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Gender and Non-Normative Sex in Sub-Saharan Africa

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GENDER AND NON-NORMATIVE SEX IN SUB-SAHARAN AFRICA

*Johanna Bond**

This Article argues for the adoption of a gender-based framework to supplement rights promotion strategies and campaigns based on LGBTI identity. The Article draws upon feminist, queer, and trans theory to develop an expansive understanding of gender within international human rights law. An analysis incorporating such theory will catalyze more systematic promotion of LGBTI rights. Although the approach is applicable across a variety of geographic contexts, this Article uses sub-Saharan Africa as an illustrative case study. A focus on gender rights as supplementary to and interrelated with LGBTI rights offers both conceptual and pragmatic benefits in the struggle to promote LGBTI rights in the region. Specifically, the United Nations Committee on the Elimination of Discrimination Against Women (CEDAW Committee) has failed to meaningfully and systematically address discrimination and violence directed at LGBTI communities in this region. An expansion of the CEDAW Committee's interpretation of gender would encourage the Committee to consider rights violations perpetrated against those who do not conform to gender norms, including normative expressions of masculinity and femininity. First, a focus on non-normative gender expression and sexuality expands our understanding of affected individuals from only self-identified gays and lesbians to include those who do not necessarily identify as gay or lesbian but who, nevertheless, do not conform to traditional norms of sexuality and gender expression. Second, a gender framework facilitates intersectional analysis. If adopted, this analysis would allow the CEDAW Committee to more fully explore how race, ethnicity, and nationhood construct sexuality in the post-colonial period. Intersectional analysis would also allow the Committee to capitalize on its success in raising awareness about and combating gender-based violence. Finally, a gender framework offers the CEDAW Committee and U.N. treaty bodies a discursive wedge to open conversations about sexuality, even in places with wide-spread homophobia.

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I. INTRODUCTION

The social norms that regulate gender also police sexuality.¹ Gender norms enforce conformity with societal expectations of appropriate mascu-

1. JUDITH BUTLER, GENDER TROUBLE 17 (1990) (“Inasmuch as ‘identity’ is assured through the stabilizing concepts of sex, gender, and sexuality, the very notion of ‘the person’ is called into question by the cultural emergence of those ‘incoherent’ or ‘discontinuous’ gendered beings who appear to be persons but who fail to conform to the gendered norms of cultural intelligibility by which persons are defined.”).

line and feminine behavior.² Social norms of masculinity and femininity enforce heteronormativity³ by dictating that sexuality flows “naturally” from gender, which, in turn, flows “naturally” from the sex assigned at birth.⁴ Based on these social norms, men are expected to exhibit masculinity expressed, in part, through sexual attraction to women. Many feminist, queer, and trans theorists have refuted these notions of a rigid, naturalized and essential sex, gender, and sexuality.⁵

Despite these gains in gender theory, those who do not conform to societal expectations of gender expression and sexuality continue to face discrimination and violence.⁶ The U.N. and its member states have had mixed responses to these human rights violations.⁷ A number of U.N. human rights bodies have denounced and explicitly prohibited discrimination and violence perpetrated against lesbian, gay, bisexual, transgender, and intersex (LGBTI) individuals.⁸ Although, on balance, U.N. entities have condemned

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2. See, e.g., Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of “Sex,” “Gender,” and “Sexual Orientation” in Euro-American Law and Society*, 83 CALIF. L. REV. 1, 109 (1995) (“The conflation’s embodiment and enforcement of active/passive sex/gender themes and traditions . . . are so pervasive, so ingrained, so institutionalized, so internalized that even our children unknowingly collect epithets like ‘queer,’ ‘sissy,’ ‘dyke,’ and ‘tomboy’ in single, automatic breaths.”).
 3. Heteronormativity refers to the ways in which society assumes heterosexuality and places expectations on each gender to follow strict roles. For a discussion on heteronormativity, see generally Michael Warner, *Introduction to FEAR OF A QUEER PLANET: QUEER POLITICS AND SOCIAL THEORY* vii (Michael Warner ed., 1993).
 4. Stephen Valocchi, *Not Yet Queer Enough: The Lessons of Queer Theory for the Sociology of Gender and Sexuality*, 19 GENDER & SOC. 750, 752 (2005) (“[T]he danger lies in their implicit recognition that the binaries of male/female, masculine/feminine, heterosexual/homosexual as well as the normative alignment across them are more than ideological constructs but are somehow naturally occurring phenomena.”).
 5. Brenda Cossman, *Gender Performance, Sexual Subjects and International Law*, 15 CAN. J.L. & JURIS. 281, 282. (2002). See generally, JUDITH BUTLER, *BODIES THAT MATTER* (1993).
 6. See *infra* Part III (explaining how sexual minorities often face discrimination for failure to conform to social expectations of gender); see also Pinar Ilkkaracan & Susie Jolly, *Gender and Sexuality: Overview Report*, BRIDGE DEVELOPMENT - GENDER, at 4 (Jan. 2007), <http://www.bridge.ids.ac.uk/sites/bridge.ids.ac.uk/files/reports/CEP-Sexuality-OR.pdf>.
 7. See, e.g., Lucas Paoli Itaborahy and Jingshu Zhu, *State-Sponsored Homophobia*, INTERNATIONAL LESBIAN GAY BISEXUAL TRANS AND INTERSEX ASSOCIATION (2013), http://old.ilga.org/statehomophobia/ilga_state_sponsored_homophobia_2013.pdf; *Combating Discrimination Based on Sexual Orientation and Gender Identity*, UNITED NATIONS HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx> (last visited Feb. 14, 2016) (noting some United Nations responses to LGBT human rights violations).
 8. See, e.g., U.N. High Comm’r for Human Rights, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Sexual Orientation and Gender Iden-*

LGBTI discrimination, the response has, at times, been restrained or inconsistent.⁹

Recognizing the interconnectedness of norms surrounding gender and sexuality, one might expect the Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee), which seeks to combat gender discrimination, to be a leader in the struggle for LGBTI rights. The Committee, which oversees implementation of the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), however, has failed to meaningfully and systematically address discrimination and violence directed at LGBTI individuals and communities. The CEDAW Committee should embrace a more expansive understanding of gender, one that reflects the fluidity of gender, gender expression, and sexuality. A broader conception of gender and the norms that police it will leverage significant, extant rights-promotion efforts to further sexual orientation and gender identity rights.

In this Article, I advocate for an expansive definition of gender within human rights discourse, one that reflects the interconnectedness and contingent nature of gender and sexuality. In an effort to illustrate what such an approach would look like, I use sub-Saharan Africa as a detailed case study. Although the theoretical approach is applicable across a variety of geographic contexts, the case study illustrates the ways in which a gender focus offers both conceptual and pragmatic benefits in the struggle to promote LGBTI rights in the region.

Sub-Saharan Africa represents a rapidly changing landscape with respect to LGBTI rights. As some countries work to expand protections for LGBTI communities, others attempt to repress emerging struggles for LGBTI rights through violence and criminal regulation.¹⁰ The dynamism and urgency of the fight for LGBTI rights in the region make this struggle the next frontier in the fight for recognition of human rights within the

tity: Report of the United Nations High Commissioner for Human Rights, U.N. Doc. A/HRC/19/41 (Nov. 17, 2011)(exemplifying a United Nations response denouncing human rights violations based on sexual orientation).

9. *Yogyakarta Principles (background information)*, THE YOGYAKARTA PRINCIPLES, http://www.yogyakartaprinciples.org/background_en.pdf (last visited on Mar. 28, 2016) (“[T]he international response has been fragmented and inconsistent, creating the need for a consistent understanding of the comprehensive regime of international human rights law and its application to issues of sexual orientation and gender identity.”).

10. See Tierney Sneed & Teresa Welsh, *What’s Driving Homophobia in Africa?*, U.S. NEWS & WORLD REPORT (Oct. 16, 2014, 12:01 AM), <http://www.usnews.com/news/articles/2014/10/16/how-anti-lgbt-legislation-in-uganda-nigeria-and-gambia-is-shaping-africa> (providing a map of the “legal status of LGBT people” in Africa).

region. Nevertheless, there has been surprisingly little legal academic scholarship devoted to LGBTI rights-promotion in the region.

Within the context of sub-Saharan Africa, a gender-based framework is a necessary complement to rights-promotion strategies that rely on identity categories such as gay, lesbian, bisexual, transgender, and intersex. In any given human rights campaign in sub-Saharan Africa, a supplementary gender focus would achieve four goals: first, it would open channels for advocacy through effective and established human rights mechanisms; second, it could include a broader range of affected individuals; third, it facilitates intersectional analysis; and fourth, it offers discursive opportunities for substantive exchange with reluctant political actors in the region.

This Article draws on anthropological, sociological, and legal literature to advocate for a shift in approaching LGBTI issues—a shift that underscores the contingency and fluidity of gender as a site of persecution and resistance within the sub-Saharan region. This approach rejects rigid, binary identity categories (masculine/feminine; hetero/homo) in favor of fluid categories that more accurately reflect the reality of sexual identity politics within sub-Saharan Africa today. An expansive conception of gender better captures how social norms constrain expressions of masculinity and femininity and, correspondingly, enforce heteronormativity.

In addition, an expansive understanding of gender—one that encompasses sexuality—is a markedly practical approach. Within the region, many people refrain from identifying publicly as gay or lesbian because of the centrality of heterosexual marriage in child rearing and the perpetuation of kinship ties. They may, however, engage in same-sex sexual activity that is viewed as supplementary to traditional family roles.¹¹ An exclusive focus on gay and lesbian identity fails to address the many ways in which gender expression and gender stereotypes enforce heteronormativity and prevent the public embrace of LGBTI identity within sub-Saharan Africa.

The U.N.'s expert bodies, including experts appointed as special rapporteurs, have greatly contributed to the growing recognition of LGBTI rights within the U.N.¹² As Ignacio Saiz suggests, however, the work of

11. See *infra* section III.E. See also Oliver Phillips, *Myths and Realities of African Sexuality*, 44 AFR. STUD. REV. 195, 197 (2001) (“[Same-sex intimate relationships] are seen as quite distinct from (but supplementary to) heterosexual marriage and so it does not disturb the economic and reproductive implications of heterosexual marriage.”).

12. See Ignacio Saiz, *Bracketing Sexuality: Human Rights and Sexual Orientation: A Decade of Development and Denial at the U.N.*, 7 HEALTH & HUM. RTS. 48, 51-52 (2004) (mentioning human rights treaty bodies as contributing to the growth of LGBT rights awareness). See also *Monitoring the Core International Human Rights Treaties*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <http://www.ohchr.org/EN/HRBodies/Pages/TreatyBodies.aspx> (last visited Jan. 29, 2016) (listing committees that monitor human rights treaties).

expert bodies stands in “stark contrast to the denial and defiance shown by certain governments at the political bodies of the U.N., where any reference to sexual orientation has consistently been ‘bracketed’ and written out of draft human rights texts.”¹³ Human rights activists have attempted to add language concerning LGBTI rights in several draft declarations or outcome documents at the conclusion of global U.N. conferences.¹⁴ However, reluctant governments have insisted on bracketing and ultimately dropping these references in the name of global consensus.¹⁵ The inability to advance the cause of LGBTI rights within the political bodies of the U.N. makes it even more important for expert bodies, such as CEDAW, to systematically address violence and discrimination against LGBTI individuals.

The CEDAW Committee has several mechanisms at its disposal to encourage States parties to fully implement the Convention.¹⁶ One of the Committee’s enforcement mechanisms is the periodic review of States parties’ reports to the Committee. These reports describe the country’s successes and challenges in implementing CEDAW.¹⁷ The Committee engages country representatives in a “constructive dialogue” that culminates in the issuance of concluding observations summarizing the country’s progress in implementing the treaty and highlighting any areas of concern or obstacles to implementation.¹⁸

The Committee’s “constructive dialogues” with state representatives offer an important opportunity to raise awareness about LGBTI rights in a less volatile political space.¹⁹ The CEDAW Committee, in particular, must take seriously the opportunity to engage governments in an expansive dia-

13. Saiz, *supra* note 12, at 48.

14. *See, e.g.*, Saiz, *supra* note 12, at 57-58 (discussing “attempts to include even a reference to sexual orientation in draft declarations”).

15. *See id.* (explaining that references to sexual orientation are often “dropped in the interests of ‘consensus.’”). For a criticism of advocacy groups’ framing of LGBT rights in terms of human rights, see generally Julie Mertus, *The Rejection of Human Rights Framings: The Case of LGBT Advocacy in the U.S.*, 29 HUM. RTS. Q. 1036 (2007) (arguing that this approach is inefficient).

16. *See generally* Jessica Neuwirth, *Inequality Before the Law: Holding States Accountable for Sex Discriminatory Laws Under the Convention on the Elimination of All Forms of Discrimination Against Women and Through the Beijing Platform for Action*, 18 HARV. HUM. RTS. J. 19 (2005) (discussing ways in which the CEDAW is implemented around the world).

17. *See id.* at 24-25 (“The Committee meets twice a year for three-week sessions to review reports that are submitted by States parties . . .”).

18. *See* Elizabeth Evatt, *Finding a Voice for Women’s Rights: The Early Days of CEDAW*, 24 GEO. WASH. INT’L L. REV. 515, 530 (2002) (“The term ‘constructive dialogue’ is often used to describe the process of considering State parties’ reports by the treaty bodies.”).

19. In contrast, political negotiations over the text of outcome documents are designed to represent the consensus of U.N. member states.

logue concerning gender and sexuality, one that is broad enough to encompass issues of grave concern to LGBTI communities. The discursive window created by the state reporting process has the potential to facilitate the evolution of LGBTI rights within the region without alienating states by requiring premature consensus or public affirmation.

Part II explores critical theory as it relates to LGBTI rights and explains the evolution of relevant terminology. It also offers an overview of strategies to promote LGBTI rights within the United Nations. Part II also explores the analytical potential of intersectional theory and concludes that an intersectional approach enhances our understanding of the lived experience of gender discrimination. Intersectionality is the best analytical method for fully understanding and addressing the social construction of race, gender, and sexuality in the post-colonial period because it considers how forms of discrimination intersect.

Part III argues for an alternative conception of gender and sexuality that includes many who would not self-identify as LGBTI but who, nevertheless, suffer violence and discrimination for their failure to conform to norms related to gender and sexuality. In addition, Part III examines the intersection of gender and sexual orientation in the context of sexual violence targeted at lesbians and those who are perceived as failing to conform to gender norms.

Part IV explores types of prohibitions against same-sex sexual activity in sub-Saharan Africa and ways in which criminal sanctions both rely on and reinforce gender stereotypes. It argues that colonial sexual regulation relied on vague offenses designed to target those whom the colonial authorities deemed to be undesirable and non-conforming. Such early laws used stereotyping as a regulatory device in much the same way as contemporary examples of gender stereotyping that police the boundaries of masculinity and femininity.

Building on this critique, Part V analyzes the work of the CEDAW Committee to date, primarily within the sub-Saharan region, and concludes that it has missed critical opportunities to meaningfully and systematically engage with questions of non-normative sexuality. An expansive understanding of gender would allow the Committee to take action on two critical fronts: First, to aggressively pursue decriminalization of same-sex sexual activity as violative of anti-discrimination and anti-stereotyping treaty provisions; and second, to extend protection from gender-based violence to include violence perpetrated against gender non-conformists.²⁰ If the Committee fails to systematically engage with issues at the intersection of

20. Ways in which people fail to conform to gender norms include non-normative expressions of masculinity and femininity and choice of intimate partner.

gender and sexuality, it will continue to miss crucial opportunities to address one of the most pressing gender-based human rights problems on the African continent and around the world.

II. IDENTITY AND ADVOCACY: AN OVERVIEW

Fundamentally, this Article seeks to answer two questions: (1) Why has the CEDAW Committee been largely ineffective in challenging regimes that oppress based on sexual rights? and (2) How can CEDAW become more effective in protecting sexual rights? The recent retrenchment of laws criminalizing same-sex sexuality within some sub-Saharan African countries provides a useful lens through which to explore action and inaction within the U.N. system. Before turning to an in-depth exploration of sexual rights within sub-Saharan Africa specifically, the following section describes the evolution of LGBTI rights within international advocacy campaigns, offers clarification regarding the terms used within human rights discourse, and explores the conceptual benefits of intersectionality theory in the context of LGBTI rights promotion.

A. International Advocacy

Internationally, there has been a growing recognition of LGBTI rights.²¹ The Human Rights Council,²² for example, has begun to systematically communicate its expectation that states recognize and respect LGBTI rights.²³ In 2008, the U.N. General Assembly passed a declaration recognizing the rights of LGBTI individuals.²⁴ In 2011, the Human Rights Council

21. See, e.g., *Celebrate Pride 2015*, AMNESTY INT'L, <http://www.amnestyusa.org/our-work/issues/lgbt-rights/pride-month> (last visited on Feb. 14, 2016) (inviting people to participate in “the growing movement for recognition of LGBT human rights . . . worldwide”).

22. The Human Rights Council is a UN body “responsible for strengthening the promotion and protection of human rights around the globe and for addressing situations of human rights violations and make recommendations on them.” *Welcome to the Human Rights Council*, UNITED NATIONS OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/HRBodies/HRC/Pages/AboutCouncil.aspx> (last visited Feb. 14, 2016).

23. See *Speak Up to Stop Discrimination*, UNITED NATIONS OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS, <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx> (stating that States have an obligation to “safeguard the human rights of LGBT people”).

24. *UN: General Assembly Statement Affirms Rights for All*, HUMAN RIGHTS WATCH (Dec. 19, 2008), <http://www.hrw.org/news/2008/12/18/un-general-assembly-statement-affirms-rights-all> (explaining that the U.N. General Assembly confirmed “international human rights protections include sexual orientation and gender identity”). With the support of 66 countries, the Declaration highlights the princi-

passed a resolution on sexual orientation and gender identity (the “SOGI Resolution”),²⁵ making it the first time that a U.N. entity has passed a resolution protecting LGBTI rights.²⁶ The U.N. Human Rights Council passed a follow-up resolution underscoring the recognition of LGBTI rights in 2014.²⁷

Violations of the rights of LGBTI individuals may take many forms. The most common include “the rights to life, security of person and privacy, the right to be free from torture, arbitrary arrest and detention, the right to be free from discrimination and the right to freedom of expression, association, and peaceful assembly.”²⁸ Given the breadth of possible rights violations, it is unsurprising that the issues surface within the context of communications from many different human rights treaty bodies.

With each type of rights violation, however, the antecedent violation is discrimination. When, for example, lesbians are targeted for homophobic sexual violence—a violation of the right to security of person—they are targeted as a result of discrimination by public or private actors. As such, discrimination is an undercurrent of all of the aforementioned rights violations. Given the ubiquity of discrimination in LGBTI rights violations and the CEDAW Committee’s focus on gender discrimination, it is surprising that the Committee has not undertaken a more systematic and probing approach concerning discrimination based on non-conforming gender and sexuality.

On March 26, 2007, a group of twenty-nine internationally renowned human rights experts released a set of guiding principles, the “Yogyakarta

ple of non-discrimination as it applies to LGBTI identity. *See id.* (discussing the purpose of the Declaration and noting the signatory countries to the General Assembly).

25. Human Rights Council Res. 17/19, U.N. Doc. A/HRC/RES/17/19 (July 11, 2014).

26. *See* Paula Gerber, *Living a Life of Crime: The Ongoing Criminalization of Homosexuality Within the Commonwealth*, 39(2) ALTERNATIVE L.J. 78, 81 (2014) (describing the “SOGI Resolution” as a “landmark”). South Africa played a leading role, presenting the resolution along with 39 other co-sponsoring states. *Id.* at 81. In 2012, the United Nations High Commissioner for Human Rights presented a report identifying laws around the globe that discriminated against LGBTI individuals. U.N. High Comm’r for Human Rights, *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Sexual Orientation and Gender Identity: Report of the United Nations High Commissioner for Human Rights*, U.N. Doc. A/HRC/19/41 (Nov. 17, 2011) (providing an overview of discriminatory anti-gay laws and describing how they violate international human rights standards).

27. *See generally* Human Rights Council Res. 27/32, U.N. Doc. A/HRC/RES/27/32 (Oct. 2, 2014) (affirming the importance of assuring LGBT rights worldwide).

28. BORN FREE AND EQUAL: SEXUAL ORIENTATION AND GENDER IDENTITY IN INTERNATIONAL HUMAN RIGHTS LAW, UNITED NATIONS OFFICE OF THE HIGH COMM’R FOR HUMAN RIGHTS 10 (2012), <http://www.ohchr.org/Documents/Publications/BornFreeAndEqualLowRes.pdf>.

Principles,” that apply international human rights law to issues related to sexual orientation and gender identity.²⁹ The Yogyakarta Principles address a range of human rights issues, including: non-discrimination; human and personal security; economic, social, and cultural rights; rights of expression, opinion, and association; freedom of movement and asylum; participation in cultural and family life; protection of human rights activists and redress.³⁰

Calling the international response “fragmented and inconsistent,” the drafters of the Principles intended to offer guidance to activists and the U.N. committees that oversee implementation of relevant human rights treaties.³¹ These committees vary in terms of the extent to which they actively address discrimination based on sexual orientation and gender identity in their communications with states concerning treaty compliance.³² The Human Rights Committee, the Committee on Economic, Social and Cultural Rights, the CEDAW Committee, the Committee on the Rights of the Child, and the Committee Against Torture all prohibit some forms of discrimination against members of LGBTI communities.³³ Some treaties open the door for an expansive interpretation of discrimination, because they prohibit discrimination based on a number of enumerated categories and “any other status,” which has been interpreted to include sexual orientation and gender identity.³⁴

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29. Press Release, The Yogyakarta Principles, Experts Release Groundbreaking Principles on Sexual Orientation, Gender Identity, and Human Rights (Mar. 26, 2007) (“The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity were released today by a group of 29 international human rights experts.”).
 30. See *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, THE YOGYAKARTA PRINCIPLES, http://www.yogyakartaprinciples.org/principles_en.htm (last visited on Feb. 14, 2016) (“The Yogyakarta Principles address a broad range of human rights standards and their application to issues of sexual orientation and gender identity.”).
 31. See *The Yogyakarta Principles: An Overview*, THE YOGYAKARTA PRINCIPLES, http://www.yogyakartaprinciples.org/background_en.pdf (last visited on Feb. 14, 2016).
 32. See *infra* notes 38-42 and accompanying text (listing examples of U.N. documents addressing treaty compliance).
 33. See *id.* The Committee on the Elimination of Racial Discrimination (CERD) has noted in several reports that it welcomes anti-discrimination legislation protecting several groups, including sexual minorities. See, e.g., Comm. on the Elimination of Racial Discrimination, Third Periodic Reports of States Parties Due in 2004: South Africa, U.N. Doc. CERD/C/461/Add.3, paras. 32 & 59 (May 19, 2005) (encouraging State parties to prohibit discrimination based on sexual orientation); Comm. on the Elimination of Racial Discrimination, Concluding Observations: Mauritius, U.N. Doc. CERD/C/MUS/15-19, para. 20 (Oct. 16, 2012) (defining prohibited discrimination to include discrimination on the basis of sexual orientation).
 34. See, e.g., International Covenant on Civil and Political Rights, art. 26, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 14668 (entered into force Mar. 23, 1976). (“[T]he law shall prohibit any discrimination and guarantee to all persons equal and

Although the CEDAW Convention does not include a catch-all for “any other status” in its definition of discrimination, there is precedent for a conception of “sex discrimination” that implicitly includes discrimination on the basis of sexual orientation and gender identity.³⁵ In 1994, the Human Rights Committee issued a decision that clarifies that the prohibition on sex discrimination in the International Covenant on Civil and Political Rights (ICCPR) encompasses discrimination based on sexual orientation and gender identity.³⁶ The Human Rights Committee reinforced this finding in subsequent jurisprudence.³⁷

Other human rights treaty bodies have supported the Human Rights Committee’s holding that sexual orientation discrimination is a prohibited form of discrimination.³⁸ For example, the Committee Against Torture has denounced the torture and cruel treatment of LGBTI individuals.³⁹ The

effective protection against discrimination on any ground such as . . . other status.”). *See also* Comm. on Econ., Soc., and Cultural Rights, General Comment No. 20, U.N. Doc. E/C.12/GC/20, para. 27 (July 2, 2009) (defining “other status” as “social groups that are vulnerable and have suffered and continue to suffer marginalization”).

35. *See* Michael O’Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualizing the Yogyakarta Principles*, 8 HUMAN RIGHTS L. REV. 207, 216 (2008) (noting that the CEDAW has not explicitly addressed sexual orientation in General Comments, but has criticized States for allowing discrimination based on sexual orientation).
36. *See* Toonen v. Australia, Communication 488/1992, U.N. Human Rights Committee, U.N. Doc. CCPR/C/50/D/448/1992, para. 8.7 (1994) (“The Committee confines itself to noting, however, that in its view the reference to “sex” . . . is to be taken as including sexual orientation.”).
37. In two subsequent cases, *Young v. Australia* and *X v. Colombia*, the Human Rights Committee affirmed that the ICCPR’s non-discrimination provision included the right to be free from discrimination based on “sex or sexual orientation.” *Young v. Australia*, Communication 941/2000, U.N. Human Rights Committee, U.N. Doc. CCPR/C/78/D/941/2000, para. 10.4 (2003) (finding that Australia violated the ICCPR “by denying the author a pension on the basis of his or her sexual orientation”); *X v. Colombia*, Communication 1361/2005, U.N. Human Rights Comm., U.N. Doc. CCPR/C/89/D/1361/2005, para. 9 (“[T]he Committee finds that the author . . . is entitled to an effective remedy, including reconsideration of his request for a pension without discrimination on grounds of sex or sexual orientation.”).
38. *See, e.g.*, Comm. on Econ., Soc. and Cultural Rights, Concluding Observations of the Comm. on Econ., Soc. and Cultural Rights: Cyprus, U.N. Doc. E/C.12/1/Add.28, para. 7 (Dec. 4, 1998) (“The Committee welcomes the abrogation of the provisions of the Penal Code criminalizing homosexual acts.”); Comm. on the Elimination of Discrimination Against Women, Concluding Observations: Kyrgyzstan, Jan. 19–Feb. 5, June 7–25, 1999, U.N. Doc. A/54/38/Rev.1, para. 128, 54th Sess., Supp. No. 38 (1999) (“The Committee recommends that lesbianism be conceptualized as a sexual orientation and that penalties for its practice be abolished.”).
39. *See, e.g.*, Concluding Observations of the Comm. Against Torture, Egypt, 29th Sess., Nov. 11–22, 2002, U.N. Doc. CAT/C/CR/29/4, para. 5(e) (Dec. 23, 2002), (ex-

Human Rights Committee, the Committee on Economic, Social and Cultural Rights, and the Committee on the Rights of the Child have all called on States parties to combat discrimination against LGBTI youth in schools.⁴⁰ In five separate General Comments, which are intended to guide States parties in their interpretations of treaty obligations, the Committee on Economic, Social and Cultural Rights has clarified that the Convention's non-discrimination provision prohibits LGBTI discrimination as applied to the rights to work, water, social security, and health.⁴¹ In addition, a num-

pressing concern over "the reports received concerning ill-treatment inflicted on men because of their real or alleged homosexuality").

40. *See* Concluding Observations of the Human Rights Comm., Mexico, 98th Sess., Mar. 8–26, 2010, U.N. Doc. CCPR/C/MEX/CO/5, at para. 21 (May 17, 2010) (noting concern over "reports of discrimination against individuals on the basis of their sexual orientation"); Concluding Observations of the Comm. on Econ., Soc., and Cultural Rights, Poland, 43d Sess., Nov 2–20, 2009, U.N. Doc. E/C.12/POL/CO/5, at paras. 12–13 (Dec. 2, 2009) (including "lesbian, gay, bisexual and transgender persons" in groups needing attention to ensure equal rights under the law); U.N. Committee on the Rights of the Child, General Comment No. 3: HIV/Aids and the rights of the child, 32d Sess., Jan. 13–31, 2003, U.N. Doc. CRC/GC/2003/3, at para. 8 (Mar. 17, 2003) ("Of concern also is discrimination based on sexual orientation."); U.N. Committee on the Rights of the Child, General Comment No. 13: The right of the child to freedom from all forms of violence, U.N. Doc. CRC/GC/13, paras. 60 and 72 (April 18, 2011) (providing for protection against discrimination and violence for minority groups); Concluding Observations of the Comm. on the Rights of the Child, New Zealand, 56th Sess., Jan. 17–Feb. 4, 2011, U.N. Doc. CRC/C/NZL/CO/3-4, at para. 25 (April 11, 2011) (recommending that "the State party ensure full protection against discrimination," including for "bisexual, gay, and transgender children"); Concluding Observations of the Comm. on the Rights of the Child, Slovakia, 45th Sess., U.N. Doc. CRC/C/SVK/CO/2, paras. 27–28 (July 10, 2007) (expressing concern that a proposed law does not adequately provide protection in certain areas, including sexual orientation); Concluding Observations of the Comm. on the Rights of the Child, Malaysia, 44th Sess., U.N. Doc. CRC/C/MYS/CO/1, para. 31 (Feb. 2, 2007) ("Concern is expressed at the insufficient efforts made to address discrimination based on sexual orientation.").
41. Comm. on Econ., Soc. and Cultural Rights, General Comment No. 20: Non-discrimination in Econ., Soc. and Cultural Rights, 42d Sess., May 4–22, 2009, U.N. Doc. E/C.12/GC/20, para. 32 (May 25, 2009) (providing that "a person's sexual orientation is not a barrier to realizing Covenant rights"); Comm. on Econ., Soc. and Cultural Rights, General Comment No. 19: The right to social security, 39th Sess., Nov. 5–23, 2007, U.N. Doc. E/C.12/GC/19, para. 29 (Feb. 4, 2008) (noting that social security may not be denied based on a person's sexual orientation); Comm. on Econ., Soc. and Cultural Rights, General Comment No. 18: The right to work, 35th Sess., Nov. 7–25, 2005, U.N. Doc. E/C.12/GC/18, para. 12(b) (Feb. 6, 2006) (stating that "[t]he labour market must be open to everyone" and prohibiting discrimination based on sexual orientation); Comm. on Econ., Soc. and Cultural Rights, General Comment No. 15: The right to water, 29th Sess., Nov. 11–29, 2002, U.N. Doc. E/C.12/2002/11, para. 13 (Jan. 20, 2003) (explaining that the Covenant prevents discrimination based sexual orientation); Comm. on Econ., Soc.

ber of U.N. Special Rapporteurs have challenged LGBTI discrimination and violence, showing that other institutional players have taken seriously the connections between LGBTI rights and gender rights (even if the CEDAW Committee is less consistent in this regard).⁴²

and Cultural Rights, General Comment No. 14: The right to the highest attainable standard of physical and mental health, 22d Sess., April 25–May 12, 2000, U.N. Doc. E/C.12/2000/4, para. 18 (Aug. 11, 2000) (prohibiting discrimination based on sexual orientation for access to health care).

42. Both Special Rapporteurs on Violence Against Women have critiqued proscriptions on women’s sexuality and, in some circumstances, specifically criticized discrimination and violence against LGBTI people. *See, e.g.*, Human Rights Council, Rep. of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, On Her Follow-up Mission to El Salvador, U.N. Doc. A/HRC/17/26/Add.2, para. 28 (Feb. 14, 2011) (by Rashida Manjoo) (“El Salvador is also facing an escalating level of violence against the gay, lesbian, bisexual, transgender and intersex communities. . .”); Comm’n on Human Rights, Rep. of the Special Rapporteur on Violence Against Women, Cultural Practices in the Family That Are Violent Towards Women, U.N. Doc. E/CN.4/2002/83, para. 102 (Jan. 31, 2002) (by Radhika Coomaraswamy) (“Women who transgress the boundaries of appropriate sexual behavior, even in countries where honour killings do not take place, are often subject to violence.”); Human Rights Council, Rep. of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Mission to Turkey, Human Rights Council, U.N. Doc. A/HRC/4/34/Add.2, para. 19 (Jan. 5, 2007) (by Yakin Ertürk) (explaining the importance of female honor in Turkish culture and that “stains may have to be cleansed at any cost, if necessary through murder”).

The Special Rapporteur on Extrajudicial, Arbitrary and Summary Executions and the Special Rapporteur on Torture have condemned violence perpetrated against LGBTI individuals. *See, e.g.*, Comm’n on Human Rights, Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Visit to Mexico, U.N. Doc. E/CN.4/2000/3/Add.3, paras. 91–92 (Nov. 25, 1999) (by Asma Jahangir) (providing information on violence against people based on their sexual orientation); Human Rights Council, Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mission to Colombia, U.N. Doc. A/HRC/14/24/Add.2, para. 74 (Mar. 31, 2010) (by Philip Alston) (“Important targets of unlawful killings by both Colombian State forces and IAGs have historically included human rights defenders, trade unionists, proponents of women’s, victims’ and minority rights, lesbian, gay, bisexual or transgender individuals or people with physical or mental disabilities.”); Comm’n on Human Rights, Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Civil and Political Rights, Including the Question of Disappearances and Summary Executions, U.N. Doc. E/CN.4/2001/9, para. 48 (Jan. 11, 2001) (by Asma Jahangir) (“The Special Rapporteur has continued to receive serious reports of persons having been subjected to death threats or extrajudicially killed because of their sexual orientation.”); Comm’n on Human Rights, Rep. of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Mission to Honduras, U.N. Doc. E/CN.4/2003/3/Add. 2, para. 68 (June 14, 2002) (by Asma Jahangir) (discussing violence “against members of sexual minorities”). Similarly, the Special Rapporteur on Human Rights Defenders has raised awareness of the challenges facing human rights defenders who actively support LGBTI rights. *See, e.g.*, Human Rights Council, Rep. of the Special Rapporteur on

Human Rights Defenders, Mission to Colombia, U.N. Doc. A/HRC/13/22/Add.3, para. 50 (Mar. 4, 2010) (by Margaret Sekaggya) (describing the “emblematic case” of an LGBT activist’s murder). The Special Representative of the Secretary General on human rights defenders has also condemned violence directed at individuals who advocate on behalf of LGBTI communities. *See, e.g.*, Special Representative of the Secretary General on Human Rights Defenders, Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council,” U.N. Doc. A/HRC/4/37, para. 96 (Jan. 24, 2007) (noting that “police or government officials are the alleged perpetrators of violence and threats against defenders of LGBTI rights” and calling for State action about this abuse). Other special rapporteurs have highlighted or referred to LGBTI rights in the context of the right to health, freedom of expression and opinion, and housing.

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Other U.N. treaty bodies have shown greater receptivity to addressing issues related to LGBTI discrimination and violence. In 2012, the United Nations Office of the High Commissioner for Human Rights (OHCHR) conducted an in-depth study of (1) the existing protection for LGBTI rights under international human rights law and (2) the treaty bodies' and other U.N. entities' treatment of LGBTI discrimination.⁴³ The report cites thirty-eight concluding observations from the Human Rights Committee about LGBTI discrimination and violence,⁴⁴ eleven concluding observations from the Committee on Economic, Social, and Cultural Rights about LGBTI rights,⁴⁵ and eight references to LGBTI rights in the concluding observations of each of the following committees: the Committee Against Torture,⁴⁶ the Children's Rights Committee,⁴⁷ and the CEDAW Committee.⁴⁸

Although the references in the OHCHR's report are not exhaustive and the report is therefore a relatively crude metric, the proportional consideration of LGBTI rights is markedly skewed toward the Human Rights Committee. Research conducted by the International Gay and Lesbian Human Rights Commission also suggests that the CEDAW Committee lags behind the Human Rights Committee in the number of times that it addresses LGBTI rights in its concluding observations with States parties.⁴⁹

Other special rapporteurs have highlighted or referred to LGBTI rights in the context of the right to health, freedom of expression and opinion, and housing.

43. See *generally* UNITED NATIONS OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, *supra* note 28.
44. The report makes observations on countries throughout the world—not just sub-Saharan countries. LGBTI discrimination and violence is a worldwide issue. See *id.* at 15, 19, 20, 31-32, 34, 36, 41, 45-46, 52, 57 (citing communications with: Poland, El Salvador, Togo, U.S., Jamaica, Mongolia, Uzbekistan, Grenada, Tanzania, Botswana, St. Vincent & the Grenadines, Algeria, Chile, Barbados, Kenya, Egypt, Romania, Lesotho, Ecuador, France, Denmark, Sweden, Slovakia, Finland, Cyprus, Cameroon, Ethiopia, Sudan, Iran, San Marino, Austria, Greece, Ireland, United Kingdom, Kuwait, Russia, Japan, Mexico).
45. See *id.* at 31, 42, 45, 52 (citing communications with: Kyrgyzstan, Cyprus, Poland, China, Trinidad and Tobago, Ireland, Sweden, Liechtenstein, Monaco, Brazil, Germany).
46. See *id.* at 20, 24, 26, 43 (citing communications with: Poland, Mongolia, Moldova, U.S., Costa Rica, Egypt, Latvia, Ecuador).
47. See *id.* at 32, 42, 43, 52 (citing communications with: Chile, Isle of Man, United Kingdom, Austria, New Zealand, Slovakia, Malaysia, China, United Kingdom & Northern Ireland).
48. See *id.* at 15, 18, 31, 41, 44, 46, 51 (citing communications with: South Africa, Uganda, Kyrgyzstan, Montenegro, Panama, Germany, Argentina, Costa Rica).
49. Using data from the IGLHRC (2008-2012), I found that the references to LGBTI rights in concluding observations were as follows: Human Rights Committee – 29 references with 7 from Africa; CEDAW Committee – 19 references with 3 from Africa; Committee on Economic, Social and Cultural Rights – 18 references with 2

Given the fundamental connections between gender and sexuality, the CEDAW Committee should lead the way in addressing LGBTI rights.

Further, the OHCHR report misses several opportunities to conceptually link gender discrimination with LGBTI discrimination. In its discussion of transphobic and homophobic violence, for example, the OHCHR's report links the right to freedom from homophobic violence to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the Refugee Convention.⁵⁰ The report acknowledges that "these attacks constitute a form of gender-based violence, driven by a desire to punish those seen as defying gender norms."⁵¹ Aside from that passing reference, however, the report, like the CEDAW Committee itself, fails to properly and systematically conceive of homophobic and transphobic violence as a form of gender-based violence that falls within the purview of the CEDAW Convention.⁵² Thus, a strong and coordinated approach to LGBTI discrimination is still lacking within international human rights treaty bodies.⁵³ Further, the CEDAW Committee has been somewhat

from Africa; Committee Against Torture – 15 references with 0 from Africa; Committee on the Elimination of Racial Discrimination – 5 references with 0 from Africa; Committee on the Rights of the Child – 0 references. INT'L GAY & LESBIAN HUMAN RIGHTS COMM'N, UNITED NATIONS TREATY-BASED BODIES CEDAW, HUMAN RIGHTS COMMITTEE, CESC, CRC AND CAT: CONCLUDING OBSERVATIONS, GENERAL RECOMMENDATIONS AND GENERAL COMMENTS RELATED TO SEXUAL ORIENTATION AND GENDER IDENTITY (2013), http://www.iglhrc.org/sites/default/files/UNTreaty%20Bodies_RefSOGI.pdf. See also INT'L GAY & LESBIAN HUMAN RIGHTS COMM'N, EQUAL AND INDIVISIBLE: CRAFTING INCLUSIVE SHADOW REPORTS FOR CEDAW 7 (2009), <http://www.iglhrc.org/sites/default/files/287-1.pdf> [hereinafter EQUAL AND INDIVISIBLE] ("[O]ther treaty bodies have looked at the issue in a more comprehensive way than the CEDAW Committee and have given serious consideration to sexual rights abuses in their reviews of states. . .").

50. See UNITED NATIONS OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS, *supra* note 28, at 14 ("[F]ailure by State authorities to investigate and punish this kind of [transphobic and homophobic] violence is a breach of States' obligation to protect everyone's right to life, liberty and security of person, as guaranteed by article 3 of the Universal Declaration of Human Rights and articles 6 and 9 of the International Covenant on Civil and Political Rights.").
51. *Id.* at 15.
52. The report lists the primary human rights treaties implicated in homophobic violence but omits the CEDAW Convention. See *id.* at 14. The report does credit the CEDAW Committee with addressing LGBTI violence in the context of its concluding observations on South Africa. The report cites to the Committee's concluding observations on South Africa two times to support the assertion that the CEDAW Committee has expressed serious concern about violence directed at women based on sexual orientation. See *id.* at 15, 18.
53. Mindy Jane Roseman & Alice M. Miller, *Normalizing Sex and its Discontents: Establishing Sexual Rights in International Law*, 34 HARV. J. L. & GENDER 313, 318 (2011).

constrained and tentative in addressing LGBTI rights in the context of its gender-based human rights work despite the links between the social regulation of gender and sexuality.⁵⁴

In addition to *international* developments in LGBTI rights protection, *regional* human rights systems have also addressed LGBTI discrimination and violence. For example, the African Charter on Human and Peoples' Rights, a regional human rights treaty, provides protection for LGBTI individuals within the region.⁵⁵ In a 2007 case involving Zimbabwe, the African Commission on Human and Peoples' Rights (the "African Commission") stated that the Charter's prohibition of discrimination based on "any status" includes non-discrimination based on sexual orientation.⁵⁶ In May 2014, the African Commission passed a resolution titled "Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity."⁵⁷ Although the resolution is non-binding, the unequivocal support for LGBTI rights signals a new and important commitment from the African Commission.⁵⁸ The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa is silent with respect to sexual orientation and gender identity.⁵⁹ Thus, given its 2014 resolution on sexual orientation and gender identity, the Commission may interpret the Protocol's provisions in a way that supports LGBTI rights promotion within the region.

54. See *infra* notes 109–113 and accompanying text.

55. See African Charter on Human and Peoples' Rights, arts. 2, 3, *entered into force* Oct. 21, 1986, 21 I.L.M. 58 (providing protection for "every individual . . . without distinction of any kind such as race, ethnic group, color, sex, language . . . or other status" and stating that "every individual shall be equal before the law").

56. See Zimbabwe Human Rights NGO Forum v. Zimbabwe, Communication 245/2000, 21st Activity Report of the African Commission on Human and Peoples' Rights (May–November 2006) January 2007 EX.CL/322(X) Annexure III para. 169 ("The aim of [the Charter's non-discrimination] principle is to ensure equality of treatment for individuals irrespective of nationality, sex, racial or ethnic origin, political opinion, religion or belief, disability, age or sexual orientation.").

57. African Commission on Human and Peoples' Rights Res. 275 (May 12, 2014).

58. Before 2014, the Commission faced considerable criticism from NGOs working on LGBTI rights for its denial of observer status to the Coalition of African Lesbians (CAL). See, e.g., *Cold Shoulder for Gay Rights in Africa*, WEST CAPE NEWS (Nov. 25, 2010), <http://westcapenews.com/?p=2512> (describing the attempt by the CAL to receive observer status and the Commission's denial).

59. See AFRICA COMM'N ON HUMAN & PEOPLES' RIGHTS, PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS ON THE RIGHTS OF WOMEN IN AFRICA (2003) (failing to address either gender orientation or sexual identity).

B. Terminological Constraints of “Women”

CEDAW’s focus on ensuring equality between women and men has historically served to justify a relatively narrow interpretation of the convention’s mandate.⁶⁰ This happens in two primary ways. First, the CEDAW Committee has often uncritically treated the category of women as a unified group with universal applicability, ignoring both the great diversity within the category and the significant insights of intersectionality.⁶¹ Second, this focus on the category of “women” reinforces a rigid and naturalized notion of biological sex as the primary prerequisite for claiming rights under CEDAW.

“Sex” has historically been understood as focusing on the biological and physiological determinants of male or female identity. The focus on physical attributes and genitalia tends to reinforce the notion of a sexual binary, in which one simply “is” male or female.

In contrast, “gender” is a term to identify and analyze the social constructions surrounding biological sex. In some recent international discourse, however, “gender” has become synonymous with “women,” collapsing the concepts and losing the constructionist focus of “gender.”⁶² As Mindy Jane Roseman and Alice M. Miller note, a “tension results from the assimilation of gender to identity politics (therefore using gender as a substitute for women), rather than the use of gender as a relational concept and a critique of power exercised differentially on the basis of sex.”⁶³ Miller also notes that “gender” is most commonly invoked in reference to either heterosexual women or to gay men, leaving lesbians and others outside of the analytical matrix.⁶⁴

60. See Darren Rosenblum, *Unsex CEDAW, or What’s Wrong with Women’s Rights*, 20 COLUM. J. GENDER & L. 98, 101 (2011) (“CEDAW’s focus on ‘women’ enshrines the male/female binary in the core of international law when CEDAW’s goals would be better served by seeking the elimination of the categories themselves.”).

61. See generally, e.g., Kimberle Williams Crenshaw, *Gender-Related Aspects of Race Discrimination*, Background Paper submitted to the Expert Group Meeting on Gender and Racial Discrimination, U.N. Doc. EGM/GRD/2000/WP.1 (2000); Johanna Bond, *International Intersectionality: A Theoretical and Pragmatic Exploration of Women’s International Human Rights Violations*, 52 EMORY L.J. 71 (2003) (discussing shortcomings of the CEDAW’s interpretation of “women”); Lisa A. Crooms, *Indivisible Rights and Intersectional Identities or “What Do Women’s Rights Have to Do With the Race Convention?”*, 40 HOW. L.J. 619 (1997).

62. Roseman & Miller, *supra* note 53, at 327 (citing “gender-mainstreaming, gender-based violence, and gender-based persecution” as examples).

63. *Id.*

64. See Ali Miller, *Fighting Over the Figure of Gender*, 31 PACE L. REV. 837, 838 (2011).

The fault line divides gender either into shorthand for attention to ‘women’ deemed a unified, single category; or gender into shorthand for an aspect of

The term “sexual orientation and gender identity” or “SOGI” has gained currency in global campaigns for LGBTI rights within the last decade. Sexual orientation is defined as “affective preference for a particular gender/sex of one’s sexual partner.”⁶⁵ Gender identity refers to “an aspect of identity linked to the sense of being male or female.”⁶⁶ SOGI has been useful in some international advocacy efforts, but the umbrella term sometimes “obscures, [sic] a much more complex reality of diverse sexual and gender practices” because it can be overbroad in linking sexual orientation and gender identity.⁶⁷

The terms “LGBT” and “LGBTI” have been used to describe those whose sexual orientation or gender identity is non-normative. In practice, however, the seemingly inclusive term tends to focus mostly on gay men (rather than on lesbian, bisexual, and transgender people).⁶⁸ As such, some individuals have chosen to self-identify as queer, rejecting categorization under SOGI or LGBT.

In sum, the continued saliency of the sex binary, the conflation of “gender” and “women,” and the focus on male gender expression within many gender identity advocacy efforts constrain queer feminist engagement with evolving sexual and gender identity categories within international human rights discourse.⁶⁹

Moreover, there may be situations in which the most successful tactic is to abandon restrictive identity categories altogether. As Sonia Katyal has argued, “[a]lthough there is certainly an appreciable emergence of self-identified ‘gay’ or ‘lesbian’ individuals throughout the world, many Western activists and scholars often fail to recognize that arguments for legal protection on the basis of sexual orientation often collide with, rather than incorporate, these pre-existing social meanings of same-sex sexual activity.”⁷⁰ Writing from an international health and development policy perspective, Rachel

gay (male), or more recently transgender, identity. Reductive and mutually exclusive uses of one of these two versions of gender abound in advocacy on U.N. policy and programming, and in the resulting policy, norms, development, and programming itself.

65. Roseman & Miller, *supra* note 53, at 325.

66. Miller, *supra* note 64, at 838.

67. *Id.* at 856.

68. Roseman & Miller, *supra* note 53, at 326.

69. See Miller, *supra* note 64, at 858.

To counter this concern, *some* sexual rights/queer feminists in human rights advocacy have been dedicated supporters of the diffusion of the [Yogyakarta Principles] in particular, and SOGI rights claims, more generally around the globe, and work against the tide to open up SOGI’s lock on gender to merge it with a diversity of women’s claims around gender expression and diversity

70. Sonia Katyal, *Exporting Identity*, 14 YALE J. L. & FEMINISM 97, 100 (2002).

Bergenfield and Alice M. Miller agree, noting that such an approach “risks contributing to in-group marginalization, misrecognition, and fracturing; ‘LGBT’ is a term that arguably grew out of political movements in the US, is not always the preferred or common term among people in aid recipient countries, and may not reflect the groups that are actually included in a program.”⁷¹

To some extent, queer and feminist theory offer an alternative to the headlong embrace of identity categories, although I view those categories (such as gay and lesbian) as strategically valuable in many cases and in many campaigns. Rather than focus on identity categories, queer theory emphasizes “resistance to heteronormative structures, and to essentialist claims to identity itself.”⁷² As Darren Rosenblum explains:

Compulsory heterosexuality, the system that forces women to define themselves in relation to men, dictates women’s heterosexuality. . . . A limited concentration on lesbian and gay legal needs, the extension of rights to people without regard to sexual orientation, inadequately describes queer legal needs. If such a narrow focus is taken, intersectional queers will face exclusion by other forces of subordination in the law, such as classism, sexism, and racism.⁷³

Feminist theorists such as Judith Butler have popularized the notion of sex as iterative performativity, or “a regularized and constrained repetition of norms” that creates the impression of a fixed and stable sex.⁷⁴ Butler’s performative understanding of sex and gender undermines the binaries typically associated with sex (male/female), gender (masculine/feminine), and sexual orientation (heterosexual/homosexual).⁷⁵ Both queer and feminist theory underscore the relationship between sex, gender, and heteronorma-

71. Rachel Bergenfield & Alice M. Miller, *Queering International Development? An Examination of New “LGBT Rights” Rhetoric, Policy, and Programming among International Development Agencies*, LGBTQ POLICY JOURNAL (Nov. 20, 2014), http://www.hkslgbtq.com/wp-content/uploads/2014/11/Queering-International-Development_-An-Examination-of-New-_LGBT-Rights_-Rhetoric-Policy-and-Programming-among-International-Development-Agencies-1.pdf.

72. Katyal, *supra* note 70, at 117.

73. Darren Rosenblum, *Queer Legal Victories: Intersectionality Revisited*, in QUEER MOBILIZATIONS: LGBT ACTIVISTS CONFRONT THE LAW 38, 40–41 (Scott Barclay et al. eds., 2009).

74. BUTLER, *supra* note 1 at 95.

75. See *id.* at 59–60 (discussing the “‘performative’ dimension of construction” and how this affects gender understanding).

tivity.⁷⁶ Butler critiques “a hegemonic discursive/epistemic model of gender intelligibility that assumes that for bodies to cohere and make sense there must be a stable sex expressed through a stable gender (masculine expresses male, feminine expresses female) that is oppositionally and hierarchically defined through the compulsory practice of heterosexuality.”⁷⁷ Butler’s conceptualization of gender as stylized performance significantly influenced the evolution of queer and feminist theory.⁷⁸

The conceptual links between gender and LGBTI identity, and the specific ways in which they manifest throughout the sub-Saharan region, support the use of a gender lens as an alternative, intersectional and often complementary, framing of LGBTI rights.⁷⁹ Gender non-conformity can be an act of queer and feminist resistance. It can also expose one to acts of homophobic, gender-based violence.⁸⁰ Sexual violence targeting lesbians occurs in many parts of the world, including the United States and other western countries.⁸¹ “[I]n South African black culture, being a black lesbian is seen as negative, as destroying the nuclear heterosexual family, and as un-African. There are expectations that African women must have children and procreate with a male partner who is to be head of the family.” By failing to conform to these expectations, South African black lesbians are “perceived as deviants” and suffer “curative rapes” intended to “erase [their] desires to be male.”⁸²

76. Darren Rosenblum describes the queer continuum in a way that reflects this understanding. He states, “The queer continuum likewise includes a range of people who resist compulsory heterosexuality, including sexual minority activists and those who do not even identify as a sexual minority but nonetheless subvert traditional gender and sexual identities.” Rosenblum, *supra* note 73, at 41.

77. BUTLER, *supra* note 1, at 151, n. 6.

78. See, e.g., Cossman, *supra* note 5, at 281 (describing Butler’s theory of gender performance as “groundbreaking”).

79. See generally, Carla A. Pfeffer, “I Don’t Like Passing as a Straight Woman”: *Queer Negotiations of Identity and Social Group Membership*, 120 AM. J. SOCIOLOGY 1 (2014) (discussing the relationship between gender and LGBT identity).

80. See Kate Gilles, *Gender-Based Violence Against the Transgender Community is Underreported*, POPULATION REFERENCE BUREAU (Dec. 2011), <http://www.prb.org/Publications/Articles/2011/gender-based-violence-transgender.aspx> (noting the violence against people who are transgender).

81. Lisa Aronson Fontes & Kathy A. McCloskey, *Cultural Issues in Violence Against Women*, in SOURCEBOOK ON VIOLENCE AGAINST WOMEN 151, 159 (Claire M. Renzetti et al. eds., 2d ed., 2010) (citing an Australian study in which lesbians reported a high rate of sexual violence).

82. ZANELE MUHOLI, MAPPING OUR HISTORIES: A VISUAL HISTORY OF BLACK LESBIANS IN POST-APARTHEID SOUTH AFRICA 19 (2013), zasb.unibas.ch/fileadmin/afrikakomp/redaktion/Dokumente/Veranstaltungen_2013/ZM_moh_final_230609.pdf.

Thus, gender's emphasis on social construction and the fluidity of identity categories makes it conceptually beneficial to use gender as a focal point to explore discrimination and violence based on sexual orientation and gender identity.⁸³ This is particularly important in the context of sub-Saharan Africa, where rigid identity categories such as gay and straight tend to have less resonance than they might in the global north. Gender-based analysis has the potential to reach beyond those who identify as gay, lesbian, or bisexual to encompass individuals whose gender expression or sexuality is non-normative but who do not self-identify as gay or lesbian.

Although many of the goals significantly overlap, feminist, queer, and trans politics do not map perfectly upon one another. For example, some early feminist responses to trans activists and scholars were hostile, leading to mistrust and rifts among potential allies.⁸⁴ Some trans theorists argue that *transgender* activists are privileged over *transsexual* activists in their alliances with feminist and queer theorists.⁸⁵ Transgender claims are often framed in feminist and queer terms that reject the imposition of gendered norms and stereotypes.⁸⁶ In contrast, some transsexual activists embrace the gender binary as they transition to a sex that was not assigned at birth.⁸⁷ This difference in focus has led some to conclude that transgender concerns resonate more with feminist and queer scholars and activists, creating a hierarchy of progressive causes in which transsexuals purportedly occupy a lower position.⁸⁸

Some trans people reject Butler's view of gender as performative, because they interpret her to say that their lived experience of gender was constructed rather than real.⁸⁹ Butler observes, "Some trans people thought that in claiming that gender is performative that I was saying that it is all a

83. See *supra* notes 62–64 and accompanying text (defining gender).

84. PATRICIA ELLIOT, DEBATES IN TRANSGENDER, QUEER, AND FEMINIST THEORY: CONTESTED SITES 18 (2010) (describing the transphobic response of some feminists such as Janice Raymond).

85. Transgender is "an umbrella term for people whose gender identity and/or gender expression differs from what is typically associated with the sex they were assigned at birth." Transsexual, on the other hand, "originated in the medical and psychological communities" and is "not an umbrella term." *GLAAD Media Reference Guide—Transgender Issues*, GLAAD, <http://www.glaad.org/reference/transgender> (last visited Feb. 14, 2016).

86. See, e.g., *Feminist Perspectives on Trans Issues*, STANFORD ENCYCLOPEDIA PHIL. (Jan. 8, 2014), <http://plato.stanford.edu/entries/feminism-trans> [hereinafter *Feminist Perspectives*] (discussing transgender arguments against gender stereotypes).

87. ELLIOT, *supra* note 84, at 12.

88. See *Feminist Perspectives*, *supra* note 86 (analyzing the relationship between trans and feminist activist movements).

89. See *id.* at Part 5.3. (covering trans critiques of Butler's work).

fiction, and that a person's felt sense of gender was therefore 'unreal.'⁹⁰ Despite Butler's contention that she intended to be inclusive, however, Patricia Elliot points out that in Butler's world of fluid gender, an individual's desire for any/other sex could be satisfied without the need for sex reassignment surgery, suggesting that Butler's vision of gender performance is not sufficiently attentive to transsexual concerns.⁹¹

Additional fissures exist in the persistent hierarchies of struggles for equality. For example, one trans commentator argues that "contempt for transsexual people" stems from "the claim that transgender/queer theorists and activists ignore transsexual efforts to achieve sex/gender congruence, misread transsexual goals as conservative, and disparage transsexual desires to live as women and men."⁹² Other theorists have attempted to find common ground, resisting appeals to describe one community as more transgressive than the rest.⁹³

A common, fundamental theme of a rights claiming regime, such as the U.N. human rights system, is autonomy.⁹⁴ Autonomy allows one to resist the social regulatory function of norms concerning sex, gender, and sexuality. Sexual autonomy allows an individual to expose the false binary of male/female or render gender unintelligible by performing gender in a way that transgresses social norms. Sexual autonomy provides transsexuals the option to embrace the gender binary and construct a sex and gender identity that is coherent and intelligible, without denigrating the choice of transsexuals to live as either a man or a woman.

C. Intersectionality as Analytical Method

There has been some progress at the United Nations in recognizing the intersections between 1) discrimination based on gender and 2) discrim-

90. Cristan Williams, *Gender Performance: The TransAdvocate Interviews Judith Butler*, TRANS ADVOCATE (May 1, 2014), http://www.transadvocate.com/gender-performance-the-transadvocate-interviews-judith-butler_n_13652.htm.

91. See ELLIOT, *supra* note 84, at 48 ("On this point, it is reasonable to conclude that even if Butler does not intend to deny transsexual realities, her ideal gender landscape is one in which the desire and experience of many transsexuals make little sense.").

92. *Id.* at 40 (discussing the work of Viviane Namaste).

93. See generally, *id.* (discussing various views from transgender theorists).

94. A rights claiming regime is a system in which people can claim certain rights from the state. See generally, Aziza Ahmed, "Rugged Vaginas" and "Vulnerable Rectums": *The Sexual Identity, Epidemiology, and Law of the Global HIV Epidemic*, 26 COLUM. J. GENDER & L. 1, 6 (2013) (explaining how sex workers attempt to claim rights from the state).

ination based on sexual orientation and gender identity.⁹⁵ The U.N. human rights treaty-making bodies have, at times, offered interpretations that support an intersectional approach to human rights violations.⁹⁶ In some cases, the treaty bodies recognize that discrimination based on gender intersects and supports discrimination based on race, ethnicity, religion, age, sexual orientation, gender identity, and other aspects of identity. Intersectionality theory requires a complex understanding of discrimination, recognizing that a woman may be simultaneously discriminated against on the basis of, for example, both race and gender or race, gender and sexual orientation.⁹⁷ Intersectionality also promotes the recognition that one may simultaneously experience discrimination along one axis of identity and experience privilege along another axis.⁹⁸

Intersectionality promotes consideration of the myriad ways in which forms of discrimination intersect and are mutually constitutive of each other.⁹⁹ Intersectional analysis exposes the ways in which some campaigns for LGBTI rights have ignored harmful race and class dynamics within sub-Saharan Africa.¹⁰⁰ Intersectional analysis also reveals a scholarly and activist focus on gay men that often minimizes or excludes the experiences of lesbians and others who do not identify as gay men.¹⁰¹ Intersectionality thus facilitates a deeper understanding of the ways in which different forms of privilege, including class and race privilege, affect how one experiences gender and sexuality.

Bergenfield and Miller illustrate the intersection of class and sexuality privilege with a quote from a young, gay, West African man who partici-

95. See, e.g., Human Rights Council, Rep. of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, U.N. Doc. A/HRC/17/26 para. 51 (May 2, 2011) (by Rashida Manjoo) (acknowledging additional factors in discrimination against women, including sexual orientation).

96. See *infra* note 115 and accompanying text.

97. See Christine E. Bose, *Intersectionality and Global Gender Inequality*, 26 GENDER & SOCIETY 67, 67 (2012) (noting that intersectionality “significantly advanced research on women of color and about others who experience multiple forms of oppression in society”).

98. See generally PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT* (1990) (analyzing the connections between intersectionality and discrimination and providing examples from the experiences of black women).

99. See Valdes, *supra* note 2, at 372 (explaining that intersectionality shows how “multiple axes of discrimination . . . operate in tandem”).

100. But see Ryan Richard Thoreson, *Somewhere over the Rainbow Nation: Gay, Lesbian and Bisexual Activism in South Africa**, 34 J. S. AFR. STUD. 679, 690 (2008) (discussing LGBT activism in South Africa).

101. See, e.g., Sylvia Tamale, *Out of the Closet: Unveiling Sexuality Discourses in Uganda*, in AFRICA AFTER GENDER? 17, 18-21 (Catherine M. Cole, et al., eds. 2007) (noting that “[e]ven the law seems more preoccupied with male-on-male sex when it criminalizes intercourse ‘against the order of nature.’”).

pated in a development program concerning safer sex practices.¹⁰² The man observed, “Every day you are talking about condom and lubricant. Are we going to eat condom and lubricant? You are coming to talk to us about HIV when people are beating us!”¹⁰³ The program failed to consider the ways in which poverty and class bias intersect with sexuality to construct this young man’s experience.¹⁰⁴

The CEDAW Committee has a mixed record on recognizing the intersectional nature of rights violations. In 2010, the Committee adopted a general recommendation concerning older women.¹⁰⁵ In it, the Committee recognizes that “the discrimination older women experience is often multidimensional, with age discrimination compounding other forms of discrimination based on sex, gender, ethnic origin, disability, levels of poverty, sexual orientation and gender identity, migrant status, marital and family status, literacy, and other grounds.”¹⁰⁶ Both the Committee’s recognition of intersectionality and its explicit reference to sexual orientation and gender identity are important. In another general recommendation addressing Article 2 and the core obligations of States parties, the Committee underscored the importance of intersectionality: “[i]ntersectionality is a basic concept for understanding the scope of the general obligations of States parties contained in Article 2.”¹⁰⁷ Despite these brief references to intersectionality, the Committee has yet to develop a method for consistently applying intersectional theory in its interpretation of obligations under the treaty.¹⁰⁸

102. See Bergenfield & Miller, *supra* note 71, at 19 (“A young gay man from a West African city who participated in a development agency-funded program aimed at increasing safer sex practices among gay men and men who have sex with men explained [his experiences] to a program staff member.”).

103. *Id.*

104. See *id.* (“This man emphasized that the myopic focus of the program only addressed one aspect of his life (sexual behavior), while neglecting his interrelated experiences of hunger, economic deprivation, and violence.”).

105. See Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 27 on Older Women and Protection of Their Human Rights, U.N. Doc. CEDAW/C/2010/47/GC.1 (Oct. 19, 2010) (affirming a commitment to the protection of all women, regardless of their age).

106. *Id.* at para. 13.

107. Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 28 on the Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women, U.N. Doc. CEDAW/C/GC/28, para. 18 (Dec. 16, 2010).

108. See generally Bond, *supra* note 61 (addressing the Committee’s failure to apply intersectionality in treaty interpretation and application); Crooms, *supra* note 61 (same).

In 2013, the Committee adopted General Recommendation 29 on Article 16 of the Convention.¹⁰⁹ The general recommendation, which addresses the “economic consequences of marriage, family relations and their dissolution,”¹¹⁰ notes that it “integrates social and legal developments that took place since the adoption of [General Recommendation No. 21], such as the adoption by some States parties of laws on registered partnerships and/or de facto unions, as well as the increase in the number of couples living in such relationships.”¹¹¹ The general recommendation also notes that families come in a variety of forms. In the only paragraph to explicitly mention same-sex relationships, the Committee’s language is tepid at best, stating:

Certain forms of relationship (i.e. same sex relationships) are not legally, socially or culturally accepted in a considerable number of States parties. However, where they are recognized, whether as a de facto union, registered partnership or marriage, the State party should ensure protection of the economic rights of the women in those relationships.¹¹²

Although certainly a positive development to include such language, the Committee’s language is restrained, missing yet another opportunity to use a gender lens to examine discrimination against LGBTI individuals. Instead, the Committee is largely deferential to States parties concerning the extent to which the state recognizes the family and marriage rights of LGBTI individuals.¹¹³ Intersectional analysis would allow the Committee to explore how gender norms operate to disadvantage those in non-normative familial relationships.

Despite its cautious willingness to recognize LGBTI rights in certain contexts within the last few years, the CEDAW Committee has missed opportunities to fully embrace an intersectional approach to its analysis of women’s rights globally. As I have discussed elsewhere, the Committee continues to be reluctant to systematically embrace intersectionality as an analytical frame.¹¹⁴ Doing so would provide a crucial mechanism through which to explore discrimination and violence perpetrated against LGBTI

109. Comm. on the Elimination of Discrimination Against Women, General Recommendation on Article 16 of the Convention on the Elimination of All Forms of Discrimination Against Women, U.N. Doc. CEDAW/C/GC/29 (Feb. 26, 2013).

110. *Id.* at paras. 1–5.

111. *Id.* at para. 6.

112. *Id.* at para. 24.

113. *Id.* at para. 6.

114. See generally Bond, *supra* note 61 (considering the theoretical structures of the United Nations’ and other organizations’ approach to women’s rights).

communities. To date, the Committee has taken steps to recognize intersectional forms of discrimination, but these steps have been limited and episodic.¹¹⁵

1. Race, Nation, and the Construction of Sexuality

In response to increasing calls for LGBTI rights within the sub-Saharan region, there has been an increase in public homophobia coming from the top levels of political leadership in a handful of countries, including Gambia, Kenya, Namibia, Swaziland, Uganda, Zambia, and Zimbabwe.¹¹⁶ These homophobic remarks have been viewed by many as a means of distracting from the many social and economic ills facing particular nations.¹¹⁷ Some scholars have attributed a rise in both public and private violence and discrimination against LGBTI individuals to homophobic public statements made by national leaders.¹¹⁸

Using high-profile homophobic statements as a metric to measure homophobia in a particular country, however, is misguided. There is a danger that “[t]his ‘teleological development narrative’ uses the state recognition of LGBT rights to mark a country’s cultural and political progress, and in the process, produces a ‘new racism’ that elevates western and westernized democracies over newly democratizing states in the global south.”¹¹⁹

Anti-gay rhetoric from African leaders like Robert Mugabe, of Zimbabwe, may reflect resistance to the “civilizing mission” of colonial oc-

115. *Id.* (addressing Committee approaches to recognizing intersectional forms of discrimination).

116. See Vasu Reddy, *Homophobia, Human Rights and Gay and Lesbian Equality in Africa*, 50 *AGENDA* 83, 83–85 (2001) (quoting political leaders making homophobic comments). See also Ludovica Iaccino, *Gay Rights: Most Homophobic Comments by World Leaders*, *INT’L BUS. TIMES* (Feb. 27, 2014), <http://www.ibtimes.co.uk/gay-rights-most-homophobic-comments-by-world-leaders-1438063> (describing homophobic comments by Gambian President Yahya Jammeh).

117. See, e.g., Katherine Franke, *Sexual Tensions of Post-Empire* 11 (Feb. 6, 2004) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=491205 (“Human rights activists have critiqued the Mugabe government’s attacks on homosexuality as a means to distract attention away from the nation’s political and economic problems.”).

118. See Tiffany M. Lebrón, Comment, “*Death to Gays!*” *Uganda’s ‘One Step Forward, One Step Back’ Approach to Human Rights*, 17 *BUFF. HUM. RTS. L. REV.* 173, 173 (2011) (“As James Wilets observed, ‘the actions of powerful religious and other institutions can have a direct impact on violence and murder against sexual minorities,’ and the events that have recently taken place in Uganda certainly lend credence to this idea.”).

119. Ashley Currier, *Representing Gender and Sexual Dissidence in Southern Africa*, 34 *QUALITATIVE SOCIOLOGY* 463, 465 (2011) (citations omitted).

cupation.¹²⁰ As such, colonial history forms an omnipresent backdrop to contemporary transnational discourses related to sexuality.¹²¹ The framing of liberal, gay-friendly states as “civilized” and opposed to illiberal, repressive states elides the ways in which colonialism continues to influence and construct national identity. European colonialists justified colonial occupation, in part, by the “deviant masculinities of non-western traditions, which were teamed up with markers of racial inferiority.”¹²² Dianne Otto cautions, “Queer advocacy must take intersectionality seriously and forge a wider social justice politics that is attentive to the continuing effects of the imperial hierarchies of race, nation, religion, ethnicity, indigeneity, ability and so on as well as those of gender and sexuality.”¹²³

This “new racism” is particularly vexing given that the sub-Saharan African region inherited from colonial powers many of the laws that are now used to persecute and discriminate against LGBTI individuals.¹²⁴ Also, as discussed in section IV.A *infra*, several of the region’s most pernicious examples of anti-sodomy legislation resulted from extensive consultation with U.S. evangelical leaders. The direct influence of colonial authority on criminal regulation, along with contemporary collaborations with western evangelicals, undermines any characterization of the problem as an Africa-specific “cultural” problem.¹²⁵

Much of the anti-gay rhetoric from political leaders like Mugabe in Zimbabwe and Museveni in Uganda has emphasized that LGBTI rights are decidedly “un-African” and an import from the West.¹²⁶ This sentiment is widespread across the region: One scholar from Ghana notes, “The

120. Dianne Otto, *Transnational Homo-Assemblages: Reading ‘Gender’ in Counter-Terrorism Discourses*, 4 JINDAL GLOBAL L. REV. 79, 87 (2013).

121. Franke, *supra* note 117 at 3 (“[S]tate efforts to eradicate the traces of empire and to resurrect an authentic post-colonial nation have produced sexual subjects that serve as a kind of existential residue and reminder of a demonized colonial past and absence.”).

122. Otto, *supra* note 120, at 87.

123. *Id.* at 94.

124. See generally HUMAN RIGHTS WATCH, *THIS ALIEN LEGACY: THE ORIGINS OF ‘SODOMY’ LAWS IN BRITISH COLONIALISM* (2008), http://www.hrw.org/sites/default/files/reports/lgbt1208_webwcover.pdf [hereinafter *This Alien Legacy*] (describing the history of anti-gay laws).

125. In response to charges that same-sex sexuality is “un-African,” a number of commentators have pointed out the real cultural import was homophobia rather than same-sex sexual conduct. See, e.g., Marc Epprecht, *Black Skin, ‘Cowboy’ Masculinity: A Genealogy of Homophobia in the African Nationalist Movement in Zimbabwe to 1983*, 7 CULTURE, HEALTH & SEXUALITY (2005) (“Homophobia, not homosexuality, would appear to be the real ‘White man’s disease’ in the region.”).

126. See, e.g., Reddy, *supra* note 116, at 84 (quoting the Zambian president as saying, “That homosexuals are free to do as they please in the West does not mean they must be freed to do the same here”).

Ghanaian government, just as its Zimbabwean, Kenyan, and Ugandan counterparts, and also religious institutions, largely perceive homosexuality as another form of Western cultural infiltration and imperialism.”¹²⁷

By associating homosexuality with the West and by calling it “un-African,” some have attempted to link African authenticity with “traditional” values that conflict with the “modern” West.¹²⁸ As such, Mugabe and others craft a form of citizenship that is purportedly traditional, drawing national identity from “traditional” values and the antithesis of modernity.¹²⁹

[I]t is . . . the static notion of a reified culture functioning as ideology and the recognition of sexual relations as an indicator of social power that are manifest in the rhetoric of Robert Mugabe and other senior government officials when they have repeatedly defined homosexuality as anti-Zimbabwean and ‘whitewashed’ it as a ‘sickness’ imported by white settlers.¹³⁰

The response of Mugabe and other African leaders toward what they regard as “white intervention” cannot be disentangled from the region’s colonial past and its history of racialized exploitation.¹³¹

Anthropologists and other scholars have long discredited the view that same-sex sexual behavior is simply an import from the West.¹³² Indeed, a number of scholars point out that the true import from the colonial era was not same-sex sexuality but, rather, homophobia.¹³³ The imposition of colo-

127. Kwame Essien & Saheed Aderinto, “*Cutting the Head of the Roaring Monster*”: *Homosexuality and Repression in Africa*, 30 AFR. STUDY MONOGRAPHS 121, 122 (2009).

128. Mikki van Zyl, *Are Same-Sex Marriages UnAfrican? Same-Sex Relationships and Belonging in Post-Apartheid South Africa*, 67 J. SOC. ISSUES 335, 339 (2011).

129. See Franke, *supra* note 117, at 9 (“To this end, state-sponsored hostility to homosexuality as a modern, colonial imported identity proved to be a clever move that was part of a larger project of collapsing the state with the traditional African nation such that opposition to the state could be framed as anti-African.”).

130. Oliver Phillips, *Blackmail in Zimbabwe: Troubling Narratives of Sexuality and Human Rights*, 13 INT’L J. HUM. RTS. 345, 350 (2009).

131. Bergenfield & Miller, *supra* note 71, at 21.

132. See Marc Epprecht, *‘Bisexuality’ and the Politics of Normal in African Ethnography*, 48 ANTHROPOLOGICA 187, 188 (2006) (“[A] growing body of research, activism, and art have comprehensively demonstrated the falseness of the ‘fact’ of Africans’ exclusive heterosexuality”). See also Deborah P. Amory, “*Homosexuality in Arica: Issues and Debates*,” 25 A J. OF OPINION 5, 5 (1997) (discrediting the rumor that “homosexuality is a ‘western perversion’ imposed upon or adopted by African populations”).

133. See Amory, *supra* note 132, at 5 (“Virulent homophobia may be the real western perversion at work here.”).

nial laws governing sex and marriage codified a colonial form of homophobia.¹³⁴

Contemporary law reform initiatives such as the repressive Anti-Homosexuality Bill in Uganda bear the imprimatur of western evangelicals.¹³⁵ According to the Christian Science Monitor, “Conservative evangelicals like Scott Lively and Lou Engle traveled to Uganda in 2009 and 2010, and Mr. Lively in particular is known to have advocated consistently and strongly against gay rights, and supported harsh laws against homosexuals.”¹³⁶ Dr. Kipyka Kaoma, a Zambian clergyman and social justice advocate, first detailed links between U.S. evangelicals and anti-gay initiatives within Africa.¹³⁷ Dr. Kaoma observes that “it’s no accident that nearly identical laws and talking points have surfaced in Uganda, Nigeria, and other countries,” and he attributes those similarities to the lobbying efforts of American evangelicals like Lively.¹³⁸

134. AMNESTY INT’L, MAKING LOVE A CRIME: CRIMINALIZATION OF SAME-SEX CONDUCT IN SUB-SAHARAN AFRICA (2013) https://www.amnestyusa.org/sites/default/files/making_love_a_crime_-_africa_lgbti_report_emb_6.24.13_0.pdf [hereinafter *Making Love a Crime*]. Dr. Basile Ndjio, a scholar from Cameroon, notes:

From a historical perspective, prior to colonialism, which fundamentally changed the sexual imagination and practices in Africa, most African traditional societies were characterized by their sexual tolerance and openness. Contrary to received ideas, what western colonization brought into African colonies was homophobia and not homosexuality, which was part of a variety of social practices. The colonial administration only extended through anti-sodomy laws the moralistic view of the Church, which perceived same-sex relationships as an expression of cultural primitivism and then encouraged African natives to move towards the so-called modern sexuality; that is, exclusive heterosexuality.

Id.

135. There is some danger in attributing the success of the Ugandan anti-gay movement to the work of a small number of U.S. based evangelicals. Although Lively and others have been quite effective in promoting their anti-gay message in Africa, there is some risk that this narrative will be overstated, minimizing the role and agency of African leaders, African clergy, and ordinary citizens within Gambia, Uganda, Zimbabwe, and other countries in which conservative, anti-gay agendas have taken hold. Second, it risks overstating the universality of homophobic views within countries like Uganda and Zimbabwe. In fact, there are many supporters of LGBTI rights in both countries, and many of them actively resist homophobia and violence.
136. Frederick Nzwili, *Uganda’s Anti-Gay Bill Refocuses Attention on US Evangelical Influence*, CHRISTIAN SCI. MONITOR (Feb. 25, 2014), <http://www.csmonitor.com/World/2014/0225/Uganda-s-anti-gay-bill-refocuses-attention-on-US-evangelical-influence-video>.
137. *See id.* (“Links between evangelicals and African anti-gay movements were first detailed in 2009 by Kipyka Kaoma, a Zambian clergyman and senior member of Political Research Associates, a think tank advocating social justice.”).
138. *Id.*

Ugandan Pastor Martin Ssempe, whose church received small grants under the US President's Plan for Emergency AIDS Relief (PEPFAR), has been accused of promoting anti-gay violence.¹³⁹ In 2010, Jeffery Gettleman of the *New York Times*, reported that three American evangelical Christians traveled to Uganda to give a series of presentations in which they discussed "how to make gay people straight, how gay men often sodomized teenage boys and how 'the gay movement is an evil institution' whose goal is 'to defeat the marriage-based society and replace it with a culture of sexual promiscuity.'" ¹⁴⁰ Thousands of Ugandans reportedly attended the talks.¹⁴¹

In their efforts to portray same-sex sexual activity as un-African, contemporary evangelicals, political leaders, and others have taken advantage of the foundation laid decades ago by colonial-era anthropologists, many of whom disregarded or failed to document same-sex sexual activity within the region.¹⁴² Some have critiqued the contributions of colonial-era anthropologists, particularly those conducting early field studies within Africa, as reluctant, biased, or unable to report on a diversity of sexual practices.¹⁴³ In some cases, Victorian values prevented real exploration of sexuality.¹⁴⁴ In other cases, scholars were simply denied access to a great deal of sexual information, or they misinterpreted cues about non-conforming sexualities.¹⁴⁵ The colonial narrative equated African male sexuality with a lack of civilization and with a state of being that was "close to nature."¹⁴⁶ According to this

139. See Bergenfield & Miller, *supra* note 71, at 18 (indicating that Pastor Ssempe's church "incited anti-gay violence").

140. Jeffery Gettleman, *Americans' Role Seen in Uganda Anti-Gay Push*, N.Y. TIMES (Jan. 3, 2010), http://www.nytimes.com/2010/01/04/world/africa/04uganda.html?_r=0.

141. *See id.* ("For three days, according to participants and audio recordings, thousands of Ugandans, including police officers, teachers, and national politicians, listened raptly to the Americans . . .").

142. See Epprecht, *supra* note 125, at 255 (suggesting that homophobia was so strong among colonial Whites that fear prevented them from mentioning same-sex sexual conduct until 1914).

143. See Epprecht, *supra* note 132, at 187.

However, as Lyons and Lyons (2004) have demonstrated, anthropologists at times 'conscripted' select evidence and even fabricated 'facts' about the people they studies in order to advance ideals and preferences around sexuality in their own societies. By conjuring idealized or exoticized Others, they helped to create an understanding of 'normal' and 'modern' by way of contrast.

144. Epprecht, *supra* note 125 ("The cult of virility among White men, and of a complementary domesticity among White women, was key to upholding an assessment of moral worth that was otherwise so relentlessly, intimately threatened by day-to-day social and sexual interactions . . .").

145. See Epprecht, *supra* note 132, at 189 (urging caution in interpreting the "early, obscure and scandalized allusions" to same-sex sexual activity as documented by colonial anthropologists.).

146. *Id.* at 190.

narrative, sexual diversity was a decadence that was unavailable to the uncivilized African male whose sexuality was defined almost exclusively by uncontrollable heterosexual desire.¹⁴⁷ Misguided colonial authorities also reasoned that because African women appeared to be always sexually available to men, there could be no need for same-sex sexual activity.¹⁴⁸ In the instances in which colonial authorities observed overt and undeniable same-sex sexual conduct, they often attributed its existence to influences outside of the region, particularly Arabs, “whose sordid reputation in Orientalist discourse was firmly entrenched.”¹⁴⁹

Over time, more evidence of same-sex sexual conduct surfaced in colonialist anthropological accounts, but these accounts were often explained away as functional necessity¹⁵⁰ or “irrelevant native foible.”¹⁵¹ Today, substantial evidence exists demonstrating the historical existence of same-sex sexuality within the region.¹⁵² The historical record, however, reveals a serious discrepancy in the research concerning male and female same-sex sexual activity, with scant analysis of African lesbianism.¹⁵³ The absence of data concerning women who have sex with women is itself evidence of the ways in which anthropological research is deeply gendered.

147. *See id.* at 189.

The prevailing prejudice, however, was that black Africans were generally uncivilized and close to nature. By definition this meant that they could not be decadent or exhibit social traits and behaviours assumed to come with civilization. The emerging consensus on homosexuality thus required that Africans conform to the expectation of a supposedly natural lack of sexual diversity (or rather, perversity, deviance, and corruption in the parlance of the time.

148. *See id.* at 190 (“Why . . . would African men and boys turn to each other for sexual release when African women and girls were so easily available for their enjoyment . . . ?”).

149. *Id.* at 190.

150. Marc Epprecht, *Homosexual “Crime” in Early Colonial Zimbabwe*, in *BOY-WIVES AND FEMALE HUSBANDS: STUDIES OF AFRICAN HOMOSEXUALITIES* 197, 221 (Stephen O. Murray & Will Roscoe eds., 1998) (providing alternate explanations for same-sex activity, including “emotions such as love and friendship”).

151. Epprecht, *supra* note 132, at 192.

152. *See generally*, *BOY-WIVES AND FEMALE HUSBANDS: STUDIES OF AFRICAN HOMOSEXUALITIES* (Stephen O. Muarry & Will Roscoe eds., 1998) (providing several essays covering historical evidence of homosexuality in Africa); Sylvia Tamale, *Researching and Theorising Sexualities in Africa*, in *AFRICAN SEXUALITIES: A READER* 11 (Sylvia Tamale ed., 2011) (discussing a background of homosexuality in Africa); Sibongile Ndashe, *The Single Story of “African Homophobia” is Dangerous for LGBTI Activism*, in *QUEER AFRICAN READER* 155 (Sokari Ekine & Hakima Abbas eds., 2013) (same).

153. *See* Amory, *supra* note 132, at 9 (expressing concern over the lack of available resources on homosexual women in Africa).

Historical accounts by colonial authorities of non-normative sexuality, or the lack thereof, demonstrate how colonial constructions of sexuality within the region were highly racialized.¹⁵⁴ Today, social constructions of diverse sexualities and gender expression continue to be highly racialized within the region, with a number of African leaders explicitly linking non-normative sexuality to race, national authenticity, and national belonging.¹⁵⁵ For example, a Zimbabwe national leader said:

What is at issue in cultural terms is a conflict of interest between the whole body, which is the Zimbabwean community and part of that body represented by individuals or groups of individuals. . . . When your finger starts festering and becomes a danger to the body you cut it off. The homosexuals are the festering fingers.¹⁵⁶

Intersectional analysis, thus, promotes a deeper understanding of the connections between gender, race, nationhood, and sexuality.¹⁵⁷

2. Intersectionality and Violence Against LGBTI Individuals

Scholars have long recognized the links between homophobia and gender-based violence.¹⁵⁸ O'Toole and Schiffman state, "By our definition, gender violence is any interpersonal, organizational, or politically oriented violation perpetrated against people due to their gender identity, sexual orientation, or location in the hierarchy of male-dominated social systems such as families, military organizations, or the labour force."¹⁵⁹ This is a broad definition of gender-based violence but one that contemplates the linkages between violence motivated by gender and sexuality.

154. For a general discussion of the important intersection of racial, sexual, and colonial discourses, *see generally* ANN LAURA STOLER, *RACE AND THE EDUCATION OF DESIRE: FOUCAULT'S HISTORY OF SEXUALITY AND THE COLONIAL ORDER OF THINGS* (1995).

155. *See* Franke, *supra* note 117 and accompanying text (describing homophobic rhetoric from Mugabe and other leaders in the region).

156. *Id.* at 6.

157. *See* Bond, *supra* note 61, at 124 ("[I]ntersectional analysis explores the connections between race, class, and gender . . .").

158. *See, e.g.*, Marry Morash, *Understanding Gender, Crime and Justice* 95 (2007) ("Perpetrators of sexual orientation-motivated bias crimes feel that people who are gay, lesbian, or bisexual are threatening and challenging to hegemonic masculinity, and that victimization can maintain the balance of power that favors their own ideas about what it means to be a man.").

159. LAURA O'TOOLE & JESSICA R. SCHIFFMAN, *Preface: Conceptualizing Gender Violence, in* GENDER VIOLENCE: INTERDISCIPLINARY PERSPECTIVES xi, xii (Laura O'Toole & Jessica R. Schiffman eds., 1997).

The targeted rape and sexual violence perpetrated against lesbians has been documented in a number of sub-Saharan African countries, most notably South Africa.¹⁶⁰ According to perpetrators, some of these rapes are motivated by a desire to “correct” or “cure” lesbians of their sexual orientation.¹⁶¹ This form of sexual assault seeks to punish those “who are perceived to not conform—or to disrupt—expected gender roles, behaviour, and/or presentation.”¹⁶² I reject the terms “corrective” or “curative” rape as the terms themselves obviously suggest a flawed sexual orientation and gender identity.¹⁶³ As a result, I use the term “targeted homophobic sexual assault.”

In one 2011 incident in Pretoria, South Africa, a 13-year-old girl was the victim of targeted homophobic sexual assault.¹⁶⁴ She reported that her assailant told her that he was attempting to “cure” her of her lesbianism.¹⁶⁵ One study reports that at least five hundred women are victims of targeted homophobic sexual assaults in South Africa each year.¹⁶⁶ Another study documents the fear of violence that pervades the lives of lesbians in the Western Cape region, noting that 86% of black lesbians in the region report living in fear of targeted homophobic sexual assault.¹⁶⁷ Due to underreporting, the full extent of the violence is not known.¹⁶⁸

160. Although some of the literature refers to this form of targeted sexual assault as “corrective” or “curative” rape, some have objected to the use of those terms as legitimizing or validating the notion that lesbianism is something to be corrected or cured. Because much of the research on targeted homophobic sexual assault to date has focused on South Africa, this Article explores sexual violence directed lesbians within the context of that country.

161. See Lorenzo Di Silvio, Note, *Correcting Corrective Rape: Charmichele and Developing South Africa’s Affirmative Obligations To Prevent Violence Against Women*, 99 GEO. L.J. 1469, 1470 (2011) (describing “corrective rape” as “an act of violence against women committed by men ostensibly to ‘cure’ lesbians of their nonconforming sexual orientation”).

162. J.A. Nel & M. Judge, *Exploring Homophobic Victimisation in Gauteng, South Africa: Issues, Impacts and Responses*, 21 ACTA CRIMINOLOGICA 19, 24, n. 2 (2008).

163. Although she continues to use the term, U.N. High Commissioner for Human Rights, Navi Pillay, calls the term “corrective rape” disturbing. Navi Pillay, *No Place for Homophobia Here*, OUTRIGHT ACTION INTERNATIONAL (Aug. 14, 2012), <https://www.outrightinternational.org/content/no-place-homophobia-here>.

164. Roderick Brown, *Corrective Rape in South Africa: A Continuing Plight Despite an International Human Rights Response*, 18 ANN. SURV. INT’L & COMP. L. 45, 45 (2012).

165. *Id.*

166. Di Silvio, *supra* note 161, at 1471.

167. *Id.*

168. *Id.* at 1472 (explaining that “underreporting is highly likely for crimes of sexual violence due to lack of faith in and the prejudice of the police, the low conviction rate, trauma endured by rape victims at trial, and, for gay women, the fear of persecution for reporting”).

Violence targeting lesbians serves as a regulatory device to enforce heteronormativity.¹⁶⁹ Describing violence against lesbians in South Africa, one scholar notes, “The high prevalence of gender-based violence against lesbians noted by the participants also attests to attempts to strengthen heteronormative patriarchal values.”¹⁷⁰ A number of U.N. Special Rapporteurs have highlighted examples of violence directed at individuals for their failure to conform to gender norms, including heteronormativity.¹⁷¹

Recognizing homophobic violence as a form of gender-based violence would help the CEDAW Committee to capitalize on its progress in raising awareness of violence against women around the world. It would also bring much needed attention to the problems of violence and discrimination facing LGBTI communities in sub-Saharan Africa. In addition to bringing LGBTI rights within the purview of the Committee’s work, a re-conceptualization would encourage a number of NGOs working on gender-based violence to expand their activist work to include LGBTI communities. As the treaty body primarily concerned with issues related to violence and discrimination based on gender, the CEDAW Committee should be leading the way in the fight to eliminate gender-based violence targeting LGBTI individuals. Instead, the Committee appears to be reluctant to systematically engage with the gender-based human rights issues surrounding non-normative sexuality within the sub-Saharan region.

D. National and Sub-National Advocacy Strategies

Advocates for LGBTI equality must use a variety of tactics in challenging discrimination and violence.¹⁷² The choice of strategy and rhetorical framing depends upon the social, legal, and political context. At times, advocates may embrace litigation and law reform strategies that rely on iden-

169. See Currier, *supra* note 119, at 469.

170. Van Zyl, *supra* note 128, at 351.

171. See, e.g., *supra* note 42 and accompanying text.

172. For example, Human Rights Campaign partners with the United States government to protect LGBT individuals in the United States, while the Coalition of African Lesbians takes a more grassroots approach. Compare Kerry Brodie, *HRC Partners with State Department to Support LGBT Communities Abroad*, HUMAN RIGHTS CAMPAIGN (Feb. 19, 2015), <http://www.hrc.org/blog/entry/hrc-partners-with-state-department-to-support-lgbt-communities-abroad> (describing a partnership between Human Rights Campaign, an LGBT advocacy group, and the United States State Department to prevent discrimination and violence against LGBT individuals), with *Our Initiatives*, COALITION OF AFRICAN LESBIANS, http://www.cal.org.za/new/?page_id=35 (last visited Feb. 14, 2016) (noting some of the research initiatives designed to protect lesbians in Africa).

tity categories such as gay, lesbian, bisexual, transgender or intersex.¹⁷³ Those identity categories may facilitate a strategy for reclaiming public spaces or asserting a collective, public LGBTI identity. At other times, advocates may choose to assert claims based on gender that emphasize gender non-conformity and resistance to compulsory heterosexuality.¹⁷⁴ These claims may be framed as gender-based claims.

I argue that using a gender framework to conceptualize LGBTI discrimination is advantageous in certain circumstances. There are clearly instances in which using fixed categories of “sexual orientation” may make more strategic sense, and, in those cases, that strategy must prevail.¹⁷⁵ Absent such strategic considerations, however, using gender as a supplemental analytical lens through which to examine LGBTI discrimination has several conceptual and pragmatic benefits.¹⁷⁶ At a minimum, scholars and activists must have both gender and sexual orientation analytical avenues open to them to maximize the potential for reform.

At the national level, advocacy strategies to promote LGBTI rights understandably vary depending on a number of factors. Nevertheless, two general approaches emerge. The first is based on an individual rights model in which advocacy centers around a group who self-identify as belonging to the oppressed group.¹⁷⁷ This approach depends upon recognition of discrimination against a protected category and willingness of members to identify as belonging to the protected group.¹⁷⁸

However, this strategy can be difficult in the Sub-Saharan region, due to intransigent and vitriolic public hostility toward LGBTI individuals. Ac-

173. See Libby Adler, *Gay Rights and Lefts: Rights Critique and Distributive Analysis for Real Law Reform*, 46 HARV. C.R.-C.L. L. REV. (AMICUS ONLINE SUPPLEMENT) 1, 3 (2011) (addressing identity-based rights movements, including initiatives for litigation and law reform).

174. See Andrew Gilden, *Toward a More Transformative Approach, The Limits of Transgender Formal Equality*, 23 BERKELEY J. GENDER L. & JUST. 83, 85 (2008) (explaining the view that advocating for LGBT rights requires addressing gender norms and ideas of sexuality).

175. For example, in South Africa, where the constitution protects against discrimination based on LGBTI identity, activists will likely use those categories for litigation seeking to protect LGBTI rights.

176. See *infra* Part II (discussing the benefits of using multiple lenses to assess sexual orientation discrimination).

177. See, e.g., Adler, *supra* note 173 at 2 (providing examples of such a movement)

178. For a discussion of identity politics, see generally Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991).

tivists in some countries report that the climate is so hostile that very few individuals publicly embrace LGBTI identity.¹⁷⁹ In Uganda, activists report:

Given the criminal status of homosexuality in Uganda, and the overwhelming homophobia of society, LGBTI organizing has been extremely challenging. It has been difficult for LGBTI people to “come out” and to openly and actively participate in the LGBTI movement because of the continued public threats and hostile messages from both the State and the public The LGBTI movement has struggled to build a collective voice, hampered by a lack of strong support systems and the continued crises brought about by hate crimes and deep-seated social hostility.¹⁸⁰

Indeed, “in some countries, as . . . in Botswana and Swaziland, there is such strong resistance to gay and lesbian people, that they don’t have any LGBTI organization at all.”¹⁸¹ Despite this sometimes open hostility, a number of activists have organized in Uganda, where activists and LGBTI individuals face extreme prejudice.¹⁸²

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179. See generally, e.g., GREGORY M. HEREK, *Stigma, Prejudice, and Violence Against Lesbians and Gay Men*, in *HOMOSEXUALITY: RESEARCH IMPLICATIONS FOR PUBLIC POLICY* 60 (John C. Gonsiorek & James D. Weinrich, eds., 1991) (providing examples of how and why some homosexuals do not want to publicly identify as gay or lesbian).
180. *Shadow Report to the CEDAW Committee: Violation of the Human Rights of Lesbian, Bisexual, Transgender (LBT) and Kuchu People in Uganda*, OUTRIGHT ACTION INTERNATIONAL 4 (September 2010), <https://www.outrightinternational.org/sites/default/files/445-1.pdf> [hereinafter *Shadow Report*]. See also Sylvia Tamale, *Out of the Closet: Unveiling Sexuality Discourses in Uganda*, in *AFRICA AFTER GENDER?* (Catherine M. Cole, et al., eds. 2007) 17, 21 (noting that the exceedingly hostile context in which lesbians and gays live and work makes it extremely difficult for homosexuals to demand their rights in Uganda with a unified voice).
181. cfs]Ruth Morgan & Saskia Wieringa, *Introduction*, in *TOMMY BOYS, LESBIAN MEN AND ANCESTRAL WIVES: FEMALE SAME-SEX PRACTICES IN AFRICA* 11, 22 (Ruth Morgan & Saskia Wiering, eds., 2005). Cf. *Civil Society Organizations Commend the African Commission’s Resolution Condemning Violence Based on Sexual Orientation and Gender Identity*, COALITION OF AFRICAN LESBIANS (May 23, 2014), <http://www.cal.org.za/new/?p=1822> (supporting and praising organizations that support LGBTI organizations).
182. Examples from Uganda include Sexual Minorities Uganda, Freedom and Roam Uganda, and Spectrum Initiatives Uganda. See *SEXUAL MINORITIES UGANDA*, <https://sexualminoritiesuganda.com> (last visited Mar. 31, 2015); *FREEDOM AND ROAM UGANDA*, <http://www.faruganda.org> (last visited Mar. 31, 2015); *SPECTRUM UGANDA INITIATIVES, INC.*, <http://www.spectrumuganda.net> (last visited Mar. 31, 2015).

Where and when it is possible, a focus on identity categories facilitates community building and organized political action. In fact, there is a political and social cost inherent in de-emphasizing identity categories. The public, expressive act of “coming out” is often a valued experience in western gay and lesbian culture. However, when downplaying political identity, the act of coming out is lost, as is the corresponding ability to organize and build community based on that identity.¹⁸³ Nevertheless, physical violence and hostility directed at LGBTI individuals often make political, identity-based organizing particularly challenging.

A second approach combines political identification with identity categories having an emphasis on strategic alliances. This approach might lead LGBTI activists to build support for LGBTI rights within mainstream human rights organizations rather than establish an LGBTI-focused organization. The Rainbow Project, a non-governmental organization in Namibia, represents an example of this approach.¹⁸⁴ As a result of hostility from national political leaders, and internal conflict over the organization’s mission, the Rainbow Project abandoned its public campaign for LGBTI legal rights.¹⁸⁵ Instead, the organization strategically transformed itself into a mainstream human rights organization and attempted to promote LGBTI rights from within the broader human rights sector by focusing on social advocacy rather than law reform and social services.¹⁸⁶

In South Africa, a number of LGBTI activists framed their rights campaigns in terms of identity politics but situated those campaigns within the country’s broader struggle for liberation, a struggle that evoked powerful notions of race and occupation.¹⁸⁷ In a 1990 meeting with the Organisation of Lesbian and Gay Activists (OLGA), Albie Sachs, a former anti-apartheid activist and Judge on the South African Constitutional Court, advised the

183. See Katyal, *supra* note 70, at 110 (“[F]ocus on the expressive, rather than constitutive elements of a gay or lesbian identity, both legally and culturally, builds upon changing the meaning of homosexuality towards a public, collective social group identity, rather than an activity.”).

184. See Ashley Currier, *Deferral of Legal Tactics: A Global LGBT Social Movement Organization’s Perspective*, in *QUEER MOBILIZATIONS: LGBT ACTIVISTS CONFRONT THE LAW* 21, 37 (Scott Barclay, Mary Bernstein, & Anna-Maria Marshall eds., 2009) (“The organization [The Rainbow Project] strategically transformed itself into a human rights organization as a way to gain civil society support for LGBT rights as human rights . . .”).

185. *Id.* at 37.

186. See *id.* at 36-37 (explaining how The Rainbow Project shifted its purpose and goals to further promote LGBTI rights).

187. See Leigh Ann van der Merwe, *There is a Voice that is Silent from Africa*, OUTRIGHT ACTION INTERNATIONAL (Dec. 27, 2013), <https://www.outrightinternational.org/content/there-voice-silent-africa> (“[A]s underprivileged South Africans, we fight many isms (classism, racism, chauvinism, patriarchy.”).

activists, “[G]o for ideas such as . . . that apartheid has told people who they are, and how to behave, but in the new South Africa[,] people should have freedom of sexual expression . . . Go for arguments about diversity, tolerance, and freedom; don’t go for the concept of a protected minority group.”¹⁸⁸ Even after LGBTI rights were enshrined in the new South African constitution, activists have continued to strategically and successfully invoke a post-apartheid liberation frame in LGBTI advocacy efforts.¹⁸⁹ In so doing, they have implicitly, and in some cases explicitly, used an intersectional lens linking the country’s history of racial oppression to LGBTI discrimination.¹⁹⁰

Organizations such as the Coalition for African Lesbians (CAL) have initiated rights campaigns that situate the struggle for LGBTI rights within a broader context of patriarchal oppression.¹⁹¹ CAL is explicitly committed to an intersectional approach to LGBTI rights that emphasizes the intersections of multiple forms of discrimination and challenges gender subordination.¹⁹² CAL Director, Dawn Cavanagh, describes her disappointment upon realizing that the language in the U.N. Human Rights Council’s 2014 Resolution on Sexual Orientation and Gender Identity had been altered to shift the focus away from an intersectional understanding of sexuality:¹⁹³ “From a feminist point of view, the loss was on language that could act as a credible bridge between pure and raw identity politics and a broader sexuality; and [sic] gender lens that includes intersectionality and the idea of gender expression, as opposed to just gender identity.”¹⁹⁴ This Article argues for an approach, much like CAL’s advocacy efforts, that emphasizes the relation-

188. Thoreson, *supra* note 100, at 690 (urging OLGA to adopt a broader, more persuasive platform that supports the rights of all whom apartheid had oppressed).

189. *See id.* at 694 (“The inevitability of progress and the triumph of justice are rhetorically persuasive narratives, and the movement has capitalised on both of these ideas by fitting their goals into a broader liberation frame.”).

190. *See supra* Part II.B (discussing how an intersectional lens is used in analyzing intersexuality in South Africa).

191. *See Profile*, COALITION OF AFRICAN LESBIANS, http://www.cal.org.za/new/?page_id=10 (last visited Mar. 31, 2015) (“[CAL] is mindful of how oppressive forms of power keep us unfree and unequal and rob us of our dignity. We understand that the oppression we live and experience as lesbian and bisexual women and transverse people is created and sustained by patriarchy in the first instance.”).

192. *Id.* (“We believe that our multiple identities intersect and are linked. Our race, class, gender, sexual orientation, [dis]ability, geographic location and other identities are connected in a web of oppression.”).

193. Interview by Association for Women’s Rights in Development with Dawn Cavanagh, *Reflections and Thoughts on the Passing of the Follow-Up Resolution on Sexual Orientation and Gender Identity [SOGI] at the United Nations Human Rights Council*, COALITION OF AFRICAN LESBIANS, <http://www.cal.org.za/new/?p=1859> (last visited Mar. 31, 2015)).

194. *Id.*

ship between gender subordination and heteronormativity through an intersectional analysis.

The project of LGBTI individuals claiming their rights is now a fully global enterprise.¹⁹⁵ The Western binary categories underlying gay and lesbian identity limit sexual and gender identities in the non-Western world.¹⁹⁶ The terms “lesbian,” “gay,” “transgender” and “intersex,” may reflect unnecessarily rigid categories that do not resonate within sub-Saharan Africa’s rural communities. These communities may have a more fluid understanding of sexuality and identity. Indeed, as human rights activist Hossam Bahgat notes, “There is a problem with sexual orientation as a concept, with identity frameworks. In the region, people don’t identify as gay. Many have wives and children Of course, identity politics are still useful for activism but we need to look at other frameworks.”¹⁹⁷ Some have called the categories “insensitive to indigenous or traditional concepts and practices.”¹⁹⁸ Indeed, contemporary debates around the cross-cultural application of gay identity remain prominent in the discourse on the global LGBTI movement.¹⁹⁹

Despite the debates over categories and advocacy models, a number of activists and scholars have been working to create a queer African identity.²⁰⁰ Indeed, although some individuals who engage in same-sex sexual

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195. See, e.g., *Lesbian, Gay, Bisexual, and Transgender Rights*, HUMAN RIGHTS WATCH, <http://www.hrw.org/topic/lgbt-rights> (describing Human Rights Watch’s dedication to LGBT activism around the world).
196. See Jyoti Puri, *Nationalism Has a Lot to Do with It! Unraveling Questions of Nationalism and Transnationalism in Lesbian/Gay Studies*, in HANDBOOK OF LESBIAN AND GAY STUDIES 427, 437 (Diane Richardson & Steven Seidman eds., 2002) (presenting the issue that a Western understanding of gay and lesbian identity might be too binary for non-Western contexts).
197. Francoise Girard, *Negotiating Sexual Rights and Sexual Orientation at the UN*, in SEX POLITICS: REPORTS FROM THE FRONT LINES 311, 350 (Richard Parker, Rosalind Petchesky & Robert Sember eds., 2007) (ebook).
198. Charles Gueboguo & Marc Epprecht, *Extortion & Blackmail on the Basis of Sexual Orientation in Africa: A Case Study from Cameroon*, in NOWHERE TO TURN: BLACKMAIL AND EXTORTION OF LGBT PEOPLE IN SUB-SAHARAN AFRICA 89, 91 (Ryan Thoreson & Sam Cook eds., 2011) [hereinafter *Nowhere to Turn*].
199. See, e.g., Oliver Phillips, *Constituting the Global Gay: Issues of Individual Subjectivity and Sexuality in Southern Africa*, in SEXUALITY IN THE LEGAL ARENA 17, 32 (Carl Stychin & Didi Herman eds., 2000) (“Creating terms and definitions inescapably binds and fixes behaviour which might before have been more malleable, removing a potential variety of interpretations, and fitting it into a larger (and binary) discourse around sex as a whole.”).
200. *Id.* at 34 (“These ‘gay/lesbian’ names for identities might originate in North America and Western Europe, but they have been appropriated by people the world over as they imply a claim to the protection and rights guaranteed under international treaties, and a way out of an almost universal form of marginalization.”).

activity do not self-identify as LGBTI, many others have embraced a gay identity that is public and political.²⁰¹ In any given rights campaign, activists must decide whether it is preferable to embrace ‘strategic essentialism’²⁰² that facilitates political organizing or to reject rigid identity categories in favor of inclusive descriptors of same-sex sexual activity, such as ‘men who have sex with men,’²⁰³ that may reach more people but, in so doing, sacrifice collective, political action.

Advocacy efforts at the international level have generally focused on LGBTI identity categories that originated in the global north and gained currency in other parts of the world.²⁰⁴ In contrast, some national and regional organizations, such as CAL,²⁰⁵ have embraced a more intentionally fluid and intersectional notion of identity. Recognizing the interconnectedness of multiple forms of discrimination, CAL’s advocacy is attuned to systems of power and privilege and their effects on LGBTI individuals in Africa.²⁰⁶

III. GENDER PERFORMANCE AND SEXUALITY IN SUB-SAHARAN AFRICA

Within the last two decades, much of the writing about African sexuality reveals a complex picture in which gender and sexuality are socially constructed and contingent.²⁰⁷ Advocacy campaigns’ reliance on rigid identity categories such as gay and lesbian has the effect of excluding those who do not embrace gay and lesbian identity categories, such as women who

201. See generally *Defending LGBTI Rights: Ensuring Equality, Safety and Health For Sexual Minorities*, AMERICAN JEWISH WORLD SERVICE (2010), https://ajws.org/wp-content/uploads/2015/05/ajws_defending_lgbti_rights.pdf (describing the political and organizing activities of partner organizations in Nigeria, Ghana, Kenya, and Uganda).

202. See STEPHEN MORTON, GAYATRI CHAKRAVORTY SPIVAK 75 (2003), for a description of the development of the phrase ‘strategic essentialism,’ a phrase coined by Gayatri Chakravorty Spivak.

203. See *infra* note 234 and accompanying text.

204. See AMERICAN JEWISH WORLD SERVICE, *supra* note 201 at 4 (“There are now LGBTI and other advocacy groups affirming diverse sexual orientations and gender identities in every region of the world.”).

205. See *About CAL*, COALITION FOR AFRICAN LESBIANS, http://www.cal.org.za/new/?page_id=7 (last visited Jan. 28, 2016) (describing CAL’s mission to embrace women’s and the LGBTI community’s struggles more broadly).

206. See *id.* (“We believe that our multiple identities intersect and are linked. Our race, class, gender, sexual orientation, [dis]ability, geographic location and other identities are connected in a web of oppression.”).

207. See generally, *Preface to BOY-WIVES AND FEMALE HUSBANDS: STUDIES OF AFRICAN HOMOSEXUALITIES* xi (Stephen O. Murray & Will Roscoe eds., 1998) (describing the history of views on gender and sexuality in African society).

have sex with women but do not identify as lesbian.²⁰⁸ There are additional obstacles to the widespread embrace of the category of “lesbianism” within the region, two of which are structural challenges to lesbianism, including economic dependence and the centrality of heterosexual marriage, and pervasive phallogentrality that equates sex with penile penetration.²⁰⁹

Kathryn Kendall, a scholar who studied women who have sex with women in Lesotho, explains that a number of structural obstacles contribute to the erasure of lesbian identity in Lesotho.²¹⁰ Kendall observes that most women in Lesotho are economically dependent on men.²¹¹ As a result of this economic dependence, very few women are able to thrive and prosper outside of the confines of heterosexual marriage.²¹² The limited economic opportunities for women in Lesotho make it difficult to conceive of a life outside of heterosexual marriage.²¹³

As is the case in the U.S. and throughout the global north, heterosexual marriage figures prominently into definitions of “family.”²¹⁴ In addition

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208. See Katyal, *supra* note 70, at 156 (“[M]any who engage in same-sex sexual conduct do not identify, and will never identify, as gay, homosexual, or bisexual.”); Stephen Valocchi, *Not Yet Queer Enough: The Lessons of Queer Theory for the Sociology of Gender and Sexuality*, 19 GENDER & SOC’Y 750, 760-61 (2005) (“Thus, by historicizing the notion of gay identity, a queer analysis uncovers the incoherence in the nature of identity-based thinking in general and demonstrates the limitations of reducing understandings of sexual subjectivity or sexual self-awareness to the currently dominant taxonomies of gay and straight.”).
209. Tamale, *supra* note 180, at 19 (“The gendered dimensions of sexuality are very clear when we consider the implicit erasure of lesbian identity in Ugandan society Somehow, the dominant phallogentric culture maintains the stereotype of women as the passive recipients of penetrative male pleasure; sex that is not penetrative does not count as ‘real’ sex.”).
210. See Kathryn Kendall, “When a Woman Loves a Woman” in Lesotho: Love, Sex, and the (Western) Construction of Homophobia, in BOY-WIVES AND FEMALE HUSBANDS: STUDIES OF AFRICAN HOMOSEXUALITIES 223, 238 (Stephen O. Murry & Will Roscoe eds., 1998) (“What the situation in Lesotho suggests is that women can and do develop strong affectional and erotic ties with other women in a culture where there is no concept or social construction equivalent to ‘lesbian’ . . .”).
211. *Id.* at 225 (“Women [in Lesotho] cannot hold property; have no custody rights in The [sic] case of divorce; cannot inherit property if they have sons; cannot borrow money; cannot own or run property or businesses; and cannot sign contracts, buy and sell livestock, land or ‘unnecessary’ goods.”).
212. *Id.* at 229 (“[W]omen have no identity apart from that of the men to whom they are related; only comparatively wealthy divorced or widowed women could set up house-keeping alone or with each other.”).
213. *Id.* (discussing the ways in which it is difficult for women in Lesotho to be independent).
214. See Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL’Y & L. 307, 308 (2004) (noting the American ideal of heterosexual monogamy as a tool to maintain family).

to the financial constraints that many Basotho²¹⁵ women face, there is an overwhelming emphasis on heterosexual marriage within Basotho culture.²¹⁶ Anthropologist Judith Gay observed, “Marriage is the principal means whereby . . . [Basotho] women attain adult status and gain access to the productive resources and cash flows which are essential to them and their dependents.”²¹⁷ The centrality of marriage has also stifled the evolution of an “out” lesbian political identity.²¹⁸

Instead, same-sex sexuality in Lesotho exists alongside conventional marriage without challenging the institution itself.²¹⁹ Kendall documents the existence of close, erotic woman-to-woman relationships among Basotho women, none of whom self-identified as lesbians in the context of Kendall’s research.²²⁰ Rudolf Gaudio similarly observes of Hausa populations in Nigeria: “[M]ost Hausa people do not see marriage as a choice but as a moral and social obligation.”²²¹ Gaudio observed that gay Hausa men decoupled marriage and heterosexual desire, having heterosexual sex to father children but not to fulfill sexual desire.²²² Both Kendall and Gaudio suggest that same-sex sexuality is accommodated outside of marriage in

215. The term Basotho is used to describe “the local inhabitants of Lesotho,” a landlocked country entirely surrounded by the Republic of South Africa. *See About Lesotho, LESOTHO*, <http://africa.co.ls/aboutLesotho.html> (last visited Jan. 28, 2016).

216. *See* Kendall, *supra* note 210, at 229 (“There is no tradition in Lesotho that permits or condones women or men remaining single; single persons are regarded as anomalous and tragic, unless they have joined celibate religious orders.”).

217. Judith Gay, *Basotho Women’s Options: A Study of Marital Careers in Rural Lesotho*, 299 (Oct. 21, 1980) (Ph.D. dissertation, Cambridge University) (on file with the author).

218. *See* Kendall, *supra* note 210, at 238 (explaining the difficulty of identifying as a lesbian because “lesbian or lesbian-like behavior has been commonplace, conventional; but it has not been viewed as ‘sexual,’ nor as an alternative to heterosexual marriage, which is both a sexual and an economic part of the culture”).

219. *See id.* at 236 (“She says that her husband and her *motsoalle’s* [special friend] husband were both supportive of the relationship; that she and her *motsoalle* enjoyed kissing and touching . . . and that in her own case, the heterosexual marriages outlasted the *motsoalle* relationship.”).

220. *See id.* at 238 (“What the situation in Lesotho suggests is that women can and do develop strong affectational and erotic ties with other women in a culture where there is no concept or social construction equivalent to ‘lesbian,’ nor is there a concept of erotic exchanges among women as being ‘sexual’ at all.”).

221. Rudolf P. Gaudio, *Male Lesbians and Other Queer Notions in Hausa*, in *BOY-WIVES AND FEMALE HUSBANDS: STUDIES OF AFRICAN HOMOSEXUALITIES* 115, 118 (Stephen O. Murray & Will Roscoe, eds., 1998).

222. *Id.* at 118 (“Hausa terms referring to male homosexuality usually presume that gay men have sex with women at least in order to father children and not necessarily for sexual pleasure.”).

Lesotho and Nigeria, respectively, as long as it does not threaten marriage and the procreative potential that defines heterosexual marriage.²²³

This decoupling of procreative sex and non-procreative sex illustrates the extent to which sexuality is inextricably linked to gender. As long as non-procreative sex does not disrupt gender norms within families, it can be accommodated.²²⁴ In other words, as long as women fulfill the gendered role of wife and mother, same-sex sexual activity is considered supplemental to heterosexual marriage.²²⁵ The gender-based limitations on women's economic capacity also underscore the links between gender role expectations and the constraints on the expression of same-sex sexuality.²²⁶

Anthropological studies also suggest that gendered role expectations define what counts as "sex."²²⁷ Kendall's research in Lesotho suggests that sex is commonly defined by the presence of the *koai*, or penis.²²⁸ Because sex is defined culturally through the presence of a penis, same-sex sexual activity between women is not seen as "sex."²²⁹ The very definition of sex as penetration limits the expression of women's sexuality. As Oliver Phillips has observed, "[I]f one recognizes that gender subordination is intrinsically linked to the refusal of women's sexual independence, one has to see 'lesbian' relations as fundamental to women's empowerment in Africa."²³⁰

Ugandan feminist scholar Sylvia Tamale observes, "What is therefore particularly threatening to patriarchy is the idea of same-sex relationships where a dominating male is absent and where women's sexuality can be defined without reference to reproduction."²³¹ In this sense, phallocentricity and structural obstacles of family relations and economic dependence, regulate women's sexuality and reinforce women's subordination.²³² Limited economic opportunities for women, the centrality of heterosexual marriage

223. Oliver Phillips, *Myths and Realities of African Sexuality*, 44 AFRICAN STUD. REV. 195, 199 (2001) (explaining that Kendall and Gaudio's works develop the idea that "rejections of same-sex relations in African cultures can . . . be explained by a preoccupation with procreation and the reproduction of kinship").

224. *Id.* at 197.

225. *Id.*

226. For examples of these gender-based limitations, see generally Kendall, *supra* note 210.

227. *See, e.g. id.* at 228–29 (telling a story of how a miscommunication over what counts as sex occurred because of gender expectations).

228. *Id.* at 229 (describing when a woman told the author, " 'You can't have sex unless somebody has a *koai* [penis]' ").

229. *Id.* at 229.

230. Phillips, *supra* note 223, at 198.

231. Tamale, *supra* note 180, at 19.

232. *See* Kendall, *supra* note 210, at 239 ("I found no women in Lesotho choosing to live in same-sex couples or to defy heterosexual expectations by choosing female lovers exclusively.").

and reproduction, and restricted understandings of what counts as “sex” all reduce the likelihood that lesbians in the sub-Saharan region will embrace a public and political identity.²³³

Some activists and scholars in sub-Saharan Africa, particularly in the public health field, refer to “men who have sex with men” (MSM) rather than rely on self-identification with categories such as gay.²³⁴ MSM reflects a more fluid, and more inclusive understanding of sexuality. It also reflects a view that one’s sexual conduct or desire can be distinct and separate from sexual identity.²³⁵ Indeed, Katyal suggests that, “imposing a gay, lesbian, or bisexual identity on individuals who may engage in same-sex sexual behavior, but who do not fit a substitutive paradigm between identity and conduct, can be unduly confining, exclusionary, and inappropriate.”²³⁶ She points out that, within some cultures, same-sex sexual activity is viewed as typical social development, necessary as part of a traditional ritual, or simply evidence of conduct rather than a core notion of identity.²³⁷

Thus, a disconnect often exists between sexual practice and identity within sub-Saharan Africa.²³⁸ In Senegal, for example, identity categories such as gay and lesbian often do not resonate.²³⁹ “In the literature on homosexuality in Senegal, sexual identity is classified into two broad types: the passive partner, identified by the term *ubbi* (also *ibbi*), who recognizes that he is homosexual, and the active partner who identifies himself by the term *yooos*, and who does not see himself as a homosexual.”²⁴⁰ The active partner thus conceives of himself as straight. In these social constructions of sexual-

233. See *supra* Part I.A (discussing factors that contribute to women in sub-Saharan Africa restraining from embracing a public identity as lesbian).

234. See, e.g., David J. Frank & Nolan E. Phillips, *Sex Laws and Sexuality Rights in Comparative and Global Perspectives*, 9 ANN. REV. L. SOC. SCI. 249, 253 (2013) (“Public health experts use the behaviorally determined category of MSM (men who have sex with men) in order to focus on acts rather than identities.”).

235. See Katyal, *supra* note 70, at 159 (“MSM activists openly challenge the drive towards essentializing the public aspects of ‘gap’ or ‘homosexual’ identity.”); *id.* at 156 (“[T]heir observations suggest that the MSM model is ‘additive’ rather than substitutive, because it demonstrates that one’s sexual identity—heterosexual, homosexual, or bisexual—can be entirely separated from one’s sexual conduct or desire.”).

236. *Id.* at 114–15.

237. See *id.* at 148 (“[S]ome cultures view same-sex sexual behavior as a normal part of social development rather than an identity-based phenomenon.”).

238. See Joseph Larmarange et al., *Homosexuality and Bisexuality in Senegal: A Multiform Reality*, 64 POPULATION 635, 641 (2009) (describing why “in an African context, the terms ‘homosexual’ or ‘bisexual’ are not necessarily appropriate for capturing sexual identities”).

239. See *id.* at 641 (“[M]en [in Senegal] spontaneously used different terms of social identity to define themselves as men with homosexual practices.”).

240. *Id.*

ity, notions of sexual passivity and gender figure prominently in role identification and its effect on LGBTI identity.

Within the region, many public health activists and scholars have eschewed identity categories in an effort to reach a wider audience for public health campaigns such as those related to HIV/AIDS.²⁴¹ In May 2008, activists held the first workshop on MSM and HIV/AIDS in Africa.²⁴² The report from the workshop emphasized the failures of most African governments to provide MSM with adequate protection against HIV.²⁴³ In this case, the move away from rigid identity categories was viewed as pragmatic and necessary to achieve critical public health objectives.²⁴⁴

The move away from identity categories, which have characterized much of the struggle for LGBTI rights in the West, reflects a strong cultural commitment to heterosexual marriage within the sub-Saharan region.²⁴⁵ Within the region, the emphasis on marriage and, at times, the near universal expectation of marriage and procreation to continue kinship lines, increases the likelihood that same-sex sexual activity will occur alongside—but without challenging—the norms of heterosexual marriage.²⁴⁶ Kendall's observations of lesbian-like activity in Lesotho, without any articulation of or political identification with lesbianism, is consistent with a more fluid, less categorical basis for describing same-sex sexuality.²⁴⁷

241. See, e.g., Frank & Phillips, *supra* note 234, at 253 (explaining how public health activists focus on acts, rather than identity, in HIV awareness because “HIV risk . . . depends on what one does rather than whom one is”).

242. See Marc Epprecht, *Sexual Minorities, Human Rights, and Public Health Strategies in Africa*, 111/443 AFR. AFF. 223, 234 (2012) (noting the prominence of the first MSM and HIV/AIDS workshop, held in Nairobi in May 2008).

243. See *id.* (“Its report urged African governments to recognize the existence of MSM and to promote their right to health for pragmatic reasons, with all that implies for prevention, treatment, care, and the necessity for ‘an overall high quality of life.’”).

244. See *id.* (describing the workshop's efforts to “use . . . implicit, euphemistic, or vague language and acronyms to get the foot in the door”).

245. See Epprecht, *supra* note 242, at 230 (“The majority of same-sex practicing people in Africa thus still prefer to keep a low profile, eschewing identity politics and adhering to family expectations and social norms even as they quietly find same-sex partners or surf the net for private connections.”).

246. See Katyal, *supra* note 70, at 158 (“[O]ne contributing cause of this divergence between identity and conduct is the emphasis placed on fulfillment of the institution of marriage, which is often seen ‘as an essential requirement for maintaining the family, as a family duty, as a sign of obedience to one’s parents.’”).

247. See Kendall, *supra* note 210, at 241 (“The freedom, enjoyment, and mutual respect of Basotho women’s ways of loving each other . . . suggests a need to look freshly at the way Western constructions of sexuality . . . are used to limit and oppress women.”).

IV. CRIMINAL REGULATION AS GENDER STEREOTYPING

Criminalization of same-sex sexual activity relies on gender stereotypes in two primary ways. First, the laws themselves reflect discriminatory stereotypes about the role of sex as determinative of gender and the role of gender as determinative of sexual orientation. Second, authorities often rely on gender-based stereotypes in the enforcement of the criminal bans on same-sex sexual activity.

Criminal regulation of sexual activity is widespread in sub-Saharan Africa and currently seems to be expanding.²⁴⁸ Although the criminal provisions, many of which were inherited from colonial authorities, ban particular sexual acts between same-sex partners, police within the region often enforce the prohibitions against individuals based on mere suspicion of having engaged in same-sex sexual activity.²⁴⁹ Because individuals are rarely apprehended while actually committing an offense, police regularly rely on stereotypes and non-conforming gender expression to identify and apprehend suspects.²⁵⁰ In this way, gender-based stereotypes themselves become the regulatory device through which police enforce bans on same-sex sexual activity. This link between criminal prohibitions and gender-based stereotyping requires the CEDAW Committee to aggressively encourage decriminalization.

A. *Parameters of Criminal Regulation*

A number of sub-Saharan African countries have recently passed laws imposing severe sanctions for same-sex sexual behavior. For example, on December 20, 2013 the Ugandan legislature passed a law that imposed severe sanctions for same-sex sexual behavior as well as for promoting homosexuality.²⁵¹ The original bill, which Parliament first considered in 2009, imposed the death penalty for “aggravated homosexuality.”²⁵² Amid inter-

248. See *Making Love A Crime*, *supra* note 134, at 18 (“Over the past decade there have been numerous attempts by various states throughout Africa to either criminalize consensual same-sex conduct, or to impose steeper penalties and broaden the scope of existing laws.”).

249. *Id.* at 21-23.

250. *Id.*

251. *Oloka-Onyango v. Attorney Gen.*, Constitutional Petition No. 08 of 2014 (2014) [UGCC]; see also Alan Cowell, *Ugandan Lawmakers Pass Measure Imposing Harsh Penalties on Gays*, N.Y. TIMES (Dec. 20, 2013), http://www.nytimes.com/2013/12/21/world/africa/ugandan-parliament-approves-antigay-law.html?_r=0 (discussing this anti-homosexuality legislation).

252. Faith Karimi, *Ugandan Parliament Passes Anti-Gay Bill that Includes Life in Prison*, CNN (Dec. 23, 2013, 2:11 PM), <http://www.cnn.com/2013/12/21/world/africa/uganda-anti-gay-bill/>.

national outrage, Parliament modified that provision to impose life imprisonment for “aggravated homosexuality” before the bill passed in 2013.²⁵³

Despite arguments that the law violated the fundamental human rights of the LGBTI community in Uganda, the Constitutional Court invalidated the law based on a procedural technicality in 2014.²⁵⁴ According to the Court, the law was passed in a parliamentary session that lacked a quorum.²⁵⁵ Although the Court sidestepped the critical human rights dimensions of the law, many LGBTI activists consider the outcome a victory.²⁵⁶ Still, Ugandan LGBTI activists are concerned that a new bill will soon emerge and that criminal prosecution may still occur under a colonial-era anti-sodomy law.²⁵⁷

On September 8, 2014, the Gambian National Assembly passed a bill imposing a life sentence for “aggravated homosexuality,” an offense which is triggered by “repeat offenders” and those living with HIV/AIDS.²⁵⁸ Prior to passage of the bill, Gambian law criminalized homosexuality, imposing a fourteen-year prison sentence for same-sex sexual activity.²⁵⁹ The bill is likely to receive the necessary presidential approval from Gambian President Yahya Jammeh who, in February 2014, remarked on television: “We will fight these vermins [sic] called homosexuals or gays the same way we are fighting malaria-causing mosquitoes, if not more aggressively.”²⁶⁰

253. *Id.*

254. *See* Oloka-Onyango v. Attorney Gen. (2014) [UGCC] (limiting its judgment to procedural irregularities, specifically, the absence of a quorum when the bill was passed in Parliament).

255. Oloka-Onyango v. Attorney Gen. (2014) [UGCC] (“We have therefore no hesitation in holding that there was no Coram in Parliament when the Act was passed, that the Speaker acted illegally in neglecting to address the issue of lack of Coram.”).

256. Robyn Dixon, *Uganda Court Rejects Anti-Gay Bill*, L.A. TIMES (Aug. 1, 2014, 1:10 PM), <http://www.latimes.com/world/africa/la-fg-uganda-antigay-20140801-story.html> (describing the celebration by some gay rights activists after the court decision).

257. *Id.* (explaining that activists recognize Parliament could pass another similar law).

258. *New Law in Gambia Imposes Life Sentence for “Aggravated Homosexuality”*, CBS NEWS (Sept. 8, 2014, 4:46 PM), <http://www.cbsnews.com/news/new-law-in-gambia-imposes-life-sentence-for-aggravated-homosexuality> (“In addition to ‘serial offenders’ and people living with HIV/AIDS, both [the Gambian law and a similar law in Uganda] . . . say examples of ‘aggravated homosexuality’ include when the suspect engages in homosexual acts with someone who is under 18, disabled or has been drugged. The term also applies when the suspect is the parent or guardian of the other person or is ‘in authority over’ him or her.”).

259. *See id.*

260. *Id.*

Likewise, on September 22, 2014, cabinet ministers in Chad voted to criminalize same-sex sexual activity.²⁶¹ Chad had not previously prohibited same-sex sexual activity.²⁶² The new penal code, which will go before Parliament and the President for approval, punishes same-sex sexual activity with a sentence of up to twenty years in prison.²⁶³ If the new penal code becomes law, Chad will join the majority of African states in banning same-sex sexual activity.²⁶⁴

It is important to note at the outset that a number of countries within the region have passed laws in the last decade that promote the rights of LGBTI individuals.²⁶⁵ A number of sub-Saharan African countries have never criminalized same-sex sexual conduct between consenting adults.²⁶⁶ Other countries within the region have changed their laws at some point to decriminalize same-sex sexual conduct.²⁶⁷ In addition to decriminalization,

261. See David Smith, *Chad Becomes 37th African State to Seek Ban on Homosexuality*, THE GUARDIAN (Sept. 22, 2014, 12:52 PM), <http://www.theguardian.com/world/2014/sep/22/chad-37th-african-state-seeking-ban-homosexuality>.

262. See *id.* (“Chad’s penal code is more than half a century old and does not explicitly mention homosexuality.”).

263. *Id.*

264. See *id.* (“Same-sex relations are illegal in 36 of the continent’s 54 countries.”).

265. Sub-Saharan Africa is a vast region with significant social, political, religious, ethnic, and economic diversity, all of which make generalizations about the region difficult and often misleading. It is, however, sometimes possible and desirable to look for commonalities in the laws and practices within this diverse region. With that great diversity in mind, I cautiously identify trends and patterns within the region with respect to the criminalization of same-sex sexual activity.

266. Those countries include: Benin, Burkina Faso, Central African Republic, Chad, Congo Brazzaville, Côte d’Ivoire, Democratic Republic of Congo, Gabon, Madagascar, Mali, Niger, and Rwanda. See Lucas Paoli Itaborahy & Jingshu Zhu, *State Sponsored Homophobia*, INT’L LESBIAN GAY BISEXUAL TRANS & INTERSEX ASS’N, at 20 (May 2013), http://old.ilga.org/Statehomophobia/ILGA_State_Sponsored_Homophobia_2013.pdf (providing an overview of the legal status of homosexual acts in various countries). Cf. *Violence Based on Perceived or Real Sexual Orientation and Gender Identity in Africa*, AFRICAN MEN FOR SEXUAL HEALTH & RIGHTS & THE COALITION OF AFRICAN LESBIANS 5 (2013), http://www.cal.org.za/new/wp-content/uploads/2013/07/English-SOGI-Booklet.small_.pdf (hereinafter *Perceived or Real Sexual Orientation*) (listing the African countries that do not criminalize same-sex conduct as of 2013: “Burkina Faso, Cape Verde, Central African Republic, Chad, Congo Brazzaville, Cote d’Ivoire, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Gabon, Guinea Bissau, Madagascar, Mali, Niger, Rwanda, and South Africa”).

267. Those countries include Benin, Cape Verde, Djibouti, Equatorial Guinea, Guinea-Bissau, São Tomé and Príncipe, and South Africa. Itaborahy & Zhu, *supra* note 266, at 20–32.

eight countries in the region have established an equal age of consent for heterosexual and homosexual sexual conduct.²⁶⁸

On the continent, South Africa has been a leader in the promotion of LGBTI rights both domestically and throughout the region.²⁶⁹ In 1996, South Africa became the first country to include an explicit prohibition against discrimination based on sexual orientation in its constitution.²⁷⁰ Since 1996, South Africa has enacted several laws protecting LGBTI rights, including those related to adoption, marriage and legal recognition of gender.²⁷¹ Despite these protections, however, discrimination and violence directed at LGBTI individuals remain a serious problem.²⁷² In 2010, South

268. See *id.* (listing those countries as: Burkina Faso, Cape Verde, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Mali, Guinea-Bissau, and South Africa).

269. See *Universal Periodic Review of South Africa*, HUMAN RIGHTS WATCH (Jan. 20, 2012), <http://www.hrw.org/news/2012/01/20/universal-periodic-review-south-africa> (“South Africa showed leadership at the international level in promoting the right of all persons to equality without discrimination based on sexual orientation.”); see also *id.* (“South Africa successfully pushed through the adoption of the first-ever UN resolution on Sexual Orientation and Gender Identity.”).

270. See Amy L. Kovac, *Africa’s Rainbow Nation*, 28 J. S. AFR. STUD. 90, 90 (2002) (“And the Constitutional Assembly, charged with drafting the final constitution, retained the sexual orientation clause, which the new parliament approved on May 8, 1996.”).

271. See Marius H. Smit, *Underneath the Radar: The Impact of Same-Sex Sexuality and Secularism on Education in South Africa*, BYU EDUC. & L.J. 513, 520 (2011) (noting the right of same-sex couples in South Africa to adopt children); *id.* at 519 (“Over the past fifteen years, almost all the provisions in the common law and statutory law that differentiated directly or indirectly between heterosexuals and homosexuals have now been set aside by parliament or declared invalid by the Constitutional Court.”). South Africa is not alone in providing legal protection for LGBTI individuals within the region. In 2006, the Seychelles amended its employment law to provide increased protection against discrimination based on sexual orientation. *Freedom in the World 2014: Seychelles*, FREEDOM HOUSE, <http://www.freedomhouse.org/report/freedom-world/2014/seychelles-0#.UJDvqMzITA> (“[A] 2006 amendment to the Employment Act prohibits discrimination based on sexual . . .”). The 2007 Labour Law in Mozambique “establishes employees’ rights to privacy, non-discrimination, and equal pay with regards to sexual orientation and HIV/AIDS status.” *Mozambique: SOGI Legislation Report*, INT’L COMM’N OF JURISTS (2013), <http://www.icj.org/sogi-legislative-database/mozambique-sogi-legislation-country-report-2013>. Cape Verde and Mauritius passed similar laws in 2008. See *Making Love A Crime*, *supra* note 134, at 18 (providing examples of countries that have “introduced legislation to explicitly outlaw discrimination on the basis of sexual orientation”). In Botswana, the 2010 Employment Amendment Act prohibited the termination of an employee based on sexual orientation discrimination. See *Botswana: SOGI Legislation Report*, INT’L COMM’N OF JURISTS (2013), <http://www.icj.org/sogi-legislative-database/botswana-sogi-legislation-country-report-2013/> (“Termination of contracts of employment on the grounds of sexual orientation or health issues is prohibited.”).

272. See XinLing Li, *Disjunctures within Conventional Knowledge of Black Male Homosexual Identity in Contemporary South Africa* (Dec. 2009) (unpublished MSSc the-

Africa was ranked fourth in the world in terms of the number of violent crimes perpetrated against LGBTI individuals.²⁷³

Thirty-eight African countries continue to criminalize same-sex sexual conduct to varying degrees.²⁷⁴ Countries may prohibit same-sex sexual activity under a variety of legal provisions, including prohibitions on “indecent,” “unnatural acts,” “immorality,” “homosexuality,” “impudent acts,” or “crimes against nature.”²⁷⁵ In Mauritania, Sudan, parts of northern Nigeria, and parts of southern Somalia, same-sex sexual conduct is not only illegal but also punishable by death.²⁷⁶

Some countries prohibit same-sex sexual conduct between men but not between women.²⁷⁷ Ghana’s criminal code, for example, does not specifically mention same-sex conduct between women.²⁷⁸ Rather, Ghana criminalizes sex between men through a provision entitled “Unnatural Carnal Knowledge,”²⁷⁹ which has been interpreted as criminalizing sex between

sis, Rhodes University) (on file with author) (“According to these survey results, discrimination on the basis of sexual orientation is still pervasive in contemporary South Africa, which interrogates significantly the relationship between democracy and majoritarianism.”).

273. See Daniel Ottosson, *State-Sponsored Homophobia*, INT’L LESBIAN GAY BISEXUAL TRANS & INTERSEX ASS’N, May 2010, at 7, http://www.gaylawnet.com/ezine/crime/ilga_2010.pdf (“South Africa is ranked the 4th country in the world with the highest rate of crimes: every year there, there are numerous cases of hate crimes towards LGBTI people and LGBTI advocates working to deliver more justice.”).

274. See *Making Love A Crime*, *supra* note 134, at 7 (“The continued criminalization of consensual same-sex conduct in 38 African countries is a serious cause for concern.”). Prohibitions against same-sex sexual conduct exist in 38 African countries, including but not limited to the following Sub-Saharan countries: Angola, Botswana, Burundi, Cameroon, Comoros, Eritrea, Ethiopia, Gambia, Ghana, Guinea, Kenya, Liberia, Malawi, Mauritania, Mauritius, Mozambique, Namibia, Nigeria, Senegal, Seychelles, Sierra Leone, Somalia, South Sudan, Sudan, Swaziland, Tanzania, Togo, Uganda, Zambia, and Zimbabwe. Itaborahy & Zhu, *supra* note 7.

275. EQUAL AND INDIVISIBLE, *supra* note 49, at 17.

276. See *Making Love A Crime*, *supra* note 134, at 7 (“Mauritania, northern regions of Nigeria, the southern region of Somalia and Sudan, retain the death penalty for [homosexual activity].”).

277. See *id.* at 18 (providing information about gendered prohibitions against same-sex activity).

278. See Ghana Criminal Code, § 104 (prohibiting “unnatural carnal knowledge”).

279. Section 104 of the Penal Code of Ghana states: “(1) Whoever has unnatural carnal knowledge— (a) of any person of the age of sixteen years or over without his consent shall be guilty of a first degree felony and shall be liable on conviction to imprisonment for a term of not less than five years and not more than twenty-five years; or (b) of any person of sixteen years or over with his consent is guilty of a misdemeanour; or (c) of any animal is guilty of a misdemeanour. (2) Unnatural carnal knowledge is sexual intercourse with a person in an unnatural manner or with an animal.” *Id.*

two men but not between two women.²⁸⁰ Malawi amended its law in 2011 to explicitly criminalize sex between women for the first time.²⁸¹

Countries vary with respect to how vigorously they enforce prohibitions on same-sex sexual activity.²⁸² A number of countries criminalize same-sex sexual conduct but do not actively enforce those prohibitions.²⁸³ Activists in many of those countries describe the ways in which even unenforced prohibitions expose the LGBTI community to harassment, violence, and exclusion.²⁸⁴ The contempt that is given expression by unenforced prohibitions on same-sex sexual conduct, in turn, fuels public and private acts of violence and harassment.²⁸⁵ Referring to sub-Saharan Africa, one scholar notes, “While at the moment convictions of women based on these laws are rare, they do create an atmosphere of terror, the climate in which law enforcement agencies can demand hefty bribes and the hatred and resentment in communities by which hate crimes can be committed.”²⁸⁶

Scholars have explored the many ways that criminal prohibitions serve an expressive function.²⁸⁷ Dan Kahan observes: “Sodomy laws, even when

280. See Ottosson, *supra* note 273, at 49 (noting that homosexual activity between two women is legal, but such activity between two men is illegal).

281. See *Sex Between Women Now a Crime in Malawi: New Law Violates Human Rights Obligations of Malawi*, INT’L COMM’N OF JURISTS (Feb. 8, 2011), <http://iglhr.org/content/sex-between-women-now-crime-malawi-new-law-violates-human-rights-obligations-malawi> (“The new Section 137A [enacted in 2011], captioned ‘Indecent practices between females’ provides that any female person who, whether in public or private, commits ‘any act of gross indecency with another female’ shall be guilty of an offence and liable to a prison term of five years.”).

282. See *Making Love a Crime*, *supra* note 134, at 18-20.

283. *Id.*

284. Office of the High Comm’r for Human Rights, United Nations, Free & Equal Campaign for Lesbian, Gay, Bisexual & Transgender Equality, Fact Sheet: Criminalization, http://www.ohchr.org/Documents/Issues/Discrimination/LGBT/FactSheets/unfe-30-UN_Fact_Sheets_Criminalization_English.pdf (“In addition to violating basic rights, criminalization [of homosexual activity] legitimizes prejudice in society at large and exposes people to hate crimes, police abuse, torture and family violence.”).

285. Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CALIF. L. REV. 643, 659 (2001) (quoting Kendall Thomas who “submits that sodomy laws have an effect outside of traditional understandings of the law, because citizens feel empowered by the background of these laws to commit acts of extreme violence against individuals who are, or are presumed to be, lesbian or gay”).

286. Morgan & Wieringa, *supra* note 181, at 19.

287. Goodman, *supra* note 285, at 644 (“In the area of criminal law especially, leading projects have focused analytically on the ‘expressive function’ of criminal law in shaping the ‘social meaning’ of particular behaviors . . .”).

unenforced, express contempt for certain classes of citizens.”²⁸⁸ When given expression through law, albeit unenforced legal provisions, these prohibitions on same-sex sexual conduct implicitly reinforce the notion of LGBTI inferiority.²⁸⁹

Whether enforced or not, criminal prohibitions on same-sex sexual activity expose LGBTI people to blackmail and extortion from friends, neighbors, classmates, police, current and former sexual partners, work colleagues, and family members.²⁹⁰ In one study in Cameroon, 44% of the 214 respondents who identified as gay, lesbian, or transsexual, reported extortion involving threats of exposure to family members²⁹¹ and 38% reported threats of exposure to police.²⁹² Another survey of men who have sex with men in Malawi, Namibia, and Botswana identified blackmail as “one of the most prevalent human rights abuses they faced, with 18% of those in Malawi, 21.3% of those in Namibia, and 26.5% of those in Botswana reporting incidents of blackmail.”²⁹³ The secondary effects of criminal prohibitions on same-sex sexual activity can be significant and severe.

The media in some countries play a role in fostering hostility and fomenting violence toward LGBTI individuals.²⁹⁴ In one well-known incident in Uganda, several publications published the names, photos, and other personal information of individuals suspected to be LGBTI.²⁹⁵ One leading LGBTI activist, David Kato, was featured on the cover of the Ugandan magazine *Rolling Stone*, which included his picture and other personal information under the headline “Hang Them.”²⁹⁶ He received death threats and, within a month, he was killed in his home.²⁹⁷ In Cameroon,

288. Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 421 (1999).

289. See Goodman, *supra* note 285, at 689-90. But see Goodman, *supra* note 285, at 661 (noting the impact of criminalization is not universal based on field research in South Africa and suggesting that, for some LGBTI people, criminalization may strengthen personal resolve to resist heterosexism).

290. See *Nowhere to Turn*, *supra* note 198, at 102 (providing data on the prevalence of blackmail and extortion to LGBTI individuals).

291. *Id.* at 97-98.

292. *Id.* at 98.

293. *Id.* at 5.

294. Amnesty International reports that, in Uganda, “there was an increase in incidents of harassment and violence against LGBTI individuals, as well as more sensationalist coverage of homosexuality in the press, after US evangelicals visited the country in 2009 and publicly preached that homosexuality is evil.” *Making Love a Crime*, *supra* note 134, at 37.

295. *Id.* at 41 (“Tabloid newspapers in Uganda have . . . printed personal information about [LGBT individuals] since 2002.”).

296. *Id.*

297. *Id.*

media outlets published names of public figures, calling it the “Complete List of Homosexuals in Cameroon.”²⁹⁸

In many countries, violence and harassment extend beyond the LGBTI community to include human rights defenders and others who work to promote LGBTI rights.²⁹⁹ In some countries, laws prohibit the “promotion of homosexuality,” and activists and human rights defenders may be arrested and prosecuted under these laws.³⁰⁰ In Uganda, for example, the Anti-Homosexuality Law, which was recently struck down by the Constitutional Court on procedural grounds, prohibited community organizing and political activity that addressed or promoted same-sex sexuality.³⁰¹ Responding to a similar proposed law in Nigeria that would have curtailed the work of human rights defenders working on LGBTI issues, the U.N. Special Representative on human rights defenders criticized the draft law on the grounds that it would restrict free expression and freedom of association.³⁰²

In other countries, human rights defenders and LGBTI allies are subjected to threats and violence even when their advocacy activities are not explicitly prohibited by law.³⁰³ In Cameroon, for example, two lawyers who defended individuals accused of violating criminal prohibitions against same-sex sexual activity have received multiple threats to themselves and their family members.³⁰⁴ Attacks or threats of violence against human rights

298. *Criminalizing Identities: Rights Abuses in Cameroon Based on Sexual Orientation and Gender Identity*, HUMAN RIGHTS WATCH 11 (Nov. 4, 2010), <http://www.hrw.org/sites/default/files/reports/cameroon1010web.pdf> [hereinafter *Criminalizing Identities*].

299. *E.g., Non-Governmental Organisations' Shadow Report on the Implementation of the International Covenant for Civil and Political Rights (ICCPR) in Malawi*, CENTER FOR THE DEV. OF PEOPLE, ET AL. 8 (noting that “several attempts to harm the security of LGBT rights advocates” occurred in response to western donors’ decision to withhold funding originally intended for Malawi) (Report was submitted to the 103rd Session of the United Nations Human Rights Commission held on Oct. 25, 2011).

300. *Uganda Planning New Anti-Gay Law Despite Opposition*, BBC NEWS (Nov. 10, 2014), <http://www.bbc.com/news/world-africa-29994678>.

301. *Shadow Report*, *supra* note 180, at 7.

302. Special Representative of the Sec’y Gen., *Addendum to Rep. of the on the Situation of Human Rights Defenders*, para. 511, U.N. Doc. A/HRC/4/37/Add.1 (Mar. 27, 2007) (summarizing cases transmitted to governments and replies received).

303. *See Guilty by Association: Human Rights Violations in the Enforcement of Cameroon’s Anti-Homosexuality Law*, HUMAN RIGHTS WATCH 52 (Mar. 2013), http://www.hrw.org/sites/default/files/reports/cameroon0313_ForUpload.pdf [hereinafter *Guilty by Association*].

304. *Id.* (“[The two lawyers] received a series of anonymous threats by cell phone and email related to their work on several high-profile homosexuality cases. One text

defenders can be particularly devastating if they succeed in limiting LGBTI individuals' access to the legal system.³⁰⁵

Criminalization of same-sex sexual conduct violates the rights of LGBTI individuals and serves as justification for social stigma, discrimination, and sometimes egregious violence. Criminal bans regulate sexuality and enforce social norms of masculinity and femininity. The prohibitions instantiate gender-based stereotypes and police sexuality by punishing non-normative behavior.

B. Historical Linkages Between Stereotypes and Anti-Sodomy Laws

In the context of criminalization of same-sex sexuality, stereotypes operate in two primary ways. First, stereotypes regarding masculinity/femininity and the sexual attraction that purportedly stems from these gender constructions motivate criminal prohibitions on same-sex sexual activity.³⁰⁶ In this sense, criminal bans rely on gender stereotypes for legitimacy.³⁰⁷ Second, stereotypes operate as a tool of enforcement.³⁰⁸ Authorities rely on gender stereotypes to identify and prosecute those suspected of violating bans on same-sex sexual activity.³⁰⁹ Stereotyping thus acts as a regulatory device for punishing non-normative sex and gender expression.

The reliance on stereotypes in the enforcement of criminal prohibitions against same-sex sexual activity stems in part from the historical ori-

message . . . threatened [the lawyer's] school-age children and warned him to stop defending persons accused of homosexuality.”).

305. *Id.* (“Recent threats against defense lawyers who have represented clients in homosexuality cases pose a new menace to the right to representation.”).

306. *See* BORN FREE AND EQUAL, *supra* note 28, at 49 (“Criminalization perpetuates stigma ‘through reinforcement of existing prejudices and stereotypes.’”); *See also* Daniel Englander, *Protecting the Human Rights of LGBT People in Uganda In the Wake of Uganda’s “Anti-Homosexuality Bill, 2009”*, 25 EMORY INT’L L. REV. 1263, 1267-68 (2011) (“[T]he lower standard of proof allows authorities to harass homosexuals or suspected homosexuals based on ‘prejudice or stereotypes of attire, manner, or association.’”).

307. *See generally* *Making Love a Crime*, *supra* note 134, at 47 (“[The] threat of persecution confines individuals to strict gender and sexual norms for fear of being labeled LGBTI; as a result, it maintains power inequalities between men and women. Lesbians and women who have sex with women are particularly vulnerable to the effects of strict gender norms which are perpetuated by anti-homosexuality laws. There is evidence of strong social norms, discriminatory laws and practices in sub-Saharan Africa which position men with greater decision-making power and control in the family, compared to women. Conceptions of masculinity are linked to women’s sexuality, and men’s control over their bodies.”).

308. *See* Englander, *supra* note 306, at 1265.

309. *Id.* at 1267. (“[T]he lower standard of proof allows authorities to harass homosexuals or suspected homosexuals based on ‘prejudice or stereotypes of attire, manner, or association.’”).

gins of the laws.³¹⁰ Within the former British colonies, many of the criminal prohibitions can be traced directly to colonial authorities.³¹¹ Almost 150 years ago, British colonial authorities introduced into the Indian Penal Code a criminal prohibition on same-sex sexual activity: Section 377.³¹² Section 377 prohibited “carnal intercourse against the order of nature with any man, woman, or animal.”³¹³ Botswana, Gambia, Ghana,³¹⁴ Kenya, Lesotho, Malawi, Nigeria, Seychelles, Sierra Leone, Somalia, Swaziland, Sudan, Tanzania, Uganda, Zambia, and Zimbabwe inherited versions of Section 377 during the colonial era.³¹⁵ South Africa also criminalized sodomy but it did so under the Roman-Dutch law it retained from the Netherlands even after the British took over in 1806.³¹⁶

Many of the versions of Section 377 that the British colonialists imposed on the colonies reflected a moral panic about “the ‘native’ environment [which] made it urgent to insert anti-sodomy provisions in the colonial code.”³¹⁷ Many versions of Section 377 made no distinction between same-sex sexual activity that was consensual (rather than non-consensual) or by adult actors (rather than child actors).³¹⁸ “To the drafters, the act of ‘sodomy’ itself was so horrible that the harm seemed uniform: regardless of the other party’s age, and regardless of whether he consented or not.”³¹⁹

Over time, the penal code of Queensland, an Australian colony, began to influence the drafting and amendments to penal codes in sub-Saharan Africa.³²⁰ Nigeria adopted a version of the Queensland Penal Code (QPC) in 1916, followed by Kenya, Uganda, and Tanzania.³²¹ Unlike the Indian Penal Code, the QPC explicitly defined “unnatural offences” to include the

310. See generally THIS ALIEN LEGACY, *supra* note 124, at 13-25 (providing an analog of the history of the origin and development criminalization of homosexual activity in British colonies).

311. *Id.*

312. *Id.* at 1-2 (explaining the history of Section 377 and its prohibition against same-sex sexual activity).

313. *Id.* at 1 (quoting language in Section 377).

314. According to Human Rights Watch, “[t]he Ghanaian code differs from other British-derived Penal Codes in Africa in that consensual “buggery,” while a crime, is defined only as a misdemeanor. Ghanaian law does not derive directly from the Indian Penal Code (or the Queensland Penal Code) – as do most other British-African codes” *Id.* at 6 n.16.

315. *Id.* at 6-7 (listing countries that accepted versions of India’s anti-homosexuality law).

316. *Id.* at 6 n.17 (“*South Africa*, although taken over by the British in 1806, retained the Netherlands’ common law, known as ‘Roman-Dutch’—which also criminalized ‘sodomy.’”).

317. *Id.* at 16.

318. *Id.* at 19.

319. *Id.*

320. *Id.* at 22.

321. *Id.* at 23.

passive sexual partner.³²² The QPC also expanded the scope of criminal liability by including “attempted” unnatural offences.³²³ By including “attempted” unnatural offenses, colonial authorities significantly broadened the types of behaviors that might be prosecuted and punished.

Along with prohibitions against same-sex sexual activity, British colonial authorities imposed laws designed to further the “civilizing mission” of colonialism.³²⁴ Often vaguely defined, these “civilizing” laws against, for example, vagrancy and begging invited the state to regulate those whose mere presence colonial authorities found undesirable.³²⁵ The penal code of Zambia, “for example, makes any ‘idle or disorderly person’ (including ‘every person who, without lawful excuse, publicly does any indecent act’) liable to a month in prison; a repeat conviction can cause one to ‘be deemed a rogue and vagabond’ with a far steeper sentence.”³²⁶ Some of these vague prohibitions gave colonial authorities the ability to target non-normative sexual behaviors.³²⁷

As Human Rights Watch has documented, the early Sudanese Penal Code vividly illustrates this connection between vaguely worded prohibitions on undesirable conduct and the targeting of non-normative sexuality.³²⁸ The 1899 Sudanese Penal Code criminalized seven types of “vagabond,” including the “catamite” or “any male person who (1) dresses or is attired in the fashion of a woman in a public place or (2) practices sodomy as a means of livelihood or as a profession.”³²⁹ Researchers at Human Rights Watch note:

A person’s clothing became not only criminal in itself, but potentially the sign of a criminal sexual history. One legal commentator clarified that ‘catamite’ meant a ‘habitual’ practitioner of sodomy, adding that ‘it is not necessary to prove when and where any individual act of this nature occurred.’ Beyond the

322. *Id.* at 24.

323. *Id.* at 23 (“This eliminated one of the ambiguities in the IPC, making clear that both partners in the act were criminal. The QPC also widened the ambit beyond “penetration,” by introducing an independent provision for “attempts to commit unnatural offences.” Thus any sexual act or approach not resulting in penetration could be called an “attempt.”).

324. *Id.* at 28 (“In the colonies, these laws . . . served the ‘civilizing mission’ ”).

325. *Id.* at 26–28 (discussing the ways in which vagrancy laws allowed the state to specifically target the poor).

326. *Id.* at 27.

327. *See id.* at 28–29 (explaining how vagrancy laws gave broad police power to regulate the behavior of non-normative sexualities).

328. *Id.* at 28–30.

329. *Id.* at 28 (quoting Sec. 448 (2) (e) of the Sudanese Penal Code).

person's appearance, no evidence was needed for his (or her) arrest and jailing.³³⁰

The colonial laws regulated those who were deemed undesirable. Often no evidence of criminal conduct was necessary.³³¹ Rather, “[b]eing, or looking like, a certain kind of person became the basis for harassment, arrest, detention, and abuse.”³³² Today, police still target LGBTI individuals for arrest based on similar stereotypes.³³³ Judgments about non-conforming gender behavior or clothing often motivate police harassment, arrest, or detention.³³⁴

C. Contemporary Examples of Stereotyping As Regulation of Sexuality

Laws that criminalize same-sex sexual activity purport to criminalize certain proscribed acts.³³⁵ In practice, however, enforcement of such laws depends on police officers' assessments of the degree to which a suspect's behavior conforms to traditional notions of sexuality and gender.³³⁶ The repeated reliance on gender-based stereotypes to identify and prosecute those suspected of engaging in same-sex activity illustrates the links between gender-based stereotypes and compulsory heterosexuality.

Authorities often arrest or harass people who they merely suspect have engaged in same-sex sexual conduct.³³⁷ One study in Cameroon, for exam-

330. *Id.* at 28 (quoting ALAN GLEDHILL, *THE PENAL CODES OF NORTHERN NIGERIA AND THE SUDAN* 749 (1963)).

331. *Id.* at 30.

332. *Id.* at 30–31.

333. See e.g., *Making Love a Crime*, *supra* note 134, at 47 (“In Uganda, Kenya, South Africa and Cameroon, it is women and men who are perceived to transgress stereotypical norms of masculinity and femininity who bear the brunt of the harassment and violence that ostensibly is caused by hostility towards LGBTI people. As one organization for former football players and sympathizers based in Cameroon put it, “Lesbians have the same problems as gay men. It is effeminate men who get targeted, and butch women who get targeted.”); *This Alien Legacy*, *supra* note 124, at 49 (“A homosexual need not be caught in the act: presumptions fed by prejudice, or stereotypes of attire, manner, or association, are enough.”).

334. See *infra* Part IV.

335. See *Making Love a Crime*, *supra* note 134, at 18–20 (describing prohibitions against same-sex activity).

336. See *THIS ALIEN LEGACY*, *supra* note 123, at 49.

337. Daniel Englander, *Protecting the Human Rights of LGBT People in Uganda In the Wake of Uganda's "Anti-Homosexuality Bill, 2009"*, 25 EMORY INT'L L. REV. 1263, 1267 (2011) (“[T]he lower standard of proof allows authorities to harass homosexuals or suspected homosexuals based on ‘prejudice or stereotypes of attire, manner, or association.’”) citing *This Alien Legacy*, *supra* note 124, at 49.

ple, reveals that authorities rarely prosecute individuals who are “caught in the act” of same-sex sexual activity.³³⁸ Among eight prosecutions between 2010 and 2012 in Cameroon, not one involved eyewitness testimony that the accused had engaged in same-sex sexual activity.³³⁹ Rather, many arrests are for “‘attempted homosexuality,’ which is equivalent to the crime of homosexuality under Cameroonian law.”³⁴⁰ These prohibitions allow state authorities to round up anyone suspected of engaging in same-sex sexual conduct.

The reliance on gender norms as a vehicle to regulate sexuality illustrates the extent to which state-sanctioned discrimination of LGBTI individuals is inextricably linked to gender. Writing about criminal regulation of sexuality in Zimbabwe, Oliver Phillips explicitly links criminal prohibitions and stereotyped expectations of masculinity and femininity.³⁴¹ He states:

The laws defining sexual offences play a role in giving shape to gender and conceptions of sexuality—they regulate sexual relations between individual people and shape interaction between men and women, and between different men, and different women. They reward certain behaviour and punish other behaviour, and in doing so assess behaviour which fits or does not fit with certain conceptions of masculinity and femininity.³⁴²

In Cameroon, for example, police have been accused of arbitrarily arresting individuals whom they suspect have engaged in same-sex sexual conduct. Section 347 of the Criminal Code of Cameroon criminalizes “sexual relations with a person of the same sex.”³⁴³ Punishment for violation of Section 347 ranges from imprisonment from six months to five years and includes fines from approximately \$40 to \$400 U.S. dollars.³⁴⁴

338. Guilty by Association, *supra* note 303, at 1 (“In most cases, the accused are convicted [of homosexual acts], often on the basis of little or no evidence.”).

339. *Id.* at 1–2 (“[A]mong the eight people . . . who were convicted for homosexuality between 2010 and 2012, in no case was there even a suggestion in the evidence presented in court that the accused engaged in sexual intercourse publicly.”).

340. *Id.* at 2.

341. Phillips, *supra* note 199, at 29.

342. *Id.*

343. See *The Status of Lesbian, Gay, Bisexual and Transgender Rights in Cameroon*, ALTERNATIVES CAMEROON 5 (June 2010), http://www2.ohchr.org/english/bodies/hrc/docs/ngos/LGBTI_Cameroon_HRC99.pdf [hereinafter *Lesbian Status*] (shadow report to the Human Rights Committee noting the criminalization of homosexual activity in Cameroon).

344. *Id.*

One of the most publicized cases of arbitrary arrest in Cameroon occurred in 2005, when police arrested thirty-two men at a club in Yaoundé.³⁴⁵ Of those detained, some bribed police to gain release, but eleven men chose not to or were unable to pay for their release.³⁴⁶ The men spent nine months in pre-trial detention and were threatened with anal examinations purportedly to determine if they had engaged in anal sex.³⁴⁷ At the eventual trial, the prosecution produced no evidence or witnesses to testify against the men.³⁴⁸ Although all were found to be not guilty due to the absence of any evidence against them, the public prosecutor refused to sign release papers, insisting instead that the men be subject to retrial.³⁴⁹ The authorities finally released the group in June 2006, but one detainee, Alim Mongonche, died within one week of his release.³⁵⁰ His death was “attributed to the lack of HIV-related treatment provided while awaiting his two trials.”³⁵¹ In such cases, stereotypes can play a role in targeting groups or individuals for arrest and detention.

Amnesty International reports that “[s]exual behaviour becomes synonymous with identity; the police do not wait for evidence of offences as defined in the law and they arrest individuals simply on the basis that societal prejudice holds they are likely to commit them.”³⁵² Numerous reports throughout the region describe incidents of arbitrary arrest of individuals suspected of engaging in same-sex sexual conduct.³⁵³ In a particularly egregious example in July 2011, the Western Regional Minister in Ghana advised the Bureau of National Investigations to arrest anyone who was perceived to be gay and suggested that individuals inform the authorities about anyone who was suspected to be gay.³⁵⁴ In another example, Gambia periodically conducted sweeps and arrests of individuals suspected of engag-

345. *Making Love A Crime*, *supra* note 134, at 25 (describing the arrest of thirty-two men at a bar).

346. *Id.*

347. *Lesbian Status*, *supra* note 343, at 9 (“[T]he prosecutor threatened them with an anal examination to prove they engaged in homosexual conduct.”).

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.* at 6–7.

352. *Making Love a Crime*, *supra* note 134, at 21.

353. *See id.* (“In some countries, authorities arrest, detain, prosecute and sentence LGBTI individuals not based on their behaviour, but rather based on the perception of their sexual orientation.”).

354. *See id.* at 22 (“In July 2011, the Western Regional Minister in Ghana asked the Bureau of National Investigations and security forces to round up the country’s gay population and called on people to inform on people they believed to be ‘homosexual.’ ”).

ing in same-sex sexual activity.³⁵⁵ In 2012, one raid at a birthday party in Banjul led to the arrest of eighteen men, some of whom reported beatings and interrogations before a trial that caused them reputational harm.³⁵⁶

One example from Zimbabwe is illustrative. An LGBTI organization from Zimbabwe submitted a shadow report to the CEDAW Committee in 2012.³⁵⁷ The shadow report mentioned, as an example of discriminatory stereotyping, a 2009 incident in which members of the Zimbabwe Women's National Soccer Team were asked to "wear dresses and 'more feminine attire' to root out lesbianism in soccer."³⁵⁸ The shadow report explicitly connected CEDAW's women's rights mandate to the violence experienced by LGBTI individuals in Zimbabwe.³⁵⁹ The report stated:

Irrespective of our sexual orientation women in Zimbabwe are not free to live and challenge collective norms and values based on the pervasive notion of culture, religion and tradition that dictates that [sic] women's livelihoods. Heteronormativity is subjectively based on the power-constructions of male-domination, political interference and the rise of religious fundamentalism. Women have been forced to carry out assigned roles and responsibilities and any deviation from these stereotypes results in the vilification and isolation from one's family, community and public life at large.³⁶⁰

This example illustrates the ways in which femininity, stereotyping, and gender non-conformity are linked to homophobia. One Ugandan lesbian organization reported to the CEDAW Committee in 2010: "Whether someone identifies as transgender, is intersex, or dresses in a manner perceived to be too masculine or improper for a woman, they are accused of

355. *See id.* at 9 ("Recent years have born witness to . . . mass arrests of those who are or who are perceived to be LGBTI people in The Gambia . . .").

356. *See New Law in Gambia Imposes Life Sentence for "Aggravated Homosexuality," supra* note 258 ("A 2012 raid at a poolside birthday party in the capital, Banjul, led to the arrests of 18 men, some of whom said they were interrogated and beaten before undergoing a very public trial that destroyed their reputations.").

357. A shadow report is a report submitted by a non-governmental organization that "shadows" or is supplemental to the official report submitted to the Committee by the reporting government. U.N. treaty bodies often rely on shadow reports to provide a realistic assessment of the government's progress in implementing the relevant treaty obligations.

358. *Report on Discrimination Against Women in Zimbabwe Based on Sexual Orientation and Gender Identity*, GAYS & LESBIANS OF ZIMBABWE (GALZ) 5 (Jan. 6, 2012), <https://www.outrightinternational.org/sites/default/files/559-1.pdf>.

359. *Id.* at 5.

360. *Id.* at 3.

being homosexual—gay or lesbian—and persecuted because of this perceived identity.”³⁶¹ Human rights reports from the region echo the concern that individuals are targeted for discrimination and violence when they do not conform to norms of masculinity and femininity.³⁶²

Other jurisdictions have confronted the link between gender discrimination and gender stereotypes. The U.S. Supreme Court considered this link in the case of *Price Waterhouse v. Hopkins*.³⁶³ The plaintiff in that case, Ann Hopkins, successfully sued Price Waterhouse alleging gender discrimination in the denial of her promotion to partner within the company.³⁶⁴ Evidence at trial revealed that company representatives instructed Hopkins to behave in more feminine ways, including advice to “wear make-up” and attend “charm school.”³⁶⁵ The Court concluded that enforcing gender norms and stereotypes within the company was discriminatory.³⁶⁶

More recently, acting as amici in the U.S. Supreme Court case of *U.S. v. Windsor*,³⁶⁷ the National Women’s Law Center, a renowned U.S.-based women’s rights organization, asserted that gender-based stereotypes played a significant role in state prohibitions against same-sex marriage.³⁶⁸ Specifically, the brief argued that gender-based stereotypes, which dictate that women are expected to express femininity and, correspondingly, to partner with and be attracted to a man, are unconstitutional under equal protection.³⁶⁹

361. *Shadow Report*, *supra* note 180, at 4.

362. *See, e.g., Criminalizing Identities*, *supra* note 298, at 37. The human rights report from Cameroon explains: “Women are more commonly singled out [for homophobic violence] because they fail to meet expectations for their appearances or because they engage in conduct deemed unfeminine.” *Id.* The report quotes an interviewee from Cameroon: “The fact that I wear shorts or pants frequently makes me a lesbian in people’s eyes. I also play soccer, and in Cameroon, people assume that if you are a soccer player, you are a lesbian.” *Id.*

363. 490 U.S. 228 (1989).

364. *See Hopkins v. Price Waterhouse*, 737 F. Supp. 1202, 1204 (D.D.C. 1990) (affirming a finding of sex discrimination).

365. *Price Waterhouse*, 490 U.S. at 235.

366. *Price Waterhouse*, 490 U.S. at 250 (discussing the role of sex stereotyping in discrimination actions).

367. 133 S. Ct. 2675 (2013).

368. *See Brief for Nat’l Women’s Law Ctr. et al. as Amici Curiae Supporting Respondents* at 14–17, *U.S. v. Windsor*, 133 S.Ct. 2675 (2013) (discussing the history of marriage laws and how they typically enforced gender stereotypes).

369. *See id.* at 2 (“Just as the Constitution has required close scrutiny of laws that restrict the roles that men and women perform within marriage on the basis of gender stereotypes, so, too the Constitution requires close scrutiny of laws based on gender stereotypes that restrict individuals’ liberty to decide with whom they will enter such intimate relationships.”). *See also* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U.L. REV. 197, 235 (1994)

Indeed, federal courts in the United States recognized, prior to *Windsonor*, that animus toward LGBTI individuals stems from gender stereotypes.³⁷⁰ A U.S. District Court in Massachusetts, for example, stated: “Sexual orientation harassment is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women.”³⁷¹ Similarly, a U.S. District Court in Minnesota recognized a sex discrimination claim that was based on allegations that peers targeted a student for harassment “not only because they believed him to be gay, but also because he did not meet their stereotyped expectations of masculinity.”³⁷² These courts and others in the U.S. have acknowledged the interconnectedness of discrimination claims based on gender stereotypes and real or perceived sexual orientation.³⁷³

In sum, stereotypes regulate sexuality by normalizing heterosexual sexual expression.³⁷⁴ According to heteronormativity, a stereotypical male should exhibit masculinity and be attracted to women.³⁷⁵ These stereotypes of appropriate gender expression and sexuality both reflect and are reinforced by criminal regulations prohibiting same-sex sexual activity.³⁷⁶ Fur-

(explaining with regard to gender stereotypes and compulsory heterosexuality in the U.S., “[m]ost Americans learn no later than high school that one of the nastier sanctions that one will suffer if one deviates from the behavior traditionally deemed appropriate for one’s sex is the imputation of homosexuality. The two stigmas, sex-inappropriateness and homosexuality, are virtually interchangeable, and each is readily used as a metaphor for the other.”).

With regard to gender stereotypes and compulsory heterosexuality in the United States, Andrew Koppelman observes:

Most Americans learn no later than high school that one of the nastier sanctions that one will suffer if one deviates from the behavior traditionally deemed appropriate for one’s sex is the imputation of homosexuality. The two stigmas, sex-inappropriateness and homosexuality, are virtually interchangeable, and each is readily used as a metaphor for the other.

Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U.L. REV. 197, 235 (1994).

370. See, e.g., *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002).

371. *Centola*, 183 F. Supp. 2d at 410.

372. *Montgomery v. Independent Sch. Dist.*, 109 F. Supp. 2d 1081, 1090 (D. Minn. 2000).

373. See generally Francisco Valdes, *supra* note 2 (documenting how courts conflate sex, gender, and sexual orientation).

374. See BUTLER, *supra* note 1, at 17 (“The heterosexualization of desire requires and institutes the production of discrete and asymmetrical oppositions between ‘feminine’ and ‘masculine,’ where these are understood as expressive attributes of ‘male’ and ‘female.’”).

375. *Id.*

376. See *supra* Part IV.

ther, police and prosecutors often rely on these gender stereotypes to target LGBTI individuals for arrest, detention or harassment in sub-Saharan Africa.³⁷⁷ The CEDAW Committee, however, has not fully explored the potential of the Convention to challenge gender stereotypes related to gender identity and sexual orientation.³⁷⁸

V. MODIFYING THE CEDAW COMMITTEE'S APPROACH TO GENDER AND SEXUALITY

As Part IV of this Article demonstrates, persecution and discrimination on the basis of non-normative sexuality is inextricably linked to gender subordination. I argue that many of the same forces that shape and regulate gender operate to regulate sexuality within the sub-Saharan region, bringing discrimination and violence based on sexual orientation and gender identity firmly within the mandate of the CEDAW Committee. The Committee should begin to systematically address LGBTI violence and discrimination, much of which is motivated by a perception that victims have violated social norms related to masculinity, femininity, and the performance of gender. This more expansive focus on gender includes gender stereotypes that foster discrimination and violence against individuals who are gender non-conforming or otherwise non-heteronormative. A broader focus on gender is long overdue and would significantly improve the Committee's engagement with issues related to sexuality.

The CEDAW Convention's anti-stereotyping provision, Article 5, has been under-theorized in the context of LGBTI rights.³⁷⁹ Article 5 of the CEDAW Convention provides an opening for the CEDAW Committee to examine gender-based stereotyping and its intersection with criminal regulation of sexuality.³⁸⁰ Gender stereotypes operate by normalizing certain attributes and associating them specifically with males or females.³⁸¹ Those attributes are constructed as normal and universal, creating a social expectation that femaleness or maleness will, by definition, reflect those attributes

377. See *Making Love a Crime*, *supra* note 134, at 21-25.

378. See Darren Rosenblum, *Unsex CEDAW, or What's Wrong with Women's Rights*, 20.2 COLUM. J. GENDER & L. 98, 101 (2011).

379. See generally Elizabeth Sepper, *Confronting the "Sacred and Unchangeable": The Obligation to Modify Cultural Patterns Under the Women's Discrimination Treaty*, 585 U. PA. J. INT'L. L. 30 (2008) (arguing that Article 5 has been under-theorized *generally*).

380. See *infra* note 386 and accompanying text.

381. See Judith Butler, *Appearances Aside*, 88 CALIF. L. REV. 55, 63 (2000) (discussing stereotypes as a way of locking people into certain societal expectations of gender).

and that heterosexual sexual orientation will flow “naturally” from the embodiment of masculinity or femininity.³⁸²

In general, CEDAW contemplates rights violations against women,³⁸³ but the CEDAW Committee has not meaningfully grappled with the distinction between sex and gender.³⁸⁴ This focus on “sex” rather than “gender” is evident in the wording of Article 1, which refers solely to discrimination on “the basis of sex.”³⁸⁵ The limiting language of Article 1 might reasonably exclude human rights claims from gender non-conforming men and thus, these men might fall outside the protection of CEDAW.

Article 5, in contrast, repeatedly invokes the concept of socially constructed gender and the need to eliminate gender-based stereotypes.³⁸⁶ Simply put, Article 5 prohibits gender stereotyping. Article 5 requires that States parties take all appropriate measures to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”³⁸⁷ Regulation of gender through stereotyping is precisely the kind of discrimination with which Article 5 of the CEDAW Convention is concerned.³⁸⁸ Article 5’s anti-stereotyping provisions provide guidance in the interpretation of other

382. See Brief for National Women’s Law Center et al. as Amici Curiae Supporting Respondents at 27, *U.S. v. Windsor*, 981 F.2d 943 (7th Cir. 1992) (“Such analyses of what constitutes sex discrimination under federal statutes help to illustrate the common basis that much sexual orientation discrimination shares with sex discrimination in stereotyping about gender preferences, roles, and abilities.”); see also Butler, *supra* note 381, at 60 (“[G]eneralizations and stereotypes’ upon which gender discrimination relies are coextensive with the practice of gender itself”).

383. See Rosenblum, *supra* note 60, at 101.

384. *Equal and Indivisible*, *supra* note 49, at 16 (“[T]he CEDAW Committee generally uses the term gender interchangeably with the term sex, which makes it harder to appreciate the differences between discrimination based on gender and discrimination based on sex.”).

385. Article 1 defines discrimination against women as “any distinction, exclusion, or restriction made on the basis of sex” Convention on the Elimination of Discrimination Against Women, G.A. Res. 34/180, Art. 1 (Dec. 18, 1979).

386. Rikki Holtmaat, *Article 5*, in *THE UN CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN: A COMMENTARY* 141 (Marsha A. Freeman et al. eds., 2012) (discussing the role of Article 5 in interpreting the CEDAW).

387. Convention on the Elimination of Discrimination Against Women, G.A. Res. 34/180, Art. 5 (Dec. 18, 1979).

388. *Equal and Indivisible*, *supra* note 49, at 16 (“By explicitly acknowledging the difference between sex and gender, the CEDAW Committee could facilitate a more profound debate on socially constructed norms and their effects on all women.”).

provisions within the Convention.³⁸⁹ Given its prominent placement within the Convention's text and its interpretation by the CEDAW Committee, Article 5 offers both its own substantive norms and "a framework for the interpretation and implementation of [the] Convention as a whole."³⁹⁰

As such, Article 5 offers greater potential than Article 1 for bringing gender stereotypes that manifest in restrictions on, discrimination against, and violence toward non-conforming sexuality within the crosshairs of the Committee. This more far-reaching interpretation of Article 5's potential would more accurately reflect how gender stereotypes operate to regulate the behavioral norms of both men and women.

However, although Article 5 applies to the gender-based stereotyping of both men and women and could reasonably contemplate a gender non-conforming man harmed by gender stereotyping, it is unlikely that the CEDAW Committee will endorse such an approach at this time. It is more likely that the Committee will adopt an incremental approach that first recognizes the intersection of gender and sexuality within the confines of its current orientation toward violations against women. In other words, its focus will be on LBT women.

The Committee should go even further in its interpretation of Article 5 to include all gender non-conforming LGBTI individuals, regardless of their sex, who suffer harm as a result of stereotypes regulating masculinity and femininity. Some might resist such an expansion of current anti-discrimination efforts and oppose the inclusion of claims from gender-non-conforming men out of a concern for scarce resources. After all, in the global campaign to eliminate discrimination and violence perpetrated against *women*, much work remains. However, any effort to combat gender discrimination is not complete and not wholly effective if it ignores discrimination and violence directed at all gender-non-conforming individuals. Anti-LGBTI violence, for example, is a regulatory device designed to police the boundaries of appropriate gendered behavior.³⁹¹ Like gender-based violence perpetrated against women *qua* women, violence perpetrated against gender-nonconforming men operates to regulate norms of masculinity and femininity in mutually reinforcing and substantially similar ways.³⁹² For this reason, all campaigns to eradicate gender-based violence (whether directed at heterosexual women or LGBTI individuals) share critical goals and

389. See generally Holtmaat, *supra* note 386 (discussing the role of Article 5 in interpreting the CEDAW).

390. *Id.* at 154.

391. See *supra* Part IV (discussing how anti-gay violence and discrimination intends to regulate behavior).

392. See *supra* Part IV.C (describing the gender stereotypes often relied upon by law enforcement in the enforcement of criminal bans on same-sex sexual activity).

should be viewed as complementing the fight for gender equality rather than competing with it for scarce resources.³⁹³

A review of CEDAW's concluding observations concerning sub-Saharan African states in recent years reveals a restrictive rather than an expansive understanding of gender regulation and its link to sexuality and gender expression.³⁹⁴ In its review of States parties' reports from the sub-Saharan region between 2005 and November 2014, the CEDAW Committee mentions discrimination and violence against LGBTI individuals in only four of the fifty-six total reports.³⁹⁵ The Committee's narrow view of its mandate represents missed opportunities to meaningfully engage government representatives on the issue of LGBTI violence and discrimination.

The CEDAW Committee should modify its approach in two ways. First, the Committee should clarify its definition of non-discrimination and stereotyping to unequivocally include those whose behavior (sexual and otherwise) does not conform to social norms surrounding gender expression and sexuality. Article 5's focus on gender stereotyping provides an opening for the Committee to explore these issues. An expansive understanding of gender and its regulatory role in sexuality would allow the Committee to encourage all states to decriminalize same-sex sexual activity. Second, an expansive understanding of gender would include violence perpetrated against those who fail to conform to gender-based norms, including norms related to sexual expression and gender identity. This approach would capitalize on the Committee's progress in raising awareness of gender-based violence around the world and would bring much-needed focus to violence perpetrated against LGBTI individuals.

A. *Exploring Gender-Based Violence*

Unlike the issue of discrimination and violence perpetrated against LGBTI communities in sub-Saharan Africa, the CEDAW Committee has devoted considerable attention to issues of gender-based violence.³⁹⁶ Expanding the Committee's focus on gender-based violence to include violence based on non-normative sexuality and gender expression is not only theoretically sound but also strategic from an advocacy perspective. The Committee and other U.N. mechanisms have devoted a significant amount

393. See COLLINS, *supra* note 98, at 221–238 (“The significance of seeing race, class, and gender as interlocking systems of oppression is that such an approach fosters a paradigmatic shift of thinking inclusively about other oppressions, such as age, sexual orientation, religion, and ethnicity.”).

394. See *infra* note 394 and accompanying text.

395. Survey conducted by the author.

396. See *infra* note 409 (providing examples of where the CEDAW Committee addressed gender-based violence).

of resources to initiatives designed to combat gender-based violence.³⁹⁷ It is now time to put those resources to work to combat violence directed at all of those who express their gender in non-conforming ways.

After decades of advocacy by women's rights organizations, gender-based violence received a great deal of attention within international human rights circles at the 1993 U.N. Conference on Human Rights.³⁹⁸ That same year, the U.N. General Assembly unanimously passed the Declaration on the Elimination of Violence Against Women, a document that has helped frame global anti-violence efforts ever since.³⁹⁹ Before that, in 1992, the CEDAW Committee adopted General Recommendation 19, which explicitly defined violence against women as a form of gender discrimination.⁴⁰⁰ Although the original text of CEDAW does not mention violence against women or gender-based violence, General Recommendation 19 brings violence against women within the purview of the Convention.⁴⁰¹

Since approximately 1993, issues related to gender-based violence have dominated global women's rights agendas—with good reason. Gender-based violence has been found to exist in every region in which it has been studied.⁴⁰² Around the world, gender-based violence has caused immeasurable harm to victims and has taken many forms including intimate partner violence, sexual violence, and sexual harassment.⁴⁰³

397. See, e.g., *What We Do*, END VIOLENCE, <http://endviolence.un.org/what.shtml> (providing examples of UN action to prevent violence against girls and women).

398. See Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 27 on Older Women and Protection of Their Human Rights, U.N. Doc. CEDAW/C/2010/47/GC.1 (Oct. 19, 2010) (affirming a commitment to the protection of all women, regardless of their age).

399. Radhika Coomaraswamy & Lisa M. Kois, *Violence Against Women*, in *WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW* 177, 177 (Kelly D. Askin & Dorean M. Koenig eds., 1999).

400. See Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19: Violence Against Women, U.N. Doc. A/47/38, para. 1 (1992) (“Gender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men.”).

401. See Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19: Violence Against Women, U.N. Doc. A/47/38, para. 3 (1992) (committing Committee efforts to studying and combatting gender-based violence).

402. *Realities and Rights of Gender Non-Conforming People and People Who Engage in Same-Sex Sexual Relations in Africa: A Civil Society Report*, AFRICAN MEN FOR SEXUAL HEALTH & COAL. OF AFRICAN LESBIANS 6 (April 2013), <http://www.cal.org.za/new/wp-content/uploads/2013/05/CIVIL-SOCIETY-REPORT-ON-REALITIES-AND-RIGHTS.pdf> [hereinafter *Realities and Rights*].

403. Rashida Manjoo (Special Rapporteur), *Rep. of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, Human Rights Council, U.N. Doc. A/HRC/26/38 (May 2, 2011) (covering the causes and consequences of gender-based violence).

Many forms of gender-based violence are designed to control sexuality.⁴⁰⁴ Gender-based violence thus operates as a social regulatory device, policing sexuality to ensure that it conforms to socio-cultural expectations of masculinity and femininity.⁴⁰⁵ Violence targeting LGBTI individuals functions to police sexuality in highly similar ways.⁴⁰⁶ For this reason, some activists have concluded “It is . . . imperative that an understanding of the violence and violations faced by LGBTI individuals be placed within the context of gender-based violence broadly conceived.”⁴⁰⁷ Mainstream human rights organizations should do likewise, incorporating violence against LGBTI individuals into the definition of gender-based violence.⁴⁰⁸ An explicit expansion of the concept of gender-based violence allows activists and U.N. experts to build on worldwide momentum to eradicate gender-based violence.

Within the sub-Saharan region, the CEDAW Committee has devoted significant energy to raising awareness of issues related to gender-based violence.⁴⁰⁹ In fact, between 2005 and November 2014, the CEDAW Committee raised the issue of gender-based violence in each of the fifty-six concluding observations from the sub-Saharan African region.⁴¹⁰ The consistency with which the Committee raised the issue of gender-based violence is neither surprising nor unjustified given the importance of the issue and the effectiveness of women’s rights advocates in raising awareness of gender-based violence around the world.

Gender-based violence is, therefore, a prominent feature in CEDAW’s dialogue with States parties within the sub-Saharan African region.⁴¹¹ In Benin, for example, the Committee urged the state to enact legislation on

404. See *Sexual and Gender-Based Violence Against Refugees, Returnees, and Internally Displaced Persons*, UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES 1, 114 (May 2003), http://www.unicef.org/emerg/files/gl_sgbv03.pdf (noting that gender-based violence may occur as an attempt force the victim to adhere to social norms for sexuality).

405. See *Business and Gender-Based Violence: Why It Matters*, GBCHEALTH 2 (Nov. 2011), http://www.businessfightsaids.org/system/documents/category_1/363/Gender%20Based%20Violence%20Issue%20Brief.pdf?1345232726 (explaining how gender-based violence is often a reflection of societal views of gender and gender roles).

406. *Realities and Rights*, *supra* note 402, at 6; see also *supra* section IV.

407. *Id.*

408. See generally *id.* (providing examples of organizations that consider anti-gay violence as gender-based violence); Part II (discussing advocacy strategies by LGBTI rights organizations).

409. See *supra* note 402 and accompanying text.

410. Survey conducted by the author.

411. Survey conducted by the author.

domestic violence and all forms of sexual abuse.⁴¹² With respect to Botswana's report, the Committee similarly urged the government to: 1) enact legislation concerning domestic violence and sexual violence and 2) ensure that all forms of violence against women and girls were criminalized.⁴¹³ In Burundi, in addition to encouraging the enactment of anti-violence legislation, the Committee urged the government to provide training to ensure that perpetrators of violence against women were prosecuted and punished.⁴¹⁴ The CEDAW Committee commented on gender-based violence in its concluding observations between 2005 and 2014 for all of the following countries in sub-Saharan Africa: Angola,⁴¹⁵ Benin,⁴¹⁶ Botswana,⁴¹⁷ Burkina

412. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Fourth Periodic Rep. of Benin, U.N. Doc. CEDAW/C/BEN/CO/4, para. 9 (Oct. 28, 2013) ("The Committee urges the State party to incorporate into its national legislation a definition of discrimination against women, which encompasses both direct and indirect discrimination in the public and private spheres, in accordance with Article 1 of the Convention.").

413. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women, para. 10, U.N. Doc. CEDAW/C/BOT/CO/3 (Mar. 26, 2010) ("The Committee urges the State party to place high priority on completing the process of full domestication of the Convention and to reaffirm that the judiciary is obliged to interpret the laws of Botswana in line with the provisions of the Convention.").

414. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women, U.N. Doc. CEDAW/C/BDI/CO/4, para. 16 (Apr. 8, 2008) ("The Committee calls on the State party to intensify its efforts to raise awareness about the Convention, its Optional Protocol and the Committee's general recommendations and to implement training programmes on the Convention for prosecutors, judges and lawyers so as to establish a legal culture supportive of gender equality and non-discrimination.").

415. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Sixth Period Report of Angola, Adopted by the Committee at its Fifty-Fourth Session (Feb. 11–Mar. 1, 2013), U.N. Doc. CEDAW/CAGO/CO/6, para. 19 (Mar. 1, 2013) (expressing concern over gender-based violence in Angola despite country's campaigns against such violence and adoption of a law against domestic violence).

416. *See* Comm. on the Elimination of Discrimination Against Women, Consideration of Reports Submitted by States Parties Under Article 19 of the Convention on the Elimination of All Forms of Discrimination Against Women, U.N. Doc. CEDAW/C/BEN/4, paras. 38–40 (Mar. 21, 2012) (noting the mandate under the Benin constitution to protect all people from torture or "cruel, inhuman, or degrading treatment.").

417. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women, U.N. Doc. CEDAW/C/BOT/CO/3, para. 25 (Feb. 5, 2008) ("The Committee is concerned about the prevalence of violence against women and girls, including domestic violence, which appears to be tolerated by society.").

Faso,⁴¹⁸ Burundi,⁴¹⁹ Cameroon,⁴²⁰ Central African Republic,⁴²¹ Cape Verde,⁴²² Chad,⁴²³ Comoros,⁴²⁴ Democratic Republic of Congo,⁴²⁵ Côte

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418. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women, U.N. Doc. CEDAW/C/BFA/CO/6, para. 21 (Nov. 5, 2010) (“The Committee reiterates its concern that the State party has not yet adopted any specific legislation to eliminate violence against women, including domestic violence, which appears to be tolerated in society.”).
419. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women, U.N. Doc. CEDAW/C/BDI/CO/4, para. 16 (Apr. 8, 2008) (“The Committee calls on the State party to intensify its efforts to raise awareness about the Convention, its Optional Protocol and the Committee’s general recommendations and to implement training programmes on the Convention for prosecutors, judges and lawyers so as to establish a legal culture supportive of gender equality and non-discrimination.”).
420. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women, U.N. Doc. CEDAW/C/CMR/CO/3, para. 26 (Feb. 10, 2009) (“The Committee welcomes the draft law on the prevention and punishment of violence against women and gender-based discrimination, but regrets that the draft law has not yet been adopted.”).
421. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Combined Initial and Second to Fifth Periodic Reps. of the Central African Republic, U.N. Doc. CEDAW/C/CAF/CO/1-5, para. 25 (July 18, 2014) (“The Committee welcomes the measures taken before the conflict to combat harmful practices, such as . . . the adoption of a national action plan addressing traditional practices harmful to women’s health and gender-based violence.”).
422. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Combined Seventh and Eighth Periodic Rep. of Cape Verde, U.N. Doc. CEDAW/C/CPV/CO/7-8, para. 18 (July 30, 2013) (“While welcoming the adoption in 2011 of Act No. 84/VII/2011 on Gender-based Violence, the Committee remains concerned about the persistence in the State party of violence against women, including domestic violence, in addition to sexual abuse at school and harassment in the workplace.”).
423. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women, para. 22, U.N. Doc. CEDAW/C/TCD/CO/1-4 (Nov. 4, 2011) (“The Committee expresses serious concern at the high prevalence of sexual and gender-based violence, including FGM, rape and domestic violence, in the State party.”).
424. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women, para. 23 U.N. Doc. CEDAW/C/COM/CO/1-4 (Oct. 24, 2012) (expressing concern over the State party’s lack of attention to gender-based violence).
425. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Combined Sixth and Seventh Periodic Reps. of the Dem. Rep. Congo, para. 10(a), U.N. Doc. CEDAW/C/COD/CO/6-7 (July 30, 2013) (urging the State party “to prevent gender-based violence, in particular sexual violence, by State and non-State actors in conflict-affected areas, ensure the protection of civilians, including women, in cooperation with MONUSCO, conduct gender-sensitive

d'Ivoire,⁴²⁶ Djibouti,⁴²⁷ Equatorial Guinea,⁴²⁸ Eritrea,⁴²⁹ Ethiopia,⁴³⁰ Gabon,⁴³¹ Gambia,⁴³² Ghana,⁴³³ Guinea,⁴³⁴ Guinea-Bissau,⁴³⁵ Kenya,⁴³⁶

training and adopt codes of conduct for the police and the military and provide training for psychologists and health-care professionals”).

426. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women, U.N. Doc. CEDAW/C/CIV/CO/1-3, para. 30 (Nov. 8, 2011) (“[T]he Committee remains concerned about the delay in the approval of the national strategy against gender-based violence; the small number of cases reported with respect to sexual and gender-based violence; the difficulties faced by women to obtain redress through the justice system; the stigmatization faced by women victims of sexual violence; their difficulties to access medical and psychological support; the absence of definition of rape in the Criminal Code; [and] the absence of legal provisions criminalizing domestic violence and marital rape . . .”).
427. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women, U.N. Doc. CEDAW/C/DJI/CO/1-3, para. 20 (Aug. 2, 2011) (“[The Committee] is concerned that women rarely report cases of gender-based violence which are usually settled within the family, that marital rape is not criminalized, and that abortion following rape is illegal. It is also concerned about reports of sexual violence in the Ali-Adeh camp without access to justice for victims.”)
428. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Sixth Periodic Rep. of Eq. Guinea, Adopted By the Comm. at its Fifty-Third Session (Oct. 1–9, 2012), U.N. Doc. CEDAW/C/GNQ/CO/6, para. 25 (Nov. 9, 2012) (“The Committee regrets that the State party has neglected the adoption of specific legislation, policies and programmes to address all forms [sic] violence against women.”).
429. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women: Eri., U.N. Doc. CEDAW/C/ERI/CO/3, para. 11 (Feb. 3, 2006) (“The Committee urges the State party, as part of its current law reform process, to undertake a comprehensive national dialogue on women’s rights to equality and non-discrimination and to enshrine in the Constitution, or other appropriate legislation, a definition of equality and discrimination against women . . .”).
430. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women, U.N. Doc. CEDAW/C/ETH/CO/6-7, para. 13 (July 27, 2011) (“The Committee recommends that the Convention and related domestic legislation be given stronger emphasis in the legal education and training of judges, prosecutors and lawyers, including those working in Sharia courts, so that a legal culture supportive of women’s equality with men and non-discrimination on the basis of sex is firmly established in the State party.”).
431. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Comments: Gabon, U.N. Doc. CEDAW/C/GAB/CC/2-5, para. 24 (Feb. 15, 2005) (“The Committee is concerned about the lack of specific legislation to eliminate violence against women, including domestic violence.”).
432. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Comments: Gambia, U.N. Doc. CEDAW/C/GMB/CO/1-3, para. 23 (July 22, 2005) (“The Committee expresses concern about the lack of legislation, policies and programmes to address violence against women, including domestic violence.”).

Lesotho,⁴³⁷ Liberia,⁴³⁸ Madagascar,⁴³⁹ Malawi,⁴⁴⁰ Mali,⁴⁴¹ Mauritania,⁴⁴²

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433. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Combined Sixth and Seventh Periodic Reps. of Ghana, U.N. Doc. CEDAW/C/GHA/CO/6-7, para. 26 (Nov. 14, 2014) (commending the State party for efforts in decreasing violence against women, but expressing concern over some areas not yet improved).
434. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women: Guinea, U.N. Doc. CEDAW/C/GIN/CO/6, para. 27 (Aug. 10, 2007) (“The Committee urges the State party to place the highest priority on implementing a comprehensive approach to address all forms of violence against women.”).
435. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women, U.N. Doc. CEDAW/C/GNB/CO/6, para. 24 (Aug. 7, 2009) (“It urges the State party to put in place, without delay, a comprehensive strategy, including clear goals and timetables, to modify or eliminate cultural practices and stereotypes that are harmful to, and discriminate against, women and to promote women’s full enjoyment of their human rights . . .”).
436. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women, U.N. Doc. CEDAW/C/KEN/CO/7, para. 26 (Apr. 5, 2011) (“The Committee urges the State party to ensure that women and girls who were the victims of the post-electoral violence have access to protection and effective redress through the speedy establishment of a special tribunal to investigate cases of such violence and that the perpetrators be effectively prosecuted and punished.”).
437. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women, para. 23, U.N. Doc. CEDAW/C/LSO/CO/1-4 (Nov. 8, 2011) (urging the State party to take actions to protect women, including “giv[ing] high priority to the enactment of the draft Domestic Violence Bill”).
438. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women, U.N. Doc. CEDAW/C/LBR/CO/6, para. 18 (Nov. 7, 2008) (“The Committee . . . remains concerned about the lack of a comprehensive legal framework to prevent and eliminate all forms of violence against women, and the lack of adequate services and protection for victims of violence.”).
439. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women, para. 18, U.N. Doc. CEDAW/C/MDG/CO/5 (Nov. 7, 2008) (“The Committee expresses concern at the high prevalence of violence against women and girls, such as widespread domestic violence and sexual violence, including rape.”).
440. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women, para. 23, U.N. Doc. CEDAW/C/MWI/CO/6 (Jan. 28, 2010) (“The Committee urges the State party to strengthen its efforts to effectively implement existing legislative measures and to address all forms of violence against women . . . and urges the State party to undertake educational and public-awareness programmes . . . to convey the message that all forms of violence against women . . . are unacceptable.”).
441. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women:

Mauritius,⁴⁴³ Mozambique,⁴⁴⁴ Namibia,⁴⁴⁵ Niger,⁴⁴⁶ Nigeria,⁴⁴⁷ Rwanda,⁴⁴⁸

Mali, U.N. Doc. CEDAW/C/MLI/CO/5, para. 20 (Feb. 3, 2006) (“The Committee urges the State party to accord priority attention to the adoption of comprehensive measures to address violence against women and girls . . .”).

442. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Combined Second and Third Periodic Rep. of Mauritania, para. 27, U.N. Doc. CEDAW/C/MRT/CO/2-3 (July 24, 2014) (urging the State party to take action to protect girls and women through steps such as “complet[ing] the adoption of a law on violence against women and a national action plan on violence against women and girls.”).
443. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women, U.N. Doc. CEDAW/C/MUS/CO/6-7, para. 20 (Oct. 21, 2011) (“[T]he Committee is concerned that violence against women remains a serious problem in the State party.”).
444. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Comments of the Comm. on the Elimination of Discrimination Against Women: Mozam., para. 25, U.N. Doc. CEDAW/C/MOZ/CO/2 (June 11, 2007) (“The Committee urges the State party to accord priority attention to the adoption of comprehensive measures to address violence against women and girls . . .”).
445. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women: Namibia, U.N. Doc. CEDAW/C/NAM/CO/3, para. 18 (Feb. 2, 2007) (“While noting the various legal and other initiatives taken by the State party to address violence against women, the Committee is concerned that violence against women remains a serious problem.”).
446. *See* Comm. on the Elimination of Discrimination Against Women, Concluding comments of the Comm. on the Elimination of Discrimination Against Women: Niger, para. 24, U.N. Doc. CEDAW/C/NER/CO/2 (June 11, 2007) (“The Committee urges the State party to place the highest priority on implementing a comprehensive approach to address all forms of violence against women.”).
447. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Committee on the Elimination of Discrimination Against Women, para. 24, U.N. Doc. CEDAW/C/NGA/CO/6 (July 8, 2008) (“The Committee urges the State party to accord priority attention to the adoption of comprehensive measures to address violence against women and girls in accordance with its general recommendation 19 on violence against women.”).
448. *See* Comm. on the Elimination of Discrimination Against Women, Draft Concluding Observations of the Committee on the Elimination of Discrimination Against Women: Rwanda, para. 26, U.N. Doc. CEDAW/C/RWA/CO/6 (Sept. 8, 2009) (encouraging the State party to take a number of actions to protect women including “put[ing] in place a comprehensive strategy and action plan to prevent and eliminate all forms of violence against women, including refugee camps, as well as an effective institutional mechanism to coordinate, monitor and assess the effectiveness of measures taken.”).

Seychelles,⁴⁴⁹ Sierra Leone,⁴⁵⁰ South Africa,⁴⁵¹ Swaziland,⁴⁵² Tanzania,⁴⁵³ Togo,⁴⁵⁴ Uganda,⁴⁵⁵ Zambia,⁴⁵⁶ and Zimbabwe.⁴⁵⁷

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449. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Combined Initial to Fifth Period Reps. of Sey., para. 22, U.N. Doc. CEDAW/C/SYC/CO/1-5 (Oct. 29, 2013) (expressing remaining concerns about violence against women in the State).
450. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Sixth Periodic Rep. of Sierra Leone, para. 21, U.N. Doc. CEDAW/C/SLE/CO/6 (Mar. 10, 2014) (recommending the State party take actions including “rais[ing] awareness of the existence of new legal provisions prohibiting marital rape and incest, encourage women to report domestic and sexual violence, and ensure that they are duly informed about available legal remedies”).
451. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women, para. 25, U.N. Doc. CEDAW/C/ZAF/CO/4 (Apr. 5, 2011) (calling upon the State party to protect women through actions including “rais[ing] public awareness, through the media and education programmes, on the fact that all forms of violence against women are a form of discrimination under the Convention, and therefore a violation of women’s rights”).
452. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Combined Initial and Second Periodic Reports of Swaz., para. 20, U.N. Doc. CEDAW/C/SWZ/CO/1-2 (July 24, 2014) (expressing concern over the lack of initiative taken by the State party to ensure protection of women from violence).
453. *See* Comm. on the Elimination of Discrimination Against Women, Draft Concluding Observations of the Comm. on the Elimination of Discrimination Against Women: United Republic of Tanzania, para. 24, U.N. Doc. CEDAW/C/TZA/CO/6 (July 16, 2008) (“The Committee urges the State party to give priority attention to combating violence against women and to adopt comprehensive measures to address all forms of violence against women and girls . . .”).
454. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Sixth and Seventh Periodic Rep. of Togo, Adopted by the Committee at its Fifty-Third Session (1-19 Oct. 2012), para. 23, U.N. Doc. CEDAW/TGO/CO/6-7 (Nov. 8, 2012) (urging the State party to take several actions such as “adopt[ing] without delay a comprehensive law addressing all forms of violence against women and . . . ensur[ing] that they criminalize marital rape, incest and female genital mutilation and that they prohibit and introduce adequate sanctions for domestic violence and sexual harassment in school, the workplace and the public sphere”).
455. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women, para. 24, U.N. Doc. CEDAW/C/UGA/CO/7 (Nov. 5, 2010) (“The Committee urges the State party to give attention, as a priority, to combating violence against women and girls and adopting comprehensive measures to address such violence . . .”).
456. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women, para. 22, U.N. Doc. CEDAW/C/ZMB/CO/5-6 (Sept. 19, 2011) (urging the State party to take actions such as “expeditiously criminaliz[ing] marital rape”).

The consistency with which the Committee has raised concerns about gender-based violence is remarkable. Through its dialogue with States parties, the Committee unmistakably signals that combating gender-based violence is a global priority. However, because violence against LGBTI individuals is intended to regulate sexuality and force conformity with societal norms of masculinity and femininity, it should be understood as yet *another form of gender-based violence*. The Committee should expand its understanding of gender-based violence to encompass violence perpetrated against LGBTI individuals and approach the issue of LGBTI violence with similar diligence and vigilance.

B. CEDAW's Blind Spot: State Reporting As Human Rights Discourse

The state reporting process represents a missed opportunity for the CEDAW Committee to consistently address LGBTI discrimination as a form of gender discrimination. The Committee should address the links between 1) gender discrimination and 2) discrimination and violence based on sexual orientation and gender identity. To do so, the Committee must more consistently and meaningfully embrace an intersectional approach to discrimination.⁴⁵⁸ So far, the Committee has done so in only four instances: the Committee's examination of State party reports from Uganda, Zimbabwe, South Africa, and Cameroon.

It is no accident that the Committee is willing to address LGBTI rights in the context of these specific states. For different reasons, these countries represent extreme examples of discrimination and violence toward LGBTI communities. As a result, it would have been difficult for the CEDAW Committee to examine the State Party report without specifically commenting on LGBTI rights. Although criminalization of and animosity toward LGBTI communities exists in a significant number of sub-Saharan states,⁴⁵⁹ the Committee has been reluctant to address discrimination and violence outside the context of these four egregious examples.

The particular circumstances in Uganda and the vehemence of new laws criminalizing LGBTI status made it impossible for the CEDAW Com-

457. See Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women, para. 24, U.N. Doc. CEDAW/C/ZWE/CO/2-5 (Mar. 23, 2012) (urging the State party to protect women through actions including "encourag[ing] women to report incidents of domestic and sexual violence, by de-stigmatizing victims and raising awareness about the criminal nature of such acts").

458. See generally Bond, *supra* note 61 (exploring an intersectional approach to discrimination).

459. See *supra* Part V (discussing criminal regulations of same-sex sexual activity and discrimination against LGBTI groups in sub-Saharan Africa).

mittee to ignore the intersection of gender discrimination and LGBTI discrimination.⁴⁶⁰ The Committee urged the government to de-criminalize same-sex sexual behavior and provide human rights protection to Uganda's lesbian, bisexual, and transgender women.⁴⁶¹

Similarly, the level of state-sanctioned and private violence and discrimination against LGBTI individuals in Zimbabwe is well-documented.⁴⁶² The Zimbabwe periodic report to CEDAW in 2012 also represents an extreme example given the public and vehement homophobia attributable to the state. Civil society reports coming out of Zimbabwe demonstrate that human rights violations of LGBTI individuals are numerous and often severe.⁴⁶³ Under these circumstances, it would have proven difficult for the Committee to ignore LGBTI human rights violations in its review of the State party's report.

South Africa represents a more complex illustration of the Committee's selective invocation of intersectional analysis. As discussed in Part II.B

460. In its review of the Ugandan report in 2010, the Committee expressed criticism of the Ugandan government's tolerance of discrimination and violence. The Committee noted that same-sex sexual behavior is criminalized in Uganda. The Committee also expressed concern over reports of harassment, violence, hate crimes and incitement of hatred against women based on their sexual orientation and gender identity. The Committee noted with concern that LGBTI women face discrimination in employment, health care, education, and other fields. The Committee also suggested that the Anti-Homosexuality Bill could further exacerbate LGBTI discrimination and violence. *See* Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women, para. 43, U.N. Doc. CEDAW/C/UGA/CO/7 (Oct. 22, 2010).

461. *See id.* at para. 44 ("The Committee calls on the State party to decriminalize homosexual behaviour and to provide effective protection from violence and discrimination against women based on their sexual orientation and gender identity . . .").

462. For example, in 2012 Zimbabwean police arrested, detained and assaulted 44 members of Gays and Lesbians of Zimbabwe (GALZ) after they released a report documenting human rights abuses against LGBTI individuals in that country. *See Perceived or Real Sexual Orientation, supra* note 266, at 16 ("On 11 August 2012, the police in Zimbabwe arrested and detained 44 members of Gays and Lesbians of Zimbabwe (GALZ) shortly after they had released their 2011 LGBTI Violations report."). Based on Zimbabwe's 2012 report, the Committee expressed concern about violence perpetrated by "State and non-State actors against lesbian, bisexual, and transgender women." Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women, para. 23, U.N. Doc. CEDAW/C/ZWE/CO/2-5 (Mar. 23, 2012). The Committee urged the government of Zimbabwe to provide effective protection for LGBTI women. *See id.* at para. 24 (urging the State party to take actions such as "put[ing] in place comprehensive measures to prevent and address violence against women and girls. . .").

463. *See Perceived or Real Sexual Orientation, supra* note 266, at 16 (discussing violations against LGBTI individuals in Zimbabwe).

infra, South Africa has been a global leader in the recognition of LGBTI rights, becoming the first country in the world to provide explicit constitutional protection for LGBTI rights. LGBTI communities in South Africa, however, continue to experience high levels of violence and discrimination.⁴⁶⁴ In 2011, the Committee both congratulated the state on its effort to protect LGBTI rights and expressed concern over continuing violence and discrimination.⁴⁶⁵

Most recently, in March 2014, the CEDAW Committee mentioned lesbian, bisexual, and transgender women victims of discrimination and violence in Cameroon.⁴⁶⁶ Like Uganda, Zimbabwe, and South Africa, Cameroon stands out as a particularly egregious example of discrimination and violence targeting LGBTI individuals.⁴⁶⁷ For example, police violated Cameroonian law when they kept a gay man for thirteen days before charging him.⁴⁶⁸ Similarly, Cameroonian police have been known to beat LGBTI individuals while in custody.⁴⁶⁹ Advocates have reported a high level of public and private violence targeting LGBTI individuals, which is validated and fueled by the Cameroonian Criminal Code provisions that prohibit same-sex sexual activity.⁴⁷⁰

On a spectrum measuring violence and discrimination against LGBTI individuals, Uganda, Zimbabwe, South Africa, and Cameroon represent one end of the continuum. In these select cases, the Committee recognized the gender-related basis for these examples of discrimination and violence per-

464. See Thoreson, *supra* note 188, at 695 (“[H]omophobic violence and ‘corrective rape’ are daily occurrences for GLB South Africans who may be multiply marginalised by poverty, sexism, and racism.”).

465. See Comm. on the Elimination of Discrimination Against Women, Concluding Observations of the Comm. on the Elimination of Discrimination Against Women, para. 39, U.N. Doc. CEDAW/C/ZAF/CO/4 (Apr. 5, 2011) (commending South Africa on its protection efforts for LGBTI individuals, but also noting caution about continuing violence).

466. See Comm. on the Elimination of Discrimination Against Women, Concluding Observations on the Combined Fourth and Fifth Periodic Reps. of Cameroon, para. 36, U.N. Doc. CEDAW/C/CMR/CO/4-5 (Feb. 28, 2014) (listing bisexual, lesbian, and transgender women as particularly disadvantaged and at risk for discrimination).

467. Alternatives Cameroon, an LGBTI advocacy organization, has documented significant numbers of arbitrary arrests, violent abuse in detention, inhuman and degrading treatment in the form of forced anal examinations purportedly to determine if anal sex has occurred, and other abuses by the state. See generally *Lesbian Status*, *supra* note 343.

468. *Id.* at 11.

469. See *id.* at 7.

470. See *id.* at 17 (“The state, by upholding the discriminatory provision of its criminal code banning same-sex sexual conduct, fuels a climate of stigmatization that causes discrimination . . .”).

perpetrated against LBT communities.⁴⁷¹ At a minimum, the Committee should extend its gender-based and intersectional analyses to other countries within the region in which LBT individuals are suffering similar forms of violence and discrimination. Beyond the minimum, the Committee should expand its understanding of gender-based harm to include gender non-conformity and non-normative sexuality.

VI. CONCLUSION

For more than two decades, the global women's rights movement has struggled with the degree to which LGBTI rights are women's rights.⁴⁷² At the 1995 United Nations Fourth World Conference on Women in Beijing, China, a number of activists and human rights defenders fought for inclusion of language pertaining to LGBTI rights.⁴⁷³ Proponents faced considerable opposition from conservative countries, including vocal opposition from the Vatican.⁴⁷⁴ In the "eleventh hour" of negotiations over the final language, all references to LGBTI rights were dropped.⁴⁷⁵ The elimination of such language, although done in an effort to avoid the scuttling of the entire document, represents one of many missed opportunities to recognize the centrality of LGBTI rights for the full enjoyment of women's rights around the world.

The CEDAW Committee should make decriminalization of same-sex sexual activity a priority in its gender-based human rights work. It is now increasingly accepted that international human rights law prohibits LGBTI discrimination.⁴⁷⁶ If the CEDAW Committee adopts a broader, intersectional understanding of gender, as I advocate here, the Committee could more systematically address discrimination and violence perpetrated against all LGBTI individuals.

I identify a number of ways in which an alternative, gender-based framework offers a critical supplement to an identity-based approach. An

471. See *supra* notes 460, 462, 465, 466 and accompanying text.

472. See generally Miller, *supra* note 64.

473. See, e.g., U.N. Fourth World Conference on Women, *Beijing Declaration and Platform for Action*, at 164, U.N. Doc. A/CONF.177/20/Rev.1 (Sept. 4-15, 1995) ("Israel would have preferred that explicit reference be made to the particular barriers faced by women because of their sexual orientation.").

474. See Girard, *supra* note 197, at 332 (quoting a participant of the Beijing conference as saying, "Beijing was the pivot, the moment where our thinking about sexuality shifted. The Vatican's reactions and anticipatory attacks made us think.").

475. See *id.* at 338 ("The result of this negotiation was a paragraph about the right of women to have control over matters related to their sexuality without the words 'sexual rights.'").

476. See *supra* notes 38–42 and accompanying text.

identity-based approach depends on an individual's willingness to self-identify according to identity categories that have been at the forefront of LGBTI rights struggles in the global north and thus, should not be the exclusive rights-promotion strategy. An identity-based approach supplemented by a gender-focused approach offers greater potential for change in the region than either strategy alone. These strategies complement each other and form essential parts of the activist's toolbox. Social, political, economic, historical, and legal factors affect which strategy will be most likely to succeed in a particular context.

A supplemental gender framework offers a number of conceptual and pragmatic benefits. A gender frame: 1) highlights intersectional aspects of discrimination and violence directed toward LGBTI communities in sub-Saharan Africa, 2) identifies avenues for activism that build upon synergies between feminist activism and pro-LGBTI activism, and 3) promotes scholarly and activist recognition of lesbianism within the region. The CEDAW Committee should open discursive space for and advocate on behalf of LGBTI rights within conservative states through its review of State parties' reports. More importantly, the CEDAW Committee and other U.N. entities can use gender as an analytical entry point for active and sustained protection of LGBTI communities in the region.

In some circumstances, a gender lens will expand the universe of potential victims of rights violations and include those who do not identify with the global North's constructions of gay and lesbian identity. Men who have sex with men but who do not identify as gay and women who have sex with women but who do not identify as lesbian are sometimes excluded from advocacy efforts that rely too heavily on self-identification with rigid identity categories. Structural obstacles, such as economic dependence and a deep commitment to heterosexual marriage and its attendant procreative potential, further exacerbate the difficulties women in the region face in publicly embracing a political identity as lesbian, bisexual, or transgendered.

The CEDAW Committee must embrace an intersectional analytical framework in order to fully understand the extent and impact of violence against LGBTI communities in the region. An intersectional approach will highlight the ways in which gender-based discrimination and discrimination based on sexual orientation and gender identity are interrelated and mutually reinforcing. An intersectional approach also allows for a richer understanding of the historical impact of colonialism on contemporary constructions of sexuality, race, and nation.

Further, an intersectional framework encourages the Committee to explore the connections between violence motivated by gender, gender identity, gender expression, and sexual orientation. Such an approach extends beyond violence committed against lesbians to include violence against any-

one whose gender expression and sexual activity do not conform with compulsory heterosexuality. The failure to conform to heteronormativity and the accompanying violence visited upon those who do not conform is a form of *gender-based* violence that should map onto the Committee's important and successful anti-violence work.

Although there have been some modest gains in the recognition of LGBTI rights within human rights institutions at the U.N. level, the political bodies of the U.N., which consist largely of government representatives, have been significantly more reluctant to acknowledge LGBTI rights. When the issue of LGBTI rights has surfaced during the drafting process of consensus documents at the U.N., the outcome documents have not yielded strong support for LGBTI rights. These highly charged, politicized discussions over language in the consensus-based outcome documents have been consistently disappointing for supporters of LGBTI rights.⁴⁷⁷

If the CEDAW Committee expands its conception of discrimination and gender-based violence to systematically include violence against LGBTI individuals, it could play a role in raising awareness of LGBTI rights among State parties through the periodic reporting process. Indeed, the Committee has already taken the first step and recognized that violence against LGBTI communities is within its mandate in the most extreme cases of discrimination and violence: South Africa, Uganda, Zimbabwe, and Cameroon. The Committee should extend that logic to countries in which the patterns of violence, discrimination, and official homophobia are slightly more muted. To do less is to take an unnecessarily restrictive view of its mandate and to miss an opportunity to reinforce rights based on a notion of gender that challenges the regulatory function of masculinity and femininity. ✱

477. Saiz describes the example of the World Conference Against Racism: "The same battles over bracketed text were fought in August 2001 at the UN World Conference Against Racism in Durban, South Africa. A proposal by Brazil to recognize sexual orientation as a related form of discrimination remained bracketed in the Conference's draft Program of Action until the last day and was eventually defeated." Saiz, *supra* note 12, at 59.