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## Western Universalism and African Homosexualities

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# ARTICLES

NICHOLAS KAHN-FOGEL\*

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### ABSTRACT

This article draws on original historical research, queer theory, communitarian philosophy, and an array of anthropological sources to suggest that efforts by Western liberals to protect practitioners of same-sex intimate conduct in Africa may be relatively unsuccessful and could further endanger the intended beneficiaries of advocacy.

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In recent years, Western human rights activists, scholars, and politicians have worked to advance homosexual rights in Africa. Understandably, they have tended to frame their arguments in liberal, universalist terms. Given the successful reliance on liberal values of equality and autonomy to enhance the status of homosexuals in the West, this approach is intuitive. Liberal ideology has also become fully entrenched in international law, and the language of constitutions of countries across Africa reflects the influence of liberal philosophy. Nonetheless, numerous African leaders have responded to liberal appeals with hostility, and often with claims that homosexuality is un-African, a disease of the morally corrupt West.

I am sympathetic to the liberal perspective, but consideration of ideas outside the liberal paradigm suggests reasons for caution in pursuing a liberal agenda to promote the well-being of people who engage in same-sex intimacies in Africa. Some of the anthropological evidence about the social significance of same-sex sexual intimacy in African cultures reinforces the claims of queer theorists, whose anti-essentialist arguments suggest that sexual identity is socially constructed, rather than the product of an immutable, biological imperative. In many African cultures, both historically and today, people who have engaged in same-sex intimacies have considered that behavior an insignificant component of their personal and sexual identities. Furthermore, in many societies, same-sex intimacy has been primarily socially contingent, rather than a stable feature of the lives of people who engage in such conduct. This suggests obstacles for liberal nondiscrimination arguments. Likewise, the observation of queer theorists that essentialist claims can be used as effectively as tools of oppression as of liberation provides reason for caution; tyrannical majorities have frequently used the idea of fundamental, immutable difference as a means of subjugating disfavored minorities. In the end, categorizing all Africans who engage in same-sex intimacies as homosexuals may make the intended beneficiaries of such categorization easier targets for majorities in societies disinclined to accept Western conceptions of sexual identity.

Communitarian philosophy is also relevant to any discussion of the legal status of homosexuality in Africa because of the deep communitarian roots of traditional cultures across the continent. Although African countries have tended to adopt constitutions that proclaim liberal rights, many of the societies in which those constitutions have arisen have lacked the West's profound cultural commitment to individualism. Instead, a broad range of African cultures have tended to emphasize group welfare and individual

responsibilities over individual rights. As a consequence, communitarian values have frequently explained the actual operation of law in African countries better than the putative liberal loyalties evinced in African constitutions. This communitarian perspective also suggests obstacles to advancement of homosexual rights in Africa through liberal arguments.

Finally, a deeper appreciation of the sordid history of Western imposition of universalizing ideals to manipulate and subjugate African minds and bodies, and of Western denial of African agency, might alert liberals to the treacherous intellectual territory they inhabit and might help liberals avoid colonialist tropes that could further inflame resistance to policies aimed at enhancement of the status of people who engage in same-sex intimacies in Africa. Western liberals are correct to counter African claims that homosexuality is un-African by pointing out that European outsiders originally introduced religious intolerance and sodomy laws to African cultures that had been more amenable to same-sex intimacy. But African leaders who insist on the Western origins of homosexuality are also correct, though in an unintended sense: the presence in many contemporary African cultures of some people who define their sexual identities in terms congruous with Western conceptions of homosexuality may indeed be the consequence of Western influence. Additionally, even though there are now some Africans who consider themselves homosexuals, advocacy by Western rights advocates and threats by Western governments might cause backlash that could make their lives worse. Ultimately, if liberals hope to have a positive impact on the lives of Africans who engage in same-sex intimacies, we should structure our interactions with the cultures we hope to influence as conversations rather than as lectures or commands.

### INTRODUCTION

A short film featured on *The New York Times* website in early 2013 addresses the ongoing struggle in Uganda over the legal status of homosexuality, emphasizing the role American evangelicals have played in funding and encouraging the Africans who have worked to enact oppressive laws and policies and who have expressed intolerant, bigoted views of homosexuals. The film, *Gospel of Intolerance*,<sup>1</sup> offers a lucid counterpoint to the numerous, prominent assertions of

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<sup>1</sup> Roger Ross Williams, *Gospel of Intolerance*, N.Y. TIMES (Jan. 22, 2013), [http://www.nytimes.com/2013/01/23/opinion/gospel-of-intolerance.html?\\_r=0](http://www.nytimes.com/2013/01/23/opinion/gospel-of-intolerance.html?_r=0).

African leaders that homosexuality is foreign to the African continent, a Western construction, and a neocolonial imposition on traditional African culture and values. In fact, the film suggests to its viewers, American religious conservatives are the neocolonialists, using Western money to shape the opinions of Africans to fit the Westerners' constricted, harmful views on morality and human nature.

The movie's observations are accurate enough, yet it is also true that both the filmmaker and the American evangelicals reproduce important features of imperialist discourse. With the self-conscious extension of an American "culture war" to the African continent, both the evangelicals and the filmmaker advocate universalizing norms of Western origin, which each contingent argues should mold African law and culture. The filmmaker, moreover, participates in a longstanding colonialist tradition by denying agency to the majority of Africans, and their leaders, who express anti-homosexual sentiment. According to the implicit message of the film, the African politicians who make vitriolic public attacks on homosexuality are mere puppets of sinister outside forces, incapable of possessing their own morally coherent perspective.

The direct claims of the evangelicals, and of many Africans, have a deeply established pedigree, dating at least to eighteenth-century accounts by explorers and missionaries who asserted that homosexual conduct was essentially foreign to the African continent.<sup>2</sup> At the height of colonialism in Africa, in the nineteenth and early twentieth centuries, Victorian-era laws against homosexual conduct, applicable in the colonies as in the metropole, reflected the period ideology that heterosexuality was the natural norm, and that homosexuality was both biologically and morally deviant.<sup>3</sup> Contemporary rights advocates assert their own universalizing rubric, derived from an alternative European lineage: the liberal notion of universal human rights to equal treatment and autonomy, dating to the Enlightenment philosophy of John Locke. Liberal philosophy came to encompass claims for the rights of homosexuals (a class Enlightenment philosophers such as Locke would not have recognized or understood in modern terms) only much later. Yet that philosophy now defines the modern framework for human rights law, including assertions of the rights of homosexuals, based on broader rights enumerated both in

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<sup>2</sup> See *infra* Part V.

<sup>3</sup> See *infra* Part II.

national constitutions and in international covenants.<sup>4</sup> And just as modern homosexual rights advocates suggest that Western conservatives are the true source of anti-homosexual sentiment in Africa, colonial Europeans (and their modern Western and African intellectual counterparts) contended that homosexual activity in Africa was the product of an external menace, at the time the morally licentious Arabs and Portuguese of Burton's infamous Sotadic Zone.<sup>5</sup>

Understandably, advocates for the normalization and protection of homosexuality in Africa have tended to frame their arguments in liberal, universalist terms. This approach is intuitive, given successful reliance on liberal values of equality and autonomy to enhance the status of homosexuals in the West. Moreover, liberal ideology has become fully entrenched in international law, and the language of constitutions of countries across Africa also reflects the influence of liberal philosophy. I am sympathetic to the liberal perspective. I believe, however, that Western lawyers, scholars, and human rights activists who have considered the status of homosexuality in Africa have given insufficient attention to ideas outside the liberal paradigm that suggest reasons for caution in pursuing a liberal agenda to improve the lives of people who engage in same-sex intimacies in Africa.

In this article, I will contextualize liberal claims within the broader anthropological and philosophical discourse on gay identity and gay rights, including an overview of current and historical conceptions of homosexual behavior and sexual identity in various African cultures. I will discuss the ideology of queer theorists, whose anti-essentialist arguments reinforce some of the anthropological evidence about the significance of same-sex sexual intimacy in African societies.<sup>6</sup> Although the anthropological record demonstrates geographically widespread behavior that modern, Western observers would characterize as homosexual, both current and historical understandings of this behavior would frequently confound modern constructions of homosexual identity.<sup>7</sup> In fact, many Africans who engage in what Westerners would term homosexual conduct consider that conduct a relatively insignificant component not only of their overall identities, but an unimportant component even of their sexual

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<sup>4</sup> See *infra* Part III.

<sup>5</sup> MARC EPPRECHT, HUNGOCHANI: THE HISTORY OF A DISSIDENT SEXUALITY IN SOUTHERN AFRICA 8 (2005).

<sup>6</sup> See *infra* Part IV.B.

<sup>7</sup> See *infra* Part V.

identities.<sup>8</sup> This anthropological substantiation of the anti-essentialist arguments of queer theorists suggests significant obstacles for liberal nondiscrimination arguments. Likewise, the observation of queer theorists that essentialist arguments can be used as effectively as tools of oppression as of liberation provides reason for caution by liberals attempting to improve African lives by classifying them in Western, essentialist terms.

I will also discuss communitarian philosophy and its relationship to many African cultures. Communitarian arguments are particularly salient in the context of any discussion of the legal status of homosexuality in Africa because of the deep communitarian roots of traditional cultures across the continent.<sup>9</sup> Although African countries have tended to adopt constitutions that proclaim liberal rights, many of the societies in which those constitutions have arisen have lacked the profound cultural commitment to individualism that observers like Michael Sandel have noted in the United States.<sup>10</sup> Instead, African cultures have tended to emphasize group welfare over individual rights.<sup>11</sup> As a consequence, communitarian values have frequently explained the actual operation of law in African countries better than the putative liberal loyalties evinced in African constitutions.<sup>12</sup> This communitarian perspective also suggests obstacles to advancement of homosexual rights in Africa through liberal arguments. Ultimately, both communitarians and queer theorists deny the very existence of rights as trumps transcending the values of the communities in which such claims are made.

These contexts—the anti-essentialist claims of queer theorists, the African anthropological record, and communitarian philosophy—may be useful to liberal human rights activists; they suggest the likely depth of political resistance to liberal initiatives, which homosexual rights advocates must consider before designing strategies to improve the lives of practitioners of same-sex intimacies in Africa. Similarly, a more expansive appreciation of the historical forces and traditions that have influenced African thought might alert liberals to the

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<sup>8</sup> *Id.*

<sup>9</sup> *See infra* Part IV.A.

<sup>10</sup> *See generally* MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* (1996) (hereinafter *SANDEL, DEMOCRACY'S DISCONTENT*); MICHAEL J. SANDEL, *WHAT MONEY CAN'T BUY: THE MORAL LIMITS OF MARKETS* (2013) (describing the pervasive commodification of social goods in the United States).

<sup>11</sup> *See infra* Part IV.A.

<sup>12</sup> *Id.*

somewhat treacherous intellectual territory they inhabit. In advocating for universal rights, liberals would do well to recognize the sordid history of Western imposition of universalizing ideals to influence and subjugate African minds and bodies. Such an appreciation might facilitate avoidance of the tropes of colonialism that could further inflame resistance to policies aimed at enhancement of the status of people who engage in same-sex intimacies in Africa.

This discussion would be salient in a large number of cultures outside of Africa as well. Traditional societies outside of Africa have often emphasized group welfare over individual rights.<sup>13</sup> Additionally, patterns of same-sex sexual contact in societies outside of Africa have frequently confounded Western conceptions of sexual identity.<sup>14</sup> Despite these potentially broader implications, I have chosen to focus on Africa, both because it coincides with my professional interests, and because the African reaction to homosexuality has incurred special attention from Western activists in recent years. This attention has been due, in part, to the extremity of some legal responses to homosexuality in Africa. It has, I believe, also been a consequence of the extreme license Westerners have historically felt entitled to take in attempting to influence African cultures to match Western ideals.

In Part II of this article, I will provide a brief overview of the legal status of homosexuality in Africa and of responses to African laws by liberal human rights advocates. In Part III, I will examine liberal legal arguments for homosexual rights in Africa. Although there is an

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<sup>13</sup> See, e.g., Tonya Kowalski, *The Forgotten Sovereigns*, 36 FLA. ST. U. L. REV. 765, n.198 (2009) (describing the Chthonic focus on human relationships in opposition to the Western emphasis on individual property ownership over community rights); Eugene KB Tan, 'We' v 'I': *Communitarian Legalism in Singapore*, 4 AUSTRL. J. ASIAN L. 1 (2002); Timothy Webster, *China's Human Rights Footprint in Africa*, 51 COLUM. J. TRANSNAT'L L. 626, 634 (2013) (stating that, "[l]ike other Asian countries, China stresses communitarian values, the importance of groups within society and the state's interest over those of the individual").

<sup>14</sup> As I will discuss below, even in the West, the modern sexual taxonomy, which conceives of homosexuality as an immutable characteristic of personal and sexual identity, did not arise until the latter half of the nineteenth century. See *infra* Part IV.B. For a broad critique of efforts to universalize Western concepts of sexual orientation, see Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97 (drawing heavily on examples from Thailand and India and arguing that the incompatibility of Western notions of sexual identity with ideas about same-sex intimacy in non-Western cultures suggests legal scholars interested in promoting rights of sexual minorities internationally should focus on autonomy rather than identity); LADY BOYS, TOM BOYS, RENT BOYS: MALE AND FEMALE SEXUALITIES IN CONTEMPORARY THAILAND (Peter A. Jackson & Gerard Sullivan eds., 1999). For an in-depth analysis of the incompatibility of historical Arab conceptions of sexuality with Western ideas about sexual identity, see JOSEPH A. MASSAD, *DESIRING ARABS* (2007).



ongoing academic debate between liberals and communitarians that transcends gay rights discourse, and although queer theorists continue to challenge the essentialist foundations of liberal philosophy, liberal, universalist paradigms have clearly prevailed in the international legal sphere. But despite the plausible basis international agreements and national constitutions provide for these arguments, international enforcement mechanisms are insufficient to offer much practical significance to such claims in the near future. Furthermore, given the depth of anti-homosexual sentiment in many African societies, the use of national courts to pursue a gay rights agenda, even if initially successful, has the potential to incite political backlash that could undermine the legal and physical security of the intended beneficiaries of litigation. In Part IV, I will examine critiques of liberalism that might be useful to liberals interested in advancing homosexual rights in Africa, including arguments about an imperialist impulse inherent to liberalism and about the potential for liberal initiatives in the developing world to backfire. I will focus in particular in Part IV on communitarian philosophy and queer theory, each of which offers potential insight on likely obstacles to liberal arguments for gay rights in Africa. In Part V, I will discuss the anthropological record of same-sex intimacies in various African cultures. To some degree, this record confirms the anti-essentialist claims of queer theorists. In Part VI, I will offer observations about the implications of communitarian thought, queer theory, and African anthropological evidence for liberals interested in promoting homosexual rights in Africa. To the extent that communitarian philosophy coincides with deeply rooted cultural perspectives in Africa, an individual rights-based agenda may be less likely to succeed. To the extent that people in Africa who engage in what Westerners would call homosexual practices are neither thought of as homosexuals by members of their communities, nor think of themselves in such terms, Western insistence on categorizing such individuals as homosexuals may endanger them. Overall, human rights advocates would do well to consider the potential unintended consequences of pursuing a liberal agenda to advance homosexual rights in Africa. In the final analysis, the lessons of this research suggest that Western lawyers, scholars, policy-makers, and activists hoping to improve the lives of people who engage in same-sex intimacies in Africa should proceed with extreme caution.

**I**  
**LAW AND CONTEMPORARY ATTITUDES TOWARD AFRICAN  
 HOMOSEXUALITY**

Today, homosexual activity is legally prohibited in thirty-six of Africa's fifty-four countries.<sup>15</sup> The severity of the prescribed punishments for homosexual sex in Africa varies significantly, from a maximum of one year of imprisonment in Liberia,<sup>16</sup> to life imprisonment in Sierra Leone<sup>17</sup> and Tanzania,<sup>18</sup> to the death penalty in Mauritania, parts of Northern Nigeria, Southern Somalia, and Sudan.<sup>19</sup> In Uganda, legislative attempts since 2009 to authorize a death penalty for "aggravated homosexuality" have received widespread attention.<sup>20</sup> In eleven Francophone African countries, same-sex sexual intimacy has never been criminalized.<sup>21</sup> However, even in some of these countries, the age of consent for same-sex sexual activity is higher than the age of consent for heterosexual sex.<sup>22</sup> In Lesotho and South Africa, modern protections for homosexuals have replaced earlier laws against same-sex sexual contact, and in Cape Verde, an older proscription of homosexual activity is absent in the modern penal code.<sup>23</sup> In some countries, like

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<sup>15</sup> LUCAS PAOLI ITABORAHY & JINGSHU ZHU, STATE SPONSORED HOMOPHOBIA—A WORLD SURVEY OF LAWS: CRIMINALISATION, PROTECTION AND RECOGNITION OF SAME-SEX LOVE 33 (2013), available at [http://old.ilga.org/Statehomophobia/ILGA\\_State\\_Sponsored\\_Homophobia\\_2013.pdf](http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2013.pdf).

<sup>16</sup> *Id.* at 51.

<sup>17</sup> *Id.* at 57.

<sup>18</sup> *Id.* at 59.

<sup>19</sup> *Id.* at 58.

<sup>20</sup> See, e.g., Daniel Englander, Comment, *Protecting the Human Rights of LGBT People in Uganda in the Wake of Uganda's "Anti-Homosexuality Bill, 2009,"* 25 EMORY INT'L L. REV. 1263 (2011); Michael Hollander, Note, *Gay Rights in Uganda: Seeking to Overturn Uganda's Anti-Sodomy Laws*, 50 VA. J. INT'L L. 219 (2009); Tiffany M. Lebrón, Comment, "Death to Gays!" Uganda's 'One Step Forward, One Step Back' Approach to Human Rights, 17 BUFF. HUM. RTS. L. REV. 173 (2011); Williams, *supra* note 1.

<sup>21</sup> ITABORAHY & ZHU, *supra* note 15, at 21 (noting that same-sex sexual activity has never been prohibited in Burkina Faso, Central African Republic, Chad, Congo, Cote d'Ivoire, Democratic Republic of Congo, Gabon, Madagascar, Mali, Niger, and Rwanda); *Uganda: Reject Anti-Homosexuality Bill*, HUMAN RIGHTS WATCH, May 10, 2011, <http://www.hrw.org/news/2011/05/10/uganda-reject-anti-homosexuality-bill>.

<sup>22</sup> ITABORAHY & ZHU, *supra* note 15, at 20 (noting a higher age of consent for homosexual sex than for heterosexual sex in Benin); *id.* at 24 (stating that the age of consent in Congo Brazzaville is thirteen for heterosexual sex and twenty-one for homosexual sex, a distinction inherited from French colonialists).

<sup>23</sup> *Id.*

Egypt, facially neutral laws have often been used to prosecute people who engage in same-sex sexual activity.<sup>24</sup>

As this overview reveals, Francophone African countries have been less likely to explicitly criminalize same-sex intimacies. This distinction seems to date to the more permissive policies of Belgian and French colonialists on this issue in some of their colonies,<sup>25</sup> as compared with the British, who consistently targeted indigenous corporeal intimacies they deemed deviant in all of their colonies.<sup>26</sup> Nonetheless, some Francophone African countries criminalized homosexual conduct after independence.<sup>27</sup> In Lusophone, Africa, Portuguese colonial laws prohibited sodomy, and both Angola and Mozambique have retained the prohibition in their current penal codes.<sup>28</sup>

The British approach stemmed from law applicable in England, where the nineteenth-century Offences Against the Person Act had reduced the punishment for sodomy and other “unnatural” sexual acts from death to imprisonment for ten years to life. After initially introducing a version of the Act in India, Britain then exported it to all of its colonial possessions.<sup>29</sup> Today, former British colonies that continue to criminalize same-sex sexual activity have tended to retain much of the original language from Section 377, which reads:

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall be liable to fine. Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.<sup>30</sup>

My own examination of public archives in Zambia reveals the British colonial government and its predecessor, the British South Africa Company, used a version of this law to prosecute men who engaged in same-sex intimacies in the territory during the colonial period. In some cases, colonial officials used the law to prosecute

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<sup>24</sup> *Id.* at 46.

<sup>25</sup> See, e.g., *id.* at 20–24. But see Neela Ghoshal, *Africa’s Small Steps Toward LGBTI Equality*, HUMAN RIGHTS WATCH (July 17, 2013), <http://www.hrw.org/news/2013/07/17/africas-small-steps-toward-lgbti-equality> (noting colonial sodomy laws in Mauritius).

<sup>26</sup> Ghoshal, *supra* note 25.

<sup>27</sup> *Id.* (observing that the French had no sodomy laws in Burundi or Cameroon, but both countries enacted their own laws penalizing homosexual conduct after independence).

<sup>28</sup> ITABORAHY & ZHU, *supra* note 15, at 43, 54.

<sup>29</sup> Douglas E. Sanders, *377 and the Unnatural Afterlife of British Colonialism in Asia*, 4 ASIAN J. COMP. L. 1, 8 (2009).

<sup>30</sup> Central Government Act, No. 45 of 1860, INDIA PEN. CODE (1860), § 377.

older males who had sexual contacts with children. For example, inspection of the 214 criminal cases in Class II Subordinate Court in 1942 in Fort Jameson,<sup>31</sup> in what is now Zambia's Eastern Province, shows two such prosecutions. In one case, *Rex v. Chajaso Zulu*, the defendant, a seventeen-year-old male, pleaded guilty to a charge of committing "an act of gross indecency with another male" after he persuaded a thirteen-year-old "to lie on the ground" in the bush near a village and "then committed the offense."<sup>32</sup> Zulu's sentence was six strokes with a cane.<sup>33</sup> In the other, *Rex v. Hamid Ahmed Malek*, the defendant, a "British Indian Male Adult," faced a charge of "Indecent Practices Between Males" after an encounter with Kufwa Zimba, a nine or ten-year-old boy.<sup>34</sup> Likewise, a reading of the ninety-five available criminal cases in the Native Commissioner's Court in Livingstone in 1913 reveals the case of *Rex v. Likandu*, in which the defendant pleaded guilty to a charge of committing "an act of gross indecency with another male person," a boy about ten years old.<sup>35</sup> Likandu claimed to have believed the boy was a woman.<sup>36</sup> He received a sentence of two months imprisonment with hard labor.<sup>37</sup>

Significantly, although each of these cases involved conduct current readers would likely conceive of as child molestation and sexual assault, the nature of the charges demonstrates that, for the British, the defendants' transgressions were tied, at least in part, to the occurrence of same-sex sexual contact.<sup>38</sup> In other cases, the British charged indigenous defendants with "gross indecency with another male" without specifying the age of the other party.<sup>39</sup> These cases represented, for the British, only a part of a broader effort to control indigenous sexuality through counterparts to Section 377. In Fort Jameson in 1942, for example, the colonial government charged two

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<sup>31</sup> Fort Jameson is now called Chipata.

<sup>32</sup> Zambia National Archives [ZNA] EP 4/13/6, Case No. 64 of 1942.

<sup>33</sup> *Id.*

<sup>34</sup> ZNA EP 4/13/6, Case No. 171 of 1942.

<sup>35</sup> ZNA KSC 2/2/2, Case No. 21 of 1913.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> In one case in the Native Commissioner's Court in Livingstone in 1913, a defendant did face a charge of "indecent assault on a male person." The court sentenced the defendant to one year of imprisonment with hard labor and fifteen lashes. ZNA KSC 2/2/2/, *Rex v. Liabwa*, Case No. 108 of 1913.

<sup>39</sup> See, e.g., ZNA 4/13/19, *Regina v. Elias Sowoyo*, Case No. 418 of 1954, Subordinate Court, Class I, Fort Jameson.

men with attempting to have carnal knowledge of cows.<sup>40</sup> The British, of course, also sought to use colonial law to shape indigenous behavior more generally to reflect contemporary British values.<sup>41</sup>

As I will detail in Part V, anthropological evidence reveals that people from a wide variety of African cultures, before, during, and after colonial rule, have engaged in what many Westerners would characterize as homosexual sex. Despite this evidence, Africans opposed to homosexuality now frequently cast homosexuality as un-African and as a Western, neocolonial menace.<sup>42</sup> In 1999, Zimbabwean President Robert Mugabe expressed this sentiment in referring to Britain's "gay government," which he believed was attempting to impose homosexuality on Africans.<sup>43</sup> In the same year, Kenyan President Daniel Arap Moi declared, "It is not right that a man should go with another man or a woman with another woman. It

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<sup>40</sup> ZNA 4/13/6, *Rex v. Mayonga Banda*, Case No. 16 of 1942; *Rex v. James Mvula*, Case No. 153 of 1942.

<sup>41</sup> A prominent example of such use of the law was the British prosecution of colonial subjects for claiming to have the powers of witchcraft or accusing others of being witches. See MARTIN CHANOCK, *LAW, CUSTOM AND SOCIAL ORDER: THE COLONIAL EXPERIENCE IN MALAWI AND ZAMBIA* 85–102 (1985). British prosecutions of colonial subjects for claiming to have powers of witchcraft, or accusing others of being witches, reflected changing attitudes on the issue at home—in seventeenth-century England, legislation punished people for being witches, but by the early eighteenth century, the law no longer recognized the possibility of actual witchcraft, and new legislation punished people for pretending to have the power of witchcraft. *Id.* at 94. My own investigation of colonial cases in the Zambia National Archives shows the prevalence of British prosecutions of indigenous subjects for claiming to be witches or accusing others of being witches. For example, in Mwinilunga District (in Northwestern Province in Zambia) seven of seventy-one criminal cases in the Native Commissioner's Court in 1915 involved witchcraft charges. ZNA KSE 3/2/2/2. In the same court in 1926, three of 135 prosecutions were for witchcraft claims. ZNA 3/2/2/5. In 1927, three of 110 criminal cases in that court involved such charges. ZNA 3/2/2/6. In 1956, the Class III Subordinate Court in Fort Jameson sentenced one person convicted of accusing another of witchcraft to eighteen months of imprisonment with hard labor. ZNA EP 4/13/20, *R v. Shadrack Jere*, Jan. 27, 1956.

<sup>42</sup> For some authors, African resistance to homosexuality represents a rejection only of Western-inspired gay identity, not a condemnation of same-sex physical intimacy more broadly. See, e.g., Katyal, *supra* note 14, at 126 (asserting that that, in the case of Zimbabwean President Robert Mugabe's public denunciations of homosexuality, "sexual identity per se, not same-sex sexual conduct, is the central target of such attacks"); Joseph Massad, *Re-Orienting Desire: The Gay International and the Arab World*, 14 PUB. CULTURE 361 (2002) (arguing that Egyptian prosecutions represented resistance to Western gay identity rather than to same-sex intimacy). But although many anti-homosexual pronouncements by Africans have reflected resistance to perceived Western imperialism, much African criticism of homosexuality has involved broad condemnation of same-sex sexual practices. Furthermore, those who have suggested a distinction between African criticism of homosexual identity and rejection of same-sex intimacy more generally have tended to be Western theorists, not African leaders themselves.

<sup>43</sup> EPPRECHT, *supra* note 5, at 4.

is against African tradition and Biblical teachings. I will not shy away from warning Kenyans against the dangers of the scourge.”<sup>44</sup> In Namibia, Alpheus Naruseb, the secretary for Information and Publicity for the South West Africa People’s Organization, asserted, “It should be noted that most of the ardent supporters of these perverts are Europeans who imagine themselves to be the bulwark of civilisation and enlightenment. They are not only appropriating foreign ideas in our society but also destroying the local culture by hiding behind the façade of the very democracy and human right (sic) we have created.”<sup>45</sup> In 2004, Nigerian President Olusegun Obasanjo declared homosexuality to be “unbiblical, unnatural and definitely un-African.”<sup>46</sup> In a 2013 article published by the Ghana Broadcasting Corporation, a journalist noted recent British threats to cut aid to Ghana if the country persisted in criminalizing homosexuality and questioned, “[W]hy is Ghana always a target for Britain? Is it a case of neo-colonialism?”<sup>47</sup>

The sense of conflict between a pro-homosexual West and African opposition to homosexuality has been evident amongst religious as well as political leaders. Perhaps most famously, at the 1998 Lambeth Conference of the Anglican Communion, African and Asian bishops combined to defeat North American and European motions in favor of gay rights. At the time, the United States Episcopal Church had already been ordaining openly gay clergy for several years, and by 2003, the Church of England would propose a gay man for Bishop of Reading.<sup>48</sup> Nonetheless, African and Asian clergy outnumbered their North American and European counterparts at Lambeth, and, in the end, the conference passed a statement declaring homosexual practices to be “incompatible with scripture.”<sup>49</sup> The belief that Western appeals for homosexual rights represent merely the latest iteration of Western cultural imperialism certainly increases the likelihood of resistance in societies buffeted by a long history of

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<sup>44</sup> NEVILLE HOAD, *AFRICAN INTIMACIES: RACE, HOMOSEXUALITY, AND GLOBALIZATION* xii (2007).

<sup>45</sup> *Id.* at 15.

<sup>46</sup> *World Briefing—Africa: Nigeria: President Backs African Bishops Over Gays*, N.Y. TIMES (Oct. 28, 2004), <http://query.nytimes.com/gst/fullpage.html?res=9B0DE7D7123DF93BA15753C1A9629C8B63>.

<sup>47</sup> Justice Mingle, *Proposed UK Visa Restriction*, GHANA BROADCASTING CORPORATION (June 28, 2013), <http://www.gbcghana.com/index.php?id=1.1436391>.

<sup>48</sup> PHILIP JENKINS, *THE NEXT CHRISTENDOM: THE COMING OF GLOBAL CHRISTIANITY* 251 (2002).

<sup>49</sup> *Id.* See also HOAD, *supra* note 44, at 51.

colonial interference. As I will discuss in further detail below, there is a sense (although largely unappreciated by African leaders who attack homosexuality) in which this belief is correct.

Overall, broad majorities of the populations in all African countries where data is available have expressed disapproval of homosexuality. In 2003, a Pew research report including information from nine African countries revealed that majorities in all nine countries believed society should not accept homosexuality.<sup>50</sup> This ranged from a mere 62 percent of the Angolan population who disapproved of homosexuality to 99 percent of Kenyans.<sup>51</sup> By 2013, Pew data on seven African countries continued to show popular disapproval of homosexuality in all countries, with majorities of over 90 percent of people in six of the seven nations in the study believing that society should not accept homosexuality.<sup>52</sup>

Western rights advocates have tended to respond to claims about the un-African nature of homosexuality with counter-assertions, including recitations of the history of colonial imposition of anti-homosexual norms,<sup>53</sup> and anthropological observations that seem to refute African contentions.<sup>54</sup> Neville Hoad, an American-based English Professor from South Africa, has described these Western efforts as attempts to “consolidate[e] evidence from elsewhere to

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<sup>50</sup> The 2003 report found that 62 percent of Angolans, 63 percent of South Africans, 84 percent of people from Ivory Coast, 93 percent of Ghanaians, 95 percent of Ugandans, 95 percent of Nigerians, 96 percent of Malians, 98 percent of Senegalese, and 99 percent of Kenyans believed society should not accept homosexuality. *News Release: Global Views on Homosexuality*, PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, 19, Nov. 18, 2003, [http://www.pewforum.org/uploadedfiles/Orphan\\_Migrated\\_Content/religion-homosexuality.pdf](http://www.pewforum.org/uploadedfiles/Orphan_Migrated_Content/religion-homosexuality.pdf).

<sup>51</sup> *Id.*

<sup>52</sup> The 2013 report found that 61% of South Africans, 90% of Kenyans, 96% of Ugandans, 96% of Ghanaians, 96% of Senegalese, and 98% of Nigerians believed society should not accept homosexuality. *The Global Divide on Homosexuality*, PEW RESEARCH CENTER (June 4, 2013), <http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/>.

<sup>53</sup> See, e.g., EPPRECHT, *supra* note 5, at 7 (stating that African arguments against homosexuality “appear to be borrowed wholesale from social conservatives in the West, while repressive laws are a direct legacy of colonial rule. Even the claim that same-sex sexual behaviour is un-African appears to have originated in the West rather than Africa itself.”); Eusebius McKaiser, *Homosexuality Un-African? The Claim is an Historical Embarrassment*, THE GUARDIAN (Oct. 2, 2012), <http://www.guardian.co.uk/world/2012/oct/02/homosexuality-unafrican-claim-historical-embarrassment>.

<sup>54</sup> See, e.g., EPPRECHT, *supra* note 5; RUTH MORGAN AND SASKIA WIERENGA, TOMMY BOYS, LESBIAN MEN AND ANCESTRAL WIVES: FEMALE SAME-SEX PRACTICES IN AFRICA (2006); STEPHEN O. MURRAY & WILL ROSCOE, BOY-WIVES AND FEMALE HUSBANDS: STUDIES IN AFRICAN HOMOSEXUALITIES (1998); McKaiser, *supra* note 53.

universalize and naturalize one's own experience," and has noted that such efforts to universalize Western notions of homosexuality have a longstanding lineage, dating to the nineteenth century.<sup>55</sup> In Hoad's assessment, typical of the postmodernist claims of queer theorists, these attempts to prove the existence of minority sexual identity lack the liberating potential homosexual rights advocates assume, for they "precisely reproduce[] the terms of the debate [they] wish . . . to end in a landscape of assertion and counterassertion."<sup>56</sup>

I will discuss the insight arguments like Hoad's might offer to liberal rights advocates in Part IV. First, however, I will provide an overview of the primarily liberal claims by Westerners hoping to improve the lives of people who engage in same-sex intimacies in Africa. Ultimately, while there are good reasons to question the efficacy of liberal arguments, these sorts of claims have tended to define the Western response to antihomosexual sentiment from Africans, shaping the policies of Western governments and influencing the development of international law.

Recent appeals by human rights organizations are numerous. In May of 2013, in response to an ongoing sodomy prosecution in Zambia, Human Rights Watch commanded, in a headline, *Zambia: Stop Prosecuting People for Homosexuality*.<sup>57</sup> Invoking the liberal foundations of Zambian and international law, the organization argued that "[t]he Zambian government is obligated under international law and its own constitution to respect the private lives and personal liberties of everyone in the country, and to cease prosecuting people for consensual adult sex."<sup>58</sup> Similarly, Amnesty International's director of law and policy recently condemned anti-homosexuality laws across the African continent, stating, "These poisonous laws must be repealed and the human rights of all Africans upheld."<sup>59</sup> In the legal academy, law review articles have frequently

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<sup>55</sup> HOAD, *supra* note 44, at xxv.

<sup>56</sup> *Id.* at xxiv (alteration in original).

<sup>57</sup> *Zambia: Stop Prosecuting People for Homosexuality*, HUMAN RIGHTS WATCH (May 20, 2013), <http://www.hrw.org/news/2013/05/20/zambia-stop-prosecuting-people-homosexuality>.

<sup>58</sup> *Id.*

<sup>59</sup> Erin Conway-Smith, *Africa's Anti-Gay Attacks Reach 'Dangerous' Levels*, GLOBAL POST (June 25, 2013), <http://www.globalpost.com/dispatch/news/regions/africa/130625/anti-gay-attacks-africa-criminalization-homosexuality-amnest-international>.



advanced liberal legal arguments for the protection of homosexual status in Africa.<sup>60</sup>

Such arguments by academics and human rights organizations have paralleled the words and actions of Western governments and international organizations. In December of 2011, President Barack Obama instructed federal agencies to begin promoting homosexual and transgender rights overseas. At the same time, Secretary of State Hillary Clinton told the United Nations Human Rights Council that “Gay rights are human rights, and human rights are gay rights.”<sup>61</sup> In Senegal in June, 2013, Obama praised the previous week’s United States Supreme Court rulings overturning the Defense of Marriage Act (DOMA) and clearing the way for gay marriage in California. Obama argued that although different countries’ customs and religious beliefs should be respected, all people must be treated equally.<sup>62</sup> Acknowledging that the “issue of gays and lesbians and how they are treated has come up and has been controversial in many parts of Africa,” Obama stated that he wanted the “African people to hear just what I believe. People should be treated equally. And that’s a principle that I think should be applied universally.”<sup>63</sup> Senegal’s President, Macky Sall, responded that Senegal is not ready to decriminalize homosexuality.<sup>64</sup>

Western appeals for greater tolerance of homosexuality in Africa have been accompanied, at times, by implicit or explicit threats to cut aid to noncompliant countries. In Hillary Clinton’s speech to the Human Rights Council, she promised “to ensure that our foreign assistance promotes the protection of LGBT rights.”<sup>65</sup> In late 2011,

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<sup>60</sup> See, e.g., Sophie M. Clavier, *Objection Overruled: The Binding Nature of the International Norm Prohibiting Discrimination Against Homosexual and Transgendered Individuals*, 35 *FORDHAM INT’L L.J.* 385 (2012); Katyal, *supra* note 14 (arguing for the use of privacy arguments rather than nondiscrimination arguments to advance the rights of sexual minorities internationally); Englander, *supra* note 20; Courtney E. Finerty, Note, *Being Gay In Kenya: The Implications of Kenya’s New Constitution for its Anti-Sodomy Laws*, 45 *CORNELL INT’L L.J.* 431 (2012); Hollander, *supra* note 20; Lebrón, *supra* note 20.

<sup>61</sup> The Associated Press, *Africa’s Anti-Gay Laws: A Look at Uganda, Malawi and More*, June 24, 2013, [http://www.huffingtonpost.com/2013/06/24/africa-anti-gay-laws\\_n\\_3491565.html](http://www.huffingtonpost.com/2013/06/24/africa-anti-gay-laws_n_3491565.html).

<sup>62</sup> Jennifer Lazuta, *In Senegal, Obama Touts Gay Rights*, USA TODAY, June 28, 2013, at 2A.

<sup>63</sup> Drew Hinshaw, *Obama Promotes Sub-Saharan Ties*, WALL ST. J., June 28, 2013.

<sup>64</sup> *Id.* Lazuta, *supra* note 62.

<sup>65</sup> Robbie Corey-Boulet, *The Obama Administration’s Bold But Risky Plan to Make Africa Gay-Friendly*, THE ATLANTIC (Mar. 7, 2012), <http://www.theatlantic.com/inter>

British Prime Minister David Cameron made a much more straightforward statement that Britain would cut aid to countries that fail to respect homosexual rights.<sup>66</sup> Meanwhile, bodies like the United Nations Human Rights Committee have repeatedly condemned laws that discriminate against homosexuals.<sup>67</sup> Ultimately, backlash against Western appeals for homosexual rights in Africa may explain increasing numbers of prosecutions of people who engage in same-sex intimacies in some countries, efforts to increase penalties for homosexual conduct, and, generally, increasingly negative public focus on an issue that most people had previously ignored.<sup>68</sup>

As I will discuss below, the ideas of communitarians and queer theorists, coupled with evidence of African cultural attitudes and practices, pose significant challenges for liberal human rights activists. Nonetheless, the profound potential of liberal arguments to increase human freedom makes liberal philosophy an intuitively appealing framework for improving the lives of homosexuals around the world. Moreover, liberal philosophy has had a momentous impact on both international law and the domestic law of countries around the world, including African nations. The denial by communitarians and queer theorists of the existence of rights also suggests the inherent limitations of any approach that requires total disavowal of foundational liberal principles. Thus, while I believe that investigation of African cultures and the ideas of communitarians and queer theorists suggest reasons for extreme caution in attempting to advance a liberal homosexual rights agenda in Africa, I do not propose that liberals should abandon their philosophical allegiance. Rather, consideration of all available evidence suggests that traditional liberal strategies could backfire. In the next Part, I offer an account of liberal philosophy in general and liberal legal arguments for gay rights in particular.

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national/archive/2012/03/the-obama-administrations-bold-but-risky-plan-to-make-africa-gay-friendly/254086/.

<sup>66</sup> *Ghana Refuses to Grant Gays' Rights Despite Aid Threat*, BBC NEWS (Nov. 2, 2011), <http://www.bbc.co.uk/news/world-africa-15558769>.

<sup>67</sup> See *infra* Part III.

<sup>68</sup> In Liberia, for example, there were no prosecutions for sodomy in the years preceding Obama's instruction to federal agencies to promote homosexual rights abroad. The announcement, however, sparked widespread denunciations of homosexuality in the country, as well as efforts to enhance the penalties for same-sex sexual intimacy in the country. See *infra* notes 343–44 and surrounding text. Likewise, in Zambia, sodomy prosecutions in 2013 are the first in the country's recent history, amidst increasing public hostility toward the idea of homosexuality. See *infra* note 358.

## II

## LIBERAL PHILOSOPHY AND LIBERAL LEGAL FRAMEWORKS

Writing over a decade ago, Carlos Ball noted that despite an ongoing debate in the legal academy between liberals and communitarians, commentary on the status of gay men and lesbians in the United States had largely ignored that debate. Instead, those discussing homosexuality in America had tended to use a liberal, rights-based structure to frame the dialogue.<sup>69</sup> Today, political and legal debates about homosexuality tend to exclude not only consideration of communitarian philosophy, but also analysis of the observations of queer theorists, the anthropologists, philosophers, sociologists, historians and literary critics who have, for decades, questioned the essentialist basis for homosexual identity that liberal rights advocates have often assumed.<sup>70</sup> As Professor Ball observed, this liberal approach centers on claims of rights to privacy and to non-discrimination,<sup>71</sup> both fundamental tenets of liberal theory. Since Professor Ball made his observations, both popular and legal culture in the United States have evolved dramatically toward greater acceptance of the claims of liberal, homosexual rights activists. The Supreme Court, in *Lawrence v. Texas*,<sup>72</sup> overturned Texas's anti-sodomy law, overruling its 1986 decision in *Bowers v. Hardwick*.<sup>73</sup> Meanwhile, although thirty-three states have passed constitutional amendments or legislation banning same-sex marriage, sixteen states and Washington, D.C., allow homosexual marriage, and several other states allow civil unions or other legal partnerships granting many of the legal benefits of marriage.<sup>74</sup> In June of 2013, the Supreme Court struck down the Defense of Marriage Act,<sup>75</sup> which had denied federal benefits to married same-sex couples, and cleared the way for same-sex marriage in California by leaving in place a district court

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<sup>69</sup> Carlos A. Ball, *Communitarianism and Gay Rights*, 85 CORNELL L. REV. 443, 446 (2000) (hereinafter Ball, *Communitarianism and Gay Rights*).

<sup>70</sup> See Part II, *supra*. Katyal, *supra* note 14, at 118 (surmising that the because of the “polarization that [queer theory] produced between queer theorists and gay rights activists, queer theory has remained a predominantly academic, rather than a legal, enterprise”).

<sup>71</sup> Ball, *Communitarianism and Gay Rights*, *supra* note 69, at 446.

<sup>72</sup> *Lawrence v. Texas*, 539 U.S. 558 (2003).

<sup>73</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986).

<sup>74</sup> *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, NATIONAL CONFERENCE OF STATE LEGISLATURES (June 26, 2013), <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx#1>.

<sup>75</sup> *United States v. Windsor*, 133 S. Ct. 2675 (2013).

determination that a California constitutional amendment banning homosexual marriage violated the federal Constitution.<sup>76</sup>

As in the United States, discussion of the status of homosexuals internationally has tended to center on notions of equality and autonomy at the heart of liberal ideology. Unsurprisingly, then, this liberal focus has shaped analysis of the laws of the numerous African countries that have criminalized homosexual conduct and, more broadly, have implemented policies that marginalize and discriminate against homosexuals.<sup>77</sup> This rights-based focus has also dictated the terms in which Western and Western-influenced activists have characterized and critiqued expressions of popular African sentiment, often by national leaders, condemning homosexuals as deviant, unnatural, immoral, and influenced by corrupt Western ideology and values.

There are good reasons for adhering to a liberal framework in seeking to improve the lives of homosexuals in Africa. First, as mentioned above, the liberal paradigm has become fully entrenched in international law. With the ratification of post World War II conventions beginning with the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, liberal, universalist philosophy became the foundation of a new body of international law, defining relationships between states and citizens in areas that before had been left to the realm of domestic political decision-making. As the former colonies of European powers became sovereign nations in the second half of the twentieth century, the new states not only ratified these international human rights documents, but also implemented constitutions reflecting the liberal values of the Western countries from which they had gained independence. Second, liberalism offers an appealing basis for advocacy because its presupposition of rights that precede political acceptance provides a conceptual bulwark against the perils that alternatives to liberalism, like communitarianism and queer theory, pose for homosexuals; ultimately, if, as communitarians and queer theorists suggest, there is no room for an idea of rights that precede other social norms, protection of the interests of homosexuals and other minority groups depends entirely on social acceptance of minority interests. The idea of rights becomes, in that case, a tautology at best.

In Part IV, I will discuss communitarian thought and queer theory, including analysis of the ways these schools of thought might inform

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<sup>76</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

<sup>77</sup> *See, e.g., supra* note 60.

liberal approaches to human rights advocacy in Africa. At this point, it is worth providing an overview of liberal philosophy and the international, regional, and domestic legal frameworks that have developed as a result of liberal influence. It is also worth discussing, in particular, the arguments liberal rights advocates have offered in support of homosexual rights in Africa and around the world.

Traditional Lockean liberalism based its central claims on the fundamental, universal nature of all people. Specifically, Locke postulated that humans are naturally free, that humans are, in all morally significant ways, equal, and that people are rational.<sup>78</sup> The claims of contemporary liberal human rights advocates continue to depend on these basic notions of equality and rationality at the heart of classical liberalism. From these basic shared attributes, two practical conclusions follow. First, if people are equal, then we must treat as morally and legally suspect any policy that favors some groups of people over others based on false claims of the inherent superiority of the favored group. Second, if we are all more or less rational, then each of us is likely to be best situated to determine her own best interests and to direct the course of her own life.

The idea that all humans are equal and rational and, therefore, have essential rights to autonomy and to equal treatment under the law has guided liberal arguments since the Enlightenment, inspiring the work of modern philosophers as diverse as John Rawls, with his concern for distributive justice and equality of opportunity, and libertarians like Robert Nozick.<sup>79</sup> In the United States and internationally, these two notions have led to the development of two lines of jurisprudence addressing discrimination and privacy/autonomy rights respectively. Each of these lines of cases lends potential support to claims by advocates for homosexual rights.

### *A. Equal Protection*

In the United States—the source of much of the scholarship advocating for homosexual rights internationally, and a source of great influence on the development of the international human rights framework and of national constitutions throughout postcolonial Africa<sup>80</sup>—the Equal Protection Clause of the Fourteenth Amendment

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<sup>78</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT II, ¶¶ 4–5 (Peter Laslett ed., 1967).

<sup>79</sup> See, e.g., E. Vance Randall, *Same-Sex Marriage and Education: Implications for Schools, Students, and Parents*, 2011 BYU EDUC. & L.J. 385, 397–98 (2011).

<sup>80</sup> See David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012) (noting that as of 1987, 160 of 170 nations in

of the Constitution provided the basis for the twentieth century's monumental Supreme Court decisions prohibiting official prejudice against blacks, women, and, on one occasion, homosexuals. The Declaration of Independence itself asserted the equality of men as a self-evident truth,<sup>81</sup> but it took a civil war, passage of the Fourteenth Amendment, and nearly another century of incremental social evolution before the nation truly began the process of living up to this ideal. Even in recent years, however, equal protection in the United States has proved a somewhat problematic route for advancing gay rights. Under the Supreme Court's established framework for evaluating equal protection claims, official discrimination based on status other than race, religion, national origin, and gender has generally been permissible so long as the law passes rational basis review, the least demanding level of constitutional scrutiny. The Supreme Court in 1996 did strike down, using mere rational basis review, a Colorado constitutional amendment prohibiting governmental treatment of homosexuals as a protected class.<sup>82</sup> Similarly, in her concurring opinion in *Lawrence v. Texas*, Justice O'Connor found Texas's law prohibiting homosexual sodomy but not heterosexual sodomy to be irrationally discriminatory.<sup>83</sup> Nevertheless, the Court has found most laws subject to rational basis scrutiny to be rationally related to some legitimate governmental purpose, thus passing constitutional muster under that lenient standard.<sup>84</sup>

The future potential for use of equal protection arguments to advance homosexual standing in the United States is uncertain. In *Windsor v. United States*, the Second Circuit Court of Appeals used intermediate scrutiny to assess the constitutionality of the Defense of Marriage Act, invalidating the Act as not substantially related to an important governmental purpose.<sup>85</sup> Intermediate scrutiny, traditionally applied to gender<sup>86</sup> and illegitimacy,<sup>87</sup> offers significantly more

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the world had modeled their constitutions on the United States Constitution, but observing a decline in the influence of the United States Constitution since the 1990s).

<sup>81</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>82</sup> *Romer v. Evans*, 517 U.S. 620 (1996).

<sup>83</sup> *Lawrence v. Texas*, 539 U.S. 558, 582–83 (2003). (O'Connor, J., concurring).

<sup>84</sup> See, e.g., *id.* at 579–80 (O'Connor, J., concurring) (stating that laws “such as economic or tax legislation” generally survive rational basis scrutiny, even when the laws appear improvident, but asserting that a mere desire to damage a politically unpopular group is not a legitimate governmental purpose); Robert B. Sobelman, *An Unconstitutional Response to Citizens United*, 77 BROOK. L. REV. 341, n.83 (2011) (observing that when the Court uses rational basis review, “it almost always upholds the law in question”).

<sup>85</sup> *Windsor v. United States*, 699 F.3d 169, 185–88 (2d Cir. 2012).

<sup>86</sup> *Craig v. Boren*, 429 U.S. 190 (1976).

protection than rational basis review and could prove an attractive mechanism for striking discriminatory laws to promote homosexual rights. Additionally, in his 2010 decision in *Perry v. Schwarzenegger*, Federal District Court Judge Walker noted the history of stereotyping and discrimination against homosexuals and asserted that “gays and lesbians are the type of minority strict scrutiny was designed to protect.”<sup>88</sup> Laws subject to strict scrutiny, which requires a law to be necessary to a compelling government purpose and narrowly tailored to meet that purpose to be constitutionally valid, rarely survive the Court’s review.<sup>89</sup>

Nonetheless, Judge Walker held it unnecessary to determine which standard of review applies to laws discriminating against homosexuals because, in his estimation, California’s constitutional provision prohibiting same-sex marriage failed even rational basis review.<sup>90</sup> Although the Ninth Circuit’s narrower ruling in the case included no language suggesting homosexuals should benefit from strict scrutiny,<sup>91</sup> the Supreme Court disposed of the case on standing grounds, leaving Judge Walker’s opinion intact.<sup>92</sup> The Second Circuit’s holding in *Windsor* is, to date, the only federal case clearly holding that even intermediate scrutiny should apply to laws that discriminate against gays and lesbians. The Supreme Court’s decision in *Windsor* contained equal protection language, but, ultimately, the standard of review and the basis for the decision were unclear. Justice Kennedy’s majority opinion asserted that DOMA was invalid because “no legitimate purpose overcomes the purpose and effect to disparage and to injure those whom the State, by its marriage laws, sought to protect in personhood and dignity,”<sup>93</sup> suggesting without explicitly stating that the Court was using a rational basis standard of review. Additionally, the opinion contains some elements of substantive due process, protecting privacy and autonomy rights.<sup>94</sup> Most importantly, however, the opinion’s treatment of federalism, suggesting DOMA’s

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<sup>87</sup> *Lalli v. Lalli*, 439 U.S. 259 (1978).

<sup>88</sup> *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 997 (N.D. Cal 2010).

<sup>89</sup> See, e.g., Richard E. Levy, *Political Process and Individual Fairness Rationales in the U.S. Supreme Court’s Suspect Classification Jurisprudence*, 50 WASHBURN L.J. 33, 35 (2010) (stating that “strict scrutiny is usually so demanding that laws subject to strict scrutiny are rarely upheld”).

<sup>90</sup> *Id.*

<sup>91</sup> *Perry v. Brown*, 671 F.3d 1052 (2012).

<sup>92</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013).

<sup>93</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013).

<sup>94</sup> *Id.* at 2695 (holding that “DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution”).

invalidity might be tied to the need to respect the sovereignty of states that have chosen to allow same-sex marriage,<sup>95</sup> could mean that equal protection arguments will fail against states that have decided not to permit homosexual marriage.

Internationally, equal protection arguments have had some limited success as a mechanism for advancing gay rights. The ratification of instrumental human rights covenants after World War II represented an embrace of liberalism and a turn away from the positivist philosophy that had previously dominated international law.<sup>96</sup> The new post-war body of international human rights treaties included rights both to equal treatment and autonomy, the core guarantees of liberal philosophy. Each of the world's three primary international human rights treaties—the International Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR)—establishes the right to freedom from official discrimination.

The UDHR, adopted by the United Nations General Assembly in the aftermath of the war, asserted that all people are “born free and equal in dignity and rights,”<sup>97</sup> “that all are entitled to equal protection against any discrimination in violation of this Declaration and against incitement to such discrimination,”<sup>98</sup> and that all people are entitled to the rights set forth in the 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.”<sup>99</sup> Later, the ICCPR echoed these ideas in its Article 26, urging that, “the law shall prohibit any 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.”<sup>100</sup> The ICESCR provides that “[t]he States Parties to the present Covenant

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<sup>95</sup> *Id.* at 2691 (stating that “the Federal Government, through our history, has deferred to state-law policy decisions with respect to domestic relations”).

<sup>96</sup> *See, e.g.,* Clavier, *supra* note 60, at 403 (noting that the aftermath of World War II gave rise to a human rights movement that “changed the conceptualization of sovereignty, and by extension challenged strict positivism”).

<sup>97</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc A/RES/217(III), art. 1 (Dec. 10, 1948) [hereinafter UDHR].

<sup>98</sup> *Id.* art. 7.

<sup>99</sup> *Id.* art. 2.

<sup>100</sup> International Covenant on Civil and Political Rights art. 26, Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].



undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind” based on categories identical to those enunciated in the UDHR and the ICCPR.<sup>101</sup>

With 167 states parties to the ICCPR<sup>102</sup> and 160 states parties to the ICESCR,<sup>103</sup> nearly every country in the world has acceded to these conventions, including the vast majority of African nations.<sup>104</sup> Yet it was unclear until the mid-1990s whether any of the nondiscrimination provisions of these instruments would be construed as protecting the rights of homosexuals. Of course, no one would seriously contend that any significant number of ratifying states would have understood the equal protection provisions of the ICCPR or the ICESCR at their inception in 1966 to safeguard the rights of homosexuals.

Yet the Vienna Convention on the Law of Treaties established a broader framework for interpretation of international agreements. Instead of concentrating solely on the actual intention of parties to a convention at the time of ratification, the Vienna Convention mandates that treaties be interpreted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>105</sup> Moreover, as Professor Sophie Clavier has noted, there are compelling reasons to eschew a strictly intent-based approach to interpretation of human rights treaties in particular. Because such covenants uphold the rights of individuals against potential abuses of state power, the understandings of states themselves are less important than in the case of an ordinary treaty designed merely to advance the interests of the ratifying nations.<sup>106</sup>

In any case, in 1994, the United Nations Human Rights Committee, established under the ICCPR to assess the compliance of ratifying

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<sup>101</sup> International Covenant on Economic, Social and Cultural Rights art. 2(2), Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

<sup>102</sup> *United Nations Treaty Collection: International Covenant on Civil and Political Rights*, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-4&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en).

<sup>103</sup> *United Nations Treaty Collection: International Covenant on Economic, Social, and Cultural Rights*, [http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=IV-3&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-3&chapter=4&lang=en).

<sup>104</sup> In Africa, only Western Sahara has failed to ratify the ICCPR, and only Mozambique, Western Sahara, and Zimbabwe have not ratified the ICESCR.

<sup>105</sup> Vienna Convention on the Law of Treaties art. 31(1), May 23, 1969, 1155 U.N.T.S. 331.

<sup>106</sup> Clavier, *supra* note 60, at 388–89.

nations,<sup>107</sup> ruled for the first time that the ICCPR protects the right of homosexuals to be free from official discrimination.<sup>108</sup> Although the Human Rights Committee's opinions are nonbinding, they are highly persuasive interpretations of the ICCPR.<sup>109</sup> In *Toonen v. Australia*, the Committee considered the claim of Nicholas Toonen that the Tasmanian Criminal Code's proscription of private sexual contact between men violated Toonen's right to equal protection under Article 26 of the Covenant.<sup>110</sup> Because the Committee determined the Code provisions violated Toonen's privacy rights under Article 17 of the Covenant, it found it unnecessary to decide whether homosexuals are a protected class under Article 26.<sup>111</sup> Nonetheless, the Committee asserted that the treaty's reference to sex as a protected class "is to be taken as including sexual orientation."<sup>112</sup> In making this determination, the Committee sidestepped Australia's request for guidance on whether the term "any other status" in Article 26 might encompass homosexuals.<sup>113</sup>

Since *Toonen*, the Committee has equivocated on whether it remains committed to interpreting sex as including sexual orientation under Article 26.<sup>114</sup> The Committee did follow *Toonen* with a 2000 decision in which it held Australia's denial of pension benefits to the surviving same-sex partner of a war veteran violated Article 26 by discriminating against the complainant "on the basis of his sex or

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<sup>107</sup> *Human Rights Committee: Monitoring Civil and Political Rights*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/bodies/hrc/>.

<sup>108</sup> *Toonen v. Australia*, Comm. No. 488/1992, U.N. GAOR Hum. Rts. Comm., 49th Sess., Supp. No. 40, vol. II U.N. Doc. A/49/40 (1994).

<sup>109</sup> HENRY J. STEINER, ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT: LAW, POLITICS, MORALS* 915 (3d. ed. 2008) (quoting others describing the Human Rights Committee's decisions as, "in effect, binding," despite the formally nonbinding nature of the Committee's communications); Laurence R. Helfer & Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 HARV. HUM. RTS. J. 61, 82 (1996) (stating that parties to the ICCPR are bound by the text of the Covenant, rather than by decisions of the Human Rights Committee); Lorraine Finlay, *Between a Rock and a Hard Place: The Kadi Decision and Judicial Review of Security Council Resolutions*, 18 TUL. J. INT'L & COMP. L. 477, 491 (2010) (noting that communications of the Human Rights Committee are nonbinding).

<sup>110</sup> *Toonen*, *supra* note 108, at 26.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> Englander, *supra* note 20 (citing Michael O'Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles*, 8 HUM. RTS. L. REV. 207, 216–17 (2008)).

sexual orientation.”<sup>115</sup> However, even if this construction fails to garner continued support, the catchall “any other status” may be a viable avenue for the continued pursuit of homosexual rights against discrimination under the Covenant.

Whatever avenue it takes, the Human Rights Committee has made clear in recent years its enduring commitment to preventing government discrimination against homosexuals as it has regularly urged reform from countries engaging in official discrimination or failing to provide sufficient mechanisms to prevent discriminatory practices.<sup>116</sup> Likewise, the United Nations Committee on Economic, Social and Cultural Rights has expressed its conviction that the ICESCR’s reference to “any other status” prohibits discrimination on the basis of sexual orientation.<sup>117</sup> Finally, the United Nations Human Rights Council, which conducts Universal Periodic Reviews (UPR) of the human rights records of all UN member states, has also included repeated recommendations by Council members for legal reform in countries that discriminate against gays and lesbians.<sup>118</sup> In 2011, the Human Rights Council passed a resolution expressing “grave concern at acts of violence and discrimination, in all regions of the world, committed against individuals because of their sexual orientation and gender identity.”<sup>119</sup>

Professor Clavier has argued that emerging international consensus, as reflected in decisions like *Toonen* and the now

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<sup>115</sup> *Young v Australia*, UN GAOR, 78th Sess., Hum Rts Comm, UN Doc CCPR/C/78/D/941/2000 (2000).

<sup>116</sup> See, e.g., U.N. Human Rights Committee (hereinafter HRC), *Concluding Observations of the Human Rights Committee: Russian Federation*, Nov. 24, 2009, CCPR/C/RUS/CO/6; HRC, *Concluding Observations of the Human Rights Committee Regarding the United States of America*, Feb. 12, 2008, P25, U.N. Doc. CCPR/C/USA/CO/3/Rev.1; HRC, *Concluding Observations of the Human Rights Committee Regarding Kenya*, Mar. 24, 2005, P27, U.N. Doc. CCPR/CO/83/KEN; HRC, *Concluding Observations of the Human Rights Committee Regarding Egypt*, Oct. 31, 2002, P19 U.N. Doc. CCPR/CO/76/EGY.

<sup>117</sup> U.N. Comm. on Econ., Soc., and Cultural Rights (CESCR), General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, P2, of the International Covenant on Economic, Social and Cultural Rights), P32, U.N. Doc. E/C.12/GC/20 (July 2, 2009).

<sup>118</sup> See, e.g., Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Benin*, A/HRC/22/9, Dec. 11, 2012; Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Nigeria*, A/HRC/11/26, Oct. 5, 2009; Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Uganda*, A/HRC/19/16, Dec. 22, 2011; Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Zambia*, A/HRC/22/13, Dec. 31, 2012.

<sup>119</sup> Human Rights Council Res. 17/19, Rep. of the Human Rights Council, 17th Sess., May 31–June 17, 2011, U.N. Doc. A/HRC/17/L.9/Rev.1 (June 15, 2011).

numerous declarations of national courts, regional courts, and UN treaty bodies, has rendered the principle of nondiscrimination against homosexuals a rule of customary international law.<sup>120</sup> Clavier acknowledged the traditional notion that customary international law is not binding on persistent objectors and that a large number of countries, including many African nations, would clearly qualify as having persistently objected to the idea that homosexual activity should be protected.<sup>121</sup> Nonetheless, Clavier asserted the strictly positivist view of international law, especially in the realm of human rights, is in decline and that, even if a rule has not attained status as a *jus cogens* norm, objection may no longer be sufficient to avoid being obligated to comply with the law.<sup>122</sup>

This argument may be difficult to sustain.<sup>123</sup> By definition, persistent objectors may opt out of customary international law, so long as the norm in question is not a *jus cogens* norm, and the evidence Professor Clavier marshaled in support of her assertion does not establish the claim. In support of her contention, Professor Clavier cited *Roper v. Simmons*,<sup>124</sup> in which the United States Supreme Court abolished the death penalty for juvenile offenders, and *Lustig-Prean v. United Kingdom*, in which the European Court of Human Rights found in favor of claimants who had been dismissed from the British Navy based on their sexual orientation.<sup>125</sup> Clavier asserted the United States Supreme Court's decision in *Roper* represented its recognition that, despite the country's status as a persistent objector, international opinion demonstrated "the impossibility of objecting to the changing values of the international society."<sup>126</sup> Yet the Supreme Court clearly stated in its opinion that, while international opinion was persuasive, it was *not* controlling.<sup>127</sup> Rather, according to the Court, international

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<sup>120</sup> Clavier, *supra* note 60, at 401.

<sup>121</sup> *Id.* at 404–07.

<sup>122</sup> *Id.* at 403–07.

<sup>123</sup> *But see* Sonia Bychkov Green, *Currency of Love: Customary International Law and the Battle for Same-Sex Marriage in the United States*, 14 U. PA. J.L. & SOC. CHANGE 53, (making the same argument as Clavier).

<sup>124</sup> *Roper v. Simmons*, 543 U.S. 551 (2005).

<sup>125</sup> Press Release, Registry of Eur. Ct. H.R., Judgments in the Cases of Lustig-Prean and Beckett v. The United Kingdom and Smith and Grady v. The United Kingdom (Sept. 27, 1999), available at [lgbt.poradna-prava.cz/folder05/lustig.doc](http://lgbt.poradna-prava.cz/folder05/lustig.doc).

<sup>126</sup> Clavier, *supra* note 60, at 406.

<sup>127</sup> 543 U.S. at 578 (stating that "[t]he opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions").

consensus merely confirmed the Court's own conclusions.<sup>128</sup> Likewise, in *Lustig-Prean*, although the European Court of Human Rights stated that it could not ignore "widespread and consistently developing views or the legal changes in the domestic laws of Contracting States in favour of the admission of homosexuals into the armed forces of those States," the Court's determination ultimately turned on its holding that the United Kingdom had violated the privacy provisions of the European Convention on Human Rights.<sup>129</sup> Even if Professor Clavier's contention that persistent objection is no longer sufficient to avoid application of customary international law were to gain widespread support, however, the problems of enforcement endemic to international law in general would likely render such a conclusion largely academic for the time being.

Regional human rights instruments offer language similar to that of international human rights documents, with potential to protect homosexuals against discrimination. In particular, the African Charter on Human and Peoples' Rights includes a broad anti-discrimination provision, with catchall protection for "other status," mirroring the language in the ICCPR and the ICESCR.<sup>130</sup> The African Charter, however, also limits the exercise of individual rights with reference to the duties individuals owe in exercising those rights, including the duty to exercise one's rights with due regard for "morality and common interest."<sup>131</sup> The Charter also asserts that "[t]he promotion and protection of morals and traditional values recognized by the community shall be the duty of the State."<sup>132</sup> Unsurprisingly, given prevailing cultural, moral, and legal norms in much of Africa, the African Court on Human and Peoples' Rights has never used the Charter to protect homosexual rights.<sup>133</sup>

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

<sup>129</sup> Judgments in the Cases of *Lustig-Prean* and *Beckett v. The United Kingdom* and *Smith and Grady v. The United Kingdom*, *supra* note 125.

<sup>130</sup> See African Charter on Human and Peoples' Rights art. 2, June 27, 1981, 1520 U.N.T.S. 217 [hereinafter African Charter].

<sup>131</sup> *Id.* art. 27.

<sup>132</sup> *Id.* art. 17(3).

<sup>133</sup> In addition to these obstacles, the requirement that states parties submit to individual claims before the African Court can hear such claims is a significant impediment to any favorable human rights rulings from the Court. See *infra* note 201. Nonetheless, the African Commission on Human and Peoples' Rights, charged with interpreting Charter rights and hearing complaints against states parties, has expressed concern about "intolerance toward sexual minorities." African Commission on Human and Peoples' Rights, Concluding Observations and Recommendations on the Periodic Report of the Republic of Cameroon, May 11–25, 2005, P14, ACHPR, 39th Ordinary Sess. (2005).

In contrast to the African Court, regional human rights courts in other parts of the world have issued definitive rulings protecting homosexual rights. In February 2012, the Inter-American Court of Human Rights ruled that sexual orientation is a suspect classification under the American Convention on Human Rights, invalidating the Chilean Supreme Court's denial of a mother's custody of her children on the basis of her homosexuality.<sup>134</sup> Likewise, the European Court of Human Rights has repeatedly cited the European Convention on Human Rights' nondiscrimination provision as a basis for striking down laws that discriminated against homosexuals.<sup>135</sup>

Nondiscrimination provisions in African constitutions also offer some potential for protection of homosexuals. Most African constitutions, unlike the United States Constitution, tend to list categories of people protected from discrimination. The constitutions of some African nations include broad catchall protections for "other status," or its functional equivalent, similar to the language of international human rights documents.<sup>136</sup> Others that do not contain

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<sup>134</sup> Atala Riffo and Daughters v. Chile, Inter-Am Ct HR (judgment of Feb 24, 2012), online at <http://www.unhcr.org/refworld/docid/4f840a122.html>.

<sup>135</sup> See, e.g., Karner v. Austria, 2003-IX Eur. Ct. H.R. 199, 210–13, (invalidating an Austrian law that denied same-sex partners succession of tenancy as violating the Convention's privacy and nondiscrimination provisions); L. & V. v. Austria, 2003-I Eur. Ct. H.R. 29, (striking down as violating the Convention's antidiscrimination provision an Austrian law that criminalized sexual relations between adults and minors between the ages of 14 and 18 only if both participants were male).

<sup>136</sup> See, e.g., CONST. OF CAMEROON, art. 2 ("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"); CONST. OF MALAWI OF 1994, art. 20 (prohibiting discrimination "on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, property, birth or other status"); CONST. OF KENYA, art. 27(1), (4) ("Every person is equal before the law and has the right to equal protection and equal benefit of the law"; "The State shall not discriminate directly or indirectly against any person on *any ground*, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth") (italics added); CONST. OF NIGERIA, art. 15(2) ("Accordingly, national integration shall be actively encouraged, whilst discrimination on the grounds of place of origin, sex, religion, *status*, ethnic or linguistic association or ties shall be prohibited") (italics added); CONST. OF TANZANIA, art. 9(h) (describing the government's obligation to ensure "that all forms of injustice, intimidation, discrimination, corruption, oppression or favouritism are eradicated"); art. 13(5) ("For the purposes of this Article the expression 'discriminate' means to satisfy the needs, rights or other requirements of different persons on the basis of their nationality, tribe, place of origin, political opinion, colour, religion, sex or station in life such that certain categories of people are regarded as weak or inferior and are subjected to restrictions or conditions whereas persons of other categories are treated differently or are accorded opportunities or advantage outside the specified conditions or the prescribed necessary qualifications except that the word 'discrimination'

such language nonetheless prohibit sex discrimination,<sup>137</sup> which a court could construe to constrain the state from discriminating against homosexuals, as did the Human Rights Committee in *Toonen*. But the dominant cultural antagonism toward homosexuality in societies across the continent may make significant progress through judicial interpretation of constitutional prohibitions on discrimination as unlikely as such victories would have been in the United States for most of its history. In fact, several African constitutions include explicit exceptions to their fundamental rights provisions when reasonably necessary to preserve public morality.<sup>138</sup> Such provisions suggest, at the least, a lower probability of a judicial determination like that of the United States Supreme Court in *Lawrence v. Texas* in its finding that moral disapproval of a practice by a majority of the population is insufficient grounds for upholding a law prohibiting the practice.<sup>139</sup>

The liberal right to equal protection of the law does not, of course, guarantee freedom from discrimination on any basis whatsoever. If a state were not able to enact laws and policies that distinguish between some groups of people for some purposes, an incredibly broad range of law would be rendered invalid. Governments would be unable, for example, to implement age restrictions on voting and driving or to treat unlicensed opticians differently from sellers of ready-to-wear

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shall not be construed in a manner that will prohibit the Government from taking purposeful steps aimed at rectifying disabilities in the society”).

<sup>137</sup> See, e.g., CONST. OF GHANA, art. 17(2) (“A person shall not be discriminated against on grounds of gender, race, colour, ethnic origin, religion, creed or social or economic status.”); CONST. OF UGANDA, art. 21(2) (stating that “a person shall not be discriminated against on the ground of sex, race, colour, ethnic origin, tribe, birth, creed or religion, social or economic standing, political opinion or disability”); CONST. OF ZAMBIA, art. 23(3) (“In this Article the expression ‘discriminatory’ mean (sic), affording different treatment to different persons attributable, wholly or mainly to their respective descriptions by race, tribe, sex, place of origin, marital status, political opinions color or creed whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description”).

<sup>138</sup> See, e.g., CONST. OF CAMEROON, art. 29(2) (“In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”); CONST. OF ETHIOPIA, art. 26(3) (noting that the government may restrict the right of privacy in the interest of “. . . public peace, public health and morality. . .”); CONST. OF ZAMBIA, art. 23(7) (referring to other provisions that allow limitations when reasonably required “in the interests of defence, public safety, public order, public morality or public health”).

<sup>139</sup> *Lawrence v. Texas*, 539 U.S. 558, 577–78 (2003). (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

eyeglasses.<sup>140</sup> Instead, courts and scholars have interpreted the right to equal treatment under the law as a right to be free from unreasonable discrimination. This inquiry has required two significant determinations. First, courts must decide whether the person claiming unlawful discrimination is a member of a group that merits special protection. The enumeration of prohibited forms of discrimination in most international human rights documents makes the first determination straightforward in many cases. However, when confronting an unenumerated form of discrimination, a court must determine whether, in the case of an instrument like the ICCPR, it is possible to bring the group under the umbrella of an explicitly listed category,<sup>141</sup> or, alternatively, whether the group has the kind of “other status” worthy of special protection. In the United States, where the Equal Protection Clause does not mention any particular protected category, the Supreme Court has looked to whether there has been a history of discrimination against a discrete and insular minority<sup>142</sup> on the basis of an immutable characteristic<sup>143</sup> in deciding whether laws discriminating against the group in question should be subject to increased scrutiny.

Hence, as mentioned above, discrimination based on some unremarkable status, like being an unlicensed optician, would be reasonable so long as the reviewing court finds it rationally related to any legitimate government purpose, in practice an extremely low bar to a finding of legitimacy. On the other hand, in the United States, a law that differentiates on the basis of race, an immutable trait and a category with an obviously fraught history, including terribly abusive discrimination, will be subject to strict scrutiny.<sup>144</sup> Courts and other human rights bodies interpreting the requirements of non-discrimination clauses in treaties and national constitutions might agree with Judge Walker’s assessment that a law that discriminates on the basis of sexual orientation is precisely the kind of law to which something akin to strict scrutiny should apply. As I will discuss below, however, to the extent that cultural beliefs and anthropological data undermine claims of immutability and assertions of status as a discrete, insular minority, such findings are less likely.

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<sup>140</sup> See *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

<sup>141</sup> See, e.g., *Toonen*, *supra* note 108.

<sup>142</sup> *United States v. Carolene Products Co.*, 304 U.S. 144, n.4 (1938).

<sup>143</sup> See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

<sup>144</sup> See, e.g., *Fisher v. Univ. of Texas at Austin*, 133 S. Ct. 2411, 2417 (2013).



Even if a court determines a group is entitled to protected status, it must ultimately still make a finding on the question of whether a discriminatory law is reasonable. A law distinguishing between people on the basis of a suspect classification is less likely to withstand scrutiny, but its incompatibility with the right to nondiscrimination is not a foregone conclusion. Hence, although discrimination on the basis of race is presumptively invalid, there are limited circumstances in which modern courts have concluded racial discrimination is reasonable.<sup>145</sup> Likewise, a decision that sexual orientation is a suspect classification might not lead to the inevitable invalidation of all laws distinguishing between heterosexuals and homosexuals. It could, for example, result in the overturning of laws that criminalize homosexual activity, as in *Toonen*, while preserving prohibitions on homosexual marriage. As of early 2013, although only ten countries had fully allowed same-sex marriage,<sup>146</sup> a much larger group of nations, including the United States, has decriminalized consensual sexual relationships between members of the same sex.<sup>147</sup>

Ultimately, while international human rights bodies are likely to continue to interpret international human rights documents as providing special protection against discrimination for homosexuals, domestic courts of countries throughout Africa are much less likely to share that perspective. As I will discuss in further detail below, the undeveloped framework for enforcement of international human rights treaties means that, in practice, the perspectives of national decision-making bodies will prevail in the event of conflict between the views of a body like the Human Rights Committee and those of domestic judges and legislators. First, however, I will consider the

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<sup>145</sup> See, e.g., *Grutter v. Bollinger*, 539 U.S. 306 (2003) (upholding the University of Michigan Law School's affirmative action policy because it was necessary to the compelling government interest in achieving diversity in higher education).

<sup>146</sup> WhiteKnot.org, World Map, available at <http://whiteknot.org/worldmap.html>.

<sup>147</sup> States parties to the European Convention on Human Rights have had to decriminalize homosexual sexual activity since the 1981 decision of the European Court of Human Rights that such laws violated the Convention's privacy protections. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) at 25 (1981). In contrast, it was only twenty years later that the Netherlands became the first country in the world to legalize same-sex marriage. Act Opening the Institute of Marriage, Burgerlijk Wetboek [BW] bk. 1, art. 30(1) (Neth.). The Treaty of Lisbon, which came into force in 2009, protects the right to marriage with no qualifying language that might suggest the right is limited to inter-gender marriages, and the treaty expressly forbids discrimination based on sexual orientation. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community, Dec. 13, 2007, O.J. (C 306) 1. In the future, the Treaty of Lisbon may serve as a basis for further advancement of homosexual marriage rights in Europe.

development of the second foundational liberal right—the right to individual autonomy, often framed as a right to privacy.

### **B. Autonomy**

Locke's belief in the universality of human rationality supported not only the idea that government must treat people equally, but also the notion that the state should generally leave people alone. If people are all essentially rational, then each person is roughly as capable as the next of deciding how to order his own life, and each person is likely to be in a better position than anyone else to determine his own interests and to choose how to pursue his own vision of what constitutes a good life.<sup>148</sup> Like the right to nondiscrimination, United States constitutional jurisprudence, international human rights treaties, regional human rights instruments, and the constitutions of African nations have enshrined the rights to privacy and autonomy.

In the United States, the Declaration of Independence reflected this liberal value in its affirmation that, like equality of men, it was a self-evident truth that men had unalienable rights, including the right to "Liberty and the pursuit of Happiness."<sup>149</sup> The First and Second (under current interpretation)<sup>150</sup> Amendments to the United States Constitution safeguard particularized forms of individual autonomy—the right to freedom of expression and association and the right to bear arms, respectively. However, the Supreme Court's interpretation of a broader, more generalized right to autonomy began in earnest with the now discredited line of early twentieth century substantive due process decisions overturning labor laws on the theory that such laws interfered with the fundamental right to economic liberty.<sup>151</sup> The Supreme Court would later resurrect the concept of substantive due process to protect unenumerated autonomy rights in a different context, with its line of privacy cases beginning in the 1960s with *Griswold v. Connecticut*.<sup>152</sup> These cases upheld as fundamental to ordered liberty the right to contraceptives for married<sup>153</sup> and

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<sup>148</sup> Robin West, *Universalism, Liberal Theory, and the Problem of Gay Marriage*, 25 FLA. ST. U. L. REV. 705 (1998).

<sup>149</sup> THE DECLARATION OF INDEPENDENCE ¶ 2 (U.S. 1776).

<sup>150</sup> See *District of Columbia v. Heller*, 554 U.S. 570 (2008) (holding the Second Amendment creates an individual right to own guns); *McDonald v. Chicago*, 561 U.S. 3025 (2010) (incorporating the Second Amendment against the states).

<sup>151</sup> *Lochner v. New York*, 198 U.S. 45 (1905); *Coppage v. Kansas*, 236 U.S. 1 (1915); *Adkins v. Children's Hospital*, 261 U.S. 525 (1923).

<sup>152</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>153</sup> *Id.*

unmarried people,<sup>154</sup> the right to abortion,<sup>155</sup> the right to have children,<sup>156</sup> and the right of people of different races to marry each other.<sup>157</sup> Finally, in 2003, the Court in *Lawrence* used the idea of substantive due process to invalidate a Texas law that criminalized sodomy between same-sex couples.<sup>158</sup>

Just as Judge Walker's opinion in *Perry v. Schwarzenegger* invalidated California's constitutional prohibition of same-sex marriage on the ground that it violated the federal Equal Protection Clause, Judge Walker also held California's constitutional amendment infringed the federal substantive due process rights of homosexual couples.<sup>159</sup> Just as the Ninth Circuit had avoided determining whether homosexuals might be entitled to heightened or strict scrutiny for equal protection purposes, Judge Reinhardt's opinion for the Ninth Circuit eschewed the due process issue altogether.<sup>160</sup> The Supreme Court's opinion in the case left Judge Walker's opinion undisturbed,<sup>161</sup> and its opinion in *Windsor*, invalidating DOMA, also included substantive due process strands, in addition to its equal protection and federalism rationales.<sup>162</sup>

International human rights documents also guarantee autonomy rights, just as they assert the fundamental right to nondiscrimination. The UDHR contains numerous provisions proclaiming autonomy rights, including a right against arbitrary interference with one's privacy, family, and home,<sup>163</sup> the right to freedom of movement,<sup>164</sup> the right to marry and found a family,<sup>165</sup> the right to choose one's employment,<sup>166</sup> and rights to freedom of religion,<sup>167</sup> opinion and

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<sup>154</sup> *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

<sup>155</sup> *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

<sup>156</sup> *Skinner v. Oklahoma*, 316 U.S. 535 (1942).

<sup>157</sup> *Loving v. Virginia*, 388 U.S. 1 (1967) (finding that Virginia's antimiscegenation law violated both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment).

<sup>158</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>159</sup> *Perry v. Schwarzenegger*, 704 F.Supp.2d at 995.

<sup>160</sup> *Perry v. Brown*, 671 F.3d at 1096.

<sup>161</sup> *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2668 (2013).

<sup>162</sup> *United States v. Windsor*, 133 S. Ct. 2675, 2696 (2013).

<sup>163</sup> UDHR, *supra* note 97, art. 12.

<sup>164</sup> *Id.* art. 13.

<sup>165</sup> *Id.* art. 16.

<sup>166</sup> *Id.* art. 23.

<sup>167</sup> *Id.* art. 18.

expression,<sup>168</sup> and association.<sup>169</sup> The ICCPR contains many similar terms.<sup>170</sup> While the UDHR and ICCPR's guarantees of a right to marry might eventually be interpreted to encompass a right to homosexual marriage,<sup>171</sup> for now, the more generalized protection of autonomy rights in the documents' privacy provisions offers greater potential to shield homosexuals against governmental oppression.

This is so at least in part because of existing precedent. As mentioned above, the Human Rights Committee's decision in *Toonen* ultimately turned on the determination that the Tasmanian Criminal Code's prohibition of private, consensual sexual activity between men violated Toonen's privacy rights under Article 17 of the Covenant. Of course, while the right to marriage is facially narrower than a right against interference with privacy, family, and home life, a finding that homosexuals have the right to marry each other would axiomatically include the kinds of sexual autonomy rights more conventionally enforced through privacy provisions. Yet, as with equal protection, the path to marriage rights through autonomy provisions may be more fraught than claims that criminalization of private sexual conduct infringes fundamental autonomy or privacy rights.

Like their international counterparts, regional human rights instruments also include protections of individual autonomy. For African countries, the African Charter on Human and Peoples' Rights safeguards autonomy rights with provisions analogous to those of international human rights documents like the UDHR and the ICCPR.<sup>172</sup> Notably, unlike the UDHR and the ICCPR, however, the African Charter contains no article offering general protection for

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<sup>168</sup> *Id.* art. 19.

<sup>169</sup> *Id.* art. 20.

<sup>170</sup> See, e.g., ICCPR, *supra* note 100, art. 12 (guaranteeing freedom of movement); art. 17 (protecting against arbitrary interference with privacy, family, and home); art. 18 (guaranteeing "freedom of thought, conscience, and religion"); art. 19 (asserting rights to freedom of opinion and expression); art. 21 (guaranteeing a right to peaceful assembly); art. 23 (proclaiming the right of "men and women of marriageable age to marry and to found a family").

<sup>171</sup> The UDHR and ICCPR's proclamations of a right of "men and women" to marry might well be interpreted more narrowly, as assuring only that men and women have a right to marry each other. UDHR, *supra* note 97, art. 16; ICCPR, *supra* note 100, art. 23. Article 16 of the UDHR, specifically notes the right shall be "without any limitation due to race, nationality or religion," but does not, of course, mention sexual orientation, a notion that would not have occurred to the document's drafters at its inception.

<sup>172</sup> African Charter, *supra* note 130, art. 8 (guaranteeing freedom of conscience and religion); art. 9 (protecting freedom to hold and express opinions); art. 10 (stating that individuals have freedom of association); art. 11 (proclaiming freedom of assembly); art. 12 (describing a right to freedom of movement).

privacy or home life. Thus, a decision completely analogous to the European Court of Human Rights' decision in *Dudgeon v. United Kingdom* that criminalization of homosexual sex violates the European Convention on Human Rights' privacy provisions,<sup>173</sup> would be untenable.

In addition to the limitation that individuals owe a duty to exercise rights with regard to morality and the common interest and the duty of the state to promote morals and traditional values, several of the African Charter's autonomy provisions include specific limitations in the interests of public welfare or law and order.<sup>174</sup> It is conceivable, however, that the Charter's articles ensuring freedom of conscience, expression, and association might someday be construed as offering protection to homosexuals, like the "penumbras" and "emanations" from the First Amendment the *Griswold* Court found supporting the right of married couples to contraceptive devices.<sup>175</sup>

Finally, African constitutions include fundamental rights provisions assuring protection of privacy and autonomy. Like the international and regional human rights instruments discussed above, these rights tend to be fairly specifically enumerated, in contrast to the open-ended possibilities for jurisprudential evolution in the United States Supreme Court's line of substantive due process cases.<sup>176</sup> And while the privacy provisions of the UDHR and the ICCPR, with their references to "privacy, family, and home," can comfortably encompass fairly broad autonomy claims, the privacy articles in some African constitutions appear to target particular categories of privacy rights with more precision, often with a focus on physical searches of the home and other interferences with property interests.<sup>177</sup> In these

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<sup>173</sup> *Dudgeon*, 45 Eur. Ct. H.R. (ser. A) at 25 (1981).

<sup>174</sup> African Charter, *supra* note 130, art. 8 (noting the right to freedom of conscience is subject to "law and order"); art. 9 (stating that the right to freedom of opinion and expression must be "within the law"); art. 10 (asserting that individuals have a right to free association only if they abide by the law); art. 11 (stating that the right to freedom of assembly may be restricted "in the interest of national security, the safety, health, ethics and rights and freedoms of others").

<sup>175</sup> *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

<sup>176</sup> *See, e.g.*, CONST. OF ZAMBIA, art. 19 (articulating a right to freedom of thought and religion); art. 20 (providing for freedom of expression); art. 21 (describing a right to free assembly and association); art. 22 (stating that "no citizen shall be deprived of his freedom of movement").

<sup>177</sup> *See, e.g.*, CONST. OF MALAWI, art. 21 (providing protection against searches of "person, home or property" and "the seizure of private possessions"); CONST. OF UGANDA, art. 27 (describing a right to privacy of "person, home, and other property," and stating that "No person shall be subjected to interference with the privacy of that person's home, correspondence, communication or other property"); CONST. OF ZAMBIA, art. 17(1)

countries, direct reliance on privacy protections would likely be more difficult for claimants asserting unenumerated rights to sexual autonomy.

Again, one might make a *Griswold*-like argument, based on “penumbras” and “emanations” from articles ensuring privacy and freedom of expression and association. Although the *Griswold* Court did not explicitly invoke substantive due process, subsequent cases made clear that doctrine provided the foundation for the developing body of American fundamental rights jurisprudence;<sup>178</sup> it is theoretically possible that some African courts might be willing to use similar doctrinal innovation to proclaim unenumerated rights. Nonetheless, African courts have not tended to develop similarly convenient mechanisms for extrapolation of general, fundamental rights from more specific constitutional provisions. As a consequence, practitioners of same-sex intimacies in many African countries might face obstacles to constitutional autonomy arguments even if judges in those countries were predisposed to be sympathetic to their claims.

As with equal protection, not all autonomy claims attract the kind of elevated scrutiny that increases the odds that a law impinging on the asserted right will fail to withstand judicial review. In the United States, for example, substantive due process claims merit strict scrutiny only if the right at issue is considered fundamental, a standard the United States Supreme Court finds satisfied when there is a “careful description of the asserted fundamental liberty interest;”<sup>179</sup> when the claimed right is “deeply rooted in this Nation’s history and tradition,”<sup>180</sup> “so rooted in the traditions and conscience of our people as to be ranked as fundamental;”<sup>181</sup> and when the right is “implicit in the concept of ordered liberty” such that “neither liberty nor justice would exist” without it.<sup>182</sup> Whether courts in the United States and elsewhere will examine homosexual marriage claims and

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(“Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises”); *but see* CONST. OF CAMEROON, art. 12 (“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence”); CONST. OF KENYA, art. 31 (including protection of information relating to “family or private affairs”); CONST. OF TANZANIA, art. 16(1) (stating that “[e]very person is entitled to respect and protection of his person, the privacy of his own person, his family and of his matrimonial life, and respect and protection of his residence and private communications”).

<sup>178</sup> *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>179</sup> *Id.* at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

<sup>180</sup> *Id.* (quoting *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977)).

<sup>181</sup> *Id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

<sup>182</sup> *Id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)).

sexual autonomy claims based on fundamental rights provisions using strict scrutiny, or something like strict scrutiny, will depend in large part on how narrowly those courts define the right at stake.

If one characterizes the ostensible right as a right to gay marriage, for example, then it becomes considerably more difficult to argue the right is deeply rooted in tradition and history. On the other hand, if courts are willing to classify the right at stake more broadly, as a right to choose one's spouse, such contentions are more plausible. Likewise, claims of rights to sexual autonomy, broadly speaking, are more likely to be found to be deeply rooted in tradition than claims of rights to homosexual sexual intimacy. Of course, a court's determination on how to frame the claimed right is likely to depend largely on the outcome the judges deciding the case favor.<sup>183</sup> So far, in any case, courts around the world have been significantly more likely to afford protection against governmental proscription of consensual sexual intimacy than to find a fundamental right to homosexual marriage.<sup>184</sup>

And as with equal protection, even a finding that the right in question is fundamental, thus requiring something like strict scrutiny, does not definitively lead to invalidation of any law that places restrictions on the right. Thus, a court might find a fundamental right to sexual autonomy or to marriage, but might then conclude that restrictions aimed at homosexuals are reasonable in light of compelling governmental interests.<sup>185</sup> These sorts of restrictive findings are, of course, more likely in a society culturally predisposed to disfavor homosexuality.

Finally, as already discussed, fundamental rights provisions in African constitutions often include specific public-interest exceptions,

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<sup>183</sup> The United States Supreme Court engaged in just such a debate in *Lawrence*. In his majority opinion, Justice Kennedy sidestepped the question of whether the rights at stake were "deeply rooted" in the country's history and traditions and whether strict scrutiny was the applicable standard, but described the claimed right fairly broadly, as a right to "private sexual conduct." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003). Scalia's dissent, on the other hand, described the asserted right more narrowly, as a right to "homosexual sodomy," and noted the majority did not even try to claim that right was "deeply rooted" in history and tradition. *Id.* at 594. In *Bowers*, the majority had framed the issue in similarly narrow terms, as a question of whether "the Constitution confers a fundamental right upon homosexuals to engage in sodomy . . ." *Bowers v. Hardwick*, 478 U.S. 186, 190 (1986).

<sup>184</sup> See *supra* notes 146–47 and accompanying text.

<sup>185</sup> Such a finding would be inconsistent with Justice Kennedy's analysis in *Lawrence*, in which he held the government had no rational basis, let alone a compelling interest, in criminalizing homosexual sex. Nonetheless, it is certain that not all jurists would agree with Kennedy's reasoning.

including exceptions for the enforcement of moral norms.<sup>186</sup> Although the United States Supreme Court held that moral disapproval of homosexual activity by a majority of the population was insufficient to justify upholding a law criminalizing such activity,<sup>187</sup> and although the Human Rights Committee rejected the Tasmanian argument that criminalization of homosexual sex was justified to preserve public health and morals,<sup>188</sup> it is likely that many African courts would be more receptive to such contentions.<sup>189</sup> In African countries with more generalized privacy protections in their constitutions, and without explicit limitations for things like public morality, privacy claims might be more likely avenues for advancing the rights of homosexuals. Even in such countries, however, prevailing cultural norms make such claims significantly less likely to succeed than in Western societies. I will discuss the reasons for this contention in further detail in Part IV.

### *C. Enforcement*

Even if one concludes that international human rights law supports privacy and nondiscrimination rights protecting homosexuals, the problem of enforcement of those rights, like the problem of enforcement of international law more broadly, remains a serious obstacle to realization of any improvement in the status of homosexuals in Africa. The Human Rights Committee's powers are limited for several important reasons. First, only states that have ratified the First Optional Protocol to the ICCPR have accepted the Committee's authority to offer opinions on complaints from individuals claiming their rights have been violated. Although 114 nations have acceded to the First Optional Protocol, many of the countries that have failed to offer homosexuals the full range of rights available to heterosexuals have not, including the United States and numerous countries in Africa with discriminatory laws.<sup>190</sup> Even if a

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<sup>186</sup> See, e.g., CONST. OF ZAMBIA, art. 17(2) (stating that, notwithstanding the Article's first clause prohibiting searches without consent, government conduct will not contravene the Article if it is reasonably required in the "interests of defence, public safety, public order, public morality, public health . . ." or to protect the "rights and freedoms of other persons").

<sup>187</sup> *Lawrence*, 539 U.S. at 577–78.

<sup>188</sup> *Toonen*, *supra* note 108.

<sup>189</sup> See *infra* Part IV.

<sup>190</sup> *United Nations Treaty Collection: First Optional Protocol to the International Covenant on Civil and Political Rights*, [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-5&chapter=4&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en).



country endorses the First Optional Protocol, the Protocol provides that any party to it may denounce the Protocol with written notice, though without prejudice to communications received before the effective date of denunciation.<sup>191</sup> Ultimately, the Human Rights Committee's authority is limited by the failure to establish any sanction whatsoever for failing to comply with its recommendations. In fact, as noted above, the Committee's opinions are not formally binding at all.<sup>192</sup> This is so even for those countries that have acceded to the First Optional Protocol.<sup>193</sup>

Although Australia responded to the Committee's report in *Toonen* by passing federal legislation to overturn the Tasmanian law and prohibiting the passage of future similar laws,<sup>194</sup> Australia was in a somewhat unusual position in its sympathy for the complainant and refusal to support the Tasmanian government's law before the Committee. In response to the complaint, Australia had conceded the Tasmanian law arbitrarily interfered with Toonen's privacy rights, was not justified on public health or morals grounds, and that if "other status" could be read to include sexual orientation, the Tasmanian law unjustifiably discriminated against homosexuals.<sup>195</sup> At the time, Tasmania was the only state in Australia that continued to criminalize homosexual conduct.<sup>196</sup>

Even if a country has not ratified the First Optional Protocol, the Human Rights Committee has the competence to review regular reports by states parties to the ICCPR on the status of their compliance with the Covenant and to hear complaints between states parties to the Covenant.<sup>197</sup> Again, however, the Committee has no

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<sup>191</sup> Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 U.N. GAOR Supp. No. 16 at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, art. 12.FN 192.

<sup>192</sup> See *Toonen*, *supra* note 108.

<sup>193</sup> Michael J. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, 99 AM. J. INT'L L. 119, 127 (2005) (noting that Article 5(4) of the Protocol provides the Committee with authority only to "forward its views to the State Party concerned and to the individual"); *c.f.* Darina Makova, *Chapter 19 Human Rights in Times of Global Inequalities: A View from Slovakia*, 16 IUS GENTIUM 325, 329 (2012) (describing the ICCPR, "when taken with its 1<sup>st</sup> Optional Protocol," as "substantially binding and practically enforceable").

<sup>194</sup> See Gus Bernardi, *From Conflict to Convergence: The Evolution of Tasmanian Anti-Discrimination Law*, 7(1) AUSTL. J. HUM. RTS. 134 (2001).

<sup>195</sup> *Toonen*, *supra* note 108.

<sup>196</sup> *Id.*

<sup>197</sup> *Human Rights Committee: Monitoring Civil and Political Rights*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www2.ohchr.org/english/bodies/hrc/>.

power to sanction states it determines to be in violation of their obligations under the Covenant. Ultimately, states parties to the ICCPR are bound by the text of the Covenant, rather than by decisions of the Human Rights Committee,<sup>198</sup> and states whose judges are predisposed against homosexuality will be less likely to interpret the ICCPR's language as providing protection for homosexual rights. The ICESCR faces similar enforcement problems.

Likewise, even if a UN member state fails entirely to cooperate with the Human Rights Council's UPR, there is no definite sanction. Rather, the Council "would decide on the measures it would need to take in case of persistent non-co-operation."<sup>199</sup> Enforcement problems have also plagued the African Charter on Human and Peoples' Rights, given the nonbinding status of the Commission's recommendations.<sup>200</sup> Moreover, without state consent, individuals are not empowered to bring claims before the African Court on Human and Peoples' Rights.<sup>201</sup>

In light of the limited capacity for implementation of human rights norms outside the machinery of a state justice system, the ICCPR itself recognizes the important role of states parties in its statement of the obligation of national governments to give effect to rights recognized under the Covenant.<sup>202</sup> The ICESCR contains a similar provision.<sup>203</sup> Of course, reliance on member nations to give effect to treaty rights leaves such nations with considerable practical power to

<sup>198</sup> See, e.g., Laurence R. Helfer & Alice M. Miller, *Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence*, 9 HARV. HUM. RTS. J. 61, 82 (1996).

<sup>199</sup> *Basic Facts About the UPR*, OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, <http://www.ohchr.org/en/hrbodies/upr/pages/BasicFacts.aspx>.

<sup>200</sup> See, e.g., Frans Viljoen & Lirette Louw, *State Compliance With the Recommendations of the African Commission on Human and Peoples' Rights, 1994–2004*, 101 AM. J. INT'L L. 1, 8 (2007) (finding a general lack of state compliance with the non-binding recommendations of the Commission).

<sup>201</sup> Article 34(6) of the protocol establishing the Court requires states parties to accept the competence of the court to hear claims from individuals and Non-Governmental Organizations in order for the Court to hear such claims. Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, adopted June 9, 1998, O.A.U. Doc. CAB/LEG/665 (entered into force Jan. 1, 2004). As of early 2013, only six African nations (Burkina Faso, Ghana, Mali, Malawi, Rwanda, and Tanzania) had chosen to allow individual claims against them in the Court. *Rwanda Deposits the Declaration Allowing Individuals Direct Access to the Court*, AFRICAN COURT ON HUMAN AND PEOPLES' RIGHTS, Feb. 28, 2013, <http://www.african-court.org/en/index.php/news/latest-news/341-rwanda-deposits-the-article-34-6-declaration-allowing-individuals-and-ngos-direct-access-to-the-african-court>.

<sup>202</sup> ICCPR, *supra* note 100, art. 2.

<sup>203</sup> ICESCR, *supra* note 101, art. 3.

interpret the nature of the rights at stake. Given pervasive obstacles to the enforcement of international law generally, and given the lack of any specific enforcement mechanism for international human rights treaties in particular, appeals to international human rights norms to promote the interests of homosexuals in Africa currently have limited potential for success.

Favorable decisions from domestic courts in Africa also seem unlikely. As others have observed in the American context, contrary to the popular mythology of courts as staunch defenders of minority rights against majoritarian oppression, courts seldom declare rights that lack significant public support.<sup>204</sup> On the occasions when courts do find rights when there is substantial public disagreement on the issue, backlash to judicial interference with the political process may lead to subversion of the very rights courts hoped to protect.<sup>205</sup> The widespread public disapproval of homosexuality in Africa suggests African courts are unlikely to issue sweeping decisions to protect homosexual rights. Even if African courts did issue such rulings, moreover, lack of African public support for homosexual rights suggests the possibility for political backlash that could endanger people who engage in same-sex intimacies in Africa more than current laws criminalizing homosexual conduct. These conclusions seem apparent even without any deeper examination of ideas outside the liberal legal paradigm or of cultural context. However, both queer theory and communitarian philosophy, and the coincidence of those ideologies with much of the African anthropological record, suggest more powerful reasons both to discount the likelihood of favorable

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<sup>204</sup> See, e.g., Jack M. Balkin, *What Brown Teaches Us About Constitutional Theory*, 90 VA. L. REV. 1537, 1551–52 (2004) (arguing that courts tend to protect minority rights only when national majorities approve of such protection); Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257, 1279 (2004) (arguing that the United States Supreme Court “operates on a leash” that ensures its decisions will hew fairly closely to public opinion); Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 445 (2005) [hereinafter Klarman, *Brown and Lawrence*]. Adem K. Abebe, *Abdication of Responsibility or Justifiable Fear of Illegitimacy? The Death Penalty, Gay Rights, and the Role of Public Opinion in Judicial Determinations in Africa*, 60 AM. J. COMP. L. 603, 620–26 (2012) (Adem Abebe has observed that in the few cases in which African courts have considered rights-based claims by practitioners of same-sex intimacies, most of those courts have relied heavily on public opinion in rejecting the claims.).

<sup>205</sup> Ruth Bader Ginsburg has argued, for example, that *Roe v. Wade* produced backlash that has made abortion reform more difficult. Emily Bazelon, *Backlash Whiplash: Is Justice Ginsburg Right that Roe v. Wade Should Make the Court Cautious About Gay Marriage?*, SLATE, May 14, 2013, [http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/05/justice\\_ginsburg\\_and\\_roe\\_v\\_wade\\_caution\\_for\\_gay\\_marriage.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/05/justice_ginsburg_and_roe_v_wade_caution_for_gay_marriage.html).

judicial opinions and to credit the possibility of severe popular backlash to outside pressure for homosexual rights in Africa.

### III CRITIQUES OF LIBERALISM

The poorly developed framework for the enforcement of international human rights law suggests practical limitations on improving the lives of homosexuals in Africa, but there are other reasons for liberals to consider exercising restraint in pursuing a homosexual rights agenda in Africa. There are always risks to pursuing a liberal agenda in a culture other than one's own, yet Professor Uday Mehta's observation of an exclusionary impulse inherent to classical liberal ideology may suggest interventionist tendencies are inextricably entwined with liberal theory. In Mehta's estimation, despite the universalism at the core of liberal philosophy, liberalism's exclusionary potential was apparent even in Locke's articulations of the distinction between "universal capacities and the conditions for their actualization."<sup>206</sup> In particular, Mehta has claimed a discrepancy between Locke's assertion of the natural and universal capacity for reason, which individuals might use to ascertain the natural laws that restrict otherwise complete human freedom, and the highly structured process Locke envisioned for inculcating this universal rationality in children in his *Thoughts Concerning Education*.<sup>207</sup> Thus, having described reason as universal and natural, Locke nonetheless endorsed the notion that certain members of society (children) could be excluded from access to the full range of liberal rights until society had imparted rationality to them through a highly regimented educational curriculum.<sup>208</sup> Mehta has also noted Locke's frequent approving references to conventional social hierarchies that impose limitations on the theoretically universal access to liberal rights he proclaimed.<sup>209</sup> In *Thoughts Concerning Education*, for example, Locke wrote, "I think a Prince, a Nobleman and an ordinary Gentleman's son, should have different ways of breeding."<sup>210</sup> And of course, for Locke, there were some members of

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<sup>206</sup> Uday S. Mehta, *Liberal Strategies of Exclusion*, in *TENSIONS OF EMPIRE: COLONIAL CULTURES IN A BOURGEOIS WORLD* 62 (Frederick Cooper & Ann L. Stole eds., 1997).

<sup>207</sup> *Id.* at 67–70.

<sup>208</sup> *Id.* at 67 (citing LOCKE, *TWO TREATISES OF GOVERNMENT* II, ¶ 60).

<sup>209</sup> *Id.* at 69.

<sup>210</sup> *Id.* at 67 (quoting JOHN LOCKE, *SOME THOUGHTS CONCERNING EDUCATION* section 217).

society—“lunaticks and ideots”<sup>211</sup>—whom the majority could permanently govern without consent.

But for Mehta, the imperialist potential of liberalism was most evident in the writing of John Stuart Mill.<sup>212</sup> Although Mill insisted that liberty was necessary for human flourishing,<sup>213</sup> Mill believed in limiting access to liberty not only for children and lunatics, but also for societies that had not developed sufficiently to be “improved by free and equal discussion.”<sup>214</sup> Thus, despite Mill’s belief in the universal human sense of dignity, and the capacity for choice as a “distinctive endowment of a human being,” he endorsed despotic colonial rule over what he considered barbarous cultures. Mill justified authoritarian rule by contrasting societies that were “capable and ripe for representative government” like Australia and the American colonies, with others, like India, that were “still a great distance from that state.”<sup>215</sup>

More generally, Mehta has noted that liberal universalism leads to an urge to “politically . . . assimilate things, even when those things are thoroughly unfamiliar.”<sup>216</sup> This “cosmopolitanism of reason” leads liberals to describe the unknown in generalities, which, “in a single glance and without having *experienced* any of it . . . make[s] it possible to compare and classify the world.”<sup>217</sup> Mehta’s observation of the liberal urge toward political assimilation perfectly describes insistence by many Western liberals on engrafting Western homosexual identity onto all practitioners of same-sex intimacies. But this epistemological perspective results, in Mehta’s view, in an urge to dominate other cultures, for “the language of those comparisons is not neutral and cannot avoid notions of superiority and inferiority, backward and progressive, and higher and lower.”<sup>218</sup>

Of course, current liberal calls for advancement of homosexual rights in Africa are arguably a far cry from the colonial policies of an invading empire. The publicity campaigns of human rights groups today do not bolster physical occupations by foreign powers, the way

<sup>211</sup> LOCKE, TWO TREATISES OF GOVERNMENT II, ¶ 60).

<sup>212</sup> Mehta, *supra* note 206 at 70–80.

<sup>213</sup> JOHN STUART MILL, ON LIBERTY (1859).

<sup>214</sup> *Id.*

<sup>215</sup> Mehta, *supra* note 206, at 76 (quoting JOHN STUART MILL, REPRESENTATIVE GOVERNMENT 214 (1861)).

<sup>216</sup> UDAY S. MEHTA, LIBERALISM AND EMPIRE: A STUDY IN NINETEENTH-CENTURY BRITISH LIBERAL THOUGHT 20 (1999).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

that European nations used abolition of the slave trade to justify their nineteenth-century colonial enterprises.<sup>219</sup> And conditioning dispensation of monetary assistance on protection of a vulnerable minority seems far removed from using the notion of cultural inferiority to rationalize occupation, wealth extraction, and the wholesale subjugation of populations that characterized the colonial experience.

On the other hand, the push for legal Westernization has gone hand in hand with pressure from international institutions like the World Bank and the International Monetary Fund for developing countries to move toward economic liberalization,<sup>220</sup> thereby creating new investment opportunities for the West, and others. In theory, the economic liberalization implemented through World Bank-imposed structural adjustment programs will lead developing countries out of poverty.<sup>221</sup> The attendant Western systems call for legal liberalization—the reshaping of non-Western legal systems to fit American and European conceptions of justice—compliments that economic liberalization; without such legal reform, the theory goes, developing countries will be unable to attract the investment that is crucial to increasing their wealth, and, of course, the wealth of investors in their newly open economies.<sup>222</sup>

Yet even if one is disinclined to read mixed motives into the appeals of human rights activists, there are important reasons for liberals to proceed with caution. As Professor Thomas Kelley has chronicled, Western pressure for liberal legal reform in developing countries may result in outcomes at odds with reformers' intentions. In a devastating account, Kelley described the plight of Niger's horso.<sup>223</sup> Descendants of chattel slaves who hold a status difficult to describe in Western terms, horso have traditionally farmed land remitted to them by village nobles, paying for the privilege with a portion of their harvests.<sup>224</sup> Although, unlike their ancestors, horso have a great deal of freedom, they hold a permanent child-like status

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<sup>219</sup> See, e.g., Thomas A. Kelley, *Unintended Consequences of Legal Westernization in Niger: Harmful Contemporary Slaves by Reconceptualizing Property*, 56 AM. J. COMP. L. 999, n.52 (2008) [hereinafter Kelley, *Slavery*].

<sup>220</sup> See, e.g., Thomas A. Kelley, *Exporting Western Law to the Developing World: The Troubling Case of Niger*, 39 GEO. WASH. INT'L L. REV. 321, 322 (2007) [hereinafter Kelley, *Exporting Western Law*].

<sup>221</sup> *Id.*

<sup>222</sup> *Id.*

<sup>223</sup> Kelley, *Slavery*, *supra* note 219.

<sup>224</sup> *Id.* at 1013–16.

in the communities in which they live, always dependent on noble elders for permission to cultivate land.<sup>225</sup> As Kelley has described, a combination of recent, Western-inspired property reforms and anti-slavery provisions has, ironically, had significant negative impacts for Niger's horso. First, antislavery provisions in Niger's constitution and penal code, defining slavery in Western terms as involving "powers attaching to the right of ownership," are unfamiliar in a culture in which all individuals owe duties to, and exert some ownership-like claims over, other members of the communities in which they live.<sup>226</sup> However, these provisions have led some nobles to assert that they neither own horso nor owe them any further duties, including the protection and care they have traditionally felt obligated to offer.<sup>227</sup> Second, property reforms aimed at ensuring clear titles to land, eviscerating communal ownership to ensure alienability, have led nobles to assert sole ownership claims over land they had traditionally ceded for horso use, leaving horso communities isolated and defenseless.<sup>228</sup>

Kelley's powerful account of the plight of the horso followed his earlier and more generalized admonitions about the possible unintended consequences of Western legal reform in the developing world.<sup>229</sup> Given the depth of Western misunderstanding of African culture, Western efforts to advance homosexual rights in Africa could also lead to unanticipated results.

While the range of critiques of liberalism is too extensive to catalogue here, two responses to the liberal legal perspective—communitarianism and queer theory—are particularly relevant to any investigation of African resistance to gay rights. These philosophies, along with the African anthropological record, can help explain why African countries, which tend to have constitutions that espouse the same liberal values as the constitutions of Western nations, might be so much less likely than their Western counterparts to interpret fundamental rights provisions as protecting homosexuals. Communitarian theory, which embraces elevation of community norms over individual interests, coincides with the values of a broad array of African cultures and helps elucidate the likely obstacles homosexual rights advocates will face in Africa. While

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<sup>225</sup> *Id.* at 1015.

<sup>226</sup> *Id.* at 1023–25.

<sup>227</sup> *Id.* at 1026–34.

<sup>228</sup> *Id.* at 1034.

<sup>229</sup> Kelley, *Exporting Western Law*, *supra* note 220.

communitarian theory can shed some light on African resistance to both autonomy and equality claims of homosexual rights advocates, the anti-essentialist assertions of queer theorists have significant implications in particular for liberal claims based on rights against discrimination. If, as queer theorists contend, sexuality is primarily a social construction, then assertions that homosexuals have the kind of minority status that merits protection against discriminatory conduct become less tenable. Similarly, if the consequence of the malleability and variability of desire is that many Africans who engage in what Westerners would term homosexual conduct consider that conduct a relatively insignificant component not only of their overall identities, but an unimportant component even of their sexual identities, then claims to the kind of suspect status that might confer legal protection against discrimination become more difficult. As I will discuss in Part V, much of the anthropological data from across the African continent supports the anti-essentialist arguments of queer theorists.

The claims of communitarians and queer theorists, and the consistency of those claims with cultural data across the African continent, should be important to anyone committed to a liberal perspective. These assertions, and their affirmation in African culture, offer insight on the likely depth of African backlash against liberal arguments for homosexual rights. The perspectives of communitarians and queer theorists also offer the possibility of a deeper understanding of the context for African assertions about homosexuality. In turn, such an understanding may assist homosexual rights advocates in pursuing a more successful agenda for improving the lives of Africans who engage in same-sex intimacies.

#### *A. Communitarian Philosophy and African Culture*

Given that African constitutions tend to enshrine liberal commitments similar to their Western counterparts, one might reasonably wonder why African citizens, legislators, and judges would be any less likely than their Western counterparts to uphold the liberal values inherent to the claims of homosexual rights advocates. A simple and obvious answer is that many African cultures remain significantly less sympathetic to homosexuality than most Western cultures, which have had a rapid evolution in perspective on homosexuality and homosexual rights. Yet this answer, by itself, is insufficient. If, in fact, the constitutions of African countries represent a wholehearted commitment to liberal values, then those constitutions should guide the judges who interpret them to separate the right from the good, upholding the former by striking down laws that represent



popular sentiment concerning the latter. Liberalism, that is, does not allow majoritarian interference with individual decisions about how to pursue a happy life in the absence of significant interference with the rights of others.<sup>230</sup>

What, then, explains illiberal decision-making by authorities with ostensibly liberal commitments? Communitarian philosophy and the communitarian ideals of many African cultures offer a partial response. Instead of espousing a separation of the right from the good, communitarians embrace the use of law to promote the good, the specifics of which will vary depending on the values of the society in question. In fact, the broader communitarian critique of liberalism denies the very possibility of rights (either to autonomy or to equal protection) that exist outside of, and precede, the communities in which liberals make their claims.<sup>231</sup>

At times, Western courts have also embraced community values over liberal rights. Justice White's majority opinion in *Bowers*, for example, explicitly endorsed the idea that moral opprobrium was sufficient to validate Georgia's sodomy law.<sup>232</sup> Chief Justice Burger's concurrence also embraced this idea in his statement that protecting homosexual sodomy as a fundamental right "would be to cast aside millennia of moral teaching."<sup>233</sup> Likewise, even today, and even in the realm of sexual autonomy, a right the United States Supreme Court has held deserving of special protection, illiberal laws prohibiting practices like polygamy and prostitution remain intact. Indeed, the very notion that liberal rights must give way to compelling state interests in the United States' equal protection and fundamental rights jurisprudence arguably represents a concession to

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<sup>230</sup> The most famous expression of this idea is John Stuart Mill's harm principle, discussed in *On Liberty*. One might argue that, in fact, the rights homosexuals seek to enforce have serious, detrimental third-party impacts. Of course, the Platonic liberal ideal of the atomistic individual pursuing her ambitions in a vacuum, with no consequences for the lives of third parties, has never been a reality. Every significant decision one makes impacts other lives. Taken to an extreme, this argument could negate every liberal autonomy claim. Communitarian theorists have made just such arguments to illustrate the putative illusory nature of liberal arguments.

<sup>231</sup> See, e.g., MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 137–38 (1991) ("The myriad associations that generate social norms are the invisible supports of, and the sine qua non for, a regime in which individuals have rights."); CHARLES TAYLOR, PHILOSOPHICAL PAPERS: PHILOSOPHY AND THE HUMAN SCIENCES 206 (1985) (claiming "that the free individual of the West is only what he is by virtue of the whole society and civilization which brought him to be and which nourishes him."); Ball, *Communitarianism and Gay Rights*, *supra* note 69, at 444.

<sup>232</sup> *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

<sup>233</sup> *Id.* at 197 (Burger, C.J., concurring).

communitarianism.<sup>234</sup> Certainly, the question in substantive due process cases of whether a right is “deeply rooted” in the country’s “history and tradition” suggests the relevance of community values in determining the significance of a claim. And as Michael Sandel has argued, before the turn of the twentieth century, the Bill of Rights offered little actual protection for individual rights against the federal government. Instead, Americans and their courts tended to conceive of liberty as requiring a “dispersion of power among branches and levels of government”<sup>235</sup> rather than elevation of individual rights over community norms. Yet it is clear now that the liberal, individualist perspective is deeply rooted, both in American culture generally and in American legal culture.

In contrast, communitarian values have played a far more significant role in the actual implementation of law and policy in many African nations than in the Western countries whose constitutions often provided templates for their African counterparts. This practical disparity between liberal constitutional language and law in action reflects the communitarian ethics of a broad range of traditional African societies, and it illuminates, to some extent, African resistance to the full range of liberalism’s implications. I will discuss the African context more thoroughly below. First, however, I will provide an overview of communitarian philosophy and communitarian critiques of liberalism.

Communitarian philosophers tend to attack liberalism on two grounds. First, communitarians contend that liberal claims are conceptually incoherent, that exclusion of moral judgments from public decision-making is neither practically nor theoretically possible.<sup>236</sup> Second, communitarians make the normative claim that liberal attempts to separate the right and the good are undesirable, for

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<sup>234</sup> One might argue these limitations are consistent with a liberal framework, given consequences for other individuals or the community at large. Again, Mill’s harm principle bounds the right to individual autonomy. Of course, without further qualification, the harm principle has no stopping point (all actions have third-party impacts) and could eviscerate liberalism’s core commitments. Nonetheless, interference with the rights of others has always been a sufficient justification for limiting rights in a liberal universe, and the idea of compelling state interests inherently involves questions of public import.

<sup>235</sup> SANDEL, *DEMOCRACY’S DISCONTENT*, *supra* note 10, at 38.

<sup>236</sup> See, e.g., Ball, *Communitarianism and Gay Rights*, *supra* note 69, at 444 (citing Thomas Moody, *Some Comparisons Between Liberalism and Eccentric Communitarianism*, in *THE LIBERALISM-COMMUNITARIANISM DEBATE* 91, 96 (C.F. Delaney ed., 1994); Michael J. Sandel, *Introduction*, in *LIBERALISM AND ITS CRITICS* 1 (Michael J. Sandel ed., 1984) (stating that “[t]olerance and freedom and fairness are values too”).

they diminish the important function of communities in promoting public goods and individual freedom and dignity.<sup>237</sup>

Communitarians have rightly observed that liberal philosophy offers an inadequate account of the manner in which courts actually make decisions. In the context of homosexual rights, for example, courts purporting to act as neutral arbiters have, in fact, engaged in overt moral analysis. Sandel illustrated this point in his discussion of *Goodridge v. Department of Public Health*,<sup>238</sup> in which the Massachusetts Supreme Court found a right to homosexual marriage. In her majority opinion, Chief Justice Margaret Marshall claimed moral neutrality in noting the irrelevance of the competing moral viewpoints that marriage should be between only men and women and that members of the same sex should be permitted to marry.<sup>239</sup> Nonetheless, Marshall's opinion then went on to define the essence of marriage as involving an exclusive, permanent commitment between partners,<sup>240</sup> whether the individuals in question are heterosexual or homosexual. Of course, Marshall's choice to favor one faction in the contest over the social meaning of marriage almost certainly reflects her moral perspective, a decision to promote a particular conception of the boundaries within which individuals in society should be permitted to pursue the good life.<sup>241</sup> Yet, as Sandel noted, "[i]f government were truly neutral on the moral worth of all voluntary intimate relationships, the state would have no grounds for limiting marriage to two persons, consensual polygamous partnerships would also qualify."<sup>242</sup>

Ultimately, communitarians suggest the very idea of liberal moral neutrality is an illusion. Promotion of the core liberal tenets of equality and autonomy itself represents a moral judgment that those ideals are more important than alternative values, like social welfare, community solidarity, or civic responsibility.<sup>243</sup> If the liberal concept of moral neutrality is practically and conceptually impossible, the

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<sup>237</sup> See, e.g., Ball, *Communitarianism and Gay Rights*, *supra* note 69, at 445 (citing Markate Daly, *Introduction*, in *COMMUNITARIANISM: A NEW PUBLIC ETHICS* xvii (Markate Daly ed., 1994) (contending that "[i]nstead of such values as individual interests, autonomy, and universality, natural rights, and neutrality, communitarian philosophy is framed in terms of the common good, social practices and traditions, character, solidarity, and social responsibility)).

<sup>238</sup> 798 N.E.2d 941 (Mass. 2003).

<sup>239</sup> *Id.* at 948.

<sup>240</sup> *Id.* at 961.

<sup>241</sup> MICHAEL J. SANDEL, *JUSTICE: WHAT'S THE RIGHT THING TO DO?* 258–59 (2009).

<sup>242</sup> *Id.* at 257.

<sup>243</sup> See, e.g., Sandel, *Introduction*, *supra* note 236, at 1.

liberal promotion of the atomistic individual, making choices in a social vacuum, free from social obligation, is also undesirable, according to communitarian arguments. Instead, communitarians suggest the state should embrace its unavoidable role of promoting the good, a concept developed and defined through community norms.

Sandel, perhaps the most prominent communitarian critic of liberalism,<sup>244</sup> began arguing with his first book that liberalism's glorification of individual rights had diminished the sense of meaning in people's lives and that any complete theory of justice must take account of the role of communities and of community obligations in shaping individuals.<sup>245</sup> According to critics like Sandel, the liberal focus on individual autonomy has undervalued the important role communities can play in promoting the welfare of the individuals who comprise them. The pervasive impact of the liberal perspective on every facet of American life and culture has, furthermore, had a disheartening impact on individuals as their identities as members of communities have been cut off from their identities as democratic citizens.<sup>246</sup> In the final analysis, according to Sandel, the triumph of liberalism has left communities weakened and unresponsive to the needs of now isolated, disenchanting citizens.<sup>247</sup>

The ultimate "good" Sandel proposes as an alternative to the moral void of liberal neutrality is the idea of civic republicanism, the promotion of greater engagement with and participation in government by citizens. In contrast to liberalism's ostensible moral neutrality and focus on the self-interested individual, making choices about how to pursue happiness in the absence of external obligation, the civic republican model promotes its particular conception of the good—a society in which public spiritedness and regard for public

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<sup>244</sup> Although Sandel has generally been associated with communitarian theory, Sandel distinguishes his "perfectionist" philosophy from communitarian ideology. The crux of Sandel's distinction is that perfectionism involves governmental promotion of the good, as defined with reference to intrinsic moral value, rather than simply to community norms. The aims of a perfectionist model are thus independent of widespread support from any particular community. MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* xi (1982). Sandel's conception of the good, however, emphasizes the moral value of communities, which can promote individual freedom and provide meaning to individual lives, as opposed to the moral vacuum of liberal tolerance.

<sup>245</sup> *Id.*

<sup>246</sup> SANDEL, *DEMOCRACY'S DISCONTENT*, *supra* note 10, at 321–24.

<sup>247</sup> Ball, *Communitarianism and Gay Rights*, *supra* note 69, at 465.

welfare predominate over the bracketed concerns of atomistic individuals.<sup>248</sup>

In arguing for the potential of communities to enrich and enhance the lives of individuals, Sandel emphasizes the crucial role that black churches played in advancing the civil rights movement in the 1960s. The fruits of that movement included obvious victories for the liberal values of individual autonomy and choice, including the end of government segregation and the attainment of voting rights for blacks. Yet the collective, communal efforts that went into obtaining those freedoms represent, for Sandel, a higher-order freedom, which results from collective engagement to influence public life.<sup>249</sup>

In contrast to Sandel's identification of a specific moral aim, other communitarians have argued for promotion of norms intrinsic only to communities of the governed. Michael Walzer's communitarian vision, for example, eschews the idea of any moral framework external to community values, but urges distribution of social goods in a manner consistent with the meanings a community has chosen to ascribe to those goods.<sup>250</sup> According to Walzer, for any social good in any society, there are accepted principles for determining how to distribute the good.<sup>251</sup> Each good or set of goods, moreover, has distributive standards that differ from those of other social goods.<sup>252</sup> Walzer's notion of "complex equality" thus requires that society allocate each social good according to the community's shared understandings of the good's significance and without intrusion of criteria from other spheres.<sup>253</sup> For example, if community tradition defines politics as a sphere separate from the market, then money should not influence the distribution of political power. Likewise, political power should not confer advantages in the marketplace.

Communitarian responses to liberalism offer some potential for advancement of minority rights. As Robin West has urged, liberal universalism's insistence on equality, which entails fundamental denial of difference, deprives those seeking to improve the lives of minorities of powerful arguments that might aid their cases.<sup>254</sup> In the case of homosexual marriage, West noted that acceptance of a liberal

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<sup>248</sup> See generally SANDEL, *DEMOCRACY'S DISCONTENT*, *supra* note 10.

<sup>249</sup> *Id.* at 348.

<sup>250</sup> See generally MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983).

<sup>251</sup> *Id.* at 6–10.

<sup>252</sup> *Id.* at 10.

<sup>253</sup> *Id.* at 12–13.

<sup>254</sup> West, *supra* note 148.

framework has led homosexual rights advocates to contend that homosexual marriage is indistinguishable from heterosexual marriage and that the right is, therefore, fundamental regardless of the genders of those wishing to exercise it.<sup>255</sup> Aside from the empirical awkwardness of the denial of difference, West suggested that denial also preempts useful claims about the ways that the differences between heterosexual and homosexual marriage militate in favor of recognition of the latter.<sup>256</sup>

In the absence of liberal constraints, for example, one might pursue government approval of same-sex marriage by emphasizing that homosexual marriage, unlike heterosexual marriage, lacks the patriarchal heritage of subjugation of women and represents, instead, a partnership of sexual equals.<sup>257</sup> Additionally, West proposes that proponents of homosexual marriage might embrace the claim of gay marriage opponents that homosexual marriage is fundamentally different from heterosexual marriage because of its lack of procreative potential. Instead of engaging in the liberal denial of difference by pointing to heterosexual unions between sterile partners, gay marriage advocates might note that the inability of homosexual couples to reproduce suggests a more altruistic union, based only on mutual love and respect, as opposed to the fundamentally selfish aim of propagating one's genes.<sup>258</sup> Finally, West contends the liberal focus on legally and morally unencumbered individual decision-makers simply belies the fundamentally communal nature of an institution like marriage.<sup>259</sup>

More broadly, the liberal requirement of moral neutrality prevents a wide range of arguments that might be useful in promoting minority interests. By requiring tolerance of individual choice, without regard to the moral significance of the choices in question, the liberal paradigm preempts exposition of the positive good that promoting minority interests might entail. In this regard, Sandel criticized the dissenting opinions of Justices Blackmun and Stevens in *Bowers*. In *Griswold*, the Court had, while advancing the liberal cause, nonetheless embraced a moral perspective in its judgment on the fundamental value of marriage as "intimate to the degree of being sacred . . . an association that promotes a way of life . . . an

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<sup>255</sup> *Id.* at 726.

<sup>256</sup> *Id.* at 727–28.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at 728.

<sup>259</sup> *Id.* at 729.

association for as noble a purpose as any involved in our prior decisions.”<sup>260</sup> According to Sandel, Blackmun and Stevens missed an opportunity to cast homosexual relationships in similar terms.<sup>261</sup> Instead, Blackmun emphasized the liberal aspects of the Court’s earlier opinions,<sup>262</sup> and both Blackmun and Stevens stressed the importance of individual choice in arguing for the invalidation of Georgia’s law.<sup>263</sup> Yet, in Sandel’s view, this insistence on liberal neutrality results in only a “thin and fragile toleration.”<sup>264</sup> It leads merely to the idea that one has to put up with homosexuals despite disliking them, “just like we have to tolerate all degenerates.”<sup>265</sup>

Notwithstanding the potential of the communitarian embrace of moral arguments to advance minority interests, I have suggested there are good reasons to adhere to a liberal framework. With a true communitarian perspective, including disavowal of the very idea of rights external to community norms, there is no guarantee that the values of the community will promote minority welfare. By definition, in fact, communal priorities will reflect majority interests. Walzer’s notion of “complex equality,” moreover, is insufficient to protect minorities. A follower of Walzer’s philosophy might argue, for example, that homosexuals must be permitted to marry because the shared community understanding of marriage is that it is a union of two individuals choosing to commit their lives to each other based on mutual feelings of love, attraction, and respect. Under this understanding, the genders of the individuals in question should be irrelevant. Yet, as others have pointed out, Walzer’s theory offers an insufficient account of the deeply contested meanings of every

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<sup>260</sup> *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

<sup>261</sup> SANDEL, *DEMOCRACY’S DISCONTENT*, *supra* note 10, at 103–08.

<sup>262</sup> *Id.* at 104–05 (citing *Bowers v. Hardwick*, 478 U.S. 186, 205 (1986) (Blackmun, J., dissenting)).

<sup>263</sup> Blackmun had noted that “much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds.” *Id.* Similarly, Stevens had written of “respect for the dignity of individual choice” and the interest one has, regardless of sexual orientation, in “deciding how he will live his own life, and, more narrowly, how he will conduct himself in his personal and voluntary associations with his companions.” *Id.* at 105 (quoting *Bowers*, 478 U.S. at 218–19 (Stevens, J., dissenting)).

<sup>264</sup> Michael Sandel, *Moral Argument and Liberal Toleration*, in AMITAI ATZIONI, ED., *NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES* 86 (1995).

<sup>265</sup> R. CLAIRE SNYDER, *GAY MARRIAGE AND DEMOCRACY: EQUALITY FOR ALL* 140 (2006).

significant social good.<sup>266</sup> Why, for example, should decision makers prioritize the notion of marriage that emphasizes romantic choice over the vision of the institution as involving the union only of partners of the opposite sex?<sup>267</sup>

Sandel's recognition of absolute moral goods also fails to sufficiently guarantee minority rights. Although Sandel promoted an argument for gay rights based on the similar moral good involved in heterosexual and homosexual relationships,<sup>268</sup> his approval of moral decision-making in constitutional jurisprudence leaves the fate of minorities dependent on the moral perspective of the presiding judges.<sup>269</sup> In the end, Sandel fails to suggest any basis for believing judges would be more likely to share his moral perspective than the voters and legislators who have, historically, often suppressed minority interests.<sup>270</sup>

Both West and Ball recognized the potential for communitarian ideas to enrich liberal claims. Ultimately, however, as West noted, communitarian philosophy is an inadequate alternative to liberalism for those concerned with advancing traditional liberal rights, including the rights of minorities. Without some commitment to rights, there can be no guaranteed basis for challenging dominant community norms that conflict with the interests of minorities in nondiscrimination or of all people in choosing how to conduct their intimate lives. As West put it, "I am certain a commitment to liberalism, universalism, and individualism is necessary to provide a floor for these arguments; without such a commitment, there is just no reason for these arguments to be heard, much less honored or heeded."<sup>271</sup> Ball, in the final analysis, reached similar conclusions.<sup>272</sup>

Communitarian arguments are particularly salient in the context of any discussion of the legal status of homosexuality in Africa because of the deep communitarian roots of traditional cultures across the continent. Although, as I have already discussed, African countries have tended to adopt constitutions that proclaim liberal rights, many

<sup>266</sup> Ball, *Communitarianism and Gay Rights*, *supra* note 69, at 490–91 (citing Ronald Dworkin & Michael Walzer, *To Each His Own: An Exchange on Spheres of Justice*, in *COMMUNITARIANISM: A NEW PUBLIC ETHICS*, *supra* note 238, at 110, 112).

<sup>267</sup> *Id.* at 503–04.

<sup>268</sup> SANDEL, *DEMOCRACY'S DISCONTENT*, *supra* note 10, at 104.

<sup>269</sup> Ball, *Communitarianism and Gay Rights*, *supra* note 69, at 480–84 (discussing SANDEL, *DEMOCRACY'S DISCONTENT*, *supra* note 10, at 90–118).

<sup>270</sup> *Id.* at 482.

<sup>271</sup> West, *supra* note 148, at 711.

<sup>272</sup> Ball, *Communitarianism and Gay Rights*, *supra* note 69, at 512–13, 517.



of the societies in which those constitutions have arisen have lacked the profound cultural commitment to individualism that observers like Sandel have noted in the United States. As a consequence, communitarian values have frequently explained the actual operation of law in African countries better than the putative liberal loyalties evinced in African constitutions.

Countless authors have noted the communitarian leanings of traditional cultures across the African continent.<sup>273</sup> While African

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<sup>273</sup> See, e.g., T.W. Bennett, *Comparative Law and African Customary Law*, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 651 (Matthias Reimann & Reinhard Zimmermann eds., 2006) (stating that African customary law “emphasizes responsibility, not rights and powers”); Chukwudum Okolo, *The African Person: A Cultural Definition*, in AN INTRODUCTION TO AFRICAN PHILOSOPHY 397 (P.H. Coetzee & MES van den Berg eds., 1995) (asserting that in African culture, “[t]here is no question of rugged individualism in outlook and life-style so characteristic of the European or the American”); Ifianyi A. Menkiti, *Person and Community in African Traditional Thought*, in AFRICAN PHILOSOPHY: AN INTRODUCTION 172 (R.A. Wright ed., 1984) (claiming that it is “the community which defines the person as person, not some isolated static quality of rationality, will, or memory . . . in the African understanding human community plays a crucial role in the individual’s acquisition of full personhood”); LEOPOLD S. SENGHOR, ON AFRICAN SOCIALISM 49, 93 (1964) (stating that “Negro-African society is collectivist or . . . communal, because it is rather a communion of souls than an aggregate of individuals . . . [N]egro-African society puts more stress on the group than on the individual, more on solidarity than on the activity and needs of the individual, more on the communion of persons than on their autonomy. Ours is a community society”); Kristen A. Dauphinais, *Training a Countervailing Elite: The Necessity of an Effective Lawyering Skills Pedagogy for a Sustainable Rule of Law Revival in East Africa*, 85 N.D. L. REV. 53, n.101 (2009) (quoting Professor Adam Todd’s remarks on the communitarian nature of customary law in East Africa); Lisa Forman, *Justice and Justiciability: Advancing Solidarity and Justice Through South Africans’ Right to Health Jurisprudence*, 27 MED. & L. 661 (2008) (asserting that the South African Supreme Court has developed a “novel rights paradigm which locates individual civil and social rights within a communitarian framework drawing from the traditional African notion of ‘ubuntu,’ denoting collective solidarity, humaneness and mutual responsibilities . . . .”); Andrew Harris, Seymour Goodman & Patrick Traynor, *Mobile Money in Developing Countries: Financial Inclusion and Financial Integrity*, 8 WASH. J.L. TECH. & ARTS 245, 248 (noting that “a strong communitarian strain exists throughout much of Africa”); Kelley, *Slavery*, *supra* note 219 (discussing the traditional communitarian approach to property ownership in Niger and the web of mutual obligations individuals owe each other in general, making the Western notion of individual freedom a foreign concept); Julie MacFarlane, *Working Towards Restorative Justice in Ethiopia: Integrating Traditional Conflict Resolution Systems With the Formal Legal System*, 8 CARDOZO J. CONFLICT RESOL. 487, 502–03 (2007) (describing a moderate form of communitarianism that exists within African societies, involving a rejection of the Western concept of rights-based justice while nonetheless leaving space for “individual challenge or even the rejection of some traditional values”); Garth Mashmann, *Book Review: Indigenous Knowledge Systems and Intellectual Property in the Twenty-First Century: Perspectives from Southern Africa*, 19 SYRACUSE SCI. & TECH. L. REP. 92, 95 (2008) (stating that communitarian values are “essential to African concepts of ownership”); Adrien Wing, *Communitarianism v. Individualism*:

cultures are, and always have been, extremely diverse, communitarian tendencies have characterized a wide range of societies throughout sub-Saharan Africa. Like communitarianism in the West, descriptions of African communitarianism have tended to emphasize responsibilities to community rather than individual rights.<sup>274</sup>

Many scholars have discussed the communitarian approach to property ownership in African cultures.<sup>275</sup> As Kelley observed, the traditional notion that members of a community might have a range of responsibilities for, and claims over, a single parcel of land has spurred Western-inspired legal reforms to ensure alienability.<sup>276</sup> Although liberal reforms might pave the way for economic development, they also have the potential to alienate many individuals who previously had been able to count on complex webs of mutual responsibilities to ensure access to community resources.<sup>277</sup> Similarly, Western-style intellectual property laws conflict with communitarian notions of shared cultural knowledge and, some have argued, may lead to “debasement and trivialization” of artistic achievements, which come to be judged as commodities rather than in terms of their social value.<sup>278</sup>

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*Constitutionalism in Namibia and South Africa*, 11 WIS. INT’L L.J. 295, 299 (1993) (discussing the importance of communitarian values in South Africa and Namibia).

<sup>274</sup> See, e.g., Bennett, *supra* note 273, at 651; Okolo, *supra* note 273, at 397; Menkiti, *supra* note 273, at 172; SENGHOR, *supra* note 273, at 49, 93; *but see* RICHARD H. BELL, UNDERSTANDING AFRICAN PHILOSOPHY: A CROSS-CULTURAL APPROACH TO CLASSICAL AND CONTEMPORARY ISSUES 62–63 (2002) (describing Kwame Gyekye’s vision of a “moderate communitarianism,” which allows for some individual challenge to community norms); KWAME GYEKYE, AN ESSAY ON AFRICAN PHILOSOPHICAL THOUGHT 160 (1995) (arguing that, in Akan society, “if the common good is attained, then logically the individual good is also attained. Strictly speaking, there can or should be no conflict between the two, for the individual and the common goods are tied up together and overlap. Therefore, any conflict stems from a misconception either of the common good, of the individual good, or of the relationship between the two . . . [T]he concept of communalism” does not operate “to the detriment of individuality. The concept of communalism, as it is understood in Akan thought . . . does not overlook individual rights, interests, desires, and responsibilities, nor does it imply the absorption of the individual will into the communal will . . .”).

<sup>275</sup> See, e.g., Bennett, *supra* note 273, at 653–54 (claiming that in African traditional societies, “duties arising out of social relationships” have priority over ideas of individual ownership and that African customary law allows a range of interests in any piece of property to vest in “various different holders”); Kelley, *Slavery*, *supra* note 219; Mashmann, *supra* note 273.

<sup>276</sup> Kelley, *Slavery*, *supra* note 219, at 1008.

<sup>277</sup> *Id.*

<sup>278</sup> Mashmann, *supra* note 273, at 95 (citing Pradip Thomas & Francis B. Nyamnjoh, *Intellectual Property Challenges in Africa: Indigenous Knowledge Systems and the Fate of Connected Worlds*, in ISAAC MAZONDE & PRADIP THOMAS, INDIGENOUS KNOWLEDGE

Other authors have discussed the communitarian focus of traditional African dispute resolution mechanisms. Writing in sweeping terms of the influence of communitarian values in African culture, Professor Jacques Frémont asserted that “[t]he first and foremost value on the continent is the preservation of social peace within the community.”<sup>279</sup> T.W. Bennett has noted, likewise, that traditional African dispute resolution is less likely to involve the use of rules to declare one party the winner and one the loser, and more likely to focus on compromise solutions to promote reconciliation.<sup>280</sup> The focus on relationships, as opposed to rules or rights, poses obvious challenges for liberal legal arguments.

Although African constitutions now tend to reflect the Western focus on the individual as the most important actor in the political life of the society, group imperatives have frequently driven political and legal decision-making even in postcolonial Africa. Thus, despite adopting constitutions that asserted liberal rights, many African leaders in the years following independence relied on the idea of group rights to economic development to justify mass subversion of individual rights.<sup>281</sup> Additionally, even today, in many African nations, the liberal frameworks of formal state legal systems are much less significant in the day-to-day lives of most people than traditional, customary norms.<sup>282</sup> To some extent, the continued vitality of customary law in the lives of many Africans reflects a lack of resources for the development of state justice systems, especially in rural areas.<sup>283</sup> The continued reliance on traditional norms also reflects the formal recognition of customary law as governing various spheres, like family relationships, in some countries.<sup>284</sup>

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<sup>279</sup> Jacques Frémont, *Legal Pluralism, Customary Law, and Human Rights in Francophone African Countries*, 40 VICT. U. WELLINGTON L. REV. 149, 151 (2009).

<sup>280</sup> Bennett, *supra* note 273, at 657.

<sup>281</sup> See B.O. NWABUEZE, PRESIDENTIALISM IN COMMONWEALTH AFRICA 106–10 (1974); H. Kwasi Prempeh, *Marbury in Africa: Judicial Review and the Challenge of Constitutionalism in Contemporary Africa*, 80 TUL. L. REV. 1239, 1266–68 (2006).

<sup>282</sup> See, e.g., *id.* at 666–67; Kelley, *Exporting Western Law*, *supra* note 220, at 342–45.

<sup>283</sup> See, e.g., Kelley, *Exporting Western Law*, *supra* note 220, at 342–45.

<sup>284</sup> See, e.g., Nicholas A. Kahn-Fogel, *The Troubling Shortage of African Lawyers: Examination of a Continental Crisis Using Zambia as a Case Study*, 33 U. PA. J. INT’L L. 719, 767–69 (2012). The Zambian Constitution’s nondiscrimination provision, for example, is explicitly inapplicable “with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law” and “for the application in the case of members of a particular race or tribe, of customary law with respect to any matter to the exclusion of any law with respect to that matter which is applicable in the

Perhaps the most prominent showcase of the enduring communitarian propensities of African cultures is the African Charter on Human and Peoples' Rights. Unlike other regional human rights documents, the Charter emphasizes group rights, both in its title and in its content.<sup>285</sup> Additionally, unlike most liberal human rights documents, the Charter declares that individuals owe a range of duties, including duties to "preserve the harmonious development of the family;" "[t]o serve [the] national community by placing both physical and intellectual abilities at its service;" ". . . [t]o preserve and strengthen social and national solidarity;" "[t]o preserve and strengthen positive African cultural values . . . and, in general, to contribute to the promotion of the moral well being of society;" to "contribute to the best of [one's] abilities . . . to the promotion and achievement of African unity;"<sup>286</sup> and to exercise all rights with due regard for "morality and common interest."<sup>287</sup>

Communitarian proclivities in cultures across Africa suggest the likelihood that Africans will continue to be less sympathetic to liberal arguments in favor of homosexual rights than even social conservatives in the West, where the deep impact of liberalism on the broader culture might lead many people to accept reforms protecting homosexuals even if they believe homosexual conduct is immoral. Additionally, African communitarianism suggests the likelihood of pervasive popular backlash if Westerners succeed in pressuring judges and political elites to adopt measures protecting homosexuals in Africa. As I will discuss in the next section, the coincidence of much of the African anthropological record with the anti-essentialist claims of queer theorists helps explain why even Africans with

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case of other persons." CONST. OF ZAMBIA, art. 23(4). In many common law African countries, legislative frameworks recognize the legitimacy of customary law so long as the customary law "does not offend public policy, or any laws of a concerned country, or natural justice, good conscience and equity." Kenneth Kaoma Mwenda, *African Customary Law and Customs: Changes in the Culture of Sexual Cleansing of Widows and the Marrying of a Deceased Brother's Widow*, 11 GONZ. J. INT'L L. 3 (2008), available at <http://www.law.gonzaga.edu/gjil/2008/02/african-customary-law/>.

<sup>285</sup> See, e.g., African Charter, art. 19 (stating that "[a]ll peoples shall be equal"); art. 20(1) ("All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen."); art. 21(1) ("All peoples shall freely dispose of their wealth and natural resources."); art. 22(1) ("All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.").

<sup>286</sup> *Id.* art. 29 (alteration in original).

<sup>287</sup> *Id.* art. 27.

apparently strong liberal commitments are less likely than people with Western notions of homosexuality to accept liberal arguments for gay rights.

### *B. Queer Theory*

Like communitarian ideology, the postmodernist philosophy of queer theorists offers a counterpoint to liberalism that human rights activists might do well to consider. This is particularly the case in Africa, where the anti-essentialist claims of queer theorists arguably coincide with much of the anthropological record.<sup>288</sup> In their denial of rights as a meaningful concept, both communitarianism and queer theory pose broad challenges to the nondiscrimination and autonomy pillars of liberalism. The anti-essentialist component of queer theory, moreover, specifically complicates the nondiscrimination arguments of homosexual rights advocates.

Before the latter part of the twentieth century, those who supported homosexual rights tended to assume that homosexuality was naturally occurring and independent of culture or social circumstance.<sup>289</sup> In the broader culture, during the period between the late nineteenth century and the 1970s, writers on the subject alternated between describing homosexuality as a psychological disorder afflicting a subset of the population and as a “normal desire present in varying degrees in the human population.”<sup>290</sup> Heavily influenced by the work of Michel Foucault, however, a new group of activists and academics began to argue in the 1970s against the notion of a natural foundation for sexual identity. Instead, according to these theorists, sexual identity is socially contingent, a product of cultural influence rather than an inevitable consequence of biology. Although queer theorists have acknowledged the historical presence of sexual contact between individuals of the same gender, they argue that homosexual identity was a late nineteenth-century invention. Before 1870, according to

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<sup>288</sup> As chronicled by other authors, the cultural significance of same-sex intimacy in cultures outside of Africa also suggests homosexual identity is socially constructed. *See, e.g.,* Katyal, *supra* note 14, at 99 (observing that “in India, to commit a homosexual act is one thing; to be a homosexual is an entirely different phenomenon”).

<sup>289</sup> Carlos A. Ball, *Essentialism and Universalism in Gay Rights Philosophy: Liberalism Meets Queer Theory*, 26 *LAW & SOC. INQUIRY* 271, 272 (2001) [hereinafter Ball, *Essentialism and Universalism in Gay Rights Philosophy*].

<sup>290</sup> Steven Seidman, *Deconstructing Queer Theory or the Under-Theorization of the Social and the Ethical*, in *SOCIAL POSTMODERNISM: BEYOND IDENTITY POLITICS* 116, 119 (Linda Nicholson & Steven Seidman eds., 1995).

Foucault, “the sodomite had been a temporary aberration,”<sup>291</sup> a vice to which all were susceptible.<sup>292</sup> The idea of homosexuality then emerged from scientific and medical discourses that purported to assess same-sex sexual contact as characteristic of individuals belonging to a stable category.<sup>293</sup> With the development of this theory of homosexuality, the transgressor had become a member of a “species,” the homosexual.

For liberal homosexual rights advocates, the common notion of homosexual identity as a naturally occurring, immutable attribute bolsters arguments that homosexuals constitute a class deserving protection against discrimination. If homosexual behavior is more than simply a fleeting indiscretion, or a product of idiosyncratic taste, and is instead a biological imperative for a discrete minority of the population, then punishment of members of that minority for acting consistently with that imperative, and with no direct third-party impacts, becomes more difficult under a liberal paradigm. Nonetheless, queer theorists have viewed this essentialist perspective as an inadequate safeguard of the freedom of people who engage in same-sex intimacies. Rather, these scholars contend, the insistence on homosexual identity accepts the majority framework that classifies the minority as fundamentally, irretrievably different, and then uses that classification as a basis for oppression.<sup>294</sup> For Steven Seidman, the danger of attempts to normalize homosexuality, as opposed to challenging the very concept, results in a “regime which perpetuates the production of subjects and social worlds organized and regulated by the heterosexual/homosexual binary.”<sup>295</sup> In the African context, in response to efforts to consolidate evidence of homosexuality in African societies across the continent, Neville Hoad wrote of the risk of “repeating the commonplaces of commonsense homophobia that reduce gay and lesbian relationships to the template of heterosexual coupledness.”<sup>296</sup>

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<sup>291</sup> MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 43 (1978).

<sup>292</sup> Sigmund Freud advanced this notion in his assertion that “All human beings are capable of making a homosexual object-choice and have in fact made one in their unconscious.” Sigmund Freud, *Three Essays on the Theory of Sexuality* (quoted in HOAD, *supra* note 44, at xvii) (citation omitted).

<sup>293</sup> Ball, *Essentialism and Universalism in Gay Rights Philosophy*, *supra* note 289, at 272.

<sup>294</sup> See, e.g., Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* 267, 277 (Carole S. Vance ed., 1984).

<sup>295</sup> Seidman, *supra* note 290, at 126.

<sup>296</sup> HOAD, *supra* note 44, at xxvi (discussing MURRAY & ROSCOE, *supra* note 54).

For queer theorists, then, the acceptance of essentialist notions, or of homosexual identity more broadly, is a double-edged sword. Despite the liberal assertion of the potential for such an approach to advance minority interests, the acceptance of categories often imposed in the service of subjugation exposes the classified minority to potential further abuse. This stance represents, for queer theorists, part of a larger reaction to the identity politics of the civil rights and feminist movements of the 1960s, which, for similar reasons, queer theorists have viewed as insufficiently radical.<sup>297</sup> Instead of accepting models frequently used by majorities as tools of oppression, queer theorists advocate deconstruction of those paradigms as a means of achieving true liberation.<sup>298</sup>

For queer theorists like Michel Foucault and Ladelle McWhorter, the means of resistance to dominant power structures has been the use of self-transformative practices to escape socially imposed identities that reinforce oppressive hierarchies. Foucault discussed the transformative potential of the pursuit of “pleasure,” which he defined in contrast to the idea of “desire,” a word that had been used by medical and religious powers to classify, pathologize, and subjugate those considered to have socially unacceptable proclivities and passions. The idea of pleasure, on the other hand, was “virgin territory,”<sup>299</sup> and, as McWhorter would later note, not terribly susceptible to quantification and measurement “in terms of statistically manipulable developmental norms.”<sup>300</sup> For Foucault, sadomasochistic sex was an example of such a transformative practice, for its potential to create “new possibilities of pleasure, which people had no idea about previously” might confound attempts to box its practitioners into predefined categories. McWhorter, heavily influenced by Foucault, discussed the pursuit of pleasure through self-transformative activities like gardening, country dancing, and political engagement to advance the rights of homosexuals. For McWhorter, as for Foucault, these practices can “increase the range

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<sup>297</sup> Ball, *Essentialism and Universalism in Gay Rights Philosophy*, *supra* note 289, at 272.

<sup>298</sup> As Ladelle McWhorter has suggested, there are “many ways in which our socially and historically produced identities endanger us, make us vulnerable, and close us off from possibilities. Identities often stand opposed to freedom.” LADELLE MCWHORTER, *BODIES AND PLEASURES: FOUCAULT AND THE POLITICS OF SEXUAL NORMALIZATION* xix (1999); *see also* Katyal, *supra* note 14, at 117–18.

<sup>299</sup> David Halperin, SAINT FOUCAULT: TOWARDS A GAY HAGIOGRAPHY 215, 217 (quoting Foucault from, *Le Gai Savoir*, MEC, summer 1988); Ball, *Essentialism and Universalism in Gay Rights Philosophy*, *supra* note 289, at 277.

<sup>300</sup> MCWHORTER, *supra* note 298, at 184.

within which we exercise our freedom and within which freedom plays itself out beyond who we currently are.”<sup>301</sup>

As Ball has observed, this endorsement of political activity to promote civil rights results, practically speaking, in an approach that resembles liberal advocacy.<sup>302</sup> What is clear from the above analysis, however, is that the denial of the idea of homosexuality as a purely socially constructed category ultimately complicates reliance on the kinds of nondiscrimination arguments that could improve the lives of people who might, under a liberal framework, be beneficiaries of such claims. To the extent that evidence of African sexual practices and attitudes coincides with the idea that homosexuality is not a stable psychological or social category, African courts are less likely to recognize the validity of nondiscrimination arguments.

The more sweeping challenge queer theory poses for liberal human rights activists is similar to the communitarian denial of rights that precede social context. Like communitarians, queer theorists deny the possibility of rights as anything other than a cultural artifact. As Ball has described this outlook, queer theorists do not stop with the denial of homosexual identity as preceding social context. Rather, the anti-essentialism of queer theorists “goes all the way down.”<sup>303</sup> For queer theorists, not only is group identity socially constructed, but there are no essential, foundational components of human identity. Yet, if all aspects of human identity are cultural constructions, the very idea of a right to equality is undermined. Ultimately, “[i]t is what we all (homosexuals, heterosexuals, bisexuals, and transgendered) share as human beings that imposes on society moral . . . obligations to abide by minimal standards of equality.”<sup>304</sup> Similarly, queer theorists have critiqued what they view as liberal “delusions of autonomy.”<sup>305</sup>

As I will discuss in detail below, the African anthropological record has often tended to substantiate the narratives of queer theorists. Although that record reveals patterns of same-sex intimacy across a wide range of African cultures, it also demonstrates that these intimacies often have manifested themselves as evanescent, socially contingent phenomena, and the practitioners of these same-sex intimacies have frequently assessed their same-sex sexual contacts as insignificant parts of their identities. Of course, these data cannot, in

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<sup>301</sup> *Id.* at 182.

<sup>302</sup> Ball, *Essentialism and Universalism in Gay Rights Theory*, *supra* note 289, at 283.

<sup>303</sup> *Id.* at 283.

<sup>304</sup> *Id.* (quoting MCWHORTER, *supra* note 298, at xvi).

<sup>305</sup> MCWHORTER, *supra* note 298, at xvi.



the end, answer the scientific question of the extent to which biology drives sexual desire. They can, however, illuminate the different cultural meanings of physical intimacies. While liberal, Western observers would be likely to classify the practitioners of these same-sex intimacies as members of a stable biological and/or social category—homosexuals—that concept has, in fact, been foreign in many African cultures. It would, moreover, be foreign even to many of those whose lives human rights advocates hope to improve by classifying them.

#### IV ANTHROPOLOGICAL DATA

Narratives of the modern drive for homosexual identity and homosexual rights in Africa often focus on Robert Mugabe's expulsion of Gays and Lesbians of Zimbabwe (GALZ) from the 1995 Zimbabwean Book Fair as the primary catalyst for the initiation of contemporary discourse outside the South African context.<sup>306</sup> Since the book fair, both Mugabe and other African leaders have characterized homosexuality as fundamentally un-African, a Western disease, and a neocolonial construction.<sup>307</sup> As discussed in Part II, these ideas are currently widespread in African society, across numerous countries and cultures. While it is tempting to dismiss such claims as mere expressions of prejudice and xenophobia, this reductive approach fails to account for the complex history of African sexual identities, the depth of European influence on African culture during the colonial era, and the modern integration and appropriation of colonial ideology, rebranded as African tradition, in the service of African nationalism.

In a meaningful but perhaps unintended and unrealized sense, characterizations by African leaders of homosexuality as a Western import have some factual basis, at least in many cultures. As discussed above, even in the West, conceptions of same-sex sexual intimacy as a defining emblem of personal and sexual identity emerged only in the nineteenth century. Before that, neither those

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<sup>306</sup> EPPRECHT, *supra* note 5, at viii; HOAD, *supra* note 44, at xi.

<sup>307</sup> See, e.g., EPPRECHT, *supra* note 5, at 4 (describing a Zimbabwean traditional healer's claim that white settlers invented the word "hungochani" to shame Africans "by falsely making a 'white man's disease' sound as if it were indigenous," noting the Mugabe government's call for Zimbabwean patriots to "defend the nation against this new form of Western imperialism," and stating that the King of Swaziland, and presidents of Kenya, Namibia, Uganda, and Zambia have similarly linked homosexuality to "external threats").

who engaged in transgressive sexual behavior nor society at large imagined homosexuality as a discrete psychological, physiological, or social category.

Similarly, throughout sub-Saharan Africa, although anthropological evidence demonstrates geographically widespread behavior that modern, Western observers would characterize as homosexual, historical understandings of this behavior would frequently have confounded contemporary constructions of homosexual identity. Because most African societies were without writing systems until the late nineteenth-century, accounts by European explorers and missionaries offer the earliest available first-hand commentary on cultural practices throughout much of the sub-continent. These accounts included discussion of nonnormative gender roles and transgressive sexual behavior in sub-Saharan African cultures as early as the sixteenth century.<sup>308</sup>

Nonetheless, early discussions of African sexuality often promoted the notion that sexual intimacy between members of the same sex was unknown in sub-Saharan Africa. In 1781, in *The Decline and Fall of the Roman Empire*, Edward Gibbon wrote, despite general European unfamiliarity with most of the African interior, that he “believe[d], and hope[d], that the negroes, in their own country, were exempt” from the “moral pestilence” of sodomy.<sup>309</sup> One hundred years later, Richard Burton speculated on what he termed a Sotadic Zone, where climate encouraged deviant sexual behavior. According to Burton’s hypothesis, only Northern Europe and sub-Saharan Africa were exempt from climatologically induced homosexuality.<sup>310</sup>

Authors have offered various explanations for such early theories of African exceptionalism. Descriptions of same-sex sexual intimacy as foreign to African cultures promoted the popular notion of Africa as a site of premodern, primitive innocence.<sup>311</sup> This vision of African

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<sup>308</sup> In the 1580s, an English prisoner of the Portuguese in Angola described indigenous men who were “beastly in their living, for they have men in women’s apparel, whom they keep among their wives.” In the 1640s, a Dutch attaché in Angola described Nzinga, the female leader of Ndongo, an Mbundu kingdom, who dressed in men’s attire, styled herself as king, and surrounded herself with a harem of young men dressed as women who were considered her wives. In 1687, Father Antonio Cavazzi described the sexually ambiguous, cross-dressing Ganga-Ya-Chibanda, presiding priest of the Imbangala of the Congo region. MURRAY & ROSCOE, *supra* note 54. In 1719, Peter Kolb wrote of Khoi-Khoi males who had sexual relations with one another. *Id.* at 173.

<sup>309</sup> EDWARD GIBBON, *THE DECLINE AND FALL OF THE ROMAN EMPIRE* (1776) 506 (quoted in MURRAY & ROSCOE at xii).

<sup>310</sup> HOAD, *supra* note 44, at 10–11; MURRAY & ROSCOE, *supra* note 54, at xii.

<sup>311</sup> HOAD, *supra* note 44, at 4.

culture dovetailed with fears in the metropole that sexual perversity, including homosexuality, was a symptom of modernity.<sup>312</sup> Additionally, these characterizations served the commercial imperatives of the slave trade, which depended on depicting the hyper-masculinity of the African male to market African bodies as a means of production.<sup>313</sup> In any case, the absence of African homosexuality remained a dominant theme in European thought until a new strand of scholarship, starting in the late 19th and early 20th centuries, began to expose the range and complexity of African sexual norms.<sup>314</sup> Any thorough evaluation of contemporary claims by African leaders that homosexuality is a foreign threat must take measure of the Western origin of the idea that homosexual practices were unknown in African societies.

These new narratives, however, catalogued same-sex intimacies throughout the continent, describing a broad range of practices and traditions. Although some of these descriptions validate contemporary Western paradigms, they frequently contradict essentialist arguments at the heart of much modern rights discourse. In his 1899 description of homosexuality in Zanzibar, for example, Michael Haberlandt noted two classes of men who engaged in homosexual sex. Some, whom the local population considered uninterested in heterosexual relations by God's will (*amri ya muungu*) showed a lack of interest in women from youth.<sup>315</sup> This population, which Haberlandt described in essentialist terms, was, according to him, congenitally homosexual. Such "inborn contraries" were also tolerated, for as soon as their relatives noticed their proclivities, "they reconcile[d] themselves without further ado to this peculiarity."<sup>316</sup> On the other hand, Haberlandt contrasted Zanzibar's inborn contraries with the "acquired contrariness" of the population of sex slaves, who were "kept away from any work, well pampered, and systematically effeminized."<sup>317</sup>

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<sup>312</sup> *Id.* at 5.

<sup>313</sup> MURRAY & ROSCOE, *supra* note 54, at 12.

<sup>314</sup> As late as 1985, respected anthropologist Michael Gelfand, describing the Shona of Zimbabwe, asserted, "The traditional Shona seems to have none of the problems associated with homosexuality. Obviously, they must have a valuable method of bringing up children, especially with regard to normal sex relations, thus avoiding the anomaly so frequent in Western society—yet another feature of their rich society." EPPRECHT, *supra* note 5, at 8 (quoting Michael Gelfand, *Apparent Absence of Homosexuality and Lesbianism in Traditional Zimbabweans*, 31 CENT. AFR. J. OF MED. 137 (1985)).

<sup>315</sup> Michael Haberlandt, *Occurrences of Contrary-Sex Among the Negro Population of Zanzibar*, in MURRAY & ROSCOE, *supra* note 54, at 64.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.* at 63–64.

Although this population enjoyed “normal sex acts” in the early stages of their socialization and would “remain normal if they [weren’t] used for too long as catamites,” over the long term, they would lose the capacity for erection and “find . . . pleasure only in passive pederasty.”<sup>318</sup>

Haberlandt’s descriptions at once affirm the possibility of essentialist claims, while also lending credence to social constructionist theories, depending on which segment one selects from the population he depicts. While Haberlandt delineates alternate strains within the same population group (black Zanzibaris) other observers of African cultures recorded behavioral patterns problematic for anyone invested in an idea of homosexuality as an organizing rubric for personal or sexual identity or as an essential, immutable physiological imperative. While a comprehensive accounting of the massive array of traditions throughout the continent is untenable and unnecessary, an overview, including a range of cultures, suggests the difficulty of any attempt to impose a universalizing organizational structure onto same-sex African intimacies.

Many authors have described the homosexual relationships they observed in Africa as situational and evanescent. In Southern Africa, anthropological accounts suggest contingent forms of same-sex relationships were the predominant structure for homosexuality in some cultures. In reporting on her fieldwork from the 1930s amongst the Nyakyusa, a Bantu group northwest of Lake Malawi, Monica Wilson observed that same-sex intimacy between adolescent boys was both common and tolerated.<sup>319</sup> Even so, these relationships apparently seldom outlasted bachelorhood, and Wilson’s informants contended that married Nyakyusa men invariably preferred females.<sup>320</sup> The few men who never married were “half-wits who ha[d]no kind of intercourse at all.”<sup>321</sup>

Numerous authors have documented the common practice of migrant miners in South Africa forming short-term same-sex marriages. Perhaps most famously, T. Dunbar Moodie and Vivienne Ndatshe catalogued the contours of these relationships in *Going for Gold: Men, Mines and Migration*. In Moodie and Ndatshe’s account, mine marriages reflected patterns of resistance to proletarianization

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<sup>318</sup> *Id.* at 64.

<sup>319</sup> MURRAY & ROSCOE, *supra* note 54, at 174–75.

<sup>320</sup> *Id.* at 175–76.

<sup>321</sup> *Id.* at 176.

by the men involved,<sup>322</sup> many of whom had left wives behind in their rural homelands. These men often resorted to mine marriages because they considered women in the towns near the mines as threats to their ambitions of returning eventually to establish households in their ancestral communities.<sup>323</sup> In his analysis of migrant labor in colonial Zimbabwe, Charles van Onselen noted similar practices but drew different conclusions about the political significance of the behaviors. According to van Onselen, mining companies tolerated, if not encouraged, prostitution, bestiality, and homosexuality amongst African men,<sup>324</sup> which helped “to secure a relatively docile labour force with minimal expenditure on wages, social services, and urban infrastructure—distracted and presumably demoralized by sexually sordid affairs, the men were disabled from organizing effective resistance against the appalling working and living conditions.”<sup>325</sup> For van Onselen, then, the proliferation of same-sex intimacy amongst migrant mine workers represented a tool of racial capitalism, rather than a method of resistance against it.

In 1900, Paolo Ambrogetti described the common practice of young Eritrean boys having sexual relationships with older men.<sup>326</sup> According to Ambrogetti, such relationships were considered only minor transgressions, and the boys’ fathers often welcomed the arrangements their sons made as a source of family income.<sup>327</sup> Nonetheless, after the boys went through puberty, they usually ended these affairs and began courting women.<sup>328</sup> E.E. Evans-Pritchard reported on the practices of the Azande, who live in parts of what are now Sudan, Central African Republic, and the Congo. In describing Azande lesbian practices, Evans-Pritchard noted that such relationships were common in polygamous households in which a woman might go for months without sharing her husband’s bed and in which the seclusion of wives prevented heterosexual adultery.<sup>329</sup> The predominant form of male same-sex intimacy occurred between

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<sup>322</sup> T. DUNBAR MOODIE & VIVIENNE NDATSHE, *GOING FOR GOLD: MEN, MINES, AND MIGRATION* 120 (1994).

<sup>323</sup> *Id.* at 135–36.

<sup>324</sup> CHARLES VAN ONSELEN, *CHIBARO: AFRICAN MINE LABOUR IN SOUTHERN RHODESIA, 1900–33*, 175–76 (1976).

<sup>325</sup> EPPRECHT, *supra* note 5, at 9 (quoting VAN ONSELEN, *supra* note 324).

<sup>326</sup> MURRAY & ROSCOE, *supra* note 54, at 21–22.

<sup>327</sup> *Id.* at 21.

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

<sup>329</sup> E.E. Evans-Pritchard, *Sexual Inversion Among the Azande*, 72 *AM. ANTHROPOLOGIST* 1428, 1429, 1431–32 (1970) (quoted in MURRAY & ROSCOE, *supra* note 54, at 28–29).

warriors and their boy-wives—between the ages of twelve and twenty—and Evans-Pritchard attributed the acceptance of such marriages to the difficulty for Azande warriors of obtaining satisfaction in heterosexual marriages; presumably, heterosexual arrangements would have been particularly problematic when war broke out, but warriors were able to take their boy-wives with them. With the dissolution of the military companies and royal court in post-European times, as marriage between men and women became easier, Pritchard noted, boy-marriage disappeared.<sup>330</sup>

In West Africa, the Mossi, in contemporary Burkina Faso, like the Eritreans and the Azande, engaged in age-defined same-sex relationships. Mossi chiefs would choose pages from the most attractive boys between ages seven and fifteen.<sup>331</sup> These pages dressed as women and engaged in sexual practices with the chiefs, particularly on Fridays, when Mossi tradition forbade sex with women.<sup>332</sup> Once pages matured, however, they took female wives.<sup>333</sup>

Today, even in African cultures in which people tend to engage in same-sex intimacies throughout their lives, participants are often unlikely to identify themselves as homosexuals or to prioritize same-sex intimacy over heterosexual marriage. Amongst the Hausa in Kano, Nigeria, for example, although men who engage in same-sex intimacies consider their desires to be inborn and immutable, these men also consider same-sex intimacy primarily as a form of play, and as secondary in importance to reproductive obligations in heterosexual marriage.<sup>334</sup> Similarly, in Nii Ajen's survey of West African homosexuality, the author emphasized that West African men who have sex with men also tend to have heterosexual relationships and marriages, and such men commonly reject any suggestion of gay identity, which simply does not have cultural resonance for them.<sup>335</sup> Other accounts have also noted that, throughout West Africa, only a small percentage of men who engage in same-sex intimacy identify themselves as being gay, and “[s]ex between men is not automatically

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

<sup>331</sup> MURRAY & ROSCOE, *supra* note 54, at 91.

<sup>332</sup> *Id.* at 91–92.

<sup>333</sup> *Id.* at 92.

<sup>334</sup> Rudolph P. Gaudio, *Male Lesbians and Other Queer Notions in Hausa*, in MURRAY & ROSCOE, *supra* note 54, at 121.

<sup>335</sup> Nii Ajen, *West African Homoeroticism: West African Men Who Have Sex with Men*, in MURRAY & ROSCOE, *supra* note 54, at 133–34.

labeled as homosexual behavior.”<sup>336</sup> In South Africa as well, many men who engage in same-sex sexual practices reject homosexual identity as un-African and as a Western construct.<sup>337</sup>

In some cases, imposition of Western sexual paradigms onto African societies has entailed mischaracterization of cultural practices that likely involve no sexual intimacy at all. For example, Nigerian sociologist Ifi Amadiume has noted that Western attempts to label as lesbian the woman-to-woman marriages that take place in some West African societies would be “shocking and offensive to Nnobi women, since the strong bonds and support between them do not imply lesbian sexual practices.”<sup>338</sup> Amadiume has argued that such characterizations impose Western prejudices onto African material as a means of justifying “choices of sexual alternatives which have roots and meaning in the West.”<sup>339</sup>

Some accounts offer potential validation for essentialist claims, and such validation is even possible from close reading of some of the same commentaries that seem to undermine the essentialist paradigm. In Ambrogetti’s description of the fleeting relationships of pre-pubescent Eritreans with older men, for example, one notes that although the boys apparently grew out of these relationships after adolescence and began to pursue women, the very fact that there were older men who offered a demand for such affairs suggests a less contingent form of desire for same-sex intimacy in a segment of the population; presumably these men also had wives and families. Although Evans-Pritchard described Azande homosexuality as common when women were unavailable, he also noted that some princes slept with boys “just because they like them,”<sup>340</sup> and that some men married boys even when they also had female wives.<sup>341</sup>

There are several reasons to read these colonial accounts with suspicion, whatever the conclusions of their authors. First, the realities these writers perceived necessarily reflected the tropes that

<sup>336</sup> MATTHEW W. ROBERTS, EMERGENCE OF GAY IDENTITY AND GAY SOCIAL MOVEMENTS IN DEVELOPING COUNTRIES: THE AIDS CRISIS AS CATALYST, 20 ALTERNATIVES 247 (1995).

<sup>337</sup> K Rebe et al., *Towards “Men Who Have Sex With Men-Appropriate” Health Services in South Africa*, SOUTHERN AFRICAN HIV CLINICIANS SOCIETY, <http://www.sahivsoc.org/Articles/MSM>.

<sup>338</sup> IFI AMADIUME, MALE DAUGHTERS, FEMALE HUSBANDS: GENDER AND SEX IN AFRICAN SOCIETY 7 (1987).

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

<sup>340</sup> E.E. EVANS-PRITCHARD, THE AZANDE 183 (1971).

<sup>341</sup> Evans-Pritchard, *Sexual Inversion Among the Azande*, *supra* note 329, at 1431 (quoted in MURRAY & ROSCOE, *supra* note 54, at 26).

shaped their expectations. Second, colonial writers could, by definition, observe African cultures only after exposure of those cultures to the potential influence of contact with the outside world; this fact necessarily complicates any attempt to identify “authentic” tradition.

Ultimately, no anthropological account can answer the question of whether, as liberal essentialists typically argue, homosexuality is a product of an immutable biological imperative, or, alternatively, a consequence only of social construction. What these reports can convey, however, is the significance individuals in various cultures ascribe to their desires. If in many cultures, practitioners of same-sex intimacies define those practices in terms that are incongruous with Western conceptions of homosexuality, whose agenda is served, one might ask, by insisting on classifying the foreign custom in Western terms?

In the end, whether the underlying basis for the conduct Westerners refer to as homosexual is biological or cultural, the anthropological evidence suggesting primarily contingent forms of same-sex intimacy in some African cultures, and the disinclination of even those who engage in lifelong homosexual intimacies in others to organize their identities around those relationships or desires, are significant obstacles to liberal homosexual rights advocates. At the very least, a survey of the historical reports of same-sex intimacies in African cultures complicates the assertions of anyone invested in pursuing a homosexual rights agenda based on Western conceptions of homosexuality as an essential, immutable characteristic, as primarily involving relationships between legal peers, and as a principal marker of psychic, social, or political identity.

Of course, as any careful reader will have noticed, this is not the end of the story. The very presence of groups like GALZ in Zimbabwe suggests that whatever the culture in Zimbabwe once was, there clearly are now Zimbabweans who precisely fit the mold of the Western homosexual. Likewise, homosexual advocacy and the limited presence of community groups in other countries demonstrate that today, there are African homosexuals across the continent.<sup>342</sup>

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<sup>342</sup> See, e.g., Ghoshal, *supra* note 25 (describing a “thriving community center” for members of the LGBTI community in Burundi); Gay and Lesbian Coalition of Kenya, <http://galck.org>; Sexual Minorities Uganda, <http://www.smug.4t.com>.



V  
THE WAY FORWARD

Given the forgoing analysis, what is a well-intentioned Western liberal concerned about protecting people who engage in same-sex intimacies in Africa to do? There are no easy answers to that question. Without doubt, African laws and attitudes toward homosexuality have had devastating consequences for some practitioners of same-sex intimacies on the continent. On the other hand, liberal human rights advocates would do well to recall Kelley's admonition about the potential for liberal reforms in the developing world to go wrong. It is easy to imagine the possibility that Western pressure for homosexual rights in Africa might have negative, unintended repercussions. An understanding of communitarian philosophy, queer theory, and evidence of cultural beliefs and practices from across Africa facilitates comprehension of that potential. Given the focus on group values over individual rights in many African cultures, Western pressure may incite deeper political backlash than one might expect in a society with a more ingrained cultural commitment to the atomistic individual at the center of liberal ideology. This backlash could further endanger Africans who engage in same-sex sexual practices. Compounding the problem, the liberal insistence on classifying Africans who practice same-sex intimacies as homosexuals, even though many of the intended beneficiaries of that classification have not thought of themselves in such terms, could make Africans who have same-sex sexual experiences easier targets for violence and persecution.

Some observers have already noted backlash against Western pressure for homosexual rights in Africa. In the wake of Obama's declaration that federal agencies should promote homosexual rights in foreign countries, and David Cameron's threat to cut British aid to nations that criminalize homosexual conduct, some African countries that had largely ignored homosexuality reacted by focusing significant negative attention on the issue for the first time. In Liberia, for example, although sodomy had been a misdemeanor punishable by up to a year in prison, there had been no prosecutions under the law in the years leading up to the American announcement.<sup>343</sup> That proclamation, however, incited a wave of Liberian denunciations of homosexuality, and in its wake, Liberian legislators introduced bills to make same-sex sexual practices and homosexual marriage

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<sup>343</sup> Corey-Boulet, *supra* note 65.

felonies.<sup>344</sup> Likewise, the International Gay Bisexual Trans and Intersex Association noted in 2013 that “diplomatic ties of aid to ‘gay rights’ by western allies to African countries have perpetuated greater homophobia in Africa with ‘gays’ being viewed as the stumbling block to access public welfare funding for health, education, shelter and other basic public amenities tied to western funding.”<sup>345</sup>

The damaging potential of political backlash to anti-majoritarian legal reform has been noted in the West as well. In the United States, Professor Michael Klarman has argued that, in the short term, *Brown v. Board of Education* generated harmful backlash that reversed the progress of social reform movements that had increased black suffrage and integration in universities and sports competitions in the South in the years leading up to the decision.<sup>346</sup> Likewise, *Roe v. Wade* may have fostered the development of America’s right-to-life movement, altering the contours of American political discourse and making abortion reform more difficult. Supreme Court Justice Ruth Bader Ginsburg has endorsed this view, arguing that *Roe*’s short-circuiting of the political process led to enduring conservative resistance to abortion.<sup>347</sup> In the context of gay rights, Klarman noted that cases like *Lawrence*, and the Massachusetts Supreme Court’s decision in *Goodridge v. Department of Public Health* that homosexuals have a right to marry, inspired states that had not previously considered the issue to amend their constitutions to ban gay marriage and mobilized conservative resistance to homosexual rights.<sup>348</sup>

By 2013, Klarman had concluded that massive resistance to a broad ruling that homosexuals have a right to marry would be unlikely.<sup>349</sup> He noted that public opinion had shifted on the matter and

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<sup>344</sup> *Id.* Others have noted similar backlash to Western calls for homosexual rights in countries outside Africa. *See, e.g.,* Katyal, *supra* note 14, at 139 (stating, in the course of arguing that Western constructions of homosexual identity leave out sexual minorities who fall outside the dominant paradigm, that “as the global gay rights movement takes hold in Thailand, the military, police, and other state leaders have increasingly targeted transgendered persons due to their visibility”).

<sup>345</sup> ITABORAHY & ZHU, *supra* note 15, at 38.

<sup>346</sup> Klarman, *Brown and Lawrence*, *supra* note 204, at 454.

<sup>347</sup> Bazelon, *supra* note 205.

<sup>348</sup> Klarman, *Brown and Lawrence*, *supra* note 204, at 466.

<sup>349</sup> Michael Klarman, *A Gay Marriage Backlash? Not Likely*, L.A. TIMES, Mar. 24, 2013, <http://articles.latimes.com/2013/mar/24/opinion/la-oe-klarman-scotus-and-gay-marriage-20130324/2>; Michael Klarman, *Marriage Equality and Political Backlash*, N.Y. TIMES, Mar. 26, 2013, <http://www.nytimes.com/roomfordebate/2013/03/26/civil-rights-decisions-in-courts-or-legislatures/marriage-equality-and-political-backlash>.

that, unlike segregation, a marriage equality ruling would not have any significant, direct impact on the lives of opponents.<sup>350</sup> Moreover, unlike the potential to subvert integration through the continued power of local officials to assign students to schools after *Brown*, or to subvert abortion rights by imposing oppressive regulations on clinics, there would be little opportunity to undermine a broad marriage equality ruling.<sup>351</sup> Public opinion in Africa, however, has not shifted dramatically in favor of homosexual rights.<sup>352</sup> Additionally, backlash to counter-majoritarian gay rights reform could be both more virulent and more sustained in cultures that lack the West's entrenched cultural commitment to individual rights. In the United States, for example, the almost reflexive dedication to individual choice may lead many of those who strongly disapprove of homosexual conduct to conclude that such conduct must be tolerated nonetheless. Members of societies in which liberal legal commitments reflect the choices of political elites, rather than mirroring widespread cultural attitudes, might come to different conclusions.

Backlash to Western pressure might take many forms. It could mean disorganized, random acts of violence against people perceived to be homosexuals. It could mean legislative measures that increase penalties for homosexual behavior, as in Liberia, or that criminalize homosexual conduct for the first time. If human rights groups successfully petition courts for decisions protecting homosexual rights, or if opponents fear they might, it could mean constitutional amendments that entrench discrimination against practitioners of same-sex intimacies. In Zambia, this possibility seems likely to come to fruition, as the convention drafting the Fourth Republican Constitution has recommended provisions on "anti-social behavior" to preclude the possibility that homosexuals might use fundamental rights provisions to support court claims.<sup>353</sup>

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<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> A recent report by the Pew Research Center, including data from eight African countries, showed that majorities in all eight countries believe homosexuality should not be accepted. Significantly, this included South Africa, where the constitution explicitly protects homosexuals from discrimination, and where the Supreme Court ruled in 2005 that homosexuals have a right to same-sex marriage. Drew DeSilver, *A Global Snapshot of Same-Sex Marriage*, PEW RESEARCH CENTER (June 4, 2013), <http://www.pewresearch.org/fact-tank/2013/06/04/global-snapshot-sex-marriage/>.

<sup>353</sup> Charles Sakala, *New Zambian Constitution to Ban Homosexuality*, ZAMBIA REPORTS, Apr. 15, 2013, <http://zambiareports.com/2013/04/15/new-zambian-constitution-to-ban-homosexuality/>.

Klarman identified three likely reasons for backlash to counter-majoritarian court decisions in the United States: such decisions increase the salience of the issue; anger over outside interference; and alteration of the order in which social change would have occurred in the absence of interference.<sup>354</sup> Each of these considerations is certainly significant to any calculation of the likely depth of resistance to efforts by Western human rights advocates to advance homosexual rights in Africa. In Africa, however, Western stimulus has increased the salience of homosexuality in a way that goes beyond merely focusing a spotlight on an issue that many had previously ignored. It has also had a creative impact on the African imagination, generating a social category that in many societies had never existed.

When leaders like Mugabe suggest that Western influence is responsible for the spread of homosexuality in Africa, they are likely correct, although in an unintended in sense; people in Africa have always engaged in same-sex intimacies, but the presence in contemporary African cultures of some people who define those intimacies in terms congruous with modern conceptions of homosexuality may indeed be the consequence of Western influence.<sup>355</sup> On the other hand, no culture is static. Today, there are some Africans who conceive of themselves as homosexuals in a sense that would be familiar in the West, and these people also have a claim to a place in the various African cultures of which they are a part. Still, other Africans who have same-sex sexual contacts continue to resist homosexual identity. Westerners who insist on classifying all Africans who engage in same-sex intimacies as homosexuals—despite the inconsistency of that classification with the visions many of its intended beneficiaries have of their own lives—may expose the people they hope to assist to greater hostility and oppression than they had faced before.

Even for Africans who identify themselves as homosexuals, coercive pressure from the West might not be the best solution. As other authors have observed, the liberal myth that American homosexuals were unable to lead satisfying lives before the Stonewall

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<sup>354</sup> Klarman, *Brown and Lawrence*, *supra* note 204, at 473.

<sup>355</sup> As Neville Hoad has observed, gay culture, “like Coca-Cola, Madonna, and Calvin Klein underwear, has become a potent American export.” Neville Hoad, *Between the White Man’s Burden and the White Man’s Disease*, 5 *GAY & LESBIAN Q.* 559, 563 (1999); *see also* Katyal, *supra* note 14.

riots of 1969 sparked the gay rights movement belies reality.<sup>356</sup> Instead, long before Stonewall, American homosexuals successfully formed communities that provided some measure of camaraderie, freedom, and insulation against the hostility of the outside world.<sup>357</sup> Similarly, even in the absence of laws protecting homosexual rights in Africa, African homosexuals have formed communities that offer friendship, emotional support, and solace. It is entirely conceivable that pressure from Western rights advocates might incite reactions that could harm those communities and stymie possibilities for slow progress toward greater acceptance.<sup>358</sup>

Cultural dynamism also cuts both ways. Pointing out the presence of some modern African homosexuals is a reasonable response to anthropological narratives that suggest primarily contingent forms of same-sex intimacy in Africa. If that is the case, however, it makes little sense to emphasize that outsiders originally introduced Africa's

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<sup>356</sup> See, e.g., Ball, *Communitarianism and Gay Rights*, *supra* note 69, at 469 (discussing GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890–1940* (1994)).

<sup>357</sup> *Id.*

<sup>358</sup> As Zambian Vice President Guy Scott recently argued, somewhat inartfully, “There’s tonnes of gay joints in this town. Well, not tonnes but they’re there, well known. It’s entirely the same phenomenon you get anywhere else. It’s live and let live. Stirring up and making it worse, that is the biggest danger. Let sleeping dogs lie is an easier policy.” David Smith, *Zambian Vice-President: ‘South Africans Are Backward,’* THE GUARDIAN (May 1, 2013), <http://www.guardian.co.uk/world/2013/may/01/zambian-vicepresident-south-africans-backward>. Vice President Scott’s statement fails to account for the fact that for at least some Zambian homosexuals, it is not “live and let live.” In recent months, for example, the prosecution of two alleged homosexuals from the Zambian town of Kapiri Mposhi has attracted regular headlines in the country and internationally. See, e.g., *Zambian Men Charged Over Gay Sex*, BBC (May 8, 2013), <http://www.bbc.co.uk/news/world-africa-22451632>. Additionally, gay rights activist Paul Kasonkamona was arrested in April of 2013 for advocating for homosexual rights on Zambian television. Obert Simwanza, *Zambia’s Gay Rights Cases Raise Concerns Over Nation’s Growing Intolerance*, AFP, June 4, 2013, [http://www.huffingtonpost.com/2013/06/05/zambia-gay-rights-cases-\\_n\\_3385441.html](http://www.huffingtonpost.com/2013/06/05/zambia-gay-rights-cases-_n_3385441.html). Yet these two cases were the only prosecutions for homosexuality in Zambia’s recent history, amid what Agence France Press referred to as an “increasingly anti-gay climate.” *Id.* Similarly, despite the international attention Uganda’s proposals for harsh penalties for homosexual conduct have attracted, Uganda’s current sodomy laws are enforced so rarely that members of Uganda’s homosexual community have suggested contesting the laws is not a priority. Hollander, *supra* note 20, at 221. There have been some moderate signs of increasing tolerance toward homosexuality in some African countries in recent years. Despite the retention of sodomy laws in Botswana and Mauritius, for example, both countries have recently banned employment discrimination based on sexual orientation. Ghoshal, *supra* note 25. In 2012, Malawian President Joyce Banda suspended enforcement of the country’s sodomy laws. Godfrey Mpondera, *Malawi Suspends Anti-Gay Laws as MPs Debate Repeal*, THE GUARDIAN (Nov. 5, 2012), <http://www.guardian.co.uk/world/2012/nov/05/malawi-gay-laws-debate-repeal>.

anti-sodomy laws and the Muslim and Christian ideology that continue to inspire African intolerance for homosexuality. Those laws, and that ideology, helped transform African cultures into what they are today and are now as much a part of those cultures as older, pre-colonial traditions that have been frequently transformed and sometimes forgotten. Western attempts to disparage African attitudes by denying agency to those who express them echo colonial discourses and fit perfectly the historical pattern of distinguishing colonized populations as failing to meet minimum criteria for access to the full range of liberal rights. This condescending approach to human rights advocacy is likely to generate further resistance.

In the final analysis, the best way for Westerners to improve the lives of practitioners of same-sex intimacies in Africa might be to step back from the front lines. Complete disengagement from a human rights crisis may be impossible for those with liberal philosophical commitments, and total abandonment of the issue is not desirable. Ultimately, the liberal insistence on the existence of universal rights provides better protection to marginalized minorities than the liberating potential of postmodernist deconstruction of identity or emphasis on the benefits of community; denial of the existence of rights as anything more than a reflection of the power relations and values of the particular communities in which such claims arise severely diminishes arguments for taking minority interests seriously. Yet even without direct attempts by Westerners to shape African law, the inexorable influence of Western culture and the independently evolving attitudes of members of African cultures may lead eventually toward greater acceptance of homosexuality in Africa. A more modest approach may also benefit the large numbers of Africans who have intimate contacts with people of the same sex but who do not consider themselves homosexuals, many of whom have likely faced negative consequences from the rising salience of homosexuality in Africa and the association of homosexual rights advocacy with cultural imperialism. In any case, direct engagement by Westerners in a battle for homosexual rights in Africa might well do more harm than good. There will always be struggles within every society to define the past in order to shape the present and influence the future. When strangers with little understanding of the context for those struggles attempt to affect their outcomes, they tend to face unintended and, at times, deeply undesirable consequences. There is no simple solution, but if liberals hope to have a positive impact on the lives of people who engage in same-sex intimacies in Africa, we

should structure our interactions with the cultures we hope to influence as conversations rather than as lectures or commands.