

1-1-2011

Sexual Orientation, Discrimination, and the Universal Declaration of Human Rights

Sharon Yecies

Follow this and additional works at: <https://chicagounbound.uchicago.edu/cjil>



Part of the [Law Commons](#)

Recommended Citation

Yecies, Sharon (2011) "Sexual Orientation, Discrimination, and the Universal Declaration of Human Rights," *Chicago Journal of International Law*. Vol. 11: No. 2, Article 28.

Available at: <https://chicagounbound.uchicago.edu/cjil/vol11/iss2/28>

This Article is brought to you for free and open access by Chicago Unbound. It has been accepted for inclusion in Chicago Journal of International Law by an authorized editor of Chicago Unbound. For more information, please contact unbound@law.uchicago.edu.

Sexual Orientation, Discrimination, and the Universal Declaration of Human Rights

Sharon Yecies*

Abstract

Like many governing bodies today, the United Nations is facing the question of whether laws that discriminate on the basis of sexual orientation are legitimate. In particular, there is a current debate in the United Nations about whether Article 2 of the Universal Declaration of Human Rights (UDHR) (providing protection against discrimination on the basis of, among other things, race, color, sex, national origin, or "other status") protects against discrimination on the basis of sexual orientation.

This Comment will discuss the importance of this question in the UN today, and analyze whether protection based on sexual orientation is included in the UDHR based on the text and case law under the UDHR. But because these approaches do not conclusively answer the question, this Comment will also adopt an approach from political philosophy.

Using the work of Mill, Locke, and Rawls, this Comment will analyze protection against discrimination based on sexual orientation from two alternative positions. The first considers whether discrimination based on sexual orientation may be necessary to the stability of non-oppressive states. The second considers whether such discrimination may be justified behind a contractarian veil of ignorance. Combined, these approaches demonstrate that laws that discriminate on the basis of sexual orientation may be legitimate under the UDHR.

A note as to the inspiration for this paper: there has been a great deal of recent scholarship advocating against discrimination on the basis of sexual orientation. There is significantly less scholarship, however, explaining why it may be legitimate for a state to discriminate on the basis of sexual orientation. In order to contribute something meaningful to this important debate, this Comment will go through a few arguments in support of the latter position.

* J.D. Candidate 2011, The University of Chicago Law School. The author would like to thank all of her professors and peers at the University of Chicago Law School for fostering an environment of tolerance and academic diversity.

Table of Contents

| | |
|---|-----|
| I. Introduction..... | 790 |
| II. Relevance of This Debate in the United Nations Today..... | 792 |
| III. Textual Interpretation..... | 793 |
| A. Statutory Background..... | 793 |
| B. Modern Analysis of Articles 2 and 29..... | 794 |
| C. Precedent Set by Case Law..... | 796 |
| IV. An Approach from Political Philosophy: The Human and Civil Rights Distinction..... | 798 |
| A. Introduction..... | 798 |
| B. The Universal Declaration of Human Rights Respects Cultural Relativism..... | 799 |
| C. The Measure of a Non-Oppressive State is One That Rules by Consent of the Governed..... | 801 |
| D. Discrimination on the Basis of Sexual Orientation May Be Necessary to the Stability of Non-Oppressive States: A Historical and Theoretical Approach..... | 803 |
| V. An Alternate Approach From Political Philosophy: The Nature of Rights and the Contractarian Veil..... | 806 |
| A. Introduction..... | 806 |
| B. A Theoretical Basis for Human Rights..... | 806 |
| C. The Costs of Non-Discrimination..... | 807 |
| D. Discrimination Based on Sexual Orientation from a Contractarian Perspective..... | 809 |
| VI. Conclusion..... | 811 |

I. INTRODUCTION

“Morality being the noblest product of culture, it is the duty of all to respect it.”¹

The Universal Declaration of Human Rights (UDHR) encourages all UN Member States to protect certain rights.² In particular, its goal is to encourage

¹ Erica-Irene A. Daes, *Freedom of the Individual under Law: A Study on the Individual's Duties to the Community and the Limitations on Human Rights and Freedoms under Article 29 of the Universal Declaration of Human Rights* 120 (United Nations 1990).

² Universal Declaration of Human Rights, General Assembly Res No 217 A (II), UN Doc A/810 at 71 (1948), online at <http://www.un.org/en/documents/udhr/index.shtml#a2> (visited Oct 4, 2010) (“UDHR”).

Member States to protect rights that humans naturally possess and that are fundamental to living a dignified human life.³ Since these rights owe their origin to the nature of human beings and not to the structure of a state, no state should deprive its citizens of these fundamental human rights.⁴

Recent international developments raise the question of whether protection against discrimination based on sexual orientation is included in the UDHR. In particular, this Comment will consider whether Article 2 of the UDHR (which protects against discrimination on the basis of, among other things, race, color, sex, national origin, or “other status”⁵) protects against discrimination on the basis of sexual orientation.

First, this Comment will discuss the importance of this question in the UN today. Second, this Comment will analyze whether protection based on sexual orientation is included in the UDHR based on the text and case law under the UDHR. But because these approaches do not conclusively answer the question of whether protection based on sexual orientation is included in the UDHR, this Comment will also adopt an approach from political philosophy. This approach will evaluate which types of discrimination are theoretically permissible under a document otherwise concerned with promoting equality.

Using the work of Mill, Locke, and Rawls, this Comment will analyze protection against discrimination based on sexual orientation from two alternative positions. The first considers whether discrimination based on sexual orientation may be necessary to the stability of non-oppressive states. The second considers whether such discrimination may be justified behind a Rawlsian veil of ignorance.

Combined, these approaches will demonstrate that the right not to be discriminated against on the basis of sexual orientation is a right that is in tension with the stability of some non-oppressive religious states, and the right against discrimination gains little support from the Rawlsian veil of ignorance. Protection against discrimination based on sexual orientation, therefore, is not included in the UDHR.

³ Id (“Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”).

⁴ Id.

⁵ Id (“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”).

II. RELEVANCE OF THIS DEBATE IN THE UNITED NATIONS TODAY

More than one half-century after drafting the UDHR, and almost two decades after the watershed *Toonen* decision (discussed in Section III.C), the UN is still debating whether laws that discriminate on the basis of sexual orientation constitute an impermissible denial of equal protection according to Articles 2 and 29 of the UDHR.

On December 18, 2008, a representative of Argentina, on behalf of a number of associated countries, presented a Declaration on Sexual Orientation and Gender Identity to the UN.⁶ The Declaration stated that, consistent with Article 29 of the UDHR, rights must be applied equally to all human beings, regardless of their sexual orientation or gender identity.⁷

Also on December 18, 2008, a representative of Syria made a general statement on behalf of a number of associated countries. The representative recognized that the protection of universal human rights is a continuing struggle. However (or perhaps consistent with this observation), the representative maintained that protection against discrimination on the basis of sexual orientation or gender identity is within the jurisdiction of individual states. According to Syria's general statement, Article 29 of the UDHR prohibits protections against discrimination on the basis of sexual orientation, and Argentina's Declaration on Sexual Orientation and Human Rights has no legal basis.⁸

Underlying the disagreement over the interpretation of Article 29 is a disagreement over whether sexual orientation deserves protection under Article 2 of the UDHR. This Comment will argue that if discrimination based on sexual orientation is necessary to the creation or stabilization of some non-oppressive states, then sexual orientation is not a protected characteristic under Article 2 of the UDHR. Consistent with Syria's declaration, discrimination on the basis of sexual orientation is within the jurisdiction of individual states and may be based on each state's moral principles.

Determining which rights are included in the UDHR can have consequences for all members of the UN. First, States can bring claims against other States under the International Covenant on Civil and Political Rights

⁶ *General Assembly Adopts 52 Resolutions, Six Decisions Recommended by a Third Committee on Wide Range of Human Rights, Social Humanitarian Issues*, GA/10801 (UN 2008), online at <http://www.un.org/News/Press/docs/2008/ga10801.doc.htm> (visited Oct 4, 2010).

⁷ Id.

⁸ Id.

(ICCPR),⁹ and individuals can bring claims under the Optional Protocol to the ICCPR.¹⁰ Therefore, the status of sexual orientation under Articles 2 and 29 will determine which laws can be challenged in front of the UN Human Rights Committee. Second, the UDHR is an important tool of customary international law. The status of sexual orientation under Articles 2 and 29 may be applicable to decisions by the International Court of Justice¹¹ and it may be used to pressure states to overturn discriminatory laws.

III. TEXTUAL INTERPRETATION

A. Statutory Background

The UDHR protects against certain forms of discrimination. Article 2 states in part: “Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”¹²

Article 2, however, must be read in the context of Article 29. The latter states in part:

(2) In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.¹³

The most popular argument for including sexual orientation under Article 2 is that sexual orientation is a protected “other status.”¹⁴ This is a broad reading of Article 2, however, and Article 29 explains that the UDHR is not unboundedly protective. In particular, rights and freedoms may be restricted for the purpose

⁹ International Covenant on Civil and Political Rights, General Assembly Res No 2200A (XXI), UN Doc A/6316, 999 UN Treaty Ser 171 (Dec 16, 1966, entered into force Mar 23, 1976) (“ICCPR”).

¹⁰ Optional Protocol to the International Covenant on Civil and Political Rights, General Assembly Res 2200A (XXI), 21 UN GAOR Supp (No 16) at 59, UN Doc A/6316 (1966), 999 UN Treaty Ser 302 (Mar 23, 1976).

¹¹ Statute of the International Court of Justice, Art 38(1)(b), 59 Stat 1055, Treaty Ser No 993 (1945) (“The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply . . . international custom, as evidence of a general practice accepted as law.”).

¹² UDHR (cited in note 2).

¹³ Id.

¹⁴ See generally Vincent J. Samar, *Gay-Rights as a Particular Instantiation of Human Rights*, 64 Albany L Rev 983 (2001).

of securing the rights of others, or for ensuring morality, public order, and general welfare.

B. Modern Analysis of Articles 2 and 29

Article 29 is a general limiting clause that allows Member States to limit the scope of the UDHR's enumerated rights. But it is also clear from experience and the general text of the UDHR that the UDHR does not protect everything that may be characterized as a "right." Does Article 29 then provide a basis for determining not only when some rights may be abridged, but also which rights are excluded from the UDHR? Can the Article, by its words alone, play this dual role?

Many interpretations of Article 29 indicate that it can. For example, if Article 29 represents a maxim that "no-one is entitled to act for the destruction of human rights or to jeopardize the human rights of others," this maxim may apply both in limiting the scope of certain enumerated rights, and deciding which rights should be protected in the first instance.¹⁵

Consider also the position that "human rights norms are procedural and contextual, and they were never intended to impose single global solutions on widely divergent societies."¹⁶ This strongly suggests that Article 29 should be understood in the context of cultural relativism (discussed in more detail below in Section IV.A), which means that protecting some rights at the extreme, and other rights at all, must be left to the discretion of individual Member States.

The previous two positions are general interpretations of Article 29 that suggest that it may not only limit the scope of enumerated rights, but may also provide a basis for deciding which rights to include in the UDHR at all. However, these positions are not sufficiently specific to answer the instant question: is a prohibition against discrimination based on sexual orientation included in the UDHR? Not necessarily, for the reasons explained below.

First, permitting discrimination based on sexual orientation is consistent with the idea that all limitations on human rights must be based on generally applicable rules. "Limitations on human rights must be...both subject-general, that is, not under-inclusive with respect to prohibited criteria of discrimination, and (in most cases at least) occasion-general."¹⁷ But discrimination based on sexual orientation may be permitted consistent with the UDHR in much the

¹⁵ B.G. Ramcharan, *Individual, Collective and Group Rights: History, Theory, Practice and Contemporary Evolution*, 1 *Intl J Group Rts* 27, 41 (1993–1994).

¹⁶ Hurst Hannum, *Book Review: Human Rights as Politics and Idolatry*, 97 *Am J Intl L* 1006, 1009 (2003).

¹⁷ Oscar M. Garibaldi, *General Limitations on Human Rights: The Principle of Legality*, 17 *Harv Intl L J* 503, 557 (1976).

same way as the freedom of speech may be constitutionally restricted in the US. Whatever the proffered reason for allowing such discrimination (and there must be a reason), the discrimination allowed must be narrowly tailored to the reason¹⁸ and not based on an ad-hoc contextual determination.

Some theories also suggest looking to standard UN practice to determine permissible limitations on the UDHR.¹⁹ UN case law on discrimination based on sexual orientation is discussed below. But in the context of generally permissible discrimination, Erica-Irene Daes suggests the following: “differential treatment is justified if it has an objective aim, derived from the public interest, and if the measures of differentiation do not exceed a reasonable relation to that aim.”²⁰

To give context to this standard, especially in relation to discrimination based on sexual orientation, consider the following other comments from Daes. First, “[d]emocracy was defined [at the Commission on Human Rights] as government of the people, by the people, for the people.”²¹ Second, “the individual’s rights ought to be subordinated to those of the national community and the international community,”²² indicating that the “public interest” mentioned in the previous paragraph may be defined by any significant interest of a democracy. Third, “[m]orality being the noblest product of culture, it is the duty of all to respect it,”²³ indicating that morality may be a significant state interest. And fourth,

[t]here is a fundamental difference between the law that expresses a moral principle and the law that is only a social regulation. ...An individual [or State] cannot be considered as accepting a “moral” principle or a “moral” rule unless he is making a serious attempt to use it in guiding his particular moral judgements [sic] and thus his actions.²⁴

Together, these comments suggest that upholding morality may be a significant and objective state interest that justifies differential treatment. Discrimination based on sexual orientation is consistent with the UDHR as long as: (1) allowing this kind of discrimination is reasonably related to a democracy’s interest in upholding morality; and (2) the moral judgment is a *bona fide* one.

¹⁸ See *R.A.V. v City of St. Paul*, 505 US 377 (1992) (holding that the St. Paul ordinance was unconstitutional because it made content-based distinctions that were narrower than the full category of low-value speech).

¹⁹ See John Quigley, *Displaced Palestinians and a Right of Return*, 39 Harv Intl L J 171, 200 (1998) (supporting this view).

²⁰ Daes, *Freedom of the Individual under Law* at 133 (cited in note 1).

²¹ Id at 72.

²² Id at 70.

²³ Id at 120.

²⁴ Daes, *Freedom of the Individual under Law* at 120–21 (cited in note 1).

Consider a state whose government is predicated on certain moral principles, including a religion that does not support homosexuality. Under the previously described view, that state may discriminate on the basis of sexual orientation as long as the discrimination is directly related to the state's objective aim, namely, promoting its welfare through morality.

But this conclusion may be uncomfortably broad; there is a wide range of democratic states and a wider range of "significant and objective interests" of those states under the preceding definition. Because Article 29 plays a dual role of both determining which rights are protected by the UDHR and determining the degree to which the UDHR protects rights, there is a risk that any right (even an enumerated right) could be curtailed based on the significant moral interest of a member state. Accordingly, this Comment will continue to analyze the right not to be discriminated against on the basis of sexual orientation based on the case law interpreting the UDHR. But, because there is only a small amount of case law, this Comment will also use two theoretical approaches to evaluate whether this right is included in the UDHR. The theoretical approaches will look more closely at the definitions of "democratic state" and "significant and objective interests" discussed above, in an attempt to narrow these definitions.

C. Precedent Set by Case Law

The UDHR is not binding international law. However, the UDHR was given force through, among other things, the ICCPR. Under the ICCPR, states may bring communications (or claims) against other states before the UN Human Rights Committee.²⁵ The Optional Protocol to the ICCPR allows individuals to bring claims before the UN Human Rights Committee as well.²⁶ Cases brought under the Optional Protocol may help to sharpen the analysis of the right against discrimination based on sexual orientation under the UDHR.

In 1991, Tasmanian resident and gay activist Nicholas Toonen challenged a Tasmanian law banning homosexual activity before the UN Human Rights Committee under the Optional Protocol. The Tasmanian law criminalized all forms of sexual contact between homosexual men.²⁷ First, Mr. Toonen claimed that the law constituted an unlawful or arbitrary interference with his privacy,

²⁵ ICCPR (cited in note 9).

²⁶ Optional Protocol to the International Covenant on Civil and Political Rights (cited in note 10).

²⁷ Tasmanian Criminal Code §§ 122(a), 122(c), 123 (1997). These provisions have since been repealed. Justice Michael Kirby, *The Future of Criminal Law, Some Big Issues*, Criminal Lawyer's Association Northern Territory Bali Conference (June 28, 1999), online at http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_crimin.htm (visited Nov 9, 2010).

contrary to Article 17 of the ICCPR. Second, he claimed that he had been deprived of equal protection, contrary to Article 26 of the ICCPR.

Article 26 of the ICCPR is very similar to Article 2 of the UDHR. It states:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁸

In 1994, the UN Human Rights Committee held that the Tasmanian law violated Toonen's right to privacy under Article 17 of the ICCPR.²⁹ However, this holding did little to clarify the meaning of "other status" under Article 26 of the ICCPR or Article 2 of the UDHR. First, the decision was limited to the right to privacy and did not extend more broadly to discrimination based on sexual orientation.³⁰ Second, the Committee considered discrimination based on sexual orientation to be the same as discrimination based on sex, and not discrimination based on "other status,"³¹ the relevant classification to the discussion in this Comment.

Interestingly, neither party in the *Toonen* case argued that discrimination on the basis of sexual orientation is equivalent to discrimination based on sex.³² This argument is rarely used in the debate over sexual orientation,³³ and it is a disfavored argument in US jurisprudence.³⁴ So while the *Toonen* decision indicates that the UN Human Rights Committee is (possibly) interested in expanding protections based on sexual orientation, the precedent set by the opinion is narrow. It leaves open an avenue for increased protections so long as parties are comfortable arguing that discrimination based on sexual orientation is the same as discrimination based on sex. But it does not clarify the meaning of

²⁸ ICCPR, Art 26 (cited in note 9).

²⁹ United Nations, *Views of the Human Rights Committee under article 5, para 4, of the Optional Protocol to the International Covenant on Civil and Political Rights*, UN Doc CCPR/C/50/D/488/1992 (1994) ("Toonen Decision").

³⁰ *Id.* § 8.2.

³¹ *Id.* § 8.7.

³² *Id.*

³³ But see United Nations Human Rights Committee, *Views of the Human Rights Committee under the Optional Protocol with regard to the case of Young v. Australia* § 10.4, UN Doc CCPR/C/78/D/941/2000 (2003).

³⁴ *Lawrence v Texas*, 539 US 558. While the court struck down a law prohibiting sodomy as an unconstitutional infringement on individual rights, the majority did not consider the sodomy law discrimination based on sex. Instead, it based its decision on the Due Process Clause of the 14th Amendment. *Id.* at 564.

“other status” under Article 2 of the UDHR, which is where future litigation over homosexual rights is most likely to focus.³⁵

IV. AN APPROACH FROM POLITICAL PHILOSOPHY: THE HUMAN AND CIVIL RIGHTS DISTINCTION

A. Introduction

This section will argue that because the UDHR allows for some form of cultural relativism, the UDHR is limited to protecting human rights, as opposed to civil rights. This section will further argue that civil rights are rights that owe their creation and protection to the state, whereas human rights are rights that all humans possess prior to the creation of the state. In particular, this section will argue that civil rights are any rights that may be at odds with how a non-oppressive or democratic state chooses to create and stabilize its government. Human rights, by contrast, are any rights that cannot be at odds with how a non-oppressive state chooses to create and stabilize its government. This Comment will use the political philosophies of John Locke³⁶ and Thomas Hobbes³⁷ to define a “non-oppressive state” as one that rules by consent of the governed, demonstrated by: (1) a citizenry’s option of non-consent, and (2) the citizenry’s failure to exercise that option.

The question of whether the right not to be discriminated against on the basis of sexual orientation is a human or civil right will be evaluated under both a historical and theoretical approach. The historical approach evaluates whether any modern non-oppressive states must discriminate on the basis of sexual orientation for the purposes of state formation or continued state stability. The theoretical approach evaluates whether a non-oppressive state may need to discriminate on the basis of sexual orientation in the process of its formation or for continued state stability.

Alternatively, the distinction between human and civil rights may be analyzed behind a Contractarian³⁸ or Rawlsian³⁹ veil. This method has the advantage of analyzing the right in question (the right not to be discriminated

³⁵ *General Assembly Adopts 52 Resolutions* (cited in note 6).

³⁶ See generally John Locke, *Second Treatise of Government* (Hackett 1980) (C.B. MacPherson ed).

³⁷ See generally Thomas Hobbes, *Leviathan* (Penguin 1986).

³⁸ The political theory, which holds that “legitimate authority of government must derive from the consent of the governed, where the form and content of this consent derives from the idea of contract or mutual agreement.” Ann Cudd, *Contractarianism*, in Edward N. Zalta, ed, *The Stanford Encyclopedia of Philosophy* (Fall 2008), online at <http://plato.stanford.edu/archives/fall2008/entries/contractarianism> (visited Oct 4, 2010).

³⁹ See generally John Rawls, *A Theory of Justice* (Oxford revd 1991).

against on the basis of sexual orientation) directly. But it has the disadvantage of being only a rough application of Rawlsian political theory.⁴⁰ This Comment will use the Rawlsian approach only to provide support for the primary method of analysis, by demonstrating that a consistent result may be reached from a different philosophical position.

B. The Universal Declaration of Human Rights Respects Cultural Relativism

The first step in the theoretical analysis is to analyze whether the UDHR respects cultural relativism. Membership in the UN is open to all “peace-loving states” that accept the obligations contained in the UN Charter and are able and willing to carry out its obligations.⁴¹ However, not all “peace-loving” signatories to the UDHR comply with its requirements. Saudi Arabia prohibits trade unions, for example, in violation of Article 23.⁴² This means that the UN recognizes that Member States must evolve in order to fulfill the requirements of the UDHR.

In order to work toward satisfying the UDHR, Member States must selectively rid themselves of norms that violate human rights. However, these states cannot do so at the cost of their stability. As peace-loving Member States evolve to comply with the UDHR, states must be able to maintain some of the cultural norms that stabilize the states themselves, sometimes temporarily and sometimes permanently. In other words, some respect for cultural relativism is required under the UDHR.

There are three arguments against the view that the UDHR respects cultural relativism. All of these arguments, however, are ultimately unsuccessful. First, the protections contained in the UDHR are said to supersede the laws of any state.⁴³ However, this argument means that the only rights worth protecting through the UDHR are those that can and should be attained universally. The UDHR supports cultural relativism, just not with respect to the rights contained within it.

Second, Sophie Clavier warns that cultural relativism “adopts a static definition of culture: a snapshot of a group of people and their system of meaning at a given time with the underlying assumption that they will not

⁴⁰ Id at 118.

⁴¹ UN Charter, Arts 3–6.

⁴² International Trade Union Confederation, *2007 Annual Survey of Violations of Trade Union Rights*, online at <http://survey07.ituc-csi.org/getcountry.php?IDCountry=SAU&IDLlang=EN> (visited Oct 4, 2010).

⁴³ See Diana Ayton-Shenker, *The Challenge of Human Rights and Cultural Diversity* (UN 1995), online at <http://www.un.org/rights/dpi1627e.htm> (visited Oct 4, 2010).

change,”⁴⁴ and this static definition may be in tension with the UDHR emphasis on evolution. However, evolution and cultural relativism are not mutually exclusive. In fact, they are often mutually reinforcing. Member States will never evolve toward the goals of the UDHR if they feel disenfranchised from the organization or agreement that enforces those norms. This risk of disenfranchisement is particularly high in international law, where enforcement mechanisms are weak. If non-relativists wish to eventually see a homogeneous world, they must try to understand and respect the heterogeneity that currently exists, so that they may help and encourage states to evolve to meet their standards. Folding cultural relativism into the UDHR provides a simple formula for states to evolve toward compliance with the explicit terms of the UDHR itself—in return for changing those practices that violate the UDHR, a state may maintain its stability and cultural identity by retaining practices that do not violate the UDHR.

Third, the UDHR appears to champion a view that eventually all rights (both civil and human) will be universal.⁴⁵ However, this is not a problem for cultural relativism for two reasons. First, even if the UDHR wants all rights to be universal, it clearly prioritizes the universality of human rights. Therefore, it is consistent with the UDHR to respect cultural relativism while states evolve into compliance with the human rights protected by the UDHR. Second, drafting history demonstrates that Western states had a disproportionate impact on the language of the UDHR.⁴⁶ In fact, at the 1993 Conference on Human Rights, a delegation (again led by Syria) put forth the following conclusions:

1. Human Rights as currently defined are not universal but based on Western morality.
2. They should not therefore be imposed as norms on non-western societies in disregard of those societies’ historical and economic development and in disregard of their cultural differences and perceptions of what is right and wrong.

⁴⁴ Sophie Clavier, *Human Rights and the Debate Between Universalism and Cultural Relativism* (San Francisco State University), online at <http://userwww.sfsu.edu/~sclavier/research/hrdebate.pdf> (visited Oct 4, 2010).

⁴⁵ Antônio Augusto Cançado Trindade, *Introduction to the Universal Declaration on Human Rights* (UN 2008), online at <http://untreaty.un.org/cod/avl/ha/udhr/udhr.html> (visited Oct 4, 2010) (“[T]he holistic view of all rights to be proclaimed promptly prevailed.”).

⁴⁶ For more on this, see Holning Lau, *Sexual Orientation: Testing the Universality of International Human Rights Law*, 71 U Chi L Rev 1689, 1693 (2004), citing Abdullahi Ahmed An-Na’im, *Human Rights in the Muslim World: Socio-political Conditions and Scriptural Imperatives*, 3 Harv Hum Rts J 13, 15 (1990) (“Relativists reminded universalists that most non-Western states did not participate in the drafting of the UDHR because, as subjects of colonialism, they were not members of the UN. Thus, relativists argue that the human rights regime’s assumption of universalism has a cultural bias, favoring Western norms derived from Enlightenment-era philosophy.”).

3... . [T]he imposition of one's standard on another culture is unjust and imperialist in nature.⁴⁷

While this Comment does not support Syria's 1993 declaration, the declaration does provide some important insights. First, it emphasizes the danger of allowing states to feel disenfranchised in the search for human rights—they may abandon the project altogether. Second, recognizing the UDHR's Western influence helps a reader to understand why the UDHR does not explicitly recognize the need to respect cultural relativism en route to the protection of human rights. Most Western societies are very close to attaining the goals of the UDHR, and they do not need to maintain unpopular regimes in order to evolve toward the UDHR's goals. However, for many non-Western states, political stability requires maintaining programs that may seem controversial to a majority of other nations in order to evolve toward compliance with the UDHR.

C. The Measure of a Non-Oppressive State is One That Rules by Consent of the Governed

Sophie Clavier also reminds us that “cultural relativism is claimed by repressive regimes whose practices have nothing to do with local or indigenous cultures but more with their own self-preservation.”⁴⁸ Any position that respects cultural relativism must distinguish between practices that are important to the history and culture of a country, and those that are in place merely to oppress.

The question presented by this Comment is whether discriminating against someone on the basis of sexual orientation can be an important cultural norm, or whether it is one that is merely used as part of a larger scheme of political oppression. In order to answer this question, this Comment must first define a non-oppressive state. It can then finally define civil rights, by evaluating which practices are necessary to such a state's stability.

Oppression in political philosophy can mean a number of things. For Hobbes, it was the state of nature where humans gained power through force rather than consent.⁴⁹ Modern philosophers⁵⁰ define oppression as illegitimate and arbitrary laws that cause material (economic or physical) deprivation.⁵¹ And, contemporary writers focus on non-formal oppression by social groups,

⁴⁷ Clavier, *Debate Between Universalism and Cultural Relativism* at 1–2 (cited in note 44).

⁴⁸ *Id.* at 5.

⁴⁹ Hobbes, *Leviathan* at 186 (cited in note 37) (famously stating the life of man in the state of nature is “solitary, poore, nasty, brutish, and short.”).

⁵⁰ 1600–1800 A.D.

⁵¹ Ann E. Cudd, *Analyzing Oppression* 5–7 (Oxford 2006).

through, for example, disparity in wealth.⁵² Since the definition of oppression is not firm, this Comment will take a minimal (Hobbesian) view of the term: an oppressive state rules by force, as opposed to consent. For the purposes of this Comment, this view is interchangeable with Locke's consent theory: political authority is legitimate only if it has the consent of those who are subject to its commands.⁵³

Consent to a political regime entails, at the least: (1) the option of non-consent,⁵⁴ and (2) a failure to exercise that option.⁵⁵ Some worry that such consent (tacit consent) is not sufficient for political authority,⁵⁶ but it is difficult to formulate a theory that accounts for when and how citizens can explicitly consent to a political regime.⁵⁷ An explicit consent view will also suffer from the main weaknesses of the tacit consent theory: inertia, cognitive bias, and incomplete information. Therefore, the best working definition is as follows: for a state to have consent of the governed, the citizens must choose not to exercise a viable option of non-consent (rebellion or relocation, for example).

Non-consent may be extraordinarily costly, but consent given to avoid costs of non-consent is consent nonetheless.⁵⁸ If a government physically restrains a citizen, on the other hand, it deprives that citizen of the option of rebellion or relocation. Therefore, citizens have the option of non-consent short of physical restraint or incapacitation due to mental restraint, inertia, cognitive bias, or incomplete information.

⁵² Id at 9 (discussing Hegel and Marx).

⁵³ Tom Christiano, *Authority*, in Edward N. Zalta, ed, *The Stanford Encyclopedia of Philosophy* § 4.1 (Fall 2008), online at <http://plato.stanford.edu/archives/fall2008/entries/authority/> (visited Oct 4, 2010), citing Locke, *Second Treatise on Civil Government* (cited in note 36).

⁵⁴ Id § 4.3, citing John A. Simmons, *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge 2001).

⁵⁵ Id § 4.8, citing Locke, *Second Treatise of Government* (cited in note 36).

⁵⁶ Edward A. Harris, Note, *From Social Contract to Hypothetical Agreement: Consent and the Obligation to Obey the Law*, 92 Colum L Rev 651, 679 (1992) ("In shifting from express and tacit consent to hypothetical agreement, contemporary social contract theorists have given up on the task of securing a sufficient account of political obligation.").

⁵⁷ See John A. Simmons, *Moral Principles and Political Obligations* 57–74 (Princeton 1979).

⁵⁸ Christiano, *Authority* § 4.9 (cited in note 53) (rebutting Hume's concern—that no one can sensibly interpret the voluntary continued residence of a person in a state as a case of tacit consent due to the cost of moving—by arguing that "many people consent to things in order to avoid the terrible costs of not consenting").

D. Discrimination on the Basis of Sexual Orientation May Be Necessary to the Stability of Non-Oppressive States: A Historical and Theoretical Approach

The project of this Comment is to find non-oppressive political regimes that must discriminate on the basis of sexual orientation in order to create or stabilize their governments. If such discrimination is necessary for the stability of non-oppressive states, the UDHR should allow such discrimination so that these states can remain stable while working toward achieving the UDHR's other goals.

This project takes both a historical and theoretical approach. A historical approach will seek to find an actual state that: (1) discriminates on the basis of sexual orientation, (2) derives its authority through consent of its citizens, and (3) requires discrimination based on sexual orientation to support its consented-to political regime. In order to respect the costliness of non-consent mentioned earlier, a historical approach should consider states that have: (1) no history of rebellion under the current political regime, (2) no recent rebellions under the current political regime, (3) no history of mass migrations, and (4) no recent mass migrations.

The historical approach, if successful, will demonstrate that states are capable of satisfying all three elements. Accordingly, it will demonstrate that discrimination on the basis of sexual orientation may be necessary to the stability of a non-oppressive state. If this can be shown, then a right not to be discriminated against on the basis of sexual orientation is a civil right, and not protected by the UDHR.

Consider, for example, Turkey. The Turkish constitution does not protect homosexual citizens from discrimination.⁵⁹ Turkey prohibits homosexuals and bisexuals from serving in the military, and has a history of other discriminatory practices.⁶⁰ Turkey is also a republican parliamentary democracy⁶¹ without a history of rebellion or mass migration. Finally, with a population that is over 99

⁵⁹ *Turkish Parliament Justice Commission Rules Out Anti-discrimination Proposal*, (Turkey LGBT History 2004), online at http://news.kaosgl.com/turkey_lgbt_history.php (visited Oct 4, 2010) (Turkish).

⁶⁰ In 1996 the Supreme Court deprived a lesbian woman of custody of her child on the grounds that the mother was "a woman who has a [sexual] habit in the degree of sickness," and in 2006 a LGBT magazine was banned under a law protecting the general morality. *Id.*

⁶¹ Central Intelligence Agency, *The World Factbook: Turkey* (CIA 2007), online at <https://www.cia.gov/library/publications/the-world-factbook/geos/tu.html> (visited Oct 4, 2010).

percent Muslim,⁶² discrimination on the basis of sexual orientation may be necessary to support the current political regime.

The example of Turkey, however, may be insufficient for a few reasons. First, Turkey already exhibits tolerance for homosexual activities in some instances. For example, sodomy is not a crime in Turkey.⁶³ Second, Turkey is increasingly sensitive to the problems of discriminating against individuals on the basis of sexual orientation, especially as it struggles to become part of the EU.⁶⁴ These facts demonstrate that it may not be necessary for Turkey to discriminate on the basis of sexual orientation.

Alternately, a theoretical approach may be employed to evaluate whether the three elements are, in theory, compatible. For this approach, consider a country that satisfies two of the three elements and ask whether it might satisfy the third. For example, the US currently discriminates on the basis of sexual orientation⁶⁵ and is also a non-oppressive state. Such discrimination is probably not required for the stability of the US,⁶⁶ given its strong culture of tolerance and

⁶² Id. This Comment recognizes that discrimination based on sexual orientation may be a bigger problem in Muslim countries than Catholic-majority countries such as Mexico or Italy. However, the fact that discrimination based on sexual orientation is not necessary to the stability of Catholic countries does not undermine the conclusion that it may be necessary to the stability of Muslim countries. As a note on the distinction between treatment of homosexuality in Muslim and non-Muslim countries, consider that as of 2007, all of the countries that applied the death penalty to homosexual acts were Muslim countries. *World Day Against Death Penalty* (International Lesbian, Gay, Bisexual, Trans and Intersex Association Oct 10, 2007), online at <http://ilga.org/ilga/en/article/1111> (visited Oct 4, 2010).

⁶³ See *India: Court Strikes Down 'Sodomy' Law* (Human Rights Watch July 2, 2009), online at <http://www.hrw.org/en/news/2009/07/02/india-court-strikes-down-sodomy-law> (visited Oct 4, 2010).

⁶⁴ *European Commission: Enlargement, EU-Turkey Relations*, online at http://ec.europa.eu/enlargement/candidate-countries/turkey/eu_turkey_relations_en.htm (visited Oct 4, 2010).

⁶⁵ See *Citizens for Equal Protection v Bruning*, 455 F3d 859, 871 (8th Cir 2006) (“laws limiting the state-recognized institution of marriage to heterosexual couples are rationally related to legitimate state interests and therefore do not violate the Constitution of the United States”). But see *Perry v Schwarzenegger*, 704 F Supp 2d 921 (ND Cal 2010) (holding California’s Proposition 8 unconstitutional because “excluding same-sex couples from marriage is simply not rationally related to a legitimate state interest”). The latter case may significantly impact the US’s approach to discrimination on the basis of sexual orientation.

⁶⁶ This debate is not entirely settled. Some maintain that such discrimination is necessary to the stability of the US, given the importance of the Judeo-Christian morality to the country’s founding. Others disagree that the Judeo-Christian morality had much of an impact on the culture and laws of the US. And still others maintain that whatever the historical arguments, such a morality should not and does not control today. Overall, there may be no fact of the matter about which norms lay at the foundation of American jurisprudence, historically or presently. For more on this, see Robert M. Cover, *The Supreme Court: 1982 Term*, 97 Harv L Rev 4, 46 (1983–1984) (“The range of meaning that may be given to every norm—the norm’s interpretability—is defined

religious pluralism. Even in the US, however, maintaining a certain national culture is important for stability and the protection of rights. And this political culture could have very easily been one that did not support religious pluralism. Robin Lovin notes:

[T]he necessary political arrangements for the emergence of normative religious pluralism were themselves grounded in religious thought about political life. In retrospect, it is not surprising that religious pluralism flourished in the North American contexts where this Protestant political thought had the widest following.⁶⁷

The US does not need to maintain discrimination in order to be internally consistent with the rest of its political and social values. Another country, however, may easily have such a need. The laws of the US are as much a product of national culture as the laws of Turkey. While they may differ substantially in substance, the difference may be a mere historical accident.

For an alternative application of the theoretical approach, consider Syria. Syria also satisfies two of the three elements discussed above. First, Syrian law discriminates on the basis of sexual orientation.⁶⁸ Second, this discrimination is a key part of the political culture necessary to the country's stability because it reflects Muslim norms with regard to sexual orientation.⁶⁹ But Syria is an "oppressive" state because of the presence of both internal conflict and substantial limitations on the option of non-consent.⁷⁰

Syria's discriminatory laws, however, may not be a result of its classification as an oppressive state. Internal conflict in Syria is mostly attributable to conflict between Muslim sects,⁷¹ all of which condemn homosexuality.⁷² Syria's discriminatory laws may be a product of its authoritarian military-dominated government, but the presence of similar laws in non-authoritarian countries

. . . both by a legal text, which objectifies the demand, and by the multiplicity of implicit and explicit commitments that go with it.").

⁶⁷ Robin W. Lovin, *Religion and Political Pluralism*, 27 *Miss Coll L Rev* 91, 103 (2007–2008).

⁶⁸ Sodomy is illegal in Syria. *Sodomy Laws: Laws Around the World*, online at <http://www.glapn.org/sodomylaws/world/world.htm> (visited Oct 4, 2010).

⁶⁹ Syria is 90 percent Muslim and 10 percent Christian. Central Intelligence Agency, *The World Factbook: Syria* (CIA 2007), online at <https://www.cia.gov/library/publications/the-world-factbook/geos/sy.html> (visited Oct 4, 2010).

⁷⁰ *Id.* (describing Syria's government as a "republic under an authoritarian military-dominated regime").

⁷¹ *Kurdish Unrest Erupts in Syria* (BBC News June 6, 2005), online at http://news.bbc.co.uk/2/hi/middle_east/4612993.stm (visited Oct 4, 2010).

⁷² *Religion Facts: Homosexuality and Islam*, online at <http://www.religionfacts.com/homosexuality/islam.htm> (visited Oct 4, 2010). See also Khalid Duran, *Homosexuality in Islam*, in Arlene Swidler, ed, *Homosexuality and World Religions* 181–97 (Trinity 1993).

makes this a weaker argument.⁷³ Theoretically, there may be a state in which discrimination on the basis of sexual orientation is a key part of the political culture necessary to the country's stability but which does not maintain an oppressive and authoritarian government. But, comparisons to Syria provide additional theoretical support for the theory that a non-oppressive state may need to discriminate on the basis of sexual orientation.

V. AN ALTERNATE APPROACH FROM POLITICAL PHILOSOPHY: THE NATURE OF RIGHTS AND THE CONTRACTARIAN VEIL

A. Introduction

The preceding discussion reasoned backward into a distinction between human and civil rights by evaluating the necessary behavior of a non-oppressive state. This section, by contrast, will reason forward from an intuitive definition of human rights. Using the work of Alan Gewirth and John Rawls, this section will evaluate the rights humans possess due to their nature and inherent dignity, and whether the right against discrimination on the basis of sexual orientation is one such right.

B. A Theoretical Basis for Human Rights

In *Human Rights: Essays on Justifications and Applications*,⁷⁴ Alan Gewirth argues that human rights are derived from human rationality. Gewirth sets up the argument by proposing that all rational agents have purposes or ends, and they rationally desire whatever goods are necessary to achieve those ends.

[A]s rational, [the agent] regards as necessary goods the proximate general necessary conditions of his acting to achieve his purposes. For without these conditions he either would not be able to act for any purposes or goods at all or at least would not be able to act with any chance of succeeding in his purposes. These necessary conditions of his action and successful action are freedom and well-being.⁷⁵

If an agent desires anything, he will also, logically, desire what is instrumental (whatever may serve as a means or agency) to his desires. The instrumental goods that are necessary to achieve an agent's purposes are, then, necessary in themselves. If they are necessary, others must be prevented from

⁷³ *Turkish Parliament Justice Commission Rules Out Anti-discrimination Proposal* (cited in note 59).

⁷⁴ Alan Gewirth, *Human Rights: Essays on Justifications and Applications* (Chicago 1982).

⁷⁵ *Id.* at 47.

interfering with them. In other words, an agent has a right to goods necessarily instrumental to his desires.

Under Gewirth's account, rights are necessarily instrumental goods based on the unique attributes and desires of human agents—rationality and the ability to plan for the future. And, because all humans possess these two attributes, rights apply equally to all humans.

There is one, and only one, ground that every agent logically must accept as the sufficient justifying condition for his having the generic rights, namely, that he is a prospective agent who has purposes he wants to fulfill . . . To avoid contradiction, every agent must hold that being a prospective purposive agent is a sufficient reason or condition for having the generic rights. Because of this sufficient reason, every agent, on pain of self-contradiction, must also accept the generalization that all prospective purposive agents have the generic rights. This generalization is an application of the logical principle of universalizability: if some predicate P belongs to some subject S because S has the quality Q, then it logically follows that every subject that has Q has P.⁷⁶

Therefore, Gewirth presents a unified defense of both equal rights and universal rights that falls out of two essential human characteristics: rationality and prospective thinking.

But Gewirth does not argue that agents have the right to all instrumental goods, only the right to necessary ones. For Gewirth, freedom and well-being are necessary instrumental goods for all rational agents,⁷⁷ and this Comment assumes that autonomy is a necessary precursor to both of these things. Proceeding under Gewirth's account, humans have a right to autonomy and whatever is necessary to secure it. The next question is whether freedom from discrimination on the basis of sexual orientation is necessary for human autonomy.

C. The Costs of Non-Discrimination

At first glance, US jurisprudence seems to easily answer the question posed above: protection against discrimination on the basis of sexual orientation is necessary to human autonomy. In *Bowers v Hardwick*,⁷⁸ Justice Blackmun dissented from a decision upholding a law prohibiting sodomy by arguing that, "individuals define themselves in a significant way through their intimate sexual relationships with others."⁷⁹ And more recently in *Lawrence v Texas*,⁸⁰ Justice

⁷⁶ Id at 51–52 (parenthetical section omitted).

⁷⁷ Id at 47.

⁷⁸ 478 US 186 (1986).

⁷⁹ Id at 205 (Blackmun dissenting).

⁸⁰ 539 US 558 (2003) (cited in note 34).

Kennedy, writing for the majority of the Court, supported extending the right to privacy to include the right to engage in homosexual sodomy in private by noting:

Liberty presumes an autonomy of self that includes ...certain intimate conduct.⁸¹

When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice.⁸²

This holding is binding with regard to privacy law in the US, but the Court's arguments do not conclusively answer the larger theoretical question: is freedom from discrimination based on sexual orientation necessary for human autonomy? Both in the US and in countries throughout the world, citizens and courts disagree on the answer to this question.

One reason for the disagreement is that protecting individuals from discrimination on the basis of sexual orientation has real costs. For example, as in the earlier discussion of Turkey, some feel that prohibiting discrimination on the basis of sexual orientation upsets a religiously based moral code. As Richard Posner notes,

[t]o permit persons of the same sex to marry [a right that likely falls out of a policy of non-discrimination on the basis of sexual orientation] is to declare, or more precisely to be understood by many people to be declaring, that homosexual marriage is a desirable, even a noble, condition in which to live.⁸³

In countries with a religiously-based legal system,⁸⁴ prohibiting sexual orientation discrimination may have the effect of undermining the coherence and integrity of the laws, especially if the legal system is premised on a moral code that condemns homosexuality.

But there is also a separate cost to consider: the cost of discomfort. Both secular and religious countries take the cost of discomfort into account when extending the protection of rights. In particular, the US discriminates against nudists on this basis through public decency laws. Michael Levin explains the reasoning as follows: "Societies respecting the diversity of individual tastes, as ours professes to, let people shun what they find repulsive. Tolerance includes

⁸¹ Id at 562.

⁸² Id at 567.

⁸³ Richard Posner, *Sex and Reason* 312 (Harvard 1992).

⁸⁴ For example, Iran is an Islamic state or a "theocratic republic." CIA, *The World Factbook: Iran* (CIA 2007), online at <https://www.cia.gov/library/publications/the-world-factbook/geos/ir.html> (visited Nov 28, 2010).

tolerating fences. Forcing people to put up with what they loathe is [a form of] tyranny.”⁸⁵

Laws prohibiting discrimination on the basis of sexual orientation differ from laws opposing nudity in significant ways.⁸⁶ However, both secular and religious countries share a commonality on the question of rights: the costs of discomfort are significant and recognized in the legal system.

The difficult task in both secular and religious countries is to figure out when the costs of discomfort are a legitimate basis on which to discriminate against individuals. As Cass Sunstein notes:

[W]idespread moral disapproval is not always a legitimate basis for law; consider the bans on miscegenation or discrimination against the mentally retarded. The task for courts invoking irrationality in the context of [discrimination based on sexual orientation] is to distinguish the contexts in which moral disapproval is legitimate from those in which it is not.⁸⁷

The question of whether protection against discrimination on the basis of sexual orientation is necessary for autonomy is more complex than it might first appear. Both secular and religious countries balance the extension of rights with the cost that those rights may impose on society, including the cost of discomfort. The right against discrimination on the basis of sexual orientation, however, will overcome these costs if this right is necessary for human autonomy. To answer the question of which rights are fundamental to human autonomy, this Comment now turns to a Contractarian perspective.

D. Discrimination Based on Sexual Orientation from a Contractarian Perspective

In *A Theory of Justice*, John Rawls attempts to derive the basic principles of justice from an original position where parties to a social contract start from behind a veil of ignorance.⁸⁸ Parties in the original position do not know their

⁸⁵ Lawrence M. Thomas and Michael E. Levin, *Sexual Orientation and Human Rights* 147 (Rowman & Littlefield 1999).

⁸⁶ See Richard A. Epstein, *Of Same Sex Relationship and Affirmative Action: The Covert Libertarianism of the United States Supreme Court*, 12 S Ct Econ Rev 75, 88–90 (2004). Richard Epstein points out one of the most important differences: “[Laws against nudity] deal with actions in public spaces, where the regulation of the commons gives the state more power than it has over private conduct. Think of those norms as traffic norms, and then ask if there is a rule against holding hands whether it could be applied to gay couples only. Direct interaction is one thing, objection to relations by others is quite another.” Email correspondence (Oct 13, 2009). It is difficult to allow the private activity of homosexual marriage, for example, but disallow all public expressions of homosexuality. Conferring rights on homosexuals in the private sphere recognizes and celebrates homosexuality in a way that will have public costs.

⁸⁷ Cass R. Sunstein, *Homosexuality and the Constitution*, 70 Ind L J 1, 6 (1994).

⁸⁸ Rawls, *A Theory of Justice* at 118 (cited in note 39).

place in society or the distribution of natural assets.⁸⁹ Given these conditions, the principles of justice agreed to “are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality.”⁹⁰ For Rawls, an equal original position is fundamental for arriving at the proper principles of justice; the only way for rational individuals to decide what is good is by starting from an equal position in deliberation.

Section V.C left off with a consideration of whether sexual orientation is so fundamental to human autonomy that, at least under Gewirth’s account, there exists a human right not to be discriminated on the basis of sexual orientation. One way of evaluating this question may be to set up a theoretical construct similar to Rawls’ veil of ignorance, where ideally rational individuals can decide if sexual orientation is sufficiently important to autonomy that it should be protected as a human right. Remember that human rights “constitute[] a law anterior and superior to the positive law of civil society,”⁹¹ meaning the protection of human rights is preferable over the stability of the state. Therefore, the question behind the veil of ignorance is whether sexual orientation is so integral to human autonomy that it should be protected even at the cost of state stabilization.⁹² That is, whether a rational individual would choose to allow discrimination on the basis of sexual orientation, not knowing whether or not he would be a victim of such discrimination, in order to protect the stability of his state and other human rights.

Rawls concludes that rational individuals would choose that “each person is to have an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for others,”⁹³ but does tell us where sexual orientation fits in this rubric. What we should look for out of Rawls’s approach, however, is not a definitive answer, but a better-defined question. In particular, this approach provides theoretical support for asking whether a person’s sexual orientation is “so integral an aspect of one’s identity [that] it is not appropriate to require a person to repudiate or change his or sexual orientation in order to avoid discriminatory treatment”?⁹⁴

⁸⁹ Id.

⁹⁰ Id at 10.

⁹¹ Marc J. Bossuyt, *Guide to the “Travaux Préparatoires” of the International Covenant on Civil and Political Rights* 6 (Martinus Nijhoff 1987).

⁹² See Gerald A. Cohen, Robert Nozick and Wilt Chamberlain: *How Patterns Preserve Liberty*, 11 *Erkenntnis* 5 (No 1 1977) (“How much equality would conflict with liberty in given circumstances depends on how much people would value equality in those circumstances.”). A necessary corollary is how much people would value equality when faced with the possible costs, including destabilizing a state.

⁹³ Rawls, *A Theory of Justice* at 53 (cited in note 39).

⁹⁴ *In re Marriage Cases*, 43 Cal 4th 757, 842 (Cal 2008).

Unlike the approach taken in Section IV, this Comment does not purport to provide a purely philosophical answer to this question. It is notable, however, that even in the highly tolerant United States, courts come down on both sides of this issue.⁹⁵ The impact of this disagreement is that an idealized rational individual may *not* choose to protect against discrimination based on sexual orientation at the cost of state stabilization. In other words, protection from discrimination based on sexual orientation may not be a human right under the Contractarian perspective. While this is not a conclusive argument, it provides qualified theoretical support for this same conclusion, arrived at through different means, in Section IV.

VI. CONCLUSION

Michael Walzer reminds us that not all rights can stand above the state or political organization. For some rights, we need the “community itself: culture, religion, and politics. It is only under the aegis of these three that all the other things we need become socially recognized needs and take on historical and determinate form.”⁹⁶ The more difficult task is to decide which rights come before the state, and which ones owe their protection to its existence.

While the UDHR is an aspirational statement with regard to human rights, it also respects cultural relativism. Because of this, discrimination based on sexual orientation is properly left to the discretion of individual Member States and not prohibited by Articles 2 and 29 of the UDHR.

In considering the preceding arguments, note that this Comment does not condone any laws that allow for violence against homosexuals. The fact that non-oppressive nations may discriminate or allow discrimination against individuals based on certain characteristics does not mean that the government may exercise force against these individuals for the same reason. While it is the prerogative of each nation to create a criminal law, the criminal law must be more careful and narrowly drawn than the civil law. Any state that imposes severe criminal sanctions on minimally harmful activity cannot be called a democratic or non-oppressive society under almost any interpretation.

This Comment concludes by noting that many forms of discrimination are tolerated, and even celebrated, in the most liberal societies. For example, the US discriminates against individuals on the basis of age,⁹⁷ national origin,⁹⁸ wealth,⁹⁹

⁹⁵ Id. See also *Kerrigan v Commissioner of Public Health*, 289 Conn 135 (Conn 2008); *Conaway v Deane*, 401 Md 219 (Ct App Md 2007).

⁹⁶ Michael Walzer, *Spheres of Justice* 65 (Basic Books 1983) (emphasis omitted).

⁹⁷ See, for example, US Const Art II § 1.

⁹⁸ Id.

past criminal activity,¹⁰⁰ and more. Various forms of discrimination are embraced because they are necessary to protect overall culture and human rights. In other words, not all rights can be protected at any cost, nor should they be. To emphasize this point, simply consider that the USSR prided itself on the fact that “socialist democracy grants to the workers the widest rights and liberties on the basis of equality, without any discrimination whatsoever.”¹⁰¹

⁹⁹ See, for example, 26 USC § 3 (“Tax determined under tables, applicable to such taxable year, which shall be prescribed by the Secretary and which shall be in such form as he determines appropriate. In the table so prescribed, the amounts of the tax shall be computed on the basis of the rates prescribed by section 1.”).

¹⁰⁰ See, for example, United States Sentencing Commission, *Federal Sentencing Guidelines Manuals*, online at <http://www.ussc.gov/guidelin.htm> (visited Oct 4, 2010).

¹⁰¹ Daes, *Freedom of the Individual Under Law* at 93 (cited in note 1).