Conceptualizing private violence against sexual minorities as gendered violence: an international and comparative law perspective

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I. INTRODUCTION

To the extent that violence against women and sexual minorities(1) is predicated upon assumptions of a polar construction of gender, (2) in which nonconformity with gender role expectations is enforced through violent and non-violent means, it is possible to speak of violence against both groups as rooted in a system of male dominance.(3) Understanding the commonality of the gendered nature of violence against the two groups can assist in formulating a response under international and national law to violence against both women and sexual minorities that reflects the common gendered societal assumptions and mechanisms which foster such violence. Indeed, this Article's central thesis is that oppression based on sexual minority status is, to a great extent, gender oppression.

Moreover, to the extent that violence against both groups reflects societal assumptions regarding appropriate gender roles, violence against both groups is frequently committed by societal actors other than the state as narrowly defined. In 1993, Dorothy Thomas and Michele Beasley published an article in the Albany Law Review.(4) That article was published in connection with the Symposium on Reconceptualizing Violence Against Women by Intimate Partners: Critical Issues, held in March 1995 in Albany, New York. In that article, Thomas and Beasley made the important observation that "[a]lthough international law is gender neutral in theory, in practice it interacts with gender-biased domestic laws and social structures that relegate women and men to separate spheres of existence: private and public."(5) Their article examined in considerable depth the sources of the international community's reluctance to recognize domestic violence as an appropriate subject of regulation by international law,(6) as well as recent changes that have occurred in the international community's approach to this issue.(7)

This Article will continue this discussion of the limits and potential of international law in addressing gendered violence by focusing on the similarities and differences between violence based on gender and violence based on sexual minority status, with a particular focus on gendered violence in the private sphere.

Part II of this Article will define the scope of the problem, demonstrating that "private" violence against women and violence against sexual minorities share at least two characteristics: both phenomena are global in scope and horrific in their consiquences. The distinction between the private and public spheres in international and national law, and the different implications for men and women of this distinction, will also be discussed in the context of gendered violence.

Part III of this Article will develop the thesis that sexual minorities are "gender outlaws," subject to systematic private societal violence for similar reasons that women are subject to such violence. This part of the Article will briefly summarize the anthropological and historical evidence which indicates that individuals who engage in same-gender sexual relations, or adopt transgendered identities, have generally only been penalized for doing so when their activities have violated norms of male supremacy.

Part IV of this Article will then discuss a central limitation of international law in addressing private gendered violence: international law's deference to national law and cultural norms. This discussion will focus on the extent to which national legal norms (as an expression of cultural norms) protect, or fail to protect, the bodily integrity of women and sexual minorities. This examination entails a discussion of the right to privacy under both national and international law, since that right can provide a limitation on the ability of the state to violate the bodily integrity of women and sexual minorities for the purpose of imposing societal gender norms. It also, however, entails a discussion of the historically gendered role of the right to privacy as a guarantor of male supremacy in the "private" world of the family. In this sense, privacy is, at best, a two-edged sword for women, even as it provides substantial protection for men and male sexual minorities. This section of the Article will also discuss the extent to which national norms of equal protection provide women and sexual minorities the equal protection of the laws against violence perpetrated on them by private societal actors.

Finally, in Part V, this Article will discuss the ways in which international law has made some progress in recognizing the rights of sexual minorities and women to be free from violence motivated by their gender or gender non-conformity.

II. DEFINING THE PROBLEM: PRIVATE VIOLENCE AGAINST WOMEN AND SEXUAL MINORITIES

When examining human rights abuses against women and sexual minorities from a global perspective, it is important to recognize that violations against the bodily integrity of both groups frequently occur outside the reach of the legal system.(8) To the extent legal systems only address violations of bodily integrity occurring outside the home--in the "public sphere"--they fail to provide protection against the numerous abuses which occur within the home--in the "private sphere."(9)

For example, in many countries, domestic violence has only recently been recognized as a crime. In other countries, it is considered to be outside the state's jurisdiction. As human rights lawyer Julie Mertus notes, "in most regions of the world, including many states in the United States, husbands are free to rape their wives without fear of legal reprisal."(10) Mertus further documents that "[i]n Brazil, until 1991 wife killings were considered to be non-criminal `honor killings'; in just one year, nearly eight hundred husbands killed their wives. Similarly, in Colombia, until 1980, a husband legally could kill his wife for committing adultery."(11) In Egypt, a husband who kills his wife to defend his "honor" may receive a maximum sentence of three years in prison.(12) The penalty for a wife who kills her husband under similar circumstances is prison and hard labor for three years to life.(13)

This national recognition of a private/public distinction is reflected in international law as well. As noted by Thomas and Beasley:

> International human rights law evolved in order to protect . . . individual rights from limitations that might be imposed on them by states. States are bound by international law to respect the individual rights of each and every person and are thus accountable for abuses of those rights. The aim of the human rights movement is to enforce states' obligations in this regard by denouncing violations of their duties under international law. The exclusive focus on the behavior of states confines the operation of international human rights law entirely within the public sphere.(14)

The public/private distinction in both domestic and international law has important implications for analyzing human rights abuses against lesbians and women generally. In many cultures, the principal instrument of societal control over women is the family.(15) To the extent women lack legal status outside of their role within the family, they do not enjoy the legal protections accorded to men. Thus, a lesbian may be beaten or killed by a family member for her orientation/identity, yet this domestic violence may not be the concern of law enforcement officials. This contrasts with the status of male sexual minorities in many societies where they enjoy an independent legal status vis-a-vis the state. Therefore, achieving basic civil and political rights relating to an individual's relationship to the state, such as the right to privacy, is more likely to have an immediate, practical effect on the civil rights of gay men. The right to privacy involves a zone of sovereignty that the state may not reach.(16) The right to privacy may offer less protection for women, for whom the state is not as frequently the primary instrument of control. As Donna Sullivan notes, "[b]ecause the family is the site of many of the most egregious violations of women's physical and mental integrity, any blanket deference to the institution of the family or privacy rights within the family has disastrous consequences for women."(17) Nevertheless, states have traditionally been very willing to discard the private/public distinction in order to punish sexual minorities for violating gender norms. Thus, while a man's beating of his wife has been traditionally considered a private, "domestic" concern, same-gender private sexual activity between two consenting adults has been considered within the legitimate scope of the state's concern.(18) In both eases, an actor representing the interests of male supremacy(19) enforces gender norm expectations. The private/public distinction enables men to enforce these norms against members of their household. Conversely, when violations of gender norms are committed by individuals outside of the male dominated heterosexual household paradigm, such as sexual minorities, piercing the public/private distinction enables the state to intervene and perform the role of the husband or father.

Under international law, the distinction between the private and public sphere is even more pronounced, since the traditional concern of international law has been the conduct of states, not individuals. As a result, the "sovereignty" of the family is also more pronounced under international law than under national law, since national laws establish and regulate the family. Thus, international human rights law has traditionally not recognized gender specific forms of abuse such as rape, sexual abuse, infanticide,(20) genital mutilation,(21) bride-burning,(22) forced marriage,(23) domestic violence, forced sterilization,(24) or forced abortion.(25)

Unfortunately, the private/public distinction is not the only impediment to recognizing the fundamental human rights of women to bodily integrity. For example, in the context of international law addressing warfare related crime, loosely termed "humanitarian law," rape of women is treated as a lesser crime than mistreatment of prisoners, even when the rape is committed by state actors.(26) Thus, it can be convincingly argued that the private/public distinction in international law is simply a manifestation of the gendered nature of international law in general. As numerous authors have observed, women have traditionally been invisible in international law.(27) The mere presence of international institutions specifically focused on women's human rights concerns underscores the

invisibility of women to those international human rights institutions vested with the mandate of addressing human rights violations against people in general.

With respect to sexual minorities, the problem of private gendered violence, and the tepid international and national legal response to such violence, is aggravated by national laws which criminalize same-gender sexual relations or other "gender nonconforming" behavior associated with sexual minority status.(28) Conceptually, one can view these laws against sexual minorities as analogous to laws which criminalize gender "inappropriate" behavior by women, such as driving a car in Saudi Arabia or walking down the street without a veil in Iran. One could argue that just as women are not penalized by the state until they commit these acts, sexual minorities are not sanctioned unless they exhibit behavior demonstrating their status. In this sense, sexual minorities are no different than women and men who exhibit gender-atypical behavior: the penalty does not attach to the biological sex per se of the individual, but rather to the manner in which the individual expresses her or his gender identity.

In some countries, national laws impose the death penalty for individuals who engage in same-sex relations.(29) The countries that currently execute individuals solely because of their sexual orientation are those countries that follow a highly rigid interpretation of Shari'a, or Islamic law.(30) The death penalty in such circumstances not only arguably violates the spirit of Shari'a itself,(31) but also violates the literal wording of the Universal Declaration of Human Rights (Universal Declaration)(32) and those provisions of the International Covenant on Civil and Political Rights (ICCPR)(33) and the American Convention on Human Rights (American Convention)(34) which limit the death penalty to only the most serious crimes.

In other countries, states are in the extra-judicial murder of sexual minorities or are passive in their approach to stopping the killings or apprehending the perpetrators.(35) In other countries, sexual minorities suffer systematic torture, police abuse and arbitrary arrest. For example, in Australia, the government-funded Australian Institute of Criminology found that "11 percent of lesbians and 20 percent of gay men had been assaulted. Of those, 12 percent of [the] gay women and 18 percent of [the] gay men had been assaulted by the police."(36)

In Mexico, beginning in October, 1994, human rights groups have documented a wide range of rights violations against sexual minorities by law enforcement officers including verbal harassment, threats, physical attacks, beatings, mass police sweeps (including raids on bars and private homes), extortion, property damage, arbitrary arrests, illegal detentions, and torture while in custody.(37) In Colombia, according to the Washington Office on Latin America

four teen-age male prostitutes testified that the

police regularly chase them down, beat them, and extort money

from them. The practice is clearly not restricted to a few agents, but

is characteristic of many of the police agents on the streets in

neighborhoods frequented by these males, and occurs weekly. While

it is not clear to what extent such abuses are perpetrated by urban

"Civil Defense" units organized by the Defense Ministry, regular

police personnel

are clearly involved. For example, one 16 year old male

prostitute tearfully described how he and a female companion were

taken by five uniformed policemen to the local police post at the

intersection of 79th and 15th streets. In the small bathroom there,

each of the five policemen raped both the young man and the female

(reportedly 16-17 years old), and forced them at gunpoint to

perform oral sex.(38)

In Romania there have been frequent allegations of systematic rapes and beatings of individuals imprisoned for sodomy under Article 200 of the Penal Code.(39) Police violence and/or abuse against sexual minorities in the United States,(40) Russia,(41) and other countries has been well-documented.(42)

"Gay bashing," as opposed to the systematic murder of sexual minorities discussed above, is endemic throughout the world. In the United States in 1994, for example, there were 632 reported crimes against gays/lesbians in New York, 332 in Los Angeles, 324 in San Francisco, 234 in Boston, 156 in Denver, and 96 in Detroit.(43) It is thought that these reported figures strongly understate the problem, particularly since many victims are afraid to "expose" their orientation by reporting the crimes.(44) A 1995 Anti-Defamation League report documents that gay bashing is frequently part of a broader phenomenon of right-wing hate violence which targets racial and ethnic minorities, immigrants, Jews, sexual minorities, homeless people, sex-workers, leftists, and other "outside" groups.(45)

To the extent the state does not punish individuals who murder or otherwise injure sexual minorities, the state may be viewed as an accomplice in the act. For example, Human Rights Watch has documented the failure of law enforcement officials in the U.S. state of Georgia to prosecute arson, vandalism, and cross-burnings directed at sexual minorities, as well as the sluggish police response to physical attacks against, and murder of, sexual minorities.(46) In 1976, an Arizona judge imposed no penalty against several teenagers who beat a gay college student to death in front of a Tucson bar.(47) The judge in that ease even praised the perpetrators' scholastic records.(48) In 1984, three teenage boys in Bangor, Maine assaulted a young gay man and then threw him into a stream where he drowned.(49) The judge released the youths to the custody of their parents rather than imposing a prison sentence on them.(50)

Nevertheless, individual incidents of "gay-bashing,"while usually a violation of domestic law, are not generally treated as international human rights concerns. This approach, however, neglects the state's role in encouraging violence against sexual minorities through its passivity, its promulgation of laws criminalizing or discriminating against sexual minorities,(51) or the role of powerful, non-state institutions in promoting human rights abuses against sexual minorities. For example, powerful religious leaders in the United States, Argentina, Iran, and other countries have publicly called for executing, imprisoning or committing other violence against sexual minorities.(52) The traditional distinction between state and non-state actors may not always reflect reality with respect to these religious leaders. In Argentina and Iran, for example, religious institutions have enjoyed a close political relationship with the state.(53) The Catholic Church appears to have been an active accomplice in the torture and murder of leftists in Argentina during the "dirty war" of the 1970s.(54) In the Spring of 1995, Argentinean Bishop Jorge Novak, a critic of the military regime, criticized the Church in his country for "our insensitivity, our cowardice, our omission, our complicity."(55) In the United States, numerous lawmakers have endorsed the Contract with the American Family, which is part of the stated agenda of the Christian Coalition, an organization which includes many individuals and groups who have advocated human rights abuses against sexual minorities.(56) In San Francisco, former Human Rights Commissioner Reverend Eugene Lumpkin declared "that he believed in the biblical penalty of death for homosexual acts."(57) In Romania, on May 24, 1995, "Patriarch Teoctist of the Romanian Orthodox Church sent a letter to speaker of the Chamber of Deputies Adrian Nastase . . . calling for homosexuality to continue to be punishable by imprisonment ., "(58) The letter was signed by the metropolitan bishops of Moldova and Bucovina, Transylvania, Oltenia, and Banat, as well as by four archbishops and various priests.(59) The actions of powerful religious and other institutions can have a direct impact on violence and murder against sexual minorities.

In many instances of private, societal violence against sexual minorities, it is very difficult to discuss the human rights of sexual minorities without recognizing the role of class(60) and power as a factor in individuals' vulnerability to human rights violations.(61) With respect to "gay bashing," there is an empirical connection between violence against sexual minorities and violence against racial, ethnic, and religious minorities, immigrants, and the homeless.(62) This suggests that the reasons for the oppression of sexual minorities are likely to be similar to the reasons for oppression of these other groups: namely the power dynamic that makes any group want to oppress any group that challenges its position. This Article argues that the violations of the human rights of sexual minorities and women reflects this model. Gendered violence is frequently the consequence of perceived threats to a male dominated societal system by groups that do not conform to the norms appropriate for the continuation of such a system.

III. SEXUAL MINORITIES AS "GENDER OUTLAWS"

Oppression based on sexual orientation or identity involves a great deal more than social intolerance of homosexual relations. The oppression discussed in this Article is fueled by any group which challenges traditionally defined gender roles. For example, focusing solely on groups defined by their sexual orientation, such as gays, lesbians or bisexuals would not address human rights violations against a wide range of other individuals who violate norms of gender conformity through their dress and other social, non-sexual forms of expression, such as transgendered individuals. To limit the scope of this Article solely to individuals engaging in homosexuality, rather than sexual minorities,(63) would ignore the reality that, to the extent societies are uncomfortable with homosexuality, it is usually because that activity is perceived as crossing gender, rather than sexual, boundaries.(64)

Comparing the oppression of sexual minorities as such with the oppression of women is useful in understanding this continuum of resistance to gender conformity. The rigid bi-polar construction of gender existing in many societies oppresses women and sexual minorities in similar ways. Thus, sexual minorities and women who attempt to transcend societal gender role expectations frequently find themselves struggling against similar adversaries for similar underlying reasons.(65)

Thus, how a society views gender roles often determines how it treats sexual minorities. As a general rule, to the extent a society does not assume a connection between same-gender sexual behavior and violation of gender roles (and the power relationships reinforced by gender roles), that same-gendered sexual behavior will be accepted.(66)

The corollary to this proposition is that as a society broadens its definition of acceptable gender norms for all persons, that society will tend to accept not just same sex sexual activity, but also same-gender relationships where one of the partners is not obligated to assume an opposite gender role. This corollary thus suggests that efforts by social movements such as feminism to broaden the definition of acceptable gender behavior, particularly with respect to societal power relationships, are closely connected to the efforts by sexual minorities to obtain societal recognition of the many forms their identities and relationships may assume.

The Hawaii Supreme Court recognized this fact when it presumptively struck down the Hawaii law prohibiting same-sex marriage in Baehr v. Lewin.(67) The majority opinion held that Hawaii's marriage law constituted sex discrimination under the State Equal Rights Amendment(68) because it prohibited women from doing something (marrying a woman) that men were entitled to do, and vice versa.(69)

This analogy between oppression based on an individual's sexual identity orientation and oppression of women who attempt to break out of traditional roles is supported to some extent by the available anthropological and historical evidence.(70) The correlation between oppression of women by states, societies, and cultures, and oppression of sexual minorities is one of the most distinctive patterns emerging from cross-cultural and comparative legal evidence.

The parallel nature of gendered violence against women and sexual minorities has, for example, played itself out in the context of the Bosnian War. In addition to the documented widespread and systematic rape of Moslem women by the Serbian and Bosnian-Serb militaries,(71) those militias have implemented a specific form of terror against Bosnian males, including male rape and genital torture, apparently inspired in part by their characterization of Bosnians as being overly gay-tolerant.(72)

A November 16, 1992 State Department Report states:

[Two Serbian] brothers were let into the [Bosnian refugee]

camp after 5:00 p.m. These brothers entered the sleeping

quarters carrying pistols and automatic rifles. They called for

Emir, Jasmin, and Alic to come forward. The three were

beaten with rifle butts and police batons.... [T]he brothers

forced Alic first to drink the Urine of the other two

prisoners. Alic was next beaten until he was unconscious and

then revived with cold water. After further beatings, Alic was

forced to take his pants off. The brothers then forced Emir

and Jasmin to bite off Alic's testicles. Alic died of his

wounds that night.(73)

There have also been charges of violent attacks against gay men by Serbian police.(74) Police raids on gays occur frequently in Serbia, and suspected homosexuals are humiliated and beaten with fists and nightsticks on the spot, or are hauled into the station for questioning and "treatment."(75)

In one documented example of police harassment, Zeljko Radovanac, an openly gay man, was taken from his home by two Belgrade policemen to the headquarters of the city police.(76) The policemen informed him that he was being taken into custody because they knew he had been listening to Croatian music.(77) An interrogator questioned him for an hour and a half, never once asking him about Croatian music.(78) The interrogator demanded the namesof all members of "Arkadia," the gay and lesbian lobby of Belgrade.(79) During the interrogation he was beaten severely by the two policemen.(80) A human rights activist observed that he had bruises on his legs and chest and that his chest was swollen.(81)

In the United States, the anti-sexual minority rhetoric of the fundamentalist right is inextricably linked to the fundamentalists' view of the appropriate role for women. Randall Terry, co-founder of Operation Rescue, a conservative anti-choice organization, has "called for the death penalty for practicing homosexuals."(82) He has also "called homosexuals criminals and [has] said they should be forced to wear a badge identifying their sexual orientation so that heterosexuals can avoid any physical contact with them."(83)

Romania is one of the few European countries that continues to criminalize homosexual relations.(84) It also has a law that absolves all the individuals participating in a gang-rape of a woman if one of the rapists later marries the victim.(85) Similarly, in the United States, a judge, citing "family values" (which are frequently used in U.S. political discourse to attack sexual minorities), sentenced a man convicted of domestic violence to marry the woman he physically abused.(86) On January 29, 1993, Canada granted asylum to a Saudi feminist(87) who, more than coincidentally, comes from a country in which gays and lesbians may be legally sentenced to death simply for their orientation.(88)

Nevertheless, as noted above, the analogy between sexual minorities and oppression of women only operates to the extent that sexual minorities threaten social and sexual gender role expectations and the hierarchical social positions that accompany those expectations. To the extent that societies incorporate homosexuality into their traditional norms of gender roles, such as having same-sex partners adopt male and female gender roles, homosexuality does not pose the same threat to societal gender norms.(89)

The complex dynamic between oppression of women and oppression of sexual minorities plays itself out among members of sexual minorities as well. For example, societies frequently treat lesbians very differently than gay men because women are frequently treated very differently than men. As Julie Dorf and Gloria Clareaga Perez note, lesbian oppression parallels both gay male and women's oppression, but is identical to neither.(90)

Homosexuality, particularly in a contemporary context, cannot be separated from the larger context of gender norm expectations and male-female gender role stereotypes. Sexual minority rights groups and feminists have not always acknowledged the connection between the struggle for gay and lesbian rights and the effort to eliminate discriminatory and arbitrary gender roles and stereotypes. Lesbians have been frequently marginalized and isolated within the feminist movement in numerous countries,(91) and gay men have frequently failed to see the connection between their struggle and the struggle to abolish gender role norms and stereotypes with respect to all people.

Sexual minorities are also gender outlaws in the sense that their very existence as identifiable minorities is not based upon the sexual acts in which they participate, but rather on their relationship to the spectrum of gender conformity. The anthropological and historical

evidence suggests that the great majority of, if not all, societies probably contain individuals with a homosexual sexual orietation.(92) Nevertheless, in some of these societies there are no individuals with separate "gay" or "lesbian" identities, but simply individuals who happen to engage in homosexual sexual activity, either exclusively or in addition to relationships with the opposite sex. In these societies, homosexual activity is viewed as simply one of the many variants of sexual activity available to the human species, with few implications for the participants' prescribed gender roles.(93) In other societies, one of the members of a homosexual relationship may be encouraged to adopt the gender role of the opposite sex or a variant thereof.(94) Society thus maintains its interest in clearly defined gender roles (and correlative asymmetric power relationships) while still permitting individuals to express their sexual attraction to individuals of the same sex. In these societies, gender role trumps over genitally-based definitions of sexual identity, and same-gender sexual activity ceases to exist. In still other societies, same-gender sexual activity is sanctioned, provided it occurs only in narrowly defined contexts, such as between generations or social classes, or in the context of cultural, religious or social rituals.(95) In neither case could the same-gender sexual activity accurately define the individuals participating in it as "gay" or "lesbian." For example, a persistent theme in anthropologic evidence regarding same-gender sexual unions is that many cultures treat differentials in class, age and power as analogous to gender differentiation.(96)

Eskridge, for example, provides a description of Ifeyinwa Olinke, a wealthy nineteenth century woman of the Igbo tribe, situated in what is now Eastern Nigeria:

She was an industrious woman in a community where most of

the entrepreneurial opportunities were seized by women,

who thereby came to control much of the Igbo tribe's

wealth. Ifeyinwa socially overshadowed her less prosperous

male husband. As a sign of her prosperity and social standing,

Ifeyinwa herself became a female husband to other women.

Her epithet "Olinke" referred to the fact that she had nine

wives.(97)

In some societies, male homosexual activity was sanctioned only so long as it occurred between individuals of different classes or generations. Greenberg notes that in ancient Greece, "[p]reoccupation with status pervaded sexual culture to the point where the Greeks could not easily conceive of a relationship based on equality. Sex always involved superiority."(98) There is thus considerable documentation of what one would call bisexuality in societies where it was considered appropriate to engage in either sexual relations with women or members of a subaltern class or younger generation,(99) as long as the individual in the socially superior position did the "penetrating."(100) Greenberg cites from "The Interpretation of Dreams" by the second century A.D. Greek philosopher Artemidorus Daldianus:

[H]aving sexual intercourse with one's servant, whether male

or female, is good; for slaves are possessions of the

dreamer, so that they signify, quite naturally, that the

dreamer will derive pleasure from his possessions.... If a man

is possessed by a richer, older man, it is good. For it is usual

to receive things from such people. But to be possessed by

someone who is either younger than oneself or destitute is

unlucky. For it is usual to give things to such people. The

same also holds true if the possessor is older but a beggar.(101)

This view of same-sex relationships simply mirrored the Athenian view of women generally:

Gender considerations had much to do with this contempt for

passivity. The upper-class Athenian family in the classical

age was highly patriarchal. Though women managed the

household, they were also restricted to it. They lacked all

legal personality, were subjected to forced marriage, and were

vulnerable to male violence. The relationship between

husbands and wives was one of unambiguous domination. In

Greek thinking, the family served as a model for all sexual

relationships. If in heterosexual couples, the male was active

and the wife responsive, then in homosexual couples the

active, insertive partner was male, the passive, receptive

partner, female. And to be female was to be inferior to men.

For a male to submit to another man sexually was thus to

declare himself unworthy of manhood. Aristophanes'

complaint about adult men who engage in passive homosexuality

is that they act like women, something real men should

not do.(102)

In discussing homosexuality in the Renaissance and Baroque periods of European history (ca. 1400-1650 A.D.), Art History Professor James M. Saslow notes that the "powerful tended to prefer their sexual objects subordinated by gender, age, and/or socioeconomic status."(103) Saslow argues that a homosexual "identity" was avoided by many men in the Renaissance and Baroque periods through categorizing sexual acts "not only by the gender of one's object-choice, but also by the role one performed. As part of a broader effort to demarcate male and female social roles and appropriate gender constructs, contemporary theory drew a sharp distinction between active (masculine) and passive (feminine) sexual roles."(104) However, the author notes that "[while adult-youth sex clearly predominated, recent research calls for reexamination of the older assertion that it was the exclusive model, sanctified by Greek precedent."(105)

Along the same vein as Saslow's call for a reexamination of the more traditional assertions regarding the lack of egalitarian homosexual models, Professor Ng cites from the scholarly work of Shen Defu (1578-1642) to illustrate that homosexuality among equals was commonplace in at least the province of Fujian, China: "The Fujianese especially favor male homosexuality. This preference is not limited to any particular social or economic class, but the rich tend to cavort with the rich, and the poor with the poor."(106)

In some societies, individuals of the same sex have been historically entitled to enter into societally recognized relationships, (107) much in the manner that some countries are beginning to formally recognize same-sex marriages or "domestic partnerships."(108) Depending on how one defines "identity," the individuals in these relationships may be thought of as having a "gay/lesbian" identity.

Finally, it is worth considering not just how sexual minorities threaten the "heterosexual" majority, but how sexual minorities threaten the power dynamic between men and women generally. To the extent that sexual minorities do threaten the power dynamic between men and women, national law and custom frequently proves the greatest obstacle to obtaining international recognition of the right of sexual minorities to be free from violence, particularly violence that occurs in the "private" sphere.(109) These obstacles will be addressed in the following section of this Article.

IV. PIERCING THE PUBLIC/PRiVATE DISTINCTION: OVERCOMING INTERNATIONAL LAWS DEFERENCE TO NATIONAL LAW AND LOCAL CUSTOM

It is important to recognize that international law has traditionally maintained a certain deference to domestic law and custom. This deference has resulted because international law is based on values, traditions, standards, and norms accepted globally, although not necessarily by every culture or country.(110) As Louis Henkin has observed, international human rights law is the law of the "lowest common denominator."(111) International human rights law thus consists, in large part, of those rights which are deemed fundamental to human beings in all parts of the world and which inure to individuals because of their status as human beings and not because they are citizens of a specific country. The Universal Declaration proclaims in its Preamble that the international community's "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world."(112) Yet, for far too long, countries have used this traditional deference to avoid addressing human rights abuses against women and sexual minorities. Thus, a threshold task for those seeking remedies under international law for violence against women and sexual minorities is obtaining a global consensus that such violence is, as a normative matter, unacceptable.

With respect to women, some progress has been made under international law toward establishing an international norm against gendered violence in cases of domestic violence and rape. As noted by Katherine M. Culliton:

A large body of international human rights law on the issue

of violence against women has developed over the last fifteen

years, particularly in the United Nations system.... The

hallmark of the United Nations' work on women's rights, the

1980 Convention for the Elimination of All Forms of

Discrimination Against Women ... was recently interpreted

by the CEDAW [the U.N. body charged with interpreting the

treaty] to stand for the norm that gender based violence is a

violation of women's fundamental human rights.(113)

Nevertheless, women have only made limited progress in developing remedies to enforce those norms against states for their failure to enforce those norms against private actors.(114)

Sexual minorities, however, have only sporadically obtained even this nominal normative recognition of their most fundamental human rights to bodily integrity and equal protection of the laws.(115) In obtaining even this limited recognition, sexual minorities face several obstacles. The first obstacle is that, unlike the case with women, the very existence of sexual minorities in many cultures is questioned, or is seen as an import from the West.(116) The second obstacle is that sexual minorities, unlike women, are frequently considered a criminal class per se in many countries.(117) As such, the right of sexual minorities to equal protection under the laws in the most elemental sense is frequently tenuous at best. Thus, in order to obtain recognition of even their most basic human right to equal protection from violence under national and international law, sexual minorities are faced with the multiple tasks of establishing their very existence, and establishing the recognition of their right, on the most basic normative level, to bodily integrity and equal protection. To do this, it is incumbent upon sexual minorities to demonstrate, through cross-cultural documentation, that sexual minorities are a global phenomenon, of relevance to all cultures and societies, and thus an appropriate object of regulation by international law. The accomplishment of this task is necessary to rebut cultural relativist arguments against providing protection for sexual minorities under international law.

Establishing the universal existence of sexual minorities is an empirical task. Establishing that the fundamental human rights of sexual minorities, and those of women, should not be abridged is both normative and legal and involves establishing that sexual minorities should be entitled to international law's "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family [as] the foundation of freedom, justice and peace in the world."(118) This Article will address these normative questions in the two subsections that follow, which discuss the right to privacy and the right to equal protection of the law.

Overcoming the first obstacle, establishing the cross-cultural existence of sexual minorities, is critical because of the status of law itself as the culturally-specific expression of the traditions and norms of a particularly society.(119) It is difficult to engage in comparative legal analysis without exploring the differing cultural assumptions underlying each country's legal approach to a specific issue.(120) Furthermore, to the extent acceptance of sexual minorities as equal members of society is not specific to a small number of countries, the justification for extending the protections of international law to sexual minorities becomes more compelling.

Thus, in order for sexual minority rights not to be dismissed as a response to a historically and geographically unique phenomenon of little relevance to the rest of the world, it is important to recognize the substantial evidence which exists that individuals with predominately homosexual, transgendered, or bisexual inclinations exist in every society, whether or not these individuals are able to express those inclinations.(121)

Indeed, it may be homophobia, rather than homosexuality that is a product of Western mores. Some historians and legal commentators have argued that much of the contemporary hostility toward sexual minorities in non-Western nations is a direct result of Western colonialism, Judeo-Christian-Islamic homophobia, and anti-sexuality in general, none of which are rooted in indigenous tradition.(122) For example, Tielman & Hammelburg argue that:

From a historical perspective, the English legislation against

homosexuality has had (and unfortunately still has) appalling

consequences for the legal position of homosexual men, and,

to a lesser extent, lesbians in the former British colonies.

The effects of the former French, Dutch, Spanish, and

Portuguese colonial legislation against homosexuality are less

severe. In general, nevertheless, Christian-based homophobia

has damaged many cultures in which sexual contacts and

relationships between men and between women used to be

tolerated or even accepted. Recently, Christian puritanism

from the West, mixed with Islamic fundamentalism, has

attacked homosexuality, even in countries where same-sex

contacts had usually been tolerated.(123)

The politicalization of gay/lesbian identity in response to society's homophobia may be predominately a modern phenomenon, but no more so than the concepts of individual human rights and women's rights, that have also developed relatively recently as a response to widespread societal human rights violations. In this sense, any effort to separate the political struggle for sexual minority rights from the larger battle for the rights of other historically oppressed minorities, misses the fact that the evolution of the political identity of sexual minorities is more similar to the evolution of the political identities of other minorities than may be immediately apparent. Nevertheless, to the extent that people inaccurately perceive homosexuality and sexual minorities in general as strictly products of contemporary Western society, they are unlikely to accept that sexual minorities deserve protection in their legal system or in the legal system of the international community of which they are a part.

The difficulties in accomplishing the first task are illustrated by the views vividly expressed by Zimbabwean President Robert Mugabe in his response to a letter from seventy U.S. Congress-persons criticizing his anti-gay tirade at the International Book Fair in Harare, Zimbabwe. President Mugabe told the Americans to keep their "sodomy, bestiality, stupid and foolish ways to themselves.... Let the gays be gays in the United States and Europe.... But they shall be sad people here."(124) Ironically, members of the Harare sexual minority community claim that of the 800 or so men in Harare's "open" gay society, most are black.(125) Furthermore, there is a word in Zimbabwe's indigenous Shona language for homosexuality: ngochani.(126)

Similarly, many Western advocates of anti-homosexual laws in the West argue that homosexuality and sexual minorities are recent aberrational products of contemporary Western society.(127) For these individuals, the work by Yale University historian John Boswell, demonstrating the existence of same-sex unions in pre-modern Christian Europe, has proven to be very unsettling.(128)

One of the limitations in documenting the human rights situation of sexual minorities in certain countries is that the greater the oppression of sexual minorities, the greater the invisibility of sexual minorities. As the Third World Region statement at the 1985 Nairobi World Conference on Women, Non-Governmental Organizations (NGOs) Forum noted:

If it seems that lesbianism is confined to white western

women, it is often because Third World lesbians and lesbians

of color come up against more obstacles to our visibility. . .

But this silence has to be seen as one more aspect of women's

sexual repression and not as a conclusion that lesbianism

doesn't concern us . . . .(129)

A. The Opportunities and Limitations of the Right to Privacy in Protecting Women and Sexual Minorities from Gendered Violence

There are many different kinds of privacy rights. The right to privacy may apply to spatial areas where the government is prohibited from intruding, such as the home, the bedroom, or a person's body.(130) The right to privacy may also apply to intangibles with which the government or other individuals are prohibited from interfering, such as one's reputation or right to marry and found a family.(131) Finally, the right to privacy may encompass certain protected activities, such as oral communication or sexual activities.(132)

The great majority of the world's countries have incorporated privacy rights into their domestic law,(133) although how that right is interpreted has varied enormously from one jurisdiction to another.

The right to privacy has been a central battleground in the battle of women to control their own bodies. The right to privacy, however, has not had the same implications for women's freedom from violence as it has had for sexual minorities,(134) particularly male sexual minorities. In part, this results because of the right to privacy's genesis as a right to be free from interference by the state. As noted above, (135) with some very horrendous exceptions, (136) women do not primarily suffer violence at the hands of the state. In fact, many women do not enjoy any kind of legal relationship with the state.(137) The right to privacy does little, therefore, to protect women from private violence since it is in the private sector that women suffer such violence.

It could be argued that the right to privacy has always existed with respect to a man's control of his family. What a man does in the privacy of his own home has traditionally not been a concern of the state, unless, of course, a man in the private sphere violates the very gender norms that maintain male supremacy.(138)

What distinguishes the contemporary right to privacy found in both national and international law is the theoretical protection of the privacy rights of all individuals afforded by international law. It is, after all, the distinguishing characteristic of human rights law that it establishes a protective regime for all individuals rather than just for select individuals occupying particular social roles, such as ruler, parent, employer, or employee.

For sexual minorities, however, the right to privacy has been a principal instrument for eliminating laws which criminalize homosexual and/or transgendered behavior--defined for the purposes of this Article as "sodomy statutes."(139) Sodomy statutes operate, however, to criminalize much more than same-gender sexual relations. These statutes operate to justify a wide range of otherwise

impermissible violations of human rights.(140) Furthermore, to the extent sodomy statutes "criminalize" sexual minorities, the statutes engender violence against sexual minorities by state actors(141) and strip them of any claim to equal protection against violence perpetrated against them. On April 6, 1995, the Human Rights Committee expressed its concern over U.S. noncompliance with the covenant in its comments(142) on the initial report by the United States to the Committee:(143)

The Committee is concerned at the serious infringement of

private life in some States which classify as a criminal offence

sexual relations between consenting adult partners of the

same sex carried out in private, and the consequences thereof

for their enjoyment of other human rights without

discrimination.(144)

Accordingly, the right to privacy has become one of the prerequisite rights to the attainment of other basic human rights for sexual minorities.(145)

Whether those same countries extend that right to their sexual minorities, however, varies dramatically from country to country and in terms of the specific privacy right in question.

In Europe, the European Court of Human Rights has effectively extended the right to privacy to private, consensual homosexual activity to every member country of the Council of Europe,(146) although Romania has still failed to comply with its obligations under the European Convention. The Council of Europe asked Romania to eliminate its sodomy law before its admittance to the Council, although the Council did not make its elimination a strict condition of joining.(147) Most other countries in Europe have legalized consensual, private homosexual activities, with the exception of a few countries of the former Soviet Union.(148) Lithuania became the last Baltic state to abolish its ban on homosexual sex. Following the Baltic States and Ukraine, Russia repealed its law banning consensual sex between men on April 29, 1993.(149) Nevertheless, individuals in Russia continue to remain imprisoned for consensual homosexual activities.(150)

In the Americas, the only countries with sodomy laws are: the Bahamas, Chile, Ecuador, Jamaica, Nicaragua, Trinidad and Tobago, and the United States.(151) In the United States, the Supreme Court has refused to extend the right to privacy to consensual homosexual (152) although courts in Kentucky,(153) Texas,(154) and Tennessee(166) have recognized just such a right in decisions based on their own state constitutions.(156)

In one example of just how out of step with international law and norms the United States is, the Montana State Senate passed a bill in March, 1995 by a 41 to 8 vote that would have required people convicted of violating the state sodomy law to register in perpetuity "with [the] police along with convicted rapists, child molesters and murderers."(157) One Republican state senator declared "that homosexual acts `were even worse than a violent sexual act."`(158) After a national outcry, in part from families of rape victims, who were offended at the state senator's comments, the State Senate unanimously voted to remove the clause on homosexual registration from the bill.(159)

In Oceania, New Zealand has eliminated its sodomy law, as has every Australian state except Tasmania.(160) Nevertheless, the Cook Islands, Fiji, Niue, Papua New Guinea, the Solomon Islands, and Western Samoa are among the countries which still retain their sodomy laws from the colonial period.(161) In Asia, the situation is considerably more dismal, with a lengthy list of countries with sodomy laws.(162) In Africa, the situation is similarly bleak.(163) In Asia and Africa the extensive list of countries with sodomy laws can be traced back to the lingering effects of colonialism and Christianity, Islam, and Marxist-Leninism.(164)

The extensive list of countries with sodomy laws, and the massive deprivation of human rights which accompany such laws, makes it evident that the criminalization of consensual sex remains one of the most basic barriers to gay and lesbian human rights in many countries in the world, including the human right to be free from violence.

Progress is, however, being made under national and international law. For example, as discussed above, the right to privacy contained in the European Convention has been interpreted by the European Court of Human Rights as prohibiting criminalization of private, consensual homosexual activity.(165) The U.N. Human Rights Committee, the body charged with interpreting the International Covenant on Civil and Political Rights, also unanimously held the Australian state of Tasmania's law which criminalized consensual sodomy to be violative of the right to privacy and non-discrimination contained in the Covenant.(166)

At the October 4, 1993 plenary of the Implementation Meeting on Human Dimension Issues for the Organization for Security and Cooperation in Europe, the head of the Dutch delegation stated:

Tolerance plays also an important part in the attitude of the state towards

persons of different sexual belonging. In the last years, it must be stated

with satisfaction, a number of positive developments have taken place in

this field in various states, such as the adoption of regulations prohibiting

discrimination against homosexuals or the abolishment of laws and regulations

forbidding homosexual acts. But in other countries the prohibition of these

acts, even to the extent of putting people on trial, are continuing. I would

like to recall that the European Court of Human Rights in Strasbourg has on

several occasions decided that a ban of homosexual activities contradicts

with stipulations in the European Convention on Human Rights, as interfering

with the right to privacy. In our view also the CSCE documents and principles

make clear that discrimination of homosexuals is contrary to the fundamental

human rights and freedoms and we call upon all those states where such a

discrimination stir] exists to change their laws and regulations

accordingly.(167)

Finally, some, but not all, NGOs have begun addressing the imprisonment of sexual minorities solely on the basis of their orientation as a violation of those individuals' fundamental human rights.(168)

B. The Gendered Context of Equal Protection Under the Law

The twin principles of equal protection and non-discrimination are present in all international human rights instruments and the great majority of national constitutions.(169) Equal protection is the principle that all individuals have the right to have the laws of a specific jurisdiction apply to them in the same manner as those laws are applied to other similarly situated individuals. Nondiscrimination is the somewhat broader principle that neither private parties nor instrumentalities of the state shall discriminate among individuals based upon arbitrary criteria.

With respect to women, international human rights norms and most, although certainly not all, national legal norms at least nominally endorse equal protection for women. In fact, this promise of protection rings hollow in the context of domestic violence and other societal crimes such as rape and domestic abuse, where the state remains passive in the face of widespread gendered violence which is anything but "private." Furthermore, as noted by Natlie Hevener Kaufman and Stefanie A. Lindquist:

At the core of the rights issue, in both national and international law,

is the fact that legal rights do not stand alone; they are embedded in

the dominant social and cultural milieu [thus] the interpretation of the

legal "right" becomes subject to the dominant cultural paradigm--an

engendered, socially constructed world, where women's experience

is seldom recognized.(170)

In other words, although international law, and most national law, recognizes the right of women to equal protection, that right is rendered meaningless if society is structured in such a manner that the violation of women's rights occurs outside of the public sphere, i.e., within those aspects of civil life for which the state has traditionally not been held accountable under international law.(171) As Katherine Culliton argues:

[T]he state's failure to prosecute domestic violence is a

violation of a person's fundamental human right to physical

integrity even without the element of gender bias. However,

the element of inequality before the law strengthens the

argument that fundamental human rights have been violated

not only because gender discrimination adds another human

rights violation, but also because the victim's suffering

becomes part of a systematic failure on the part of the state

to protect women's rights with respect to a particular class of

human rights violations (172)

With respect to sexual minorities, the principal battle is more basic: to obtain acceptance, as a norm of international law, that sexual minorities are entitled to equal protection of the law.

There are at least three situations in which the rights of sexual minorities to equal protection and non-discrimination are violated. The first is when a state makes certain acts between members of the same sex illegal while permitting the same acts between heterosexuals.(173) The second occurs when certain rights are granted to individuals or withheld from individuals on the basis of their sexual orientation.(174) The third occurs when a state discriminates against sexual minorities in its application of a law which is facially neutral in its application to heterosexuals or homosexuals.

In a sense, the struggle for applying international human rights law to sexual minorities is, at its core, a question of equal protection and non-discrimination. It consists of applying the entire spectrum of international human rights law to sexual minorities on an equal basis as that law is applied to individuals who conform to gender roles--socially and sexually.(175)

An important point to make regarding the right to equal protection and non-discrimination under international law--and most national law--is that the instruments are worded so that almost every right explicitly applies to "every person" or "all people."(176) Similarly, prohibitory provisions are worded so that "no one" shall be subject to the relevant human rights violations.(177) In addition, the principal international human rights instruments contain provisions explicitly granting equal protection and the right to non-discrimination to "all people."(178) Although sexual minorities are generally not included in the wording of those provisions, the breadth of the wording indicates that the categories listed as protected are not exclusive and that, indeed, the provisions should be interpreted as expansively as possible.(179)

On April 4, 1994, the United Nations Human Rights Committee, in a unanimous ruling, concluded that Tasmania's statute criminalizing homosexual relations violated Australia's obligations under articles 2 (non-discrimination) and 17 (right to privacy) of the ICCPR.(180) The Committee did not rule on article 26 of the ICCPR (equal protection) because it had "found a violation of Mr. Toonen's rights under articles 17(1) and 2(1) of the Covenant requiring the repeal of the offending law . "(181)

Several constitutions explicitly prohibit discrimination based on sexual orientation.(182) Some jurisdictions have interpreted the general equal protection and/or non-discrimination wording in their respective constitutions to include sexual orientation. In Canada, the Supreme Court affirmed that the anti-discrimination provisions of the Canadian Charter of Rights and Freedoms (section 15) applied to discrimination based on sexual-orientation.(183)

Legislation providing explicit national statutory guarantees of non-discrimination based on sexual orientation has been implemented in Denmark, Finland, France, New Zealand, The Netherlands, Norway, and some of the states and provinces of Australia, Brazil, Canada, and the United States.(184)

The ruling by the U.N. Human Rights Committee in the Toonen case(185) marks the first time that an international court has ruled a state's law invalid on the basis that it affected the rights of sexual minorities to non-discrimination.

There are also efforts underway by the Council of Europe and the European Union to change European law to prevent discrimination. In 1981, the Parliamentary Assembly of the Council of Europe adopted Recommendation 924 and Resolution 766 condemning discrimination against homosexuals.(186)

In February 1994, as a result of intensive lobbying by national gay and lesbian organizations and the International Lesbian and Gay Association, the European Parliament of the European Union approved the Resolution on Equal Rights for Homosexuals and Lesbians in the European Community.(187) This resolution:

5. Calls on the Member States to abolish all legal provisions which criminalize and discriminate against sexual activities between persons of the same sex;

6. Calls for the same age of consent to apply to homosexual and heterosexual activities alike;

7. Calls for an end to the unequal treatment of persons with a homosexual orientation under the legal and administrative provisions of the social security system and where social benefits, adoption law, laws on inheritance and housing and criminal law and all related legal provisions are concerned;

8. Calls on the United Kingdom to abolish its discriminatory provisions to stem the supposed propagation of homosexuality and thus to restore freedom of opinion, the press, information, science and art for homosexual citizens and in relation to the subject of homosexuality and calls upon all Member States to respect such rights to freedom of opinion in the future;

. . .

10. Calls upon the Member States, together with the national lesbian and homosexual organizations, to take measures and initiate campaigns to combat all forms of social discrimination against homosexuals;

11. Recommends that Member States take steps to ensure that homosexual women's and men's social cultural organizations have access to national funds on the same basis as other social and cultural organizations, that applications are judged according to the same criteria as applications from other organizations and that they are not disadvantaged by the fact that they are organizations for

homosexual women or men.(188)

The Resolution further requests that the Commission of the European Community on Equal Rights for Lesbians and Gay Men prepare a Recommendation providing for an end to

the barring of lesbians and homosexual couples from marriage or

from an equivalent legal framework, and should guarantee the full

rights and benefits of marriage, allowing the registration of

partnerships, [and ending] any restriction on the right of lesbians and

homosexuals to be parents or to adopt or foster children.(189)

While participating in a meeting of the Organization for Security and Cooperation in Europe,(190) the head of the Norwegian delegation stated in the opening plenary on September 28, 1993:

An active governmental approach to combat discrimination of

vulnerable groups is needed. Speaking of tolerance, Mr. Chairman,

let me inform you that Norway has been preoccupied of [sic]

securing equal rights for persons of different sexual belonging [sic].

To this end we have introduced legal protection against discrimination

and will urge other states to take similar steps .... (191)

International law has made significant progress in recognizing the rights of sexual minorities to freedom from imprisonment for engaging in consensual sexual relations and from arbitrary discrimination.(192) lb the extent these decisions by international legal bodies eliminate the justification for violence by the state against the bodily integrity of sexual minorities, and eliminate the justification for state deprivation of freedom, they are to be applauded. To the extent, however, such decisions only help to eliminate violations of sexual minority human rights by the state, their usefulness is limited for the reasons discussed in this article. For sexual minorities, as for women, a principal obstacle to the realization of the guarantee of equal protection from violence is the reluctance of international law to recognize "private" gendered violence as an appropriate realm for regulation by international law.

V. PROGRESS IN PIERCING THE PUBLIC/PRIVATE DISTINCTION IN NATIONAL AND INTERNATIONAL LAW

International and national law are beginning to make progress in piercing the state/non-state distinction.(193) International instruments, such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Convention on the Elimination of All Forms of Discrimination Against Women, impose affirmative obligations on states to ensure the equality of women and men in various aspects of family life.(194) Moreover, the international jurisprudence associated with these instruments has increasingly recognized "a duty on the part of the state to protect human beings against violations of their fundamental rights," whether such violations are perpetrated by state or private actors.(195)

A. Hate Crime

Some jurisdictions are making progress in combatting gendered "private" violence with legislation imposing harsher penalties for crimes motivated by hatred towards women and sexual minorities. For example, in June of 1995, Canada passed Bill C-41, a hate crimes bill, which requires that hate motivation be treated by judges as an aggravating factor in sentencing a person convicted of a crime.(196) As noted by various commentators, "[t]he bill allows harsher sentences for crimes motivated by hate towards a victim's race, religion, language, color, gender, age, mental or physical disability or sexual orientation."(197) To some extent, this was already the case in Canada since the Ontario Court of Appeal ruled that harsher sentences are appropriate if the crime was motivated by hatred of the personal characteristics of the victim, such as, inter alia, gender or sexual orientation.(198)

In the United States, federal law requires the Attorney General to compile data on crimes motivated by hatred against certain groups, including women and sexual minorities.(199) Lest this relatively timid step against gay bashing be interpreted as an endorsement of homosexuality, the Act states that "[n]othing in this Act shall be construed, nor shall any funds appropriated to carry out the purpose of this Act be used, to promote or encourage homosexuality."(200) A number of U.S. states also have passed legislation that requires harsher penalties for crimes motivated by hate and/or requires compilation of data on hate crimes.(201) In addition, certain jurisdictions such as New Jersey and the District of Columbia provide for civil liability (i.e., monetary damages and injunctive relief for the victim of the crime) for intimidation of another person on the basis of, inter alia, sexual orientation.(202) Those jurisdictions also provide for liability in certain circumstances for the parents of minors committing such acts.(203)

As noted above, in February of 1994, in response to increased incidents of "gay bashing," the European Parliament passed the Resolution on Equal Rights for Homosexua'ls and Lesbians in the European Community,(204) which., among other things "[c]alls on the Member States, together with the national lesbian and homosexual organizations to take measures and initiate campaigns against the increasing acts of violence perpetrated against homosexuals and to ensure prosecution of the perpetrators of these acts of violence .... (205)

B. Hate Speech

In recognition of the often close relationship between expression and hate violence, and the widespread incidents of hate expression toward sexual minorities,(206) at least some forms of verbal abuse against lesbians and gay men have been made criminal offenses in Denmark, Ireland, Norway, and the Netherlands.(207) The Irish Prohibition of Incitement to Hatred Act 1989 makes it a "criminal offence to incite hatred on the basis of sexual orientation.(208) Similarly as discussed above, article 266(b) of the Danish Penal Code makes it illegal "to utter publicly or deliberately, for the dissemination in a wider circle a statement or another remark, by which a group of people a:re threatened, derided or humiliated on account of their . . . sexual orientation." (209)

In 1981, Norway amended its penal code to make it a criminal offense to make "grossly" insulting statements about people because of their "homosexual disposition, lifestyle or orientation."(210) In urging passage of the Act, the Ministry of Justice stated to the Storting (Parliament) that:

Homosexuals are a vulnerable group. Surveys have shown that

considered as a group, homosexuals are liable to suffer as a result of

collisions with society's norms and values. One way of compensating

for this is to make a stand in legal terms against the humiliation of

homosexuals. Such a stand, in the form of criminal law provisions,

will protect the integrity of individual homosexuals.(211)

This provision has been tested once in court. In 1983, a Norwegian clergyman made certain statements in a local radio broadcast.(212) The lower court ruled in favor of the clergyman.(213) The case was appealed to the Norwegian Supreme Court, where the majority found the remarks "unduly insulting" to homosexuals and consequently subject to section 135(a) of the Penal Code.(214)

In the United States, courts have taken a very dim new of prohibitions of "hate speech" and have struck down statutes that criminalize hateful expressive conduct such as cross-burning on private property that would not otherwise have been illegal.(215) Courts, however, have tolerated laws, such as those discussed in the previous subsection, that provide penalty enhancements for crimes shown to be motivated by hatred toward a group of people, including those defined by their sexual orientation.(216)

The principal international human rights treaties unanimously require governments to prohibit "hate speech" based on race, religion, or nationality. For example, the ICCPR states that "[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."(217) Article 13, paragraph 5 of the American Convention contains the broadest prohibition: "Any. . . advocacy of national, racial, or religious hatred that constitute incitements to lawless violence or to any other similar illegal action against any person or group of persons on any grounds including those of race, color, religion, language, or national origin shall be considered as offenses punishable by law."(218)

The clause "on any grounds including" would seem to provide a basis under international treaty law for protecting women and sexual minorities from hate expression. To date, neither the Inter-American Commission nor the Inter-American Court of Human Rights has had occasion to rule whether the Convention grants such protection.(219)

Although the European Convention does not contain an explicit prohibition of hate speech, cases interpreting the Convention have held that such a prohibition is implicit in Articles XVII and XIV(.220)

Because international treaties are unequivocal in their condemnation of hate speech,(221) international law provides greater authority for limiting such expression than does, for example, United States jurisprudence. From a comparative legal perspective, however, many countries' laws already prohibit hate expression,(222) so the effect of international law on those countries' existing law may be limited. Nevertheless, to the extent international law extends protection against hate speech to sexual minorities, it may encourage individual countries to follow suit.

These actions undertaken by jurisdictions to affirmatively protect their sexual minorities from threats to bodily integrity are a recognition that a simple obligation on the part of the state to not threaten the bodily integrity of its citizens who are sexual minorities is insufficient. Rather, the creation of societal norms repudiating hatred may be required to effectively combat "private" violence against certain groups.

C. Recognition by National Governments and International Law of Private Gendered Violence Against Sexual Minorities as Grounds for asylum

The right to asylum is of particular importance when considering the international human rights of sexual minorities since sexual minorities frequently reside in countries that persecute them. In almost no other area of international human rights law is the dialectic between national and international law so pronounced. Frequently, national asylum regulations, including those of the United States, (223) are based directly on the wording of, and criteria contained in, the principal international asylum instruments.(224)

The most relevant international human rights documents regarding the right to asylum are the 1951 U.N. Convention Relating to the Status of Refugees(225) and the 1967 Protocol Relating to the Status of Refugees.(226) The Convention and Protocol define a "refugee" as someone who

owing to a 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 such fear, is unwilling to avail himself of the protection of that country ....(227)

According to the U.N. High Commissioner for Refugees:

Under the 1951 Convention and 1967 Protocol, a person seeking refugee status must demonstrate that: (1) he or she is outside his or her country of nationality or former habitual residence; (2) he or she fear persecution (the "subjective element"); (3) such fear of persecution is well-founded (the "objective element"); (4) such persecution is "for reasons of race, religion, nationality, membership in a particular social group, or political opinion"; and (5) "owing to such fear, he or she does not wish to return to his or her country of nationality or former habitual residence."(228)

The right to asylum is also contained in other human rights instruments.(229)

Most "industrialized" nations recognize the right to asylum in accordance with international law, although few countries have constitutional provisions explicitly granting such a right.(230) In this sense the right to asylum, more than other fundamental human rights, is truly a product of international law, although the manner by which countries apply the right varies substantially from country to country.(231) In the United States, which has largely incorporated the international standard (at least in theory), there is virtually no divergence between the two standards, although there has been in the application of the standards. The United States Supreme Court has determined that, although the U.N.'s Handbook on Procedures and Criteria for Determining Refugee Status is not legally binding on U.S. officials, it nevertheless "provides significant guidance in construing the [1967] Protocol" and "in giving content to the obligations" established therein.(232)

Once a country's court characterizes an individual as a "refugee" under the Convention, he or she is entitled to certain rights and protections, usually including the right not to be deported to their country of origin.(233)

Most cases in which the meaning of persecution has been considered are those of individuals suffering violence or threatened violence directly by the hand of the state.(234) There is evidence, however, of progress by international law and some countries in recognizing the right to asylum based on these kinds of gender-specific abuses.(235)

New immigration rules in Canada, the U.S., and elsewhere increasingly recognize the unique forms of gendered human rights abuses committed against women and sexual minorities by "nonstate" actors. The U.S. Immigration and Naturalization Service now recognizes "rape, domestic abuse and other forms of violence against women [by non-state actors] as potential grounds for political asylum."(236)

With respect to sexual minorities, the United Nation's High Commissioner for Refugees has made substantial progress in recognizing persecution based on sexual orientation as a legitimate ground for asylum,(237) as have a growing number of countries, including the United States. Individuals have been granted asylum based on sexual orientation in Australia, Belgium, Canada, Finland, Germany, Sweden, the Netherlands, and the United States.(238) For the purposes of this Article, the most important cases are those that have recognized "persecution" against sexual minorities from countries in which sodomy laws, or other laws specifically targeting sexual minorities, do not exist. On December 1, 1994, Australia granted asylum to a gay man from Colombia, a country without a sodomy law.(239) In 1992, the Canadian Immigration and Refugee Board granted asylum to Jorge Alberto Inaudi, an Argentinean gay man, finding that homosexuals constituted a "particular social group" within the refugee definition.(240) In that case, the Board found homosexuality to be an immutable characteristic and also determined that "even if homosexuality were a voluntary condition it is one so fundamental to a person's identity that a claimant ought not to be compelled to change it."(241)

On February 16, 1995, the Canadian Immigration and Refugee Board determined that a transgendered individual from Iran qualified as a "Convention refugee" based on his political opinion.(242) The board determined that:

After considering the totality of the evidence in this case, the panel found that there is a good possibility that the claimant, as a

transsexual, would come to the attention of the Iranian authorities

should he be returned to Iran. The documentary evidence is replete

with evidence of how the restrictive Iranian regime views and

represses any sexual expression which is contrary to its own

standard. Such behavior and expression is perceived by the

authorities as being a defiant

demonstration of political opposition to the current regime.... Having

so found, it becomes redundant and unnecessary in this case to

determine the issue of whether the claimant is also a Convention

refugee because of his membership in a particular social group.(243)

Canada has also, on three different occasions, granted asylum based on sexual minority status to individuals from Venezuela.(244)

In the United States, the government is also increasingly granting refugee status to sexual minorities, including those from countries without sodomy laws. Remarkably, asylum has been granted on the basis of, inter alia, widespread violence suffered by sexual minorities at the hands of "non-state" or "quasi-state" actors. On March 18, 1994, for the first time in the United States, an INS asylum officer (as opposed to an immigration judge) granted asylum to a Mexican gay man (Ariel Da Silva, aka Jose Garcia) based on persecution because of sexual orientation and HIV status.(245) Subsequently, the INS has granted asylum to, among others, gay men from Turkey (October 18, 1994), Colombia (November 17, 1994), Venezuela (February 23, 1996), Singapore (March 10, 1995), Eritrea (March 31, 1995), and Honduras (April 19, 1995).(246) In July 1993, Immigration Judge Philip Leadbetter granted asylum to Marcelo Tenorio, a Brazilian gay man, citing evidence that "anti-gay groups appear to be prevalent in Brazilian society and continue to commit violence against homosexuals, with little official investigation and few criminal charges being brought against the perpetrators."(247)

The truly remarkable increase in successful asylum cases based on state and private violence against sexual minorities should inevitably force those countries granting asylum to examine their own record with respect to state passivity in the face of widespread private violence against sexual minorities. Similarly, each grant of asylum focuses attention on the human rights records of those countries from which the asylum seekers flee. In this sense, the developments with respect to the right of asylum are one of the most vivid illustrations of the dialectic between international law and national law and practice.

VI. CONCLUSION

Understanding society's violent reaction to gender nonconformity by women and sexual minorities helps to illustrate that gendered violence is not the result of isolated, irrational reactions by individual, maladjusted males to private, personal affronts, but rather is a predictable response by members of a dominant class to perceived threats to their dominant position. In that sense, "private" violence against women and sexual minorities, is profoundly public, political, and systemic.

This Article's discussion of those areas of the law where oppression of women and sexual minorities is not treated in a parallel manner, suggests that there are concrete ways in which an understanding of the common roots of gendered violence can still advance the interests of both groups to be free from violence. For example, some national hate crime legislation defines crimes based on sexual orientation, but not on gender, as hate crimes. Frequently, this reflects a reluctance to view violence against women as a manifestation of generalized societal misogeny. It may be difficult to view violence against women as systemic and based on "us/them" hatred because women are us. To the extent sexual minorities are clearly viewed as a "them" group, society may more easily view violence against them as akin to other "us-them" forms of hatred such as racial bigotry. To the extent violence against sexual minorities is based on the same notions of male supremacy as is misogyny, it creates a conceptual bridge between traditional racial, ethnic, and religious concepts of bigotry and gendered bigotry. Sexual minorities assist in this bridge function as members of a clearly "them" group and as a group which is subject to gendered oppression. To the extent we can see gendered violence against women as rooted in the same institutional opposition to gender nonconformity that the law more transparently exhibits towards sexual minorities, we can better address violence against women and sexual minorities.

Finally, the discussion of equal protection and privacy in this Article illustrates that these legal concepts are an important, but narrow and incomplete, part of the solution to systemic private violence against women and sexual minorities. Until equal protection norms provide true equal protection against all types of violence, whether public or private, the legal concept remains a hollow legal construct based upon a narrow, male dominated view of society's obligations. Similarly, the right to privacy remains a meaningless right for women until it provides more than the simple right to be free from state interference in family relations. Until the right to privacy is actually applied to protect women from state or "private" interference with their decisions over their own bodies and lives, the right to privacy will remain only a male generated legal construct. We can hope that the growing acceptance of state responsibility for "private" acts of hate violence against women and sexual minorities, under national and international law, will assist in empowering societal institutions to fight these kinds of systemic violence.

(1) As used in this Article, the term "sexual minorities" includes all individuals who have traditionally been distinguished by societies because of their sexual orientation, inclination, behavior, or nonconformity with gender roles or identity. The term "sex" will refer to the

biological designation of an individual as a male or female (as genitally defined) and the term "gender" will refer to the socially constructed roles of "female," "male," or combination thereof. The term "homosexual" (when used as an adjective) or "homosexuality" will refer to same-sex desire or sexual activity by either sex, whether a single instance or over a lifetime. When used as a noun, however, "homosexual" will refer to an individual of either sex with a predominant or exclusive attraction to members of the same sex. The terms "gay" or "lesbian" will be used to refer to those individuals who have adopted a conscious social identity reflecting a desire to enter into predominantly or exclusively same-sex relationships. The term "bisexual" will refer to individuals who engage in, or have an inclination to engage in, both heterosexual and homosexual relations. The term "transgenderism" will refer to activity or identity which conflicts with established societal norms of gender construction, such as transvestism and transsexualism. The San Francisco Human Rights Commission, in its report Investigation into Discrimination Against Transgendered People, found:

2. That the term Transgender is used as an umbrella term that includes male and female cross dressers, transvestites, female and male impersonators, pre-operative and postoperative transsexuals, and transsexuals who choose not to have genital reconstruction, and all persons whose perceived gender or anatomic sex may conflict with their gender expression, such as masculine-appearing women and feminine-appearing men.

3.... Gender identity is the deeply felt knowledge of an individual that he or she is male or female; in transgendered persons, the gender identity and the anatomic sex may not be in alignment.... It is the expression of gender identity that results in discrimination because that expression is perceived as conflicting with the expectations placed upon the individual solely because of the form of his or her body, particularly the genitals.

JAMISON GREEN, S.F. HUMAN RIGHTS COMM'N, INVESTIGATION INVESTIGATION DISCRIMINATION AGAINST TRANSGENDERED PEOPLE ch. 4 (Sept. 1994).

(2) The parallel use of "women" and "sexual minorities" should not in any way imply that the two categories are mutually exclusive. The terms are used separately only when relevant for indicating the different consequences which flow from an individual's membership in that particular class. Clearly, a very different set of consequences arise when individuals are members of both classes, and this Article attempts to address the issues raised in at least some of the those instances.

(3) Even when women do conform to gender role expectations, they may suffer domestic violence because of a societal assumption of male dominance; i.e., the belief, on a conscious or unconscious level, in a man's right to commit violence against his female partner.

(4) See Dorothy Q. Thomas & Michele E. Beasley, Domestic Violence as a Human Rights Issue, 58 ALB. L. REV. 1119 (1996) [hereinafter Thomas & Beasley]. Thomas and Beasley's article was previously published in Human Rights Quarterly in substantially the same form. See Dorothy Q. Thomas & Michele E. Beasley, Esq., Domestic Violence as a Human Rights Issue, 16 HUM. RTS. Q. 36 (1993).

(5) Thomas & Beasley, supra note 4, at 1122.

(6) See id.

(7) See id.

(8) See generally Donna Sullivan, The Public/Private Distinction in International Human Rights Law, in WOMEN'S RIGHTS HUMAN RIGHTS 126 (Julie Peters & Andrea Wolper eds., 1995) (discussing the distinctions between and consequences of public and private violence against women and sexual minorities).

(9) See Jennifer gingham Hull, Battered, Raped and Veiled: The New Sanctuary Seekers, L.A. TIMES, NOV. 20, 1994, at 26, available in 1996 WL 2376693.

Because most asylum applicants are male, persecution has been defined almost

solely by men's experiences, which tend to involve public activities such as

organizing and demonstrating against the government. While women participate

in such activities, they also suffer abuses that men do not, often at the

hands of people with no official government connection. Their husbands abuse

them and authorities deny help. They are raped or beaten by soldiers who want

to terrorize communities or intimidate the women's politically active

husbands . . . [or] they are abused in the name of custom--arranged

marriages, genital mutilation, bride burnings. However, unlike the

traditional public acts of oppression, many of these practices are

performed not by the state, or an invading army, but by the girls' own

family--mothers, aunts, sisters. They have thus been viewed as personal

or cultural rather than as political matters warranting asylum.

Id.

(10) Julie Mertus, State Discriminatory Family Law and Customary Abuses, in WOMEN'S RIGHTS HUMAN RIGHTS, supra note 8, at 135, 141.

(11) Id. at 140-41 (citing James Brooke, Honor Killing of Wives is Outlawed in Brazil, N.Y. TIMES, Mar. 29, 1991, at B16; Magdala Velasquez Toro, Columbia: Legal Gains for Women, in EMPOWERMENT AND THE LAW: STRATEGIES OF THIRD WORLD WOMEN 71, 73 (Margaret Schuler ed., 1986)).

(12) See HUMAN RIGHTS WATCH, HUMAN RIGHTS WATCH WORLD REPORT: 1997, at 339 (1996).

(13) See id.

(14) Thomas & Beasley, supra note 4, at 1121 (footnotes omitted).

(15) See Mertus, supra note 10, at 136. The author notes that:

Women's obligations in societies are often defined in terms of their

obligations in the family. By prescribing women's role in society--as

reproducer, producer, or a combination of the two--and by regulating

women's access to wealth--particularly the rights to property ownership and

inheritance--family laws profoundly affect women's social and

economic status, influencing everything from women's access to education and

health care to their rates of fertility and mortality.

Id.

(16) For further discussion of the right to privacy, see infra Part IV. A.

(17) Sullivan, supra note 8, at 127.

(18) See James D. Wilets, International Human Rights Law and Sexual Orientation, 18 HASTINGS INT'L & COMP. L. REV. 1,66 n.295 (1994) (listing countries which criminalize private, consensual same-sex sodomy).

(19) The extent to which the assumption that society is an agent of male domination is valid may vary somewhat among legal jurisdictions, but there is considerable evidence that the consequences of this historical reality have not yet disappeared from any society. See, e.g., Ngaire Naffine, Sexing the Subject (of Law), in PUBLIC AND PRIVATE 18 (Margaret Thornton ed., 1995).

(20) See Charlotte Bunch, Transforming Human Rights from a Feminist Perspective, in WOMEN'S RIGHTS HUMAN RIGHTS, supra note 8, at 11, 16 (implying that no one "demands government accountability [for] [f]emale infanticide and malnutrition").

(21) See Nahid Toubia, Female Genital Mutilation, in WOMEN'S RIGHTS HUMAN RIGHTS, supra note 8, at 224; Catherine L. Annas, Irreversible Error: The Power and Prejudice of Female Genital Mutilation, 12 J. CONTEMP. HEALTH L. & POL'Y 325, 325 (1996) (describing the "circumcision" of a ten-year old girl by a barber).

(22) See Indira Jaising, Violence Against Women: The Indian Perspective, in WOMEN'S RIGHTS HUMAN RIGHTS, supra note 8, at 51, 53 (noting that bride burning in India, where wives are sometimes murdered or driven to suicide when they or their families can not meet the terms of the pre-arranged dowry, results in few successful prosecutions).

(23) See Mertus, supra note 10, at 137-38 (noting that women in many countries have no voice in selecting their husbands).

(24) See Lori L. Heise, Freedom Close to Home: The Impact of Violence Against Women on Reproductive Rights, in WOMEN'S RIGHTS HUMAN RIGHTS, supra note 8, at 238, 248 (noting the continued existence of female sterilization resulting from "pressure or incentives").

(25) See Zhu Hong, The Testimony of Women Writers: The Situation of Women in China Today, in WOMEN'S RIGHTS HUMAN RIGHTS, supra note 8, at 96, 97 ("Recently, the [Chinese] government announced a plan for the avoidance of undesirable births, in essence a more precisely targeted campaign for forced sterilization and abortion.").

(26) See Hilary Charlesworth, Worlds Apart: Public/Private Distinctions in International Law, in PUBLIC AND PRIVATE, supra note 19, at 243, 248 (citing Judith Gardam, Gender and Non-Combatant Immunity, 3 TRANSNATIONAL LAW AND CONTEMPORARY

PROBLEMS 345, 359-62 (1993) (footnotes omitted)). See also Rhonda Copelon, Gendered War Crimes: Reconceptualizing Rape in Time of War, in WOMEN'S RIGHTS HUMAN RIGHTS, supra note 8, at 197, 197 (noting that "military tribunals rarely either indict or sanction [rape].").

(27) See generally Hilary Charlesworth, What are "Women's International Human Rights"?, in HUMAN RIGHTS OF WOMEN 58 (Rebecca J. Cooked., 1994) (discussing the protection of women's rights under international law). See also Christine M. Chinkin, Peace and Force in International Law, in RECONCEIVING REALITY: WOMEN AND INTERNATIONAL LAW 203, 204 (Dorinda G. Dallmeyer ed., 1993) (nosing the lack of recognition by international lawyers of the role played by women in promoting world peace); Berta Esperanza Hernandez-Trayol, Women's Rights as Human Rights--Rules, Realities and the Role of Culture: A Formula for Reform, 21 BROOKLYN J. INT'L L. 605, 608 (1996) (noting the "traditional exclusion of women from the articulation, development, implementation, and enforcement of human rights"); Christine Sylvester, Feminists and Realists View Autonomy and Obligation in International Relations, in GENDERED STATES: FEMINIST (RE)VISIONS OF INTERNATIONAL RELATIONS THEORY (V. Spike Peterson ed. 1992).

(28) See Wilets, supra note 18, at 66 n.295 (listing countries which criminalize private, consensual same-sex sodomy).

(29) In Iran, Article 110 of the Islamic Penal Law provides that the "punishment for sodomy is killing; the Sharia judge decides on how to carry out the killing." Penal Code of the Peoples Islamic Republic of Iran, art. 110 (translation by the Law Offices of A.A. Atai & Associates, Attorneys at Law, 218 Motahari Ave., Mofateh Crossing, P.O. Box 15875-1633, Tehran, Iran (on file with author)). Article 121 of the Iranian Penal Code approved by the Islamic Consultancy Parliament on July 30, 1991 and ratified by the High Expediency Council on November 28, 1991, provides that "punishment for Tafhiz (the rubbing of the thighs or buttocks) and the like committed by two men without entry, shall be a hundred lashes for each of them." Id. at art. 121 (translation by the Law Offices of A.A. Atai & Associates, Attorneys at Law, 218 Motahari Ave., Mofateh Crossing, P.O. Box 15875-1633, Tehran, Iran (on file with author)). Article 129 provides that "punishment for lesbianism is a hundred lashes for each party." Id. at art. 129 (translation by the Law Offices of A.A. Atai & Associates, Attorneys at Law, 218 Motahari Ave., Mofateh Crossing, P.O. Box 15875-1633, Tehran, Iran (on file with author)). Articles 110 and 131 of the Islamic Penal Law provide that "if the act of lesbianism is repeated three times and punishment is enforced each time, death sentence will be issued the fourth time." Id. at arts. 110, 131 (translation by the Law Offices of A.A. Atai & Associates, Attorneys at Law, 218 Motahari Ave., Mofateh Crossing, P.O. Box 15875-1633, Tehran, Iran (on file with author)).

These penalties have, in fact, been enforced. See Iran:Amnesty International Concerned at Continuing Political Executions, AMNESTY INT'L L WKLY. UPDATE, (Amnesty Int'l, New York, N.Y.), Dec. 7, 1992, reprinted in Amnesty International, First Steps: Amnesty International's Work on Behalf of Lesbians and Gay Men 12 (July 1993) (unpublished manuscript on file with author) [hereinafter First Steps]; Jack Anderson, Iranian Homosexuals Fear for Their Lives, S.F. CHRON., Jan. 22, 1990, at A17 ("On New Year's Day, three accused homosexual men were publicly beheaded in one of the city squares of Nahavand and two accused lesbians were stoned to death in Langrood.").

In Saudi Arabia, all homosexual acts are subject to the death penalty. See Tielman & Hammelburg, World Survey on the Social and Legal Position of Gays and Lesbians, in THE THIRD PINK BOOK 249,322 (Aart Hendriks et al. eds., 1993); see also SEXUALITY AND EROTICISM AMONG MALES IN MOSLEM SOCIETIES (Arno Schmitt & Jehoeda Sofer eds., 1992) (discussing the legal status of homosexuals in Moslem societies).

In Pakistan, the Hadood Ordinances, which were promulgated in 1979 to provide criminal sanctions in the form of harsh "hadd" punishments for acts considered to be in violation of the Islamic Code of Behavior, punish unlawful sexual relations with stoning to death. U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1993, at 1372 (1994); ASIA WATCH, VOL. 5, No. 13, PERSECUTED MINORITIES AND WRITERS IN PAKISTAN 5 n.8 (1993).

(30) See, e.g., IRAN CONST. art. 4 ("All civil, penal . . . and other laws and regulations must be based on Islamic criteria. This principal applies absolutely and generally to all articles of the Constitution as well as to other laws and regulations . . . .").

(31) Cf. Eleanor A. Doumato, The Ambiguity of Shari'a and the Politics of `Rights' in Saudi Arabia, in FAITH & FREEDOM 135, 142-43 (Mahnaz Afkhami ed., 1995) (noting that "only the Qur'an [the Koran] and hadith [traditions] are infallible sources of divine law").

(32) Article 3 of the Universal Declaration of Human Rights states that "[e]veryone has the right to life, liberty and the security of person." Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810 (1948), at art. 3 [hereinafter Universal Declaration].

(33) Article 6 of the International Covenant on Civil and Political Rights states:

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes . . . .

International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966) [hereinafter ICCPR] (emphasis added).

(34) Article 4 of the American Convention on Human Rights repeats the ICCPR's limitation of the death penalty to only serious crimes, stating:

1. Every person has the right to have his life respected. This right shall be protected by law, and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court . . . .

American Convention on Human Rights, Nov. 22, 1969, art. 4(1), 1144 U.N.T.S. 123, 9 I.L.M. 99 (entered into force July 18, 1978) [hereinafter American Convention].

(35) See Sidney Brinkley, Brazilian Is First to Gain Asylum for Being Gay, WASH. BLADE, Aug. 13, 1993, at 1. Judge Philip Ledbetter, in his decision granting asylum to Marcelo Tenorio, wrote that "all of the testimony and documentation submitted support [Tenorio's] assertions that homosexual individuals in Brazil are frequently beaten, tortured or killed. Moreover, these events support [Tenorio's] assertion that the government of Brazil does little to prevent violence against homosexuals by organized anti-gay groups." Id. For the actual text of the decision, see Matter of Marcelo Tenorio, File No. A72 093 558 (U. S. Dep't of Justice, Executive Office for Immigration Review, Immigration Court, San Francisco, July 23, 1993). Because this problem has been pronounced in Latin America, see Jaire A. Marin, Hunting Gays in South America, 4 COLOMBIA UPDATE, No. 2 (Colom. Human Rights Network), Apr.-June 1992, at 1 ("[H]undreds of gay men are being murdered in South America. They are the target of `social clean-up' death squads that operate under cover of darkness in the major cities of Brazil Colombia, Ecuador and Peru."), and because of the extensive activity of Latin American human rights activists in documenting those abuses, the documentation in this section is primarily from that region of the world.

In Colombia, an average of 1.8 persons a day are victims of "social cleansing" by right-wing death squads, often with the complicity of the police. See Marc Cooper, Reality/Check, SPIN, Nov. 1993, at 110 ("For the hands behind the Colombian social cleansing are none other than those of the Colombian National Police--the very institution that receives the bulk of tens of millions of dollars in annual U.S. military aid, all in the name of fighting drugs."). Less than five percent of the individuals involved in these killings have been prosecuted by the government, and less than one percent have actually been punished. Telephone Interview with Juan Pablo Ordonez, Esq., Board Member, Colombia Human Rights Committee (based in Washington, D.C.) (Mar. 20, 1994); see also Colombian Nightmare, GUIDE, Mar. 1992, at 18 ("Gay people in Colombia are being tortured and killed by vigilante death squads with almost total impunity."). Amnesty International's 1993 Colombia Report contains graphic descriptions of the extra-judicial killings of sexual minorities:

Killings of "social undesirables" by "death squads" backed by the police in

major cities and towns continued to be reported. Vagrants (including

children), homosexuals and petty criminals were gunned down in the streets

at night or were seized and driven away in unmarked cars. Their bodies,

which were rarely identified, often bore signs of torture.

Colombia, AMNESTY INT'L REP. 1993 [Amnesty Int'l, New York, N.Y.), reprinted in First Steps, supra note 29, at 12.

(36) Gay Bashing Widespread in Australia--Report, Reuter Library Report, Dec. 9, 1993 (emphasis added), available in LEXIS, World Library, Reuwld File.

(37) See Police Launch Wave of Repression in Chihuahua, Mexico, ACTION ALERT (Int'l Gay and Lesbian Human Rights Comm'n, S.F., Cal.), Apr. 1996, at 2. The documentation suggests that there is high level governmental involvement in orchestrating the repression. See id.

(38) WASHINGTON OFFICE ON LATIN AMERICA, THE COLOMBIAN NATIONAL POLICE, HUMAN RIGHTS AND U.S. DRUG POLICY 24 (1993). See Elizabeth F. Schwartz, Comment, Getting Away with Murder: Social Cleansing in Colombia and the Role of the United States, 27 U. MIAMI INTER-AM. L. REV. 381, 389 (1996) (discussing police persecution of sexual minorities in Columbia).

(39) Interview with Rasvan Ion, Director, Gay and Lesbian Human Rights Commission of the Romanian Independent Society of Human Rights (Societatea Independenta Romana a Drepturilor Omului), in Bucharest, Romania (Aug. 4, 1993); Interview with Edwin Rekosh, Attorney, International Human Rights Law Group, in Bucharest, Romania (Aug. 10, 1993). See also AMNESTY INTERNATIONAL, ROMANIA: CONTINUING VIOLATIONS OF HUMAN RIGHTS (May 1993), reprinted in First Steps, supra note 29, at 24-26 (Amnesty International stated that it "has recently also received reports that homosexual men or persons suspected of being homosexual have been tortured or ill-treated in Romanian police stations and prisons").

(40) See, e.g., GARY DAVID COMSTOCK, VIOLENCE AGAINST LESBIANS AND GAY MEN 152-62 (1991) (documenting violence by the police against lesbians and gay men). Amnesty International is but one organization which has documented "torture, ill-treatment and excessive force by police" against the United States populace generally, and against sexual minorities particularly. See, e.g., Amnesty International, United States of America, Work to Halt Torture, Cruel, Inhuman or Degrading Treatment or Punishment, in VIOLATIONS OF THE HUMAN RIGHTS OF HOMOSEXUALS 37 (1994).

(41) In Russia, there is substantial documentation of police either participating in anti-gay violence or standing by while such violence occurs. See MASHA GESSEN, INT'L GAY AND LESBIAN HUMAN RIGHTS COMM'N, THE RIGHTS OF LESBIANS AND GAY MEN IN THE RUSSIAN FEDERATION 22-23 nn.53-54 (1994). In Argentina, the organization Comunidad Homosexual de Argentina has reported that four hundred men and women were arrested in police "attacks" in December 1989. See Darrell Yates Rist, Global Gay Bashing: Homosexuals and Human Rights, 260 NATION 482, 482-83 (1990) (discussing these attacks and noting that persons arrested by the police were "forced to undress, threatened with guns, verbally abused, given nothing to eat and little to drink, exposed to mockery, insults, humiliation and even sexual assault").

(42) In Ecuador, Argentina, Mexico, and other countries, the threat of arbitrary arrest has enabled police to extort sexual minorities on a widespread basis. See Policia Extorsiona a los gays, LA HORA DE LA ACTUALIDAD (Quito), Nov. 20, 1990, at 13. In Argentina, where homosexuality is also not prohibited per se, many provincial edictos policiales permit police to arrest and jail gays for as long as thirty days without filing formal charges. See Tielman & Hammelburg, supra note 29, at 254. Police edicts also permit the arrest of any individual who is dressed in the clothes of the opposite sex in public, even though there is no law prohibiting such conduct. See RAFAEL AMADEO GENTILI, . . . ME VA A TENER QUE ACOMPANAR 61 (El Naranjo, Buenos Aires 1996) ("Los que se exhibieren en la via publica o lugares publicos vestidos o disfrazados con ropes del sexo contrario."). This police authority to carry out arbitrary arrests has resulted in numerous instances of blackmail and extortion of sexual minorities. Interview with Kenny de Michelli, President, Travestis Unidas Argentina (Buenos Aires), in Rio de Janeiro, Braz. (June 24, 1996). The Argentinean "Morality Division" reportedly continues to arrest individuals and demand bribes in exchange for their release. See Gary Marx, Gays in Latin America Begin to Claim Rights, CHI. TRIB., Jan. 28, 1992, at 1 (noting that owners of bars and discos in Latin America often have to pay bribes to the police to prevent harassment of their clientele and that police also extort bribes in exchange for not telling a person's family members that she or he is gay).

In Peru, where there is no sodomy law, a lesbian bar was raided and approximately seventy women were taken to the police station, questioned, and forced out of the police station late in the evening after the official curfew hours. The raid was staged in cooperation with a local television station so that the entire country could watch on the evening news as the women were forced out of a small door. See Peruvian Channel 2 News (television broadcast, June 1987) (on file with author).

In Costa Rica, where homosexuality is not specifically prohibited, there are numerous reports of police raids in San Jose. See Tielman & Hammelburg, supra note 29, at 271. In December 1992 Amnesty International wrote to Costa Rican President Rafael Calderon Fournier to express its concern about the torture and the cruel, inhuman, and degrading treatment of transvestites. See First Steps, supra note 29, at 10.

In Cuba, primarily in the 1960s, 1970s, and 1980s, sexual minorities had been subjected to repeated detentions, incarcerations, and physical beatings simply on the basis of their sexual orientation and not on the basis of any "illegal" criminal behavior. See In re Matter of Toboso-Alfonso, 13 Immigr. Rep. (MB) B1-29, B1-30 (Houston B.I.A. Mar. 12, 1990) ("The applicant for asylum] testified that it was a criminal offense in Cuba simply to be a homosexual. The government's actions against him were not in response to specific conduct on his part (e.g., for engaging in homosexual acts); rather, they resulted simply from his status as a homosexual."). The court further noted that:

In addition to the applicant's testimony, he supplemented the record with the

following information: Several articles describing "Improper Conduct," a

film which centers on the testimony of 28 Cuban refugees and recounts the

human rights violations, including incarceration in forced labor camps

known as "Military Units to Aid Production," suffered by Cubans whom the

Government considers to be dissidents or "antisocial," particularly male

homosexuals; a newspaper article entitled, "Gay Cubans Survive Torture

and Imprisonment," in which Cuban homosexuals in the United States, most of

whom were part of the Mariel boat lift, describe their treatment by the Cuban

Government, including repeated detentions incarcerations, and physical

beatings; and, Amnesty International's Report for 1985 which describes the

political situation in Cuba.

Id. at B1-31.

There is now, however, considerable evidence that the situation for sexual minorities in Cuba has greatly improved. Cuba has apparently eliminated its sodomy law and Cuban government officials have stated that the country has "learned from its mistakes." World, FRONTIERS, Apr. 22, 1994, at 24. In an interview with Tomas Borge, Fidel Castro stated that homosexuality "is one of the natural aspects and tendencies of human beings which should be respected.... I am absolutely opposed to any form of repression, contempt, scorn or discrimination with regards to homosexuals." Stephanie Davies, A Rainbow Revolution, GAY TIMES (UK), Mar. 1995, at 13.

In China, while homosexual activity itself is not illegal, see Gillian Rodgerson, Abuse Continues in China Despite Open Gay Group, GAY TIMES (UK), Mar. 1993, at 20 ("Although homosexual activity itself is not illegal in China, [gay people have been] accused of `bad morality and mental disorders' and told that if they do not change their sexual orientation they will `disrupt social order and harm the society.'"), electrodes and herbal emeti have been frequently used to "cure" homosexuals of their "disease" in violation of all international human rights instruments, specifically ICCPR Article 7's prohibition of non-consensual medical or scientific experimentation. See id.

A gay Chinese man has told the Australian magazine Capital Q that he is

being forced to undergo electroshock therapy three times a week and his lover

is doing hard labour in a re-education camp. . . . He wrote the magazine to

"let the gay people in the free world hear my voice. Please do not forget

that gay people are suffering in China."

Id. See also Telephone Interview with J. Quan Li, Founding Member, Great Stonewall Society (S.F, Cal.) (May 13, 1996); Louise Branson, Shock `Cure' for China's Homosexuals, TIMES (London), Feb. 4, 1990, available in LEXIS, World Library, Times File (noting that "China has adopted a brutal approach to homosexuals"); Nicholas D. Kristof, China Using Electrodes to "Cure" Homosexuals, N.Y. TIMES, Jan. 29, 1990, at A2, available in LEXIS, World Library, Allwld File (noting that Chinese officials believe that "the idea is to stimulate an extremely unpleasant reaction that will be associated thereafter with erotic thoughts"). However, in 1992, the Chinese Ministry of Public Security permitted a lesbian couple to live together, admitting that there were no national laws that contained specific regulations on homosexuality. See China Finds No Laws to Break Up Lesbian Pair, Reuters, Apr. 29, 1992, available in LEXIS, World Library, Reuwld file (noting that "no legal basis [in Chinese law] has been found to prevent the [lesbian] relationship").

In Turkey, where there are also no laws against homosexual activity, gay rights activists have been subjected to harassment, intimidation, and ill-treatment. See First Steps, supra note 29, at 28. In July 1993, three gay rights activists, Huseyin Kuskaya, Cem Ozipek, and Onur Sarvaut, as well as twenty-eight foreign supporters of gay rights, were detained in police custody simply for attempting to attend the first Congress of Homosexual Solidarity in Istanbul. See id. Amnesty International has stated that it is "concerned about the arbitrary detention of gay rights activists . . . [and] is also concerned about the humiliating and degrading treatment which some of the above mentioned individuals faced while in detention."

Id.

In Spain, two activists from the Front d'Alliberament Gai de Catalunya were arrested, apparently without cause, on September 15, 1993 after peacefully demonstrating outside the Chilean Consulate in protest of government passivity in response to a fire in a gay disco in Valparaiso, Chile. See Activists Arrested in Barcelona, ACTION ALERT (Int'l Gay and Lesbian Human Rights Comm'n), Nov./Dec. 1993, at 2. At no time were the demonstrators told why they were being arrested, and while in police custody they were forced to undergo strip searches. See id. A trial judge immediately released them since no criminal charges could be substantiated against them. See id.

(43) See Elizabeth Atkins Bowman, Hate Crimes Against Gays Up in Metro Detroit in `94, DETROIT NEWS, Mar. 7, 1995, at B6, available in 1995 WL 7233370.

(44) See id.

(45) See ANTI-DEFAMATION LEAGUE, THE SKINHEAD INTERNATIONAL; A WORLDWIDE SURVEY OF NEW-NAZI SKINHEADS (1995). See also P. FINN & T. MCNEIL, DEPARTMENT OF JUSTICE REPORT, THE RESPONSE OF THE CRIMINAL JUSTICE SYSTEM TO BIAS CRIME, AN EXPLORATORY REVIEW (1987) (indicating that homosexuals are probably the most frequent victims of hate crimes).

(46) See HUMAN RIGHTS WATCH, supra note 12, at 366.

(47) See DAVID F. GREENBERG, THE CONSTRUCTION OF HOMOSEXUALITY 466 (1988) (providing examples of the fact that violence against sexual minorities is often ignored by the judicial community).

(48) See id.

(49) See id. (citing Joan Cort & Edmund Carlevale, Murder in Maine Renews Human Rights Bill, ADVOCATE, Sept. 4, 1984, at 12-13).

(50) See id.

(51) See, e.g., text accompanying infra notes 140-63, 174-75 (discussing countries which criminalize or discriminate against sexual minorities).

(52) See `Go Home, Yankee' Gay Activists Yell; Human Life International Delegates Jeered EDMONTON J., Apr. 23, 1996, at at A4 (hereinafter `Go Home, Yankee) (noting that Randall Terry co-founder of Operation Rescue, called for the death penalty for practicing homosexuals and for requiring them to wear publicly displayed badges identifying their sexual orientation). Anita Bryant, a former leader of the fundamentalist "Save our Children" campaign, has stated that "God puts homosexuals in the same category as murderers." GREENBERG, supra note 47 at 467. Reverend Jerry Falwell, leader of the Moral Majority, called on his supporters to "[s]top the Gays dead in their perverted tracks." Id.

The Roman Catholic Church in Argentina has been implicated in inciting the murder of Argentinean sexual minorities. See Robert Julian, A Decisive Time for Argentine Gays, ADVOCATE, Dec. 17, 1991, at 50. Argentinean army chaplain Father Lobardero called for the death penalty for homosexuals and, in both print and television interviews, has argued that the commandment "Thou Shalt not

Kill" does not apply to homosexuals. See id. In the article, Julie Dorf, Executive Director of the International Gay and Lesbian Human Rights Commission, speaking in response to the vitriolic statements by members of the Argentinean Catholic Church against sexual minorities, noted that "the church and the government foster an atmosphere of fear." Id.

On May 18, 1990, Ayatollah Musavi-Ardebili, a leading Islamic cleric, stated in a prayer sermon delivered at Teheran University:

For homosexuals, men or women, Islam has prescribed the most severe

punishments.... After it has been proved on the basis of Sharia, they should

seize him [or her], they should keep him standing, they should split him in

two with a sword, they should either cut off his neck or they

should split him from the head.... He will fall down .... After he is dead,

they bring logs, make a fire and place the corpse on the logs, set fire to

it and burn it. Or it should be taken to the top of a mountain and thrown

down. Then the parts of the corpse should be gathered together and

burnt. Or they should dig a hole, make a fire in the hole and throw him

alive into the fire. We do not have such punishments for other offenses.

Rex Wockner, BBC Confirms Reports Iran Is Executing Gays, BAY AREA REP., May 31, 1990.

(53) See, e.g., David L. Marcus, Coming Clean; Former Officers' Admissions About Argentine `Dirty War' Vindicate Victims' Mothers, DALLAS MORNING NEWS, May 20, 1995, at 1A, available in 1995 WL 7493663 ("The newly talkative torturers say the military acted with the consent of the Roman Catholic Church hierarchy and the blessing of several priests who knew how victims were killed."). See also supra note 30 (noting that the Constitution of the Islamic Republic of Iran explicitly recognizes the legal supremacy of Islamic teachings).

(54) See, e.g., Church Accomplice in Argentina's Dirty War, Reuters, Apr. 28, 1995, available in LEXIS, World Library, Reuters File.

[A]n ex-navy captain who last month admitted that tortured detainees were

drugged and thrown from aircraft into the sea, said the [Catholic] church

was consulted on how to "dispose of" detainees and navy chaplains comforted

officers after "death flights".

Rights groups say chaplains were on hand to help extract confessions from

prisoners in the torture chambers.

Id. See also Carl Honore, Chilling Tale of "Dirty War": Captain's Revelation Making Argentines Recall What They'd Dearly Love to Forget, S.F. EXAMINER, Mar. 26, 1995, at A22, available in 1995 WL 4917554 (noting that a former Argentinean military officer "claims that the Catholic Church sanctioned the death flights [where prisoners were drugged and then thrown from planes into the ocean] as a humane form of execution and that navy chaplains gave counseling to the officers involved"); Phil Davison, Junta's Opponents Thrown Live Into Sea, INDEPENDENT (London), Mar. 15, 1995, at 15, available in LEXIS, News Library, ARCNWS File.

The story has taken on an additional dimension with reports that the Roman

Catholic church knew of or even suggested the `death flights'.... [C]hurchmen

supported the practice as a "non-violent Christian way to die. Chaplains

comforted the officers involved [in the flights] with parables from the Bible

about the necessity of separating the wheat from the chaff...."

Id. (3d alteration in original). See also Argentina: Military Apologizes for Abuses During Dirty War, Catholic Church Follows Suit, NOTISUR - LATIN AM. POL.AFF., May 5, 1995, available in 1995 WL 2370073 ("In addition to the military, for many years human rights organizations have accused the Catholic Church of complicity in the dirty war, saying that the hierarchy maintained a `sinful silence' during those years, and at times collaborated with the repression.").

(55) Gabriel Escobar, Argentine Church Pressed to End Silence; Catholic Hierarchy's Role in 1970's Repression Comes Under Scrutiny, WASH. POST, May 7, 1996, at A1, available in 1995 WL 2092622. See also Marcus, supra note 53, at 1A ("Argentina's

bishops called for a reflection on the accusations [of church participation in the `dirty war'] and `a deep examination of our consciences.'").

(56) See infra notes 82-83 and accompanying text (discussing the agenda of certain fundamentalist organizations).

(57) Religious Discrimination Suit Filed Against Mayor is Dismissed, S.F. CHRON., Mar. 22, 1995, at A18, available in 1995 WL 5274644.

(58) Orthodox Church Demands Punishment of Homosexuals, Romanian Press Agency, May 27, 1995, available in LEXIS, World Library, BBCSWB File.

(59) See id.

(60) Anti-gay activism, racism and class resentments may be intimately connected as an expression of "status discontent." David Greenberg argues that such status discontent could be understood as a contributing, although far from exclusive, factor in anti-gay sentiment in the United States:

I am suggesting that status discontent may be more intense in the working

class and lower-middle class because it is there that familialism and

patriotism have been held with particular tenacity, and because members of

those classes have few other sources of social status with which to cushion

loss of status from the normalization of homosexuality. For

male teenagers, masculine status anxiety is another likely suspect.

GREENBERG, supra note 47, at 474 n.79.

(61) For example, many individuals who engage in same-gender relations are arbitrarily arrested, beaten or killed when such sexual activity occurs in the context of their activities as sex workers, street persons or in other socially marginalized positions. The extensive killings of prostitutes and street people documented in this Article cannot be understood solely as the oppression of sexual minorities as such, but also as a product of their social marginalization.

(62) See supra text accompanying note 45 [observing that a recent report indicates that "gay bashing" is part of a broader phenomenon of hatred toward other "outside groups").

(63) See supra note 1 (defining these terms as they are used in this Article).

(64) For an extensive and illuminating discussion of the connection between homosexuality and transgender identity, see THIRD SEX, THIRD GENDER: BEYOND SEXUAL DIMORPHISM IN CULTURE AND HISTORY (Gilbert Herdt ea., 19941 [hereinafter THIRD SEX].

(65) The justifications employed by legal institutions for oppressing sexual minorities are frequently very similar to the justifications employed for oppressing non-conforming women and men. See generally Andrew Koppelman, The Miscegenation Analogy: Sodomy Law as Sex Discrimination, 98 YALE L.J. 146 (1988) (noting that laws which impose sex-based classifications or which mandate traditional gender-related conduct should be found unconstitutional); see also Sylvia A. Law, Homosexuality and the Social Meaning of Gender, 1988 WIS. L. REV. 187, 218-21, 230-33 (1988) (noting that most state opposition to homosexual and feminist conduct is based "on a defense of traditional ideas of family stability").

(66) See infra text accompanying notes 92-108 for examples of societies that accept same-gendered sexual activity.

(67) 852 P.2d 44 (Haw. 1993).

(68) HAW. CONST. art. I, [sections] 3.

(69) See id. at 63-68 (examining Hawaii's marriage statute under the Equal Protection Clause contained in Hawaii's State Constitution). See also Koppelman, supra note 65, at 147 (equating discrimination against sexual minorities to gender discrimination, because both "impose traditional sex roles"); Law, supra note 65, at 218-21, 230-33. "When we perceive heterosexism as reinforcing sexism, it is apparent that laws discriminating against gay people injure both gay people and everyone who seeks freedom to experience the full range of human emotions, . . . without gender-defined constraints." Id. at 232.

(70) See William N. Eskridge, Jr., A History of Same-Sex Marriage, 79 VA. L. REV. 1419, 1510 (1993) ("More recent experience reveals a connection between intolerance of same-sex unions and suppression of women ....").

(71) See, e.g., Michele Brandt, Comment, Doe v. Karadzic: Redressing Non-State Acts of Gender-Specific Abuse Under the Alien Tort Statute, 79 MINN. L. REV. 1413 (1995) (discussing gender specific human rights violations during Bosnia's ethnic conflict).

(72) See, e.g., Jason Thomas, New Serbian Terror: Male Rape in Bosnia, BAY AREA REP., June 17, 1993.

(73) Id. at 18-19.

(74) Serbian Government Blames Gays for International Isolation, GAY TIMES (UK), Feb. 1998, at 18 ("[G]ay men in Serbia are facing ridicule and homophobic attacks in the press and seriousviolence and harassment at the hands of the police.").

(75) Boris Liler, Serbia's War on Gays, FRONTIERS, July 31, 1992, at 11. See also Catherine Durand,Le SOS des Gais, GAT PIED HEBDO, Dec. 12, 1991, at 17; Boris Liler, Serbien Sucht Einen Sundenbock, VERFOLGT, Oct. 1992, at 46; Rex Wockner, Belgrade, Yugoslavia Gays Organize, Resist War in Croatia, OUTLINE, Jan. 1992.

(76) See Letter from International Gay & Lesbian Human Rights Commission to Helsinki Watch (Feb. 26, 1993) (on file with author).

(77) See id.

(78) See id.

(79) See id.

(80) See id.

(81) See id.

(82) `Go Home Yankee' supra note 52, at A4.

(83) Id.

(84) See Homosexuals Face Stiff Jail Terms, Agence France-Presse, Sept. 11, 1996, available in 1996 WL 12136138 (noting that newly enacted legislation in Romania provides jail terms from between six months and three years for private consensual homosexual activity). The other European countries which criminalize homosexual relations are Belarus, Cyprus Albania, Bosnia-Hercegovina, Serbia, Macedonia, and Moldova. See Countries with Sodomy Laws (visited Mar. 13, 1997) <http://www.qrd.org/qrd/world/europe/countries.with.sodomy.laws-ilga> (citing the Gay and Lesbian Human Rights Commission).

(85) See THE PENAL CODE OF THE ROMANIAN SOCIALIST REPUBLIC, reprinted in COMPARATIVE CRIMINAL LAW PROJECT, CRIMINAL LAW EDUC. AND RESEARCH CTR., THE PENAL CODE OF THE ROMANIAN SOCIALIST REPUBLIC, at 94-95 (Simone-Marie Vrabiescu Kleckner trans., 1976).

If, before the sentence becomes final, the offender

and the victim marry, or, in the case of participation, the victim and one

of the participants marry, the acts provided for in paragraphs 1 [rape with

violence and injuries] and 2 [gang-rape] are not

punishable. The non-imposition of a penalty affects all the participants.

Id.

(86) See Ohio Man Sentenced to Marry Girlfriend, CHI. SUN-TIMES, July 16, 1995, at 24, available in 1995 WL 6662227 ("I happen to believe in traditional American values: boy meets girl, boy asks girl out, boy and girl go steady, boy and girl get married, and then boy and girl start raising a family ....").

(87) See Clyde H. Farnsworth, Saudi Woman Who Fled Predicts Crackdown, N.Y. TIMES, Feb. 7, 1993, at 19, available in 1993 WL 2169154.

Under the Canadian asylum guidelines, women who fear persecution for failing

to obey gender-biased laws and those persecuted for opposing discrimination

against women are eligible for asylum.... Women who flee domestic violence

after authorities fail to help are also eligible, as well as those who

refuse to participate in certain traditions, such as arranged marriages and

veiling.

Hull, supra note 9, at 26.

(88) See supra note 29 and accompanying text (noting countries which impose the death penalty for homosexual activities).

(89) See Eskridge, supra note 70, at 1510 ("Ancient cultures (Egypt, Mesopotamia, Greece, and Rome) maintained strict patriarchal

lines of authority over women yet also tolerated same-sex unions among men, which fit into the prevailing patriarchy.").

(90) See Julie Dorf & Gloria Careaga Perez, Discrimination and the Tolerance of Difference: International Lesbian Human Rights, in WOMEN'S RIGHTS HUMAN RIGHTS, supra note 8, at 324, 332.

(91) See id. at 329-30 ("There are few countries in the world that can claim that their feminist movement's institutions, structures, and theories have openly welcomed lesbian activists or included lesbian issues.").

(92) There is substantial evidence that same-gender sexual relationships and transgenderism have existed, and continue to exist in almost all, if not all, cultures. See David Gelman, Born or Bred, NEWSWEEK, Feb. 24, 1992, at 46 (`"If you look at all societies,' says Frederick Whitam, who has researched homosexuality in cultures as diverse as the United States, Central America and the Philippines, 'homosexuality occurs at the same rates with the same kinds of behavior.'"). In 1951, in a seminal anthropological study, Yale University professors Clellan S. Ford and Frank A. Beach found that "[i]n 49 (64 percent) of the 76 societies other than our own for which information is available, homosexual activities of one sort or another are considered normal and socially acceptable for certain members of the community." CLELLAN S. FORD & FRANK A. BEACH, PATTERNS OF SEXUAL BEHAVIOR 130 (1951) (footnotes omitted). "The cross-cultural and cross-species comparisons presented [in the study] combine to suggest that a biological tendency for inversion of sexual behavior is inherent in most if not all mammals including the human species." Id. at 143. In other words, some kind of homosexual inclination (whether expressed in exclusively homosexual or bisexual ways) may be present in most individuals.

Moreover, Yale University historian John Boswell provides extensive documentation that homosexual unions were present, and even sanctioned, in medieval Christian Europe until the twelfth century. See JOHN BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE 218-61 (1994) [hereinafter SAME-SEX UNIONS]; JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY 207-66 (1980) (discussing the flourishing gay culture of the middle ages).

William Eskridge, Jr., has written of the existence of same-sex and/or transgenderal unions in: (1) nineteenth-century Nigerian society, see Eskridge, supra note 70, at 1419-20; (2) pre-Columbian Native-American societies, see id. at 1453-58; (3) nineteenth-century Zuni society, see id. at 1419-20; (4) ancient Egyptian, Greek and Roman societies, see id. at 1441-47; (5) Mesopotamian society, see id. at 1437-41; (6) the Azande, Siwah, el Garah, Basotho, Venda, Meru, Phalaborwa, Nuer, Bantu, and Lovedu societies of Africa, see id. at 1458-62; and (7) the Paleo-Siberian, Chinese, Vietnamese, Indian, Japanese, Burmese, Korean, and Nepalese societies of Asia in what. is now New Zealand and the Cook Islands, see id. at 1462-69.

Vivien Ng, Professor of History and Women's Studies at the State University of New York at Albany, notes that "male homosexuality has a long and documented history in China." Vivien W. Ng, Homosexuality and the State in Late Imperial China, in HIDDEN FROM HISTORY 76, 76 (Martin Bauml Duberman et al. eds., 1989). Professor Ng cites from the third-century B.C. text, Chronicles of the Warring States, to describe one of the literary terms for homosexuality:

One of the expressions for male love, longyang, stems from the well-known

homosexual relationship between Longyang Jun, a fourth-century B.C.

minister, end the prince of Wei. From the Chronicles, too, we know about

the affection between Duke Ling of Wei and his minister, Ni

Xia. Once, when the two men were taking a stroll in an orchard, Ni picked a

peach off one of the trees and took a bite off it. The fruit was so delicious

that he offered the rest of it to the duke; a common euphemism for male

homosexual love, fen tao zhi ai (literally, "the dove of shared

peach"), is derived from this account.

Id. al. 77 (footnotes omitted).

A study conducted by Dr. K.K. Aggarwal, President of the Delhi branch of the Indian Medical Association, showed that almost 90% of the inmates in Delhi's Tihar prison had engaged in homosexual sex. See Worldwatch, GAY TIMES (UK), Mar. 1995.

(93) See, e.g., Eskridge, supra note 70, at 1420 (discussing Sergius and Bacchus, two Roman soldiers who were lovers).

(94) For example, in many societies, "passive" males may be encouraged to adopt a gender role which may appear to a Western observer as a kind of transsexualism, but which may be in fact an entirely different gender construct from the bipolar model with which most societies are familiar. See generally Niko Besnier, Polynesian Gender Liminality Through Time and Space, in THIRD SEX, supra note 64, at 285 (discussing the "intermediate" gender categories of the islands of Polynesia); Serena Nanda, Hijras: An Alternative Sex and Gender Role in India, in THIRD SEX, supra note 64, at 373, 373 (discussing the "cultural notions of hijras as `intersexed' and 'eunuchs,' emphas[izing] that they are neither male nor female, man nor woman"); Will Roscoe, How to Become a Berdache: Toward a Unified Analysis of Gender Diversity, in THIRD SEX, supra note 64, at 329 (discussing the berdache tradition in Native American societies).

(95) See Francisco Valdes, Unpacking Hetero-Patriarchy: Tracing the Conflation of Sex, Gender & Sexual Orientation to Its Origins, 8 YALE J.L. & HUMAN. 161, 182 (1996) (noting that the ancient Greeks had "[t]hree rules" for acceptable same-sex activity which included class and age considerations).

(96) See id.

(97) Eskridge, supra note 70, at 1419-20 (citing IFI AMADIUME, DAUGHTERS, FEMALE HUSBANDS: GENDER AND SEX IN AN AFRICAN SOCIETY 48-49 (1987)).

(98) GREENBERG, supra note 47, at 147.

(99) See, e.g., id. at 155-58 (discussing the sexual practices of the ancient Romans and noting that it was acceptable for males to engage in sex with women, slaves or "free boys").

(100) See, e.g., id. at 158.

Even [in those instances] when it was considered socially inappropriate,

homosexual desire was not considered abnormal as long as it took the active

form.... As in Greece the Romans tended to consider the passive or receptive

role incompatible with the honor and dignity of a free citizen, especially

when it continued into adulthood. Sexual submission to a powerful patron

was, seemingly, a familiar way of building a career, but it left the client

vulnerable to potentially ruinous denunciations. A man's failure to live up

to the standard of masculinity expected of someone in his rank was especially

disturbing in a society that was attempting the systematic subjugation of

the entire known world.

Id. (footnotes omitted).

(101) Id. at 147 (alterations in original) (quoting ARTEMIDORUS 59-60 (1975).

(102) Id. at 149 (emphasis added) (footnotes omitted).

(103) James M. Saslow, Homosexuality in the Renaissance: Behavior, Identity, and Artistic Expression, in HIDDEN FROM HISTORY, supra note 92, at 90, 92.

(104) Id. at 98.

(105) Id. at 93.

(106) Ng, supra note 92, at 85-86.

(107) See Eskridge, supra note 70, at 1435-70 (discussing historical recognition of same-sex unions in various cultures).

(108) See, e.g., Danish Registered Partnership Act, No. 372 of 1989.

(109) For a discussion of the private/public distinction under international law, see supra text accompanying notes 8-25 and accompanying text.

(110) See, e.g., 1 OPPENHEIM'S INTERNATIONAL LAW 24-27 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) (noting that customary international law is premised on the general practices of sovereign states, but universal acceptance of such practices is not necessary).

(111) Louis Henkin, Remarks at Albany Law Review's Symposium on Conceptualizing Violence, Present and Future Developments in International Law, 60 ALB. L. REV. 571 (1997).

(112) Universal Declaration, supra note 32, at Preamble.

(113) Katherine M. Culliton, Finding a Mechanism to Enforce Women's Right to State Protection from Domestic Violence in the Americas, 34 HARV. INVL. L.J. 507, 610-11 (1993) (footnotes omitted).

(114) See Nancy Kim, Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and

Uncritical Absolutism, 25 COLUM. HUM. RTS. L. REv. 49, 49 (1993) ("[T]he prevailing conception of human rights [distinguishes] state from non-state actors. Human rights activists believe that the behavior of non-state actors falls outside the purview of international law.").

(115) 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, 61 (1996) (noting that "no international human rights treaties expressly mention homosexuality or sexual orientation" and that only during the last decade have human rights institutions interpreted human rights treaties to protect the "fundamental rights of lesbians and gay men").

(116) See infra notes 121-29 and accompanying text (noting that many people incorrectly view homosexuality as non-indigenous to their culture).

(117) See Wilets, supra note 18, at 66 n.295 (listing countries which criminalize private, consensual same-sex sodomy).

(118) ICCPR, supra note 33, at Preamble (emphasis added).

(119) See supra notes 110-11 and accompanying text (discussing this characteristic of international law).

(120) For example, the fact that Hawaiian custom and practice apparently included same-sex unions played a role in the debate regarding same-sex marriage following the Hawaii Supreme Court decision in Baehr v. Lewin, 852 P.2d 44 (Haw. 1993), which ruled that Hawaii's ban on same-sex marriages presumptively violated the state constitution's prohibition of sex discrimination. See Same Sex Unions Were Accepted in Hawai'i, HONOLULU ADVERTISER, June 13, 1993, at B3. Hawaii's constitution provides that lawmakers and courts should give deference to traditional Hawaiian usages, customs, practices, and language, stating:

The State reaffirms and shall protect all rights, customarily and

traditionally exercised for subsistence, cultural and religious purposes and

possessed by ahupua'a [land area] tenants who are descendants of native

Hawaiians who inhabited the Hawaiian Islands prior to 1778, subject to the

right of the State to regulate such rights.

HAW. CONST. art. XII, [section] 7. See also Robert J. Morris, J.D., Configuring the Bo(u)nds of Marriage: The Implications of Hawaiian Culture & Values for the Debate About Homogamy, 8 YALE J.L. & HUMAN. 105 (1996) (discussing Hawaiian customs and the modem legal status of same sex-marriages); Jon M. Van Dyke et al., The Protection of Individual Rights under Hawaii's Constitution, 14 U. HAW. L. REV. 311 (1992) (discussing the Supreme Court of Hawaii's innovative approach to protecting individual rights under the state constitution).

(121) See supra note 92 and accompanying text (discussing studies which have documented the existence of these inclinations within most societies). While gay and lesbian social and sexual identities, in the sense of a conscious desire to enter into same-sex relationships or marriages, are not a unique, contemporary construction of Western society or capitalism, the particularly acute objectification of homosexuality as the defining characteristic of a person's social position may, however, be more prevalent now. In societies which have oppressed sexual minorities in a historically specific period, and then undergone a period of general liberalization of social/sexual mores, it is predictable that sexual minorities would articulate their claims for equal political and social rights in terms focusing on their identities as sexual minorities. Such an evolution of minority identity bears a striking resemblance to the evolution of other minority identities which have developed, in part, in response to oppression by the majority.

(122) See Worldwatch, GAY TIMES (UK), May, 1995, at 46 ("As in so many countries in the former British Empire, India's ban on male homosexuality is an unpleasant left-over from the days of colonial rule."). See also Jomar Fleras, Reclaiming Our Historical Rights: Gays and Lesbians in the Philippines, in THE THIRD PINK BOOK, supra note 29, at 66 (discussing the ritualization of homosexual, bisexual, transgender, and transvestite behavior among Philippine cultures in the pre-colonial period); I. Wachirianto, Adat Nusantara--Gemblakan de Ponorogo, GAYA NUSANTARA, June 1993, at 23-26 (discussing the acceptance of homosexuality among certain Borneo cultures).

(123) Tielman & Hammelburg, supra note 29, at 251.

(124) James Roberts, Mugabe's Ill-Fitting Suit of Moral Outrage, INDEPENDENT London), Aug. 27, 1995, at 12 (describing the verbal attacks on sexual minorities made by Zimbabwean President Robert Mugabe). See also Human Rights Yes, Gay Rights No: Mugabe, GAY TIMES (UK), Sept. 1995, at 38.

(125) See Donald G. McNeil, Jr., For Gay Zimbabweans, a Difficult Political Climate, N.Y. TIMES, Sept. 10, 1995, at A34, available in 1995 WL 9665985 (discussing the large gay population in Zimbabwe).

(126) See id.

(127) See, e.g., Bowers v. Hardwick, 478 U.S. 186, 192-94 (1986) (noting that homosexual activity lacks a historical foundation). In the Bowers decision, the U.S. Supreme Court refused to extend the right to privacy to invalidate Georgia's sodomy law in the context of same-gender sexual relations. See id. at 195-96. At the time of Bowers, Georgia's sodomy statute applied equally to homosexual and heterosexual sodomy. See id, at 200 (Blackmun, J., dissenting) (citing GA. CODE ANN. [section] 16-6-2 (1984)). The Supreme

Court, however, expressed no opinion in its decision as to "the constitutionality of the Georgia statute as applied to [heterosexual] acts of sodomy." Id. at 188 n.2.

(128) See supra note 92 (discussing John Boswell's work).

(129) INTERNATIONAL GAY AND LESBIAN HumAN RIGHTS COMMISSION, UNSPOKEN RULES: SEXUAL ORIENTATION AND WOMEN'S HUMAN RIGHTS at v (Rachel Rosenbloom ed., 1996).

(130) United States jurisprudence, for example, traditionally held that the right to be secure in one's home was not an independent "privacy" right, but was subsumed within the Fourth Amendment's procedural right of "the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Griswold v. Connecticut, 381 U.S. 479, 484-85 (1965). This procedural right was later recognized by the Supreme Court as an indication of the Constitution's implicit recognition of the substantive right to privacy. See id. In most other constitutions, as we will discuss below, this kind of privacy right (along with prohibitions against illegal searches and seizures generally) is subsumed under the right to privacy.

(131) See, e.g., Zablocki v. Redhail, 434 U.S. 374, 377 (1978) (holding that "the right to marry is part of the fundimental `right to privacy' implicit in the fourteenth amendment's due process clause").

(132) See Campbell v. Sundquist, 926 S.W.2d 250, 258-66 (Tenn. Ct. App. 1996) (holding that the Tennessee State Constitution's right to privacy protects private sexual activities).

(133) See Wilets, supra note 18, at 63-64 (listing such countries).

(134) For a discussion of the Article's non-mutually exclusive use of the terms "Women" and sexual minorities, see supra note 2.

(135) See supra Part IL

(136) See generally AMNESTY INTERNATIONAL, WOMEN IN THE FRONT LINE: AN AMNESTY INTERNATIONAL REPORT (1991) (noting violations of the human rights of women committed by state actors throughout the world).

(137) See supra notes 8-13 and accompanying text (discussing the lack of legal status suffered by many women).

(138) See Wilets, supra note 18, at 66 n.295 (listing countries which criminalize private, consensual same-sex sodomy).

(139) For purposes of this Article, 4sodomy statute means a law criminalizing consensual homosexual activity.

(140) In the U.S., for example, the existence of these criminal laws has been invoked to justify a wide range of human rights violations against gays and lesbians. These include:

(1) restrictions on the free speech rights of sexual minorities ("advocating a criminal activity"). See Gay Lib v. University of Missouri, 558 F.2d 848, 858 (8th Cir. 1977) (Regan, J., dissenting) ("In view of the expert testimony ... defendants were warranted in concluding that formal recognition of Gay Lib would tend to expand homosexual behavior and activity on campus and likely result in felonious acts of sodomy proscribed by Missouri law."), cert. denied, 434 U.S. 1080 (1978);

(2) denial of equal protection and non-discrimination protection to sexual minorities ("Society has an interest in discouraging criminal activity."). See Padula v. Webster, 822 F.2d 97, 98 (D.C. Cir. 1987) (upholding the FBI's policy of considering homosexual conduct a "significant" and often dispositive factor in employment decisions).

It would be quite anomolous [sic], on its face, to declare status defined by

conduct that states may constitutionally criminalize as deserving of strict

scrutiny under the equal protection clause.... If the [United States Supreme]

Court was unwilling to object to state laws that criminalize the behavior

that defines the class, it is hardly open to a lower court to conclude that

state sponsored discrimination against the class is invidious.

Id. at 103 (citing Bowers v. Hardwick, 478 U.S. 186 (1986)).

(3) denial of the right of freedom of association to sexual minorities ("society is justified in limiting association of individuals engaged in criminal or immoral activity"). See ALA. CODE [sections] 16-1-28 (1975). This section provides:

No public funds or public facilities shall be used by any college or

university to, directly or indirectly, sanction, recognize, or support

the activities or existence of any organization or group that fosters or

promotes a lifestyle or actions prohibited by the

sodomy and sexual misconduct laws of [the State of Alabama].

Id.

(4) denial of other basic human rights to sexual minorities. See generally Cass R. Sunstein, Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 65 U. CHI. L. REV. 1161 (1988) (discussing the right to privacy and its relationship to the Federal Due Process and Equal Protection Clauses).

Accordingly, for lesbians and gays, the elimination of sodomy laws has become a prerequisite to the attainment of their fundamental civil and constitutional rights.

(141) See supra notes 28-50 and accompanying text (discussing the criminal codes of certain countries which penalize sexual minorities and providing documentation of assaults against them).

(142) Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Comments of the Human Rights Committee, 53d Sess. 50, U.N. Doc. CCPR/C/79/Add. (1995) [hereinafter Comments].

(143) Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Initial Reports of States Parties Due in 1993, Addendum, United States of America, Human Rights Comm., U.N. Doc. CCPR/C/81/Add.4 (1994).

(144) Comments, supra note 142, at pare. 22 (emphasis added).

(145) Cf. Kendall Thomas, Beyond the Privacy Principle, 92 COLUM. L. REV. 1431 (1992) (discussing Bowers v. Hardwick and the right to privacy within the confines of one's own home). It should be noted, however, that the right to privacy is not sufficient for obtaining full human rights for sexual minorities. Privacy is a "negative" right: it gives sexual minorities only the right to be left alone in the privacy of their own home. It in no way recognizes the full range of expressions of a sexual minority's identity. The fact that European countries which recognize the privacy rights of sexual minorities nevertheless insist on harassing them when they attempt to exercise their fundamental rights to free expression, assembly, and association, is illustrative of this problem. See supra note 42 (discussing countries in which state officials harass sexual minorities who publicly exercise their fundamental rights).

(146) See Dudgeon v. United Kingdom, 4 Eur. Ct. H.R. 149 (1981). In Dudgeon, the European Court of Human Rights held that the right to privacy contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (entered into force Sept. 3, 1963) [hereinafter European Convention], extended to private, consensual relations between individuals of the same gender. See id. Accord Norris v. Ireland, 13 Eur. Ct. H.R. 186, at 196-97 (1991); Modinos v. Cyprus, 16 Eur. H.R. Rep. 485, at 494 (1993).

(147) Nevertheless, Romania continues to maintain its prohibition against consensual sodomy in violation of the European Convention despite strong protests from the Council of Europe rapporteurs sent to that country to assess the human rights situation. See, e.g.,, Most-Favored Nation (MFN) Trade Status for Romania: The Current Human Rights Situation (Int'l Human Rights Law Group Written Statement), Aug. 1993, at 15 ("The Council of Europe has strongly criticized the criminal prohibition of homosexual acts between consenting adults conducted in private."). Furthermore, the law is strictly enforced. See Peter Maass, Romanian Gays Hide in the Shadows; Communist-Era Law Against Homosexual Acts Is Strzetly Enforced, WASH. POST (D.C.), Nov. 12, 1993, at A41, available in LEXIS, News Library, ARCNWS File (detailing "anti-homosexual acts" laws and the status of sexual minorities in Romania).

(148) See supra note 84 (listing these countries). See also Alexandra Duda, Comparative Survey of the legal and Societal Situation of Homosexuals in Europe, EURO-LETTER (Int'l Lesbian and Gay Ass'n), Sept. 1995 (providing a comprehensive analysis the treatment of same-sex sexual activities by various European countries).

(149) See GESSEN, supra note 41, at 24 n.55 (citing Zakon Rossiyskoy, Federatsii O vneseni i izmeneniy dopolneniy v Ugolouniy kodeks RSFSR, Ugolourtoprotessualny kodeks RSFSR i Ispravitelutrudooey kodeks RSFSR, ROSSISKAYA GAZETA (Moscow), May 27, 1993, at 6). Some scholars believe that, until the past few years, the number of people charged and convicted for violating article 121.1 of the Russian Penal Code could have been as high as 1000 per year. See David Tuller, Advocates Fight for Russia's Imprisoned Gays, S.F. CHRON., Oct. 18, 1993, at A], available in 1993 WL 6430917 (discussing the number of gay men in Russian prisons).

(150) See, e.g., Masha Gessen, Editorial, Russia Still Imprisons Men for Homosexuality, N.Y. TIMES, NOV. 20, 1993, at 20. See also GESSEN, supra note 41, at 27-33.

(151) For a list of countries with sodomy laws and applicable penal sections, see Wilets, supra note 18, at 66 n.295. Twenty-three U.S. states currently criminalize consensual sodomy: Alabama, misdemeanor offense, ALA. CODE [section] 13A-6-65 (1975) (not applicable to married couples); Arizona, misdemeanor offense, ARIZ. REV. STAT. ANN. [section] 13-1411 to-1412 (West 1989); Arkansas, misdemeanor offense, ARK. CODE ANN. [section] 5-14-122 (Michie 1993); Florida, misdemeanor offense, FLA. STAT. ANN. [section] 800.02 (West 1992); Georgia, felony offense, GA. CODE ANN. [section] 16-6-2 (1996) (punishment for consensual sodomy is "imprisonment for not less than 10 nor more than 20 years"); Kansas, misdemeanor offense, KAN. STAT. ANN.[section] 21-3505 (1995) (applies to same-sex sodomy only); Montana, felony offense, MONT. CODE ANN. [sections] 45-6-505 (1995) (applies to same sex sodomy only); North Carolina, felony offense, N.C. GEN. STAT. [Sections] 14-177 (1996); Oklahoma, felony offense, OKLA. STAT. ANN. tit. 21, [sections] 886 (West 1983 & Supp. 1997); Rhode Island, felony offense, R.I. GEN. LAWS [Sections] 11-10-1 (1994); South Carolina, felony offense, S.C. CODE ANN. [sections] 1615-120 (Law. Co-op. 1985); Utah,

misdemeanor offense, UTAH CODE ANN. [Sections] 76-5-403 (1995); Virginia, felony offense, VA. CODE ANN. [sections] 18.2-361 (Michie 1996).

(152) See Bowers v. Hardwick, 478 U.S. 186, 195 (1986) ("There should be, therefore, great resistance to expand the substantive reach of [the Due Process Clauses of the Fifth and Fourteenth Amendments], particularly if it requires redefining the category of rights deemed to be fundamental.").

(153) See Commonwealth v. Wasson, 842 S.W.2d 487, 491-92 (Ky. 1992) (holding that a Kentucky statute which criminalized homosexual sodomy violated privacy and equal protection guarantees of the state constitution).

(154) See State v. Morales, 826 S.W.2d 201, 204 (Text Ct. App. 1992) ("[W]e can think of nothing more deserving of protection [under the Texas State Constitution] than sexual behavior between consenting adults in private."). The decision in Morales, however, was reversed by the Texas Supreme Court on jurisdictional (as opposed to substantive) grounds in State v. Morales, 869 S.W.2d 941 (Text 1994), leaving Morales as ambiguous authority on the issue of the right to privacy in Texas.

(155) See Campbell v. Sundquist, 926 S.W.2d 250, 258-66 (Teen. Ct. App. 1996).

Pursuant to this state's constitution and constitutional jurisprudence, we

conclude that our citizens' fundamental right to privacy ("the right to be

let alone") encompasses the right of the plaintiffs to engage in consensual,

private, non-commercial, [homosexual] sexual conduct, because that activity

"involv[es] intimate questions of personal and family concern."

Id. at 266.

(156) See generally Juli A. Morris, Challenging Sodomy Statutes: State Constitutional Protections for Sexual Privacy, 66 IND. L.J. 609, 611-12 (1991) (discussing the states which have recognized expanded state constitutional privacy rights for sexual minorities).

(157) Montana Rescinds Homosexual Sex Clause after Outcry, Reuters, Mar. 23, 1995, available in LEXIS, News Library, REUWLD File.

(158) Id. (quoting Montana State Senator Al Bishop).

(159) See id.

(160) For a comprehensive list of countries which criminalize sodomy, see Wilets, supra note 18, at 66 n. 295.

(161) See id.

(162) The list includes most of the former Soviet republics in Asia, Bangladesh, Bhutan, India, Iran, Jordan, Kuwait, Malaysia, Nepal, Pakistan, Qatar, Saudi Arabia, Seychelles, Singapore, Sri Lanka, Syria, the United Arab Emirates, and Yemen. See id.

(163) The African countries with sodomy laws include Algeria, Burkina Faso, Ethiopia, Ghana, Kenya, Libya, Malawi, Mauritania, Morocco, Mozambique, Namibia, Nigeria, Sudan, Tanzania, Togo, Tunisia, Uganda, and Zaire. See id.

(164) See supra notes 122-23 and accompanying text (noting the historical roots of antihomosexual behavior).

(165) See supra note 146 and accompanying text (listing cases which recognize such a right).

(166) See Toonen v. Australia, Case No. 488/1992, U.N. Hum. Rts. Comm., 15th Sess., U.N. Doc. CCPR/C/50/D488/1992 (1994). See also Tasmanian Gay & Lesbian Rights Group, GAY LAW REFORM INTASMANIA: INFORMATION FOR THE MEDIA (n.d.). For a further discussion of the substance of that decision, see Wilets, supra note 18, at 51.

(167) Kurt Krickler, Report on ILGA's Participation in the CSCE Implementation Meeting on Human Dimension Issues, Warsaw, 27 Sept. -14 Oct. 1993, EURO-LETTER (Int'l Lesbian and Gay Ass'n), Nov. 21, 1993.

(166) In September 1991, after a great deal of controversy, Amnesty International amended its mandate to recognize people imprisoned because of their sexual orientation as "prisoners of conscience." See Wilets, supra note 18, at 72. The International Human Rights Law Group has been active in working with human rights organizations in Romania seeking to repeal that country's sodomy law. See id. at 73. In 1994, Human Rights Watch adopted a policy of opposing the imprisonment of sexual minorities because of their "private sexual practices." See Memorandum to Human Rights Watch Staff, Apr. 25, 1994. It should be noted that while the policy is based, in part, upon international law's prohibition of discrimination on the basis of status, those non-discrimination provisions are used to justify equal protection for sexual minorities with respect to freedom from violence and arbitrary detention, not to expand the mandate to include state discrimination against sexual minorities per se.

(169) See Wilets, supra note 18, at 52-53 (discussing the fundamental rights which are granted to all people under international law).

(170) Natalie Hevener Kautman and Stefanie A. Lindquist, Critiquing Gender-Neutral Treaty Language: The Convention on the Elimination of All Forms of Discrimination Against Women in WOMEN'S RIGHTS HUMAN RIGHTS, supra note 8, at 114, 116-16.

(171) See Kenneth Roth, Domestic Violence as an International Human Rights Issue, in HUMAN RIGHTS OF WOMEN, supra note 27, at 326, 329-31.

A . . . conceptual obstacle to the treatment of domestic violence against

women has been the focus of the human rights movement, and human rights law,

on violations by the state. Anyone can commit a common crime, but only a

state and its agents can commit a human rights violation under international

law.

Id. at 329.

(172) Culliton, supra note 113, at 514.

(173) Whether the law prohibiting the acts themselves (whether committed between heterosexuals or homosexuals) is a violation of an individual's right to privacy, is an issue addressed earlier in this Article. See supra Part IV.A.

(174) An example of this might be discrimination in employment where an individual is fired from employment solely because of his homosexuality. See, e.g., Wilets, supra note 18, at 49 (discussing such discrimination).

(175) See generally Koppelman, supra note 65 (arguing that sodomy laws violate equal protection guarantees). Thus, as the dissent in the United States Supreme Court case Bowers observed, "Michael Hardwick's standing may rest in significant part on Georgia's apparent willingness to enforce [a statute, which on its face, criminalized both heterosexual and homosexual sodomy] against homosexuals [which] it seems not to have any desire to enforce against heterosexuals." 478 U.S. 186, 201(1986) (Blackmun, J., dissenting). "[U]nder the circumstances of this case, a claim under the Equal Protection Clause may well be available without having to reach the more controversial question whether homosexuals are a suspect class." Id. at 203 n.2. For further discussion of this case, see supra note 127.

(176) See, e.g., American Convention, supra note 34, at art. 5 ("Every person has the right to have his physical, mental, and moral integrity respected." (emphasis added)).

(177) See, e.g., ICCPR, supra note 33, at art. 18(2) ("No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice." (emphasis added)).

(178) Article 2 of the Universal Declaration provides: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, 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." Universal Declaration, supra note 32, at art. 2 (emphasis added).

Article 7 of the Universal Declaration lays out the equal protection guarantees of the Declaration: "All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination." Id. at art. 7 (emphasis added).

Article 2(1) of the ICCPR provides:

Each State Party to the present Covenant undertakes to respect and to ensure

to all individuals within its territory and subject to its jurisdiction the

rights recognized in the present Covenant, without distinction of any kind,

such as race, colour, sex, language, religion, political or other

opinion, national or social origin, property, birth or other status.

ICCPR, supra note 33, at art. 2(1) (emphasis added).

Article 26 of the ICCPR provides:

All persons are equal before the law and are entitled without any

discrimination to the equal protection of the law. In this respect, the

law shall prohibit any d discrimination and guarantee to all persons equal

and effective protection against discrimination on any ground such as race,

colour, sex, language, religion, political or other opinion, national or

social origin, property, birth or other status.

Id. at art. 26 (emphasis added).

(179) See supra note 178 (noting the comprehensive equal protection provisions of international human rights treaties).

(180) See Toonen v. Australia, Case No. 488/1992, U.N. Hum. Rts. Comm., 50th Sess., U.N. Doc. CCPR/C/50/D/488/1992 (1994). The communication to the Committee was originally submitted under the Optional Protocol to the ICCPR by Nicholas Toonen on December 25, 1991, alleging Tasmania's violation of ICCPR articles 2 (non-discrimination), 17 (privacy), and 26 (equal protection) by reason of the existence of Tasmania Criminal Code sections 122(a) and (c) and 123, which criminalize various forms of sexual contact between men, including all forms of sexual contact between consenting adult homosexual men in private. See id. at paras. 2.1-.7. In September 1992, the Australian federal government, over Tasmania's objections, refused to object to the admissibility of the case under the Optional Protocol, while reserving its position on the substance of Toonen's claim. See id. at pare. 4.1. In November 1992, the Committee declared the case admissible. See id. at pare. 5.2. For additional discussion of this case, see generally GAY LAW REFORM IN TASMANIA, supra note 166.

(181) Toonen, Case No. 488/1992, at pare. 11.

(182) For example, the newly enacted South African Constitution explicitly bans discrimination based on sexual orientation and extends prisoner visitation rights to unmarried "partners." See S. AFR. CONST. ch 2, [Subsections] 9(3), 35(2)(fl(i). The Bill of Rights in the Interim Constitution states that "[t]he state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth." S. AFR. CONST. ch 2, [Subsections] 9(3). South African gay activists have stated that they would use the new constitution to invalidate South Africa's sodomy law. See Aras Van Hertum, Constitution Includes Gays, WASH. BLADE, Dec. 17, 1993, at 13.

The Constitution of the German State of Brandenburg explicitly prohibits discrimination based on sexual orientation. See Kees Waaldijk, The Legal Situation in the Member States, in HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE 71, 78 n.15 (Kees Waaldijik & Andrew Clapham eds., 1993) (citing Art. 12 (Gesetz-und Verordnungsblatt fur das Land Brandenburg, 1992, No. 181). The wording of this constitutional provision is inherited from proposed changes to the East German Constitution which never went into effect because of German unification. &e id. at 77 n.10; Andrew Clapham &; J.H.H. Weiler, Lesbians and Gay Men in the European Community Legal Order, in HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE, supra, at 7, 14 n.9. In November 1993, the German State of Thuringia adopted a new constitution prohibiting discrimination on grounds of sexual orientation. See Alexandra Duda, Comparative Survey of the Legal and Societal Situation of Homosexuals in Europe, EURO-LETTER (Int'l Lesbian and Gay Ass'n), Mar. 27, 1994.

The constitutions of two Brazilian states, Sergipe and Mato Grosso, and the Federal District of Brazil contain prohibitions of discrimination based on sexual orientation. See James D. Wilets, The Human Rights of Sexual Minorities, 22 HUM. RTS., Fall 1995, at 22, 25.

In Poland, on April 11, 1995, the Polish Constitutional Committee proposed a clause prohibiting discrimination based on sexual orientation. See Piotr Dukaczewski, Homosexual Rights Provision, WARSAW VOICE, Apr. 24, 1995; Press Review, PAP POLISH PRESS AGENCY, Apr. 12, 1995. Article 22, paragraph 2 of the draft constitution provides that "[n]o one can be discriminated against because of their sex, race, national or ethnic background, health, physical or mental disability, social background, place of birth, sexual orientation, language spoken, religious faith or lack thereof, opinions, material status or for any other reason." Id. (emphasis added).

(183) See Tracey Tyler, Age Limit on Anal Intercourse Struck Down, VANCOUVER SUN, May 27 1996, at A14, available in 1995 WL 3516632. See also Mary Williams Walsh, Canada Moving Swiftly to Guarantee Gay Rights, S.F. CHRON., Jan. 2, 1993, at A13, available in 1993 WL 6388300 (noting the progress that Canada has made in protecting the rights of gays and lesbians).

(184) See generally Wilets, supra note 18, at 56-57 (discussing the non-discriminatory guarantees provided by various foreign countries and individual U.S. states).

In Norway, it is a criminal offense for a business to refuse a person goods or services because of their "homosexual disposition, lifestyle or orientation." See NOR. PENAL CODE [Sections]349(a) (translation found at chttp://qrd.tcp.com/qrd/world/europe/norway/state.of.lgb.rights.in.norway> (visited Mar. 14 1997)).

In Brazil, over sixty municipalities have laws prohibiting discrimination based on sexual orientation. as well as two states and the Federal District of Brasilia. See Wilets, supra note 182, at 25.

In Denmark, the Penal Code "makes it illegal 'to utter publicly or deliberately, for the dissemination in a wider circle, a statement or another remark, by which a group of people are threatened, derided or humiliated on account of [their] sexual orientation.'" Id. at 25 (citing DANISH PENAL CODE [Sections] 266(b)).

In Finland, it is a criminal offense to discriminate on the grounds of race, faith, sex, nationality, colour, age or sexual orientation. FINNISH PENAL CODE ch. 47, pare. 3.

The New Zealand Human Rights Act of 1993 provides that no person shall be discriminated against based on "sexual orientation,

which means a heterosexual, homosexual, lesbian, or bisexual orientation." Human Rights Act of 1993, [Sections] 21(1)(m) (1993) (N.Z.).

(185) See supra note 180 and accompanying text (discussing the Toonen case).

(186) See Human Rights Information Package, in CSCE HUMAN DIMENSION SEMINAR ON TOLERANCE (Int'l Lesbian and Gay Ass'n), Nov. 1992, at 2. Paragraph 7 of Recommendation 924 states:

[T]he Committee of Ministers:

i. urge those members states where homosexual acts between consenting

adults are liable to

criminal prosecution, to abolish those laws and practices;

ii. urge member states to apply the same minimum age of consent for

homosexual and

heterosexual acts;

iii. call on the governments of the member states:

a. to order the destruction of existing special records on homosexuals

and to abolish the practice of keeping records on homosexuals by the

police or any other authority;

b. to assure equality of treatment, no more no less, for homosexuals with

regard to employment, pay and job security, particularly in the public

sector;

c. to ask for the cessation of all compulsory medical action or research

designed to alter the sexual orientation of adults;

d. to ensure that custody, visiting rights and accommodation of children

by their parents should not be restricted on the sole grounds of the

homosexual tendencies of one of them;

e. to ask prison and other public authorities to be vigilant against the

risk of rape, violence and sexual offenses in prisons.

Comm'n on Soc. and Health Questions' Report on Discrimination Against Homosexuals, EUR. PARL. Doc. No. 4755, para. 7 (1981).

(187) See Resolution on Equal Rights for Homosexuals and Lesbians in the European Community, 61/40, 1994 O.J., Resolution No. A3-0028/94, Feb. 8, 1994 [hereinafter Resolution on Equal Rights], reprinted in No. 2 INTERNATIONAL LESBIAN AND GAY ASSOCIATION BULLETIN (1994), at 22-23; Douglas Sanders, Drawing Lines on Lesbian and Gay Rights (Jan. 7, 1993) (unpublished manuscript, on file with author). The Resolution is based on the "Roth Report," which was adopted by the Committee on Civil Liberties and Internal Affairs of the European Parliament of the European Union and issued as the Report on Equal Rights of Homosexuals and Lesbians in the European Community. See Resolution on Equal Rights, supra, at Preamble (noting that the Resolution was enacted "having regard to the report of the Commission on Civil Liberties and Internal Affairs"). The Roth Report called for the adoption of resolutions recognizing civil unions for same sex couples and eliminating discrimination with respect to freedom of movement and other areas of civil life. See Report of the Commission on Civil Liberties and Internal Affairs, A3-0028/94 (Jan. 26, 1994).

(188) Resolution on Equal Rights, supra note 187 Id. at pares. 5-8, 10-11.

(189) Id. at pare. 14.

(190) The Organization for Security and Cooperation in Europe (OSCE), known until December 31, 1994 as the Conference on Security and Cooperation in Europe (CSCE), was created as a result of the signing of the Helsinki Final Act in 1975 by the United States, Canada, and the countries of Western and Eastern Europe, including the Soviet Union. See Miriam Shapiro, Changing the CSCE into the OSCE: Legal Aspects of a Political Transformation, 89 AM. J. INT'L L. 631, 631 (1995). The Helsinki Final Act

provides for periodic meetings among representatives of the OSCE member nations to discuss various issues, including human rights. See id. At each of these meetings a Final Document is issued, the provisions of which the participating OSCE member nations agree to implement. See id. Although not binding on the member nations in a strictly legal sense, see id., the provisions create international obligations for the signatory countries and have a substantial political and quasi-legal impact under international law to the extent that they define the international human rights commitments of the member nations. The Final Documents have included increasingly detailed human rights provisions and there has been increasing pressure to include specific provisions with respect to sexual minorities.

(191) Krickler, supra note 167.

(192) On April 4, 1994, the United Nations Human Rights Committee ruled that the Australian State of Tasmania's sodomy law violated the privacy and non-discrimination provisions of the ICCPR. See Toonen v. Australia, Case No. 48811992, U.N. Hum. Rts. Comm., 50th Sess. U.N. Doc. CCPR/C/50/D/488/1992 (1994). This historic ruling by the Human Rights Committee has dramatically improved the ability of gays and lesbians to look to international law to vindicate their fundamental human and civil rights.

(193) See Sullivan, supra note 8, at 128-34 (noting that treaties and customary laws apply to both state and private actors).

(194) See Universal Declaration, supra note 32, at art. 16(1); ICCPR, supra note 33, at art. 24(4); Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (1979).

(195) Sullivan, supra note 8, at 130.

(196) See 22 S.C. [Sections] 718.2 (1995) (Can.).

(197) Jim Fox, Parliament Passes Hate-Crimes Bill, ST. PETERSBURG TIMES (Fla.), June 18, 1995, at A13, available in 1995 WL 5776805 (emphasis added).

(198) See Susan Eng, Hate Bill Takes Us Forward, TORONTO STAR, June 26, 1995, at A15, available in 1995 WL 6001875.

(199) Hate Crimes Statistics Act, 28 U.S.C. [sections] 534 (1990).

(200) Id. [sections] 534 (2)(b).

(201) For example, the District of Columbia provides for enhanced penalties for bias-motivated crimes, including those based on the sexual orientation of the victim. See D.C. CODE ANN. [sections] 22-4003 (1981).

Minnesota provides for a separate criminal offense of assault when motivated by bias because of the victim's actual or perceived race, color, religion, sex, sexual orientation, disability, age, or national origin. See MINN. STAT. ANN. [sections] 609.2231(4) (West Supp. 1997). Minnesota also requires separate reporting of crimes motivated by hate based on, inter alia, sexual orientation, see id. [sections] 626.5531, and requires training of peace officers in understanding and assisting victims of hate crimes and in accurately reporting these crimes, see id. [sections] 626.8451.

New Jersey provides increased penalties for harassment, see N.J. STAT. ANN. 2C:334 (West 1987), assault, see id. [sections] 2C:12-1, and other crimes if the crime was motivated by bias towards the victim on the basis of, inter alia, sexual orientation.

Oregon provides for the crime of "intimidation in the first degree" for crimes motivated by anti-sexual orientation and committed by two or more persons that cause physical injury, or place that person in fear of imminent physical injury. OR. REV. STAT. [Sections] 166.165 (1995).

Rhode-Island provides for a separate crime of bias-motivated assault and/or battery, see R.I. GEN. LAWS [sections] 11-5-13 (1994), and also provides for the development of a system for monitoring such hate crimes, see id. [sections] 42-28-46 (1993).

The State of Washington requires that the Washington Association of Sheriffs and Police Chiefs shall "monitor, record and classify" data on crimes committed because the victims were perceived to be of a particular race, color, religion, ancestry, national origin, gender, sexual orientation, or had a mental, physical or sensory handicap. WASH. REV. CODE ANN. [sections]36.28A.030 (West Supp. 1997).

Wisconsin provides for increased penalties for underlying crimes committed because of, inter alia, the victim's sexual orientation. See WIS. STAT. ANN. [Sections] 939.645(1)(b) (West 1996).

(202) The District of Columbia provides civil. penalties for injury to the person or property of a person because of her sexual orientation, [i]respective of any criminal prosecution or the result; of a. criminal prosecution ...." D.C CODE ANN. [sections] 22-4004.

New Jersey law similarly provides civil Liability for intimidation of another person on the basis of inter alia, sexual orientation. See N.J. STAT. ANN. [sections]2A. 5..3A,-21 (West Supp 1997).

(203) See N.J. STAT. ANN. [sections] 2A:53A-21(g); D.C. CODE ANN. [sections] 22-4004(C) ("The parent; of a, minor shall be liable for any damages that a minor is required to pay [as the result of any biassrelated crime] if any action or omission of the parent or legal guardian contributed to the action of the minor.").

(204) See supra note 187 anal accompanying text (discussing this resolution)

(205) Resolution on Equal Rights, supra note 187, at pare. 9.

(206) See, e.g., Emmanuel Le Quang Huy, Boucs Emissaires, Xenophobie et Espagne, ou des Groupes Nazis Clament Haut et Fort Leur Haine des "Pedes, Toxicos, Putes, Gitans" GAI PIED HEBDO, Feb. 27, 1992, at 12.

(207) See Waaldijk, supra note 182 at :123.

(208) Id.

(209) See Wilets, supra note 182, at 25 (quoting DANISH PENAL CODE [sections] 266(b)

(210) NOR. PENAL CODE [sections] 135(a) (translation found at <http://qrd.tcp.com/qrd/world/europe/ norway/state.of lgb.rights.in.norway> (visited Mar. 14 1997)); see also THE NORWEGIAN MINISTRY OF CHILDREN AND FAMILY AFFAIRS, THE NORWEGIAN ACT ON REGISTERED PARTNERSHIPS FOR HOMOSEXUAL COUPLES 17-18 (1993) [hereinafter THE NORWEGIAN MINISTRY] (citing NOERWEGlAN PENAL CODE, [sections] 135(a)).

(211) THE NORWEGIAN MINISTRY, supra note 210, at 17-18.

(212) See id.

(213) See id.

(214) Id.

(215)See, e.g., R.A.V. v. City of St. Paul, 505 U.S. 377, 391 (1992) (finding a local ordinance which prohibited, inter alia, cross-burning to be "facially unconstitutional"); Joseph E. Sullivan, New Jersey Bias-Crimes Statutes Are Ouerturned, N.Y. TIMES, May 27, 1994, at B3, available in LEXIS, News Library, NYT File (discussing the New Jersey Supreme Court's ruling which held that painting swastikas and burning crosses are activities "protected by [the] free speech guarantees of the United States Constitution.").

(216) See INTERNATIONAL CENTRE AGAINST CENSORSHIP, STRIKING A BALANCE, HATE SPEECH, FREEDOM OF EXPRESSION AND NON-DISCRIMINATION V, ARTICLE 19, at 269-83 (Sandra Coliver ea., 1995) [hereinafter STRIKING A BALANCE] (discussing these penalty enhancements).

(217) ICCPR, supra note 33, at art. 20, pare. 2.

(218) American Convention, supra note 34, at art. 13, pare. 6 [emphasis added).

(219) See Dinah Shelton, The Jurisprudence of the Inter-American Court of Human Rights, 10 AM. U. J. INT'L L. & POLS'Y 333, 360-71 (1994) (discussing decisions of the Inter-American Court); Richard J. Wilson, Inter-American Commission on Human Rights: Individual Case Resolutions, 10 AM. U. J. INT'L L. & POL'Y 19, 218-19 (1994) (listing cases that have addressed Article 13 of the American Convention).

(220) See STRIKING A BALANCE, supra note 216, at 269-83 (discussing these cases).

(221) See supra notes 217-18 and accompanying text (discussing international law's condemnation of hate speech).

(222) See supra notes 182, 184 (listing examples of such laws).

(223) It is worthwhile to single out the United States in this respect since the United States has been relatively resistant to the incorporation of international law as part of its domestic law. See generally Harry A. Blackmun, The Supreme Court and the Law of Nations, 104 YALE L.J. 39 (1994) (observing that the United States does not consistently enforce principals of international law); James D. Wilets, Using International Law to Vindicate the Civil Rights of Gays and Lesbians in U.S. Courts, 27 COLUM. HUM. RTS. L. REV. 33 (1995) (discussing the Toonen decision and its possible effects on sodomy laws in the United States).

(224) For a detailed guide to international and national asylum practice, see INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION, ASYLUM BASED ON SEXUAL ORIENTATION: A RESOURCE GUIDE (1996).

(225) July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137.

(226) Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 268.

(227) Convention Relating to the Status of Refugees, supra note 226, at art. 1(A)(2) (emphasis added). The Protocol Relating to the Status of Refugees incorporates this definition by reference. See Protocol Relating to Refugees, supra note 226, at art. 1(2). See also, e.g., Immigration Act of Canada, R.S.C. ch. 28, s. 1 (1985 4th Supp.). This Act defines "convention refugee" as any person who:

(a) by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(i) is outside the country of the person's nationality

and is unable or, by reason of that fear, is

unwilling to avail himself of the protection of that

country ....

Id.

(228) Advisory Opinion Letter from U.N. High Commissioner for Refugees (UNHCR), Branch Office for the United States of America, to Noemi E. Masliah, Attorney at Law, July 27, 1994, at 2 (on file with author) [hereinafter UNHCR Advisory Opinion].

(229) Article 14 of the Universal Declaration provides that "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution." Universal Declaration, supra note 32, at art. 14, para. 1.

Article 13 of the ICCPR contains a much weaker right to asylum, basing the right on the law of the country to which the applicant is seeking asylum:

An alien lawfully in the territory of a State Party to the present Covenant

may be expelled therefrom only in pursuance of a decision reached in

accordance with law and shall, except where compelling reasons of national

security otherwise require, be allowed to submit the reasons against his

expulsion and to have his case reviewed by, and be represented for the

purpose before, the competent authority or a person or persons especially

designated by the competent authority.

ICCPR, supra note 33, at art. 13.

Article 12, paragraph 3 of the Banjul (Africa) Charter on Human and Peoples' Rights provides that "[e]very individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with laws of those countries and international conventions." Organization of African Unity: Banjul Charter on Human and Peoples' Rights June 27, 1981, 21 I.L.M. 69, 61 (1982) (entered into force Oct. 21, 1986).

Article 22, paragraphs 7 and 8 of the American Convention provides:

7. Every person has the right to seek and be granted asylum in a foreign

territory, in accordance with the legislation of the state and international

conventions, in the event he is being pursued for political offenses or

related common crimes.

8. In no case may an alien be deported or returned to a country, regardless

of whether or not it is his country of origin, if in that country his right

to life or personal freedom is in danger of being violated because of his

race, nationality, religion, social status, or political opinions.

American Convention, supra note 34, at art. 22, pares. 7-8 (emphasis added).

The European Convention, supra note 146, does not contain an asylum provision.

(230) But see, e.g., F.R.G. CONST art. 16(a) ("Persons persecuted on political grounds enjoy the right of asylum.").

(231) See, e.g., Suzanne B. Goldberg, Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men, 26 CORNELL INT'L L.J. 605,609 (1993) (noting that "courts differ over the precise definition" of the groups which are to be afforded asylum under the United States' Immigration and Nationality Act).

(232) INS v. Cardoza-Fonseca, 480 U.S. 421, 439, n.22 (1987).

(233) See T. David Parish, Note, Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee, 92 COLUM. L. REV. 923, 934 (1992) ("Under the Protocol, the United States is forbidden to deport (`refouler') a refugee to any country in which her life or freedom would be threatened.").

(234) See Nancy Kelly, Guidelines for Women's Asylum Claims, 6 INT'L J. REFUGEE L. 517,518 (1994) (noting that, in order to

achieve refugee status, a person must establish that she has a well-founded fear that she will be prosecuted "at the hands of the government" or by an individual or entity that the government "cannot or will not control").

(235) See id. at 530 n.47 (citing examples in which women have been granted asylum based on domestic abuse).

(236) Ashley Dunn, INS Opens Door to Abused Women, L.A. DAILY NEWS, May 27, 1995, at N1, available in 1995 WL 5405568. As INS Commissioner Doris Meissner notes: "These new guideliness do not lower the standard that must be met by women seeking refugee status.... What they do is educate asylum officers about the gender-based discrimination and provide them with procedures and methods for evaluating whether individual claims meet the refugee standard." Id.

(237) A UNHCR Advisory Opinion given with respect to a gay asylum seeker from Pakistan, provides a valuable framework of analysis in support of asylum applications in the United States and other countries. After noting that the Pakistani asylum-seeker resided in the United States, and had' expressed his fear of returning to Pakistan, thus meeting the first two criteria discussed in the beginning of this chapter, the Opinion notes with respect to the third criterion that:

An asylum seeker must. . . show that his or her fear is well-founded. This

objective element of the definition is satisfied if the asylum-seeker can

"establish, to a reasonable degree, that his continued stay in his country

of origin has become intolerable to him for the reasons stated in

the definition, or would for the same reasons be intolerable if he returned

there." (emphasis added by author of Opinion).... Your client's fears of

persecution are well-founded for the reason that he is subject to a national

law that prohibits and severely punishes any form of consensual

sexual relationship outside of heterosexual marriage.

UNHCR Advisory Opinion, supra note 228, at 3. An asylum seeker must also prove, as part of the above criterion, that the harm he or she fears constitutes "persecution." See id.

The UNHCR has observed with respect to punishments for sodomy:

Although persons fleeing from prosecution or punishment for a common law

offense are not normally refugees, when such punishment is excessive it may

amount to persecution within the meaning of the definition.... Clearly, a

possible punishment of life imprisonment or death is excessive in relation

to the offense of sodomy. Moreover, laws which criminalize and

disproportionally punish consensual homosexual relations may not only

reflect a state policy of persecution but may also on their own amount to

persecution.... Thus, the Pakistani law against sodomy is properly viewed

as inherently persecutory.

Id. at 3-4.

The last critical element to demonstrate to demonstrate refugee status is persecution "for reasons of race, religion, nationality, membership in a particular social group, or political opinion ...." Id. at 2. The Advisory Opinion notes that:

Your client's fears are due to his membership in a particular social group,

namely, the group made up of homosexuals.... Your client belongs to a social

group the members of which have a shared identity based on their distinct

sexual orientation. "Membership of such a particular social group may be at

the root of persecution because there is no confidence in the group's

loyalty to the Government or because the political outlook antecedents or

economic activity of its members, or the very existence of the social group

as such, is held to be an obstacle to the Government's policies.". . . From

the Pakistani government's actions, it appears that persons of such an

orientation are perceived as an affront to the religious sensibility of the

country. For these reasons, Pakistani homosexuals are properly understood as

members of a particular social group within the meaning of the refugee

definition.

Id. at 4 (citations omitted).

(238) See International Asylum Fact Sheet, (Int'l Gay and Lesbian Human Rights Comm'n Asylum Project), May 28, 1995 (on file with author); Gay Refugee Status--A New World Trend?, (Int'l Gay and Lesbian Human Rights Comm'n Press Release), Mar. 26, 1992; Doris Sue Wong, More Gays Seeking US Asylum, BOSTON GLOBE, Nov. 7, 1992, at 13, available in 1992 WL 4200421 (noting that "homosexuals have been granted asylum in other countries, including the Netherlands, Germany, Finland, Sweden, Finland [sic] and Canada" (quoting Julie Dorf, Director, International Gay and Lesbian Human Rights Commission)).

(239) See Gay Refugee Status--A New World Trend?, supra note 238.

(240) Case of Jorge Alberto Inaudi, ref. T91-04459 (IRB (Can.) Apr. 9, 1992).

(241) Id. at 5.

(242) Case No. V93-01711 (1995).

(243) Id. at 5-6.

(244) See id.

(245) See Brian F. Henes, The Origin and Consequences of Recognizing Homosexuals as a "Particular Social Group" for Refugee Purposes, 8 TEMP. INT'L & COMP. L.J. 377, 397 (1994) (discussing this case).

(246) See International Asylum Fact Sheet, supra note 238.

(247) In re Marcelo Tenorio, File No. A72 093 558 (Executive Office for Immigration Review Immigration Court, San Francisco, July 26, 1993), at 15-16. See also David Tuller, Gay Brazilian Claims Persecution--Wins U.S. Asylum, S.F. CHRON., July 29, 1993, at A13, available in 1993 WL 6418581 (discussing this case); EUA Dao Asilo a Gay, JORNAL DO BRASIL July 30 1993; Juiz Da Asilo a Homosexual Brasileiro Nos Estados Unidos, O GLOBO (Brazil) July 30 1993.

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