No. 02-102

IN THE
Supreme Court of the United States

JOHN GEDDES LAWRENCE and TYRON GARNER,
Petitioners,

v.

STATE OF TEXAS,
Respondent.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF TEXAS, FOURTEENTH DISTRICT

BRIEF *AMICI CURIAE* OF MARY ROBINSON, AMNESTY INTERNATIONAL U.S.A., HUMAN RIGHTS WATCH, INTERIGHTS, THE LAWYERS COMMITTEE FOR HUMAN RIGHTS, AND MINNESOTA ADVOCATES FOR HUMAN RIGHTS IN SUPPORT OF PETITIONERS

ROBERT WINTEMUTE
SCHOOL OF LAW
KING'S COLLEGE LONDON
UNITED KINGDOM

JOSEPH F. TRINGALI
TYLER B. ROBINSON
SIMPSON THACHER & BARTLETT
425 Lexington Ave.
New York, NY 10017-3954
(212) 455-2000

HAROLD HONGJU KOH*
JAMES SILK
DEENA R. HURWITZ
ALLARD K. LOWENSTEIN
INTERNATIONAL HUMAN RIGHTS
CLINIC, YALE LAW SCHOOL
127 Wall Street
New Haven, CT 06511
(203) 432-4932

Counsel for Amici Curiae

* *Counsel of Record*

178403

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

Whether Petitioners' criminal convictions under the Texas "Homosexual Conduct" law, which criminalizes adult, consensual same-sex intimate behavior, but not identical behavior by different-sex couples – violate the Fourteenth Amendment right to equal protection of the laws?

Whether Petitioners' criminal convictions for adult consensual sexual intimacy in the home violate their vital interests in liberty and privacy protected by the Due Process Clause of the Fourteenth Amendment?

Whether *Bowers v. Hardwick*, 478 U.S. 186 (1986), should be overruled?

TABLE OF CONTENTS

Contents

TABLE OF CITED AUTHORITIES

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

Treaties and Conventions

Cited Authorities

Constitutions

Page

Other

Cited Authorities

Cited Authorities

Cited Authorities

INTEREST OF *AMICI CURIAE*

Amici curiae are an individual and five nongovernmental organizations dedicated to the promotion of freedom worldwide.[1]

Mary Robinson served as United Nations High Commissioner for Human Rights from 1997 to 2002. Previously, she served for seven years as the President of the Republic of Ireland, and for twenty years as a Senator. As a barrister, she served as counsel in *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988).

Amnesty International is an international human rights organization established in 1961 to promote a world in which every person enjoys the human rights enshrined in the Universal Declaration of Human Rights. Amnesty International was awarded the Nobel Peace Prize in 1977.

Human Rights Watch, the largest U.S.-based international human rights organization, was established in 1978 to report on violations of human rights worldwide.

Interights, a London-based international human rights organization, was established in 1982 to provide leadership in the legal protection of human rights worldwide.

The Lawyers Committee for Human Rights, based in New York City, has worked since 1978 in the United States and abroad to create a secure and humane world by advancing justice, dignity, and respect for the rule of law.

Minnesota Advocates for Human Rights, founded in 1983, is the largest Midwest-based non-governmental organization engaged in international human rights work.

---

1. Letters of consent to the filing of this brief have been lodged with the Clerk of Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for amici states that no counsel for a party authored this brief in whole or in part and no person, other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

This Court should not decide in a vacuum whether criminalization of same-sex sodomy between consenting adults violates constitutional guarantees of privacy and equal protection. Other nations with similar histories, legal systems, and political cultures have already answered these questions in the affirmative. Applying the same or similar constitutional terms to nearly identical fact patterns, foreign and international courts have barred the criminalization of sodomy between consenting adults. This Court should pay decent respect to these opinions of humankind. Far from ignoring parallel precedents, this Court has regularly and traditionally used international and foreign law rulings to aid its constitutional interpretation.

International and foreign court decisions have triply rejected the understanding of the right to privacy in this Court's decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986). These decisions reject: (1) *Bowers*' *decisional theory* of privacy, which denies that sexual conduct between same-sex partners is one of the "fundamental liberties" that is "implicit in the concept of ordered liberty;" (2) *Bowers*' *relational theory* of privacy, which claims that "no connection [exists] between family, marriage, or procreation on the one hand, and homosexual activity, on the other;" and (3) *Bowers*' *zonal theory* of privacy, which claims that sexual activity between same-sex partners in the home cannot be protected without also protecting "adultery, incest, and other sexual crimes" in the home. *Id.* at 196.

Finally, international and foreign courts have invalidated same-sex sodomy laws for betraying naked prejudice and a "bare . . . desire to harm a politically unpopular group" inconsistent with this Court's equal protection reasoning in *Romer v. Evans*, 517 U.S. 620, 634 (1996) (citation and internal quotation marks omitted). International and foreign rulings demonstrate the irrationality of discriminating against some individuals who commit sodomy, but not others, based solely on their sexual orientation. By their nature, sodomy laws arbitrarily deny persons equal treatment based solely on whom they choose to love.

I. THIS COURT HAS TRADITIONALLY USED INTERNATIONAL AND FOREIGN LAW RULINGS TO AID ITS CONSTITUTIONAL INTERPRETATION

From the beginning of the Republic, the Constitution's Framers understood that the United States could not maintain its global position without paying "a decent respect to the opinions of mankind."[2] Applying this view to modern times, Justice O'Connor recently noted:

> Although international law and the law of other nations are rarely binding upon our decisions in U.S. courts, conclusions reached by other countries and by the international community should at times constitute persuasive authority in American courts. . . . While ultimately we must bear responsibility for interpreting our own laws, there is much to learn from other distinguished jurists who have given thought to the same difficult issues that we face here.[3]

The lower court's decision rested on *Bowers v. Hardwick,* in which this Court concluded seventeen years ago that same-sex sodomy was not "implicit in the concept of ordered liberty," that no connection exists between same-sex activity and family, marriage, or procreation, and that to protect same-sex sodomy would compel the eventual legalization of adultery and incest.

---

2. *See* Declaration of Independence, ¶ 1 (U.S. 1776) (emphasis added): "When in the Course of human events, it becomes necessary for one people to dissolve the political bonds which have connected them with one another . . . *a decent respect to the opinions of mankind* requires that they should declare the causes which impel them to the separation." As Justice Blackmun noted, the concept of a "decent respect for world opinion" requires that "evolving standards of decency be measured, in part, against international norms." Harry A. Blackmun, *The Supreme Court and the Law of Nations*, 104 Yale L.J. 39, 45-46 (1994).

3. Justice Sandra Day O'Connor, *Keynote Address Before the Ninety-Sixth Annual Meeting of the American Society of International Law*, 96 Am. Soc'y Int'l L. Proc. 348, 350 (2002).

Bowers v. Hardwick, 478 U.S. 186, 191, 194, 196, 197 (1986). Yet as this brief demonstrates, each of these empirical conclusions has since been firmly rebutted by judicial evidence from other nations. These parallel international and foreign law rulings necessarily "cast an empirical light on the consequences of different [national] solutions to a common legal problem." *Printz v. United States*, 521 U.S. 898, 977 (1997) (Breyer, J., dissenting).

Without examining these foreign precedents, the court below upheld the Texas Homosexual Conduct statute in part because it found that "homosexual conduct is not a right that is 'implicit in the concept of ordered liberty.'" *Lawrence v. State*, 41 S.W.3d 349, 361 (Tex. Crim. App. 2001) (en banc). Yet as this Court has repeatedly recognized, the very concept of "ordered liberty" is not uniquely American, but is "enshrined" in the legal history of "English-speaking peoples," including neighboring legal systems.[4] Throughout history, this Court has relied on the legal experiences of other advanced democracies to illuminate the reach of certain fundamental rights and their connection to ordered liberty.[5] Just last Term, in *Atkins v.*

4. *Ingraham v. Wright*, 430 U.S. 651, 673 n.42 (1977) (quoting *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949)); *see also Knight v. Florida*, 528 U.S. 990, 997 (1999) (Breyer, J., dissenting from denial of certiorari) (stating that "this Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in roughly comparable circumstances" and that "[i]n doing so, the Court has found particularly instructive opinions of former Commonwealth nations insofar as those opinions reflect a legal tradition that also underlies our own [Bill of Rights]").

5. *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436, 488 n.59, 521-22 (1966) (comparing U.S. practice with that in India, Sri Lanka, and Scotland); *Poe v. Ullman*, 367 U.S. 497, 548 (1961) (Harlan, J., dissenting) (delimiting notion of privacy in the home by looking to "common understanding throughout the English-speaking world"); *Quinn v. United States*, 349 U.S. 155, 167 (1955) (finding practice "supported by long-standing tradition here and in other English-speaking (Cont'd)

Virginia,[6] this Court looked to the opinions of "the world community" to conclude that execution of persons with mental retardation would offend civilized standards of decency.

The court below cited ancient Roman law, Blackstone, and Montesquieu to justify its ruling upholding the Texas statute in part because "Western civilization has a long history of repressing homosexual behavior by state action." *Lawrence*, 41 S.W.3d at 361. Yet in making that assertion, the court took no notice of judicial decisions from any *modern* Western civilization. In so doing, the court below ignored Chief Justice Rehnquist's 1989 admonition that "now that constitutional law is solidly grounded in so many [foreign] countries, *it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative*

(Cont'd)
nations"); *Rochin v. California*, 342 U.S. 165, 169 (1952) (Due Process Clause obliges courts to ascertain whether laws offend "those canons of decency and fairness which express the notions of justice of English-speaking peoples"); *Malinski v. New York*, 324 U.S. 401, 413-14 (1945) (Frankfurter, J., concurring) ("[t]he safeguards of 'due process of law' and 'the equal protection of the laws' summarize the history of freedom of English-speaking peoples"); *Rast v. Van Deman & Lewis Co.*, 240 U.S. 342, 366 (1916) (Constitution embodies "'only relatively fundamental rules of right, as generally understood by all English-speaking communities'") (quoting *Otis v. Parker*, 187 U.S. 606, 608-09 (1902)).

6. 122 S. Ct. 2242, 2249 n.21 (2002) (Stevens, J.):

> [W]ithin the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved. . . . Although [factors including world opinion] are by no means dispositive, their consistency with the legislative evidence lends further support to our conclusion that there is a consensus among those who have addressed the issue.

See also Thompson v. Oklahoma, 487 U.S. 815, 830 (1988) (looking to global standards on execution of fifteen year-olds).

process."[7] In so suggesting, the Chief Justice merely summarized the previous practice of the members of this Court in looking to foreign practice or precedent to illuminate interpretations of the United States Constitution.[8]

---

7. The Hon. William H. Rehnquist, *Constitutional Courts-Comparative Remarks (1989)*, *reprinted in Germany and its Basic Law: Past, Present and Future – a German-American Symposium* 411, 412 (Paul Kirchhof & Donald P. Kommers eds., 1993) (emphasis added). As the Chief Justice explained:

> For nearly a century and a half, courts in the United States exercising the power of judicial review had no precedents to look to save their own, because our courts alone exercised this sort of authority. When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.

Id. *Cf. Raines v. Byrd*, 521 U.S. 811, 828 (1997) (Rehnquist, C.J.) (noting European law on legislative standing but declining to find it in U.S. constitutional regime); *Washington v. Glucksberg*, 521 U.S. 702, 710, 718 n.16, 785-87 (1997) (Rehnquist, C.J.) (declaring that "in almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide" and noting that "other countries are embroiled in similar debates" concerning physician-assisted suicide, citing Canadian Supreme Court, British House of Lords Select Committee, New Zealand's Parliament, Australian Senate, and Colombian Constitutional Court).

8. *See, e.g.*, *Planned Parenthood v. Casey*, 505 U.S. 833, 945 n.1 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) (citing abortion decisions by West German Constitutional Court and Canadian Supreme Court); *Thompson v. Oklahoma*, 487 U.S. 815, 830, 851 (1988) (Stevens, J.) (execution of juveniles violates norms shared "by other nations that share our Anglo-American heritage, and by the leading members of the Western European community"); *id.* at 851 (O'Connor, J., concurring) (noting that U.S. had agreed by ratifying Article 68 of

(Cont'd)

As petitioners' brief demonstrates, since *Bowers* was decided, a new national consensus against criminal sodomy laws has emerged. Given this national shift, in Justice Scalia's words:

> The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so "implicit in the concept of ordered liberty" that it occupies a place

---

(Cont'd)

the Geneva Convention to set a minimum age of 18 for capital punishment in certain circumstances); *Enmund v. Florida*, 458 U.S. 782, 796-797 n.22 (1982) (O'Connor, J.) (noting elimination or restriction of felony murder in England, India, Canada, and a "number of other Commonwealth countries"); *United States v. Stanley*, 483 U.S. 669, 710 (1987) (O'Connor, J., concurring in part and dissenting in part) (relying on Nuremberg Military Tribunals in arguing against non-consensual medical experimentation on humans); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 381 (1995) (Scalia, J., dissenting) (Australian, Canadian, and English legislation banning anonymous campaign speech suggest that such bans need not impair democracy); *Zadvydas v. Davis,* 533 U.S. 678, 721 (2001) (Kennedy, J., dissenting) (stating that particular detention of aliens "accords with international views" and referencing Report of U.N. Working Group on Arbitrary Detention and U.N. High Commissioner for Refugees' Guidelines on Detention of Asylum-Seekers); *Glucksberg*, 521 U.S. at 785-87 (Souter, J., concurring) (examining Dutch constitutional practice on physician-assisted suicide); *Holder v. Hall*, 512 U.S. 874, 906 n.14 (1994) (Thomas, J., concurring) (mentioning voting systems of Belgium, Cyprus, Lebanon, New Zealand, West Germany, and Zimbabwe in assessing race-consciousness in U.S. voting system); *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 403 (2000) (Breyer, J., concurring) (finding Court's First Amendment jurisprudence consistent with decisions of European Court of Human Rights and Canadian Supreme Court); *Knight*, 528 U.S. at 995-98 (Breyer, J., dissenting from denial of certiorari) (finding instructive decisions of Privy Council, Supreme Court of India, Supreme Court of Zimbabwe, European Court of Human Rights, Canadian Supreme Court, and U.N. Human Rights Committee on whether lengthy delay in execution renders it inhumane).

> not merely in our mores but, text permitting, in our Constitution as well.

Thompson v. Oklahoma, 487 U.S. at 868 n.4 (Scalia, J., dissenting).

The United States shares a common legal heritage, tradition, and history with many foreign constitutional systems.[9] Legal concepts like "privacy," "liberty," and "equality" are not U.S. property, but have global meaning. By construing these terms in light of foreign interpretations, this Court can use the experience of nations that share its common constitutional genealogy as laboratories to test workable social solutions to our common constitutional problems. *Cf. New State Ice Co. v. Liebmann*, 285 U.S. 262, 310-11 (1932) (Brandeis, J., dissenting) (states in this nation can "serve as . . . laborator[ies]" for "social and economic experiments"). To ignore these precedents virtually ensures that this Court's ruling will generate conflict and controversies with the United States's closest global allies.

II. INTERNATIONAL AND FOREIGN LAW DECISIONS HAVE REJECTED THIS COURT'S DECISION IN *BOWERS* AS RESTING ON A TRIPLY FLAWED UNDERSTANDING OF THE RIGHT TO PRIVACY

This case presents this Court with the opportunity to overrule *Bowers v. Hardwick*, 486 U.S. 178 (1986), which held that the constitutional right to privacy does not protect adult consensual same-sex sodomy in the home. When reexamining prior holdings, the Court's "judgment is customarily informed by a series of prudential and pragmatic considerations,"

9. The U.S. Constitution served as the "principal inspiration and model" for many foreign and international constitutions and covenants. Louis Henkin, *Rights: American and Human*, 79 Colum. L. Rev. 405, 415 (1979). There remains to this day a "vigorous overseas trade in the Bill of Rights, in international and constitutional litigation involving norms derived from American constitutional law." Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 Colum. L. Rev. 537, 540 (1988).

including "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification."[10]

When reexamining *Bowers*, this Court should assess "whether facts . . . have come to be seen so differently" by looking to international, as well as local, understandings. In an increasingly interdependent world, this Court's understanding of facts should be informed by the parallel understandings of peer nations. These precedents demonstrate that the *Bowers* Court misperceived key facts about same-sex sexual conduct. In particular, the *Bowers* Court held that the right to engage in same-sex sodomy fell outside three different theories of privacy—a decisional theory, a relational theory, and a zonal theory. To the contrary, the weight of international and foreign court authority establishes: first, that sexual conduct between same-sex partners involves precisely the kind of intimate decisionmaking this Court has protected under its decisional theory of privacy; second, that sexual conduct between same-sex partners falls within the kind of familial relationships this Court has protected under the relational theory; and third, that sexual conduct between same-sex partners in the home can be protected under a zonal theory without also committing courts to protect "adultery, incest, or other sexual crimes" in the home.

A. Decisional Privacy: In *Casey*, this Court observed that the privacy right protects *decisions:* "the most intimate and personal choices a person can make in a lifetime, choices central to personal dignity and autonomy." 505 U.S. at 851; *see also Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (privacy right encompasses "the interest in independence in making certain kinds of important decisions"). Yet *Bowers* rejected the contention that adult consensual same-sex activity in the home was such an intimate or personal choice, relying instead on a relational theory of privacy that protected only the relations of "family, marriage, and procreation."

10. *Casey*, 505 U.S. at 854-55.

In stark contrast to *Bowers*, foreign and international court decisions have long held that decisional privacy protects adult consensual same-sex sexual activity. International and foreign tribunals have accepted as self-evident that decisions pertaining to sexual conduct between same-sex partners are among "the most intimate and personal choices a person can make in a lifetime." *Casey*, 505 U.S. at 851. Five years before *Bowers*, the European Court of Human Rights decided *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981), *available at* http://www.echr.coe.int, which struck down laws in Northern Ireland prohibiting all sexual activity between men. Rendered by the world's most influential international human rights court, the *Dudgeon* judgment now binds all of the European continent and protects more than 800 million residents of the 44 member states of the Council of Europe.[11]

In *Dudgeon*, the European Court of Human Rights held by a 15-4 vote that laws barring male-male sexual conduct in the home violated Article 8 of the European Convention on Human Rights, which states: "[e]veryone has the right to respect for his private and family life, his home and his correspondence."[12] The *Dudgeon* Court treated as self-evident that Dudgeon's "private life . . . includes his sexual life" and explicitly discussed that privacy right in terms of intimacy and personhood, that is, decisional privacy.[13] Since *Bowers*, the European Court of

11. Although the decision in *Bowers* turned on a single vote, "[n]o one drew the [U.S.] Supreme Court's attention to the importance of *Dudgeon* as a recent decision by the strongest international court of human rights, dealing with a closely analogous problem and having potential persuasive value." Lester, *supra* note 9, at 560. For information on the Council of Europe, see http://www.coe.int.

12. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 8, 213 U.N.T.S. 230, *available at* http://www.coe.int [hereinafter *European Convention*].

13. *Dudgeon*, 45 Eur. Ct. H.R. ¶ 41. The Court observed that the law forced Dudgeon to choose between compliance and personhood: "either he respects the law and refrains from engaging . . . in prohibited sexual acts to which he is disposed by reason of his homosexual

(Cont'd)

Human Rights has twice reaffirmed the *Dudgeon* decision: in *Norris v. Ireland* (1988) and *Modinos v. Cyprus* (1993).[14]

In *Toonen v. Australia* (1994), the U.N. Human Rights Committee followed the *Dudgeon* Court's reasoning and rejected this Court's reasoning in *Bowers*.[15] The Committee construed Article 17 of the International Covenant on Civil and Political Rights, which applies to 149 states party with combined populations of at least three billion people. These countries

(Cont'd)
tendencies, or he commits such acts and thereby becomes liable to criminal prosecution." *Id*. The Court found the asserted state interests insufficient to justify the "detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation." *Id*. ¶ 60.

14. *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) (1988), *available at* http://www.echr.coe.int; *Modinos v. Cyprus*, 259 Eur. Ct. H.R. (ser. A) (1993), *available at* http://www.echr.coe.int. In a recent summary of its case law on the right to respect for private life, the Court noted:

> Private life is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8 (*see, for example, . . . the Dudgeon v. the United Kingdom judgment of 22 October 1981* . . .). Article 8 also protects *a right to identity and personal development* and the right to establish and develop relationships with other human beings and the outside world.

P.G. and J.H. v. United Kingdom, App. No. 44787/98 ¶ 56 (Eur. Ct. H.R. 2001), *available at* http://www.echr.coe.int (emphasis added).

15. *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994) (Hum. Rts. Comm.), *available at* http://www.unhchr.ch/tbs/doc.nsf. In *Toonen*, the Committee found unanimously that Tasmanian laws that prohibited all sexual activity between men violated Article 17's declaration that "No one shall be subjected to arbitrary or unlawful interference with his privacy." *Id*. ¶¶ 8, 9, & 10, citing International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, 999 U.N.T.S. 172, *available at* http://www.unhchr.ch/tbs/doc.nsf [hereinafter ICCPR]. In response, the Tasmanian and Australian Parliaments repealed these sodomy laws.

include the United States, which ratified the Covenant on June 8, 1992. 1676 U.N.T.S. 543.[16]

In the Council of Europe countries, *Dudgeon* has made legislative repeal mandatory since 1981.[17] In Canada, New Zealand, and Israel, legislative repeal took place in 1969, 1986, and 1988 respectively.[18]

In South Africa, common-law and statutory provisions prohibiting male-male sexual activity were unanimously struck down by the Constitutional Court, *inter alia*, under section 14 of the Constitution of 1996, which states that "everyone has the right to privacy." In *National Coalition for Gay and Lesbian Equality v. Minister of Justice* (1998) (*National Coalition I*),

16. In 1995, the Committee considered the initial report of the United States submitted under Article 40 of the Covenant and expressed its concern "at the serious infringement of private life" represented by U.S. sodomy statutes, in violation of Article 17 and the ruling in *Toonen*. *Concluding Observations of the Human Rights Committee: United States of America*, U.N. Doc. CCPR/C/79/Add.50; A/50/40 (Oct. 30, 1995) ¶ 287, *available at* http://www.unhchr.ch/tbs/doc.nsf. No reservation or understanding qualifies the U.S. acceptance of Article 17, and the major U.S. qualification to Article 26 is an understanding that requires that laws be "rationally related to a legitimate government objective," a test which, as Part III *infra* demonstrates, the Texas sodomy law does not satisfy. 138 Cong. Rec. S4781-01 (daily ed., Apr. 2, 1992). For this reason, *amici* also believe that *Toonen* casts doubt on the validity of the Texas sodomy law under the Supremacy Clause of the Constitution.

17. *See* Robert Wintemute, *Sexual Orientation and Human Rights* 93-95 (1997). As an observer member of the Council of Europe that has not followed *Dudgeon*, the United States stands virtually alone among its Western allies in continuing to tolerate sodomy statutes.

18. For Canada, see Criminal Law Amendment Act, 1968-69, Statutes of Canada 1968-69, ch. 38, § 7. For New Zealand, see Nigel Christie, *The New Zealand Same-Sex Marriage Case: From Aotearoa to the United Nations*, *in Legal Recognition of Same-Sex Partnerships: A Study of National, European and International Law* 317 (Robert Wintemute & Mads Andenæs, eds. 2001). For Israel, see Aeyal Gross, *Challenges to Compulsory Heterosexuality: Recognition and Non-Recognition of Same-Sex Couples in Israeli Law, in* Wintemute & Andenæs, *id*. at 391.

the South African Court, like the European Court of Human Rights and the U.N. Human Rights Committee, articulated a decisional theory of privacy, which encompasses an adult's intimate and private decision whether to engage in sexual conduct with a same-sex partner.[19]

In this hemisphere, the Colombian Constitutional Court has similarly underscored the need to protect sexual conduct between same-sex partners not because it occurs within a particular relationship or space, but because it relates to decisional privacy, a fundamental aspect of one's personhood.[20]

---

19. The South African Court observed:

> Privacy recognises that we all have a right to a sphere of private intimacy and autonomy which allows us to establish and nurture human relationships without interference from the outside community. The way in which we give expression to our sexuality is at the core of this area of private intimacy. If, in expressing our sexuality, we act consensually and without harming one another, invasion of that precinct will be a breach of our privacy.

1998 (12) BCLR 1517 (CC) ¶ 32, 1998 SACLR LEXIS 36.

20. *Sentencia No. C-098/96* (Corte Constitucional, 1996) (Colombia Constitutional Court), *available at* http:/ bib.minjusticia.gov.co/jurisprudencia/CorteConstitucional/1996/ Constitucionalidad/C-098-96.htm (*unoff. trans.*).The Colombian Court reasoned:

> Sexuality, whether heterosexual or homosexual, is an essential element of humans and their psyche and, therefore, is included in the broader framework of sociability. The full constitutional protection of the individual, in the form of the rights to personality, and its free development (Colombian Constitution, Articles 14 and 16) includes in its essential core the process of autonomous assumption and decision regarding one's own sexuality. It would be senseless if sexual self-determination were to remain outside the limits of the rights to personality, and its free development, given that identity and sexual conduct occupy in the development of the person and in the unfolding of his liberty and autonomy such a central and decisive place.

Id. ¶ 4.

B. Relational Privacy: *Bowers* further stated that "no connection between family, marriage, or procreation on the one hand, and homosexual activity, on the other, has been demonstrated." 486 U.S. at 191. Yet the European Court of Human Rights, the U.N. Human Rights Committee, and several national constitutional courts have found adult consensual same-sex sexual activity to be protected by the right to privacy even if no connection can be established to "family, marriage, or procreation." Even if such a connection were necessary, tribunals in countries as disparate as South Africa, the United Kingdom, Canada, and Israel have repeatedly challenged *Bowers'* claim by recognizing that there can be a familial dimension to same-sex relationships.

In 1999, the Constitutional Court of South Africa held 11-0 that South Africa could not allow married different-sex partners of permanent residents to immigrate while threatening to deport unmarried same-sex partners of permanent residents.[21] In so holding, the court underscored that recognition of the familial dimension of same-sex partnerships was a global trend, citing Canadian, Israeli, and British authorities.[22] The court stated that gays and lesbians are "capable of forming intimate, permanent, committed, monogamous, loyal and enduring relationships," and "of constituting a family, whether nuclear or extended, and of establishing, enjoying, and benefiting from family life." *Id*. ¶ 53.

The highest appellate court of the United Kingdom has also recognized that there can be a familial aspect to same-sex relationships. In *Fitzpatrick v. Sterling Housing Association Ltd.*

---

21. *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* (1999) (*National Coalition II*), 2000 (1) BCLR 39 (CC), *available at* http://www.concourt.gov.za/judgments/1999/natcoal.pdf.

22. *Id.* ¶ 48. The Court reasoned that "[i]n other countries a significant change in societal and legal attitudes to same-sex partnerships in the context of what is considered to constitute a family has occurred. . . . [T]hese judgments . . . give clear expression to the growing concern for, understanding of, and sensitivity towards . . . gays and lesbians and their relationships. . . ." *Id*.

(1999), the House of Lords held that a man's eighteen-year monogamous same-sex relationship with a deceased tenant qualified him as a "family member" statutorily protected against eviction. [1999] 3 W.L.R. 1113 (H.L.). Lord Clyde observed that "the concept of 'family' is now to be regarded as extending to a homosexual partnership." *Id*. at 1136. Lord Slynn agreed that "two people of the same sex can be regarded as having established membership of a family, one of the most significant of human relationships which both gives benefits and imposes obligations." *Id*. at 1124. Similarly, in *Chamberlain v. Surrey School District No. 36* (2002), the Canadian Supreme Court held 7-2 that a school board acted unreasonably in refusing to approve for classroom use children's books depicting families in which both parents were of the same sex.[23]

Finally, in *El-Al Israel Airlines v. Danilowitz* (1994), the Supreme Court of Israel rejected *Bowers*' claim that there is no evidence of a "connection between family . . . and homosexual activity." *Bowers*, 486 U.S. at 191. Chief Justice Barak observed that the distinction between same-sex and different-sex partners was "not at all relevant to the issue before us," asking how "living together for persons of the same sex [was] different, with regard to the relationship of sharing and harmony and running the social unit, from this life of sharing for heterosexual couples?" *Danilowitz*, 48(5) P.D. 749 ¶ 15 (1994), *available at* http://62.90.71.124/mishpat/html/en/verdict/ElAl.pdf.

C. Zonal Privacy: Finally, this Court has long asserted a zonal theory of privacy that gives heightened protection to activities that occur within the home. *See, e.g.*, *Stanley v. Georgia*, 394 U.S. 557 (1969). *Bowers* anomalously rejected the claim that such a zonal theory would protect adult consensual

23. 2002 Can. Sup. Ct. LEXIS 97 (Dec. 20, 2002). Noting that the children in the district came "from many different types of families"—including "traditional families," "single-parent families," "interracial families," and "same-sex parented families"—the court held that the school could not exclude books representing such families from the curriculum based solely "on the ground that one group of parents finds them morally questionable." *Id*. ¶ 20.

same-sex sexual activity in the home, stating that "it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home." 478 U.S. at 195-96. Yet since *Bowers,* international and foreign precedents have resoundingly demonstrated that recognizing the right of consenting adults to engage in non-commercial sexual activity in the home in no way commits this or any other court to protect "adultery, incest, or other sexual crimes." Other courts have easily negotiated this slippery slope by using the principles of harm, consent, and commerce to qualify the zonal protection of privacy.

These three limiting principles can be found in the jurisprudence of the European Court of Human Rights. In *Laskey, Jaggard & Brown v. United Kingdom*, 24 Eur. H.R. Rep. 39 (1997), *available at* 1997 WL 1104639 (1997), the Court emphasized the harm principle in declining to extend *Dudgeon* to protect consensual, sado-masochistic sexual activity in the home. The *Laskey* Court stressed "that not every sexual activity carried out behind closed doors necessarily falls within the scope of Article 8" privacy.[24]

The European Court has also emphasized that privacy protections extend only to acts among consenting adults. In *Dudgeon* itself, the Court acknowledged that "some degree of regulation of male homosexual conduct" by the criminal law was justified—even with respect to consensual acts committed in private—"to provide sufficient safeguards against exploitation

24. The European Court of Human Rights has had no occasion to apply this harm principle to the case of adultery for the simple reason that in Council of Europe countries, adultery among consenting adults is rarely, if ever, a criminal offense, as opposed to a ground for divorce. *See Tyler v. United Kingdom* (App. No. 21283/93) (1994) (Eur. Comm'n H.R.), *available at* http://www.echr.coe.int (observing in a disciplinary case against a Church of England priest that "adultery . . . commonly is not criminal in member states of the Council of Europe"). *Cf. Bowers*, 478 U.S. at 209 n.4 (Blackmun, J., dissenting) (using analogous harm principle to distinguish same-sex sodomy from adultery).

and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence."[25] This limiting principle would withhold legal protection from ostensibly consensual incest or child molestation in the home.[26] The European Commission of Human Rights has also withheld the protection of Article 8 privacy from commercial sexual conduct, even if it occurs in the home.[27]

25. *Dudgeon*, 45 Eur. Ct. H.R. ¶ 49 (citations and internal quotation marks omitted). The South African Constitutional Court has similarly stated that it is

> not aware of any jurisdiction which, when decriminalising private consensual sex between adult males, has not retained or simultaneously created an offence which continues to criminalise sexual relations [including sodomy] even when they occur in private, where such occur without consent or where one partner is under the age of consent.

National Coalition for Gay and Lesbian Equality v. Minister of Justice (1998) (*National Coalition I*), 1998 (12) BCL 1517 (CC) ¶ 66, *available at* 1998 SACLR LEXIS 36.

26. Since *Dudgeon*, no European cases have been brought challenging a prosecution for consensual incest as a violation of Article 8's privacy provision. Most prosecutions for incest involve sexual activity between a parent and a child who did not consent or is below the age of consent, acts that would be criminal even if the parties were not related. *See, e.g.*, *R. v. United Kingdom* (App. No. 15396/89) (1991) (Eur. Comm'n H.R.), *available at* http://www.echr.coe.int; *H.S. v. Sweden* (App. No. 20708/92) (1994) (Eur. Comm'n H.R.). *Cf. Bowers*, 478 U.S. at 209 n.4 (Blackmun, J., dissenting) (using analogous consent principle to distinguish same-sex sodomy from incest).

27. In *F. v. Switzerland*, the Commission held "that sexual relations which, as here, resulted from a wish for remuneration and were engaged in professionally amounted to prostitution and do not belong to the sphere of private life protected by Article 8 ¶ 1 of the Convention." App. No. 11680/85), 55 Eur. Comm'n H.R. Dec. & Rep. 178 (1988). Similarly, the South African Constitutional Court unanimously held in *Jordan v. State* (2002) that a criminal prohibition of prostitution, which would apply even in the home, was a justifiable limitation of the constitutional right to privacy. 2002 (11) BCLR 1117 (CC), *available at* http://www.concourt.gov.za.

In sum, *Bowers* falsely predicted that courts could not draw principled distinctions among various forms of protected and unprotected sexual activity in the home. Since *Bowers*, the "empirical light" cast by foreign precedents plainly illuminates the principled distinctions that can be drawn within a zonal conception of privacy.

III. INTERNATIONAL AND FOREIGN COURT DECISIONS HAVE INVALIDATED SODOMY LAWS FOR EXPRESSING AN IRRATIONAL ANIMUS AND PREJUDICE THAT DENIES A POLITICALLY UNPOPULAR GROUP EQUAL TREATMENT

Sodomy laws target and punish a single group in our society for their intimate decision to love members of their own sex. In *Romer v. Evans*, 517 U.S. 620 (1996), this Court struck down a Colorado constitutional amendment forbidding legal protection of sexual conduct between same-sex partners, in part, because the law "impos[ed] a broad and undifferentiated disability on a single named group." *Id.* at 632. Unlike *Bowers*, *Romer* recognized an obvious truth: that rank prejudice can never be a legitimate governmental interest.

Two independent principles of international and foreign law support invalidating Texas's sodomy law. First, as in *Romer,* Texas's justifications for its sodomy law express irrational animus and prejudice. Second, international and foreign law recognize sodomy laws as impermissible discrimination based on sexual orientation, which violates fundamental global principles of equal treatment.

A. Irrational Animus and Prejudice: International and foreign court decisions demonstrate that sodomy laws are motivated by the very state interests that *Romer* forbade: "a bare . . . desire to harm a politically unpopular group [which] cannot constitute a *legitimate* governmental interest." 517 U.S. 620, 634 (1996) (quoting *Department of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973)) (emphasis in original). Moreover, rulings in international and foreign jurisdictions clearly show

that same-sex sodomy laws function arbitrarily to make "a class of people a stranger to [the] law[]."[28]

Sodomy laws prohibit conduct that "causes no harm to anyone else." *National Coalition I*, 1998 (12) BCLR 1517 (CC) ¶ 26. For that reason, the Constitutional Court of South Africa facially invalidated South Africa's sodomy laws, finding that: "The enforcement of the private moral views of a section of the community, which are based to a large extent on nothing more than prejudice, cannot qualify as such a legitimate [government] purpose." *Id*. ¶ 37.

In *Dudgeon*, the European Court of Human Rights echoed this Court's opinion in *Romer*, declaring: "Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed" by private sexual conduct between same-sex partners, "this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved."[29] Similarly, the Constitutional Court of Colombia powerfully rejected judicial enforcement of societal prejudice against homosexuals: "The Court does not believe that the democratic principle may in truth support a majority

---

28. *Id*. at 635. At bottom, sodomy laws are like "laws of the kind [that were before this Court in *Romer*, which] raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected." *Id.* at 634.

29. *Dudgeon,* 45 Eur. Ct. H.R. ¶ 60; *see also S.L. v. Austria*, App. No. 445330/99 ¶ 44 (Eur. Ct. H.R. Jan. 9, 2003)

> To the extent that [the Austrian law in question] embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot of themselves be considered . . . sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour.

(citing *Smith and Grady v. United Kingdom*, 29 Eur. H.R. Rep. 493 ¶ 97 (1999)).

consensus that relegates homosexuals to the level of second class citizenship."[30]

International and foreign authorities demonstrate that sodomy laws mark gays and lesbians as a class of outlaws, scapegoat them as a group, and foster discrimination by building barriers to their equal treatment in domains unrelated to the criminal law. The South African Constitutional Court explained that a same-sex sodomy law "state[s] that in the eyes of our legal system all gay men are criminals." *National Coalition I*, 1998 (12) BCLR 1517 (CC) ¶ 28. The South African Court graphically compared the effect of sodomy laws to the laws of the apartheid era the country had just escaped: "Just as apartheid legislation rendered the lives of couples in different racial groups perpetually at risk, the sodomy offense builds insecurity and vulnerability into the daily lives of gay men." *Id*.

International and foreign bodies have also recognized that sodomy laws generate widespread discrimination against gays and lesbians in other areas of life. The U.N. Human Rights Committee has criticized U.S. sodomy laws due to "the serious infringement of private life . . . and the consequences thereof for their enjoyment of other human rights without discrimination."[31] These consequences involve discrimination

---

30. *Sentencia No. C-098/96* (Corte Constitucional, 1996) (Colombia Constitutional Court), ¶ 4.1, *available at* http://bib.minjusticia.gov.co/ jurisprudencia/CorteConstitucional/1996/Constitucionalidad/C-098-96.htm (*unoff. trans.*) (emphasis added). The Court went on to say:

> The principle of equality (Constitution, article 13) is radically opposed, to the subjugation by legal means, for reasons of a sexual nature, of a minority that does not share the sexual likes, habits and practices of the majority. Prejudices, whether phobic or not, and false beliefs that have historically served to anathem[a]tize homosexuals, do not confer legitimacy on laws that convert homosexuals into the object of public scorn.

Id.

31. *Human Rights Committee: United States*, *supra* note 16, (Cont'd)

in other areas of law and in social and civic life. According to the South African Court, sodomy laws obstruct legal equality for gays and lesbians in domains unrelated to the criminal law, because such laws "'entrench[] stigma and encourag[e] discrimination in employment and insurance and in judicial decisions about custody and other matters bearing on orientation.'"[32] The European Court of Human Rights similarly recognized that "one of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public."[33]

B. Equal Treatment: Reflecting an emerging global movement, international treaty bodies and foreign court decisions have correctly viewed same-sex sodomy laws as impermissible discrimination. These decisions have recognized the irrationality of criminally punishing some individuals who commit sodomy, but not others, based solely on their sexual orientation.[34]

(Cont'd)
¶ 287; *see also Concluding Observations of the Human Rights Committee: Chile*, U.N. Doc. CCPR/C/79/add.104 (Mar. 30, 1999) ¶ 20, *available at* http://www.unhchr.ch/tbs/doc.nsf. Similarly, the Constitutional Court of South Africa stated that the maintenance of sodomy laws "radiates out into society generally and gives rise to a wide variety of other discriminations, which collectively unfairly prevent a fair distribution of social goods and services and the award of social opportunities for gays." *National Coalition I*, 1998 (12) BCLR 1517 (CC) ¶ 36.

32. 1998 (12) BCLR 1517 (CC) ¶ 23 (quoting Edwin Cameron, *Sexual Orientation and the Constitution: A Test Case for Human Rights*, 110 S. Af. L.J. 450, 455 (1993)).

33. *Norris v. Ireland*, 142 Eur. Ct. H.R. (ser. A) ¶ 21 (1988) (citation and internal quotation marks omitted).

34. In analyzing a law that criminalized certain sexual acts between men, the South African Court put it well:

> There being no similar provision in relation to acts by women with women, or acts by men with women or by women with men, *the discrimination is based on sexual orientation and therefore presumed to be unfair.* The impact

(Cont'd)

The U.N. Human Rights Committee has repeatedly concluded that laws criminalizing same-sex sodomy constitute discrimination based on sexual orientation.[35] The U.N. Committee on Torture[36] and the U.N. Working Group on Arbitrary Detention condemned Egypt's gender-neutral "debauchery" law as constituting discrimination on the basis of sexual orientation.[37] Similarly, the U.N. Committee on the Rights of the Child has analyzed disparities in age-of-consent laws between same and different-sex partners as sexual orientation discrimination.[38] Guidelines promulgated by the U.N. High Commissioner for Refugees further recognize that laws criminalizing homosexual conduct may, if the penalty is severe, constitute persecution on the ground of sexual orientation.[39]

(Cont'd)

> intended and caused by the provision is flagrant, intense, demeaning and destructive of self-realisation, sexual expression and sexual orientation.

National Coalition I, 1998 (12) BCLR 1517 (CC) ¶ 76 (emphasis added).

35. *Human Rights Committee: United States*, *supra* note 16, ¶ 287; *Concluding Observations of the Human Rights Committee: Cyprus*, UN Doc. CCPR/c/79/Add.88 (Apr. 6, 1998) ¶ 11, *available at* http://www.unhchr.ch/tbs/doc/nsf; *Human Rights Committee: Chile*, *supra* note 31, ¶ 20.

36. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, 1465 U.N.T.S. 113, *available at* http://www.unhchr.ch/tbs/doc.nsf.

37. *Concluding Observations of the Committee Against Torture: Egypt*, U.N. Doc. CAT/s/XXIX/Misc. 4 (Nov. 20, 2002) ¶ 5(e), *available at* http://www.unhchr.ch/tbs/doc.nsf; Working Group on Arbitrary Detention Opinion No. 7/2002 (Egypt) (Sept. 3, 2001) at 5-6.

38. *Concluding Observations of the Committee on the Rights of the Child: (Isle of Man) United Kingdom of Great Britain and Northern Ireland*, U.N. Doc. CRC/C/15/Add.134 (Oct. 16, 2000) ¶ 22, *available at* http://www.unhchr.ch/tbs/doc.nsf.

39. *Guidelines on International Protection, Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, U.N. Doc. HCR/GIP/ 02/01 (May 7, 2002) ¶¶ 16-17, *available at* http:// www.unhchr.ch/tbs/doc.nsf.

These views have been echoed by the constitutional courts of South Africa[40] and Ecuador,[41] which have also treated various national laws infringing gay rights as discrimination based on sexual orientation.

These rulings regarding sodomy laws stand atop a much larger global human rights trend calling for equal treatment of persons without regard to their sexual orientation. Virtually every international human rights treaty and every democratic country's constitution contain provisions guaranteeing the right to equal protection of the laws. Since the 1970s, international and foreign courts have increasingly come to recognize that these provisions bar discrimination based not only on race, sex, and religion, but sexual orientation as well. In addition, both international courts and treaty bodies have ruled that various treaties' equal protection provisions cover sexual-orientation discrimination.

International courts and treaty bodies have construed the equal treatment provisions of almost every major international human rights treaty to ban discrimination based on sexual orientation. In 1999, the European Court interpreted Article 14 of the European Convention on Human Rights, which provides: "[t]he enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground . . ." to proscribe discrimination based on sexual

---

40. *National Coalition I*, 1998 (12) BCLR 1517 (CC) ¶ 76.

41. The Constitutional Court of Ecuador also invalidated a sodomy law as a violation of equality:

> Homosexuals are, above all, bearers of all the rights of the human person and thus have the right to exercise them in conditions of full equality, which does not imply the absolute identity but rather a proportional equivalence between two or more beings, that is, their rights to enjoy legal protection, whenever in the manifestation of their conduct they do not infringe the rights of others just as is the case with all other persons.

Constitutional Tribunal, Ecuador, Sentencia No. 111-97-TC, Registro Oficial (Official Registry), Supp., No. 203, Nov. 27, 1997, at 6, 7.

orientation.[42] Recently, the fifteen member states of the European Union included sexual orientation as an impermissible ground of discrimination in two international instruments.[43]

Similarly, five of the six major U.N. human rights treaties have been interpreted by their respective supervisory organs to cover sexual orientation discrimination.[44] In *Toonen v. Australia*, the U.N. Human Rights Committee construed Article 26 of the International Covenant on Civil and Political Rights (ICCPR) to require that states party "guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, . . . religion, . . . national . . . origin, . . . or other status," to include a protection against discrimination on the basis of sexual orientation.[45] In reviewing state periodic reports under the International Convention Against Torture, to which the United States is also a party, the U.N. Committee on

42. In *Mouta v. Portugal*, the Court found that a national tribunal's custody decision, based primarily on the applicant's sexual orientation and practice of living with another man, violated Article 14 (and Article 8 ("respect for . . . family life")) of the European Convention on Human Rights. [2001] 1 FCR 653 (Eur. Ct. H.R. 1999).

43. On October 2, 1997, the fifteen Member S tates of the European Union/Community signed the Treaty of Amsterdam, which inserted a new Article 13 into the Treaty Establishing the European Community, O.J. (C 340) 173 (1997), *available at* http://europa.eu.int/eur-lex/en/treaties/index.html (consolidated version). Article 13 authorizes the Council of the European Union to take "appropriate action to combat discrimination based on . . . sexual orientation." On December 7, 2000, the fifteen Member States authorized the solemn proclamation of the Charter of Fundamental Rights of the European Union, which in Article 21(1) provides that discrimination shall be prohibited on grounds "such as . . . sexual orientation . . . ." 2000 O.J. (c 364) 1 (2000), *available at* http://www.europarl.eu.int/charter/pdf/text_en.pdf.

44. The sixth treaty is specifically directed to racial discrimination. *See* International Convention on the Elimination of All Forms of Racial Discrimination, art. 1(1), 660 U.N.T.S. 195, *reprinted in* 5 I.L.M. 352 (1966).

45. Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994) ¶ 8.7, *available at* http://www.unhchr.ch/tbs/doc.nsf.

Torture has criticized states for prison conditions that discriminate and persecute based on sexual orientation.[46] Similar interpretations have been rendered with regard to three other conventions to which the United States is a signatory[47]: the International Covenant on Economic, Social and Cultural Rights,[48] the Convention for the Elimination of All Forms of Discrimination against Women,[49] and the Convention on the Rights of the Child.[50]

---

46. S*ee Concluding Observations of the Committee against Torture: Brazil*, U.N. Doc. CAT/A/56/44 (May 16, 2001) ¶ 119, *available at* http://www.unhchr.ch/tbs/doc.nsf; *Committee against Torture: Egypt*, *supra* note 37.

47. When a state has signed, but not ratified a treaty, it is obliged under international law not to act in a manner that would defeat the object and purpose of that treaty. *See Restatement (Third) of the Foreign Relations Law of the United States* §§ 312(3) (1987) ("*Restatement (Third)*").

48. In a general statement of interpretation concerning health care, the U.N. Committee on Economic, Social and Cultural Rights declared that Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (which requires states "to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, . . . or other status") proscribes discrimination on the basis of sexual orientation. *CESCR General Comment No. 14*, U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) ¶ 18, *available at* http://www.unhchr.ch/ tbs/doc.nsf.

49. The U.N. Committee on the Elimination of Discrimination Against Women has called for the removal of criminal laws against lesbianism and commended protections afforded to individuals with a well-founded fear of persecution on the basis of sexual orientation. *Concluding Observations of the Comm. on the Elimination of Discrimination Against Women: Kyrgyzstan*, U.N. Doc. CEDAW/A/54/38 (Jan. 27, 1999) ¶¶ 127-28, *available at* http://www.unhchr.ch/tbs/doc.nsf; *Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Sweden*, U.N. Doc. CEDAW/A/56/38 (July 31, 2001) ¶ 334, *available at* http://www.unhchr.ch/tbs/doc.nsf.

50. Article 2 of the Convention on the Rights of the Child contains a similar equality provision, which the Committee on the Rights of the

(Cont'd)

Less than three years ago, a U.S. Ambassador told the U.N. Commission on Human Rights:

> Nothing in international law can justify the persecution of individuals on the basis of sexual orientation. In fact, both the UDHR [Universal Declaration of Human Rights] and the ICCPR prohibit discrimination without distinction of any kind. No nation, including my own, is perfect, nor is any immune from legitimate criticism of its efforts to ensure non-discriminatory treatment of individuals on the basis of sexual orientation.[51]

Article 2 of the Universal Declaration of Human Rights, which has been widely accepted as reflective of customary international law, has been interpreted to apply to sexual orientation discrimination.[52] Moreover, the U.S. government, in accord with the U.N. High Commissioner for Refugees, has concluded that persecution based on sexual orientation is a legitimate ground for claiming refugee status under the International Refugee

---

(Cont'd)

Child has interpreted to apply to sexual orientation discrimination. *Committee on the Rights of the Child: (Isle of Man) United Kingdom of Great Britain and Northern Ireland*, *supra* note 38.

51. Statement of Ambassador Nancy Rubin on Protection of Vulnerable Groups, Before United Nations Commission on Human Rights, April 11, 2000, *available at* http://www.humanrights-usa.net/2000/item14.html.

52. *See* Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810, at 71 (1948), *available at* http://www.unhchr.ch/tbs/doc.nsf ("Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, colour, sex, . . . or other status."); *Restatement (Third)*, *supra* note 47, § 701 n.4; *see, e.g.*, Working Group on Arbitrary Detention Opinion No. 7/2002 (Egypt), *supra* note 37, at 5-6; *see also The Paquete Habana*, 175 U.S. 677, 700 (1900) (International law "is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination.").

Convention and Protocol and U.S. immigration laws.[53] In addition, several U.N. Special Rapporteurs and a Special Representative to the U.N. Secretary-General now explicitly consider prevention of discrimination based on sexual orientation to be part of their respective mandates.[54]

Constitutional courts in Canada,[55] Israel,[56] Colombia[57] and

53. *In re Toboso-Alfonso*, 20 I. & N. Dec. 819 (BIA 1990), Att'y. Gen. Order No. 1895-94, June 19, 1994; *Guidelines on International Protection*, *Gender-Related Persecution*, *supra* note 39.

54. *See, e.g.*, Report of the Special Rapporteur on the Independence of Judges and Lawyers, U.N. Comm. on Hum. Rts., 58th Sess., U.N. Doc. E/CN.4/2002/72 (Feb. 11, 2002), *available at* http://www.unhchr.ch/ tbs/doc.nsf; Report of the Special Rapporteur on Torture, U.N. Comm. on Hum. Rts., 58th Sess., U.N. Doc. E/CN.4/2002/76 (Dec. 27, 2001), *available at* http://www.unhchr.ch/tbs/doc.nsf; Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, U.N. Comm. on Hum. Rts., 55th Sess., U.N. Doc. E/CN.4/1999/39 (Jan. 6, 1999), *available at* http://www.unhchr.ch/tbs/doc.nsf; Report of the Special Representative on Human Rights Defenders, U.N. Comm. on Hum. Rts., 57th Sess., U.N. Doc. E/CN.4/2001/94 (Jan. 26, 2001), *available at* http://www.unhchr.ch/tbs/doc.nsf.

55. The Supreme Court of Canada has held that the Canadian Charter of Rights and Freedoms proscribes discrimination on the basis of sexual orientation. In *Egan v. Canada*, [1995] 2 S.C.R. 513, 603, *available at* 1995 S.C.R. LEXIS 375, the Court noted that "judicial opinion has overwhelmingly recognized that sexual orientation is an analogous ground" to those enumerated in Section 15(1), which provides: "[e]very individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination . . . based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." Canadian Charter of Rights and Freedoms, Section 15, www.efc.ca/pages/laws/charter/charter.head.html. *See also Vriend v. Alberta*, [1998] 1 S.C.R. 493, *available at* 1998 S.C.R. LEXIS 76 (Section 15 requires that sexual orientation be "read into" a province's general anti-discrimination law).

56. In *Danilowitz*, 48(5) P.D. 749 ¶ 17 (1994), the Israeli Court held that the state airline's policy of extending certain employee benefits to different-sex but not same-sex couples violated the constitutional guarantee of equality: "This discrimination—against homosexuals and lesbians—is improper. It is contrary to equality." (Cont'd)

Ecuador[58] have recognized that the fundamental principles of equality extend to sexual orientation discrimination, reading constitutional equal protection provisions implicitly to prohibit discrimination based on sexual orientation. Following these global trends, several nations drafting new constitutions—including South Africa,[59] Fiji,[60] Ecuador,[61] and Switzerland[62]—have adopted language that effectively bars sexual orientation discrimination in their equal protection clauses. Finally, sexual orientation has been added as a ground to national legislation

57. The Constitutional Court of Colombia has held that the Colombian Constitution's equality provision implicitly includes sexual orientation: "[T]he establishment of legal norms that tend to affect the free exercise of sexuality, disregards the principle of substantive equality, which, in accordance with Article 13 of the Constitution, imposes on the State the duty to promote conditions conducive to real, effective equality of treatment. . . ." *Sentencia C-507/99* (Corte Constitucional, 1999) (Colombia Constitutional Court), ¶ 5.4, *available at* http://bib.minjusticia. gov.co/jurisprudencia/CorteConstitucional/1999/Constitucionalidad/C-507-99.htm (*unoff. trans.*).

58. *See* Constitutional Tribunal, Ecuador, Sentencia No. 111-97-TC, Registro Oficial (Official Registry), Supp., No. 203, Nov. 27, 1997, at 6-8 (decided before Ecuador explicitly included sexual orientation in the equality provision of its new constitution).

59. The Constitution of South Africa provides: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, . . . colour, sexual orientation, . . . religion . . ." S. Afr. Const. (Act 108 of 1996), ch. 2 (Bill of Rights), 9(3), *available at* http://www.concourt.gov.za/constitution/index.html.

60. *See* Fiji Const. (Constitution Act, 1997 (Amended, 1999)), sec. 38(2), *available at* http://www.oefre.unibe.ch/law/icl/fj00000_html#5038.

61. Constitución de 1998 [Constitution] art. 23, § 3 (Ecuador), *available at* http://www.georgetown.edu/pdba/Constitutions/Ecuador/ecuador98.html.

62. In 1999, Switzerland adopted a new Federal Constitution that included a prohibition on discrimination based on the broader ground of "way of life." Bundesverfassung [BV] [Constitution], art. 8(2) (Switzerland), *available at* http://www.oefre.unibe.ch/law/icl/sz00t__.html.

prohibiting discrimination in such areas as employment, education, health care, housing, or the provision of services both in the public and private sector in Europe, Canada, Australia, Israel, New Zealand, South Africa, Costa Rica, and Namibia.[63]

CONCLUSION

Punishing people for whom they love is simple injustice, which offends our national concept of "ordered liberty." In striking down South Africa's sodomy laws, Justice Albie Sachs declared: "Only in the most technical sense is this a case about who may penetrate whom where. At a practical and symbolical level it is about the status, moral citizenship and sense of self-worth of a significant section of the [national] community."[64]

The United States is not the world's only civilized society. In a globalizing world, it would be folly to ignore foreign practice and precedent at a time when courts across the world are "increasingly caught up in a process of cross-fertilization among legal systems."[65] This Court cannot disregard the rest of the

63. Among the 44 Member States of the Council of Europe, 15 Member States have passed legislation prohibiting sexual orientation discrimination in at least one such area. Seven more Member States must do so by December 2, 2003, to comply with Council Directive 2000/78/EC. The Directive was adopted on Nov. 27, 2000 under Article 13 of the European Community Treaty, and prohibits sexual orientation discrimination in public and private employment. In Canada, "sexual orientation" appears in antidiscrimination legislation at the federal level, in nine of ten provinces, and in two of three territories. In Australia, "sexual orientation" or a similar term appears in the legislation of all six states and both territories. The same is true for at least one of the areas listed in text at the national level in Israel, New Zealand, South Africa, Costa Rica, and Namibia. *See Legal Recognition of Same-Sex Partnerships* 782-87 (Robert Wintemute & Mads Andenæs eds., 2001).

64. *National Coalition I,* 1998 (12) BCLR 1517 (CC) ¶ 107 (Sachs, J., concurring).

65. Mary Ann Glendon, *Rights Talk* 158 (1991) (citing Europe, Australia, Canada, and New Zealand).

civilized world in addressing the privacy and equality issues raised by this case. Left undisturbed, the lower court's parochial analysis will undermine U.S. influence in the global development of human rights and compromise the United States' reputation as "the world's foremost protector of liberties." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 285 (1990) (Brennan, J., dissenting).

For the foregoing reasons, the judgment of the Texas Court of Criminal Appeals affirming the convictions of Lawrence and Garner should be reversed.

Respectfully submitted,

ROBERT WINTEMUTE
SCHOOL OF LAW
KING'S COLLEGE LONDON
UNITED KINGDOM

JOSEPH F. TRINGALI
TYLER B. ROBINSON
SIMPSON THACHER & BARTLETT
425 Lexington Ave.
New York, NY 10017-3954
(212) 455-2000

HAROLD HONGJU KOH*
JAMES SILK
DEENA R. HURWITZ
ALLARD K. LOWENSTEIN
INTERNATIONAL HUMAN RIGHTS
CLINIC YALE LAW SCHOOL
127 Wall Street
New Haven, CT 06511
(203) 432-4932

Counsel for Amici Curiae[66]

* *Counsel of Record*

---

66. Amici are grateful to Professor Kenji Yoshino of Yale Law School, Professor Ryan Goodman, the J. Sinclair Armstrong Assistant Professor of International, Foreign, and Comparative Law of Harvard Law School, and to Yale Law Students Alexis Agathocleous, Matthew Alsdorf, Lindsay Barenz, Michael Bosworth, Gregory Cleaver, Darren Cohen, Melissa Durkee, Tali Farimah Farhadian, Amy Kapczynski, Joshua Kaplan, Daphna Renan, Joanne Savage, Heather Sias, Dean Smith, and Jake Sullivan for their extraordinary contributions to this brief.