

# Don't Ask, Don't Tell: Where Is the Protection Against Sexual Orientation Discrimination in International Human Rights Law?

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## I. INTRODUCTION

According to Article 2 of the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948, all human beings are entitled to the rights enumerated in the document “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”<sup>1</sup> Following suit, both the International Covenant on Economic, Social and Cultural Rights<sup>2</sup> and the International Covenant on Civil and Political Rights<sup>3</sup> specify that human beings are entitled to human rights without distinction on the aforementioned grounds. Similarly, most of the human rights documents adopted in the post-World War II era, including the 1951 Convention on the Prevention and Punishment of the Crime of Genocide,<sup>4</sup> the 1951 Convention Relating to

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1. Universal Declaration of Human Rights, G.A. Res. 217 A (III), art. 2 U.N. Doc. A/810, at 71 (1948) [hereinafter UDHR].

2. G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1967) (*entered into force* Jan. 3, 1976) [hereinafter ICESCR].

3. G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1967) (*entered into force* Mar. 23, 1976) [hereinafter ICCPR].

4. 78 U.N.T.S. 277 (*entered into force* Jan. 12, 1951).

the Status of Refugees,<sup>5</sup> and various regional human rights instruments, contain language stating that human rights standards apply without discrimination. However, notably missing from the language in these human rights documents are clauses that specifically identify sexual orientation as an inappropriate basis for discrimination.<sup>6</sup>

This lacuna in international human rights law is mirrored by a lack of institutional attention to the issue of sexual orientation and discrimination in both international organizations and human rights nongovernmental organizations (NGOs). Lesbian and gay organizations have not been given wide access to human rights forums within the United Nations. The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities has rejected proposals to study discrimination on the basis of sexual orientation.<sup>7</sup> After complaints from developing countries, the UN Development Programme modified its Human Development Report by replacing its "Human Freedom Index," which included "freedom for homosexual activity" as one of the criteria, with a more narrow "Political Freedom Index," which excluded this criterion.<sup>8</sup> References to sexual orientation in the Platform of Action formulated at the Fourth World Conference on Women in 1995 were omitted because of opposition on the part of delegations from many developing countries, despite support from a majority of the delegations to the drafting committee.<sup>9</sup> Similarly, human rights NGOs have been slow to concern themselves with sexual orientation discrimination. For instance, Amnesty International did not adopt individuals imprisoned because of their sexual orientation as prisoners of conscience until 1991

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5. 189 U.N.T.S. 137 (*entered into force* Apr. 22, 1954) [hereinafter *Refugee Convention*].

6. Interestingly, while the horrors of the Holocaust gave impetus to the development of international human rights law after World War II, the fact that thousands of homosexuals were persecuted by the Nazis and that thousands of gay men died in concentration camps, did not generate similar support for including protections for homosexuals in the emerging international human rights regime. For a discussion of the Nazi persecution of homosexuals, see RICHARD PLANT, *THE PINK TRIANGLE: THE NAZI WAR AGAINST HOMOSEXUALS* (1986); GUNTER GRAU, ED., *HIDDEN HOLOCAUST? GAY AND LESBIAN PERSECUTION IN GERMANY, 1933-45* (Patrick Camiller trans., 1995).

7. In 1995, after an acrimonious debate, the Sub-Commission on Prevention of Discrimination and Protection of Minorities added male homosexuals to the list of groups deemed to be more vulnerable to a risk of HIV infection as a result of "disadvantaged economic, social or legal status." See Douglas Sanders, *Getting Lesbian and Gay Issues on the International Human Rights Agenda*, 18 HUM. RTS. Q. 67, 88 (1996). Through this amendment, the resolution condemning discrimination against individuals with HIV or AIDS was expanded explicitly to include homosexuals, apparently the first specific reference to homosexuals by the Sub-Commission on Prevention of Discrimination and Protection of Minorities. See *id.*

8. See *id.* at 89.

9. Thirty-three states favored the inclusion of references to sexual orientation discrimination, while twenty states opposed the references. See *id.* at 91.

when the organization expanded its mandate after nearly two decades of internal debate over this issue.<sup>10</sup>

As this brief overview indicates, international human rights law fails to set promotional standards and guidelines prohibiting discrimination on the basis of sexual orientation. In this way, existing international human rights law reflects the widespread international opinion, across cultures and in developed as well as developing states, that discriminatory treatment of lesbians, gays and bisexuals is one form of clearly acceptable discrimination.<sup>11</sup> In Iran, for example, individuals engaging in same-sex relations reportedly have been executed.<sup>12</sup> Gay organizations in various countries report that their governments fail to investigate and prosecute the murders of sexual minorities.<sup>13</sup> Although same-sex sexual activity has been decriminalized by many nation-states in recent decades, at least fifty-five countries across the world still criminalize homosexuality, and only a handful of countries have adopted legislation designed to prevent sexual orientation discrimination.<sup>14</sup> Moreover, many states restrict gay, lesbian, and bisexual persons' freedom of speech and expression. Notably, these restrictions are in place in "democracies" as well as "nondemocracies." For example, it is illegal in both Great Britain and Austria "to publicly advocate, promote or encourage homosexuality."<sup>15</sup> As these examples indicate, sexual orientation discrimination is prevalent throughout most of the world.

Of course, international human rights law does not in and of itself prevent discrimination. Although the nondiscrimination clauses in the major human rights documents clearly specify race and sex as unacceptable grounds for discrimination, racial and gender discrimination

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10. See Nicole LaViolette & Sandra Whitworth, *No Safe Haven: Sexuality as Universal Human Right and Gay and Lesbian Activism in International Politics*, 23 *MILLENNIUM* 575 (1994); Sanders, *supra* note 7, at 103-04.

11. In this Article, the terms "gay," "lesbian" and "bisexual" are used to describe individuals who engage in same-sex sexual behavior. Critics have suggested that these terms are modern "Western" categories, noting that in other cultures and historical periods, individuals who engaged in same-sex sexual behavior did not necessarily self-identify as "homosexual." See Sanders, *supra* note 7, at 75-76; LaViolette & Whitworth, *supra* note 10, at 581-82. While it is important to keep in mind that same-sex sexual behavior may not have precisely the same meaning across time and space, the terms remain useful to the extent that states persecute individuals for engaging in same-sex sexual activity. When states target individuals for discriminatory treatment based upon same-sex sexual behavior, it does not matter whether they self-identify as "homosexual;" they are still persecuted by the state. To this end, the categories can be utilized as a means of helping to create a foundation for the protection of basic rights. As Douglas Sanders suggests, "[t]he recognition of lesbian and gay men as minorities legitimates their claim to equality rights." Sanders, *supra* note 7, at 76.

12. See LaViolette & Whitworth, *supra* note 10, at 564-68.

13. See *id.*

14. See *id.*; Sanders, *supra* note 7, at 71.

15. LaViolette & Whitworth, *supra* note 10, at 566.

continue to be fundamental problems across the globe. Additionally, nondiscrimination clauses do not specify with precision the meaning of discrimination.<sup>16</sup> Moreover, the major documents in international human rights law do not always impose immediate obligations but rather issue declarations of intent and statements of principle towards which parties to these agreements agree to strive. For example, the International Covenant on Economic, Social and Cultural Rights mandates that each party to the treaty “undertakes to take steps” to achieve the realization of the rights enumerated therein.<sup>17</sup> In addition, even human rights treaties that provide specific terms of compliance, such as the norms laid out in the International Covenant on Civil and Political Rights, do not contain any enforcement mechanisms.<sup>18</sup> Despite this omission, most human rights advocates and scholars nonetheless believe they are an important first step in promoting human rights. Even in the absence of enforcement mechanisms, international human rights law can increase knowledge and awareness of human rights and can provide human rights advocates with an international principle to which they can refer in their efforts to broaden support for human rights.<sup>19</sup> Proponents of nondiscrimination lack even this minimal promotional guideline to use in an effort to expand support for the rights of gay, lesbian, and bisexual persons.

A number of principles in existing international human rights law, including the right to freedom of speech and expression, the right of consenting adults to marry, and the right to equal protection under the law,

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16. However, some conventions elaborate on the meaning of nondiscrimination with regard to the categories of race and gender. See Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180 (XXXIV), U.N. GAOR, 34th Sess., Supp. No. 46, at 194, U.N. Doc. A/34/830 (1979) (*entered into force*, Sept. 3, 1981) [hereinafter CEDAW]; International Convention on the Elimination of All Forms of Racial Discrimination, Mar. 7, 1966, 660 U.N.T.S. 195 (1966) (*entered into force* Jan. 4, 1969) [hereinafter Racial Discrimination Convention]. Although it has never been codified in treaty form, the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief represents an effort to elaborate on the norm of nondiscrimination on religious grounds. See Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, G.A. Res. 36/55, U.N. GAOR, 36th Sess., Supp. No. 51, at 171, U.N. Doc. A/36/684 (1981). Children’s rights are not mentioned in the nondiscrimination clauses of the major human rights documents, but the Convention on the Rights of the Child was completed in 1989. This document explicitly affirms that children are entitled to basic human rights and enumerates additional rights of children. See Convention on the Rights of the Child, G.A. Res. 44/25 (XLIV), U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/44/736 (1989).

17. See ICESCR, *supra* note 2, art. 2.

18. Article 4 specifies that states may not derogate from a variety of human rights norms under any circumstances, including: prohibitions against the arbitrary deprivation of life, the right to freedom from torture and cruel, inhuman or degrading treatment, prohibitions against slavery, and the right to freedom of thought and conscience. See ICCPR, *supra* note 3, art. 4.

19. See Jack Donnelly, *International Human Rights: A Regime Analysis*, 40 INT’L ORG. 633-39 (1986).

provide a potential foundation for gay, lesbian, and bisexual rights. To build this foundation, the nondiscrimination clauses in major human rights documents should be expanded to include sexual orientation as a prohibited basis for discrimination. This expansion of international human rights law could be achieved through one of two basic methods. First, human rights advocates could urge national courts and international and regional human rights bodies to interpret the existing language in international human rights treaties broadly.<sup>20</sup> The language in the nondiscrimination clauses does not imply that the list of protected categories is all-inclusive. Therefore, courts and human rights bodies could claim that the categories of “sex” or “other status” include gay, lesbian, and bisexual persons and thus that sexual orientation discrimination is already prohibited.<sup>21</sup> Second, human rights advocates could encourage nation-states either to adopt separate protocols to existing human rights treaties which specifically prohibit sexual orientation discrimination or to create an entirely new convention addressing sexual orientation discrimination.<sup>22</sup> Practically speaking, relying on the existing language in human rights treaties would be an easier method for promoting the ideal of nondiscrimination on the basis of sexual orientation than amending existing human rights documents. At the same time, the lack of specific language protecting gay, lesbian, and bisexual persons from discrimination is indicative of the lack of intent on the part of signatories to the major human rights documents to extend protection on these grounds. Moreover, the lack of specific protective language reflects and, arguably, has contributed to the lack of attention to this issue on the part of most human rights advocates and organizations. Whether human rights advocates choose to rely on the language in existing nondiscrimination clauses or to press for the creation of new human rights documents, they need to broaden their advocacy by

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20. One limitation of relying on national courts is that they will vary in their application of international law because each national constitution treats international law differently. Coupled with the fact that international human rights law generally does not provide for its own enforcement, variation in terms of national commitment to international law may limit the impact of calling on national courts to broaden their interpretation of existing human rights law.

21. Certain developments within the United Nations suggest that this view has some merit. In a 1994 decision, *Toonan v. Australia* (U.N. GAOR, U.N. Doc. CCPR/C/50/D/488/1992), the Human Rights Committee of the United Nations determined that Tasmanian law violated a gay activist’s right to privacy and arbitrarily interfered with his rights. The Committee decided this case on the grounds that “sex” covered sexual orientation. See Sanders, *supra* note 7, at 93-94. It is important to note that there is no institutional machinery for enforcing this interpretation of international human rights law so its impact is limited. Similar problems would exist with other international and regional courts and human rights committees whose decisions cannot be forcibly implemented.

22. Such a convention could be patterned after the Racial Discrimination Convention or CEDAW. See CEDAW, *supra* note 16; Racial Discrimination Convention, *supra* note 16.

specifically addressing the rights of gay, lesbian, and bisexual persons.<sup>23</sup> While expanding human rights law alone end discrimination against gay, lesbian, and bisexual persons, human rights scholars and advocates at least need to put sexual orientation on the human rights agenda as an important step in the struggle to promote respect for the dignity and worth of all human beings.

## II. PROTECTING SEXUAL ORIENTATION UNDER INTERNATIONAL HUMAN RIGHTS LAW

The core documents in the international human rights regime include the Universal Declaration of Human Rights,<sup>24</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>25</sup> and the International Covenant on Civil and Political Rights.<sup>26</sup> Together, these documents are commonly referred to as the International Bill of Human Rights. As a General Assembly Resolution, the Universal Declaration of Human Rights, passed by the UN General Assembly without dissent on December 10, 1948, is generally considered a nonbinding statement of aspirational principles, though some legal commentators believe that these principles have achieved the status of customary international law.<sup>27</sup> In any event, both covenants, approved by the General Assembly in 1966, became binding multilateral treaties in 1976 after they had been ratified by the requisite number of states. A variety of provisions in these core documents could provide protection for gay, lesbian, and bisexual persons if international human rights law were expanded to preclude discrimination on the grounds of sexual orientation. Similarly, the rights of gay, lesbian, and bisexual persons would be protected if other major human rights documents, including the 1951 Convention Relating to the Status of Refugees<sup>28</sup> and the 1967 Protocol Relating to the Status of

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23. It should be noted that these methods are not necessarily mutually exclusive. Human rights advocates could simultaneously explore the viability of each approach as they seek to advance the norm of nondiscrimination on the basis of sexual orientation. The fundamental argument in this article is that international human rights law needs to be expanded to address sexual orientation discrimination, regardless of the approach that is taken. This article does not advocate a particular approach to achieving this objective, but rather advocates the general expansion of international human rights law to encompass a prohibition based upon sexual orientation. It will be up to human rights advocates and scholars to explore which approach has a greater probability of being effective.

24. UDHR, *supra* note 1.

25. ICESCR, *supra* note 2.

26. ICCPR, *supra* note 3.

27. For an overview of the discussion among legal scholars regarding the status of the Universal Declaration of Human Rights under international law, see HENRY J. STEINER & PHILIP ALSTON, EDS., INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS 136-47 (1996).

28. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150.

Refugees,<sup>29</sup> were expanded to prohibit sexual orientation discrimination. The following overview of the fundamental human rights norms in these major documents illustrates the way in which they can be used to protect the rights of gay, lesbian, and bisexual persons.

*Right to life, liberty, and security of person.* The Universal Declaration of Human Rights states: “Everyone has the right to life, liberty and security of person.”<sup>30</sup> The International Covenant on Civil and Political Rights elaborates on this right. The Covenant states that every human being’s right to life “shall be protected by law” and that “[n]o one shall be arbitrarily deprived of his life.”<sup>31</sup> It also asserts that no person shall be subject to “arbitrary arrest or detention” and that “[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by the law.”<sup>32</sup> Because the Covenant says the right to life shall be protected by law, parties to this treaty would be bound to pass laws designed to protect individuals whose lives were threatened solely because of their sexual orientation if discrimination based upon sexual orientation were prohibited by international human rights law. Thus, parties to the treaty could incur state responsibility if they systematically fail to prosecute life-threatening criminal violence directed at individuals because of their sexual orientation.<sup>33</sup> Moreover,

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29. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 267, *reprinted in* 6 I.L.M. 78 (1967) (*entered into force* Oct. 4, 1967) [hereinafter *Refugee Protocol*].

30. UDHR, *supra* note 1, art. 4.

31. ICCPR, *supra* note 3, art. 6.

32. *Id.* art. 9.

33. Under the customary view of state responsibility under international law, a state incurs responsibility when an agency or actor associated with the state acts in a way that violates its international legal obligations. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 433-40 (1990). Under this customary view, states do not incur responsibility for the acts of private individuals. An expanded definition of the concept of state responsibility has gained acceptance among many feminist scholars in recent years. According to this expanded view, states also incur responsibility as a result of the systematic failure to prosecute human rights abuses by private actors. A state will not incur responsibility for human rights abuses simply because it fails adequately to enforce its general criminal laws; such failure may simply reflect widespread criminal problems or insufficient resources for law enforcement. Instead, “[n]onprosecution of the crimes of private individuals becomes a human rights issue (assuming no state action or direct complicity) *only* if the reason for the state’s failure to prosecute can be shown to be rooted in discrimination along prohibited lines, such as those set forth in Article 26 of the Covenant on Civil and Political Rights.” Dorothy Q. Thomas & Michele E. Beasley, *Domestic Violence as a Human Rights Issue*, 15 *HUM. RTS. Q.* 36, 42 (1993). Feminists have used this expanded concept of state responsibility to argue that states incur responsibility when they systematically fail to prosecute crimes committed by private actors, including rape and domestic violence, that violate the human rights of women. This article relies on the expanded concept of state responsibility, arguing that states could incur responsibility for failing to prosecute violent crimes which threaten the lives of gay, lesbian, and bisexual persons if the nondiscrimination clauses of the major international human rights documents were modified.

arrests resulting from laws which criminalize same-sex sexual activity could be depicted as arbitrary.

*Right to privacy.* The Universal Declaration of Human Rights states that “[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.”<sup>34</sup> Similar language is found in the International Covenant on Civil and Political Rights.<sup>35</sup> Extending this right to privacy to all individuals regardless of sexual orientation could have a tremendous impact upon the daily lives of gay, lesbian, and bisexual persons. For state parties to the Covenant, laws prohibiting private sexual activity between consenting adults would violate this international legal norm. Moreover, custody decisions by national courts revoking parental custody on the grounds of gay, lesbian, and bisexual orientation would also violate this norm.

*Right to marry.* Under the Universal Declaration of Human Rights and the International Covenant of Civil and Political Rights, a variety of principles involving the right to marry and found a family are enunciated. Both documents provide that “[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State”<sup>36</sup> and that “[t]he right of men and women of marriageable age to marry and to found a family shall be recognized.”<sup>37</sup> While the relevant articles do not specifically assert that the right applies only to men and women marrying each other, general state practice in this area clearly indicates that the signatories to these documents intended this limitation. In terms of applying this principle without discrimination on the basis of sexual orientation, homosexuality becomes the relevant point of reference in this case. The right of bisexuals to marry is not proscribed so long as they are marrying a person of the opposite biological sex. Only same-sex marriages are not protected by this language in the International Bill of Human Rights.<sup>38</sup> If sexual orientation discrimination were prohibited,

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34. UDHR, *supra* note 1, art. 12.

35. The Covenant alters the language of the Declaration by specifying that only “unlawful” attacks on honor or integrity are prohibited and by specifying that “arbitrary or unlawful” interference violates the right to privacy. See ICCPR, *supra* note 3, art. 17.

36. UDHR, *supra* note 1, art. 16.

37. ICCPR, *supra* note 3, art. 23.

38. In reference to the situation in the United States, William Eskridge has suggested that the right of consenting adults to marry is a necessary component of full citizenship in the United States. In response to the argument made by opponents of gay marriage that extending state recognition to same-sex marriages would signal that the state approved of a “lifestyle” that many individuals find immoral and offensive, Eskridge points out that state recognition of gay marriages would not necessarily indicate that the state was approving homosexuality. See WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO

then same-sex marriages among consenting adults would be protected, and families, regardless of the sexual orientation of their members, would be entitled to protection by the state and society.<sup>39</sup>

*Right to freedom of thought, conscience, opinion and expression.* Both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights assert a right to freedom of thought, conscience, and religion,<sup>40</sup> in addition to enunciating a right to freedom of opinion and expression.<sup>41</sup> If discrimination on the grounds of sexual orientation were prohibited, then all individuals would have a right not only to self-identify as gay, lesbian, or bisexual, but also to express freely their sexual identities and opinions. Obviously, for parties to the binding Covenant, any policy which expressly prohibits individuals from privately self-identifying as gay, lesbian or bisexual would violate their right to freedom of thought and conscience. Additionally, policies which allow individuals to identify as gay, lesbian, and bisexual persons but prohibit them from expressing their sexual identity publicly would be discriminatory. For example, the “Don’t ask, Don’t tell” policy enforced with regard to the U.S. military would constitute a violation of freedom of expression.<sup>42</sup> Any policy promoted by a state which allows various forms of sexual identity but prohibits their free expression or the systematic failure of a state to prosecute such discrimination by private actors would violate the right to freedom of expression and opinion. It should be noted, however, that in its present form, the International Covenant on Civil and

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CIVILIZED COMMITMENT 11-12, 104-09, 190-91 (1996). In the United States, a variety of persons whose lifestyles the state and society do not necessarily approve are legally allowed to marry as long as they are marrying someone of the opposite sex. These persons include convicted felons, “deadbeat dads,” pedophiles, transvestites, individuals who have had sex changes, drug dealers, and spouse abusers. *See id.* at 11-12. The fact that same-sex couples have been restricted in their ability to marry in the United States indicates the discriminatory nature of this policy. Other critics have pointed to a fear of a “slippery” moral slope: if we allow gay marriages, why not allow polygamy? Why not allow marriage between adults and children? *See id.* at 144-48. Indeed, in 1972, the National Coalition of Gay Organizations, in a list of demands for law reform, called for the repeal of all legislative restrictions which limited the sex or *number* of persons married. *See id.* at 163. While not representative of all gay organizations and activists, this statement indicates the potential for extending the argument for gay marriage. However, giving legal recognition to gay marriages does not necessitate going down this slippery slope. Restrictions on marriage would still be valid so long as they did not discriminate against a class of people and so long as they were based on a “compelling state interest.” *See id.*

39. Extending the right to marry to same-sex couples would have implications in a variety of other areas of law. For example, in countries like the United States which use family reunification as one criteria in admitting legal immigrants, same-sex spouses would merit treatment as immediate family and thus be able to enter the country under the same criteria as opposite-sex spouses.

40. *See* UDHR, *supra* note 1, art. 18; ICCPR, *supra* note 3, art. 18.

41. *See* UDHR, *supra* note 1, art. 19; ICCPR, *supra* note 3, art. 19.

42. *See* 10 U.S.C. § 654 (1997).

Political Rights clearly permits restrictions on the freedom of opinion and expression “. . . as are provided by law and are necessary . . . [f]or respect of the rights or reputations of others [and] [f]or the protection of national security or of public order[], or of public health or morals.”<sup>43</sup> Because most restrictions on freedom of opinion or expression are justified as necessary for national security, public order, or moral purposes, the Covenant gives states significant leeway in applying this principle. Nevertheless, a prohibition against sexual orientation discrimination would make it easier for human rights advocates to argue that restrictions on the freedom of expression of gay, lesbian, and bisexual persons are arbitrary and discriminatory.

*Right to equal protection of the law.* The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights each assert that all human beings “. . . are equal before the law and are entitled without any discrimination to equal protection of the law.”<sup>44</sup> If sexual orientation discrimination were prohibited, gay, lesbian, and bisexual persons would be entitled to equal protection of the law under all circumstances. In this way, the norm would reinforce other provisions which suggest that the application of the law cannot be arbitrary and that the state has a significant role in protecting the rights of gay, lesbian, and bisexual persons. This principle would be relevant in the case of hate crimes, child custody, freedom of expression, and most of the additional human rights norms previously discussed.

*Right to work and equal pay.* The Universal Declaration of Human Rights states, “[e]veryone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment [and] the right to equal pay for equal work.”<sup>45</sup> The International Covenant on Economic, Social, and Cultural Rights uses similar language in asserting these rights while elaborating on a few details. It provides that the parties to this covenant “will take appropriate steps to safeguard” the right to work.<sup>46</sup> In addition, it states that “[e]qual opportunity for everyone to be promoted in his employment to an appropriate higher level [shall be] subject to no considerations other than those of seniority and competence.”<sup>47</sup> The application of these norms to all individuals regardless of sexual orientation would require states to take steps to safeguard the right to work, equal pay, and promotion. Critics of

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43. ICCPR, *supra* note 3, art. 19. In contrast, the Covenant identifies the right to freedom of thought and conscience as a norm from which no derogation is permitted. *See id.* art. 4.

44. UDHR, *supra* note 1, art. 7; ICCPR, *supra* note 3, art. 26.

45. UDHR, *supra* note 1, art. 23.

46. ICESCR, *supra* note 2, art. 6.

47. ICESCR, *supra* note 2, art. 7.

civil rights protections for gay, lesbian, and bisexual persons often argue that sexual orientation as a category differs significantly from the categories of ethnic minorities and women because gay, lesbian, and bisexual persons can “pass” as straight and can mask their identity and are therefore less vulnerable to discrimination than other groups.<sup>48</sup> A fundamental flaw in this type of criticism, from the perspective of a rights-based framework, is that it assumes that gay, lesbian, and bisexual persons should “pass” or are able to “pass” as heterosexual persons. If sexual orientation discrimination were prohibited, lesbian, gay, and bisexual persons would have a right to express freely their sexual identity and at the same time have the right to equal opportunities for employment and equal pay for equal work. This right would encompass public sector employment, including military service, as well as private sector employment.

*Right to physical and mental health.* The International Covenant on Economic, Social, and Cultural Rights recognizes “the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”<sup>49</sup> The Covenant also states that parties shall take steps to prevent, treat, and control “epidemic, endemic, occupational and other diseases.”<sup>50</sup> This provision indicates that individuals should have equal opportunity to benefit from state efforts to limit diseases; if the categories of nondiscrimination in international human rights law were expanded, this provision would apply to gay, lesbian, and bisexual persons. In a social environment where discrimination on the basis of sexual orientation is permitted, a variety of obstacles doubtlessly hinder the highest attainment of physical and mental health by gay, lesbian, and bisexual persons. These obstacles include the tolerance of hate crimes and violence, the

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48. John Luddy makes this argument in his defense of the U.S. policy banning the open participation of homosexuals in the military. Responding to critics of this ban who liken sexual orientation discrimination to racial discrimination, Luddy stresses the difference between racial distinctions, based most obviously on skin color, and sexual orientation, which he characterizes primarily as a behavioral attribute. See John Luddy, *Make War, Not Love: The Pentagon's Gay Ban is Wise and Just*, in SAME SEX: DEBATING THE ETHICS, SCIENCE, AND CULTURE OF HOMOSEXUALITY 267-73 (John Corvino ed., 1997). This type of argument is also represented by a certain strain of conservative thought in the United States which advocates private tolerance for homosexuals as long as they remain “closeted” but sanctions public disapproval of and repression towards the open expression of homosexuality. For both a description and critique of this argument, see ANDREW SULLIVAN, *VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY* 94-132 (1995).

49. ICESCR, *supra* note 2, art. 12.

50. *Id.* art. 12. One potential problem with this language is that it could be used to justify discrimination against individuals with certain diseases. For example, states could use the express language to justify policies which prevent individuals with AIDS or who are HIV-positive from entering their territory. It could also be used by states to justify incarcerating individuals with AIDS or HIV.

repression of the open expression of sexual identity, and interference with privacy and family life. It should be noted that the International Covenant on Economic, Social, and Cultural Rights does not specify the steps that parties must take to uphold the right to physical and mental health. Rather, it states that each party to the treaty “undertake[.] . . . steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”<sup>51</sup> This language gives parties considerable discretion in determining the specific steps which will be taken and also allows for a consideration of available resources in determining which steps should be taken towards implementing these rights. Thus, even if sexual orientation discrimination were prohibited, states would not be required to take *specific* steps to ensure the physical and mental health of gay, lesbian, and bisexual persons. However, parties to the treaty would be obligated to undertake some steps to ensure each citizen’s right to the highest attainable standard of physical and mental health. In doing so, each country would be required to treat all individuals, regardless of sexual orientation, equally.

*Right to education.* Under the International Covenant on Economic, Social, and Cultural Rights, the right of all human beings to education is recognized. The parties to the Covenant

agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups.<sup>52</sup>

If discrimination on the basis of sexual orientation were prohibited, human rights advocates could argue that education should contribute to the development or dignity of individuals regardless of sexual orientation and that it should promote understanding or tolerance on these grounds.

*Right to asylum.* According to the 1951 Convention Relating to the Status of Refugees, a refugee is a person who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to

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51. *Id.* art. 2.

52. *Id.* art. 13.

such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>53</sup>

Technically, this convention only covers persons who became refugees before January 1, 1951, but the 1967 Protocol Relating to the Status of Refugees adopts the same definition and omits the date limitation of the 1951 Convention.<sup>54</sup> Individuals who are persecuted solely because of their sexual orientation are not explicitly protected by the definition of refugee in these documents. Adding sexual orientation to the categories of persecution in the international legal definition of refugee would create another mechanism for protecting individuals who are discriminated against solely because of their sexual identity.

The above overview indicates the ways in which human rights law might be used to promote respect for the dignity of all individuals, regardless of sexual orientation, if international human rights law were expanded to prohibit discrimination against gay, lesbian, and bisexual persons. While this exercise is useful in exploring the potential expansion of the boundaries of human rights protection, it must again be stressed that international human rights law cannot in and of itself prevent discrimination. The human rights documents discussed above do not always create immediate obligations on the part of parties to the documents. Even when the documents do impose immediate obligations, they do not create institutional mechanisms for enforcing these norms. Nevertheless, by asserting statements of principle and aspirational goals, these documents can provide a standard for evaluation and as such, can be used by human rights advocates in their struggle to shape policy, values and ideas. In this regard, it is worthwhile to explore the possibility of incorporating prohibitions against discrimination based on sexual orientation as one tool in the struggle for promoting human rights across the globe.

### III. PHILOSOPHICAL CRITIQUES

Two fundamental philosophical critiques can be used to challenge the argument that international human rights law should be expanded explicitly to prohibit sexual orientation discrimination. First, what can be called “cultural critiques” question the legitimacy of the human rights paradigm in general and challenge the idea that “universal rights” are appropriate or desirable for providing a moral framework designed to

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53. Refugee Convention, *supra* note 5, art. 1.

54. See Refugee Protocol, *supra* note 25, art. 1.

promote human dignity. These cultural critiques include both traditional and conservative arguments regarding morality and community, as well as arguments from the left of the political spectrum based on the idea of cultural relativism. Second, radical critiques, as exemplified by some strains of feminist thought as well as elements of scholarship within the gay and lesbian community, also challenge the legitimacy of the human rights paradigm, though for different reasons than the cultural critiques. While agreeing with liberal advocates of human rights that gay, lesbian, and bisexual persons should be treated with respect and dignity, radical critics argue that human rights law will be ineffective in achieving this goal and may in fact perpetuate sexual orientation discrimination. Each of these critiques will be considered in turn.

*A. Cultural Critiques of a Liberal, Rights-Based Perspective*

Cultural critiques of the notion of human rights come from across the ideological spectrum. These critiques, whether from the ideological left or right, can be used to criticize the extension of human rights protections to gay, lesbian, and bisexual persons. Edmund Burke developed a classic, conservative critique of “universal rights” and liberty. In criticizing the excesses of the French Revolution, Burke wrote:

I flatter myself that I love a manly, moral, regulated liberty as well as any gentleman of that society. . . . I think I envy liberty as little as they do to any other nation. But I cannot stand forward, and give praise or blame to anything which relates to human actions and human concerns on a simple view of the object, as it stands stripped of every relation, in all the nakedness and solitude of metaphysical abstraction. Circumstances (which with some gentlemen pass for nothing) give in reality to every political principle its distinguishing color and discriminating effect. The circumstances are what render every civil and political scheme beneficial or noxious to mankind.<sup>55</sup>

Although he does not specifically refer to culture in his argument, Burke clearly articulates an argument in defense of “traditional” communities. Burke criticizes the emphasis on reason that underlies the liberal, rights-based perspective and argues instead for the importance of emotion or sentiment in shaping an orderly, moral, and civil political and social system. In doing so, Burke emphasizes the importance of such values as tradition, loyalty, religion, and even love. To this end, any challenge to traditional values is seen as a threat to the order and morality of the community. Applied to political and cultural communities across most of

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55. Edmund Burke, *Reflections on the Revolution in France*, in *PRINCETON READINGS IN POLITICAL THOUGHT* 349, 349 (Mitchell Cohen & Nicole Fermon eds., 1996).

the globe today, Burke's argument suggests that any effort to extend basic rights to gay, lesbian, and bisexual persons could be depicted as "noxious to mankind" because such efforts would not give adequate attention to the "circumstances" or values that shape order and morality in particular communities.<sup>56</sup>

Philosophy, like politics, makes strange bedfellows. Contemporary cultural critiques of the liberal notion of rights typically come from the left of the political-ideological spectrum and yet appear to mirror Burke's conservative argument in many respects. Like Burke, cultural relativists argue that neither politics nor morality can be evaluated outside of the concrete circumstances of a particular time and place. Two basic versions of the relativist argument have been used to criticize the notion of universal human rights. "Descriptive" relativism merely asserts that moral values and beliefs clearly differ across cultures whereas "normative" relativism argues that culture *should* be the primary determinant of moral values and beliefs.<sup>57</sup> Thus, descriptive relativists point to the great diversity of ideological and belief systems that are manifested in global politics but *may* remain open to the argument that universal human rights norms are a desirable objective. In this case, the descriptive relativist is likely to argue that cultural sensitivity is necessary if progress towards universal human rights is to be achieved.<sup>58</sup> In contrast, normative relativists typically reject the desirability of universal human rights norms which are seen as representative of "Western" interference in traditional cultures and a new form of "moral imperialism."<sup>59</sup>

It is difficult to challenge the empirical accuracy of descriptive relativism. Some human rights scholars have tried to identify certain basic values or practices that are common to all cultures, even if they are manifested in a variety of ways.<sup>60</sup> Nonetheless, most human rights

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56. In *Bowers v. Hardwick*, 478 U.S. 186, 197 (1986), the United States Supreme Court asserted the legitimacy of using traditional moral values to determine the law and rejected a challenge to Georgia's anti-sodomy statute based on the claim that the statute violated the petitioner's right to privacy.

57. Fernando Tésón is responsible for pointing out the distinction between descriptive and normative relativism. See Fernando Tésón, *International Human Rights and Cultural Relativism*, in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 47 (Richard Pierre Claude & Burns H. Weston, eds., 2d ed. 1992).

58. See Adamantia Pollis, *Human Rights in the Liberal, Socialist, and Third World Perspective*, in HUMAN RIGHTS IN THE WORLD COMMUNITY: ISSUES AND ACTION 156 (Richard Pierre Claude & Burns H. Weston eds., 2d ed. 1992).

59. For a description and critique of normative relativism, see Tésón, *supra* note 53, at 49-50.

60. See ALISON DUNDES RENTELN, *INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM* (1990).

advocates acknowledge that cultural difference impedes the achievement of universal human rights norms. Of course, the struggle for human rights is explicitly political.<sup>61</sup> If there were actually universal agreement on human rights norms, there would be no need for human rights laws or activism because universal agreement would result in universal protection.

While it is difficult to dispute the accuracy of descriptive relativism, there are several grounds on which normative relativism can be challenged. First, as Fernando Téson points out, normative relativists undermine their own argument that universal moral principles do not exist by identifying relativism as the one appropriate universal moral guideline. In addition, Téson argues that relativists assume that because certain principles predominate in a culture, they are necessarily appropriate and moral. This perspective mistakes authority for morality. Finally, Téson charges normative relativists with elitism, a charge relativists commonly lodge at human rights advocates, in that they sometimes accept the desirability of human rights for minorities in “Western” cultures but not for minorities in “non-Western” cultures.<sup>62</sup>

Another fundamental problem with the idea of normative relativism is that the term “culture” is not analyzed sufficiently. What is culture? Must the boundaries of culture coincide with nation-states? If not, then why do some groups within a state, such as indigenous people, constitute a “culture” while other groups, such as gay, lesbian, and bisexual persons, do not? One scholar has suggested that “cultural absolutists” romanticize “primitive cultures” and stereotype “the inhabitants of non-Western geographical regions with the religio-cultural beliefs that these commentators believe must define the non-Westerners’ lives and dominate their thoughts.”<sup>63</sup> Many feminists also suggest that it is important to deconstruct the notion of culture by considering the extent to which people possess the ability to participate in shaping the values of their culture. One such approach is to examine the status of the individuals claiming to represent their culture. Because large numbers of people are often excluded from shaping or speaking on behalf of their culture, the definition of culture has explicitly political content and is therefore used to protect the interests of specific groups within particular

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61. See JACK DONNELLY, INTERNATIONAL HUMAN RIGHTS 20-21 (1993).

62. See Téson, *supra* note 53, at 47-50.

63. Rhoda E. Howard, *Cultural Absolutism and the Nostalgia for Community*, 15 HUM. RTS. Q. 315, 327 (1993).

cultures.<sup>64</sup> As a result, the normative relativist position that cultural beliefs and values are necessarily less political and, hence, morally superior to any “external” values can be called into question.

The struggle to attain international human rights commonly reflects a struggle within and across cultures to shape values and power relations within cultures. Given the historical record of economic and political imperialism, the popularity of normative relativist arguments among non-Western elites is understandable, and it is important for human rights advocates to be sensitive to cultural differences. At the same time, human rights advocates are under no moral obligation to capitulate to these normative relativist arguments. Proponents of normative relativism commonly assume that the concept of universal human rights is merely a new tool of domination on the part of “Western” states.<sup>65</sup> In reality, nation-states are not the vanguard of the human rights movement. To the extent that they address human rights at all, most nation-states’ foreign policies are likely to include more rhetoric than substantive content in terms of efforts to advance international human rights. Instead, NGOs and individuals are at the forefront of the human rights struggle and typically advocate only nonviolent methods. To be sure, human rights advocates need to be more sensitive to cultural norms and more willing to work at the grassroots level if they hope to make progress in promoting universal human rights. Nevertheless, relativists should not dismiss individual or group claims for human rights simply because elites within a culture justify certain practices as fundamental to that culture.<sup>66</sup>

Recognition that the definition of culture is shaped by the political and economic interests of elites is especially important given that cultural relativist arguments seem to resonate across cultures most strongly when they are used to justify discrimination against vulnerable groups with few strong advocates even in the human rights community. For example, some human rights advocates accept cultural divergence with regard to rights that are viewed as less fundamental. Commonly, women’s rights

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64. See Arati Rao, *The Politics of Gender and Culture in International Human Rights Discourse*, in *WOMEN’S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 169-70 (Julie Peters & Andrea Wolper eds., 1995).

65. See Tésou, *supra* note 53, at 50. It should be noted that it is a mistake to treat the liberal, rights-based paradigm rigidly as a “Western philosophy” while looking at cultural relativism as an oppositional “non-Western philosophy.” Cultural relativism has been very prominent among Western scholars, and post-modern Western scholars have reinforced the cultural relativists’ emphasis on the importance of time and place in shaping meaning and morality. Traditional, culturally conservative arguments against universal rights, like those of Burke, have also come out of the West. In short, Western philosophy has by no means been marked by clear and consistent support for human rights. Thus, it is a mistake to malign the liberal, rights-based paradigm merely by depicting it as *the* philosophy of Western elites.

66. See Howard, *supra* note 59, at 336-37.

are categorized among norms that are not fundamental.<sup>67</sup> Certainly, the failure of human rights scholars and advocates adequately to address the issue of discrimination and sexual orientation suggests that they accord less priority to the rights of gay, lesbian, and bisexual persons. Indeed, one value that is arguably universal across cultures, at least among state elites in contemporary global politics, is the acceptability of discrimination, if not outright repression and violence, against gay, lesbian, and bisexual persons. In this regard, it is especially important to point out that gay rights have not been a central “Western value.” Rather, gay, lesbian, and bisexual persons have been widely persecuted in “Western culture,” while at the same time same-sex sexual behavior has been accepted in varying degrees in different eras and cultures in both the non-Western world and Western world.<sup>68</sup> It does not make sense to deny basic rights to some individuals on the grounds that gay rights are being imposed by “the West.” Rather, the widespread vulnerability of gay, lesbian, and bisexual persons makes it even more imperative that human rights advocates speak out against discrimination on the grounds of sexual orientation.

*B. Radical Critiques of a Liberal, Rights-Based Perspective*

Radical philosophical critiques of a liberal, rights-based approach to preventing discrimination against individuals because of their sexual orientation come from various feminist as well as gay and lesbian perspectives. According to many feminists, legal institutions are inadequate for protecting women because they are “hierarchical, adversarial, exclusionary, and unlikely to respect claims made by women.”<sup>69</sup> Accordingly, these feminist critics reject an exclusively legal approach for advancing justice and equality for women. While advancing the principle of legal protection for women may be necessary, it is not sufficient because human rights law has continually failed to protect

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67. See Gayle Binion, *Human Rights: A Feminist Perspective*, 17 HUM. RTS. Q. 509, 521 (1995).

68. William Eskridge notes that there is historical evidence of same-sex unions in many non-Western as well as Western cultures. See ESKRIDGE, *supra* note 34, at 15-50 (providing a brief overview of the history of same-sex unions). Eskridge claims that the “modern West has been almost uniquely intolerant of unions that depart from its norm of different-sex companionate marriage.” *Id.* at 37. See also JOHN BOSWELL, *SAME-SEX UNIONS IN PRE-MODERN EUROPE* (1994); LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH CENTURY AMERICA* (1991); DAVID M. HALPERIN, *ONE HUNDRED YEARS OF HOMOSEXUALITY* (1990).

69. Binion, *supra* note 63, at 513 (citing CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986)).

women from repression and injustice.<sup>70</sup> Moreover, some feminist scholars have proposed a less adversarial “responsibility model” to replace the rights-based framework for advancing justice and equality for women. Under this model, human rights would be reconceptualized as human needs and the “goal would be to effect change and not ‘to blame.’”<sup>71</sup> According to this perspective, a less adversarial approach would be more consistent with women’s experiences and would be more effective in promoting justice and equality.<sup>72</sup> Many feminists also stress that the human rights model has not sufficiently addressed human rights abuses in the private sphere.<sup>73</sup> Other feminists further criticize the human rights paradigm because it does not adequately challenge structural violence, patriarchy, and gender-differentiation.<sup>74</sup> According to this view, the concept of human rights is based on an understanding of human nature which adopts the male as the norm. Interestingly, many feminists appear to echo the conservative, Burkean criticism that the human rights paradigm’s foundation in “rationality” and “objectivity” is problematic, even though they argue this emphasis is a result of the masculine bias of the model. In sum, several strands of feminist thought challenge the liberal, rights-based perspective for being too accepting of the status quo.

Similar arguments have been made by scholars and advocates within the lesbian and gay rights movement. According to a radical perspective within this movement, while the “liberal equality paradigm” can in some respects promote basic rights for gay, lesbian, and bisexual persons, it also contributes to the perception of gay, lesbian, and bisexual persons as a distinct minority. These critics argue that the liberal, rights-based perspective does not adequately challenge the dominance of heterosexuality as a norm.<sup>75</sup> Thus, a radical perspective within the gay and lesbian rights movement depicts certain rights sought by other members of the gay and lesbian movement as catering to “heterosexist” ideology and, thus, as regressive rather than progressive. For example, proponents of the recognition of gay marriages in the United States base their arguments in part on the socially conservative view that marriage

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70. See Binion, *supra* note 63, at 514.

71. *Id.* at 525.

72. See *id.* at 524-26.

73. See Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63, 68-75 (1993); V. Spike Peterson, *Whose Rights? A Critique of the ‘Givens’ in Human Rights Discourse*, 15 ALTERNATIVES 303, 315-24 (1990).

74. See Peterson, *supra* note 69, at 323.

75. See DIDI HERMAN, RIGHTS OF PASSAGE: STRUGGLES FOR LESBIAN AND GAY LEGAL EQUALITY 3-10 (1994).

would help to stabilize and solidify homosexual relationships.<sup>76</sup> Critics suggest that this argument urges gay, lesbian, and bisexual persons to aspire to the standard of monogamy, ostensibly a heterosexual ideal (if not one that is always attained in practice), rather than challenging sexual conservatism. Radical perspectives within the gay and lesbian movement view such efforts to adopt “heterosexual values” as a contributing factor to the dominance of heterosexuality and, as a result, to the minority status of gay and lesbian identity.<sup>77</sup> In this way, the liberal, rights-based perspective can be seen as a threat to the radicalism of the movement.

These radical critiques, while challenging the limitations of a liberal, rights-based perspective, do not clearly undermine the liberal ideal. Feminist and gay and lesbian critics are correct to point out that the creation of human rights law is not sufficient to promote justice and equality for all people. Nevertheless, a recognition of the limitations of human rights norms does not mean they are irrelevant. A number of powerful obstacles hinder the attainment of justice and equality for all individuals. The articulation of fundamental human rights norms can be one, if not the only, tool in the broader struggle to shape social and political values, ideas, and interests.

The argument that the liberal, rights-based paradigm does not dramatically challenge patriarchy and heterosexism as ideologies is accurate in the sense that the mere existence of human rights norms prohibiting gender or sexual orientation discrimination will not inevitably undermine the dominance of these ideologies. Indeed, under a framework in which basic rights to privacy and to freedom of expression, opinion and religion are promoted and protected, many individuals will choose to live according to patriarchal and heterosexual norms. It is precisely this fact that frustrates radical critics of the human rights paradigm. However, even though the liberal, rights-based perspective will not inevitably lead to radical outcomes, radicalism needs liberalism. In the absence of basic human rights protections for political participation, freedom of speech and expression, and the right to education and equality before the law, it is not clear that these radical critiques will find protected space for expression. The liberal paradigm does not dictate that the outcome will be radical, but as an ideal it promotes the right of

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76. See ESKRIDGE, *supra* note 34, at 62-66; SULLIVAN, *supra* note 44, at 178-87; Craig R. Dean, *Gay Marriage: A Civil Right*, 27 J. HOMOSEXUALITY 110, 114 (1994); Jonathan Rauch, *For Better or Worse? The Case for Gay (and Straight) Marriage*, NEW REPUBLIC, May 1996, at 22-23.

77. See HERMAN, *supra* note 71, at 145-49 (arguing that the “family” model is exclusionary, and that by “adopting” its qualities, gay, lesbian, and bisexual persons reinforce its dominance).

individuals to live and to try to shape political and social systems in radical ways, as long as such efforts do not violate the fundamental rights of other human beings. It should be stressed that the notion that all human beings have fundamental rights is a radical idea itself, and, arguably, provides the most appropriate framework for promoting the dignity and well-being of all human beings while protecting the great diversity that exists *within* as well as across cultures and political systems.

#### IV. CONCLUSION

The nondiscrimination clauses of the core documents in international human rights law state that all human beings are entitled to fundamental rights “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.”<sup>78</sup> Because these clauses do not list sexual orientation as an impermissible basis for discrimination, international human rights laws fail even at this aspirational level to promote basic rights for gay, lesbian and bisexual persons. Although it is true that international human rights law cannot alone prevent discrimination, it is a necessary tool in the struggle to promote human rights for all individuals. International human rights law can help to shape social attitudes. In general, law can be used to gradually change people’s minds, if not their hearts. Prohibitions against discrimination can help to make it more difficult for individuals openly to discriminate. Of course, a decline in overt discrimination may merely suggest that discrimination takes other covert, sometimes more insidious forms. Nonetheless, minimizing overt discrimination is a tool, albeit an incomplete one, for moving towards equality and nondiscrimination.<sup>79</sup>

The argument that the expansion of international human rights law is a necessary step in promoting an authentic norm of nondiscrimination does not imply that the rights-based framework is without problems. As discussed above, there are fundamental philosophical arguments which challenge the human rights paradigm, including cultural critiques and radical perspectives, that need to be taken seriously. There are additional problems *within* the rights-based framework that have not been considered yet. This framework does not establish how competing visions concerning fundamental rights should be balanced. For example, the right to privacy is seen by many as implying that individuals in the private sphere should be free “to hire, house, or serve in their business

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78. E.g., UDHR, *supra* note 1, art. 2.

79. See Vincent J. Samar, *A Moral Justification for Gay and Lesbian Civil Rights Legislation*, 27 J. HOMOSEXUALITY 163 (1994)

establishments whomever they want.”<sup>80</sup> This interpretation of the right to privacy could be used to authorize sexual orientation discrimination in the private sphere and obviously clashes with the idea that gay, lesbian, and bisexual persons have a right to be free from discrimination on the basis of their sexual orientation. Within the gay and lesbian rights movement, controversy has also surrounded “outing,” the practice of publicly announcing the sexual orientation of individuals in order to raise awareness about the prevalence of homosexuality. According to some critics of this practice, outing is a violation of the right to privacy. Proponents contend that outing is protected by a right to free speech and that it promotes the dignity of homosexuals by challenging the stigma associated with gay or lesbian sexual orientation.<sup>81</sup> An additional example of potentially clashing rights involves the right to freedom of religion and the right to be free from sexual orientation discrimination. For instance, should religious organizations be compelled to accept a nondiscrimination policy towards gay, lesbian, and bisexual persons when such a policy would violate fundamental religious doctrines?<sup>82</sup> International human rights laws do not provide a clear framework for determining how competing rights claims should be balanced. Nevertheless, the fact that any effort to expand human rights law to cover all individuals regardless of sexual orientation will give rise to competing rights claims does not mean that this effort should not be made. To date, an imbalance has characterized international human rights law because sexual orientation discrimination is not explicitly prohibited. Thus, human rights advocates need to rectify the situation by giving significant attention to the rights of gay, lesbian, and bisexual persons while recognizing that competing rights claims also will need to be taken into consideration.

In conclusion, the nondiscrimination clauses in major human rights documents should be expanded to include protection for gay, lesbian, and

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80. *Id.* at 150.

81. For a comprehensive argument in favor of the practice of outing, particularly in reference to the outing of public figures, see MICHELANGELO SIGNORILE, *QUEER IN AMERICA: SEX, THE MEDIA, AND THE CLOSETS OF POWER* (1993). For an argument critical of the practice of outing, see David J. Mayo & Martin Gunderson, *Privacy and the Ethics of Outing*, 27 *J. HOMOSEXUALITY* 47, 47-65 (1994).

82. These potential conflicts all relate to the question of where the line between the public and private spheres of life should be drawn. Just as in the cases of racial and gender discrimination, meaningful prohibitions against sexual orientation discrimination will require states to treat some formerly “private” issues as public. However, as the potential conflicts above illustrate, not every private issue can be treated as public within a rights-based framework. Determining where to draw the line in terms of state regulation of private behavior will require further political and scholarly debate. In terms of the argument in this paper, the most important step for human rights advocates and scholars is to ensure that sexual orientation discrimination has a place on both the political and scholarly agendas.

bisexual persons as an important step in the struggle to minimize all forms of discrimination in practice. Various rights, including the right to freedom of speech and expression, the right of consenting adults to marry, the right to equal protection under the law, the right to privacy, and the right to education, should not be arbitrarily denied to individuals merely because of their sexual orientation. The inclusion of an aspirational statement adopting a prohibition against sexual orientation discrimination will not provide for its own enforcement and, thus, will not inevitably end the persecution of gay, lesbian, and bisexual persons. Nevertheless, human rights discourse can at least give persecuted groups an important political symbol to use in the struggle against oppression. In sum, international human rights law should be expanded to include prohibitions against discrimination based on sexual orientation in order for the ideal of human rights to promote consistently respect for the dignity and worth of all human beings. To this end, human rights organizations and scholars need to end their relative silence and “come out of the closet” to promote norms that are consistent with the noble ideal of human rights.