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Gay Marriage--A Modern Proposal: Applying *Baehr v. Lewin* to the International Covenant on Civil and Political Rights

ANNE M. BURTON*

"[W]e protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households. . . . The fact that individuals define themselves in a significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many 'right' ways of conducting those relationships . . . ."

I. INTRODUCTION

Gay\textsuperscript{2} couples cannot legally marry anywhere in the United States. Of course, many gay couples do "marry" in unofficial ceremonies\textsuperscript{1} or in

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2. To simplify discussion, I synonymously use the terms "gay" and "same-sex," even though, as the Supreme Court of Hawaii aptly observed in *Baehr v. Lewin*, "'Homosexual' and 'same-sex' marriages are not synonymous . . . . Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals." *Baehr v. Lewin*, 852 P.2d 44, 51 n. 11 (Haw. 1993). Likewise, I use interchangeably the phrases "heterosexual" and "opposite-sex." Further, I use the phrases "gay people" and "homosexual people" throughout this note to include bisexual and transgender persons, gay men, and lesbians. The phrase "sexual orientation" includes bisexual, heterosexual, and homosexual orientations.

3. Gay "marriages" have always occurred and will continue to occur, despite the fact that states do not legally validate these unions. *See generally William N. Eskridge, Jr., A History of Same-Sex Marriage, 79 Va. L. Rev. 1419 (1993); John Boswell, Same-Sex Unions in Premodern Europe (1994).* In his treatise on family law, Homer Clark discusses an interesting aspect of the history of marriage:

[U]ntil the middle of the eighteenth century . . . informal marriages were held valid by the ecclesiastics whose jurisdiction it was to determine the validity of marriages. . . . Why the church should sanction . . . wholly informal non-religious unions . . . can only be the subject of speculation. It may have been done merely out of a recognition that it was better to regularize than to condemn unions which would be formed regardless of what the law might say. If so, this is another example of the law's willingness to conform once rigorous rules to the unruly demands of human nature, a process many times repeated in the history of marriage and divorce. *Homer H. Clark, Jr., The Law of Domestic Relations in the United States 22 (2d ed. 1988)* (emphasis added). Perhaps state laws will similarly change to recognize gay unions which will be formed regardless of what the law might say.
contractual arrangements analogous to opposite-sex weddings. Still, states refuse to legally legitimate these commitments.

In this Note, I assert that gay people have a fundamental human right to marry and that the time has come in the United States for states to legally recognize same-sex marriages. I define the term fundamental human right to mean a universal individual right that precedes positive law. This Note explores the law's denial of this very basic and human right and its impact on gay Americans.

In this age of increasing globalization, gay rights advocates should look to international human rights instruments to frame new legal arguments. In a world where the GATT,\(^4\) NAFTA,\(^5\) and other major international agreements have become commonplace, international law provides an alternate and increasingly powerful means of securing those basic human rights which domestic laws ignore here at home. By urging individual states to comply with the human rights commitments which the United States has entered into on an international level, gay rights advocates may finally be able to change an institution which has long resisted change.

The United States has signed many international treaties and agreements, and one could apply the analysis in this paper to many of these instruments. However, this Note looks to one document in particular, the International Covenant on Civil and Political Rights.\(^6\) Although the ICCPR does not expressly protect gay marriage as a fundamental human right, or even gay rights generally, the instrument does contain provisions on both the right to marry and equal protection. As set forth below, these provisions can be interpreted to support marriage rights for gay people.

Although the ICCPR does not specifically address gay rights, it is nonetheless a useful analytical tool in this debate. The reasoning of the landmark gay marriage decision from Hawaii, \textit{Baehr v. Lewin}\(^7\) illuminates its usefulness. When applied to the relevant ICCPR provisions, the reasoning employed by the Supreme Court of Hawaii in \textit{Baehr} reveals a powerful argument for the legalization of same sex marriage in the United States.

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\(^7\) \textit{Baehr}, 852 P.2d at 44.
fact, the reasoning embraced by the court in *Baehr* could unlock many gender-based protections for gay people, in both our domestic laws and in our international commitments. For the purposes of this paper, however, I discuss only the interplay between *Baehr* and the ICCPR.

Part II of this Note discusses the cultural significance of the institution of marriage, arguing that, since marriage is both a treasure trove of social and financial benefits and a court-endorsed fundamental right in our society, gay people deserve access to this important institution. Part III posits that the lack of legal protections for gay people in the United States, coupled with growing anti-gay sentiment, necessitates looking to international human rights instruments to secure basic rights for gay Americans. Part IV examines the significance of the Supreme Court of Hawaii’s gay marriage decision in *Baehr v. Lewin* and the impact it could have on gay advocacy. Part V then applies the *Baehr* reasoning to the ICCPR to suggest how gay rights advocates may want to incorporate the *Baehr* Court’s reasoning into future legal arguments. This Note concludes that the United States must take a more active role in protecting the human rights it promised to protect when it signed onto the ICCPR, and that this arguably includes legalizing gay marriage.

II. MARRIAGE AS A CULTURALLY SIGNIFICANT INSTITUTION

A. Marriage as a Fundamental Right

Why is it so important that gay people have the right to marry? In fact, an internal debate exists within the gay community over this issue. One critic of the institution, while acknowledging that marriage “provides the ultimate form of acceptance for personal intimate relationships in our society, and gives those who marry an insider status of the most powerful kind,” still maintains that to legalize gay marriage would only work to assimilate the gay movement into the mainstream, and thereby fail to address diverse family structures. On the other hand, proponents of gay marriage, while acknowledging the much-criticized patriarchal roots of the institution of marriage, argue that the

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8. Throughout the paper, I use the term “gender” interchangeably with “sex” to highlight the distinction between classifications based on sex and those based on sexual orientation. Normally, “sex” refers to biological characteristics and “gender” refers to socially acquired characteristics.

legalization of gay marriage would ensure both state legitimation of their gay relationships as well as the legal benefits which accompany marriage. As one gay marriage proponent explains, "the issue is not the desirability of marriage, but rather the desirability of the right to marry."

Before exploring the interplay of the Hawaii case and the ICCPR, it is important to consider the position of marriage as an institution in American society. In so doing, one can better understand the urgency of gay people’s fight to have access to this basic human right.

One way to gauge a society’s respect for an institution is to examine the judicial opinions that discuss that institution. Often judicial opinions serve as such indicators of the cultural significance of institutions. With respect to marriage, U.S. courts—most notably the U.S. Supreme Court—have long held that marriage is a fundamental right protected by the U.S. Constitution. Although states have the power to regulate marriage, the U.S. Supreme Court has held on numerous occasions that the federal Constitution protects the right to marry and that this right is fundamental.

In *Meyer v. Nebraska*, the Supreme Court stated that the liberty interest guaranteed by the Fourteenth Amendment’s Due Process Clause includes the right to marry. In *Skinner v. Oklahoma*, the Supreme Court struck down a state statute providing for the sterilization of habitual criminals, noting that “[w]e are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.”

In *Loving v. Virginia*, the Supreme Court directly examined the right to marry. In *Loving*, the Court struck down a Virginia statutory scheme which prohibited interracial marriages. The Court held that Virginia’s anti-miscegenation statutes violated both the Equal Protection and Due Process Clauses of the Fourteenth Amendment. In this landmark decision, the Court

11. 262 U.S. 390 (1923).
15. *Id.* at 541.
18. *Id.*
recognized the fundamental right of people to marry whom they choose. The Court wrote:

Marriage is one of the “basic civil rights of man”.... To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes... is surely to deprive all the State’s citizens of liberty without due process of law. The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry, or not to marry, a person of another race resides with the individual and cannot be infringed by the State.19

If the word “racial” above in Loving is replaced with “gender,” and the words “another race” are replaced with “the same sex,” a strong argument emerges for the legalization of same-sex marriage. The rationale that fueled anti-miscegenation statutes—the “if-God-had-wanted” argument—reminds the arguments used today to obstruct civil protections for gay men and women. Although the facts of Loving involve racial classifications, Loving can be read as standing for the general proposition that people may marry whom they choose regardless of discriminatory laws banning certain types of marriage and regardless of the non-traditional nature of those marriages.20 Indeed, Loving supplies a useful framework to explore deep-rooted prejudices against gay people and to sort out the issues surrounding the current debate over gay marriage. In Loving, the Court upheld a different kind of marriage, one to which few were accustomed in that era, and which many found frightening, unnatural, and offensive. Certainly, many racists still consider interracial marriages frightening, just as many people consider same-sex marriages

20. Some readers may protest that homosexual marriage deserves no more legal protection than do incestuous unions, or marriages involving minors. Where one draws the line depends, of course, on one’s moral and political philosophy. The author sees a great difference between, on the one hand, two unrelated consenting adults of the same sex wishing to marry, and, on the other, a father and daughter wishing to marry. The debate then becomes a toss-up between how much, and whose, morality we wish to see reflected in our laws, and how much individual choice we want the law to protect. Ironically, those who most favor limiting government intrusion into our private lives may be the same people who most vigorously petition states to prohibit same-sex marriages.
frightening. In short, numerous aspects of *Loving* undeniably parallel the modern prospect of legalized gay marriage.  

Some might insist that *Loving* applies only to racial classifications. However, in *Zablocki v. Redhail*, the Supreme Court underscored the extensive scope of *Loving*: “Although *Loving* arose in the context of racial discrimination, prior and subsequent decisions of this Court confirm that the right to marry is of fundamental importance for *all individuals.*” In *Zablocki*, the Court struck down a Wisconsin statute which prohibited non-custodial parents who owe child support from marrying without court approval. The Court held that the statute impermissibly interfered with the fundamental right of marriage.  

Although the U.S. Supreme Court has repeatedly held that the Constitution protects marriage as a fundamental right, none of the above decisions directly support the view that gay people have a fundamental right to marry their same-sex partners. No United States court has ever held that marriage is a fundamental right for gay people—not even the Supreme Court of Hawaii in *Baehr*. This Note does not engage in a fundamental rights analysis of same-sex marriage; *Baehr* promises that the legalization of gay marriage will occur, if at all, under the auspices of equal protection, and not through a fundamental rights framework. Still, to understand why gay Americans, like other Americans, expect and deserve access to this constitutionally protected fundamental right, one must appreciate the institution’s status as a fundamental right in this country.

A fundamental right is not an absolute right. Yet, when courts declare a right such as marriage to be fundamental, they should not uphold state statutes limiting that right to heterosexual couples. To call a right “fundamental,” and then limit it to certain favored groups undermines the weight of that designation. A state law that validates only heterosexual

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23. *Id.* at 384 (emphasis added).
24. *Id.* at 388.
25. The U.S. Supreme Court has held that states may restrict a fundamental right so long as the restriction does not place an undue burden on that right. *Planned Parenthood v. Casey*, 112 S. Ct. 2791 (1992). Nonetheless, when courts choose to deny a fundamental right to an entire group of people based solely on the sameness of genders of the partners, courts both disable the individuals involved and vandalize the right.
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marriages deserves no more judicial backing than a law prohibiting marriage between interracial couples.

Consider the concept of marriage itself. There is no reason to interpret the term marriage to mean only a heterosexual union. Before Loving, many interpreted “marriage” to mean only same-race marriages and called upon Judeo-Christian heritage to justify this ab initio definition. To limit the term marriage to mean only opposite-sex unions makes equally little sense. After all, few would disagree that the operative word in the phrase “heterosexual union” is “union.” Marriage is, above all, a union. For many Americans, such a union does not require one man and one woman to constitute a commitment. Despite the lack of judicial or legislative backing, many gay Americans consider marriage a sacred institution. Unsurprisingly, many gay people wish to formalize their commitments through marriage—just as state laws permit heterosexual citizens to do.

One of the most common arguments against same-sex marriage is that traditionally the essential purpose of marriage is to procreate. John Quinn, the Archbishop of San Francisco has stated, “The permanent commitment of husband and wife in marriage is intrinsically tied to the procreation and raising of children.”

The District of Columbia Court of Appeals recently denied a same-sex couple the right to marry stating:

Although we recognize that gay and lesbian couples can and do have children through adoption, surrogacy, and artificial insemination, and that not all heterosexual married couples are able, or choose, to procreate, we cannot overlook the fact that the Supreme Court has only contemplated marriages between persons of opposite sexes—persons who had the possibility of having children with each other.

Thus, the argument runs, since gay couples cannot reproduce, states should not allow them to marry.

The U.S. Supreme Court has discussed the link between procreation and marriage. However, in important marriage decisions like Loving, the fact that the two plaintiffs could procreate was not determinative. Rather, the central issue in Loving was discrimination. Undoubtedly, many people marry solely

to procreate, but it does not follow that the ability or desire to procreate should be a prerequisite to marriage. Imagine some of the ridiculous consequences of such a threshold requirement. States would be required to prohibit all sterile or impotent people from marrying. In contrast, the procreation prerequisite would not bar fertile lesbians from marrying, since they can procreate by way of artificial insemination. Likewise, gay men could satisfy the procreation prerequisite simply by employing a surrogate. Or, were science to advance to the point where doctors could incubate a fetus to term outside the womb, gay men could procreate by securing a donated ovum.

Procreation is only one of many reasons that people choose to marry. Today, people marry for a variety of reasons including emotional companionship and the security of a dual income. Homer Clark writes:

Recently, marriage has come to resume some of its importance as a producing economic unit . . . providing the benefits of two sources of income for the maintenance of a single home. But the fact is that the most significant function of marriage today seems to be that it furnishes emotional satisfactions to be found in no other relationships. For many people it is a refuge from the coldness and impersonality of contemporary existence.

Same-sex couples seek the emotional and financial security of marriage just as opposite sex couples do. Aside from its lack of modern relevance, the procreation argument ignores the legitimacy of many family relationships such as adoptive families and couples who simply choose not to bear children—both of which our culture accepts. In short, the procreation argument is specious.


30. CLARK, supra note 3.

31. The Supreme Court of Hawaii chastised the dissent for its claim that “the purpose of [HAw. REV. STAT.] § 572-1 [the marriage statute] is to promote and protect propagation.” Baoehr, 852 P.2d at 48-49 n.1. The Court cited the Hawaii legislature’s 1984 removal from the marriage statute of the outdated requirement that “[n]either of the parties is impotent or physically incapable of entering into the marriage state” as support for the idea that the ability to procreate is not a prerequisite to marriage.
B. The Social and Economic Benefits of Marriage

Anti-gay rights groups vehemently oppose laws that place gay people on an equal legal footing with heterosexual people. Mike Gabbard, a Christian fundamentalist activist in Hawaii who opposes gay marriage commented, "They [homosexual people] want to be treated the same as us when they are not." These critics feel that gay people asking for their basic human rights is tantamount to a demand for special legal privileges. Such conservative groups routinely employ this "special privileges" rhetoric against groups seeking basic civil rights, such as women and racial minorities, as a way to attack affirmative action programs. However, when applied to gay rights efforts, such rhetoric falls flat. Gay rights advocates have never sought any sort of affirmative action hiring or quota preference. As Evan Wolfson, attorney and director of the Lambda Legal Defense and Education Fund Marriage Project, and an attorney for the plaintiffs in Baehr explains:

Like nongay people, gay people need and want the right to marry. We don't need "gay marriage," or "same-sex marriage," or "just domestic partnership"; we need marriage. The term gay marriage implies that same-sex couples are asking for rights or privileges that married

32. Man to Man, Civil Rights, ECONOMIST, July 1, 1995, at 22.
33. For example, the leader of Coloradans For Family Values, Kevin Tebedo, stated, "The people in the state do not want to give homosexuals protected class status. They [Coloradans] believe they [homosexuals] already have equal rights, and they do ..." The MacNeil/Lehrer NewsHour, Dec. 31, 1992, available in LEXIS, News Library, MACLEH File. Coloradans For Family Values led the push to amend Colorado's constitution ("Amendment 2") to prohibit cities from enacting gay rights ordinances.

Much to the dismay of gay rights advocates, who had launched a successful boycott of Colorado, the amendment passed a state referendum on November 3, 1992 with 53.4% of Coloradans voting for the amendment that would prohibit progressive gay rights legislation.

The constitutional amendment provided in part:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado . . . nor any of its agencies, [or] political subdivisions . . . shall enact . . . or enforce any statute, regulation [etc.] . . . whereby homosexual [etc.] . . . practices or relationships shall constitute . . . the basis . . . of . . . any person . . . to have or claim any minority status quota preferences, protected status or claim of discrimination.

However, in Evans v. Romer, the Supreme Court of Colorado upheld a lower court's permanent injunction barring enforcement of the amendment, stating that Amendment 2 unconstitutionally affected the "fundamental right of gay men, lesbians, and bisexuals to participate equally in the political process." Evans v. Romer, 854 P.2d 1270, 1273 (Colo. 1993) (Evans I).

34. The 1992 official Republican party platform rejected "efforts by the Democratic Party to include sexual preference as a protected minority receiving preferential status under civil rights statutes." William Schneider, Anti-Gay Rhetoric: Handle with Care, 24 NAT'L J. 2098 (1992).
couples do not have. What we are asking for is our equal right to marry the one we love and care for, just as nongay Americans do.\textsuperscript{35}

Ironically, heterosexual Americans\textsuperscript{36} enjoy countless legal privileges through marriage—marital privileges that stem solely from the fact that each spouse is of a different gender.

These legal benefits are another indication of the cultural significance of the institution of marriage. For example, one spouse may visit another in the hospital, in jail, or in other "family only" restrictive areas. Since gay couples are not related by blood and cannot become related by marriage such establishments may lawfully deny gay people this important privilege.\textsuperscript{37} Marriage also enables couples to file joint tax returns, claim money-saving exemptions, and inherit from intestate spouses under forced-share statutes.\textsuperscript{38} Foreign citizens gain the right to reside in the United States by marrying Americans, thus avoiding deportation.\textsuperscript{39} Spousal benefits such as pensions,\textsuperscript{40} worker's compensation,\textsuperscript{41} Social Security,\textsuperscript{42} health insurance from a spouse's employer,\textsuperscript{43} and death benefits from insurance policies are all benefits of which only heterosexual individuals may take advantage.

Gay people cannot enjoy marital life estate trusts, estate tax marital deductions,\textsuperscript{44} family partnership tax income, damage recoveries from injury to a spouse, bereavement leave, unemployment benefits for quitting a job to

\textsuperscript{35} Evan Wolfson, \textit{Altared States}, 10 PERCENT, May-June 1995, at 28, 28.
\textsuperscript{36} This also includes homosexual people who happen to marry persons of the opposite sex.
\textsuperscript{37} The right to enter restricted hospital areas takes on greater meaning when one considers the impact of AIDS on the gay community.
\textsuperscript{38} \textit{E.g.}, IND. CODE § 29-1-2-1(b) (1993).
\textsuperscript{39} 8 U.S.C. § 1186a(a)(1) (1994) provides: "[A]n alien spouse . . . shall be considered, at the time of obtaining the status of an alien lawfully admitted for permanent residence, to have obtained such status on a conditional basis . . . ." Such conditions include the finding that the marriage is valid and that it was not entered into solely to gain permanent resident status.
\textsuperscript{40} \textit{E.g.}, IND. CODE § 36-8-7-11(c)(1) (1993).
\textsuperscript{41} \textit{E.g.}, IND. CODE § 22-3-3-19(a)(1)-(2) (1993).
\textsuperscript{43} Having access to health care benefits for one's family is a sizable and valuable component of many Americans' employment compensation packages. Single people voluntarily waive this component, but gay people who wish to marry must involuntarily forfeit these valuable benefits. A handful of municipalities (e.g., Berkeley, CA, Burlington, VT, and New York, NY) and corporations (e.g., Ben & Jerry's Homemade, and Pillsbury, Madison & Sutro) have tried to extend such benefits to their gay employees, but cannot convince their insurance carriers to cooperate. 
\textsuperscript{44} 26 U.S.C. § 6013 (1988).
move with a spouse, or access to neighborhoods and buildings zoned "family only." 45 "Because lesbians and gay men are almost always treated as legally 'single'--at best 'roommates'--for the purposes of taxes, immigration, tort law, criminal law, government benefits, and housing restriction, gay couples are denied access to the mechanisms by which society encourages and grants benefits to heterosexual family relationships." 46 Thus, contrary to the popular anti-gay rights rhetoric, heterosexuals, not homosexuals, enjoy many legal privileges.

U.S. courts call marriage a fundamental right, and our society grants legal spouses with many social and economic benefits. It is no wonder that gay people have pushed to have their relationships legally recognized. Gay couples in Denmark, 47 Norway, 48 and Sweden 49 already enjoy most marital rights under the registered partnership laws of their respective countries. 50 For American gay couples, however, the struggle has yet to produce any solid progress.

III. THE UNSATISFACTORY STATE OF GAY RIGHTS IN THE UNITED STATES

As stated above, American men and women may not lawfully marry members of their own sex. Disgracefully, the prohibitions on gay life in the United States neither begin nor end with marriage rights. The general ban on gay marriage typifies a much larger problem--namely, the lack of basic civil rights for gay Americans in almost every area of life the law touches.

This section discusses two important ideas. First, gay rights are human rights issues, and the lack of human rights for gay individuals in the United States merits international censure. Second, apart from state action denying gay people their rights, there exists a strong anti-gay sentiment in the United States that signals the need to look outside domestic laws for policies to protect gay rights. Clearly, not all heterosexual Americans oppose gay rights.

45. CURRY, supra note 43, at XI.
47. Denmark’s partnership law was passed in 1989. Since Denmark legalized gay marriage, more than 3,000 gay Danish couples have wed. See, e.g., First Gay Marriages in Sweden, Agence Fr. Presse, Jan. 2, 1995, available in LEXIS, News Library, WORLD File.
50. Registered partnership legislation is pending in many countries, including Finland, the Netherlands, Iceland, the Czech Republic, Spain, and Slovenia.
However, because both the majority of voters and the countermajoritarian courts refuse to recognize gay rights in this country, the universal rights ratified by the United States in international instruments provide an alternative to domestic law for gay rights advocates.

A. Gay Rights As Human Rights

Although it is not unlawful to be gay, or, for instance, for gay citizens to vote, many statutes in the United States either directly discriminate against gay people or indirectly license discrimination by failing to provide gay people with rights equal to those enjoyed by heterosexuals. As second class citizens, gay people do not have legal recourse for many wrongs committed against them. Gay Americans risk losing their jobs, homes, health, and even custody of their children, merely for being open about their sexuality.

51. Note, however, that the U.S. military may, and regularly does, discharge gay people from the military merely for being homosexual, regardless of whether one engages in a homosexual act. 32 C.F.R. pt. 41, App. A (1995) provides: "Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements demonstrate a propensity to engage in homosexual conduct, seriously impairs the accomplishment of the military mission." (emphasis added).


    On a brighter note, Senator Jeffords of Vermont recently introduced the Employment Non-Discrimination Act of 1995 (ENDA) in the Senate. The bill seeks to prohibit employment discrimination on the basis of sexual orientation. Jeffords stated:

    The time has come to extend this type of protection to the only group—millions of Americans—still subjected to legal discrimination on the job.

    When this issue has been raised in the states, the debate has often turned on the phrase 'special rights.' This bill does not create any 'special rights.' Rather, it simply protects a right that should belong to every American, the right to be free from discrimination at work because of personal characteristics unrelated to successful performance on the job.

141 Cong. Rec. S8501, 8501-02 (daily ed. June 15, 1995) (statement of Sen. Jeffords) [hereinafter ENDA Bill]. A version of the bill was also introduced in the House of Representatives. See H.R. 1863, 104th Cong., 1st Sess. (1995). Despite his supportive statements, President Clinton has wavered on gay issues, most notably with regard to gay inclusion in the military. Moreover, the impending 1996 election may bring a leader who is less supportive of gay rights.
As recently as 1990, gay people could not enter the United States as aliens because the Immigration and Naturalization Act forbade entry of persons afflicted with "sexual deviation" and "[a]liens who have been convicted of a crime involving moral turpitude." Although gay foreigners may now legally enter the country, people with AIDS still may not. Moreover, gay foreigners generally cannot obtain extended political asylum, even though they may suffer torture, harassment, and even execution in their countries for being gay. For example, in Romania, gay people face prison terms of one to five years for gay sexual activity. Julie Dorf, executive director of the International Gay and Lesbian Human Rights Commission (IGLHRC) in San Francisco, has addressed the lack of gay rights around the world:

[N]o country is really good to us. Obviously, the places where we’re put to death are the worst. Iran is the most well-documented. . . . But Saudi Arabia and some of the other Islamic countries have harsh laws as well. Places where we’re tortured, usually through psychiatric treatment, include China, possibly Taiwan, the former U.S.S.R. [and] Romania. And then there are places where the government is failing to prosecute anti-gay death squads or random murderers; that is primarily Brazil, Ecuador and Peru. Targeted murders of activists

54. SEXUAL ORIENTATION AND THE LAW, supra note 52, at 150-53.
56. Id. at § 1182(a)(9).
59. Deborah Claymon, Gays in Romania Still Living in Fear, S.F. CHRON., July 11, 1994, available in LEXIS, News Library, MAJPAP File. International pressure from human rights groups and from the Council of Europe has caused Romania’s parliament to reconsider its anti-sodomy statute. Romania recently signed onto the European Convention on Human Rights, but before the Council of Europe will accept Romania into its organization, Romania must fulfill 11 conditions, including repeal of its anti-sodomy law. Id.
60. Dubbed by many as the new "gay Amnesty International."
take place in Mexico, where over 12 have been killed in the past year.\textsuperscript{61}

Dorf founded the IGLHRC in 1991 in response to Amnesty International’s failure to document and address the international persecution of sexual minorities. Since then, Amnesty has joined the fight against international abuses of gay people’s human rights. Amnesty International has even urged the United Nations to incorporate express protection of gay people in the Universal Declaration of Human Rights.\textsuperscript{62} So although human rights groups recognize gay rights as human rights, the United States still has not. The global consequences of the United States’ failure to recognize homosexual rights as human rights are profound and merit international censure. If the United States is to be a world leader in human rights issues, it must first address gay rights within its own borders.

B. Anti-gay Sentiment in the United States

Not only has the United States refused to recognize gay rights, there is significant antagonistic sentiment toward gays in the United States. In a recent poll, fifty-two percent of the respondents felt that homosexual relationships were acceptable for others but not for themselves, only six percent felt that such relationships were acceptable for both themselves and others, and thirty-nine percent found them “not acceptable at all.”\textsuperscript{63} Sixty-four percent of the respondents did not “think that marriages between homosexual couples should be recognized by the law.” In a more recent poll, sixty-three percent of the voters polled did not support legalizing same-sex marriage.\textsuperscript{64} Across the Atlantic, gay couples fair better in the polls. A recent Reuters survey reported that nearly three-quarters (seventy-three percent) of the Dutch believe that their government should allow gay people to marry.\textsuperscript{65}

\begin{itemize}
\item \textsuperscript{62} Amnesty Focus on Gay Bias Hailed, CAPITAL TIMES, Feb. 10, 1994, available in LEXIS, News Library, PAPERS File.
\item \textsuperscript{64} Statistics taken from a telephone survey of 1,000 voters on June 21-26, 1995 reported in Poll Examines Voters’ Stand on Legalizing Gay Marriage, CHARLESTON DAILY MAIL, July 6, 1995, at P6A; The People Speak, PHOENIX GAZETTE, July 6, 1995, at A2.
\item \textsuperscript{65} Dutch Support Gay Weddings, Reuters, July 5, 1995, available in LEXIS, News Library, WIRES File.
\end{itemize}
Addressing U.S. domestic human rights generally, Dr. Rick Halperin, chairman of Amnesty International USA commented, "We want to make an emphatic statement about the human rights situation here in the United States ... that this country is a major human rights violator." Indeed, a conspicuous omission from the freedoms enjoyed in the United States is equal legal rights for gays.

Clearly, gay people have some legal freedoms in this country, such as the right to organize and conduct parades. This right flows from the equal application of free speech rights to gay and straight people. Since courts and legislatures continually block gays' access to other essential rights such as marriage, and even sex, the United States' commitment to individual liberty and equal justice under the law must be reexamined.

Twenty U.S. states still outlaw the private consensual expression of gay sexuality. Many states proscribe both homosexual and heterosexual sodomy, but a handful of states—Arkansas, Kansas, Maryland, Missouri, Montana, Nevada, Tennessee, and Texas—punish homosexual sodomy alone. States that criminalize sodomy impose fines and/or sentences ranging from $500 to life imprisonment. Idaho notoriously punishes both homosexual and heterosexual sodomy with a maximum sentence of life imprisonment. Larry Kramer, a gay writer and activist, expresses the frustration of many homosexuals when he writes, "We are denied the right to love. Can you imagine being denied the right to love?" It is worth noting that no state prohibits only heterosexual sodomy. Indeed, homosexuals bear the brunt of these archaic laws.

67. U.S. CONST. amend. I.
68. CURRY, supra note 43, at IX-X.
69. Although states differ in their definitions, sodomy is generally defined as oral or anal sex between heterosexual or homosexuals.
70. It is ironic that so progressive a state as Nevada, which permits both gambling and prostitution, would punish homosexual intercourse with a maximum sentence of 6 years in prison. NEV. REV. STAT. ANN. § 201.354(1) (Michie 1993) states: "It is unlawful for any person to engage in prostitution or solicitation therefor, except in a licensed house of prostitution." Contrast this with NEV. REV. STAT. ANN. § 201.190 (Michie 1986), which provides: "[E]very person of full age who commits the infamous crime against nature shall be punished by imprisonment in the state prison for not less than 1 year nor more than 6 years."
71. CURRY, supra note 43, at IX-X.
72. LESBIANS, GAY MEN, AND THE LAW, supra note 46, at xvii. Certainly, states regulate only the physical expression of love, not love itself.
Many people argue that states need not repeal sodomy statutes since these laws go unenforced, but one need not look any further than *Bowers v. Hardwick* \(^7^3\) to see that states still enforce these statutes. Furthermore, the mere existence of anti-sodomy laws constitutes an official expression of opprobrium and creates an atmosphere that tacitly encourages gay bashing.

Groups hostile to civil rights for gays are advocating restriction of those rights in various states. These groups have launched anti-gay rights initiatives across the country in Colorado, Idaho, Oregon, Maine, and Florida. In Idaho and Oregon, state constitutional amendments are fashioned after Colorado’s failed Amendment 2, which sought to block so called “protected-class” status for gays. The Idaho Citizens Alliance, the conservative group which spearheads the Idaho Proposition 1 campaign, seeks to limit access to information about gays in schools and public libraries.\(^7^4\) Certainly, the constitutionality of the goals of these campaigns is assailable. Still, these widespread attempts to restrict gay rights create an atmosphere charged with gay animus. The legal, social, and political climate for gay rights in the United States is dismal considering our commitment to democracy and individual rights. Julie Dorf writes:

If anything, the unprecedented right-wing opposition to [the gay rights] movement . . . in this country underscores the need for international support . . . Americans . . . take for granted that the U.S. is on the cutting edge of . . . political progressiveness. In truth, gay activists have much to gain by looking outside our borders, particularly at a time when we are seeing the limitations . . . such as solely relying on the same handful of friendly congressional representatives . . . . Meanwhile, sodomy laws are currently being challenged in Nicaragua, Romania, India, Chile, and elsewhere--any one of which is likely to see change before North Carolina.\(^7^5\)

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73. 478 U.S. 186 (1986) (Supreme Court upholding as constitutional Georgia’s right to criminalize and prosecute homosexual sodomy).


Thus, although the United States has historically played an active role in promoting human rights, some countries in the world currently surpass the protective measures afforded gays by the United States. The clearest example is South Africa. Long ostracized for its disregard of human rights during the apartheid era, South Africa recently became the first country in the history of the world to incorporate protection of sexual minorities in its national constitution.\(^7\)

Despite the Baehr decision and the Employment Non-Discrimination Act of 1995,\(^7\)\(^6\) an anti-gay rights atmosphere pervades the United States. The new conservative Congress makes domestic support for gay rights seem unlikely in the near future. Speaker of the House Newt Gingrich, whose half-sister is a lesbian, believes “[i]t is madness to pretend that families are anything other than heterosexual couples. . . . Over time, we want to have an explicit bias in favor of heterosexual marriage.”\(^7\)\(^8\) The Rehnquist Court has also shown hostility toward civil rights.\(^7\)\(^9\) Unless the United States elects a president who is supportive of gay rights in 1996, the situation will deteriorate. As a consequence of this strong anti-gay sentiment in the United States, gay rights advocates need to look outside of the domestic arena in their fight for equality.

IV. THE SIGNIFICANCE OF BAEHR V. LEWIN

Despite the dismal state of gay rights in the United States, one recent judicial decision offers a glimmer of hope. Just as Brown v. Board of Education\(^8\)\(^6\) marked a shift in the Supreme Court’s treatment of racial discrimination, Baehr v. Lewin may prove to be a similar watershed event for gay rights analysis. This case marks a dramatic shift from the framing of gay

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77. See ENDA Bill, supra note 52.
78. Joyce Price, Gingrich: Gays are Welcome; Urges Party to be Tolerant but Decrees Same-Sex Marriage, WASH. TIMES, Nov. 24, 1994, available in LEXIS, News Library, MAJPAP File.
79. Nadine Strossen, United States Ratification of the International Bill of Rights: A Fitting Celebration of the Bicentennial of the US. Bill of Rights, 24 U. Tol. L. Rev. 203, 211 (1992). Strossen, president of the American Civil Liberties Union, writes: “[T]he Supreme Court can no longer be relied on to secure human rights . . . . Therefore, to secure domestic human rights, one must look to alternative sources of protection . . . . and to alternative forums other than federal courts.” Id. at 214. Strossen specifically advocates looking to the ICCPR to secure human rights in the United States. Id. at 221.
rights issues in terms of sexual orientation and privacy, to framing those issues in terms of gender-based equal protection as applied to gay rights.81

In _Baehr_, the plaintiffs--two female couples and one male couple--challenged Hawaii’s marriage statute,82 arguing that it violated their equal protection and due process rights83 and their express right to privacy84 under the Hawaii constitution. In December 1990, Hawaii state officials in the Department of Health cited Hawaii’s marriage statute in refusing to issue marriage licenses to the three same-sex couples.85

In _Baehr_, the plaintiffs appealed a lower court’s dismissal of their claim that Hawaii’s practice of refusing to give marriage licenses to same-sex couples is an impermissible gender-based distinction that constitutes discrimination against the applicants on the basis of gender. The Supreme Court of Hawaii remanded the case86 stating that, “on its face and as applied, [Hawaii’s marriage statute] denies same-sex couples access to the marital status and its concomitant rights and benefits, thus implicating the equal protection clause of article I, section 5” of the Hawaii constitution.87 The Court said that on remand the State of Hawaii must show that its prohibition on same-sex marriages is narrowly tailored to advance a compelling state interest.88 Under this strict scrutiny standard, it will be very difficult for Hawaii to justify the gender-discriminatory statute. If the state fails to meet this standard, the Supreme Court of Hawaii will presume the Hawaii marriage statute to violate the state’s constitution.

81. For a detailed analysis of gender-based protections for gay men and women, see, e.g., Andrew Koppelman, _Why Discrimination Against Lesbians and Gay Men is Sex Discrimination_, 69 N.Y.U. L. REV. 197 (1994).

82. HAW. REV. STAT. § 572-1 (1985). At the time of the challenge, Hawaii’s marriage statute did not expressly limit marriage to heterosexual couples. The Hawaii legislature has since amended Hawaii’s marriage statute to expressly permit only male-female marriages. Section 572-1 now provides: “In order to make valid the marriage contract, _which shall be only between a man and a woman_ . . . [the parties must meet various requirements]” (emphasis added).

83. HAW. CONST. art. I, § 5 provides: “No person shall be deprived of life, liberty or property without due process of law, nor be denied the equal protection of the laws, nor be denied the enjoyment of the person’s civil rights or be discriminated against in the exercise thereof because of race, religion, sex or ancestry.”

84. HAW. CONST. art. I, § 6 provides: “The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest.”

85. _Baehr_, 852 P.2d at 44.

86. Remand to the Circuit Court was originally scheduled for 1994, but was delayed until September 25, 1995. Recently, the remand was rescheduled for 1996. _Trial on Same-Sex Marriages Postponed_, PHOENIX GAZETTE, July 15, 1995, available in LEXIS, News Library, MAJPAP File.

87. _Baehr_, 852 P. 2d at 47.

88. _Id._ at 68.
The Hawaii legislature has characterized marriage as a policy issue and declared its authority over policy matters. In the *Baehr* decision, the court acknowledged that "[m]arriage is a state-conferred legal partnership, the existence of which gives rise to a multiplicity of rights and benefits reserved exclusively to that particular relation." However, the court also stated that "[n]otwithstanding the state's acknowledged stewardship over the institution of marriage, the extent of permissible state regulation of the right of access to the marital relationship is subject to constitutional limits or constraints."

Although the court clearly stated in *Baehr* that same-sex couples do not have a fundamental right to marry under the Hawaii constitution, *Baehr* is a pivotal case for gay rights. First, from a substantive point of view, the Hawaii court has come closer to legalizing gay marriage than any other court in the nation. If Hawaii legalizes same-sex marriages, the effects will be felt across the country since other states must recognize gay marriages performed in Hawaii under the Full Faith and Credit Clause of the U.S. Constitution. One commentator writes, "The sparks that are flying in Hawaii would be [sic] nothing compared with the firestorm that would be ignited in other states—particularly those where the Christian right has become a potent force—if they are required to recognize homosexual marriages performed in Hawaii."

Second, and most importantly, *Baehr* marks the first time in the history of the gay rights movement that a state supreme court has adopted the gender-based rationale to protect gay rights. Gay rights advocates have tried unsuccessfully for years to use this rationale.

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89. 1994 Haw. Sess. Laws 217, §§ 1, 6, 8.
90. *Baehr*, 852 P.2d at 47.
91. *Id*.
92. The Full Faith and Credit Clause provides: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." U.S. CONST. art. IV, § 1, cl. 1. However, whether states will recognize Hawaii-performed gay marriages depends on judges' interpretations of their states' public policy schemes. *Restatement (Second) of Conflict of Laws* § 283(2)(1969) provides: "A marriage which satisfies the requirements of the state where the marriage was contracted will everywhere be recognized as valid unless it violates the strong public policy of another state which had the most significant relationship to the spouses and the marriage at the time of the marriage."

Several authors have provided a detailed analysis of the potential impact of *Baehr* in other states. See, e.g., Joseph W. Hovermill, *A Conflict of Laws and Morals: The Choice of Law Implications of Hawaii's Recognition of Same-Sex Marriages*, 53 MD. L. REV. 450 (1994) (concluding that, absent an express statement by a state legislature that same-sex marriages are void in that state, judges should not invalidate gay marriages performed in Hawaii).

To truly understand the impact of *Baehr*, it is crucial to keep the concepts of sex and gender separate from sexual orientation. Sex and gender refer to whether a person is male or female, while sexual orientation speaks to a person’s choice of sexual partners. Sex and sexual orientation are not equivalent classifications, but all people have both attributes. For example, a gay man is someone with a homosexual orientation and a male gender. Although the distinction seems obvious, many people confuse, if not conflate, the sex and sexual orientation classifications.

For years, gay rights advocates have pushed for the rights of homosexuals using the gender-based rationale. Arguing for rights as *gays and lesbians*, gay people have sought equal protection under the law as *men and women*. In *Baehr*, the court based its holding on the simple, yet potentially revolutionary, idea that if a man has the right to marry a woman, a woman also has the right to marry a woman, and a man also has a right to marry a man. Until *Baehr*, courts had refused to accept this reasoning. The most inspiring aspect of the *Baehr* decision is that the court employed the gender-based analysis to expand such a tradition-laden substantive right as the right to marry. This high court’s initiative in applying gender-based reasoning to marriage rights could have vast implications for gay people in terms of housing, employment, and other rights.

Accordingly, *Baehr* signals a significant change in how gay rights advocates should frame litigation in the future. Whether Hawaii legalizes same-sex marriage remains to be seen, but the *Baehr* decision has already made an important impact on the future framing of gay rights litigation.

Hopefully, the Hawaii Supreme Court will be the first of many courts to recognize the legitimacy of the gender-based gay rights approach. However, it is important to consider the relative merits and potential pitfalls of the gender-based approach to expanding gay people’s civil rights. On the positive side, by framing the issue in terms of gender (i.e., male and female), gay rights advocates may bypass some of the fear and misunderstanding usually associated with homosexuals and allay the fear many people have of extending rights to “yet another” group of people. Many Americans believe, if only very generally, in equal rights for men and women. Although a claim of gender-based discrimination is by no means a sure way to secure equal rights for gay

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94. *Baehr*, 852 P.2d at 44.
95. *See, e.g.*, DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979).
people, many battles have already been fought and won to eradicate gender-based discrimination.

On the negative side, gay rights advocates may risk censure for misusing gender-based classifications. Opponents of gay rights might consider this approach disingenuous since the ultimate goal is to secure gay rights, not gender rights. Similarly, some gay people consider this approach self-defeating. Some believe that gay people should not ride the coattails of gender-based victories, but should instead stake out their own sexual orientation-based rights.

Nevertheless, gay people are men and women, and they need not deny their genders. Indeed, gay people should demand the same gender-based rights that heterosexual people have. A gay man is no less "male" than a heterosexual man. The fact that a person is gay should not diminish that person's rights as a man or woman. Thus, the gender-based approach to expanding gay rights is simply a realistic reframing of the debate.

A final consideration is that this gender-based approach may run afoul of legislative intent. In most cases, one can safely assume that drafters who employ the word "sex" or "gender" in various statutory schemes do not envision their words as being construed to provide protections for gay people. Thus, the gay movement's use of gender classifications might jeopardize the future enactment of gender-protective legislation if legislators fear their words will be interpreted to secure protections for gay people. Although legislators can avoid extending gender-based rights to gay people by expressly limiting the scope of legislation, it will be difficult because gay men and women will still be males and females, and thus will be entitled to gender-based protections, despite the limiting language.

While the Baehr court's reasoning has its drawbacks as described above, the decision itself has important implications for the gay movement. Viewed as a precedent in judicial thinking, gays can begin to approach civil rights litigation from a new angle regardless of the final outcome of the case.

V. APPLYING BAEHR TO INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

Today we reside in what many social theorists refer to as a global village. Indeed, when one considers such links as the “Chunnel” connecting England and France and the international information superhighway, it is apparent that people of the world are coming together socially, if not culturally. Likewise, we are coming together in political and legal alliances. In the past decade alone, the world has witnessed the birth of the European Union, the reunification of Germany, and the widespread growth of western-style democracy in formerly communist countries. One of the most significant globalizing events of this century was the formation of the United Nations.

The United Nations was founded in 1942 when twenty-six countries came together to declare the common belief that “complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice in their own lands as well as in other lands.” This declaration marked the first use of the phrase “human rights” in an international instrument and demonstrated a clear intention on the part of member countries to scrutinize human rights conditions both outside and within their borders. Today, over fifty international and regional documents comprise the major human rights instruments of the world, some of which the United Nations oversees. Many United Nations documents address specific human rights, such as the International Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Elimination of All Forms of Discrimination Against Women. Others,
such as the International Covenant on Civil and Political Rights (ICCPR),\textsuperscript{102} address more general human rights.

The ICCPR, together with the International Covenant on Economic, Social, and Cultural Rights\textsuperscript{103} and the Universal Declaration of Human Rights\textsuperscript{104} comprise the United Nations International Bill of Human Rights. As of May 1, 1993, 114 countries including the United States had signed onto the ICCPR.\textsuperscript{105} Among the rights the ICCPR protects are freedom of association,\textsuperscript{106} freedom of thought and religion,\textsuperscript{107} and freedom from slavery.\textsuperscript{108}

\textit{A. Enforcement of the ICCPR}

ICCPR Article 28 established the United Nations Human Rights Committee to hear alleged violations of the covenant and to consider the periodic status reports submitted by signatory countries.\textsuperscript{109} The First Optional Protocol to the ICCPR allows individual citizens of a signatory country to take complaints of alleged ICCPR violations directly to the United Nations Human Rights Committee.

According to the United Nations, "Under the Optional Protocol, individuals who claim that any of their rights set forth in the [ICCPR] have been violated and who have exhausted all available domestic remedies may submit written communications to the United Nations Human Rights Committee."\textsuperscript{110} Some countries that have signed the ICCPR have also signed the First Optional Protocol.\textsuperscript{111} However, although the United States is a signatory country of the ICCPR, it has never signed the Optional Protocol.

\textsuperscript{102} ICCPR, \textit{supra} note 6.  
\textsuperscript{105} \textit{INTERNATIONAL HUMAN RIGHTS DOCUMENTS AND INTRODUCTORY NOTES} 24 (Felix Ernacora et al. eds., 1993). Although the United Nations adopted the ICCPR in 1966, the United States did not ratify it until 1992.  
\textsuperscript{106} ICCPR, \textit{supra} note 6, 999 U.N.T.S. at 178.  
\textsuperscript{107} \textit{Id}.  
\textsuperscript{108} \textit{Id}.  
\textsuperscript{109} \textit{Id}.  
Therefore, individual Americans who claim that the United States has deprived them of an ICCPR-protected human right may not file complaints directly to the United Nations Human Rights Committee. Additionally, the United States is not completely self-policing with regard to the ICCPR.

The United States, like the other countries party to the ICCPR, must submit periodic reports to the Secretary-General of the United Nations. In these reports, the United States accounts for the measures it has adopted that give effect to the rights it has promised to protect by signing the ICCPR. The Secretary-General then forwards each country’s reports to the Human Rights Committee for review.

The United States recently made its first report on its human rights record under the ICCPR to the United Nations Human Rights Committee. In the 213 page report, the U.S. State Department admitted that “many challenges and problems remain,” especially in the areas of police brutality, the death penalty, attacks on abortion clinics and activists, and sex discrimination, among others. In the report’s preface, the head of the Bureau of Human Rights and Humanitarian Affairs, John H. F. Shattuck, writes, “It is of little use to proclaim principles of human rights protection at the international level unless they can be meaningfully realized and enforced domestically.”

Although the United States monitors its own adherence to the ICCPR and does not solicit input from individual citizens, the United States cannot control outside criticism. Prior to the United States’ submission of its report, the World Council of Churches held hearings in the United States to provide a sounding board for individuals who wished to have their stories heard by the United Nations. The World Council is an independent international group which serves as both a forum for individuals’ complaints and as an alternative voice to the United States’ report to the Human Rights Committee.

In addition to the checks of independent monitors like the World Council of Churches, parties to the ICCPR must contend with criticism from other member states. Article 41 of the ICCPR provides that a signatory country may assert that another signatory country has not fulfilled its obligations under the

112. ICCPR Article 40, reprinted in INTERNATIONAL HUMAN RIGHTS DOCUMENTS AND INTRODUCTORY NOTES 30 (Felix Ermacora et al. eds., 1993).
covenant. In other words, countries may monitor other signatory countries’ human rights records and file complaints with the United Nations Human Rights Committee if a country violates an ICCPR-protected human right. Nevertheless, by not signing the Optional Protocol to the ICCPR, the United States significantly limits the ability of individual citizens to call on the United States to comply with its human rights commitments under the ICCPR.

It is important not to overemphasize the power of international treaties and covenants like the ICCPR. Countries that do not ratify or sign onto international instruments have no obligation to comply with the established rules. Even those countries which do ratify international instruments retain their sovereign power and are the ultimate decisionmakers as to whether or not to comply with the precatory standards laid out in a given document. One observer of United States foreign policy, David Forsythe, writes, “The place of human rights in U.S. foreign policy depends mainly on considerations of power and policy and only tangentially on law. In the interplay of politics and law, politics is the more determinative factor. Little is ever done merely because a legal rule requires action . . .”  However, in order to be an effective critic of other nations’ abuses, the United States must take care to fulfill its own obligations under the human rights treaties it has signed. As former President Jimmy Carter writes:

By ratifying the International Covenant on Civil and Political Rights, the U.S. has taken one step forward, albeit at too slow a pace. It now is incumbent upon future administrations to accelerate this progress and take action to end our country’s inconsistency and double standards in dealing with human rights at home and abroad. We can hardly clamor for justice in other parts of the world if we will not pledge to provide justice for our own citizens.  

Thus, the United States must strengthen its leadership role in promoting and encouraging human rights around the world by fully complying with its own international commitments.

In addition to the inconsistencies between the rights protected by the ICCPR and United States domestic law, the United States’ commitment to the

document as a whole is in doubt. Many contend that the ICCPR has little meaning in the United States because of the exceptions the United States took to the ICCPR upon ratifying it in 1992. The United States made five reservations, five understandings, and three declarations when it signed onto the ICCPR. The most serious reservation was the statement that Articles 1 through 27 of the ICCPR—most of the document—are not self-executing in the United States. Thus, no action can be brought in the United States under the ICCPR.

In a declaration by the United Nations at the Second World Conference on Human Rights, members encouraged states to limit the number of reservations they make when signing onto a treaty. Following the United States’ recent report on its compliance with the ICCPR, human rights experts from various countries criticized the United States “for endorsing [the ICCPR] only halfheartedly and keeping laws on its books that allow capital punishment for teenagers.”

Despite the limited scope of U.S. enforcement of the ICCPR, the instrument can be a valuable device for gay rights advocates around the world. While the Human Rights Committee enforces the terms of the ICCPR, it is also the main source of interpretation of the instrument. To understand the potential scope of the ICCPR provisions, it is important to examine the Human Rights Committees’ interpretive decisions. For gay rights advocates, one decision is particularly important.

In 1994, the Committee heard the Toonen case and determined that anti-sodomy laws in Tasmania, one of the six Australian states, violated the terms of the ICCPR. The Committee found that the only effective remedy for the plaintiff would be for the state to repeal its statutes. Most importantly, the Committee made a clear statement which interpreted ICCPR Article 2 to include sexual orientation in the list of explicitly protected classifications covered by the ICCPR’s provisions.


B. The Toonen Case

The Toonen case involved an Australian citizen, Nick Toonen, a resident of the Australian state of Tasmania. Australia is a signatory state of the ICCPR, and has also signed the First Optional Protocol of the ICCPR. Therefore, individual Australian citizens may file complaints directly with the U.N. Human Rights Committee.

Mr. Toonen filed a complaint alleging that Tasmania's anti-sodomy statutes violated his rights under Articles 2, 17, and 26 of the ICCPR. Article 2 provides for the equal application of member states' laws; Article 17 provides for the right to be free from unlawful interferences with one's privacy; and Article 26 is the equal protection provision of the ICCPR. The Committee found that Tasmania had violated Articles 2 and 17 of the Covenant, and therefore did not reach the question of whether it had also violated Article 26. ICCPR Article 2 provides:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.122

Mr. Toonen asked the Human Rights Committee to interpret the words "or other status" in Articles 2 and 26 to include sexual orientation. The Committee commented on the meaning of the phrase:

The State party [Australia, not Tasmania] after review of the travaux préparatoires, the Committee's General Comment on articles 2 and 26 and its jurisprudence under these provisions, contends that there 'appears to be a strong argument that the words of the two articles ['or other status'] should not be read restrictively.' While the travaux

121. Tas. Stat. R. §§ 122(a), (c) and 123.
122. ICCPR, reprinted in INTERNATIONAL HUMAN RIGHTS DOCUMENTS AND INTERNATIONAL NOTES, 24 (Felix Ermacora et al. eds., 1993).
preparatoires do not provide specific guidance on this question, they also appear to support this interpretation.123

However, the Committee did not use this clause to attack Tasmania’s anti-sodomy laws. Instead, it made a brief but powerful statement regarding gay rights stating, “The Committee confines itself to noting, however, that in its view the reference to “sex” in articles 2, paragraph 1, and 26 is to be taken as including sexual orientation.”2

The Committee concluded that in order for Australia to fully comply with the ICCPR, Tasmania would have to repeal its anti-sodomy statutes. Australia vigorously urged Tasmania to repeal the offending statutes, but Tasmania refused. An intense debate over the state’s right to refuse to repeal its law soon followed. Australia, considered a world leader in human rights protections, gave Tasmania two months to repeal its ICCPR-violative statutes.125

Australia, however, could argue under the Toonen decision, that twenty U.S. states similarly violate the ICCPR. Notwithstanding this inconsistency among signatory nations, Toonen is an important case for gay rights advocates worldwide. The United Nations, through its Human Rights Committee, has finally endorsed gay rights as worthy of protection by placing sexual orientation within the scope of the ICCPR.

Thus, gay rights advocates should consider the broad application of the ICCPR as one way to secure marriage rights for gays. Article 26 of the ICCPR provides for equal protection on the basis of gender, regardless of sexual orientation. As discussed below, the ICCPR protects marriage as a fundamental right and thus seems to protect the right of gays to marry one another. In light of the Toonen decision, there is great potential for the ICCPR, together with other decisions such as Baehr, to protect many rights for gays, including marriage.

123. ICCPR Article 17 provides: “No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence . . . .” Id. at 27. The Human Rights Committee stated that the concept of “privacy” includes adult consensual sexual activity in private. Further, the Committee decided that Tasmania’s anti-sodomy laws interfered with Mr. Toonen’s privacy, even if the statutes remain unenforced, and that this interference was arbitrary. See U.N. Doc., supra note 122.

124. Unfortunately, although the Human Rights Committee incorporated sexual orientation as a protected class under the ICCPR, to do so, the Committee blended the idea of “gender” with “sexual orientation.”

C. The ICCPR Through the Lens of Baehr

The gender-based reasoning adopted by the Supreme Court of Hawaii in *Baehr* should have an impact on the way gay rights advocates frame human rights arguments under U.S. laws and international treaties. *Baehr* gives important new meaning to all laws and instruments such as the ICCPR which incorporate gender based protections.

Although the ICCPR does not contain provisions that specifically protect homosexuals, it does contain provisions which protect gender based rights. Article 26, the equal protection section of the ICCPR, provides:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.126

This section implicitly127 prohibits discrimination on the basis of sexual orientation. The U.N. Human Rights Committee has not formally ruled whether the inclusion of the phrase “or other status” in Article 26 affords protection based upon sexual orientation.128 Nonetheless, Article 26 arguably protects the right of gay people to marry.

The ICCPR also contains a provision which protects the right to marry. Article 23 provides: “[t]he right of men and women of marriageable age to marry and to found a family shall be recognized.”129 Article 23 does not expressly protect the right of of same-sex partners to marry. However, it seems clear that it protects marriage as a fundamental human right. A concurrent reading of Article 23 and Article 26 supports the concept of gay marriage as a fundamental human right. Such a reading is not unprecedented. In *Baehr*, the Supreme Court of Hawaii found that the equal protection clause of the Hawaii constitution prohibits gender-based discrimination. Recall that

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126. ICCPR, supra note 6, art. 26, 999 U.N.T.S. 171 (emphasis added).
127. Unfortunately, Article 26 does not expressly protect against discrimination based on sexual orientation.
128. See generally, U.N. Doc., supra note 120.
129. ICCPR, supra note 6, art. 23, 999 U.N.T.S. 171.
Article 26 explicitly provides for equal protection on the basis of gender, regardless of sexual orientation.

The *Baehr* court held that if a man can marry a woman the state cannot prohibit a woman from exercising the same right. Thus, under the equal protection clause of the Hawaiian constitution, a woman may marry a woman; a man may marry a man. Because of the similarities between Hawaii's constitution and Articles 23 and 26 of the ICCPR, *Baehr*’s reasoning could successfully be applied to the ICCPR resulting in the same conclusion that the *Baehr* court reached.

Thus, there are several ways to make use of the ICCPR in the struggle for gay rights. First, as previously discussed, the logical interpretation of the ICCPR itself arguably stands for the right of homosexuals to marry one another. For gay rights advocates in the United States, this is a very important step because the United States has ratified the agreement. Second, the *Toonen* decision is a great triumph for the gay rights movement. Finally, the *Baehr* decision is the pinnacle of the analysis. Using the *Baehr* court’s reasoning, gay rights advocates have a new and very strong argument that the United States must recognize gay marriage and other gay rights as fundamental human rights that can no longer be denied.

**VI. CONCLUSION**

Although *Baehr* signals a fundamental change in one court’s framing of gay rights issues, gay couples in the United States continue to wait for the right to marry—the same right their heterosexual friends have exercised for centuries. Setting aside for now the attempt to shelter sexual orientation protection under due process claims of privacy, gay rights advocates may be able to unlock the door to many rights which gay people have been denied by pushing for gay rights under the auspices of gender-based equal protection. Whether or not Hawaii legalizes gay marriage, *Baehr* gives new legitimacy to gender-based arguments. Now it is time to truly test these arguments. Gay rights advocates should apply the reasoning in *Baehr* wherever gender-based protections exist. American gay rights advocates must demand that the United States fulfill within its own borders the human rights promises it has made internationally.

In the United States, where we prize individual liberty, human rights, and the separation of church and state, states should permit consenting adults to marry one another, regardless of their sex or sexual orientation. Because this
right does not currently exist in any state or federal law in the United States, and given the slim prospects for progressive change, gay rights advocates should press for this basic right through the use of international human rights agreements.

The United States has the unique opportunity to lead the world in the protection of gay people's human rights. As one of the founding members of the United Nations and one of the world's political and economic superpowers, the United States needs to reassess and reconfirm its role in promoting human rights in a changing world. As one author points out, "[t]he United States will not be a player in the development of international human rights law unless and until domestic legislation explicitly implements the pertinent international provisions." To satisfy our commitments under the ICCPR, and to maintain our position as a world leader in human rights, the United States must take steps to legalize gay marriage.
