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—Preamble, NLG Constitution

Meaningful progress has been made vindicating the rights of LGBTQ Americans over the past few years. In 2010, at President Obama's urging, Congress repealed the military's odious "Don't Ask, Don't Tell" policy, which stigmatized gay and lesbian service members by forcing them into the closet. In 2011 Obama announced his "personal" support for same-sex marriage on *Good Morning America*. He went on to quickly qualify, however, that the legality of same-sex marriage should be left for individual states to determine, implying that he didn't regard it as a fundamental constitutional right of the kind guaranteed to by the Supreme Court to interracial couples (like Obama's parents) throughout the nation in *Loving v. Virginia*. In other words, our first African-American president decided to take a states' rights position.

Though hardly a full-throated endorsement, Obama's announcement was greeted with euphoria among mainstream gay rights activists and added steam to the same-sex marriage cause. In 2013 the homophobia-inspired Defense of Marriage Act (DOMA), which denied federal benefits to same-sex couples legally married in their home states, was struck down in a 5–4 decision by the Supreme Court.

More and more states are revising their marriage laws away from the irrational fears of the past. While progress on the LGBTQ front is long overdue—and most of the victories seem to denote inclusion into existing institutions rather than challenging or dismantling corrupt and harmful ones—momentum is gathering toward a better future for Americans who value equality.

This isn't the case the world over. Some regimes are becoming increasingly hostile to the basic rights of their LGBTQ citizens. In this issue, we look at legal issues pertaining to gay rights from both international and domestic perspectives. In "Cause of Action: Using International Human Rights Law to Advance Gay Rights," Nathan Madson and Jenny Odegard use the case of Russian activist Nicolai Alekseyev* to demonstrate how international law can be used to defeat discrimination in nations where domestic law fails to do so. In "Gay Mar-

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Nathan Madson
and Jenny Odegard

CAUSE OF ACTION: USING INTERNATIONAL HUMAN RIGHTS LAW TO ADVANCE GAY RIGHTS

I. Introduction

There are few places in the world where it is truly safe to be gay and there are even fewer places where it is safe to be a transgender or gender non-conforming person. And while some of the world's most powerful countries "urge" the global decriminalization of homosexuality or the repeal of discriminatory laws that affect the Lesbian, Gay, Bisexual, and Transgender (LBGT) community, we are still a long way off from a future where everyone is safe being who they are. Some countries will tout the fact that they have decriminalized homosexuality as proof of their progressive attitudes and that they treat all their citizens equally. It is clear, however, that just because a country no longer explicitly arrests and jails individuals for being lesbian, gay, bisexual or transgender, that does not mean they are safe.

There are some nation-states that are truly leading the way toward protecting LGBTQ people from violence and discrimination. As a part of a larger effort to engage with the international community and to be respected abroad, many countries are taking strides to comply with international human rights treaties, the United Nations (UN) Charter and other regional legal bodies. Unfortunately, not all states show the same deference toward international law. Whether it is a distrust of international law or entrenched homophobia, some governments ignore international (and sometimes domestic) law that requires equal treatment of all people.

Nevertheless, there are numerous opportunities for individuals whose basic human rights have been violated to utilize international legal bodies to file an individual complaint. Using international law to assist individuals seeking justice is a natural progression from the other human rights work in which international bodies engage. Moreover, an individual compliant is helpful to hold one's own country accountable to the larger international community.

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This article discusses the various international legal remedies available to LGBTQ people who are seeking equality and respect for their basic human rights and examines the barriers and legal remedies applicable to LGBTQ individuals living in Russia. We chose to examine Russia because of its prominent role in international legal bodies and recent high-profile examples of discrimination and suppression. To begin, we discuss the development of LGBTQ rights within the public international legal regime in Section II. Section II.A goes further, exploring the various ways in which individuals can leverage the existing human rights bodies to seek justice and equality. The remainder of Section II extrapolates on the potential pitfalls of filing an action against a state, and looks at an example of successful use of the International Covenant on Civil and Political Rights (ICCPR) by Australian activist Nicholas Toonen under the First Optional Protocol.

Section III looks at what regional options are available in Europe, including the Council of Europe's European Court of Human Rights. Section IV goes deeper, providing a look at the human rights situation for LGBTQ people in Russia. After discussing Russia's legal obligations in Sections IV.A and IV.B, Section IV.C covers several of the major concerns facing Russian LGBTQ people. Section IV.D examines the case filed by Russian activist Nikolai Alekseyev before the European Court of Human Rights, alleging a violation of his right to the freedom of assembly. In order to limit our inquiry to a length suitable for this format, we addressed only the situation of individuals living in states that have ratified both the ICCPR and the Optional Protocol, since the factors affecting individuals in other states are nearly infinitely variable.

II. Gay rights as human rights

The Universal Declaration of Human Rights (UDHR) was adopted by the United Nations General Assembly after World War II, showing the international community's need for firm and direct recognition of the fundamental and inalienable rights bestowed upon every human being.[1] The UDHR is broad, guaranteeing the right to life, liberty, and freedom from persecution. The original document does not limit the types of discrimination prohibited under its terms, but rather contains strong language that the rights in the declaration be granted "without distinction of any kind." The UDHR goes on to list race, sex, religion, and political opinion as potential categories for discrimination, but the drafters very clearly meant for the declaration to provide protection and rights to all those who experience persecution, recognizing the changing nature of intolerance and discrimination.[2]

Over the subsequent decades, the United Nations General Assembly has incorporated specific human rights under the UDHR, expanding the explicit recognition by the international community of the variety of ways in which

a nation may infringe on a person's inalienable rights. In 2011, the Human Rights Council passed Resolution 17/19, which incorporated gender and sexual identity as priorities under the Universal Declaration of Human Rights.[3] The resolution recognized the violence and discrimination that people face because of their sexual orientation and gender identity and ordered a report from the High Commissioner for Human Rights about discriminatory laws and practices, as well as acts of violence. Moreover, the resolution requested recommendations on ending these human rights violations.[4]

In addition to the UDHR, the United Nations General Assembly and many member states have adopted the ICCPR. The ICCPR established the Human Rights Committee,[5] an organization within the United Nations that leads the effort against human rights violations and discrimination and is charged with monitoring and enforcing the terms of the ICCPR.[6] Among the duties of the committee is the responsibility for hearing complaints from State Parties about potential violations of the Covenant by another State Party.[7]

A. Individual remedies

United Nations doctrine can function in a variety of ways. Human rights that are recognized by the United Nations can be enforced through a complaint by an individual or a state party to the United Nations Charter. With respect to rights derived from treaties, member states are only bound insofar as they have signed and ratified a treaty in accordance with any reservations.

With respect to resolutions passed by the General Assembly, a resolution is typically not binding international law. Rather, resolutions are evidence of international customs or expressions of a general principle of law. A resolution may also lay the groundwork for a future treaty. The International Court of Justice will look to resolutions as a part of their evaluation of customary international law as authority for a particular case.

Resolutions may be considered differently in domestic courts of different countries. For example, in the United States a resolution is given similar standing to a treaty. This means that in order to be enforceable, it must be ratified by Congress and incorporated into domestic statutory law. Alternatively, a treaty or resolution that vests specific rights and duties in individuals may be self-executing, which means that it requires no additional action on the part of domestic lawmakers to become binding law.[8]

As such, individuals seeking a remedy at international law must look closely at the foundation for their claim and the legal effect of the resolution, treaty, or court decision that they are using to establish their claim. Once they have established the basis, the individual can submit their complaint to the relevant committee, special rapporteur, or to either of the courts admin-

istered by the United Nations.[9] Which entity one may submit their complaint to depends on the right that was violated and the legal basis on which it is founded. In the case of the rights of lesbian, gay, bisexual and transgender people, their rights to be free from discrimination and human rights abuses is encoded in the UDHR and the ICCPR and, thus, the appropriate forum would be the Human Rights Committee established by the ICCPR.

1. Individuals' remedies: Optional Protocol

While the original text of the ICCPR mandates that only a state party may initiate a committee hearing, in 1976, the General Assembly introduced the first Optional Protocol to the ICCPR.[10] The first Optional Protocol empowers the Human Rights Committee to hear complaints from individuals who believe that a state has violated their rights under the ICCPR or that a state has refused to protect an individual's rights following a private actor's violation of their rights.[11] In order for the Protocol's terms to have a binding effect on a state, the state must be a signatory to the ICCPR as a whole and must have specifically ratified the first Optional Protocol.[12] Unlike the rest of the Covenant, the Optional Protocol is not self-executing.[13] Therefore, the first Optional Protocol applies only to citizens of states that have taken the additional steps necessary to ratify it.[14]

Under the Optional Protocol, individuals can submit a complaint to the committee seeking a review of their case. In order to submit a complaint, the individual must pursue and exhaust their[15] domestic remedies.[16] Once the written complaint has been submitted to the committee, it will be reviewed within six months and the committee will submit a decision to the individual and to the state party. A remedy may form part of the final decision.

2. Individual remedies: International Court of Justice

Aside from seeking intervention by the committee, individuals can also file a lawsuit alleging a violation of human rights codified in treaties through the International Court of Justice (ICJ). The ICJ is the judicial arm of the United Nations.[17] The court is staffed by a panel of fifteen judges who are elected by the members of the General Assembly and the Security Council. The court has jurisdiction over member states that have specifically submitted to its jurisdiction pursuant to Article 38 of the court's charter.

The ICJ can hear any case that involves a matter provided for in the United Nations Charter or in any treaties or conventions currently in force.[18] The court will answer questions of statutory interpretation, questions of international law and questions of fact regarding an alleged breach of international law. The court applies the law of international conventions that are expressly recognized by the contesting states, customary international law and general principles of law recognized by civilized nations.[19]

Resolutions adopted by the United Nations are considered as strongly persuasive evidence of customary international law. Customary international law is defined as law resulting from the general and consistent practice of states and opinio juris.[20] Resolution 17/19 acknowledges the problem of discrimination and persecution based on gender identity and sexual orientation and calls for committee action. This Resolution may help contribute to the ICJ's evaluation of the complaint.

The ICJ only has jurisdiction over member states, and only states may bring an action. In order for individual citizens to pursue an ICJ decision, a member state must sue on their behalf. This typically means that a member state will take up the case of one of its nationals and file a dispute against another member state.[21] States who are not signatories of the ICJ Charter can also become subject to its jurisdiction through a special agreement, a clause in a treaty, or by a unilateral declaration.[22]

The ICJ system is effective in providing an unbiased evaluation of all issues in a given case and judging it against relevant international law, just as a domestic court would do. Unlike domestic courts, however, the ICJ is not a forum that is available to any person or party who has been injured by another person or party subject to ICJ jurisdiction. The fact that the ICJ is available only to state parties limits its effectiveness for citizens outside the court's jurisdiction who are suffering from a violation of a right derived from a treaty.

In the case of the right to be free from persecution based on sexual orientation, there is a positive obligation on the part of the state to protect individuals' rights, and it is hard to imagine a state suing itself in the ICJ for noncompliance. For an action to be brought in the ICJ pursuant to the rights of LGBTQ individuals, a member state would have to have injured a citizen of another member state, and the citizen's home country would need to bring the action. Taking into account the political and legal marginalization of minorities in many countries, this seems to be an overwhelming procedural burden for individuals seeking relief from persecution.

3. Accessibility of individual remedies

Committee hearings may be a significantly more effective way for individuals to look for relief following human rights violations. Unlike the ICJ, committee complaints are open to anyone who has been injured by a state action or inaction that falls under the purview of that committee.[23] There are also procedures in place to compel a committee to act quickly or discreetly in special circumstances. These qualities of the committee process make it much more accessible than the ICJ for individuals living in poverty or in rural areas, although the significant time, effort, and access to technology required are still barriers to submitting a complaint.[24]

B. Prevailing against a state actor

After state parties have had their challenge heard by the International Court of Justice, the court will issue an opinion. The court will make recommendations for a remedy or actions by the state if a human rights violation is found, and the matter is then referred to the United Nations Security Council.[25] The Security Council typically attempts to enforce judgments through peaceful means.[26] The Council may investigate the human rights violations found by the court and undertake a mediation effort, appoint a special representative to manage the situation or take actions against the member state that is violating the terms of the treaty. There are a number of enforcement options available to member states that continue to violate the treaty terms, including economic sanctions and collective military action.[27]

After a committee hears a case and makes a determination, the decision is final and there are no appeals. Along with the decision, the committee will outline the proper remedy for the person or group that has suffered from human rights violations.[28] The remedy could include the release of a specific prisoner, financial compensation, or the repeal of legislation that violates the treaty.[29]

If the committee determines that there has been a violation of human rights by a member state, the state must submit information within three months of the decision documenting the steps it took to resolve the findings of the committee and comply with the remedy. If the member state does not respect the decision, then the committee will assign the case to a delegate: either the Special Rapporteur on Follow-up of Views or a member of the committee.[3031]

C. The process in action: *Toonen v. Australia*

The world of public international law can seem obscure and inaccessible, particularly to those who are forced to live on the margins of society because of systemic and widespread discrimination. While they may know that their rights are being violated and have an inherent sense of their inalienable rights as humans, it can be very difficult to pursue a remedy at the international level.

Still, individuals have successfully pursued actions against their home countries for violations of these treaties. One particularly famous case is *Toonen v. Australia*, in which an activist from Tasmania, Australia, sought international intervention to invalidate state laws criminalizing homosexual activity.[32] Specifically, Tasmanian criminal code sections 11(a) and (c) and section 123 criminalized all sexual contact between two men, whether it was in public or private and regardless of the age and consent of the individuals. The law allowed authorities in Tasmania to conduct investigations into the intimate lives of adult men suspected of having same-sex relations if they had sufficient evidence that someone had violated the statute. In this specific

case, Mr. Toonen was an outspoken advocate on the issues of gay rights and HIV/AIDS prevention, and his public discussions as a part of that activism would have provided sufficient evidence to justify a police investigation into whether he had violated sections 122 and 123.[33] In addition to being subject to criminal sanctions because of his sexual orientation, Mr. Toonen argued that the law also set the stage for discrimination and harassment in other areas of his life, such as employment, and condoned the stigmatization and threats of violence that he experienced frequently.[34]

In this way, Tasmania's criminal code infringed upon the right to be free from discrimination and the right to privacy under the ICCPR, to which Australia is a signatory. Mr. Toonen also had the right to pursue this case because Australia has ratified the First Optional Protocol.

The case was considered a landmark decision when the Human Rights Committee both affirmed that the ICCPR prohibited discrimination based on sexual orientation and when it ordered Australia to repeal its offending law.[35] The law was successfully abolished after the Committee's communication was issued, paving the way for other activists to push for similar reforms pursuant to treaties that their countries had signed and ratified.[36]

III. Remedies available in European countries

People who are living in states that are members of the Council of Europe also have access to the international human rights laws recognized by the Council of Europe and enforced by the European Court of Human Rights.[37]

The Council of Europe has forty-seven member states, including Russia. As a whole, member states in the Council of Europe are home to more than 800 million Europeans, making this organization large and influential over a wide geographic, legal, and cultural spectrum. The Council's work includes encouraging and facilitating international cooperation on both legal and economic levels, and The Council emphasizes human rights as a central focus. The Council's view of human rights is based on the terms of the European Convention on Human Rights (hereinafter the European Convention).[38]

The European Convention is modeled after the UDHR and seeks to affirm nearly all the same rights within the European community. All European Council member states are bound by the terms of the European Convention.[39] The European Convention is broad and affirms essential human rights such as the right to be free from slavery and the right to marry. Article 14 expressly prohibits discrimination, outlining several groups that may be subject to discrimination, but, as in the UDHR, the protections under Article 14 are not limited to the named groups.[40] The European Convention also guarantees individuals the right to an effective remedy, which includes remedies for

rights violations made by people acting in an official capacity on behalf of their government.[41] This is a very important right for people who experience systemic discrimination or who are persecuted by their government.

The Council of Europe is also specifically working to target fighting homophobia under the principles of Article 14 of the European Convention. The Council recognizes how intertwined various human rights are, and how discrimination against LGBTQ people can also mean infringing on the right to free expression, the right to employment, and the right to marry.[42]

The European Convention is administered by the European Court of Human Rights.[43] Like the ICJ or committees established through treaties, the European Court of Human Rights only accepts cases once the individual, group, state or other party has exhausted domestic remedies and has still not found relief.[44] States may pursue actions against other member states, or individuals may file applications to the court alleging violations of the European Convention.[45]

Once the case has been heard by the court, the court issues a final and binding judgment.[46] The judgment is then referred to the Committee of Ministers, which oversees the implementation of whatever remedy the court has prescribed.[47]

IV. Case study: the Russian Federation[48]

The ability to bring individual complaints for LGBTQ discrimination has been used by many people in many different international fora, but the complaints filed by Nikolai Alekseyev[49] from Russia present a unique opportunity to look at specific rights that should ostensibly be protected at local, national and international levels. Alekseyev brought a lawsuit against the Russian Federation, a Council of Europe member, in 2010 at the European Court of Human Rights, alleging a violation of his human rights, specifically his right to assemble and peacefully protest. While these are not the only violations of LGBTQ people's human rights in the Russian Federation, this particular case has sparked considerable controversy in Russia and across the world.[50]

A. Russia's domestic law

The first and foremost legal commitments the Russian Federation has are to its own laws, and, as discussed above, it is necessary to exhaust domestic remedies in order to access international remedies.

Laws at the national, subnational and local levels all play a role in how LGBTQ peoples are treated, protected and discriminated against. Though there are no constitutional provisions or national laws explicitly protecting LGBTQ people, there are several laws that can be used by LGBTQ people to exercise the rights every Russian citizen is supposedly given.

The Constitution of the Russian Federation has two particular articles relevant to this discussion. First, Article 30 protects the right to freedom of association.[51] Although Article 30 does not specifically mention LGBTQ people, it can be used to protect the right to assembly for LGBTQ people who hope to organize or assemble with other LGBTQ people. The specific language of Article 30 is relatively broad; there is nothing that restricts the right to freedom of association. As with any human right, however, the Russian Constitution does provide for the selective abridgement of some of its constitutional rights.[52] While Article 55.3 does allow federal laws to restrict constitutional rights, rights can only be restricted in a very limited number of occasions, such as for the defense of public morals, rights or health, or for state security.[53]

Another national-level law is the Federal Law on Assemblies, Meetings, Demonstrations, Marches and Picketing, which is also known as the Assemblies Act, that grants citizens the right to stage marches and demonstrations and to convene meetings.[54] The law lays out a simple process for obtaining permission for a march, the first of which is to apply with the municipal body.[55] The application must contain a guarantee that participants will follow any conditions put in place by the municipal body and to generally maintain public order.[56] Those who fail to comply with those requirements could be forced to leave the event.[57]

The law requires a proper venue defined by considerations of public safety and allows the organizers to alter their proposal if the municipal body deems it improper.[58] The municipal body is tasked with protecting public order and the safety of others and will ultimately grant or deny an applicant the permission to hold an event. Still, Section 18.1 prohibits anyone – both the organizers and officials—from infringing upon participants' right to express their opinion, so long as the opinion does not disrupt public order.[59]

B. Russia's commitments to international law

Russia has inherited the Soviet Union's place in many of the international bodies it sat on and has taken on the responsibilities and obligations its predecessor agreed to in various treaties. In the multitude of different international communities to which Russia now belongs, there are several declarations of individual rights that, like domestic law, can be invoked by LGBTQ people seeking enforcement of basic freedoms.

The human rights conventions promulgated by the United Nations, the International Covenant on Economic, Social and Cultural Rights and the ICCPR, both protect the individual rights of Russian citizens. Throughout the 1960s and 1970s, the Soviet Union signed and ratified both of these human rights treaties. The Soviet Union acceded to the First Optional Protocol in

1991. The Optional Protocol allows for individuals to file a complaint with the UN Human Rights Committee for a violation of the rights protected in the ICCPR. Following the collapse of the Soviet Union, the Russian Federation acquired the same legal obligations and commitments to human rights that the Soviet Union had.

On a regional level, Russia is also a member of the Council of Europe, becoming the 39th member state in 1996.[60] Russia also ratified the European Convention of Human Rights in 1998,[61] thereby agreeing to be bound by decisions of the ECHR.[62]

Under Article 46 of the European Convention on Human Rights, member states must respect the decisions of the ECHR, particularly when they are a party to the controversy.[63] Although Russia has done a good job of complying with the financial awards it has been ordered to pay, it consistently violates the intent of and the rights protected by the Convention.[64] These international commitments have been used by advocates in the past in an attempt to hold the Russian government liable for human rights abuse, including LGBTQ activists like Alekseyev.

C. Human rights abuses within Russia

Russia is one of the few countries in the world in which the political and legal situation is getting worse for LGBTQ people. While there have been some improvements, there have also been a considerable number of human rights abuses and an overall negative attitude toward LGBTQ people. It is no surprise, then, that there has been enough support in the State Duma, the lower house of parliament, to pass a law limiting freedom of expression that sets the LGBTQ community back decades.[65]

In 1993, the International Lesbian and Gay Association undertook a compendium of the legal and political status of homosexuality around the world. While the entry on Russia indicates there had been improvements since the fall of the Soviet Union in 1991, there was still some way to go: "A minority of the population (30 percent) is in favor of gay and lesbian rights. A slightly larger minority (33 percent) favors killing homosexuals."[66] Fast-forward twenty years and there is still considerable hostility toward LGBTQ people, but those negative feelings may actually have increased as of late.[67]

For instance, politicians and media personalities have started to conflate homosexuality and pedophilia.[68] The Orthodox Church has also publically called for the strengthening of heterosexual families.[69] One of the Church's beliefs is that Western Europe has been exporting an incompatible form of liberalism into Russian society.[70] Thus, support for LGBTQ individuals may be seen as

a strong connection to the West and greater distance from Russian ideals.

Although homosexuality has been decriminalized and larger cities have seen gay amenities (such as clubs, bars, taxi services, bookstores and beaches) thrive, being gay in public is still largely unacceptable.[71] For same-sex families in Russia, it is often necessary that their lives and relationships are kept secret.[72] For at least one family, a child did not know that his other father was actually his father and not just a family friend that lived with them.[73] In addition, coming out at work can have disastrous effects, up to and including being fired.[74]

Alekseyev's organization, GayRussia, has also worked with the Levada Center to poll Russian adults on their feelings toward homosexuality. In July 2010, the Levada Center asked 1,600 people about homosexuality and found that only 45 percent of Russians thought LGBTQ people should have the same rights as everyone else; 41 percent opposed equal rights and 15 percent were undecided.[75] Of those polled, 84 percent opposed same-sex marriage, and shockingly, 18 percent of the people thought LGBTQ people should be "isolated from society."[76]

Nearly three years later, in February 2013, the Levada Center issued the same survey and found an increase in negative attitudes toward LGBTQ people.[77] Seventy-seven percent of people supported discriminating against or restricting LGBTQ people's rights.[78] This included 5 percent of people who wanted to kill homosexuals, 16 percent who wanted to isolate homosexuals, 22 percent who want to forcibly treat or cure homosexuals, and 27 percent who believe homosexuals need "psychological support."[79] Since the last survey, there has been a 4 percent increase in the number of people who want to isolate homosexuals, a 5 percent increase in the desire for forcible treatment, and 7 percent fewer people want homosexuals to just be left alone.[80]

1. Decriminalization of male acts of homosexuality[81]

Homosexuality was made a crime in the Soviet Union in 1934.[82] Under Soviet law, Section 121 prohibited anal intercourse between men only, but it did not mention other homosexual behavior between consenting men, nor was homosexual behavior criminalized for women.[83] Each year, approximately 1,000 men were arrested under Section 121.[84]

Homosexuality was decriminalized in 1993, nearly sixty years after Josef Stalin originally criminalized it.[85] Though it was no longer illegal, homosexuality remained on the national list of mental illnesses until 1999.[86] While it is true that homosexual behavior is no longer a crime, nor is homosexuality considered a mental illness, that does not mean that the situation for LGBTQ people in Russia is devoid of discrimination or hostile legislation.

2. Legislating against "homosexual propaganda"

One of the most controversial laws to have been passed against the LGBTQ community is the ban on homosexual propaganda. St. Petersburg, as well as several other localities, passed laws that banned disseminating "homosexual propaganda" among minors in early 2012.[87] Though Alekseyev lives in Moscow, he was the first individual to be fined under St. Petersburg's homosexual propaganda law for disseminating a sign that read "Homosexuality is not perverted."[88] He was brought before a court and fined 5,000 rubles (129 euros).[89] He told international media that he would fight the decision and has already considered bringing his case before the ECHR.[90]

The law in St. Petersburg is not the sole homosexual propaganda law. There are numerous places across the country that have enacted similar bans. In 2013, the State Duma had its first reading of a national bill that mirrors the St. Petersburg.[91] Several months later, in June 2013, the bill passed its second reading in the lower house.[92] Finally, in July 2013, Russian president Vladimir Putin signed the bill into law, which forbids disseminating "homosexual propaganda" to children.[93]

While it is clear that the 2013 law is hostile toward LGBTQ people, one of the biggest concerns is that "homosexual propaganda" has not been defined in the national law.[94] One of the few parts of the provision that is clear is that "homosexual propaganda" includes comparing "traditional and unorthodox marital relations" as being equal.[95] Like the St. Petersburg law, it outlaws "the targeted and uncontrolled dissemination of generally accessible information capable of harming the health and moral and spiritual development of minors."[96] This is clearly a broad and potentially dangerous description that could result in liability for people who choose to truthfully answer questions about their families or themselves.

If convicted, an individual would have to pay between 4,000 and 5,000 rubles, officials would have to pay between 40,000 and 50,000 rubles, and a legal body would have to pay between 400,000 and 500,000 rubles.[97]

3. Demonstrations and Moscow Pride

The focal point of Alekseyev's activism has been Moscow Pride. Since May 2006, Alekseyev has attempted to hold an annual pride march in Moscow, an event that he hoped would raise awareness of LGBTQ rights within the larger community.[98] While Alekseyev and his colleagues have followed the provisions of the Assemblies Act, they have yet to host an officially-sanctioned demonstration.

The initial application to host a Pride March in May 2006 was rejected, in part, because the mayor believed that such a demonstration had the potential

to "stir up society."[99] The first deputy mayor noted that the Assemblies Act did not allow the mayor to ban a meeting, but that it could allow him to suggest a new time or venue.[100] Only if the event created a "real public threat" could it be stopped.[101] As the deputy mayor thought that a Pride event would be contrary to the health and morals of the society, she recommended the mayor have some plan to stop the event if the municipal body tasked with reviewing the application approved it.[102] The mayor and deputy mayor did not need to worry, however, as the Department for Liaison with Security Authorities of the Moscow Government rejected the parade proposal "on grounds of public order, for the prevention of riots and the protection of health, morals and the rights and freedoms of others."[103] The department did not, however, suggest a new venue or time, as set forth in the Assemblies Act.

After receiving the rejection, the organizers submitted a notice to hold a picket in the park on the same date and time, but it was rejected on the same grounds.[104] The mayor said that 99.9 percent of the population approved of the ban, and when Alekseyev protested the department's rejections in court, the rejections were upheld.[105] That did not stop Alekseyev from demonstrating and he was arrested during the picket and taken to the police station for breaching the conditions for holding a public demonstration.[106] This is just one example of the Russian government selectively using the language of the assembly law when doing so will support its point.

Much the same thing happened when Alekseyev tried to register for a Pride March in 2007.[107] Then-mayor Yuri Luzhkov described gay pride parades as "satanic" and promised Moscow would never have one.[108] In 2008, Alekseyev submitted ten different requests for marches with different times and routes in an attempt to be approved for at least one of the proposals, but all ten were rejected.[109] In a second attempt, Alekseyev submitted notices for fifteen more marches, which were similarly rejected.[110] As a last resort, Alekseyev sent a notice to the president of the Russian Federation, filed a complaint in court and filed notice to picket. Unfortunately, the president did not respond, the court upheld the rejection and the notice to picket was rejected.[111]

In 2010, Alekseyev filed a lawsuit against the Russian government at the ECHR. Ultimately, the Court agreed with Alekseyev that the Russian government violated his rights under the European Convention on Human Rights, and that it discriminated against him based on his sexual orientation.[112] The Court awarded him 29,510 euros in damages and legal fees.[113] After Alekseyev filed his case with the ECHR, but before it had delivered its opinion, he alleged that Russian security forces took him from the airport and held him in secret detention for two days before ultimately being released.[114] He reported that the forces asked him to drop his lawsuit at the ECHR. He refused.[115]

Although Alekseyev proposed another Pride March in 2011, one year after the ECHR held that the Russian government was violating his right to freedom of assembly, he was again unable to obtain the necessary permission.[116]

It was in 2012, however, that Alekseyev faced his largest hurdle. When he asked the city council to grant him permission to host a Pride march, the council effectively banned the event for 100 years.[117] Alekseyev appealed the decision, but the highest court in Moscow upheld the ban.[118]

D. Alekseyev appears before the European Court of Human Rights[119]

After exhausting his domestic remedies, Alekseyev took his case to the ECHR. He alleged that the government violated his rights under the European Convention on Human Rights, namely his right to freedom of assembly under Article 11. Ultimately, the ECHR agreed, awarding Alekseyev damages.

1. Article 11: Freedom of assembly

In order to appear before the ECHR, Alekseyev had to allege that the government had somehow violated one of his rights under the European Convention of Human Rights. Article 11 of the Convention protects the right to peacefully assemble and the freedom of association. Although these rights are not absolute, Russia was only allowed to restrict the right to freedom of assembly when the right is both restricted by law and the restriction is "necessary in a democratic society in the interest of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

Alekseyev argued that the government had failed to comply with its own laws when denying the Pride March, saying there was no "legitimate aim" in denying the march, and that the denial was not necessary. The government, on the other hand, argued that any restrictions it had enacted had been within the letter of the law. Specifically, the government noted that it had received numerous complaints and threats of violence in response to the mere suggestion of a gay pride march, and Articles 55(3) of the Constitution and 8(1) of the Assemblies Act allows the government to restrict or deny public events in the interest of public order and safety.

The government also tried to argue that because the majority of people in Moscow found homosexuality to be incompatible with their morals that it would have been a violation of the majority's rights to allow a gay pride parade. This nonsensical argument relied on an interesting reading of the ICCPR and the ICESCR. Specifically, the government argued that the provisions which "guarantee[] individuals respect for and protection of their religious and moral beliefs," would be violated because the organizers of the event were forcing their viewpoints on the rest of the city.

Alekseyev, on the other hand, claimed that the Assemblies Act did not allow for a ban on public events. If the government believed that the venue for a public event was inappropriate, it was the government's responsibility to suggest another venue. Even if it was correct that there was no safe venue for the event, a Pride march could only be banned pursuant to a legitimate purpose and that it needed to be necessary in a democratic society. A previous ECHR decision said that something that shocks society does not rise to a sufficient level to warrant a ban.

Ultimately, however, the Court found that the Article 11, and the European Convention in general, may require "positive obligations," especially when it comes to individuals with minority viewpoints or status. Although the organizers of the pride march were likely to anger or offend some members of the Moscow community, that was not a sufficient reason for the government to violate Alekseyev's Article 11 right to freedom of assembly. Noting that states have the responsibility to "take appropriate measures" to protect individuals rights of freedom of expression without regard to sexual orientation or gender identity, the Court held that the Russian government had been tasked with protecting Alekseyev's right of peaceful assembly, regardless of his sexual orientation or gender identity. Moreover, the Court determined that, "Member states should take appropriate measures to prevent restrictions on the effective enjoyment of the rights to freedom of expression and peaceful assembly resulting from the abuse of legal or administrative provisions, for example on grounds of public health, public morality and public order."

The Court did recognize that the threats of violence and counter-protests posed a risk, but noted that it was the City's responsibility to assess the risk and make "concrete estimates of the potential scale of disturbance in order to evaluate the resources necessary for neutralizing the threat of violent clashes." The City failed to do this, banning the march before it carefully considered exactly how many people would be counter-protesting, if they would be doing so legally or with respect to the demonstrators' physical integrity, and what resources would be needed to protect the demonstrators.

Finally, the Court noted that the then-mayor of Moscow had repeatedly stated that there should be no pride parades in his city, as they were inappropriate. In addition, the Government had argued that because homosexuality offended the majority of religious doctrines and moral values, these types of events should be banned. These arguments, however, were not sufficient reasons under domestic law to prohibit the Pride March.

2. Article 14: Freedom from discrimination

In addition to his claim that the government violated his right of freedom of assembly, Alekseyev also argued that the government violated his rights

under Article 14 of the Convention: "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." Specifically, he alleged that the reason why the government refused to grant him permission for a Pride march was because of his status as a sexual minority. The Court agreed, finding a violation of Alekseyev's freedom from discrimination in conjunction with the violation of his right to freedom of assembly.

Alekseyev argued that even though the official language of the prohibition did not mention sexual orientation as the reason for the ban, it was clear that officials did not support the Pride March because of their morals. There were discriminatory remarks made by the mayor and the government used the religious groups' disapproval as the basis for its rejection. According to Alekseyev, this indicated the discriminatory nature of the ban.

The government countered, claiming that its rejection of the application was not discriminatory in nature, but because sexual minorities and religious groups have not been able to get along and, thus, the government was forced to restrict the rights of sexual minorities.

Pointing out that while the government could have treated Alekseyev differently because of his sexual orientation, any actions it took needed to be necessary in the circumstances. The Court held, however, that the government failed to provide any evidence that its decision to ban pride parades was "compatible with the standards of the Convention," much less that it was necessary. Moreover, the Court believed the mayor's public comments about homosexuality and about pride marches in general indicated a violation of Article 14.

V. Conclusion

The case study from Russia shows how individuals can avail themselves of international legal protections when the domestic justice system fails them. Unfortunately, it also shows the willingness of some sovereign nations to skirt the requirements of the court and to ignore the larger meaning behind rulings. Although Russia has complied with the requirements to pay fines, the judgment of the ECHR seems to have had little effect on the issue of freedom of expression and right to assembly for the LGBTQ community.

In contrast, the *Toonen* case from Australia showed what progress can be made when individual activists utilize the international justice system and are fortunate enough to live in a nation that respects and abides by the rule of international law. It also highlights an important note about international LGBTQ rights: it matters where LGBTQ people live when they seek to avail

themselves of international protections. Had Alekseyev lived in a country that was not part of the European community, he would have needed to rely on the provisions under the first Optional Protocol of the ICCPR. And, had he lived in a country that had not ratified the Optional Protocol, he would be limited to domestic remedies.

As evinced by the case study, sometimes countries that are bound by international human rights law still find ways to skirt its commitments. Whether a country does so by ignoring the ruling of an international body or by paying the fines it has been assigned without making any real changes, there are places where the legal rights of LGBTQ people are not respected.

Though this article has focused mostly on the rights of gay men, lesbians and bisexual people, there may be additional challenges facing transgender people. Although the body of international human rights law protects individuals without regard to their gender, some countries may not recognize a transgender person's transition to the proper gender or have extremely difficult barriers to legally transitioning. In addition, many transgender people's sexual orientation is often presumed, making them subject to much the same discrimination that lesbian, gay and bisexual individuals face.

In one sense, Russia occupies a unique place within the fight for equality and basic human rights for the LGBTQ community. Russia is a highly influential member of the United Nations through its place on the Security Council and an important political and economic partner within the region and globally. Yet Russia also still insists on ignoring the rule of international law at its own convenience and continues to resist conforming with the human rights norms of some its most important allies. Anti-gay sentiments continue to have strong support from Russian lawmakers, which sends a clear message to citizens that discrimination and hatred towards LGBTQ people is acceptable, while making sure that LGBTQ people know that they are second-class citizens.

The question then becomes—what can activists do to push Russia and other powerful nations to comply with treaties and international legal norms to which it is bound? The answer may be a combination of continued individual legal actions and utilizing political and economic pressure abroad. Recent global reactions to the July 2013 law show an international disapproval of these attitudes and a use of a variety of tactics to bring public attention to these issues.

Activists in the United States and elsewhere have called for a boycott of the Winter 2014 Olympics while diplomats and the International Olympic Committee are struggling to come to an agreement to prevent Russia from enforcing the law against athletes and tourists attending the games. If Russian authorities do enforce the propaganda ban, visitors could face fines, jail

time, or deportation.[120] Protestors are also seeking to put economic pressure on Russia and Russian companies through a boycott of Russian-made vodkas.[121] The issue has also gotten the attention of United States President Barak Obama, who mentioned the issue in an interview, saying he has "no patience" for countries that intimidate and discriminate against people based on their sexual orientation. [122]

The international pressure on this issue will hopefully show Russia the consequences of violating its obligations as world leader and member of the international community. While protests and boycotts do not directly call on international legal bodies to take action against Russia's violations, these efforts are an equally important part of the equation needed to solve this problem and end discrimination against LGBTQ people.

This case study demonstrates how much more work must be done to bring countries into compliance with their human rights obligations under international law and shows how a variety of legal and political tactics may be used to affect change.

The outcry against Russia's actions will also hopefully send a message to other countries that there are serious consequences to discrimination of any kind and to violating international human rights laws, even for the most powerful international players.

NOTES

1. United Nations, *The Universal Declaration of Human Rights*, *available at* http://www.un.org/en/documents/udhr/history.shtml.
2. Universal Declaration on Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (1948) [hereinafter UDHR].
3. Human Rights, sexual orientation and gender identity, G.A. Res. 17/19, U.N. Doc. A/RES/17/19 (July 14, 2011).
4. *Id.* at 1.
5. Not to be confused with the UN Human Rights Council, which is a subdivision of the General Assembly.
6. International Covenant of Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976 [hereinafter "ICCPR']. At Part IV Art. 28.
7. *Id.* at Part IV Art 41.
8. Russell G. Donaldson, *United Nations Resolution as Judicially Enforceable in United States Domestic Courts,* 42 A.L.R. Fed. 577 (1979). It is generally accepted in international law that a treaty may be either self-executing or non-self executing. The concept is more controversial in the United States. For a discussion on the nuances, see Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 Sup Ct. Rev. 131 (2008).
9. The courts administered by the United Nations include the International Court of Justice and the International Criminal Court and tribunals.

10. ICCPR, *supra* note 6, art. 41.
11. Optional Protocol to the International Covenant on Civil and Political Rights, 999 U.N.T.S.1966, p. 171 [hereinafter Optional Protocol to the ICCPR].
12. *Id.*at Art. 8.
13. A non self-executing treaty or international covenant is one that, in order to be binding domestically, must be ratified per the laws of the state. A self-executing treaty is one that is binding upon the state once it is signed. The terms self-executing and non self-executing are generally associated with the standing of treaties signed by the United States, but the concept is applicable in the broader sense. Curtis A. Bradley, *Self-Execution and Treaty Duality*, 2008 SUP CT. REV. 131 (2008).
14. For a list of state parties that have signed and ratified the Optional Protocol, *see* Multilateral Treaties Deposited with the Secretary General, ST/LEG/SER.E/22/add.1, April 2, 2006, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en.
15. Instead of using "his or her" as individual pronouns, the writers will use "their" out of respect for those who do not identify on either end of the gender binary.
16. Complaints cannot be made anonymously under the optional protocol. Optional Protocol to the ICCPR *supra* note 11 at Art. 3.
17. Statute of the International Court of Justice, June 26, 1945, art. 36, para 1, [hereinafter I.C.J. Statute]. Art. 36.
18. *Id.*
19. *Id.* at Art. 38.
20. John Lee, *The Underlying Legal Theory to Support a Well-Defined Right to a Healthy Environment as a Principle of Customary International Law*, 25 COLUM. J. ENVTL. L. 303 (2000). *Opinio juris* is defined as judicial and academic writings that put forth the position that something is a legal obligation.
21. International Court of Justice, *Frequently Asked Questions*, *at* http://www.icj-cij.org/information/index.php?p1=7&p2=2#2 [last accessed Mar. 30, 2012].
22. *Id.*
23. *Id.*
24. For detailed information on complaints to United Nations Committees, *see* Lubicon Lake Band v. Canada, Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40) (1990). *See also* Amnesty Int'l, *Canada: 20 Years' Denial of Recommendations Made by the United Nations Human Rights Committee and the Continuing Impact on the Lubicon Cree,* AI INDEX AMR 20/003/2010 (Mar. 2010), *at* http://www.amnesty.org/en/library/info/AMR20/003/2010/en.
25. I.C.J. Statute, *supra* note 17, art. 41
26. U.N. Security Council, http://www.un.org/docs/sc/unsc_background.html [accessed Mar. 29, 2012].
27. *Id.*
28. Human Rights Committee, Civil and Political Rights: The Human Rights Committee, Fact Sheet No. 15 (Rev. 1) (2005) at 25.
29. *Id.*
30. U.N. Office of the High Commissioner for Human Rights, Individual Complaints, http://www2.ohchr.org/english/bodies/petitions/individual.htm#afte [accessed Jun. 9, 2013].

31. In order to limit the scope of this discussion, we have addressed only individuals living in United Nations member states that are also signatories to the ICCPR and Optional Protocol. Individuals in member states that are not signatories have fewer remedies available to them and the specifics would depend largely on their participation in other treaties and the extent of their country's cooperation with the United Nations. The variables in these cases are too numerous to address here.
32. Toonen v. Australia, Human Rights Committee Communication No. 488/1992, CCPR/C/50/D/488/1992, 4 April 1994, at para. 1.
33. *Id.* at 2.2-2.4.
34. *Id.* at 2.4.
35. *Id.* at 8.7, 10.
36. Amnesty International, *The Human Rights of Lesbian, Gay, Bisexual and Transgender People,* 1 March 2005, *available at* http://www.amnesty.org/en/library/info/IOR40/004/2005/en.
37. The European Council and the European Court of Human rights are not the exclusive human rights organizations in Europe. However, the later part of this paper discusses the situation of LGBTQ people in Russia, and we have therefore limited discussion of international human rights laws to those applicable in Russia. Russia is not a member of the European Union at this time.
38. Council of Europe, *800 million Europeans: Guardian of human rights, democracy and the rule of law* (Jan. 2012) at 5.
39. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, amended by Protocols 11 & 14 [hereinafter European Convention].
40. *Id.* at Art. 14.
41. *Id.* at Art. 13.
42. Council of Europe, Fight against homophobia: for equality and diversity, http://hub.coe.int/web/coe-portal/what-we-do/human-rights/homophobia?dynLink=true&layoutId=128&dlgroupId=10226&fromArticleId [accessed April 29, 2013].
43. European Convention, *supra* note 39 at art. 19.
44. *Id.* at Art. 32-35.
45. *Id.*
46. *Id.* at Art. 44.
47. *Id.* at Art. 46.
48. *Update, September 4, 2013:* Following publication of this article, Nikolai Alekseyev reportedly published a variety of anti-Semitic and otherwise offensive comments on his social media accounts. The authors of this article condemn such comments and offer support for all who suffer from discrimination and racism in Russia.
49. Because Nikolai Alekseyev is Russian and his name is normally spelled in the Cyrillic alphabet, there are numerous spellings of his name in English. We have chosen one and remained consistent throughout the article.
50. Nikolai Alekseyev does not represent the viewpoints of all LGBTQ people in Russia, nor do all LGBTQ people agree with the emphasis that Alekseyev has placed upon the right to hold gay pride marches in Moscow. For a greater discussion of LGBTQ responses to Alekseyev's work, *see* Michael Schwirtz, *Russia's Best-Known Gay Activist Has an Uphill Fight*, N.Y. Times, Jun. 17, 2011. Some have accused Alekseyev of

failing to tackle some of the more basic problems within Russian society first, including explaining what homosexuality is or what LGBTQ people home to gain from increased visibility in gay pride marches: "'He focuses only on these protests,' said Igor Yasin, another Moscow-based gay-rights campaigner. 'And when he has the opportunity to explain what he is fighting for, what we are fighting for, it seems as if he's not able to provide an answer.'"

51. *The Constitution of the Russian Federation*, Bucknell University, http://www.departments.bucknell.edu/russian/const/ch2.html (last visited Apr. 30, 2013)
52. *Id.* Article 55.3 says, "Human and civil rights and liberties may be restricted by the federal law only to the extent required for the protection of the fundamentals of the constitutional system, morality, health, rights and lawful interests of other persons, for ensuring the defense of the country and the security of the state."
53. *Id.*
54. Alekseyev v. Russia, Eur. Ct. H.R. (2010).
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Russian Federation*, Council of Europe, http://hub.coe.int/web/coe-portal/country/russian-federation?dynLink=true&layoutId=163&dlgroupId=10226&fromArticleId= (last visited Apr. 29, 2013).
61. *Id.*
62. *Simplified Chart of signatures and ratifications*, Council of Europe (Apr. 20, 2013), http://conventions.coe.int/Treaty/Commun/ListeTableauCourt.asp?MA=3&CM=16&CL=ENG
63. Julia Lapitskaya, *Note: ECHR, Russia, and Chechnya: Two is not company and three is definitely a crowd*, 43 N.Y.U. J. Int'l L. & Pol. 479, 484.
64. *Id.* at 485.
65. Paul Henley, *'Gay propaganda' bill proves divisive in Russia,* BBC, http://www.bbc.co.uk/news/world-europe-21578520 (Feb. 26, 2013, 8: 48 p.m.).
66. Rob Tielman & Hans Hammelburg, *World Survey on the Social and Legal Position of Gays and Lesbians*, in The Third Pink Book 249, 319 (Aart Hendricks, Rob Tielman and Evvert van der Veeen eds., 1993).
67. Henley, *supra* note 64.
68. *Id.*
69. *Id.*
70. *Id.*
71. Schwirtz, *Russia's Best-Known Gay Activist, supra* note 49.
72. Henley, *supra* note 64.
73. *Id.*
74. *Id.*
75. Michael Schwirtz, *Anti-Gay Law Stirs Fears in Russia*, N.Y. Times, Feb. 29, 2012.

76. *Id.*
77. *77% of Russians choose to "cure," "isolate" or "eliminate" homosexuality*, GAY-RUSSIA, http://english.gay.ru/news/rainbow/2013/03/12-25630.htm (Mar. 12, 2013).
78. *Id.*
79. *Id.*
80. *Id.*
81. Technically, female homosexuality was never criminalized in Russia, but this should not be seen as Russian society being more open and accepting of lesbians.
82. Tielman & Hammelburg, *supra* note 65.
83. *Id.*
84. *Id.*
85. Henley, *supra* note 64.
86. Ben Tavener, *TV case tests Russian gay rights,* BBC, http://news.bbc.co.uk/2/hi/europe/8197735.stm (Aug. 13, 2009, 9:13 a.m.).
87. *Gay rights campaigner fined in Russia for 'propaganda'*, BBC, http://www.bbc.co.uk/news/world-europe-17955794 (May 4, 2012, 8:47 a.m).
88. *Id.*
89. *Id.*
90. *Id.*
91. *'Homosexual propaganda' law signals latest Russian crackdown*, NBC, http://worldnews.nbcnews.com/_news/2013/07/27/19699629-homosexual-propaganda-law-signals-latest-russian-crackdown?lite (July 27, 2013, 6:57 p.m.).
92. Nataliya Vasilyeva and Mansur Mirovalev, *Russian Anti-Gay Bill Passed By Lower Parliament,* BBC, http://www.huffingtonpost.com/2013/06/11/russian-anti-gay-bill-_n_3421454.html?utm_hp_ref=mostpopular (Jun. 11, 2013, 2:10 p.m.).
93. *Russian MPs back 'gay propaganda' ban amid scuffles*, BBC, http://www.bbc.co.uk/news/world-europe-21194710 (Jan. 25, 2013, 11:43 a.m.).
94. *Id.* Although this paper focuses more on homosexuals than it does on bisexuals or transgender people, it is believed that this law would also infringe upon their rights and put them at risk for anti-LGBTQ attacks.
95. *Russian MPs*, *supra* note 92.
96. Michael Schwirtz, *Anti-Gay Law Stirs Fears, supra* note 74.
97. Henley, *supra* note 64.
98. *See generally* Alekseyev v. Russia, Eur. Ct. H.R. (2010).
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Moscow bans 'satanic' gay parade*, BBC, http://news.bbc.co.uk/2/hi/europe/6310883.stm (Jan. 29, 2007, 6:27 p.m.). Luzhkov also accused the West of orchestrating the demand for gay pride parades and of sending money to Russian organizers.

109. *Id.*

110. *Id.*

111. *Id.*

112. *European court fines Russian for banning gay parades*, BBC, http://www.bbc.co.uk/news/world-europe-11598590 (Oct. 21, 2010, 11:31 a.m.).

113. *Id.*

114. *Moscow gay rights rally broken up with eight arrests*, BBC, http://www.bbc.co.uk/news/world-europe-11385596 (September 21, 2010, 1:04 p.m.).

115. *Id.*

116. *Gay rights campaigner fined in Russia for 'propaganda'* BBC, http://www.bbc.co.uk/news/world-europe-17955794 (May 4, 2012, 8:47 a.m).

117. *Gay parades banned in Moscow for 100 years*, BBC, http://www.bbc.co.uk/news/world-europe-19293465 (August 17, 2012, 6:37 a.m.)

118. *Id.*

119. Unless otherwise noted, all material in this section is from *Alekseyev v. Russia*, Eur. Ct. H.R. (2010).

120. Andrew Roth, *Athletes in Sochi to Be Barred From Advocating Gay Causes*, N.Y. TIMES, Aug. 1, 2013, *available at* http://www.nytimes.com/2013/08/02/sports/olympics/new-russian-law-stirs-olympic-controversy.html?ref=sports.

121. *Protesters call for boycott of Russian vodka after anti-gay law enacted*, SF EXAMINER, August 7, 2013, *available at* http://www.sfexaminer.com/sanfrancisco/protesters-call-for-boycott-of-russian-vodka-after-anti-gay-law-enacted/Content?oid=2538103.

122. Julie Pace, *Obama Defends Gay Rights, Has 'No Patience' For Russia On Discrimination,* HUFFINGTON POST, Aug. 6, 2013 *at* http://www.huffingtonpost.com/2013/08/06/obama-gay-rights-russia_n_3716787.html).

Zachary Wolfe

GAY MARRIAGE: ACCOMMODATIONIST DEMANDS EXPAND THE CONCEPTION OF HUMAN DIGNITY

The movement for marriage equality appeared to many on the left as an accommodationist or even regressive demand. But the moves of marriage equality advocates, helpfully aided by the right-wing reaction to it, transformed the debate into one of civil rights and human dignity, with a far more serious challenge to the status quo than may have been evident at an initial assessment of the potential implications of the demand. This summer's Supreme Court decisions, dissents, and range of reactions reflect how much progress has been made and how stark are the lines between those who have been moved by these struggles and those who entrench into old prejudices.

To different audiences and at different times, the demand for marriage equality might appear as either accommodationist or radical. To be sure, in one sense the demand is almost by definition accommodationist, but it may well have the potential to serve more radical purposes, depending on how the discourse around the demand is constructed. These differing views of the role that demands for marriage equality can play in either securing a better society or reinforcing the very institutions that need undermining is, as one scholar as noted, the "tension between equality as sameness with normativity (hetero- or homo-) and equality as freedom for difference from the norm."[1] This article argues that the evolution of the debate into the language of civil rights and human dignity, prodded on helpfully by the right-wing tactic of denying the dignity of same-sex couples, converted the marriage equality demand into one that offered much greater challenge to old ideas and institutions than would have been possible had it been allowed to remain a purely accommodationist demand.

Nature of the debate—what is implicated in the demand for marriage equality?

For many, marriage is a deeply problematic institution that, among other things, plays "a central role in structuring the domination of women"[2] and accordingly the LGBTQ movement should leave it behind as it strives to create new forms of social organization, rather than seek access to a "discredited patriarchal institution."[3] On the other hand, and even accepting that premise,

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just as coming out of the closet held potential to shake social expectations and assumptions, some viewed a demand for access to marriage as a "radical challenge to straight society"[4] that offered a promising means of forcing a rethinking of societal choices about which forms of social organization receive official recognition.

LGBTQ activists and individuals were having these debates from almost immediately after the Stonewall uprising. For the early movement at large, however, the notion of pushing for marriage equality was, at the time, "viewed as a minority position within the larger lesbian and gay movement's agenda"[5] and was not picked up by the major national organizations, "either because they were critical of marriage, saw it as a hopeless cause, or most commonly, simply had other priorities."[6]

Outside the movement, and despite Justice Alito's assertion that same-sex marriage is new in the US,[7] the issue was part of the public consciousness and a legal issue at least as far back as the 1970s. The first legally developed demand for a marriage license by a same-sex couple occurred in May 1970 in Minnesota.[8] This and other cases[9] did not go unnoticed by the mainstream media, as chronicled in a recent article:

> In 1971, *The San Francisco Chronicle* declared that a "gay marriage boom" was underway. In the first few years of that decade, *The New York Times*, *Life* magazine, *Jet*, and other periodicals ran feature articles about a handful of couples who launched America's first battles for legal recognition of same-sex marriage. Jack Baker and Michael McConnell, the best known of these couples, were invited to appear on Phil Donahue's enormously popular daytime television show, and a number of lesbian couples quickly followed in their footsteps. Although ultimately unsuccessful, Baker and McConnell's campaign garnered considerable media support....[10]

Then as now, this type of presentation of the issue of same-sex marriage —a demand by individual couples to have their relationships recognized, often in the context of a specific need such as authority to make healthcare decisions or obtain spousal employment benefits (or any of the other now-famous number of 1,138 benefits of marriage under federal law[11])—reflects the sort of assertion of legal rights in response to a particular injustice that is common for US social issues and familiar to the American public and legal system.

In this sense, the initial presentation and narrative about the issue was not a large-scale challenge to how we think about social relations and respect for relationships that may not fit "the norm," but rather a demand to let same-sex couples fit into that old institution, in part because to deny this entry is to harm those individuals in specific (and fiscal) ways. This individual rights discourse can be contrasted with a very different sort of legal/rights rhetoric reflected in the ruling by South Africa's Supreme Court Justice Albie Sachs when he

held that marriage equality was required under its Constitution, because "what is at stake is not simply a question of removing an injustice experienced by a particular section of the community. At issue is a need to affirm the very character of our society as one based on tolerance and mutual respect."[12]

Broadening the issues

The transformation of the U.S. debate into something more critical had a start during the second step in Massachusetts's march to marriage equality, when its Supreme Judicial Court held that civil unions were not enough to satisfy the state's Constitution.[13] In 2003, that court held that denial of marriage rights to same-sex couples violated the Massachusetts Constitution, but it stayed the judgment "for 180 days to permit the Legislature to take such action as it may deem appropriate."[14] In response, the legislature proposed civil unions and requested an advisory opinion as to whether the pending bill that

> prohibits same-sex couples from entering into marriage but allows them to form civil unions with all 'benefits, protections, rights and responsibilities' of marriage, [would] comply with the equal protection and due process requirements of the Constitution of the Commonwealth and articles 1, 6, 7, 10, 12 and 16 of the Declaration of Rights?[15]

In turn, the "civil rights *amici*" brief, filed on behalf of John Lewis and 31 human and civil rights organizations, argued that "Unjustified government discrimination is inherently injurious, damaging the dignity and societal standing of members of the disfavored groups."[16] The court agreed, holding that "Maintaining a second-class citizen status for same-sex couples by excluding them from the institution of civil marriage *is* the constitutional infirmity at issue."[17] This represented a step (even if a small one) away from a debate focused on individual harm in terms of tangible benefits and toward recognizing that the argument had something to do with a larger point about state sanctioned discrimination.

Interestingly, the fight for marriage equality that began in clerks' offices and courtrooms with paperwork and lawsuits moved into less controlled venues, and the prevalence of civil disobedience also helped mainstream America to see this as a civil rights struggle. There were a few incidents of couples refusing to leave the clerk's office without a marriage license.[18] More high-profile were the actions of local clerks and Mayors, most famously in San Francisco,[19] in defying their states' failure to recognize same-sex marriages. When officials in Chicago and Sandoval County (in the latter, under guise of a legal opinion that New Mexico law already permitted same-sex marriages) followed suit, conservative *World Net Daily* covered these events under the headline "'Anarchy Is Breaking Loose Across America': San Francisco's same-sex marriage defiance inspiring imitators."[20] It was surprisingly

prescient—six days later, the Mayor of New Paltz, New York, officiated marriage ceremonies (and was arrested for his actions, although the charges were eventfully dropped[21]) and in turn inspired the Mayor of Nyack, New York, to announce that he would marry same-sex couples and a Multnomah County Commissioner to officiate wedding ceremonies for same-sex couples in Portland, Oregon.[22] Although these civil disobedience actions appear to have waned in the past few years[23] and were not able to directly convey legal rights,[24] they captivated public attention for a time and helped to present the demand for marriage equality as something more than a technical legal demand working its way through the courts.

Advocates for marriage equality who wish to see this issue stand for a greater challenge to broad social attitudes must also appreciate the role of the right-wing response. As noted, marriage equality is explicitly an accommodationist demand (accommodate us within this traditional institution) and the immediate rejection of that demand appeared fairly knee-jerk (it seems weird, so let's ban it in our state). Initially, voters seemed to view the issue of whether or not to grant marriage equality as a simple matter of choice and preference—a show of hands of "who wants gay marriage?" without further intellectual framing. Early campaigns relied on this, emphasizing rhetoric that "the voters should decide" the definition of marriage,[25] and many state groups joined the Let the People Vote Coalition, funded by the National Organization for Marriage (NOM).[26] There did not seem to be a need for opponents of marriage equality to say much more than this; they would win as long as the vote was to be cast based on the public's immediate reaction to the developments.[27]

However, as attitudes changed and people began to see same-sex marriages being performed in other states without dramatic negative consequence, the opponents of marriage equality became more assertive. And here, they seem to have overstepped, creating something of a backlash from voters as well as making it possible—perhaps necessary—for the discussion to proceed to questions of civil rights and human dignity. The anti-equality campaign began arguing that same-sex marriage would be harmful to children and would encroach upon families.[28] The Prop. 8 proponents even averred this in court, although they could not produce any reliable evidence in support of their claims.[29] In an interview while the DOMA and Prop. 8 cases were pending before the U.S. Supreme Court, the Chair of NOM referred to Chief Justice Roberts's family as "second-best"—not ideal because the children were adopted rather than born into that family, but certainly far better than a same-sex household.[30]

With these and similar statements, the anti-equality movement demonstrated to the American public the level of bigotry and intolerance that

undergirds opposition to marriage equality, and it did so more directly and obviously than supporters of equality could have gotten away with if they had tried to so characterize these positions without this helpful illustration. With their views laid bare, people could then call the bigotry what it was.

In turn, the response of NOM and its allies was to profess confusion and play the victim, and to attempt to return the discussion to one of majoritarian preference, uninformed by the claims of rights of others. It launched an advertising campaign that it called "No Offense," the cornerstone of which was a videoclip of Miss America contestant Carrie Prejean saying "I believe that a marriage should be between a man and a woman. No offense to anybody out there. But that's how I was raised, and that's how I think that it should be, between a man and a woman."[31] But too much of the public had moved past this way of thinking, and was increasingly uncomfortable denying gays and lesbians rights on the basis of such unsubstantiated personal beliefs that they themselves were now willing to question.

Marriage equality becomes a civil rights issue for the courts, too

With the confluence of these influences, voters realized that they were not just being asked whether or not they "liked" same-sex marriage but rather were being asked to conclude that gay and lesbian couples were completely lacking in social value and potentially dangerous to children and valued institutions. Decisions to deny rights on either basis are constitutionally suspect. This was reflected in and crystalized through the litigation, when the District Court found that Prop. 8 was enacted purely to impose a "private moral view" and held that the Constitution does not allow laws to be justified solely by "the moral disapprobation of a group or class of citizens . . . no matter how large the majority that shares that view. The evidence demonstrated beyond serious reckoning that Proposition 8 finds support only in such disapproval."[32]

Judge Walker's handling of the Prop. 8 case helped both to shift the public debate and clarify the legal framework. For the first time, asserted state interests were put to the test—claims of harm to children, that same-sex marriage undermines the institution of marriage, and a legitimate interest in preserving historically valued institutions all had to be substantiated and subjected to cross-examination, and all such claims were found to be without basis.[33] Despite equality opponents' success in preventing the trial from being broadcast,[34] their lack of substantial, legitimate reasons for continuing this form of discrimination became apparent to an interested public.[35] Legally, because of the durability of findings of fact on appeal, the case appeared to be a very strong basis for the first Federal Court precedent related to marriage equality.[36] Although the 9th Circuit affirmed the holding on narrow grounds, it reiterated that "Proposition 8 serves no purpose, and has no effect, other

than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples."[37]

Refocussing at the Supreme Court

As the issued headed to the U.S. Supreme Court, some on the left were hopeful that we could see a landmark decision in favor not only of marriage equality but LGBTQ rights in general. One of the biggest open questions in the law today is the level of scrutiny to be applied to discrimination on the basis of sexual orientation. Although marriage equality can be resolved without reaching this issue—even favorably, either by relying solely on the due process clause and applying strict scrutiny because marriage is a fundamental right[38] or by holding that the discrimination fails even a rational basis test[39]—many advocates wanted the Court to take the opportunity to issue a broader ruling that would make clear that sexual orientation discrimination is incompatible with the Constitutional commitment to equality. In an interesting variation, some questioning at oral argument seemed to assume that all discrimination on the basis of sexual orientation is irrational.[40]

A more convoluted means of avoiding the question was not viable, despite the Obama Administration's best efforts. The Solicitor General argued that the Court need not even consider what sort of state interests would be good enough to warrant discrimination because California does not discriminate against same-sex couples in child adoption or other respects, regardless of whether their marriages are recognized or not. The 9th Circuit put this succinctly:

> Proposition 8 therefore could not have been enacted to advance California's interests in childrearing or responsible procreation, for it had no effect on the rights of same-sex couples to raise children or on the procreative practices of other couples. Nor did Proposition 8 have any effect on religious freedom or on parents' rights to control their children's education; it could not have been enacted to safeguard these liberties.[41]

Accordingly, so this argument goes, there is no need to decide if any of these possible reasons for discrimination are practically sound or Constitutionally legitimate, and the discriminatory law fails in the absence of even an arguable justification that actually exists in that state.

The Obama Administration's adoption of this reasoning represented its attempt to side against Prop. 8 without going so far as to articulate an argument that sexual orientation discrimination should be viewed as presumptively illegitimate under the equal protection clause.[42] But of course, this would set up an impossible framework when it comes time to consider states other than California, which may be using discriminatory marriage laws as part and parcel of their discrimination against same-sex couples in many material respects.

Several of the Justices pointed out that a ruling on the Obama Administration's proposed basis would mean that a state that discriminates against same-sex couples extensively, in as many aspects of life as possible, would be on firmer Constitutional ground; Justice Breyer pressed the Solicitor General, "I'd like to know with some specificity how that could be."[43] Whatever the merits of the technical legal position, there can be no intellectually satisfying response.

On the other end of the spectrum, the right wing of the Court saw an opportunity to undermine the equal protection clause. And in contrast to the ham-handed rhetoric of the right in the public debate, Chief Justice Roberts and Justices Scalia and Alito were paying close attention to the shifting tide of public opinion. Particularly notable at oral argument were soft questions from the Chief Justice that gave Paul Clement openings to claim that progress in achieving some level of political support for LGBTQ rights meant that discrimination against this group should not be viewed with suspicion. Indeed, in his defense of DOMA, Paul Clement's closing line was "[a]llow the democratic process to continue."[44] The Chief Justice also pressed the advocate for overturning DOMA, asserting that "political figures are falling over themselves to endorse your side of the case."[45]

The aim here was to promote a new bar to the ability to invoke heightened scrutiny under the equal protection clause. The right wing of the Court would emphasize an aspect of past cases that suggested that one indicator of a suspect class is the "political powerlessness" of the group subjected to discrimination.[46] They would convert this common characteristic into a requirement that those invoking the protections of the equal protection clause must be unable to secure *any* legislative victories. (The line of argument here parallels Justice Scalia's repeated references to the broad political support for the Voting Rights Act when the case against Section 5 was being heard the month before.[47])

Objective analysis should overcome crocodile tears

Ultimately, this issue of whether or not sexual orientation is a suspect classification was not addressed directly in the opinions because a majority struck down DOMA by applying rational basis review, thus avoiding the question of whether or not sexual orientation is a suspect class, and a different majority held that the Prop. 8 proponents lacked standing and therefore the Court could not reach the merits in that case. Nevertheless, the opponents of marriage equality took aim at the ability of courts to find violations of equal protection principles by turning the question of whether a law has a legitimate purpose into a value judgment about those who voted for the law. If this were the test, then a victory on equal protection grounds would be extremely difficult to achieve.

As discussed above, supporters of marriage equality had been arguing in public and litigating in court the actual effects of discriminatory laws and whether purported justifications have any basis in reality. When those justifications were shown to be lacking in support, their conclusion (and that of the courts below in both *Windsor* and *Perry*) was that the laws must therefore fail the constitutional test. But in their dissents, Justices Scalia and Alito adopt the role of victims of unfounded insult, much like NOM attempted to invoke, as discussed above. Justice Alito complained that the conclusion that DOMA does not serve any legitimate purpose "cast[s] all those who cling to traditional beliefs about the nature of marriage in the role of bigots or superstitious fools."[48] Justice Scalia characterizes the majority rationale as a "conclusion that only those with hateful hearts could have voted 'aye' on this Act."[49]

There will of course be those who, like NOM and the right wing of the Court, will be unwilling to accept the logical conclusion of a fair evaluation of discriminatory laws. But when all possible legitimate reasons for the law have been tested and found wanting, then the fact that a legislator or voter did not feel like a bigot when the vote was cast does not mean that there "must have been" some reason other than prejudice. Rational basis review must be left at an objective analysis of whether or not legitimate reasons truly exist, without some extra element of affirmative findings of malice. Discriminatory laws with no legitimate purpose are, materially and objectively, founded on nothing but "a bare desire to harm," regardless of whether or not that was consciously on the mind of the majority. Indeed the insidious nature of prejudice that may be the most vexing challenge today is that the discrimination often comes without that conscious awareness of why the actor is choosing to profile that individual or pass over that applicant or enact that barrier to a program or institution. This does not mean that we don't conclude that prejudice was at work when no other explanation holds up.

Outside the courtroom, changes in public opinion seem to suggest that many people are able to confront their old prejudices without constructing this psychological obstacle that takes their belief that they are not prejudiced as some sort of confirmation that they therefore must not be wrongfully discriminating. Searching analysis of one's past choices can sometimes lead to disturbing revelations, but this is not a reason against recognizing the illegitimacy of those actions. Marriage equality, it turns out, was a context in which many people were able and willing to rethink their immediate feelings and recognize and abandon old prejudices.

Conclusion

The movement for marriage equality has been an important force for change politically and legally. This may have come as something of a sur-

prise for those who look for noncooptable demands and radical tactics as the ways forward, and the success of this movement is worthy of analysis. It was certainly successful politically—the opponents of marriage equality were not wrong when they said there has been a "sea change"[50] in public attitudes, and this is being reflected in the votes of legislators and plebiscites. More importantly, the changing attitude is not merely about whether the public is accepting of same-sex marriages; it is about respect for the dignity of relationships that happen to differ from their own, and important proof that people can, as the Presidents like to say, "evolve" away from old prejudices.[51] This is the happy irony of the marriage equality movement: the accommodationist demand wound up doing so much to open minds to new ways of thinking.

NOTES

1. Margot D. Weiss, *Gay Shame and BDSM Pride: Neoliberalism, Privacy, and Sexual Politics*, Radical History Rev 87, 89 (No. 100, 2008).
2. George Chauncey, Why Marriage? The History Shaping Today's Debate Over Gay Equality. 93 (2004).
3. *Id.* at 89.
4. Craig Rimmerman, The Lesbian and Gay Movements: Assimilation or Liberation 100 (2008).
5. *Id.* at 100.
6. Chauncey, *supra* note 2 at 94.
7. Transcript of Oral Argument at 56, Hollingsworth v. Perry, U.S. Supreme Court, No. 12-144 (March 25, 2013) (Alito, J.) ("But you want us to step in and render a decision based on an assessment of the effects of this institution which is newer than cell phones or the Internet?").
8. Baker v. Nelson, 291 Minn. 310; 191 N.W.2d 185 (1971). The U.S. Supreme Court rejected review "for want of substantial federal question." 409 U.S. 810 (1972).
9. *See e.g.*, Jones v. Hallahan, 501 S.W. 2d 588 (Ky. 1973) (first claim for marriage recognition by a lesbian couple); Singer v. Hara, 11 Wash. App. 247, 522 P.2d 1187 (1974); Adams v. Howerton, 486 F.Supp. 1119 (C.D. Cal. 1980) (marital ceremony by male couple would not be recognized by INS); DeSanto v. Bansley, 35 Pa. D. & C.3d 7 (Del. Co, PA. 1982) (seeking divorce from an asserted common-law marriage).
10. Elise Chenier, *Gay Marriage, 1970s Style*, 20.2 Gay & Lesbian Rev. Worldwide 19 (2013).
11. U.S. General Accounting Office, *Defense of Marriage Act: Update to Prior Report* (2004), *available at* http://www.gao.gov/new.items/d04353r.pdf.
12. Minister of Home Affairs v. Fourie, 2006 (1) SA 524 (CC) at 39 (S. Afr., Dec. 1, 2005).
13. Opinions of the Justices to the Senate, 440 Mass. 1201, 802 N.E. 2d 565 (2004).
14. Goodridge v. Department of Pub. Health, 440 Mass. 309, 344, 798 N.E.2d 941 (2003).
15. Opinions of the Justices to the Senate, 440 Mass. 1201, 1202, 802 N.E. 2d 565, 566 (2004).

16. Brief of Civil Rights Amici Curiae, *Request for an Advisory Opinion* A-107, No. SJC-09163 at 5 (Mass. 2004).

17. Opinions of the Justices to the Senate, 440 Mass. at 1209, 802 N.E. 2d at 571.

18. *See e.g.* Tanya Domi, *Civil Disobedience: Gay Texas Couple Apply For Marriage License, Get Arrested Instead*, THE NEW CIVIL RIGHTS MOVEMENT, Jul. 6, 2012 (arrest in Dallas); *Lesbian seeking marriage license arrested in NC*, CBS News, May 10, 2012 (arrest in Winston-Salem); Eric Rofes, *Marriage and Civil Disobedience: Upping the Ante and Creating an Activist Movement*, in I DO, I DON'T: QUEERS ON MARRIAGE Greg Wharton & Ian Phillips, eds. (2004) (describing his experience in the San Francisco marriage ceremonies in civil disobedience terms: "I joined thousands of people this weekend and defied the laws of my state in a brazen act of civil disobedience. We didn't chain ourselves to a building, sit down in the middle of a crowded intersection, or occupy a public official's office until our demands were met. We simply got married.").

19. *Mayor defends same-Sex marriages: San Francisco will resume issuing licenses Monday*, CNN, Feb. 22, 2004.

20. *'Anarchy Is Breaking Loose Across America': San Francisco's same-sex marriage defiance inspiring imitators*, WND.com, Feb. 21, 2004.

21. Jennifer Medina, *Charges Dropped Against Mayor Who Performed Gay Weddings*, N.Y. TIMES, Jul. 13, 2005.

22. Rukmini Callimachi, *Gay Marriage Licenses Issued in Oregon*, WASH. POST, Mar. 3, 2004 (also reporting on the statement of the Mayor of Nyack).

23. *But see*, Miranda Leitsinger, *Highlighting 'Vague' law, Santa Fe mayor encourages gay marriage*, NBC NEWS, Mar. 19, 2013.

24. *See* Lockyer v. City and County of San Francisco, 95 P.3d 459 (Cal. 2004) (issuing a writ of mandate against San Francisco's mayor preventing issuance of additional same-sex marriage licenses and voiding all that had previously been); Li v. State, 110 P.3d 91 (Or. 2005) (same, regarding Multnomah County, Oregon); Hebel v. West, 803 N.Y.S.2d 242 (App. Div. 2005) (same, against mayor of New Paltz, New York).

25. *See e.g. Press Releases*, VOTEONMARRIAGE.ORG, *at* http://www.voteonmarriage.org/news.shtml> (Massachusetts).

26. *See* http://www.letthepeoplevote.com

27. *See* Kenneth Jost, *Gay Marriage*, *in* ISSUES IN RACE, ETHNICITY AND GENDER: SELECTIONS FROM THE CQ RESEARCHER (2d ed., 2005) 327, 349 ("Opponents believe public opinion is on their side and will ultimately prevail. 'In spite of what you're seeing in pop culture and in the media, in the absence of anything pushing back on the gay agenda, in spite of that silence except from groups like ours, Americans seem to be resonating with what we believe to be true,' says [Sandy] Rios of Concerned Women for America.").

28. *See* Hollingsworth v. Perry, 704 F.Supp.2d 921, 930 (N.D. Cal. 2010).(finding that "The key premises on which Proposition 8 was presented to the voters thus appear to be the following: 1. Denial of marriage to same-sex couples preserves marriage; 2. Denial of marriage to same-sex couples allows gays and lesbians to live privately without requiring others, including (perhaps especially) children, to recognize or acknowledge the existence of same-sex couples; 3. Denial of marriage to same-sex couples protects children; 4. The ideal child-rearing environment requires one male parent and one female parent; 5. Marriage is different in nature depending on the sex of the spouses, and an opposite-sex couple's marriage is superior to a same-sex couple's marriage; and

6. Same-sex couples' marriages redefine opposite-sex couples' marriages.") (*quoting* California Voter Information Guide, California General Election, Tuesday, November 4, 2008 ("[Proposition 8] protects our children from being taught in public schools that 'same-sex marriage' is the same as traditional marriage. . . . If the gay marriage ruling [of the California Supreme Court] is not overturned, TEACHERS COULD BE REQUIRED to teach young children there is no difference between gay marriage and traditional marriage. . . . [W]hile gays have the right to their private lives, they do not have the right to redefine marriage for everyone else.")).

29. *Hollingsworth*, 704 F.Supp.2d at 931 ("proponents in their trial brief promised to 'demonstrate that redefining marriage to encompass same-sex relationships' would effect some twenty-three specific harmful consequences. At trial, however, proponents presented only one witness, David Blankenhorn, to address the government interest in marriage. Blankenhorn's testimony is addressed at length hereafter; suffice it to say that he provided no credible evidence to support any of the claimed adverse effects proponents promised to demonstrate. During closing arguments, proponents again focused on the contention that 'responsible procreation is really at the heart of society's interest in regulating marriage.' When asked to identify the evidence at trial that supported this contention, proponents' counsel replied, 'you don't have to have evidence of this point.').
30. Mark Sherman, *Diverse High Court Families Mirror Country*, AP, Mar. 13, 2013.
31. National Organization for Marriage, *Miss California Press Conference, National Organization For Marriage*. May 15, 2009, *available at* http://www.youtube.com/watch?v=Kqvty4Wf8eo.
32. *Hollingsworth*, 704 F.Supp.2d at 938 (N.D. Cal. 2010)
33. *Hollingsworth*, 704 F.Supp.2d at 956-991 (findings of fact).
34. Hollingsworth v Perry, 130 S.Ct. 1132 (2010).
35. The trial received considerable media attention and dramatic re-enactments. Bob Egelko, *Prop. 8 Trial on YouTube After All - Re-Enacted*, S. F. CHRONICLE, Feb. 2, 2010.
36. Judge Walker was explicit that his conclusions were based on factual findings "pursuant to FRCP 52(a)," *Hollingsworth*, 704 F.Supp.2d at 927, which provides that findings of fact "must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility," Fed. R. Civ. Pro. 52(a).
37. Perry v. Brown, 671 F.3d 1052, 1063-64 (9th Cir. 2012).
38. *Hollingsworth*, 704 F.Supp.2d at 991, citing Zablocki v Redhail, 434 US 374, 388, 98 S. Ct. 673, 54 L. Ed. 2d 618 (1978).
39. *Id.* at 997-1003.
40. Transcript of Oral Argument at 14, *Hollingsworth* (Sotomayor, J.) ("outside of the marriage context, can you think of any other rational basis, reason, for a State using sexual orientation as a factor in denying homosexuals benefits or imposing burdens on them? Is there any other rational decision-making that the Government could make? Denying them a job, not granting them benefits of some sort, any other decision? . . . If they're a class that makes any other discrimination improper, irrational, then why aren't we treating them as a class for this one thing?").
41. *Perry*, 671 F.3d at 1063.

42. Transcript of Oral Argument at 52, *Hollingsworth* (Verrilli, S.G.) ("California's own laws do cut the legs out from under all of the justifications that Petitioners have offered in defense of Proposition 8.).
43. *Id.* at 54 (Breyer, J.).
44. Transcript of Oral Argument at 113, United States v. Windsor, U.S. Supreme Court, No. 12-307 (March 26, 2013).
45. *Id.* at 108.
46. *See e.g.* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).
47. Transcript of Oral Argument at 16-17, 46, Shelby County v. Holder, U.S. Supreme Court, No. 12-96 (Feb. 27, 2013).
48. United States v. Windsor, 2013 U.S. LEXIS 4921, *114; 81 U.S.L.W. 4633 (Jun. 26, 2013) (Alito, J., dissenting)
49. United States v. Windsor, 2013 U.S. LEXIS 4921, *Id.* at *83; 81 U.S.L.W. 4633 (Jun. 26, 2013) (Scalia, J., dissenting).
50. Transcript of Oral Argument at 107, 109, 113, *Windsor* (Scalia, J) (term subsequently adopted by the Chief Justice as well as counsel for Windsor).
51. *See e.g.* Peter Baker, *Now in Defense of Gay Marriage, Bill Clinton*, N.Y. TIMES, Mar. 26, 2013; Karen Tumulty, *Equality Advocates See Speech as Watershed*, WASH. POST, Jan. 22, 2013 (noting that President Obama "became the first president to use the word 'gay' as a reference to sexual orientation in an inaugural address; reporting on earlier statement that his views were "constantly evolving").

Heidi Boghosian

THE ARMY GOES SPYING ALONG

Faith in God, then we're right,
And we'll fight with all our might,
As the Army keeps rolling along.
—from the official song of the U.S. Army[1]

For six weeks in 1968, thousands of activists sheltered on the National Mall in a frequently rained-on encampment of shacks known as Resurrection City. The Reverend Martin Luther King, Jr. and other civil rights activists, notably from the Southern Christian Leadership Conference's[1] Poor Peoples' Campaign, had hoped that the live-in would compel Congress to pass laws that would eliminate poverty.[2] Resurrection City was bulldozed in late June of that year, by which time its occupants had seen the assassinations of Dr. King on April 4, and Senator Robert F. Kennedy on June 8.

Of the many visitors to the short lived encampment, Army spies came to monitor protesters and actively subvert their mission. An army major and several others assumed false identities, infiltrated Resurrection City and followed orders to influence Leadership Conference policy. Other agents patrolled the area in plain clothes to attempt to gather information from participants. Agents with false press identification conducted interviews of protesters on videotape to try to determine their plans.[3]

Infiltration of Resurrection City was just one example of the Army's far-reaching program civilian intelligence gathering that flourished in the 1960s, from college campuses to the 1968 political conventions, as opposition to the war in Vietnam grew. (Campuses provided an especially fertile ground for surveillance because young agents were able to pose as students and many university administrators willingly cooperated with field offices.)[4] It did not matter that Article I, Section 8 of the U.S. Constitution[5] and 10 U.S.C. Section 332, provide that the Army must be controlled and directed by civilians, and only then in response to invasion, or insurrection.[6] It was clear that the justification for involving the military in surveillance was pretexual, and that a vast Army intelligence apparatus was designed in large part to browbeat lawful political activity.[7]

In 1968, the Senate Subcommittee on Constitutional Rights, chaired by Senator Sam Ervin, learned that the Department of Defense was monitoring

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Americans it suspected of engaging in subversive activities. The committee found a computer system operated from the military's "domestic war room," overseen by the Directorate of Civil Disturbance and Planning Operations in the Pentagon's basement. The database, containing the records of 18,000 U.S. citizens, was created by the Army in 1967 in response to local authorities in Detroit to assist in dealing with civil uprisings.[8] In 1970, Christopher H. Pyle, an attorney and former captain in Military Intelligence in the U.S. Army, published an article, "CONUS Intelligence: The Army Watches Civilian Politics," stating that nearly 1,000 plainclothes investigators were monitoring political protesters.[9] Several of the individuals and groups mentioned in the article filed the class action *Laird v. Tatum*,[10] in which plaintiff Arlo Tatum and others claimed that their First Amendment rights were chilled by the existence of the Army program. The Supreme Court dismissed the case on the grounds that the plaintiffs failed to show injuries as a result of the spying and lacked standing to bring the action.

A quarter of a century later, in 2009, activists in Washington State learned through Freedom of Information Act (FOIA)-requested documents that an informant working for the United States military spied on antiwar groups in Olympia and Tacoma. As was later revealed, the military admitted that their goal was to debilitate the groups. National Lawyers Guild member Larry Hildes has represented the activists since 2006, initially in challenging a pattern of harassment against them by local law enforcement agents. At that time he could not have known that what was for him a routine case would turn into one of the most significant court challenges eclipsing *Laird*.

National Lawyers Guild Executive Director Heidi Boghosian interviewed Larry Hildes[11] for the *NLG Review* to discuss his case, *Panagacos v. Towery*.[12] This interview sheds light on this sordid story of army spying on civilians in the U.S.

HB: *When did you suspect that this was more than just a case of police harassing activists?*

LH: One of our clients, Brendan Dunn, was arrested with two friends in Seattle for refusing to turn over an Anarcho-Syndicalist flag to police. We later learned that the arresting officer had a preoccupation with anarchists. Brendan had been stopped and arrested many times while attending, and even while on his way to, demonstrations. At the same time, the Olympia Police Department (OPD) started cracking down and confiscating papers from the Industrial Workers of the World for setting up newspaper bins around town, even though they had paid for, and had permission to set up the bins. Curious about what was going on, Brendan put together a Public Records Act request to the OPD seeking copies of all anarchist-related intelligence and correspondence.

HB: *What kinds of documents did he receive in response to his request?*

LH: To Brendan's surprise, he received hundreds and hundreds of pages of "Force Protection Memos" and "Threat Assessments" from Ft. Lewis on Port Militarization Resistance (PMR), a group that he was active with in Olympia and Tacoma. PMR was protesting the use of civilian ports for shipments of Stryker vehicles and other weapons of occupation to the wars in Iraq and Afghanistan. Brendan hadn't expected any of this. He started poring through the documents.

HB: *Do you think it was an accident that the Olympia Police Department released so much information?*

LH: We don't know if they were released by mistake, if someone sympathetic to our cause released the documents, or if the authorities send them to intimidate the activists.

The documents were in e-mail form and had a distribution list that included virtually every civilian law enforcement agency and every military agency including the Department of Homeland Security, from north of Seattle down to Portland. They also indicated a host of federal agencies and others that we couldn't readily identify.

One part stood out: they had detailed information of PMR, including names of specific activists, and strategies for disrupting and in their words, "neutralizing" PMR, how they were going to fight it. The author of several of these reports was listed as John Towery. He didn't have a title, so Brendan and Drew Hendricks started researching to find out who he was.

HB: *How specifically did Brendan and Drew discover the informant's identity?*

LH: It proved amazingly easy. The first thing they did was look for a Facebook page. John Towery had one and his had his photograph. Brendan and Drew immediately recognized him as the person they knew as John Jacob, arecently active member of PMR who had actually been coming to meetings for several years, and who also assumed responsibility as administrator for the group's e-mail listserv. Strange things had been happening with the email for a while. Things were ending up in hands they should not have been. The email would stop working right before key actions. PMR members were getting an idea that something weird was going on.

So they did some more checking. By checking on Towery's voter registration information and other public records, they found his address. The address matched the listed address for John Jacob, and someone went by the house to take a picture. Sure enough, there was John Jacob's car and John Jacob's motorcycle parked in the driveway.

His nickname in PMR was "Agent Orange" which, although clever, seemed somewhat strange even before his true identity was uncovered. John Towery was a civilian employee of the Force Protection Division at Fort Lewis, Washington army base just outside of Tacoma. It was clear that he gathered intelligence and handed it over to Tom Rudd at Force Protection-Fort Lewis (where the Stryker Brigades came from). His full name is John Jacob Towery. He was the infiltrator.

Upon a first read, it was shocking. But when we thought back, it actually made sense. Strange things had been happening for more than two years by that point. In the discovery phase of several criminal cases, the city of Tacoma had produced detailed analyses of PMR and their action plans. Folks would show up for unannounced demonstrations only to find that the police were on site preparing to arrest everyone. We hadn't known at the time how they knew to turn up at those actions; now we know that it was because they had been monitoring PMR's email communications. The confidential attorney-client listserv for a criminal case in Olympia was compromised. We now understood how confidential communications had come to be produced in trial by the prosecutor.

HB: *When Brendan and Drew confirmed Towery's identity, what did they do?*

LH: They didn't out him at first. They didn't do anything people mistakenly do at first. They didn't start rumors. They didn't snitch jacket. They carefully and methodically checked and found on Facebook that he worked for the Army Force Protection doing intelligence. Not very intelligent.

In retrospect, some people were suspicious but at the time he blended in. He went to events. He brought his kids. And people believed him. He had some idea of politics. He drove a group down in his truck to the Anarchist book fair in Portland, and found other ways to build trust and friendship with Brendan and other folks, even though he was a lot older than most of them. He at least superficially understood the politics.

And these are people who are very aware of security culture and checking people out and being careful. But he was very, very good at what he did. And he fooled enormous numbers of people. Brendon considered him a close friend. Other people did.

Only then, with concrete proof, did Brendan and Glen Crespo, another of our plaintiffs, confront Towery. They confronted him at a café in Tacoma and he said, "Yes, I've been spying on you. I'm doing it for your own good. There are other spies watching you who mean you much more harm." The presumption was if you don't let me do it; there are worse out there.

We do know that the Army had at least one more spy. We caught the Coast Guard spy. There were two officers from the Tacoma Police Department's

Office of Homeland Security Committee who at various times monitored and attended meetings. There were others from various other agencies who tried to get on the listserv, who showed up at meetings and were not allowed to continue.

HB: *What did John Towery admit to doing?*

LH: He wouldn't say exactly, other than that he reported to law enforcement and the Army. But, he did do all of that; we know from the documents received by Brendan, and from others we've received in other related civil cases. We also know, for example, that he and representatives of the Tacoma Police Department met with Detectives of the Aberdeen, Washington Police Department and Grays Harbor Sheriff's Office, a different county, and devised a list of people to be followed and targeted and license plates of vehicles to be pulled over. (That by the way included my wife and me. We were followed as we drove through the streets of Aberdeen the night before a demonstration. I wanted to confront them; she wouldn't let me).

We have a panicked series of e-mails and communications about that because we were staying that night in a vacant apartment of a building then owned by a friend that happened to overlook the police station across the street. After a series of e-mails about following us, we got, "Oh my God, they've gone into an apartment building across the street from us. The lights went on in an apartment immediately across from the Police Station. We think they're watching us!" Several of our plaintiffs got stopped repeatedly as a result, and one, Phil Chinn, was pulled over driving a carload of folks to Aberdeen and at 10 in the morning when he had not been drinking, got stopped and arrested by the State Patrol for DUI even though he blew a zero on the breathalizer.

The county charged him with DUI and, even when the blood tests came back negative for everything they refused to dismiss. So, I wrote a dismissal motion and went through the police report that stated "I recognized the suspect's vehicle from the Attempt to Locate Bulletin." In addition to the dismissal motion for lack of probable cause, I sent a discovery request for all information related to the Attempt to Locate code. The next morning, the prosecutor called me and asked if we had any objection to them dismissing the case. Three weeks later in response to a Public Records Act request, we got the Attempt to Locate Code that read: "Attempt to Locate a green Ford Taurus, Washington Plate #____. Three known anarchists in the vehicle. When you stop them, let Aberdeen know so they can continue the pursuit." We persuaded Phil to sue, and along with the ACLU we ended up settling for $169,000 and $248,000 in attorneys fees. Phil is now a second year student at Seattle University Law School, doing very well, and active in the National Lawyers Guild.

Our clients and others got arrested and stopped, over and over again, demonstrations got disrupted, and folks from PMR got targeted everywhere they went for a while. The only two people arrested at a demonstration in San Francisco were from PMR and were identified by a Tacoma lieutenant. Towery sent bulletins out about who was going to the protests against the Democratic and Republican Conventions in 2008, and virtually all of those folks were arrested in one place or the other in targeted sweeps or raids.

We also found out that the Air Force at McGwire AFB in New Jersey had a PMR/SDS taskforce 3,000 miles away from PMR and was exchanging information with the Olympia Police Department. Folks who were coming up for peaceful demonstrations from Portland were repeatedly attacked and arrested at PMR demos in Tacoma after being identified in advance. Basically, the information was used to target PMR and individuals associated with it systematically and pervasively, disrupting not only their ability to gather and to demonstrate, but their lives, until PMR disintegrated.

HB: *What happened next?*

LH: I'd been representing the group in several criminal cases. There were ongoing discussions that the police seemed to know in advance what they were planning. Everyone would be arrested as they were getting out of their cars, before they did anything.

HB: *So these were unlawful arrests that amounted to a pattern of harassment?*

LH: They figured out a chokepoint. If they couldn't get the equipment there, they couldn't send the troops. If they couldn't send the equipment or the troops, then there would be no war. They clearly succeeded in scaring the military by these peaceful acts of civil disobedience (about 80 percent of the time they didn't even engage in acts of civil disobedience). They tried to talk to soldiers and had really good discussions with them, which scared the military.

When there would be a crackdown Tacoma would not let the activists demonstrate on public property at the Port, so they went to the freeway ramps and blocked the equipment from getting off the freeway to go to the Port of Tacoma. Every time the military tried to do something, they did something else. So for a while they were able to work around this. Eventually it prevented them from demonstrating; they were spending all their time dealing with criminal cases. People started fighting with each other.

HB: *That is exactly what happened with COINTELPRO with government infiltration and disruption, playing on interpersonal relationships. This sounds like a classic COINTELPRO case but with very clever activists. It must have been a coup to discover Towery—all the pieces fit together.*

LH: All of a sudden everything made sense.

HB: *What makes this case different from other infiltration cases?*

LH: The fact that our clients caught the Army spying on civilians is very rare. The number of agencies involved—military, federal, state and local—is way beyond anything I've ever seen before. The relentless efforts to destroy PMR is strongly reminiscent of what the FBI did to the Black Panthers, to AIM, to other groups. This was a massive military and intelligence operation launched against a few dozen people who at worst committed acts of civil disobedience. You have to wonder what else is going on out there in this era of fusion centers and endless electronic surveillance that we don't know about. This is surveillance using computers, systematized databases and communicating by e-mail, as well as actual spies, and using the legislation and tools of post 9/11 America fusion centers, designation of groups as threats, as well the blurring of lines between civilian and military "threat assessments;" talking about "neutralizing PMR" as if they were a hostile military force. It's quite scary.

HB: *How did Towery fit in to the whole network?*

LH: Towery was a retired army officer. He worked as a civilian employee of the Army. He now, we believe, works for Naval Investigative Services at Bremerton, Washington. He reported directly to Tom Rudd, the Director of Force Protection (protecting the security of troop movements). Rudd reported to the Provost Marshall at Ft. Lewis, who is in charge of all judicial, legal, and intelligence functions at Ft. Lewis, essentially everything about courts, rules, legality, and law enforcement operations. He reports directly to the Garrison Commander (the General in Charge of the base). Not only was Towery not disaffected or looking to get out, he was tied tightly into a very short command chain at the upper echalons of the base.

HB: *What is the status of the case as of June 2013?*

LH: Towery and Rudd moved to dismiss the case against them arguing that they were immune from suit for this as it was "just doing their jobs." They also asserted that you can't sue the military for spying on civilians.

We won. Our Federal District Court Judge denied their motions in large part and said we had alleged enough to allow the case to go forward as to First and Fourth Amendment violations. Brendon Dunn had been arrested five times. We won each time. Several people had been arrested. Two entire households (one which in retrospect should have picked another name as it was jokingly referred to as HQ) were raided repeatedly.

At one point we got a call because the Tacoma Police Department and another agency were going to raid the house to stop an anarchist book fair. They went to the landlord and said you have terrorists in the house. If you don't kick them out we'll charge you with terrorism. The new house had a

camera outside it aimed on a traffic pole. He got kicked out after similar threats were made to the landlord. They totally disrupted the lives of a dozen to two dozen people involved in PMR, including most of our plaintiffs.

HB: *The prosecution tried to dismiss your case based on Laird v. Tatum. But in your case, as distinguished from Laird, there were actual injuries.*

LH: Yes, they appealed to the 9th Circuit and argued *Laird*. And we said, *Laird* said you cannot sue the military unless you have other damages. And *Laird* hints that arrests would be enough to overcome it, if you can show a pattern. And that's what we did; we showed how many times these people had been stopped, had been arrested. The pattern. The fact that the police would arrest them not only at demonstrations, but also before they got to demonstrations. And at least once, in the case of Jeff Berryhill, they arrested him as he was standing outside of his house talking to someone. They disrupted the households. Brendon Dunn finally was forced to leave Olympia because they intensely went after him with character assassinations, *à la* COINTELPRO. So we brought this to the 9th Circuit and Judge Fletcher, Jr., son of the late Betty Fletcher, asked us:"They can investigate because your clients might do illegal things and might be engaged in dangerous behavior?"

I said, maybe. Of course our clients were never involved in dangerous behavior; they only engaged in civil disobedience. But they cannot arrest them before they even get to the demonstration, or before they even do anything. Half of our plaintiffs are women involved in a planned women's action where police blocked off the street at night; there were no Strykers in sight; they were going to take another route. Police arrested them all on charges of "attempted disorderly conduct."

HB: *There is no such charge.*

LH: There is no such charge. Either you are disorderly or you are not. If you block traffic in Washington state you can be charged with disorderly conduct. There was no traffic. The police blocked off the whole area. They arrested the women for a thought crime.

The court was persuaded by that, and by the pattern of arrests and the attacks on the two houses. The court said yes, if you can show actual damages you can overcome *Laird* and you can sue the military. To our knowledge this is the first time an appellate court has ever said this since *Laird*.

This distinguished the case from *Laird*, in which a divided Supreme Court held that spying on civilian activists and the chilling effect on the First Amendment from that spying alone is not enough to allow a case to go forward.Towery and Rudd did not further appeal, so the 9th Circuit's ruling that you can sue the military when you have arrests and other damages stands.

Two years have gone by since we filed the case. The defendants want to now hurry up, to engage in a short amount of discovery and then move for summary judgment, so we're getting ready to move forward and try to carve out enough time to gather all of the evidence we need. We have to keep pushing back hard.

Much is at stake here, for both sides. The attorneys for Towery and Rudd made clear that they intend to try to force us to reveal exactly the details about how PMR organized and who was active, information they tried to get by spying. So we're going to have to be aggressive and zealous in protecting our clients' rights to freedom of association.

HB: *What's at stake here? If you win, what are you asking for and what will the results be?*

LH: It needs to be enough money to set precedent and to compensate our clients for what they went through. Our clients have made clear that the two main things we need are information about the full extent of what Towery, Rudd, and the agencies did, and what information they gathered, and strong injunctive relief to bar the military and the other agencies from ever doing this again. We must push back against the destruction of the First Amendment and the Fourth Amendment. The right to protest and organize and the right to privacy are fundamental. Without the right to protest and petition the government for redress, to demand justice and peace, we have no way to protect the other rights. These are frightening times. We hope this case will cast some light into the darkness.

HB: *How pervasive do you think Army spying is now?*

LH: In the set of emails and other information that Brendan got from the public records request, there was a series of communication between the PMR and Students for a Democratic Society (SDS) taskforce at McGuire Air Force Base in New Jersey and the Olympia Police Department. I don't know why the Air Force is involved at all. But I particularly don't know why McGuire Air Force Base, 3,000 miles away, has a PMR/SDS taskforce. It says to me that this is going on all over.

This kind of coordination, however, is what the fusion centers were created to do. They circumvented the previous constitutional law and allowed the military to work with civilian law enforcement and all the federal law enforcement agencies to work with local ones. As a result they systematically spy on all people.

A 2012 congressional report criticized fusion centers for producing intelligence of "uneven quality—oftentimes shoddy, rarely timely, sometimes endangering citizens' civil liberties and Privacy Act protections…and more

often than not unrelated to terrorism." The two-year investigation by the U.S. Senate Permanent Subcommittee on Investigation found the Department of Homeland Security officials were aware of the impediments to effective counterterrorism work with the centers, but found that they did not report the issues to Congress or fix the problems in a timely fashion.[13]

The military does not like dissent. The lines between military and civilian law enforcement and military tactics and police tactics has blurred to the point that they think they have a green light to do whatever they want. They've decided that dissent against their wars is the enemy.

That's why this case is important enough for us to have hung on through several years of foot dragging and appeals. The attorneys for Rudd have said they are sick of this case and they are going to allow us two months of discovery and then move for summary judgment. I think they're going to fight us. We want to know the answer to that question too. Where else are they doing this; how much are they doing this. This is unacceptable in terms of a free society.

[Former U.S. Attorney General Michael] Mukasey basically stripped away all of the prohibitions against the FBI's spying on activists that we won in the courts, the streets and through the Church Committee in the 1970s and 1980s when the rampant abuses of COINTELPRO came to light. Agents are now free to spy on anyone with almost any or no pretext. Fusion Centers were created after 9/11 to obliterate the lines that prevented the kind of conspiracy and assault that we faced from Towery and company, without restriction or regulation. And the result is what it was back in the 1960s and before. The FBI and other agencies use infiltrators to create supposed plans for violent activities, engage in massive entrapment and deception, and then make high profile felony arrests for folks who haven't done anything and had no intention or idea of committing supposed acts of terrorism.

The NATO 5 provides a perfect example of how this works.

HB: *The case of the NATO 5 involved police entrapment of activists in May 2012. Two undercover police detectives in Chicago allegedly encouraged Occupy activists to engage in a plot at the 2012 NATO Summit.14 After a midnight raid on the home of two Occupy Chicago activists days before the summit, three NATO protesters were charged with terrorism and other felonies and have been held on $1.5 million bond each.15 Arrested in the raid were two known undercover officers who went by the names "Mo" and "Glove," and who both infiltrated Occupy Chicago months earlier. Shortly after the three NATO activists were arrested, two others were arrested on terrorism-related charges. One of them, Mark Neiweem, was snatched by undercover police*

officers from Michigan Avenue in Chicago, an intimidating maneuver for those witnessing the arrest.[16]

LH: In our case, there's no evidence that any of them planned to commit any act. The supposed evidence is from a spy claiming what they intended to do, so that they could scare everyone with claims of violent demonstrators and destroy the protests and then terrify the next organizing effort for the next major protest.

It's become all about what we saw in Puget Sound and have seen again with the Grand Jury witch hunts—the use of a military perspective on the world and military tactics to destroy protest, to crush dissent as if it were the enemy, not part of what makes a society healthy, part of the check-and-balance that's supposed to preserve freedom. If we are the enemy to be neutralized—if dissent is terrorism—then I shudder to think where we are and where we're heading. So, we have to fight this hard and roll this back. This has never been a free society, but it can be if we demand it and make it free. We ultimately have to power to do that, and we must.

HB: *Larry, you've been handling First Amendment related cases for several years, with many successes. What advice do you have for young attorneys interested in pursuing this line of work?*

LH: We as attorneys have extraordinary power and privilege. We are morally and politically obligated to use that power and privilege to help bring about justice, and we can. Don't be afraid to take the hard cases, to represent those who dissent, and these days especially anarchists who get so targeted and marginalized. Don't be afraid to take on the military, the FBI, other agencies and groups that scare you, because if we don't defend those who do, who will?

The right to dissent is sacred. The right to carve out space for protest and speech is what allows us to become a free society. Don't surrender the freedom of association, guard people's right to organize privately, because that's how people protect themselves, each other, and the Constitution, free from spying, charts of who works with whom and how, and other means the state uses to repress us.

HB: *What do you tell activists who may fear that they are the subjects of infiltration?*

LH: Yes, you probably are! Learn security culture, and be careful, but don't be paranoid. Don't let your fears, and their intimidation, silence you or turn you against each other. The biggest weapon the security state has is our fear and their ability to use it to silence us. The more we dissent, the more we take the streets and demand justice, demand a just society, the safer we are.

We protect our rights by using them. Never be afraid and never turn back.

NOTES

1. Edmund L. Gruber, *The Army Goes Rolling Along* (1908). It was written in 1908 by field artillery First Lieutenant [later Brigadier General] Edmund L. Gruber, while stationed in the Philippines. In 1917 John Philip Sousa transformed it into a march, renaming it "The Field Artillery Song." It was retitled "The Army Goes Rolling Along," and adopted in 1956 as the Army's official song. It is played at the conclusion of every Army ceremony.
2. FRANK J. DONNER, THE AGE OF SURVEILLANCE 305 (Alfred A. Knopf ed., 1980).
3. Ralph Michael Stein, Laird v. Tatum: *The Supreme Court and a First Amendment Challenge to Military Surveillance of Lawful Civilian Political Activity*, 1 HOFSTRA L. REV. 244, 250 (1973).
4. DONNER, *supra* note 2, at 306.
5. U.S. CONST. art 1, § 8. This section lays out the enumerated powers of Congress, one of which is "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions…"
6. 10 U.S.C. § 332 (Westlaw 2013). The statute text states:

   > Use of militia and armed forces to enforce Federal authority: Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

7. DONNER, *supra* note 2, at 305.
8. Ron Ridenhour & Arthur Lubow, *Bringing the War Home*, 5 NEW TIMES 18, 20-24 (1975), *available at* www.namebase.org/ppost14.html.
9. Stein, *supra* note 3, at 245 (quoting Christopher Pyle, *CONUS Intelligence: The Army Watches Civilian Politics*, WASHINGTON MONTHLY, (1970)).
10. Laird v. Tatum, 408 U.S. 1 (1982).
11. E-mail from Larry Hildes, attorney, to author, March 19, 2011; Interview by WBAI Radio with Heidi Boghosian, Executive Director, National Lawyers Guild, and Michael Ratner, Attorney, (Apr. 8, 2011), *available at* http://lawanddisorder.org/2013/04/law-and-disorder-april-8-2013/. Larry Hildes been an activist for 32 years, since he was 16. For the last 18 years he has been a civil rights and human rights attorney, based in Bellingham, Washington, specializing in the political rights of demonstrators and other First Amendment issues around the country and internationally. A member of the National Lawyers Guild for over two decades, Larry is the proud child of union activists who taught him to never cross a picket line and never trust a boss.
12. Panagacos v. Towery, 782 F.Supp.2d 1183 (W.D. Wash. 2011), aff'd 501 Fed.Appx. 620 (9th Cir. 2012).
13. Carl Levin & Tom Coburn, United States Permanent Subcommittee on Investigations, Committee on Homeland Security and Governmental Affairs, Federal Support for and Involvement in State and Local Fusion Centers, Majority and Minority Staff Report (2012), *available at* www.hsgac.senate.gov/download/?id=49139e81-1dd7-4788-a3bb-d6e7d97dde04..

14. Lee Klawans, *Lawyers Guild Claims NATO Activists Entrapped by Police Informants,* EXAMINER.COM (May 22, 2012), www.examiner.com/article/lawyers-guild-claims-nato-activists-entrapped-by-police-informant-photo.

15. Michael Martinez & Paul Vercammen, *Police: 3 terror suspects at NATO summit were plotting to hit Obama's campaign HQs*, CNN.COM (May 19, 2012), www.cnn.com/2012/05/19/us/nato-terror-suspects/.

16. Kris Hermes, *The NATO 5: Manufactured Crimes Used to Paint Political Dissidents as Terrorists,* 38 GUILD NOTES 5 (2013).

Alan W. Clarke

BOOK REVIEW: *THE TERROR COURTS*

Jess Bravin, *The Terror Courts: Rough Justice at Guantanamo Bay*, New Haven, London: Yale University Press, 2013. 448 pp.

As top Bush administration lawyers energetically sought to create a bureaucracy that condoned, if not promoted, the use of torture-derived evidence in the trials of terrorism suspects, lower ranking military JAG[1] lawyers resisted —often at the expense of their reputations and careers. Military prosecutors' opposition to torture (and the use at trial of evidence derived therefrom) inflicted on terrorism suspects during the Bush presidency has been widely reported in the popular press; however, no prior book or article put a human face on this conflict. *The Terror Courts* rectifies this gap, providing unrivaled perspective on the struggles of a few military lawyers against the creation of a torture culture,[2] placing faces and stories solidly within this confrontation against the evil that is torture. If, as Martha Nussbaum argues,[3] justice arises from stories that arouse empathy, then this book constitutes essential reading for all who would understand the moral error that constitutes the torture-infected Guantanamo Bay military commissions experiment.[4]

The Terror Courts follows Marine prosecutor Lt. Colonel Stuart Couch's conversion from enthusiastic American exceptionalist to skeptic and torture opponent in the prosecution of detainees (many of whom were innocent bystanders caught up in and tortured during America's war on terror) before Guantanamo Bay military commissions.[5] It must not be supposed that this book merely tells a warm and fuzzy story of conversion and resistance. Rather, it integrates several stories into the complex legal mix surrounding detainee prosecutions. This reveals its true strength—it demonstrates that persistent resistance to oppressive authority can (eventually) succeed. Postmodern theorizing since Foucault often leaves slight space for sites of resistance to repressive social and political power.[6] *The Terror Courts* provides an antidote. We can and should challenge human rights abuses.[7]

If the Guantanamo Bay detainee prison closes[8] it will be in large part because of JAG officers who came to see groups like the ACLU and the National Lawyers Guild, if not as allies, then at least not as enemies. It will

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also be as a result of books such as this making Guantanamo Bay's murkiest secrets public.

Unlike many of his superiors in the military and executive branch chains of command, Stuart Couch did not attend an Ivy League law school. Graduating from Campbell University Law School in Buies Creek, North Carolina, Couch also differed from those "elite" lawyers in that he knew, understood and respected the law. Guided by a resilient moral and religious perspective, he saw the detainees as human beings clothed with personal dignity and entitled to the benefits the rule of law provides to everyone accused of a crime, no matter how heinous.[9] These understandings put him, and others like him, on a collision course with the Bush administration and its polished consigliere culled from the top ranks of the academy and Big Law.

At first Couch, like other military prosecutors, remained skeptical of claimed detainee torture. They fervently believed that the military could fairly try the Guantanamo Bay detainees. Inhumane treatment and even torture might arise in isolated instances, but allegations of widespread systemic torture were, they thought, the product of over imaginative left-wing ideologues. Denied access to detainees or the underlying evidence, Couch, and a few other prosecutors, persistently inquired. If cases were to be prepared for successful prosecutions, they needed to know the conditions under which military and CIA interrogators obtained confessions. While "President Bush's order set aside the rules applying to American courts" and allowed admission of "all probative evidence" it also required a "full and fair trial."[10] Would confessions and other evidence obtained through torture or the use of cruel, inhumane and degrading treatment undermine such a trial? Moreover, even if abusively obtained confessions were admissible and considered probative, would they nonetheless violate international law, including the Geneva Conventions and the Convention Against Torture? Did Bush's order trump international law? Finally, Couch felt that, "Human beings are created in the image of God" and therefore "we owe them a certain amount of dignity."[11] Couch found both legal and moral reasons to circumvent orders limiting inquiry.

Rebuffed in his attempts to acquire relevant evidence, Couch employed unorthodox tactics to pry information out of reluctant intelligence and law enforcement agencies. Gradually he and other prosecutors learned that intelligence operatives were torturing confessions from prisoners (and rendering some detainees to even more brutal, medieval torture in countries well-known for abysmal human rights records, such as Egypt, Syria and Morocco). Suspicion ripened into certainty once prosecutors obtained access to top-secret intelligence documents that confirmed the existence of vast clandestine, governmentally approved torture chambers.[12]

While some military commission lawyers (particularly those higher in the chain of command) ignored mounting evidence of torture, Couch now knew beyond reasonable doubt that his prosecutions hinged on pursuing people who had suffered the most pitiless and sustained forms of torture—not merely the occasional odd spate of inhumane and degrading treatment. While he feared scuttled prosecutions and potential transgressions of a lawyer's ethical duties, there remained a larger dilemma. Irrespective of legal considerations, was it morally acceptable to knowingly try, convict and punish those whom the U.S. had tortured? Rejecting torture-derived evidence as legally inadmissible, Couch and a few others opposed superiors who insisted on proceeding irrespective of the abusive treatment of detainee-defendants.

Philosopher and legal ethicist David Luban argues that the Milgram obedience to authority experiments "demonstrates that each of us ought to believe three things about ourselves: that we disapprove of destructive obedience, that we think that we would never engage in it, and, more likely than not, that we are wrong to think we would never engage in it."[13] Or, as Jean-Paul Sartre put it, "Anybody, at any time, may equally find himself victim or executioner."[14] We are given to understand that the slippery slope to obeying abusive, vicious authority appears remarkably open and easy.[15]

Easy, but not inevitable; like the 3,000 or so humble and impoverished Huguenots of Le Chambon-sur-Lignon, who during World War II risked everything to resist the Nazis to spirit about 6,000 Jews from France and across difficult mountains to safety in Switzerland,[16] Lt. Colonel Stuart Couch, and others like him, demonstrate that not everyone blindly follows abusive authority; not everyone becomes complicit. Hope resides in this book. Rather than to focus on the fact that most people blindly follow authority, perhaps we should ask what is it about those who do resist that cause them to fight back? *The Terror Courts* gives us the example of Stuart Couch, whose case may be unusual but, one must believe, is not unique. We ought perhaps not to generalize overmuch from a single instance. However, one case suffices to suggest the right questions. Why do some resist? What makes such resistance effective?

A few instances from the book reveal accounts of heroism providing examples of ways to fight abusive authority. Ironically, Australia's conservative pro-Bush government helped cause one of the more significant breaches in the Gitmo torture regime. Unlike the UK[17] and other European governments,[18] which demanded the return of their citizens detained at Guantanamo Bay, Australia, like Canada,[19] had not demanded the return of its citizens and had gone along with U.S. plans to prosecute two of its people, David Hicks[20] and Egyptian-born Mamdouh Habib.

The Australian Prime Minister, John Howard, faced increasingly intense political opposition to his government's support for the U.S. war on terror including its Guantanamo military commissions component, and needed for both prosecutions to be resolved. He sought to demonstrate concern that the government not appear to favor "a young Adelaide-born white Australian [Hicks] over an awkward, overweight, and often unpleasant forty-eight-year-old Egyptian immigrant."[21] Habib's prosecution turned out to be anything but straightforward. "Habib came across as obnoxious and untruthful, but his contradictory and uncorroborated statements added up to nothing approaching a war crime."[22] The CIA claimed to have reliable evidence of Habib's involvement with 9/11 but they were not sharing that information with Couch.

Lacking evidence, Couch at first stalled on prosecuting the case. Then, when ordered to proceed with charges, he sought to secure higher-level approval to drop the case against Habib. Finally Couch was allowed to see Habib's confession—a confession that was almost certainly the product of torture including "the removal of fingernails, the use of electric prods, threatened sexual assault with a dog, forcible injection with drugs, extinguishment of cigarettes on flesh, the insertion of unspecified objects and gases into his anus and the electrocution of his genitals,' according to allegations summarized by an Australian court."[23] As Habib later said, he "signed whatever they wanted me to sign . . . I signed to survive."[24]

Couch told his superior, "Sir, I've seen the best the government has to offer. I can't make a case against this guy." "Noted, [the superior] said. Now where are the charges?"[25] Finally, in a brave but desperate move, Couch circumvented the chain of command and went to the commissions appointing authority, John Altenburg, whose "signature was required before the prosecution could proceed."[26] Altenburg told him to proffer charges and then he, Altenburg, would then refuse those charges. Thus, after years of wrangling, the charges against Habib were quashed. This placed the Bush administration in a quandary. Calculating that the risk to national security of releasing Habib did not outweigh the political cost of replacing Altenburg, the government freed him.[27]

In a show of pettiness, "Donald Rumsfeld refused to supply a plane or even to permit Habib to travel over U.S. airspace. That forced Canberra to charter a special flight traversing Mexico instead, costing Australian taxpayers half a million dollars to bring Mamdouh Habib home."[28]

Among other things, this case demonstrates the complex interplay between domestic resistance to torture from both within and without the government and resistance abroad. Political pressure from ordinary Australians forced a conservative and reluctant government to put political pressure on the U.S.

government, which in turn put pressure on what was supposedly a neutral and independent military commissions system. One lesson is that resisters like Couch rarely succeed when acting alone. Rather, the pressures that force positive change come from a variety of sometimes unexpected and unlikely places. A courageous single person may seem to be acting alone, but rarely succeeds without support, whether visible or not. While governments' exercise focused power, resistance to abusive authority is often diffuse; but, as in the case of resistance to the Bush torture bureaucracy, that does not necessarily mean that such dispersed pressure is ineffective. It does, however, depend on the hope that one person's actions will combine with unknown and unknowable others to pressure repressive authority. If the Guantanamo gulag is to end it will be as the result of multiple pressures such as those Jess Bravin recounts in this book.

It is impossible to know whether Habib was one more innocent tortured and held at Guantanamo Bay, or perhaps an inept low-level al Qaeda fellow-traveler. In any event his represented "another case infected by torture"[29] and jettisoned without trial. But other cases were thwarted as a result of torture notwithstanding the fact that the U.S. held a guilty terrorist unquestionably meriting criminal conviction and punishment. If there is a cost to the torture of innocent people there is also a cost to seeing legitimate prosecutions lost as a direct result of torture.

Mohammed al-Qahtani's case presents a prime example—indubitably a bad guy plainly linked to the 9/11 attacks on the U.S. but whose case was so tainted that it could no longer proceed. Al Qahtani was the first prisoner selected for the administration's "varsity plan" which involved subjecting him to abuse so severe that he began talking to non-existent people and hearing voices.[30] "Once again the Bush administration had to choose between prosecuting a 9/11 suspect and risking disclosure of its detainee practices."[31] The case was put on hold and later when charges were finally proffered, the convening authority, Susan Crawford, dismissed all of them. She "provided no public explanation for quashing the Qahtani prosecution. But the reason was torture."[32]

Al Qahtani's case raises another question bedeviling both the Bush and Obama administrations and which will likely continue to be a problem for the foreseeable future. What do we do with people like al Qahtani, whom we have tortured and cannot fairly try, but who are deemed too dangerous to release? "The 'torture' US interrogators inflicted on Qahtani 'has tainted everything going forward,' Crawford said, and she applied the standard remedy when government misconduct pervades a criminal case: dismissal of charges. She asks 'What do you do with him now if you don't charge him and try him? I

would be very hesitant to say, 'Let him go.'"[33] Both the executive and judicial branches of government will likely need to deal with this problem for many years. Holding indefinitely those deemed dangerous but without trial or conviction contravenes values held at least since the inception of the Bill of Rights and seems a parlous step.

Habib's story and that of Mohammed al-Qahtani demonstrate just how thoroughly torture infused and thwarted prosecutions in the war on terror. A system that was supposed to provide rough and quick justice without appeal has ground to a halt, mired in its own excesses. Ironically the federal courts, when allowed to try terrorists, have proved far more adept at securing convictions. Nonetheless, the U.S. continues this failed experiment with military commissions. This system has swept up innocents and small fry at a cost of millions of dollars while making difficult and perhaps impossible the legitimate prosecution of vicious terrorists.[34] The list of abuses is so long and horrific that a short book review cannot do it justice. But this parade of horribles, valuable as that might be, is not the reason that this book should be widely read. Its true strength lies in its giving this whole sordid episode a human face; in putting the legal aspects of U.S. torture in a moral and political context. It is a cry for we the people to demand better of our government. Without pedantry or didacticism *The Terror Courts* calls for the courage to resist destructive authority.

NOTES

1 The acronym JAG stands for "Judge Advocate General" and is applied to military lawyers and judges.

2 David Luban coined the phrase "torture culture" in *Liberalism, Torture and the Ticking Bomb*, 91 Va. L. Rev. 1425, 1427 (2005).

3 Martha Nussbaum, Poetic Justice: The Literary Imagination and Public Life (1996).

4. One should resist the temptation to think that military commissions and other ad hoc military tribunals lead necessarily to unfair trials. Prior to the Bush administration the military had a proud history going back to the Revolutionary War of conducting such battlefield inquiries in a reasonably just and fair manner. *See*, Detlev F. Vagts, *Military Commissions: A Concise History,* 101 Am. J. Int'l L. 35 (2007). Contrast the generally well-regarded post World War II Nuremberg trials that have largely escaped the charge of victor's justice, with the more controversial Tokyo trials. In particular the trial of General Tomoyuki Yamashita, "the Tiger of Malaya," which was strongly criticized for imposing an unrealistically high degree of command responsibility for the war crimes of lower level soldiers and for violating the principle of *nulla poena sine lege. See, e.g.,* Alan W. Clarke, *De-cloaking Torture:* Boumediene *and the Military, Commissions Act,* 11 San Diego Int'l L.J. 59, n. 115 and surrounding text (2009). Bush administration lawyers cited a single discredited Supreme Court case, *Ex Parte Quirin,* 317 U.S. 1 (1942) (allowing the summary convictions and executions of Nazi saboteurs in 1942) as precedent for creating presidentially run commissions designed

for quick convictions. As Bravin points out, *Quirin* was a singular, never (until the Bush administration) repeated case even under identical circumstances during WWII. JESS BRAVIN, THE TERROR COURTS: ROUGH JUSTICE AT GUANTANAMO BAY (2013) at 52. Moreover, many modern scholars *see* the "*Quirin* case [as] no landmark to celebrate but an embarrassment fit for 'judicial confinement or reconsideration.'" *Id.* at 55.

5. In *The United States and Torture, Incarceration, and Abuse*, (Marjorie Cohn, ed., 2011) Jane Mayer's chapter, "Outsourcing Torture: The Secret History of America's 'Extraordinary Rendition' Program," demonstrates that torture inevitably expands to the torture of wholly innocent people. I wrote in reviewing that book, "Mayer points out, for every terrorist [who is guilty of terrorist acts] many of the people the U.S. rendered to torture were either innocent of any crime or connection to terrorism. While torture is never morally justifiable, and while it yields more false information than good, torture of the blameless, like execution of the guiltless, must trouble anyone with a conscience." 67 NAT'L L. GUILD REV. 186, 188 (2010).

6. Bryan D. Palmer, *What's Law Got to Do with It? Historical Considerations on Class Struggle, Boundaries of Constraint, and Capitalist Authority*, 41 OSGOODE HALL L.J. 465, 467-8 (2003).

7. The fact that one can successfully challenge the creation of a torture culture must play an important role in determining the morality of our actions. *See, e.g.*, Robert Stern, *Does 'Ought Imply 'Can'? And Did Kant Think it Does?* 16.1 UTILITAS 42 (2004 Cambridge University Press). If torture is one of the worst human rights violations, then our ability to vigorously protest suggests that one ought, at a bare minimum, speak out in dissent. Jess Bravin has, in writing *The Terror Courts*, played an important role. It remains for the rest of us to dispute this and other human rights abuses carried out in our name and for our supposed benefit. Members of the National Lawyers Guild recognize this responsibility.

8. *See, e.g.*, Peter Finn and Julie Tate, *Obama Renews Push to Close Guantanamo but Hurdles are Just as High as Before*, WASH. POST, May 23, 2013, *available at* http://www.washingtonpost.com/world/national-security/obama-renews-push-to-close-guantanamo-but-hurdles-are-just-as-high-as-before/2013/05/23/19699cf0-c3de-11e2-8c3b-0b5e9247e8ca_story.html?hpid=z1.

9. Felix Cohen warned against drinking "the Lethean draught" which induces "forgetfulness of terrestrial human affairs," leading to "divorce of legal reasoning from questions of social fact and ethical value." Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 809, 814 (1935). Like Martha Nussbaum, Cohen thought judges and presumably prosecutors should first have empathy. Emotions and empathy it turns out inform our moral reasoning in ways that Kant and the rationalists could never have guessed. *See, e.g.*, JESSE J. PRINZ, THE EMOTIONAL CONSTRUCTION OF MORALS (2008); JOSHUA GREEN, LIANE YOUNG, TAMLER SOMMERS, A VERY BAD WIZARD (2009), reprinted in LIVING ETHICS, AN INTRODUCTION, (2d ed., Michael Minch and Christine Weigel, eds. 2012). Plainly, members of the Bush administration forgot or perhaps never learned this important lesson.

10. BRAVIN, *supra* note 4 at 145.

11. *Id.* at 146.

12. The story of how these prosecutors acquired secret evidence of U.S. torture practices cannot be told in this review, but that account is important for understanding the Bush administration's secrecy in the creating its torture regime. Governments tend to hide embarrassing information on the pretext that revelation of such information would hurt national security. Nowhere is that clearer than here where torture proved both im-

moral and counterproductive. Thus, the extent to which even military prosecutors were shielded from such information helps give us a fuller picture of just how embarrassing this information was. Moreover, it underlines for us just how far this information really was from actually hurting important national security interests. Embarrassment, not security, drove the decision to classify and make secret the Bush torture machine.

13. David Luban, *The Ethics of Wrongful Obedience*, in ETHICS IN PRACTICE: LAWYER'S ROLES RESPONSIBILITIES AND REGULATION 97 (Deborah L. Rode, ed., 2000).

14. Preface to HENRI ALLEG, THE QUESTION at xxvii (Bison Books ed. John Calder trans., Univ. of Nebraska Press 2006)(1958).

15. Slippery slope arguments, when presented in an evidence-free vacuum are "often fallacious, offering little more that an easy out for those reluctant to address problematic moral issues." L.A. Whitt, *Acceptance and the Problem of Slippery-Slope Insensitivity in Rule-Utilitarianism*, 23 DIALOGUE 649 (1984). However, robust empirical evidence demonstrates that torture inevitably expands both to more and more people many of whom are either innocent or lower-level people with little valuable information and it must continue to ratchet up in intensity to the logical conclusion of killing the victim even though innocent. Alan W. Clarke, *Creating a Torture Culture*, 32 SUFFOLK TRANSNAT'L L. REV. 1, 13-28 (2008). Thus, this particular slippery slope meets the criteria for acceptable argument. Whitt, at 650.

16. Phillip Hallie, *From Cruelty to Goodness*, HASTINGS CENTER REPORT, Vol. 11, No.3 (1981), reprinted in LIVING ETHICS, *supra*. note 9, at 351, 356.

17. Duncan Gardham, *Britain Asks US to Free Five From Guantanamo*, THE DAILY TELEGRAPH (London), August 8, 2007.

18. Alan Ramsay, *Too Gutless to Save One of Our Own*, SYDNEY MORNING HERALD, (Australia), Dec. 10, 2005, at 33.

19. Canada (Prime Minister) v. Khadr, [2010] S.C.J. 3 (Can).

20. Hicks originally faced extremely serious charges including criminal conspiracy, attempted murder by an unprivileged belligerent, and aiding the enemy. United States v. David Matthew Hicks, *at* http://www.defense.gov/news/Jun2004/d20040610cs.pdf, retrieved May 18, 2013. The case fell apart for a variety of reasons including lack of hard evidence; he pled guilty to relatively minor charges, and was released to Australian custody, where he has since been released from prison. Tom Allard, *Prisoner of Political Fortune Set Free*, SYDNEY MORNING HERALD (Australia), Dec. 29, 2007, at 6.

21. BRAVIN, *supra* note 4 at. 225.

22. *Id.* at 232.

23. *Id.* at 235.

24. *Id.*

25. *Id.* at 236.

26. *Id.*

27. *Id.* at 237.

28. *Id.* at 238.

29. *Id.* at 236.

30. JOSEPH MARGULIES, GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER, 86, 178 (2006).

31. BRAVIN, *supra* note 4 at 259.
32. *Id.* at 322.
33. *Id.* at 377.
34. As this is written the putative architect of the 9/11 attacks as well as numerous other terrorist attacks, and who has been in US custody since March 1, 2003, has yet to be tried. He was waterboarded 183 times and his torture will inevitably figure in any trial. His case is probably the most significant case from among many where justice has been delayed precisely because of the use of torture to procure evidence.

Richael Faithful

RESPONSE TO BRETT DEGROFF'S BOOK REVIEW OF *THE NEW JIM CROW*

Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness,* New York: The New Press, 2010. 290 pp.

Professor Michelle Alexander's *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* is one of the most influential political books of the new century. It delivers two appeals. First, she urges that the current mass incarceration crisis, taking form over three decades of bi-partisan "tough on crime" political rhetoric, demands immediate reform. Second, she explains that to end mass incarceration as a political, social, and cultural phenomenon, we must confront it for what it is—America's racial caste system's newest manifestation.

Alexander's thesis is not new. Her insights echo those of other critical race contemporaries writing for more academic audiences. *The New Jim Crow* explains the contours of the mass incarceration crisis to a broader audience, and offers a framework in which to understand its origins so readers can resist its lethal assault. Importantly, Professor Alexander correctly concludes that there is no way to end mass incarceration without broader, more robust efforts to dismantle racial caste in America. Mass incarceration does not bear a strikingly close but coincidental resemblance to the racist systems of America's past—it is a new one invented for the twenty-first century.

The New Jim Crow urges America to be smarter. Are we to be fooled into thinking that mass incarceration—a system linked to a historically racist criminal justice system and comprised of "the larger web of laws, rules, policies, and customs that control those labeled criminals in and out of prison"[1]—is not a cousin of Jim Crow, because it is not explicitly racist? The United States has not washed away over 100 years of *de jure* segregation and all that preceded it in the last forty years, however much more enlightened we've become. Professor Alexander reminds us that history will judge us for our naivety or courage after the next forty years have passed.

Perhaps the most important contribution of *The New Jim Crow* to the national mass incarceration dialogue is its demonstration that the most com-

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mon sense understanding of mass incarceration's scale and power is as a racial caste system—not merely a class or partisan phenomenon.[2] It is about race, even if Middle America cannot come to terms with history's demons haunting us today.

Professor Alexander persuasively builds her case, demonstrating that the crisis will only worsen if its racial caste foundations are not dismantled. In the book's first chapter, "The Rebirth of Caste," she walks readers through America's "highly adaptable" racial history. Post-slavery racial caste has survived in a process of"preservation through transformation."[3] Racial caste began with the birth of slavery, then morphed into bond labor,[4] then to share-cropping, to Black Codes (including convict laws),[5] to white supremacist domestic terrorism,[6] and to *de jure* Jim Crow, which lasted well into the 1980s.[7] Professor Alexander effectively proves that though "[t]he emergence of each new system of control may seem sudden…history shows that the seeds are planted long before each new institution begins to grow."[8]

This introductory chapter's important goal is to disabuse readers of two historical myths. The first is that "No caste system in the United States has ever governed all black people."[9] Not only have racial caste systems tolerated exceptions, such as "free blacks" during slavery, but these systems actually *rely* on black success stories to obscure the role of race as a systemic organizing principle.

Professor Alexander uses the relevant example of two-time elected President Barack Obama. While some deem his success an indicator that the U.S. has moved beyond its shameful racist past, a more sophisticated analysis—one that actually considers the empirical evidence—suggests that President Obama represents an exceptional success story. Rare and inspiring (and statistically aberrant) success stories of Black upward mobility occurred under slavery and Jim Crow, as well. His election as the first Black U.S. President does not indicate that racial caste no longer exists but rather indicates that the previous form of racial caste—the old Jim Crow—is dead.[10]

The second historical myth Professor Alexander lays to rest is that America has consistently and uniformly moved toward racial equality. She points out that a period of transition marks the end of each racial caste system, and that during this time of confusion, new racial caste systems are put in place.[11]

Here, it is easy to see how we could have underestimated the fundamental nature of racial caste in America. For instance, the Reconstruction Era was lauded as a period of black advancement, in which the Thirteenth, Fourteenth, and Fifteenth Amendments, Civil Rights Act of 1866 (including the Freedman's Bureau) were passed. Yet, in hindsight, history reveals that these legislative achievements contained enormous omissions, such as the absence of

any prohibition in the Fifteenth Amendment against non-explicit racist voting barriers, such as poll taxes and literacy tests.[12] Some of our forefathers and mothers naively assumed that the racism's "strange fruit" could be legislated away by simply asking us to open opportunity to all, *regardless of race*. It was a mistake with an incredibly high price.

The historical lesson from this ten-year reform period is that we tend to over-trust that inadequate laws or court cases will eradicate our country's racial caste system, and that we tend to under-appreciate the vigorous enforcement of reformist policies and norms to transform our country's deeply engrained values. *The New Jim Crow*'s first chapters impart that we cannot peer into history's rearview to conclude that racial caste has not adapted, particularly in light of mass incarceration statistics reflecting its impact, and irrefutable evidence of dramatically diminished life indicators and chances for most folks of color.

Professor Alexander shows that mass incarceration is almost single-handedly fueled by the racially-driven War on Drugs. *The New Jim Crow* adds to the rapidly growing literature that shows the War on Drugs' success in targeting and incarcerating communities of color. In the beginning of the second chapter, "The Lockdown," Professor Alexander relates that "Convictions for drug offenses are the single most important cause of the explosion in incarceration rates in the United States."[13] Racial stereotypes were translated into a bi-partisan "law and order" platform,[14] racial inequities were codified into exceptionally punitive criminal laws,[15] poorer communities of color were besieged by violent law enforcement and surveillance,[16] and virtually an entire generation[17] of Black and Brown people are consigned to second-class "felon" status.[18] The result is that "more Black Americans are under correctional control today than were enslaved in 1850, a decade before the Civil War began."[19]

I have witnessed this reality in my own practice as a civil rights lawyer-organizer specializing in felony disenfranchisement. Virginia, my home state and where I practice, has maintained a lifetime disenfranchisement ban for people convicted of felonies since 1851.[20] Even though its permanent disenfranchisement law was established before the Civil War, it was explicitly used as a tool to exclude emancipated Black men from their franchise at the turn of the century, along with poll taxes, literacy tests, and other well-known "southern strategies" to deny former slaves full citizenship.[21] The state constitution was eventually amended in 1970; however, the minor linguistic change hardly remedies Virginia's seventy-year history of curtailing Blacks' voting rights.

Today, more than 450,000 or over 7 percent of the Commonwealth's voting age population is missing from the rolls.[22] A staggering *one in every five Black Virginians* are disenfranchised.[23] While 53 percent of those disenfran-

chised are Black, only 38 percent of the small number of people who regain their civil rights are Black.[24] These shocking figures, including these racial disparities, are attributable to the War on Drugs, from crack to oxycodone.[25]

Professor Alexander's insistance on the specific impact of mass incarceration on communities of color is justified. I have seen entire segregated communities of color, many of whom also live in the economic and social shadows, carved out of the electoral map. While I also work with many other people—mostly working-class whites in more rural parts of the state ravaged by meth and other drug epidemics—the scale and concentration is of a different quality compared to urban communities of color.

In my experience, Black disenfranchisement is generally more punitive due to the fact that most Blacks live in segregated, under-resourced communities still reeling from legacies of long-time systemic deprivations. So while I work hard to help every Virginian restore her, his or zer's civil rights, appreciate the pain of every person's story with which I am entrusted, and campaign for fairer, more humane laws for every person with a felony conviction, *some lives are different because of race.*

The bottom line is that though the mass incarceration net has caught an explosive number of people generally, it is a morally unacceptable reality that many are people of color, from the same communities, despite the fact that drug use is the same or even more prevalent in surrounding communities that are overwhelmingly white and middle-class.[26] Such an outcome may not be by intentional design but it is not coincidental either.

Professor Alexander convincingly proves that racial caste provides the most rational framework in which to grasp the mass incarceration crisis. In the book's fifth chapter—"The New Jim Crow"—she brings readers to the logical finish line: forty short years after the death of Jim Crow, mass incarceration is the newest racial caste system in America. It is the most rational inference not only in light of historical precedent but in terms of the current reality. For example, "More black men are imprisoned today than at any other moment in our nation's history…. More are disenfranchised today than in 1870, the year the Fifteenth Amendment was ratified prohibiting laws that explicitly deny the right to vote on the basis of race,"[27] She notes that "The adoption of the new system of control is never inevitable, but to date it has never been avoided."[28] If readers agree with Professor Alexander's historical overview, and accept her presentation of evidence revealing the War on Drugs' racial undertones, then how can a reader not conclude that mass incarceration is fundamentally about racial control?

Too often we treat race differently in our cultural logic in the U.S. Professor Alexander anticipates that many readers, particularly those who do not

personally know the vast underclass "left behind"[29] prison walls, will deny this "obvious, though uncomfortable, truth."[30] She knows some readers will claim that this truth can not be possible because in our "colorblind" society race is no longer an important factor in shaping individuals' destinies. They say that by choosing to believe that people are unaffected by racialized histories that confer innumerable benefits or disadvantages or unscathed by significant, current racial disparities in education, employment, housing, and health, we are part of a progressive future for America. This hopeful fantasy could not be further from the truth, particularly for mass incarceration survivors.

The book's last two chapters speak to these denials, including colorblindness, which are largely viewed from the perspective of those who are not the target of racial injustice. This peculiar logic shows itself in the belief that in the absence of overt racial animus, racial equality must exist. Professor Alexander expertly debunks the assumption of intentionality as a non sequitur. She points out whether racial caste is structured around overt racism or not, its *effect* is all the same. In the end, mass incarceration, like the original Jim Crow, is proving catastrophic for African-Americans.[31] The fact that mass incarceration governs some mostly poor whites does not make the situation better nor does it mean that its impact is not still racial control—it shatters the myth of meritocracy for most Black Americans that the rules of the game are justice and fair-play.

Moreover, Professor Alexander goes on to explain that colorblindness has actually contributed toward the mass incarceration crisis. Colorblindness, she observes, forges the public consensus that allows mass incarceration of people of color to occur as we speak, almost unsuspected by many people in the U.S. Whether the intent of colorblindness is to promote indifference toward people of other races or indifference toward the race of other individualsis indeed an important distinction. However, she arrives at a different conclusion than the simplistic, co-opted interpretation of Dr. Martin Luther King Jr.'s speeches and writings.

The body of King's and his contemporaries' work, as Prof. Alexander explains, warned that Black Americans were at risk of being 'crucified by conscientious blindness' to race[32] because racial indifference enabled the evils of racial caste. In other words, it was not the poison of individual racial animus that built and sustained Jim Crow—rather, it was the broad indifference to the plight of Blacks that permitted such dehumanization for most of our nation's history. As Martin Luther King, Jr. described, racial indifference led to the "total estrangement…[which] descends into inflicting physical and spiritual homicide upon the out-group."[33] If a reader were to embrace racism's complexity, it does not distance us from some members of our grandparents'

generation whom were presumably honest and well-intentioned yet whose racial indifference perpetuated systemic racial violence.

The New Jim Crow cites the overwhelming legal and social science evidence proving that class or any factor, other than race, does not explain mass incarceration inequities, from law-making to criminal sentencing. In this context, the question is this: what alternative frame is there to explain mass incarceration that is as clear, complete, and convincing as racial caste? It is the most reasonable conclusion considering all the facts. I suggest, at the very least, that *The New Jim Crow* effectively shifts the burden of proof to colorblind proponents to show that mass incarceration is not a new racial caste system.

The New Jim Crow's thesis, which implores us that the only way to dismantle mass incarceration is to understand it as Jim Crow is not beside the point—it is the point that can no longer be denied. Professor Alexander, in fact, makes clear that the book's main project is to heighten the urgency with which racial justice advocates must address this issue. The book arms these advocates with facts and data to persuade their well-intentioned but indifferent friends that some of us—many people of color—are dying at the hands of mass incarceration.

She bestows this book upon us, and encourages us to speak our truth with "greater conviction, credibility, and courage."[35] We should respond to her call. Its aim was never to provide a politically palpable legislative blueprint to produce short-term fixes or even devise a highly-detailed movement strategy for the long-term work. Other people will write those books. Instead, *The New Jim Crow*, though not perfect, achieves its chief goal of engaging in an honest, heart-breaking inquiry into the despair experienced by a growing underclass of color, and asks us, "So, what are we gonna do about it?"

NOTES

1. Michelle Alexander, The New Jim Crow: Mass Incarceration in the Age of Colorblindness 13 (2010)
2. It is important to distinguish between caste and class systems. Notably, caste systems have little to no mobility, whereas class systems are theoretically less fixed, permitting people to gain or lose status based on a variety of circumstantial factors. In *The New Jim Crow,* Professor Alexander specifically characterizes race in America as a caste system, because of the fixed nature of *perceived* racial identity (often based on color, phenotypic features, and other "cultural" markers), and the life chance implications resulting from one's assigned race. While some may argue that race is no longer as rigid a status as during Jim Crow, its close correlations to education, class, health, and other quality of life indicators demonstrate severe limitations for people identified as of color. *Id.* at 21.
3. *Id.* at 21.

4. *Id.* at 25.
5. *Id.* at 28.
6. *Id.* at 37.
7. *Id.* at 30–35.
8. *Id.* at 22.
9. *Id.* at 21.
10. *Id.*
11. *Id.* at 21–22.
12. *Id.* at 30.
13. *Id.* at 59.
14. *Id.* at 63–73.
15. *Id.* at 64–71.
16. *Id.* at 95-136.
17. *Id.* at 174.
18. *Id.* at 137–172.
19. *Id.* at 175.
20. Constitution of 1850. Virginia Polytechnic Institute. Microfiche. JK9665.C65, reel 62, no. 2256, printed on Dec. 21, 2011.
21. *See, Advancement Project, Access Denied: The Impact of Virginia's Felony Disenfranchisement Laws* (Dec. 2005).
22. *See, Sentencing Project, State-Level Estimates of Felon Disenfranchisement in the United States, 2010* 16-17 (2012) *available at* http://sentencingproject.org/doc/publications/fd_State_Level_Estimates_of_Felon_Disen_2010.pdf.
23. ALEXANDER, *supa* note 1, at 17.
24. *Id.* The 38 percent figure is a calculation based on an unpublished analysis conducted of the annual clemency reports issued by the Virginia Governor (on file with author).
25. There has been extensive media coverage and academic research about the rural War on Drugs. *See, e.g.*, Patrik Jonsson, *Why It's So Hard To Win the War Against US Oxycodone Epidemic*, C.S. MONITOR, Jun. 1, 2011, *available at* http://www.csmonitor.com/USA/Society/2011/0601/Why-it-s-so-hard-to-win-the-war-against-US-oxycodone-epidemic.
26. ALEXANDER, *supa* note 1, at 97–98
27. *Id.* at 175.
28. *Id.* at 22.
29. *Id.* at 175.
30. *Id.* at 177.
31. *Id.* at 228.
32. *Id.* at 229.
33. http://www.thekingcenter.org/king-philosophy#sub1.
34. ALEXANDER, *supra* note 1, Preface.

riage: Accommodationist Demands Expand the Conception of Human Dignity" Zachary Wolfe provides a leftist analysis of the contemporary American same-sex marriage movement.

Since we've learned from Edward Snowden about the new domestic application of the National Security Agency's global surveillance system, with all its incomprehensible technological nomenclature, it's almost satisfying to find that the American military still spies on political dissidents the old-fashioned way—by sending undercover agents to infiltrate and disrupt their organizations. Genuinely satisfying—and a source of pride for Guild members—is the story told by Guild Executive Director Heidi Boghosian in "The Army Goes Spying Along." Here she interviews Guild attorney Larry Hildes, who won a major victory in the Ninth Circuit on behalf of civilian activists in Washington state, whose group had been infiltrated by an army spy in plain violation of its constitutional rights.

The Bush-Cheney torture regime harmed more than its obvious victims in Guantánamo, Bagram Airfield, Abu Ghraib, and elsewhere. It placed military jurists of conscience in agonizing, untenable positions, pressuring them to violate their personal values and their oath to defend the Constitution of the United States. In his review of Jess Bravin's *The Terror Courts*, *NLGR* Contributing Editor Alan Clarke, a renowned expert on Bush-Cheney war crimes, explores the legal apparatus set up for high-value detainees and others swept up in the Global War on Terror following the attacks of 9/11.

Over the past few years Michelle Alexander's bestseller *The New Jim Crow* has gotten America talking about the role of racism in the era of mass incarceration with more frequency and honesty. We at *NLGR* are determined to continue and advance the discussion. In our last issue (70-1) we published a review of *The New Jim Crow* by *NLGR* Managing Editor, Brett DeGroff. We close this one with a different perspective on the book by *NLGR* Articles Editor, Richael Faithful, an activist-attorney whose practice in the areas of civil rights and felon disenfranchisement gives her unique insight into the reconstituted racial caste system Alexander describes. This discussion has become even more immediate in light of the Supreme Court's meddlesome and regressive holding earlier this year in *Shelby Co. v. Holder*, which cut the heart out of the Voting Rights Act and laid the foundation for the spate of vote-restricting laws now moving through state legislatures around the country.

—Nathan Goetting, Editor-in-chief

**Update, September 4, 2013:* Shortly after the online publication of this issue it came to light that Alekseyev blasted anti-Semitic comments all over the social media. For an example of the latest reporting on this, see James Nichols, *Nikolai Alexeyev, Russian LGBT Activist, Makes Anti-Semitic Comments On Social Media*, HUFFINGTON POST, http://www.huffingtonpost.com/2013/09/03/nikolai-alexeyev-anti-semitic_n_3860511.html. Assuming the reports of Alekseyev's online hate speech are true, which we will seek to verify, he has shamed and discredited himself. He's disappointed countless activists who looked up to him and forfeited his standing as a human rights leader.

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