

FREEDOM OF CONSCIENCE AND NEW “LGBT RIGHTS” IN INTERNATIONAL HUMAN RIGHTS LAW

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INTRODUCTION

Much is at stake in the developing conflicts between freedom of conscience and lesbian, gay, bisexual, and transgender (LGBT) policies in international human rights law. Conscience is the human faculty with which individuals seek moral truth.¹ Over centuries, as evil roused the conscience of previous generations, they recognized the existence of human rights, and called upon states to protect these rights. In the twentieth century, drafters of the international human rights framework cited our endowment with conscience and reason as evidence of our inherent human “dignity,” the basis for universal and inalienable human rights.²

Because the creators of the international human rights system had a high view of conscience, both as a faculty for discerning moral truth and evidence of human dignity, they identified it as a “core human right”; and they created the strongest level of legal protection for it.³ As conflicts between freedom of conscience, state interests, and other rights have arisen, legal interpreters have consistently upheld freedom of conscience. However, over the past decade, conflicts between freedom of conscience and new LGBT policies (particularly legislatively and court-created same-sex marriage and sexual orientation nondiscrimination mandates) have grown. These conflicts threaten the status of freedom of conscience, both as a core human right and as foundational to the human rights system.

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¹ See *Conscience*, BLACK’S LAW DICTIONARY (10th ed. 2014).

² See G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 1 (Dec. 10, 1948) [hereinafter UDHR].

³ See International Covenant on Civil and Political Rights art. 4, *opened for signature* Dec. 16, 1966, S. Treaty Doc. No. 95-20, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976) [hereinafter ICCPR]; Louis B. Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U.L. REV. 1, 17–19 (1982) (explaining that while the ICCPR admits that states have the authority to derogate certain human rights in times of emergency, the ICCPR categorizes the right to conscience as an inalienable right that never can be lawfully derogated).

I. ORIGINS OF HUMAN RIGHTS

A. *Where Do International Human Rights Come From?*

No matter what human rights you believe in, this is an important question. For what you believe about the source of human rights will largely determine which rights you consider to be universal and how you believe the human rights system should be sustained and strengthened.

Philosophers, theologians, and legal scholars from many different time periods, have recognized conscience as a source of our rights. From Socrates to Thomas Aquinas, men have sought to determine questions about rights in their conscience.⁴ The assertion that conscience is the human faculty for apprehending moral truth may seem obvious, but it was not until the seventeenth century that thinkers began to articulate the relationships between conscience, reason, and rights.

In 1625, Dutch legal scholar Hugo Grotius, the “Father of International Law,” identified “right reason” (the ability to discern right from wrong) as a uniquely human power.⁵ Grotius and many others of his time saw human conscience as evidence that God made individuals in His own image (*Imago Dei*).⁶ He also believed that the power to discern right from wrong necessitated certain rights.⁷ A century after Grotius, Swiss scholar Emmerich de Vattel articulated the role of states vis-à-vis each other. In his watershed book, *The Law of Nations*, he asserted that states have duties to protect each other’s citizens from injury.⁸ Taken together, Grotius’ view of our unique human nature and Vattel’s view of the state, created the basis for an international human rights system.⁹ Neither saw

⁴ Robert P. Lawry, *Ethics in the Shadow of the Law: The Political Obligation of a Citizen*, 52 CASE W. RES. L. REV. 655, 718–19 (2002) (discussing the attempts of Socrates, Aquinas, Thoreau, Martin Luther King, Jr. et. al. to proffer an acceptable solution in instances when conscience and the duty to obey the law are in conflict).

⁵ 1 HUGO GROTIUS, *THE RIGHTS OF WAR AND PEACE* 150–153 (Richard Tuck ed., Liberty Fund 2005) (1625), <http://socserv2.socsci.mcmaster.ca/econ/ugcm/3ll3/grotius/Law2.pdf>; Benjamin Strauman, *Early Modern Sovereignty and Its Limits*, 16 THEORETICAL INQUIRIES L. 423, 429–30 (2015) (noting that Cicero and Grotius similarly attribute right reason to humans alone).

⁶ Janne Elisabeth Nijman, *Grotius’ Imago Dei Anthropology: Grounding Ius Naturae et Gentium*, in INTERNATIONAL LAW AND RELIGION (Martti Koskenniemi et al. eds.) (forthcoming) (manuscript at 2–3), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2665553.

⁷ See GROTIUS, *supra* note 5, at 1132 & n. 8.

⁸ EMER DE VATTEL, *THE LAW OF NATIONS*, 262–63 (Richard Whatmore & Béla Kapossy eds., Liberty Fund 2008) (1758), <http://oll.libertyfund.org/titles/2246>.

⁹ See Evan J. Criddle, *Standing for Human Rights Abroad*, 100 CORNELL L. REV. 269, 299–332 (2015).

the state as the source of human rights but as trustee of the duty to protect rights.¹⁰

Conscience has also been the engine of human rights action. In 1789, William Wilberforce, the “Conscience of England,” showed his nation that African and West Indian slaves were no less human than their masters and possessed human rights in no less measure.¹¹ In his speech “On the Horrors of the Slave Trade,” he made this appeal:

[W]hat is there in this life that should make any man contradict the *dictates of his conscience*, the principles of justice, the laws of religion, and of God? . . . [T]he circumstances of this trade are now laid open to us . . . we can not turn aside so as to avoid seeing it¹²

Wilberforce’s Christian beliefs motivated him to action.¹³ But, in his appeal to the nation, he did not rely on shared religious beliefs. He called upon the conscience of all citizens to recognize the evil of the slave trade and do their part in ending it. Wilberforce knew the human rights of slaves hinged upon the ability of men to apprehend truth in their conscience.

Florence Nightingale revolutionized medical care in armed conflict after seeing soldiers die needlessly in the Crimean War in 1854.¹⁴ She wrote, “[e]very man stands upon his own conscience; everything is between himself and his God.”¹⁵ Conscience caused the earliest human rights activists to turn ideas into action to protect the vulnerable.

In the twentieth century, World War II and the Holocaust shocked the collective conscience of the world. The post-World War II generation vowed “never again” and created a system of international law to protect the human rights of every person. In 1947, the United Nations (UN)

¹⁰ See *id.* at 308, 313, 332 (noting that the “fiduciary theory” based on the work of Vattel and Grotius provides for an international law system where human rights are vested “exclusively in human beings,” not the state).

¹¹ See William Wilberforce, *On the Horrors of the Slave Trade*, Speech in the House of Commons (May 12, 1789), in 4 *THE WORLD’S FAMOUS ORATIONS* 60, 68 (William Jennings Bryan & Francis W. Halsey eds., 1906) (arguing against the inhumanity of the slave trade that caused the “effusion of human blood,” set “fellow creatures a-hunting each other for slaves,” and filled fairs and markets with “human flesh”).

¹² *Id.* at 69–70 (emphasis added).

¹³ Michael V. Hernandez, *A Flawed Foundation: Christianity’s Loss of Preeminent Influence on American Law*, 56 *RUTGERS L. REV.* 625, 681 n. 348 (2004).

¹⁴ See Tsvetelina Gerova-Wilson, *Nursing Is Not a Lesser Included Profession: Why Physicians Should Not Be Allowed to Establish the Nursing Standard of Care*, 16 *QUINNIPIAC HEALTH L.J.* 43, 45 n. 12 (2012–2013) (describing the impact of Nightingale’s reforms on the practice of nursing and treating those wounded in war).

¹⁵ Letter from Florence Nightingale (Feb. 17, 1848), in 7 *FLORENCE NIGHTINGALE’S EUROPEAN TRAVELS* 264, 265 (Lynn McDonald ed., 2004) (ebook) (writing these words in reflecting upon Michelangelo’s painting, *The Last Judgment*, and perhaps revealing the associations she made between conscience, duty, rights, and religion).

commissioned American First Lady Eleanor Roosevelt, Lebanese Christian leader Charles Malik, Chinese philosopher Peng Chun Chang, French diplomat René Cassin, and Canadian lawyer John Peters Humphrey to draft the Universal Declaration of Human Rights (UDHR).¹⁶ They came from different nations, cultures, and religions.¹⁷ Roosevelt was Protestant.¹⁸ Cassin was Jewish.¹⁹ Chang was a noted Confucian scholar.²⁰ Malik was Greek Orthodox.²¹ They could not agree on divinity, but all saw the need for a transcendent basis for human rights.

They found this in human dignity—Article 1 of the UDHR states: “All human beings are born free and equal in *dignity and rights*. They are *endowed with reason and conscience . . .*”²²

Like Grotius and Vattel, the drafters found that man’s endowed qualities of reason and conscience are evidence of our unique human dignity. This dignity requires all states to recognize the rights of all humans. The clear lesson of World War II was that an unchecked state could produce unimaginable evil and suffering and abhorrent violations of individual rights.²³ Therefore, the UDHR made clear that human dignity and endowed reason and conscience was the source of human rights, not the state.²⁴ To directly safeguard individual conscience, it created the strongest legal protection possible. The UDHR itself did not create rights—it merely recognized their existence.²⁵

II. FREEDOM OF CONSCIENCE IN INTERNATIONAL LAW

The UDHR has a robust definition of freedom of thought, conscience, and religion in Article 18: “Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in

¹⁶ See *History of the Document*, UNITED NATIONS, <http://www.un.org/en/sections/universal-declaration/history-document/> (last visited Feb. 2, 2016).

¹⁷ See *id.*

¹⁸ Mary Ann Glendon, *God and Mrs. Roosevelt*, FIRST THINGS (May 2010), <http://www.firstthings.com/article/2010/05/god-and-mrs-roosevelt>.

¹⁹ JAY WINTER & ANTOINE PROST, RENÉ CASSIN AND HUMAN RIGHTS: FROM THE GREAT WAR TO THE UNIVERSAL DECLARATION 318 (2013).

²⁰ Mary Ann Glendon, *Foundations of Human Rights: The Unfinished Business*, 44 AM. J. JURIS. 1, 1 (1999).

²¹ *Drafting of the Universal Declaration of Human Rights*, UNITED NATIONS, <http://research.un.org/en/undhr/draftingcommittee> (last visited Feb. 2, 2016).

²² UDHR, *supra* note 2, art. 1 (emphasis added).

²³ See Karina Michael Waller, *Intrastate Ethnic Conflicts and International Law: How the Rise of Intrastate Ethnic Conflicts Has Rendered International Human Rights Laws Ineffective, Especially Regarding Sex-Based Crimes*, 9 AM. U. J. GENDER SOCIAL SOC. POL’Y & L. 621, 622, 624–25 (2001); *History of the Document*, *supra* note 16.

²⁴ See UDHR, *supra* note 2, pmb., art. 1–2.

²⁵ See *id.*

public or private, to manifest his religion or belief in teaching, practice, worship and observance.”²⁶

Protection of these freedoms was strengthened in 1966, when another UN committee drafted the legally binding treaty, the International Covenant on Civil and Political Rights (ICCPR).²⁷ Of the rights in the ICCPR, seven have been elevated to the status of “non-derogable.”²⁸ These “core human rights” are the right to life (Article 6);²⁹ the prohibition of torture, cruel, inhuman and degrading treatment (Article 7);³⁰ the prohibition of medical or scientific experimentation without consent (Article 7);³¹ the prohibition of slavery, slave trade and servitude (Article 8);³² the prohibition of imprisonment because of an inability to fulfill contractual obligations (Article 11);³³ the principle of legality in criminal law (Article 15);³⁴ the right to be recognized everywhere as a person before the law (Article 16);³⁵ and the freedom of “thought, conscience and religion” (Article 18).³⁶

States bound by the ICCPR may not suspend these rights even if they claim an emergency.³⁷ Seventy-four nations have signed the ICCPR and are therefore legally bound to protect the non-derogable right of freedom of conscience.³⁸

Throughout its history of interpreting the ICCPR, the UN Human Rights Committee (the “Committee”), a distinct body from the UN Human Rights Council, has described freedom of thought, conscience, and religion as “far-reaching and profound.”³⁹ In diverse conflicts between freedom of conscience, state interests and/or other rights, the Committee has sought to give the maximum amount of space to individuals to follow their conscience.⁴⁰ The following examples of people who held different religious, philosophical, and moral convictions are illustrative.

²⁶ *Id.* art. 18.

²⁷ *See* ICCPR, *supra* note 3.

²⁸ *Id.* art. 4, para. 2.

²⁹ *Id.* art. 6.

³⁰ *Id.* art. 7.

³¹ *Id.*

³² *Id.* art. 8.

³³ *Id.* art. 11.

³⁴ *See id.* art. 15.

³⁵ *Id.* art. 16.

³⁶ *Id.* art. 18, para. 1.

³⁷ *Id.* art. 4.

³⁸ *International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION (last updated Mar. 23, 2016, 7:38 PM), https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtmsg_no=IV-4&chapter=4&lang=en.

³⁹ G.A. Res. 50/183, Elimination of All Forms of Religious Intolerance, ¶ 3 (Mar. 6, 1996).

⁴⁰ *See infra* Sections II.A–C.

A. *Conscience and National Security*

The Committee upheld freedom of conscience even when governments argued that they had a stronger interest in national security, specifically compulsory military service. South Korea and Turkey objected to giving conscientious objector status to Jehovah's Witnesses, but the Committee overruled them.⁴¹ While acknowledging each state's right to conscript its citizens, the Committee upheld the right of citizens to follow their conscience, and warned governments against punishing them.⁴²

B. *Conscience and Education*

When the government of Norway forced children from humanist families to participate in Christian Christmas activities, the Committee found a freedom of conscience violation.⁴³ The Committee held that the state unnecessarily burdened the parents by demanding that they explain why their children would not participate.⁴⁴ It ordered the government to allow parents to educate their children "in conformity with their own convictions."⁴⁵

C. *Conscience and Public Order*

In 2012, when the government of France claimed its interest in secularism and public order trumped a Sikh student's right to wear a turban in the classroom, the Committee upheld the student's right to exercise his freedom of thought, conscience, and religion.⁴⁶

In all of these situations the Committee honored the far-reaching and profound nature of freedom of conscience by elevating it over the state's

⁴¹ Human Rights Committee., Communication No. 1786/2008, U.N. Doc. CCPR/C/106/D/1786/2008, §§ 2.1–2.2, 8, 9 (Feb. 1, 2013) [hereinafter Communication No. 1786/2008]; Human Rights Committee., Communication Nos. 1853/2008 and 1854/2008, U.N. Doc. CCPR/C/104/D/1853-1854/2008, §§ 2.1, 2.5, 2.9, 10.5 (June 19, 2012) [hereinafter Communication Nos. 1853/2008 and 1854/2008]; Human Rights Committee., Communication No. 1642–1741/2007, U.N. Doc. CCPR/C/101/D/1642–1741/2007, §§ 1.1, 2.6, 3.1, 7.4, 10 (Apr. 27, 2011) [hereinafter Communication No. 1642–1741/2007]; Human Rights Committee., Communication Nos. 1321/2004 and 1322/2004, U.N. Doc. CCPR/C/88/D/1321–1322/2004, §§ 2.1–2.2, 8.2 (Jan. 23, 2007) [hereinafter Communication Nos. 1321/2004 and 1322/2004].

⁴² See Communication No. 1786/2008, *supra* note 41, §§ 2.1–2.2, 8–9; Communication Nos. 1853/2008 and 1854/2008, *supra* note 41, §§ 2.1, 2.3, 2.5–2.6, 10.5; Communication No. 1642–1741/2007, *supra* note 41, §§ 7.4, 10; Communication Nos. 1321/2004 and 1322/2004, *supra* note 41, §§ 8.4, 9–10.

⁴³ See Human Rights Committee, Communication No. 1155/2003, U.N. Doc. CCPR/C/82/D/1155/2003, § 14.7 (Nov. 23, 2004).

⁴⁴ *Id.* §§ 14.6–14.7.

⁴⁵ *Id.* § 14.6.

⁴⁶ Human Rights Committee, Communication No. 1852/2008, U.N. Doc. CCPR/C/106/D/1852/2008, §§ 2.1, 8.7 (Feb. 4, 2013).

generally applicable laws and stated interests in national security, education, and public order.

Man's endowment of conscience and reason has been recognized as evidence of our unique human dignity for centuries.⁴⁷ Therefore, all human beings (men, women, and children) possess universal and inalienable human rights.⁴⁸ Conscience has been crucial to the philosophical and legal foundation of the international human rights system. Both history and an established record of decisions by the United Nations explain why the international legal community has given the highest level of protection to freedom of conscience.

Then why is there a cause for concern?

III. LGBT POLICIES IN INTERNATIONAL LAW

LGBT policies have developed very recently at an incredibly rapid pace. There is significant confusion about what LGBT activists actually mean when they describe these policies. LGBT activists seek to advance new human rights at the UN on the basis of sexual attraction/orientation and gender preference.⁴⁹ Basing new human rights on these preferences will open the door to an infinite variety of human rights demands.⁵⁰ Where conflicts have arisen, LGBT activists have sought to subordinate freedom of conscience to LGBT rights, particularly in the context of same-sex marriage and related non-discrimination provisions.⁵¹ This trend endangers freedom of conscience and the universal human rights system itself.

A. What Is Meant by LGBT Policies

As discussed above, Article 1 of the UDHR grounds human dignity in "endowed . . . reason and conscience . . ." ⁵² All human beings possess human rights because of our unique human nature (as evidenced by reason and conscience). Therefore, our unique dignity as humans is not grounded in our sexual attraction or gender preferences. LGBT-identifying persons have the same human rights as others, because of their human dignity, evidenced by their endowed reason and conscience. Their sexual attraction or gender preferences are not the basis of their humanity or their rights.

⁴⁷ See Straumann, *supra* note 5, at 429–30 (discussing the way Cicero, the stoic philosophers, and Grotius identified the ability to employ reason to discern natural law as a core human quality).

⁴⁸ UDHR, *supra* note 2, pmb., art. 1–2.

⁴⁹ See *infra* notes 73–78 and accompanying text.

⁵⁰ See *infra* notes 74–80 and accompanying text.

⁵¹ See *infra* notes 87, 89–90 and accompanying text.

⁵² UDHR, *supra* note 2, art. 1.

One of the most frequently referenced statements about this issue was made in 2011 by then U.S. Secretary of State Hillary Clinton who said, “[G]ay rights are human rights, and human rights are gay rights.”⁵³ Definitions are important and, in this context, they are extremely important. This statement misleads in two ways: (1) it implies that same-sex attracted or transgendered persons do not currently enjoy human rights protections; and (2) it implies that all LGBT claims merit recognition as new human rights.

No credible voice in the international human rights community asserts that LGBT persons do not have human rights.⁵⁴ Those who imply otherwise create proverbial “straw men.” In another speech, Secretary Clinton claimed that, “[m]en and women are harassed, beaten, subjected to sexual violence, even killed, because of who they are and whom they love.”⁵⁵ The UDHR and ICCPR’s protections of every individual from arbitrary arrest, torture, and extrajudicial killing by the state already apply to all persons, regardless of their sexual attraction or gender preference.⁵⁶ All human beings, regardless of sexual attraction or gender preference, are protected in international human rights law because they have human dignity, not *because of* their sexuality or gender preference. If any person is denied these rights, then UN human rights bodies should investigate and strengthen enforcement of their rights.

However, the LGBT movement’s attempts to focus exclusively on violence against persons who identify themselves as part of that community undermine the impartial nature of the human rights system.⁵⁷ Violence against heterosexuals is equally unjust. Secretary Clinton thus points to a problem that already has a solution.

⁵³ U.S. Sec’y of State Hillary Rodham Clinton, Remarks in Recognition of International Human Rights Day (Dec. 6, 2011), <http://www.state.gov/secretary/20092013clinton/rm/2011/12/178368.htm>.

⁵⁴ See, e.g., *Combating Discrimination Based on Sexual Orientation and Gender Identity*, OFF. OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUM. RTS. (last visited Feb 3, 2016), <http://www.ohchr.org/EN/Issues/Discrimination/Pages/LGBT.aspx> (“Protecting LGBT people from violence and discrimination does not require the creation of a new set of LGBT-specific rights, nor does it require the establishment of new international human rights standards. . . . All people, irrespective of sex, sexual orientation or gender identity, are entitled to enjoy the protections provided for by international human rights law.”).

⁵⁵ U.S. Sec’y of State Hillary Rodham Clinton, Remarks at an Event Celebrating Lesbian, Gay, Bisexual, and Transgender (LGBT) Month (June 22, 2010), <http://www.state.gov/secretary/20092013clinton/rm/2010/06/143517.htm>.

⁵⁶ *Combating Discrimination Based on Sexual Orientation and Gender Identity*, *supra* note 54.

⁵⁷ See Stephen Baskerville, *The Sexual Agenda and Religious Freedom*, 4 INT’L J. RELIGIOUS FREEDOM, no. 2., 2011, at 91, 91, 98 (arguing that instituting rights specifically for certain groups, like the LGBT community, ultimately pits those rights against the rights of others rather than promoting real freedom).

A parallel trend has developed in international advocacy for freedom of conscience. Some groups have sought to focus attentions exclusively on the wrongs against their particular communities (e.g. “Islamophobia,” “anti-Semitism,” and “Christianophobia”) rather than on strengthening norms and enforcement for all.⁵⁸ This emphasis has detracted from protecting freedom of conscience for people of other faiths, agnostics and atheists.⁵⁹ Every person has the right to freedom of thought, conscience, and religion because they have human dignity. This is true for the Muslim, the Jew, the Christian, the Jehovah’s Witness, the humanist, and the Sikh, as it is for every human being.

The most effective way to protect human rights is to strengthen impartial enforcement of the rights that the UDHR and ICCPR already recognize.⁶⁰ Only then will a just human rights framework be established. The LGBT movement’s attempts to shift the focus from universal rights to the sexual orientation of right bearers adds bias to the current system.

B. *Not All LGBT Claims Involve Human Rights*

The statement that, “Gay rights are human rights and human rights are gay rights,” also misleads because it implies that the claims of LGBT activists are co-extensive with existing human rights. However, this is not true since LGBT activists claim many new human rights on the grounds of sexual attraction and gender preference.⁶¹ If these become the basis for recognizing new rights, then the international system will be subjected to ever expanding claims of new rights.

The founding document of the movement to include LGBT policies in the universal human rights framework is the Yogyakarta Principles (YP)

⁵⁸ See, e.g., *About*, COUNCIL ON AM-ISLAMIC RELATIONS, <http://www.islamophobia.org/about.html> (last visited Feb. 4, 2016).

⁵⁹ See, e.g., *Atheists and Islam: No God, Not Even Allah*, ECONOMIST, Nov 24, 2012, at 73 (examining the plight of underrepresented groups such as atheists in predominantly Muslim countries where human rights are enforced among only legally recognized religious communities).

⁶⁰ See *Combatting Discrimination Based on Sexual Orientation and Gender Identity*, *supra* note 54.

⁶¹ See, e.g., Bil Browning, *Sweeping Federal LGBT Rights Bill from Senate, House Democrats Has Huge Support in New Poll*, ADVOCATE (Nov. 17, 2015, 10:28 PM) <http://www.advocate.com/politics/2015/07/21/sweeping-lgbt-rights-bill-be-introduced-week> (Browning advocates for the Equality Act, which would “ensur[e] full rights for the LGBT community” since “every person deserves to live free from fear of discrimination, regardless of who they are or whom they love.” This Act proposes to offer rights and protections to LGBT individuals in “public accommodations, public education, employment, housing, federal funding, jury service” and credit; construes the Religious Freedom Restoration Act so that it cannot be used to “defend discrimination against LGBT people”; and specifies that “sex-segregated facilities must admit individuals in accordance to their gender identity”; and classifies gender identity and sexual orientation as a protected class.); see also *infra* notes 73–78 and accompanying text.

drafted in Indonesia in 2006.⁶² Described by Human Rights Watch as “groundbreaking,”⁶³ the YP is the roadmap for effecting change in international human rights law. This “sweeping”⁶⁴ set of principles call for “action from the UN human rights system, national human rights institutions, non-governmental organizations, and others.”⁶⁵ At the United Nations, LGBT activists have used the YP to press for “sexual orientation” to be read into all human rights treaties and documents.⁶⁶ LGBT activists have also succeeded in using the YP to change national constitutions and laws in countries like Nepal,⁶⁷ the Netherlands,⁶⁸ and India.⁶⁹ In Brazil’s 2011 decision to recognize same-sex marriage, Chief Justice Celso de Mello cited the YP.⁷⁰ In light of the growing trend of “transnational legalism” (borrowing legal precedent from other countries, a practice to which the U.S. Supreme Court is not immune),⁷¹ the influence of the YP is likely to grow.

Therefore, it is critical to understand what the YP says and how it threatens to limit freedom of conscience. The YP’s introduction cites “[s]exual orientation and gender identity” as “integral to every person’s dignity and humanity”⁷² Based on this new understanding of human dignity, the YP says “States may incur *additional obligations* as human rights law continues to evolve.”⁷³

⁶² THE INT’L COMM’N OF JURISTS & THE INT’L SERV. FOR HUMAN RIGHTS, THE YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY 7 (2006) [hereinafter THE YOGYAKARTA PRINCIPLES], http://www.yogyakartaprinciples.org/principles_en.pdf.

⁶³ ‘Yogyakarta Principles’—A Milestone for Lesbian, Gay, Bisexual, and Transgender Rights’, HUM. RTS. WATCH (Mar. 26, 2007), <https://www.hrw.org/news/2007/03/26/yogyakarta-principles-milestone-lesbian-gay-bisexual-and-transgender-rights>.

⁶⁴ *Id.*

⁶⁵ Press Release, Experts Release Groundbreaking Principles on Sexual Orientation, Gender Identity, and Human Rights (Mar. 26, 2007), http://www.yogyakartaprinciples.org/principles_en.htm.

⁶⁶ *E.g.*, Comm. on Econ., Soc., & Cultural Rights, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights, ¶ 32 & n.25, U.N. Doc. E/C.12/GC/20 (July 2, 2009).

⁶⁷ Kyle Knight, *How Nepal’s Constitution Got Queered*, HUM. RTS. WATCH (Oct. 14, 2015), <https://www.hrw.org/news/2015/10/14/how-nepals-constitution-got-queered>.

⁶⁸ *The Netherlands: Victory for Transgender Rights*, HUM. RTS. WATCH (Dec. 19, 2013), <https://www.hrw.org/news/2013/12/19/netherlands-victory-transgender-rights>.

⁶⁹ *India: Enforce Ruling Protecting Transgender People*, HUM. RTS. WATCH (Feb. 5, 2015), <https://www.hrw.org/news/2015/02/05/india-enforce-ruling-protecting-transgender-people>.

⁷⁰ Omar G. Encarnación, *The Ghost of Roe*, FOREIGN AFF. (June 28, 2015), <https://www.foreignaffairs.com/articles/united-states/2015-06-28/ghost-roe>.

⁷¹ *See id.*

⁷² THE YOGYAKARTA PRINCIPLES, *supra* note 62, at 6.

⁷³ *Id.* at 7 (emphasis added).

LGBT activists assert that “new obligations” include the “right to donate blood,”⁷⁴ the “right to gender reassignment surgery,”⁷⁵ the “right to assisted reproductive technology,”⁷⁶ and the “right to same-sex prostitution.”⁷⁷ Once rights can be created based on sexual/gender preferences, the possibilities for expanding the human rights framework become infinite.

For instance, leading LGBT rights groups, including the Human Rights Campaign, argue that “men who have sex with men” have a right to donate blood.⁷⁸ They argue that denial of this “right” is based upon animus.⁷⁹ LGBT activists argue that homosexual men have the same right to donate blood as all other men or women, and that to deny them this “right” is a violation of equality.⁸⁰ However, the motivation behind medical professionals opposing homosexual men donating blood is their risky sexual behavior, and the health of the recipients who receive blood donations.⁸¹ This form of “discrimination” is not a matter of animus, but a matter of public safety.⁸² LGBT activists do not ground the assertion of this “right” in human dignity founded in reason and conscience. In this case, as in many others, LGBT rights activists divert discussion from the

⁷⁴ See Michael Fabricant, *Equalizing the Right to Donate Blood Is the Next Frontier for UK Gay Rights*, GUARDIAN (Aug. 14, 2014, 5:36 AM), <http://www.theguardian.com/commentisfree/2014/aug/14/right-to-donate-blood-uk-gay-rights-safe-sex>; see also William Bigelow, *Obama and FDA: Let Gay Men Donate Blood*, BREITBART (May 12, 2015), <http://www.breitbart.com/big-government/2015/05/12/obama-and-fda-let-gay-men-donate-blood/>.

⁷⁵ See Paige St. John, *In a First, California Agrees to Pay for Transgender Inmate’s Sex Reassignment*, L.A. TIMES (Aug. 10, 2015, 3:30 AM), <http://www.latimes.com/local/california/la-me-inmate-transgender-20150810-story.html>.

⁷⁶ See NAT’L WOMEN’S LAW CTR. & LAW STUDENTS FOR REPROD. JUSTICE, IF YOU REALLY CARE ABOUT LGBT RIGHTS, YOU SHOULD CARE ABOUT REPRODUCTIVE JUSTICE! 2, (Oct. 2011), https://www.law.berkeley.edu/php-programs/centers/crrj/zotero/loadfile.php?entity_key=SZBSAWH8.

⁷⁷ See Graeme Reid, *Dispatches: U.S. Raid on Rentboy Is a Raid on Rights*, HUM. RTS. WATCH (Aug. 27, 2015), <https://www.hrw.org/news/2015/08/27/dispatches-us-raid-rentboy-raid-rights>.

⁷⁸ See Press Release, Human Rights Campaign, Human Rights Campaign Reaffirms Call for End to Blood Ban for Gay and Bisexual Men (May 20, 2010), <http://www.hrc.org/press/human-rights-campaign-reaffirms-call-for-end-to-blood-ban-for-gay-and-bisex>.

⁷⁹ E.g., Mark Joseph Stern, *South Africa’s Terrible Solution to the Gay Blood Donation Ban*, SLATE (May 21, 2014, 10:40 AM), http://www.slate.com/blogs/outward/2014/05/21/south_africa_s_gay_blood_donation_ban_solution_is_terrible.html.

⁸⁰ See Fabricant, *supra* note 74.

⁸¹ See CTR. FOR DISEASE CONTROL & PREVENTION, HIV IN THE UNITED STATES: AT A GLANCE 1 (2015), http://www.cdc.gov/hiv/pdf/statistics_basics_ataglance_factsheet.pdf.

⁸² See Sabrina Tavernise, *F.D.A Easing Ban on Gays, to Let Some Give Blood*, N.Y. TIMES, Dec. 24, 2014, at A1.

substantive issues by attacking the motives of dissenters.⁸³ However, the focus of the international community should be on the basis for recognizing rights. If sexual/gender preferences become the basis for the recognition of universal human rights, will there be any limits to new human rights?

C. *LGBT Policies and the Right to Marriage*

Of the many policies that LGBT activists assert, the one that has come into sharpest conflict with freedom of conscience is the purported right to same-sex marriage.

UDHR Article 16 describes the right to marriage:

- (1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

....

- (3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.⁸⁴

In 1948, the drafters of the UDHR were certainly describing the concept of marriage as between one woman and one man. The primary concerns in the text are that the union be entered into at the appropriate age, with consent, and with each gender receiving equal rights.⁸⁵ The drafters took care to note that the institution of marriage and “family” (referring to a mother and father) was a “natural and fundamental” group unit which both state and society should protect.⁸⁶

Around the world and at the United Nations, LGBT activists now seek to redefine Article 16 to include marriages between two men and two women.⁸⁷ Article 16 does not include these types of marriages nor does it include polygamy or polyandry.⁸⁸ The argument that “love is a human right” has engendered great compassion and sympathy over the emotional, psychological, mental distress that will be felt if same-sex

⁸³ See, e.g., *id.*

⁸⁴ UDHR, *supra* note 2, art. 16.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See *Love Is a Human Right*, AMNESTY INT’L, <http://www.amnestyusa.org/our-work/issues/lgbt-rights/marriage-equality> (last visited Feb. 6, 2016).

⁸⁸ See UDHR, *supra* note 2, art. 16 (referencing the right to marriage as between “men” and “women”).

marriages do not occur.⁸⁹ The argument has in large part led twenty-two Western countries to legalize same-sex marriage.⁹⁰ But if distress becomes the basis for rights then how can the international community deny Muslims a right to four wives, or fathers or mothers the right to marry their daughters or sons? Is their desire for polygamy or incest any less a justification for rewriting Article 16?

D. *How Same-Sex Marriage Threatens Freedom of Conscience*

No true, universal human right grounded in human dignity would lead to the violation of other true human rights. However, the LGBT movement's efforts to limit debate of its policies limits freedom of conscience. YP Principle 21(b) states that governments must "[e]nsure that the expression, practice and promotion of *different opinions, convictions and beliefs* with regard to issues of sexual orientation or gender identity" not be "undertaken in a manner incompatible with human rights."⁹¹ The vague phrase "incompatible with human rights" creates a justification for censoring those who hold "different opinions, convictions and beliefs" on LGBT policies.⁹² This would infringe on freedom of speech as well as freedom of conscience (Articles 18 and 19 of the UDHR and ICCPR).⁹³

The YP also urges governments to ensure civil society compliance with same-sex marriage and accompanying rights. Principle 24 states that, "the right to found a family," should not be limited by gender identity or sexual orientation, because "[f]amilies exist in diverse forms" and also should not be limited "by descent or marriage."⁹⁴ It urges governments to "take all necessary legislative, administrative and other measures to ensure that no family may be subjected to discrimination on the basis of the sexual orientation or gender identity of any of its members, including with regard to family-related social welfare and other public benefits, employment, and immigration."⁹⁵ This expands the definition of marriage to include almost any relationship and effectively renders the term devoid of any distinctive meaning.

⁸⁹ See, e.g., Robyn Harper, 'Gay Marriage' vs. 'Marriage' and the Human Right to Love, HUFFINGTON POST: HUFFPOST QUEER VOICES BLOG (June 15, 2012, 7:22 PM), http://www.huffingtonpost.com/robyn-harper/gay-marriage-vs-marriage-a_b_1597456.html; Kate Allen, Opinion, *Love is a Human Right*, GUARDIAN (May 17, 2008, 8:00 AM), <http://www.theguardian.com/commentisfree/2008/may/17/loveisahumanright>; see also *Love Is a Human Right*, *supra* note 87.

⁹⁰ *Gay Marriage around the World*, PEW RES. CTR. (June 26, 2015), <http://www.pewforum.org/2015/06/26/gay-marriage-around-the-world-2013/>.

⁹¹ THE YOGYAKARTA PRINCIPLES, *supra* note 62, at 26 (emphasis added).

⁹² *Id.*

⁹³ UDHR, *supra* note 2, art. 18–19; ICCPR, *supra* note 3, art. 18–19.

⁹⁴ THE YOGYAKARTA PRINCIPLES, *supra* note 62, at 27.

⁹⁵ *Id.* at 27–28.

It also tells governments that, “in all actions or decisions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, . . . sexual orientation or gender identity of the child or of any family member or other person may not be considered incompatible with” the best interests of children.⁹⁶ This would seem to dictate the result even if there is evidence to the contrary.

Same-sex marriage in the YP is a “positive right” that requires other citizens, private employers, and private social welfare institutions to legally recognize same-sex marriages and “diverse forms” of families.⁹⁷ It threatens freedom of conscience more so than other LGBT policies.

In both philosophy and law, human rights may be categorized as negative or positive.⁹⁸ A negative right restrains the state from taking action that harms an individual or limits his or her freedom.⁹⁹ A positive right creates obligations by the state (and sometimes other citizens) to provide benefits (e.g., housing) to an individual.¹⁰⁰ The differences between positive and negative rights (and the duties they create) are illustrated in the following examples.

Negative right: Citizen A desires to use an otherwise prohibited substance in a religious ceremony, but this does not require the state to create a duty from Citizen C to Citizen A. The state simply recognizes A’s right and does not interfere with A’s exercise of it. A’s exercise of the right does not impact anyone else’s rights.

Positive right: Citizen A’s marriage to Citizen B creates a duty from Citizen C to A+B because C must recognize the marital status of A+B in a wide variety of situations, (e.g., marriage services, housing, and children). Thus, other citizens/entities such as C have duties to A+B.

The recognition of this “right” may be coupled with nondiscrimination laws which impose burdens on Citizen C in a variety of circumstances at the demands of A+B.

For instance, a manager of a small business (Citizen C) considered a place of public accommodation may be compelled to provide wedding services to A+B.

A private employer (Citizen C) may be compelled to provide employment benefits to A+B.

A private adoption agency (Citizen C) may be compelled to provide adoption services to A+B.

⁹⁶ *Id.* at 28.

⁹⁷ *Id.* at 27–28.

⁹⁸ See JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 198–201 (1980).

⁹⁹ See *id.* at 200.

¹⁰⁰ See *id.*

Unlike negative rights, the exercise of positive rights will force others to act or choose not to act.¹⁰¹ When A+B decide they want to exercise their right to same-sex marriage, citizens who believe marriage should be between one man and one woman will be forced to choose between obedience to their conscience or to the state.

E. Decisions in the European Court of Human Rights

Some governments that have legalized same-sex marriage have already begun enforcing conformity with the LGBT agenda driving it. In the European regional human rights framework, LGBT activists have succeeded in demoting freedom of conscience.

In 2013, the European Court of Human Rights (ECHR) upheld two decisions by the British government.¹⁰² Two employers, a municipal government and a private counseling firm, terminated civil servant Lilian Ladele and counselor Gary McFarland.¹⁰³ Ladele asked to be excused from providing marriage certificates to same-sex couples and McFarland asked to be excused from providing psycho-sexual counseling to same-sex couples.¹⁰⁴ Both had co-workers who were willing to provide these services.¹⁰⁵ Yet the ECHR found that their employers rightfully terminated them because they were obligated to uphold “equality” and non-discrimination. Two dissenting judges wrote:

If anything, both the law . . . and the practice of other local authorities allowed for the possibility of compromises which would not force registrars to act against their consciences In [Ladele’s] case, however, a combination of back-stabbing by her colleagues and the blinkered political correctness of the Borough . . . eventually led to her dismissal.¹⁰⁶

Through this decision, the ECHR rejected the long-held, prudent judgments of the UN Human Rights Committee which gave wide berth to freedom of conscience as discussed in its decisions above. Unlike the Committee’s deference to conscience, the ECHR elevated LGBT policies over freedom of conscience even though there was no finding of “animus” (an invalid justification anyway) and both Ladele and McFarlane sought help from their co-workers to provide services to the same-sex couples.¹⁰⁷ When courts elevate non-discrimination above freedom of conscience, they shift the burden of proof to conscientious objectors who must show why

¹⁰¹ *See id.*

¹⁰² *Eweida v. United Kingdom*, 2013-I Eur. Ct. H.R. 42.

¹⁰³ *Id.* at 7–12.

¹⁰⁴ *Id.* at 8–9, 11–12.

¹⁰⁵ *Id.* at 8, 11, 13.

¹⁰⁶ *Id.* at 50 (Vučinić & De Gaetano, JJ., dissenting in part).

¹⁰⁷ *See id.*

their desire to live consistently with their beliefs deserves greater protection than same-sex couples who desire to marry.¹⁰⁸ Yet forcing these objectors to explain themselves in this way erroneously (and unlawfully) undermines one of the most fundamental and foundational human rights—the (non-derogable) right to conscience found in both the UDHR and ICCPR.¹⁰⁹

Leading legal scholars also seek to minimize concerns that same-sex marriage threatens freedom of conscience.¹¹⁰ They point to the fact that clergy may refuse to perform same-sex marriages.¹¹¹ However, this misses the point since the vast majority of individuals who experience conflicts between their conscience and LGBT policies are not clergy. The UDHR does not limit freedom of conscience to religious professionals. It explicitly protects the right of every person to “manifest his religion or belief in teaching, practice, worship and observance” both “in public [and] private.”¹¹²

F. How LGBT Policies Could Alter the Balance Between the State and the Individual

In 2011, the UN Human Rights Council passed a resolution on LGBT policies.¹¹³ Then U.S. Deputy Assistant Secretary of State for International Organizations Suzanne Nossel said: “That is the way these international norms are built . . . It’s not from scratch. . . [I]t builds up over time. So this is really a critical beginning of a universal recognition of a new set of rights that forms part of the international system.”¹¹⁴

Her statement appears based on the view that the state or UN are the source of our human rights. At the very least, the LGBT movement’s claims to new human rights are premised on the understanding that the state or UN can create new human rights over time.¹¹⁵ But after World

¹⁰⁸ See *id.* at 51.

¹⁰⁹ See UDHR, *supra* note 2, art. 18–19; ICCPR, *supra* note 3, art. 18–19.

¹¹⁰ See, e.g., Brief for Foreign and Comparative Law Experts Harold Hongju Koh et al. as Amici Curiae in Support of Petitioners at 39–41, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1022707.

¹¹¹ *Id.* at 40–41.

¹¹² UDHR, *supra* note 2, art. 18.

¹¹³ See Human Rights Council Res. 17/19, U.N. Doc. A/HRC/RES/17/19 (July 14, 2011) (emphasizing the Human Rights Council’s commitment to protecting the LGBT community from discrimination or violence on the basis of sexual orientation or gender identity and establishing a panel to propose further action).

¹¹⁴ Jill Dougherty, *U.N. Council Passes Gay Rights Resolution*, CNN (June 17, 2011, 7:00 PM), <http://www.cnn.com/2011/WORLD/europe/06/17/un.lgbt.rights/>.

¹¹⁵ See *id.* (demonstrating that Nossel sees women’s rights and minority rights as new rights that were created by states over time rather than as pre-existing rights that were being abridged).

War II, Charles Malik warned that when the state has the ultimate power to create rights, it also has the power to revoke them.¹¹⁶ Only when human rights are grounded in transcendent, fixed authority can they stand the test of time and shifts in power. Because (as the UDHR recognizes) human rights are grounded in human dignity, as evidenced by endowed reason and *conscience*, it is critical to vigorously protect freedom of *conscience*.

CONCLUSION

Conscience occupies a place of paramount importance in international human rights law for a reason. With the conscience individuals can seek moral truth. Our endowment with conscience and reason was foundational to the philosophical and legal development of the human rights system. Conscience has also been the engine of human rights activism, from the abolition of slavery to the condemnation of genocide.

The tragedy of World War II led the international community to recognize the tremendous need for an international human rights framework that would protect the individual and his or her conscience, and what flows from it—speech and action. For sixty-eight years, people from around the world have relied on this framework for protection from their own governments.

LGBT policies have been advanced as new “rights” quite recently and very rapidly. Regional human rights courts have failed to protect the right to freedom of conscience in conflicts with LGBT policies. In light of the rapid expansion of LGBT policies and the legalization of same-sex marriage around the globe, it will be important to strengthen protections of freedom of conscience in the face of efforts to gut it.

The existing human rights structure that was so carefully built, over such a long span of time, and by so many should not be altered easily and with haste. Moral convictions in the human conscience led to the recognition of the inalienable and inherent nature of human rights for all. Demoting freedom of conscience to elevate LGBT policies will cause irreversible damage to the entire human rights system. If freedom of conscience is destroyed by conflicts with LGBT policies, how will the human rights system be sustained? Much is at stake.

¹¹⁶ See Charles Malik, Address During the Initial Plenary General Debate of the Third Regular Session of the General Assembly of the United Nations (Sept. 27, 1948) in *THE CHALLENGE OF HUMAN RIGHTS: CHARLES MALIK AND THE UNIVERSAL DECLARATION* 115–16 (Habib C. Malik ed., 2000).