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Human Rights and Homo-sexuals: The International Politics of Sexuality, Religion, and Law

Jeffrey A. Redding*

The issue of the case and the crimes it includes repeat what happened in the time of the Sodomites and the wrath that fell upon them. They created an unprecedented obscenity among human beings by having sexual intercourse with human and demon males, and ignoring the women God created.

—Judge Hassan al-Sayes¹

I was so scared that in the end I said, “I don’t know anything about contempt of religion, I am just gay.”

—Murad²

* Legal Consultant, Lawyers Collective, Bombay, India; 2004-05, Assistant Professor of Political Science/Law, American University in Cairo; 2003-04, Fellow, Center for the Study of Law and Culture, Columbia Law School. There are many people and institutions who have contributed to this article, and my ability to find the time, place, and space to contemplate its many claims. First and foremost, I would like to thank the Center for the Study of Law and Culture at Columbia Law School, and especially its co-directors Katherine Franke and Kendall Thomas, for providing an extremely supportive home for the exploration of law’s many relationships to religion, sexuality, and culture. This article would not have been possible without the generous support, and wisdom, of this center and the people who make it happen. I would also like to thank especially the many people involved with Lawyers Collective, in both Delhi and Bombay, for the help they have provided me for many years now. Finally, for their several forms of assistance, guidance, critique, and inspiration - all of which have directly impacted this article - I would like to thank Sadia Abbas, Hossam Bahgat, Mary Anne Case, Glenn Cohen, Rodney Collins, Vivek Divan, Vikram Doctor, Elizabeth Emens, Aaron Frankel, Clark Gard, Anand Grover, Paul Gunataram, Alok Gupta, Zarine Habeeb, James Hathaway, Abbas Hyderi, Indira Jaising, Surina Khan, Scott Long, Alice Miller, Arvind Narrain, Victoria Neilson, Matthew Nelson, Martha Nussbaum, Jinah Paek, Chris Jones-Pauly, Ahmed Refky, Barbara Roberson, Zahir Riaz, Jeff Spinner-Halev, Andrew Sreniawski, Kristen Stilt, Damian White, Ali Faisal Zaidi, Auntie and Uncle, and Karin Zitzewitz. Emily Eidenier, in Cairo, provided excellent research assistance for this article, and also helpful editorial comment. Of course, I take full responsibility for all arguments and errors expressed in this article. This article is dedicated to Ellen Sapper, who first taught me irony, and who continues to make me laugh.

¹ From his 2003 verdict in the retrial of 21 Egyptian men who had, in 2001, been found guilty of the “habitual practice of debauchery.” HUMAN RIGHTS WATCH, IN A TIME OF TORTURE: THE ASSAULT ON JUSTICE IN EGYPT’S CRACKDOWN ON HOMOSEXUAL CONDUCT 98 (Mar. 2004), *available at* <http://hrw.org/reports/2004/egypt0304/>.

² Describing his reaction to his interrogation by Egyptian prosecutors during the 2001 “Queen Boat” scandal in Egypt. *Id.* at 36.

I. INTRODUCTION

¶1 In April 2003, at the 59th Session of the United Nations Commission for Human Rights (UNCHR) in Geneva, Brazil unexpectedly introduced a resolution for consideration that called upon both the United Nations and state governments to incorporate protection from persecution and discrimination on the basis of “sexual orientation” into their human rights practices and procedures.³ While this was not the first time that the relationship between human rights and protection from persecution and discrimination on the basis of “sexual orientation” had been discussed at the UNCHR, it was indeed the first time that a resolution had been proposed with such wide ramifications for member states vis-à-vis the protection of (non-normative) sexual orientations.⁴ Earlier, while still controversial, the UNCHR had only considered, and passed, resolutions that worked to protect people from being extra-judicially, arbitrarily, and summarily executed based on their sexual orientation.⁵ This time, however, far more than the right to kill people based on their sexual orientation was at stake for UN member states.

¶2 Not surprisingly, the Brazilian resolution did not pass and, indeed, an international coalition of states worked strenuously to either delay consideration of the proposal or to kill it outright. Prominent in this somewhat-motley coalition were Pakistan (on behalf of the Organization of the Islamic Conference), the Vatican, and Zimbabwe.⁶ While these states did not succeed in getting the resolution voted down, their opposition was instrumental in tabling full consideration of the Brazilian resolution until the UNCHR’s 60th session in 2004.⁷ At this 2004 session, the Brazilian resolution was again

³ The text of the U.N. Comm’n on Human Rights draft resolution, entitled, *Human Rights and Sexual Orientation*, E/CN.4/2003/L.92, can be found at Int’l Gay and Lesbian Human Rights Comm’n, *Sexual Rights and Sexual Orientation at the United Nations Commission on Human Rights: Campaign Dossier (Draft) 17 (2005)*, available at http://www.iglhrc.org/files/iglhrc/UNCHR%20Action_Kit_2005.doc. This kind of (proposed) resolution is commonly referred to as a “soft resolution,” i.e. one which does not explicitly require any specific United Nations or state action, but instead – in this resolution’s own terms, for example – “expresses deep concern” about a given type of human rights violation, and then “calls upon,” “encourages,” and “requests” different parties to work to end this type of human rights violation. *Id.* at 7.

⁴ See generally Douglas Sanders, *Human Rights and Sexual Orientation in International Law* (Nov. 23, 2004), <http://www.ai-lgbt.org/international.doc> (discussing the history of “sexual orientation” discussions, reports, and debates in the United Nations system). See also Holning Lau, *Sexual Orientation: Testing the Universality of International Human Rights Law*, 71 U. CHI. L. REV. 1689 (2004).

⁵ See, e.g., U.N. Comm’n on Human Rights, *Extrajudicial, Summary or Arbitrary Executions: Commission on Human Rights Resolution 2002/36*, U.N. Doc. E/CN.4/2002/200 (Apr. 22, 2002), available at http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2002-36.doc.

⁶ See Int’l Gay and Lesbian Human Rights Comm’n, *supra* note 3, at 7-8, 14-15, for a narrative of the spirited discussions and events that transpired at the 2003 meeting of the UNCHR. Interestingly, and a matter which should raise some questions about how exact the expression “sexual orientation” actually is, one of Pakistan’s objections (in 2004) to the Brazil resolution was that “[t]he concept of ‘sexual orientation’ has never been defined in the U.N. . . . The list of sexual behaviour could always be expanded to include grossly errant behaviour like pedophilia.” Sanders, *supra* note 4, at 42 (excerpting a 2004 letter from Pakistan to other Organization of the Islamic Conference countries). See also Arvind Narrain, *Brazil Resolution on Sexual Orientation: Challenges in Articulating a Sexual Rights Framework From the Viewpoint of the Global South 2 (2004)* (unpublished manuscript, on file with author), for a discussion of how Sri Lanka’s representative at the 60th session of the UNCHR was also worried that “sexual orientation” could be taken to mean “pedophilia” or “adultery.”

⁷ See Int’l Gay and Lesbian Human Rights Comm’n, *supra* note 3, at 8. See also U.N. Comm’n on Human Rights, *Postponement of Draft Resolution E/CN.4/2003/L.92 and the Proposed Amendments*

confronted with vocal opposition and a vote on the resolution's substantive terms was put off for yet another year.⁸ At the 61st session in April 2005, the UNCHR again failed to discuss the resolution, and it has now completely fallen off of the UNCHR's agenda, unless some state is brave enough in the future to affirmatively re-introduce the resolution for discussion.⁹

¶3 In consideration of the formidable opposition to the Brazilian resolution, and the very real possibility that it will not be revived in the foreseeable future, some important and urgent questions about future strategy and aims must now be posed. Considerable resources and effort have been invested in the struggle for the Brazilian resolution by some of the leading international gay and lesbian human rights organizations, including the International Gay and Lesbian Human Rights Commission, Amnesty International's Outfront project, and Human Rights Watch's Lesbian and Gay Rights project. While these resources and efforts have surely raised a great deal of international awareness of and collaboration on the problems that people with persecuted sexual orientations suffer, one must wonder if another course of action might generate these same benefits without the problems that come with the Brazilian resolution. Accordingly, now is the time to ask whether the Brazilian resolution (or any efforts like it) is the best way forward, and whether international human rights norms and practices (and resources) could be used more effectively to help protect the large numbers of those persons whose persecution is the ostensible target of the Brazilian resolution.

¶4 This article will argue that such an alternative way does indeed exist and, moreover, that one can find it by realizing the ways in which *existing* human rights guarantees protect persons from *religious* persecution and discrimination. In this respect, as this article will demonstrate, a great deal of the global persecution of gays, lesbians, homosexuals and other persons whose identities or practices somehow mark them as "dangerous" is steeped in claims of religiosity.¹⁰ Furthermore, as this article will also demonstrate, while it is certainly true that some homosexuals¹¹ (among others) want to

There to E/CN.4/2003/L.106-110): Commission on Human Rights Decision 2003/118 (Apr. 25, 2003), available at

[http://www.unhcr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/E.CN.4.DEC.2003.118.En?Opendocument](http://www.unhcr.ch/Huridocda/Huridoca.nsf/(Symbol)/E.CN.4.DEC.2003.118.En?Opendocument).

⁸ See Int'l Gay and Lesbian Human Rights Comm'n, *supra* note 3, at 8. See also U.N. Comm'n on Human Rights, *Report to the Economic and Social Council on the Sixtieth Session of the Commission (Draft Report of the Commission)*, U.N. DOC. E/CN.4/2004/L.11/Add.6 (Apr. 21, 2004) (prepared by Mr. Mike Omotosho), available at <http://72.14.207.104/search?q=cache:-vK9YV1w3g0J:www.unhcr.ch/huridocda/huridoca.nsf/0/11BAED6C86B754F0C1256E830057508E/%24File/G0413962.doc%3FOpenElement+U.N.+DOC.+E/CN.4/2004/L.11/Add.6&hl=en&ct=clnk&cd=2>.

⁹ See Posting of John Fisher, john@arc-international.net, to chr@list.arc-international.net (Apr. 21, 2005) (on file with author).

¹⁰ Of course, such persecution is not *only* steeped in claims of religiosity. Gays, lesbians, homosexuals, and others have also been persecuted on the basis that they are a threat to masculinity, or even, "the nation." For a classic discussion of the relationship between nationalism and (homo)sexuality, see GEORGE L. MOSSE, NATIONALISM AND SEXUALITY: MIDDLE-CLASS MORALITY AND SEXUAL NORMS IN MODERN EUROPE (1988). See also Neville Hoad, *Between the White Man's Burden and the White Man's Disease: Tracking Gay and Lesbian Rights in Southern Africa*, 5 GLQ: J. LESBIAN & GAY STUD. 559 (1999) (discussing the role of anti-colonial nationalism in the persecution of gays and lesbians in contemporary southern Africa).

¹¹ There is a longstanding discussion in sexuality theory about what it means to be "homosexual." This discussion often breaks down into one between people who believe that "the homosexual" is someone who engages in certain "conduct" or "acts," and other people who believe that "homosexuals" are only those persons who have that "status" or "identity" (however acquired), irrespective of any "homosexual acts" that these people may or may not engage in. As the general thrust of this article should make clear, I do not

identify as “gay,” some do not wish to so identify. Moreover, some who *do* so identify do not necessarily understand “gay” as first and foremost a *sexual* identity at every point in time (if ever at all). For this latter set of persons, their gayness (or homosexuality) is deeply interwoven with personal experiences and understandings of religion.

Accordingly, when such “homo-sexuals”—to use a neologism—are persecuted, they understand this persecution as “religious” persecution. Thus, as formulated and understood by many persons and states—but not by enough international human rights activists—persecution of the “sexual” can often actually be persecution of the “religious.”

¶5 In response to this reality, this article will thus argue that existing human rights protections concerning religious persecution (and discrimination) provide sufficient means for countering most of the incidences of persecution that the Brazilian resolution seems to be trying to counter with its new formulations concerning “sexual orientation.” Moreover, this article will also argue that these existing human rights guarantees are also *necessary* means of protection for the substantial and increasing number of people who are not willing to surrender their understandings of religion and religiosity to those who would use the same to persecute gays, lesbians, homosexuals, and others whose identities or practices somehow mark them as “blasphemous” or “heretical.” However, this *necessity* will only be felt by international human rights actors if, in the process of countering such persecution, they simultaneously work to demonstrate respect for persons’ diverse self-identifications and self-understandings. Accordingly, another goal of this article is to demonstrate how such respect should inform the international human rights effort.

¶6 Of course, it is important to remember that, ultimately, some people *do* need protections for their “sexual orientation.”¹² Thus, the argument here is *not* that “sexual orientation” should *never* be protected under international human rights law. However, that being the case, it is also important to realize that for those people who see their gay identities or homosexual practices as first and foremost imbricated in much larger debates concerning religion—including tolerance and pluralism within religion—existing human rights guarantees provide less-personally-compromising, and thus more just, tools for countering their persecution. And, indeed, for these people, the Brazilian resolution provides very limited, if any, assistance, even while generally being unnecessary.

¶7 The politics of sexuality and religion, and the complex of legal and other issues that arise when they intersect, are intensely experienced in many places around the globe. However, perhaps nowhere have these politics and issues been on more public and international display than in Egypt over the last several years. Part II opens by discussing how an influential state like Egypt has recently engaged in a set of politics which challenges commonplace configurations of sexuality and religion, and sexual and religious identities. Importantly, as Part II explains, in the past few years the Egyptian

think that this (admittedly simplified) discussion is a particularly helpful one, as both the existence *and meaning* of acts and identities are likely to depend on local context and the various ways that religion, culture, society, gender, and class (among other factors) shape that particular context. Consistent with these observations, then, this article hopes to complicate our ability to self-assuredly see various acts as “sexual” versus “religious,” or to easily presume whether others are identifying “sexually” versus “religiously” when they indicate that they are “homosexual.” And, thus, my use of “homosexual” here is a capacious and indeterminate one.

¹² In the sense that some people *do* identify, or are identified, as having a (disfavored) “sexual orientation.”

state has actively worked to define “gayness” as “un-Islamic” in the Egyptian public’s imagination, in the process of carrying out a well-publicized arrest and torture campaign against (allegedly) gay men. In this way, the Egyptian state has seriously undermined the possibility of discussions linking gayness to issues of sexuality and sexual rights and, instead, has contributed to a discourse in which people’s Islamic religious credentials are brought into serious question by any affiliation with or sympathy for gayness.

¶8 While the Egyptian state’s efforts to demonize gayness have been, unfortunately, all too effective, a number of people have begun to actively challenge commonplace discourses concerning Islam, homosexuality, and gayness which the Egyptian state’s efforts both reflect and contribute to. Part III explains this “homo-sexual” challenge, outlining its arguments and also demonstrating the ways in which this challenge parallels other movements (e.g. feminist Muslim movements) which argue for more tolerance and legitimacy for heterodox voices and approaches within Islam.¹³ This Part concludes by arguing that international human right norms and practices which ignore or overlook such important movements, and which continue to structure an inherent opposition between religion and gayness or homosexuality, are as morally and legally problematic as the attempts by the Egyptian state to control what it means to be “sexual” or “religious,” or “gay” or “Muslim.”

¶9 Of course, Egypt is not the only contemporary state that attempts to actively control—and repress—certain sexual and religious identifications that it finds “blasphemous” or “heretical.” And, indeed, such a mode of politics and governance has been present in India for much of its nearly sixty years of existence. Fortunately, the Indian state’s attempts in this respect have gone far from unchallenged, and public debates concerning a tangle of issues related to family law, religion, gender, and sexuality have carried on in response for many years now. While these debates have often been fierce—implicating as they do a whole range of sensitive issues—they have occasionally been productive, and not just destructive. And, indeed, from the mass of law and policy proposals that these debates have generated, emerges real-world traction—and precedent—for the thorough reconsideration of common-place legal notions of the “sexual” and the “religious” that this article ultimately argues for.

¶10 Accordingly, Part IV of this article discusses the politics and law of sexuality and religion in contemporary India, concentrating on those areas of law—in particular, family law—where such politics have been most prominent. This discussion highlights both the Indian state’s attempts to police the borders of religious and sexual identities, but also the refusal of a number of individuals in India to acquiesce to the conventional, orthodox identifications that the Indian state often endorses. In regard to these unorthodox identifications, and as Part IV also discusses, Indian public debates over family law have resulted in some very interesting proposals concerning family law reform—proposals that reflect the importance that many Indian citizens attach to their “religious” identities (e.g. Hindu, Muslim, Christian), but that also allow the possibility of more free-flowing, “bottom-up” understandings of those identities. Ultimately, like these Indian legal

¹³ “Homo-sexual” movements also exist within Christianity, Judaism, and other religions. While the literature on religion and (homo)sexuality is voluminous, one good place to begin an exploration of the contemporary dynamics of different (Christian and Jewish) religious discussions concerning religion and homosexuality is *SEXUAL ORIENTATION AND HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE* (Saul M. Olyan & Martha C. Nussbaum eds., 1998).

proposals—and *unlike* the Indian state’s attempts to control the meaning of not only certain religious identifications, but also “religiosity” generally—this article’s human rights proposals will argue that international human rights norms and practices must begin to understand not only specific identities (e.g. “gay,” “Muslim”), but also the general categories of “sexuality” and “religion,” in less essentialist ways.

¶11 Building upon the demonstrations in Parts II through IV of how complicated the global politics of sexuality and religion actually are, and also the difficulties that these complicated politics present for any neat legal attempt to universally define various sexual and religious identities—or sexual versus religious persecution as well—Part V is dedicated to demonstrating how international human rights norms and practices themselves might better respond to, and also demonstrate respect for, this human complexity. And, indeed, one way such norms and practices might demonstrate such respect is to acknowledge that the situation is far from hopeless if the Brazilian resolution never succeeds, and then work to make existing human rights protections more readily available to those who need them. Accordingly, Part V demonstrates how many states have justified their criminalization of certain forms of same-sex activity in religious terms, and then discusses how existing human rights protections concerning *religious* persecution and discrimination might be used to counter such criminalization. Relatedly, this part will also demonstrate how existing protections for asylum applicants who have experienced *religious* persecution can help large numbers of asylum applicants—homosexual and otherwise—who would otherwise have to (problematically) argue their cases on the basis of their supposed “membership in a particular social group.”

¶12 Persecution of and discrimination against gays, lesbians, homosexuals, homosexuals, and others whose identities or practices somehow mark them as “blasphemous” or “heretical” is a prevalent, if usually ignored, aspect of much contemporary life around the globe. While much of the international human rights activism directed at this persecution was an outgrowth of social movements in both the U.S. and Europe, increasingly vibrant circles of gay and lesbian human rights activism are emerging in contexts as different as India, Taiwan, South Africa, and Brazil. Given these widening circles of activism, and the diverse contexts in which they are situated, there is clearly now a need to rethink what “gay” or “homosexual” mean—or might mean—and also how international human rights activism should adapt in response to potentially different interpretations and implementations of these and other identities and practices.¹⁴ This being the case, then, this article ultimately hopes that what has happened in Geneva with the Brazilian resolution will be viewed as less of a “setback” than a, perhaps ironic, *opportunity* for international human rights actors to rediscover important core values concerning respect for persons’ diverse self-identifications and self-understandings.

¹⁴ However, such reconsiderations of this activism, and its norms and practice, should not simply be more “comparative” or “international” in nature, but also much more “interdisciplinary.” With regard to this need for more interdisciplinary work, all too often one finds an inexcusable disconnect in international human rights activism between those discussions concerning sexuality and sexual liberty, and those concerning religion and religious liberty. Accordingly, an underlying - though central - premise of this article is that international human rights activism, when it takes up issues concerning sexual orientation, sexual identity, and sexuality, has something to learn from the ways in which *religious* identities have been constructed, debated, and persecuted around the globe in various national and cultural contexts. And, indeed, this article hopes to advance such a premise by way of example. See also JANET R. JAKOBSEN & ANN PELLEGRINI, *LOVE THE SIN: SEXUAL REGULATION AND THE LIMITS OF RELIGIOUS TOLERANCE* (2004) for another example of such inter-disciplinary work.

II. EGYPT, THE “QUEEN BOAT 52,” AND THE POTENTIAL RELIGIOSITY OF SEXUALITY

¶13 On May 11, 2001, officers from both the local Cairo Vice Squad and Egypt’s national State Security Investigations unit raided the Queen Boat nightclub in Cairo. Approximately three dozen men were arrested and taken into custody that evening from the Queen Boat.¹⁵ Eventually, thirty of these men—and twenty-two others rounded up from the streets, homes, and workplaces of Cairo in the several days before the raid on the Queen Boat itself¹⁶—would be tried before an Emergency State Security Court for Misdemeanors on charges stemming from their alleged “habitual practice of debauchery.”¹⁷ Ultimately, twenty-three of these “Queen Boat 52” men were convicted by this security court,¹⁸ and subsequent appeals and retrials have not substantially altered these convictions.¹⁹

¶14 To this day, there remains a large degree of uncertainty—and thus only speculation—about what in particular drove Egypt’s crackdown on “debauched” men. Examining the history of public and legal discourse in Egypt vis-à-vis “debauchery,” the patterns in how “debauched” men were identified and picked up from the Queen Boat (and elsewhere in Egypt), and also the authorities’ treatment, including torture, of the men they arrested, it is not easy to understand what the law or the authorities in Egypt understood “debauchery” to mean.²⁰ For example, examining the arrest patterns on the evening of May 11, 2001, it is unclear whether it was possible for non-Egyptian foreigners to be guilty of “debauchery,” or whether this was a crime particular to the

¹⁵ HUMAN RIGHTS WATCH, *supra* note 1, at 22.

¹⁶ *Id.* A minor (17-year-old) boy was also arrested during this period of time. He was tried and convicted in a Cairo juveniles court. *Id.* at 42, n.142.

¹⁷ *Id.* at 41. The particular provision under which these men were charged is article 9(c) of the “Law on the Combating of Prostitution” (Law 10 of 1961). This provision authorizes a three-year imprisonment of, and the imposition of fines on, anyone who “habitually engages in debauchery or prostitution.” *Id.* at 130.

¹⁸ One of the defendants was convicted for both the “habitual practice of debauchery” and “contempt of heavenly religion,” while another defendant was convicted only of the latter crime. *Id.* at 43.

¹⁹ Indeed, if anything, most of the convicted had their sentences *lengthened* from *two* years of imprisonment to *three* years upon retrial. *See id.* at 46.

²⁰ Putting aside, for the moment, the vagaries of its application in relation to the “Queen Boat 52,” the meaning of the Egyptian penal code’s “debauchery” (*fujur*, in the law’s original Arabic) provisions has also been quite unclear elsewhere. This is, perhaps, not surprising considering the particular genealogy of these provisions of the Egyptian penal code. In particular, the law with whose violation the “Queen Boat 52” were charged is entitled the “Law on the Combating of Prostitution.” *Id.* at 41, 134. This law was originally promulgated in 1951, and was the direct outgrowth of the end of direct British colonial rule in Egypt, and a desire by many Egyptian post-colonial political activists to end the system of brothels and legalized prostitution that British soldiers had made regular use of while occupying Egypt. Such a system was a potent reminder of Egypt’s subjugation at the hands of the British, and both nationalist and pan-national Muslim political activists worked to dismantle it. *See generally id.* at 131-35 (describing the history behind and various possible interpretations of the Egyptian penal code’s penalisation of “debauchery”). However, it appears that political fervor outpaced legal exactitude (or even the desire for it).

Thus, for example, in the process of drafting the “Law on the Combating of Prostitution,” there was discussion concerning whether “debauchery” should mean a criminal set of acts which can only be committed by men and not women. *See id.* at 133. Similarly, there was also discussion over whether “debauchery” should be understood to be co-equal with “prostitution.” *See id.* at 133-34; *see also id.* at 14-15 & nn.24-26 (demonstrating how subsequent Egyptian judicial decisions interpreting “debauchery” have further complicated any easy understanding of the meaning of this term). Finally, historically-speaking, there has also been some disagreement over whether all parties involved in a sexual encounter can be charged with “debauchery,” or only those persons who have committed particular types of acts (i.e. “passive” versus “active”). *See id.* at 15-16.

Egyptian male citizen. And, indeed, of the men picked up by the police from the Queen Boat nightclub that May evening, at least nine non-Egyptian men (of Arab ethnicity) were inexplicably released after reaching one of Cairo's police stations, along with some Egyptians whose social and political connections protected them from further harassment, detention, and abuse by the police.²¹

¶15 However, not only is it unclear how the Egyptian authorities understood “debauchery,” but it is also unclear how they understood its relationship to “gayness,” or even what “gayness” itself was. And, indeed, while the following exchange between the police and “Hossein,” during his detention by the police, demonstrates that something “gay” was at stake in the Egyptian crackdown,²² it also suggests that what “gay” meant for the Egyptian authorities is not easily determinable:

We went out of the cell to the officer's desk. We were very happy, hoping we would leave. We found out it was the opposite. The officer shouted at us and humiliated us, and they beat us, and no one went home. It turned out to have been a game. . . . He told me to say that I was gay. He actually said the word “gay.” He had the tape recorder on. I said, “What does ‘gay’ mean?” He hit me. “Just pronounce the word I told you to say.” So I said that word.²³

Interestingly, as well, another man has recounted that Egyptian police officers “asked me who I knew who was gay. . . . I didn't give any names. . . . The man said, ‘We're looking for members of this *political organization*. We believe you when you say you don't belong: if you sign this, you can prove it and we will let you go.’ I didn't agree.”²⁴

¶16 Finally, also demonstrating that the Egyptian authorities' understanding of “debauchery,” “gayness,” and their relation was—if not impossible to pinpoint—

²¹ See *id.* at 31, 33. Not all foreigners, however, have subsequently escaped trouble. For example, one foreign national, at least, has been caught up in the Egyptian authorities' campaign, and convicted of crimes. Ultimately, however, this man was acquitted as well upon appeal. See *id.* at 86.

²² In addition to their preoccupation with “gay” men, the following experience that “Anwar” had with the police demonstrates that the Egyptian authorities were also interested in men with other types of identities: “[A police officer] made me walk back and forth, and sit down: and open my shirt, and he looked at my chest hair. I was very embarrassed when he asked me to pull down my pants. He looked at my underwear. . . . Then he grabbed me and took me down to a holding cell and had the guard open it, and he threw me in. He told the prisoners in the cell, ‘Here's a *khawal*, maybe. Find out if he's a *khawal*.’ And he locked the door.” *Id.* at 94.

Similarly, one might note the following encounter between “Wahid” and the Egyptian police: “Taha Embaby started calling all of our names. He was a high-ranking officer. Very big and fat and cruel. . . . He had a tape recorder with him. Everyone was forced to say whether he was passive or active. He said, ‘I just want to know the number of *khawalat*, or disgusting perverts, in Egypt. I'm doing a research on this and I need to know in one hour.’ This hour lasted for thirteen months. So one by one we went to the tape recorder and said whether we were active or passive. Those who refused were beaten. I said I was both and I was beaten.” *Id.* at 34.

Contemporarily speaking, “khawal” has been translated into English as “faggot” though, it should be noted, what this English term means is perhaps just as uncertain/changing as the meaning of “khawal” itself. See generally *id.* at 6; Bruce Dunne, *Power and Sexuality in the Middle East*, MIDDLE E. REP. 11 (1998); DIANE SINGERMAN, AVENUES OF PARTICIPATION: FAMILY, POLITICS, AND NETWORKS IN URBAN QUARTERS OF CAIRO 100-01 (1995) (discussing contemporary uses of the term “khawal”).

²³ HUMAN RIGHTS WATCH, *supra* note 1, at 34. See also *id.* at 80 for additional accounts of interrogations conducted by the Egyptian police that were also interested in the “gayness” of Egyptian men.

²⁴ *Id.* at 80.

certainly “unconventional,” it should be noted that the Egyptian authorities deployed a number of quite interesting indices to determine who was “gay” or “khawal.”²⁵ Such indices included whether or not a man was wearing colored underwear²⁶ or had a shaved chest.²⁷ Apparently, as well, a man’s muscles could provide a certain sort of immunity from intense suspicion and mistreatment.²⁸

¶17 Ultimately, then, such a confusing (and, for many people, bizarre) pattern of arrests and detentions by the Egyptian authorities makes it very difficult to give any uncomplicated answer to the question of what drove the authorities to arrest the “Queen Boat 52,” or the large number of men rounded up both before and after this infamous event. In particular, it remains difficult to answer with any certainty that these men were specifically arrested for being “gay” or, even if they were, what this “gayness” (as understood by the authorities) was.²⁹

¶18 And, indeed, in regard to all these unanswered questions, it has often been overlooked that “debauchery” and “gayness” actually entered into the picture later than what is commonly understood: the original charges against the “Queen Boat 52” concerned not “debauchery,” but “contempt of heavenly religion.”³⁰ While these charges were mostly later amended, the investigation of a Sherif Farhat—one of the two men ultimately convicted of “contempt of heavenly religion”—by the Egyptian government’s State Security Investigations unit, as well as the public aftermath of this investigation, is both revealing and suggestive.

¶19 For example, as a result of these investigations of Farhat, evidence was supposedly uncovered that Farhat had founded a “cult” that was committed to giving Muslim religious sanction to homosexuality. Evidence of the existence of this “cult” included a booklet supposedly in Farhat’s possession called “Agency of God on Earth: Our religion is the religion of Lot’s people, our prophet and guide is Abu Nawas.”³¹ Passages from this booklet allegedly stated that “sex can make people love each other more than anything” and that “[h]omosexuality is a human right, and not an offence that angers God, because it does not leave any harm.”³²

¶20 Given what was supposedly uncovered by Egypt’s State Security Investigations unit, it is not surprising then that the public scandal which the Egyptian government subsequently orchestrated around Farhat and his co-accused had many “religious” overtones. For example, state-owned newspapers described these men as members of a “devil-worshippers organization,” with one state-owned newspaper going so far as to publish a headline with the following “news”: “Satanist Pervert Surprises: They Called Themselves God’s Soldiers and Practice Group Sex in Private and Public . . . Meetings

²⁵ See note 22 for a discussion of meanings of the term “khawal.”

²⁶ HUMAN RIGHTS WATCH, *supra* note 1, at 11.

²⁷ See *id.* at 33, 36.

²⁸ Thus, “Bassam,” a bodybuilder who was picked up right before the raid on the Queen Boat, recounted to Human Rights Watch that “[a]ll along I was treated quite differently from the others. . . . You know, I have muscles, I look like a man. The guards respected me.” *Id.* at 33. See also *id.* at 112, n.419 (describing the lesser suspicion and punishment that Bassam was subjected to).

²⁹ Similarly, it is difficult to say that these men were specifically arrested for being “khawal,” or to understand what the Egyptian authorities understood “khawal” to mean.

³⁰ HUMAN RIGHTS WATCH, *supra* note 1, at 41. This crime is described by article 98(f) of the Egyptian Criminal Code.

³¹ *Id.* at 24.

³² *Id.* at 24, n.52.

Every Thursday at Queen Boat.”³³ Additionally, several Egyptian government officials who were involved with the (public) trials of the “Queen Boat 52” attempted to portray it as a matter of “religiosity” and “religious” morals. Thus, not only did Judge Hassan al-Sayes (whose epigraph opens this article) attempt to link the “Queen Boat 52” with violations of Islamic religious/moral norms, but so did an Egyptian prosecutor who was involved in the trial of a juvenile boy who was arrested during the May 2001 crackdown in Cairo.³⁴ Speaking to the court concerning this boy, the prosecutor submitted that there were “[a] number of those who submitted to vice, until they became its servants with no conscience, have hurried towards all that God has prohibited, ridding themselves of all morals. They strayed from the straight path that God has drawn for man and through which He organized his desires.”³⁵ Finally, the Prosecutor General of Egypt himself, responding to international condemnation of Egypt’s conduct in relation to the “Queen Boat 52,” has emphasized that “[w]e are dedicated to protecting society against perversion, from a *religious*, social, and cultural point of view.”³⁶

¶21 While perhaps shocking to the uninitiated, the Egyptian government’s coordination of a *religious* scandal concerning the “Queen Boat 52” merely followed the readily-available model provided by other public scandals that the Egyptian government had orchestrated before. For example, in one of these scandals, in 1997, dozens of teenagers from middle-class and wealthy households were arrested in Cairo and Alexandria and detained for months (though never charged for a crime) based on accusations that they had been worshiping Satan in different nightclubs.³⁷ And, in another of these scandals, in 1996, large numbers of working-class Shias were accused of and persecuted for sympathies with Satan.³⁸

¶22 Apparently, then, with the “Queen Boat 52” scandal, not only was the Egyptian government interested in religiously defaming these men, but so was it interested in flaunting its own Muslim religious credentials.³⁹ While it is probably the case that not *every* person involved in the persecution of the “Queen Boat 52” saw their mission as one ordained by God, or understood these men first and foremost as religious heretics, certainly some people in Egypt—and highly-placed ones at that—did understand their campaign against “debauched” men as deriving from religious obligation. And, indeed, because of such persons, a significant portion of the public debate of this and related cases and events has been influenced in a way in which religious considerations now figure prominently - and in a way that they did not necessarily have to. In this way, the Egyptian government has been able to alchemize controversies and debates that might be sexual ones, into religious ones.

³³ *Id.* at 22, 39.

³⁴ *See id.* at 42, n.142.

³⁵ *Id.* at 98.

³⁶ *Id.* at 96 (emphasis added).

³⁷ *Id.* at 7, n.12.

³⁸ *Id.* Shias are a minority in overwhelmingly Sunni Egypt.

³⁹ *See* Hossam Bahgat, *Explaining Egypt’s Targeting of Gays*, MIDDLE E. REP. ONLINE, July 23, 2001, <http://www.merip.org/mero/mero072301.html>, for one commentator’s analysis of why the Egyptian government felt the need to flaunt its religious values in the way and at the time it did so. As Bahgat notes, during 2001, the government was facing rising popular support for opposition Islamist political forces, and the government’s campaign might be understood as an attempt to draw support away from this opposition.

III. HOMO-SEXUALS AND RESPECT

He looked me up and down and said, “Do you pray?” I really didn’t know what to say. . . . The thing is . . . I know that I have more values and more honesty than him. And I know my relationship with God is more than he knows. But to him I am just an accused person - worse than an accused person, an animal - because I am gay.

—Amgad⁴⁰

¶23 While the Egyptian government has, generally-speaking, been able to successfully configure its mistreatment of the men it rounded up on the Queen Boat and elsewhere as a matter of enforcing religious norms, increasingly large numbers of people have begun to vocally challenge this and similar incidences of repression. Moreover, such people have not only worked to demonstrate the pure inhumanity of this repression, but they have also worked to contest this repression within the paradigm in which this repression has and continues to be committed, i.e. an ostensibly “religious” paradigm. While it is true that such persons have had to work in response to a set of political and social exigencies (and occasionally crises), they are far from being totally subsumed by a merely desperate or reactionary sort of politics—religious or otherwise. Instead, these individuals (and the organizations that they have subsequently established) have helped formulate a number of ground-breaking re-thinkings of religion and religious identities, exhibiting a great deal of creativity in their endeavors. And, indeed, it is these people who see their gay identities or homosexual practices as deeply imbricated in much larger debates concerning tolerance and pluralism within religion that this article means when it uses the neologism “homo-sexual.”

A. *Homo-sexuals and the “New Enlightenment”*

¶24 In many ways, homo-sexuals might very well be considered part of a larger ongoing movement within human rights activism that legal scholar Madhavi Sunder has extensively discussed—a movement in which once-sacrosanct boundaries surrounding religion have increasingly been assailed by activists troubled by what often occurs behind the closed doors of family, community, and religion.

¶25 Thus, in her work on this type of human rights activism,⁴¹ Sunder has argued against what she perceives to be a tendency in contemporary international human rights practice to accept (what she terms) a “New Sovereignty” manner of thinking. According to Sunder, this “New Sovereignty” manner of thinking has worked to either shore up or re-institute an Enlightenment-era set of practices by which the world was divided into public and private spheres, with the former to be governed by public “rationality” and the latter left to the devices of religious and other “irrational” or sentimental institutions (e.g. the nuclear family).⁴² As Sunder sees it, contemporary reactionary religious and cultural organizations have been most responsible for the development of the “New Sovereignty”

⁴⁰ Human Rights Watch, *supra* note 1, at 81.

⁴¹ See, e.g., Madhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399 (2003).

⁴² See *id.* at 1402, 1407-10, 1424.

manner-of-thinking,⁴³ and human rights organizations have too blindly followed along with these organizations' troublesome agendas. Writes Sunder:

[R]eligion qua religion is less the problem than is our traditional legal construction of this category. Premised on a centuries-old, Enlightenment compromise that justified reason in the public sphere by allowing deference to religious despotism in the private, human rights law continues to define religion in the twenty-first century as a sovereign, extralegal jurisdiction in which inequality is not only accepted, but expected. Law views religion as natural, irrational, incontestable, and imposed - in contrast to the public sphere, the only viable space for freedom and reason. Simply put, religion is the "other" of international law.⁴⁴

¶26 In her work, not only does Sunder assail the continuing deployment and international acceptance of this "New Sovereignty," but so does she also work to publicize and support those persons and activists who are helping shape (again, to use Sunder's terms) the "New Enlightenment." In this "New Enlightenment," women and other disadvantaged members of religious and cultural groups are insisting on the right to participate in and shape these groups' self-understandings and practices. Increasingly restless, and no longer content to just leave religious and cultural groups with which they disagree,

[i]ndividuals in the modern world [are] increasingly demand[ing] change within their religious communities in order to bring their faith in line with democratic norms and practices. Call this the New Enlightenment: Today, individuals [are] seek[ing] reason, equality, and liberty not just in the public sphere, but also in the private spheres of religion, culture, and family.⁴⁵

¶27 As an example of this "New Enlightenment" mode of politics and contestation, Sunder discusses the work of the London-based organization Women Living Under Muslim Laws (WLUML). As part of its mission, WLUML "aims to strengthen women's individual and collective struggles for equality and their rights, especially in Muslim contexts."⁴⁶ And, according to Sunder, WLUML's work is a good example of the

⁴³ Sunder writes of religious fundamentalists: "In defending the near absolute sovereignty of religion, law has ceded enormous power to the private sphere and, in the process, has created a different kind of beast. The perverse result of 'othering' discourses is that the 'other' often appropriates its negative image and wears it with pride. Thus, we see law's fundamentalist view of religion being reproduced by religious fundamentalists, who hold themselves out as an alternative to the West's morally defunct, bureaucratic rationality." *Id.* at 1424.

⁴⁴ *Id.* at 1402.

⁴⁵ *Id.* at 1403.

⁴⁶ Women Living Under Muslim Laws, About Women Living Under Muslim Laws, <http://www.wluml.org/english/about.shtml> (last visited Feb. 21, 2006). WLUML works to accomplish its goals by "[b]reaking the isolation in which women wage their struggles by creating and reinforcing linkages between women within Muslim countries and communities, and with global feminist and progressive groups . . . [and s]haring information and analysis that helps demystify the diverse sources of

ground-breaking human rights work being done as part of the “New Enlightenment” because it is

confronting injustice *within* the contexts of religion and culture. . . . Rather than simply acquiescing to the claims of fundamentalists, or pursuing women’s human rights purely through secular strategies, as formal human rights law would require, WLUML [has] forged an alternate course. . . . These strategies [have] enabled [] women to pursue greater freedom and equality, but without conceding their right to religion.⁴⁷

B. *Homo-sexual Organizations*

¶28 In addition to WLUML, a number of other organizations also have recently broken ground vis-à-vis Islam and human rights, but this time by specifically working to challenge “conventional” Islamic norms concerning sexuality—and homosexuality, in particular. Such “conventional”⁴⁸ norms, while differing in their enforcement across time, place, and school of Islamic legal thought, generally frown upon, and sometimes call for the gruesome punishment of men and women who are found engaging in same-sex intimacy. In challenging such norms, these homo-sexual organizations (and individuals as well) are not only engaging in the type of “anti-essentialist critique”⁴⁹ that organizations like WLUML have used to “highlight[] the political and historical contingency of practices thought to be essential to Islam,”⁵⁰ but they also work to challenge the *essentialist* and commonplace assumptions that popular and human rights discourses often make about what constitutes religion (and sexuality) generally.

¶29 For example, the high-profile organization Al-Fatiha has been working since 1998 to “[s]upport Muslims who identify themselves as lesbian, gay, bisexual, transgender, intersex, questioning, [or] those exploring their sexual orientation or gender identity [i.e. LGBTIQ Muslims], . . . [and to p]rovide a supportive and understanding environment for LGBTIQ Muslims who seek to reconcile their sexual orientation or gender identity with Islam.”⁵¹ Moreover, concerning Islam specifically, Al-Fatiha’s mission statement goes on to state that “Al-Fatiha promotes the progressive Islamic notions of peace, equality and justice. We envision a world that is free from prejudice, injustice and discrimination,

control over women’s lives, and the strategies and experiences of challenging all means of control.” *Id.*

⁴⁷ Sunder, *supra* note 41, at 1434-35, 1441 (emphasis added).

⁴⁸ I use the word “conventional” here instead of “classical,” because the latter term usually focuses one’s attention on Islamic *legal* discussions concerning same-sex intimacy, to the exclusion of larger, less technical - and arguably just-as-influential - *popular* discussions of and attitudes towards such intimacy. Thus, while all the main schools of (Sunni and Shia) Islamic legal thought, to one degree or another, condemn same-sex sex acts, one finds both greater and lesser degrees of tolerance of same-sex intimacy throughout Muslim social history. Of course, then, the actual content of “conventional” Islamic norms concerning same-sex intimacy is open to a great deal of debate. By using “conventional” in quotation marks then, I am suggesting the indeterminacy in what actually has been usual, both historically and contemporarily, while also acknowledging that *influential and prominent discourses today* - both elite and popular, and both Muslim and non-Muslim - understand the Muslim view of same-sex intimacy to be mostly a negative one.

⁴⁹ Sunder, *supra* note 41, at 1438.

⁵⁰ *Id.* at 1437.

⁵¹ Al-Fatiha Foundation, About Us, <http://www.al-fatiha.org/about.html> (last visited Feb. 21, 2006).

where all people are fully embraced and accepted into their faith, their families and their communities.”⁵²

¶30

Among its many activities, Al-Fatiha has organised several conferences/gatherings of LGBTIQ Muslims, with the first one taking place in 1998 in Boston. While these conferences have attracted quite a variety of people, with many different viewpoints about both religion and sexuality, it is clear that a number of participants have been emboldened by these gatherings to articulate and give voice to rather unorthodox interpretations of Islamic religious norms, especially in relation to homosexuality and/or gayness. For example, one of the participants at the 1998 Al-Fatiha conference wrote the following concerning his experience there:

Like many of the people who had gathered for the Boston event, I had long struggled with some of the inherent problems that arise when one tries to combine Islam and homosexuality-especially the Islam of the mullahs and the gay constructs of the “West.” For me, those difficulties were twofold. Firstly to find a personal space where my faith and my sexual identity could peaceably co-exist, and perhaps even re-enforce one another. And secondly to explore ways and means to resolve the tension and despair that knowledge of my sexual orientation has caused within my very traditionally Muslim family.

Over the course of the weekend, we spoke of many things-what are the challenges and problems faced by GLBT Muslims? Does Muslim and gay constitute an oxymoron? What does Islam “really” say about homosexuality? What space have Muslim societies given to expressions of “other” sexualities?

...

We certainly did not address every thorny issue that challenges GLBT Muslims, but for the first time in my life, the clamor of my internal conflict fell silent. I realized that we had been drawn together by love, and that rather than being separate, schizophrenic, mutually exclusive aspects of my personality-my Faith and my Queerness sprang from the same source of Love. Love for Allah, love for Islam, love for humanity, love for my family, love for my friends, love for my partner-all of these are the same.

...

Messages of hate and intolerance have come to dominate the pronouncements of Muslim clergy and so-called Islamic governments. Homosexuality is routinely decried as a Western import when same-sex love has existed since the beginning of human civilization, and is

⁵² *Id.*

widespread in many Muslim societies. The Quranic passages which refer to the destruction of the people of Lut are typically cited as evidence of God's rage against 'The Homosexuals' when in fact, I would humbly suggest that they teach us more about the importance of kindness to strangers, and the sins of lust and rape, rather than about homosexual love.

Nowhere in The Qur'an is the death penalty prescribed for homosexuality, yet in Iran and Afghanistan for example, Allah's name is invoked as teenage boys, accused of homosexuality, are executed by the state. This process alarms me, not only because it infringes upon the lives and liberties of individuals, but also because it brutalizes Muslim societies and inures people to accept this sort of summary justice as acceptable. Islam enjoins its practitioners to fight oppression, and to defend the faith. One could argue therefore, that it is our Muslim duty to secure the protection of GLBT Muslims and to challenge the ullema's interpretations and encourage them to preach the love of God, and the love of humanity rather than the fear of God and the hatred of anyone who is different to the mainstream.

...

We need to open a dialogue around these issues here in the West. We need to look for voices of support both within the mainstream Muslim community and amongst the religious scholars. We need to study The Qur'an (those of us that can) and search within the sacred text for evidence (which must surely exist) to support the contention that homosexual love is as pure and God-given as any other. Most of all, we must ourselves strive to become better Queer Muslims.⁵³

¶31 And another attendee at this conference described his experiences at the Boston conference, and his views on Islam, as follows:

I am gay. I am a Pakistani-Canadian. I am a Muslim. For as long as I can recall, these three elements of my identity have either been on a mission to break away and assert themselves as distinct entities, or in a constant struggle for dominance.

...

Although I was born Muslim, I don't presently practice the religion. Neither does anyone in my immediate family. I was born in Lahore, Pakistan and lived in Rawalpindi with my phuppie [paternal aunt] until the age of ten, at which point I immigrated to Canada to come live with my

⁵³ Shaffiq Essajee, *Reconciling God: The First GLBT Muslim Conference in Boston Explores the Complexities Facing Many Queer Muslims*, Al-Fatiha Foundation, <http://www.al-fatiha.org/sub1.html> (last visited Feb. 21, 2006).

parents. While living in Pakistan, I had learned how to perform namaz, and to recite the Holy Quran, and all of the kalmas; however, I gradually forgot it all in Canada.

It wasn't until the age of 17, while I was struggling with my sexuality, that I decided to revisit the Quran, in order to find out what Allah had to say about homosexuals. I vividly recall reading the Quranic verses and feeling my chest close in on me. How could Allah be so cruel, so heartless as to punish people like myself? All I ever wanted to do was to love someone, and to receive that love in return. But it was hopeless; nothing I read allowed me to be who I am.

At that point, I put the book away and decided to abandon Islam. In fact, I started learning about other faiths, including Hinduism, and Christianity.

...

So there I was, in Boston, Massachusetts, on a rainy weekend in a room full of the most diverse people you could imagine. There were folks coming in from the Netherlands, South Africa, and Belgium. Others were from Arizona, Boston, Chicago, Washington D.C., and N.Y. City. Unfortunately, I was the only Canadian there. There were approximately five lesbian-identified women, one woman who refused to be classified, one female-to-male transgender and about 23 gay-identified men. They represented various class, age and cultural backgrounds. We had African-Americans, South Asians, Europeans, and Middle-Eastern folks, just to name a few. . . .

We participated in intense debates and discussions focused on various topics including: Islam and LGBT identity, what Islam really says about homosexuality, as well as the obstacles and challenges faced by LGBT Muslims around the world. In addition, we undertook cross-cultural comparisons of gender and sexuality in Islamic societies (both present and historic).

...

For me, the most significant part of this retreat was witnessing that there were LGBT Muslims out there who had managed to develop and maintain a positive LGBT identity, while still following Islam. I also learned to separate the widely accepted interpretations of the mullahs, which are riddled with heterosexist bias, from the truest form of Islam, which stresses the fundamental principles of equality and justice. I have to admit that at some level I was hoping to find some theological accommodation for homosexuality in the Holy Quran. I never found that. Time simply did not permit an exhaustive theological examination. However, what I did

find was affirmation, affirmation for myself as an individual. I am gay, by nature, and I refuse to believe that Allah created people who are sinful by their very nature.⁵⁴

¶32 Other organizations as well have facilitated both theological exploration and personal affirmation, and not just by men either. In 2004, the United Kingdom-based Safra Project organized a conference in London for “lesbian, bisexual, transgender, queer and questioning women who identify as Muslim religiously and/or culturally, and their female friends, partners and family members as well as other women who identify with the topics addressed.”⁵⁵ This conference began with a discussion of the history and future of Islamic legal and theological discussions concerning same-sex (and, in particular, female-female) relationships, with the facilitator of this part of the conference explaining that:

[t]he work that I have focused on comes from the Progressive Islam movement which seeks to challenge traditional ideas relating to women’s role and sexuality in classical Muslim laws. These ideas include the notion that men are superior to women and that therefore women and men are not equal but have different (set) roles in society. . . . [T]he techniques used by progressive Muslim scholars have been used and extended to uncover not only the male bias that favours men over women but also the heterosexual bias that ignores and denies any sexuality other than a heterosexual one. [For example, t]he supposed references to male same-sex relationships in the Quran occur in the story of Lut. These verses have also been used to extend the prohibition on same-sex relationships to women. The story of Lut has however been reinterpreted as being ambiguous at best and certainly not referring to same-sex relationships as we understand them in our lives today.⁵⁶

¶33 Finally, it is worth noting that it is not just organizations located in the U.S. and the U.K. which have been involved in the interrogation of commonplace configurations concerning Islam and homosexuality. And, indeed, Salaam in Canada,⁵⁷ The Inner Circle in South Africa,⁵⁸ and Women for Women’s Human Rights in Turkey⁵⁹ specifically work

⁵⁴ Mohammed Khan, *Revisiting the Quran: A Report from the First International Retreat for GLBT Muslims*, Al-Fatiha Foundation, <http://www.al-fatiha.org/sub2.html> (last visited Feb. 21, 2006).

⁵⁵ SAFRA PROJECT, CONFERENCE REPORT: STRATEGIES FOR EMPOWERMENT AND CAPACITY BUILDING 3, (June 5, 2004) http://www.safraproject.org/Reports/Safra_Project_Conference_Report_5_June_2004.pdf.

⁵⁶ *Id.* at 4-5. This is not to say that this conference, or other similar ones, spend all their time on theological and legal discussions. Indeed, complicating this entire re-interpretive approach, are issues concerning family honor/shame that do not go away even in the face of convincing religio-textual arguments. Thus, at this conference, “[a] few people found that no matter how much information you give your parents on sexuality and religion they still could not accept it and that often it was not about the religion but actually other issues such as embarrassment they felt in their communities about having an LGBTQ son or daughter.” *Id.* at 12.

⁵⁷ See Salaam Queer Muslim Community, <http://www.salaamcanada.com> (last visited Feb. 21, 2006).

⁵⁸ See The Inner Circle, <http://www.theinnercircle-za.org> (last visited Feb. 21, 2006).

⁵⁹ See Women for Women’s Human Rights: New Ways, http://www.wwhr.org/_homepage_en (last visited Feb. 21, 2006).

to destabilize these configurations, as do numerous other organizations around the world whose work depends on or results in challenging commonplace and/or stereotyped understandings of Muslim sexuality.

¶34 Furthermore, a large number of courageous *individuals* all over the world are challenging—on their own, and in their own way—all sorts of norms and expectations concerning what it means to be Muslim. And, indeed, in this respect, the following personal statement of facts made on behalf of a Saudi lesbian woman (“Ms. A.B.N.”) in her application for asylum in the U.S. provides a very vivid example of what these challenges can look like, and how global they have become:

Ms. A.B.N. is proud to be Muslim. Her religious beliefs are an integral part of her identity. However, she believes that there should be a way to combine modern views about the role of women in Islamic societies with traditional Islamic beliefs. Ms. A.B.N. believes she should not be forced to marry, dress as a “proper” woman is expected to dress, forgo a higher education, or adhere to a heterosexual lifestyle simply because her government and her family dictate.

...

Ms. A.B.N.’s belief in her right to live freely and openly, as a lesbian is not only a political opinion, but is also an integral part of her identity as a Muslim. Ms. A.B.N. believes that she is a lesbian because that is how God made her. She believes that her sexuality is “between her and her God” and thus she must live according to the sexual identity she believes God endowed her with.⁶⁰

C. *The Moral Importance of Respecting Self-Identifications and Self-Understandings*

¶35 Given the ways in which organizations and individuals involved in the “New Enlightenment” have begun to vigorously challenge conventional Islamic religious norms concerning gender and sexuality, international human rights norms and practices that choose to ignore or overlook these significant movements ultimately replicate some of the same abuses that the Indian and Egyptian states commit when they (among others) attempt to control what it means to be “sexual” or “religious,” or “gay” or “Muslim.” While it is true that “abusive” human rights norms and practices (i.e., those that choose to structure an inherent opposition between religion and gayness and/or homosexuality) do not directly *physically* persecute individuals—unlike the way more-muscular state practices often do—these international norms and practices nonetheless parallel (non-violent) state norms and practices that work to control personal identity. Indeed, both types of norms and practices inflict a certain sort of *moral* harm upon individuals.

¶36 Philosopher Charles Taylor describes such a moral harm in his essay, “The Politics of Recognition.”⁶¹ In this essay, Taylor argues that modern states must respond, in some

⁶⁰ Memorandum of Law and Facts in Support of A.B.N.’s Application for Asylum and/or Withholding of Removal 42-43 (July 2002) (citation omitted) (on file with author).

⁶¹ Charles Taylor, *The Politics of Recognition*, in MULTICULTURALISM: EXAMINING THE POLITICS OF

shape or form, to a “powerful moral ideal that has come down to us. [Such ideal] accords moral importance to a kind of contact with myself, with my own inner nature, which it sees as in danger of being lost, partly through the pressures toward outward conformity.”⁶² Like Taylor, one might describe this moral ideal as one concerning the importance, for states and societies, of giving due recognition to the various and diverse ways in which their constituents *identify*.⁶³

¶37 Given that this ideal is one which people generally feel to be *morally* important, it is then not surprising that “a person or group of people can suffer *real* damage, *real* distortion, if the people or society around them mirror back to them a confining or demeaning or contemptible picture of themselves. Nonrecognition or misrecognition can inflict harm, can be a form of oppression, imprisoning someone in a false, distorted, and reduced mode of being.”⁶⁴ Or, in other words, the non-recognition, or misrecognition, by a state or society of people within its borders can cause these people to feel as if they have suffered a *moral* violation or *moral* harm.

¶38 Of course, “recognition” itself—if not attuned to individuals’ often quixotic and unstable self-identifications and self-understandings—can also work a certain kind of harm as well. Thus, Anthony Appiah, in response to Taylor’s essay, expresses worry about a kind of multiculturalist politics that demands respect for identities *qua* identities—and not persons. As Appiah sees it, “[c]ollective identities [such as being ‘black’ or ‘gay’] . . . provide what we might call scripts: narratives that people can use in shaping their life plans and in telling their life stories.”⁶⁵ However, there can also be a darker side to such scripts, and their political uses. For example,

[d]emanding respect for people *as blacks* and *as gays* requires that there are some scripts that go with being an African-American or having same-sex desires. There will be proper ways of being black and gay, there will be expectations to be met, demands will be made. It is at this point that someone who takes autonomy seriously will ask whether we have not replaced one kind of tyranny with another. . . [A] boundary . . . is crossed by someone who demands that I recognize my life around my ‘race’ or my sexuality.⁶⁶

¶39 Elaborating upon Appiah’s worries, Patchen Markell, as well, has expressed concern with certain aspects of Taylor’s essay. In particular, Markell worries that Taylor’s “recognition” actually represents a “misrecognition” of the uncertainty, contingency, and dynamic nature of human language and, hence, human professions of identity. Writes Markell:

RECOGNITION 25, 25 (Amy Gutmann ed., 1994).

⁶² *Id.* at 30.

⁶³ *See id.* at 36.

⁶⁴ *Id.* at 25 (emphasis added).

⁶⁵ K. Anthony Appiah, *Identity, Authenticity, Survival: Multicultural Societies and Social Reproduction*, in MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 149, 159-160 (Amy Gutmann ed., 1994).

⁶⁶ *Id.* at 162-63 (emphasis added).

[Taylor's] understanding of injustice as misrecognition is only intelligible if recognition itself is a matter of the respectful cognition of an identity that is in some sense independent of the vicissitudes of human interaction . . . for if identities were not independent in this way, they could not serve as reliable benchmarks by which to judge the adequacy of particular cognitive acts or structures. . . .

The politics of recognition, then, is at odds with itself. Rooted in an admirable awareness of [human] vulnerability and finitude, it nevertheless advances an understanding of justice and injustice that ultimately denies those phenomena in the name of an attractive but impossible vision of [human] sovereign agency.⁶⁷

¶40

As Parts IV and V demonstrate, this article does not endorse the kind of multiculturalist politics that both Appiah and Markell describe and, rightfully, fear. While arguing for changes in the ways international human rights norms and practices “recognize” sexuality and religion (and sexual and religious identities) this article, like the works of Appiah and Markell,⁶⁸ rejects *all* forms of politics and law—whether international or domestic—that actively work to restrict and control personal self-identifications and self-understandings. Its recommendations that international human rights norms and practices recognize the variety of ways people self-identify and unpredictably understand their identities are, thus, exactly that: a recommendation that

⁶⁷ PATCHEN MARKELL, *BOUND BY RECOGNITION* 59 (2003).

⁶⁸ And also Taylor's work. Indeed, one possible reading of Taylor would understand him to be not-so-much endorsing a multiculturalist politics of recognition but as, more-so, rejecting the ways states often actively and maliciously “misrecognize” people. Thus, Taylor writes that “[e]qual recognition is not just the appropriate mode for a healthy democratic society. Its refusal can inflict damage on those who are denied it. . . . The projection of an *inferior or demeaning image* on another can actually distort and oppress, to the extent that the image is internalized.” Taylor, *supra* note 61, at 36 (emphasis added).

the *diversity* and *malleability*⁶⁹ of human identity be acknowledged and recognized,⁷⁰ and not the conventional “scripts” that both states and traditions⁷¹ often author and enforce.

¶41

Such scripts can be racial, ethnic, national, lingual, and sexual—and religious, as well. In this latter respect, Talal Asad’s work is instructive, and especially to the extent that it brings into serious question an all-too-common disconnect between philosophical and political discussions concerning religion, and related discussions (like Taylor’s and Appiah’s) concerning race, ethnicity, nationality, gender, sexuality, and other significant personal and social demarcations. And, indeed, in his work, Asad discusses how this disconnect has been, at least partially, the result of a common “script” concerning religion itself, one that has—in a questionable universalistic project—emphasized religion’s essential autonomy from the social or, even more broadly, the worldly: “the insistence that religion has an autonomous essence—not to be confused with the essence of science, or of politics, or of common sense—invites us to define religion (like any essence) as a transhistorical and transcultural phenomenon.”⁷² Yet, as Asad argues, “this separation of religion from power is a modern Western norm, the product of a unique post-Reformation history” that, quite usefully, coincides with the contemporary “liberal demand . . . that [religion] be kept quite separate from politics, law, and science.”⁷³

⁶⁹ As Markell points out, it is not enough to recognize diverse *and static* identities. To do so only trades one misunderstanding of the diversity of human identity for another. Writes Markell: “[O]n its own, the idea that identities are multiple and complex is perfectly compatible with the thought that identities, in all their complexity, are nevertheless independent and antecedent facts about us that ought to be cognized properly and accorded due respect. [Understanding identity in terms of] change and instability [is] a bit more radical. [Such an understanding] suggest[s] that all exchanges of recognition will tend to become obsolete as our identities shift over time.” MARKELL, *supra* note 67, at 16. As the Indian experience with conversion demonstrates, *see* Part IV *infra*, self-identifications and self-understandings are, indeed, not static for a very large number of people in the world.

⁷⁰ It is important to note here, as well, that recognizing such diversity and malleability can take the form of recognizing that some people do not wish to identify at all. Thus, Sonia Katyal has argued that international gay and lesbian activism should prioritize the idea of “sexual autonomy” in its norms and practices. As Katyal explains it, “[u]nder this framework, the right to sexual autonomy should be understood as providing legal protection to permit individuals to identify with a particular gender identity or sexual orientation if desired, *or none at all*.” Sonia Katyal, *Exporting Identity*, 14 YALE J.L. & FEMINISM 97, 171 (2002) (emphasis added). As Katyal sees it, the benefits of such a sexual autonomy framework, as compared to ones that explicitly protects peoples’ “sexual orientations” or “sexual identities,” is that the latter frameworks “often require individuals to ‘name’ themselves or ‘come out’ as an implicit prerequisite . . . As a result, what some see as gay liberation, others see as a colonizing conflict of identity.” *Id.* at 173-4.

⁷¹ As Kumkum Sangiri has noted, what passes as religious tradition is often the residue of various political transactions and compromises among elites and the state. Writes Sangiri: “There is a long history not only of representing the defence of patriarchal arrangements, privileges and/or the sexual regulation of women as the *defence* of religion but also of the interested representation of patriarchal arrangements as religious *rights* by ‘community’ spokesmen . . . The coding of patriarchy as religion by community spokesmen has been and is by and large shared by the state which selected *denomination* above differential class, caste and regional practices and above an uncompromising secularism as the primary basis for defining family laws.” Kumkum Sangiri, *Politics of Diversity: Religious Communities and Multiple Patriarchies*, ECON. & POL. WKLY. 3287, 3295 (1995).

⁷² TALAL ASAD, *GENEALOGIES OF RELIGION: DISCIPLINE AND REASONS OF POWER IN CHRISTIANITY AND ISLAM* 28-9 (1993).

⁷³ *Id.* at 28. It is important to note here that Asad cautions the reader that “[f]rom [all] this it does not follow that the meanings of religious practice and utterances are to be sought in social phenomena, but only that their possibility and their authoritative status are to be explained as products of historically distinctive disciplines and forces. The anthropological student of *particular* religions should therefore begin from this point, in a sense unpacking the comprehensive concept which he or she translates as ‘religion’ into heterogeneous elements according to its historical character.” *Id.* at 54.

D. Summary

¶42 Building upon the moral-philosophical and political points that Taylor, Appiah, Markell, and Asad develop in their important works, as well as the lived experiences of increasingly large numbers of persons from around the globe, Part V demonstrates how the best international human rights norms and practices can begin to more deeply and thoroughly respect persons' diverse self-identifications and self-understandings. In particular, such norms and practices can demonstrate this respect by working to *recognize*—and work with the reality of—that while some homosexuals (among others) want to identify as “gay,” others do not wish to so identify. Moreover, some who *do* so identify don't necessarily understand “gay” as first and foremost a *sexual* identity at every point in time (if ever at all). For this latter set of persons, their gayness or homosexuality is deeply interwoven with personal experiences and understandings of religion. Accordingly, when such persons are persecuted, they understand this persecution as “religious” persecution. Thus, as formulated and understood by many persons—and governments—but not by enough international human rights activists, persecution of the “sexual” can often actually be persecution of the “religious.”

¶43 Taking into account this complicated reality, Part V demonstrates how international human rights norms and practices can avoid complicity with attempts to control what it means to be “sexual” or “religious.” Such attempts come from states, certainly, but also from hegemonic notions of “common sense” about the nature of the world and the human beings, identities, and practices that fill it. Working to buttress Part V's conclusions, then, one goal of this Part has been to demonstrate the difficulties of instituting any universal or *a priori* valuation of situations where human rights are being abused—especially, any valuation that “sexual orientation” discrimination is generally what is at stake in these situations.

¶44 Part IV will continue this Part's goal of dismantling state repression, and also those “common-sense” norms concerning religion and sexuality in which too many international human rights norms and practices are premised. In particular, this next Part will work to do so by discussing a set of politics concerning religion and sexuality in India that is important for this article's ultimate recommendations concerning international human rights norms and practices. In particular, Part IV will discuss those complicated political and legal debates concerning family law, religion, gender, and sexuality that have been a regular feature of Indian public life for the past several decades. Such debates, in all their long-lividness, have generated a mass of law and policy proposals which can provide real-world traction—and precedent—for the thorough reconsideration of common-place international legal notions of the “sexual” and the “religious” that this article argues for. It is to this often-surprising tangle of Indian politics, law, and policy that I thus now turn.

IV. INDIAN FAMILY LAW DEBATES CONCERNING RELIGIOUS AND SEXUAL IDENTITIES

¶45 For many years now, Indian politics has been consumed by a complex mass of religious and sexual disputes, with family law and its reform prominently situated in a number of the debates which make up this complicated politics. While this politics has

always been fierce, and has also occasionally spilled over into gruesome violence,⁷⁴ it has also generated a set of incredibly interesting family law reform proposals that work to undermine the Indian state's attempts to essentialize religion and religious identity and, conversely, to protect and respect persons' diverse self-identifications and self-understandings in India. This Part will explore this complicated family law system, and its associated politics, in the process working to demonstrate not only the need for, but also *how* international human rights activism might engage in, the thorough reconsideration of common-place international legal notions of the "sexual" and the "religious" that this article argues for.

¶46 In this Part, then, I will first give a very short, general introduction to how family law is organized in India. After this introduction, I will then outline the Indian jurisprudence concerning the right to religiously convert. This line of jurisprudence has both historically and (more so) recently intersected with and impacted upon family law and politics in India in important ways. Moreover, this jurisprudence provides a vivid demonstration of the means by which Indian law and politics often work to try to control not only the various religious identities which exist in India, but also the meaning of "religiosity" itself.

¶47 Fortunately, such attempts at control have not gone uncontested and, accordingly, after discussing the restrictive ambitions which Indian law and politics often manifest, this Part next outlines and explains how recently-proposed Indian family law reforms are attempting to counteract these ambitions, in the process demonstrating how international human rights norms and practices might conceivably de-essentialize established notions of what "religion" and "religious identity," and also "sexuality" and "sexual identity," are. Such de-essentialization is not only possible, but necessary, if international human rights norms and practices are going to respect persons and also "work" in the diverse contexts in which people develop their self-identifications and self-understandings. In this respect, in closing this Part, I will discuss how the same Indian law and politics which work to control all-things-religious in Indian society, also suggest the sexual quality of much of this law and politics. Such a reality, in turn, demonstrates how unpredictably identities, and persecution, can circulate in different contexts, and the problems—both moral and practical—that are created by assuming, as the Brazilian resolution and many of its supporters do, that the "sexual" is easily and always locatable.⁷⁵

⁷⁴ See generally Pankaj Mishra, *The Other Face of Fanaticism*, N.Y. TIMES MAG., Feb. 2, 2003; Martha C. Nussbaum, *Body of the Nation: Why Women Were Mutilated in Gujarat*, BOSTON REV. (Summer 2004), available at <http://www.bostonreview.net/BR29.3/nussbaum.html>. While I believe that it is extremely important to always keep in mind the potential for gruesome violence in politics, both in India and elsewhere, I must emphasize that I am not mentioning such violence in order to make a *practical* argument for the necessity of respecting persons' religious and sexual self-identifications. As my discussion in the preceding Part argues, practical considerations as to political and social stability are not the only reason for a state to avoid intrusive regulations of personal identity; there are also important *moral* reasons to avoid such regulation that discussions in the fields of political philosophy and political ethics make clear. While these moral reasons are not completely divorced from considerations of political and social stability - as no plausible real-world moral system ever could be - they are not premised in notions of how best to bureaucratically manage today's instances of political and social violence.

⁷⁵ See, e.g., the statement by New Zealand's representative to the UNCHR's 61st Session, on the behalf of 31 other countries, that "[s]exual orientation is a fundamental aspect of every individual's identity and an immutable part of self." Ambassador Tim Caughley, New Zealand UNCHR Representative, Statement to the 61st Session of the UNCHR (Apr. 15, 2005), <http://www.mfat.govt.nz/speech/minspeches/15april05>.

A. Introduction to Family Law in India

¶48 As an inheritance from its British colonial past, India's system of family law (or, "personal law") is organized such that people of different "religious" identifications are governed by different marriage, divorce, and inheritance laws.⁷⁶ Thus, for example, a Muslim marital couple in India will be governed by a different set of divorce laws than a Hindu marital couple will be. Likewise, the laws that govern the inheritance that Christian Indian children receive from their parents are different than those laws that govern the inheritance that Muslim Indian children receive from their parents. Furthermore, not only does India's system of family law discriminate between members of different "religious" communities in India, but so does it work to perpetuate discrimination—either formally or informally—against women within each specific set of family laws.⁷⁷

¶49 While this organization of family law in India has a long history, within the past twenty-five years, intense controversies concerning it have erupted in conjunction with the renewal of a number of longstanding debates concerning the meaning and place of secularism in Indian society and politics. And, indeed, perhaps the most fierce of these national controversies erupted in 1985 as a result of the Indian Supreme Court's decision in the *Shah Bano* case.⁷⁸

¶50 The basic question presented by this controversial case was whether the Indian Code of Criminal Procedure's requirement that a man indefinitely financially maintain his ex-wife after a divorce—if she is "unable to maintain herself"⁷⁹—was applicable to Muslim men, who supposedly have more limited responsibilities⁸⁰ towards their ex-wives under classical Muslim family law and, hence, Indian Muslim personal law.⁸¹ *Shah Bano*

html.

⁷⁶ For a more detailed overview of many dimensions of India's family law system, see RELIGION AND PERSONAL LAW IN SECULAR INDIA (Gerald James Larson ed., 2001). For a discussion of comparable family law systems throughout the rest of South Asia, see MEN'S LAWS, WOMEN'S LIVES: A CONSTITUTIONAL PERSPECTIVE ON RELIGION, COMMON LAW AND CULTURE IN SOUTH ASIA (Indira Jaising ed., 2005). Finally, it is important to note that the 1954 Special Marriage Act does technically allow "any two persons" to marry in India without having to utilize any of the explicitly -religion-premised family laws. The Special Marriage Act, No. 43 of 1954, India Code, *available at* <http://indiacode.nic.in/fullact1.asp?tfnm=195443>. However, "the Act has not been well publicized and there seems to be a manipulation to subvert its provisions." FLAVIA AGNES, LAW AND GENDER INEQUALITY: THE POLITICS OF WOMEN'S RIGHTS IN INDIA 97 (1999).

⁷⁷ *See generally* AGNES, *supra* note 76. Thus, for example, Indian Muslim daughters will generally inherit less from a deceased parent than an Indian Muslim son will. *See generally* DAVID PEARL & WERNER MENSKI, MUSLIM FAMILY LAW 439-93 (3rd ed. 1998). While the differences (and similarities) are too complicated to explain here, it is worth noting that the Islamic law of inheritance is not monolithic, and that Sunni and Shia law diverge on the question of women's inheritance. *See id.*

⁷⁸ Mohd. Ahmed Khan v. Shah Bano Begum, [1985] 3 S.C.R. 844 (India).

⁷⁹ INDIA CODE CRIM. PROC. § 125 (1974).

⁸⁰ Under most classical interpretations of Islamic divorce law, it is generally the rule that a man is required to financially maintain his (ex-)wife up until she has menstruated three times, post-divorce. *See* PEARL & MENSKI, *supra* note 77, at 182-84, 280-82.

⁸¹ More specifically, two interlinked questions presented by this case concerned 1) whether or not the Code of Criminal Procedure's maintenance requirement overrode any contrary requirements in Muslim personal law, and 2) whether or not the Code of Criminal Procedure's section 127(3)(b) exemption from providing maintenance for persons who have already paid "the whole of the sum which, under any customary or personal law applicable to the parties, was payable on such divorce," INDIA CODE CRIM. PROC. § 127(3)(b), had been satisfied by the payment of dower (*mahr*) to Shah Bano from her husband. *See* *Shah Bano*, 3 S.C.R. at 851, 862.

was a seventy-three-year-old Muslim woman who had been divorced after forty-six years of marriage by her husband's pronouncement of *talaq*. Her ex-husband was appealing an order by the Madhya Pradesh High Court that he pay a "princely sum" of twenty-five rupees a month in maintenance to his ex-wife.⁸²

¶51 Ultimately, the Supreme Court decided against Shah Bano's husband, holding/finding that 1) the Code of Criminal Procedure's requirements superseded any contradictory Muslim personal law rules and requirements,⁸³ and 2) that nothing in Muslim personal law forbade indefinite maintenance to a divorced wife "who is unable to maintain herself."⁸⁴

¶52 Arguably, the first holding was sufficient to have settled the dispute in the case at hand and, thus, it was gratuitous and unnecessarily provocative to have attempted an interpretation and definition of the Muslim community's personal law. This seems especially the case given that other portions of the Court's opinion took a patronizing tone in regard to the content of such personal law,⁸⁵ as well as (the lack of) efforts by the Muslim community to reform it⁸⁶—and all this by a judiciary in a state which has not been particularly well-known for good treatment of its Muslim citizens.⁸⁷

¶53 Provocative as it was, then, this opinion ended up igniting large protests by conservative Muslims across India. Counter-protests by a number of dissident Muslim women and their allies ensued, adding fuel to the fire.⁸⁸ Eventually, then-Prime Minister Rajiv Gandhi and his government acquiesced to conservative Muslim demands to pass a law whose goal was the elimination of Muslim—and only Muslim—women's rights to petition for and receive indefinite post-divorce maintenance from their ex-husbands.⁸⁹ In response, cries of "appeasement" were effectively raised by Hindu nationalist quarters, which eventually helped lead to the national electoral successes of the Hindu-nationalist BJP political party. These successes, in turn, led to a polarization in Hindu-Muslim relations in India, and also a number of political and legal dilemmas for Indian feminists who previously had been such active proponents of a role for the Indian state in the reform of the Indian family law system.⁹⁰ And, ultimately, throughout this entire political storm, the Indian family law system survived relatively intact, yet again.

⁸² Shah Bano, 3 S.C.R. at 850.

⁸³ See *id.* at 854-56.

⁸⁴ See *id.* at 859-62.

⁸⁵ The lead paragraph in this opinion, in fact, includes the following remarks: "[I]t is alleged that the 'fatal point in Islam is the 'degradation of woman'. To the Prophet is ascribed the statement, hopefully wrongly, that 'Woman was made from a crooked rib, and if you try to bend it straight, it will break; therefore treat your wives kindly.'" *Id.* at 849-50.

⁸⁶ See *id.* at 867.

⁸⁷ Zoya Hasan, one of India's most prominent political scientists, claims that "the actual status of Muslims [in India] has remained the best guarded national secret in the country." Zoya Hasan, *Introduction: Contextualising Gender and Identity in Contemporary India*, in FORGING IDENTITIES: GENDER, COMMUNITIES AND THE STATE vii, xx (Zoya Hasan ed., 1994). Furthermore, she claims that the Indian state has acquiesced to the demands of conservative Muslim *ulema* concerning family law since "for the State this is the easiest form of 'appeasement' because it deflects attention away from the [poor] social and material conditions of Muslims." *Id.* at xxi.

⁸⁸ See Kirti Singh, *The Constitution and Muslim Personal Law*, in FORGING IDENTITIES: GENDER, COMMUNITIES AND THE STATE 96, 101-3 (Zoya Hasan ed., 1994).

⁸⁹ See The Muslim Women (Protection of Rights on Divorce) Act, No. 25 (1986) (India) available at <http://indiacode.nic.in/fullact1.asp?tfnm=198625>.

⁹⁰ See discussion *infra* pp. 467-68.

B. Indian Jurisprudence on Conversion and Religiosity

¶54 In many ways, the BJP's Hindu-nationalist—and anti-Muslim—political program is just the latest chapter in a long story of Hindu-Muslim communitarian conflict in contemporary India. Tragically, this conflict has consumed many lives by not only constantly stirring its own maelstrom but, also, continually spewing its misfortune into many other aspects of contemporary Indian life. And, indeed, the generally-heightened sense of communalism which this conflict has contributed to has only exacerbated a number of other longstanding communal tensions and disagreements (and occasionally violence) between Hindus and Christians, Hindus and Buddhists, and other communal groups in India.

¶55 In an attempt to control such tensions and disagreements,⁹¹ a number of states in India have tried to regulate and restrict religious conversions, with such conversions having often been a source of much controversy and conflict between communities in India.⁹² However, in doing so, these states have only contributed to the more fundamental problem of essentialism vis-à-vis “religious” identity, and the inflexibilities and intolerances that this essentialism ultimately gives rise to.

¶56 As an example of the heights to which some Indian states have been willing to go to control self-identification in India, one only has to examine the facts behind the landmark 1977 Indian Supreme Court opinion in *Rev. Stainislaus v. Madhya Pradesh*.⁹³ This case concerned the Article 25(1) constitutionality of a 1968 Madhya Pradesh Act, entitled the “Madhya Pradesh Dharma Swatantrya Adhiniyam.”⁹⁴ Article 25(1) states that “[s]ubject to public order, morality and health . . . all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.”⁹⁵

¶57 While ostensibly pertaining to “religious freedom,”⁹⁶ the Madhya Pradesh Act actually strenuously worked to bureaucratically regulate conversion (and thus self-identification) in Madhya Pradesh. For example, this Act required that a “Form A” be filed with a District Magistrate within seven days of any conversion ceremony, after being filled out by the (religious) person (e.g. priest) who oversaw the conversion ceremony.⁹⁷ Among other things, Form A required such person to declare the occupation, income, and marital status of the person who was converting.⁹⁸ Such information was relevant, in the wider context of the Act, as this Act's penalties included

⁹¹ Whether doing so in a benevolent manner or not.

⁹² See, e.g., HUMAN RIGHTS WATCH, POLITICS BY OTHER MEANS: ATTACKS AGAINST CHRISTIANS IN INDIA (Oct. 1999) available at <http://www.hrw.org/reports/1999/indiachr/>, for a discussion of how fears of Christian conversion of Hindus have fueled anti-Christian violence in India.

⁹³ *Rev. Stainislaus v. Madhya Pradesh*, [1977] 1 S.C.C. 677 (India). This case decided both Stainislaus' appeal and also a similar case which came from the Orissa High Court, concerning the constitutionality of the Orissa Freedom of Religion Act, 1967. See *Mrs. Yulitha Hyde v. State of Orissa*, A.I.R. 1973 Ori. 116.

⁹⁴ *Madhya Pradesh Dharma Swatantrya Adhiniyam*, 1968. This case arose as a result of the State of Madhya Pradesh's initiation of a prosecution against Reverend Stainislaus, in 1970, for an alleged violation of the 1968 Act. Stainislaus' constitutional petition to the Supreme Court arose in the context of challenging that prosecution, after his Article 25(1) challenge to the 1968 Act at the Madhya Pradesh High Court earlier failed. See *Rev. Stainislaus v. State of Madhya Pradesh*, A.I.R 1975 MP. 163.

⁹⁵ INDIA CONST. art. 25, § 1.

⁹⁶ See *Rev. Stainislaus*, A.I.R. at 164 for the Madhya Pradesh High Court's translation of the Act's name as the (Madhya Pradesh) “Religious Freedom Act.”

⁹⁷ See *id.* at 165 for an outline of the Act, as well as a reproduction of Form A.

⁹⁸ See *id.*

imprisonment for a period of up to two years for any person who was found to have used “allurement,” “force,” or “fraud” to convert another person.⁹⁹

¶58 In its 1977 *Rev. Stainislaus* opinion, the Indian Supreme Court upheld the constitutionality of the Madhya Pradesh Act¹⁰⁰ arguing, among other things, that this Act was a legitimate expression of Madhya Pradesh’s Article 25(1) constitutional powers to regulate religious liberty so as to preserve “public order, morality and health.”¹⁰¹ In this respect, the Court wrote: “Thus if an attempt is made to raise communal passions, e.g. on the ground that some one has been ‘forcibly’ converted to another religion, it would, in all probability, give rise to an apprehension of a breach of the public order, affecting the community at large.”¹⁰²

¶59 Given the violence that has too frequently broken out in India as a result of public controversies concerning conversion,¹⁰³ it is—in some heavily-qualified sense—“understandable” that the Supreme Court of India endorsed the argument that there needs to be some sort of regulation of “abuses” of the right to proselytize. However, that being said, the decision in *Stainislaus* does work, intentionally or not, to maintain a dominant social and political role for Hinduism in India by creating hurdles for people who wish to exit out of Hinduism and enter into another “religion.” Furthermore, this result is worryingly replicated in a number of other important judicial decisions as well. Such decisions extend from the 1975 Supreme Court decision in *Ganpat v. Presiding Officer*¹⁰⁴ to the very recent 2005 Supreme Court decision in *Bal Patil v. Union of India*.¹⁰⁵

⁹⁹ *See id.*

¹⁰⁰ And also the Orissa Freedom of Religion Act, 1967, available at <http://orissagov.nic.in/law/>.

¹⁰¹ *See Rev. Stainislaus v. Madhya Pradesh*, [1977] 1 S.C.C. 677, 683 (India). *See also* INDIA CONST. art. 25, § 1. The Court’s opinion in *Rev. Stainislaus v. Madhya Pradesh* also held that 1) that the Article 25(1) right to “propagate” religion does not mean the right to *convert* other people, but only the right to “transmit or spread one’s religion by an *exposition* of its tenets,” *Rev. Stainislaus*, 1 S.C.C. at 682 (emphasis added), and 2) that the Madhya Pradesh Act was actually an effort to preserve *everyone’s* Article 25 “freedom of conscience” rights - including potential convertees’. *Id.* With respect to this latter argument, the Court wrote: “[T]here is no fundamental right to convert another person to one’s own religion because if a person purposely undertakes the conversion of another person to his religion, as distinguished from his effort to transmit or spread the tenets of his religion, that would impinge on the ‘freedom of conscience’ guaranteed to all citizens of the country alike.” *Id.*

¹⁰² *Id.* at 683.

¹⁰³ *See* HUMAN RIGHTS WATCH, *supra* note 92.

¹⁰⁴ *Ganpat v. Presiding Officer*, A.I.R. 1975 S.C. 420 (India). This decision is very interesting, both for how it works to maintain a dominant role for Hinduism in India but, also, how it does so in the context of making some very admirable statements about the fluidity and indeterminacy of personal identity.

Ganpat arose as a result of an election dispute, in which the appellant, Ganpat, legally challenged the electoral victory of a candidate who was running for the state of Maharashtra’s Legislative Assembly. This candidate had won his election victory in competition for a seat which was reserved for members of India’s disadvantaged “Scheduled Castes.” Ganpat’s claim, however, was that the candidate in question (a “respondent 2”) had converted to Buddhism and thus could not be considered a member of any Scheduled Caste - caste presumably being a Hindu institution.

The evidence presented by Ganpat in this case concerning the religious identity of respondent 2 focused on respondent 2’s role in the allegedly Buddhist marital ceremonies which were conducted for two of his nieces, as well as respondent 2’s visits to a local Buddhist temple. Countering this evidence is respondent 2’s testimony that “he is a Hindu, his wife is a Hindu and they were married according to Hindu rites.” *Id.* at 422. Furthermore, respondent 2 had previously taken up a scholarship in England that was reserved for members of the (Hindu) Scheduled Castes.

Ultimately, the Court resolved the case at hand by ruling in favor of respondent 2, in the process declaring that a number of the Court’s observations in this case as to the nature of Buddhism and Hinduism, and Buddhist and Hindu identity, were “merely to show that this is not a case of black and white but a grey

The decisions in the prominent cases of *Sarla Mudgal v. Union of India*¹⁰⁶ and *Lily Thomas v. Union of India*¹⁰⁷ have produced a similar result as well. These latter two cases have drawn so much attention in India because they concern the legal implication

area where customs and habits of centuries along with some new ideas co-exist and it is difficult to say from a man's attitude in respect of certain questions whether he is a Hindu or a Buddhist." *Id.* at 425.

Such observations as to the nature of Buddhism and Hinduism, and Buddhist and Hindu identity, include the following ones, written in reaction to the allegations in this case concerning the wedding ceremonies of respondent 2's nieces: "What exactly constitutes a proper Buddhist wedding is not very clear from the evidence . . . [E]xcept perhaps for the garlanding of the pictures of Dr. Ambedkar and Buddha there is very little difference between a wedding according to Buddhist rites and a wedding according to Hindu rites . . . But on that ground we find it difficult to accept that any marriage in which [Dr. Ambedkar's] photograph was garlanded or even a Buddhist Bhiku officiated should be considered to be a wedding according to Buddhist rites." *Id.* at 422-23. Moreover, not only did the Court observe that the line between Buddhism and Hinduism is an indeterminate one, but so did the Court note that this line is one that people sometimes very quickly cross back-and-forth over: "There is evidence in this case that persons who still continue to be Hindus marry persons who have become Buddhists and that in such cases the officiating Bhiku asks them to become Buddhist *on the occasion of the marriage*. Again this might explain the resort to the Buddhist rites being followed in these marriages even where one of the parties to the marriage is a non-Buddhist. There is no evidence that in such cases the Hindu partner does not profess Hinduism *thereafter*." *Id.* at 423(emphasis added).

Ultimately, then, the Court concluded by holding that "[r]eligion is essentially a highly personal matter and there the open assertion by a person especially an educated member of the society about the religion he professes should be given considerable weight over the interested testimony of others based on stray instances." *Id.* at 425.

The Court's concluding observations and holding are generally to be commended, in that they recognize that individuals must (generally) be permitted to define their (religious) identities for themselves. Indeed, the Court's remarks here indicate that its discussions as to the nature of Hinduism and Buddhism were not attempts to comprehensively define the substantive content of these religious systems of belief, but merely an attempt to point out that what might seem to be a set of conflicting and mixed-up (Hindu and Buddhist) religious beliefs and practices may actually be perfectly reconcilable - at least from the perspective of an individual adherent.

However, that being said, there are subtle indications that a troublesome form of identity regulation was actually going on here. For example, in its opinion, the Court noted that, in general, "Hinduism is a very broad based religion . . . Hinduism is so tolerant and Hindu religious practices so varied and eclectic that one would find it difficult to say whether one is practicing or professing Hindu religion or not." *Id.* at 423-24. Furthermore, the Court also opines that "[e]specially when one is born a Hindu the fact that he goes to Buddhist temple or a church or a durgah cannot be said to show that they are no more Hindus unless it is *clearly proved* that they have changed their religion from Hinduism to some other religion." *Id.* at 424 (emphasis added).

While seemingly benign, the Court's statements about Hindu tolerance actually reflect a great deal of the propaganda and ideology historically espoused by Hindu nationalist organizations. And, indeed, such beliefs have historically been used to justify the Indian state's grouping together of disparate religious affiliations under the rubric of "Hindu," the argument being that such a grouping is legitimate since Hinduism tolerates - and also encompasses - most any system of belief or practice. Such hegemonic grouping is then used to argue that India is a Hindu-majority state - with Muslims as a distinct and overwhelmingly out-numbered minority. In turn, the encroachment of Hindu-majoritarian nationalism on the Indian state's professed secularity has been defended on the basis that state-sponsored Hinduism and secularism are perfectly consistent with each other, since both are essentially non-communitarian systems of belief.

Ultimately, then, the important *Ganpat* decision works in tandem with other policies and decisions of the Indian state to prevent "leakage" from Hinduism, all while seemingly lending support to the idea that one should have the right to define one's personal identity.

¹⁰⁵ *Bal Patil v. Union of India*, A.I.R. 2005 S.C. 3172 (India). For a relevant discussion of this decision, see Jeff Redding, *Aren't the Jains a Minority? The Supreme Court Doesn't Think So*, 20 *LAWYERS* 26 (2005).

¹⁰⁶ *Smt. Sarla Mudgal v. Union of India*, A.I.R. 1995 S.C. 1531 (India).

¹⁰⁷ *Lily Thomas v. Union of India*, A.I.R. 2000 S.C. 1650 (India).

of Hindu men's conversions to Islam in order to avail themselves of Muslim family law provisions permitting polygamy—a volatile mix of explosive issues if there ever was one. Not only, then, do these cases demonstrate how Indian jurisprudence concerning conversion has impacted family law and politics in India but, moreover, they show the ways in which Indian law and politics have often worked to control not only the various “religious” identities that exist in India, but also the meaning of “religiosity” itself.

¶61 The first of these cases, *Sarla Mudgal*, jointly resolved petitions brought by a women's organization and three different women, all of whose husbands had converted to Islam with the (alleged) intent to marry second wives¹⁰⁸—polygamy being permitted (at least under certain circumstances) under classical interpretations of Islamic law¹⁰⁹ and, moreover, Indian Muslim personal law.¹¹⁰ The questions presented by this case concerned:

- 1) “[W]hether a Hindu husband, married under Hindu law, by embracing Islam, can solemnise second marriage?”
- 2) “Whether such a marriage without having the first marriage dissolved under law, would be a valid marriage qua the first wife who continue [sic] to be a Hindu?”
- 3) “Whether the apostate husband would be guilty of the offence under Section 494 of the Indian Penal Code (IPC) [criminalising bigamy].”¹¹¹

Ultimately, citing and discussing an extensive body of case-law precedent on this issue, the Court held that the Hindu men implicated in this case would be guilty under Section 494 of the Indian Penal Code if the factual allegations against them were proven in a trial.¹¹²

¶62 In response to the Court's holding in *Sarla Mudgal*, the Muslim organization Jamiat-Ulema Hind¹¹³ brought suit at the Supreme Court, arguing in *Lily Thomas v.*

¹⁰⁸ Interestingly, one petitioner in this case was a woman that one of the previously-Hindu men married upon his conversion. According to this petition, this man “under the influence of . . . [his] first Hindu-wife, gave an undertaking . . . that he had reverted back to Hinduism and had agreed to maintain his first wife and three children.” Smt. Sarla Mudgal, A.I.R. 1995 S.C. at 1533. While it is not clear why this woman's situation and petition was grouped in with the other petitions that the Court heard in this case, her complaint was that “she continues to be Muslim, not being maintained by her husband and has no protection under either of the personal laws.” *Id.*

¹⁰⁹ See generally PEARL & MENSKI, *supra* note 77, at 237-40.

¹¹⁰ See *id.* at 252, where the authors state: “The current position in Indian law is therefore clearly that a wife who is an unwilling party to a polygamous Muslim marriage can approach the courts for various remedies, but she cannot legally challenge the basic right of the husband to make polygamous arrangements.”

¹¹¹ Smt. Sarla Mudgal, A.I.R. 1995 S.C. at 1532.

¹¹² Actually, it was only the *Lily Thomas* decision which confirmed that the accused men in this case would still have to be tried and convicted of violating Section 494 in a normal trial, see *Lily Thomas*, A.I.R. 2000 S.C. at 1666, as the *Sarla Mudgal* decision could be read to be presumptively finding these men guilty as accused. See Smt. Sarla Mudgal, A.I.R. 1995 S.C. at 1539 (answering questions presented by the case in a very forceful manner).

¹¹³ The Court variously refers to this group as “Jamiat Ulema Hind,” *Lily Thomas*, A.I.R. 2000 S.C. at 1669, “Jamiat-Ulema Hind,” *id.* at 1661, and “Jamata-e-Ulema Hind,” *id.* at 1667. There were other unnamed petitioners arguing along with the Jamiat-Ulema Hind in this case as well.

Union of India that the Court's holding in *Sarla Mudgal* violated the Article 25 constitutional right to religious freedom, as "making a convert Hindu liable for prosecution under the Penal Code would be against Islam, the religion adopted by such person upon conversion."¹¹⁴

¶63 Ultimately, in *Lily Thomas*, the Court decided that constitutional religious liberty rights were not violated by the outcome in *Sarla Mudgal*.¹¹⁵ However, as interesting as this constitutional outcome is, the opinions in *Lily Thomas* make a number of even more general, and more interesting, comments concerning what they take the nature of "true" Islam—and, more generally, "true" religiosity—to be. These comments arose as a result of the Court's apparent disgust with the polygamous conduct of men who convert from Hinduism to Islam, as well as an apparently irresistible urge to comment on not only the nature of the "Islam" that the Jamiat-Ulema Hind was trying to protect, but also a key question raised in *Sarla Mudgal* itself,¹¹⁶ namely: "[W]here a non-Muslim gets converted to the 'Muslim' faith without any real change or [sic] belief and merely with a view to avoid an earlier marriage or to enter into a second marriage, whether the marriage entered into by him after conversion would be void?"¹¹⁷

¶64 In regards the nature of Islam, the lead opinion in *Lily Thomas* comments that the

plea [by the Jamiat-Ulema Hind] demonstrates . . . ignorance . . . about the tenets of Islam and its teachings. . . . The violators of law who have contracted the second marriage cannot be permitted to urge that such marriage should not be made subject-matter of prosecution under the general Penal Law prevalent in the country. The progressive outlook and wider approach of Islamic law cannot be permitted to be squeezed and narrowed by unscrupulous litigants, apparently indulging in sensual lust sought to be quenched by illegal means.¹¹⁸

¹¹⁴ *Id.* at 1666. This is the Court's description of an Article 25 religious liberty claim that was originally raised in *Sarla Mudgal*. However, it seems that the same basic line of argument was used in *Lily Thomas*, as well, since the Court, when addressing the Article 25 claim at issue in this case, explicitly raises (and dismisses) this previously-made argument. See *id.*

¹¹⁵ In this respect, the Court wrote that, properly understood, the "[f]reedom guaranteed under Art. 25 of the Constitution is such freedom which does not encroach upon a similar freedom of the other persons. Under the constitutional scheme every person has a fundamental right not merely to entertain the religious belief of his choice but also to exhibit this belief and ideas in a manner which does not infringe the religious right [sic] and personal freedom fo [sic] others." *Id.*

¹¹⁶ Though not in this case itself.

¹¹⁷ *Lily Thomas*, A.I.R. 2000 S.C. at 1655 (S. Saghir Ahmad, J., concurring). The colorful (and prejudicial) description of this issue was clearly prompted by the nature of the one of the Hindu wife's allegations against her husband in *Sarla Mudgal*. These allegations were that "THE RESPONDENT . . . HAS CONVERTED TO ISLAM SOLELY FOR THE PURPOSE OF RE-MARRYING AND HAS NO REAL FAITH IN ISLAM. HE DOES NOT PRACTICE THE MUSLIM RITES AS PRESCRIBED NOR HAS HE CHANGED HIS NAME OR RELIGION AND OTHER OFFICIAL DOCUMENTS." *Id.* Evidence that the wife presented in this respect included 1) her converted husband's actual admission to her that his intention in converting was to take on another wife, 2) a birth certificate for a child that was born from this converted husband's second marriage indicating that he had never officially changed his name or religion and, finally, 3) documents indicating that neither the electoral rolls or the documents that the converted husband submitted for an application for a Bangladeshi visa indicated that he had ever officially changed his name or religion. *Id.* at 1655-1656.

¹¹⁸ *Id.* at 1666-67 (Sethi, J.)

¶65 Echoing these concerns on “sensual lust,” and responding to the issue of “feigned”¹¹⁹ conversions that was raised in *Sarla Mudgal*, the concurring opinion opines that

[r]eligion is a matter of faith stemming from the depth of the heart and mind. Religion is a belief which binds the spiritual nature of man to a supernatural being; it is an object of conscientious devotion, faith and pietism. Devotion in its fullest sense is a consecration and denotes an act of worship. Faith in the strict sense constitutes firm reliance on the truth of religious doctrines in every system of religion. Religion, faith or devotion are not easily interchangeable. If the person feigns to have adopted another religion just for some worldly gain or benefit, it would be religious bigotry. Looked at from this angle, a person who mockingly adopts another religion where plurality of marriage is permitted so as to renounce the previous marriage and desert the wife, he cannot be permitted to take advantage of his exploitation as religion is not a commodity to be exploited. The institution of marriage under every personal law is a sacred institution.¹²⁰

¶66 While the Court here clearly had a great deal of respect for what it conceives as “religion,” even the briefest survey of contemporary religious thought around the world (or even just in India) would demonstrate that the Court’s observations in this case about the universally sacred nature of marriage—and also the general nature of “religion”—are actually deeply controversial.¹²¹ In particular, the Court’s attempt to detach both religion and marriage from “worldly gain or benefit”¹²² articulates a “sanctification” of both marriage and religion that many persons and systems of belief simply do not embrace.¹²³

¶67 Moreover, such sanctification also clearly attempts to draw a sharp and firm line between the “religious” and an all-too-worldly (and base) “sexual.” In this way, then, this Indian jurisprudence concerning conversion ends up attempting to control not only the various religious identities which exist in India, but also the meaning of both the “religious” and the “sexual.”

¶68 Fortunately, recently proposed Indian family law reforms have attempted to undermine such restrictive and essentializing Indian law and politics. Moreover, in the

¹¹⁹ *Id.* at 1660 (S. Saghir Ahmad, J., concurring).

¹²⁰ *Id.*

¹²¹ See, e.g., John Witte, Jr., *An Apt and Cheerful Conservation on Marriage*, EMORY U. SCH. L. PUB. L. & LEGAL THEORY RES. PAPER SERIES, Res. Paper No. 05-17 (2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=755105, for a discussion of how Christianity itself has had no single perspective on the nature of marriage.

¹²² See Lily Thomas, A.I.R. 2000 S.C. at 1660.

¹²³ In this respect, it is helpful to note the following remarks by Talal Asad concerning the sanctification of religion: “The requirement of affirmation is apparently innocent and logical, but through it the entire field of evangelism was historically opened up, in particular the work of European missionaries in Asia, Africa, and Latin America. The demand that . . . practices must *affirm something about the fundamental nature of reality*, that it should therefore always be possible to state meanings for them which are not plain nonsense, is the first condition for determining whether they belong to ‘religion.’ The unevangelized come to be seen typically as those who have practices but affirm nothing . . . or as those who do affirm something (probably ‘obscure, shallow, or perverse’), an affirmation that can therefore be dismissed.” ASAD, *supra* note 72, at 43.

process of doing so, these proposed reforms have provided real-world examples of how human rights-oriented law can better respect persons and their diverse self-identifications and self-understandings. Thus, it is to a discussion of these reform proposals, and their history, that I now turn.

C. Indian Family Law Reform Proposals and the Difficulty of Attempting to Define the Boundaries of the Religious and the Sexual

¶69 *Lily Thomas, Sarla Mudgal, and Rev. Stainislaus* force a spotlight on the questions of *what* exactly religion is, what its relationship to worldly concerns—such as sex and marriage—is, and *who* should get to answer these questions. Regarding the “who” question, this article argues that individuals themselves should get to answer these questions, and that international human rights norms and practices should work more strenuously to encourage states to demonstrate a deeper and more thorough respect for persons’ self-identifications and self-understandings—whether those understandings are orthodox or not. Thus, to the extent that the discussions in *Lily Thomas* do not demonstrate such respect, they are very misguided ones.¹²⁴

¶70 Fortunately, criticism of and opposition to the Indian courts’ jurisprudence on family law, and the way in which these courts (and the state to which they belong) have attempted to control self-identification and self-understanding, has a rich tradition in Indian intellectual and non-governmental circles. Indeed, since the *Shah Bano* controversy and the BJP’s electoral successes, Indian feminists in particular have engaged in serious and intense debates about how best to go about reforming India’s family law system, and the obstacles to gender equality and religious liberty that this system poses.

¶71 Such debates are not just recent ones, however, and, indeed, before the rise of the BJP in the early 1990s, Indian feminists (generally speaking) actively advocated for the eradication of India’s differentiated family law system and, in its place, the legislation of a “uniform civil code” of family law. Importantly, such a strategy had the support of the Constitution of India itself, with Article 44 of this constitution declaring that “[t]he State shall endeavour to secure for the citizens a uniform civil [including family law] code throughout the territory of India.”¹²⁵

¶72 Events of the late 1980s and 1990s, however, shattered the considerable consensus that had existed in Indian feminist circles concerning the need for and desirability of a uniform civil code. Suddenly, with the empowerment in national politics of the extremist BJP-led Hindu-nationalist movement, many of these feminists became concerned that

¹²⁴ While it is possibly the case that married women in India would generally be disadvantaged by allowing their husbands to engage in polygamy, the regulation of that polygamy, and its consequences, could proceed independently of the regulation of “religion” itself. Indeed, extant provisions of the Indian Code of Criminal Procedure could very easily be interpreted in a way to force a husband to provide maintenance for a first wife if this woman was “unable to maintain herself” (as a result of the husband’s second marriage). See INDIA CODE CRIM. PROC. § 125 (1974).

¹²⁵ INDIA CONST. art. 44. Technically-speaking, Article 44 is not directly enforceable by the courts in India, as it is included under the “Directive Principles of State Policy” section of the constitution. Article 37 of this section declares that “[t]he provisions contained in this Part [of the Constitution] shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.” INDIA CONST. art. 37.

any uniform civil code that was legislated by a BJP (or BJP-led) government would not be a code representative of and fair to all of India's different communities. Instead, these feminists feared, such a uniform code would only serve to enshrine a particular set of Hindu family law norms, in spite of that uniform code's applicability to all of India's citizens—Hindu or not.

¶73 One might say, then, that after the *Shah Bano* controversy and the rise of the BJP, an impasse set in within India's feminist community. In particular, for many feminists, working within the (now-BJP-dominated) Indian political system for a gender-just uniform civil code suddenly seemed much less palatable. Complicating things further during this time, some prominent feminists charged the Indian judiciary itself with complicity with the Hindu nationalist agenda,¹²⁶ thereby raising another set of questions concerning the advisability of approaching *courts* to ask for changes to the family law system.

¶74 Given these political and legal dilemmas, one approach that gained some considerable degree of support among Indian feminists during this time was to work on changing attitudes concerning family and family law *within* each of the different (religious) communities in India. By doing so, the thinking was, Indian feminists could help build "progressive" religion-specific constituencies. These constituencies could then be used to rally for changes to *each separate* community's family laws, thereby obviating the need for a pan-community, uniform civil code.

¶75 In hindsight, however, this "internal reform" option never really had much prospect of widespread success considering, among other factors, the size and diversity of India's religious communities and the relatively meager financial resources of Indian feminists and their allies. And, indeed, this approach achieved very little legislatively.¹²⁷

¶76 Unhappy with this impasse, then, a number of Indian feminists have recently worked to formulate new diagnoses of the current legal and political situation, in order to devise new strategies—legal and otherwise—to counter the extant family law system and the serious problems that it continues to create for people of all stripes and persuasions. In this respect, the discussions and proposals that recently came out of a large conference in New Delhi are illustrative.¹²⁸

¹²⁶ See, e.g., BRENDA COSSMAN & RATNA KAPUR, *SECULARISM'S LAST SIGH? HINDUTVA AND THE (MIS)RULE OF LAW* (1999).

¹²⁷ Perhaps the most important success in this respect came with the legislation of The Indian Divorce (Amendment) Bill, No. 51 (2001) (India), *available at* <http://indiacode.nic.in/fullact1.asp?tfnm=200151>. This legislation, which amended The Indian Divorce Act, No. 4 (1869) (India), *available at* <http://indiacode.nic.in/fullact1.asp?tfnm=186904>, essentially equalized the availability of divorce for Christian women and men in India, and also introduced the possibility of divorce by mutual consent. While this new law was an impressive achievement, it took a decade of concerted activism to achieve, in a minority population that is much smaller and more organized than, say, India's Muslim population. See Press Release, Catholic Bishops' Conference of India, National Council of Churches in India, Joint Women's Programme, Christians Hail the Indian Divorce Amendment Act 2001 (Sept. 2, 2001), *available at* <http://www.wfn.org/2001/09/msg00000.html>.

¹²⁸ While, obviously, a large number of related discussions, conferences, and scholarship both preceded and followed this conference, *see generally* AGNES, *supra* note 76, at 167-91, this particular conference was nonetheless unique in that it attracted feminist legal scholars and advocates from all of the countries of South Asia (with the exception of Bhutan). *See generally* MEN'S LAWS, WOMEN'S LIVES: A CONSTITUTIONAL PERSPECTIVE ON RELIGION, COMMON LAW AND CULTURE IN SOUTH ASIA, *supra* note 76 (gathering the various contributions to this conference together in one volume). In this way, analysis of the ways in which religious, sexual, and also nationalist politics have impacted upon the development of family law in India was enriched.

¶77 Among the many issues discussed at this conference, one of the most intriguing and spirited discussions concerned a proposal for feminists to begin working to implement an *optional*, gender-just code of family law. One might call this the “choice” proposal. At its most general level, advocates of this proposal suggested that they could accept the current (ostensibly) religion-based family law system (at least for the time being), as long as comprehensive, gender-just, and non-explicitly-religiously-based family laws were also available for those persons who would prefer to be governed by such laws.¹²⁹ One key advantage that advocates of this proposal discussed was that it could provide a fruitful (perhaps temporary) compromise between proponents of a uniform civil code and those who feared the implications of such a code for minority religious communities.

¶78 Other persons at this conference felt that, as part of any legal reform process, the “religious” credentials of the various extant family laws must be challenged. Such persons noted the often complex political and legislative histories behind these family laws, including the political give-and-takes between the state and religious leaders that explain the particular (and sometimes surprising) formulations that these laws possess.¹³⁰ One might call this the “de-essentialization” proposal. Ultimately, then, the purpose of this proposal/challenge was to unpack the extant, politically-laden notion of what passes as “religion” and “religious” family law in South Asia, in order to have another discussion about what is “really” at stake in these debates over family law. Or, as Kumkum Sangiri has artfully put it:

It may be more productive, though less popular, to speak of [religious] communities not as “given” on religious lines but to speak of the political, economic and electoral processes that are producing and privileging this particular sort of ‘community’ and facilitating specific types of ideological investment in it. It would then follow that secular feminist interventions could be directed at these processes, and not confined to finding just means of arbitration between “given,” pre-formed religious communities.¹³¹

¹²⁹ Such a code was partially created in India with the legislation of The Special Marriage Act, No. 43 (1954) (India), *available at* <http://indiacode.nic.in/fullact1.asp?tfnm=195443>. Since the enactment of this Act, debates have continued in India (though in fits and spurts) on the desirability of a more comprehensively gender-just family law code which would also be optional in nature. *See* AGNES, *supra* note 76, at 169, 171.

¹³⁰ *See, e.g.,* Muhammad Khalid Masud, *Apostasy and Judicial Separation in British India*, in ISLAMIC LEGAL INTERPRETATION: MUFTIS AND THEIR FATWAS 193 (Muhammad Khalid Masud et al. eds., 1996) for a discussion of how the British were convinced to pass an amendment to the Muslim law of divorce in India in 1939, in response to increasing Muslim concerns that Muslim women were converting to Christianity in order to take advantage of – what was then – one of the only real ways to obtain a judicial divorce from their husbands.

¹³¹ Sangiri, *supra* note 71, at 3292. Similarly, Sangiri has also remarked that “the state has supported patriarchal interests on religious grounds both ideologically and in practice. There is a long history not only of representing the defence of patriarchal arrangements, privileges and/or the sexual regulation of women as the *defence* of religion but also of the interested representations of patriarchal arrangements as religious *rights* by ‘community’ spokesmen. . . . The coding of patriarchy as religion by community spokesmen has been and is by and large shared by the state which selected *denomination* above differential class, caste and regional practices and above an uncompromising secularism as the primary basis for defining family laws.” *Id.* at 3295.

¶79 Both the proposal to allow people to choose whether they will live according to either “religious” or “non-religious” family laws, as well as the proposal that there must be a de-linking of “religion” from the extant family laws, are very interesting proposals in what they potentially suggest vis-à-vis self-identification and self-understanding in India. And, indeed, these proposals strive to undermine the notion that to be a member of a given religion requires one to adhere to that religion’s family law norms or, alternatively, that adherence to Indian personal law is necessarily equivalent to being “religious.” Ultimately, then, these proposals can work to buttress respect for persons’ self-identifications and self-understandings—whether orthodox or not.

¶80 While each of these proposals is very interesting in itself, considering how both proposals might function *together* if the philosophical and legal trajectories in which each is situated were to merge, is also worth careful consideration. And, indeed, if one were to combine the “choice” and “de-essentialisation” proposals, one would have to consider the possibility that members of a given religion might want to follow the family law of “their religion” in *some* aspects of their lives but not in others.¹³² In these other areas of life, then, people might want to follow a non-religious law, or perhaps even the family law of a religion “different” than their own. Ultimately, then, persons would be allowed the legal opportunity to live not only completely outside the family law of “their religion” and under the terms of a non-religious family law system but, also, the real opportunity to live according to several different religious and non-religious family laws simultaneously. For example, if such a combination-proposal were to be actually adopted in India, the law would allow any Indian woman to choose to marry under Muslim law, yet also respect her desire to be governed by Hindu divorce law, and also permit her children to inherit from her according to the terms of a non-religious family law code. Moreover, the law would allow this without considering that woman’s religious identity—or, importantly, her religiosity itself—suspect or subject to challenge.¹³³

¶81 Of course, such a system of law is only a hypothetical one, and many political and social obstacles lay between its conceptualization and its reality. Nonetheless, the discussion of such a system—one that is anticipated and suggested by a consideration of both the “choice” and “de-essentialization” proposals—is important in the way that it acknowledges the plural (and complicated) ways in which many individuals identify. Importantly as well, such a system of law acknowledges that religiosity may not be for everyone at all times “a matter of faith stemming from the depth of the heart and mind[,] a belief which binds the spiritual nature of man to a supernatural being[, and] an object of conscientious devotion, faith and pietism.”¹³⁴

¶82 Ultimately, then, Indian discussions of family law reform recognize that religious identity may be complicated even if religiosity is mundane. Moreover, in recognizing that religiosity is not necessarily distinct from people’s daily, mundane concerns about their position in the world, Indian discussions of family law reform suggest the serious problems (moral, practical, legal) which come with any attempt to partition off the “religious” from the “worldly.” In turn, and to the extent that sex is part of this world,

¹³² This is assuming that people want to marry, have children, or do other “family” things at all.

¹³³ In the same way that the best aspects of the decision in *Ganpat v. Returning Officer* tried to immunize people’s religious identity and religiosity from legal challenge. A.I.R. 1975 S.C. 420 (India).

¹³⁴ Lily Thomas, A.I.R. 2000 S.C. at 1660.

such Indian discussions suggest that the law should not attempt to draw any hard and permanent line between the “religious” and the “sexual.”

¶83 In regard to this latter point, it is important to note that it is not only Indian feminists who have suggested the difficulty of distinguishing the “religious” and the “sexual,” but also the Indian courts themselves. And, indeed, the decision in *Lily Thomas* itself suggests the difficulty in legally establishing the boundaries between the “religious” and the “sexual.”

¶84 To understand this aspect of the *Lily Thomas* decision, it is worth remembering that the dispute in *Lily Thomas* was framed by the Court as one concerning *religious* liberty, with the *Lily Thomas* Court suggesting that Hindu men who convert to Islam to enjoy polygamy fall outside of the pale of *religion* and may not use *religion* to justify and defend the legal legitimacy of that choice.¹³⁵ If that is the case, however, one question which then arises - but which was never addressed by the Court—is: If these men were not *religious*, were they at least *sexual*? Or, in other words, if these men did not suffer from a limitation on their actions because of *religious* discrimination, might they then have experienced *sexual* discrimination?

¶85 Interestingly, then, the more the Indian state (whether through its courts or otherwise) emphatically attributes an ascetic, non-sexual meaning to religiosity, the more the Indian system of “religious” family law begins to look like an attempt to govern “sexuality” and not—as the Indian Supreme Court would have it—“religion.” And, indeed, taking the Indian Supreme Court’s words in *Lily Thomas* at face value, it seems that the Indian family law system’s use of “Hindu” and “Muslim” might have far less to do with regulating “religions” than regulating—and officially-constituting—different “sexualities,” or even “sexual orientations.”¹³⁶ In particular, under such a system, polygamy has become the sole domain of Islam, and to be “Muslim” means that one at least entertains the possibility of engaging in polygamy.¹³⁷

¹³⁵ See *id.* at 1660, 1666-67.

¹³⁶ In this respect, if one were to acknowledge that a person’s “sexual orientation” could be towards polygamous relationships, one might also wonder whether the men whose behavior was at issue in *Lily Thomas* experienced *sexual orientation* discrimination. Indeed, if these men were to bring another legal claim on the basis of *sexual orientation* discrimination, they might very well challenge the ways in which the Indian family law system recognizes that monogamists may be either Hindu or Muslim (among other options), but leaves the polygamist only with Islam.

Of course, this point raises the question of how one should understand the meaning of the term “sexual orientation.” While space does not permit a detailed discussion of sexuality theory and potential definitions of this term, it is worth noting that there is at least a theoretical recognition that a “sexual orientation” can include a preference for others of a certain race, class, status, height, etc. See EDWARD STEIN, *THE MISMEASURE OF DESIRE: THE SCIENCE, THEORY, AND ETHICS OF SEXUAL ORIENTATION* 64-67 (1999). In other words, there is a recognition that one’s “sexual orientation” (if one has one at all) does not have to be preoccupied with the sex or gender of one’s sexual object choice. Accordingly, an ambitious definition of the term might recognize people’s preferences for a particular number of simultaneous sexual/affectional partners—whether that number be “one,” “two,” or “many.” See generally Elizabeth Emens, *Monogamy’s Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 340-54 (2004) (discussing whether polyamory might be a distinct sexual identity or orientation).

It should be emphasised that my analysis of the implications of the *Lily Thomas* decision here is limited to what would be the “official” implications of this decision, in a governmental/legal system predicated on careful interpretation of and obeisance to case-law precedent. I leave it as an open question whether a great deal of *people* in India actually understand Islam and Hinduism (for themselves) as sexualities or sexual orientations.

¹³⁷ Recognizing that “sexual orientation” can include a person’s preferences about numbers of

¶86 Ultimately, then, the *Lily Thomas* decision seems to have confirmed *sexual* aspects to the Indian family law system that this decision strenuously worked to religiously sanctify. Or, as Kumkum Sangiri describes this system, and the politics surrounding it:

Beneath the opposition between a state-imposed uniform civil code and personal laws that are sought to be reformed from ‘within’ a community . . . lies an unresolved but entirely patriarchal concern: who will control and regulate women? . . . In the debates on the Hindu Code Bill [which ultimately outlawed polygamy for Hindus], Hindus had . . . also administered a warning to the effect that if polygamy became illegal Hindu men would have to convert to Islam to marry more than one woman or would be forced to keep concubines. The confusion between spiritual benefit and male promiscuity must have been amazing.¹³⁸

¶87 In sum, the consequences of the judicial reasoning in *Lily Thomas* provide a vivid example of the unpredictable quality of many common identities—whether “Hindu,” “Muslim,” “religious,” or “sexual.” Furthermore, the overall situation in India provides a vivid example (in addition to that provided by Egypt) of why—and how—international human rights norms and practices must begin to pay much closer attention to the particular ways in which identities and persecution circulate in different contexts if these human rights norms and practices are ever to demonstrate thorough respect for persons and their diverse self-identifications and self-understandings, or otherwise be effective.

¶88 Part V builds upon these Indian discussions, exploring how their suggestions that law not attempt to *a priori* define the meaning and content of “religious identifications” or, indeed, the content of the “religious” and the “sexual” more generally, might be applied to two key areas of international human rights norms and practices. In particular, Part V discusses means to improve the international human rights system’s response to persecutory anti-sodomy laws and, also, the refugees who result from these laws (and other forms of persecution). By discussing these two key areas of concern in international law, Part V provides concrete examples of how this article’s proposals would work in practice, and also how this article’s proposals would help re-acquaint the international system of human rights with those moral-philosophical values concerning respect for persons (see Part III *supra*) that have historically informed the international human rights effort. In doing so, this Part also demonstrates why the Brazilian resolution is both unnecessary and insufficient.

V. IMPLICATIONS FOR INTERNATIONAL HUMAN RIGHTS

¶89 States use anti-sodomy laws both to justify their own persecutory actions, as well as to delegate to non-state actors the (seeming) responsibility to persecute the “blasphemous” and “heretical.”¹³⁹ Thus, attacked by both the state and by their families

sexual/affectional partners, *see supra* note 136, one might then say here that the law in India is constructing Islam to be a “bi”—i.e. potentially interested in both monogamy and polygamy—sexual orientation.

¹³⁸ Sangiri, *supra* note 71, at 3295, 3296.

¹³⁹ *See* Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431 (1992), for a discussion of how “homosexual sodomy statutes work to legitimize homophobic violence and thus violate

and communities, it is no surprise that many homo-sexuals decide to flee to safer environs, whether that be another city, or another country altogether. Unfortunately, such refugees often do not face the warmest welcome (to say the least), with many states expecting conformity (or confinement) in exchange for whatever limited assistance they extend to these refugees.

¶90 This Part outlines how this article’s discussions concerning sexual and religious self-identifications and self-understandings can be used to better counter this state of affairs, namely by introducing changes into 1) how international human rights law conceptualizes and works to eradicate state persecution of homo-sexuals, as specifically accomplished through the legislation and enforcement by states of anti-sodomy laws; and 2) how international refugee law recognizes homo-sexuals when state persecution, however accomplished, causes people to flee their home countries. Ultimately, then, the hope is that the recommendations discussed in this Part will help better mitigate against abuse—both corporal and moral, and both at home and abroad.

A. *Anti-sodomy Laws*

¶91 As with Egypt, many states choose to pursue gays, lesbians, homosexuals, homo-sexuals, and others whose practices or identities somehow mark them as “dangerous,” by enforcing laws written to penalize “debauchery,” “public lewdness,” and other such things.¹⁴⁰ That being said, many influential states have historically chosen to pursue their adversaries with laws criminalizing “sodomy,”¹⁴¹ with South Africa and the United States being two prominent examples of this approach.

¶92 As this article’s discussions have suggested, whatever the particular choice of legal terminology or approach, the motivation—or, to use a legal term, the “intent”—behind such laws is often paradigmatically “religious” in nature.¹⁴² This section will first

the right to be free from state-legitimated violence at the hands of private and public actors.” *Id.* at 1435.

¹⁴⁰ See Sodomy Laws, Sodomy Laws Around the World, <http://www.sodomylaws.org/index.htm> (last visited Feb. 21, 2006) for an overview of such various laws around the world. See also INT’L GAY AND LESBIAN HUMAN RIGHTS COMM’N, WHERE HAVING SEX IS A CRIME: CRIMINALIZATION AND DECRIMINALIZATION OF HOMOSEXUAL ACTS (2003), <http://www.iglhrc.org/site/iglhrc/content.php?type=1&id=77>.

¹⁴¹ It should be noted here that the definition of “sodomy” is not universally agreed upon, and I am using the term “anti-sodomy laws” loosely here to refer to laws which penalise some sort of *physical contact* between individuals, rather than “lewd” behavior by individuals. Indeed, Michael Foucault called sodomy “that ultimately confused category,” MICHAEL FOUCAULT, THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION 101 (Robert Hurley trans., Vintage Books ed. 1990), and Janet Jakobsen and Ann Pellegrini have noted the diversity of acts criminalised in the U.S. under the rubric of “sodomy.” See JAKOBSEN & PELLEGRINI, *supra* note 14, at 23-24. This all being said, at least one of the South African “anti-sodomy laws” that I discuss below seems to penalise acts between two people that do not have to involve physical contact. See discussion *infra* note 144.

¹⁴² The enforcement of such laws can also (to use an American legal term of art) “disparately impact” upon people of different religious affiliations. That being said, in this section I will be focusing on situations where there is open religious justification given for such laws by states. I concentrate on such situations as such openness by states in expressing the religious motivation and intent behind their laws is extremely common and thus paradigmatic. Indeed, in this respect, it might be helpful to remember Madhavi Sunder’s observation that “in defending the near absolute sovereignty of religion, law has ceded enormous power to the private sphere and, in the process, has created a different kind of beast. The perverse result of ‘othering’ discourses is that the ‘other’ often appropriates its negative image and wears it with pride. Thus, we see law’s fundamentalist view of religion being reproduced by religious fundamentalists, who hold themselves out as an alternative to the West’s morally defunct, bureaucratic

demonstrate this point using the laws and jurisprudence of South Africa and the United States to confirm the hegemonic religious motivation that very often is explicitly articulated as justification for their criminalization of sodomy, yet which is rarely appropriately acknowledged by the law. After this demonstration, and based on this article's discussions, I will then suggest changes to the international human rights system's reaction to these state practices, using a well-known decision of the United Nations' Human Rights Committee to ground these recommendations in the real world.

¶93 One important caveat must be made at the outset of this discussion, however. It may seem that by critiquing the failure of legal institutions (whether international or domestic) to acknowledge the religious liberty interests at stake in the cases they adjudicate, I am trying to impose a religion-premised paradigm on victims of persecution who themselves have not articulated the issues in these cases using such a paradigm. However, what is important to remember here is that targets of persecution do not have to be religious themselves in order to claim religious persecution or discrimination—non-religious people as well can suffer from attempts at religious hegemony.¹⁴³ This being the case, in situations where it would seem that any and all possibly viable legal arguments would be used to try to counter persecution and discrimination, the fact that religious liberty arguments are hardly ever raised by either religious or non-religious victims of persecution seems to say a lot about how ordinary people perceive human rights institutions and their (un)willingness to listen to diverse lives, self-identifications, and self-understandings.

1. South Africa

¶94 In 1998, in the case of *National Coalition for Gay and Lesbian Equality v. Minister of Justice*, the Constitutional Court of South Africa overturned several South African common-law and statutory provisions criminalizing same-sex sodomy and other same-sex activities.¹⁴⁴ This decision was important and widely-anticipated, seeing that it gave the Constitutional Court a vital opportunity to determine the meaning and reach of the groundbreaking Section 9 of South Africa's 1996 post-apartheid constitution. Section 9 declared that the state may not "unfairly discriminate directly or indirectly against anyone on one or more grounds, including . . . sexual orientation."¹⁴⁵

¶95 Ultimately, the Constitutional Court declared that the challenged common-law and statutory provisions were in contravention of Section 9's protections against discrimination on the basis of sexual orientation.¹⁴⁶ In addition, the Constitutional Court also determined that the challenged common-law provisions, in particular, violated

rationality." Sunder, *supra* note 41, at 1424 (emphasis added).

¹⁴³ See *infra* note 201.

¹⁴⁴ Nat'l Coalition for Gay and Lesbian Equality v. Minister of Justice 1999 (1) SA 6 (CC) (S. Afr.). I intentionally use the very general word "activities" here because section 20A(1) of the challenged South African Sexual Offences Act itself very generally states that "[a] male person who commits with another male person at a party *any act* which is calculated to stimulate sexual passion or to give sexual gratification, shall be guilty of an offence." See *id.* at 6 (emphasis added). Under a plausible reading of this Act, any heterosexual man who opened up a pornographic magazine with nude images of women in it, in order to show this magazine to another heterosexual man, would be guilty of an offence.

¹⁴⁵ S. AFR. CONST. 1996 § 9, cl. 3.

¹⁴⁶ Nat'l Coalition for Gay and Lesbian Equality, 1999 (1) SA 6 (CC) at 28-29.

Sections 10 and 14 of the 1996 South African constitution, protecting (respectively) human dignity and privacy.¹⁴⁷

¶96 Clearly, the Constitutional Court, in its wide-ranging opinion in *National Coalition for Gay and Lesbian Equality*, decisively invalidated the common-law and statutory provisions at issue in this case. However, the question remains why certain constitutional provisions were invoked to invalidate these laws, but not other ones. For example, in the Witwatersrand High Court opinion which led to the Constitutional Court's decision in this case, the High Court found that one of the challenged statutory provisions was discriminatory on the basis of "sex" or "gender," because the statute only criminalized certain male-male interactions, and not (arguably) similar female-female or female-male interactions.¹⁴⁸ However, the Constitutional Court, in its own opinion, did not pursue this particular line of constitutional argumentation, instead relying on the constitution's specific provision outlawing "sexual orientation" discrimination.¹⁴⁹

¶97 In addition, despite referring to the "gay erotic self-expression"¹⁵⁰ at issue in the case, as well as how "[t]he criminali[z]ation of sodomy in private between consenting males . . . hits at one of the ways in which gays give *expression* to their sexual orientation,"¹⁵¹ the Constitutional Court did not discuss at any length how the challenged laws impinged upon constitutional freedom of expression in South Africa.¹⁵²

¶98 Even more interestingly, the Constitutional Court ignored any possible problems that the challenged laws present for religious liberty in South Africa. This omission is quite surprising, considering the Constitutional Court's observations that the common-law offense of sodomy "criminali[z]e[s] private conduct of consenting adults which causes no harm to anyone else. It has no other purpose than to criminalise conduct which fails to conform with the moral or *religious* views of a section of society."¹⁵³ Moreover, the Constitutional Court noted,

There is still a substantial body of theological thought which holds that the basic purpose of the sexual relationship is procreation. . . . There is an equally strong body of theological thought that no longer holds the view. . . . It must not be thought that the view which holds that sexual expression should be limited to marriage between men and women with procreation as its dominant or sole purpose, is held by crude bigots only. On the contrary, it is also sincerely held, for considered and nuanced *religious* and other reasons.¹⁵⁴

However, even though such religious (or moral) values motivated South Africa's anti-sodomy laws, the Constitutional Court still saw these laws as being a manifestation of *sexual orientation* discrimination, and neither *religious* discrimination nor an

¹⁴⁷ *Id.* at 29-34.

¹⁴⁸ *See id.* at 15.

¹⁴⁹ *Id.* at 71.

¹⁵⁰ *Id.* at 72.

¹⁵¹ *Id.* at 37.

¹⁵² Section 16 of the South African constitution declares that "[e]veryone has the right to freedom of expression." S. AFR. CONST. 1996 § 16.

¹⁵³ Nat'l Coalition for Gay and Lesbian Equality, 1999 (1) SA 6 (CC) at 28.

¹⁵⁴ *Id.* at 38 (citing *S v H* 1995 (1) SA 120 (C) (S. Afr.)).

impingement upon *religious* liberty. Indeed, wrote the Constitutional Court: “It is nevertheless equally important to point out, that such [religious and moral] views, however honestly and sincerely held, cannot influence what the Constitution dictates in regard to *discrimination on the grounds of sexual orientation*.”¹⁵⁵

¶99 While, as the examples of the United States and the United Nations in this section will confirm, the South African Constitutional Court is far from unique among human rights institutions (whether domestic high courts or international human rights bodies) in its reluctance to invalidate anti-sodomy laws on the grounds of religious liberty or discrimination, as this article argues, this reluctance is nonetheless extremely problematic from a human rights perspective.

2. United States

¶100 In 2004, the United States Supreme Court, in its own widely-anticipated decision in *Lawrence v. Texas*,¹⁵⁶ invalidated a Texas state statute which declared that “[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex.”¹⁵⁷ “Deviate sexual intercourse” was defined by the statute as “(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object.”¹⁵⁸

¶101 The Supreme Court’s *Lawrence* decision received a great deal of attention, both in the U.S. and elsewhere, not only for its constitutional invalidation of the statute in question, but also for the way in which it abruptly overruled a previous Supreme Court opinion—from only 18 years before—*upholding* the constitutionality of the state of Georgia’s anti-sodomy statute. And, indeed, in regard to its previous decision in *Bowers v. Hardwick*,¹⁵⁹ the 2004 Supreme Court firmly declared that “[it] was not correct when it was decided, and it is not correct today. It ought not to remain binding precedent. *Bowers v. Hardwick* should be and now is overruled.”¹⁶⁰

¶102 While the answers to a number of legal questions remain unclear after the Supreme Court’s decision in *Lawrence*,¹⁶¹ what is clear from this decision is the 2004 Supreme Court’s distaste for the *Bowers* opinion. And, indeed, the Supreme Court, in its *Lawrence* decision, found many problems with *Bowers*’ engagement in a simplistic

¹⁵⁵ *Id.* at 39 (emphasis added).

¹⁵⁶ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁵⁷ TEX. PENAL CODE ANN. § 21.06(a) (2003).

¹⁵⁸ TEX. PENAL CODE ANN. § 21.01(1) (2003).

¹⁵⁹ *Bowers v. Hardwick*, 478 U.S. 186 (1986).

¹⁶⁰ *Lawrence*, 539 U.S. at 578.

¹⁶¹ The number of legal questions remaining after this opinion is indicated by the Court’s insistent closing observations that “[t]he present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter. The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle.” *Id.*

analysis of the “ancient roots”¹⁶² that anti-sodomy statutes have in U.S. history, or, as then-Chief Justice Burger saw it in his concurring opinion, “Western civilization.”¹⁶³

¶103 Regarding this claim about “Western civilization,” Burger wrote that “[a]s the [majority opinion] notes . . . the proscriptions against sodomy have very ‘ancient roots.’ Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. Condemnation of those practices is firmly rooted in Judaeo-Christian moral and ethical standards.”¹⁶⁴ Writing in response to such reasoning, and expressing its disapproval, the *Lawrence* Court had this terse reply: “In summary, the historical grounds relied upon in *Bowers* are more complex than the majority opinion and the concurring opinion by Chief Justice Burger indicate. Their historical premises are not without doubt and, at the very least, are overstated.”¹⁶⁵

¶104 The *Lawrence* decision’s criticism of Burger’s 1986 analysis of “Western civilization” was not the first criticism directed at Burger’s invocation of “Judeo-Christian moral and ethical standards” and, indeed, the *Bowers* decision, and Burger’s concurrence with it, has been the subject of a number of critical commentaries over the years.¹⁶⁶ In this respect, then, the *Lawrence* decision was especially welcome for its denunciation of hegemonic religious politics and, also, the portions of *Bowers* which sought legitimization from and for these politics. Wrote the Supreme Court in *Lawrence*:

It must be acknowledged, of course, that the Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral. The condemnation has been shaped by religious beliefs, conceptions of right and acceptable behavior, and respect for the traditional family. For many persons these are not trivial concerns but profound and deep convictions accepted as ethical and moral principles to which they aspire and which thus determine the course of their lives. These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law. “Our obligation is to define the liberty of all, not to mandate our own moral code.”¹⁶⁷

¶105 Curiously, however, even while evidently attempting to sharply reverse course vis-à-vis its previously indulgent invocations of religious morality, the Supreme Court did not in this case invalidate the Texas statute using the First Amendment, i.e. the U.S. Constitution’s most notable religious liberty provision. Instead, the Supreme Court chose

¹⁶² *Bowers*, 478 U.S. at 192.

¹⁶³ *Id.* at 196 (Burger, J., concurring).

¹⁶⁴ *Id.*

¹⁶⁵ *Lawrence*, 539 U.S. at 571.

¹⁶⁶ See, e.g., Andrew Koppelman, *Sexual and Religious Pluralism*, in *SEXUAL ORIENTATION AND HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE* 215, 218 (Saul M. Olyan & Martha C. Nussbaum eds., 1998). (critiquing “sectarian” quality of Burger’s concurrence); William N. Eskridge, Jr., *A Jurisprudence of “Coming Out”*: Religion, Homosexuality, and Collisions of Liberty and Equality in *American Public Law*, 106 *YALE L.J.* 2411, 2425 (1997) (drawing comparisons between anti-Mormon and anti-homosexual bigotry).

¹⁶⁷ *Lawrence*, 539 U.S. at 571 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 850 (1992)).

to invalidate the Texas statute under the U.S. Constitution's more general protections of "liberty."¹⁶⁸

¶106 Thus, like the South African Constitutional Court, the U.S. Supreme Court has also been reluctant to invalidate anti-sodomy laws on the grounds that they impede religious liberty or advance religious discrimination. In the next section, using a decision from the United Nations Human Rights Committee (UNHRC), I will first demonstrate how this extremely problematic reluctance is also evident in the decisions of international human rights bodies. Then, using this real-world UNHRC decision as a concrete example, I will examine how this article's discussions can be used to change international human rights norms and practices concerning the persecution of gays, lesbians, homosexuals, homosexuals, and others whose practices or identities somehow mark them as "blasphemous" or "heretical."

3. United Nations Human Rights Committee

¶107 In the groundbreaking 1994 case of *Toonen v. Australia*,¹⁶⁹ Nicholas Toonen, from the Australian state of Tasmania, brought a complaint to the United Nations Human Rights Committee (UNHRC), arguing that sections 122(a), 122(c), and 123 of the Tasmanian Criminal Code, criminalizing "various forms of sexual contact between men, including all forms of sexual contact between consenting adult homosexual men in private,"¹⁷⁰ violated his rights under the International Covenant on Civil and Political Rights (ICCPR). In particular, Toonen argued that these Tasmanian criminal code provisions violated his Article 2 (non-discrimination in ensuring availability of rights), Article 17 (privacy), and Article 26 (non-discrimination/equal protection of the law) rights under the ICCPR.¹⁷¹ Regarding discrimination specifically, Toonen argued that "[the challenged provisions] distinguish between individuals in the exercise of their right to privacy on the basis of sexual activity, sexual orientation and sexual identity," and that "[t]he Tasmanian Criminal Code does not outlaw any form of homosexual activity between consenting homosexual women in private and only some forms of consenting heterosexual activity between adult men and women in private."¹⁷²

¶108 Ultimately, the UNHRC agreed with Toonen that the challenged Tasmanian provisions violated his ICCPR rights. In particular, the UNHRC held that these provisions violated Toonen's Article 2 and Article 17 rights.¹⁷³ Interestingly, however, in upholding Toonen's Article 2 claim, the UNHRC felt it necessary to reconfigure his original claim of "sexual orientation" (or "sexual identity") discrimination as one actually pertaining to "sex" discrimination. And, indeed, it did so quite inexplicably, simply and

¹⁶⁸ Which is protected by the 14th Amendment of the United States Constitution. See *Lawrence*, 539 U.S. at 578. It should also be noted that Justice Sandra Day O'Connor's concurring opinion in *Lawrence* relied as well on the 14th Amendment, though this time on provisions of this amendment which declare that no "State [shall] . . . deny to any person within its jurisdiction the equal protection of the laws." See *id.* at 579 (O'Connor, J., concurring).

¹⁶⁹ U.N. Comm'n on Human Rights, *Toonen v. Australia*, U.N. DOC. CCPR/C/50/D/488/1992 (Mar. 31, 1994).

¹⁷⁰ *Id.* para. 2.1.

¹⁷¹ *Id.* para. 3.1.

¹⁷² *Id.*

¹⁷³ *Id.* para. 11. As a result of its holding, the UNHRC declared that the challenged provisions of the Tasmanian Criminal Code must be repealed. *Id.* para. 10.

suddenly declaring, with no additional explanation, that “[t]he Committee . . . [notes] . . . that in its view, the reference to ‘sex’ in articles 2 . . . and 26 [of the ICCPR] is to be taken as including sexual orientation.”¹⁷⁴

¶109 While the *Toonen* decision was widely-hailed, its holding remains both a mystery and a problem. Toonen’s complaint, it is true, could have been interpreted as a sex discrimination complaint, seeing as this complaint highlighted how the Tasmanian provisions at issue allowed women to engage in certain forms of activity with men, but criminalized the same activities for men.¹⁷⁵ However, this is not the only possible reading of Toonen’s complaint: it could just as easily be read as a straightforward complaint of sexual orientation (or sexual identity) discrimination.¹⁷⁶ Moreover, either way, the UNHRC did not simply say that this case presented an instance of sex discrimination, but that “sex . . . is to be taken as including sexual orientation.”¹⁷⁷ Such a statement is not only overly ambitious, but also provocative, in that it suggests that one’s sexual orientation determines (at least in part) one’s sex (or gender).¹⁷⁸ It is far from clear, however, that Toonen himself embraced this particular model of his sexual orientation and/or sex, and it is certainly the case that many other people around the globe do not.¹⁷⁹

¶110 Another mystery about this decision is how, despite repeated and lengthy discussions of whether or not states could invoke “morality” to limit people’s Article 17 privacy rights, the UNHRC failed to see Tasmania’s criminal law provisions as impinging upon freedom of religion or conscience—both protected equally under Article 18 of the ICCPR.¹⁸⁰ Thus, despite the window of opportunity opened by Toonen’s assertion that “Australia is a pluralistic and multi-cultural society whose citizens have

¹⁷⁴ *Id.* para. 8.7.

¹⁷⁵ The U.N. Comm’n on Human Rights understood Toonen to be complaining, in part, that “[i]n spite of the gender neutrality of Tasmanian laws against ‘unnatural sexual intercourse,’ [section 122] . . . has been enforced far more often against men engaged in homosexual activity than against men or women who are heterosexually active.” *Id.* para. 7.6 (emphasis added). See generally Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. REV. 471 (2001) for a description of and reaction to this kind of argument.

¹⁷⁶ Toonen also complained that “[section 122] criminalizes an activity practised more often by men sexually active with other men than by men or women who are *heterosexually* active. . . . [T]he existence of [sections 122 and 123] has adverse social and psychological impacts on himself and on others in his situation and cites numerous recent examples of harassment of and discrimination against homosexuals and lesbians in Tasmania.” U.N. Comm’n on Human Rights, *Toonen*, *supra* note 169, para. 7.6, 7.8 (emphasis added).

¹⁷⁷ *Id.* para. 8.7.

¹⁷⁸ Douglas Sanders argues that *Toonen* merely advanced the argument that (male-oriented) sodomy laws are sex discrimination because they penalise men for having sex with men, while women are not similarly penalised. See Sanders, *supra* note 4, at 30. See also Stein, *supra* note 175 (explaining and evaluating this kind of sex discrimination argument in detail). I disagree with this interpretation of *Toonen*, however, as the UNHRC did not simply find sex discrimination here, but instead made the more provocative - and ambiguous - claim that “sex . . . is to be taken as including sexual orientation.” See U.N. Comm’n on Human Rights, *Toonen*, *supra* note 169, para. 8.7.

¹⁷⁹ See Katyay, *supra* note 70, at 133 for a discussion of “transgenderal homosexualities,” where “the social meaning of homosexuality is actually defined by transgressions of *gender*, instead of the tendency to engage in same-sex sexual conduct.” This model of homosexuality, like any other one, is not a universal model, however.

¹⁸⁰ Article 18, section 1 reads: “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 choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.” Int’l Covenant on Civil and Political Rights art. 18, para. 1, adopted on Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

different and at times conflicting moral codes,”¹⁸¹ the UNHRC chose to discount the state of Tasmania’s claim of a “morality interest” in its criminal law provisions by merely noting that these assertions were not backed up by actual enforcement: “Considering further that these provisions are not currently enforced, which implies that they are not deemed essential to the protection of morals in Tasmania, the Committee concludes that the provisions . . . arbitrarily interfere with Mr. Toonen’s right under article 17, paragraph 1.”¹⁸² Left unsaid were the legal consequences if a state (like Egypt) actually chose to enforce its persecutory set of laws.¹⁸³

¶111 In sum, then, the HRC’s *Toonen* decision, while important and groundbreaking in some ways, is disappointing and insufficient in many others. In particular, its unexplained configuration of sexual orientation as a component of sex (or gender) ignores a distinction that is important to many people’s self-identification, and its sidestepping of the religious liberty issues at stake in this case not only ignores how states actually justify their persecution, but also forecloses the important challenges that homo-sexuals bring to conventional religious norms. In this latter respect, the *Toonen* decision is akin to both the South African and the U.S. decisions discussed earlier in this section.

¶112 Ultimately, then, both *Toonen* and the decisions from South Africa and the U.S. reflect¹⁸⁴ and encourage an all-too-conventional sort of human thinking that ignores homo-sexuals and the ways in which they see their gay identities or homosexual practices—and persecution—as being deeply interwoven with personal experiences and understandings of religion, instead of sex. Importantly, as well, all three decisions ignore the ways in which states, quite proudly,¹⁸⁵ understand the persecution they commit as motivated by religious concerns, and not those pertaining to sex or sexual orientation per se.

¶113 Fortunately, the UNHRC, and international human rights law in general, can do better. And indeed, following this article’s discussions in Parts III and IV, if such international human rights institutions, norms, and practices were to begin to listen more carefully to the ways in which persons understand and states describe their (respective) persecutions, then *existing* human rights protections concerning religious persecution and discrimination could be used to counter most of the global persecution of gays, lesbians, homosexuals, homo-sexuals, and others whose identities or practices somehow mark them as “blasphemous” or “heretical.” Moreover, using existing protections, such as the International Covenant on Civil and Political Right’s landmark Article 18, would not require the assistance of the Brazilian resolution.

¶114 Thus, following this article’s discussions of both Charles Taylor and the Indian experience, if international human rights norms and practices were to actively respect the ways in which very different understandings of particular sexual and religious identities—and sexuality and religiosity generally—circulate globally, then people would

¹⁸¹ U.N. Comm’n on Human Rights, *Toonen*, *supra* note 169, para. 7.2. This statement perhaps reflects Toonen’s own feeling of membership in a particular moral community.

¹⁸² *Id.* para. 8.6.

¹⁸³ For more on this point, see Sarah Joseph, *Gay Rights Under the ICCPR - Commentary on Toonen v Australia*, 13 U. TASMANIA L.R. 392, 404-6 (1994).

¹⁸⁴ In the sense that the lack of religious liberty arguments made by complainants in these cases suggests that people feel discouraged from making such claims in these cases, even if they would ideally like to. See “caveat” discussion *supra* p. 473-74.

¹⁸⁵ See discussion *supra* note 142.

be encouraged to use those provisions of (international) law that best fit their selves and local situations. Under such a modified international regime, there would be no need to embrace any particular kind of discrimination or persecution argument—whether sexual-orientation-premised *or* religion-premised—in order to acquire legal legitimacy.

Moreover, no legitimacy would be lost by *changing* one’s legal arguments over time, in response either to changing self-identification and self-understanding or the versatile mechanics of state repression. In sum, the law would encourage doctrinal variance vis-à-vis discrimination and persecution, acknowledging the diversity and variance in people’s and state’s experiences, while also not ignoring the age-old struggles for religious power and legitimacy that continue to motivate much persecution. Indeed, the abiding nature of such religious persecution is one of the reasons why there has been such a huge amount of investment over time in international human rights provisions relating to religious freedom.¹⁸⁶

¶115 However, not only are such existing provisions being *presently* ignored when it comes to gays, lesbians, homosexuals, homo-sexuals, and others who identities or practices somehow mark them as “blasphemous” or “heretical,” but so might any *future* use of such provisions be crippled if the Brazilian resolution actually were to pass. As the next section will discuss in more detail, while it is surely the case that a limited number of people are poised to benefit if the UNCHR were to pass the Brazilian resolution, it is also likely that this resolution will even more deeply entrench *Toonen*-like tendencies to institute a one-size-fits-all discrimination paradigm.

¶116 Such a paradigm might be convenient but, as this article has argued, it is also deeply problematic. The next section buttresses this article’s observations and recommendations by critiquing international refugee law and its serious blind spots.

B. International Refugee Law

¶117 As this article discusses, many individuals from around the globe are increasingly contesting conventional juxtapositions of religion (and Islam in particular) and gayness or homosexuality. However, for all their daring challenges to conventional orthodoxies, such homo-sexual people have not earned much respect. Instead, they have usually only suffered even more intense forms of persecution at the hands of states, communities, and families.¹⁸⁷

¶118 While conditions in homo-sexuals’ home countries are often repressive enough to warrant fleeing without deep reflection about what the future holds elsewhere, these refugees often do not find the welcome they were expecting or hoping for in their country of destination. Instead, the conditions and treatment they are subjected to are often horrible in their own way, as numerous press accounts and personal testimonials have amply demonstrated.

¶119 However, despite such publicity, one aspect of the maltreatment of refugees that has not been extensively discussed before is the way in which not just states, but also current international refugee norms and practices, participate in this maltreatment. In

¹⁸⁶ See generally Natan Lerner, *The Nature and Minimum Standards of Freedom of Religion or Belief*, 2000 BYU L. Rev. 905 (2000) (discussing the history of international legal protections relating to religious freedom).

¹⁸⁷ See generally Thomas, *supra* note 139.

particular, as I will discuss in this section, these international norms and practices mistreat *homo-sexual refugees* through effectively ignoring these refugees' experiences, self-identifications, and self-understandings and, instead, throwing such refugees into a legal box constructed for "particular social groups" or (in some more specific articulations of this box) "sexual orientation refugees."

¶120 I begin this section by providing a very brief overview of international refugee law, before moving on to a critique of how this body of international law presently handles homo-sexual refugees. I close the section by tying its discussions into the previous section's discussions and recommendations, as well as by making specific recommendations for changes to UN discussions concerning international refugee law.

1. International Refugee Law Overview

¶121 In general, both the seminal 1951 United Nations Convention Relating to the Status of Refugees and the 1967 United Nations Protocol Relating to the Status of Refugees define a refugee as a person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country."¹⁸⁸

¶122 Of the five characteristics of persons (i.e., race, religion, nationality, political opinion, or membership in a particular social group) that these two international human rights instruments make salient for the purposes of recognizing a "refugee" in the first instance, gays, lesbians, homosexuals, and others have increasingly found asylum based on their ostensible "membership of a particular social group." Thus, for example, in the 1990 ground-breaking *Matter of Toboso-Alfonso* decision,¹⁸⁹ the U.S. government granted a homosexual¹⁹⁰ Cuban man asylum because of this man's membership in the (persecuted) "particular social group" of "homosexuals."¹⁹¹ Similarly, in 1995, in another important decision, the New Zealand government granted an Iranian homosexual man asylum on the basis of his membership in the "particular social group" of "homosexuals in Iran."¹⁹²

¶123 While *some* success in *some* jurisdictions has been achieved using arguments based on "membership of a particular social group," the legal hashing-out of this expression has often been strange, awkward, and difficult.¹⁹³ And indeed, because of this fact, as well as

¹⁸⁸ Convention Relating to the Status of Refugees, art. 1, *adopted on July 28, 1951*, 189 U.N.T.S. 150 (*entered into force* Apr. 22, 1954); Protocol Relating to the Status of Refugees, *adopted on Jan. 31, 1967*, art. 1, 606 U.N.T.S. 267 (*entered into force* Oct. 4, 1967).

¹⁸⁹ *Matter of Toboso-Alfonso*, 20 I. & N. Dec. 819 (B.I.A. 1990).

¹⁹⁰ Toboso-Alfonso described himself as a homosexual. *See id.* at 820.

¹⁹¹ *Id.* at 822. It is worth noting here that one of Toboso-Alfonso's tormentors in Cuba was the ideological Union of Communist Youth. *See id.* at 821. It is not clear then why Toboso-Alfonso felt that he could not bring an asylum claim based on his torment by this group advancing a particular "political opinion."

¹⁹² *Refugee Appeal No. 1312/93* 62 (Refugee Status Appeals Authority 1995), *available at* <http://www.nzrefugeeappeals.govt.nz/>. Wrote the Appeals Authority: "We are satisfied, on the evidence received, that homosexuals in Iran are a cognisable social group united by a shared internal characteristic namely, their sexual orientation. We also find that homosexuality is either an innate or unchangeable characteristic, or a characteristic so fundamental to identity or human dignity that it ought not be required to be changed." *Id.*

¹⁹³ As the New Zealand Refugee Status Appeals Authority described the situation, after undertaking a

the fact that “sexual orientation” was (obviously) never specifically enumerated by the 1951 Convention or the 1967 Protocol as something relevant for the purpose of determining refugee status, it is understandable that international gay and lesbian activists and asylum advocates have advocated for the Brazilian resolution. For all of the uncertainties of what counts as a “sexual orientation,” the term nonetheless seems (to some people) more concrete than the awkwardly-termed—not to mention, uncertainly-enforced—“membership in a particular social group.” At the least, it would seem that the “average person” might know whether or not they possessed a “sexual orientation,”¹⁹⁴ even if they could not understand the complicated and uneven jurisprudence as to what constitutes “membership of a particular social group.”

¶124 That being said, a number of observers of and participants in the asylum process have been less than fully-enthusiastic about sexual orientation asylum claims, both as they are typically presently configured, and as how they likely increasingly would be if the Brazilian resolution were to succeed. In the next section, I will discuss the existing problems with international refugee norms and practices that these persons—and also this article—diagnose, and how the Brazilian resolution would likely exacerbate these problems.

2. Problems with Existing International Refugee Law Norms and Practices

¶125 While those who express worry about how existing (and future) sexual orientation asylum claims are configured do not begrudge others the opportunity for a better life, they do worry about the forms of injustice that such claims—as currently configured—perpetrate on both participants in and bystanders to the asylum process. Thus, as Jacqueline Bhabha has commented on the asylum process, more generally:

[There is a] pressure to generate simplistic, even derogatory characterizations of asylum seekers’ countries of origin, as areas of barbarism or lack of civility in order to present a clear-cut picture of persecution. The central guiding principle of this pressure might be described as “the worse the better” - the more oppressive the home state, the greater the chances of gaining asylum in the host state. While understandable as a pragmatic strategy to maximize the chances of a successful outcome, this approach easily turns into stereotypy [*sic*], even cultural arrogance. . . . [I]t is reductive: differing conceptions of gender, religious or age-based roles and rights within the state, and the culture or religion of the asylum seeker may be homogenized into a uniform picture - a stereotype may come to stand in for the variety of possible forms of oppression.

survey of relevant jurisprudence from around the world: “One issue emerging from the rather confused sexual orientation jurisprudence is whether a social group should be identified by the internal characteristics of the group or whether the external perceptions of the group by society at large, or the agent of persecution in particular, should be determinative.” *Id.* at 59-60. See also T. David Parish, *Membership in a Particular Social Group under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92 COLUM. L. REV. 923, 932-44 (1992) for a discussion of this confusion in the U.S. context.

¹⁹⁴ Then again, there is a lot of variance in how this expression can be interpreted. See, e.g., Narrain, *supra* note 6 for Sri Lanka’s thoughts about what this term might encompass, and also see discussion *supra* note 135 regarding whether “polyamory” might be a “sexual orientation.”

. . . [T]his strategy is not cost-free - it legitimizes and perpetuates simplistic stereotypes under challenge in many of the countries from which asylum seekers flee. It may also narrow the scope for advancing asylum claims on behalf of claimants who do not fit the prevailing stereotype.¹⁹⁵

¶126 Similarly, a number of observers of and participants in the asylum process have remarked on how many sexual orientation asylum claims, in particular, often structure an antagonistic relationship between “gayness” (or “homosexuality”) and “religion,” in effect positioning these two as either strangers to each other—or inevitable and eternal enemies. Moreover, this positioning seems especially common when gay, lesbian, and homosexual Muslims from so-called “Islamic states” press asylum claims.¹⁹⁶ In this respect, then, many persons who have observed and participated in the asylum process have expressed worry about how sexual orientation asylum claims often serve to both generate and perpetuate unfair bias against both Muslims and Islam—thus making some winners, but many others losers in one way or another.

¶127 To understand this particular worry, one might consider the following statements contained in a Memorandum of Law which was submitted to a U.S. immigration tribunal by attorneys representing a Pakistani lesbian pursuing asylum in the U.S on the basis that “lesbian women” constitute a persecuted “particular social group” in Pakistan:

Given the conservative nature of Pakistani society, and its Islamic ideology, it is unsurprising that there is little documented information available about homosexuals in Pakistan. As a sampling of other countries in the region, which adhere to Islamic law demonstrates, homosexuals and those suspected of being homosexual are subject to imprisonment and death in Muslim countries. In Egypt, for example, in March 2002, five Egyptian men were sentenced to three years in prison with hard labor for engaging in gay sex. . . . In Saudi Arabia, three men accused of homosexual acts were beheaded in ‘accordance with Islamic law’ Similarly, the ‘Taliban which ruled Afghanistan until recently, used to topple brick walls over suspected homosexuals to kill them.’¹⁹⁷

¹⁹⁵ Jacqueline Bhabha, *Internationalist Gatekeepers?: The Tension Between Asylum Advocacy and Human Rights*, 15 HARV. HUM. RTS. J. 155, 162 (2002); see also Susan Musarrat Akram, *Orientalism Revisited in Asylum and Refugee Claims*, 12 INT’L J. REFUGEE L. 7 (2000) for a critique of how Islam and Muslim women, in particular, fare under refugee attorneys’ “the worse the better” strategies. As part of her critique, Akram notes that “[n]eo-Orientalist portrayals of Islam doom asylum and refugee applicants’ cases from the very start. . . . First, the distorted view of ‘Islam’ put forward by . . . refugee advocates can be disproved by government research and expert testimony, thus undermining the credibility of the refugee’s account. Second, not only are these monolithic portrayals of Islam simply incorrect and open to government rebuttal, but they silence the voice of the refugee herself, with a number of destructive consequences.” *Id.* at 10.

¹⁹⁶ Or “Muslim countries.” This terminology is variously—and confusingly—used to refer to demographically Muslim-majority states, states which have Islam as an official religion, and/or states which enforce Islamic law.

¹⁹⁷ Memorandum of Law in Support of Application 4 (on file with author).

¶128 One can find similarly sweeping generalizations concerning Islam, as well as religion more generally, in the following case of a homosexual Jordanian man who was successful in his application for refugee status in Australia. While, unlike the Pakistani woman, this man does not take the reader on a quick tour through a cruel and globally-congealed Islam, he does make a number of regional, cultural, and religious generalizations that seem both disconnected from his specific experiences and knowledge (in Jordan and Palestine), as well as gratuitous. Writes this man:

I was born in, [*sic*] Jordan. My family originally came from Palestine. I have (several) brothers and one sister. My father was a professional, but he is retired now. My father is a devout religious Muslim and has made the Haj to Mecca. Some of my brothers have been to Mecca as well. My uncle is a Muslim priest and he is the head Imam in our town. I grew up in a very religious family. As an example, we could not mix with the females in our family, so I did not even see my female cousins in my life, as it was seen to be against our religion by my family. All my life I can remember that my father and my uncle used to force us children to go to the mosque to pray. We could not say no to them because they would punish us by fire and by sticks until we started bleeding. I have not forgotten how they used to force me to do things I didn't want to do. I know that when you are part of a religious family, you have no freedom. You always live in stress, which sometimes directs you to do things against your religion. All my life I can remember that my only sexual leanings have been of a homosexual nature. When I was young, I met a friend at school. . . . If I have to go back to Jordan[,] unless I know my life is secure with the approval of this application, I will always be afraid and will have to live this awful secret and double life. I cannot enjoy the freedom which other homosexuals have in this open and free society where individual rights are truly respected. Being a homosexual is against our Muslim religion and the Arab culture as expressed in Jordan. . . . The law in Jordan strictly forbids a man from having sexual relations with another man. It is against the Muslim religion. People found in this situation face severe public punishment. Homosexuality is also against Arabic culture and traditions.¹⁹⁸

¶129 Clearly, these kinds of generalizations have an audience—and an important one at that—in states' immigration tribunals. Indeed, the following remarks by an Australian tribunal, concerning the application for asylum by a homosexual man coming from Afghanistan, demonstrate how even the most conjectural and unsupported generalizations about Islam and its antagonistic relationship to homosexuality or gayness often get a sympathetic playing out:

¹⁹⁸ Australian Legal Information Institute, *Reference N98/21046* (Refugee Review Tribunal 1999), available at <http://www.austlii.edu.au/>.

There is only limited first hand information on the issue of homosexuality [in Afghanistan], given that this subject is a taboo in Afghanistan. Various literature on this issue indicates that in many Muslim and Arab societies, homosexuality serves as a “temporary (but nevertheless valid and important) proxy stage of growth between puberty and marriage”. [sic] Since there is a segregation of genders in Muslim societies, albeit to varying degrees, young males develop partnerships with other males, whether older or younger. They acquire their first sexual experiences by practicing on each other, and many of them eventually end up in heterosexual marriages, thus abandoning these homosexual relationships or continue to practice them secretly on the side. Those who do continue to be involved in such relationships are the *true homosexuals*, but who would not dare to reveal it. In other words, for the most part, sex between men is the flip side of the segregation of women. Therefore, it would seem that sex between men is frowned upon but accepted, as long as the practicing persons marry and have their own children and also keep quiet about this activity.

This equally applies to Afghanistan. As one study has termed it, ‘the prevalence of sex between Afghan men is an open secret’. [sic] The practice of using young boys as objects of pleasure is reportedly also quite common, particularly in Kandahar and the South. It would seem that such relations are more coercive and more opportunistic in that strong older men are taking advantage of poor and young males, who often do not have the choice. The above notwithstanding, *truly gay men and women* would not be tolerated by the society, and those who are *truly homosexual* would have to hide their sexual orientation.

Homosexuality is therefore not seen as natural or acceptable. Homosexuality is outlawed in Islam and liable to punishment through stoning. A person who is a homosexual is seen to be in violation of God’s law, and should therefore seek repentance.¹⁹⁹

¶130 Examining, then, how refugee claims of gay, lesbian, and homosexual Muslims from around the globe are often being configured, one might very easily (and perhaps reasonably) conclude that there is little or no role for gayness or homosexuality within Islam. In other words, to be gay or homosexual *and* Muslim is a near impossibility. As this article has argued, however, such an articulation, and legal enforcement, of Islam (not to mention gayness and homosexuality) actively disrespects the experiences and reality of many homo-sexual people around the globe who have a different understanding of what it means to be Muslim and gay or homosexual.

¶131 Furthermore, examining these refugee cases, one can see how they reflect the conventional international human rights discourse on Islam and homosexuality, in

¹⁹⁹ Australian Legal Information Institute, *Reference N03/47786* (Refugee Review Tribunal 2004) (emphasis added), available at <http://www.austlii.edu.au/>.

particular—and religion and sexuality, generally—that many observers of and participants in the asylum process have diagnosed, and which this section has discussed. And, indeed, so strong a hold does this discourse seem to have that even though each of the three asylum applicants discussed in this section characterized his home country’s enforcement of an Islamic religious agenda as ostentatious and totalitarian,²⁰⁰ none of the three raised a religious persecution claim in relation to the persecution of his homosexuality. Moreover, no such claims were raised even though all of these applicants were in very difficult circumstances, where one would have expected them to pursue all legal arguments which had a chance at succeeding—a religious persecution argument being one of these.²⁰¹ Ultimately, then, the lack of such religious persecution arguments in these case suggests there exists a very strong perception that religious persecution claims are legally unavailable (or unviable) when it comes to gay, lesbian, and homosexual asylum applicants.

¶132 If this is the situation presently, one can only imagine how much more problematic the asylum process will become if immigration tribunals do not even have to consider whether gays, lesbians, and/or homosexuals in a given society form a “particular social group.” And, indeed, if “sexual orientation” is added to “race, religion, nationality, membership of a particular social group or political opinion” for the purposes of defining a refugee, the choice of legal box that homo-sexuals are forced into will likely become even more unavoidable. In that case, the distance between gayness or homosexuality and religion will have become perhaps non-traversable, and a (following Bhabha) *homogenizing* simplification will have come at the expense of many people who are either homo-sexual and/or who should already be quite able to successfully argue a claim of religious persecution.²⁰²

¶133 For these reasons, then, the Brazilian resolution, both in the context of international refugee law and vis-a-vis states’ anti-sodomy laws, seems both insufficient and

²⁰⁰ See Memorandum of Law in Support of Application 4, *supra* note 197, and Australian Legal Information Institute, *Reference N98/21046*, *supra* note 198. See also Australian Legal Information Institute, *Reference N03/47786*, *supra* note 199, for the applicant’s depiction of Afghanistan as a place where the Taliban’s return was a distinct possibility.

²⁰¹ Indeed, whether or not the asylum applicants saw themselves as religious, they should have been able to argue successfully that their respective totalitarian governments were trying to impose religious conformity - either on non-believers, or on dissident believers. See generally T. Jeremy Gunn, *The Complexity of Religion and the Definition of “Religion” in International Law*, 16 HARV. HUM. RTS. J. 189, 206-12 (2003) (discussing how religious persecution can occur both intra- and inter-group). While it may seem that by saying *religious* persecution exists in situations where a *religious* government mistreats a *non-religious* person that one is focusing disproportionately - and misguidedly - on the *persecutor’s intent* in characterizing the situation, I feel such worries are misplaced in the present circumstances. Indeed, the usual critique of persecutor’s-intent-focused inquiries is that they “effectively require[] proof of the subjective motivation of the persecutor before refugee status can be granted.” James Hathaway, *The Causal Nexus in International Refugee Law*, 23 MICH. J. INT’L L. 207, 208 (2002). See also Shayna Cook, *Repairing the Legacy of INS v. Elias-Zacarias*, 23 MICH. J. INT’L L. 223, 246 (2002) (critiquing a U.S. Supreme Court ruling that requires asylum applicants to prove intent and thus engage in “the nearly impossible task of determining the persecutors’ states of mind”). While it is true that such proof is often locked away in secret files and the minds of men, the cases described in this section are, like the situation in Egypt described *supra*, typical in the way that governments *openly* boast of their religious motivation in cracking down on “deviants.” See discussion *supra* note 142. Thus, while a concern about having to prove persecutor’s intent/subjective motivation is problematic in many contexts, it is not one that we need worry about here.

²⁰² See discussion *supra* note 201.

unnecessary. In the next section, I will confirm this lack of necessity in the context of proposing changes to the UN's existing discussions concerning international refugee law.

3. Proposed Solutions

¶134 When Ms. A.B.N., from Part III, left Saudi Arabia and applied for asylum in the U.S., she was clearly determined to retain her Muslim religious identity. Thus, in an affidavit for her asylum case (discussed in Part III, *supra*),²⁰³ not only did she assert that she “should not be forced to marry, dress as a ‘proper’ woman is expected to dress, forgo a higher education, or adhere to a heterosexual lifestyle,” Ms. A.B.N. also resolutely declared that she is “proud to be Muslim” and that “[h]er religious beliefs are an integral part of her identity.”²⁰⁴ Thus, not surprisingly, Ms. A.B.N. argued that not only did she face persecution on account of her membership in a particular social group in Saudi Arabia, but also because of her *religious* and political beliefs. Or, as her attorney put it:

A.B.N. should be granted asylum because her Application for Asylum, her Supplemental Statement, and other supporting materials demonstrate that she has a well-founded fear of future persecution, on account of her *membership in the social group of Saudi Arabian lesbians* who have not conformed to traditional gender roles, as well as on account of her *liberal religious practices and feminist political beliefs*.²⁰⁵

¶135 Recently, in a statement of guidelines relevant to Ms. A.B.N.'s case, the United Nations High Commission for Refugees (UNHCR) recognized that “[i]n certain States, the religion assigns particular roles or behavioural codes to women and men respectively. Where a woman does not fulfil [*sic*] her assigned role or refuses to abide by the codes, and is punished as a consequence, she may have a well-founded fear of being persecuted for reasons of religion.”²⁰⁶

²⁰³ See discussion *supra* p. 452-53.

²⁰⁴ Memorandum of Law and Facts in Support of A.B.N.'s Application for Asylum and/or Withholding of Removal, *supra* note 60, at 42.

²⁰⁵ *Id.* at 2 (emphasis added).

²⁰⁶ U.N. High Comm'r for Refugees, *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*, para. 25, U.N. DOC. HCR/GIP/02/01 (May 7, 2002) available at http://cgrs.uchastings.edu/law/unhcr_un.php. Similarly, Canada's Immigration and Refugee Board, recognised in 1993 that “[a] woman who, in a theocracy for example, chooses not to subscribe to or follow the precepts of a state religion may be at risk of persecution for reasons of religion. In the context of the [1951] Convention refugee definition, the notion of religion may encompass, among other freedoms, the freedom to hold a belief system of one's choice or *not to hold* a particular belief system and the freedom to practise a religion of one's choice or *not to practise* a prescribed religion. In certain states, the religion assigns certain roles to women; if a woman does not fulfill her assigned role and is punished for that, she may have a well-founded fear of persecution for reasons of religion.” Immigration and Refugee Board of Canada, *Women Refugee Claimants Fearing Gender-Related Persecution: Guidelines Issued By the Chairperson Pursuant to Section 65(3) of the Immigration Act* (Nov. 13, 1996), available at http://www.irb-cisr.gc.ca/en/about/guidelines/women_e.htm#AII. Moreover, according to these guidelines: “In evaluating the ‘membership in a particular social group’ ground for a fear of gender-related persecution, [the following] consideration[is] necessary: [] *Most of the gender-specific claims involving fear of persecution for transgressing religious or social norms may be determined on grounds of religion or political opinion.* Such women may be seen by the governing authorities or private citizens as having made a religious or political statement in transgressing those norms of their society.” *Id.* (emphasis added).

¶136 However, despite the fact that the UNHCR has found that “gender-related” persecution can be motivated by religious (and/or ideological) reasons—with other expert institutions arguing that “most” instances of this kind of persecution are so-motivated²⁰⁷—such persecution continues to often be inappropriately dealt with under the “membership in a particular social group” clause of the 1951 Convention. In this respect, then, the UNHCR has emphasized,

[g]ender-related claims have often been analyzed within the parameters of this ground, making a proper understanding of this term of paramount importance. However, in some cases, the emphasis given to the social group ground has meant that other applicable grounds, such as religion or political opinion, have been over-looked. Therefore, the interpretation given to this ground cannot render the other four [1951] Convention grounds superfluous.²⁰⁸

¶137 Certainly, there is no reason to disagree with the UNHCR here that the enforcement of international refugee law has often misunderstood how certain forms of persecution can be and are seen as “religious” persecution. However, Part II’s moral-philosophical discussion insists that the problems with the over-characterization of gender-related-persecution as persecution on the basis of one’s “membership in a particular social group” are more serious an issue than the use of the expression “over-looked” suggests. And, indeed, such language suggests that the harm caused to asylum applicants here is one of inconvenience, rather than, as Charles Taylor emphasizes, *actual moral harm*.

¶138 Additionally, one must wonder: Who has done the “over-looking” here? Is it the asylum applicants, or the immigration tribunals to which these people are applying for refugee status? In this respect, it would seem that it could not be the asylum applicants, at least if one had any faith in, or respect for, the applicants and their self-identifications and self-understandings. At the least, such persons should not be presumed to “over-look” their own experiences. As for immigration tribunals, it is similarly problematic to suggest that they should stop “over-looking” potential grounds for asylum, in that this seems to imply that such tribunals should be in the business of *determining* or *defining* applicants’ experiences, instead of (more) simply deciding whether those experiences meet the legal requirements for a grant of refugee status. That being said, the UNHCR seems to have quite a bit of faith in both its and immigration tribunals’ powers of omniscience. Hence, the following UNHCR recommendations:

It is also important to be aware that in many gender-related claims, the persecution feared could be for one, or more, of the Convention grounds. For example, a claim for refugee status based on transgression of social or religious norms may be analysed in terms of religion, political opinion or membership of a particular social group. *The claimant is not required to*

²⁰⁷ See, e.g., Immigration and Refugee Board of Canada, *supra* note 206.

²⁰⁸ U.N. High Comm’r for Refugees, *supra* note 206, para. 28.

*identify accurately the reason why he or she has a well-founded fear of being persecuted.*²⁰⁹

¶139 The problems with the UNHCR, and the international refugee norms that this important body both responds and contributes to, are not limited to the definition and enforcement of “gender-based” persecution, but also supposed “sexual orientation-based” persecution as well. Indeed, another set of more-recent UNCHR recommendations exacerbates the lack of serious investment in respecting persons and their diverse self-identifications and self-understandings that the UNHCR’s gender-persecution recommendations already demonstrate. This time, however, they do so by defining “religious” persecution in a way which works to demarcate and defend a sharp and problematically firm line between the “religious” and the “sexual.”

¶140 Thus, despite the fact that the UNHCR’s gender-persecution recommendations recognize that “[r]efugee claims based on differing sexual orientation contain a gender element”²¹⁰ and, also, that persecution for gender-deviance is too often solely characterized as persecution on the basis of membership of a particular social group—instead of, say, religion as well²¹¹—more-recent recommendations by the UNHCR refuse to draw the conclusion that its earlier observations imply. In particular, it would seem that if supposed sexual orientation persecution can actually be gender persecution, and that supposed gender persecution can actually be religious persecution, that supposed sexual orientation persecution could then actually be religious persecution.

¶141 Instead of drawing this logical conclusion, however, the UNCHR’s even-more-recent recommendations completely ignore the possibility that persecution of gays, lesbians, homosexuals, homo-sexuals and others whose identities or practices somehow mark them as “blasphemous” or “heretical” may be persecuted for religious reasons, or may see themselves as religious dissidents. Such an omission occurs in these recommendations despite the acknowledgment that “[i]n assessing religion-based claims, decision-makers need to appreciate the frequent interplay between religion and gender, race, ethnicity, cultural norms, identity, way of life and other factors.”²¹² Shockingly, such a list of factors pointedly does not include any mention of “sexuality” or “sexual orientation,” despite explicit attention elsewhere in these recommendations to “the impact of gender on religion-based refugee claims”—including the impact of sexual acts coerced by ostensibly “religious” authorities.²¹³

¶142 Ultimately, then, it would seem that the solutions to the problems with how international refugee law currently conceptualizes and recognizes persecution against gays, lesbians, homosexuals, and others whose practices or identities somehow mark

²⁰⁹ *Id.* para. 23 (emphasis added). Such recommendations seem to be consistent with the recommendatory “Michigan Guidelines on Nexus to a Convention Ground.” See James C. Hathaway, *The Michigan Guidelines on Nexus to a Convention Ground*, 23 MICH. J. INT’LL. 211 (2002).

²¹⁰ U.N. High Comm’r for Refugees, *supra* note 206, para. 16.

²¹¹ See *id.* para. 28.

²¹² U.N. High Comm’r for Refugees, *Guidelines on International Protection: Religion Based Refugee Claims under Art. 1A(2) of the 1951 Convention and/or the 1967 Protocol Relating to the Status of Refugees*, 10, U.N. DOC. HCR/GIP/04/06 (Apr. 28, 2004).

²¹³ See *id.* at 8 for the U.N. High Comm’r for Refugees’ report that “[i]n some countries, young girls are pledged in the name of religion to perform traditional slave duties or to provide sexual services to the clergy or other men.”

them as “deviant” or dangerous can be found in the same UNHCR recommendations that demonstrate the existence of these problems. And, indeed, by listening more closely to what international human rights norms and practices already permit, as well as to how both persons and states understand their respective persecutions, solutions for the problems of many (if not most) of these persecuted persons can be found or, as it may be, “re-discovered.” Certainly, some people may need to escape persecution on the basis of their “sexual orientation.” However, a much greater number need to escape hegemonic articulations and enforcements of religious morality with which they disagree.

¶143 All this being the case, I believe that it is likely that the Brazilian resolution—in addition to having no international political viability—will exacerbate the misidentifications that international refugee law, as well as other areas of international human rights law, already perpetuates by providing an even simpler, and simplistic, choice of legal box for overburdened immigration tribunals. Alternatively, the UNHCR’s recommendations, as well as other international human rights provisions relating to religious liberty, provide—if faithfully and *fully* implemented—a greater number of asylum-seekers a better opportunity to pursue their claims without having to distort their situations and selves. Such distortion not only harms the potential for success of present and future asylum applications by both homo-sexuals and others, but also harms people’s sense of personal integrity. Ultimately, then, as with anti-sodomy laws, pursuing the Brazilian resolution is not only largely unnecessary, but also potentially harmful.

VI. CONCLUSION

¶144 Religious persecution has been a seemingly unshakeable aspect of the human experience. While religions, and the meaning of “religiosity” itself, have often changed a great deal in both the distant and recent pasts, religious conflict has remained an abiding aspect of global life. Unfortunately, such a situation has been given a new lease on life by recent global events. And, indeed, it is no great revelation to say that religious conflict is here to stay with us for the foreseeable future.

¶145 While this situation is certainly tragic, international human rights norms and practices do no justice by actively working to obscure—or *sexualize*—this all-too-common *religious* conflict. Unfortunately, however, such norms and practices have perpetuated injustice by not only failing to acknowledge such religious conflict, but also refusing to understand the non-static quality to much of the religious experience. As this article demonstrates, this refusal to understand has been a particular problem in international legal discussions of Islam and sexuality.

¶146 Fortunately, the international arena is not the only one which has struggled with these issues. While Egypt’s handling of these issues has been horrific, discussions and conflict both there and in India have suggested the need for, and the means by which, international human rights norms and practices can more thoroughly respect persons’ diverse situations, self-identifications, and self-understandings—whether “sexual,” “religious,” or otherwise. Accordingly, this article has discussed these two specific contexts in the hope that their particulars can elucidate the ways in which an international system of human rights can better demonstrate respect for people, wherever located, and however persecuted.

¶147 The issues that international human rights law, national laws, and religious doctrine will have to confront will change over time. Answers to questions involving

tolerance, pluralism, and sexuality will change as well, adjusting as structures of governance intersect with the impermanence of humanity. That being the case, homosexuals, if perhaps tomorrow's vanguard, are also today's reality. While states will attempt to persecute them in both temporal arenas, international human rights norms and practices should do so in neither. It is in this spirit, and with this hope, then, that this article's recommendations are offered.