.) (Can.).

241. *Re Same Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79 (Can.); *M. v. H.*, [1999] 2 S.C.R. 3 (Can.); see MARY C. HURLEY, BILL C38: THE CIVIL MARRIAGE ACT (Can. Parl. Doc. LS-502E, Sept. 14, 2005), available at <http://www.parl.gc.ca>.

242. *Spanish MPs Approve Gay Marriages*, BBC NEWS, June 30, 2005, available at <http://news.bbc.co.uk/2/hi/europe/4636133.stm>.

unconstitutional,²⁴³ prompting the South African parliament to consider marriage for same-sex couples, which it adopted by law in November 2006.²⁴⁴ A sixth, Hungary, has allowed common law same-sex marriages since 1995 without extending a right to civil marriage to same-sex couples.²⁴⁵ At present, several other states, including Australia,²⁴⁶ Germany,²⁴⁷ and Taiwan,²⁴⁸ are currently considering adopting same-sex marriage as well.

As with nondiscrimination laws, where federal states have been slow in recognizing a right to same-sex marriage, provincial or local governments have sometimes steamed ahead. In Brazil, for example, Rio Grande do Sul became the first state in that country to recognize same-sex civil unions in April 2004.²⁴⁹ The province of Victoria did the same in Australia.²⁵⁰ Similarly, although same-sex marriage is not recognized by the U.S. federal government or most states, it has been allowed in the state of Massachusetts since 2003²⁵¹ and has recently been declared a constitutional right

243. *Minister of Home Affairs v. Fourie*, 2006 (3) BCLR 355 (CC) (S. Afr.), available at <http://www.constitutionalcourt.org.za/uhtbin/hyperion-image/J-CCT60-04>.

244. Phumza Macanda, *Africans Cheer, Condemn S. Africa Gay Marriage Bill*, REUTERS NEWS, Nov. 15, 2006; John Reed, *S. Africa to Legalise Gay Partnerships*, FIN. TIMES, Aug. 24, 2006; *South Africa OKs Same-Sex Marriage*, CBS NEWS, Nov. 14, 2006, <http://www.cbsnews.com/stories/2006/11/14/world/main2179939.shtml>.

245. This was the result of a decision of the Hungarian Constitutional Court rather than the parliament. Uitz, *supra* note 142, at 712 (citing Decision 14/1995 (III. 13.) AB). The Hungarian parliament did, however, expressly recognize same-sex common-law marriages the following year. MERIN, *supra* note 42, at 131 (citing Act of 1996: XLII Law 1-3 (May 21, 1996) (Hung.)); see also Farkas, *supra* note 181, at 569; Szakacs, *supra* note 57, at *4. Common law marriages confer most of the economic and other rights and duties of formal marriage as well as the privilege against spousal testimony and hospital visitation rights. It does not, however, confer an obligation of mutual support or any parental rights. See MERIN, *supra* note 42, at 131-32; Farkas, *supra* note 181, at 570.

246. See Marriage (Relationships Equality) Amendment Bill 2007, Bill No. 07034, Feb. 28, 2007, available at <http://parlinfoweb.aph.gov.au>.

247. See Eric Fongaro, *Le mariage homosexuel à l'épreuve du droit international privé*, 133 J. DU DROIT INT'L 477, 480 (2006).

248. See *Advocates Seek Talks with Lawmakers over Issues on Gay Rights*, TAIWAN NEWS, Nov. 2, 2006, available at <http://english.www.gov.tw>; Paula L. Ettelbrick, *Recognition of Gay Marriage: A Global Phenomenon*, SAN JOSE MERCURY NEWS, Dec. 6, 2006, at A1; Paul Wiseman, *Same-Sex Marriage Spurs Few Political Ripples in Taiwan*, SEATTLE TIMES, Feb. 27, 2004, at A10.

249. Danya Levy, *Civil Union Bill: Gay Unions a Global Issue*, N.Z. HERALD, Oct. 7, 2004, at A18.

250. See MERIN, *supra* note 42, at 171.

251. See *Goodridge v. Dep't of Health*, 798 N.E.2d 941 (Mass. 2003).

in Iowa by a state district court,²⁵² and in Connecticut by the Connecticut supreme court.²⁵³

The U.S. experience is particularly instructive. Although the federal Supreme Court has repeatedly found marriage to be a “fundamental freedom” and “one of the basic civil rights of man,”²⁵⁴ it has, in holding statutes criminalizing adult consensual homosexual conduct unconstitutional, disclaimed any intent to preclude laws discriminating against same-sex marriage²⁵⁵—a decision that lower state and federal courts have typically understood to preclude equal protection claims to a right to marry.²⁵⁶ Like several other countries have done,²⁵⁷ the United States enacted a law in 1996—the Defense of Marriage Act (DOMA)—to define marriage for federal purposes specifically as the union of a man and a woman to the exclusion of all other definitions with the intent to deprive the U.S. states of their right to define marriage to include same-sex couples with federal effect.²⁵⁸ The Internal Revenue Service and

252. See *Varnum v. Brien*, Case No. CV5965 (Iowa Dist. Ct. Aug. 30, 2007) (unpub.), available at <http://data.lambdalegal.org/pdf/legal/varnum/varnum-d-08302007-ia-district.pdf>. At the time of this writing, the Iowa Supreme Court is currently considering the appeal in the case. *Varnum v. Brien*, No. 07-1499, Ia. Sup. Ct.; see *Supreme Court Schedules Gay Marriage Hearing: Oral Arguments Begin Dec. 9*, WASH. BLADE, Oct. 6, 2008, available at http://www.washblade.com/thelatest/thelatest.cfm?blog_id=21440.

Appellate courts of several states have recently considered and struck down lower court rulings finding discrimination against same-sex marriages unconstitutional. See, e.g., *Deane v. Conaway*, 932 A.2d 571 (Md. App. 2007), *rev'd* 2006 WL 148145 (Md. Cir. Ct. Jan. 20, 2006); *Andersen v. King County*, 138 P.3d 963 (Wash. 2006).

253. See *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

254. *Loving v. Virginia*, 388 U.S. 1, 12 (1967); see, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942).

255. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). This despite Justice Scalia's opinion that the Court's opinion undermined the legal foundation for such discrimination. *Id.* at 604 (Scalia, J., dissenting).

256. See, e.g., *Wilson v. Ake*, 354 F. Supp. 2d 1298 (M.D. Fla. 2005); *In re Kandu*, 315 B.R. 123 (Bankr. W.D. Wash. 2004); *Standhardt v. Superior Ct. ex rel. Cty. of Maricopa*, 77 P.3d 451 (Ariz. 2003); *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005); *Samuels v. New York State Dep't of Health*, 29 A.D.3d 9 (N.Y. App. Div. 2006). But see, e.g., *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Kerrigan*, 957 A.2d 407; *Varnum*, Case No. CV5965.

257. Australia, for example, amended its federal Marriage Act in 2004 to define marriage explicitly as a union between men and women “to the exclusion of all others,” and the conservative Prime Minister caused the Governor-General to veto the Australian Capital Territory's attempt to establish gay civil unions in May 2006. See *Australia: No Wedding Bells*, *ECONOMIST*, June 17, 2006, at 50; *Outrage as Same-Sex Union Bill Vetoed*, *CANBERRA TIMES*, June 14, 2006, available at 2006 WLNR 10117183.

258. Defense of Marriage Act, Pub. L. 104-199, 110 Stat. 2419 (1996) (codified at 1 U.S.C.

other federal agencies have accordingly declared that they will not recognize same-sex marriages for federal tax and other regulatory purposes.²⁵⁹ Congress hoped the DOMA would prevent U.S. states not permitting same-sex marriages from being compelled to recognize another U.S. state's same-sex marriage under the Full Faith and Credit Clause of the Constitution.²⁶⁰ In addition, constitutional amendments have repeatedly been introduced into Congress to prevent any state from allowing same-sex marriages.²⁶¹ These amendments have so far been rejected by a small margin, but twenty-nine U.S. states have amended their constitutions to ban same-sex marriages and in some cases partnerships,²⁶² and the rest (excepting Connecticut and Massachusetts) have done so by legislation.²⁶³ Although civil unions are available in some states, and several counties and municipalities offer domestic partnerships,²⁶⁴ few states can offer substitutes similar to those common in Europe due to the importance of federally granted marriage benefits.²⁶⁵

Of course, this may seem like a classic case of the exception proving the rule that sexual minorities lack a human right to marry under customary international law. While recognition of such a right is still nascent, there has been a definite international trend, beginning in 1989, of legally creating various kinds of domestic partnership and civil union arrangements that, while not fully equivalent to marriage, are designed to put same-sex couples on a more equal footing with heterosexual couples respecting most of

§ 7, 28 U.S.C. § 1738C (2004)).

259. See Anthony C. Infanti, *Prying Open the Closet Door: The Defense of Marriage Act and Tax Treaties*, 105 TAX NOTES 563, 563 (Oct. 25, 2004).

260. LYNN O. WARDLE & LAURENCE C. NOLAN, *FUNDAMENTAL PRINCIPLES OF FAMILY LAW* 216 (2d ed. 2006). The normal conflict of laws rule is that the validity of marriage is governed by the *lex loci celebrationis*, unless some important public policy would be threatened by recognition of the marriage. *Id.* at 219.

261. *E.g.*, H.R.J. Res. 91, 109th Cong. (2006); H.R.J. Res. 88, 109th Cong. (2006); S.J. Res. 13, 109th Cong. (2005); H.R.J. Res. 39, 109th Cong. (2005); S.J. Res. 1, 109th Cong. (2005); H.R.J. Res. 106, 108th Cong. (2004); S.J. Res. 30, 108th Cong. (2004); S.J. Res. 26, 108th Cong. (2003); H.R.J. Res. 56, 108th Cong. (2003); H.R.J. Res. 93, 107th Cong. (2002).

262. See Nat'l Gay & Lesbian Task Force, *Relationship Recognition Map for Same-Sex Couples in the United States* (Nov. 4, 2008), available at <http://www.thetaskforce.org>.

263. *Id.*; see also MERIN, *supra* note 42, at 229.

264. See MERIN, *supra* note 42, at 246-48 tbl.2.

265. *Id.* at 251.

the duties and benefits of marriage. The earliest, and among the most egalitarian, is Denmark's Registered Partnership Act of 1989.²⁶⁶ Since that watershed, over a dozen states in Western Europe have adopted various forms of civil unions or domestic partnerships for same-sex couples.²⁶⁷ Most recently, in December 2007, the Hungarian Parliament created a registered partnership for either same-sex or different-sex couples.²⁶⁸ This partnership grants all of the rights of married couples except parental rights and the right to take the same surname.²⁶⁹ Other countries are considering adopting civil unions or registered partnerships as well.²⁷⁰

As with same-sex marriage, sub-state political entities like provinces, counties, and cities have also adopted civil union or registered partnership laws when the national government failed

266. The Registered Partnership Act, Act No. 372 of June 7, 1989 (Den.). See generally Marianne H. Pedersen, *Denmark: Homosexual Marriages and New Rules Regarding Separation and Divorce*, 30 J. FAM. L. 289 (1991-92). The Danish Act was adopted in 1996 by Greenland as well. See MERIN, *supra* note 42, at 67.

267. Act on Registered Partnerships 950/2001 (Fin.); C. CIVIL art. 515 (2000) (Fr.); Gesetz zur Beendigung der Diskriminierung gleichgeschlechtlicher Gemeinschaften: Lebenspartnerschaften (Feb. 16, 2001), BUNDESGESETZBLATT (Official Gazette) I, at 266, available at <http://www.bgbportal.de/BGBL/bgb11f/b101009f.pdf> (F.R.G.); Act on Registered Partnership, No. 87 (1996) (Ice.); Registered Partnership Act (Apr. 30, 1993) (Norway); Law No. 6/2001 (Port.); Law No. 7/2001 (Port.); Registration for Homosexual Couples of Partnership Act (June 23, 1994) (Swed.); Act on Registered Partnerships Between Persons of the Same Sex (June 5, 2005) (Switz.); see *Eingetragene Partnerschaft in der Berufsvorsorge der Ehe gleich*, NZZ ONLINE, Sept. 29, 2006, <http://www.nzz.ch/2006/09/29/il/newzzESOAZA20-12.html> (Switz.); Civil Partnership Act 2004, ch. 33, available at <http://www.opsi.gov.uk/acts/acts2004/20040033.htm> (U.K.); MERIN, *supra* note 42, at 56, 80, 94, 108, 134-35; Caroline Forder, *European Models of Domestic Partnership Laws: The Field of Choice*, 17 CAN. J. FAM. L. 371, 390 (2000); Sofia Oliveira Pais, *Portugal: De Facto Relationships and Same-Sex Relationships in Portugal*, in 2002 INTERNATIONAL SURVEY, *supra* note 46, at 340, 344; Taylor, *supra* note 148, at 584.

The parliament of the Czech Republic approved a registered partnership law for same-sex couples over the President's veto in March 2006 (taking effect in July 2006). *Czech MPs Approve Gay Rights Law*, BBC NEWS, Mar. 15, 2006, available at <http://news.bbc.co.uk/2/hi/europe/4811030.stm>.

268. See Orsolya Szeibert-Erdős, *Same-Sex Partners in Hungary: Cohabitation and Registered Partnership*, 4 UTRECHT L. REV. 212 (2008).

269. *Id.*

270. For example, bills have been introduced into the Argentinian parliament, but none has so far passed. See *Argentina Moving Toward Gay Marriage Rights*, 365GAY.COM, Mar. 1, 2007 (on file with *William and Mary Law Review*).

to do so. In the United States, Vermont,²⁷¹ Connecticut,²⁷² New Hampshire,²⁷³ New Jersey,²⁷⁴ and Oregon²⁷⁵ permit civil unions that are in almost all ways equivalent to marriage with respect to state-granted (but not federal) rights. Domestic partnerships granting somewhat lesser rights than civil unions are now available in many U.S. states, most comprehensively in California²⁷⁶ and Maine.²⁷⁷ Similarly, the city of Buenos Aires and province of Rio Negro in Argentina, the Australian states of New South Wales and Queensland, the *Distrito Federal* of Mexico, and several Italian provinces have also adopted civil unions or domestic partnerships when the national government would not.²⁷⁸

This is not to equate civil union, much less registered partnership, to the recognition of equal family rights for sexual minorities. The partnership and civil union often differ substantially in the scope and terms of benefits and obligations imposed on the partners, and some of them afford quite limited rights. The French *Pacte civil de solidarité* (PaCS), for example, is similar to marriage in requiring the partners to furnish "mutual and material aid," holding them jointly liable for debts, permitting joint income

271. An Act Relating to Civil Unions, VT. STAT. ANN., tit. 15, §§ 1201-07 (2000).

272. An Act Concerning Civil Unions, 2005 Conn. Pub. Acts No. 05-10.

273. N.H. REV. STAT. ANN. § 457-A:1 (2007).

274. N.J. Assembly Bill A3787 (2007) (codified at N.J. STAT., tit. 37 (2007)).

275. Ashbel S. Green, *Civil Unions Get the Nod in Oregon*, PORTLAND OREGONIAN, Feb. 2, 2008, available at 2008 WLNR 2110669.

276. CAL. FAM. CODE §§ 297-299.6 (West 2008). The California Supreme Court found that homosexuals had the same constitutional right to marriage as heterosexuals in early 2008, *In re Marriage Cases*, 183 P.3d 34 (Cal. 2008), but California voters quickly passed a referendum to amend the California constitution to deprive homosexuals of the right to marry. See Peter Henderson, *Gays See Rights Growing Despite Election Losses*, REUTERS, Nov. 6, 2008, available at <http://www.reuters.com>.

277. See generally Peter Hay, *Recognition of Same-Sex Legal Relationships in the United States*, 54 AM. J. COMP. L. 257 (2006).

278. See Nerina Boschiero, *Les unions homosexuelles à l'épreuve du droit international privé italien*, 40 RIVISTA DI DIRITTO INTERNAZIONALE 50, 56 (2007) (Italy); Kirby, *supra* note 182, at 14-15; *Gay Couple Unites in Argentina, A First for Latin America*, GMAX, July 21, 2003, <http://www.gmax.co.za/look/07/21-argentina.html>; *Mexican Capital Legalizes Same-Sex Civil Unions*, AFP NEWswire, Nov. 10, 2006, available at http://www.breitbart.com/article.php?id=061110062654.7a0l6ypb&show_article=1. See generally Jenni Millbank & Kathy Sant, *A Bride in Her Every-Day Clothes: Same Sex Relationship Recognition in NSW*, 22 SYDNEY L. REV. 181 (2000). The Australian capital territory tried to do the same thing, but was blocked by the Prime Minister. See *Outrage as Same-Sex Union Bill Vetoed*, *supra* note 257.

taxation, giving them an undivided half interest in each others' property (community property), conferring a survivorship right to housing, and granting death benefits in employment.²⁷⁹ But it differs from marriage in not requiring sexual fidelity, not granting an employment holiday to celebrate the marriage, not conferring an automatic inheritance right, creating no parental rights, and not conferring an automatic right of French nationality on the partner (instead, the PaCS is an "element of appreciation" for consideration by the French government).²⁸⁰ It is common for domestic partnerships to deny sexual minorities important rights, including joint taxation, inheritance, social security rights, and equal rights to child custody.²⁸¹ In contrast, Nordic registered partnerships mirror the characteristics of marriage—including tax and social security benefits, inheritance rights, community property, and a duty of mutual support—with only a few specified exceptions relating to pension rights and the status of children, some of which have been abandoned.²⁸² Moreover, the very creation of a separate system of family rights for homosexuals may be taken as a denial of the equal dignity and value of homosexual relationships to heterosexual ones.²⁸³

279. MERIN, *supra* note 42, at 139-40; Claudina Richards, *The Legal Recognition of Same-Sex Couples—The French Perspective*, 51 INT'L & COMP. L.Q. 305, 317-18 (2002).

280. Fongaro, *supra* note 247, at 483, 507; Richards, *supra* note 279, at 317-19.

281. See Resolution on Homophobia in Europe, EUR. PARL. DOC. P6_TA(2006)0018, ¶ E. The German law, for example, is limited in the sense that, for example, although registered partners benefit from inheritance rights like spouses, they do not obtain the same inheritance tax benefits. See MERIN, *supra* note 42, at 146-47.

282. See MERIN, *supra* note 42, at 89-90, 92, 99, 102, 105. Initially, Danish and Swedish registered partners could not jointly adopt, have joint custody over the other's children, or obtain artificial insemination. The first two limitations were abandoned in Denmark, however, in 1999. See *id.* at 73-74, 77. Sweden switched to allowing same-sex adoption in 2002. See Marion MacGregor, *Sweden Opts for Gay Adoption*, DEUTSCHE-WELLE, June 7, 2002, available at <http://www.dw-world.de/dw/article/0,2144,571702,00.html>.

283. See *In re Marriage Cases*, 183 P.3d 384, 444-46 (Cal. 2008) ("[P]articularly in light of the historic disparagement of and discrimination against gay persons, there is a very significant risk that retaining a distinction in nomenclature with regard to this most fundamental of relationships whereby the term 'marriage' is denied only to same-sex couples inevitably will cause the new parallel institution that has been made available to those couples to be viewed as of a lesser stature than marriage and, in effect, as a mark of second-class citizenship."); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 417 (Conn. 2008) ("[W]e cannot discount the plaintiffs' assertion that the legislature, in establishing a statutory scheme consigning same sex couples to civil unions, has relegated them to an inferior status, in essence, declaring them to be unworthy of the institution of marriage.");

The proliferation of legal forms of partnership conferring rights and obligations short of full marriage itself poses certain practical problems for same-sex couples. Partnerships may not be recognized in other states lacking such forms of partnership or having different forms of same-sex partnership. Before 2004, this might have posed a problem for same-sex partners in the European Union, where a Swedish registered partnership was not recognized in Germany, and a German life-partner need not be recognized in Sweden.²⁸⁴ Now, the ramifications are less severe in some parts of Europe than elsewhere. Since 1995, the Nordic states have agreed to recognize each other's registered partnerships,²⁸⁵ and recently the EU Council and Parliament have issued a directive on the free movement of EU citizens and their family members that extends nondiscrimination rights to registered partners where a host member state recognizes registered partnerships as equivalent to marriage.²⁸⁶ Nonetheless, most European states that continue to deny a right to same-sex marriage within their own borders equally apply conflicts of law principles to decline to recognize same-sex marriages that have taken place even in Belgium, Holland, or Spain.²⁸⁷ Moreover, outside of the EU the problem remains in most places (e.g., a Vermont civil union need not be recognized in Denmark, and vice versa).²⁸⁸

Opinions of the Justices to the Senate, 802 N.E.2d 565 (Mass. 2004) ("The dissimilitude between the terms 'civil marriage' and 'civil union' is not innocuous; it is a considered choice of language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.").

284. See Fiorini, *supra* note 227, at 1048.

285. MERIN, *supra* note 42, at 78.

286. Directive 2004/58/EC, 2004 O.J. (L 229) 35.

287. For example, the French Ministry of Justice recently informed the French *Parlement*, in response to a direct question on the subject, that because family law matters generally remain within the jurisdiction of EU member states, "a homosexual union could have no legal effect in France except if national law admitted this form of union for the couple.... [T]he marriage of two women or of two men of French nationality in the Netherlands or Belgium would not be recognized in France, because French national law prohibits it." Réponse ministérielle no. 41533, Ministre de Justice, JOAN Q., July 26, 2005, at 7437, reprinted in Fongaro, *supra* note 247, annex at 509 (my translation); see also Fongaro, *supra* note 247, at 479. Italy similarly declines to recognize foreign same-sex marriages, civil unions, and domestic partnerships. See Boschiero, *supra* note 278, at 53-57.

288. A recent New York appellate court, however, has established a rule that the state must recognize same-sex marriages validly entered into in other states. See *Martinez v. County of Monroe*, 850 N.Y.S.2d 740 (N.Y. App. Div. 2008).

Even equating civil unions and registered partnerships to marriage, however, would not amount to a clear pattern of recognition of equal human rights for sexual minorities. Fewer than two dozen states approving same-sex marriage or the rough equivalent on a national level hardly evidences an international custom. On the whole, opposition to such recognition remains overwhelming. National recognition of a right to same-sex marriage continues to be denied in the entirety of Central and South America, the Middle East, Asia, and all but one state in Africa.²⁸⁹ Nonetheless, even among these states, a few have forbidden discrimination against homosexuals in the granting of benefits that otherwise accrue only to married persons. The Supreme Court of Israel has forbidden discrimination against homosexuals in the granting of employment benefits that otherwise accrue only to spouses as well as inheritance rights.²⁹⁰ Employment benefits and some other property rights are now extended to same-sex couples in Argentina,²⁹¹ New Zealand,²⁹² parts of Australia,²⁹³ and in many European states that do not recognize same-sex partnerships as well.²⁹⁴ Similarly, Brazil and Colombia have now extended inheritance and social security benefits to same-sex partners.²⁹⁵

U.N. practice on the point has been ambiguous. In 2004, the U.N. Secretary-General extended spousal benefits to same-sex partners

289. See OTTOSSON, *supra* note 42; World Legal Survey, *supra* note 42; see also Hubbard & Cassidy, *supra* note 46, at 262 (Namibia); Tabuchi, *supra* note 11 (Japan); Kerry Williams, "I Do" or "We Won't": *Legalizing Same-Sex Marriage in South Africa*, 20 S. AFRICAN J. HUM. RTS. 32, 45 (2004) (South Africa). Aruba, though forced by its affiliation as a colony of the Netherlands to recognize the marriage, has resisted through its Prime Minister's opposition on moral grounds to recognition of same-sex marriage. *Aruba: Lesbian Couple Win Case to File Marriage*, MIAMI HERALD, Aug. 24, 2005, at A8.

290. *El Al Isr. Airlines Ltd. v. Danilowitz*, [1994] IsrSC 48(5) 749, ¶¶ 15-17 (Isr. Sup. Ct.), available at <http://www.tau.ac.il/law/aealgross/Danilowitz.htm> (employment benefits); *In re Estate of M.R. v. Att'y Gen. for the Gen. Custodian*, CA 3245/03 (Civ. App. Ct. Nazareth Nov. 10, 2004) (Israel) (inheritance); see also David Flatto, *Justice in Flux*, JERUSALEM POST, Apr. 21, 2006, at 12.

291. See *Argentina Moving Toward Gay Marriage Rights*, *supra* note 270.

292. MERIN, *supra* note 42, at 174.

293. Millbank & Sant, *supra* note 278, at 185-89.

294. See, e.g., Laurence R. Helfer, *Lesbian and Gay Rights as Human Rights: Strategies for a United Europe*, 32 VIR. J. INT'L L. 157, 168 (1991) (Sweden).

295. Mike Ceaser, *Gay Rights Grow in Colombia*, S.F. CHRON., Apr. 26, 2007, at A12; Human Rights Watch, *Non-Discrimination in Civil Marriage: Perspectives from International Human Rights Law and Practice*, available at <http://www.hrw.org/backgrounder/lgbt/civil-marriage.htm>.

of U.N. staff where the domestic partnership was legally recognized in the staff-person's country of citizenship. Although the Secretary-General's directive was revised to omit the term "domestic partnership" in deference to protestations from the Organization of the Islamic Conference, the regulation took effect nonetheless.²⁹⁶ The effect is limited, because same-sex couples married outside of their country of citizenship do not benefit from spousal benefits within the U.N. organization if their country of citizenship refuses to recognize same-sex marriages,²⁹⁷ but it represents the U.N. taking at least a neutral position regarding equal rights for sexual minorities.

On the other hand, the U.N. HRC has rejected the argument that sexual minorities have an equal human right to family life. In 2002, the Committee responded to a challenge to New Zealand's prohibition on same-sex marriage,²⁹⁸ opining that the state's decision to deny same-sex couples the benefits of marriage that it grants to different-sex couples did not constitute discrimination in violation of Article 26 of the ICCPR.²⁹⁹ Given the undisputed fact that a law that permits heterosexuals but not homosexuals to marry is facially discriminatory on grounds of sexual orientation, and given further that all forms of state arbitrary discrimination are prohibited by the ICCPR,³⁰⁰ the Committee's conclusion is difficult to reconcile with its earlier recognition that Article 26 prohibits discrimination based on sexual orientation in *Toonen*³⁰¹ and *Young*.³⁰² To justify its decision, the Committee noted that the text of Article 23(2)

296. See Edith M. Lederer, *New U.N. Direction [sic] Drops Reference to Domestic Partnerships but Allows Same-Sex Partners of U.N. Staff To Collect Benefits*, AP ONLINE, Oct. 2, 2004; William M. Reilly, *U.N. Members Criticize Same-Sex Benefits*, UPI NEWS PERSP., Mar. 15, 2004.

297. See, e.g., Int'l Labour Org., Admin. Trib. Judgment No. 2449 (May 5, 2005), ¶ A, available at <http://www.ilo.org/public/english/tribunal/fulltext/2449.htm>.

298. *Joslin v. New Zealand*, U.N. GAOR, Hum. Rts. Comm., 57th Sess., Comm. No. 902/1999, U.N. Doc. A/57/40, at 214 (July 17, 2002) [hereinafter *Joslin*].

299. *Id.* ¶ 8.3.

300. The U.N. Human Rights Committee interprets "discrimination" for purposes of the ICCPR as encompassing "any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex ... or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms." U.N. Hum. Rts. Comm., General Comment No. 18: Non-discrimination, Nov. 10, 1989, ¶ 7.

301. *Toonen*, *supra* note 76.

302. *Young*, *supra* note 136.

established "[t]he right of men and women of marriageable age to marry and to found a family."³⁰³ The Committee could have read this provision as undetermined on the question of same-sex marriage, as homosexuals are either men or women who seek a right to marry. Instead, it interpreted Article 23(2) to establish the right of men of marriageable age to marry women of marriageable age, and vice versa.³⁰⁴ The Committee contrasted the Convention's use of the terms "every human being," "everyone," and "all persons" elsewhere in the Convention with Article 26's use of the term "men and women."³⁰⁵

The Committee could reasonably have interpreted the treaty language otherwise. The Committee could, for example, have decided that the use of the words "men and women" was intended to mitigate the vagueness of the term "marriageable age" by clarifying that adults ("men and women") rather than children had the right to marry. Such an interpretation would promote the human right of children not to be forced into arranged marriages.³⁰⁶ The Committee chose instead the more politically acceptable reading, which no doubt accorded with the views of ICCPR's parties at the time. After all, at the time the Convention was drafted, no state could have considered same-sex marriage to fall within the scope of the human rights to intimate association and family life, because none of the signatories allowed such marriages at the time. Whether this position is justifiable on policy grounds is, of course, an entirely different question, but the Committee's mandate and position do not encourage it to adopt aggressively expansionistic interpretations of politically controversial human rights, however consistent such an interpretation might be with legal doctrines generally.

303. *Joslin*, *supra* note 298, ¶ 8.2; ICCPR, *supra* note 1, art. 23.

304. *Joslin*, *supra* note 298, ¶ 8.2.

305. *Id.*

306. See UDHR, *supra* note 1, art. 16(1); Convention on the Elimination of All Forms of Discrimination Against Women art. 16(2), *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981).

2. Equal Parental Rights

The most entrenched form of discrimination against sexual minorities has long related to the custody and adoption of children. When even the states of northern Europe were just beginning to pass registered partnership laws for same-sex couples, equal parental rights in general and adoption rights specifically were expressly denied to sexual minorities.³⁰⁷ Much has changed in a very short period; many states, including several that prohibit same-sex marriage, now allow same-sex couples or single homosexuals to assume custody of their own or their partners' children, or to adopt unrelated children, on a nondiscriminatory basis. As of 2008, these states included Belgium,³⁰⁸ Brazil,³⁰⁹ Canada,³¹⁰ Denmark,³¹¹ Finland,³¹² Israel,³¹³ the Netherlands,³¹⁴ South Africa,³¹⁵ Spain,³¹⁶ Sweden,³¹⁷ the United Kingdom,³¹⁸ and some provinces of Australia.³¹⁹ In a few states in Europe, the custody of a sexual minority's biological child can be shared with nonbiological same-sex parents.³²⁰ In some cases, these rights are even automatic, as in the Netherlands, where a woman upon marriage to another

307. Eric Fish, *The Road to Recognition*, 27 HARV. INT'L L.J. 32, 32 (2005).

308. *Gay Couples in Belgium Get Adoption Rights*, WASH. BLADE, Apr. 21, 2006, available at http://www.washblade.com/thelatest/thelatest.cfm?blog_id=6317; Danny McCoy, *Belgium Legalizes Same-Sex Adoption*, GMAX.CO.ZA, Apr. 24, 2006, available at <http://www.gmax.co.za/look06/04/24-belgium.html>.

309. See Dias, *supra* note 142, at 77.

310. See Wintemute, *supra* note 61, at 1157.

311. See Fish, *supra* note 307, at 32.

312. See Williams, *supra* note 289, at 46-47.

313. See Hilary Leila Krieger, *Court: Lesbian Can Adopt Partner's Kids*, JERUSALEM POST, Feb. 13, 2006, at 1.

314. See Q & A SAME SEX MARRIAGE: A GUIDE TO DUTCH POLICY 10 (2003), available at http://www.nlembassy.org.yu/downloads/ethical.samesex_policy.pdf

315. See Louw, *supra* note 218, at 315-18 (citing Dawood v. Minister of Home Affairs, 2000 (8) BCLR 837 (CC) ¶¶ 53-60, 86 (S. Afr.)); Wendy Isaack, *Equal in Word of Law: The Rights of Lesbian and Gay People in South Africa*, 30 HUM. RTS. 19, 21 (ABA 2003) (citing Du Toit v. Minister of Welfare & Population Dev., CCT 40/01 2002 (10) BCLR 1006 (CC)).

316. See *Spanish MPs Approve Gay Marriages*, *supra* note 242.

317. See MacGregor, *supra* note 282.

318. Civil Partnership Act, 2004, c. 33, § 79, available at <http://www.opsi.gov.uk/acts/acts2004/20040033.htm>.

319. See World Legal Survey, *supra* note 42.

320. See, e.g., Taylor, *supra* note 148, at 598-99 (Germany).

woman acquires joint custody of the other's prior children without any formalities.³²¹

Most of the world, however, continues to deny equal parental rights to sexual minorities.³²² The denial of custody and visitation rights to homosexuals following divorce remains common in most countries. In some, custody or visitation is conditioned upon a homosexual parent hiding his or her sexual identity from the child.³²³ Courts in most U.S. states, where judges have significant discretion to discriminate if they choose,³²⁴ have come to reject homosexuality as a basis for denying custody of children,³²⁵ but in many states it has been considered a relevant factor in making custody determinations, and there is an automatic presumption in several of them that sexual minorities are unfit to have custody even of their own children.³²⁶ The Supreme Court's 2003 decision overturning antisodomy laws in *Lawrence v. Texas* would appear to cast doubt on the continued validity of such discrimination,³²⁷ but the matter has not been tested at the federal Supreme Court level. In sum, only a few countries have openly recognized that sexual

321. MERIN, *supra* note 42, at 127.

322. See, e.g., Levy, *supra* note 249, at A18 (Russian Fed.); Council of Europe Doc. 8755, *supra* note 43, Explanatory Mem. ¶¶ 41, 43 (Andorra, the Czech Republic, France, Hungary, Malta, Poland, Romania, Slovenia, Switzerland). Some of the countries mentioned in these sources are excluded here because they have altered their laws since the sources were published to allow adoption.

323. See, e.g., Mouta v. Portugal, 31 Eur. H.R. Rep. 47, 1065 ¶ 14 (2001); Pantazis, *supra* note 181, at 311 (South Africa).

324. See Nancy D. Polikoff, *Lesbian and Gay Couples Raising Children: The Law in the U.S.*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS, *supra* note 142, at 153-54.

325. See MERIN, *supra* note 42, at 186 n.45 (Alaska, Iowa). But see Kate Kendell, *Lesbian and Gay Parents in Child Custody and Visitation Disputes*, 30 HUM. RTS. 8, 8, 22 (ABA 2003).

326. See, e.g., Lofton v. Sec'y of Dep't of Children & Fam. Serv., 358 F.3d 804, 819-20 (11th Cir. 2004) (Florida); *Ex Parte H.H.*, 830 So.2d 21, 37-38 (Ala. 2002); Downey v. Muffley, 767 N.E.2d 1014, 1021 (Ind. Ct. App. 2002); *In re Marriage of Diehl*, 582 N.E.2d 281 (Ill. App. 1991); *Morris v. Morris*, 783 So.2d 681, ¶¶ 45-47 (Miss. 2001); *H. v. P.*, 643 S.W.2d 865, 869-71 (Mo. Ct. App. 1982); *N.K.M. v. L.E.M.*, 606 S.W.2d 179, 183 (Mo. Ct. App. 1980). But see *Delong v. Delong*, No. WD 52726, 1998 WL 15536, at *5 (Mo. Ct. App. Jan. 20, 1998) (refusing to apply the traditional irrefutable presumption that a homosexual is an unfit parent but allowing consideration of whether the parent's homosexuality harmed the child); *Pascarella v. Pascarella*, 512 A.2d 715, 717-18 (Pa. Super. 1986); *Bottoms v. Bottoms*, 457 S.E.2d 102, 107-08 (Va. 1995).

327. Cf. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 467 (Conn. 2008) (concluding that the *Lawrence* reversal of *Bowers* undermined the legal basis for concluding that homosexuality is not a quasi-suspect basis for discrimination under the equal protection clause of the U.S. Constitution).

minorities are no less likely to be adequate parents than heterosexuals.³²⁸

Adoption and artificial insemination remain sensitive subjects as well even for more liberal states. Lesbians are denied the right to artificial insemination by law in most countries in which it is available—most of both Australia and Europe,³²⁹ although it is permitted in the United States,³³⁰ Canada,³³¹ a few European states,³³² New Zealand,³³³ and South Africa.³³⁴ Similarly, those states that have established marriage rights or domestic partnership laws for same-sex couples in most cases continue to deny rights to adopt an unrelated child. This is the case, for example, in the Czech Republic,³³⁵ Finland,³³⁶ France,³³⁷ Germany,³³⁸ Hungary,³³⁹ Iceland,³⁴⁰ and Norway.³⁴¹ In the United States, most states do not

328. See Dias, *supra* note 142, at 77.

329. OTTOSSON, *supra* note 42; World Legal Survey, *supra* note 42; MERIN, *supra* note 42, at 89, 92 (Norway), 140-41 (France), 147 (Germany); Farkas, *supra* note 181, at 569, 571 (Hungary). In Australia, some provinces allow artificial insemination to single women and lesbians in a relationship, while others do not. See MERIN, *supra* note 42, at 172.

330. MERIN, *supra* note 42, at 189. However, Nancy Polikoff has pointed out that the absence of a prohibition on lesbian artificial insemination in the United States reflects the lack of federal government involvement in artificial insemination (sperm banks in the United States being privately operated) rather than approval of the practice. See Polikoff, *supra* note 324, at 158 n.13.

331. Wintemute, *supra* note 61, at 1158.

332. Council of Europe Doc. 8755, *supra* note 43, ¶¶ 52, 54. Denmark legalized artificial insemination for single women in 2006. See AFP, *Denmark Legalizes Lesbian Artificial Insemination*, ABC ONLINE, June 2, 2006, <http://www.abc.net.au/news/newsitems/200606/s1654368.htm>; see also Nigel Nelson, *Lesbian Victory*, PEOPLE (UK), Sept. 9, 2007, at 20, available at 2007 WLNR 17588662. In Finland, it appears there is no legal obstacle to insemination. MERIN, *supra* note 42, at 109.

It should be noted, however, that even in those states that allow lesbians artificial insemination, some allow the sperm donor some control over the fate of the child as the "biological father." See, e.g., *J. McD. v. P.L.*, [2007] I.E.S.C. 28, ¶ 23 (July 19, 2007) (S.C.) (Ir.), available at <http://www.courts.ie/Judgments.nsf> (denying lesbian parents of a child born by artificially insemination the right to take the child on extended vacation in a foreign country where the sperm donor objects).

333. MERIN, *supra* note 42, at 175.

334. See Gerber, *supra* note 142, at 49-50.

335. See *Czech MPs Approve Gay Rights Law*, *supra* note 267.

336. See World Legal Survey, *supra* note 42.

337. See Richards, *supra* note 279, at 323.

338. See Taylor, *supra* note 148, at 599.

339. See Farkas, *supra* note 181, at 569.

340. Iceland Registered Partnership Law 1996, July 1, 1996.

341. See World Legal Survey, *supra* note 42.

prohibit same-sex couples from adopting by law, and several allow second-parent adoptions by same-sex couples.³⁴² While a handful prohibit such adoptions by law, every state except Florida and Utah permits single sexual minorities to adopt,³⁴³ rendering the legal obstacles mostly formal.³⁴⁴ A few countries do allow such adoptions,³⁴⁵ and most states of Western Europe allow a member of a same-sex couple to adopt the children of the other,³⁴⁶ but this remains far from a global trend.

The European adoption treaties do not mandate nondiscriminatory treatment of prospective adopting parents based on sexual orientation. The 1967 European Convention on the Adoption of Children provides that states may in their discretion allow for adoption either by two persons married to each other or by a single person,³⁴⁷ but makes no mention of sexual orientation. Nor do the explanatory notes indicate—for reasons that are easy to surmise—that the possibility of adoption by homosexuals was even contemplated during the convention negotiations.³⁴⁸ The Council of Europe's Committee of Ministers is now considering a draft revision

342. See Polikoff, *supra* note 324, at 161-62; Nelson, *supra* note 332, at 20.

343. Polikoff, *supra* note 324, at 166. California, Connecticut, the District of Columbia, Illinois, Indiana, Maine, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, and Vermont allow adoption by same-sex couples. Florida, Mississippi, North Carolina, and Utah expressly prohibit it. See Human Rights Campaign Foundation, Adoption, http://www.hrc.org/issues/parenting/adoptions/adoption_laws.asp (last visited Nov. 20, 2008); FLA. STAT. ANN. § 63.042(3) (West 1985).

344. As Nancy Polikoff observes, however, this leaves many children adopted by same-sex couples in the United States in the unfortunate position of having only one parent recognized by law. Polikoff, *supra* note 324, at 160.

345. These are currently Belgium, Denmark, the Netherlands, South Africa, Spain, Sweden, and the United Kingdom. See MERIN, *supra* note 42, at 114, 119-23.

346. See, e.g., MERIN, *supra* note 42, at 109-10 (Finland); *France Broadens Gay's Parental Rights*, CBS NEWS, Feb. 25, 2006, available at <http://www.cbsnews.com/stories/2006/02/25/ap/world/mainD8FVTSJO0.shtml> (France); Act on Registered Partnerships, Law No. 40, Apr. 30, 1993 (Nor.), available at <http://www.lovdato.no/all/hl-19930430-040.html>; Law No. 87, June 12, 1996 (Ice.), available at <http://www.althingi.is/lagasofn/nuna/1996087.html>, translation available at <http://eng.domsmalaraduneyti.is/laws-and-regulations/nr/117>; Adoption and Children Act 2002, 2002, c. 38 (U.K.), available at http://www.opsi.gov.uk/acts/acts2002/ukpga_20020038_en1.

347. European Convention on the Adoption of Children art. 6, Apr. 24, 1967, 634 U.N.T.S. 254, 260 (1968).

348. There is no mention of sexual orientation or same-sex couples in the Convention's explanatory report. See Council of Europe, Explanatory Report to the European Convention on the Adoption of Children, ETX No. 058 (Apr. 24, 1967), available at <http://conventions.coe.int/Treaty/EN/Reports/Html/058.htm>.

to the treaty that continues to provide for the possibility of discrimination based on sexual orientation:

Article 7 – Conditions for adoption

1. The law shall permit a child to be adopted:
 - a. by two persons of different sex
 - i. who are married to each other, or
 - ii. where such an institution exists, have entered into a registered partnership together;
 - b. by one person.
2. States are free to extend the scope of this convention to same-sex couples who are married to each other or who have entered into a registered partnership together. They are also free to extend the scope of this convention to different-sex couples and same-sex couples who are living together in a stable relationship.³⁴⁹

The draft revision mandates allowing married or registered different-sex couples to adopt, but permits states to discriminate against married or registered same-sex couples. It further permits states to discriminate against same-sex couples living in a stable relationship where marriage or registered partnership is not a legal option. Nothing in the draft convention prohibits states from discriminating against homosexual individuals seeking single-parent adoption.

As elsewhere, European treaty tribunals and agencies have been slow to recognize a right against discrimination in parental rights. The CoE's erstwhile Commission on Human Rights declined to recognize any right of same-sex couples to obtain parental rights over their partner's children, arguing that a same-sex couple "cannot be equated to a man and a woman living together" as far as parental authority over a child.³⁵⁰ The ECtHR's jurisprudence has been more progressive, at least very recently. In 2001, the ECtHR held that discrimination against homosexuals in custody decisions violates the human rights to family life and nondiscrimination. In

349. Council of Eur. Parl. Ass., *Draft Convention of the Council of Europe on the Adoption of Children* (revised), Doc. 11274 (2007), available at <http://assembly.coe.int/>.

350. *Kerkhoven & Hinke v. The Netherlands*, App. 15666/89 (1992).

Mouta v. Portugal,³⁵¹ the applicant's custody over his daughter, which was originally awarded based on the vindictive and unstable behavior of his former wife following his divorce,³⁵² was reversed by a Portuguese appellate court at least partly, if not entirely, on the ground of his homosexuality.³⁵³ After asserting that a homosexual father cannot *ipso facto* provide a home environment that is "the healthiest and best suited to a child's psychological, social and mental development," the court revoked the applicant's custody and awarded visitation rights with the recommendation that he not "act in a way that would make his daughter realize that her father is living with another man in conditions resembling those of a man and wife."³⁵⁴ Noting that the appellate court's decision was based on the applicant's sexual orientation, the ECtHR found in effect that to base custody decisions on sexual orientation alone constituted discrimination in violation of Article 8 of the ECHR taken in conjunction with Article 14.³⁵⁵

In the 2002 case *Fretté v. France*, however, the court shied away from a rigorous equal protection approach.³⁵⁶ In that case, a single homosexual man had been denied the opportunity to adopt a child pursuant to French law, which allowed single, heterosexual men and women the right to adopt.³⁵⁷ Although the Paris Social Services Department concluded that "[a] child would probably be happy with" the applicant, it decided that "his particular circumstances as a single homosexual man" preclude him from being "entrusted with a child."³⁵⁸ Because the applicant's unmarried status "could not lawfully constitute the sole reason for the decision,"³⁵⁹ the govern-

351. 31 Eur. H.R. Rep. 47 (2001).

352. The applicant's former wife was initially awarded custody over the daughter by the courts, but she denied the father his legal visitation rights and accused him (apparently falsely) of child abuse. *Id.* ¶¶ 10-11. Eventually, a family court granted custody to the applicant because the child's mother repeatedly refused to comply with court orders and custody agreements, and because she could not or did not provide a home for the child, but rather left her with the child's maternal grandparents, who had no appropriate living arrangements for the child. *Id.* ¶¶ 12-14.

353. *Id.* ¶¶ 12-14.

354. *Id.* ¶ 14.

355. *Id.* ¶¶ 28, 36.

356. 38 Eur. H.R. Rep. 21 (2004).

357. *Id.* ¶ 10.

358. *Id.*

359. *Id.* ¶ 13.

ment based its decision exclusively on the assumption that a homosexual was *ipso facto* substantially unfit to act as a parent.³⁶⁰ On application to the ECtHR, the court made the surprising claim that “the right to respect for family life [in Article 8 of the ECHR] presupposes the existence of a family and does not safeguard the mere desire to found a family.”³⁶¹ The court observed nonetheless that, because French law grants a right to “all single persons” to apply for adoption, the denial of the right to adopt to a homosexual man on that ground alone implicated the applicant’s rights under Article 14 of the ECHR taken in conjunction with Article 8.³⁶²

Emphasizing the primacy of the best interests of the child, the court then noted that many EU states continue to deny single persons and homosexuals the right to adopt children, which “total lack of consensus” gave the states a wide margin of appreciation to adopt regulations as they saw fit.³⁶³ Given that a minority of mental health experts had opined that children might suffer in some way under the parenthood of homosexuals, the court concluded that France’s decision “appears objective and reasonable” and that the discrimination against homosexuals was consistent with Article 14 of the ECHR.³⁶⁴

The court’s interpretation of Articles 8 and 14 of the ECHR and its own jurisprudence in *Fretté* was unexpected. It is facially contrary to the U.N. Human Rights Committee’s reading of Article 23(2) of the ICCPR, which affirms “the right of men and women of marriageable age to marry and to found a family.”³⁶⁵ It is also inconsistent with other human rights instruments, such as the American Declaration on the Rights and Duties of Man and the European Charter, which both recognize a human right to “found” or “establish” a family.³⁶⁶ It further conflicts with the ECtHR’s own approach to defining proportionality in *Karner v. Austria*, decided

360. *Id.* ¶ 10.

361. *Id.* ¶ 31.

362. *Id.* ¶ 33.

363. *Id.* ¶¶ 36, 41.

364. *Id.* ¶¶ 42-43.

365. ICCPR, *supra* note 1, art. 23(2) (emphasis added); see U.N. Hum. Rts. Comm., General Comment No. 19: Protection of the Family, The Right to Marriage and Equality of the Spouses (Art. 23), ¶ 4 (July 27, 1990), available at <http://www.unhchr.ch/tbs/doc.nsf/0/6f97648603f69bcd12563ed004c3881?Opendocument>.

366. American Declaration, *supra* note 2, art. VI; European Charter, *supra* note 1, art. 9.

that same year, in which the court demanded that the state show that the challenged measure be “necessary” to achieve a legitimate goal.³⁶⁷ The evidence presented by France was very far from showing that denying homosexuals the equal right to adopt was necessary to protect children; indeed, the great bulk of evidence showed the contrary. Finally, the decision in *Fretté* conflicted with the court’s holding two years earlier in *Goodwin v. United Kingdom*, in which it expressly interpreted Article 12 as securing a “fundamental right” not only to protection of a preexisting family but to “found” a family.³⁶⁸

Beyond its jurisprudential inconsistencies, the court seems not to have followed its own reasoning to its natural conclusion. The logical corollary to the ECtHR’s dictum in *Fretté* that Article 8 does not safeguard the right to found a family is that the words “[e]veryone has the right to respect for his private and family life”³⁶⁹ would not prevent the state from denying its citizens the right to reproduce or forcibly sterilizing members of its population based on scientifically unproven assumptions about class inferiority. Unless the court did indeed intend to hold that the state could forbid a homosexual the right to reproduce (e.g., by impregnating a female friend or surrogate mother) consistent with Articles 8 and 14 of the Convention, it is unclear how concerns for the best interests of a child would deny a homosexual the right to adopt an orphan while upholding his undoubted right to maintain custody of his own biological child. Indeed, the conclusion that the discrimination in *Fretté* was “objective and reasonable” is inconsistent with the court’s own reasoning in *Mouta v. Portugal* only three years earlier.³⁷⁰ Putting aside the absence of evidence that parental homosexuality harms children (or is transmitted to children, a separate question),³⁷¹ if homosexuals are presumptively unfit

367. *Karner v. Austria*, 38 Eur. H.R. Rep. 24, 537 ¶ 41 (2004).

368. *Goodwin v. United Kingdom*, [2002] E.C.H.R. 28957/95, ¶ 98.

369. ECHR, *supra* note 1, art. 8.

370. *Mouta v. Portugal*, 31 Eur. H.R. Rep. 47, ¶¶ 28, 36 (2001).

371. There is significant evidence that children raised by homosexual parents show no more inclination to homosexuality than other children and are not otherwise harmed by having homosexual parents. See, e.g., AM. PSYCHOLOGICAL ASS’N, LESBIAN AND GAY PARENTING: A RESOURCE FOR PSYCHOLOGISTS 8-12 (Wash., D.C. 1995), available at <http://www.apa.org/pi/lgbcp/publications/lgparenting.pdf>; J.S. Gottman, *Children of Gay and Lesbian Parents*, in *HOMOSEXUALITY AND FAMILY RELATIONS* 177 (F.W. Bozett & M.B.

parents, it is no more reasonable to put their own children in their custody than to put an orphan in their custody. The court's unorthodox reasoning in *Fretté* indicated a continuing judicial toleration of irrational homophobia as late as 2002.

The court did not, however, take long to reverse its position. The Grand Chamber of the court overturned the *Fretté* decision only six years later in *E.B. v. France*.³⁷² The facts of the case were substantially the same as in *Fretté*; a single homosexual was denied authorization to adopt a child based at least in part on the unsupported assumption that homosexuals are unfit parents.³⁷³ The applicant alleged a violation of Article 14 taken in conjunction with Article 8 of the ECHR.³⁷⁴ The court held fast to its problematic interpretation of Article 8 as not including a right to found a family, reiterating that the right presupposes the existence of a family.³⁷⁵ Emphasizing that the Convention is a "living instrument" that must be interpreted in accordance with "present-day conditions,"³⁷⁶ the court reversed *Fretté* by ten votes to seven.³⁷⁷

The published reasoning for the change of interpretation was sparse. The court merely noted that France had to bear the burden of proof and that its reasons for discrimination—primarily the argument that children need a stable father-figure that the applicant had no way to provide—was not "particularly convincing and weighty."³⁷⁸ Presumably, the court had in mind the fact that, in allowing single heterosexual parents to adopt, France implicitly contradicted its own position on the importance of a father-figure.

Sussman eds., 1990); R. Green, *Sexual Identity of 37 Children Raised by Homosexual or Transsexual Parents*, 135 AM. J. PSYCHIATRY 692, 696-97 (1978); C. Patterson, *Children of Lesbian and Gay Parents*, 63 CHILD DEV. 1025 (1992); J. Schwartz-Gottman, *Children of Gay and Lesbian Parents*, 14 MARRIAGE & FAM. REV. 177 (1989).

372. *E.B. v. France*, 47 Eur. H.R. Rep. 21 (2008).

373. Actually, it would be more precise to say that the facts in *E.B. v. France* favored respondent France's position more than the facts in *Fretté*. In *Fretté*, the applicant's homosexuality was the sole apparent ground for denial of authorization to adopt. In *E.B.*, it was one of two main objections raised against the authorization. See *id.* ¶¶ 71-73, ¶¶ O-11 to O-115 (Costa, J., dissenting).

374. See *id.* ¶ 41.

375. See *id.*

376. *Id.* ¶¶ 46, 92.

377. *Id.* ¶ 2. While the court majority made perfunctory efforts to distinguish the facts in *Fretté* from the facts before it, *id.* ¶ 71, the contradiction between the two decisions is undeniable.

378. *Id.* ¶ 94.

Whatever the court's de facto motivations, however, it established a rule applicable among Council of Europe states to the effect that, when single-parent adoptions are allowed, they must be authorized without regard to the sexual orientation of the applicant.

II. INTERNATIONAL HUMAN RIGHTS THEORY AND SEXUALITY

The emerging pattern in the most influential states toward restraining government interference in and discrimination based on noncommercial sexual behavior presents an edifying case study of how human rights norms can develop as "general principles of law recognized by civilized nations"³⁷⁹ until they become interpretive forces in customary international law. The rapidity of the development and dissemination of these norms offers a unique insight into the forces promoting and retarding the development of customary law in a highly interconnected community of states with diverse cultures. The pace of change in this case illustrates how the spread of a human rights norm may proceed glacially until a critical mass of states of sufficient influence have adopted the norm. At that point, the trend may accelerate under propitious conditions.

In the case of sexual minority human rights, decriminalization advanced slowly over the last fifty years, but as the number of states abandoning criminal prohibitions increased, regional and international human rights authorities began to find the reasoning underlying decriminalization persuasive. The same logic that justified decriminalization took on a momentum of its own and soon led to a similar pattern in the abandonment of arbitrary state discrimination against sexual minorities in many states. The combination of lobbying from influential states, international and regional authorities, and civil society has snowballed, and the pace of reform has consequently accelerated in the last twenty years.

The United States, for example, changed in only forty years from a country where every state maintained prohibitions on oral and anal intercourse to one where no state could constitutionally prohibit such behavior,³⁸⁰ and two states clearly permit same-sex

379. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38(1)(c).

380. *Lawrence v. Texas*, 539 U.S. 558, 570, 572 (2003). These laws were apparently rarely enforced. William Eskridge reports that, from 1880 to 1995, some 203 prosecutions for adult consensual homosexual sex were pursued. WILLIAM ESKRIDGE, *GAYLAW* 375 (1999).

marriage. This is not to say that international pressure and example are the only factors promoting the development of new human rights norms. There are many other important influences at play. Not least is the ideological aspect of the norms, which is the subject of this part of the Article. The importance of ideology is especially great here because the resistance to the spread of the norms is itself clothed in ideological trappings.³⁸¹

But upon what ideologies have the international organizations and tribunals, as well as domestic political and legal elites, relied in justifying extending human rights to sexual minorities? Two main theories of human rights appear in the precedents dealing with unconventional sexuality. While both of the theories sometimes make an appearance in the same case, they are conceptually distinct and in some ways may be contradictory.

The first theory treats homosexuals, and to some extent bisexuals and transsexuals, as more or less homogenous groups in need of special protections. Under this approach, human rights of privacy and nondiscrimination are extended to homosexuals, bisexuals, and their sexual activities on the basis of the perception of these groups as particularly disadvantaged and socially and politically under-represented. This theory is essentially based on a human right to freedom from arbitrary discrimination based on minority group membership, because it relies upon a conception of sexual minorities as fundamentally different in some socially important but legally insignificant way.

The other group of approaches common in international legal precedents reads the privacy, family, and other rights more broadly to encompass substantive limitations on state regulation of private, consensual, adult sexual behavior and to posit a general norm of nondiscrimination based on sexual preferences and practices absent a showing of tangible harm to identifiable persons. This class of theories, typically based on something akin to a libertarian theory of governance, invokes "the harm principle" to invalidate state interference in or discrimination against unconventional sexuality. These theories and the extent of their compatibility will be examined in the following pages.

381. The most prominent nonideological factors are psychological, an analysis of which goes beyond the scope of this Article and my own competence.

A. Sexual Minority Group Discrimination Theories

Some of the rationales justifying the extension of human rights to sexual minorities advanced by legal and political elites have been based on a view of homosexuals as a clearly defined minority group entitled to protection from oppressive majoritarian legislation. One commentator, Michele Grigolo, has concluded that the trend of the ECtHR's jurisprudence is toward the granting of human rights to homosexuals and bisexuals based on their perceived status as a homogenous group.³⁸² He views the concept of "sexual life" to have been "narrowed and limited to a sphere of 'legal and judicial toleration' of the homosexual legal subject."³⁸³ The Human Rights Commission and ECtHR have both sometimes expressed views superficially consistent with Grigolo's interpretation. In *Dudgeon v. United Kingdom*, the Commission found that U.K. criminal statutes prohibiting homosexual intercourse directly affected Dudgeon, the self-identified homosexual applicant, as a member of "a particular class of persons whose conduct is thus legally restricted."³⁸⁴ The Commission thus seemed to identify homosexuals as a disfavored class.³⁸⁵

The ECtHR used similar reasoning in both *Lustig-Prean & Beckett v. United Kingdom*³⁸⁶ and *Smith & Grady v. United Kingdom*.³⁸⁷ There, the court implicitly analogized homophobia to racism:

382. Michele Grigolo, *Sexualities and the ECHR: Introducing the Universal Sexual Legal Subject*, 14 EUR. J. INT'L L. 1023, 1031-32, 1039-40 (2003).

383. *Id.* at 1039.

384. 3 Eur. H.R. Rep. 40, ¶ 86 (Eur. Comm'n Hum. Rts. 1980).

385. The ECtHR did not repeat the Commission's argument precisely, but instead observed that "the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of Article 8(1)." *Dudgeon v. United Kingdom*, 4 Eur. H.R. Rep. 149, ¶ 41 (1982). While this language could apply equally to a heterosexual who wished to engage in illegal homosexual intercourse, the court seemed to limit its holding in the following sentence: "*In the personal circumstances of the applicant*, the very existence of the legislation continuously and directly affects his private life" *Id.* (emphasis added). Although the reference to the applicant's "personal circumstances" may be read to implicate his desire to engage in homosexual intercourse, it may equally, if not more probably, be read to refer to his self-identification as a homosexual.

386. *Lustig-Prean & Beckett v. United Kingdom*, 29 Eur. H.R. Rep. 548 (1999).

387. *Smith & Grady v. United Kingdom*, 29 Eur. H.R. Rep. 493, ¶ 97 (2000).

To the extent that [the service regulations prohibiting homosexual enlistment in the military] represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification ... any more than similar negative attitudes towards those of a different race, origin or colour.³⁸⁸

In *Smith & Grady*, moreover, the court distinguished between the case before it and *Kalaç v. Turkey*, in which a judge advocate of the Turkish Air Force was compelled to retire after adopting fundamentalist religious views.³⁸⁹ According to the court, the key difference between the cases was that in *Kalaç*, the applicant had been "dismissed on grounds of his conduct" while the applicants in *Smith & Grady* "were discharged on grounds of their innate personal characteristics" (i.e., their status as homosexuals).³⁹⁰

State domestic practices extending human rights to sexual minorities have sometimes proceeded from similar reasoning. In *Romer v. Evans*, the U.S. Supreme Court overturned a Colorado state constitutional amendment that would have prohibited any state action or judicial decision that protected any person from state, municipal, or private discrimination based on their "homosexual, lesbian or bisexual orientation."³⁹¹ In reaching that decision, the Court explained that the amendment denied a class of citizens the equal protection of the laws in "an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society," whereas the U.S. Constitution "neither knows nor tolerates classes among citizens."³⁹² The Court could discern no rational explanation for the statute except as an unconstitutional expression of "animus toward the class it affects."³⁹³ In *Romer*, the Colorado amendment was directed toward perpetuating discrimination against homosexuals and bisexuals as a class; it was not, to use the ECtHR's distinction in *Smith & Grady*, designed to perpetuate discrimination based on behavior per se, such as sexual activity.

388. *Lustig-Prean*, 29 Eur. H.R. Rep. at ¶ 90; *Smith & Grady*, 29 Eur. H.R. Rep. at ¶ 97.

389. 27 Eur. H.R. Rep. 552 (1999).

390. *Smith & Grady*, 29 Eur. H.R. Rep. at ¶ 93.

391. 517 U.S. 620, 620 (1996).

392. *Id.* at 621, 628-31.

393. *Id.* at 632.

In *Lawrence v. Texas*, however, the state had criminalized the activity of same-sex intercourse, which was more akin to legislated discrimination against specific behavior.³⁹⁴ Here, the Supreme Court relied on the centrality of unconventional sex to the homosexual identity³⁹⁵ and effectively merged the conduct-based discrimination with class-based discrimination. Much of the majority opinion's reasoning emphasized that the Texas legislation at issue violated the petitioners' rights to privacy not only because the motivation for the law was moral condemnation of private, harmless behavior, but rather because the sole motivation for the law was the criminalization and marginalization of a class of persons—sexual minorities—by regulating conduct tied to their identities.³⁹⁶ The Court's references to the importance of a legally preserved "autonomy of self," and its statement that the state cannot "demean [the] existence" of homosexuals or "control their destiny by making their private sexual conduct crime," while having broader implications for all state regulation of private sexual behavior, seem to be intended to condemn state regulations that punished homosexuals and bisexuals *qua* sexual minorities.³⁹⁷ Justice O'Connor's concurring opinion, with its repeated references to homosexuals as a "politically unpopular group" (echoing the majority opinion in *Romer v. Evans*), followed the same logic.³⁹⁸

A similar emphasis on nondiscrimination against homosexuals as a class is evident in various U.S. state supreme court decisions. The Kentucky Supreme Court's 1993 decision finding the Kentucky prohibition on homosexual conduct unconstitutional is an interesting example.³⁹⁹ There, the court first held that legislation criminalizing private, harmless conduct violates the state constitution.⁴⁰⁰ Yet, it switched philosophies in mid-opinion to hold that

394. 533 U.S. 558, 566 (2003).

395. *E.g.*, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1616 (2d ed. 1988).

396. *Lawrence*, 533 U.S. at 562, 578.

397. *Id.*

398. *Id.* at 580, 582 (O'Connor, J., concurring). In the United States, arbitrary discrimination against a group may violate the constitutional guarantee of equal protection of the laws if the group has been subjected to a "history of purposeful unequal treatment" and constitutes a "discrete and insular minority." See *Kimel v. Fl. Bd. of Regents*, 528 U.S. 62, 83 (2000).

399. *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1993).

400. *Id.* at 491.

homosexuals constituted a "separate and identifiable class" deserving of protection from discrimination based on their sexual preference.⁴⁰¹ Other state supreme courts have equally identified homosexuals as a "separate and identifiable class" for purposes of equal protection analysis.⁴⁰²

The majority opinion of the Supreme Court of Canada in *Egan v. Canada*, in which the court established that sexual orientation was a prohibited ground for discrimination, similarly held that "homosexuals, whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage."⁴⁰³ The South African Constitutional Court, in holding the law prohibiting homosexual intercourse unconstitutional, also relied in part on the concept of homosexuals as a coherent group deserving of protection against discrimination.⁴⁰⁴ The court based its decision on the observation that "[g]ay men are a permanent minority in society and have suffered in the past from patterns of disadvantage."⁴⁰⁵

The tension between casting the issue as a universal right to liberty or privacy and a right to nondiscrimination clarifies why judicial opinions condemning state-sponsored or tolerated discrimination against sexual minorities tend to contain some inconsistencies in their analysis. In *Lawrence*, the majority opinion and Justice O'Connor's concurring opinion were at odds on precisely this issue.⁴⁰⁶ The majority opinion purported to rest the unconstitutionality of the Texas statute primarily on a fundamental right to privacy (a right to "substantive due process").⁴⁰⁷ The majority

401. *Id.* at 500.

402. See, e.g., *Jegley v. Picado*, 80 S.W.3d 332, 351 (Ark. 2002); *In re Marriage Cases*, 183 P.3d 384, 401, 441-44 (Cal. 2008) (finding homosexuals to be a "suspect class" for whom discriminatory measures must meet strict scrutiny); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 468-69 (Conn. 2008).

403. *Egan v. Canada*, [1995] 2 S.C.R. 513, ¶ 175 (Can.).

404. *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice*, 1998 (12) BCLR 1517 (CC) (S. Afr.), available at 1998 SACLX LEXIS 36.

405. *Id.* ¶ 26. Justice Sachs in his concurring opinion likewise concluded that "[a]t the heart of equality jurisprudence is the rescuing of people from a caste-like status and putting an end to their being treated as lesser human beings because they belong to a particular group." *Id.* ¶ 129 (Sachs, J., concurring).

406. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 562, 567, 578 (2003); *id.* at 583, 585 (O'Connor, J., concurring).

407. *Id.* at 572, 582 (majority opinion).

referenced the minority status of homosexuals without apparently relying on a right against arbitrary discrimination as a basis for its decision.⁴⁰⁸ Justice O'Connor's opinion was more explicit in resting the unconstitutionality on a right of homosexuals as a class to be free from arbitrary discrimination in the form of "equal protection of the laws" analysis.⁴⁰⁹ In the U.S. state cases finding marriage discrimination based on sexual orientation to violate fundamental freedoms guaranteed by the state constitutions, both the right to found a family and a prohibition on arbitrary discrimination based on minority class membership were invoked as grounds to strike down the prohibition on same-sex marriage.⁴¹⁰

The ECtHR has conflated these principles consistently. The court has typically found discriminatory measures inconsistent with the human rights to privacy (Article 8 of the ECHR),⁴¹¹ finding as an afterthought that claims of discrimination (Article 14)⁴¹² may also be implicated but raise no additional issues.⁴¹³ The conflation can be traced to the court's position that Article 14 confers only rights derivative of the substantive human rights set forth in the Convention. In both *Lustig-Prean & Beckett* and *Smith & Grady*, the court grounded its decisions on the Article 8 right to privacy. It held that the claim of Article 14 discrimination did amount "in effect to the same complaint, albeit seen from a different angle," as the Article

408. *Id.* at 571-72.

409. *Id.* at 564; *id.* at 583-85 (O'Connor, J., concurring).

410. *See, e.g., In re Marriage Cases*, 183 P.3d 384, 441-46 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 424, 476 (Conn. 2008).

411. Article 8 provides:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ECHR, *supra* note 1, art. 8.

412. Article 14 provides:

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Id. art. 14.

413. *See, e.g., Smith & Grady v. United Kingdom*, 29 Eur. H.R. Rep. 493, ¶ 116 (2000).

8 claim, and therefore did "not give rise to any separate issue."⁴¹⁴ In reality, the claims had quite different import. A decision purely based on Article 8 would have amounted to a general prohibition on arbitrary state interference in one's personal associations and sexual conduct regardless of membership in a repressed group. The assertion that this claim in the petition was dismissed, in the court's words, because of their "innate personal characteristics" of belonging to a "homosexual minority"⁴¹⁵ was a claim of discrimination based on status under Article 14 respecting rights protected by the Convention. There is a consequential difference between deciding the case as a pure Article 8 claim and an "Article 14 taken in conjunction with Article 8" claim.⁴¹⁶ Analyzing the Article 8 claim without reference to Article 14, the court left it unclear whether the minority group status of homosexuals was an important factor in its decisions.

The ECtHR seems dimly aware of the problems of relying exclusively on the position of homosexuals as a minority class, but it has not clearly announced whether discrimination is impermissible because of the status of homosexuals as disfavored minorities or because the state has no legitimate interest in regulating private, harmless conduct of this kind. Relying exclusively on a view of sexual minorities as a class worthy of protection may seem unduly limiting to the court. The logical but unacceptable corollary of this line of reasoning is that a self-identified heterosexual may be the subject of criminal prohibitions and other discrimination to which a self-identified homosexual (or perhaps bisexual) would be legally immune. The *Dudgeon* (Commission) and *Smith & Grady* (the court) reasoning in some ways implies that a heterosexual but not a homosexual could have suffered discrimination for an instance of same-sex intercourse consistent with European human rights law. Yet, it must certainly have occurred to the Commission or court that heterosexuals might have the same human right as do homosexuals to engage in intercourse with someone of the same sex if they so choose, especially in light of the copious social science evidence showing that a relatively high percentage of self-identified

414. *Id.* ¶¶ 115-16.

415. *Id.* ¶¶ 93, 97.

416. *Id.* ¶ 116.

heterosexuals have had sexual fantasies about or actual intercourse with persons of the same sex at one time or another.⁴¹⁷ Evidence of these considerations may be gleaned from the court's decisions in *Dudgeon*, *Lustig-Prean & Beckett*, *Smith & Grady*, and *A.D.T.* to rely on the Article 8 right of privacy to strike down state interference rather than the Article 14 right against discrimination.

The identical reasoning would preclude a claim by homosexuals of discrimination where the laws at issue penalized oral or anal penetration in homosexual or heterosexual intercourse equally (as they did under the U.S. state legislation in *Bowers v. Hardwick*⁴¹⁸), unless one adheres to the position that heterosexuals do not have

417. See PAUL GEBHARD, ALAN B. JOHNSON & ALFRED C. KINSEY, *THE KINSEY DATA: MARGINAL TABULATIONS OF THE 1938-1963 INTERVIEWS CONDUCTED BY THE INSTITUTE FOR SEX RESEARCH* (1979) (U.S.); ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* 472-74 (1953) (U.S.); ALFRED C. KINSEY ET AL., *SEXUAL BEHAVIOR IN THE HUMAN MALE* 656 (1948) (U.S.); Lee Ellis, Brian Robb & Donald Burke, *Sexual Orientation in United States and Canadian College Students*, 34 *ARCHIVES OF SEXUAL BEHAV.* 569 (2005) (Canada & U.S.); Lee Ellis, Donald Burke & M.A. Ames, *Sexual Orientation as a Continuous Variable: A Comparison Between the Sexes*, 16 *ARCHIVES OF SEXUAL BEHAV.* 523 (1987) (Canada & U.S.); E. Narring, S.M. Stronski Huwiler & P.A. Michaud, *Prevalence and Dimensions of Sexual Orientation in Swiss Adolescents: A Cross-Sectional Survey of 16 to 20-year-old Students*, 92 *ACTA PAEDIATR.* 141 (2003) (Switzerland); Preeti Pathela, Anjum Hajat, Julia Schillinger, Susan Blank, Randall Sell & Farzad Mostashari, *Discordance Between Sexual Behavior and Self-Reported Sexual Identity: A Population-Based Survey of New York City Men*, 145 *ANNALS OF INTERNAL MED.* 416 (2006) (U.S.); Gary Remafedi, Michael Resnick, Robert Blum & Linda Harris, *Demography of Sexual Orientation in Adolescents*, 89 *PEDIATRICS* 714 (1992) (U.S.); Ritch C. Savin-Williams & Geoffrey L. Ream, *Prevalence and Stability of Sexual Orientation Components During Adolescence and Young Adulthood*, 36 *ARCHIVES OF SEXUAL BEHAV.* 385 (2007) (U.S.); Stuart N. Seidman & Ronald O. Rieder, *A Review of Sexual Behavior in the United States*, 151 *AM. J. PSYCHIATRY* 330 (1994); Anthony M.A. Smith, Chris E. Rissel, Juliet Richters, Andrew E. Grulich & Richard O. de Visser, *Sex in Australia: Sexual Identity, Sexual Attraction and Sexual Experience Among a Representative Sample of Adults*, 27 *AUSTL. & N.Z. J. PUB. HEALTH* 138 (2003) (Australia); Bente Traeen, Hein Stigum & Dagfinn Soerensen, *Sexual Diversity in Urban Norwegians*, 39 *J. SEX RES.* 249 (2002) (Norway); William D. Mosher, Anjani Chandra & Jo Jones, *Sexual Behavior and Selected Health Measures: Men and Women 15-44 Years of Age, United States, 2002*, *ADVANCE DATA* No. 362 (U.S. Dep't of Health & Hum. Serv., Ctr. for Disease Control & Prevention, Nat'l Ctr. for Health Statistics), Sept. 15, 2005, at 14-15, available at <http://www.cdc.gov/nchs/data/ad/ad362.pdf>; see also *Dudgeon v. United Kingdom*, 4 Eur. H.R. Rep. 149, 183 (1982) (Walsh, J., dissenting in part) ("The fact that a person consents to take part in the commission of homosexuals acts is not proof that such person is sexually oriented by nature in that direction."). Judge Walsh's dissent notices this distinction in order to preach "tolerance" for the unfortunate, "pathological" few who are "incurable" homosexuals, as opposed to "those whose tendency comes from a lack of normal sexual development" or other "curable" source. *Id.*

418. 478 U.S. 186, 188 n.1 (1986).

the same right as homosexuals to explore their sexuality.⁴¹⁹ It is at least possible that some men and women do not fully realize their homosexual tendencies until they have had a chance to explore them through interpersonal conduct. A law exempting homosexuals but not heterosexuals from a criminal prohibition on oral or anal intercourse would make every first instance of intercourse a crime at the time committed where the person was uncertain of his or her sexual orientation, but not a crime after the epiphany. Such a law would be difficult to enforce, indeed.

Even were the classification not artificial, however, the distinction between heterosexuals and sexual minorities differs significantly from other kinds of group discrimination, such as sex discrimination and race discrimination. With some exceptions, race and sex are not primarily determined by conduct, but by observable characteristics. Sexual minorities are characterized by personality traits—various degrees of intimate attraction to other members of the same sex—which are typically expressed and observed by the resulting intimate sexual conduct—conduct in which, as observed earlier, heterosexuals can engage as well.⁴²⁰

Yet, if conduct is considered a legitimate basis for classifying a person, we find ourselves engaged in an elusive search for a distinction between identity-typing conduct and non-identity-typing conduct. Presumably narcotics abusers do not define their core identities as junkies, and persons who engage in consensual incest consider that activity (defined as such) peripheral to their identities as well. But one need not look far afield to find examples more difficult to classify, not only because sexual conduct is personal and intimate, and sexuality is part of most persons' core sense of self, but because portioning out humanity into the neat categories of homosexual and heterosexual is reductionistic. Private adult masturbation (which has sometimes been outlawed)⁴²¹ may well be

419. The counterargument is that, because such laws are virtually never enforced against adult, consensual, private heterosexual behavior (e.g., heterosexual oral or anal intercourse), Nan D. Hunter, *Life After Hardwick*, 27 HARV. C.R.-C.L. L. REV. 531, 538-39 (1992), and indeed because such laws are often limited in their scope to same-sex intercourse, see, e.g., *Lawrence v. Texas*, 539 U.S. 558, 570 (2003), it is clear that the intent of the legislature is to strike at the homosexual's identity through the only conduct by which they can express their identities *qua* homosexuals.

420. See sources cited in note 417, *supra*.

421. In Indonesia, masturbation was a crime as late as 2003. Ahmad Junaidi, *Revision*

fundamental to a healthy person's sense of sexuality,⁴²² yet presumably few would claim that the activity defines their very identity. This brings us to the intractable conundrum of how much attraction to or sexual conduct with persons of the same sex moves a person from the "heterosexual" category to the "bisexual" category, and from there to the "homosexual" category.

More fundamentally still, classifying human beings based on putative personality characteristics, or even identity, is inherently problematic. Treating homosexuals as members of a minority class forces dichotomization of a full spectrum of human sexual preferences and practices. Many men and women have engaged in one-time or periodic homosexual encounters without necessarily labeling themselves as homosexual or even bisexual.⁴²³ Forcing the complexities of sexuality into two or three Procrustean categories is unhelpful to understanding the conduct and whether state regulation is necessary.

This is not to say that minority group analysis is never a helpful approach to understanding how international human rights law relates to sexuality; it merely indicates that this conceptualization has its limitations. The relevance of sexual minorities as "classes" or "groups" remains critical to the theory of nondiscrimination as applied both to the minorities themselves and their sexual conduct. A heterosexual who is prohibited from engaging in unconventional sexual intercourse suffers less than does a homosexual, because although both experience an interference with their rights of liberty, privacy, and intimate association, the prohibition specifically targets and affects the homosexual's primary avenue for sexual self-expression and attachment to another.⁴²⁴ As the ECtHR has often (though inconsistently) recognized, a right to privacy or

Needed of 'Repressive' Articles, THE JAKARTA POST, Oct. 3, 2003, at 2.

422. See Eli Coleman, *Masturbation as a Means of Achieving Sexual Health*, in MASTURBATION AS A MEANS OF ACHIEVING SEXUAL HEALTH 5 (Walter O. Bockting & Eli Coleman eds., 2003); David Farley Hurlbert & Karen Elizabeth Whittaker, *The Role of Masturbation in Marital and Sexual Satisfaction: A Comparative Study of Female Masturbators and Nonmasturbators*, 17 J. SEX EDUC. & THERAPY 272 (1991); see also Barbara L. Anderson, *A Comparison of Systematic Desensitization and Directed Masturbation in the Treatment of Primary Orgasmic Dysfunction in Females*, 49 J. CONSULTING & CLINICAL PSYCHOL. 568 (1981); Barbara L. Andersen & Jill M. Cyranowski, *Women's Sexual Self-Schema*, 67 J. PERSONALITY & SOC. PSYCHOL. 1079 (1994).

423. See sources cited in note 417, *supra*.

424. See *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring).

intimate association does not exhaust the human rights relevant to unconventional sexuality or sexual minorities.⁴²⁵ Discrimination against sexual minorities, not only per se but in a manner calculated to deny them access to resources and activities necessary for the full development of their human identity on terms equal to heterosexuals, must necessarily fail the court's proportionality test. Such discrimination, if it benefits society at all, is unlikely to afford a benefit approaching in magnitude the detriment it creates for the public generally and sexual minorities specifically. Whatever its effect on heterosexuals, it inevitably deprives sexual minorities of their opportunity to achieve personal happiness and fulfillment in the context of the culture within which they live. And, as Joseph Landau has observed, "[o]ne cannot live a complete life without being part of the broader culture at the same time"⁴²⁶—an observation that sufficiently reflects the views of the international community that it has found its way into several international human rights treaties.⁴²⁷

Discrimination analysis, when properly utilized, also has the advantage of accounting for the context-dependence of social legislation. If homosexuals are truly a separate "class," then to argue that it is nondiscriminatory to prohibit both heterosexuals and homosexuals from engaging in oral or anal intercourse⁴²⁸ is akin to claiming that a law prohibiting both the rich and the poor from sleeping under bridges, begging in the streets, and stealing food is evenhanded,⁴²⁹ or that an insurance policy exempting from coverage diseases to which only women are susceptible is nondiscriminatory on the ground that both men and women can be free from the disease.⁴³⁰ Such arguments ignore the diversity of contexts

425. See, e.g., *Smith & Grady v. United Kingdom*, 29 Eur. H.R. Rep. 493, ¶ 127 (2000).

426. Joseph Landau, *Marriage as Integration*, in *SAME-SEX MARRIAGE: PRO AND CON* 323, 325 (Andrew Sullivan ed., 1997). Presumably, intolerance of unconventional sexuality is not a core element of any state's culture except, perhaps, that of the Holy See.

427. See, e.g., International Covenant on Economic, Social, and Cultural Rights art. 15(1), Jan. 3, 1976, 993 U.N.T.S. 3 ("The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life."); Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights art. 14(1), Nov. 17, 1988, O.A.S.T.S. No. 69 (1988) ("The States Parties to this Protocol recognize the right of everyone: a. To take part in the cultural and artistic life of the community.").

428. E.g., *Bowers v. Hardwick*, 478 U.S. 186, 190-91 (1986).

429. ANATOLE FRANCE, *LE LYS ROUGE* 117-18 (Calmann-Lévy ed., Paris, 1923) (1894).

430. See Aaron Xavier Fellmeth, *Feminism and International Law: Theory, Methodology*

in which different groups of persons live. Class membership may have meaning in human rights analysis not because the minority class is entitled to rights different from the majority's, but because the rights lose their meaning when taken out of context.

As noted in Part I, treating different classes of persons unequally may be justified if the discrimination is necessary to fulfill a pressing need in a democratic society and a proportional (in ECtHR analysis)⁴³¹ or "reasonable and objective" (in HRC analysis)⁴³² measure for the achievement of a legitimate state purpose. In the context of regulation of unconventional sexuality or discrimination against sexual minorities, states have typically sought to justify their action on the grounds of preservation of public morality or *ordre public*.⁴³³ No state seriously puts forward the argument that same-sex intercourse among a minority of the population threatens state security, causes riots, or leads to a criminal lifestyle. States have defended some forms of discrimination, however, as necessary for public morality purposes. For example, as noted, states have often claimed that discriminatory ages of consent prevent adolescents from being influenced by early homosexual experiences.⁴³⁴ These arguments, besides being uniformly based on poorly substantiated assumptions about how sexuality develops, assume that the state has a legitimate interest in preventing members of society from becoming homosexual, or at least engaging in homosexual experimentation.

and *Substantive Reform*, 22 HUM. RTS. Q. 658, 663 (2000).

431. In elaborating the standard of proportionality, the court recently stated that it requires not only that the measure at issue be "in principle suited for realising the aim sought," but that it was also "necessary ... to achieve that aim." *Karner v. Austria*, 38 Eur. H.R. Rep. 24, ¶ 41 (2004).

432. U.N. Hum. Rts. Comm., General Comment 18: Non-discrimination, ¶ 13 (Nov. 10, 1989), in *Compilation of General Comments and General Recommendations Adopted by the Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1 (Sept. 4, 1992).

433. See *Lawrence v. Texas*, 539 U.S. 558, 582 (2003) (O'Connor, J., concurring); *Bowers*, 478 U.S. at 196, 212; *Dudgeon v. United Kingdom*, 4 Eur. H.R. Rep. 149, ¶¶ 45-46 (1982).

434. *E.g.*, *Wolfmeyer v. Austria*, 42 Eur. H.R. Rep. 3, ¶¶ 21, 23 (2006); *L. & V. v. Austria*, 36 Eur. H.R. Rep. 55, ¶ 24 (2003); *X. v. United Kingdom*, 3 Eur. H.R. Rep. 63, ¶ 154 (Eur. Comm'n on Hum. Rts. 1978). Other states may phrase their homophobia in more neutral terms, as in *Hong Kong*: "The reasons [for the age discrimination] are that men between 16 and 21 often have only a limited and possibly distorted knowledge of homosexual activity; they might be curious about and inclined to experiment with new activities and consequently be easily led into committing homosexual acts" Chan, *supra* note 74, at 72.

This assertion brings us to the question of whether the prevention of homosexuality is a legitimate state purpose—a matter to be explored in detail in subsequent pages. Here, it suffices to observe that, even assuming *arguendo* that the prevention of homosexuality is a legitimate state purpose, many forms of discrimination have no reasonable relation to the purpose of “preventing” homosexuality and, indeed, are not intended for such purpose. For example, there is no reason to believe that denying equal housing or inheritance rights to homosexual couples effectively discourages homosexuality. The purpose of much discrimination is little more than the dehumanization of sexual minorities by validating the very biases that gave rise to them—specifically, the illusion of heteronormative superiority—thereby promoting continuing discrimination.⁴³⁵ And the reason such laws have often been found discriminatory based on sexual orientation, beyond the fact that they are usually designed precisely for that reason, is the dissonance between the ostensible purposes of such laws and the inappositeness of regulating unconventional sexuality to accomplishing them.

The most obvious example is the continued prevalence of prohibitions on same-sex marriage, which has often been stridently defended by state authorities and commentators as necessary to ensure the sanctity of marriage as a bond to foster procreation for the perpetuation of the human race.⁴³⁶ Even the ECtHR has

435. Cf. *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice*, 1998 (12) BCLR 1517 (CC) ¶ 125 (S. Afr.) (Sachs, J., concurring), *available at* 1998 SACLX LEXIS 36 (impugning “differentiation which perpetuates disadvantage and leads to the scarring of the sense of dignity and self-worth associated with membership of the group”).

436. See, e.g., *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 515-16 (Conn. 2008) (Zarella, J., dissenting); *Deane v. Conaway*, 932 A.2d 571, 619-21 (Md. Ct. App. 2007); *EGALE Can. Inc. v. Canada*, [2001] 95 B.C.L.R. (3d) 122, ¶ 205, *rev'd*, [2003] 225 D.L.R. (4th) 472 (Can.) (holding that same-sex couples cannot claim equal treatment to different-sex couples because the latter “may, as between themselves, propagate the species and thereby perpetuate humankind. Same-sex couples cannot.”); Chairperson of the Immigr. Selection Bd. v. Frank, Case No. SA 8/99 (Sup. Ct. Namib. Mar. 5, 2001), *available at* <http://www.saflii.org/na/cases/NASC/2001/1.html>, *quoted in* Hubbard & Cassidy, *supra* note 46, at 263 (describing the “family institution” under the Namibian Constitution and various regional and international human rights treaties as “a formal relationship between male and female, where sexual intercourse between them in the family context is the method to procreate offspring and thus ensure the perpetuation and survival of the nation and the human race”); Explanatory Statement, Resolution on Discrimination Against Transsexuals, EUR. PARL. RES. A3-16/89, at 10-12, 1989 O.J. (C 256) 33 (quoting the French Cour de Cassation as denying a right to sex reassignment because transsexuals “constitute a risk for society, and if they

recently accepted that “protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment” between different sex couples and same sex couples if the measures taken to protect or encourage such families are proportional to the goal sought.⁴³⁷

One problem with such claims is evident from their appeal to abstract normative values without reference to any connection between the discriminatory regulation and the protection of the values invoked. Opponents of same-sex marriage rarely acknowledge the fact that heterosexual marriage is no longer widely considered either necessary or sufficient for fostering procreation.⁴³⁸ Very few states require marriage as a precondition to procreation.⁴³⁹ Reproduction occurs frequently outside of marriage and is rarely if ever a criminal act in modern state practice. Conversely, although some states historically made the impossibility of procreation due to impotence or sterility a basis for divorce, that is no longer the case.⁴⁴⁰ Many heterosexual couples marry with no intent to procreate, nor are they required to do so by law.⁴⁴¹

spread, for the human race”); MERIN, *supra* note 42, at 143 (describing the German *Bundesverfassungsgericht* [Constitutional Court] decision against extending marriage to same-sex couples on similar grounds); Turcescu & Stan, *supra* note 21, at 297 (quoting Romanian deputy Emil Popescu as stating “incest is preferable to homosexuality since at least the former preserved the chance of procreation”); see also Fongaro, *supra* note 247, at 479-80 (quoting the author of the preliminary comments on the French Code Civil as defining marriage as “the association of a man and a woman who unite to perpetuate the species, to help one another through mutual aid to carry the burden of life, and to share their common destiny”) (my translation).

437. *Karner v. Austria*, 38 Eur. H.R. Rep. 24, 537 ¶ 40 (2004).

438. See *In re Marriage Cases*, 183 P.3d 384, 431-33 (Cal. 2008). But see Farkas, *supra* note 181, at 567 (recounting the Constitutional Court of Hungary’s finding that marriage is protected under law because it fosters procreation).

439. Cf. *Goodwin v. United Kingdom*, 35 Eur. Ct. H.R. 18, ¶ 98 (“[T]he inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the [right to marry].”).

440. See, e.g., Salvador Pérez Álvarez, *La incidencia de la Ley 13/2005 en el reconocimiento de los matrimonios entre personas del mismo sexo celebrados en el ámbito de la Unión Europea*, 57 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL (R.E.D.I.) 842, 849-51 (2005) (describing how the procreative requirements of Spanish marriage law were abandoned by 1981); see also *In re Marriage Cases*, 183 P.3d 384, 431-33 (Cal. 2008) (U.S.).

441. See, e.g., *Deane v. Conaway*, No. 24-C-04-005390, 2006 WL 148145, at *7 (Md. Cir. Ct. Jan. 20, 2006) (U.S.); *Nat’l Coal. for Gay & Lesbian Equal. v. Minister of Home Affairs*, 2000 (1) BCLR 39 (CC) (S. Afr.), available at <http://www.saflii.org/za/cases/ZACC/1999/17.html>; JEAN CARBONNIER, *TERRE ET CIEL DANS LE DROIT FRANÇAIS DU MARIAGE* [The Complete French Law of Marriage] 334 (Paris: Librairie Générale de Droit et de

Even were procreation the purpose of state-sponsored or sanctioned marriage, the argument would still be a *non sequitur*. Whether same-sex marriages are allowed or prohibited can have at most a tenuous relation to procreation rates in different sex marriage. Laws disadvantaging unconventional sexuality and lifestyles may offer a kind of indirect public approval of the procreative possibility, but the incentive is neither clear nor direct.⁴⁴² Of course, it would be absurd to argue that a homosexual denied the right to marry another person of his or her own sex will switch sexual orientations and marry someone of a different sex. Outlawing oral and anal intercourse or same-sex marriage merely stigmatizes sexual minorities and forces them into clandestinity; it cannot turn them into heterosexual baby factories by legislative fiat. A direct way of encouraging procreation (indeed, one sometimes adopted),⁴⁴³ if such a policy is considered beneficial to the state, is to reward procreation with subsidies or benefits, because these can reach the persons who may be able and inclined to procreate.

Finally, the very premise of the argument that the state has a legitimate interest in fostering procreation is less persuasive in a badly overpopulated world. Putting aside the legitimate question of whether population decline is in fact problematic, it is implausible to claim that the survival of the "human race" is threatened by a dearth of reproduction given that the U.N. estimates that the

Jurisprudence 1950) ("If marriage is only completed by procreation, the logical consequence of sterility is [automatic] divorce."); MERIN, *supra* note 42, at 31-33; DAVID A.J. RICHARDS, WOMEN, GAYS, AND THE CONSTITUTION 444 (1998); *see also infra* note 539.

442. History confirms repeatedly that pro-fecundity policies rarely work even among heterosexuals. One case in point is Communist Romania, which, in spite of a homophobic legal code and "a comprehensive pro-natal programme," failed to reverse declining population trends. Turcescu & Stan, *supra* note 21, at 291. Similarly, an aggressive program of propaganda, financial incentives and punishments, and other measures deployed in fascist Italy in the 1920s and 1930s failed to reverse or appreciably slow declining birth rates in that country. *See* CHRISTOPHER DUGGAN, A CONCISE HISTORY OF ITALY 218-19 (1994).

443. In the United States, the federal and state governments reward procreation through numerous measures. At the federal level, for example, the Internal Revenue Service provides a subsidy of up to \$1,000 per year for every child, *see* IRS, *Publication 972: Child Tax Credit*, at 2, OMB No. 1545-0074, available at <http://www.irs.gov/pub/irs-pdf/p972.pdf>, plus up to \$6,000 per year to pay for child care services, *see* IRS, *Publication 503: Child and Dependent Care Expenses*, available at <http://www.irs.gov/pub/irs-pdf/p503.pdf>. Every state provides low-income families with subsidies for child medical care (some services being free). *See* U.S. Dep't of Health & Hum. Serv., *Insure Kids Now!*, <http://www.insurekidsnow.gov/> (last visited Nov. 20, 2008).

current world population of 6.5 billion is likely to grow to approximately 9.2 billion by 2050,⁴⁴⁴ and, indeed, "at the world level, continued population growth until 2050 is inevitable even if the decline in fertility accelerates."⁴⁴⁵ All available data better support the hypothesis that the continued propagation of humankind at the current rate is more likely to be disastrous than desirable.⁴⁴⁶ There are certainly some states in which the population of the ethnic majority is declining, especially relative to immigrants, but the concern in such cases is not really with the propagation of the *human* race so much as the national race. The state may, in some limited circumstances, arguably have a legitimate interest in preventing an absolute population decline, but state intolerance toward homosexuality correlates *inversely* with declining national population.⁴⁴⁷

Considering how weak is the case for justifying state recognition of marriage and the state grant of substantial benefits to married couples based on a procreation incentive, on what basis can state favoritism toward married couples be justified? The most plausible explanation seems to relate to the state's interest in fostering supportive relationships between unrelated individuals and ensuring stable homes for any children, discussed above.⁴⁴⁸ As some state authorities have recognized expressly,⁴⁴⁹ the arguments for

444. See U.N. Dep't of Econ. & Soc. Affairs, Population Div., *World Population Prospects: The 2006 Revision*, Exec. Summary at 5 (2007), U.N. Doc. ST/ESA/SER.A/261/ES, available at <http://www.un.org/esa/population/publications/wpp2006/English.pdf>.

445. *Id.* at 7.

446. See, e.g., PAUL R. EHRLICH & ANNE H. EHRLICH, *THE POPULATION EXPLOSION* 13-21 (1990) (summarizing evidence that the world's growing population is overwhelming the ecosystem's capacity to sustain life); DONELLA H. MEADOWS, JORGEN RANDERS & DENNIS L. MEADOWS, *LIMITS TO GROWTH: THE 30-YEAR UPDATE passim* (2004) (summarizing the evidence and presenting computer models based on population growth, food production, pollution and other data to demonstrate the risks of overpopulation).

447. Almost all of the eighty-one states that continue to impose criminal penalties for same-sex intercourse are developing countries, and almost all world population growth is occurring in developing regions "and especially in the group of the 50 least developed countries." See *World Population Prospects: The 2006 Revision*, *supra* note 444, at 5.

448. See *supra* discussion in Part I.C.1.

449. See H CJ 721/94 *El Al Isr. Airlines Ltd. v. Danilowitz*, [1994] IsrSC 48(5) 749, ¶ 15 (Isr. Sup. Ct.), available at <http://www.tau.ac.il/law/aeyalgross/Danilowitz.htm>. In the U.S. judicial approach to identifying indicia of intimate relationships, an analysis of mutual financial commitments, exclusivity, mutual emotional reliance, and the term of the relationship are considered. See Craig A. Bowman & Blake M. Cornush, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances*, 92 COLUM. L. REV.

limiting such relationships to heterosexual couples are thin. It is difficult to imagine any reasonable justification for prohibiting same-sex marriage except in terms of discrimination against homosexuals and bisexuals as a class on the grounds of their sexual orientation. And, where the cause of discrimination can be traced to nothing more than hostility to a minority group whose activities do no tangible harm to themselves or the majority, the protection of that group from arbitrary discrimination may require tailoring the legal theory to the form that the discrimination takes. Framing the right as a universal right to intimate association alone may increase the ability of heterosexuals to engage in sexual experimentation without addressing insidious forms of discrimination against bisexuals and homosexuals.

B. Legal Moralism, the Harm Principle, and Privacy

1. The Harm Principle in State Practice

Given that the major human rights treaties proclaim as their fundamental purpose the preservation of human dignity and autonomy,⁴⁵⁰ the subject at hand raises the question of whether the state is ever justified in interfering with or discriminating based upon private sexual behavior between two consenting adults. The term "autonomy" denotes a basic condition of freedom from state interference and adverse discrimination, but the term "dignity" is value-laden. The term has been used, for example, to justify restrictions on consensual sexual conduct such as pornography in the name of preventing the dehumanization of women,⁴⁵¹ or the deterrence of individuals from engaging in violent sadomasochistic sex.⁴⁵² In such cases, the state's interest in preserving human

1164, 1175-77 (1992). It is telling that this analysis is not necessarily affected by the fact that the members of the couple belong to the same sex.

450. See, e.g., U.N. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, pmbl., para. 1, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (Dec. 18, 1980), 1249 U.N.T.S. 13; U.N. Declaration on the Elimination of Discrimination against Women, G.A. Res. 2263 (XXII), pmbl., para. 1 (Nov. 7, 1967); ICCPR, *supra* note 1, pmbl., para. 1; UDHR, *supra* note 1, pmbl., paras. 1, 5 & art. 1.

451. See, e.g., *Regina v. Butler*, [1992] S.C.R. 452, 456 (Can.) (Gonthier, J., concurring).

452. See, e.g., *K.A. & A.D. c. Belgique*, App. Nos. 42758/98 & 45558/99, Eur. Ct. H.R. (2005); *Laskey, Jaggard & Brown v. United Kingdom*, 24 Eur. H.R. Rep. 39 (1997). In these

dignity (however conceived) may override the value of human autonomy to engage in acts that compromise one's own dignity or the dignity of others. Human rights discourse has, however, tended toward treating the preservation of autonomy as itself a critical component of human dignity. Because liberty is the basic condition under international human rights law,⁴⁵³ when the state and the individual disagree as to what conduct infringes upon that individual's own human dignity, the individual's conception of his or her own dignity is entitled to some deference. The circumstances under which the state's conception of human dignity can trump the individual's underlies much of the debate on the limits of state interference with sexuality.

Legal protection of privacy and freedom of intimate association plays a central role in preserving both dignity and autonomy by limiting the state's power to interfere with any individual's chosen path toward self-actualization through interpersonal relationships.⁴⁵⁴ Laurence Tribe has noted that "virtually every intrusion upon association works a displacement of human personality."⁴⁵⁵ The major human rights treaties allow such intrusions only upon a showing of sufficient state interest.⁴⁵⁶ The question, then, is when state regulation of private, consensual conduct can be justified as consistent with international human rights law and the moral theory underlying it.

International human rights law imposes a burden of justification on the state seeking to discriminate against a disfavored class or individual conduct that falls within the scope of the defined freedoms of speech, association, or privacy. This burden is increased

cases, however, the preservation of the health of the individuals seems to have played a supporting if not predominant role.

453. See, e.g., UDHR, *supra* note 1, art. 3.

454. Cf. *In re Marriage Cases*, 183 P.3d 384, 424 (Cal. 2008) ("The legal commitment to long-term mutual emotional and economic support that is an integral part of an officially recognized marriage relationship provides an individual with the ability to invest in and rely upon a loving relationship with another adult in a way that may be crucial to the individual's development as a person and achievement of his or her full potential.").

455. TRIBE, *supra* note 395, at 974; see also H.L.A. HART, LAW, LIBERTY AND MORALITY 22 (1963) ("Interference with individual liberty may be thought an evil requiring justification ... for it is itself the infliction of a special form of suffering.... This is of particular importance in the case of laws enforcing a sexual morality."). This view may be traced back to liberal philosophers such as John Stuart Mill and Jeremy Bentham.

456. See, e.g., UDHR, *supra* note 1, arts. 29(2), 30.

when the state seeks to regulate or discriminate based on intimate, private conduct between consenting adults. Because any interference must be proportional and "necessary in a democratic society" or reasonable and objectively necessary to accomplish a legitimate state purpose, the basis for regulation must first be grounded in a theory of legitimate state interests. In this regard, state authorities have been notably unsuccessful in justifying discrimination against unconventional sexuality as necessary or even helpful to preventing some societal harm or promoting some public benefit. The realm of intimate association between consenting adults is considered the most fundamental kind of privacy interest. The European Commission of Human Rights has long insisted that "a person's sexual life is an important aspect of his private life" protected by Article 8 of the ECHR.⁴⁵⁷ Similarly, the European Parliament has publicized its "unshakeable attachment to the principle that each individual is entitled to have his privacy respected and to self-determination in sexual matters."⁴⁵⁸

Such interests can be divided into three classes. First, the state has an interest in protecting or a duty to protect its citizens from tangible harm. Second, the state has an interest in fostering the improvement of the physical and mental welfare of its citizens through economic growth, improved standards of living, and participation in self-governance. Third, the state may arguably have an interest in preventing the spread of immoral behavior (a theory known as Legal Moralism).

State authorities, in seeking to explain the regulation of intimate conduct, have rarely even attempted to justify the regulation as advancing either of the first two state interests. Protection of morality is the default justification for such regulation. Yet, both municipal courts and international human rights authorities increasingly have viewed purely moral justifications for the regulation of intimate conduct with suspicion, and the theory of minority group discrimination has rarely fully expressed the human rights values at stake. The legislation, cases, and decisions discussed in Part I evidence a striving by domestic and interna-

457. *E.g.*, *X. v. Germany*, App. No. 5935/72, 3 Eur. Comm'n H.R. Dec. & Rep. 46, 54 (1976); *X. v. United Kingdom*, 3 Eur. H.R. Rep. 63, ¶ 126 (Eur. Comm'n on Hum. Rts. 1978).

458. EUR. PARL. RES. 812, ¶ 4 (1983).

tional authorities alike to identify some basis for the evaluation of novel human rights claims touching all persons, regardless of class membership.⁴⁵⁹ They have sought to apply a broad theory of human rights that can express and protect the values at stake while balancing the state's interest in regulating conduct to achieve the polity's legitimate goals.

A general theory of human rights has undoubted attractions. If applied properly, it achieves justice by treating like cases identically and does not provoke criticism for doctrinal self-contradiction resulting from ad hoc reasoning or messy political compromises. The natural place to turn has been political philosophy. Ethicists have provided these authorities with a great deal of food for thought. The broadest of their theories, libertarianism, in its most extreme form rejects all state regulation not necessary to prevent concrete harms to identifiable individuals.⁴⁶⁰ In *On Liberty*, Mill proposed his libertarian philosophy concerning the proper limits of governmental power:

[T]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.... The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

....

... This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological.... Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as

459. See *supra* discussion in Part I.

460. Other philosophers have proposed limits on state powers of coercion to their own visions of "harm." Kant, for example, would have permitted state coercion only to prevent citizens from interfering with each others' freedom of action. See IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 35-37 (John Ladd trans., Hackett Pub. Co. 1999) (1797).

may follow: without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived.

....
 ... The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it.⁴⁶¹

Mill objected to state regulation of personal conduct purely on moral grounds unless necessary to prevent identifiable harm.⁴⁶² Significantly, Mill did not include as a harm mere offense to public moral sensibilities:

There are many who consider as an injury to themselves any conduct which they have a distaste for, and resent it as an outrage to their feelings But there is no parity between the feeling of a person for his own opinion and the feeling of another who is offended at his holding it; no more than between the desire of a thief to take a purse and the desire of the right owner to keep it.⁴⁶³

Regulation unnecessary to prevent or remedy an injustice or prevent such harm can never be justified in Mill's view regardless of the moral view others may take at the conduct in question.

Libertarianism, with its focus on protecting individual autonomy and liberty, and its seemingly bright line between permissible

461. JOHN STUART MILL, *ON LIBERTY* 9 (Cambridge Univ. Press 1989) (1859).

462. *Id.* at 15.

463. *Id.* at 84. The question of whether the public nature of sexual conduct can justify state regulation based on its offensiveness to viewers is beyond the scope of this Article, the focus of which is intimate sexual conduct (which by definition is not public) and discrimination based on sexual proclivity or orientation. On offense as a basis for state regulation generally, see 2 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS* (1988) (discussing theories of the role of offense to others as a basis for criminal prohibitions).

and forbidden state regulation, seems to fit naturally into a human rights framework. It should not be surprising, then, that Mill's harm principle has found its way into judicial and other analyses of both international human rights and domestic constitutional issues in the United States, Europe, and other developed countries. Both states and international authorities have increasingly invoked libertarian theories to support limitations on governmental power and to erect barriers against discrimination in the realms of personal privacy and intimate association.⁴⁶⁴

Among state legislatures that have adopted a libertarian philosophy of state regulation of sexuality, Australia⁴⁶⁵ and Portugal⁴⁶⁶ stand out for having decriminalized all sexual behavior involving only consensual, private, adult conduct. When the latter decriminalized homosexual conduct in 1974, it specifically abolished prohibitions on consensual adult incest, adultery, and prostitution as well on the theory that any regulation of intimate adult association and sexuality exceeded the state's legitimate authority.⁴⁶⁷ The U.K. Parliament's 1967 decision to abolish the offense of "buggery" was based on the report of a Committee whose reasoning could have led to the same outcome:

The law's function is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others It is not, in our view, the function of the law to intervene in the private life of citizens, or to seek to enforce any particular pattern of behaviour ... [T]here must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business.

....

... We do not think it is proper for the law to concern itself with what a man does in private unless it can be shown to be so

464. It is interesting to note that the libertarian Jeremy Bentham argued explicitly in an unpublished 1785 essay that state regulation of homosexual activity could not be justified. Jeremy Bentham, Paederssty (1785) (unpublished manuscript), *transcribed in Offences Against One's Self*, 3 J. HOMOSEXUALITY 389 (1978) (pt. 1) & 4 J. HOMOSEXUALITY 91 (1978) (pt. 2) (Louis Crampton ed.).

465. Human Rights (Sexual Conduct) Act 1994, § 4(1) (Austl.).

466. See Ana Cristina Santos, *Sexual Orientation in Portugal: Towards Emancipation*, 9 S. EUR. SOC'Y & POL. 159, 166-67 (2004).

467. See *id.*

contrary to the public good that the law ought to intervene in its function as the guardian of that public good.⁴⁶⁸

The decision was also based in part on the arguments of H.L.A. Hart to similar effect (and equally inspired by Mill's harm principle).⁴⁶⁹

Municipal courts, too, have invoked the harm principle to justify overturning statutes regulating sexual conduct. The New York Court of Appeals wrote in 1980 that "although on occasion it does serve such ends, it is not the function of the Penal Law in our governmental policy to provide either a medium for the articulation or the apparatus for the intended enforcement of moral or theological values."⁴⁷⁰ The court went on to note that "[n]o substantial prospect of harm from consensual sodomy nor any threat to public as opposed to private morality has been shown."⁴⁷¹ The Arkansas Supreme Court similarly held in 2002 that "the fundamental right to privacy implicit in our law protects all private, consensual, noncommercial acts of sexual intimacy between adults" and cannot be infringed by any state legislation unless through "the least restrictive method available" to protect a "compelling state interest."⁴⁷² The court based this conclusion on the proposition that "the police power [of the state] may not be used to enforce a majority morality on persons whose conduct does not harm others."⁴⁷³ Other U.S. state courts have similarly focused on constitutional tests that require the state to justify discriminatory measures by indicating a tangible harm prevented by the discrimination as well to justify the claim that the discrimination serves a compelling, important, or legitimate (depending on the standard of scrutiny) state interest.⁴⁷⁴

468. GR. BRIT. COMM. ON HOMOSEXUAL OFFENCES & PROSTITUTION, THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION 10, ¶ 61 (1963).

469. HART, *supra* note 455, at 50-52; see RICHARDS, *supra* note 41, at 24.

470. *People v. Onofre*, 415 N.E.2d 936, 941 n.3 (N.Y. 1980).

471. *Id.* at 943.

472. *Jegley v. Picado*, 80 S.W.3d 332, 350 (Ark. 2002) (internal quotation omitted).

473. *Id.* at 353.

474. See, e.g., *In re Marriage Cases*, 183 P.3d 384, 436 (Cal. 2008) (requiring that discrimination based on sexual orientation meet the strict scrutiny standard of being necessary to serve a compelling state interest); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 421-32 (Conn. 2008) (requiring that discrimination based on sexual orientation at least

In some cases, U.S. state courts have invoked Mill's philosophy explicitly. The Kentucky Supreme Court in 1909 found the state government incompetent "to invade the privacy of a citizen's life and to regulate his conduct in matters in which he alone is concerned, or to prohibit him any liberty the exercise of which will not directly injure society."⁴⁷⁵ The court cited Mill's *On Liberty* as a politico-ethical basis for its position.⁴⁷⁶ Revisiting this libertarian approach explicitly in 1993, the court invalidated the Kentucky law prohibiting homosexual conduct as "beyond the reach of state action by the guarantees of liberty in the Kentucky Constitution."⁴⁷⁷ In finding the Pennsylvania prohibition on "deviate sexual intercourse" unconstitutional, the Pennsylvania Supreme Court equally relied on Mill:

With respect to regulation of morals, the police power should properly be exercised to protect each individual's right to be free from interference in defining and pursuing his own morality but not to enforce a majority morality on persons whose conduct does not harm others.... Many issues that are considered to be matters of morals are subject to debate, and no sufficient state interest justifies legislation of norms simply because a particular belief is followed by a number of people Spiritual leadership, not the government, has the responsibility for striving to improve the morality of individuals.⁴⁷⁸

The court then went on to quote liberally from *On Liberty* to similar effect.⁴⁷⁹

meet the intermediate scrutiny standard of being substantially related to an important state interest); *Deane v. Conaway*, No. 24-C-04-005390, 2006 WL 148145, at *9 (Md. Cir. Ct. Jan. 20, 2006) ("When tradition is the guise under which prejudice and animosity hides, it is not a legitimate state interest.... Similarly, expressing moral disapproval of a class is not sufficient to sustain a classification where there is no other legitimate state interest."), *rev'd*, 932 A.2d 571 (Md. 2007); *State v. Walsh*, 713 S.W.2d 508, 511-12 (Mo. 1986).

475. *Commonwealth v. Campbell*, 117 S.W. 383, 385 (Ky. 1909).

476. *Id.* at 386.

477. *Commonwealth v. Wasson*, 842 S.W.2d 487, 496 (Ky. 1993); *see also id.* at 487, 502-03 (Combs, J., concurring) ("It may be asked whether a majority, believing its own happiness will be enhanced by another's conformity, may not enforce its moral code upon all. The answer is that, first, morality is an individual, personal—one might say, private—matter of conscience").

478. *Commonwealth v. Bonadio*, 415 A.2d 47, 50 (Pa. 1980).

479. *Id.* at 50-51.

Finally, the U.S. Supreme Court has sometimes been influenced by a libertarian philosophy of government with respect to sexual conduct. The majority in *Eisenstadt v. Baird*, although disclaiming that its decision passed judgment on moral legislation per se,⁴⁸⁰ nonetheless implied that sexual privacy and family life decisions could not be subjected to arbitrary state interference on moral grounds: "If the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."⁴⁸¹

Fourteen years later, the 5-4 majority of the U.S. Supreme Court in *Bowers v. Hardwick* relied in its reasoning on the idea that states were free to regulate private behavior based entirely on majority moral revulsion.⁴⁸² The dissenters argued *a contrario* that "privacy embodies the moral fact that a person belongs to himself and not others nor to society as a whole,"⁴⁸³ implying that privacy rights may trump the state's interest in moral legislation. Indeed, the dissent later made this point expressly. First, it remarked on the "theological nature of the origin of Anglo-American antisodomy statutes,"⁴⁸⁴ then concluded:

A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus. "The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."⁴⁸⁵

In reversing *Bowers* less than two decades later, the Court majority took up the same theme; it asked essentially whether the majority of citizens may use the power of the State to enforce their moral views through the criminal laws and concluded that it could

480. 405 U.S. 438, 453 (1972) (emphasis omitted).

481. *Id.*

482. *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986). The majority opinion misleadingly characterized the prohibited conduct as homosexual intercourse, but the law at issue in fact criminalized heterosexual oral and anal intercourse as well.

483. *Id.* at 204 (Blackmun, J., dissenting) (citations omitted).

484. *Id.* at 211 n.6.

485. *Id.* at 211-12 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984)).

not, at least where the views interfered in private consensual sexual conduct.⁴⁸⁶ Noting that the decision in *Bowers* related to a Georgia statute that criminalized anal and oral sex between heterosexuals and homosexuals alike, the Court observed that the prohibition was “as consistent with a general condemnation of nonprocreative sex” as with persecution of homosexuality.⁴⁸⁷ The majority was referring to its decisions in *Griswold v. Connecticut*⁴⁸⁸ and *Eisenstadt v. Baird*,⁴⁸⁹ which found state laws prohibiting the use of contraception to violate the penumbral privacy rights implicit in the Bill of Rights. But the majority in *Lawrence* did not expressly base its decision on a penumbral privacy right. It instead struck down the statute as a violation of substantive due process under the Fourteenth Amendment without drawing a clear line between constitutionally permissible and impermissible morality-based legislative interference with the so-called due process right.⁴⁹⁰

In his dissent, Justice Scalia interpreted the majority opinion as a blanket rejection of all legislation based on purely moral criteria.⁴⁹¹ Although the Court did not recognize a fundamental right to sexual privacy as such in *Lawrence v. Texas*, other decisions of the Court on the subject seem to imply a view that the state has no rational or legitimate interest in regulating private, harmless

486. *Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

487. *Id.* at 570.

488. 381 U.S. 479 (1965).

489. 405 U.S. 438 (1972).

490. *See Lawrence*, 539 U.S. at 558.

491. *See id.* at 599 (Scalia, J., dissenting) (“This effectively decrees the end of all morals legislation.”). Justice Scalia’s position was that outlawing sexual behavior as immoral based on religious prejudices was a “rational basis” for state regulation. *Id.* at 589.

sexual conduct.⁴⁹² Justice O'Connor, in her concurring opinion, echoed *Romer v. Evans*, emphasizing that

"a bare ... desire to harm a politically unpopular group," [is] not [a] legitimate state interest.

....

... Moral disapproval of this group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause.⁴⁹³

Municipal courts in other countries have invoked the harm principle as well. In overturning the South African prohibition on homosexual conduct, for example, the Constitutional Court found the right to sexual privacy limited by the harm principle: "If, in expressing our sexuality, we act *consensually and without harming one another*, invasion of that precinct will be a breach of our privacy."⁴⁹⁴ The law prohibiting male homosexual intercourse could not withstand constitutional scrutiny, the court held, because "[i]t has no other purpose than to criminalise conduct which fails to conform with the moral or religious views of a section of society."⁴⁹⁵

492. In *Romer v. Evans*, it will be recalled, the U.S. Supreme Court struck down a Colorado state constitutional amendment denying sexual minorities all right to state protection from public or private discrimination. 517 U.S. 620 (1996). The Court's objection to the statute was based at least in part on the perception that a state constitutional amendment solely promulgated to vilify a group "lacks a rational relationship to legitimate state interests." *Id.* at 632; see also *id.* at 634. If the point of the amendment was to harm sexual minorities, precluding them from state protection against discrimination based on sexual orientation was a rational way to go about it. The Court's objection, then, must have been that the State of Colorado had no "legitimate interests" in preventing discrimination against sexual minorities and unconventional sexual conduct. Yet, if the state had a legitimate interest in criminalizing such conduct, as the Court held that it did only ten years earlier in *Bowers v. Hardwick*, 478 U.S. 186 (1986), it is unclear what was illegitimate about precluding sexual minorities as such from discrimination. It is possible the Court majority implicitly assumed that the state has no legitimate interest in regulating private sexual conduct that creates no harm to any person.

493. *Lawrence*, 539 U.S. at 580, 582 (O'Connor, J., concurring) (citations omitted). The Supreme Court's decisions in these cases have motivated lower courts to find laws prohibiting heterosexual oral intercourse unconstitutional in military disciplinary circumstances as well, see, e.g., *United States v. Bullock*, ARMY 20030534, 2006 WL 3490409, at *3 (A. Ct. Crim. App. Nov. 30, 2004), implying that the days of the U.S. ban on homosexuals in the armed forces are numbered.

494. *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice*, 1998 (12) BCLR 1517 (CC) ¶ 32 (S. Afr.), available at 1998 SACLX LEXIS 36 (emphasis added).

495. *Id.* ¶ 26.

The court thought such a legislative rationale was entitled to no weight in justifying discrimination.⁴⁹⁶ “The enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice,” the court concluded, “cannot qualify as ... a legitimate [governmental] purpose.”⁴⁹⁷

The ECtHR has employed comparable reasoning in its more recent decisions. In finding discriminatory ages of consent to violate the human rights to equal treatment and privacy in *S.L. v. Austria*, it held:

To the extent that [the impugned law] embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour.⁴⁹⁸

In *Goodwin v. United Kingdom*, the ECtHR buttressed its decision to require states that permit sex reassignment surgery to treat postoperative transsexuals as having changed their sex for all legal purposes by observing that “[n]o concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals”⁴⁹⁹ Here again, the court’s reasoning put great weight on the absence of detriment to society.

Finally, international authorities have sometimes invoked libertarian-type arguments to defeat discrimination against unconventional sexuality. The U.N. Human Rights Committee in *Toonen v. Australia* rejected Tasmania’s justification for its laws criminalizing homosexual intercourse as necessary for the protection of morals; “moral issues,” the government asserted, “must be

496. *Id.* ¶ 27.

497. *Id.* ¶ 37; *see also id.* ¶ 108 (Sachs, J., concurring) (“[Male homosexuality] is repressed for its perceived symbolism rather than because of its *proven harm*.... [T]he threat was that same-sex passion in itself is seen as representing to heterosexual hegemony.”) (emphasis added).

498. 37 Eur. H.R. Rep. 39, ¶ 44 (2003).

499. 35 Eur. Ct. H.R. 18, ¶ 91 (2002).

deemed a matter of domestic decision.”⁵⁰⁰ According to the Committee, acceptance of this proffered justification would “open the door to withdrawing from the Committee’s scrutiny a potentially large number of statutes interfering with privacy.”⁵⁰¹ Whatever the Committee’s unstated reasoning for affirming its own jurisdiction, it rejected the notion that promoting state morality could per se justify an intrusion on sexual privacy.

A telling indicator of the influence of the harm principle on both domestic courts and international tribunals is their tendency to frame questions regarding the permissibility of legislation discriminating against sexual minorities and unconventional sex in terms of whether the legislation is “legitimate” or “necessary.” The ECHR expressly requires that moral regulation be “necessary in a democratic society.”⁵⁰² In *S.L. v. Austria*, the ECtHR stated that discrimination based on sexual orientation must pursue a “legitimate aim” and have an “objective and reasonable justification”⁵⁰³—indeed, “particularly serious reasons by way of justification” because of the private, consensual, and harmless nature of unconventional sexuality.⁵⁰⁴ It follows, then, that an objective showing of harm could render an unconventional sexual practice illegal, as the ECtHR has in fact held. In *Laskey, Jaggard & Brown v. United Kingdom*,⁵⁰⁵ and *K.A. & A.D. c. Belgique*,⁵⁰⁶ the applicants had been convicted of engaging in sadomasochistic sex. In both cases, the ECtHR, objecting to the “extreme nature of the practices involved” and the attendant risk of harm, found the conduct not protected by Article 8 even though it was admittedly consensual, private, and had never resulted in any significant injury. In *Laskey*, the deciding factor for the court, like the Human Rights Commission,⁵⁰⁷ appears to have primarily been concern about the potential for serious injury of the condemned practices, not with “the sexual

500. *Toonen*, *supra* note 76, ¶ 8.4.

501. *Id.* ¶ 8.6.

502. ECHR, *supra* note 1, art. 8(2).

503. *S.L. v. Austria*, 37 Eur. H.R. Rep. 39, ¶ 36 (2003); *L. & V. v. Austria*, 36 Eur. H.R. Rep. 55, ¶ 44 (2003).

504. *S.L.*, 37 Eur. H.R. Rep. at ¶ 37; *accord Karner v. Austria*, 38 Eur. H.R. Rep. 24, ¶ 37 (2004).

505. 24 Eur. H.R. Rep. 39 (1997).

506. Apps. No. 42758/98 & 45558/99, Eur. Ct. H.R. (2005) (available in French only).

507. *Laskey*, 24 Eur. H.R. Rep. at ¶¶ 58-61.

proclivities of the applicants" or any moral dimension of the regulation.⁵⁰⁸

In *K.A. & A.D.*, in which the applicants were heterosexual, the court similarly noted the bleeding, unconsciousness, and scarring that resulted from the practices, the copious imbibing of alcohol, and the failure to heed the victim's cries for cessation of the torture.⁵⁰⁹ The court found the measures intended to protect both "the rights and freedom of others" and public health.⁵¹⁰ As to whether the criminal prohibitions on sado-masochistic sex were necessary and proportionate, the court noted that however broad the right to private sexual practices, they are limited by the victim's willingness to participate, which means that the practices must occur in an atmosphere of respect for the "victim's" right to withdraw consent.⁵¹¹ Although the law at issue forbade the intentional wounding or harm of another person regardless of consent, the court found the government's prohibition valid on the narrow ground that, in the case at hand, that right was not respected by the applicants.⁵¹² In light of the earlier *Laskey* decision, however, it seems that the explicit basis for the court's decision is deceptively narrower than the court itself represents. The two cases are consistent only if in *K.A. & A.D.* the court would have upheld the government's regulation of the conduct regardless of whether the victim's right to withdraw consent had been somehow guaranteed by the applicants, on the theory that Belgium (like the United Kingdom in *Laskey*) has the right to prohibit extreme sado-masochistic practices to prevent possible injuries.⁵¹³

508. *Id.* ¶¶ 43-47.

509. *K.A. & A.D. c. Belgique*, Apps. No. 42758/98 & 45558/99, ¶¶ 13-17, Eur. Ct. H.R. (2005) (available in French only).

510. *Id.* ¶ 81.

511. *Id.* ¶ 85.

512. *Id.*

513. A most interesting distinction was suggested by the applicants between legally sanctioned forms of assault and injury, such as those occurring in boxing, wrestling, cosmetic surgery, or circumcision. *Laskey*, 24 Eur. H.R. Rep. at ¶ 59. The Commission's explanation for the distinction was that boxing was subject to increasing regulation. *Id.* ¶ 61. This is hardly convincing, however, as even regulated boxing typically results in severe, even permanent damage of a kind absent in the sadomasochistic sex practiced by the applicants. *Id.* ¶ 44. The most cogent explanation for a distinction may be the moral theory offered by Lord Templeman: "Society is entitled and bound to protect itself against a cult of violence. Pleasure derived from the infliction of pain is an evil thing. Cruelty is uncivilised." *Id.* ¶ 20.

Nonetheless, the ECtHR has developed its jurisprudence in a legal environment in which the "protection of morals" is a textually valid basis for state regulation of private conduct without express reference to harm. In developing its margin of appreciation jurisprudence defining what kinds of regulation are proportional and "necessary in a democratic society" to meet a pressing social need, the ECtHR has come to weigh several factors, including the "moral climate" of the state at issue, public demands for regulation and its enforcement, and trends in Council of Europe member states.⁵¹⁴ And in so doing, the court has left open the door to arguments in favor of discriminating against harmless unconventional sexuality.

The problem with the court's factors from a jurisprudential perspective is that each is extralegal. The first two, relating to the view of the conduct from the standpoint of public morality in the regulating state, merely justify the court in deferring to the state whenever it undertakes an invasion of privacy for popular reasons such as a "public demand for stricter enforcement of the [challenged] law."⁵¹⁵ Yet, privacy can hardly be called a "human right" or "fundamental freedom" if its invasion is sanctioned whenever private conduct is socially unpopular.⁵¹⁶ Indeed, just as a right to freedom of speech is only truly necessary to protect unpopular speech, unpopular conduct requires more principled and thorough protection against state intrusion than popular conduct. A prohibition on publicly approved conduct will eventually yield to public demands for repeal in any democracy. Perhaps this is why, after

Yet, even this explanation, superficially appealing as it is, falls short of justifying a criminal prohibition of sadomasochism while boxing and countless horror, martial arts, and action motion pictures, video games, and other media in which the public either views or participates in the infliction of pain on others for entertainment or pleasure, are officially sanctioned. Probably the real distinction between the prohibited and the accepted activities is that the former involve sex and the latter do not. This suggests that either puritanical sexophobia or, more likely, a distaste for associating violence or cruelty with sex (ideally, an expression of love, which is, again ideally, the very opposite of cruelty), but in any case certainly not repugnance to cruelty or violence underlies the criminalization of sadomasochistic sex. A fuller exploration of this subject would exceed the scope of this monograph.

514. *E.g.*, *Norris v. Ireland*, 13 Eur. H.R. Rep. 186, ¶ 46 (1989); *Dudgeon v. United Kingdom*, 4 Eur. H.R. Rep. 149, ¶¶ 56-57, 60 (1982).

515. *Norris*, 13 Eur. H.R. Rep. ¶ 46.

516. *Cf. W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637-38 (1943) ("One's ... fundamental rights may not be submitted to vote; they depend on the outcome of no elections.").

finding that legislation penalizing oral and anal intercourse was strongly supported in Northern Ireland and popularly deemed "necessary to preserve prevailing moral standards," the court paradoxically held that the resulting invasion of privacy could *not* be justified by the moral indignation provoked by the prohibited conduct.⁵¹⁷ The importance of these factors even in the court's own jurisprudence is open to question.

The many judicial invocations of some form of the harm principle cannot, however, be interpreted to reflect an international consensus on how conflicts between sexual privacy and state regulation should be resolved. Even these state and international authorities are unwilling to countenance the extreme proposition that international law prohibits them to regulate harmless conduct based solely on elite or majority moral repugnance toward the conduct. Almost all laws proceed in a sense from a moral vision; even ostensibly morally neutral laws may proceed from *a priori* moral values. Laws providing incentives for well ordered economic behavior, for example, may arise from the utilitarian conviction that the public benefits of economic efficiency outweigh the loss of freedom caused by the regulation. A law requiring citizen military service may prevent no harm, but it increases state security. The "harm" that such laws prevent is not a tangible one directed at any identifiable individual but is more in the nature of a sacrifice of concrete, expected public benefits (the second justification for discrimination, discussed above). Mill himself granted that state coercion could be justified to secure social justice.⁵¹⁸ This expanded notion of harm as encompassing the degradation of valued public benefits, such as providing children with stable families, increasing economic growth, etc., is more defensible as a limitation on state intrusions on the most sensitive and personal internationally-recognized human rights (assuming the connection between the regulation and the

517. *Dudgeon*, 4 Eur. H.R. Rep. at ¶ 57; *accord Norris*, 13 Eur. H.R. Rep. at ¶ 46. Mashood Baderin has used similar reasoning to argue that the U.N. Human Rights Committee's interpretation of the Article 17 right to privacy as precluding laws criminalizing oral or anal intercourse should not apply in Islamic states, where "[h]omosexuality is generally seen to be strongly against the moral fabric and sensibilities of Islamic society and is prohibited morally and legally under Islamic law." MASHOOD A. BADERIN, INTERNATIONAL HUMAN RIGHTS AND ISLAMIC LAW 117 (2003).

518. Mill, *supra* note 461, at 79.

achievement of these benefits is empirically verified rather than assumed or imagined).

The view that states may regulate even private or intimate harmless conduct without providing any measurable benefit to the public has, nonetheless, never lacked defenders. In the realm of intimate association, two ethical bases for such regulation are commonly invoked: (1) cultural traditions disfavoring the impugned practice, and (2) religious-based moral revulsion to the impugned practice.⁵¹⁹ The justification for discriminating against unconventional sexuality on either basis is typically grounded on either of two propositions. First, the regulation is justified as reaffirming a majority public cultural or religious belief that, if nothing else, contributes to societal solidarity by identifying a common, if harmless, enemy. Obviously, the enemy (the would-be practitioner of unconventional sexuality) is excluded from this sense of solidarity, but it is considered an acceptable price for the benefit to the remainder of society. Alternatively, the regulation is said to be justified to protect the majority against the discomfort of knowing that someone, somewhere, is freely enjoying a sexual experience that they find distasteful or have been told is wrong.

2. Social Benefits of Punishing Immorality

The justification based on creating solidarity in identifying practices reviled by society as a whole has found many vehement defenders, because it can be used to shoehorn purely moral regulation into the category of a public good. States often justify oppression of or discrimination against sexual minorities based on cultural traditions, and these have been supported by the writings of some influential academics, lawyers, and judges.⁵²⁰ In *Liberty, Equality, Fraternity*, James Fitzjames Stephen argued that purely moral government regulation could be justified if the object of regulation was "good" (meaning approved by the majority "[i]n any given age and nation") and the regulation was likely to be effective

519. Usually these cultural traditions are tied to religious beliefs, but in some cases the causation may be reversed.

520. Judge Walsh, dissenting in *Dudgeon*, quotes Devlin, for example. See *Dudgeon*, 4 Eur. H.R. Rep. 149 (Walsh, J., dissenting, ¶ 9).

at reasonable expense.⁵²¹ The basis of the right to limit the freedom of others for purely moral reasons is grounded, in Stephen's view, in the potentially limitless importance of the effects of the acts and thoughts of each person on any other.⁵²² Total moral tolerance of the harmless activities of other people is only possible, he concluded, "when men have become completely indifferent to each other—that is to say, when society is at an end."⁵²³ Stephen's argument is finally based, then, on a utilitarian appeal to the value of social cohesion through shared condemnation of difference.

Similarly, in opposing the deregulation of homosexual intercourse in England, Patrick Devlin argued that "society" must have a "right" to preserve its own culture and the ethical norms underlying it, or it will face dissolution.⁵²⁴ Society cannot function, Devlin declared, without intolerance based on religion or irrational feelings.⁵²⁵ These utilitarian positions have been echoed and modified more recently by others. Some, such as William Galston,⁵²⁶ claim that liberal democratic states should have room to promote liberal virtues that perpetuate the state ideology, and (with particular relevance to the question of sexuality) the "stability" of families should rank among these virtues.

Certainly the very definition of "society" assumes some level of shared morality, although it is important to exaggerate neither the extent of detail that the community must share nor the consequences of allowing dissent. H.L.A. Hart observed that, accepting that shared morality is a necessary component of social cohesion, it is a *non sequitur* to claim that there should be no limits on a temporal majority's ability to circumscribe the liberty of all in the name of promoting the shared morality of the present.⁵²⁷ This would be equivalent to postulating that society consists of little or nothing more than the common majoritarian morality of the

521. JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 137, 145, 159 (1873).

522. *Id.* at 138.

523. *Id.* at 143.

524. PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 5-12 (1972).

525. *Id.* at 17. Devlin would perhaps have differed from Stephen by disclaiming the state's right to impinge on fundamental rights. Jeffrie Murphy ably analyzes this aspect of Devlin's argument. See Jeffrie Murphy, *Legal Moralism and Liberalism*, 37 ARIZ. L. REV. 37, 84-85 (1995).

526. WILLIAM A. GALSTON, *LIBERAL PURPOSES* 220 (1991).

527. See HART, *supra* note 455, at 50-52.

moment—and every last shred of it—an obvious overstatement. Many components of any given society's shared culture have little moral valence, such as a preference for spicy food or a propensity to venerate accomplished athletes and entertainers. It is equally important to recognize that, under the right circumstances, many moral beliefs held by a majority of society can be discarded or ignored without threatening to tear the fabric of society itself. Repeated legal experiments in cultural engineering, including *Brown v. Board of Education* in the United States or the abolition of apartheid in South Africa (both defended by *inter alia* the perceived necessity of separating races for the preservation of morality), have demonstrated as much.⁵²⁸

Accepting *arguendo* that social cohesion and family stability (however defined) have value, it does not follow that these values are best expressed through the deterrence of difference. Tolerance of harmless difference is itself a social value; it might credibly be argued it ranks higher among the values that a liberal democratic culture should share than those alleged to justify discrimination. International human rights law clearly favors such tolerance in promoting the right to dissent in speech and association.⁵²⁹ In contrast, what kind of "social cohesion" does intolerance of harmless difference foster if not illiberality and the atavistic and irrational pleasure that the majority feels upon sharing an illusory feeling of superiority induced by the collective castigation of any who seek to express themselves and live their lives according to their idiosyncratic inclinations? Unless circumscribed by some limiting principle, the arguments for social conformity as defined by the majority mock the very values of autonomy and liberty that international human rights law seeks to promote.⁵³⁰

528. This implies a response to the more moderate assertion that human rights law should accept moral regulation if it is designed to overcome an "inherent evil" or to promote virtues consistent with a prevailing state ideology of liberal democracy. If the state, as Galston advocates, is left a free hand to promote "liberal virtues," see generally GALSTON, *supra* note 526, at 213-40, these virtues would seem to include the protection of privacy and freedom of association, and the toleration of harmless differences in sexual preferences or intimate interaction.

529. See UDHR, *supra* note 1, art. 19.

530. Stephen would rejoin that regulation based on cultural preferences should be limited to cases in which a large majority of society has long, "strenuously and unequivocally," objected to a practice. STEPHEN, *supra* note 521, at 159. A pure majoritarian approach of this kind remains inimical to human rights and even constitutionalism, as it sets no necessary

Alternatively, it may be argued that unconventional sexuality does harm the state in some palpable way. This argument necessarily assumes that states continue to have political reasons for incorporating moral views about harmless sex or family arrangements into their legal codes (e.g., to promote gross economic growth, to ensure a large supply of military recruits, etc.). Whatever force (if any)⁵³¹ the assumption that states maintain such an interest may have, that interest must be balanced against the very substantial interest of each individual in controlling and expressing his or her own sexuality. As the ECtHR and many state courts have recognized, such basic rights should only be compromised in the service of an exceptionally pressing and weighty state interest, a standard difficult to meet in regulating harmless adult, consensual sexual conduct.⁵³² Several of the court's decisions, especially those finding

limits on government power, so long as the "vice" punished has been long and stridently disfavored by a large majority. If most members of a society believed that the failure to attend church should be punishable by a long term of imprisonment, this could under some circumstances constitute a sound basis for such regulation in this view. Again, this is precisely the kind of enforced conformity against which international human rights law's protections are most necessary. Punishing or deterring harmless dissent in subservience to majority cultural prejudices forecloses individual freedom and self-realization for no purpose other than to reaffirm the majority in holding those prejudices. The desire to force others to adhere slavishly to cultural prejudices recalls Thomas Jefferson's judgment on self-subjected conformity to preexisting systems of thought: "Such an addiction is the last degradation of a free and moral agent." Letter from Thomas Jefferson to Francis Hopkinson, Mar. 13, 1789, in *THE ESSENTIAL JEFFERSON* 172 (Jean M. Yarbrough ed., 2006).

531. No modern state prohibits sexual abstinence or the use of contraceptives, at least partly because so few states perceive themselves as underpopulated. As David Richards observes, the state may have had a legitimate role in encouraging procreation

when there was massive infant mortality ... and a correspondingly desperate need to have large numbers of children, at least some of which [sic: whom] might survive to perform needed tasks in a basically agrarian way of life. But such a context is no longer present in industrialized societies with modern health care and growing worries about overpopulation

RICHARDS, *supra* note 41, at 69-70; *see id.* at 111-12. Or, in the words of Judge LaForme of the Ontario Superior Court of Justice:

[I]t could reasonably be argued ... that [reliance on procreation] appears to be a mere pretext used to rationalize discrimination against lesbians and gays.

One could reasonably reach the conclusion that the real, although unstated, purpose of the restriction is to preserve the exclusive privileged status of heterosexual conjugal relationships in society.

Halpern v. Canada, [2002] 215 D.L.R.(4th) 223, ¶¶ 242-43 (Super. Ct. Ont.) (LaForme, J.), *rev'd on other grounds*, [2003] 225 D.L.R. (4th) 529 (Ont. Ct. App.) (Can.).

532. Even the strictest legal moralists do not necessarily argue that state discrimination against unconventional sexuality and sexual minorities can be justified. *See, e.g.*, Murphy,

prosecutions based on the videotaping and controlled public exhibition of pornography incompatible with human rights law, accord with the treatment of liberty of intimate association and privacy as the ultimate values at stake. In *Scherer v. Switzerland*, for example, the court held that a bookshop/video store that privately showed homosexual pornography in a back room for "those in the know" could not be prosecuted for publishing obscene items consistent with the right to free expression protected by ECHR Article 10.⁵³³ In *A.D.T. v. United Kingdom*, the ECtHR confirmed that videotaped private homosexual intercourse not involving any physical harm and made with no intent of public distribution was protected by Article 8.⁵³⁴ Similarly, the U.S. Supreme Court's broad statement of its philosophical premise in *Lawrence* included among the most important kinds of liberty sexual behavior as "the most private human conduct."⁵³⁵ In the same case, the Court referred to its precedential decision in *Roe v. Wade*⁵³⁶ finding a constitutional right to abortion as establishing "the right of a woman to make certain fundamental decisions

supra note 525, at 76. Stephen himself put several limitations on his criteria for legitimate regulation of harmless behavior, including that it generally must not enter "into a direct contest with a fierce imperious passion, which the person who feels it does not admit to be bad, and which is not directly injurious to others." STEPHEN, *supra* note 521, at 148. This is less an ethical limitation for Stephen than a pragmatic one, but it would appear to preclude government condemnation of unconventional sexuality, at least among those drawn to it by a "fierce imperious passion." *Id.* Stephen also argues that legislation should not be "meddlesome," *id.* at 158, which, although obscure in meaning, seems to imply that laws should not regulate behavior of insignificant social consequence (if his statement is not to be interpreted as a candid acceptance of the harm principle). Even so, it argues strongly against discrimination against unconventional sexuality. Stephen even argues that legislation ought "in all cases whatever scrupulously to respect privacy," meaning familial, love, and friendship relations. *Id.* at 160-62. Here, too, Stephen is obscure; his language could arguably preclude government regulation on or limits to any of the behavior under discussion here, from homosexual intercourse to same-sex marriage. It could also preclude the criminalization of spousal abuse, polygamy, or some kinds of slander. It is, in short, too vague to serve as a guide to the legitimacy of governmental regulation of harmless behavior. The point, though, is that even such a confirmed legal moralist as Stephen has difficulty accepting limitless government regulation of harmless differences in intimate behavior, however strongly socially condemned these differences may be.

533. 18 Eur. H.R. Rep. 276, ¶¶ 10, 53-54 (1994). *But see* Reiss v. Austria, 20 Eur. H.R. Rep. CD 90 (1995) (finding that the display of a homosexual pornography videotape in a bar was not "private" conduct protected by Article 8).

534. *A.D.T. v. United Kingdom*, 31 Eur. H.R. Rep. 33, ¶¶ 26, 37-39 (2000).

535. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

536. 410 U.S. 113 (1973).

affecting her destiny.”⁵³⁷ This *Roe* language is reminiscent of the Court’s conclusion in *Lawrence* that Texas could show no legitimate state interest to “justify its intrusion into the personal and private life of the individual.”⁵³⁸

Subordinating individual freedoms of this nature to such political exigencies would seem to be inconsistent with the very purpose and spirit of international human rights law. It is precisely the function of human rights to protect dissenters from social control unless necessary for the protection or promotion of society for a legitimate end consistent with democracy and human dignity, liberty, and development of human potential. The importance to human dignity and autonomy of the right to privacy and intimate life can hardly be overstated.⁵³⁹ Another commentator has aptly observed: “It is an individual’s intimate associations that give him his best chance to be seen (and thus to see himself) as a whole person rather than as an aggregate of social roles”⁵⁴⁰—roles often defined for him or her in social contexts by others. The trust, interdependence, and interpersonal permeability that mark sex and intimate association as sensitive and important components of each individual’s identity, self-conception, and intimate social relationships also justify their treatment as rights deserving of unusual protection against arbitrary state infringement.

3. *Sexuality, Religion, and Human Rights*

The social repugnance to unconventional forms of intimacy and sexuality, manifested at some point or another in the laws of almost

537. *Lawrence*, 539 U.S. at 565.

538. *Id.* at 578.

539. See Richards, *supra* note 41, at 79 (“We may say, paraphrasing Lincoln on slavery, that if the right to intimate life is not a basic right, then nothing is.”) (citation omitted). In any case, as a factual matter, no country in the world requires procreation as a matter of law as a precondition to the validity of marriage, although some may provide that the marriage implies a sexual (procreative or not) relationship. See, e.g., Taylor, *supra* note 148, at 589-90 (Germany). But see *Halpern v. Canada*, [2002] 215 D.L.R.(4th) 223, ¶ 239 (Super. Ct. Ont.) (LaForme, J.), *rev’d on other grounds*, [2003] 225 D.L.R. (4th) 529 (Ont. Ct. App.) (Can.) (“[I]t is well established ... that a marriage is valid and not voidable despite the fact that one spouse refuses to have sexual intercourse, or is infertile, or insists on using contraceptives when having sexual intercourse.”).

540. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 635-36 (1980).

all states, arises primarily from official religious condemnation of these practices. Opposition to same-sex marriage or domestic partnership is particularly strident in states closely affiliated with homogeneous and well-organized religious orders.⁵⁴¹ Even relatively secular states continue to deny any right to same-sex marriage or the equivalent largely based on religious opposition.⁵⁴² Religious activists have also opposed bills and laws in many countries that would prohibit persecution or discrimination based on sexual orientation.⁵⁴³

The reason so many globally successful religions oppose unconventional sexuality and seek to impose doctrinal control over sexual behavior generally is not difficult to understand. Religion is characterized by faith, which is the uncritical belief in the unproven or unprovable, and usually scientifically improbable, assertions made by other people who have claimed some unique insight into mystical events or divine thoughts. Because faith is by definition difficult to transmit through rational and objective evidence, religions must rely heavily on socialization; they depend on

541. In the constitution of highly Catholic Poland, for example, marriage is defined as a union of a man and a woman specifically to preclude same-sex marriages. KONSTYTUEJA RZECZYPOSPOLITEJ POLSKIEJ (Constitution of Poland) art. 18 (1997), available at <http://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>; see Neely Tucker, *New Constitution Could Closet Poland's Emerging Gays*, DETROIT FREE PRESS, May 13, 1997, at 5A. In Italy, the opposition of the Catholic Church to same-sex marriage has stymied discussions of same-sex marriage in parliament. See MERIN, *supra* note 42, at 156. In Russia, the Kremlin's new ties to the Russian Orthodox Church are thought by some to doom any possibility of that state recognizing a right to same-sex marriage in the near future. Graeme Smith, *Lonely Crusader of the Urals, Russian Champion of Same-sex Marriage Fighting an Uphill Battle*, THE GLOBE & MAIL (Toronto), Feb. 15, 2006, at A1.

542. See, e.g., MERIN, *supra* note 42, at 81, 84, 138 (France, Norway); Chan, *supra* note 74, at 76 (Hong Kong); Robyn Emerton, *Neither Here nor There: The Current Status of Transsexual and Other Transgender Persons Under Hong Kong Law*, 34 H.K. L.J. 245, 265 (2004) (Hong Kong); Weiss, *supra* note 4, at 285 (Singapore); *Outrage as Same-Sex Union Bill Vetoed*, CANBERRA TIMES, June 14, 2006, available at 2006 WLNR 10117183 (Australia); Hanna Rosin & Richard Morin, *As Tolerance Grows, Acceptance Remains Elusive*, WASH. POST, Dec. 26, 1998, at A01 (citing a U.S. survey finding that, of Americans describing homosexuality as "unacceptable," a majority cited religious objections as the reason); Laura Sheeter, *Latvia Cements Gay Marriage Ban*, BBC NEWS, Dec. 15, 2005, available at <http://news.bbc.co.uk/2/hi/europe/4531560.stm> (Latvia); Uganda: State Homophobia, *supra* note 199 (Uganda); Homosexuelle und Kirche [Homosexuals and Church], Kirchliche Segnung gleichgeschlechtlicher Partnerschaften: Übersicht [Church Belling of Same-Sex Partnerships: Overview], <http://huk.org/aktuell/segnung-uebersicht.htm> (last visited Nov. 20, 2008) (Germany).

543. See, e.g., Press Release: Human Rights Watch, *supra* note 152.

inculcating beliefs in the subject before the subject is mature enough to develop the intellect and practical experience sufficient to question and critically evaluate the claims of the religion with reference to real world experience.⁵⁴⁴ With only a few exceptions,⁵⁴⁵ it is in the nature of an internationally successful religion to foster fertility, using parents as the primary means of transmitting religious beliefs directly to their children,⁵⁴⁶ the more numerous the better. The process continues indirectly throughout adolescence with (sometimes mandated) exposure to indoctrinating institutions such as churches, religious schools, and social activities.⁵⁴⁷ This strategy is globally effective; even in a state as

544. Socialization is, of course, only one method organized religions use to grow and maintain dominance. More extreme tools include extreme penalties such as death for renouncing, insulting, or disagreeing with the religion. *See, e.g.*, Islamic Penal Code of Iran [1996] arts. 513-14, available at http://mehr.org/Islamic_Penal_Code_of_Iran.pdf (prescribing execution or imprisonment for insulting Islam, Mohamed, or "the founder of the Islamic Republic of Iran"); U.N. Hum. Rts. Comm., Concluding Observations of the Human Rights Committee: Sudan, ¶ 8, U.N. Doc. CCPR/C/79/Add.85 (Nov. 19, 1997) (noting that Sudan imposes the death penalty for apostasy, which is deemed incompatible with Article 6 of the CCPR); BADERIN, *supra* note 517, at 79 (death for apostasy in Islam); JAMILA HUSSAIN, ISLAMIC LAW AND SOCIETY 138 (1999) (same); Mashood A. Baderin, *A Macroscopic Analysis of the Practice of Muslim State Parties to International Human Rights Treaties: Conflict or Congruence?*, 1 HUM. RTS. L. REV. 265, 295-96 (2001) ("[U]nder Article 126 of the 1991 Sudanese Penal Code, apostasy from Islam is a criminal offence punishable with death if proclaimed or made public expressly or by action.... To protect the sensitivity of the Muslim population, utterances and publications that revile God, His Prophets and the Islamic faith are prohibited in many Muslim States."); *see also* Organization of the Islamic Conference, *Cairo Declaration on Human Rights in Islam*, art. 22(a) (Aug. 5, 1990), U.N. Doc. A/45/5/21797, at 199 ("Everyone shall have the right to express his opinion freely in such manner as would not be contrary to the principles of the Shari'ah.") (emphasis added). The Catholic Church merely indirectly threatens eternal damnation for the "sins" of apostasy and blasphemy. *See* CATECHISM OF THE CATHOLIC CHURCH ¶¶ 817, 1031, 1035, 1472, 1488, 1857-58, 2087-89 (2d ed. 1997).

545. Buddhism, for example, by no means emphasizes procreation as a religious duty. *See* Harris T. Lifshitz, *Overpopulation: No Strength in Numbers*, 6 FAM. L.Q. 93, 102 (1972). Yet, ironically, the two great civilizations with the closest ties to Buddhism, India and China, also suffer from the greatest overpopulation. *See* WORLD FACTBOOK 2008, *supra* note 49. Evidently, the religion's focus on chastity and withdrawal from worldly pleasures has not exerted much influence. In any case, Buddhism's apathy toward, if not discouragement of, procreation may partly explain its eclipse as a major global religion in the nineteenth and twentieth centuries.

546. This was demonstrated clearly in the erstwhile common law presumption of *religio sequitur patrem*. *See, e.g.*, *F. v. F.*, (1902) 1 Ch. 688, 689 (U.K.); *In re McGrath*, (1893) 1 Ch. 143, 148 (U.K.).

547. *See* Joseph A. Erickson, *Adolescent Religious Development and Commitment: A Structural Equation Model of the Role of Family, Peer Group, and Educational Influences*,

religiously tolerant and diverse as the United States, inter-generational transmission of parental religious ideology tends to be generally successful.⁵⁴⁸ The more children each adherent has, the more likely the popularity of the faith will grow rapidly over time. Religious control over procreation is, among other things, a game of numbers, and the growth of hierarchical religions relies heavily on the subordination of sexuality (and indeed the subordination of women generally)⁵⁴⁹ to the parental role.

31 J. SCI. STUD. RELIGION 131, 132, 143-46, 149 (1992); Bruce Hunsberger, *Parent-University Student Agreement on Religious and Nonreligious Issues*, 24 J. SCI. STUD. RELIGION 314, 316-19 (1985); Scott M. Myers, *An Interactive Model of Religiosity Inheritance: The Importance of Family Context*, 61 AM. SOC. REV. 858, 858, 862-64 (1996); Darren E. Sherkat, *Counterculture or Continuity? Competing Influences on Baby Boomers' Religious Orientations and Participation*, 76 SOC. FORCES 1087, 1088-92, 1098-1103 (1998). There is significant evidence that homophobia is correlated to the transmission of conservative religious and social values. See ESKRIDGE, *supra* note 380, at 224.

548. See Christian Smith, Robert Faris, Melinda Lundquist Denton & Mark Regnerus, *Mapping American Adolescent Subjective Religiosity and Attitudes of Alienation Toward Religion: A Research Report*, 64 SOC. RELIGION 111, 126-28 (2003) (finding that two-thirds of American twelfth graders over the last twenty years report that their religious beliefs are mostly similar or very similar to those of their parents, while less than a quarter said they were mostly or very different).

549. Many theistic religions seek to relegate women to a reproductive role with minimal rights and powers outside of the home even today. In Catholicism, for example, matrimony is strongly encouraged with a primary view to sponsor "ordered to the procreation and education of the offspring." CATECHISM OF THE CATHOLIC CHURCH, *supra* note 544, at ¶¶ 1601, 1652. With regard to Islam, the Qur'an puts men "a degree above" women and puts them in a paternalistic relationship to them. See QUR'AN 2:228, 4:34. Many Islamic states have codified various manifestations of religious sexism through, for example, discriminatory divorce and inheritance rights in favor of men, restrictions on dress, and disenfranchisement. See Baderin, *supra* note 544, at 279-87. In Iran, this sexism is effectuated in many ways by, for example, establishing legal rules to disregard or devalue women's testimony in criminal trials and making the payment of blood money much lower for the murder of women than for men. See, e.g., Islamic Penal Code of Iran [1996] arts. 119, 128, 300-01, available at http://mehr.org/Islamic_Penal_Code_of_Iran.pdf. This was reaffirmed in Article 6(b) of the Organization of the Islamic Conference's *Cairo Declaration on Human Rights in Islam*, see *supra* note 544, at 199, which posits that "[t]he husband is responsible for the support and welfare of the family." Even in relatively liberal Protestant England, the subordination of women through marriage was so extreme that Blackstone could blandly declare that "the very being or legal existence of the woman is suspended during marriage, or at least is incorporated and consolidated into that of the husband under whose wing, protection and cover she performs everything" WILLIAM BLACKSTONE, 1 COMMENTARIES ON THE LAWS OF ENGLAND 442 (1832).

David Richards posits an interesting parallel of and interaction between the sexist degradation of women and homophobia not so much as a matter of religion as of politics and philosophy. See generally RICHARDS, *supra* note 41, at 109-15.

Encouraging or demanding procreation has been particularly useful to the two most dominant religions today, Catholicism (over 17.3 percent of the world population—with some 1.1 billion adherents) and Islam (over 20.1 percent of the world population, with some 1.3 billion adherents).⁵⁵⁰ The Catechism of the Catholic Church, which has claimed that the predominant purpose of marriage is procreation at least since the Council of Trent in 1563,⁵⁵¹ still states today: “The deliberate use of the sexual faculty, for whatever reason, outside of marriage is essentially contrary to its purpose.”⁵⁵² Masturbation, fornication, and homosexuality are accordingly labeled immoral, “gravely disordered conduct”—in the last case to the point of being reviled as a “grave depravity ... contrary to the natural law.”⁵⁵³ Marriage, on the other hand, entails an “obligation of ... fecundity,” and “it is necessary that each and every marriage act remain ordered per se to the procreation of human life.”⁵⁵⁴ Thus, “every action which, whether in anticipation of the conjugal act, or in its accomplishment, or in the development of its natural consequences, proposes, whether as an end or as a means, to render procreation impossible is intrinsically evil.”⁵⁵⁵ In November 2000, the Pontifical Council for the Family extended its condemnation to same-sex partnership arrangements, calling them “a deplorable distortion of what ought to be a communion of love and life between a man and a woman in a reciprocal gift, open to life.”⁵⁵⁶

Both the Qur'an and Islamic law condemn homosexuality between adults⁵⁵⁷ in unequivocal terms.⁵⁵⁸ Other popular, hierarchi

550. WORLD FACTBOOK 2008, *supra* note 49, at 1-2; Baderin, *supra* note 544, at 265. At present, fifteen states have constitutionally declared Islam as the official state religion.

551. See JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT 16-41 (1997).

552. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 544, at ¶ 2352.

553. *Id.* ¶¶ 2352-53, 2357. In Paul's letters to the Corinthians, he states that homosexuals will not inherit the “kingdom of God.” 1 *Corinthians* 6:9-10.

554. CATECHISM OF THE CATHOLIC CHURCH, *supra* note 544, at ¶¶ 2363, 2366.

555. *Id.* ¶ 2370.

556. PONTIFICAL COUNCIL FOR THE FAMILY, MARRIAGE, AND “DE FACTO” UNIONS (July 26, 2006), available at <http://www.vatican.va>.

557. The Qur'an appears to offer homosexual pederasty as a reward in paradise, QUR'AN 52:24 (“And round them shall go boys of their own, as fair as virgin pearls”); 56:17 (“Round about them shall go youths never altering in age”); 76:19 (“And round about them shall go youths never altering in age; when you see them you will think them to be scattered pearls.”). Pederasty was common in the Middle East from about 800 C.E. to the mid-

cally organized religions, such as Mormonism,⁵⁵⁹ Orthodox Judaism,⁵⁶⁰ the Eastern Orthodox Church,⁵⁶¹ and the Russian Orthodox Church⁵⁶² also condemn unconventional sexuality and incorporate duties of fertility into their ethics.⁵⁶³ Indeed, religious groups have long led the charge against any recognition of homosexual human rights, sometimes through the language of vilification and hatred,⁵⁶⁴ but more often through political influence and

nineteenth century. See STEPHEN O. MURRAY & WILL ROSCOE, *ISLAMIC HOMOSEXUALITIES* (1997); Maarten Schild, *The Irresistible Beauty of Boys: Middle Eastern Attitudes About Boy-Love*, 1 PAIDIKA (1987). Modern Muslims often deny this reading of the Qur'an, however, due to the modern distaste for the practice.

558. QUR'AN 4:16, 20-21, 7:80-84, 26:162-68; Baderin, *supra* note 517, at 196. The Qur'an is widely considered by Islamic scholars to dictate at a minimum what is required and forbidden to Muslims. See YUSUF AL-QARADAWI, *THE LAWFUL AND THE PROHIBITED IN ISLAM* 18 (1984).

559. See The First Presidency and Council of the Twelve Apostles of The Church of Jesus Christ of Latter-day Saints, *The Family: A Proclamation to the World* (Sept. 23, 1995) ("We declare that God's commandment for His children to multiply and replenish the earth remains in force. We further declare that God has commanded that the sacred powers of procreation are to be employed only between man and woman, lawfully wedded as husband and wife."), available at http://www.lds.org/Static%20files/pdf/Manuals/TheFamily_AProclamationToTheWorld_35538_eng.pdf; Brooke Adams, *LDS Backs Amendment Against Gay Marriage*, THE SALT LAKE TRIB., July 8, 2004, at A1.

560. *Genesis* 1:28, cited in H CJ 721/94 El Al Isr. Airlines Ltd. v. Danilowitz, [1994] IsrSC 48(5) 749 (Isr. Sup. Ct.) (Kedmi, J., dissenting), available at <http://www.tau.ac.il/law/aeyalgross/Danilowitz.htm> ("The bond that makes two persons—of the two sexes—a 'couple' in the linguistic social meaning, is characterized by their decision to share their lives; and 'shared' in this context means, among other things and especially, cohabitation, whose primeval—and conceptually necessary—purpose is to bring children into the world") (Israel); *Leviticus* 18:22, 2d:13.

561. Basil of Caesarea, Canons 7, 62, in THE SEVEN ECUMENICAL COUNCILS 604, 608 (Philip Schaff & Henry Wace eds., 1994); Smith, *supra* note 541, at A1. Turcescu and Stan recount in detail the vigorous but ultimately unavailing attempts of the Romanian Orthodox Church and its parliamentary allies to oppose the decriminalization of homosexual intercourse. See Turcescu & Stan, *supra* note 21, at 292-98.

562. *E.g.*, Council of Eur. Parl. Ass. Deb., 30th Sess. (Oct. 2, 2007), Doc. No. AS(20007) CR 30, available at <http://assembly.coe.int> [hereinafter *Parade Debate*] (describing Patriarch Alexy II of the Russian Orthodox Church as calling a petition for a homosexual parade as "propaganda for sin" and comparing homosexuality to kleptomania).

563. This is not to say that smaller religions do not also foster fertility cults. Some tribal religions in Africa, for example, make ancestor-worship, eternal life, or other (often postmortem) benefits contingent on reproduction. See Gerber, *supra* note 142; Huncar, *supra* note 46, at F2. This is merely to say that a cult of fecundity may be a necessary but insufficient factor in a religion's widespread success.

564. See, *e.g.*, *Parade Debate*, *supra* note 562 (comparing homosexuality to kleptomania); Wintemute, *supra* note 150, at 129, 151 n.74 (quoting Catholic, Jewish, and Protestant religious authorities in Israel and Latvia comparing homosexuals to vampires,

insistence that government elites legally impose the religious understandings of morality and conceptions of the family on the state.⁵⁶⁵

State government officials have often explicitly acknowledged the basis of regulation of unconventional sexuality in the dominant state religion. Religious views are commonly invoked by legislators, executive officials, and courts to justify the continued prohibition on homosexual intercourse, the refusal to recognize nondiscrimination rights based on sexual orientation, and even the suppression of free speech and association by sexual minorities. In Orthodox Russia, for example, the mayor of Moscow recently refused homosexuals the right to organize a parade on the basis that it would outrage religious leaders.⁵⁶⁶ In Argentina, the Supreme Court cited "Catholic ethics" in upholding the government's refusal to register a gay rights organization.⁵⁶⁷ In the United Arab Emirates, the Minister of the Interior recently claimed that the torture and imprisonment of homosexuals could be justified as "respecting religion which forbids this type of behavior."⁵⁶⁸ Such justifications for the denial of the most fundamental human rights to sexual

kleptomaniacs, and pedophiles, or urging their execution); MEPs Urge Member States, *supra* note 43 (noting "inflammatory/hate/threatening language" used by religious leaders in the EU regarding sexual minorities).

565. See, e.g., Resolution on Homophobia in Europe, EUR. PARL. DOC. P6_TA(2006)0018, ¶ C; Council of Europe Doc. 8755, *supra* note 43, Draft Recommendation ¶ 3, Explanatory Mem. ¶ 3 (noting opposition from religious leaders to equal rights for homosexuals); JOHN GALLAGHER & CHRIS BULL, PERFECT ENEMIES 13-24, 78, 209 (1996) (U.S.); DIDI HERMAN, THE ANTIGAY AGENDA 78-80 (1997) (U.S.); MERIN, *supra* note 42, at 84 (Norwegian Lutheran State Church opposition to same-sex marriage); DAVID RAYSIDE, ON THE FRINGE 113-39 (1998) (Canada); Fish, *supra* note 307, at 32 (Spain); Wintemute, *supra* note 150, at 128 ("In Britain, we now have the Christian Institute, which opposes every single proposal for equal treatment of LGBT individuals and same-sex couples.") (U.K.); Shawn Pogatchnik, *Northern Ireland Grants Gay Couple Legal Recognition*, TULSA WORLD, Dec. 20, 2005, at A5 (Northern Ireland); Reilly, *supra* note 296 (opposition to same-sex partnership employment benefits to U.N. employees from Islamic states and the Holy See); Smith, *supra* note 541, at A1 (Russia); Dias, *supra* note 149 (Brazil). That said, in many cases religious groups—usually small or minority denominations such as Episcopalians—have opposed discrimination against homosexuals. See, e.g., Neil Katsuyama, *Church Backs Gay Rights by Calling Off Weddings*, YALE DAILY NEWS, Jan. 19, 2005, available at <http://www.yaledailynews.com/Article.aspx?ArticleID=27872>.

566. Rodriguez, *supra* note 4, at 13.

567. Eugene Robinson, *Argentina's Gays Battle Intolerance*, WASH. POST, Dec. 12, 1991, at A43.

568. *Gays Arrested in Dubai*, *supra* note 46, at A61.

minorities are far from rare even in states with a tradition of recognizing human rights generally.⁵⁶⁹

At core, all explicit state justifications for excepting unconventional sexuality from the protection of international human rights to privacy, family life, and association are reducible to religious justifications. They may originate in a psychological revulsion of some kind, but their rationalization appears uniformly in guise of moral objections that, because of the absence of any basis in demonstrable societal or individual harm, must ultimately appeal to a religious tenet. Yet, these arguments are fundamentally incompatible with international human rights as a concept for two reasons.

First, if human rights may always be derogated based on majority religious beliefs, they can never be meaningfully international. Religions differ radically in the kinds of conduct they stigmatize as immoral, and these reasons may have no rational justification as necessary for the promotion of democracy or human autonomy and liberty. Unrestrained Legal Moralism is fundamentally incompatible with human rights as a concept, because it treats the majority's prejudices and beliefs in matters having no necessary effect on their own lives as more worthy of respect than an individual's control over his or her own life. This is a position toward which the ECtHR has recently moved, albeit solely so far with respect to Islamic fundamentalism.⁵⁷⁰ Legal Moralism requires no evidence that the majority has the slightest real interest in the regulated behavior, yet it elevates the majority's wishes on the subject to a place of virtual supremacy. If human rights are universal rights, they must remain impervious to derogation based

569. *E.g.*, *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Norris v. Ireland*, 13 Eur. H.R. Rep. 186, ¶ 24 (1989) (describing a decision by the Supreme Court of Ireland holding antisodomy laws constitutional because *inter alia* "[h]omosexuality has always been condemned in Christian teaching as being morally wrong"); *Dudgeon v. United Kingdom*, 4 Eur. H.R. Rep. 149, ¶ 56 (1982); *Dudgeon v. United Kingdom*, 3 Eur. H.R. Rep. 40, ¶¶ 111-12 (Eur. Comm'n Hum. Rts. 1980); Nolen, *supra* note 46, at A15 (describing a case in which a Ugandan cabinet minister justified fining a radio show discussing homosexuality because the show contravened "God's moral values").

570. *See Refah Partisi v. Turkey*, 37 Eur. H.R. Rep. 1, ¶ 123 (2003) ("In the Court's view, a political party whose actions seem to be aimed at introducing *sharia* in a State party to the Convention can hardly be regarded as an association complying with the democratic ideal that underlies the whole of the Convention.").

on moral objections not founded on a demonstrable connection to tangible social or individual harms or societal benefits.⁵⁷¹

Second, whenever a religious majority imposes its moral values on a minority by prescription without a showing of harm, there is an inexorable risk of offending each dissenting individual's right to freedom of conscience and religion, both of which are fundamental components of international human rights law.⁵⁷² Given that, in any state, heterogenous religions and moral belief systems exist—and the human right to freedom of religion and conscience must necessarily encompass dissent in the handful of states that claim a homogenous religion—it is inconsistent with these principles for the state to allow a religion or a group of religions to define the legal parameters and consequences of intimate association for all persons in that state.⁵⁷³ A theocentric approach to human rights law⁵⁷⁴ that subordinates individual liberty and conscience to the religious beliefs of the majority or governing elite with no further justification inherently contradicts the concept of international human rights. The incompatibility of pure Legal Moralism with international human rights law is presented starkly when considering the case of majority religions whose elites present sexist practices as divinely ordained. No viable theory of international human rights law could accept sex discrimination as justifiable purely on moral grounds. Discrimination based on sexual orientation must equally be justified as serving some more concrete state interest.⁵⁷⁵

571. Keep in mind that this argument relates to state derogation of human rights, not to state regulation in general. For example, the argument does not imply that state regulation of dog fighting or public littering on Legal Moralist grounds would be illegitimate because there is no human right to torture animals for pleasure or deface the environment. It is possible, perhaps, to argue that these activities are merely expressions of a more fundamental right to liberty, but even so, as the courts and human rights authorities have stressed, the objection to religious-based regulation of sexuality relates to the importance of sexuality and family life to an individual's personal identity, self-realization, and self-expression.

572. See American Declaration, *supra* note 2, arts. III-IV; ECHR, *supra* note 1, arts. 9, 10; ICCPR, *supra* note 1, arts. 18, 19.

573. The Supreme Court of Canada arrived at this conclusion with respect to Canada's Charter of Rights and Freedoms. See *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295.

574. *E.g.*, BADERIN, *supra* note 517, at 51.

575. For an argument equating discrimination based on sexual orientation with other forms of discrimination, see DAVID RICHARDS, *IDENTITY AND THE CASE FOR GAY RIGHTS* 84-170 (1999).

International human rights law cannot in the long run survive subordination to state-sponsored religion for this reason. Sexuality issues reveal and provoke this conflict due to the historical and political importance of controlling sexuality in every major religion. A secular theory of human rights, unlike a religious theory, must justify its limitations on freedom and privacy with reference to some demonstrable harm or sacrifice of an articulable benefit to society. The unaccountable invocation of divine mandate does not suffice. Reference to the harm principle or some variant by state authorities are among the first shots fired in a fundamental conflict between international human rights law and state-sponsored religion. The treatment of sexuality issues in the crossfire may foreshadow how this conflict will play out with respect to other rights, such as the right to due process of law or nondiscrimination on the basis of race or religion. It may, in the alternative, merely indicate the evolution of an exceptionalism in which sexuality and family life are entitled to greater immunity to moralistic regulation than other kinds of human rights. But imputing such a limited future role to the harm principle is premature. The usefulness of the harm principle for evaluating state regulation impinging on other, nonintimate rights, such as freedom of public speech and association, is quite evident.

C. Intimate Exceptionalism and Opinio Iuris

Some forms of discrimination in state measures to subsidize specific kinds of relationships are inevitable so long as preferences in favor of marriage, recognized cohabitation, and other forms of regulated intimate association remain dominant in states.⁵⁷⁶ It could easily be argued that, normatively, the state has no especially convincing interest in offering encouragement to couple relationships (as opposed to no relationships or relationships between three or more unrelated people).⁵⁷⁷ But whatever one's position on the

576. See *Dudgeon v. United Kingdom*, 4 Eur. H.R. Rep. 149, ¶ 49 (1982) (holding that "some degree of regulation" of any form of sexual conduct can be "justified as necessary in a democratic society") (internal quotation marks omitted).

577. The author thanks Chrystin Ondersma for drawing his attention to this debate. That said, Grigolo's question: "Can we assume that more than 40 men, who met for 10 years and engaged in sado-masochistic practices, were doing so just for 'sex' and 'flesh', and remained

ethics of the issue, a human right to immaculate freedom of intimate association is not a position embraced by even the most egalitarian states.⁵⁷⁸ Whatever the rhetoric used, the application of Mill's harm principle by both municipal and international authorities has been intended to extend primarily, if not exclusively, to cases of government regulation of private, adult, consensual sexual conduct and discrimination based on such conduct. Most, though not all,⁵⁷⁹ tribunals have explicitly or implicitly limited the application of Mill's harm principle to this context.⁵⁸⁰ Although some scholars and advocates⁵⁸¹ and indeed the EU Parliament in 2001⁵⁸² have called for absolute deregulation of and nondiscrimination with respect to intimate relationships or at least sexual conduct, even this limited constraint is not a position popular with most states. States evidently believe that they continue to have a legitimate interest in encouraging specific kinds of enduring, supportive human relationships. Although much of the reasoning of legal authorities looks superficially like Libertarianism, in fact, states and international tribunals continue to act as if regulation of even private sexual conduct is legitimate where such regulation

completely indifferent to each other?" Grigolo, *supra* note 382, at 1043, is not especially relevant. The pertinent question is whether they have an ethical right to succeed to each others' pensions because two persons committed to a relationship of indefinite duration have a legal right to such succession, and the answer is not obviously affirmative.

578. Denmark, for example, has hesitated to merge the concepts of cohabitation and marriage, because it apparently wishes to encourage different-sex marriage. See MERIN, *supra* note 42, at 70.

579. The Pennsylvania Supreme Court explicitly stated that, as a matter of Pennsylvanian constitutional law, the harm principle limits the government's police power "generally," *Commonwealth v. Bonadio*, 415 A.2d 47, 98 (Pa. 1980), and did not limit its holding to private conduct, *see id.* at 100 (Roberts, J. & O'Brien, J., dissenting).

580. *E.g.*, *Lawrence v. Texas*, 539 U.S. 558, 578 (2003); *see also Jordan v. State*, 2002 (11) BCLR 1117 (CC) (S.Afr.), available at <http://www.concourt.gov.za> (holding that the prohibition on prostitution conducted in private quarters is not protected by a right to privacy); *F. v. Switzerland*, App. No. 11680/85, 55 Eur. Comm'n H.R. Dec. & Rep. 178, 180-81 (1988) (same).

581. *E.g.*, Grigolo, *supra* note 382, at 1028, 1042-43 (calling for the total deregulation of intimate association); Wayne Morgan, *Queering International Human Rights Law*, in *LAW AND SEXUALITY: THE GLOBAL ARENA* 208 (Carl Stychin & Didi Herman eds., 2001). Morgan professes that his goal is to "break down" the "heteronormative system" and to undermine its assimilating tendencies. *Id.* at 215-25.

582. Resolution on the Situation Concerning Basic Rights in the European Union, 2001/2014(INI), EUR. PARL. DOC. P5_TA(2003)0012, ¶ 102, available at <http://www.europarl.europa.eu> (calling on EU member states to afford the same rights to married and unmarried couples).

serves a greater societal interest, such as prohibiting some forms of commercial sex, preventing the social subordination of women, or deterring subtle forms of familial exploitation. Thus, with few exceptions, states consistently deny there is a human right to have polygamy and group marriage recognized by the state, and almost every state in the world continues to criminalize some forms of consensual intimate conduct, such as violent sadism and incest.⁵⁸³ In this light, the fact that several states that have granted equal or nearly equal human rights to sexual minorities continue to exclude adoption, custody, and artificial insemination rights from the scope of equal rights may be explained by the necessity of balancing the privacy right to intimate association with the public interest in protecting children from family relationships that are perceived, rightly or wrongly, as disadvantageous. In short, almost all states continue to believe their regulation of at least some intimate conduct on purely moral grounds is consistent with international human rights law.

Yet, states must justify all such restrictions as consistent with human rights, and the practices of the great majority of states of the world respecting sexual minorities and unconventional sexuality cannot easily be reconciled with any self-consistent human rights jurisprudence or even ethical theory. Any explanation for the absence of a strict correlation between state commitments to international human rights generally and their recognition of equal human rights for sexual minorities⁵⁸⁴ must account for the role of

583. See, e.g., Decision 20/1999, MK. 1999/56 (Hung. Const. Ct.), available at <http://www.mkab.hu/content/en/en3/04989404.htm> (upholding criminal laws prohibiting incest); Karst, *supra* note 540, at 672 (incest); Robert Wintemute, *De l'égalité des orientations sexuelles à la liberté sexuelle: Jurisprudence européenne et comparée*, in LA LIBERTÉ SEXUELLE 161, 176-83 (Daniel Borrillo & Danièle Lochak eds., 2005) (discussing limitations in Canadian jurisprudence on sadomasochistic practices); cf. *Dudgeon v. United Kingdom*, 4 Eur. H.R. Rep. 149, ¶ 49 (1982) ("In practice there is legislation [regulating consensual, private intimate conduct] in all the member states of the Council of Europe."). But see, e.g., Recognition of Customary Marriages Act 120 of 1998 (S. Afr.) (recognizing and permitting polygamous marriages where it is an historic custom), discussed in Williams, *supra* note 289, at 36; Baderin, *supra* note 544, at 275-79 (discussing the position of Islamic states denying that international human rights law can contravene divine law mandating the allowance of polygamy).

584. Jim Nickel refers to these as "Universal Rights Applied to Minorities" to distinguish them from special group rights proper. See JAMES W. NICKEL, MAKING SENSE OF HUMAN RIGHTS 54 (2d ed. 2006).

organized, fundamentalist religions in undermining the uniform application of human rights.

Fundamentalist religious opposition to the recognition of the rights discussed throughout this Article has impeded state recognition of these entitlements as human rights and international consensus on their status as such. Nonetheless, the trend toward limiting state discrimination in the realms of sexuality and family life is unmistakable. As described in Section I, in the last fifty years, countries criminalizing homosexual intercourse have gone from a large majority to a clear minority, and this minority is under significant international pressure to abandon criminal penalties. The number of states officially recognizing and granting rights to persons involved in same-sex relationships has expanded rapidly in the last two decades. In only the last five years, as many countries have adopted laws permitting full same-sex marriage. One of the final frontiers in equal rights—equal access to adoption and procreation rights for same-sex couples—has burgeoned in the same brief period, and has received new impetus in 2008 from the ECtHR. At the same time, states that have abolished antisodomy laws or instituted same-sex partnerships or marriage have very rarely reversed course. The trend has been hastened by the expansion of the scope of several NGOs' mandates—most notably those of Amnesty International in 1991, Human Rights Watch in 1994, and by academics and NGOs in the Yogyakarta Principles in 2007—to encompass monitoring and pressuring state governments to discontinue practices that discriminate against sexual minorities.⁵⁸⁵ State governments are progressively retreating out of their citizens' bedrooms and locking the door with constitutional rights and, it appears probable in the near future, international human rights.

This brings the discussion back to the most potentially compelling distinction between the regulation of familial and sexual life and regulation that may intrude on other human rights. The former class of rights has been characterized by courts, international human rights authorities, and academics as different from other

585. Peter R. Baehr, *Amnesty International and Its Self-Imposed Limited Mandate*, 12 NETHER. Q. HM. RTS. 5 (1994); Wilets, *supra* note 52, at 36-37; Masha Gessen, *Amnesty International Adopts Lesbians and Gay Men*, THE ADVOCATE, Oct. 22, 1991, at 52.

rights—as deserving of special protection because of their centrality to individual self-conception, autonomy, and identity. This description of the rights at stake is surely accurate, but no more so than it would be if applied to many other human rights, such as freedom of speech, of religion, of political association, or against arbitrary discrimination. The operative distinction does not appear to be whether the right is important to the individual's identity so much as whether the state sacrifices something of real value in giving it broad scope. States are increasingly recognizing that the costs of discrimination based on sexual orientation to the affected individuals, the consistency of human rights doctrine and ethics, and the atmosphere of respect for liberty and toleration of harmless difference cannot be justified by any meaningful countervailing benefit to the state.

Although a confluence of state practices may be an influential source of evidence of the development of a customary international norm,⁵⁸⁶ *opinio iuris sive necessitatis* must show the emergence of a mature rule accepted as binding on the international community before one can safely conclude that the human rights to privacy, intimate association, family life, and freedom from arbitrary discrimination have been recognized as applying to sexual minorities and unconventional sexuality to the same extent as heterosexuals and heterosexual intercourse. And the discussion in Part II of this Article makes abundantly clear that only a handful of states have yet adopted the position that human rights to sexuality and unhindered arrangement of family life should be free from regulation except when some definite harm is shown, and that human rights of sexual minorities will be honored in the same way and to the same extent as those of heterosexuals.

One of the most interesting aspects of the key movements in the international community toward abolishing discrimination based on sexual orientation and extending the freedom of intimate association to unconventional sexuality is its almost uniformly inward-looking character. As noted earlier, the U.S. Supreme Court decision in *Lawrence v. Texas* was framed as a constitutional decision rather than the enforcement of an international human

586. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38(1)(c).

rights norm.⁵⁸⁷ The Court's references to foreign and ECtHR practices were apparently epiphenomenal.⁵⁸⁸ The same may be said of the egalitarian trends advanced by courts and legislatures in Canada,⁵⁸⁹ Israel,⁵⁹⁰ and South Africa.⁵⁹¹ Each state's judicial decisions cited to decisions of the ECtHR and courts in other jurisdictions merely to confirm a transnational trend supporting what was apparently a constitutionally preordained decision rather than as a source of authority.⁵⁹² Indeed, almost every domestic tribunal that has overturned laws discriminating against sexual minorities or unconventional sexuality, and almost every state legislature that has abolished discriminatory legislation or adopted antidiscrimination legislation, has done so without relying on international human rights law as a basis of authority.⁵⁹³ Instead,

587. 539 U.S. 558, 578 (2003).

588. The U.S. state court opinions having a similar effect have also avoided relying on human rights treaties or customary international law.

589. The Canadian Supreme Court decision opening the door to homosexual marriage did not rely on international law, and the provincial decisions found discrimination against homosexuals in marriage laws to be contrary to the Canadian Charter of Rights and Freedoms rather than international human rights law. Canadian Prime Minister Jean Chrétien accordingly explained Canada's decision to allow same-sex marriage as a response to an "evolution of society" rather than a demand of international human rights law. Press Release, Family Research Council, *Gay Marriage in Canada Is a Wake-Up Call to America* (June 18, 2003) (on file with author).

590. The legislative history of Israel's prohibition on discrimination based on sexual orientation indicates a concern with "the rules accepted today in the enlightened world" but not international law per se. H.C.J. 721/94 *El Al Isr. Airlines Ltd. v. Danilowitz*, [1994] IsrSC 48(5) 749, ¶ 9 (Isr. Sup. Ct.) (Dorner, J., concurring), available at <http://www.tau.ac.il/law/aeyalgross/Danilowitz.htm>. Similarly, the Israeli Supreme Court decision prohibiting discrimination in employee benefits, was premised upon an Israeli "judicial principle" and "Israeli statutory law." No reference was made to international law. *Id.* ¶¶ 11-12 (Barak, Dep'y C.J.).

591. *Nat'l Coal. for Gay & Lesbian Equal. v. Minister of Justice*, 1998 (12) BCLR 1517 (CC) ¶¶ 9-10, 17 (S. Afr.), available at 1998 SACLX LEXIS 36.

592. *E.g., id.* ¶ 42 ("If nothing else, the judgments in *Dudgeon* and *Norris* are indicative of the changes in judicial and social attitudes in recent years.").

593. For example, in the U.S. state cases overturning state prohibitions on same-sex marriage, the state supreme courts uniformly and exclusively on state and federal precedents without relying on international precedent or often even mentioning international human rights law. *See, e.g., In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008). The same is also true, although sometimes to a lesser extent, of the state court decisions finding prohibitions on same-sex intercourse unconstitutional. *See, e.g., Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992).

these movements have been premised upon domestic constitutional understandings of liberty, privacy, and nondiscrimination.

The conspicuous exception is of course Europe through the European Union and the Council of Europe. In 1998, for example, the EU Parliament adopted a resolution prospectively denying its consent to any country seeking to join the EU that, "through its legislation or policies, violates the human rights of lesbians and gay men," calling on applicant countries to "repeal all legislation violating the human rights of lesbians and gay men," and calling on the Commission to consider respect and observance of "human rights of gays and lesbians" when negotiating the accession of applicant countries.⁵⁹⁴ In 2001, it called upon "the eighty [sic] countries in the world which still prohibit homosexuality in their domestic law to change this legislation without delay."⁵⁹⁵ In 2004, the Parliament passed a resolution "having regard to" both the UDHR and the European Charter, calling on the EU Council and Commission "to address and take concrete measures in respect of those countries which have laws that discriminate on the grounds of sexual orientation" and calling on all countries that criminalize homosexual intercourse to abolish those laws.⁵⁹⁶ But even so, the ECtHR has not yet recognized that the right to family life extends to homosexuals and others who seek same-sex marriage.

Perhaps most telling for purposes of discerning the *opinio iuris*, many states have explicitly denied that international human rights law encompasses nondiscrimination, marriage, or other rights for sexual minorities or to unconventional sexuality. In 2004, the United States criticized the report of the U.N. Special Rapporteur on Health for asserting that the "correct understanding of fundamental human rights principles, as well as existing human rights

594. Resolution on Equal Rights for Gays and Lesbians in the EC, EUR. PARL. RES. B4-0824 & 0852/98, 1998 O.J. (C 313), ¶¶ J, 2, 3.

595. Resolution on Human Rights in the World in 2000 and the European Union Human Rights Policy, EUR. PARL. RES. A5-0193/2001, ¶ 116. The Parliament may have underestimated this number by excluding countries that have no law explicitly prohibiting homosexual intercourse. However, as noted above in Part II.A, some countries regularly prosecuted and punished homosexuality pursuant to more general laws relating to "obscenity," "hooliganism," and similar terms. In these countries, homosexuality is of course illegal as well.

596. Resolution on the Annual Report on Human Rights in the World 2004 and the EU's Policy on the Matter, EUR. PARL. DOC. P6_TA(2005)0150, pmb1. & ¶ 215.

norms, leads ineluctably to the recognition of sexual rights as human rights.”⁵⁹⁷ The United States representative specifically asserted that international human rights law does not guarantee against discrimination on the basis of sexual orientation.⁵⁹⁸ Similarly, the Belgian *Conseil d’État*, in its advisory opinion on draft legislation opening marriage to same-sex couples, expressly disclaimed any duty under international human rights law to permit same-sex couples to marry on the same terms as different-sex couples.⁵⁹⁹ In deciding to replicate the Netherlands’s decision to allow same-sex marriages, the Belgian government determined that the “evolution of Belgian society,” as opposed to an international obligation, justified the liberalization.⁶⁰⁰ Other states have taken similar positions.⁶⁰¹ The Supreme Court of Namibia, as just one example, has explicitly interpreted the African Charter, the UDHR, and the ICCPR to afford family rights only to heterosexuals.⁶⁰² In

597. U.N. Comm’n on Human Rights, Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, ¶ 54 (Feb. 16, 2004), U.N. Doc. E/CN.4/2004/49.

598. Ambassador Richard S. Williamson, U.S. Rep. to the U.N. Comm’n on Human Rights, Statement on the Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, U.N. Doc. E/CN.4/2004/49 (Mar. 30, 2004), available at <http://geneva.usmission.gov/humanrights/2004/statements/0330WilliamsonHealth.htm>. Given the ambiguity created by the unusual phrasing of Ambassador Williamson’s statement, it is perhaps fairest to reproduce his words *verbatim*:

Most troubling, however, is the Special Rapporteur’s apparent confusion about what constitutes international human rights law. We would like to know why he appears to believe “General Comments” produced by treaty bodies, as well as Summit documents, principles, and guidelines, constitute international human rights law, as he has erroneously suggested in his discussion on discrimination on the ground of sexual orientation. In fact, it is not international human rights law.

Id.

599. See Fiorini, *supra* note 227, at 1044.

600. *Id.* at 1045.

601. It is interesting that hostility to the human rights of sexual minorities is most strident in states whose records of compliance with even well established human rights norms has been sporadic or outright deficient. In some states, this denial extends even to the right to homosexual intercourse, and in a disappointing number of states finds expression in tacit or even explicit toleration of the persecution of sexual minorities. The President of Zimbabwe, for example, in 1995 made a bone-chilling speech declaring of homosexuals: “We do not believe they have any rights at all.” Derrick Z. Jackson, *Mugabe’s Anti-Gay Tirade*, *GLOBE & MAIL*, Aug. 14, 1995, at A17.

602. Chairperson of the Immigr. Selection Bd. v. Frank, Case No. SA 8/99 (Mar. 5, 2001, Sup. Ct. Namib.), discussed in Hubbard & Cassidy, *supra* note 46, at 262-63.

very few states indeed have national, regional, or international tribunals interpreted international human rights treaties to require general nondiscrimination against homosexuals, especially in marriage and other family rights.

Perhaps the most telling indicator of state rejection of the extension of human rights to sexual minorities is the concerted attempts of a large group of states to keep the issue off the international human rights agenda. The Group of 77's objections in 1991 to the possibility of the U.N. Development Programme including freedom for homosexual activity among the forty criteria used to construct the Human Freedom Index, for example, ultimately led to the replacement of the index altogether with a Political Freedom Index excluding any reference to sexual orientation.⁶⁰³ Similarly, twenty developing states opposed the inclusion of any reference to nondiscrimination based on sexual orientation in the U.N. Fourth World Conference on Women's Platform of Action in 1994.⁶⁰⁴ More recently, Pakistan, acting on behalf of the Organization of the Islamic Conference, moved unsuccessfully in the U.N. Commission on Human Rights to delete any reference to a duty of states to investigate discriminatory murders and summary executions based on sexual orientation from the report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions.⁶⁰⁵

The evidence is abundantly clear that, beyond parts of Europe and a few isolated states elsewhere, the trend toward recognition of rights to unimpaired sexual privacy and nondiscrimination for sexual minorities remains an aspirational goal for international law. Even in the most progressive states, the recognition of these rights has been based on state-level policy preferences first, with acknowledgment of the relevance of the ECHR—a regional if influential treaty—following in the wake. Predictions about the further development of these norms should also be tempered by the fact that vestiges of legally sanctioned discrimination continue to exist in Council of Europe member states as well. Nonetheless, the

603. See Sanders, *supra* note 42, at 89.

604. See *id.* at 89-90 & n.92.

605. Press Release, U.N. General Assembly, Third Committee Approves Draft Resolution Calling for Effective Action To Eliminate Extrajudicial, Summary or Arbitrary Executions, U.N. Doc. GA/SHC/3731 (Nov. 25, 2002); see U.N. Comm'n on Human Rights, Report on the 59th Session, Supp. 3, U.N. Docs. E/2003/23, E/CN.4/2003/135 (Oct. 1, 2003).

absence of any cogent secular moral justification for discrimination against sexual minorities implies that international human rights law must evolve to encompass them eventually if it is to avoid conspicuous hypocrisy. As Eric Heinze has observed, "[I]f we are to preserve the internal logical and moral consistency of human rights law, naturalism compels us to recognize rights not explicitly named in, yet conceptually implied by, extant human rights norms."⁶⁰⁶ The freedom to decide how to develop and express one's sexual identity without suffering oppression or discrimination is most certainly conceptually implied by, if not inseparable from, the recognized rights to intimate association, privacy, family life, and nondiscrimination enjoyed by heterosexuals. Moreover, there is every indication that general principles of law recognized by the states that generally respect human rights are converging rapidly on norms rejecting all but the most serious and cogent of justifications for state intermeddling in private, intimate association and sexual liberty, and state-initiated or tolerated discrimination against sexual minorities.

The developments presented here illustrate not only how norms of customary international law can begin from the domestic practices of individual states and gradually evolve into international practice, but also how doctrinal consistency, ethical theories, religious dogma, and other idealistic forces can stimulate and accelerate this process. An especially important aspect of the ideational dynamics revealed in this study are the roles of political and legal elites within the state. Specifically, secular doctrinal and ethical arguments tend to appeal most to both national and international judges and elites acting on behalf of intergovernmental organizations, while state legislative and executive elites rely much more on religious and cultural ideas. Given the political forces acting on (or, equally important, not acting on) the respective elites, these preferences are not at all surprising. Most state executive and legislative elites are far more exposed to popular pressures and cannot rely solely on a consistent theory of ethics or legal doctrine to justify their positions on sensitive political issues. The tension between secular and religious forces is especially strong in states characterized by strongly religious populations governed by an

606. ERIC HEINZE, *SEXUAL ORIENTATION: A HUMAN RIGHT* 127 (1995).

independent and secular judicial system—a description applicable to most modern democracies. This helps explain both the movement toward doctrinal consistency in the treatment of sexual minorities in recent years and the slow pace of its progress. As for states that continue to resist recognition of such rights, it suffices to note that, when political and legal elites institutionally subscribe to the same fundamentalist religious precepts, both legal and social pressures suppress any internal forces working for change (for example, dissent or advocacy by gay rights groups), and pressure from the international community is likely to meet strong and unified resistance.

CONCLUSIONS

The very nature of international human rights law commits states to accepting the international community's interest in protecting the most intimate forms of individual conduct from some forms of state interference or discrimination. There is no paradox in international law peeking into the boudoir to ensure that the state refrains from doing so. Some state regulation of intimate conduct is of course inevitable, and the tension between the centrality of the concept of autonomy to human rights and the relatively narrow state interests in regulating intimate conduct have generated revealing theories about the relationship between organized religion, political power, and international human rights theory.

In terms of how this tension has played out in practice, the survey of international practices regarding sexual minorities and unconventional sexuality in Part I confirms, with only a few exceptions, Kees Waaldijk's hypothesis of a "standard sequence" of "legislative recognition" of a human right to sexual freedom:

- (1) decriminalisation, followed or sometimes accompanied by the setting of an equal age of consent, after which (2) anti-discrimination legislation can be introduced, before the process is finished with (3) legislation recognising the same-sex partnership and parenting.⁶⁰⁷

607. Kees Waaldijk, *Small Change: How the Road to Same-Sex Marriage Got Paved in the Netherlands*, in *LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS*, *supra* note 142, at 439-40.

In fact, Waaldijk's predicted sequence reflects not only new legislative developments since his writing, but the sequence of judicially driven liberalizations as well, which has often been the *primum mobile* of human rights in this area. More remarkable still, in many cases, judicial action has taken these rights all the way from decriminalization to recognition of same-sex marriage and parental rights within a few decades, sometimes with legislative action lagging behind.

This trend in state practice is gradually driving toward worldwide recognition that, first and most basically, state laws criminalizing unconventional sex between or among consenting adults in private, at least on a noncommercial basis, violate the human rights to privacy and intimate association of the participants. This principle is indeed as established a human rights doctrine as any other, and is resisted primarily by those states that object to international human rights norms more generally (while nonetheless becoming parties to its major treaties).

Recognition of a broad human right against discrimination based on sexual orientation has not, however, gathered as broad a consensus. Although international authorities have made moves toward recognition of a nondiscrimination principle, state practice indicates continued and widespread resistance to accepting a duty to protect sexual minorities against arbitrary government or private discrimination. Rights to family life and parental rights have been much less universally acknowledged. It would be premature, then, to declare that a substantial consensus of states recognizes the application of human rights to sexual minorities and unconventional sexuality on an equal basis.

Except respecting issues of family law, resistance has been based upon a claim that such discrimination is necessary to protect *ordre public* or public morality, both of which in the right circumstances can justify derogating from accepted human rights norms. Yet, this basis for disclaiming the application of human rights to sexual minorities itself holds the promise for the future retraction of objections. To invoke an exception or qualification to a general obligation to sustain a state policy logically implies acceptance of that obligation. The question then becomes whether the state can justify the discrimination by showing that it is a measure appropri-

ate for serving a legitimate state interest. From this position, the ultimate triumph of a nondiscrimination norm is inevitable, because arguments that discrimination based on sexual orientation serves a legitimate state interest can rarely if ever survive sustained scrutiny upon examining the available empirical evidence.

On the other hand, arguments opposing same-sex marriage and parental rights have been based on less propitious reasoning. In many cases, the arguments have been framed on purely textual readings of human rights instruments, which have so far uniformly been interpreted to guarantee only a right to marry persons of a different sex. By framing the right narrowly in this manner, the larger issue of discrimination based on sexual orientation seems to disappear. This is a subjective interpretive choice, but it is one that enjoys the support of the great majority of the international community and thus reflects state practice, because of continued and widespread support for "traditional"—at least traditional Christian—views of the family.⁶⁰⁸

Whether these widely accepted readings of the *ordre public* exception and the right to family life are self-consistent and accord with the more general purpose and doctrine of international human rights law is a separate question. Perhaps the emerging international trend toward condemning state action designed solely to persecute or officially disapprove of a specific class of persons and toward requiring a showing of harm to justify interfering in the liberty of intimate association and sexual choices will ultimately become a first order rule of human rights law. At the very least, a norm is developing to reject intrusions on such fundamental liberties based merely on the discomfort some officious members of society feel at knowing someone, somewhere, is having a good time in a way they find unpleasant to imagine. Nothing could be more incompatible with the modern understanding of human rights than regulation that limits human freedom for no other purpose than to reinforce existing popular prejudices. This is the interpretation of the ICCPR's and the ECHR's requirements that limitations on

608. It reflects Christian views, because both Judaism and Islam permit polygyny, which is not a practice generally accepted in the international community as consistent with human rights law. See, e.g., U.N. Hum. Rts. Comm., General Comment 28, Equality of Rights Between Men and Women (Article 3), ¶ 24, U.N. Doc. CCPR/C/21/Rev.1/Add.10 (Mar. 29, 2000).

protected human rights be "necessary in a democratic society" most confluent with modern international human rights theory and, it is safe to predict, most likely to prevail ultimately in the international community.

The last frontier in this evolution will be the recognition of full rights to same-sex marriage and equal parental rights. Opposition to these rights is likely to break down along with the traditional values that tie marriage to gender hierarchy and reproduction. The concept of marriage is mutable enough for this evolution; marriage is a socially constructed concept reflecting protean political and cultural understandings.⁶⁰⁹ Despite the many histrionic claims that same-sex marriage threatens to undermine whatever value state recognition gives heterosexual marriage,⁶¹⁰ as William Eskridge has pointed out, states are not at all selective in whom they will allow to marry, whether they are deadbeat parents, child molesters, or convicted rapists.⁶¹¹ All of these benefit from a human right to found a family by marrying a (different sex) adult of their choice. In any case, much more influential factors are undermining heterosexual marriage,⁶¹² and world legal trends strongly incline toward breaking down sexist relational hierarchies and rigid family laws.⁶¹³ Accelerating that disintegration are claims of same-sex couples to public recognition of their equal right to choice of intimate association regardless of whose devotion to any particular religious tradition that choice may shock or offend. Although same-sex couples denied the right to marry suffer significant discrimination in the allocation of societal wealth and benefits relative to different-sex couples who may marry, and this discrimination is

609. See generally William N. Eskridge, *A History of Same-Sex Marriage*, 79 VA. L. REV. 1419 (1993).

610. See, e.g., MERIN, *supra* note 42, at 83.

611. ESKRIDGE, *supra* note 216, at 105-07.

612. For example, the modern developments of gender equality, decreasing birth rates, and other legal and sociological events creating or promoting what Anthony Giddens has called "relational mobility" probably play a much more significant role in undermining the institution of marriage. See MARY ANN GLENDON, *STATE, LAW AND FAMILY* 126-28, 320-23 (1977); Ira Mark Ellman, *Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Marriage Roles*, 34 FAM. L.Q. 1, 8-13 (2000); Ira Mark Ellman, *The Place of Fault in Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 782 (1996). See generally ANTHONY GIDDENS, *THE TRANSFORMATION OF INTIMACY* (1992).

613. See MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW* 187-92 (1989).

certainly difficult to justify in itself,⁶¹⁴ it has been observed that few same-sex couples probably seek formal marriage for the material benefits so much "as for the opportunity to say something about who they are and to obtain community recognition of their relationship."⁶¹⁵ It is, in short, a claim to a general value integral to fundamental and universal human rights enjoyed by individuals not significantly different in position and certainly no different in human needs and aspirations.

That sexual minorities cannot be described as a group occupying an international position of special economic and political power means that the forces shaping the development of sexual human rights norms must be located somewhere other than the most obvious sources. Although special interest lobbying has undoubtedly played some role in the development of the norms domestically in developed countries, such influence can account neither for the rapidity of its international dissemination nor for the judicial origin of the rights in most countries.⁶¹⁶ One of the central insights to be derived from this study, then, is that international human rights can ultimately become embodied in state practice though originating in primarily ideological factors.

The divergence between religious ideology and emerging human rights ideology sets sexual rights apart from many other human rights. Few such rights encounter much mainstream religious opposition.⁶¹⁷ The most obvious analogy is rights against discrimination based on sex and gender. Women as a group have historically been, and to a lesser extent continue to be, deprived of political and economic power worldwide.⁶¹⁸ The role of ideology in the advancement of the human rights of women contains obvious parallels to that of sexual minorities. Both groups have suffered

614. See Karst, *supra* note 540, at 684, 687.

615. *Id.* at 651; see Rune Halvorsen, *The Ambiguity of Lesbian and Gay Marriages: Change and Continuity in the Symbolic Order*, 34 J. HOMOSEXUALITY 207, 212, 226 (1996); see also *Egan v. Canada*, [1995] 124 D.L.R. (4th) 609, 645 (L'Heureux-Dubé, J.) ("[I]t must be recalled that the rights deprivation that triggered s. 15 [denial of marriage benefits to same-sex couples] is not economic. It is something which is fundamental to the person.").

616. *Cf. Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 446-47 (Conn. 2008) (reciting evidence that homosexuals lack substantial political or economic power in the United States).

617. The obvious exception is the right to freedom of religion and conscience, which is understandably popular among smaller religious groups and less popular in hierarchical majority religious groups and in states proclaiming a national religion.

618. See generally Fellmeth, *supra* note 430, at 662-64.

systematic disempowerment. Both groups encounter strong opposition to their human rights claims based on cultural and religious ideologies. But women's rights claims have enjoyed a recognition and legitimacy that continues to be withheld from claims of sexual rights more generally. Part of the explanation may indeed be political and economic. Women account for a half of the world's population, while self-identified sexual minorities account for only a small portion. Although it certainly cannot be said that women have achieved the rights now recognized exclusively by virtue of exercises of their power, their sheer number and visibility in society have aided their cause considerably.⁶¹⁹ Sexual minorities, in contrast, remain invisible or face great dangers merely for identifying themselves as such in a large part of the world. There has never in history been an openly gay or bisexual voice leading the government of any powerful nation toward equal human rights based on sexual orientation. The ability of sexual minorities to advocate their own rights internationally is severely crippled by their social, legal, and political ostracization or invisibility.

The confluence of factors that has promoted the cause of women's human rights is not, then, equally propitious for claims of sexual human rights. But at least one of the factors that has made women's human rights claims so compelling is present in this case as well—the logical consistency of sexual minority claims to human rights with the same claims made by heterosexuals. This purely secular ideational factor has surprising explanatory power for the movement toward recognition of sexual minority human rights, especially when formulated as “minority group rights” comparable to claims made in the past by ethnic minorities, religious minorities, and women. The proposition that ideas can by themselves exert an endogenous and powerful force in international politics is still sometimes disputed, but that conclusion is strongly supported by this study.

Claims to sexual liberties more generally, independent of minority group rights, also evidence a significant idealist influence in international relations. These claims push states seeking to rely

619. Cf. *Kerrigan*, 957 A.2d at 441-43 (discussing the significant advances toward equality through political and economic power made by women in the United States in contrast to those made thus far by homosexuals).

on conservative rationales for limiting human freedom or discriminating between various kinds of sexual activities and orientations to adopt secular justifications for state regulation that may not, in the end, allow them to sustain longstanding cultural and religious practices. Resistance to this trend has been substantial, and more should be expected. Human beings do not give up their deeply held beliefs of any kind easily. But, *pace* theorists who claim that only political, economic, and military power can explain state behavior on the world stage, the rapid and large-scale global movement toward acceptance of expanded human rights to privacy, association, and family life provides evidence that ideological consistency creates a certain momentum of its own that can shape the development of new norms of international law.