CLAIMING QUEER LIBERTY

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ABSTRACT

Sexual liberty must come out of the international legal closet. While non-discrimination and privacy law have been the basis for some very important queer rights victories, they cannot deliver that which is most central to queer sexuality: the right to have consensual sex outside the confines of the classic marital, procreative model. Bringing international law into conversation with liberatory queer theory, this Article argues for codification in international human rights law of a right to sexual liberty under which sexual choice and diversity are celebrated. Beyond enabling international human rights law more fully to advance human dignity, this shift would afford an opportunity to refurbish the international human rights edifice in a globally inclusive way—something that continued pursuit of an identity-based, integrative queer rights agenda cannot achieve

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Authoritarian states—both religious and secular—fear, and therefore seek to constrain, the power of sex.[1] Sex is frightening for them because it is perhaps the ultimate liberating experience: in the throes of desire and passion people are at their least manipulable and most fully determined to maximize pleasure, whatever the risks.[2] Indeed, taking some risk in sex may enhance excitement, pushing us deeper into the moment and farther from the orderly confines that authoritarians prefer.[3] Because sexual longing is so deeply hardwired into our systems, it is an act of resistance that is difficult to regulate or constrain. Yet, because the visceral power of sex is so palpable, it is in practice a nearly irresistible target for authoritarian action.[4]

Even states that would not ordinarily be viewed as authoritarian sometimes are when it comes to queer[5] sex. So-called "liberal" states have not hesitated to impose rules that deny people the right to have consensual sex in the ways natural to them or that limit the circumstances or context within which sex is deemed acceptable.[6] Aberrant, if nonetheless visceral, sexual desire drives people to act at odds with conventions. It is thus often perceived as a threat to

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[1] Eric Heinze, *Sexual Orientation and International Law: A Study in the Manufacture of Cross-Cultural "Sensitivity,"* 22 MICH J. INT'L L. 283, 284 (2001) ("[A]utocratic regimes [seek to] bolster their domestic authority by promoting nationalistic campaigns based on ideas of moral (i.e., sexual) purity.").

[2] URVASHI VAID, VIRTUAL EQUALITY: THE MAINSTREAMING OF GAY AND LESBIAN LIBERATION 193 (1995) ("[W]e are threatening because our movement represents the liberation of the most powerful and untamed motivating force in human life: desire.").

[3] MICHAEL WARNER, THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE 211 (1999) ("Those who want to clean up sex, like those who want merely to celebrate it, commonly forget that sexiness cannot be divorced from things that we really dislike about sex: irrationality, impulse, shamefulness, disgust. To this list we should add: risk.").

[4] SHANE PHELAN, SEXUAL STRANGERS: GAYS, LESBIANS, AND DILEMMAS OF CITIZENSHIP 46–47 (2001) ("The most important republican passion is love—for one's country, for its laws, and for one's fellow citizens . . . One of the primary threats to such citizenly love is the particular love for another, especially romantic love . . . [which] has the potential to destroy polities.").

[5] In referring to "queer" sex, I mean simply to identify sex that is outside the heteronormative (marital, procreative) model. *See, e.g.*, VAID, *supra* note 2, at 287; DAVID HALPERIN, SAINT FOUCAULT: TOWARDS A GAY HAGIOGRAPHY 62 (1997). "Queer" may also be used to denote a non-normative *identity. See* CARL STYCHIN, LAW'S DESIRE: SEXUALITY AND THE LIMITS OF JUSTICE 141 (1995) ("Central to a queer identity . . . is the problematisation of categories of sexual identity and boundaries of sexual propriety, as they have been historically constituted."). The queer commitment to challenging that which is assumed to be normal has inspired a broader theoretical project (queer theory) that "has come to represent an anti-normative or non-conformist project that rejects the possibility of operating within the structures of power." Odette Mazel, *Queer Jurisprudence: Reparative Practice in International Law*, 116 AM. J. INT'L L. UNBOUND 10, 11 (2022). Indeed, it may be said to comprise ". . . a more fundamental critique of . . . regimes of the normal that, together, regulate our relations with each other and the planet." Dianne Otto, *Queerly Troubling International Law's Vision of "Peace,"* 116 AM. J. INT'L L. UNBOUND 1, 2 (2022).

[6] *See generally* Avani Uppalapti et al., *International Regulation of Sexual Orientation, Gender Identity, and Sexual Autonomy*, 18 GEO. J. OF GENDER & L. 635 (2017).

social cohesion—and is therefore to be resisted, or at least carefully regulated,[7] even by otherwise relatively benign governments.[8]

The fact that queer sexual desire challenges social norms points to a third concern. It is not just states (of either the authoritarian or liberal stripe) that attempt to keep sex within particular confines. Groups that exercise forms of social authority within states—for example, religious, ethnic, political, or other factions[9]—are often as determined as states to maximize their hold on power. Leaders are prone to stigmatize those who differ or dissent from dominant norms as disrespectful, iconoclasts, dangerous, or apostates.[10] Nowhere is this more true than as regards non-conforming forms of sex,[11] which run up against the very definitions of family and community that many social groups depend upon for their own authority.[12] In many cases, therefore, the official effort to limit sexual options is supported, indeed even demanded, by major parts of society itself.[13]

The response of international human rights law to the frequent denial of autonomy in making decisions about one's sex life has been muted at best. International human rights law does not yet codify a right to sexual liberty. In contrast to other critical aspects of self-realization (for example, conscience, speech, movement, or work choice) a right to sexual liberty can only be indirectly

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[7] "The separation of bodies in public space is the cornerstone of segregation policy and has long been practiced to regulate bodies in relation to race, especially, but also gender, age, class[,] disability and sexuality." Sally Hines, *The Feminist Frontier: On Trans and Feminism*, 28 J. GENDER STUD. 145, 154 (2019). More specifically, "marriage is a public institution that creates a right to private sexual relations, and yet is defined by public policy." Indeed, "[i]n the modern era, marriage has become the central legitimating institution by which the state regulates and permeates people's most intimate lives; it is the zone of privacy outside of which sex is unprotected. In this context, to speak of marriage as merely one choice among others is at best naive." WARNER, *supra* note 3, at 96.

[8] For example, "nativist nationalist politicians [in Eastern Europe] began to use LGBT rights as a way of reestablishing a sovereignty they felt had been conceded to Europe." MARK GEVISSER, THE PINK LINE: JOURNEY ACROSS THE WORLD'S QUEER FRONTIERS 22 (2020).

[9] John Mburu, *Awakenings: Dreams and Delusions of an Incipient Lesbian and Gay Movement in Kenya*, *in* DIFFERENT RAINBOWS 179, 184 (Peter Drucker ed., 2000) ("[D]iatribes [in parts of Africa] by politicians, clergy and intellectuals [have resulted in] the construction of a powerful mechanism for social control and imposition of a heterosexist ideology.").

[10] In the biblical story of Sodom and Gomorrah, for example, the "chameleon terms" of the parable "make it particularly useful for 'oppressive legislation and demagoguery.'" Nan Seuffert, *Queering International Law's Stories of Origin: Hospitality and Homophobia*, *in* QUEERING INTERNATIONAL LAW: POSSIBILITIES, ALLIANCES, COMPLICITIES, RISKS 213, 223 (Dianne Otto ed., 2018).

[11] VAID, *supra* note 2, at 383.

[12] PHELAN, *supra* note 4, at 62 ("[F]amilies must be both defended and used as weapons against sexual chaos . . . Nuclear families provide the only template for sexual order in our society."); DAVID BELL & JON BINNIE, THE SEXUAL CITIZEN: QUEER POLITICS AND BEYOND 145–46 (2000) ("The trouble with family . . . is that it is a term with too many things attached to it; it is too embedded in ideas about love, sex, relationships, privacy, ownership, responsibility and so on.").

[13] "Popular culture is permeated with ideas that erotic variety is dangerous, unhealthy, depraved, and a menace to everything from small children to national security . . . All these hierarchies of sexual value—religious, psychiatric, and popular—function in much the same ways as do ideological systems of racism, ethnocentrism, and religious chauvinism. They rationalize the well-being of the sexually privileged and the adversity of the sexual rabble." Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, *in* PLEASURE AND DANGER 143, 151–52 (Carole Vance ed., 1984).

and partially claimed.[14] Advocates have invoked cognate rights (in particular, to non-discrimination and to privacy) to vindicate at least some components of sexual liberty.[15] But sexual liberty in a complete and affirmative sense—celebrating and protecting our right autonomously to decide how best to live our sex lives[16]—remains very much the proverbial right that dare not speak its name.[17]

The reluctance to claim sexual liberty moreover transcends the traditional progressive-conservative divide. Some extreme conservatives simply shudder at the thought of sex outside the confines of private procreative activity.[18] More articulate conservatives invoke history or tradition to argue against sexual liberty, alleging that sex has always been understood to be a valuable, if purely private, activity restricted to the matrimonial bedroom.[19] Neither of these objections should, however, give international human rights law pause. The revulsion of some people to a particular form of protection is not only legally irrelevant,[20] but is often at the root of precisely the disfranchisement international human rights law seeks to remedy—as in the case of miscegenation laws or *apartheid*.[21] Nor does international human rights law treat history or tradition as

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[14] *See, e.g.*, VAID, *supra* note 2, at 179 ("The goal to liberate the homosexual in every one of us is now phrased as the modest right to live without discrimination based on homosexual orientation.").

[15] *See* discussion *infra* at Parts I and II.

[16] Rosalind Petchesky, *Sexual Rights: Inventing a Concept, Mapping an International Practice*, *in* FRAMING THE SEXUAL SUBJECT: THE POLITICS OF GENDER, SEXUALITY, AND POWER 81, 88 (Richard Parker et al. eds., 2000) ("Why is it so much easier to assert sexual freedom in a negative than in an affirmative, emancipatory sense; to gain consensus for the right not to be abused, exploited, raped, trafficked, or mutilated in one's body, but not the right to fully enjoy
one's body?").

[17] Int'l Council on Hum. Rts. Pol'y, *Sexuality and Human Rights* 7 (2009) ("Early efforts to bring human rights and sexuality together suffered from an initial focus on protecting people from harm . . . While initially justified as necessary, the abuse focus contributed to a lack of coherent rights-based claims that affirmed diverse sexualities.").

[18] MARTHA NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION & CONSTITUTIONAL LAW, at xiii (2010) ("For a long time, our society, like many others, has confronted same-sex orientations and acts with a politics of disgust, as many people react to the uncomfortable presence of gays and lesbians with a deep aversion akin to that inspired by bodily wastes, slimy insects, and spoiled food—and then cite that very reaction to justify a range of legal restrictions, from sodomy laws to bans on same-sex marriage.").

[19] Jyl Josephson, *Citizenship, Same-Sex Marriage, and Feminist Critiques of Marriage*, 3 PERSPECTIVES ON. POL. 269, 272 (2005) ("For the Christian Right and other social conservatives . . . restricting marriage to heterosexuals preserves an ascriptive version of citizenship, one that ensconces a particular form of intimate relationship as the state-recognized norm.").

[20] Some rights in the International Covenant on Civil and Political Rights, Dec. 16, 1996, 999 U.N.T.S 171 (hereinafter "ICCPR") may be limited, but only for only specifically enumerated reasons. While the protection of "public morals" might be asserted as justification, the Human Rights Committee has insisted that "the concept of morals derives from many social, philosophical and religious traditions: consequently limitations . . . for the purpose of protecting morals must be based on principles not deriving from a single tradition." U.N. Hum. Rts. Comm., Gen. Comment No. 22: Freedom of Thought, Conscience or Religion, ¶ 8, UN Doc. HRI/GEN/1/Rev.7 (2004). And even if that standard were somehow met, any limitation on a Covenant right must also be "consistent with the other rights recognized in the present Covenant," including of course the duty of non-discrimination—a notion that includes myriad permutations of sexuality and sexual identity as described in Part I below.

[21] *See* Peggy Pascoe, *What Comes Naturally: Miscegenation Law and the Making of Race in America*, *in* SOUTH AFRICA: THE RISE AND FALL OF APARTHEID (Nancy Clark ed., 2016).

a bulwark against protection.[22] To the contrary, practices such as slavery and torture with long historical pedigrees have been explicitly outlawed in part because their pervasive and long-standing natures exacerbated their perceived wrongfulness.[23]

A more nuanced conservative position steeped in libertarian thought might, however, be imagined. Those devoted to autonomy and skeptical about state power might be legitimately concerned that a right to sexual liberty could compromise efforts to ensure the (real) consent of those who participate in sex, to guard against abuse as an assault on true autonomy, and to respect the liberty of non-participants.[24] These are all fair and important issues, but the normative structure of international human rights law already caters to these concerns. It recognizes the importance of disallowing protection of even some very important forms of protected conduct to the extent that they infringe the rights and freedoms of others.[25] Moreover, its supervisory bodies, over roughly a half-century of practice, have been at pains to circumscribe protected freedoms in ways necessary to do justice to both countervailing rights and to pressing reasons of security and safety.[26] Because these concerns are so readily addressed, they ought not to obscure the overarching autonomy-enhancing nature of a right to sexual liberty.

In many ways, it is the progressive reluctance to claim sexual autonomy (both for queer people and more generally) that is more stubborn and more worrisome. Progressive reluctance to advocate a right to sexual liberty stems in part simply from fear that the effort would be pointless given the interest convergence described above among so many states and multiple powerful social actors committed to sexual conformity.[27] While this might prove to be the case, states do on occasion consent to the codification of rights not aligned with prevailing practice—especially where they can see that broader economic or other interests are served. Critically, they have done so even on issues that make many governments very uncomfortable—for example, on the elimination of all forms of discrimination against women, a duty that now binds all but seven countries in

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[22] VAID, *supra* note 2, at 338 ("The burden is on the religious right's leaders to demonstrate how their views are compatible with a democratic political system.").

[23] *See* LYNN HUNT, INVENTING HUMAN RIGHTS: A HISTORY (2008).

[24] *See generally,* Cass Sunstein & Richard Thaler, *Libertarian Paternalism is Not an Oxymoron*, 70 U. Chi. L. Rev. 1159 (2003).

[25] Multiple civil and political rights—including to liberty of movement, to manifest religion or belief, to freedom of expression, to engage in peaceful assembly, and to enjoy freedom of association—are expressly subject to limitations necessary to protect the rights of others. ICCPR, *supra* note 20, at arts. 12, 18, 19, 21, 22. Economic, social and cultural rights may be limited where necessary to promote the general welfare in a democratic society. International Covenant on Economic, Social and Cultural Rights, art. 4, Dec. 16, 1996, 999 U.N.T.S 171 [hereinafter "ICESCR"].

[26] *See* NIHAL JAYAWICKRAMA, THE JUDICIAL APPLICATION OF HUMAN RIGHTS LAW: NATIONAL REGIONAL AND INTERNATIONAL JURISPRUDENCE 146–64 (2017).

[27] "[I]t is no accident that gay people viewed gay identity under a very thin description. Survival dictated as much. It argued for a strategy of denial—not just of the particular difference that prevailing external descriptions imposed, but of all difference . . . [so that] gay people came to describe themselves as just like everyone else . . . They sought to establish gay sex as a fundamental right by generalizing, abstracting, and sanitizing it. In short, they tried to offer a very thin, unthreatening, and largely desexualized description of gay identity." Daniel Ortiz, *Creating Controversy: Essentialism and Constructivism in the Politics of Gay Identity*, 79 VA. L. REV. 1833, 1850–51 (1993).

the world.[28] In a perhaps ironic sense, the relative weakness of international human rights *enforcement* may actually be a strength on the *accession* front, neutralizing at least some of the resistance to joining the normative conversation in the first place.[29] And yet, once that conversation is engaged, the subtle pressure of the ongoing dialogue of justification at the heart of the enforcement system of international human rights law has often been surprisingly effective. It often stimulates improvements in state practice, at least incrementally and at the margins.[30]

The more concerning version of progressive reluctance to argue for a right to sexual liberty is often rationalized as pragmatic. Why advocate a clearly controversial right to sexual liberty when sexual minorities can access so much—for example, spousal benefits, parenting rights, sex reassignment—by invoking already codified rights, in particular protections against discrimination? Is it not risky to push the envelope in ways that are virtually guaranteed to generate opposition?[31]

This view is, however, highly partial—privileging claims for the *integration* of those seen to be sexually different[32] over claims that seek the

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[28] Holy See, Iran, Somalia, Sudan, and Tonga are the only countries that have not signed the Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13. Palau and the United States have signed, but not ratified, the Women's Convention. *Status of Treaties: Convention on the Elimination of All Forms of Discrimination Against Women*, UNITED NATIONS TREATY COLLECTION (last visited Dec. 20, 2021), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-8&chapter=4

[29] Indeed, it has been perhaps skeptically observed that "human rights have to date transformed the terrain of idealism more than they have the world itself." SAMUEL MOYN, HUMAN RIGHTS AND THE USES OF HISTORY 100 (2017).

[30] For example, a decision of the UN Human Rights Committee on same-sex pension rights was critical to convincing Colombia to change its domestic pension regime, while an advisory opinion from the Interamerican Court of Human Rights persuaded Costa Rica to legalize same-sex marriage and to recognize transgender rights. Bruce Wilson & Camila Gianella-Malca, *Overcoming the Limits of Legal Opportunity Structures: LGBT Rights' Divergent Paths in Costa Rica and Columbia*, 61 LAT. AM. POL. & SOC'Y 138, 147–48, 153 (2019). Adopting the process-based performance framework (namely, the ability of an organization to reach smaller-scale objectives, which might be helpful towards the achievement of the overall goals) a recent analysis demonstrates the utility of the UN periodic reporting system to both create learning opportunities and generate pressure on states. Valentina Carraro, *Promoting Compliance with Human Rights: The Performance of the United Nations' Universal Periodic Review and Treaty Bodies*, 63 INT'L STUD. Q. 1196 (2019).

[31] *See generally* ANDREW SULLIVAN, VIRTUALLY NORMAL: AN ARGUMENT ABOUT HOMOSEXUALITY (1996); *see also* Andrew Sullivan, *The End of Gay Culture: Assimilation and Its Meaning*, THE NEW REPUBLIC (Oct. 23, 2005), https://newrepublic.com/article/61118/the-end-gay-culture; VAID, *supra* note 2, at 377 ("Our squeamish liberal allies would grant us 'civil rights' but would reject our claim that we are morally equivalent to straight people in every way.").

[32] BELL & BINNIE, *supra* note 12, at 49 ("[T]he gay conservative's dream [was] . . . invisibility and total assimilation into mainstream (for which read: white, middle-class, suburban) America."); Michael Warner, *Normal and Normaller: Beyond Gay Marriage*, 5 J. LESBIAN & GAY STUD. 119, 131 (1999) ("Marriage . . . would make for good gays—the kind who would not challenge the norms of straight culture, who would not flaunt their sexuality, and who would not insist on living differently from ordinary folk.").

explicit *validation of sexual difference and choice* itself.[33] While integration for those who seek it should of course be available,[34] a full-throated right to sexual liberty is not just about disallowing the social exclusion of sexual outliers, enabling them to enjoy whatever things are valued by the sexually compliant.[35] It is rather about the proclamation of sexual choice and divergence as positive things[36]—in the same way that diversity engendered by freedoms of belief or speech or work choice is understood to be a positive thing. Sexual liberty should be protected as a matter of principle because it is a big part of what makes life worth living, and because it enables us to connect and to experience emotion in ways that are natural and important.

Codifying a right to sexual liberty is also a strategically critical means of decentering the significance of majority preferences.[37] Whereas majoritarian values inform both non-discrimination and privacy rights,[38] a right to sexual liberty would ensure that individual autonomy is the starting point for analysis.[39] Because any conversation about balancing of interests would necessarily start from the premise that *all* persons—particularly those outside the circle of power—must be able to live fulfilling sex lives,[40] the weight of even clearly dominant social preferences would be dramatically reduced.[41]

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[33] VAID, *supra* note 2, at 4 ("The irony of gay and lesbian mainstreaming is that more than fifty years of active effort to challenge homophobia and heterosexism have yielded us not freedom but 'virtual equality,' which simulates genuine civil equality but cannot transcend the simulation.").

[34] Yet, as Joshi rightly observes, the quest for inclusion and respectability may make sexual minorities "publicly respectable and privately queer. These constituent desires do not sit comfortably together." Yuvraj Joshi, *Respectable Queerness*, 43 COLUM. HUM. RTS. L. REV. 415, 448 (2012).

[35] One of the main challenges is to discover "[h]ow . . . appeals [can] be made to international human rights law to make precarious queer lives more liveable without legitimising the heteronormative imperial heritage of the normative framework of international law." Dianne Otto, *Introduction: Embracing Queer Curiosity*, *in* QUEERING INTERNATIONAL LAW: POSSIBILITIES, ALLIANCE, COMPLICITIES, RISKS 1, 7 (Dianne Otto ed., 2018).

[36] WARNER, *supra* note 3, at viii ("[Q]ueer culture has long cultivated an alternative ethical culture that is almost never recognized by mainstream moralists as anything of the kind.").

[37] STYCHIN, *supra* note 5, at 29 ("The strategy, for those who seek to undermine the universality of the (hetero)sexual subject, must continue to be resistance to and subversion of, its rhetorical privileging.").

[38] *See* Parts I and II *infra*.

[39] "Most people mistake their sexual preference for a universal system that will or should work for everyone . . .We have learned to cherish different cultures as unique expressions of human inventiveness rather than as the inferior or disgusting habits of savages. We need a similar anthropological understanding of different sexual cultures." Rubin, *supra* note 13, at 154.

[40] Jeffery Kosbie, *How the Right to be Sexual Shaped the Emergence of LGBT Rights*, 22 U. PA. J. CONST. L. 1389, 1393 (2020) ("[A] right to be sexual . . . claims protection from state regulation based on the dignity of sexual choices and sexual identities. The state can regulate sexual violence and lack of consent, but its justifications cannot be about the dignity or morality of sexual conduct.").

[41] Rights-based based protection "is stronger than without rights . . . [because] curtailments and restrictions of rights must be specifically justified. Acknowledging a right places a burden of explanation and justification on the actor who wants to restrict the right." ANNE PETERS, BEYOND HUMAN RIGHTS: THE LEGAL STATUS OF THE INDIVIDUAL IN INTERNATIONAL LAW 538 (2016).

In short, it is my view that because the imperative is real and the tools to design a fair- minded right to sexual liberty are well-known and time-tested, we should embrace the challenge.[42] Sexual liberty must come out of the legal closet.

My argument proceeds in four parts.

Part I assesses the contributions of the foundational principle of non-discrimination to realizing aspects of a right to sexual liberty. We should acknowledge that advocacy has so far opened many vitally important conceptual doors—for example, striking down gay-oriented sodomy laws; condemning homophobic killings; mandating equality in such spheres as respect for relationships and employment; guaranteeing access to health in relation to both disease and sex reassignment; and protecting sexual minorities seeking to speak and act collectively.

Part II identifies concerns about the utility of the non-discrimination paradigm to advance queer rights on the international plane. Despite its strengths, an advocacy strategy predicated on non-discrimination requires the suppression of sexuality, exposes persons who engage in queer sex to the vagaries of non-discrimination's unwieldy conceptual framework, and does not do the basic job of protecting the right to have sex.

Part III considers the possibility that the failings of the non-discrimination framework can be countered by reliance on privacy doctrine. I argue that while the international right to privacy does indeed have the power to strike down some constraints on sexual liberty, it is hopelessly entrenched in traditional assumptions about what types of sex are worthy of protection—and hence cannot be relied upon to vindicate a queer vision of sexual liberty.

Part IV addresses the question of why it makes sense to advocate an international human right to sexual liberty. Especially with international human rights law under siege for being overly prescriptive[43] and insufficiently attentive to non-Western views,[44] why push for a robust right to sexual liberty? The fundamental point is that it is important as a matter of principle for human rights law to tackle the ongoing dissonance between what people say (or are told to say) about sex and how they actually seek to live. I also explain why I believe that the establishment of a right to sexual liberty may help to meet concerns about the cultural inclusiveness of international human rights law and may refurbish the human rights edifice in a way that continued reliance on identity-based pursuit of an integrative agenda will not.

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[42] VAID, *supra* note 2, at 324 ("Our avoidance [of sexuality] merely lends credence to the lie perpetrated by the right. Since we have nothing to be ashamed of . . . let us stop acting guilty.").

[43] STEVEN RATNER, THE THIN JUSTICE OF INTERNATIONAL LAW: A MORAL RECKONING OF THE LAW NATIONS (2015); PETERS, *supra* note 41.

[44] *See generally* MICHAEL IGNATIEFF, THE ORDINARY VIRTUES: MORAL ORDER IN A DIVIDED WORLD (2017).

I. Where Non-Discrimination Has Taken Us

There is no right to sexual liberty in international human rights law.[45] Such a right has, moreover, never been formally proposed by any state or global governance body.[46] Even within the non-governmental queer rights community, the pitch for "broad sexual rights and/or bodily autonomy" remains rare.[47] It has been overshadowed by the chorus of acclaim for a patchwork approach[48] that marries a broadened understanding of the scope of non-discrimination with tailored applications of already codified human rights.[49] Under this amalgam approach,[50] sexual minorities are deemed entitled to the benefit of traditional internationally guaranteed human rights.[51] They are not, however, able to claim rights beyond the traditional catalog,[52] including to sexual liberty as such.

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[45] The closest international human rights law has come to an affirmation of sexual liberty is the view of the Committee on Economic, Social and Cultural Rights that the right to health "include[s] the right to control one's health and body, including sexual and reproductive freedom." U.N. Comm. on Econ., Soc. & Cultural Rts., Gen. Comment No. 14: The Right to the Highest Attainable Standard of Health (Article 12), ¶ 8, UN Doc. E/C.12/2000/4 (Aug. 11, 2000). But the Committee has yet to rely on that view in its review of state party reports as the basis for an affirmative duty to respect a broad-ranging right to sexual liberty, focusing instead on specific concerns such as sexual minority access to health care, avoidance of unwarranted medical interventions, and decriminalization of same-sex relations.

[46] Notably, however, the World Health Organization's (non-binding) 2002 definition of sexual rights included the rights "to decide to be sexually active or not; . . . [to] consensual sexual relations; . . . [and to] pursue a satisfying, safe, and pleasurable sexual life." Int'l Council on Hum. Rts. Pol'y, *supra* note 17, at 9.

[47] SEXUAL RIGHTS INITIATIVE, ADVANCING SEXUAL RIGHTS FOR ALL 4 (2016). Academic opinion has at times been similarly skeptical. Peters, for example, argues that some "rights proclamations seem exaggerated . . . The World Congress of Sexology has propagated rights to comprehensive sex education and to sexual pleasure, and it notes that 'sexual rights are fundamental and universal human rights' . . . These claims . . . seem too specific and/or not foundational enough to warrant the human rights label in themselves." PETERS, *supra* note 41, at 443–44.

[48] It has been suggested that the emergence of protection for sexual minorities was embedded in the women's anti-violence struggle and advocacy of HIV-related health concerns, with the multiple sources of rights and the fractured structures and processes of human rights militating against a unified conceptual development of relevant rights. Mindy Jane Roseman & Alice Miller, *Normalizing Sex and Its Discontents: Establishing Sexual Rights in International Law*, 34 HARV. J. L. & GENDER 313, 332–35 (2011).

[49] "[T]he content of the discourse generated at this stage of development shies away from the language of 'sexual rights' utilised earlier by NGOs at UN forums, to a terrain that deploys accepted terms drawn from the existing human rights system." Aeyal Gross, *Homoglobalism: The Emergence of Global Gay Governance*, *in* QUEERING INTERNATIONAL LAW: POSSIBILITIES, ALLIANCES, COMPLICITIES, RISKS 148, 164 (Dianne Otto ed., 2018). The influential non-governmental "Yogyakarta Principles" are very much in this mode, seeking simply "to capture the existing state of international law." Michael O'Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, 8 HUM. RTS. L. REV. 207, 235 (2008). The initial Yogyakarta Principles were supplemented in 2017. *See* INTERNATIONAL COMMISSION JURISTS, ADDITIONAL PRINCIPLES AND STATE OBLIGATIONS ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION, GENDER IDENTITY, GENDER EXPRESSION AND SEX CHARACTERISTICS TO COMPLEMENT THE YOGYAKARTA PRINCIPLES (2017). For a detailed analysis of the Yogyakarta Principles approach, *see* Matthew Waites, *Critique of 'Sexual Orientation' and 'Gender Identity' in Human Rights Discourse: Queer Politics Beyond the Yogyakarta Principles*, 15 CONTEMP. POL. 137 (2009).

[50] For example, UN Special Rapporteur Paul Hunt found that sexual rights could be embedded in "privacy, equality, and the integrity, autonomy, dignity, and well-being of the individual." Paul Hunt

The absence of a right to sexual liberty in international human rights law may reflect the priorities of the predominantly heterosexual male group that conceived that body of law. One can assume that their priorities did not extend to codification of sexual liberty since the variant of that liberty most important to them—access to women to satisfy their sexual desires—was both assumed to be natural[53] and, in practical terms, was not under threat. Indeed, the establishment of a right to sexual liberty *for all* might have been seen to pose a threat to their extant privileges,[54] enabling wives to decline their husbands' sexual demands and empowering sex workers to insist on safety and fairness in their sexual transactions. At least as seriously, liberating sexual minorities to pursue lives natural to them would have amounted to a direct challenge to the sanctity of family forms[55] that have long served most straight men well.[56] It is thus not surprising that, rather than codifying a right to sexual liberty, the drafters of the international human rights regime explicitly codified the centrality of traditional marriage and the heterosexual family.[57]

(Special Rapporteur), *The Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health*, ¶ 54, UN Doc. E/CN.4/2004/49 (Feb. 16, 2004).

[51] "The predominant approach in international human rights discourse has been to attach 'sexual orientation' and 'gender identity' individually or in concert to existing human rights guarantees, including privacy, non-discrimination and health." Jena McGill, *Sogi . . . So What? Sexual Orientation, Gender Identity and Human Rights Discourse at the United Nations*, 3 CAN. J. HUM. RTS. 1, 20 (2014). It has, thus, been argued that the Yogyakarta Principles "betray continued compartmentalisation, and reveal the limits of formal human rights doctrine in this area." INT'L COUNCIL ON HUM. RTS. POL'Y, *supra* note 17, at 10.

[52] "[T]he concept of equality . . . does not support differences, it only supports sameness . . . The law provides no room to argue that we are different, but are nonetheless entitled to equal protection." Paula Ettelbrick, *Since When is Marriage a Path to Liberation?*, *in* WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK OF GAY AND LESBIAN POLITICS 757, 759 (Mark Blasius & Shane Phelan eds., 1997). In the context of claims based on sexual orientation or identity, the goal of non-discrimination law is not "expanding the content of . . . rights or conceiving any new rights in the area of sexuality." Kristen Walker, *Capitalism, Gay Identity and International Human Rights Law*, 9 AUSTL. GAY LESBIAN L. J. 58, 67 (2000).

[53] "[Feminist] critique has suggested that not only is the body of the citizen normatively male, but also that this maleness makes it invisible in regimes of Western societies . . . The normative male body is not simply absent, but is phallic. The phallic body is impermeable, a source by never a receptacle . . . Masculinity can be phallic only because femininity is vulnerable, castrated, unfixed." PHELAN, *supra* note 4, at 41–43.

[54] WARNER, *supra* note 3, at 24 ("Normally, straight male power is covered by a tacit immunity agreement.").

[55] BELL & BINNIE, *supra* note 12, at 135 (The family is . . . the primary moral location where sexual citizenship is affirmed: families are assumed to be a good thing almost by definition."). Noting "the pre-eminence of the family in international law," Walker points to the failure of international human rights law "to challenge the ideological role of the family in international law and under global capitalism." Walker, *supra* note 52, at 69.

[56] "[T]he centering of notions of the family obviously draws on sexualized constructions of appropriate (and inappropriate) modes of living together and caring for one another." BELL & BINNIE, *supra* note 12, at 10. "[T]he home becomes a haven for men to the exact extent that women do the physical and emotional labor of the family." PHELAN, *supra* note 4, at 68. Thus, "[t]he deeper threat we present to heterosexual culture lies in the disruption that our sexuality and gender nonconformity make in a society invested in rigid gender roles and the myth that the heterosexual nuclear family should be the sole form of relationship." VAID, *supra* note 2, at 191.

[57] *See* ICCPR, *supra* note 20, art. 23 ("The family is the natural and fundamental group unit of society and is entitled to protection by Society and the state. The right of men and women of marriageable age

Keenly aware of these in-built limitations,[58] early advocates for gay and other queer rights within the UN system did not pursue a truly liberationist agenda.[59] Not only was the edifice of international human rights law unfriendly to the validation of non-traditional sexuality, but bruising defeats when claiming sexual liberty in domestic courts[60] were no doubt front of mind. As Goldberg's analysis of "risky arguments" makes clear, "a discrete argument has the potential to accomplish much of what the norm-challenging argument seeks, without the costs of that argument."[61] Viewed in this light, the non-discrimination framework—seeking *not to challenge* the rights protected but rather to gain entry for sexual minorities into the circle of those able to *claim traditional rights*—was understandably attractive. It also had a textually plausible foundation in UN human rights treaties,[62] and had already generated some victories at the national and regional levels.[63] Advocates were buoyed by the belief that, once inside the tent of entitlement, queer people could massage the content of at least some traditional rights—privacy chief among them[64]—in ways that would better the lives of sexual minorities.[65] They therefore conceived, and successfully sold, an identity-based roadmap of international queer rights.[66]

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to marry and to found a family shall be recognized."); International Covenant on Economic, Social and Cultural Rights art. 10, Dec. 16, 1996, 999 U.N.T.S 171 ("The widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society . . ."); Damian Gonzalez-Salzberg, *Queering Reparations under International Law: Damages, Suffering, and (Heteronormative) Kinship*, 116 AM. J. OF INT'L L UNBOUND 5, 6 (2022) ("Despite the absence of any description as to the type of family envisioned [in the Universal Declaration of Human Rights and the Civil and Political Covenant], the context of adoption of both international instruments evidences that the family structure the drafters had in mind was that of the nuclear family, composed of the dyadic conjugal unit and their offspring.").

[58] Jasbir Puar, *Rethinking Homontationalism*, 45 INT'L J. MIDDLE EAST STUD. 336, 336 (2013).

[59] "[M]uch legal work and advocacy on sexuality draws on older, perhaps more comfortable thinking that assumes most people across the world 'naturally' have settled identities . . . [leading to invocation of] principles of non-discrimination . . . apply[ing] this principle to identities and practices that are assumed to be settled and fixed." Int'l Council on Hum. Rts. Pol'y, *supra* note 17, at 18–19; *see also*, Sonia Katyal, *Exporting Identity*, 14 YALE J. L. & FEMINISM 97, 119 (2002).

[60] "In the United States . . . identity-based strategies became uniquely necessary in the wake of Bowers v. Hardwick . . . [which] foreclosed constitutional protection for private sexual behavior between members of the same sex [thus forcing] litigants . . . to explore protections based on sexual identity as an alternate means of protection . . . [But this] masked the potentially uncomfortable reality that sexual identity is not always a fixed and central category." Katyal, *supra* note 59, at 101; *see also* Ortiz, *supra* note 27, at 1852.

[61] Suzanne Goldberg, *Risky Arguments in Social-Justice Litigation: The Case of Sex Discrimination and Marriage Equality*, 114 COLUM. L. REV. 2087, 2094 ("[E]ven those [judges] who agree with the litigant's ultimate claim may go out of their way to reject or otherwise disassociate themselves from arguments that directly contest norms embedded in widespread practices.").

[62] *See* ICCPR, *supra* note 20, at arts. 2, 26; *see also* ICECSR, supra note 25, at art. 2.

[63] Stewart Chang, *The Postcolonial Problem for Global Gay Rights*, 32 BOS. U. INT'L L. J. 309, 311 (2014) ("As has been the case with other 'modern' human rights, the shift in European and American [queer rights] policy tacitly becomes a cue for the remaining parts of the globe to catch up.").

[64] *See infra* Part III.

[65] STYCHIN, *supra* note 5, at 154–55 ("The assertion of coherent identity categories may . . . be legally enabling . . . Claims that the category warrants legal protection from invidious discrimination demand that it be understood as coherent, possessing some degree of stability . . .").

[66] Referring to the advent of the "Yogyakarta Principles," *see supra* note 49, Gross observes that "the idea that everyone has a sexual orientation . . . which is integral to their humanity . . . represents an

An early victory under the non-discrimination framework was the UN Human Rights Committee's 1994 decision in *Toonen v. Australia.*[67] The Committee found the anti-sodomy laws of the state of Tasmania both discriminated on the basis of sexual orientation and breached the right to privacy. Succeeding on this challenge was easier than it might have been, since Australia declined to defend Tasmania's anti-gay laws as reasonable limits justified by public morals concerns[68]—an argument that had actually been found persuasive in the earlier case of *Hertzberg v. Finland*.[69] Nor was the decision an especially clear vindication of the importance of sexual orientation or identity as such. Rather than treating sexual orientation or identity as a specific form of protected "other status" under the International Covenant on Civil and Political Rights (ICCPR),[70] the Committee found quality rights to inhere in gay men on the grounds of their "sex"[71]—seemingly adopting a view of victimized men as "sisters in suffering."[72]

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exportation of the Western model of sexual orientation." Aeyal Gross, *Queer Theory and International Human Rights Law: Does Each Person Have a Sexual Orientation?*, 101 AM. SOC. INT'L L. 129, 130. The approach taken to vindication of queer rights was thus arguably an instance in which non-governmental advocates "may work for the people in the South or in the non-Western world, but this does not mean that they represent the people in the South or in the non-Western world." YASUAKI ONUMA, A TRANSCIVILIZATIONAL PERSPECTIVE ON INTERNATIONAL LAW 76 (2010).

[67] Toonen v. Australia, Communication No. 488/1992, UN Doc. CCPR/C/50/D/488/1992 (U.N. Hum. Rts. Comm. March 31, 1994).

[68] *Id.* at ¶ 6.1.

[69] The Hertzberg case determined that while advocacy of homosexuality was prima facie protected speech under the Civil and Political Covenant, Finland enjoyed a "margin of appreciation" to limit broadcast on radio and television of matters that "could be judged as encouraging homosexual behaviour," allowing it to invoke the "public morals" exception under Art. 19(3). Leo Hertzberg v. Finland, Communication No. 61/79, UN Doc. CCPR/C/OP/1, ¶ 124 (U.N. Hum. Rts. Comm. 1985). *See also* Laurence Helfer & Alice Miller, *Sexual Orientation and Human Rights: Toward a United states and Transnational Jurisprudence*, 9 HARV. HUM. RTS. J. 61, 63, 72 (1996).

[70] ICCPR, *supra* note 20, at arts. 2, 26.

[71] Toonen v. Australia, *supra* note 67, at ¶ 8(7); Helfer & Miller, *supra* note 69, at 76 ("This interpretive choice is remarkable. No party to the case had raised the sex discrimination argument, and the 'other status' clause was the obvious textual choice under both the ICCPR and analogous European precedents."); *see also*, Jack Donnelly, *Non-Discrimination and Sexual Orientation: Making a Place for Sexual Minorities in the Global Human Rights Regime*, *in* INNOVATION AND INSPIRATION: FIFTY YEARS OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 95, 108 (Peter Baeher et al eds., 1999) (characterizing the Toonen approach as "substantively problematic").

[72] Rus Funk, *Men Who Are Raped*, *in* MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME 222 (Michael Scarce ed., 1997). The reasoning is of course logically defensible on the basis of pure literalism. "The argument is simple, formal, and straightforward. If a person's sexual orientation is a dispositional property that concerns the sex of people to whom he or she is attracted, then, to determine a person's sexual orientation, one needs to know the person's sex and the sex of the people to whom he or she is primarily sexually attracted." Edward Stein, *Evaluating the Sex Discrimination Argument for Gay and Lesbian Rights*, 49 UCLA L. REV. 471, 485–86 (2001). Much the same appeal to literalism has been adopted by the US Supreme Court. *See Bostuck v. Clayton County*, 140 S. Ct. 1731 (2020) ("We agree that homosexuality and transgender status are distinct concepts from sex. But . . . discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex: the first cannot happen without the second."). But as a matter of international treaty interpretation, a purely literal interpretation of this kind is impermissible; rather, "[a] treaty shall 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." Vienna Convention on the Law of Treaties, art. 31(1), May 23, 1969 1155 U.N.T.S. 331. As the International Court of

Despite its conceptual untidiness, it is undeniable that the *Toonen* decision was path- breaking. The Human Rights Committee began virtually immediately condemning states that criminalized same-sex relations. This effort drew initially on the right to privacy,[73] but subsequently invoked the duties to respect the right to life[74] and to avoid cruel, inhuman, or degrading treatment.[75] By 2012, the UN High Commissioner for Human Rights adopted a general position that international human rights law requires states to decriminalize homosexuality.[76]

Nor has progress been limited to decriminalization. The duty to guarantee sexual minorities access to rights without discrimination now includes entitlement to "special measures of protection . . . [where there are] specific threats or pre-existing patterns of violence."[77] Impartial investigations of anti-queer violence must be conducted,[78] with effective redress provided,[79] including

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Justice has made clear, "[f]or treaty interpretation rules there is no 'ordinary meaning' in the absolute or the abstract." Land, Island and Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras), Separate Opinion, 1992 I.C.J Rep. 351, 719 (Sept. 11); Constitution of the Maritime Safety Committee of the Intergovernmental Maritime (IMCO), Advisory Opinion, 1960 I.C.J. Rep. 150, 158 (June 8) ("The word obtains its meaning from the context in which it was used."). Interpretation should thus recognize that as a matter of principle, "patriarchy and heterosexual dominance are two . . . separable systems . . . [I]t mischaracterizes laws that discriminate on the basis of sexual orientation to see them primarily justified by sexism rather than homophobia . . . By failing to address arguments about the morality of same-sex sexual acts and the moral character of lesbians, gay men, and bisexuals, the sex discrimination argument 'closets,' rather than confronts, homophobia." Stein, *supra* note 72, at 500, 503–504.

[73] The Human Rights Committee's first expression of concern "at the serious infringement of private life in some states which classify as a criminal offence sexual relations between adult consenting partners of the same sex carried out in private" occurred in 1995. U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: United states of America, ¶ 287, UN Doc. CCPR/C/79/Add.50 (April 7, 1995) [hereinafter "U.S. 1995 Concluding Observations"].

[74] The Human Rights Committee first condemned the imposition of the death penalty as upon conviction for homosexual acts as a breach of Art. 6 in 2007. U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Sudan, ¶ 19, UN Doc. CCPR/C/SDN/CO/3 (Aug. 29, 2007).

[75] The Human Rights Committee first invoked Article 7 in 2010 as the basis for recommending the decriminalization of sexual activities between adult males and the extension to homosexuals of protection against violence. U.N. Hum. Rts Comm., Concluding observations of the Human Rights Committee: Uzbekistan, ¶ 22, UN Doc. CCPR/C/UZB/CO/3 (April 7, 2010).

[76] U.N. High Comm'r Hum. Rts., *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*, at 28, UN Doc. HR/PUB/12/06 (2012). The conclusion was reached by reference to the duties of privacy and non-discrimination, *id.* at 30, and was restricted to "private, adult, consensual same-sex conduct." *Id.* at 37. The imposition of the death penalty to punish homosexuality by five countries was explicitly condemned. *Id.* at 34.

[77] U.N. Hum. Rts. Comm., Gen. Comment No. 36: Right to Life, ¶ 23, U.N. Doc. CCPR/C/GC/36 (Oct. 30, 2018).

[78] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Peru, ¶ 8, UN Doc. CCPR/C/PER/CO/5 (April 29, 2013) (states "should provide effective protection to LGBT individuals and ensure the investigation, prosecution, and punishment of any act of violence motivated by the victim's sexual orientation or gender identity.").

[79] "For restitution to be effective, efforts should be made to address any structural causes of the violation, including any kind of discrimination related to, for example, gender, sexual orientation . . . and all other grounds of discrimination." U.N. Comm. against Torture, Gen. Comment No. 3: Implementation of Art. 14 by states Parties, ¶ 8, UN Doc. CAT/C/GC/3 (Dec. 13, 2012).

by way of hate crime legislation.[80] Efforts to "cure" queer people or to impose "corrective" surgery on them must be ended.[81] Evictions on the basis of sexuality are prohibited.[82] Sexual minorities are entitled freely to access the labor market.[83] Transgender persons must be given access to gender reassignment surgery[84] and to a process for legal gender recognition whether they choose such surgery or not.[85] There is a duty to combat "bullying . . . in schools, in particular against lesbian, gay, bisexual, and transgender students."[86] Public health infrastructure must include appropriate sexual and reproductive health services, with "staff . . . trained to recognize and respond to the specific needs of vulnerable or

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[80] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Swaziland, ¶ 19, UN Doc. CCPR/C/SWZ/CO/1 (Aug. 23, 2017) ("The state party should . . . [a]dopt legislation explicitly prohibiting hate crimes against lesbian, gay, bisexual, transgender and intersex persons.").

[81] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Ecuador, ¶ 12, UN Doc. CCPR/C/ECU/CO/6 (Aug. 11, 2016) ("The state party should . . . redouble its efforts to eliminate fully the practice of placing [LGBTI] persons in institutions for treatment to 'cure their sexual orientation or gender identity'; adopt the necessary measures to investigate, prosecute and ensure suitable punishment for persons responsible for such 'treatment'; and provide full reparation for victims, including rehabilitation and compensation."); U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Australia, ¶ 26, UN Doc. CCPR/C/AUS/CO/6 (Dec. 1, 2017) ("The state party should . . . move to end irreversible medical treatment, especially surgery, of intersex infants and children, who are not yet able to provide fully informed and free consent, unless such procedures constitute an absolute medical necessity.") [hereinafter "Australia 2017 Concluding Observations"].

[82] U.N. Comm. on Econ., Soc., and Cultural Rts., Concluding observations of the Human Rights Committee: Uganda, ¶ 30(c), UN Doc. E/C.12/UGA/CO/1 (July 8, 2015). ("[T]he Committee expresses concern about information on many incidents of eviction of tenants following the passage of the Anti-Homosexuality Act in 2014 . . . [T]he Committee urges the state party to . . . [i]nvestigate all reported cases of illegal evictions of lesbian, gay, bisexual, transgender and intersex persons and ensure they are compensated . . .").

[83] "The labour market must be open to everyone under the jurisdiction of states parties . . . [T]he Covenant prohibits any discrimination in access to and maintenance of employment on the grounds of . . . health status (including HIV/AIDS), sexual orientation . . . or other status, which has the intention or effect of impairing or nullifying exercise of the right to work on a basis of equality." U.N. Comm. on Econ., Soc. and Cultural Rts., Gen. Comment No. 18: The Right to Work, ¶ 12(b)(I), UN Doc. E/C.12/GC/18 (Feb. 6, 2006). In addition, the duty to provide equal remuneration for work of equal value "applies to all workers without distinction based on . . . sexual orientation, gender identity or any other ground." U.N. Comm. on Econ., Soc. and Cultural Rts., Gen. Comment No. 23: The Right to Just and Favourable Conditions of Work, ¶ 11, UN Doc. E/C.12/GC/23 (April 27, 2016).

[84] U.N. Comm. on Econ., Soc. and Cultural Rts., Concluding observations of the Human Rights Committee: Lithuania, ¶ 8, UN Doc. E/C.12/LTU/CO/2 (June 24, 2014). ("The Committee is concerned at the situation of individuals in the state party who face discrimination in their enjoyment of the rights guaranteed under the Covenant on the grounds of sexual orientation or gender identity, including access to health-care services such as gender reassignment surgery."). [hereinafter "Lithuania 2014 Concluding Observations"].

[85] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Ireland, ¶ 8, UN Doc. CCPR/C/IRL/CO/3 (July 30, 2008) ("The Committee . . . is furthermore concerned that the state party has not recognized a change of gender by transgender persons by permitting birth certificates to be issued for these persons.") [hereinafter "Ireland 2008 Concluding Observations"]; Lithuania 2014 Concluding Observations, *supra* note 84, ¶ 8 ("The Committee encourages the state party to take effective measures to ensure that lesbian, gay, bisexual and transgender persons can enjoy their economic, social and cultural rights without discrimination . . . and that legal recognition of their gender is not dependent on whether or not they have undergone gender reassignment surgery.").

[86] U.N. Comm. on Econ., Soc. And Cultural Rts., Concluding observations of the Human Rights Committee: Kazakhstan, ¶¶ 48–49, UN Doc. E/C.12/KAZ/CO/2 (March 29, 2019).

marginalized groups."[87] Asylum from "persecution owing to . . . sexual orientation or gender identity" is to be guaranteed.[88] Sexual minority migrants must be protected against the particular risks of exploitation and abuse.[89] Subject only to generally applicable limits,[90] queer people may publicly "express[] sexual identity and seek[] understanding for it,"[91] assemble to advocate their rights whether or not such activities "may be regarded as annoying or offensive by others,"[92] and openly participate in political and public life.[93] International human rights law is now understood even to impose a duty on states to undertake proactive efforts "to change societal perceptions of lesbian, gay, bisexual, transgender and intersex persons."[94]

There have, of course, also been some setbacks. Perhaps ironically, given the pace with which it has been embraced by many states,[95] the right of sexual minorities to marry and to form a family has foundered in global human rights jurisprudence[96]—though the analysis undergirding its rejection is patently

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[87] U.N. Comm. on Econ., Soc. And Cultural Rts., Gen. Comment No. 14, *supra* note 47, at ¶¶ 18, 37.

[88] U.N. Comm. against Torture, Concluding observations on the second periodic report of Namibia, ¶ 27, UN Doc. CAT/C/NAM/CO/2 (2017); *see generally* U.N. High Comm'r on Refugees, Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity, UN Doc. HCR/GIP/12/09 (Oct. 23, 2012).

[89] "The Committee recommends that the state party . . . [f]ocus on combating social stigmatization and sanction all forms of aggression and violence against migrants, with particular emphasis on protecting . . . lesbian, gay, bisexual, transgender and intersex persons . . . and develop campaigns against machismo and homophobia and promote social inclusion and respect for diversity." U.N. Comm. on the Prot. of the Rts. of All Migrant Workers & Members of Their Families, Concluding observations on the second periodic report of Guatemala, ¶ 27(d), UN Doc. CMW/C/GTM/CO/2 (May 2, 2019).

[90] ICCPR, *supra* note 20, at art. 19(3). Importantly, LGBTI protests may not be subject to "unnecessary or disproportionate limitations." Praded v. Belarus, Communication No. 2029/2011, UN Doc. CCPR/C/112/D/2029/2011, ¶ 7.8 (U.N. Human Rts. Comm. Nov. 25, 2014).

[91] Fedotova v. Russian Federation, Communication No. 1932/2010, UN Doc. CCPR/C/106/D/1932/2010, ¶ 10. 8 (U.N. Hum. Rts. Comm. Nov. 30, 2012).

[92] Alekseev v. Russian Federation, Communication No. 1873/2009, UN Doc. CCPR/C/109/D/1873/2009, ¶ 9.6 (U.N. Hum. Rts. Comm. Dec. 2, 2013).

[93] For example, it was determined that Colombia had a duty to "[e]nsure that . . . lesbian, bisexual and transgender women . . . are represented in the Presidential Council for Women's Equity." U.N. Comm. on the Elimination of Discrimination against Women, Concluding observations on the ninth periodic report of Colombia, ¶ 20(d), UN Doc. CEDAW/C/COL/CO/9 (March 19, 2019).

[94] U.N. Hum. Rts. Comm., Concluding observations on Eritrea in the absence of its initial report, ¶ 22, UN Doc. CCPR/C/ERI/CO/1 (May 3, 2019). *See also*, U.N. Hum. Rts. Comm., Concluding observations on the fourth periodic report of Bulgaria, ¶ 12, UN Doc. CCPR/C/BGR/CO/4 (Nov. 15, 2018) ("The state Party should . . . [i]ntensify efforts to combat negative stereotypes and prejudice against lesbian, gay, bisexual, transgender and intersex persons and to promote tolerance through training and awareness-raising campaigns for government officials and the general public, including through public schools.").

[95] The Human Rights Campaign notes that "[t]here are currently 31 countries where same-sex marriage is legal: Argentina, Australia, Austria, Belgium, Brazil, Canada, Chile, Colombia, Costa Rica, Denmark, Ecuador, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, Mexico, the Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, Switzerland, Taiwan, the United Kingdom, the United states of America and Uruguay." *Marriage Equality Around the World*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/marriage-equality-around-the-world (last visited Feb. 07, 2022).

[96] In the 2002 decision of Joslin v. New Zealand, Communication No. 902/1999, UN Doc. CCPR/C/75/D/902/1999, (U.N. Hum. Rts. Comm. July 30, 2002), it was determined that the right to

weak and unlikely to survive scrutiny.[97] And, of course, even when rights are recognized, there is often a huge gap between formal pronouncement and the enforcement of rights in practice.[98]

Yet it would be churlish to deny the momentous changes that non-discrimination law has produced at the United Nations over the last quarter century.[99] That marriage rights can be singled out as a failure actually speaks to the overall breadth of the rights that *have* been explicitly found to accrue to queer people.[100] Treaty bodies increasingly assert queer rights issues with vigor in their dialog of justification process with state parties.[101] While global international

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marry guaranteed by Art. 23 of the Civil and Political Covenant is limited to marriage between a man and a woman.

[97] As Gerber et al note, "[e]ntirely absent from Joslin . . . is a consideration of how a restrictive reading of the right to marry is compatible with the right to non-discrimination in ICCPR arts. 2 and 26." Paula Gerber, Kristine Tay & Adiva Sifris, *Marriage: A Human Right for All?*, 36 SYDNEY L. REV. 643, 651 (2014). While invocation of Art. 2 may not be apt given the Committee's finding that no right under Art. 23 or any other provision of the Covenant was engaged, the all-encompassing nature of the Art. 26 duty surely calls for reconsideration of the decision rendered in Joslin. As the Individual Opinion of Members Lallah and Scheinin in the case observed, "it is the established view of the Committee that the prohibition against discrimination on grounds of 'sex' in article 26 comprises also discrimination based on sexual orientation. And when the Committee has held that certain differences in the treatment of married couples and unmarried heterosexual couples were based on reasonable and objective criteria and hence not discriminatory, the rationale of this approach was in the ability of the couples in question to choose whether to marry or not to marry, with all the entailing consequences. No such possibility of choice exists for same-sex couples in countries where the law does not allow for same-sex marriage or other type of recognized same-sex partnership with consequences similar to or identical with those of marriage. Therefore, a denial of certain rights or benefits to same-sex couples that are available to married couples may amount to discrimination prohibited under article 26, unless otherwise justified on reasonable and objective criteria." Joslin v. New Zealand, *supra* note 96.

[98] *See generally* Olga Avdeyeva, *When Do states Comply with International Treaties, Policies on Violence Against Women in Post-Communist Countries*, 51 INT'L STUD. Q. 877 (finding growing evidence that states' formal ratification of international human rights treaties does not routinely generate changes in states' domestic human rights practice) (2007). If a more modest process-based approach is taken, however, there is a good case that UN periodic reporting has real value. Carraro, *supra* note 30.

[99] The mainstreaming approach has arguably meant that advocates for queer rights have "gained access to and successes in UN bodies as unlikely as the Security Council." Gross, *supra* note 49, at 168. It is noteworthy, however, that a UN special procedure on sexual orientation discrimination was established only in 2016, and then on a very close 23–18–6 vote: Dominic McGoldrick, *The Developments and Status of Sexual Orientation Discrimination under International Human Rights Law*, 16 HUM. RTS. L. REV. 613, 625 (2016). Others, however, place less stock in the centrality of such a procedure, noting that "[t]he work of existing thematic mechanisms, being grounded in broad human rights principles rather than identity claims, carries authority in countries and cultures that don't recognize 'sexual orientation' or 'gender identity.'" SEXUAL RIGHTS INITIATIVE, *supra* note 47, at 14.

[100] It remains, though, that "marriage is a useful cypher for the whole citizenship debate, since it is seen as a cohesive element of social life, straddling the public and the private, containing a mix of rights and duties, and occupying a central position in political, legal and popular discourses." BELL & BINNIE, *supra* note 12, at 58.

[101] *See generally* Paula Gerber & Joel Gory, *The UN Human Rights Committee and LGBT Rights: What is it Doing? What Could it be Doing?*, 14 HUM. RTS. L. REV. 403, 411–15 (2014). Some caution is, however, warranted. McGoldrick reports that in the first Universal Periodic Reporting (UPR) cycle, states accepted expert recommendations related to sexual orientation and gender identity only 36% of the time, as contrasted with a 73% overall acceptance rate. In the second UPR cycle, that figure rose to only 37%. McGoldrick, *supra* note 99, at 624. As Baisley notes, "UN experts and expert bodies are

human rights law is not supranational law in the sense that it automatically trumps contrary domestic norms, it is nonetheless clear that United Nations standards for the protection of sexual minorities have often inspired national efforts to improve the lives of sexual minorities.[102]

At least as important, the scope of the overarching duty to guarantee all rights without discrimination has expanded exponentially since the *Toonen* decision. With claims no longer limited to those that can be shoe-horned into the category of "sex,"[103] the most broadly applicable guarantee of non-discrimination is found in Art. 26 of the ICCPR[104] may now be invoked in myriad contexts, including to contest differentiation on the following grounds:

1999	engaging in "private homosexual relations between consenting adults"[105]
	"sexual orientation"[106]
2002	engaging in "private sexual relations between consenting adults"[107]

not ideal norm entrepreneurs because they have little control over how issues are framed." Elizabeth Baisley, *Reaching the Tipping Point? Emerging Human Rights Norms Pertaining to Sexual Orientation and Gender Identity*, 38 HUM. RTS. Q. 134, 143 (2016). More generally, lawmaking through treaty bodies suffers from "piecemeal approaches" under which "spaces may be open for some aspects of sexual rights because others are shut down." Roseman & Miller, *supra* note 48, at 373.

[102] In a recent report, the UN's Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity noted that international standards on sexual orientation and gender identity had recently been invoked in "countless decisions of domestic tribunals including the Supreme Courts of Botswana, India, and Nepal, national laws, such as of Argentina and Belgium, and public policy as is the case with Colombia and Sweden." Victor Madrigal-Borloz (Independent Expert), *Report of the Independent Expert on protection against violence and discrimination based on sexual orientation and gender identity*, ¶ 35, UN Doc. A/HRC/47/27 (June 23, 2021).

[103] In contrast to the Human Rights Committee's embrace of the notion of sexual orientation as a facet of sex, *see supra* note 71 and accompanying text, it is noteworthy that the supervisory body for the companion Economic Covenant led the way in adopting the view that sexual orientation is best understood as a protected form of "other status." U.N. Comm. on Econ., Soc. and Cultural Rts., Gen. Comment No. 20: Non-discrimination in economic, social and cultural rights, ¶ 32, UN Doc. E/C.12/GC/20 (July 2, 2009).

[104] "[A]rticle 26 . . . provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities. Article 26 is therefore concerned with the obligations imposed on states parties in regard to their legislation and the application thereof. Thus, when legislation is adopted by a state party, it must comply with the requirement of Article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in Article 26 is not limited to those rights which are provided for in the Covenant." U.N. Hum. Rts. Comm., Gen. Comment No. 18, *supra* note 83, at ¶ 12.: Non-Discrimination, ¶ 12, UN Doc. HRI/GEN/1/Rev.7 (May 12, 2004).

[105] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Ecuador, ¶ 8, UN Doc. CCPR/C/79/Add.92 (Aug. 18, 1998).

[106] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee:
Hong Kong Special Administrative Region, ¶ 14, UN Doc. CCPR/C/79/Add.117 (Nov. 15, 1999).

[107] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Egypt, ¶ 19, UN Doc. CCPR/CO/76/EGY (Nov. 28, 2002) [hereinafter "Egypt 2002 Concluding Observations"].

2004	"sexual minorities"[108]
2007	"consenting adults of the same sex"[109]
2008	those partaking in "same-sex sexual activities between consenting adults"[110]
	"transgender persons"[111]
	"unmarried cohabiting same-sex couples"[112]
	persons in "non-traditional forms of partnership"[113]
2009	"lesbian, gay, bisexual, and transgender (LGBT) persons"[114]
2011	"persons living with HIV/AIDS, including homosexuals"[115]
	"gender identity"[116]
2012	"homosexuality between adults of both sexes"[117]
	"bisexuality or transsexuality"[118]

[108] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Poland, ¶ 18, UN Doc. CCPR/CO/82/POL (Dec. 2, 2004).
[109] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Algeria, ¶ 26, UN Doc. CCPR/C/DZA/CO/3 (Dec. 12, 2007).
[110] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Botswana, ¶ 22, UN Doc. CCPR/C/BWA/CO/1 (Apr. 24, 2008).
[111] Ireland 2008 Concluding Observations, *supra* note 85, ¶ 8.
[112] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Japan, ¶ 29, UN Doc. CCPR/C/JPN/CO/5 (Dec. 18, 2008).
[113] Ireland 2008 Concluding Observations, *supra* note 85, ¶ 8.
[114] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Russian Federation, ¶ 27, UN Doc. CCPR/C/RUS/CO/6 (Nov. 24, 2009).
[115] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Jamaica, ¶ 9, UN Doc. CCPR/C/JAM/CO/3 (Nov. 17, 2011).
[116] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Islamic Republic of Iran, ¶ 10, UN Doc. CCPR/C/IRN/CO/3 (Nov. 29, 2011). It is noteworthy, however, that treaty supervisory bodies have yet to define "gender identity," leading one commentator to argue that "gender is an identity per se" such that there is no need to treat "gender and gender identity as distinct categories." Giovanna Gilleri, *Abandoning Gender 'Identity,"* 116 AM. J. INT'L L. UNBOUND 27, 27 (2022).
[117] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Malawi, ¶ 7, UN Doc. CCPR/C/MWI/CO/1 (June 18, 2012).
[118] U.N. Hum. Rts. Comm., Concluding observations adopted by the Human Rights Committee at

2014	"intersex conduct"[119]
	"same-sex couples"[120]
	"LGBT students"[121]
	"students considered to be homosexuals"[122]
2015	"trans-gender identity, bi-gender identity, asexuality, and cross-dressing"[123]
	persons who engage in "consensual same-sex sexual conduct"[124]
	"intersex individuals"[125]
	"diverse gender identities"[126]
2016	"actual or presumed gender identity"[127]
	persons "imitating members of the opposite sex"[128]
	"real or perceived sexual orientation or gender identity"[129]
	victims of "homophobic and transphobic violence"[130]

its 105th session, 9–27 July 2012: Armenia, ¶ 10, UN Doc. CCPR/C/ARM/CO/2 (Aug. 13, 2012).

[119] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Sri Lanka, ¶ 8, UN Doc. CCPR/C/LKA/CO/5 (Nov. 21, 2014).

[120] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Japan, ¶ 11, UN Doc. CCPR/C/JPN/CO/6 (Aug. 20, 2014).

[121] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Malta, ¶ 10, UN Doc. CCPR/C/MLT/CO/2 (Nov. 21, 2014).

[122] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Burundi, ¶ 8, UN Doc. CCPR/C/BDI/CO/2 (Nov. 21, 2014).

[123] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Russian Federation, ¶ 10, UN Doc. CCPR/C/RUS/CO/7 (Apr. 28, 2015).

[124] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: South Korea, ¶ 14, UN Doc. CCPR/C/KOR/CO/4 (Dec. 3, 2015).

[125] *Id.*

[126] *Id.* ¶ 15.

[127] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Morocco, ¶ 12, UN Doc. CCPR/C/MAR/CO/6 (Dec. 1, 2016).

[128] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Kuwait, ¶ 13, UN Doc. CCPR/C/KWT/CO/3 (Aug. 11, 2016) [hereinafter Kuwait 2016 Concluding Observations].

[129] *Id.*

[130] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Namibia, ¶ 10, UN Doc. CCPR/C/NAM/CO/2 (Apr. 22, 2016).

	persons who have "same-sex relationships"[131]
	"bodily diversity"[132]
	"transvestites [and] transsexuals"[133]
2017	"same-sex families"[134]
	"intersex infants and children"[135]
2020	"sexuality"[136]
	"including multiple discrimination"[137]
2021	"including multiple, direct and indirect discrimination… [in] both the public and the private sectors"[138]

In short, international human rights law now imposes a broad-ranging duty to guarantee virtually all traditional rights without discrimination on the basis of virtually all permutations of queer identity.

II. What's Missing?

Tempting as it may be to claim normative victory for queer rights in international human rights law, it would be premature.

The first worry is that all of the gains to-date are embedded in the non-discrimination approach to international queer rights. Queer people may not—by virtue of their queer identity—be discriminated against in accessing the traditional catalog of international human rights.[139] But if the matter of interest is

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[131] *Id.*
[132] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: South Africa, ¶ 21, UN Doc. CCPR/C/ZAF/CO/1 (Apr. 27, 2016).
[133] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Argentina, ¶ 3(c), UN Doc. CCPR/C/ARG/CO/5 (Aug. 10, 2016).
[134] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Italy, ¶11, UN Doc. CCPR/C/ITA/CO/6 (May 1, 2017).
[135] Australia 2017 Concluding Observations, *supra* note 81, ¶ 26.
[136] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Dominica, ¶ 15, UN Doc. CCPR/C/DMA/COAR/1 (Apr. 24, 2020).
[137] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Tunisia, ¶ 16, UN Doc. CCPR/C/TUN/CO/6 (Apr. 24, 2020).
[138] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Botswana, ¶ 12, UN Doc. CCPR/C/BWA/CO/2 (Nov. 24, 2021).
[139] "[A]t least from a liberal, positivist point of view, we have had some successes. We have made gains in being included in the heteronormative system." Wayne Morgan, *Queering International*

not guaranteed in the catalog, queer people have no greater access to it than does anyone else.

While this may sound equitable, in fact it is not.[140] That is because straight people benefit from an unquestioned, if tacit, right to engage in mainstream (marital, procreative[141]) sex.[142] In contrast, queer sex benefits from no such presumptive entitlement.[143] With no underlying right to sexual liberty to which the non-discrimination doctrine[144] can attach, queer people are in an especially vulnerable position.[145]

Human Rights Law, *in* SEXUALITY IN LEGAL ARENA 208, 211 (Carl Stychin & Didi Herman eds., 2000).

[140] "The claim of recognition does not occur within a liberal situation of equality or 'veil of ignorance,' but within pre-existing networks of cultural power and meaning." PHELAN, *supra* note 4, at 87.

[141] "[I]t appears that there is a general vision of sexuality that assumes that sex must be legitimised by higher goals (marriage, love, procreation)." Int'l Council on Hum. Rts. Pol'y, *supra* note 17, at 39.

[142] Simply put, there are "heteronormative assumptions that underpin international human rights law more generally." Gross, *supra* note 49, at 167. In Otto's succinct framing, "[h]eterosexual analytics saturate our everyday lives without most of us even noticing." Dianne Otto, *Resisting the Heteronormative Imaginary of the Nation-state: Rethinking Kinship and Border Protection*, *in* QUEERING INTERNATIONAL LAW: POSSIBILITIES, ALLIANCES, COMPLICITIES, RISKS 238, 240 (Dianne Otto ed., 2018).

[143] "[A] fallacy . . . is the idea that homosexuality and heterosexuality are merely two sides of a common coin called sexuality . . . In a society where institutions embody a presumption of heteronormativity and homosexual deviance, arguing that we are just like everyone else convinces no one." VAID, *supra* note 2, at 46.

[144] Non-discrimination is in any event an especially wobbly component of international human rights law. It is not the case that every form of differentiation in access to rights based on a protected category amounts to unlawful discrimination under international law. Instead, a given differentiation rather amounts to prohibited discrimination only insofar as the differentiation is not adjudged "objective and reasonable." U.N. Hum. Rts. Comm., Gen. Comment No. 18, *supra* note 83, at ¶ 13. As Thoreson rightly concludes, the "objective and reasonable" carve-out presents an ever-present risk of retrogression. Ryan Thoreson, *The Limits of Moral Limitations: Reconceptualizing Morals in Human Rights Law*, 59 HARV. INT'L L. J. 197, 211–18 (2018). Indeed, one commentator worries that the Human Rights Committee has adopted a "focus . . . on a general standard of reasonable and objective without correlation to the actual discriminatory impact on rights . . . By frontloading the justification inquiry and completely obliterating the consideration of the impact of discrimination on the equal enjoyment of rights, the Committee has foregone developing a richer understanding of discrimination, intersectional or otherwise." Shreya Atrey, *Fifty Years On: The Curious Case of Intersectional Discrimination on the ICCPR*, 35 NORDIC J. OF HUM. RTS. 220, 238 (2017). Greater reliance on the "objective and reasonable differentiation" loophole can moreover be especially concerning when international rights claims are adjudicated in domestic courts and tribunals, fora in which traditional understandings of "reasonableness" can have real salience.

[145] "The demand for civil rights puts one in the position of admitting one's vulnerability and dependence on the larger society . . . The group is . . . forced to account for itself as incomplete, dependent subjects . . . This paradox prevents the demand for citizenship from going beyond inclusion to a broader vision of social transformation and justice, and so maintains the structures of citizenship that produced the exclusion." PHELAN, *supra* note 4, at 57. Thus, it is arguable that in the international legal space "queer engagement with human rights has taken the radicality out of queer rather than resulting in the queering of international human rights law . . . [R]adicalism . . . [is] quickly quenched by the lure of normativity and glitter of respectability." Ratna Kapur, *The (Im)possibility of Queering International Human Rights Law*, QUEERING INTERNATIONAL LAW: POSSIBILITIES, ALLIANCES, COMPLICITIES, RISKS 131, 132 (2018).

The simple truth is that non-discrimination law cannot deliver what is most central to queer sexuality:[146] the right to have consensual sex outside the conventional confines of the marital, procreative model. Persons who deviate from sexual norms must now be protected from most *consequences* of that deviation, at least insofar as those consequences resonate within the traditional human rights catalog. But many of us still do not have the right to have sex in the ways that are most natural to, or fulfilling for, us.[147]

This might be thought of as a distinction without a difference. But imagine if political activists were told that while they had no right to hold a political opinion as such, the government would nonetheless step in to ensure that their activism did not strip them of their civil and other basic rights. Or that people were told they would be protected from harms arising from the religious identity imputed to them by their acts of observance—but that religious observance would not itself be a protected interest. Would that be considered a satisfactory state of affairs?

Surely it would not.[148] That is because, as critically important as consequentialist protection undoubtedly is, the central purpose of human rights law is explicitly to name and protect that which is understood to be fundamental to human dignity.[149] As Phelan writes,

> Full citizenship requires that one be recognized not in spite of one's unusual or minority characteristics, but with those

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[146] The present approach to queer rights has "increasingly narrowed its scope to those issues of sexual orientation that have the least to do with sex . . . The movement in too many ways has chosen to become a politics of sexual identity, not sex." WARNER, *supra* note 3, at 25, 40.

[147] "[T]his project is itself bounded and limited by a liberal scaffolding which provides little space for radical alternatives or for the 'failed' queer who refuses normative compliance." Kapur, *supra* note 145, at 145. Cossman was an early advocate of a "shift from identity to self-determination by emphasizing [that] sexuality is something we do, not simply something we have." Brenda Cossman, *Gender Performance, Sexual Subjects and International Law*, 15 CAN. J. L. & JURIS. 281, 294 (2015).

[148] PHELAN, *supra* note 4, at 58 ("Without a vision of a desired future, such a politics amounts to a continual picking at the scab of suffering.").

[149] "[B]iological [non-discrimination] and privacy-based arguments for lesbian and gay rights fail to address the actual wrong . . . [T]hey fail to claim that same-sex desire is of the same moral status as opposite-sex sexual acts, and that relationships between people of the same sex have the same moral status as relationships between people of the opposite sex." Stein, *supra* note 72, at 504. To be clear, my invocation of human dignity is not an endorsement of the movement seeking to treat "dignity" as a free-standing norm rather than as a more general ethical construct from which legally binding human rights norms may be derived; perhaps regrettably "[n]o consensus exists about the contours of human dignity as a legal concept." Michèle Finck, *The Role of Human Dignity in Gay Rights Adjudication and Legislation: A Comparative Perspective*, 14 INT'L J. CONST. L. 26, 28 (2016). *But see*, UNDERSTANDING HUMAN DIGNITY (Christopher McCrudden ed., 2014). Indeed, as Moyn rightly insists, "the party most closely associated with claims about human dignity was neither liberal nor socialist but conservative and rigid in its commitment to hierarchy: the Catholic Church . . . Searching for divine certification of our standing may always be appealing, but the liberal interest in dignity seems to follow from less exalted and metaphysical concerns . . . [Moreover dignity is] far less helpful when some of us insist that our fellow humans care about one another's broader welfare or social emancipation." MOYN, *supra* note 29, at 26, 33. For a critique of the value of "dignity" in queer rights litigation, *see* Jeffery Redding, *Queer-Religious Potentials in US Same-Sex Marriage Debates*, *in* QUEER THEORY: LAW CULTURE, EMPIRE 122, 127 (Robert Leckey & Kim Brooks eds., 2010) (arguing in particular that such claims in the US have been inattentive to the complexity of non-straight communities).

> characteristics understood as part of a valid possibility for the conduct of life. Emergence into publicity as an equal means that one appears on the terms by which one understands oneself.[150]

In contrast, protecting people on the basis of actual or ascribed identity arising from activity that is not itself protected is a bit like being invited into a house through the back door. Of course, it's better than being left outside in the cold. But it's neither gracious nor truly dignified, sending a message of tolerance rather than genuine acceptance,[151] and certainly not conveying recognition of value. In our embrace of the non-discrimination approach to international human rights law, queer people have—at least impliedly—accepted what Bell and Binnie rightly call "the burden of compromise:"

> [R]ights claims articulated through appeals to citizenship carry the burden of compromise in particular ways: this demands the circumscription of "acceptable" modes of being a sexual citizen . . . [I]t tends to demand a modality of sexual citizenship that is privatized, de-radicalized, de-eroticized, and *confined* in all senses of the word: kept in place, policed, limited.[152]

Urvashi Vaid has made clear that this approach has harmful consequences.[153] She insists that "a rights-based movement can co-exist with prejudice against lesbians and gay men," noting that traditional queer advocacy "focuses on the suppression of sexuality itself."[154] She further suggests that a rights-based movement "can even advance while leaving homophobia intact."[155] Arguing against acceptance of "the compromised minimum,"[156] Vaid pushes us to recognize the broader social importance of sexual liberty as such:

> [C]ivil rights do not change the social order in dramatic ways; they change only the privileges of those asserting those rights. Civil rights strategies do not challenge the moral and antisexual underpinnings of homophobia, because homophobia does not originate in our lack of full civil equality . . . The deeper threat we present to heterosexual culture lies in the disruption that our sexuality and gender nonconformity make in a society invested in rigid gender roles and the myth that the heterosexual nuclear family should be the sole form of relationship . . . Heterosexual

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[150] PHELAN, *supra* note 4, at 16.
[151] "The very notion of 'tolerance' implies subordination: you don't 'tolerate' something which is good (you celebrate it), you only 'tolerate' things you would rather didn't exist." Morgan, *supra* note 139, at 220. *See* WARNER, *supra* note 3, at 46–47 ("Sex and sexuality are disavowed as 'irrelevant' in an attempt to fight stigma. But the disavowal itself expresses the same stigma . . . Try imagining, by contrast, that heterosexuality might be irrelevant to the normative organization of the world.").
[152] BELL & BINNIE, *supra* note 12, at 3.
[153] VAID, *supra* note 2.
[154] *Id.*, at 37. Thus, for example, "legal recognition appears to take the sex out of same-sex relationships, leaving intact only their sameness to heterosexuality." Joshi, *supra* note 34, at 440.
[155] *Id.*, at 179.
[156] *Id.*, at 388.

> morality is predicated on the suppression of joy or, more accurately, on its control by religion: there are appropriate places to feel ecstasy (religious enlightenment and marriage), and all other arenas are wrong. But in gay life, pleasure serves a very different role. We do not fear it; we embrace it, ritualize it, and are transformed by its power.[157]

In short, we have accepted a cultural loss[158] that parallels the kind of exclusion lamented by Bhabha as a "deeply negating experience, oppressive and exclusionary."[159] Our embrace of non-discrimination to secure access for those who engage in queer sex to the traditional (heterosexual and marriage-oriented[160]) catalog of rights means that we have thus far opted not to contribute to the creation of a "vernacular cosmopolitanism [which] measures global progress from the minoritarian perspective [and in which] claims to freedom, and equality are marked by a 'right to difference in equality.'"[161]

III. Privacy to the Rescue?

Even if it is acknowledged that non-discrimination law cannot deliver a right to sexual liberty, it might still be suggested that such a right can be established (or is at least confidently claimed) under the right to privacy. If so, it might be argued that there is no need to pursue codification of a right to sexual liberty. Schabas contends that this is the case, arguing that "[s]exual autonomy represents a particularly important case of the right to communication in the area of privacy. Regulation of sexual behaviour therefore constitutes interference with privacy."[162] Subject only to limitations which are "absolutely necessary" to protect vulnerable persons or involving "sexual conduct in public," Schabas takes

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[157] *Id.*, at 183, 191, 383.

[158] Joshi notes that it is more accurate to speak of the pursuit of normalcy than of assimilation since that term better captures the phenomenon of "lesbians and gays constitut[ing] themselves as being worthy of recognition." Joshi, *supra* note 34, at 421.

[159] HOMI BHABHA, THE LOCATION OF CULTURE, xi (1994). He continues that such neglect "spurs you to resist the polarities of power and prejudice, to reach beyond and behind the invidious narratives of center and periphery." *Id.*

[160] Marriage sanctifies some couples at the expense of others. It is selective legitimacy . . . Marriage, in short, discriminates." WARNER, *supra* note 3, at 82. More specifically, "[e]ven though people think that marriage gives them validation, legitimacy, and recognition, they somehow think it does so without invalidating, delegitimizing, or stigmatizing other relations, needs, and desires." *Id.* at 133. Indeed, "[t]he deeper issue is that queers outside the gilded cage of marriage may actually be more susceptible to discrimination." Joshi, *supra* note 34, at 445.

[161] BHABHA, *supra* note 159, at xvi–xvii. Drawing on this notion of "difference in equality" one could in principle imagine "[a] queer conception of equality [that] would . . . reject the notion of measuring equality by a hegemonic standard that purports to be universal, and it should recognize 'equal difference' that is based not only on similarity but also on what is different." Aeyal Gross, *The Politics of LGBT Rights in Israel and Beyond: Nationality, Normativity, and Queer Politics*, 46 COLUM. HUM. RTS. L. REV. 81, 132 (2015).

[162] WILLIAM SCHABAS, U.N. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: NOWAK'S CCPR COMMENTARY 474 (3rd ed. 2019).

the view that the right to privacy articulated in Article 17 of the ICCPR already requires state parties to abstain from any regulation of sexual acts.[163]

This optimistic view contrasts with the more circumspect position taken by Joseph and Castan that "[r]egulation of sexual behaviour that takes place in private *may be* an interference with privacy" (emphasis added).[164] The strongest support they locate for even this cautious assertion is a minority opinion in the Human Rights Committee decision of *Hertzberg* which *left open* the question of whether Article 17 protects "the right to be different and live accordingly."[165] Indeed, the majority opinion in the case vindicated the state party's right to censor speech on the grounds that "that radio and TV are not the appropriate forums to discuss issues related to homosexuality."[166]

On balance, the jurisprudence of the Human Rights Committee does not suggest a commitment to leverage a broadly conceived right to sexual liberty from Article 17's right to privacy. To its credit, the Committee regularly invokes the right to privacy to insist on the need to decriminalize same-sex activity,[167] at least insofar as such activity is "carried out in private."[168] But Article 17 has thus far been drawn upon to question only a few other practices at odds with sexual liberty—in particular, to condemn criminal prosecutions for public indecency,[169] "imitating members of the opposite sex,"[170] and propositioning a person of the same sex.[171] On no occasion has the Committee's review of state reports led it to

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[163] *Id*.

[164] SARAH JOSEPH & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 554 (3rd ed. 2013).

[165] Hertzberg v. Finland, Communication No. 61/79, UN Doc. CCPR/C/OP/1, ¶ 18.68 (U.N. Hum. Rts. Comm. 1985).

[166] *Id.* at ¶ 10.4.

[167] *See supra* text accompanying notes 73–76.

[168] This limitation was common in relevant concluding observations made through 2008. *See e.g.*, U.S. 1995 Concluding Observations, *supra* note 73, ¶ 22 ("Concerned at the serious infringement of private life in some states which classify as a criminal offence sexual relations between adult consenting partners of the same sex carried out in private."); Egypt 2002 Concluding observations, *supra* note 107, ¶ 19 ("should refrain from penalizing private sexual relations between consenting adults."); U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Saint Vincent and the Grenadines, ¶ 8, UN Doc. CCPR/C/VCT/CO/2 (2008) ("concerned that consensual homosexual acts between adults in private are still criminalized"). But beginning in 2009 the Human Rights Committee has consistently invoked Art. 17 to call for the decriminalization of homosexuality without limiting its application to the private sphere. *See e.g.*, U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Grenada, ¶ 21, UN Doc. CCPR/C/GRD/CO/1 (Aug. 14, 2009) ("notes with concern that the Criminal Code penalizes same-sex sexual activities between consenting adults."); U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committees: Uzbekistan, ¶ 7, UN Doc. CCPR/C/UZB/CO/4 (Aug. 15, 2015) ("concerned that consensual sexual activities between adult males continue to be criminalized"); U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Kenya, ¶ 13, UN Doc. CCPR/C/KEN/CO/4 (May 11, 2021) ("should . . . [a]mend all relevant laws . . . to decriminalize consensual sexual relations between adults of the same sex").

[169] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Democratic Republic of the Congo, ¶¶ 13–14, UN Doc. CCPR/C/COD/CO/4 (Nov. 30, 2017).

[170] Kuwait 2016 Concluding Observations, *supra* note 128, ¶ 13.

[171] U.N. Hum. Rts. Comm., Concluding observations of the Human Rights Committee: Cameroon, ¶¶ 13–14, UN Doc. CCPR/C/CMR/CO/5 (Nov. 30, 2017).

insist on full respect for an affirmative right to sexual liberty as an inherent aspect of the right to privacy.

There is, in any event, something decidedly odd about invoking "privacy" in order to secure sexual "liberty."[172] After all, if liberty means anything, it must mean the right to be and to act in ways natural to oneself whether in a private space *or not*.[173] For many queers, the goal is decidedly not just to be able to do what one wishes in the privacy of one's own proverbial bedroom.[174] To the contrary, they wish to be able to express themselves as freely as heterosexuals do in *public* spaces[175] — whether that is by holding hands, enjoying an embrace or a kiss, or even by finding a nook in a park for something more sexually robust. It is simply true that many persons (queer or not) take particular pleasure in sexual intimacy outdoors or in other places not clearly within the private sphere.[176] Reliance on privacy to vindicate sexual liberty moreover presupposes access to a private space for sex—an assumption that is simply not realistic for many persons whose economic or social circumstances require them to share housing with others.[177] Nor does the privacy doctrine easily lend itself to the protection of sex—even in the bedroom—when more than just two persons are involved.[178]

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[172] BELL & BINNIE, *supra* note 12, at 4 ("The outcome of rights claims . . . is to secure private space to be a sexual citizen.").

[173] "I would argue that any politics based on . . . a sentimental rhetoric of privacy is not only a false idealization of love and coupling; it is an increasingly powerful way of distancing citizens from the real, conflicted, and unequal conditions governing their lives, and that it serves to reinforce the privilege of those who already find it easiest to imagine their lives as private." WARNER, *supra* note 3, at 100.

[174] VAID, *supra* note 2, at 388 ("We seek to be gay or lesbian not merely in the shelter of the ghetto or in the 'privacy' of the bedroom or in the confines of a more spacious closet.").

[175] "[S]truggles over real and symbolic space may be useful in progressing the discussion between a simple dichotomy of redistribution versus recognition . . . [W]e need to see social exclusion as manifest in space." BELL & BINNIE, *supra* note 12, at 82. In particular, because "the city is the prime site both for the materialization of sexual identity, community and politics," *id.* at 83, "[r]esidents [of a city] should not dictate the uses of the urban space around them to the exclusion of other users of the city. To do so is to fail to recognize what a city is." WARNER, *supra* note 3, at 190.

[176] "The thrill lies, at least in part, in being off stage, in being provocative, in being in the words of the law lewd and lascivious." Cossman, *supra* note 147, at 292. In particular, "many men who participate in public sex do not see it as an expression of political identity . . . Even those who consider themselves gay may be seeking in such venues a world less defined by identity and community than by the negation of identity through anonymous contact; they may be seeking something very different from 'community' in a venue where men from different worlds meet, often silently, for sex." WARNER, *supra* note 3, at 165–66; *see also*, BELL & BINNIE, *supra* note 12, at 61.

[177] Sonia Katyal, *Sexuality and Sovereignty: The Global Limits and Possibilities of Lawrence*, 14 WM. & MARY BILL OF RTS. J. 1429, 1469 (2006). "Full lesbian/gay equality requires Third World liberation in a broader social sense: liberation from poverty and dependency. LGBT people need housing to give them physical room for their relationships." Peter Drucker, *Reinventing Liberation: Strategic Questions for Lesbian/Gay Movements, in* DIFFERENT RAINBOWS 207, 211 (Peter Drucker ed., 2000).

[178] Even in its landmark ruling finding sodomy laws to be unconstitutional, the Constitutional Court of South Africa nonetheless insisted that "there is no reason why the concept of privacy should be extended to give blanket libertarian permission for people to do anything they like provided that what they do is sexual and done in private . . . Respect for personal privacy does not require disrespect for social standards." *National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1999 (1) SA 6 (CC) at 118–19 (S. Afr.).

Indeed, as a matter of principle, so long as the rights of others are not genuinely infringed, why ought "privacy"—protecting sex behind closed doors with only two persons involved—be reified as somehow uniquely appropriate to vindicate sexual rights? Is this not, as Morgan argues, acquiescing in an approach that "silences sexual difference"[179] by keeping it hidden? More generally, why should the assumed mainstream preference for a limited range of safeguarded sexuality[180] dictate the sphere of what protected sexual liberty involves? Just as we recognize that both speech[181] and religion[182] are broad-ranging protected interests that transcend majoritarian preferences,[183] so too should sexual liberty be liberated from the constraints of the privacy doctrine.[184]

IV. Addressing Disfranchisement

The analysis in Parts II and III has shown why the present reliance on an amalgam of non-discrimination and privacy law to vindicate international queer rights must be called into question. Fundamentally, the doctrinal problems identified give rise to an overarching problem of disfranchisement: some people who have queer sex do not fall into even the expansive categories of identity now protected from discrimination and some people embrace queer sex lives not protected under privacy law.

The first problem—that significant numbers of people having queer sex simply do not identify as belonging to any of the various categories that are now

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[179] Morgan, *supra* note 139, at 220.

[180] "Perhaps we should call it moralism, rather than morality, when some sexual tastes or practices (or rather an idealized version of them) are mandated for everyone." WARNER, *supra* note 3, at 4.

[181] The right to freedom of expression under Art. 19 of the Civil and Political Covenant extends to "even expression that may be regarded as deeply offensive." U.N. Hum. Rts. Comm., Gen. Comment No. 34: Article 19, Freedoms of Opinion and Expression, ¶ 11, UN Doc. CCPR/C/GC/34 (2011).

[182] The right to freedom of religion protects "theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms 'belief' and 'religion' are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community." U.N. Hum. Rts. Comm., Gen. Comment No. 22, *supra* note 20, at ¶ 2. Moreover, "[t]he fact that a religion is recognized as a state religion or that it is established as official or traditional or that its followers comprise the majority of the population, shall not result in any impairment of the enjoyment of any of the rights under the Covenant, including articles 18 and 27, nor in any discrimination against adherents to other religions or non-believers." *Id.* ¶ 9.

[183] "The Committee observes that the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition." U.N. Hum. Rts. Comm., Gen. Comment No. 22, *supra* note 20, at ¶ 8. *See also*, U.N. Hum. Rts. Comm., Gen. Comment No. 34, *supra* note 181, at ¶ 32.

[184] "[T]he rhetoric of privacy has historically functioned to perpetuate the oppressive politics of the 'closet': privacy is the ideological substrate of the very secrecy that has forced gay men and lesbians to remain hidden and underground, and thus rendered them vulnerable to private homophobic violence. There is no reason to think that we can rid privacy of its sedimented history." Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431, 1510 (1992).

entitled to protection against discrimination[185]—follows from the fact that each of those categories is predicated upon identity.[186] This is to be expected, since non-discrimination law in pith and substance is about ensuring that individuals are not treated on the basis of group stereotypes, but rather on the basis of their own particularized attributes and abilities.[187] Non-discrimination is thus a powerful protection for many queer people who feel that they are stigmatized on the basis of actual or ascribed group identity.

But for those persons who simply seek to engage in forms of sex that transgress social norms, the idea that protection must be sought through the assertion of some type of group identity may be quite foreign. Whether because they choose to be "on the down low"[188] or otherwise have no desire to disrupt their traditional family, matrimonial, or other structures, a significant number of persons wish to have queer sex without belonging to any queer community. The challenge is thus to ensure protection where the risk arises not "for who they are but for what they do; conduct is the issue."[189]

The second problem is that the narrow ambit of international privacy law[190] means that it can be invoked to legitimize harsh measures against those not clearly "on the side of 'good,' 'normal,' or 'natural'"[191] versions of non-traditional sexuality. For example, "more LGBTI people are jailed, abused, and tortured daily under laws targeting sex work than are arrested worldwide under sodomy laws. These include not just LGBTI sex workers but other people arrested for loitering, 'cruising,' or walking while trans."[192] The narrow scope of concern under privacy law has permeated the work of even many who see themselves as advocates for queer inclusion. This is seen, for example, in both the failure to explicitly condemn the anti-sex goals of Russia's laws on propagandizing of non-

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[185] *See supra* text accompanying notes 105–138. A focus on protection by identity "will lose the context and the connections between the lived realities of LGBTI persons and of those who do not identify as such." SEXUAL RIGHTS INITIATIVE, *supra* note 47, at 9.

[186] "[T]he universalisation of the homosexual as a transhistorical, trans-spatial subject as he/she is articulated in human rights discourse reproduces . . . ethical violence. By attempting to transform participants in certain intimacies into homosexual persons, do we not do a greater disservice to the vast majority of participants in same-sex acts in other places?" Neville Hoad, *Arrested Development or the Queerness of Savages: Resisting Evolutionary Narratives of Difference*, 3 POSTCOLONIAL STUD. 133, 153 (2000).

[187] *See* SANDRA FREDMAN, DISCRIMINATION LAW 109 (2nd ed. 2011).

[188] *See generally* Jessie Heath & Kathy Goggin, *Attitudes Towards Male Homosexuality, Bisexuality, and the Down Low Lifestyle: Demographic Differences and HIV Implications*, 9 J. BISEXUALITY 17 (2009).

[189] Waites, *supra* note 49, at 152.

[190] *See supra* Part III.

[191] Cai Wilkinson, *Putting "Traditional Values" Into Practice: The Rise and Contestation of Anti-Homopropaganda Laws in Russia*, 13 J. HUM. RTS. 363, 373 (2014).

[192] SEXUAL RIGHTS INITIATIVE, *supra* note 47, at 12.

heterosexuality[193] and in the endorsement of gay marriage[194] as an "anchor . . . in the chaos of sex and relationships"[195] or critical "civilizing" influence on gay men.[196] As Otto succinctly summarizes the concern, "[w]hile . . . some former deviants have been welcomed into the charmed circle of good sexuality, the demonisation of those who remain on the outer limits has intensified."[197]

The imperative is to do right by all queers—not just those who conform to heteronormative expectations of the kind most readily protected by non-discrimination and privacy law. The pursuit of a comprehensive right to sexual liberty also holds promise for other sexually subordinated subjects, logically including[198] many (if not most) women.[199] So too will it be of value to "straight"

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[193] "Rather than advocating for intimate and sexual liberation, mainstream LGBT activism has instead become complicit in the moral regulation of intimate practices . . . This complicity in moral regulation . . . creates an opening for challenges such as the current Russian one . . . [in which one sees] the dependence of rights-based claims on the presence of an undesirable and morally inferior 'other,' in this case the nonhomonormative queer . . . making the concept of LGBT rights look decidedly relativistic and contingent on being the 'right sort' of gay or transgender person." Wilkinson, *supra* note 191, at 373.

[194] "[M]arriage . . . privileges state-regulated, long-term pairing over other forms of intimacy and connectedness. Many in the gay movement—like their counterparts in the women's movement—have been critical of marriage not only for its gender inequity and history of violence but also for the ways in which it contributes to a *devaluing* of other ways of being sexual, loving, and nurturing." Suzanna Walters, *Take My Domestic Partner, Please: Gays and Marriage in the Era of the Visible*, *in* QUEER FAMILIES, QUEER POLITICS: CHALLENGING CULTURE AND THE STATE 338, 348 (Mary Bernstein & Renate Reimann eds., 2001).

[195] Andrew Sullivan, *Here Comes the Groom*, THE NEW REPUBLIC (Aug. 28, 1989), https://newrepublic.com/article/79054/here-comes-the-groom.

[196] WILLIAM ESKRIDGE, THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT (1996).

[197] Otto, *supra* note 142, at 256.

[198] Sadly, the Convention on the Elimination of All Discrimination Against Women (CEDAW) cannot be relied upon to leverage broader liberatory goals since it "enshrines the male/female binary . . . when CEDAW's goals would be better served by the elimination of the categories themselves." Darren Rosenbaum, *Unisex CEDAW, or What's Wrong with Women's Rights*, 20 COLUM. J. GENDER & L. 98, 101 (2011); *see also*, Dianne Otto, *Queering Gender [Identity] in International Law*, 33 NORDIC J. HUM. RTS. 299, 306 (2015). As Gallagher observes, "[u]nlike the [Universal Declaration of Human Rights], CEDAW takes an asymmetric approach by prohibiting all discrimination against 'women,' rather than symmetrically or categorically prohibiting discrimination based on 'sex' or 'gender.'" Robina Gallagher, *Redefining 'CEDAW' to Include LGBT Rights: Incorporating Prohibitions Against the Discrimination of Sexual Orientation and Gender Identity*, 29 S. CAL. INTERDISC. L. J. 637, 638 (2020). The supervisory committee moreover "refused to take a clear stance on the question of whether the discrimination ground 'sex' in the Convention includes all identities captured under the LGBTI initialism." Rikki Holtmmat & Paul Post, *Enhancing LGBTI Rights by Changing the Interpretation of the Convention of the Elimination of All Forms of Discrimination against Women?*, 33 NORDIC J. OF HUM. RTS. 319, 330 (2015). In contrast, for example, in the Convention on the Elimination of Racial Discrimination (CERD) "race is a category, not an identity. If CERD were about identity in the way that CEDAW is, it would specify a particular race, such as 'black' or 'African descent.' It does not; any race, defined in a broad or narrow fashion, can benefit from CERD's protections." Rosenbaum, *supra* note 198, at 145. *See also* Elise Meyer, *Designing Women: The Definition of "Woman" in the Convention on the Elimination of all Forms of Discrimination Against Women*, 16 CHI. J. INT'L L. 553 (2016) (discussing the range of ways in which "women" could in theory be interpreted to include queer people). Interestingly, Meyer notes that "[s]tate[] parties themselves include [queer] individuals in their country reports to CEDAW." *Id.* at 582.

[199] This is not to say that all feminists would agree; to the contrary, as Rubin observes, one strain of feminism "has called for sexual liberation that would work for women and well as for men" while

people whose preferred sex lives are not protected by the relegation of sexual liberty to the status of only a subset of the right to privacy.[200] Indeed, as people increasingly embrace more inclusive and fluid understandings of sexuality,[201] the appeal of a broadly framed right to sexual liberty is likely to increase.[202]

Establishment of a right to sexual liberty would also attenuate the political divide that has bedeviled the identity-based, discrimination-oriented approach to vindicating international queer rights.[203] Nearly a quarter century ago, Altman noted that there is a problem with "Western lesbian/gay theorists and activists . . . claiming a universality for an identity which developed out of certain historical specificities."[204] The emergence of queer identity was largely a product of increased economic independence in wealthier countries,[205] which enabled

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another "has considered sexual liberalization to be inherently a mere extension of male privilege." Rubin, *supra* note 13, at 165. She insists, however, that we need to "challenge that feminism is or should be the privileged site of a theory of sexuality. Feminism is the theory of gender oppression. To assume automatically that this makes it the theory of sexual oppression is to fail to distinguish between gender, on the one hand, and erotic desire, on the other." *Id.* at 169. Approached from the optic of validating erotic desire, "[t]he civil rights model can be turned inside-out by shifting the analysis away from the denial of subjecthood to women in patriarchal culture and towards the value of the objectified . . . The redemption of the value of the loss of the coherent self in sex . . . becomes a profoundly antiphallocentric manoeuvre . . . which may in turn undermine existing definitions of maleness." STYCHIN, *supra* note 5, at 69–70. Cossman makes a comparable point, arguing that if gender is understood to be performative rather than simply a descriptor of the social differences following from biological sex, "gender outlaws [could be seen] not only as political allies of feminism, but as struggling against the very same restrictions on the performance of gender within a heterosexual matrix that requires stable sexed bodies." Cossman, *supra* note 147, at 290.

[200] "What if our work were defined not as getting for gay people that which other minority groups have won, but as dealing with the violence that threatens all of us? . . . Transforming straight culture poses a massive challenge that has room in it for everyone." VAID, *supra* note 2, at 208–09. "Individuals . . . have a stake in a culture that enables sexual variance and circulates knowledge about it, because they have no other way of knowing what they might or might not want, or what they might become, or with whom they might find a common lot." WARNER, *supra* note 3, at 7.

[201] STYCHIN, *supra* note 5, at 31 ("Not only does an articulated gay identity undermine the universality of the sexual subject, it also potentially challenges the naturalness of gendered identity as it has been culturally constructed.").

[202] PHELAN, *supra* note 4, at 127 ("[D]isarticulating identity, sexual act, and desire forces us to find a political ground for alliances, a vision for the future rather than the simple claim of identity.").

[203] "[A] large number of people around the world . . . do not feel comfortable with international law [which they] regard . . . as an expression of, and a tool of, Western dominance over the world . . . Human rights [are] a product of modern Europe . . . [which] sometimes sounds like another beautiful slogan by which Western powers rationalize their interventionist policies." ONUMA, *supra* note 66, at 106, 373. Onuma's call, however, is emphatically not for a rejection of human rights as a global public good, but rather for its recalibration to be more culturally inclusive. *Id.* at 376–89. In the end, "[t]o accept the system of sovereign states, a product of modernity, and to reject that of human rights, a counter-product, is an arbitrary selection of modernity. This should not be allowed." *Id.* at 390.

[204] Dennis Altman, *The Emergence of Gay Identities in Southeast Asia*, *in* DIFFERENT RAINBOWS 137–38 (Peter Drucker ed., 2000); *see generally*, Peter Drucker, *Introduction: Remapping Sexualities*, *in* DIFFERENT RAINBOWS 9, 12–25 (Peter Drucker ed., 2000).

[205] "In Western Europe and the United states, industrialization and urbanization reshaped the traditional rural and peasant populations into a new urban industrial and service workforce. It generated new forms of state apparatus, reorganized family relations, altered gender roles, made possible new forms of identity, produced new varieties of social inequality, and created new formats for political and ideological conflict." Rubin, *supra* note 13, at 155; *see also*, Joshi, *supra* note 34, at 431.

people seeking queer sex lives to live on their own and to form communities of choice.[206] In earlier times, in contrast, "a person's sexual self was not defined in terms of the sex of his/her partners. The rise of les-bi-gay people transformed 'doing' into 'being,' and homosexual activity became a basis for the identities."[207] Those new-found identities in turn enabled and informed the non-discrimination tack to international human rights advocacy.[208] But for many people living outside of Western countries, queer identity—in any of its forms—simply does not ring true.[209] Chou, for example, points out that "[m]any Chinese *tongzhi* stress that sexuality is only one integral part of life and does not mark them as categorically different people."[210] This does not mean, of course, that people are not having queer sex in non-Western societies.[211] To the contrary, there are often rich traditions of non-mainstream sexual attraction that have withstood the tests of both time and tyranny.[212] But the notion of a queer *identity*[213] of the kind that non-discrimination principles require is often literally foreign.[214] It too often runs

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[206] World War II "plucked millions of young men and women, whose sexual identity was just forming, out of their homes, out of towns and small cities, out of the heterosexual environment of the family and dropped them into sex-segregated situations." John D'Emilio, *Capitalism and Gay Identity*, *in* THE GAY & LESBIAN STUDIES READER 467, 472 (Henry Abelove et al eds., 1983).

[207] Sherry Joseph & Pawan Dhall, "*No Silence Please, We're Indians!"—Les-bi-gay Voices from India*, *in* DIFFERENT RAINBOWS 157, 173 (Peter Drucker ed., 2000).

[208] "[T]he Gay International . . . [seeks] to liberate Arab and Muslim 'gays and lesbians' from the oppression under which they allegedly live by transforming them from practitioners of same-sex conduct into subjects who identify as homosexual and gay." Joseph Massad, *Re-Orienting Desire: The Gay International and the Arab World*, 14 PUB. CULTURE 361, 362 (2002).

[209] Katyal, *supra* note 59, at 102 (noting the clash between the Western "substitutive model" that assumes the equivalence of public sexual identity and private sexual conduct and the "transformative" and "additive" models predominant in other parts of the world).

[210] Wah-Shan Chou, *Individual Strategies for Tongzhi Empowerment in China*, *in* DIFFERENT RAINBOWS 193, 194 (Peter Drucker ed., 2000).

[211] To the extent that a label is chosen at all, it may be predicated on engaging in same sex activity rather than on identity, such as the "men having sex with men—MSM—but not gay" label that some queer Indians prefer. Joseph & Dhall, *supra* note 207, at 161. As Bell and Binnie note, "'men who have sex with men' might be the only true dissidents of our time (since they resist identarian restriction altogether)." BELL & BINNIE, *supra* note 12, at 52 (citing Alan Sinfield, *Diaspora and Hybridity: Queer Identities and the Ethnicity Model*, 10 TEXTUAL PRACTICE 271 (1996)).

[212] *See* Drucker, *supra* note 204, at 11–12. Examples include the Zapotec tradition of mampo, *see* Max Mejia, *Mexican Pink*, *in* DIFFERENT RAINBOWS 43, 44 (Peter Drucker ed., 2000); South African mine workers and sangoma, *see* Mark Gevisser, *Mandela's Stepchildren: Homosexual Identity in Postapartheid South Africa*, *in* DIFFERENT RAINBOWS 111, 122 (Peter Drucker ed., 2000); Indian same-sex relationships existing parallel to traditional marriage, *see* Joseph & Dhall, *supra* note 207, at 159; and the Sub-Saharan African tradition of jin bandaa, *see* Mburu, *supra* note 9, at 182.

[213] "Mugabe, Museveni, Nujoma et al are right about one thing: while homosexual practise predates the colonization of the continent, the advent of a 'gay' subculture—of people taking on identities as 'gay' or 'lesbian' and demanding rights as such is without doubt a new—and Western—import, insofar as it is a consequence of urbanization and modernization as a global society." Gevisser, *supra* note 212, at 116. It must be acknowledged, however, that social antipathy to queer people is often stoked by governments in order to "distract[] domestic and international publics alike from other vexing issues such as political repression, corruption and bad governance." Rahul Rao, *Global Homocapitalism*, 194 RADICAL PHIL. 38, 45 (2015).

[214] VAID, *supra* note 2, at 286 ("A false assumption underlies all gay and lesbian organizing: that there is something at once singular and universal that can be called gay or lesbian or bisexual or even transgendered identity.").

roughshod over indigenous understandings of self-actualization and sexuality[215] predicated on the coexistence of traditional marriage and family[216] with other expressions of sexuality.[217]

Even for those who might prefer queer community and identity,[218] the conditions that allowed queer communities and identity to blossom in richer countries[219] have yet to arrive in many parts of the world.

> "In the absence of welfare states, family is important in the Third World for simple survival. Marriage and children are the only forms of old-age or health insurance in many poor countries."[220]

In many poorer communities, "there is simply no space to be gay."[221] To insist—as non-discrimination law does—that queer identity is the lynchpin to protection is thus to ignore the deep socioeconomic divisions in the world that too often make it nearly impossible to be part of a community that exists outside of

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[215] "By privileging Western definitions of same-sex sexual practices, non-Western practices are marginalized and cast as 'premodern' or 'unliberated'. . . [T]he closet is not a monolithic space, and . . . 'coming out' or becoming publicly visible is not a uniform process that can be generalized across national cultures." Martin Manalansan, *In the Shadows of Stonewall: Examining Gay Transnational Politics and the Diasporic Dilemma*, *in* THE POLITICS OF CULTURE IN THE SHADOW OF CAPITAL 485, 486, 501 (Lisa Lowe & David Lloyd eds., 1999). Tragically, identity-based initiatives "can serve to erase indigenous identities around sexuality and gender in favor of 'gay' or 'transgender' identities more readily recognizable to Western activists and law . . . [I]t may make rights claimants more vulnerable; may make them look more 'foreign' and less rooted in their own cultures, and in the process more othered and exposed." SEXUAL RIGHTS INITIATIVE, *supra* note 47, at 15.

[216] Chang, *supra* note 63, at 352 ("Historically, ethnic aversion to homosexual behavior was not so much a judgement on sexuality as it was on those who do not value procreation.").

[217] "The tension is between two very different ways of dealing with homosexuality—the traditional approach, which finds ways of accommodating it and not talking about it . . . and the Western way, which claims for homosexuals a 'gay' identity . . . With the latter comes personal freedom—and extreme cultural conflict." Gevisser, *supra* note 212, at 117. "Gay Africans, like straight Africans, do not leave their home cultures unless they are forced to; they find, rather, ways of reconciling their differences with the values of their home-communities." *Id.* at 135. Indeed, "[t]he need of Western lesbigays to engage in identity politics as a means of enhancing self-esteem may not be felt in other societies." *Id.* at 153. "Not all the people that the movement reaches are willing to redefine the concepts of family and marriage . . . In other words, many les-bi-gay people fear that visibility may mean too heavy a price to pay." Joseph & Dhall, *supra* note 207, at 174. In China, queer people increasingly "use a strategy of resistance in which same-sex relationships are legitimated not by rejecting the mainstream but by 'queering' it." Chou, *supra* note 210, at 205. It is reported that some Filipino men are revolted by what they see as vulgar public displays by those who "come out." Manalansan, *supra* note 215, at 437.

[218] "In the age of digital technology and social media, previously isolated people suddenly found themselves part of a global queer community, able to connect with others first in chat rooms and then on hookup sites or social media platforms; to download ideas about personal freedom and rights that encouraged them to become visible; and to claim space in society." GEVISSER, *supra* note 8, at 15.

[219] In pre-Stonewall times, "it is no accident that gay people viewed gay identity under a very thin description. Survival dictated as much." Ortiz, *supra* note 27, at 1850.

[220] Drucker, *supra* note 177, at 216; Dennis Altman, *Rupture or Continuity? The Internationalization of Gay Identities*, 48 SOC. TEXT 77, 88 (1996) ("Affluence, education, and awareness of other possibilities are all prerequisites for the adoption of new forms of identity, and the spread of these conditions will increase the extent to which gay identities develop beyond their base in liberal Western societies.").

[221] Gevisser, *supra* note 212, at 127; *see also*, Mburu, *supra* note 9, at 189; Katyal, *supra* note 177, at 1469–70.

traditional heterosexual and marital family structures.[222] As Kapur pointedly reminds us,

> [t]he gaining of queer selfhood through visibility may involve great losses, ranging from familial and social rejection and ostracism, to being deprived of home, livelihood and services, to discrimination and humiliation, to violent assault and sometimes even death at the hands of the bigoted and/or the ignorant.[223]

The bottom line is that there may simply be few alternatives to traditional family support structures in many poorer countries.[224] If we insist that human rights claims may only be made by assertion of queer *identity* we risk ostracizing (or threatening the survival of) some of the most vulnerable people who engage in queer sex.[225]

It is true, of course, that non-discrimination law does not literally require the assertion of a queer identity in order to vindicate rights—imputed or ascribed group identity suffices.[226] But something remains conceptually askew when people who either choose not to adopt such an identity, or whose lives are too difficult or circumscribed to allow for such a choice, are nonetheless required to work within an identity-based paradigm of rights. As Gross rightly insists, "the idea of sexual orientation may sometimes be restricting rather than liberating."[227]

In addition to its validation of non-identarian queer lives and recognition of the socioeconomic constraints that constrain options for many queer people, a third type of inclusivity furthered by a focus on sexual liberty is the possible reduction of resistance from the political bloc thus far most staunchly opposed to queer rights—namely, the Organization of Islamic Cooperation.[228] While this

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[222] Katyal, *supra* note 59, at 158 ("In many situations, material conditions force individuals to prioritize family over social identification, a factor that is complemented by the strong boundaries that exist between public identity and private conduct.").

[223] Kapur, *supra* note 145, at 141.

[224] Drucker, *supra* note 177, at 216 ("In the absence of welfare states, family is more important in the Third World for simple survival. Marriage and children are the only form of old-age or health insurance in many poor countries.").

[225] "It is not the Gay International or its upper-class supporters in the Arab diaspora who will be persecuted, but rather the poor and nonurban men who practice same-sex conduct and who do not *necessarily* identify as homosexual or gay." JOSEPH MASSAD, DESIRING ARABS 189 (2007). As Onuma has eloquently argued, international law needs to "respond to desires, wishes, expectations and aspirations of a far larger number of non-Western people who were generally ignored when people saw, narrated, and administered the world in the twentieth century." ONUMA, *supra* note 66, at 33.

[226] The UN Human Rights Committee has made clear that "the term 'discrimination'. . . should be understood to imply any distinction, exclusion, restriction or preference which is *based on* any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has *the purpose or effect* of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms." U.N. Hum. Rts. Comm., Gen. Comment No. 18, *supra* note 83, at ¶ 7.

[227] Gross, *supra* note 66, at 132.

[228] The 1981 and 1990 Organization of the Islamic Conference declarations "prioritize[] Sharia law over the perceived Judeo-Christian and secular provenance of [the Universal Declaration of Human Rights] . . . and thus do[] not provide scope for including sexual orientation." Momin Rahman, *Queer Rights and the Triangulation of Western Exceptionalism*, 13 J. HUM. RTS. 274, 276 (2014). Rahman

may seem counterintuitive, Puar has pointed out that this group's unwavering resistance to protecting queer people against discrimination is not simply doctrinally based,[229] but is also a reaction to the politicization by Western countries of the duty not to discriminate against queer people via "homonationalism."[230] With instances of discrimination against queer people treated as indicia of backwardness,[231] Islamic (and other) countries that have not embraced the duty of non-discrimination are relegated to a subaltern status.[232] Rahman equates this stance to a new variant of colonialism under which Western discourse

> frames modernization as the necessary precursor to sexual diversity, and thus resistance to queer rights is seen as indicative of a less economically developed, less democratic, and less secular social formation. . . . Homocolonialism provokes Muslim homophobia which becomes part of the process of triangulation, reinforcing Islamophobia because the resistance to sexual diversity is taken as fundamentally indicative of Muslim "otherness" to modernity. . . . Not only does this potentially prevent the development of queer Muslim religious discourses within queer and Muslim politics, but it lowers the

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notes too that half of the countries that criminalize homosexuality are majority Muslim states. *Id*. *See generally*, Robert Blitt, *The Organization of Islamic Cooperation's (OIC) Response to Sexual Orientation and Gender Identity Rights: A Challenge to Equality and Nondiscrimination Under International Law*, 28 TRANSNAT'L L. & CONTEMP. PROBS. 89, 183 (2018) (noting in particular that the Organized Islamic Cooperation (OIC) has sought to "mainstream its views as consistent with and embracing human rights universality").

[229] Hamzic identifies two streams of Islamic interpretation—a scripturalist approach that "equates Islamic legal tradition with shari'a, a set of divine and immutable principles" and a new historian approach under which "shari'a cannot be artificially disentangled from public policy," and argues that "we shall find . . . no reference to the categories of sexual orientation and gender identity" under either approach. Vanja Hamzic, *The Case of 'Queer Muslims': Sexual Orientation and Gender Identity in International Human Rights Law and Muslim Legal and Social Ethos*, 11 HUM. RTS. L. REV. 237, 253–54 (2011). She blames a "post-colonial condition" for the fact that presently "[f]or the first time in the history of Muslim communities, *people*, the fellow Muslims, instead of certain illicit *acts*, have received blanket condemnation. states, jurists and scholars have now joined hands in defence of *naturalised* normative *heterosexuality* and neo-Victorian sexual puritanism." *Id.* at 261.

[230] This term derives from JASBIR PAURA, TERRORIST ASSEMBLAGES (2007); *see also*, Puar, *supra* note 58, at 336. Massad, for example, argues that "it is not same-sex practices that [were] being repressed by Egyptian police [in the 2001 raid on the Queen Boat] but rather the sociopolitical identification of these practices with the Western identity of gayness and the publicness that these gay identified men seek." Massad, *supra* note 208, at 382; *see also*, Gross, *supra* note 66, at 130 ("what is being repressed is not same-sex sexual practices but, rather, the sociopolitical identification of these practices with the Western idea of gayness"). Rao notes moreover that a homonationalist agenda has been adopted by international financial institutions, giving rise to what he calls "homocapitalism." Rao, *supra* note 213, at 38.

[231] Non-discrimination based on sexual orientation or gender identity has become "a barometer by which the right and capacity for national sovereignty is evaluated." Puar, *supra* note 58, at 336.

[232] "Because of . . . [their] humiliating past, [non-Western countries] tend to be excessively sensitive to criticism from the developed countries," with criticisms "perceived as arrogant interventions or pressures from the outside world." ONUMA, *supra* note 66, at 56.

> likelihood of debate and change within Muslim communities on issues of sexuality and gender.[233]

The identarian focus of anti-discrimination law serves the homonationalist agenda well,[234] emphasizing the extent to which (Western-embraced) forms of collective identity are safeguarded in a particular state.[235] A focus on sexual liberty, in contrast, is less readily deployed as a tool of stigmatization—especially if forms of extramarital and non-heterosexual sex, long practiced in Muslim and other non-Western societies, are taken into account. This shift in focus might therefore defuse at least some of the present antagonism directed at traditional approaches to queer rights.

This point should not be overstated. Islam, like most organized religions,[236] has rarely been an ally of sexual liberation.[237] But it remains that a right to sexual liberty, at least if carefully framed in a culturally inclusive way, has the potential to lower the homonationalist temperature engendered by the Western, identity-based variant of queer rights[238] that has predominated in international human rights law to-date.

Conclusions

The short point, then, is that both the privacy and non-discrimination routes taken to vindicate queer rights have left some who partake in queer sex behind—people whose needs and aspirations call for adoption of a right to sexual

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[233] Rahman, *supra* note 228, at 277, 280, 282. "Once LGBT rights are incorporated into global governance, they can be appropriated to reinforce or strengthen the political and/or economic power of Northern states over states in the global South." Gross, *supra* note 49, at 154.

[234] "My point . . . is an argument against a Western nativism . . . that considers assimilating the world into its own norms as ipso facto 'liberation' and 'progress' and a step toward universalizing a superior notion of the human. There is nothing liberatory about Western human subjectivity including gays and lesbians when it does so by forcibly including those non-Europeans who are not gays or lesbians while excluding them as unfit to defend themselves." MASSAD, *supra* note 225, at 42.

[235] Much queer rights advocacy has been "aligned with a set of (white) secular norms which reinforce the racist representation of Islam and Muslims as homophobic and culturally backward, where practices such as gay marriage serve as a marker for the distinction between a radicalised, primitive, Muslim population and upright, proper, homosexual citizens." Kapur, *supra* note 145, at 136.

[236] "In every nation where the idea of human rights has taken root, there has been a conflict between human rights ideals and the dominant religion and culture." ONUMA, *supra* note 66, at 458.

[237] David Leeming, *Religion and Sexuality: The Perversion of a Natural Marriage*, 42 J. RELIGION & HEALTH 101 (2003) (arguing that the split between sexuality and religion is especially evident in the repression of women and the criminalization of sexuality characteristic of religions of the Abrahamic tradition). *But see*, QUEER AND RELIGIOUS ALLIANCES IN FAMILY LAW POLITICS AND BEYOND (Nausica Palazzo & Jeffrey A. Redding eds., 2022) (an exploration of the possible common ground between religion and queer rights).

[238] Indeed, it might well better align with contemporary queer rights activism in wealthier countries to take a more fluid view of the relationship between sexuality and identity. As Massad has noted, "[t]he categories gay and lesbian are not universal at all and can only be universalized by the epistemic, ethical, and political violence unleashed on the rest of the world by the very international human rights advocates whose aim is to defend the very people their intervention is creating . . . [W]hat the incitement and intervention of international human rights activism achieves is the replication of the very Euro-American human subjectivity its advocates challenge at home." MASSAD, *supra* note 225, at 41.

liberty. I have argued the case for an approach to international queer rights that goes beyond the integrative agenda to embrace also non-integrative, liberatory goals. To be clear, I am not calling for "unfettered freedom."[239] The right to sexual liberty I advocate is rather a more modest claim, intended to guarantee freedom from oppressive constraints[240] and firmly anchored in the usual balancing processes of international human rights law.[241] Establishment of a right to sexual liberty in international human rights law would nonetheless be transformative: it would impose a duty of justification on whoever challenges the presumption that we are all entitled freely to choose to have consensual sex in whatever ways we find satisfying. Absent the ability to satisfy that high bar, any constraint on consensual sex would be unlawful.[242]

The non-discrimination framework deployed to-date, in contrast, fails to do substantive justice to the intrinsic importance of recognizing sexual liberty as a core component of what it means to be truly human. And perhaps most important of all, an identity-based remedy is at odds with the way that many people who have queer sex see themselves, especially those living outside the Western world. A right to sexual liberty shifts the discussion away from the culturally cribbed assumption that the choice of sexual partners or activities necessarily implicates one's identity, allowing sex to be understood instead as something worthy of protection because it has value in and of itself.[243]

Establishing a right to sexual liberty also avoids the pitfalls of continued reliance on privacy rights. While the privacy doctrine has been effectively invoked to mandate the decriminalization of (private) same-sex activity, it has not been interpreted to require states to protect all forms of consensual sex. To the contrary, privacy law can be counted on only to protect sexual activity between not more than two persons in a strictly private space—meaning that it is most friendly to forms of queer sex that come relatively close to the heterosexual

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[239] This is the goal embraced in RATNA KAPUR, GENDER, ALTERITY AND HUMAN RIGHTS: FREEDOM IN A FISHBOWL 70, 76 (2018).

[240] *See generally* JOHN STEWART MILL, *Introduction*, *in* ON LIBERTY (1869). Some would nonetheless argue that the liberatory character of such a move is undermined by its reinforcement of the state's regulatory authority. *See e.g.*, Kapur, *supra* note 145, at 140. Yet this critique seems more embedded in an aspirational preference for supranational law over (extant) international law, a foundational premise that logically counsels against any and all engagement with (extant) international law rather than speaking to prospects for queer rights advocacy in particular.

[241] *See supra* text accompanying notes 25–26, 144.

[242] Care would of course need to be taken to ensure that the bases upon which legitimate constraints could be imposed are not overly broad. As Thoreson rightly observes, a "morals" limitation clause could be especially problematic even as it might well both incentivize participation and play a constructive role in the supervisory dialogue. Thoreson, *supra* note 144, at 206. His insistence that any morals constraint be understood to legitimate only consideration of intertextual morality (looking "both at the treaties to which the state has acceded and the state's own constitutional jurisprudence as evidence of its foundational values." *Id.* at 234–35) is wise.

[243] "A sexual autonomy model . . . equalizes one's sexual and identity preferences by focusing on the act of choosing, rather than the gender or identity chosen . . . Expressive liberty, then, goes one step further than expressive identity: it permits the choice of with whom to have sexual relations, how to identify oneself, and whether or not the relationships one chooses should be publicly recognized." Katyal, *supra* note 176, at 1475, 1482.

analogue.[244] It is also most readily invoked by those whose social and economic circumstances provide them with ready access to space that is traditionally acknowledged to be genuinely *private*.

These points are not tantamount to saying that the proponents of earlier approaches were short-sighted, much less misguided.[245] I believe that we owe these pioneers an enormous debt of gratitude for having capitalized on the ability of extant liberal-inspired international human rights law to deliver certain social goods critical to queer rights[246]—and to do so at quite a remarkable pace. I see no value in contesting the importance of the victories secured, in particular under the non-discrimination framework.[247] For many queer people, social inclusion on traditional terms is valued—and that is a choice that we should have.[248]

My argument is rather that the liberal framework of international human rights law can be harnessed to do much more. As Nussbaum makes clear, liberal principles themselves require more than non-discrimination and respect for privacy; true equal respect instead requires "the capacity for imaginative and emotional participation in the lives of others."[249] The conceptual weaknesses of the non-discrimination paradigm and the narrow range of people having queer sex whose lives fit its parameters should therefore give us pause.[250] Nor is there any good reason to limit sexual autonomy by reference to heteronormative and marriage-based privacy rights. While there is no need to revisit, much less to reject, the true successes secured to-date,[251] a right to sexual liberty moves us to

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[244] Classic understandings of a sexual citizen involve "a heterosexual citizen . . . whose sexuality is contained within the private realm of family and conjugality." Brenda Cossman, *Sexing Citizenship, Privatising Sex*, 6 CITIZENSHIP STUD. 483, 485 (2002).

[245] It has been argued, for example, that "if we are to concede that citizenship discourse can accommodate only certain articulations of sexual rights, would we not be better served by refusing that agenda altogether, and finding more imaginative ways to mobilize sexual politics?" BELL & BINNIE, *supra* note 12, at 142. My own view is that the rights secured are neither unimportant to many queer people nor at odds with now seeking to engage law in a more expansive quest for sexual liberty. That said, Bell and Binnie are clearly right to insist that "we should always keep a critical eye on the moves we make to secure status as citizens, and look around at the potential harm any rights claims might have on others." *Id.* at 146.

[246] "Organizing around the notion that there is a fixed, definable gay and lesbian identity is far more convenient than organizing around the notion that homosexual desire is present in every person. It is also far less threatening . . ." VAID, *supra* note 2, at 209.

[247] Others disagree, of course. Working under both paradigms has been described as "Scyla and Charybdis—steering for recognition endangers one's ability to be different, forcing one to forswear differences that interfere with the assimilating body, while claims to autonomy founder on the problems of delineating a space that is both distinct from the mainstream and deserving of its protection." PHELAN, *supra* note 4, at 112.

[248] "Obviously, no thoughtful gay activist should or would take a position that argues for continual exclusion of lesbians and gays from any institution or practice they choose to join—be it marriage or the military." Walters, *supra* note 194, at 345.

[249] NUSSBAUM, *supra* note 18, at xix.

[250] "Equality and non-discrimination should . . . be included, but not as the sole or primary focus." Walker, *supra* note 52, at 72.

[251] VAID, *supra* note 2, at 24–25 ("Our focus has reflected the historical necessity of eliminating draconian laws and harmful social policies. The time has come for us to shift that focus somewhat in order to win the larger battle of full equality.").

the next level.[252] It decenters mainstream preferences and makes room for queers and all others autonomously to decide how best to live an authentic sexual life.

[252] Ortiz, *supra* note 27, at 1856 ("For the purpose of combating a single monolithic external description, a thin master description may serve best. For purposes of later empowering the group, new and positive thick master descriptions may serve even better.").