The Right to Privacy for Gay People Under International Human Rights Law

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INTRODUCTION

Abusive treatment of gay people is a global problem. Iran has imposed death sentences on gay men and lesbians. In Columbia and Peru, gay activists have received death threats from “goon squads.”2 Gay rights organizations have been banned in Argentina, and the police have harassed homosexuals there.3 On the Isle of Man, the local parliament has refused to repeal a local statute banning homosexual sodomy despite pressure from the Parliament at Westminster.4

Despite such flagrant human rights violations, the international human rights community has remained silent. The United Nations Committee on Nongovernmental Organizations has refused to admit the International Lesbian and Gay Organization because the U.N. delegate from Libya denounced the group as immoral.5 Amnesty International has refused to monitor state persecution of gay men and lesbians because it does not want “to impose its own morality on the world.”6

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The human rights issues surrounding such incidents are numerous. Various international human rights instruments\(^7\) grant to individuals freedom of association.\(^8\) Likewise, they grant freedom from cruel and unusual punishment\(^9\) and rights to conscience\(^10\) and privacy.\(^11\)

This Comment examines the right to privacy in international law and the protections that it offers gay people. Part I of this Comment briefly reviews the development of international human rights law following the Second World War. Part II discusses


\(^8\) The right to associate freely is a guaranteed right in the major international human rights covenants. See American Convention, supra note 7, at art. 16; International Covenant, supra note 7, at art. 22; European Convention, supra note 7, at art. 11; Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810, at art. 20 (1948) [hereinafter Universal Declaration].

\(^9\) The international human rights covenants safeguard the individual from cruel and unusual punishment. See American Convention, supra note 7, at art. 5; International Covenant, supra note 7, at art. 7; European Convention, supra note 7, at art. 2; Universal Declaration, supra note 8, at art. 5.

\(^10\) The international human rights covenants guarantee to individuals the right to conscience. See American Convention, supra note 7, at art. 12; International Covenant, supra note 7, at art. 18; European Convention, supra note 7, at art. 9; Universal Declaration, supra note 8, at art. 18.

The Universal Declaration states: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.” Universal Declaration, supra note 8, at art. 18.

The International Covenant states:

Everyone shall have the right to freedom of thought, conscience and religion.

This right shall include freedom to have or to adopt a religion or belief of his own choice, and freedom, either individually or in community with others and in public and private, to manifest his religion or belief in worship, observance, practice and teaching.

International Covenant, supra note 7, at art. 18(1).

The European Convention states: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.” European Convention, supra note 7, at art. 9(1).

The American Convention states: “Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one’s religion or beliefs, and freedom to profess or disseminate one’s religion or beliefs, either individually or together with others, in public or private.” American Convention, supra note 7, at art. 12(1).

\(^11\) See infra notes 45–48 and accompanying text.
the right to privacy guaranteed in those instruments. Part III reviews case law exploring the scope of the right to privacy, particularly with regard to gay people. Part IV examines cultural opposition to homosexuality. Part V analyzes the possible expansion of the right to privacy to include gay men and lesbians and explores the need to balance this right with the right of societies to maintain their cultural values. This Comment concludes that the right to privacy in international law should be expanded to protect gay people.

I. THE INTERNATIONAL HUMAN RIGHTS SYSTEM

While international law has long recognized that states have a duty to treat aliens humanely, it has recognized no similar duty with regard to a state’s own nationals. Only following World War II did international human rights law evolve to limit state power in this regard.

The United Nations Charter (U.N. Charter or Charter) was first to recognize limits on a state’s power against its own nationals. The Charter requires the United Nations to promote “universal respect for, and observance of, human rights and fundamental freedoms for all without any distinction as to race, sex, language, or religion.” It also requires all member states to cooperate with the United Nations in the promotion of human rights.

The U.N. Charter, however, provides no catalog of these fundamental freedoms. At the time of the drafting of the Charter, the delegates recognized the need to develop such an international “Bill of Rights.” Subsequently, the U.N. General Assembly approved Resolution 217(III), the Universal Declaration of Human Rights (Universal Declaration). The Universal Declaration outlines these basic human rights in its 30 articles.

The legal status of the Universal Declaration has been the subject of much debate. Some legal scholars maintain that al-

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13 Id. at 11.
14 See id. at 14.
15 U.N. Charter arts. 55(c), 1(3).
16 Id. at art. 56. Article 56 states: “All Members pledge themselves to take joint and separate action in co-operation with the Organization for achievement of the purposes set forth in Article 55.” Id.
18 See generally, Universal Declaration, supra note 8.
19 Sieghart, supra note 12, at 53.
though the Universal Declaration possesses great moral and political authority, it cannot itself create legally binding obligations under international law.\textsuperscript{20} Many other commentators argue that the Universal Declaration either codifies customary international law or has become customary international law from the consistent practice of states.\textsuperscript{21} Some authorities argue that the Universal Declaration is at least binding on members of the United Nations.\textsuperscript{22}

Although its legal status has been debated, the Universal Declaration has inspired several international and regional human rights covenants, including the European Convention for the Protection of Human Rights and Freedoms (European Convention),\textsuperscript{23} the International Covenant on Civil and Political Rights (International Covenant),\textsuperscript{24} and the American Convention on Human Rights (American Convention).\textsuperscript{25} Like the Universal Declaration, these international human rights covenants outline a "Bill of Rights."\textsuperscript{26} Unlike the Universal Declaration, the international

\textsuperscript{20} See id.; Robertson, supra note 17, at 26–27. These authorities examine the debate concerning the legal status of the Universal Declaration. Proponents of the view that the Universal Declaration is just a statement of policy point to the Preamble of the Universal Declaration, which states:

Now, therefore, the General Assembly proclaims this Universal Declaration of Human Rights as the \textit{common standard} of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of the Member States themselves and among the peoples of territories under their jurisdiction. Universal Declaration, supra note 8, at pmbl. (emphasis added). For a discussion of this view, see Sieghart, supra note 12, at 53; Robertson, supra note 17, at 26–27.

\textsuperscript{21} See Sieghart, supra note 12, at 53; Robertson, supra note 17, at 27–28. These commentators examine the views of those who maintain that the Universal Declaration is now customary international law. Proponents of this view point to the consistent practice of states and international bodies of invoking the provisions of the Universal Declaration which has caused its contents to become customary international law. For a discussion of their views, see Sieghart, supra note 12, at 53; Robertson, supra note 17, at 27–28.

\textsuperscript{22} Sieghart, supra note 12, at 53. This commentator examines the arguments of those who believe that the Universal Declaration is binding on all U.N. members under article 56 of the U.N. Charter, which requires member states to promote human rights in cooperation with the United Nations. Id. The Universal Declaration was intended as an enumeration of those rights the members are required to promote under article 56. See id.

\textsuperscript{23} See European Convention, supra note 7, at pmbl.

\textsuperscript{24} See International Covenant, supra note 7, at pmbl.

\textsuperscript{25} See American Convention, supra note 7, at pmbl.

\textsuperscript{26} See \textit{generally} American Convention, supra note 7; International Covenant, supra note 7; European Convention, supra note 7.
human rights covenants create absolute and immediate obligations on the state parties, requiring states to modify their domestic law to conform to the covenants' provisions. The covenants state that all persons are entitled to the equal protection of the rights guaranteed, and they oblige state parties to provide domestic remedies for violations of these rights. In addition, the covenants create international tribunals with varying degrees of power to supervise and enforce compliance with their provisions.

Neither the Universal Declaration nor the covenants extend absolute rights. They recognize limitations and restrictions on the exercise of individual rights. The covenants qualify the individual's rights with one's obligations to the family, the community, the family, the community, and mankind. In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

Universal Declaration, supra note 8, at art. 29.

Likewise, the American Convention imposes a general restriction in article 32(2) on the rights it recognizes: "(1) Every person has responsibilities to his family, his community, and mankind. (2) The rights and freedoms of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare in a democratic society." American Convention, supra note 7, at art. 32.

The International Covenant imposes a similar, but narrower restriction in article 47: "Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources." International Covenant, supra note 7, at art. 47.

American Convention, supra note 7, at art. 32(1).

Id.; Universal Declaration, supra note 8, at art. 29(1).
and mankind.\textsuperscript{35} In addition, states may lawfully restrict an individual's rights to protect the rights of others,\textsuperscript{36} the general welfare,\textsuperscript{37} public order,\textsuperscript{38} morality,\textsuperscript{39} and the security of all.\textsuperscript{40} Many articles granting rights also include specific restrictions on those rights.\textsuperscript{41}

Where the covenants recognize such restrictions on the exercise of individual freedoms, they must be interpreted narrowly.\textsuperscript{42} Only criteria specifically listed in the covenants can be used to justify the application of restrictions.\textsuperscript{43} In addition, these criteria cannot be read in a manner rendering the right a nullity.\textsuperscript{44}

The Universal Declaration and the covenants provide a framework for the international protection of human rights. Besides setting a standard for human rights protection, they provide a means of enforcement. Within this framework, gay men and lesbians may be able to find the means to protect their human rights.

II. THE RIGHT TO PRIVACY IN INTERNATIONAL LAW

A. The Right to Privacy in International Human Rights Instruments

The right to privacy is guaranteed in the Universal Declaration,\textsuperscript{45} the International Covenant,\textsuperscript{46} the European Conven-

\textsuperscript{35} American Convention, \textit{supra} note 7, at art. 32(1).
\textsuperscript{36} Id. at art. 32(2); Universal Declaration, \textit{supra} note 8, at art. 29(2).
\textsuperscript{37} American Convention, \textit{supra} note 7, at art. 32(2); Universal Declaration, \textit{supra} note 8, at art. 29(2).
\textsuperscript{38} Universal Declaration, \textit{supra} note 8, at art. 29(2).
\textsuperscript{39} Id.
\textsuperscript{40} American Convention, \textit{supra} note 7, at art. 32(2).
\textsuperscript{41} SIEGHART, \textit{supra} note 12, at 88–90.
\textsuperscript{42} Caprino v. United Kingdom, 1978 Y.B. EUR. CONV. ON H.R. 284, 294 (extract of case heard before Commission); SIEGHART, \textit{supra} note 12, at 91 ("The general rule is the protection of the freedom; the exception is the restriction. The restriction may not be applied in a sense that completely suppresses the freedom, but only insofar as necessary for preserving the values which the paragraph exhaustively enumerates and protects.").
\textsuperscript{43} Caprino, 1978 Y.B. EUR. CONV. ON H.R. at 294; SIEGHART, \textit{supra} note 12, at 91 ("All exception clauses must be strictly interpreted, and no other criteria than those mentioned in that clause itself may be the basis of any restriction on the right protected.").
\textsuperscript{44} SIEGHART, \textit{supra} note 12, at 91.
\textsuperscript{45} Universal Declaration, \textit{supra} note 8, at art. 12. Article 12 states: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of law against such interference or attacks." \textit{Id}.
\textsuperscript{46} International Covenant, \textit{supra} note 7, at art. 17. Article 17 states: "(1) No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or
tion,\textsuperscript{47} and the American Convention.\textsuperscript{48} None of these instruments recognizes this right in absolute terms. Rather, each limits the scope of the protection, recognizing offsetting interests to which the right to privacy must yield.\textsuperscript{49}

The Universal Declaration guarantees a limited right to privacy.\textsuperscript{50} It protects an individual’s privacy only from “arbitrary interference.”\textsuperscript{51} In addition, like all other rights recognized in the Universal Declaration, the right to privacy is limited by obligations

correspondence, nor to unlawful attacks on his honour and reputation. (2) Everyone has the right to protection of law against such interference or attacks.” \textit{Id.}

\textsuperscript{47} European Convention, \textit{supra} note 7, at art. 8. Article 8 states:

(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

\textit{Id.}

\textsuperscript{48} American Convention, \textit{supra} note 7, at art. 11. Article 11 states:

(1) Everyone has the right to have his honor respected and his dignity recognized.

(2) No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor and reputation.

(3) Everyone has the right to the protection of the law against such interference or attacks.

\textit{Id.}

\textsuperscript{49} See \textit{supra} notes 32–44 and accompanying text.

\textsuperscript{50} Universal Declaration, \textit{supra} note 8, at art. 12. Some authorities take the position that the entire Universal Declaration has the status of customary international law. For a discussion of the views of these authorities, see SIEGHART, \textit{supra} note 12, at 53; ROBERTSON, \textit{supra} note 17, at 27–28. Such a position would logically include the right to privacy.

The American Law Institute has taken the position that although all of the Universal Declaration is not customary international law, the right to privacy has achieved that status. \textit{See Restatement (Third) of the Foreign Relations Law of the United States § 702 (1987) [hereinafter Restatement].} Section 702 states that:

A state violates international law if, as a matter of state policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or cruel, inhuman, or degrading treatment or punishment, (e) prolonged arbitrary detention, or (g) a consistent pattern of gross violations of internationally recognized human rights.

\textit{Id.} (emphasis added).

With regard to § 702(g), comment k states that rights guaranteed in the Universal Declaration and the principal international covenants are internationally recognized rights. \textit{Id.} at § 702, cmt. k. Among such fundamental rights are the “privacy of the home” and “basic privacy such as the right to marry and raise a family.” \textit{Id.} A consistent pattern of unjustified state intrusion on the right to privacy would be a violation of customary international law.

\textsuperscript{51} Universal Declaration, \textit{supra} note 8, at art. 12.
to one's community.\textsuperscript{52} The right to privacy is also subject to lawful limitations, which are necessary to protect morality and the rights of others in a democratic society.\textsuperscript{53}

Like the Universal Declaration, the American Convention recognizes a limited right to privacy. It protects individuals from "arbitrary or abusive interference" with their privacy.\textsuperscript{54} In addition, like all other rights recognized in the American Convention, the need in a democratic society to protect the general welfare and rights of others can limit the individual's right to privacy.\textsuperscript{55}

The European Convention similarly guarantees the right to privacy.\textsuperscript{56} It permits public authorities to interfere with this right, however, to protect public morality and the rights and freedoms of others.\textsuperscript{57} Such interference must, however, be lawful and necessary in a democratic society.\textsuperscript{58}

The International Covenant, like the Universal Declaration, guarantees the right to privacy. It protects individuals from "arbitrary and unlawful" interference with their privacy.\textsuperscript{59} Unlike the Universal Declaration, however, the International Covenant recognizes no other pertinent limitations on this right.\textsuperscript{60}

All the international human rights instruments recognize the individual's right to privacy. They also permit, to varying degrees, some restrictions on that right. Consequently, the scope of the right to privacy and, thus, its ability to offer human rights protection to gay people remains unclear.

\textbf{B. Interests Protected}

The restrictions recognized in the previously described international human rights instruments are not the only source of uncertainty regarding the right to privacy. The concept of privacy itself is not defined in any of the instruments. Indeed, various

\begin{footnotesize}
\begin{itemize}
\item [52] \textit{Id.} at art. 29(1).
\item [53] \textit{Id.} at art. 29(2).
\item [54] American Convention, \textit{supra} note 7, at art. 11(2).
\item [55] \textit{Id.} at art. 32(2).
\item [56] European Convention, \textit{supra} note 7, at art. 8(1).
\item [57] \textit{Id.} at art. 8(2).
\item [58] \textit{Id.}
\item [59] International Covenant, \textit{supra} note 7, at art. 17(1).
\item [60] See generally International Covenant, \textit{supra} note 7. The only general restriction on the rights recognized in the International Covenant is that none of the rights granted is to be interpreted as "impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources." \textit{Id.} at art. 47.
\end{itemize}
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legal systems understand the concept of privacy differently.\textsuperscript{61} Some legal scholars have suggested that the right to privacy protects the individual only from unwanted publicity.\textsuperscript{62} Others have suggested a broader definition, including the right to physical and mental integrity, and moral and intellectual freedom.\textsuperscript{63}

Although the concept of privacy is still not clearly defined, there is ample opportunity and a pressing need for international jurists to define it.\textsuperscript{64} Interpreting the scope of the right to privacy in the conventions, however, requires strict adherence to rules of treaty interpretation.\textsuperscript{65} The texts of the relevant articles must 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.”\textsuperscript{66} Supplementary means of interpretation are acceptable when necessary.\textsuperscript{67} The opinions of respected jurists are one recognized supplementary means available to define the concept of the right to privacy in international human rights instruments.\textsuperscript{68}

\textsuperscript{61} JACQUES VELU, The European Convention on Human Rights and the Right to Respect for Private Life, the Home and Communications, in PRIVACY AND HUMAN RIGHTS 34 (1973). Velu believes that “the scope of the right to respect for private life depends on current manners and custom and varies from place to place, even in Europe. This explains why it is difficult to found a broad definition of this concept on any common legal tradition.” Id. In addition, Velu maintains that all individuals cannot expect the same privacy rights because “the wall around a person’s private life is not identically situated with everyone.” Id.

\textsuperscript{62} SIEGHART, supra note 12, at 313.

\textsuperscript{63} RICHARD B. LILLICH, Civil Rights, in HUMAN RIGHTS IN INTERNATIONAL LAW 148 (1984); VELU, supra note 61, at 36. Some argue that the right to privacy includes protection from:

(1) Attacks on physical and mental integrity or moral and intellectual freedom.
(2) Attacks on honor and reputation and similar torts.
(3) The use of name, identity, or likeness.
(4) Being spied upon, watched, or harassed.
(5) The disclosure of information protected by the duty of professional secrecy.

LILICH, supra, at 148.

\textsuperscript{64} LILICH, supra note 63, at 149.


\textsuperscript{67} Id. at art. 32. Article 32 states:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.

Id.

\textsuperscript{68} See Statute of the International Court of Justice, Oct. 24, 1945, art. 38(1)(d), 59 Stat.
The scope of the right to privacy in these instruments is critical for gay people. If the right to privacy is interpreted broadly to provide a realm of personal autonomy free from unjustified state intrusion, decisions about personal and sexual relationships could arguably fall within that realm. Such a broad interpretation of the right to privacy could provide a legal basis for protecting gay people from state persecution.

III. THE PRIVACY RIGHTS OF GAY PEOPLE IN VARIOUS LEGAL SYSTEMS

The opinions of respected jurists are one supplementary means available to define the scope of the right to privacy in international human rights instruments. Both the European Court of Human Rights (European Court) and the U.S. Supreme Court have addressed the privacy rights of gay men and lesbians. These courts, however, have arrived at different results. The European Court has held that the right to privacy guaranteed in article 8 of the European Convention protects gay people from state interference. The Supreme Court has held that the right to privacy under the Fourteenth Amendment of the U.S. Constitution does not provide protection to gay people.

A. The European Human Rights Convention

Case law construing the European Convention supports a broad interpretation of the right to privacy. In Dudgeon v. United Kingdom, the European Court of Human Rights held that Northern Ireland’s sodomy statutes banning sexual activity between males, without regard to age, violated the right to privacy guar-
anteed under article 8 of the European Convention. The United Kingdom had argued that article 8(2) of the Convention permitted the challenged legislation. That article allows states to restrict an individual's privacy, where lawful and necessary in a democratic society, to protect morals and the rights and freedoms of others.\textsuperscript{73} The United Kingdom maintained that the legislation was needed in Northern Ireland to safeguard public morality and to protect the interests of those persons in need of special protection—for example, the young and the mentally handicapped—from sexual exploitation.\textsuperscript{74}

The European Court rejected the United Kingdom's argument. The Court agreed that the regulation of homosexual activity might be necessary to some degree.\textsuperscript{75} It concluded, however, that blanket prohibitions against all private homosexual activity were not "necessary in a democratic society" to protect public morals and to prevent the sexual exploitation of the young or mentally handicapped.\textsuperscript{76}

In its analysis of whether the statutes were "necessary," the European Court defined the concept of necessity quite strictly.\textsuperscript{77} It stated that interference with the right to privacy is not "necessary in a democratic society" simply because it is "useful, rea-

\textsuperscript{73} Id.; European Convention, \textit{supra} note 7, at art. 8(2).
\textsuperscript{74} \textit{Dudgeon}, 4 EUR. H.R. REP. at 162.
\textsuperscript{75} \textit{Id.} at 163.
\textsuperscript{76} \textit{See id.} at 164.
\textsuperscript{77} \textit{Id.} at 164–65. The majority stated:

First, "necessary" in this context does not have the flexibility of such expressions as "useful," "reasonable," or "desirable," but implies the existence of a "pressing social need" for the interference in question.

In the second place, it is for the national authorities to make the initial assessment of the pressing social need in each case; accordingly, a margin of appreciation is left with them. However, their decision remains subject to review by the court . . .

Finally, in article 8 as in several other articles of the Convention, the notion of "necessity" is linked to that of a "democratic society." According to the Court's case-law, a restriction on a Convention right cannot be regarded as "necessary in a democratic society" (two hallmarks of which are tolerance and broadmindedness) unless, amongst other things, it is proportionate to the legitimate aim pursued.
sonable, or desirable” to protect morality or the rights of others.\textsuperscript{78} Rather, such interference is “necessary” only in response to a “pressing social need” to protect morals or the rights of others.\textsuperscript{79} Where the need for interference is “pressing,” it must be proportional to the burden imposed on the individual.\textsuperscript{80}

The Court concluded that only it could make the ultimate assessment regarding the necessity of such restrictions.\textsuperscript{81} The Court indicated that in analyzing the necessity of legislation to protect morals, it would respect the assessment of local authorities.\textsuperscript{82} Such deference could not be unlimited, however, especially when the local action interfered with “a most intimate aspect of private life.”\textsuperscript{83}

The European Court stated that moral opposition to homosexuality in Northern Ireland was a factor to be considered in determining whether there was a pressing need for the statutes protecting public morality.\textsuperscript{84} The Court recognized the need not to impose values from outside but to examine the statutes “in the context of Northern Ireland society.”\textsuperscript{85} Nonetheless, it suspected that the United Kingdom’s representation of moral opposition was exaggerated. The Court noted that in Northern Ireland itself, officials had not enforced the statutes in recent years.\textsuperscript{86} As a result of this failure to enforce the statutes, it found no injury to Northern Ireland’s moral standards or any public demand for stricter enforcement.\textsuperscript{87}

\textsuperscript{78} Id. at 164.
\textsuperscript{79} Id.
\textsuperscript{80} Id. at 165.
\textsuperscript{81} Id. at 164.
\textsuperscript{82} Id.
\textsuperscript{83} Id. at 165.
\textsuperscript{84} Id. at 166. The majority stated:
As the Government correctly submitted, it follows that the moral climate in Northern Ireland in sexual matters, in particular as evidenced by the opposition to the proposed legislative change, is one of the matters which national authorities may legitimately take into account in exercising their discretion . . . . Whether this point of view be right or wrong, and although it may be out of line with current attitudes in other communities, its existence among an important sector of Northern Ireland society is certainly relevant for the purposes of article 8(2).
\textsuperscript{85} Id. at 165.
\textsuperscript{86} Id. at 167.
\textsuperscript{87} Id. The court inferred from this public indifference that there was no deep-rooted opposition to private homosexual conduct between adults. Id. In his dissenting opinion, Judge Zekia interpreted this fact differently, concluding that the lack of public concern about the rarity of prosecution resulted from the fact that such offenses are quite rare, indicating a very deep-rooted opposition to homo-sexuality. Id. at 173.
The Court did not, however, limit its inquiry to social conditions in Northern Ireland. It noted dramatic social changes in the rest of Europe and increased tolerance for gay people. The Court cited the general decriminalization of homosexuality throughout Europe as evidence that it was no longer considered necessary or appropriate to subject private homosexual behavior between adults to criminal sanction in order to protect public morality.

The Court also rejected the argument that the statutes were needed to protect the young and mentally handicapped from sexual exploitation. It concluded that blanket prohibitions against homosexual conduct were overly broad, and that more narrowly drafted age of consent laws could provide such protection. The Court indicated, however, that it would defer to the assessments of local authorities in defining the age of consent.

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88 Id. at 167. The majority stated:

As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member-States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member-States.

89 Id.

90 See id. at 164.

91 Id. The majority opinion stated:

The Court has already acknowledged the legitimate necessity in a democratic society for some degree of control over homosexual conduct notably in order to provide safeguards against the exploitation and corruption of those who are specially vulnerable by reason, for example, of their youth. However, it falls in the first instance to the national authorities to decide on the appropriate safeguards of this kind required for the defence of morals in their society and, in particular, to fix the age under which young people should have the protection of the criminal law.

92 Id. at 168–69. The United Kingdom has set the age of consent for male homosexual activity at 21. For all others, the age of consent is 17. This has been challenged under article 14 of the European Convention which states: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” European Convention, supra note 7, at art. 14. In Dudgeon, the plaintiff argued that the Northern Ireland statutes restricted his right to privacy to a greater degree than restrictions on male homosexuals in the rest of the United Kingdom and that they were also greater than those imposed on heterosexuals and lesbians in Northern Ireland. 4 EUR. H.R. REP. at 169. The Court in Dudgeon declined to address the article 14 argument, having invalidated the statutes under article 8. Id. at 170. The European Commission on Human Rights has not accepted these article 14 arguments. See X v. United Kingdom, 7 EUR. H.R. REP. 145 (1984).
The Court concluded from this process that there was no pressing need for these statutes to protect public morals or to protect the "vulnerable sections of society." The Court found that the need certainly was not proportional to "the detrimental effects which the very existence of the legislative provisions in question could have on the life of a person of homosexual orientation . . . ." Ultimately, the Court believed that although homosexual conduct might shock many persons, that alone could not justify intrusion into the private sphere.

In a dissenting opinion, Judge Zekia disputed the majority's conclusion that the statutes were not "necessary in a democratic society." Noting the united condemnation of sodomy in both the Christian and Moslem religions, he emphasized the right of majorities in those countries to enforce traditional morality. Such communal rights, he concluded, were protected under articles 9 and 10 of the European Convention guaranteeing freedom of religion and expression. Indeed, he concluded that thwarting the will of the majority in such matters would be undemocratic.

Judge Zekia concluded that these communal rights outweighed any individual's right to privacy. He feared that a change in the law would cause greater disturbance in more traditional societies than the majority suspected. Judge Zekia believed that authorities in those societies were in a better position than the Court to

93 Dudgeon, 4 EUR. H.R. REP. at 167.
94 Id.
95 Id.
96 Id. at 171.
97 Id.
98 Id. at 172.
99 Id. Judge Zekia wrote:
While considering the respect due to private life of a homosexual under article 8(1), we must not forget and must bear in mind that respect is also due to the people holding the opposite view, especially in a country populated by a great majority of people who are completely against unnatural immoral practices. Surely the majority in a democratic society are entitled . . . to respect for their religious and moral beliefs and entitled to teach and bring up their children consistently with their own religious and philosophical convictions.
Id.
100 Id. Judge Zekia wrote:
A democratic society is governed by the rule of the majority. It seems to me somewhat odd and perplexing, in considering the necessity of respect for one's private life, to underestimate the necessity of keeping a law in force for the protection of morals held in high esteem by the majority of people.
Id.
101 Id.
assess both the prevailing moral standards in those countries and
the extent to which such standards should be enforced.\textsuperscript{102}

In a separate dissent, Judge Matscher disagreed with the ma-
jority's definition of "necessity." In his opinion, the article 8(2)
requirement that legislation be "necessary in a democratic society"
does not mean that there must be a "pressing social need" for
the legislation.\textsuperscript{103} Rather, the legislation will satisfy the require-
ment if, without it, there is a risk that the goal will not be
achieved.\textsuperscript{104}

Notwithstanding the objections raised in the dissents, the Eu-
ropean Court has continued to follow the position adopted in
\textit{Dudgeon}. In \textit{Norris v. Ireland}, the Court recently invalidated so-
domy statutes in the Republic of Ireland.\textsuperscript{105} It concluded, in
accordance with the \textit{Dudgeon} standard, that the "detrimental ef-
facts" of these statutes on the lives of gay people outweighed the

\textsuperscript{102} \textit{Id.} at 173.
\textsuperscript{103} \textit{Id.} at 174–75. Judge Matscher wrote:

[It is said that the adjective "necessary" implies the existence of a "pressing social
need" to interfere in the manner in question. In my opinion, once it is accepted
that an aim is lawful within the meaning of article 8(2), any measure directed
toward this aim is necessary when, if the measure is not taken, there is a risk
that the aim will not be achieved. It is only in this context that one discusses
whether a certain measure is necessary and, to add a new element, whether the
merit of the aim is in proportion to the seriousness of the measure. Since the
adjective "necessary" refers solely to the measures (means), it does not allow the
lawfulness of the aim itself to be "weighed" which the judgment seems to do by
relating "necessary" to "pressing social need."
\textit{Id.}
\textsuperscript{104} \textit{Id.} at 175.
\textsuperscript{105} \textit{Norris v. Ireland}, 13 Eur. H.R. Rep. 186, 201 (1989). The Court reviewed the
validity of three statutes still in force in Ireland. The 1861 Act stated that: "Whosoever
shall be convicted of the abominable crime of buggery, committed either with mankind
or with any animal, shall be liable to be kept in penal servitude for life." \textit{Id.} at 189. Section
62 of the 1861 Act provided that:

Whosoever shall attempt to commit the said abominable crime of buggery, committed either with mankind
or with any animal, shall be guilty to be kept in penal servitude for life.
\textit{Id.} at 189–90.
The three statutes were interpreted by the \textit{Norris} court as providing some discretion to
the trial judge in sentencing. \textit{Id.} at 190.
protection of public morals.\textsuperscript{106} The Court expressly rejected the view of the Irish Government that the \textit{Dudgeon} standard effectively eliminates the morals exception from article 8(2) of the European Convention.\textsuperscript{107} It concluded that the deferential approach, which the Irish Government suggested, would leave state discretion in the area of public morals unfettered.\textsuperscript{108} Referring to \textit{Dudgeon}, the Court stated that such broad deference to local judgments cannot be warranted where the state intrudes on a "most intimate aspect of private life."\textsuperscript{109}

\textbf{B. The United States}

Unlike the decisions of the European Court, U.S. case law discussing the right to privacy does not consider the language of international human rights instruments. Rather, U.S. cases interpret the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution.\textsuperscript{110} Thus, U.S. case law will not aid in interpreting restrictions on the right to privacy in international human rights instruments. It will, however, aid in defining the types of interests that can be reasonably included within the privacy right.\textsuperscript{111}

In \textit{Bowers v. Hardwick}, the Supreme Court held that the right to privacy does not protect all private sexual conduct between consenting adults.\textsuperscript{112} The Court upheld the constitutionality of a Georgia sodomy statute prohibiting all oral and anal sex acts.\textsuperscript{113} Recognizing the danger of judges imposing their own values on

\textsuperscript{106} \textit{Id.} at 200–01. In reasoning echoing that found in \textit{Dudgeon}, the court concluded that there was no pressing social need to proscribe all private consensual homosexual activity in order to protect public morals. \textit{Id.} at 200. As in \textit{Dudgeon}, the court noted that there was no tremendous public opposition to private consensual homosexual activity in the Republic of Ireland. \textit{Id.} at 198.

\textsuperscript{107} \textit{Id.} at 199.

\textsuperscript{108} \textit{Id.} at 199–200.

\textsuperscript{109} \textit{Id.} at 200.


\textsuperscript{111} Statute of the I.C.J., \textit{supra} note 68, at art. 38(1)(d).


\textsuperscript{113} \textit{Id.} at 188. The Georgia statute criminalized sodomy, making it punishable by imprisonment for not less than one year and not more than 20 years. The statute defined sodomy as "any sexual act involving the sex organs of one person and the mouth or anus of another . . . ." \textit{Id.}
the U.S. Constitution, the Court defined the right to privacy narrowly. It concluded that the right to privacy protects only matters related to family, marriage, and procreation.

Concluding that the Fourteenth Amendment right to privacy was not broad enough to protect the interests of gay people, the Court refused to recognize an independent fundamental right “to engage in homosexual sodomy.” It indicated that the Fourteenth Amendment only protects those fundamental liberties “implicit in the concept of ordered liberty such that neither liberty nor justice would exist if they were sacrificed” or “deeply rooted in this Nation’s history and tradition.” The Court thought it obvious that a right to homosexual sodomy is not a fundamental right. Thus, because no fundamental right had been violated, the Court deferred to the judgment of the Georgia legislature that sodomy should be criminalized to protect morality.

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114 Id. at 194. The majority stated: “The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.” Id.

115 Id. at 190. Justice White wrote for the majority:

Accepting decisions in these cases and the above description of them, we think it evident that none of the rights announced in those cases [declaring the right to privacy] bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated . . . . Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct is constitutionally insulated from state proscriptions is unsupportable.

116 Id. at 191-92. “Precedent aside, however, respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy.” Id. at 191.

117 Id. at 191-92.

118 Id. at 192. The majority opinion states:

It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. Sodomy was a criminal offense at common law and was forbidden by the laws of the original thirteen States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 states outlawed sodomy, and today, 24 states and the District of Columbia continue to provide criminal penalties for sodomy performed in private between consenting adults. Against this background, to claim that a right to engage in such conduct is “deeply rooted in this Nation’s history and tradition” or “implicit in the concept of ordered liberty” is, at best, facetious.

119 Id. at 192-94. The Court reasoned that:

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inade-
In a dissenting opinion, Justice Blackmun maintained that the majority had misstated the issue. He believed that the case was not about a right to commit sodomy, but about "the most comprehensive of rights and the right most highly valued by civilized men, namely, the right to be let alone." Justice Blackmun thought that the Court had interpreted prior case law too narrowly. In his view, the right to privacy is not limited only to a family, marriage, or procreational context, but extends to all decisions that are proper for individuals to make.

Justice Blackmun rejected the majority's conclusion that the long and passionately held moral convictions of the people of Georgia were sufficient grounds for the statute. On the contrary, he believed that the fact that gay men and lesbians live in a manner that upsets the majority of people is reason for the courts to be especially sensitive to their rights. He also stated that religious values were not sufficient justification for the statute.

I cannot agree that either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from the Court's scrutiny. As Justice Jackson wrote so eloquently... "we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization... [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."

"It is precisely because the issue raised by this case touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority."
ute, stating that "the legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine." Although Bowers v. Hardwick is helpful in trying to define the scope of the right to privacy in international law, it has limited utility. The majority's concerns about expanding the right to privacy to protect gay people are partially due to that right's status under the U.S. Constitution. Unlike international human rights instruments, the U.S. Constitution does not mention a right to privacy. Rather, it is a judicial extrapolation from the Due Process Clause of the Fourteenth Amendment. Recognizing the danger of judicial overextension, the Court adopted a very conservative approach, concluding that the right to privacy should be expanded cautiously.

IV. CULTURAL OPPOSITION TO HOMOSEXUALITY

Many states restrict gay people's right to privacy because of moral objections to homosexuality. The international human rights instruments appear to permit such restrictions because they do not confer the right to privacy in absolute terms. Indeed, they expressly permit interference with an individual's private life to protect the general welfare and morality.

Moral objections to homosexuality are common throughout the world. The Christian and Jewish religions have historically condemned homosexuality. Islam has similarly proscribed homosexual activity. In recent years, however, religious opposition to homosexuality has been criticized. Some scholars dispute the interpretation of scriptural passages commonly invoked to con-

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124 Id. at 211–12. Justice Blackmun wrote: A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus . . . . No matter how uncomfortable a certain group may make the majority of the Court, we have held that "mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty." Id. (quoting O'Connor v. Donaldson, 422 U.S. 563, 575 (1975)).
125 Id. at 211.
126 See supra note 114 and accompanying text.
127 See supra notes 32, 45–48 and accompanying text.
128 Id.
130 INTERNATIONAL LESBIAN AND GAY ASSOCIATION, SECOND ILGA PINK BOOK 154 (1988) [hereinafter ILGA].
demn homosexuality.131 Some historians point to past tolerance of homosexuality in both Christian132 and Muslim societies.133 Furthermore, the process of secularization in many nations makes religious concerns irrelevant in secular law.134

The international legal trend reflects this process of secularization. Most European nations have abandoned their sodomy laws.135 In recent years, many common law countries have repealed or refused to enforce such statutes. In the United Kingdom, homosexual acts are legal between most persons over the age of twenty-one.136 Ireland has abandoned its sodomy statute.137 In the United States, twenty-six states have abandoned their sodomy statutes.138 New Zealand has amended its sodomy statute, legalizing homosexual activity between persons over the age of sixteen.139 Australia has decriminalized homosexual conduct in the Capital territory, New South Wales, South Australia, and Victoria.140

Religious and moral opposition to homosexuality are frequently the justification for laws criminalizing homosexual conduct. The use of religious views to justify secular legislation, however, has been criticized in recent years. The international legal trend decriminalizing homosexual conduct reflects this criticism.

V. EXTENDING THE RIGHT TO PRIVACY TO GAY PEOPLE

Expanding the right to privacy in the international human rights instruments to protect gay people from state persecution would certainly not be accepted in many parts of the world. Indeed, an attempt to do so might fuel arguments that international human rights law is no more than an imposition of the

131 See generally JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY (1980).
132 Id.
134 See supra note 124 and accompanying text.
135 See supra note 88 and accompanying text.
136 ILGA, supra note 130, at 231.
139 ILGA, supra note 130, at 221.
140 Id. at 219.
values of the rich and powerful nations of Western Europe and North America on the rest of the world.\textsuperscript{141} Such an imposition could itself constitute a violation of human rights law by denying to less powerful nations the dignity of their religious and cultural values.\textsuperscript{142} The process of incorporating international human rights law into any society must, therefore, carefully account for the local culture.\textsuperscript{143}

Deference to the values of such societies, however, cannot be absolute. International human rights law extends rights both to individuals and minorities, often against the will of the majority culture.\textsuperscript{144} For example, international law has recognized the rights of religious and ethnic minorities\textsuperscript{145} as well as those of racial minorities.\textsuperscript{146}

The right to privacy is such an internationally recognized human right\textsuperscript{147}—it will not automatically yield to majority opposition. None of the international instruments, however, recognizes the right to privacy in absolute terms.\textsuperscript{148} Rather, they expressly permit interference with an individual's private life to protect the general welfare and morality.\textsuperscript{149} While states are not permitted

\textsuperscript{141} Sieghart, \textit{supra} note 12, at 15.
\textsuperscript{142} See \textit{supra} notes 99–100 and accompanying text.
\textsuperscript{143} Dudgeon v. United Kingdom, 4 \textit{EUR. H.R. REP.} 149, 172 (1981) (Zekia, J., dissenting).
\textsuperscript{144} American Convention, \textit{supra} note 7, at art. 1; International Covenant, \textit{supra} note 7, at art. 2(1); European Convention, \textit{supra} note 7, at art. 1.

The International Covenant states: "[E]ach State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant . . . ." International Covenant, \textit{supra} note 7, at art. 2(1).

The European Convention states: "The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention." European Convention, \textit{supra} note 7, at art. 1.

The American Convention states: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms . . . ." American Convention, \textit{supra} note 7, at art. 1.

\textsuperscript{145} International Covenant, \textit{supra} note 7, at art. 1. Article 27 states: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language." \textit{Id.}

\textsuperscript{147} See \textit{supra} note 50 and accompanying text.
\textsuperscript{148} See \textit{supra} notes 45–60 and accompanying text.
\textsuperscript{149} \textit{Id.}
to enact restrictions that would render the right to privacy a nullity,\textsuperscript{150} states do appear to enjoy some discretion in determining the extent of interference.

Local sentiment should be considered, especially when a controversial issue, like homosexuality, is involved.\textsuperscript{151} Even the \textit{Dudgeon} Court, when analyzing the extent to which Northern Ireland could restrict the privacy rights of homosexuals, factored local sentiment against homosexuality into its analysis.\textsuperscript{152} Failure to account for local cultural values can only undermine the legitimacy of international human rights law.

Nonetheless, interference with the right to privacy, at least in democratic societies, should be limited. In such societies, intolerance cannot be used to justify public policy,\textsuperscript{153} especially when the resulting burden on the affected individual or minority is very great.\textsuperscript{154} As a matter of policy, the standard adopted to interpret the scope of the right to privacy in the international instruments, at least for persons living in democratic nations, must reflect the fact that people in those nations greatly value their personal autonomy.\textsuperscript{155}

The loose standards articulated in the \textit{Bowers} majority opinion\textsuperscript{156} and the dissents in \textit{Dudgeon}\textsuperscript{157} are too weak to further this policy. These standards would permit local governments to substitute their own moral judgments for those of the affected individuals. Such a standard would render a nullity both the rights to privacy and to conscience recognized in the international instruments.

Thus, as the European Court has held when interpreting the right to privacy in the European Convention, interference with the right to privacy should be permitted only when there is a pressing social need for such interference which outweighs the burden on the individual.\textsuperscript{158} This standard would prevent states from criminalizing homosexual conduct outright, given the burden that such an action would impose on gay people.\textsuperscript{159} The

\textsuperscript{150} See \textit{supra} note 42 and accompanying text.

\textsuperscript{151} \textit{Merrills}, \textit{supra} note 65, at 145.

\textsuperscript{152} See \textit{supra} note 84 and accompanying text.

\textsuperscript{153} See \textit{supra} note 122 and accompanying text.


\textsuperscript{155} See \textit{supra} note 121 and accompanying text.

\textsuperscript{156} See \textit{supra} notes 112–19 and accompanying text.

\textsuperscript{157} See \textit{supra} notes 96–104 and accompanying text.

\textsuperscript{158} See \textit{supra} note 77 and accompanying text.

standard might not, however, preclude nations from favoring their own cultural values in a less burdensome fashion—for example, by only allowing heterosexual marriages.160

The texts of the Universal Declaration and the American Convention support the application of a privacy standard developed in the context of democratic societies. The language of these two instruments is similar to the language of the European Convention, permitting restrictions on the right to privacy only in the context of a democratic society.161 The Universal Declaration allows lawful interference with the right to privacy where necessary in a democratic society to protect morality.162 Likewise, the American Convention only permits interference with the individual’s right to privacy where necessary in a democratic society to promote the general welfare.163 Thus, the scope of the right to privacy in the Universal Declaration and the American Convention appears as broad as that of the European Convention, which protects gay people’s privacy interests.

The text of the International Covenant, however, does not construe the right to privacy in the context of a democratic society. Rather, the International Covenant forbids only arbitrary interference with the right to privacy.164 Nonetheless, the text of the International Covenant does not support an interpretation of the right to privacy that would always permit states to substitute their moral judgments for those of individuals. Such a construction, besides greatly curtailing the scope of the privacy right,

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161 See supra notes 32, 45, 47, 48 and accompanying text.

162 Universal Declaration, supra note 8, at art. 29(2).

163 American Convention, supra note 7, at art. 32(2).

164 See supra note 46 and accompanying text.
would violate rules of construction by effectively eliminating the right to conscience recognized in article 18(1).  

Although the scope of the right to privacy outlined in *Dudgeon* is potentially broad enough to offer gay people protection, the likelihood of enforcement of such a broad interpretation is questionable. This is especially so in authoritarian and totalitarian states and states where traditional religious values are still strong. Such states, unlike democracies, do not necessarily value tolerance and personal autonomy. They consider a broad interpretation of the right to privacy no more than an outside imposition. Absent binding treaty obligations, gay people in those states cannot rely on the international human rights instruments to protect their human rights. Nonetheless, given the seriousness of human rights violations against gay people, international human rights organizations should carefully monitor for abuses and protest them to the offending governments.

**CONCLUSION**

International law extends fundamental rights to privacy and conscience to all human beings, including gay men and lesbians. Nonetheless, these rights are systematically denied to gay people throughout the world because of religious and moral objections to homosexuality. The right to privacy in the international human rights instruments protects the personal decisions of gay people. Although enforcement of this right may be difficult, human rights organizations should protest human rights violations against gay people, especially in nondemocratic states. These governments should not simply claim that protecting the human rights of gay people would be an imposition of western culture on the rest of the world.

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165 See *supra* note 42 and accompanying text.
166 SIEGHART, supra note 12, at 15.
167 RESTATEMENT, supra note 50, at § 703, cmt. c.