

**NATURAL LAW OR LIBERALISM?
GAY RIGHTS
IN THE NEW EASTERN EUROPE**

by

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**A thesis submitted in conformity with the requirements
for the degree of Master of Laws
Graduate Department of Faculty of Law
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ABSTRACT

Natural Law or Liberalism? Gay Rights in the New Eastern Europe

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This paper endeavours to chart a course for the advancement of gay and lesbian rights in the newly formed democracies of Central and Eastern Europe (CEE). At the current time, most if not all CEE countries have decriminalized sodomy. The question remains then – where should they go from here? The varying situations in western democracies in Europe, North America, Southern Africa and Australasia are discussed, and put forward as possible models for implementation in CEE. As part of the ongoing debate about the relationship between morality and law, two legal theories, Natural Law as espoused by John Finnis and his contemporaries, and Ronald Dworkin’s Liberal Equality are compared and contrasted as tools used by legislators and judges when considering the situation of lesbians and gay men. Liberalism and proportionality are shown to be the preferred philosophy to be followed for the continued advancement of gay and lesbian rights.

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This paper is dedicated to the gay and lesbian community in my native Russia for whom the struggle continues – I hope this work will be useful. *Udachi!*

Alexander Dmitrenko
Toronto, September, 2001

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INTRODUCTION

At the cusp of the new millennium, Central and Eastern Europe (CEE) witnessed an extraordinary explosion of state building. Twenty-two new countries emerged from the ruins of the Soviet Empire, forever changing the political map of Eurasia.¹ Freshly liberated from totalitarian regimes, these nations began rediscovering their national identities while striving to build democracies.² The changes were far-reaching: from *diktatura proletariata* (dictatorships of the proletariat) to democratic rule-of-law states, from planned to market economies, and from oppressed societies to societies of free individuals.

In an attempt to deal with the vast array of new political, economic and social relationships, transitional democracies of the East looked carefully at the experiences and achievements of established democracies of the West.³ Initially, a mere willingness to bridge the gap with the West and receive much-needed financial assistance moved CEE countries to carry out basic reforms critical for their acceptance by the Western world. Membership in such organizations as the Council of Europe, Europe's most prominent

¹By the end of 1999 almost all constituent republics of the former Soviet Union and former Yugoslavia became sovereign states – peacefully or through military conflict as happened in the case of the former Yugoslav Republics of Slovenia, Croatia and Bosnia-Herzegovina. Currently Yugoslavia is still a federal state with two constituent Republics – Montenegro and Serbia. At this same time, the Czecho-Slovak Federal Republic (Czechoslovakia) split peacefully into two separate states: the Czech Republic and Slovakia.

²It is nonetheless important to note that not all the newly independent state chose democracy. Turkmenistan and less so Kazakhstan, Kyrgyzstan, Tajikistan, and Uzbekistan became semi-dictatorial countries with Presidents elected for life and opposition parties – if they exist at all – have no seats in their powerless Parliaments. By virtue of these facts, although meritorious of analysis, these countries will be outside the scope of this paper.

³In this essay, the terms West, Western democracies, and Western civilization refer to the countries of Western Europe, the United States of America, Canada, Australia, and New Zealand.

inter-parliamentary organization, the North-Atlantic Treaty Organization (NATO) or the European Union had its price. Many CEE countries adjusted their legislation to accommodate basic democratic values and principles as well as encourage free markets. As a result, such doctrines as the separation of powers, multi-party system, constitutional adjudication, transparency in governance, and human rights were transplanted to post-Soviet states. In restructuring their political systems, many CEE countries introduced 'checks' and 'balances' similar to those already in use in the United States, Germany, France, Italy, Switzerland, and other Western countries. National charters of rights and freedoms mirrored international human rights declarations and conventions.

Russia serves as one of the most interesting examples of a transitional democracy.⁴ The 1993 Constitution of the Russian Federation, which began a new chapter in Russian history, is somewhat like an *Airbus* – that is it is assembled from parts manufactured in various countries.⁵ In brief, the new Russian Constitution adopted many of the French and American concepts of the presidency.⁶ The parliamentary electoral system and the structure of the Constitutional Court were borrowed from the German *Grundgesetz*.⁷ The

⁴Special attention given to Russia in this paper is also due to the author's personal interests and knowledge of Russia.

⁵*Constitution of the Russian Federation*, adopted by referendum, Dec. 12, 1993 [hereinafter *RF Const.*]. English text avail. in W. Butler and J. Henderson, eds., *Russian Legal Texts*, (London: Simmonds & Hill, 1998).

⁶However, the mechanisms of checks and balances of the French and American models – such as the possibility of 'cohabitation' in France or Congress's exclusive legislative prerogative in the US – were overlooked. *La Constitution de la Vème République*, oct. 4, 1954 (avail. at www.assamblee-natoinale.fr/textes/c1958web.htm; English text avail. at www.assamblee-natoinale.fr/english/8ab.asp) [hereinafter *Fr. Const.*]; *Constitution of the United States of America*, 1787 [hereinafter *US Const.*].

⁷It combines proportional and majoritarian representation and establishes a five percent threshold for party representation. See *Grundgesetz, Basic Law for the Federal Republic of Germany*, 1949 [hereinafter *Grundgesetz*]. For more on German constitutionalism, see D.P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*. 2nd ed. (Durham and London: Duke University Press, 1993) [hereinafter *Kommers*]; and D.P. Currie, *The Constitution of the Federal Republic of Germany*. (Chicago: Chicago University Press, 1994).

reconstructing Russia's federal relations, while Spain and Belgium provided inspiration for asymmetrical federalism.⁸ The drafters of the Russian Constitution copied into Chapter II, *Rights and Freedoms of Person and Citizen*, many of the rights proclaimed in international covenants and declarations.⁹ In its turn, this *Airbus* of Russian constitutionalism was a great help in the constitution-making process in other countries of the former USSR.¹⁰

However, transplanting of all these foreign and international democratic principles into Russian soil did not instantly create "a democratic, federal rule-of-law state."¹¹ One of the most apparent factors undermining the sincerity of Russia's pledge to democracy is the institutionalized mistreatment of minorities. This is epitomized by the ongoing military action in the breakaway Caucasian republic of Chechnya.¹² Also, new legislation on freedom of religion, lobbied for by Russia's 'traditional' faiths, significantly undercuts competitors from 'new faiths.'¹³ Russia's history is crammed

⁸See *RF Const.*, *supra* note 5, Chapter III "The Russian Federation."

⁹See especially the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, Rome, Nov. 4, 1950 (avail. at <http://www.coe.fr/eng/legaltxt/5e.htm>) [hereinafter *European Human Rights Convention* or *EHRC*].

¹⁰See e.g. *Constitution of Armenia*, July 5, 1995 <http://www.armeniaembassy.org/constitution.html>; *Constitution of Ukraine*, the Fifth Session of the Verkhovna Rada, June 26, 1996 <http://www.rada.kiev.ua/const/conengl.htm>

¹¹Art. 1.1 of the RF Const. defines the Russian Federation (Russia) as "a democratic federal rule-of-law state with a republican form of government." *RF Const.*, *supra* note 5, art. 1.1.

¹²For an historical background, see W. Hayden, "Seeds of Unrest: The Political Genesis of the Conflict in Chechnya (1990-1994)" (2000) 24 *Fletcher F. World Aff.* 49.

¹³Federal Law No. 125-FZ, *On Freedom of Conscience and Religious Organizations*, 1997. Avail. in Lexis, Intlaw Library, Rfarch File ["Freedom of Conscience Law"]. The law distinguishes between "religious organizations" and "religious groups," where only religious organizations may qualify for the full protection of the state and tax benefits. For a religious group to become an organization, it "must present government confirmation that it has existed on the given territory for no less that fifteen years." (*Ibid.* Art. 9.1). This provision caused an outrage among scholars, various international human rights organizations, and foreign governments because it was obvious that no new faith could establish itself in Russia even ten years ago as religion was outlawed by the Soviet Government. Therefore, practically only those religions, which existed in Russia before the 1917 Revolution would qualify. See the collection of articles in Emory

with other embarrassing episodes – imperialistic wars in the Caucasus in the seventeenth and eighteenth centuries, Jewish pogroms in the nineteenth and early twentieth centuries, the deportation of Crimean Tatars, Chechens, Ingush, Turks, and Volga Germans from central and southern Russia to uninhibited parts of Kazakhstan and Siberia after the Second World War. The history of prejudice and oppression of minorities in Russia demonstrates the mentality of intolerance towards difference that many Russians still harbour.¹⁴

What is noteworthy in present-day Russia is that there appear to be no effective international or domestic mechanisms to compel the country to respect its minorities. In the face of international pressure, many scholars seem concerned that the imposition of western ideals of democracy onto the rest of the world might have a detrimental impact on local cultures, national identity and morals of other nations.¹⁵ Therefore, while most CEE countries accept basic democratic premises, disagreement arises about the extent to which foreign ideologies should be adopted. For a country like Russia, which has often been self-aggrandizing and had expansionist designs on neighbouring states, cultural suppression from abroad is a particularly troublesome matter. Given that it is a difficult task to compel Russians to adopt certain behaviours – after all, Russia *was* a superpower and is still a major world player – the international community has had little or no

Int. L.R. Vol.12: J. John White, "Soul Wars: The Problem and Promise of Proselytism in Russia" (*Ibid.*) 1; C.W. Durham and L.B. Homer, "Russia's 1997 Law on Freedom of Conscience and Religious Associations: An Analytical Appraisal" (*Ibid.*) 101; J. Gunn, "Caesar's Sword: The 1997 Law of the Russian Federation on the Freedom of Conscience and Religious Associations" (*Ibid.*) 43.

¹⁴For example, it has recently become customary for political leaders, especially in the regions, to use anti-Semitic language. Another example is Moscow's government decision backed by judicial verdict to disallow the presence of Jehovah Witness organizations in the city of Moscow.

¹⁵Similar concerns are usually raised by the countries of the Middle East and the leaders of the anti-globalization movement.

success in urging the Kremlin to stop its assault on Chechnya or hinder the ratification of the *Law on Freedom of Conscience*.¹⁶

On a domestic level, the Russian judiciary, which should be the 'nerve centre' in the protection of rights, remains very weak vis-à-vis the other branches of power. The judiciary is corroded with corruption. In the Soviet Era, the judicial system was subordinate to and manipulated by the Communist party machine.¹⁷ Following *perestroika*, courts became somewhat more independent from the executive, yet still a far cry from the place they occupy in many Western democracies. The power struggle between the President and the State Duma in the mid-1990s, won by President Yeltsin, had a detrimental effect on the judiciary, and particularly on the Constitutional Court that had involved itself in the political conflict.¹⁸ Sittings of the Court were postponed for almost two years.¹⁹ Upon its re-establishment in 1994, the Court showed more loyalty to the President and the executive branch than to the democratic principles and values endorsed by the Constitution, such as protecting minority rights. It upheld the notorious

¹⁶See *supra* note 13 and accompanying text.

¹⁷The Soviet judicial system was therefore sardonically called "*telephone justice*" – party officials 'nudged' judges (usually over the phone) to render certain desired decisions in cases. See, e.g. L.I. Shelley, "Corruption in the Post-Yeltsin Era" (2000) 9 E. Eur. Const. Rev. 70.

¹⁸The 1993 Constitution created a unique model of government making the Russian President the most powerful figure on the national political scene. He can initiate, sign, promulgate, and veto laws; appoint/dismiss the Prime Minister, the Procurator General, judges of the Constitutional and other federal courts; and even dissolve the State Duma in certain circumstances. *RF Const.*, arts 84(d, e), 83(a, c-f), 84(b), 109, and 117 respectively. See also *Konstitutsija Rossiyskoy Federatsii: nauchno-prakticheskiy kommentariy (Constitution of the Russian Federation: Commentary for Academia and Practitioners)*. Edited by B.N. Topornin. (Moscow: Yurist, 1997).

Federal Constitutional Law on the Constitutional Court of the Russian Federation, 1993. "Constitutional Court: Development and Activity," online: Constitutional Court of the Russian Federation <http://ks.rfnet.ru/english/booklet.htm> (date accessed: Feb. 23, 2001).

¹⁹*Ibid.*

*Law on Freedom of Conscience*²⁰ as well as Yeltsin's decrees sanctioning the 1994 military assault on Chechnya that hurled Russia into a humiliating civil war, bringing terrorist attacks and international denunciation.²¹

Despite attaining more independence and rising in public opinion in recent years, the judiciary is still the weakest link in government. Contributing to this unfortunate situation is the continuing debate among scholars, politicians and judges as to whether it should be permitted for non-elected judges to render judgement on questions of political process.²² Having a judiciary in such a tenuous position, unable to protect itself and

²⁰Decision in the case determining the constitutionality of Article 27.3.3 & 27.4 of the Federal Law "On Freedom of Conscience and Religious Organizations", [1999]. See *supra* note 13 and accompanying text.

²¹Decision in the case determining the constitutionality of the Decrees of the RF President No. 2137 of Nov. 30, 1994 "On Measures to Reinstate Constitutional Rule of Law and Legal Order on the Territory of the Chechen Republic," No. 2166 of Dec. 9, 1994 "On Measures to Suppress Activities of Unlawful Armed Formations on the Territory of the Chechen Republic and in the Area of the Ossetia-Ingushetia Conflict," Decree of the RF Government No.1360 of Dec. 9, 1994 "On Ensuring State Security and Territorial Integrity of the Russian Federation, Rule of Law, Rights and Liberties of Citizens, and Disarmament of Unlawful Armed Forces on the Territory of the Chechen Republic and Neighbouring Regions of the North Caucasus," and Decree of the RF President No.1833 of Nov. 2, 1993 "On the Fundamental Provisions of the Military Doctrine of the Russian Federation", [1995].

For more insightful discussion on constitutional issues around Russia's 1994-1996 military campaign in Chechnya, see R. Sharlet, "Transitional Constitutionalism: Politics and Law in the Second Russian Republic" (1996) *Wis. Int'l L.J.* Summer 495.

For an international perspective on Russia's military assault in Chechnya, see E/CN.4/RES/2000/58, *Resolution on the Situation in the Republic of Chechnya of the Russian Federation*, 56th Session; UN Commission on Human Rights April 25, 2000 <http://www.unhcr.ch/huridocda/huridocda.nsf/>; *Resolution on the Situation in the Republic of Chechnya of the Russian Federation*, 57th Session; UN Commission on Human Rights April 20, 2001 [http://www.unhcr.ch/huridocda/huridocda.nsf/\(Symbol\)/E.CN.4.RES.2001.24.En/](http://www.unhcr.ch/huridocda/huridocda.nsf/(Symbol)/E.CN.4.RES.2001.24.En/); "Russian Federation: Violations of human rights and international humanitarian law in the Chechen Republic. Amnesty International's Recommendations to the 56th Session of the UN Commission on Human Rights," online: Amnesty International <<http://www.web.amnesty.org/web/news.nsf/print/>> (date accessed: March 27, 2001). Due to Russia's unwillingness to follow the resolutions of the *UNCHR*, Russia's membership in the Council of Europe was suspended in 2000.

²²Opponents of a strong judiciary, and judicial activism in particular, usually rely on the principles of democratic government and separation of powers that, in their mind, should exclude judges from the lawmaking process. The other side of the debate claims that a judicial check on the legislature is important for the protection of minorities against majoritarian rule and may well be inspired by lawmakers' own unwillingness to resolve certain urgent issues. Both sides cite various cases in support of their position. An especially strong example is the case of the US Supreme Court ruling in *Brown v. Board of Education* 347 U.S. 483, 74 S.Ct. 686 (1954) that ended racial segregation in the USA. (The author of this

others (especially vulnerable groups) from unjust political actions, inevitably impedes the process of democratization and liberalization of Russia.

Yet, while the situation in Chechnya and the *Law on Freedom of Conscience* were at the forefront of the struggle for human rights in Russia, discriminatory practices against other groups received little media coverage and infinitesimal political and judicial attention. A further example highlighting the slow liberalization of Russia is the marginalized position of sexual minorities. Still largely considered to be a Western phenomenon, gays and lesbians experience a high degree of prejudice within society and discrimination in all spheres of life.²³ While the continuing process of democratization has had a beneficial impact on the status of *ethnic, national, and religious* minorities, there has been little or no change with regard to *sexual* minorities.

The history of discrimination against homosexuals dates back to Tsarist times, when sexual intercourse between two men was deemed a criminal offence.²⁴ Although homosexuality was decriminalized after the Bolshevik revolution, it was officially labelled as a disease.²⁵ Under Stalin, homosexuality was re-criminalized and severely dealt with by persecution, discrimination and silence.²⁶ The period from 1934-1987 was

paper does not, however aim to engage in the discussion as to whether the judges' own dedication or public pressure on the Court brought *Brown* to life).

²³According to then-popular position of Soviet authorities and propaganda, such horrors of capitalist society as homosexuality, prostitution, drug use and, as a result, AIDS were only present in Western world since market-based, rather than human-based society allowed personal choice and freedom go beyond the limits of normal and moral. However, the success of the USSR government in creating homogenous Soviet society has never become true. See I.S. Kon, *The Sexual Revolution in Russia: From the Age of the Czars to Today* Translated by J. Riordan. (New York: The Free Press, 1995) [hereinafter, Kon]; I.S. Kon and J. Riordan, eds., *Sex and Russian Society*, (London: Pluto Press, 1993).

²⁴*Ibid.*

²⁵Kon, *bid.*

²⁶*Ibid.*

nightmarish for sexual minorities in the Soviet Union, as they faced criminal punishment, obligatory psychiatric treatment, mounting prejudice, and other types of discrimination.²⁷ Soviet propaganda portrayed homosexuality as a disease that had spread all over the Western world, but would not be allowed to take root in Soviet soil. Under Article 121.1 of the 1964 *Criminal Code*, imprisonment for up to five years or confinement in psychiatric institutions was guaranteed for those who disobeyed.²⁸

The year 1987 marked the beginning of the process of open public discussions on homosexuality from a scientific and humanitarian point of view by professionals and journalists.²⁹ In 1990, gay men and lesbians themselves took up the cause, putting human rights at the forefront. Yet, only in 1993 was “Article 121.1 repealed as a part of a wide-ranging reform law, brought about by strong pressure from the West” and a desire for Russia to join the Council of Europe.³⁰ Following the decriminalization of sodomy, the homosexual underground in Russia began to develop into a gay and lesbian sub-culture, with its own organizations, publications, and centres that began an open fight against continuing social discrimination and defamation. The new 1997 *Criminal Code* was no longer discriminatory – sodomy was not criminalized, the legal age of consent was set at 14 for any sexual conduct; it established identical punishments for homosexual

²⁷*Ibid.*

²⁸*Ugolovnyi Kodeks RSFSR (Criminal Code of the RSFSR), 1964.*

²⁹Kon, *supra* note 23.

³⁰*Ibid.* Before the fall of the Soviet Union, homosexual sodomy between adults in private was criminalized in all CEE countries. While the majority of countries decriminalized homosexual sodomy in early 1990s, Romania, Armenia, and Azerbaijan were the last of the former eastern block countries to amend their Soviet-type criminal statutes in 1996 and 2000 accordingly. The overall status of sexual minorities in these countries has, however, not significantly improved. See Human Rights Watch/Africa and I.G.a.L.H.R. Commission, *Public Scandals: Sexual Orientation and Criminal Law in Romania: a Report*. (New York ; London: Human Rights Watch, 1998).

and heterosexual rape; and the victims of other criminal sexual actions were referred to as “*he or she.*”³¹

The 1997 *Criminal Code* is, however, the only document that contains gender-neutral language and concern for sexual minorities in Russia. Lack of anti-discrimination legislation made it possible for the courts to refuse to officially register gay groups, for police to raid and close gay bars, and for parents to commit their gay children to psychiatric institutions.³² There are no laws relating to the needs and rights of homosexual and transgender individuals in employment, the military, immigration, domestic partnerships, inheritance, social welfare, parenting, adoption, or other important matters. Such concerns do not appear to be on the agenda for politicians, while the courts, as described above, lack the authority and willingness to intervene.

To cite Leonid Kuchma, the President of Russia’s southern neighbour, Ukraine, addressing the issue of continuing discrimination against homosexuals, “there are other, much more important and serious matters Ukraine has to deal with at the moment. [...] We might come back to the question of homosexuality in 500 years.”³³ It is understandable that CEE governments are preoccupied with “much more serious” issues of state-building (such as political power-struggles, economic crises, international relations, and more increasingly, terrorism and separatism), but a sanctioning a 500-year

³¹FZ No. 63 (last amended FZ No. 158, July 7, 1999), *Criminal Code of the Russian Federation*, June 13, 1996 avail. in Russia at <http://www.consultantplus.ru/dbs/prof.phtml>, arts. 132-4.

³²See “World Legal Survey: Russia,” online: The International Lesbian and Gay Association <http://www.ilga.org/information/legal_survey/europe/russia.htm> (date accessed: April 15, 2001).. The site contains references to other primarily electronic sources, such as *Russian Queer World*, *Gay.ru*, *Le Seminaire Gai*, and *Lesbian Motherhood in Europe*.

³³“Ukraine will come back to the question of homosexuality in 500 years,” online: *Gay.ru* <<http://www.gay.ru/archives>> (date accessed: Sept. 10, 2000).

delay in dealing with the issues pertaining to the equality, freedom, welfare, development and in some cases survival of a certain group of the population is incredibly unfair and undermines democratic principles and values.

The hope of gay rights activists in these countries is that the East will once again follow the example of the West, where the legal status of homosexuals has made steady progress from a total ban on homosexual conduct some fifty years ago to the current trend to offering legal recognition to same-sex relationships on municipal, regional and national levels. Therefore, during the third *All-Russian Gay and Lesbian Conference* in Moscow in 1996, activists sent an open letter to the State Duma, the lower House of Parliament, demanding the legalization of same-sex unions.³⁴ The answer, received a month later, indicated that the Duma's Family Committee made a request "to receive copies of domestic partnership laws from other nations."³⁵

However, transposing Western experience in dealing with homosexuality to CEE countries is burdened by substantive differences in the legal treatment of sexual minorities in different jurisdictions. On the one hand, all democracies of the West, except for the United States, recognized that the state does not have the right to enter the bedrooms of its citizens and thus revoked their sodomy laws. On the other hand, however, there is no unified position on whether the state should in fact recognize and protect the rights of sexual minorities. Same-sex marriage, gay parenting, adoption by

³⁴"World Legal Survey: Russia," online: The International Lesbian and Gay Association (ILGA) <http://www.ilga.org/information/legal_survey/europe/russia.htm> (date accessed: April 15, 2001). Latvian and Ukrainian human rights activists made similar attempts. "Ukrainian Gays Fight for the Legalization of Same-Sex Marriages in Newly Independent States," online: ForUm <<http://gay.ru/news/rainbow/29-08-01.htm>> (date accessed: Aug. 30, 2001).

³⁵*Ibid.*

gay parents, and equal age of consent are now on the political agenda of the gay rights movement in countries where sodomy laws were successfully revoked. The states dealt with these issues in two different ways.

Some countries, such as Greece, Ireland, Italy, and Spain, have chosen a slower path, as their governments seem hesitant to step beyond the repeal of sodomy laws.³⁶ The status of sexual minorities in these countries remains at a relatively low level also because courts have been reluctant to use interpretive techniques other than relying on the original intent of the drafters who did not anticipate extending constitutional protections to homosexuals, historical evidence of centuries old anti-gay practices and policies, or slippery slope arguments. They also showed restraint and deference to the legislatures, which are deemed to be in a better position to evaluate measures necessary to protect the public morality, health, youth, and the rights of others.

On the other hand, the Scandinavian and Benelux countries have become pioneers in adopting pro-gay legislation.³⁷ Guided by the principles of tolerance, proportionality, equality and freedom, legislators and courts in these countries granted same-sex

³⁶Legal surveys on the legal status of sexual minorities in Greece, Ireland, Italy, Spain, and any other country are available at *The ILGA* website <http://www.ilga.org>. See e.g. "World Legal Survey: Italy," online: The ILGA <http://www.ilga.org/information/legal_survey/europe/italy.htm> (date accessed: April 19, 2001); "World Legal Survey: Greece," online: The ILGA <http://www.ilga.org/information/legal_survey/europe/greece.htm> (date accessed: April 19, 2001).

³⁷For a comprehensive analysis of the current situation in Norway, see "World Legal Survey: Norway," online: The ILGA <http://www.ilga.org/information/legal_survey/europe/norway.htm> (date accessed: April 19, 2001); in Finland, see "World Legal Survey: Finland," online: The ILGA <http://www.ilga.org/information/legal_survey/europe/finland.htm> (date accessed: April 19, 2001); in Sweden, "World Legal Survey: Sweden," online: The ILGA <http://www.ilga.org/information/legal_survey/europe/sweden.htm> (date accessed: April 19, 2001), in Belgium, see "World Legal Survey: Belgium," online: The ILGA <http://www.ilga.org/information/legal_survey/europe/belgium.htm> (date accessed: April 19, 2001); in Luxembourg, see "World Legal Survey: Luxembourg," online: The ILGA <http://www.ilga.org/information/legal_survey/europe/luxembourg.htm> (date accessed: April 19, 2001); in the Netherlands, see "World Legal Survey: Netherlands," online: The ILGA <http://www.ilga.org/information/legal_survey/europe/netherlands.htm> (date accessed: April 19, 2001).

partnerships official recognition and provided them with various rights necessary for protection and development of their unions.³⁸

Given the Russian history of intolerance towards minorities and sexual minorities in particular and the weakness of the judicial system, it is likely that Russia will adopt the more conservative first approach. There have already been supporting examples when top officials said that homosexuality “goes against the traditional moral values of most Russians.”³⁹ However, is it the first approach the best available option? Should the morality of the majority justify interference with the rights of minorities? And if so, are there reasonable limits to doing so?

This paper aims to find answers to these questions and identify which of the two approaches would be a better choice for Russia and other CEE countries. The discussion will provide a comprehensive evaluation of the arguments for and against further advancement of gay rights. The paper will focus on the decisions of legislative and judicial bodies of Western democracies and certain international organizations (the United Nations and the Council of Europe). Such discussion will contribute to the challenge of debunking existing views on the morality and law relationship, minority status, privacy rights, equality, and the role of society and democratic institutions in changing legal and moral norms.

³⁸*Ibid.*

³⁹“Nyet to Moscow Pride,” online: 365Gay.com <<http://www.365gay.com/newscontent/072401.htm>> (date accessed: Aug. 10, 2001). In July 2001, Moscow’s mayor refused to allow gay pride to be held in the Russian capital scheduled to take place in September. In a harshly worded rebuke the officials said in a statement, “the city government will not allow holding this march in Moscow ... because such demonstrations outrage the majority of the capital’s population, are in effect propaganda of dissipation and force upon society unacceptable norms of behaviour.” *Ibid.*

These arguments as put forward in legislative and judicial processes are wrapped in a larger context of legal theories that illustrate the background of the problem, but sometimes rely on similar arguments. Placing the debate on gay rights in a theoretical framework may be a beneficial exercise for the young Russian democracy. Discrimination against minorities and the weakness of judiciary have uncovered a deep-seated problem – the reforms (the ‘borrowing process’) were conducted without first establishing a solid theoretical base or background. Underlying the changes, however, was the most fundamental shift from the crumbled ideology of Marxism-Leninism to Western theories of individual liberty and equality.⁴⁰ The description of modern legal theories as they deal with such hot-button issue as the advancement of gay rights exposes the theories’ advantages and drawbacks.

Indeed, the debate around gay rights has brought to bear a very critical look at two popular legal theories, *natural law* and *liberalism*. The opinions of leading contemporary scholars, representing both schools of thought, will be used for the purposes of discussion. Part I will be dedicated to the most prominent natural lawyer of our time – John Finnis, whose position provides theoretical support to the first approach. In Part II, the discussion will focus on the works of his nemesis Ronald Dworkin, one of the most influential legal scholars of contemporary liberalism, who argues in favour of greater

⁴⁰In late 1990s, there was an increased interest to philosophies of Thomas Hobbes, John Locke, Jean-Jacques Rousseau, Charles-Louis Montesquieu, and others who put forward an argument in favour of free individual choice, developed civil society, liberal values, and/or market economy (all these topics were subject to Soviet censorship).

equality for sexual minorities and therefore praises “famously tolerant political communities.”⁴¹

The choice of these two authors was not coincidental. Both, Finnis and Dworkin explicitly wrote to address issues pertinent to the gay rights debate. In “*Law, Morality, and ‘Sexual Orientation,’*” Finnis aims to defend the natural law vision of homosexuality as wrong and immoral in the new legal and social setting following the decriminalization of sodomy.⁴² By providing, in his words, “reflective, critical, publicly intelligible and rational arguments” he hopes to ascertain the immoral character of homosexuality and hence, require the state to take all necessary actions to discourage homosexuality and resist any attempt to further advance gay rights. However, an examination of Finnis’ argument will show that despite his promises of objectivity and rationality, his theory would be unfavourable for implementation in CEE countries as it lacks logical connection, misstates reality, demonstrates little understanding of and respect for competing morals, and encourages harm against homosexual individuals.

The core argument of Dworkinian liberalism has always been equality, an underlying principle of any democratic society where individual morality is not linked to positive law.⁴³ In his later articles, however, Dworkin’s philosophy shifts toward accepting the ‘communitarian’ idea of the importance of community, but morality of a given democratic community for Dworkin remains a more abstract and general concept, limited

⁴¹R. Dworkin, “Liberal Community” (1989) 77 Calif. L. Rev. 479, at 487. [hereinafter “Liberal Community”].

⁴²J.M. Finnis, “Law, Morality, and “Sexual Orientation”” (1994) 69 Notre Dame L. Rev. 1049. [hereinafter “Law, Morality, and “Sexual Orientation””].

⁴³R. Dworkin, *Taking Rights Seriously*. (London: Duckworth, 1977); R. Dworkin, “The Model of Rules” (1967) 35 Univ. of Chi. L.Rev. 14.

to the principles of tolerance, equality and freedom.⁴⁴ This theory has more value for Russia than the natural law position because it shows that (abstract) constitutional principles of individual equality and freedom must also entail practical implementation. Dealing with the issue of the further advancement of gay rights, the generality of Dworkinian liberalism should be taken into consideration together with the evidence, facts and information revealed during the discussion of Finnis' theory.

Another reason for choosing Finnis' natural law and Dworkinian liberalism as the basis of discussion is the geographical application of their theories. In his analysis, Finnis relies on the legal regulation of sexual behaviour in Europe and particularly in the United Kingdom. Dworkin, on the other hand, considers primarily the results of the U.S. jurisprudence. The comparison between these two theories therefore provides a unique opportunity to study various legislative and judicial materials on gay rights in Europe and North America. By doing so, it will be possible to sift through various arguments made in favour of and against gay rights and judge them against the requirements of universality, objectivity, and proportionality. The conclusion will offer a brief summary of all these arguments and make a case for liberal tolerance.

⁴⁴R. Dworkin, *Sovereign Virtue: The Theory and Practice of Equality*. (London: Harvard University Press, 2000); R. Dworkin, Foundations of Liberal Equality in *Equal Freedom: Selected Tanner Lectures on Human Values*, S. Darwall, ed. 1995); R. Dworkin, "Freedom's Law: the Moral Reading of the Constitution" (1996).

CHAPTER ONE

THE ‘INHERENT IMMORALITY’ OF HOMOSEXUALITY:

NEW NATURAL LAW THEORY

1. TENETS AND CRITICISM OF NATURAL LAW THEORY

Over the past two decades, scholars, jurists and politicians have given renewed attention to “natural law theory.” Natural law theory asserts that positive, or man-made law should be formulated and evaluated according to a higher moral law (natural law) that is not made by humans, but is inherent in the nature of the universe. The major tenets of this theory stem from the teachings of Aristotle and the Stoics. The writings of St. Thomas Aquinas and canonical Christian morés have also had a significant impact on this theory. While it traces its origins to the works of Aristotle and Aquinas, natural law has been revised in the twentieth century by thinkers such as Jacques Maritain, Yves Simon, John Finnis, Germain Grisez and Robert P. George.

Despite various squabbles among adherents on interpretive points, most natural lawyers agree on the basics. The seminal notion of natural law theory is “its claim to an objective moral truth, discoverable by reason.”⁴⁵ According to natural lawyers, human nature is universal and distinguished by rationality (or reason). Naturally, all human beings employ rationality in pursuit of their self-evident purposes. At a very basic universal level, these self-evident purposes (goods) do not conflict with moral obligations. Therefore, morality is universal, objective, and discoverable by reason.

⁴⁵K. Greenawalt, “How Persuasive Is Natural Law Theory?” (2000) 75 Notre Dame L. Rev. 1647, at 1647.

However, because the concept of morality is so broad, natural lawyers view positive human laws as defining general moral principles and resolving “matters of indifference.” They argue that although written laws are not meant to endorse each and every individual moral precept, laws must be essentially grounded in morality. In the legislative process, lawmakers should simply defer to rationality, which should inevitably help them discover moral principles, say natural law theorists. As a result of historic debate, most modern natural lawyers agree to the “*dura lex non lex*” principle of Roman Law, which means that even unjust law should be obeyed in order to avoid “disruptive consequences.”

Furthermore, according to natural law theorists, law must be respected by ordinary judges who are limited in their ability to rely on their own morals – that is they should follow the original meaning (or intent) of a given law. Similarly, executive officers must comply with statutory language before applying their own moral judgment to particular circumstances. Natural lawyers believe that moral truth will inevitably govern the decisions of all – lawmaker, judge and executive officer.

The central argument of natural law theory – a necessary connection between morality and law – has increasingly become the subject of rigorous criticism.⁴⁶ Most critics of natural law theory argue that neither human nature nor morality is universal. Rather, various scholars maintain that apart from some very basic elements, both human nature and morality are largely dependent upon history and culture, which are far from being universal. Some of the most oft-cited examples of changes in moral values are objections

⁴⁶See *e.g.* H.L.A. Hart, “Positivism and the Separation of Law and Morals” (1958) 71 Harv. L.Rev. 593, 619. In his work, which has become one of the fundamental of legal positivism, Hart argues that there is “no necessary connection between law and morality.”

to slavery (which was long thought to be moral) and interracial marriages (which were categorically opposed by natural lawyers and prohibited by positive law).

Opponents of the claim to the universality and objectivity of morality have also shown that culture is another highly influential factor. There is plenty of evidence to demonstrate that different societies render opposite moral judgements in similar instances. Polygamy is one such example. While illegal in Western democracies, polygamous marriages are traditionally accepted and religiously encouraged in some countries in the Middle East and Southeast Asia. The significance of cultural (as well as religious) aspects in the formation of moral values is even better seen by comparing two distinct communities co-existing within the same country, province or region (*e.g.*, coterminous Mennonite and non-Mennonite communities in Southwestern Ontario).

It has also been established that the high level of generality used by theorists in determining moral principles can provide no concrete defence for natural law theory. Even if one agrees on such basic principles as the inherent value of human life (and hence the immorality of killing), critics have insisted that natural law does not offer any constructive argument in addressing “hot button” issues that divide society.

Besides criticism of a universality of morality (or because morality is not universal), critics maintain that the natural law claim that morality is discoverable by reason is inherently flawed. In many instances, “refined reason” may lead lawmakers and judges to make impartial and morally sound decisions. (Once again, one may cite the examples of slavery and miscegenation). However, blind reliance on morality in the justification of political and judicial decisions has been successfully challenged in recent years. As will

be discussed later in this paper, in many instances, judges look for a rational explanation of legislative choices and are no longer satisfied with a defence based solely on morality or history. Hence, all of the aforementioned points – differences between cultures, changes in moral values within a given society, and on occasion, the doubtful reasonableness of morality – have caused a significant decline in support for natural law theory.

2. THE REVIVAL OF NATURAL LAW THEORY: JOHN FINNIS

Modern views on homosexuality are but another ‘chink in the mortar,’ which holds together the ‘foundation’ upon which natural law philosophy is built. For centuries, homosexual acts had been regarded as ‘unnatural’ and thus condemned for both religious and moral reasons. Consequently, criminal prosecution of homosexual acts served as a notable example of the connection between morality and law. Interestingly, in some countries, only male homosexuality was the subject of criminal law (Ireland and Germany).⁴⁷ For instance, in the first European anti-sodomy case, the German Federal Constitutional Court upheld such a distinction because “biological differences justify different treatment of sexes.”⁴⁸ This ‘biological’ argument, supporting earlier natural law theories, seems odd five decades later as more information about the nature and behaviours of homosexuals becomes available from various sociological and anthropological studies. Although this unique ‘socio-biological’ argument for upholding sodomy laws, attempted to

⁴⁷*The Offences against the Person Act*, 1861, (Ireland); *The Criminal Law Amendment Act*, 1885, (Ireland) – the same laws applied in Northern Ireland.

⁴⁸*Homosexuality Case*, [1957] (6 BVerfGE 289). Judges relied on feeble sources to find that male attitudes to sex and relationship are ‘biologically’ different from female attitudes. They cited higher visibility, higher frequency, less commitment and shorter duration of male relationships as compared to female ones.

factually justify different treatment of sexes in the realm of penal law, it proved to be a weak solution, and the law was repealed in 1994.

The process of the revocation of sodomy statutes that prevailed in Western Europe in the second half of the twentieth century symbolized another setback for natural law theory. The attempted revival of a centuries-old tradition is therefore due to modern partisans of the natural law school of thought who presented comprehensive theories of political morality and human well being that aim to address “hot button” issues, such as the legal treatment of homosexuality. Since the 1980 publication of *Natural Law and Natural Rights*, author John Finnis, professor of law at Oxford University, has been recognized as the leading proponent of natural law theory within contemporary Anglo-American legal circles.⁴⁹ His 1986 article “*Law, Morality, and ‘Sexual Orientation,’*” represents a milestone endeavour on the topic, as the author uses the “standard modern European form of legal regulation of sexual conduct” to prove that the connection between morality and law remains strong, despite marked progress in the area of gay rights.⁵⁰ In his article, Finnis also responds to criticism and attempts to show that morality is in fact universal, objective and discoverable by reason.

3. THE STANDARD MODERN EUROPEAN POSITION OF REGULATION OF SEXUAL CONDUCT

While moral disapproval of homosexual conduct is largely a cross-cultural phenomenon, Finnis is particularly concerned with the latest developments in the area of gay rights in *European* countries. In his very first paragraph, he announces that the article deals only

⁴⁹J.M. Finnis, *Natural Law and Natural Rights*. (New York: Oxford University Press, 1980).

⁵⁰Law, Morality, and "Sexual Orientation," *supra* note 42.

with the position accepted by the *European Court of Human Rights (ECHR)* and the *European Commission of Human Rights*.⁵¹ This “standard modern [European] position,” as described by Finnis, has two facets. On the one hand, recent decisions of the *European Court of Human Rights* in *Dudgeon* and then in *Norris* and *Modinos* clearly prohibit “mak[ing] it a punishable offence for consenting adult persons to engage, in private, in immoral sexual acts.”⁵² Yet, on the other hand, Finnis argues that in these cases, the Court recognizes the authority of states “to discourage ... homosexual conduct and ‘orientation.’”⁵³

a) *Dudgeon v. U.K.*

In the first case, examining the claim of Mr. Dudgeon, a homosexual male being charged under the 1861 and 1885 Northern Ireland criminal laws punishing consensual sodomy between males,⁵⁴ the *ECHR* first recognized that the maintaining the legislation constituted “a continuing interference with Mr. Dudgeon’s rights to respect for private life, which include[d] private sexual life, within the meaning of Article 8.1.”⁵⁵ The UK government asserted (in support of the law) that it was necessary for the protection of the morals and rights and freedoms of others (the two permitted justifications for restricting

⁵¹Finnis claims that his conclusions are essentially based on the decisions of the *European Court of Human Rights (ECHR)* in *Dudgeon v. UK* (1981), 45 Eur. Ct. H.R. 21 (Ser. A), 4 E.H.R.R. 149 [hereinafter *Dudgeon*]; *Norris v. Ireland* (1989), 142 Eur. Ct. H.R. 20 (Ser. A), 13 E.H.R.R. 186 [hereinafter *Norris*]; *Modinos v. Cyprus* (1993), 16 E.H.R.R. 485 [hereinafter *Modinos*].

⁵²*Ibid.*

⁵³“Law, Morality, and “Sexual Orientation,”” *supra* note 4 at 1049.

⁵⁴*Dudgeon*, *supra* note 51. Northern Ireland criminal laws, *see supra* note 47.

⁵⁵*Dudgeon*, *ibid.*

the right to a private life).⁵⁶ It is important to note, however, that Northern Ireland was the only part of the United Kingdom where sodomy laws remained unchanged. In England, Scotland and Wales, such laws were repealed following the publication of the Wolfenden Report, an extraordinary mid-1950s investigation into the biological, social and psychological causes and aspects of homosexuality that argued in favour of decriminalization of homosexual sodomy.⁵⁷

Judges examined “to what extent, if at all, the maintenance in force of this legislation necessary in a democratic society.” By relying on previous cases,⁵⁸ the *ECHR* proceeded to explain that “since the notion of ‘necessity’ is linked to that of a ‘democratic society,’ the restriction would only be ‘necessary in a democratic society,’ two hallmarks of which are tolerance and broadmindedness,” only if it was “proportionate to the legitimate aim pursued.”⁵⁹ This requirement of proportionality is only another version of the ‘proportionality test,’ embraced in many jurisdictions as an integral part of the constitution, which states that restrictions on rights must be (a) the least intrusive and that (b) purposes correlated to effects.⁶⁰

⁵⁶*EHRC*, *supra* note 9, art. 8.2.

⁵⁷“The Wolfenden Report,” 48, Committee on Homosexual Offences and Prostitution, London: Stein & Day. 1963 .

⁵⁸*Marckx v. Belgium* (1979), 2 E.H.R.R. 330; *Airey v. Ireland* (1979), 2 E.H.R.R. 305: “The very existence of this legislation continuously and directly affects his private life.”

⁵⁹*Dudgeon*, *supra* note 51, para. 53, citing *Handyside v. U.K.* (1976), 1 E.H.R.R. 737 and *Young, James & Webster v. U.K.* (1981), 4 E.H.R.R. 38.

⁶⁰The ‘proportionality test’ originated in Germany (see *Pharmacy Case* (1958) 7 BVerfGE 377, and the commentary by *Kommers*, *supra* note 7, pp. 274-9). The test was later adopted in other jurisdictions. (E.g. the Supreme Court of Canada in *R v. Oakes*, [1986] 1 S.C.R. 103 and *Irwin Toy*, [1989] 1 S.C.R. 927 found the proportionality requirement on the basis of the “free and democratic society” clause of Art. 1 of *The Constitution Act, 1982. Canadian Charter of Rights and Freedoms*, Apr. 17, 1982 [hereinafter *Can. Const.*]; the Supreme Court of Israel in *Mizrahi* (or „Gal Law” Amendment) *Case* referred to Sec. 1(a) of *Basic Law of Israel: Human Dignity and Liberty*, 1992: “The purpose of the Basic Law is to protect human

Having evaluated available evidence from other democratic countries where sodomy laws were repealed, judges of the *ECHR* announced that “there [was] a better understanding, and consequently an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States.”⁶¹

The *ECHR* then recognized the fact that the authorities refrained in recent years from enforcing the law, and that “no evidence has been adduced to show that this has been injurious to moral standards in Northern Ireland or that there was any public demand for stricter enforcement of the law.”⁶² The combination of this evidence and the experience of other countries where sodomy laws were revoked proved that the interests of the state in the maintenance of such laws were in fact not very significant.

For these reasons, the *ECHR* concluded in *Dudgeon* and reaffirmed in *Norris* and *Modinos* that “such justifications as there are for retaining the law in force unamended are *outweighed* by the detrimental effects, which the very existence of the legislative

dignity and liberty, in order to anchor in a Basic Law tile values of the State of Israel as a Jewish and democratic state.”

Still a unique example is art. 36 of the South African Constitution that explicitly requires the limitation of the right to be “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including: (a) the nature of the right; (b) the importance of the limitation; (c) the nature and extent of the limitation; (d) the relations between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.” *Constitution of the Republic of South Africa*, May 8, 1996, art. 36.1 [hereinafter *S.A. Const.*]

⁶¹*Dudgeon*, *supra* note 51, para. 60.

⁶²*Ibid.*

provisions in question can have on the life of a person of homosexual orientation like the applicant.”⁶³ The Court in essence found that the law did not satisfy the *purposes/effects* requirement of the proportionality test because “the restriction imposed on Mr. Dudgeon under Northern Ireland law, by reason of its breadth and absolute character, [was] disproportionate to the aims sought to be achieved.”⁶⁴ It took, however, two more years before the law was repealed.⁶⁵

The significance of *Dudgeon* and its progeny should not be underestimated. As noted earlier, prior to their acceptance into the Council of Europe, Central and Eastern European countries had to bring their legislation into line with the *European Human Rights Convention*, several protocols and the *ECHR* case law. As a result, all CEE countries introduced the necessary changes to their criminal laws and by 2001 sodomy laws existed nowhere in Europe.

b) Toonen v. Tasmania

In a very similar case, the *United Nations Human Rights Committee (UNHRC)* found the *Tasmanian Criminal Code*, punishing “indecent practices between male persons” in violation of privacy rights under Article 17.1 of the International Covenant on Civil and

⁶³*Ibid.* See also *Norris*, and *Modinos supra* note 51.

⁶⁴*Ibid.*

⁶⁵See *Effects of Judgments or Cases 1959 – 1998*, <http://www.echr.coe.int/eng/effects.html>, vis. 17.09.2000: “The Homosexual Offences (Northern Ireland) Order 1982, which entered into force on 9 December 1982, decriminalized homosexual acts conducted in private between consenting males aged 21 or over, subject to certain exceptions concerning mental patients, members of the armed forces and merchant seamen (Resolution DH (83) 13, 27.10.1983).”

Political Rights (ICCPR).⁶⁶ It was noted that in all other Australian states, “laws criminalizing homosexuality have been repealed,” and even in Tasmania, the law has not been enforced, which nonetheless did “not amount to a guarantee that no action [would] be brought against homosexuals in the future.”⁶⁷ The Commission therefore held that “the provisions [did] not meet the ‘reasonableness’ test” requirements as their continued existence “arbitrarily interfere[d] with Mr. Toonen’s right under Article 17.1.”⁶⁸ In other words, as in the European sodomy cases, the Tasmanian Criminal Code provisions failed to satisfy the proportionality test.

However, in *Toonen*, the *UNCHR* found that sodomy laws failed not only the *purposes/effects* part of the ‘reasonableness test,’ but also the first prong of the test, requiring that means were effective and least restrictive to the right. In response to the Tasmanian authorities’ assertion that sodomy laws were necessary for the prevention of HIV/AIDS, the *UNHRC* stated that “the criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to prevent the spread of HIV/AIDS” because (a) the sodomy law, “by driving underground many of the people at risk of infection,” is counterproductive “to the implementation of effective education programmes [...] [for] [...] HIV/AIDS prevention,” and (b) “no link has been shown

⁶⁶*Toonen v. Australia*, [1992] Communication No 488/1992: Australia 04/04/94 CCPR/C/50D/488/1992 (United Nations Human Rights Committee). [hereinafter *Toonen*], *International Covenant on Civil and Political Rights*, 999 U.N.T.S. 171, Mar. 23, 1976 [hereinafter *ICCPR*]; For more information, see M. Morris, *The Pink Triangle: the Gay Law Reform Debate in Tasmania*. (Sydney, Australia: UNSW Press, 1995).

⁶⁷*Toonen*, *ibid.* para. 8.2, 8.6.

⁶⁸*Ibid.* para. 8.6.

between the continued criminalization of homosexual activity and the effective control of the spread of the HIV/AIDS.”⁶⁹

The fact that the highest international body rendered the decision in this case makes some authors believe that *Toonen* carries significant weight when arguing for the repeal of sodomy laws in other parts of the world.⁷⁰

c) Finnis' Account of the Standard Modern European Position

Finnis acknowledges the change in legal attitudes toward homosexuality, but provides his own account of the causes and consequences of such change. At the outset, he recognizes that “modern theory and practice draw a distinction not drawn in the former legal arrangements.”⁷¹ Reflecting on the general consensus in Western jurisprudence, he further argues that states can no longer assume “a directly parental disciplinary role in relation to consenting adults” acting in private, but they are entitled to supervise “the moral-cultural-educational environment.”⁷² Through supervision of the public realm, Finnis maintains, the state assumes an important role in assisting young people (directly and through their teachers) to avoid “bad forms of life” and encouraging all citizens to be “autonomous, self-controlled persons rather than slaves to impulse and sensual gratification.”⁷³ He then concludes that by virtue of its immoral character, homosexuality

⁶⁹*Ibid.* para. 8.5.

⁷⁰See, e.g. R. Wintemute, *Sexual Orientation and Human Rights*. (Oxford: Clarendon Press, 1995).

⁷¹Law, Morality, and "Sexual Orientation," *supra* note 42 at 1053.

⁷²*Ibid.*

⁷³*Ibid.*

must be discouraged by state action and any further expansion of gay rights must be opposed.

Finnis believes that there is enough evidence that lawmakers and judges do not aim to go further than decriminalizing homosexual sodomy. This he describes as the second facet of the standard modern European position. He first refers to the second part of the *Dudgeon* and *Norris* decisions, where the judges held that the regulation of the age of consent in the UK (which was higher for homosexual than for heterosexual conduct) was within “the margin of appreciation” of local authorities.⁷⁴ The Court announced that the measures aimed at protecting youth fell “in the first instance to the national authorities to decide on the appropriate safeguards of this kind ... in particular, to fix the age under which young people should have the protection of the criminal law.”⁷⁵ The majority judges thus chose the path of deference and restraint and refused to examine this matter even on the basis of Article 14 (non-discrimination) as they felt it was the same as the Article 8 right to private life claim.

The dissenting judges noted that the failure of the Court to recognize “a clear inequality of treatment in the enjoyment of the right” guaranteed by Article 14 “deprived this fundamental provision in great part of its substance and function in the system of substantive rules established under the Convention.”⁷⁶ The majority also failed to analyze the experiences of other European countries, where the age of consent was not

⁷⁴*Dudgeon, Norris, supra* note 51.

⁷⁵*Dudgeon, ibid.* para. 62.

⁷⁶*Ibid.* dissenting opinion of judges Evrigenis and Garcia de Enterría citing *Airey v. Ireland* (1979), 2 E.H.R.R. 305.

only equal for different sexual acts, but was also set lower than in the UK (incl. N. Ireland) or Ireland.⁷⁷

In the final analysis, *Dudgeon*, *Norris* and *Modinos* provide support for Finnis' theory as these cases recognized that in principle it was permissible for the majority to enforce its moral code in the law, even though they resulted in the invalidation of sodomy laws. In light of these developments, Finnis' attention switches to legislative actions discouraging homosexuality that would serve as additional support for his argument. He refers to the fact that the UK Parliament "has voted more than once to maintain the legal position whereby the age of consent for lawful intercourse is twenty-one for homosexuals but sixteen for heterosexual intercourse."⁷⁸ Yet, he only quickly mentions that in 1994 the age of consent for homosexuals was reduced to eighteen. Most importantly, however, as of January 8, 2001, the *Sexual Offences (Amendment) Bill* came into force to harmonize the age of consent laws for homosexual and heterosexual conduct at sixteen in England, Scotland and Wales.⁷⁹ There is also continued lobbying of Parliament to lower the age of consent for any sexual conduct to fourteen.⁸⁰

⁷⁷Malta, Netherlands, Portugal, Spain – 12; Germany, Italy, Iceland, San Marino, Slovenia – 14, Czech Rep., Denmark, France, Greece, Poland, Slovakia, Sweden – 15, etc. Nowhere in Europe is the age of consent above 18 years. See Robert Wintemute, *Sexual Orientation and Human Rights* (Oxford: Clarendon Press, 1995), Appendix IV, at 270-1.

⁷⁸Law, Morality, and "Sexual Orientation," *supra* note 42 at 1050.

⁷⁹According to *Stonewall*, the leading organization fighting for lesbian and gay equality in UK, "[t]he age of consent is now equal for all. In England, Wales, and Scotland it is set at sixteen. In Northern Ireland it is seventeen. This change was brought about following the use of the *Parliament Act* in November 2000 following *Stonewall's* most successful campaign to date." See online: Stonewall <<http://www.stonewall.org.uk>> (date accessed: May 15, 2001).

⁸⁰The Law lords, Britain's equivalent of the Supreme Court, have recently urged Parliament to reform the laws of consent as they had "long since ceased to reflect ordinary life." See "UK May Lower Age to 14," online: 365Gay.com Newscenter in London <<http://www.365gay.com/newscontent/072601age.htm>> (date accessed: July 25, 2001).

There have in fact been numerous victories in the continuing struggle for the recognition of gay families with London to become the first city in the United Kingdom to embrace a domestic partnership registry.⁸¹ Liverpool is also expected “to be ahead of the game and to recognize that society is changing.”⁸² Although homosexual couples will not get more rights than they already have under, inheritance and other legislation, official recognition of same-sex partnerships represents an important moral and ideological step toward the “better understanding and increased tolerance” of sexual minorities in the United Kingdom. Such steps taken by legislatures in recent years appear to undercut Finnis’ position.

d) Sexual Orientation as a Non-Discriminatory Ground, or Is Omission a Rejection?

Finnis also makes a claim that the standard modern European position “deliberately rejects” including sexual orientation on the list of discriminatory grounds because it is not mentioned among the non-discriminatory grounds of Article 14 of the *European Convention*. His contention, which places him on the “exclusionary side” in the debate about the meaning of an omission/non-inclusion in law, is that states can and should discriminate against people on the basis of sexual orientation in order to discourage “unnatural” forms thereof. However, his interpretation of the provision of article 14 seems rather narrow, as the list of non-discriminatory grounds is open-ended. There is no explicit indication that the words “other status” shall not be understood as to include sexual orientation. Alternatively, the reference to ‘sex’ might be also viewed as being

⁸¹“Gay Couple Registers Partnership in London,” online: Gay.com
<<http://gay.com/news/article.html?2001/09/04/2>> (date accessed: Sept. 4, 2001).

⁸²*Ibid.*

inclusive of sexual orientation. For instance, the *UNCHR* gave such an interpretation of Article 26 of the *ICCPR* in *Toonen*.⁸³ In other cases, a similar claim was raised that the discrimination was on the basis of the gender of the partner rather than sexual orientation *per se* (gay marriage or employment benefits cases).⁸⁴

Finnis certainly opposes the idea of adopting laws prohibiting discrimination on grounds of sexual orientation because such laws, he claims, “would work significant discrimination and injustice against (and would indeed damage) families, associations and institutions, which have organized themselves to live out and transmit ideals of family life that place a high value on the worth of truly conjugal sexual intercourse.”⁸⁵

However, not only is his argument contradictory to the results of various studies, it is also diminished by recent legal developments in countries as diverse as Brazil, Canada, Germany, South Africa and the USA, where laws explicitly prohibiting discrimination on the basis of sexual orientation have been adopted on a national or state/provincial level.⁸⁶ Most recently, for the first time in the history of a top-level international organization, the *UN Committee on Economic, Social and Cultural Rights* General Comment 14 (July 4, 2000), explicitly names discrimination based on sexual orientation among non-discrimination grounds.⁸⁷

⁸³*Toonen*, *supra* note 66 para. 8.7.

⁸⁴*El-Al Israel v. Danilowitz*, [1994] (Supreme Court of Israel)..

⁸⁵Law, Morality, and "Sexual Orientation," *supra* note 42 at 1054.

⁸⁶See Wintemute, *supra* note 70. In Canada, as of today, all provinces (except Alberta, PEI, and NWT) have made it illegal to discriminate against gays in housing, public accommodation and employment. "GLBT Celebrates Canada Day," online: Gay.com <<http://www.gay.com/news/article.html?2001/07/02/4>> (date accessed: July 3, 2001).

⁸⁷*The Right to the Highest Attainable Standard of Health: General comment 14*, E/C.12/2000/4 2000, UN Economic and Social Council, Committee on Economic, Social and Cultural Rights, 22nd Session (avail. at

4. FINNIS' "REFLECTIVE, CRITICAL, PUBLICLY INTELLIGIBLE AND RATIONAL ARGUMENTS" OF THE IMMORALITY OF HOMOSEXUALITY

Although diminished, Finnis' argument is not destroyed by the mere fact that there have been certain laws adopted that run counter to his position. While the core goal of his article is to prevent this from happening, Finnis could claim that lawmakers were mistaken because there are 'reasonable' grounds to render homosexuality immoral and hence discourage it in law. The negative stance on homosexuality, he explains, is not "a manifestation either of mere hostility to a hated minority, or of a purely religious, theological, and sectarian belief, which can ground no constitutionally valid determination disadvantaging those who do not conform to it."⁸⁸ Finnis promises to provide "reflective, critical, publicly intelligible and rational arguments" that will defend this moral judgment and will therefore illustrate why laws and regulations should be consistent with moral judgements and why any further expansion of gay rights should be discouraged.⁸⁹ Yet, the most recent 'pro-gay' developments in jurisprudence around the Globe should indicate that there might be something wrong with his argument if it were not ignored.

[http://www.unhchr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4,+CESCR+General+comment+14.En?OpenDocument](http://www.unhchr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4,+CESCR+General+comment+14.En?OpenDocument)), para 18. Also, the *UNAIDS*, the United Nations body that works for the prevention of HIV/AIDS and to help those already infected, appealed that "states should enact and strengthen anti-discrimination and other protective laws that protect vulnerable groups." What is important is that for the first time in the history of an international organization of that level, the term sexual minorities (specifically gay men) were deemed to be granted protection against discrimination. *HIV/AIDS and Human Rights Guidelines*, 1999, UNAIDS <http://unaids.org/publications/documents/human/index.html>, Guidelines 5 and commentary 2(h), at 20-22 [hereinafter *UNAIDS Guidelines*]

⁸⁸Law, Morality, and "Sexual Orientation," *supra* note 42 at 1055.

⁸⁹*Ibid.* at 1055.

Finnis' venture is, however, different from an infamous argument made by Lord Devlin in early 1960s. Deeply troubled by the recommendations of the Wolfenden Committee in favour of decriminalization of sodomy in the UK, Lord Devlin argued that the mere fact that a majority of people considered homosexuality immoral was sufficient reason to justify its criminalization as well as to justify mistreatment of persons engaging in it.⁹⁰ Whether in fact homosexual conduct was immoral was of no import to Devlin. In his view, moral principles act as "invisible bonds" for society and their loosening would represent "the first stage of [societal] disintegration." Society is therefore "justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions."⁹¹ Other natural lawyers, while agreeing with Lord Devlin that the state often has a legitimate role in the enforcement of morality, argued that such enforcement is only permissible when it is "true morality, not whatever morality happens to be dominant in a given society."⁹²

Finnis is determined to prove that moral disapproval of homosexuality has a reasonable basis. In an effort to prove the 'objectivity' of his claim, he begins his analysis with the examination of ancient Greek philosophical thought. In reference to the case of *Romer v. Evans* (see Chapter II), he expresses the opinion, though disputed in scholarly circles, that Plato, Socrates, Xenophon, Aristotle, and other ancient philosophers viewed

⁹⁰"The Wolfenden Report," *supra* note 57; P. Devlin, *The Enforcement of Morals*. (London: Oxford University Press, 1959).

⁹¹*Devlin, ibid.* at 13.

⁹²See R. George, *Making Men Moral: Civil Liberties and Public Morality*. (New York: Oxford University Press, 1993), at 60. In this book, R. George defends the use of the law to enforce morality, within limitations prescribed by notions of prudence and pluralism.

homosexual acts as “manifestly unworthy of the human being and immoral.”⁹³ Finnis thus contends that the ban on homosexuality has a long history starting “before the period when Christian beliefs as such were politically and socially dominant.”⁹⁴

Finnis then proposes his own moral theory about sexuality: that inherent good is only associated with sexual acts which are reproductive in nature. According to Finnis, the good of marriage lies in the biological and personal aspects of it (“parenthood and friendship”), the combination of which is only possible through “the union of the *reproductive* organs of husband and wife.”⁹⁵ In his explanation, “genital intercourse between spouses enables them to actualize and experience [...] their marriage itself, as a single reality with two blessings (children and mutual affection).”⁹⁶

Sterile marriages, although “naturally incapable of reproduction,” also merit moral approval because they experience “the two-in-one flesh common good and reality of marriage.” According to Finnis, “intercourse between spouses in a marital way” (that is,

⁹³*Ibid.* at 1056-1065. Interestingly, Finnis’s attention to Greek philosophers is not only due to their contribution to the natural law tradition. Rather, Finnis uses his article as an opportunity to re-argue the battle that he had lost to Martha C. Nussbaum in *Romer v. Evans*, 64 L.W. 4353, 116 S. Ct. 1620 (1996), [hereinafter *Romer*]. See also J.M. Finnis, “Shameless Acts” in Colorado: Abuse of Scholarship in Constitutional Cases” (1994) 10 Acad. Questions 19-41 (cited in “Law, Morality, and “Sexual Orientation,”” *supra* note 4, at 1056).

In her testimony against the Colorado Amendment 2 and in her later works, Professor Nussbaum challenged the view that Greek philosophers condemned homosexual copulations. See e.g. M.C. Nussbaum, “Platonic Love and Colorado Laws: The Relevance of Ancient Greek Norms to Modern Sexual Controversies” (1994) 80 Va. L. Rev. 1515; D.M. Estlund and M.C. Nussbaum, eds., *Sex, Preference, and Family: Essays on Law and Nature*, (New York: Oxford University Press, 1997); S.M. Olyan and M.C. Nussbaum, *Sexual Orientation & Human Rights in American Religious Discourse*. (New York: Oxford University Press, 1998); S.A. Garrick, “Sex, Preference, and Family: Essays on Law and Nature D.M. Estlund and M.C. Nussbaum” (2000) 21 Women’s Rts L. Rep. 249.

⁹⁴Law, Morality, and “Sexual Orientation,” *supra* note 42 at 1063.

⁹⁵*Ibid.* at 1066 [emphasis added].

⁹⁶*Ibid.* at 1064.

penile-vaginal, non-contracepted sex) creates a “communion, companionship, societas and amicitia of the spouses.”⁹⁷

On the contrary, Finnis claims that the union of reproductive organs of “friends” (the term he uses to describe the relationship between “man and man, man and boy, woman and woman”) is unnatural as it precludes the possibility of reproduction. Finnis thus concludes that, exploited in unnatural way, “the reproductive organs of friends cannot make them a biological (and therefore personal) unit.”⁹⁸ Without a personal unit, homosexual acts, continues Finnis, “can do no more than provide each partner with individual gratification.” He thus rejects any significance of feelings that two same-sex individuals may experience toward each other and calls their “attempt to express affection by orgasmic non-marital sex [to be] the pursuit of an illusion.”⁹⁹ In Finnis’ reality, “there is no important distinction in essential moral worthlessness between solitary masturbation, being sodomized as a prostitute, and being sodomized for the pleasure of it,” or having contracepted sex.¹⁰⁰

Finnis’ fear is that such ‘unnatural coupling’ and ‘gay ideology’ as a political force represent a threat to the norms and values of the community and to the “self-understanding” of its individual members.¹⁰¹ Homosexual orientation, he claims (without providing any evidence), “is, in fact, a standing denial of the intrinsic aptness of sexual intercourse to actualize and in that sense, give expression to the exclusiveness and open-

⁹⁷*Ibid.*

⁹⁸*Ibid.*

⁹⁹*Ibid.* at 1065.

¹⁰⁰*Ibid.* at 1067.

¹⁰¹*Ibid.* at 1069.

ended commitment of marriage as something good in itself.”¹⁰² Acceptance of homosexuality, he continues, represents “an active threat to the stability of existing and future marriages.”

In his conclusion, Finnis asserts that because homosexual conduct is immoral and threatening to the public welfare, the state is obliged to discourage such conduct and prevent any further expansion of gay rights in such forms as “advertising or making homosexual services, the maintenance of resorts for homosexual activity, or the promotion of homosexual ‘lifestyles’ via education and public media of communication, to recognize homosexual ‘marriages,’ or permit the adoption of children by homosexually active people.”¹⁰³ However, seven years after the publication of “Law, Morality, and ‘Sexual Orientation,’” the majority of items on his *stop-gay-rights-expansion* list have become the norm in Western Europe and other parts of the world.

One of the most significant setbacks that Finnis’ theory has suffered in recent years is the new legislation in the Netherlands, which affords gays and lesbians full access to marriage.¹⁰⁴ Effective April 1, 2001, Dutch same-sex couples will be allowed to marry and adopt children.¹⁰⁵ Legislation on same-sex partnerships exists in Denmark, France, Norway, Sweden, Finland, Belgium, Germany, and Iceland.¹⁰⁶ The 1995 Hungarian

¹⁰²*Ibid.* at 1070.

¹⁰³*Ibid.* at 1076.

¹⁰⁴The Netherlands became the first, and as yet the only, country in the world to grant same-sex marriages the same legal status as heterosexual ones.

¹⁰⁵The Netherlands Senate approved the legislation on Dec. 19, 2001, which was previously passed by the lower house of parliament. Same-sex relationships have been legally recognized in the Netherlands since 1998, but those couples did not have co-parent adoption rights. Couples who already have legally registered partnerships are now allowed to convert it into full marriage.

¹⁰⁶In Germany, a new law on “Homo-Ehe” (gay marriage) came into force on Aug. 1, 2001 after the Constitutional Court denied an appeal from Bavaria, Saxony and Thuringia to postpone the promulgation

Supreme Court decision made Hungary the first country in Central and Eastern Europe to grant official recognition to same-sex partnerships.¹⁰⁷ In addition, the age of for homosexual and heterosexual acts has recently been harmonized in Estonia while post-Soviet criminal legislation in many other countries of the former Soviet Union did not even make a distinction.¹⁰⁸ There are many other examples of new developments in the recognition of gay rights and equalization of the status of sexual minorities with the majority. Certainly, by the time the work on this thesis is complete, there will be many new relevant examples. These recent developments make Finnis' description of "the standard modern position of regulation of sexual conduct" redundant. The question is then, why Finnis' argument (specifically construed to prevent similar developments) has been overlooked, as gay rights activists counted victory after victory in various parts of the world? And, would natural law theory be of any help to the new Russia?

5. CRITICISM OF FINNIS' POSITION

In analyzing Finnis' position, many critics point out that "his arguments are inconsistent, flawed, and ultimately unpersuasive."¹⁰⁹ Once deconstructed, his theory appears to be

of the law. The Court will have to consider the Law on merits – these *Laender* claim that the Law is contradictory to the *Grundgesetz*. "Debates around the Law on Gay Marriage in Germany," online: Gay.ru <<http://gay.ru/news/rainbow/19a-07-01.htm>> (date accessed: July 20, 2001).

¹⁰⁷See e.g. Law on Marriage and Family, [1995] Decision No. 14/1995 (III.13) AB Resolution (Hungarian Supreme Court).

¹⁰⁸*Karistusseedustik (Penal Code)*, 2001, (Republic of Estonia), art. 41 sets the age of consent regardless of the gender and activities involved at 14. Preceding Penal Code (1992) made a difference between the age of consent for homosexual (16) and heterosexual (14) conduct. On Russia, see *supra* note 31 and accompanying text.

¹⁰⁹C. Ball, "Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism" (1997) *Geo. L.J* 1871, at 1912.

based on forty-six (46) assumptions, most of which are “tacit.”¹¹⁰ Criticism of Finnis’ position can be consequently divided into four main groups: criticism for (i) a lack of logical connection, (ii) a lack of empirical evidence, (iii) an unnecessarily harsh impact on homosexuals, and (iv) a lack of respect for competing morals.

a) Lack of Logical Connection

First, Finnis’ rejection of any moral worthiness of homosexual and contracepted heterosexual sex because they cannot create biological (reproductive) unions is contrary to his own logic. According to his theory, marriage is “a single reality with two blessings (children and mutual affection).” For Finnis, “parenthood” and “friendship” are the two goods of marriage. He argues that since the “reproductive organs of friends cannot make them a biological [...] unit, they *therefore* cannot make a personal one.” Finnis thus appears to require that there be a way “to differentiate between those kinds of sexual relations, which have the possibility of producing a child and those kinds of sexual relations which do not have such a possibility.”¹¹¹ In his mind, a personal unit is only possible where a biological (reproductive) unit already exists.

However, the real inconsistency of Finnis’ argument begins where he grants an exception to this “parenthood and friendship” criteria to sterile marriages because, he argues, their reproductive organs, although incapable of procreation, establish a “natural *societas*

¹¹⁰P.J. Weithman, “A Propos of Professor Perry: A Plea for Philosophy in Sexual Ethics” (1995) 9 Notre Dame J. L. Ethics & Pub. Pol’y 75.

¹¹¹M. Strasser, “Natural Law and Same-Sex Marriage” (1998) 48 DePaul L. Rev. 51, at 65.

(companionship) of the two sexes.”¹¹² It would seem then that he claims a personal unit is not dependant on the existence of a reproductive unit, but rather on the type of sexual organs involved and the use of contraceptives. For him, “societas” between two people is only attainable through penile-vaginal, non-contracepted intercourse between husband and wife and no other form of sexual intercourse including contracepted marital intercourse.

In earlier times, Hadley Arkes claimed that “natural law theories demand an intrinsic link between sexual unity and procreation.” As a result, sterile marriages had been viewed as immoral.¹¹³ Nevertheless, this perception has since been refuted even by natural lawyers. By virtue of reasonableness and empirical evidence, most scholars now believe that the inability of sterile marriages to procreate does not preclude a couple from establishing a unique “communion of friendship.”

The problem with Finnis’ theory is that it “cannot get past the same equation of biology and morality that doomed Arkes’ argument.”¹¹⁴ Finnis’ argument is inconsistent when he denies homosexual relationships of mutual affection because these relationships are not procreative, but at the same time he maintains that the sexual acts of sterile couples are morally worthy because they actualize an “intimacy of friendship.” He does not provide any rational explanation of how “a lifelong, monogamous, faithful, and loving

¹¹²Law, Morality, and “Sexual Orientation,” *supra* note 42 at 1064.

¹¹³For more on Arkes, see “Defense of Marriage Act: Hearing on H.R. 3396 (testimony of Hardley Arkes).” *In House Comm. on the Judiciary, 104th Cong.*, 1996.

¹¹⁴J.G. Culhane, “Uprooting the Arguments Against Same-Sex Marriage” (1999) 20 *Cardozo L. Rev.* 1119, at 1206-07.

communion between a man and a man or a woman and a woman” is different from that of sterile marriages, since procreation is by nature not available to either.¹¹⁵

The distinction between sterile marriages and homosexual couples thus appears to have been *arbitrarily* construed. It is contrary to logic and reality. If “friendship” has an independent value, one or another act, regardless of its sexual context, may enable two individuals to actualize and experience their friendship itself “as a single reality with [its one or more] blessings, whatever those blessings may be.”¹¹⁶ Once Finnis acknowledges ‘the *societas*’ of the sterile spouses despite their ‘biological defection,’ the similar ‘biological defection’ of homosexual couples should not be the reason to deny ‘the *societas*’ and, ultimately, any moral good of such relationships. With the only real difference between these two types of relationships being the sexual organs involved, Finnis fails to explain why penile-vaginal non-reproductive intercourse creates a personal union whereas penile-anal or penile-oral intercourse does not.

The logic of Finnis’ argument completely collapses when he draws the distinction between sex within sterile marriages and contracepted sex within marriages capable of reproduction. It is indeed strange to consider sexual acts within marriage to be morally illicit unless they actualize a procreative union (actual or would-be). The experiences of so many happily-married couples indicate that “[t]he human sexual appetite is both natural and basic” and that sexual acts between spouses, even if inconsistent with

¹¹⁵M.J. Perry, “The Morality of Homosexual Conduct: A Response to John Finnis” (1995) 9 Notre Dame J. L. Ethics & Pub. Pol’y 41, at 50.

¹¹⁶*Ibid.* at 48.

procreative function, allow them to experience “a sexual-spiritual union.”¹¹⁷ As Kent Greenawalt, professor of law at the Columbia University, points out, “intercourse within marriage does have an extra element when one is aware that it may produce a (wanted) child, but the lived experiences of intercourse when procreation is precluded by physical impossibility does not vary (significantly) from that when contraceptives are used.”¹¹⁸ Distinction between sterile and other non-reproductive sexual acts seems absurd given that in all cases “the individuals involved would intend to have sexual relations [nonetheless], knowing that they could not produce a child through their lovemaking.”¹¹⁹

Finnis’ claim about the immorality of contracepted sex is even more ridiculous since the use of contraceptives has been long allowed and in many instances encouraged by the “standard modern form of regulation of sexual conduct.” In fact, contraceptives are commonly viewed as serving ‘good purposes.’ Preventing the transmission of diseases is only one of various compelling reasons why many couples choose to forgo procreation. Other examples include: dangers to the health of the mother or future child,¹²⁰ economic, social and familial reasons and, in certain countries, government control of birth rates.¹²¹

Moreover, Finnis’ belief that the reproductive organs of spouses exploited “in a marital way” automatically create a “communion of friendship” represents an overly optimistic

¹¹⁷*Ibid.* at 52-55 citing G. Grisez, *The Way of the Lord Jesus, Living a Christian Life*. (Chicago: Franciscan Herald Press, 1993), at 636.

¹¹⁸Greenawalt, *supra* note 45 at 1669.

¹¹⁹Strasser, *supra* note 111 at 65.

¹²⁰This argument has been convincing for the majority of the US Supreme Court to allow abortion even during the third trimester. *Roe v. Wade*, 410 U.S. 113 (1973) and *Planned Parenthood of Southeastern PA v. Casey*, 505 U.S. 883 (1992).

¹²¹China provides the best-known example – the “one family – one child” policy, when families are subject to sterilization after their first child is born.

and idealistic statement. In reality, there are many marriages with one-sided or no affection (consider, for example, such extreme cases as pre-arranged marriages in various Muslim or Hindu communities, or marriages between royal families). Also, “not every marriage is one in which the spouses want to have children.”¹²² It is illogical to assert that mutual affection within pre-arranged marriages or sterile marriages whose members may be content with their biological condition exists, but that it does not within a lifelong monogamous loving relationship between two individuals of the same sex (perhaps even willing to use artificial insemination or adopt children) or a married couple (who may already have children) who use contraceptives.

b) Lack of Empirical Support

Not only does Finnis’ denial of “societas” for same-sex couples represent an inconsistent argument, it is also subject to empirical disproof. His portrayal of relationships between homosexuals as “disintegrat[ing] each of them precisely as acting persons” and threatening to the rest of society contradicts empirical evidence. His argument about disintegration is radically disconnected from the actual experiences of the ‘selves’ who are allegedly undergoing this disintegration and alienation. Michael Perry, prominent legal scholar, states that “the *reality* apprehended by many homosexual and heterosexual couples (either unmarried or practicing contracepted sex) is directly contrary to the *reality* postulated by Finnis.”¹²³

¹²²Perry, *supra* note 115 at 50.

¹²³*Ibid.* at 59.

Claiming that homosexual love has as little moral value as solitary masturbation or sex with a prostitute, as Finnis does, clearly overlooks the moral potential of gay relationships, evidence of which has been increasingly seen by the larger society in the last few decades. During political and judicial debates about homosexuality, reference is frequently made to numerous studies, all of which demonstrate that the majority of homosexual relationships are not (significantly) different from heterosexual ones.¹²⁴ It has been shown that homosexual relationships, just like heterosexual ones, are essentially based on love, respect, commitment, affection, and passion between the partners. Therefore, it is reasonable to believe that both types of relationships are equally capable of creating the “societas” of two individuals, which they actualize and experience regardless of sexual context of their relationship.

It is unclear how Finnis, unless a homosexual himself, could evaluate feelings between two same-sex individuals without any objective criteria. Responding to Finnis’ assertion that many people may suffer from delusions about the quality of their sexual experiences, Perry suggests that Finnis himself who is delusional.

Even if Finnis were correct that all homosexual and unmarried heterosexual couples are under an illusion about the real meaning of their feelings, his claim that such relationships are “deeply hostile” and thus threatening to the well being of society and “the stability of existing and future marriages” has proven to be false. Although similar assumptions have been also made in various political and judicial debates, neither Finnis nor other anti-gay activists have been able to provide any empirical proof of a corruption

¹²⁴See *e.g. Baehr v. Lewin*, 74 Haw. 530, 852 P. 2d 44 (Haw. Sup. Ct. 1993).

of societal values or devaluation of the institution of marriage in countries where gay rights have achieved marked progress (in particular, legal marriage in the Netherlands).

Finnis and those of his ilk have failed to prove that gay rights are a threat to society at large because empirical evidence from many countries has clearly shown that progress in the status of sexual minorities has not brought anarchy or caused devastating consequences to people's morals. In fact, anti-gay arguments are strikingly analogous to arguments previously offered against interracial marriages. There is no evidence that making homosexuality morally permissible induced people to abandon morality or to think better of murder, cruelty, or dishonesty.¹²⁵ As H.L.A. Hart, the father of modern legal positivism wrote "people will not abandon morality, will not think better of murder, cruelty and dishonesty, merely because some private sexual practice which they abominate is not punished by the law."¹²⁶

On the contrary, it has been established that "the emotional and economic safety nets forged by same-sex couples and their families were not found to be without value to society at large."¹²⁷ Upon examining evidence currently available, many scholars believe that "the challenge of gay couples to be included in the institution of marriage promises a new look at what marriage means."¹²⁸ Several studies have indicated that gay marriage does not represent any significant threat to "the stability of existing and future

¹²⁵*Bowers v. Hardwick*, 478 U.S. 186, 107 S.Ct. 29 (1986), [hereafter *Bowers*], Blackmun, J., dissenting.

¹²⁶*Hart*, *supra* note 46. Cited in *Bowers*, *supra* note 125 at 212 Blackmun J., dissenting.

¹²⁷*Canada (A.G.) v. Mossop*, [1993] 1 S.C.R. 554, L'Heureux-Dubé, J.

¹²⁸*Perry*, *supra* note 115 at 63.

marriages.”¹²⁹ Rather, defenders of “true marriage” have been invited to fight the real dangers to marriage, such as domestic violence, alcoholism, drug addiction, poverty, various social factors, and even the ‘mother-in-law phenomenon.’¹³⁰ A relatively high divorce rate coupled with a lower number of marriages might also indicate that by construing various alternatives to marriage (such as civil unions or common-law partnerships), the importance of marriage as the sole institution that gives the ‘societas’ of two individuals its legal meaning is diminished.¹³¹

Finnis has not, however, been creative in claiming that the acceptance of homosexuality represents ‘a threat’ to future and existing marriages. In its decision upholding sodomy laws, the *Irish Supreme Court* relied made an originalist reading of their country’s Constitution (a religiously-inspired document), with an unsupported claim that homosexual conduct constituted “a threat to public health” and was “inimical to marriage and is *per se* harmful to it as institution.”¹³² It is no surprise that Finnis arguments are similar to those employed in defence of sodomy laws. Virtually, these are the same arguments appealing to historically strong moral and religious disapproval of homosexuality, and the threat it presents to public health, the institution of marriage and youth. Nevertheless, as shown above, Finnis failed to construct logical argument or provide empirical evidence to defend his position. Therefore, the *ECHR* overruled this decision by the by the Irish Court, with dissenting judges appealing to the fact that Irish

¹²⁹Joan Sexton, for example, gives gay marriage only twenty-fourth place in “the list of threats to modern Christian marriage.” J. Sexton, “Learning from Gays” (1994) *Commonweal* 28.

¹³⁰W.N. Eskridge, *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment*. (New York: Free Press, 1996).

¹³¹*Ibid.* (discussing how the unitive goal of marriage should in fact induce natural law theorists to support same-sex marriage).

¹³²*Norris v. A.G.*, [1984] I. R. 36.

society was “religiously-minded” and by enacting the law had only exercised its democratic power.¹³³

c) Undue Impact on Homosexuals

Finnis’ position is “harsh, even cruel” towards homosexuals. According to Grisez-Finnis theory, homosexuals are immoral by virtue of the character of their sexual orientation and should remain celibate.¹³⁴ However, a truer note is sounded by American law professor Kent Greenawalt: “My experience tells me that to consign to permanent celibacy many persons who are not called to such life by devotion or inclination is to insist that they should deprive themselves of one of the richest sources of human affection and understanding.”¹³⁵

Finnis-like arguments contribute to hostility, prejudice and discrimination against sexual minorities by the majority, which inevitably leads to various personal traumas and the alienation of homosexuals from the rest of society. This has a similarly detrimental effect on reducing a still high suicide rate among gay and lesbian youth. According to a *Human Rights Watch* 2001 report, “Lesbian, gay, bisexual, and transgender youth of

¹³³Judge Zekia disagreed with the reasoning of the Court in both *Dudgeon* and *Norris* as “licensing immorality” of “being free to indulge privately in homosexual relations.” He referred to the fact that Christian and Moslem religions, which “to a great degree” provide roots for moral concepts, are “all united in the condemnation of homosexual relations and of sodomy.” Cyprus and Ireland, he argued, “populated by a great majority of people who are completely against *unnatural immoral practices* [were] only religiously-minded” countries that “adhere to moral standards which are centuries old.” Since “a democratic society is governed by the rule of the majority,” which is entitled to respect for their religious and moral beliefs and to bring up their children consistently with their own religious and philosophical convictions, the change to such law of “high esteem,” argued Judge Zekia, was “likely to cause many disturbances in the country in question.” *Dudgeon, supra* note 51.

¹³⁴R.P. George, “Nature, Morality, and Homosexuality,” in D. Forte, ed. *Natural Law and Contemporary Public Policy*, (Washington D.C.: Georgetown University Press, 1998), at 29, 38.

¹³⁵Greenawalt, *supra* note 45 at 1671.

school age suffer daily harassment, abuse, and violence at the hands of their peers.”¹³⁶

Another report from *Amnesty International* detailing cases of physical, psychological, and emotional abuse of gay, lesbian and bisexual people around the world, indicates that denial of their humanity (*i.e.* viewing them as immoral) is “the first step toward inhuman, cruel and degrading treatment.”¹³⁷ Anti-gay arguments or, adopting the language of the report, “inflammatory rhetoric [...] have also acted as an incitement to state officials to torture or ill-treat members of sexual minority groups with impunity.”¹³⁸

Also, as noted earlier in reference to the *Toonen* case, anti-gay arguments are counterproductive to the prevention of the spread of HIV/AIDS and other sexually transmitted diseases. *UNAIDS* has gathered a significant body of evidence from around the world indicating that blaming certain groups in society (drug users, homosexuals, and sex workers) for spreading the disease was not an adequate or efficient policy.¹³⁹ Rather, the UN body recommended that governments ensure the protection of those infected and, more importantly, “improve social and legal status of populations whose human rights are not fully respected,” in particular gay men.¹⁴⁰ *The Handbook for Legislators on HIV/AIDS, Law and Human Rights* also states that “laws can be the source of systematic discrimination against women, young people and gay men by not protecting them against

¹³⁶The report states that many gay teens are bullied to the point that it is a human rights issue. “Hatred in the Hallways. Violence and Discrimination Against Lesbian, Gay, Bisexual, and Transgender Students in the U.S. Schools,” New York: Human Rights Watch. May 31, 2001 <<http://www.hrw.org/reports/2001/uslgbt/>>.

¹³⁷The report outlines abuse, torture and harassment of gays in more than 30 countries, including the United States, the Russian Federation, Argentina, Jamaica and Uganda. “Crimes of Hate, Conspiracy of Silence,” New York: Amnesty International. June 22, 2001 <http://www.ai-lgbt.org/ai_report_torture.htm>.

¹³⁸*Ibid.*

¹³⁹*UNAIDS Guidelines, supra* note 87.

¹⁴⁰*Ibid.*

violence, unfair property laws, and failing to recognize their domestic relationships (e.g. de facto relationships irrespective of sexuality).”¹⁴¹

The spread of HIV/AIDS can thus be partly blamed on legal and societal attitudes towards homosexuality that drive people underground and make them live ‘down low.’¹⁴² According to the latest data, “women now make up more than half of the adults worldwide who become infected with HIV daily” and more than four-fifths of all infected women get the virus from their male partners.¹⁴³ Therefore, *UNAIDS* recognizes that stigmatization and discrimination (of homosexuals and women) are among the key obstacles to effective prevention of the disease and treatment of people living with HIV/AIDS.¹⁴⁴

Legal homophobia also has other adverse consequences. As suggested by Richard Posner, one of the leading scholars on law and economics, recognition and protection of gay rights has important economic dimensions.¹⁴⁵ Certainly, such events as Love Parades, Gay Pride Parades or the Gay Games have proven to be colossal financial successes for cities hosting such events.¹⁴⁶ Many countries and cities have developed

¹⁴¹*Handbook for Legislators on HIV/AIDS, Law and Human Rights*, 1999, UNAIDS <http://unaids.org/publications/documents/human/law/ipuexsue.html>.

¹⁴²The term ‘down low’ refers to a male who does not reveal his bi/homosexual inclinations to his female friend or wife, but continues to have sexual relations with male friends. The phenomenon is especially strong within the black community as men living “down low” are usually blamed for an increasing number of cases of HIV/AIDS among African American women. “The Low Down on Down Low Culture,” online: *Africana.com* <*Africana.com*> (date accessed: Aug. 17, 2001).

¹⁴³“HIV, AIDS, Women and Children,” online: AVERT <www.avert.org/womnchil.htm> (date accessed: August 2, 2001).

¹⁴⁴*UNAIDS Guidelines*, *supra* note 87 and *UNAIDS Handbook*, *supra* note 141.

¹⁴⁵R. Posner, *Sex and Reason*. (Cambridge, Mass.: Harvard University Press, 1992).

¹⁴⁶The organizers of the 2001 annual Love Parade, that brought more than 1,5 million people to Berlin, paid the city 1,5 million dollars USA. Toronto’s Gay Pride remains to gather one of the largest audiences in Canada with more than 800,000 people in 2001. Atlanta, Chicago, Los Angeles, and Montréal have

special programmes to encourage gay tourism.¹⁴⁷ Hence, equal treatment of homosexuals is profitable to the health, success and development not only of particular individuals, but also to society at large. Importantly, moral values in countries, where gay rights have progressed, have shown no signs of erosion. These are also factors to be given thorough consideration when deciding upon advancing the status of sexual minorities in CEE and other countries.

d) Lack of Respect for Competing Morals

Finally, Finnis' position demonstrates an utter lack of understanding and respect for different and competing morals and is therefore unethical. As he fails to provide any reference to reliable sources in support of his argument, he also fails to build an effective defence against evidence showing that homosexual relationships are more than capable of mutual affection. By denouncing any instance of such mutual affection as false, he proclaims that "the attempt to express affection by orgasmic non-marital sex [is] the pursuit of an illusion."¹⁴⁸ His argument is thus essentially "about the inherent quality of various acts rather than qualities of lived experience" and is therefore contrary to the evidence gleaned from that experience.¹⁴⁹ In other words, Finnis, like many natural law

selected as the finalist for hosting Gay Games VII in 2006. Gay Games VI will be held in Sydney in 2002. For more information, see online: Federation of Gay Games <<http://www.gaygames.com>> (date accessed: July 5, 2001).

¹⁴⁷The Toronto Tourism Board announced that it began a special campaign to make the city the 'Canadian Mecca for gay tourism.' However, Toronto may find it a difficult task to compete with its rival-city Montréal, which launched a similar programme in 1996.

¹⁴⁸"Law, Morality, and "Sexual Orientation,"" *supra* note 42 at 1065.

¹⁴⁹Greenawalt, *supra* note 45 at 1668.

theorists, gives priority to theory over reality. In essence, he negates the very human nature he purports to represent.

However, “it is also true that coherent theories that seemed convincing at one time appear to be shot with error, even ridiculous, at a later time.”¹⁵⁰ As discussed earlier, natural law theory previously suffered a stunning defeat of its stance on slavery and miscegenation. The prospects of each theory have thus proven to be reliant on scientific, sociological, psychological, economic and other information. In addition, this information, coupled with lived experiences of lawmakers, judges, and/or ordinary citizens, may bring about crucial changes.¹⁵¹ As suggested earlier, the progress and direction of gay rights will inevitably clarify whether it is public opinion, judicial discretion or legislative wisdom that plays a crucial role in changing laws and people’s attitudes.

Regardless of the answer, however, Finnis does not appear to fully appreciate the role that constitutional adjudication plays in protecting the interests and rights of minorities from the will and biases of majorities. Courts all over the world – especially in Germany, Canada, and South Africa – have espoused the principles of rationality and proportionality, upon which judges weigh governmental interests against those of the minority.¹⁵² These principles are believed to “provide the core of the protection which constitutions and human rights treaties guarantee all over the world [and] determine

¹⁵⁰*Ibid.* at 1670.

¹⁵¹As noted earlier, the debate as to whether the judiciary or public in the mid-sixties in the United States was the decisive factor in changing segregation and miscegenation policies is, however, outside the scope of this research.

¹⁵²See *supra* note 60 and accompanying text. For a general overview of implementation of the principles of rationality and proportionality in the contexts of separation of powers and protection of constitutional rights in a comparative constitutional framework, see D. Beatty, *Constitutional Law in Theory and Practice*. (Toronto: University of Toronto Press, 1995).

whether a law is constitutional or not.”¹⁵³ An important part of rationality and proportionality tests, however, is the willingness of lawmakers and judges to put themselves in the position of a minority member or, at the very least, to take a neutral (*i.e.* objective, impartial) approach when evaluating something they cannot themselves experience. Finnis’ argument is thus damaging to the principles of rationality, proportionality, impartiality, and objectivity, as, according to his argument, all state bodies should look at minorities through the prism of the majoritarian value-system.

The gay rights movement accentuates how diverse the majority-minority paradigm is. While a majority of society is not capable of experiencing the emotions of homosexual relationships, it does not mean that such relationships should be regarded as ‘unacceptable.’ Rather, judgement regarding the moral value of homosexuality must be based upon objective criteria comprising the results of various studies and lived experiences of all involved, especially of homosexuals.

On an empirical level, the charge is irrefutable. Since the ‘modern standard position’, denouncing the state power to criminalize homosexual conduct has emerged, many gay and lesbian families have proven to be making the lives of many people happy and fulfilling. If any damage has occurred – it is prejudice and intolerance that have suffered the most. Against this evidence, Finnis’ outright rejection of the moral worthiness of homosexual conduct and his attempt to provide arguments to stop the further

¹⁵³D. Beatty, "Law and Politics" (1996) 44 Am. J. of Comp. Law 131, at 142.

advancement of gay rights have thus failed, precisely because his position seems “little more than prejudice masquerading as [theory].”¹⁵⁴

6. ILLOGICAL, UNPERSUASIVE, CRUEL AND UNETHICAL POSITION

Despite his promise to present “reflective, critical, publicly intelligible and rational arguments,” Finnis fails to do so. In the absence of any evidence of the damaging effects of homosexual relationships on the rest of society, it is illogical, unpersuasive, cruel, and unethical to demand that such relationships have no right to exist and impose an obligation on the state to discourage them. The irony of Finnis’ position is that he believes that homosexual activity is *never* loving and *always* immoral (according to the natural cause), “but he tragically misses the point that we are – straight, gay, and bisexual alike – capable of so much more than roles prescribed by functions.”¹⁵⁵ Once the basic assumption that only non-contraceptive penile-vaginal intercourse between spouses (and no other sexual conduct) can actualize mutual affection and, thus, is morally worthy, “is shown to be false (as a matter of rationality, logic, experience, and reflection), the entire carapace of Finnis’ ethical asexual structure comes tumbling down.”¹⁵⁶

In the final analysis, against all evidence of how fulfilling, enduring and loving homosexual relationships may be, Finnis’ arguments do not pass the real-world test and have thus been gradually and repeatedly refuted. That is why, only seven years after the publication of his article, his description of the “modern standard position on the

¹⁵⁴Perry, *supra* note 115.

¹⁵⁵Culhane, *supra* note 114 at 1207.

¹⁵⁶Ball, *supra* note 109 at 1919.

regulation of sexual conduct” seems quaintly historic. An inevitable change toward more tolerance and acceptance of homosexuality in societal, religious, and legal attitudes is underway in many countries. Revoking criminal statutes punishing persons for engaging in homosexual acts was only the first – yet very critical – step toward equal treatment of sexual minorities. Those hesitating about adopting positive measures towards sexual minorities should look to experiences of countries as diverse as the Netherlands, Canada, South Africa, Brazil, Australia, and Denmark for guidance.

Finnis’ argument (based on implausible empirical claims to justify policies, with no apparent rational basis) has proven incapable of stopping the moving train of societal and legal developments from reaching the next stop – whether it be gay marriage in the Netherlands, adoption by gay couples in Canada or the constitutional prohibition of any discrimination on the basis of sexual orientation in South Africa. Yet, arguments like the one espoused by Finnis remain key obstacles in the way of this train and therefore, while movement toward a better understanding and acceptance of homosexuality is a worldwide trend, real progress on gay rights is still slow and somewhat elusive.

7. IMPORTANCE OF FINNIS’ THEORY AND PROPORTIONALITY TEST

Finnis’ article does not bolster natural law theory; in fact it shows its glaring inability to make a case for rejecting any moral value of homosexuality. However, his attempt to infuse the fading theory with more rational sense rather than relying solely on considerations of majoritarian morality (like Devlin or George) is of import to future natural law scholars. Without doubt, there will be a new generation of natural lawyers, as

the central premise of the natural law theory – a necessary connection between morality and law – remains a critical theoretical and practical notion. To borrow from Carlos Ball, “As the arguments raised by new natural lawyers demonstrate, the debate over society’s regulation and acceptance of homosexual conduct is, at its core, a normative one.”¹⁵⁷ Also, as noted earlier, such international instruments as the *European Human Rights Convention* and *ICCPR* explicitly recognize the authority of member-states in “the protection of public morals.”¹⁵⁸ The 1993 Russian Constitution has a similar passage in Article 55.3.¹⁵⁹

Nevertheless, even though the protection of morality can serve as justification for laws, the *ECHR* and *UNCHR* pointed out that such justifications are not absolute “as this would open the door to withdrawing from the Committee’s scrutiny a potentially large number of states interfering” with protected rights.¹⁶⁰ In restricting the rights of its citizens, the state must prove on a proportional basis that its interests are significant enough to warrant same and are not outweighed by the detrimental effects on vulnerable groups. Application of the proportionality principle should not be a matter of choice but rather a constitutional obligation on the part of lawmakers and judges.

It is worth noting that the proportionality requirement is now known to the Russian constitutional adjudication due to German influence.¹⁶¹ Judges of the Russian

¹⁵⁷*Ibid.* at 1919.

¹⁵⁸*ECHR*, *supra* note 9, arts 8-11.

¹⁵⁹A restriction on constitutional rights should be permitted “only to the extent to which it is necessary for the purposes of defence of the foundations of the constitutional system, morality, health, rights, and legal interests of other persons and ensuring the defence and security of the State.” *RF Const.*, art. 55.3.

¹⁶⁰*Toonen*, *supra* note 66 para 8.6.

¹⁶¹Two reasons might explain the special connection between the Russian and German Constitutional Courts – (a) as noted earlier, the Russian Constitutional Court was structured according to the German

Constitutional Court interpreted the words of Article 55.3 – “only in extent to which it is necessary” – as the foundation for proportionality test.¹⁶²

Attempts, like the one undertaken by Finnis, to offer a theoretical explanation for international case law are nonetheless important. Although the judgments of the *ECHR* and *UNCHR* may only refer to a particular set of circumstances and the rule of precedent does not apply, the decisions definitely represent a persuasive authority for national legislature and courts. It is especially true for Russia, where by virtue of the Constitution, “generally recognized principles and norms of international law and international treaties of the Russian Federation become an integral part of its legal system” and would trump national legislation if contradiction occurs.¹⁶³ Since Russia is a signatory to a great number of international declarations and conventions and is a member of the Council of Europe, international law represents an important source of liberalization and democratization of Russian society.

New natural lawyers should therefore offer arguments based on logic, lived experience, tolerance, and respect for different and competing morals, rather than suggesting “policies [that] are a product of prejudicial attitudes.”¹⁶⁴ Moral conclusions relevant to political and legal choices should embrace ideas of human fulfillment and common good.

model and (b) German constitutionalism and the activities of the German Constitutional Court are often regarded as one of the most respected among the countries of the civil law tradition.

¹⁶²*RF Const.*, *supra* note 5, art. 55.3. In its decision in the case determining the constitutionality of Arts. 6.6 and 7.1.2 of the Law “on the Usage of Cash-Registers in Monetary Transactions with Population” [1998], the Court stated that “a sanction that restricts a constitutional right shall correspond to the requirements of justice and must be *proportionate* to constitutionally proclaimed goals and protected lawful interests, as well as the character of the action committed.” Also see decision in the case determining the constitutionality of Art. 5.2 of the Federal Law “on Prosecutor’s Office” [2000].

¹⁶³*RF Const.*, *ibid.* art 15.3.

¹⁶⁴Strasser, *supra* note 111 at 60.

Implementation of these ideas is an important challenge to new democracies. However, the conclusion is that in present form, natural law theory does not offer a critical argument in support of its claim of the immorality of homosexuality and is therefore outdated by the progress of gay rights in many democratic countries.

The approach of John Finnis and his compatriots from the natural law tradition, an approach which 'unabashedly' holds that homosexual conduct is immoral and that public policies should be formulated accordingly, has inspired various scholars to advocate for a bracketing of moral issues when defining rights and formulating policies. One such theory, advocated by Ronald Dworkin, represents an interesting mix of liberalism and 'communitarianism' and contributes to the formulation of a theoretical framework for the morality-law relationship in the context of gay rights. The hope is that Dworkinian liberal equality will fill a large ideological gap in CEE countries following the collapse of Marxist-Leninist philosophy of international proletarian equality.

CHAPTER TWO

DWORKINIAN LIBERAL EQUALITY AND AMERICAN JURISPRUDENCE ON GAY RIGHTS

1. DEVELOPMENT OF LIBERALISM

Natural law philosophy's gradual decline in popularity, combined with the separation of church and state left room for new theories on law and morality. Since the nineteenth century, liberalism, a philosophy that regards individual liberty as the greatest of political and legal goods, has become the predominant theory of (western) political morality.

Liberalism began in Europe during a period of insidious state interventionism accompanied by feudal and aristocratic inequalities and intolerance toward religious minorities. The 'new' idea of giving individual rights a priority therefore seduced many a brilliant mind – John Locke, Thomas Hobbes, and Charles-Louis Montesquieu, to name but a few. Early liberalism reflected a basic denial of any natural social hierarchy and argued for a strict separation between the individual good (moral, religious and philosophical) and the broader political discourse (where rights and public policy are defined).

A liberal ideal is thus the 'autonomy model' where individual liberty is respected by a neutral state. The first component of the autonomy model is a set of basic and abstract ideas about individual liberty – freedom of choice, universal rights and liberties that serve as the basis for societal structures. The requirement of a minimal role of the state or state-neutrality, the other important component of the liberal position, is due to liberalists'

strong dislike of state and legal paternalism, aimed at enhancing an individual's well-being and saving him/her from destruction.

In the liberalist mind, the state should interfere with individual liberty only on the basis of a "harm principle." This principle, formulated by John Stuart Mills in his famous essay *On Liberty* states that "the only purpose for which power can rightfully be exercised over any member of a civilized community, against his will, is to prevent harm to others."¹⁶⁵ "Harm principle" has become a paradigm of classical liberalism. According to this paradigm, laws should be based on neutral reasoning and serve as a tool of democratic self-governance. This 'classical liberalism,' also known as 'laissez-faire' or 'minimalist state' liberalism, was consistent in its demands for individual liberty and state neutrality in all spheres of life, economic as well as non-economic.

A different take on liberalism was espoused by its main contemporary rivals, 'communitarians,' who challenged the autonomy model by praising the importance and primacy of the community.¹⁶⁶ They maintained that "human nature is necessarily social and an individual necessarily defines herself in terms her culture makes available."¹⁶⁷ Therefore, an enduring and prosperous community life would inevitably benefit each individual citizen. Common values and goals, communitarians insisted, must be taken into account, and indeed play a substantial role in political and judicial processes. They

¹⁶⁵J.S. Mill, *On Liberty*. (Harmondsworth: Penguin, 1982), at 68.

¹⁶⁶For more on liberalism-communitarianism debate, see works of the most prominent contemporary communitarian scholars – M.J. Sandel, ed. *Liberalism and Its Critics*, (New York: New York University Press, 1984).; M.J. Sandel, *Liberalism and the Limits of Justice*. (New York: Cambridge University Press, 1998)., C.F. Delaney, ed. *The Liberalism-Communitarianism Debate: Liberty and Community Values*, (Lanham, Md.: Rowman & Littlefield, 1994)., and M. Walzer, *Spheres of Justice: a Defence of Pluralism and Equality*. (Oxford: Robertson, 1983).

¹⁶⁷R.J. Lipkin, "Progressivism as Communitarian Democracy" (1999) *Widener L. Symposium* J. 229. at 240.

appealed to empirical evidence to show that classical liberalism was fated to fail since by underestimating the importance of communitarian life, it fails to propose a robust theory of community.¹⁶⁸

Communitarians also noted that the second claim of liberalism – state-neutrality, where lawmaking and adjudication are based on reasoning that is neutral on certain moral issues – was virtually unattainable.¹⁶⁹ They pointed out that both legislators and judges are human beings with their own moral beliefs and ethical convictions about good and evil and how it is fair to treat other people. It would be therefore impossible, communitarians held, to expect these people to abandon these beliefs and convictions while doing their jobs. Instead, political and judicial decisions, communitarians maintained, should be based on a consideration of what is best for the health of the community.¹⁷⁰

Reacting to these critiques, modern-day liberal theorists have made attempts to enrich liberal doctrine. Some have heeded the need for a doctrine that would recognize the importance of state action, especially in protecting the rights of marginalized minorities and the economically impoverished. The liberal school of thought thus underwent a transition from ‘laissez-faire’ to so-called ‘welfare liberalism.’¹⁷¹ Although hailing from ‘state neutrality’ roots, ‘welfare liberals’ recognize the claims of the broader community to freedom, rationality, and justice. In understanding that the realization of these ideals is implausible without a proper moral environment, contemporary liberals

¹⁶⁸ *Ibid.*

¹⁶⁹ *Supra* note 166.

¹⁷⁰ *Ibid.*

¹⁷¹ For more on ‘welfare liberalism’ and liberal equality in relation to acceptance of homosexuality see L.C. Backer, "Exposing the Perversions of Toleration: the Discrimination of Private Sexual Conduct, the Moral Penal Code, and the Oxymoron of Liberal Toleration" (1993) 45 Fla. L. Rev. 755.

have shifted their attention from individuals to communities, thus adopting some aspects of communitarianism into their canons.

2. *DWORKINIAN PHILOSOPHY*

Despite the fact that a just society has become the principal ambition of contemporary liberalists, various authors have developed different approaches as to how best to create such a just society. John Rawls, a renowned proponent of political liberalism, believes that political consensus among all citizens on “at least the constitutional essentials and the basic questions of justice” should serve as the basis of legislation in a just society.¹⁷²

Ronald Dworkin, an eminent liberalist scholar, rejects the idea of political consensus because, in his mind, it predisposes society to a situation where a majoritarian morality will inevitably prevail at the expense of those who do not hold majoritarian views.¹⁷³ He argues that the *integration* of citizens into the political life of the community should serve as the foundation of any just (liberal) society, where equality and justice are essential principles of such a society.¹⁷⁴

Although in his earlier writings, Dworkin, like Rawls, demarcated a clear line between political values and personal preference, his more recent works indicate the transition to

¹⁷²J. Rawls, *Political Liberalism*. (New York: Columbia University Press, 1993), at 156; J. Rawls, *The Theory of Justice*. (Cambridge, Mass.: Belknap Press of Harvard University Press, 1971).

¹⁷³Dworkin, *Sovereign Virtue: The Theory and Practice of Equality*; Dworkin, *Foundations of Liberal Equality*; Dworkin, "Liberal Community"; Dworkin, "Freedom's Law: the Moral Reading of the Constitution," *supra* notes 41 and 44.

¹⁷⁴*Ibid.*, especially "Liberal Community."

“welfare” liberalism.¹⁷⁵ He advocates for “liberal equality” – a version of liberalism, which creates a link between individual ethics and community policies. According to Dworkin, such a link is highly important because legislators and judges cannot make decisions without calling upon their own ethical beliefs. Therefore, he deems a moral reading of the (U.S.) Constitution permissible because, in his view, it allows judges to incorporate rights not found in the majority vote process by relying on their “own background convictions of political morality.”¹⁷⁶

Dworkin takes a stand against natural law theorists in the morality and law debate. He utterly rejects Lord Devlin’s Darwinesque usage of “moral position” in “the anthropological sense,” that is, morality is what the majority believes it is.¹⁷⁷ Morality, Dworkin explains, is not the prerogative of any particular group of society – let alone the majority – but rather a limited number of basic principles shared by *all* members of the community. Initially he suggested that these were “legal principles,” which bind judges in deciding “hard cases,” but their nature and weight remained unspecified.¹⁷⁸ In his more recent works, Dworkin holds that distributive justice and equality form a critical framework for political morality.¹⁷⁹

He maintains that these fundamental principles of justice and equality constitute political morality because *all* members of society embrace them. In his mind, the enforcement of

¹⁷⁵Compare Dworkin, *Taking Rights Seriously*; “The Model of Rules,” *supra* note 43 and Dworkin, *Sovereign Virtue: The Theory and Practice of Equality*; Foundations of Liberal Equality; “Liberal Community; and “Freedom’s Law: the Moral Reading of the Constitution,” *supra* notes 41 and 44.

¹⁷⁶Dworkin brings such examples as abortion and racial equality.

¹⁷⁷Dworkin, *Taking Rights Seriously*, *supra* note 43 at 253.

¹⁷⁸See Dworkin, “The Model of Rules,” *supra* note 43.

¹⁷⁹Dworkin, Foundations of Liberal Equality; “Freedom’s Law: the Moral Reading of the Constitution” , *supra* note 44.

these principles corresponds with the critical interests of any integrated citizen because, Dworkin contends, such citizen “accepts that the value of his own life depends on the success of his community in treating everyone with equal concern.”¹⁸⁰ That fusion of political morality (equality for all) and critical self-interest (to live in equal society) is for him “[...] the important way in which individual citizens should merge their interests and personality into political community.”¹⁸¹ An integrated citizen, according to Dworkin, would do everything he or she could to ensure “justice not only for himself but for everyone else as well” and would think of his/her life as being “diminished” if his/her efforts fail.¹⁸² By virtue of this interdependence, Dworkin concludes, “[p]olitical community has [an] ethical priority over our individual lives.”¹⁸³

Although such an acceptance of the community’s ethical priority inevitably opens the window of liberalism to communitarian ideas, Dworkin, nonetheless, does not think that he abandons or compromises liberal tolerance and neutrality. Integration between individual and political morality, he asserts, “offers no threat to liberal principles” but rather simply repeats “that success [in] political decisions requires tolerance.”¹⁸⁴ He continues, “although liberals have not emphasized the ethical importance of integration, recognizing its importance does not threaten, but rather nourishes, liberal principles.”¹⁸⁵

Dworkin contests the communitarian assumption that that the lives of individuals and that of their community are two integrated but separate entities. He calls it fallacious to

¹⁸⁰“Liberal Community,” *supra* note 41.

¹⁸¹*Ibid.* at 501-2: describing such a community, Dworkin introduces a term of “civic republicanism.”

¹⁸²*Ibid.* at 502.

¹⁸³*Ibid.* at 504.

¹⁸⁴*Ibid.* at 500-1.

¹⁸⁵*Ibid.* at 500.

describe communal life as the life of an outside person of the same shape, the same moral watersheds and dilemmas, and the same standards of success and failure as the individual lives of the citizens who make it up. In drawing an analogy with the communal life of an orchestra, Dworkin intends to prove that the communal life is limited to “the acts treated as collective by the practices and attitudes that create the community as a collective agent.”¹⁸⁶ In his mind, acts of government accorded in legislative, executive, and judicial decisions identify the political community as a collective agency.

Dworkinian liberalism is especially important for our purposes, since he specifically wrote on a number of occasions about societal regulation of homosexual conduct. Such interest in the law and homosexuality debate is not surprising. Just like Finnis, Dworkin offers his vision of the problem in order to prove the viability of his theory. Yet, Dworkin, unlike Finnis, does not create an entirely new story about the (im)morality of homosexuality. Rather, he places the problem in the larger framework of his liberal equality. He offers a comparative analysis of the two landmark gay rights cases in American jurisprudence – *Bowers v. Hardwick*, upholding Georgia’s criminalization of sodomy, and *Romer v. Evans*, invalidating the Amendment to the Colorado Constitution that expressly prohibited inclusion of sexual orientation among discrimination grounds.¹⁸⁷ As a result, he condemns the former decision as a failure of *integration*, but celebrates the latter as a triumph of *integration*. Before turning to his theoretical evaluation of those cases, a description of the standard modern American position of regulation of sexual conduct is necessary.

¹⁸⁶*Ibid.* at 495.

¹⁸⁷Dworkin, *Sovereign Virtue: The Theory and Practice of Equality*, Chapter 14; *Bowers*, *supra* note 125; *Romer*, *supra* note 93.

3. STANDARD MODERN AMERICAN POSITION OF REGULATION OF SEXUAL CONDUCT

The standard modern American position of regulation of sexual conduct is notably different from its European counterpart. As described by Finnis, “the modern [European] theory and practice draws a distinction not drawn in the former legal arrangements – a distinction between (a) supervising the truly private conduct of adults and (b) supervising the public realm or environment. ... [where] the type (a) supervision of truly private adult consensual conduct is now considered to be outside the state’s normally proper role,” which led to the decriminalization of sodomy.¹⁸⁸ The American jurisdiction does not make such a distinction, as sodomy statutes are still good law in fifteen states.¹⁸⁹

The shift in European policy towards homosexuality was supported by the decisions of the *European Court of Human Rights* in *Dudgeon, Norris* and *Modinos*, which found that the sodomy statutes of the United Kingdom, Ireland, and Cyprus respectively were in violation of privacy rights under the *European Human Rights Convention*. The *Court* held that the legitimate interests of states in protecting morality, public health and youth were “outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant.”¹⁹⁰ As a result, sodomy was decriminalized in all member states of the Council of Europe.

¹⁸⁸“Law, Morality, and “Sexual Orientation,”” *supra* note 42 at 1053.

¹⁸⁹There are currently four states (Kansas, Missouri, Oklahoma, and Texas) that have sodomy laws that focus only on same-sex activities. See: “Legislating Equality: A Review of Laws Affecting Gay, Lesbian, Bisexual, and Transgendered People in the United States,” Washington, D.C.: The National Gay and Lesbian Task Force. June, 2000 [hereinafter *The NGLTF Report*].

¹⁹⁰*Dudgeon, Norris, supra* note 51.

On the contrary, in *Bowers v. Hardwick* (*Bowers*), the Supreme Court of the United States rejected the privacy claim and upheld sodomy laws in Georgia, five years after the European breakthrough decision in *Dudgeon*. The decision was based on the presumption that a majority of the electorate in Georgia has the right to enforce their “moral sentiments” in the law.¹⁹¹ Despite the similarity of the arguments put forward in *Dudgeon* and *Bowers*, the courts have obviously reached opposite conclusions. Therefore, it is important to bear in mind the evidence revealed in the European and the *UNHRC* cases since some of these facts were not even considered in the majority opinion in *Bowers*. Even though Russia has outstripped the United States as far as the decriminalization of sodomy is concerned, the reasoning of the majority and dissenting judges in *Bowers* as well as other cases concerning homosexuality will provide critical insight into various arguments put forward in favour of or against further advancement of gay rights.

a) Bowers v. Hardwick and the Right to Privacy

Before proceeding with an examination of the reasoning in *Bowers*, a brief description of the methodologies applied in US rights litigation is necessary. As a result of the US Supreme Court’s –at times, inconsistent– decisions, a ‘three-standard’ review was established. While claims to *fundamental* rights trigger ‘strict scrutiny,’ claims to other rights would require less rigorous, ‘intermediate’ or ‘rational-basis’ scrutiny.¹⁹² Strict scrutiny analysis, that is, an inquiry into governmental regulation as “necessary to serve a *compelling state interest* and ... narrowly drawn to achieve that end,” is therefore regarded

¹⁹¹*Bowers*, *supra* note 125.

¹⁹²*Constitutional Law of the United States*.

as being akin to the proportionality test.¹⁹³ If a right is not explicitly protected under the Constitution, judges may determine whether or not the right is *fundamental* and, consequently, which test to apply.

Unlike the *European Human Rights Convention (EHRC)* or the *International Covenant on Civil and Political Rights (ICCPR)*, the right to privacy does not enjoy an express guarantee in the American Constitution – in fact there is no explicit reference to it.¹⁹⁴ Nonetheless, by virtue of previous decisions of the U.S. Supreme Court, there are reasonable grounds to believe that “[i]n the United States Constitution the right to privacy in one or another form has been founded upon the First Amendment; the Fourth and Fifth Amendments; in the “penumbras” of the Bill of Rights; in the Ninth Amendment; and in the concept of liberty guaranteed by the first section of the Fourteenth Amendment.”¹⁹⁵ In US jurisprudence, the right to privacy has also been referred to as “the right to be left alone.”¹⁹⁶ It has also been shown that “the term ‘compelling State interest’ was used ... in cases depending on the claim to privacy.”¹⁹⁷ This was the position of the U.S. Court of Appeals that relied on previous decisions of the Supreme Court to outlaw the Georgia

¹⁹³ *Arkansas Writers' Project v. Ragland*, 481 U.S. 221 (1987) [emphasis added].

¹⁹⁴ *ECHR*, *supra* note 9, art. 8; *ICCPR*, *supra* note 66, art. 17; *U.S. Const.*, *supra* note 6.

¹⁹⁵ *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243 (1969); *Terry v. Ohio*, 392 U.S. 1 (1968); *Griswold v. Connecticut*, 381 U.S. 479, 85 S.Ct. 1678 (1965); *Roe v. Wade*, 410 U.S. 113 (1973); and *Meyer v. Nebraska*, 262 U.S. 390 (1923) respectively. *Norris v. A.G.*, *supra* note 132, McCarthy J. dissenting.

¹⁹⁶ *Norris v. A.G.*, *ibid.*, O'Higgins C.J., quoting *Olmstead v. United States*, 277 U.S. 438 (1928), Brandeis J. dissenting.

¹⁹⁷ *Norris v. A.G.*, *ibid.* McCarthy J. dissenting.

sodomy statute since the state failed to show any compelling reason to keep the law.¹⁹⁸

However, the Supreme Court reversed the decision.

In analyzing the decision in *Bowers*, it is important to note that the majority adopted an exceedingly narrow understanding of both the meaning of the Georgia sodomy law and the right at stake.¹⁹⁹ First, by challenging the legitimacy of the Georgia statute to criminalize homosexual sodomy only, the majority ignored the fact that the statute, which originally criminalized only male-to-male sodomy, was amended in 1968 to prohibit “any sexual act involving the sex organs of one person and the mouth or anus of another.”²⁰⁰ They relegate[d] the actual statute being challenged to a footnote because technically, the sex or status of the persons engaged in sodomy was irrelevant as a matter of law.

Second, although claim was made to the right of privacy, the majority chose to define the question of the constitutional inquiry much more narrowly. Justice White, delivering the opinion of the Supreme Court, stated that the question presented in this case was “whether the Federal Constitution confers a *fundamental right upon homosexuals to engage in sodomy* and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time.”²⁰¹ By formulating such a narrow question, Justice White insured the outcome in the case as there would be no support for such a right in previous cases involving family relationships, marriage, and procreation, as “none of the

¹⁹⁸ *Hardwick v. Bowers*, 760 F.2d 1202, 765 F.2d 1123 (1986). The majority relied on *Roe v. Wade*, 410 U.S. 113 (1973), and *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

¹⁹⁹ *Bowers*, *supra* note 125.

²⁰⁰ *Georgia Code Ann.*, 1984, § 16-6-2 (a).

²⁰¹ *Bowers*, *supra* note 125 at 190 [emphasis added].

rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy.”²⁰²

Neither was Justice White willing to ‘announce’ such a right. He stated:

“Announcing rights not readily identifiable in the Constitution’s text involves more than the imposition of the Justice’s own choices of values on the States and the Federal Government; the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. It was said that this category includes those fundamental liberties that are implicit in ‘the concept of ordered liberty’ [or] ‘deeply rooted in this Nation’s history and tradition.’”²⁰³

It was ‘obvious’ to the majority that “neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy.” because “proscriptions against that conduct have ancient roots.”²⁰⁴ The Court’s discretion in choosing the level of generality that it wished to apply to this case was also apparent in the majority’s interpretation of the Framers’ intent. For Justice White, the conclusion was easy – no *fundamental* right, no *strict* scrutiny.

This position of the Court was extensively criticized for its “preoccupation with ‘homosexual sodomy’” and “cramped reading of the issue before it.”²⁰⁵ In analyzing previous case-law rejected by the Court as irrelevant to Hardwick’s claim, dissenting Justice Blackmun pointed out that the Court “closed [its] eyes to the basic reasons why

²⁰²*Ibid.* citing such cases as *Carey v. Population Services International*, 431 U.S. 678, 97 S.Ct. 2010 (1977), *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817 (1967), as well as those cited by McCarthy J. in *Norris v. A.G.*, see *supra* note 195.

²⁰³*Ibid.* at 191, quoting *Palko v. Connecticut*, 302 U.S. 319, 58 S.Ct. 149 (1937), at 325-6 and *Moore v. East Cleveland*, 431 U.S. 494 (1977), 503.

²⁰⁴*Bowers, ibid.*

²⁰⁵W.N. Eskridge, “Hardwick and Historiography” (1999) *Univ. of Illinois L. Rev.* 631; *Bowers, ibid.* Blackmun J. dissenting, at 202.

certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause matter of state law."²⁰⁶ The Court appeared 'quite unwilling' to see that "this case [was] about 'the most comprehensive of rights and the right most valued by civilized men,' namely, the right to be left alone."²⁰⁷

The Court's dealing with the 'spatial right to privacy' is "symptomatic of its overall refusal to consider the broad principles that have informed [the Court's] treatment of privacy in specific cases."²⁰⁸ Blackmun, in his dissenting opinion, described this right as "perhaps the most 'textual' of the various constitutional provisions" because "the right of an individual to conduct intimate relationships in the intimacy of his or her *own home* is at the heart of the Constitution's protection of privacy."²⁰⁹ He interpreted the Fourth Amendment as attaching "special significance," "expressed guarantee," and "special protection" to "the right of people to be secure in their own [...] houses."²¹⁰

The majority, however, dismissed Hardwick's assertion that "the result should be different when homosexual conduct occurs in the privacy of the home." It stated: "otherwise illegal conduct is not always immunized whenever it occurs in the home."²¹¹ In support of its statement, the majority provided the examples of 'similar victimless crimes,' such as the possession of illegal drugs, firearms or stolen goods that "do not escape the law where they

²⁰⁶ *Bowers*, *supra* note 125 at 199, Blackmun J. dissenting.

²⁰⁷ *Ibid.* quoting *Olmstead v. United States*, 277 U.S. 438 (1928), Brandeis J. dissenting.

²⁰⁸ *Bowers*, at 206.

²⁰⁹ *Ibid.* at 208 (Blackmun, J., dissenting) citing *Stanley v. Georgia*, 394 U.S. 557, 89 S.Ct. 1243 (1969); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S.Ct. 2628 (1973); *Olmstead v. United States*, 277 U.S. 438, S.Ct. 564 (1928).

²¹⁰ *Bowers*, *ibid.* at 206-8.

²¹¹ *Ibid.*

committed at home.”²¹² However, such an equation between private, consensual sexual conduct and activities, which are ‘inherently dangerous,’ ‘stolen,’ or ‘physically dangerous’ is questionable.²¹³ A more sound parallel would be between homosexual sodomy in private and other acts of similar nature, such as, heterosexual intercourse (or sodomy) between unmarried individuals, masturbation or watching pornography, which would be punished if committed in public but are permitted in the privacy of one’s own home. The majority thus failed to take into proper account the nature of the restriction, that is, legislative motives and state interests in proscribing certain activities even if committed in private.

b) Homosexual Sodomy and Other Sexual Offences

The Court also announced that it was “unwilling to start down the road” of decriminalizing all voluntary sexual conduct between consenting adults, such as “adultery, incest, and other sexual crimes even though they are committed in the home.”²¹⁴ However, once again, the Court did not present “simple, analytically sound distinctions between certain private, consensual sexual conduct, on the one hand, and adultery and incest (the only two vaguely specific ‘sexual crimes’ to which the majority points), on the other.”²¹⁵ Such application of the ‘slippery slope’ argument is unsubstantiated because the core reasoning underlying the prohibition of adultery and incest is different from that submitted in support of sodomy statutes. As pointed out by the dissenting judges, “adultery is likely to injure third

²¹²*Ibid.*

²¹³*Ibid.* at 209.

²¹⁴*Ibid.* at 195-6.

²¹⁵*Ibid.* at 209, FN4, Blackmun J. dissenting.

persons,” while “the nature of familial relationships renders true consent to incestuous activity sufficiently problematic that a blanket prohibition of such activity is warranted.”²¹⁶ In fact, such a blanket prohibition is also contestable because clearly not all incestuous relationships are based on undue dependence and trust of one party, heinously abused by another.

The case of polygamy, another sexual offence, which was raised in *Bowers*, but was relied upon in later decisions against a homosexual, represents a more complex issue.²¹⁷ The heated debate on this issue touches closely upon freedom of religion as polygamists argue that it is the religious duty of every male Mormon to have more than one wife. The key objection is the unequal status of women in such relationships, who are inevitably subject to mistreatment and subordination. However, the non-recognition on the part of the state of such relationships may lead to certain undesirable consequences, as only the first wife is entitled to various legal rights.²¹⁸ Moreover, if the state opposes polygamy because such marriages subject women to unequal treatment, why then it would it not correct this situation by allowing women to have several husbands? It is an argument without merit. For even if polygamy were permitted, the risk of many more men or women entering such relationships is minuscule.

Most importantly, however, the majority in *Bowers* did not consider the experience of those twenty-five states, where sodomy laws were successfully revoked, and yet, other

²¹⁶ *Ibid.*

²¹⁷ *United States v. Reynolds*, 345 U.S. 1 (1953). See *Romer*, *supra* note 93, Scalia J. dissenting.

²¹⁸ *Ibid.*

sexual offences such as adultery, incest, or polygamy remained unchallenged. The majority's slippery slope arguments are therefore not ultimately persuasive.

c) Morality and Law

The justification for criminalizing sodomy, as viewed by the majority in *Bowers*, was "the presumed belief of the majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable."²¹⁹ The U.S. Supreme Court, like other courts in cases that were discussed earlier, accepted the authority of morality in law. However, in *Bowers*, unlike *Dudgeon* or other international cases, the majority of the Court was reluctant to consider all relevant facts that contributed to the repeal of sodomy laws in Europe and Tasmania (non-enforcement of the laws, increased tolerance and understanding of homosexuality, decriminalization of sodomy in other states, counter-productivity in the fight against the spread of HIV/AIDS, and, most importantly, detrimental effects on homosexuals). Rather the American judges, like their Irish counterparts in *Norris v. A.G.*, used such interpretive techniques as original intent, slippery slope, historical evidence, and moral and religious disapproval of homosexuality to uphold sodomy laws (applying such techniques very narrowly).²²⁰

By giving such weight to a majoritarian morality, the judges of the U.S. Supreme Court in *Bowers* showed their self-restraint and deference to democratic process. The development and progress of the law would therefore be dependant upon the will of the majority and

²¹⁹*Bowers, supra* note 125 at 196.

²²⁰For instance, in discussing Framer's intent, the fact that the Constitution also reveals other interests, such as prohibition of discrimination, was overlooked.

their representatives in legislatures. However, the more than two hundred year history of the U.S. Supreme Court proves that the Court has not always ‘remained in the wings’ of the political process and the nation’s ‘history and tradition.’ On at least one momentous occasion, the Court enforced policies then opposed by religion, history and majorities in several states, as the judges unanimously stood up against racial segregation in *Brown v. Board of Education* and later struck down the prohibition of miscegenation in *Loving v. Virginia*.²²¹ That is why, in his dissenting opinion in *Bowers*, Justice Stevens drew a parallel between anti-sodomy and racial discrimination cases.²²² In his view, because “miscegenation was once treated as a crime similar to sodomy [and] neither history nor tradition could save a law prohibiting miscegenation from constitutional attack ... the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding the practice.”²²³

Although it is unlikely that “either the length of the time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court’s scrutiny,” such facts would be important for a proportionality analysis as they signify the importance of particular moral beliefs to a given society.²²⁴ Undoubtedly, the morality of sexual behaviour lies at the core of most society’s moral beliefs. Nevertheless, the Court’s failure to challenge sodomy laws on a proportionality basis led to a very disappointing outcome.

²²¹*Brown v. Board of Education* 347 U.S. 483, 74 S.Ct. 686 (1954), *supra* note 22 and *Loving v. Virginia*, 388 U.S. 1, 87 S.Ct. 1817 (1967).

²²²*Bowers*, *supra* note 125, Stevens J. dissenting.

²²³*Ibid.* at 216, citing *Loving v. Virginia*, *supra* note 220.

²²⁴*Bowers*, *ibid.* at 210.

The Court's argument in *Bowers* would have been more coherent had the American judges followed the path of their Irish counterparts and relied on the "traditional Judeo-Christian values" that supposedly inspired the *Bill of Rights*. In his concurring opinion, Justice Burger makes this point by saying that "condemnation of [sodomy] practices is firmly rooted in Judaeo-Christian moral and ethical standards."²²⁵ Yet, in the American context, an argument based on religion was indefensible unless the Court was willing to break "the wall of separation" between Church and State it so had vigilantly constructed.²²⁶ The US Supreme Court therefore appears to have let morality into the law, but disregarded the fact that "moral concept[...]'s to a great degree are rooted in religious beliefs."²²⁷ It remains unclear why religion is 'out,' but morality is still 'in.' The irony and hypocrisy of this situation lies in the fact that it is impracticable to build "a wall of separation" between Church and State. To do so is to disconnect morality from law.

d) South African Sodomy Case

In recent years, however, various courts have been reluctant to uphold legislation, which is based solely on moral grounds. In a unique judgement of *The National Coalition for Gay & Lesbian Equality v. Minister of Justice*, the South African Constitutional Court declared that "the enforcement of private moral views of a section of the community, which are

²²⁵*Bowers, ibid.*, Burger J., concurring.

²²⁶For examples on how the U.S. Supreme Court draws a sharp line between church and state, see e.g. *Employment Division, Department of Human Resources of Oregon v. Smith*, 484 U.S. 872 (1990); *Lee v. Weisman*, 505 U.S. 577; 112 S.Ct. 2649 (1992); and *City of Boerne v. Flores*, 512 U.S. 507, 117 S.Ct. 2157 (1997). In *Lee v. Weisman*, the Court agreed with Deborah Weisman, a student of Jewish faith, who refused to participate in the prayer during graduate ceremony, despite the significance of the ceremony to all the rest of students. *Lee v. Weisman, ibid.*

²²⁷*Dudgeon, supra* note 51, Zekia J. dissenting.

based to a large extent on nothing more than prejudice, cannot qualify such as a legitimate purpose.”²²⁸ Unlike any other anti-sodomy case, where the will of the majority and the protection of societal morality were held to be legitimate reasons to enact the law, the South African Constitutional Court found “no valid purpose” for the maintenance of the law.²²⁹ Another example of rejecting morality in law comes from Canada, where in *Butler*, the Supreme Court upheld an existing obscenity law, stating that although the law had moral purposes in the past, it was no longer an instrument of the enforcement of private morality, but rather served neutral legitimate purposes (preventing harm to women).²³⁰

In his dissent in *Bowers*, Justice Blackmun, took a similar position as he argued that “the assertion that “traditional Judeo-Christian values proscribe the conduct involved [...] cannot provide adequate justification for *16-6-2*.”²³¹ He stated,

“That certain, but by no means all, religious groups condemn the behaviour at issue gives the State no licence to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends on whether the State can advance some justification for its law beyond its conformity to religious doctrine [...] Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect.”²³²

He also reminded the majority that “no matter how uncomfortable a certain group may make the majority of this Court, we have held that ‘[m]ere public intolerance or animus

²²⁸*The National Coalition for Gay & Lesbian Equality v. Minister of Justice*, [1998] (Const. Ct. of South Africa), para. 37 [hereinafter *South Africa Sodomy Case*].

²²⁹*Ibid.*

²³⁰*R v. Butler*, [1992] (C.S.R.).

²³¹*Bowers*, *supra* note 125 at 200, Blackmun J. dissenting.

²³²*Ibid.* quoting *Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879 (1984).

cannot constitutionally justify the deprivation of a person's physical liberty."²³³ In Blackmun's mind, sodomy laws did not pass the first prong of the proportionality test as he argued that to "justify invading the houses, hearts, and minds of citizens who choose to live their lives differently" seemed "no less intrusive, or repugnant [than] permitting searches to obtain evidence regarding the use of contraceptives," which was prohibited under previous case-law.²³⁴

Still, while the majority did not apply the proportionality test to strike down the Georgia statute, dissenters could only express the hope that "the Court will soon reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in [the American] Nation's history than tolerance of nonconformity could ever do."²³⁵ The 1996 *Romer v. Evans* decision might bolster this hope.

e) Romer v. Evans and Equal Protection Clause

In *Romer v. Evans*, the US Supreme Court struck down the Colorado *no-special-rights-to-gays* constitutional Amendment because it was "inexplicable by anything but animosity towards" homosexuals.²³⁶ Only ten years after *Bowers*, this was a major switch in the legal treatment of homosexuality. Surprisingly, however, the majority judges in *Romer* did not even mention that predecessor case – neither reversing it nor altering its outcome. Dissenting Justice Scalia was outraged: "If it is constitutionally permissible for a State to

²³³*Ibid.* at 212, citing *City of Cleburne v. Cleburne Living Center*

²³⁴*Bowers, ibid.* at 213, relying on *Griswold v. Connecticut, supra* note 195.

²³⁵*Bower, ibid.* at 214.

²³⁶*Romer, supra* note 93, at 633.

make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely *disfavouring* homosexual conduct.”²³⁷ He accused the majority of following the *Zeitgeist* rather than the court’s precedent, framers’ intent, and the nation’s history.

Neither did *Romer* constitute a *volte-face* in the Court’s treatment of majoritarian morality. The language of the majority actually hinted that if the legislation had been drawn more narrowly, it might have been upheld: “its sheers and breadth [were] so discontinuous with the reasons offered for it, that the amendment seems inexplicable by anything but animus towards the class of persons affected; it lacks a rational relationship to legitimate state interests.”²³⁸

A possible explanation for the *Romer* majority ignoring the Court’s earlier ruling in *Bowers* was the distinctiveness of constitutional grounds of the respective claims. While *Bowers* was argued as a privacy case, the challenge to the Colorado constitutional amendment was based on the *Equal Protection Clause* that “must at the very least mean that a bare [...] desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest.”²³⁹ This shift in attention from privacy to equality typifies a more general trend within the gay rights movement.²⁴⁰ As described earlier, equality is also the core theme of Dworkinian liberalism.

²³⁷*Ibid.* at 634

²³⁸*Ibid.*

²³⁹*Ibid.*

²⁴⁰See e.g. Eskridge, *The Case for Same-Sex Marriage: From Sexual Liberty to Civilized Commitment.* , *supra* note 130.

Yet, this approach of the U.S. Supreme Court clearly distinguishing between equality and privacy in gay rights cases is somewhat unique. As was noted in relation to the *ECHR* and *UNCHR* cases, the international tribunals refused to give separate consideration to the equality claim as they thought it was virtually the same as a privacy claim.²⁴¹ The South African Constitutional Court, although it examined all relevant claims individually, stated that there was an overlap between the concepts of privacy, dignity, and equality.²⁴² The distinctiveness of the South African approach, however, is also due to the fact that the 1996 Constitution, destined to ‘seal the coffin’ of *Apartheid*, specifically prohibits discrimination on the basis of sexual orientation.²⁴³

In *Bowers*, the equality argument was raised only by concurring and dissenting judges. Justice Powell, in his concurring opinion, expressed a concern over the fact that a prison sentence of long duration for private consenting homosexual conduct “would create a serious Eighth Amendment issue.”²⁴⁴ Justice Blackmun also suggested that “Georgia’s exclusive stress before this Court on its prosecution of homosexual activity despite the gender-neutral terms of the statute may raise serious questions of discriminatory enforcement [because] individuals singled out for prosecution are of the same sex as their partners.” He concluded that due to such sex-based discrimination, “a claim under the *Equal Protection Clause* may well be available.” But the equality argument was never fully developed in this case.

²⁴¹See *supra* note 51.

²⁴²*South Africa Sodomy Case*, *supra* note 228.

²⁴³*S.A. Const.*, *supra* note 60, art. 9.3.

²⁴⁴*Bowers*, *supra* note 125 at 197, Powell, J., concurring. He referred to the *Constitution of the United States of America*, Amendment VIII [1791]: “... *cruel and unusual punishment [shall not be] inflicted.*” However, with Powell having joined the majority, the scales were tipped in favour of a pro-sodomy law party.

f) Is Bowers Still a Valid Law?

Despite the fact that neither *Romer* nor any other case of the U.S. Supreme Court overruled *Bowers*, its application has been clearly disregarded by many state legislatures and courts that invalidated sodomy laws in their jurisdictions.

At the time when *Bowers* was decided, twenty-four states and the District of Columbia still had sodomy laws. Historically, sodomy was forbidden by the laws of the original thirteen States.²⁴⁵ In 1868, when the Fourteenth Amendment was ratified, all but five of the thirty-seven States in the Union had criminal sodomy laws.²⁴⁶ In fact, until 1961, all fifty States outlawed sodomy.²⁴⁷ The revocation of sodomy laws started in the northern states (in 1961, Illinois became the first state to repeal its sodomy laws) and was gradually moving south (with Georgia being a roadblock).²⁴⁸ Although that battle in the Supreme Court was after a pro-sodomy party, the trend nonetheless continued.

Today, only fifteen states maintain their sodomy laws. In 2001, three states have thus far repealed their sodomy statutes. Minnesota is the latest jurisdiction to do so as the state Attorney General's office let a deadline for appealing a district court judge's ruling holding the state's sodomy law unconstitutional pass on September 7, 2001.²⁴⁹ Earlier,

²⁴⁵"Survey on Constitutional Right to Privacy in the Context of Homosexual Activity" (1986) 40 U. Miami L.R. 521, at 525 (cited in the majority opinion in *Bowers*, *supra* note 125). See also Eskridge, "Hardwick and Historiography," *supra* note 205.

²⁴⁶"Survey on Constitutional Right to Privacy in the Context of Homosexual Activity," *ibid*.

²⁴⁷*Ibid*.

²⁴⁸In 1961, Illinois adopted the American Law Institute's Model Penal Code, which decriminalized adult, consensual, private, sexual conduct. *Illinois Criminal Code*, §§11-2, 11-3, 1961,

American Law Institute, Model Penal Code, § 213.2, 1962,

²⁴⁹"Minnesota Sodomy Law Goes Down by Default," online: Gay.com / PlanetOut.com Network <<http://gay.com/news/article.html?2001/09/04/1>> (date accessed: Sept. 10, 2001).

Arkansas judges ruled that the state's ban on consensual sex between adult, same-sex partners was unconstitutional.²⁵⁰ In May, Arizona Gov. Jane Hull "signed into law a bill that repeals the state's ban on cohabitation, oral sex and sodomy."²⁵¹ The Governor wrote: "the laws that are repealed ... are unenforced and unenforceable."²⁵² "Keeping archaic laws on the books does not promote high moral standards; instead, it teaches the lesson that laws are made to be broken," the Governor added.²⁵³ Thus, *Bowers* may be overcome once and if sodomy is decriminalized in the remaining fifteen states.

There is indeed a clear indication of a thawing of public opinion and increased understanding and tolerance among American legislative and judicial bodies towards homosexuality. Besides revoking sodomy laws, a growing number of American states, counties, cities, towns, and private companies grant legal recognition to same-sex partnerships including domestic partnership laws and registries, employment benefits, anti-hate crime laws, inheritance, and laws that prohibit discrimination on the basis of sexual orientation, gender identity and HIV/AIDS status. According to the *National Gay and Lesbian Task Force*, by January 2000, eleven states and the District of Columbia adopted legislation prohibiting sexual orientation discrimination in private employment, eighteen states and the District of Columbia prohibited sexual orientation discrimination in public employment, and an additional thirty-seven million Americans (14% of the total

²⁵⁰ *Ibid.* This decision was announced in April, 2001.

²⁵¹ "Arizona Governor Signs Sodomy Law Repeal," online: Gay.com / PlanetOut.com Network <http://content.gay.com/channels/news/heads/010509_arizona_sodomy.html?from=front_010513_5/14/01> (date accessed: June 19, 2001).

²⁵² *Ibid.*

²⁵³ *Ibid.*

population of the U.S.) were protected from such discrimination by *local* laws.²⁵⁴ Through a review of legislation ‘on the books’ in 2000, the recognition of non-traditionally defined families grew “by leaps and bounds” at the local level as many municipal governments set up some form of domestic registry (41) and offered some employment benefits to domestic partners of their employees (83).²⁵⁵ Since the publication of the *National Gay and Lesbian Task Force’s* report, the state of Vermont adopted groundbreaking legislation giving certain legal recognition to domestic partnerships.²⁵⁶ Also, the number of states, counties and cities that passed pro-gay legislation has dramatically increased.²⁵⁷

Nevertheless, despite all these positive developments at the state and local levels in the United States, at the federal level, progress was more ‘like one step forward two steps back.’ Controversies surround federal government policies in the military (e.g. the “don’t ask, don’t tell” policy), immigration (same-sex partnerships are not covered under immigration law) or family relationships (the *Defence of Marriage Act* imposing a ban on recognition of foreign same-sex marriages). In its recent ruling in *Boy Scouts of America v. Dale*, the US Supreme Court once again confirmed that its multifaceted interpretive techniques and puzzling doctrines are always ready to support the Court’s negative stance on homosexuality.²⁵⁸ As a result, Boy Scouts’ right to freedom of association was given a priority over non-discrimination and equality considerations as this publicly funded

²⁵⁴The NGLTF Report, *supra* note 189 at 4-5.

²⁵⁵*Ibid.* at 5-7.

²⁵⁶

²⁵⁷For more recent information gathered by the NGLTF, see <http://www.nglftf.org>.

²⁵⁸*Boy Scouts of America v. Dale*, 120 S.Ct. 2446 (2000) [hereinafter *Dale*].

organization could suspend the membership of those who are found to be homosexual.²⁵⁹ Interestingly, Boy Scouts in neighbouring Canada as well as in European countries have all rejected such policies as contrary to the ideals and principles the organization stands for.²⁶⁰

Unlike the *European Court of Human Rights* or *South African Constitutional Court*, which in their decisions referred to practices in other jurisdictions, the *U.S. Supreme Court* has been reluctant to consider foreign experience (this is somewhat similar to the Russian position). Rather, as the deconstruction of the majority reasoning in *Bowers* demonstrated, American judges can reach any conclusion they wish by choosing among sources of constitutional interpretation (that are not hierarchical), adopting a 'passive' or 'active' position in the democratic political process, and adjusting the level of generality in defining the constitutional issue at stake, framers' intent, precedent, etc.

Following such a comparison between the US and other jurisdictions, the argument in favour of the proportionality test is unequivocal. It is important to emphasize, however, that this test requires consideration of all relevant facts and a degree of empathy for those who claim the violation of their rights. The outcome in *Bowers* should have been the same as in *Dudgeon*, *Norris*, *Toonen*, and *South African Sodomy Case* as the American judges did not propose any substantially new or valid argument in favour of upholding the statute. The fact that the Georgia sodomy laws had moral grounds, as laws usually do, was only one of many factors in the case - most of which the majority of the U.S. Supreme Court

²⁵⁹*Ibid.*

²⁶⁰Canada is among counties leading the way in the cause of gay rights both on federal and even more so on provincial levels (especially Nova Scotia, Québec, Ontario, and British Columbia). See e.g. "GLBT Celebrates Canada Day," online: (date accessed:

ignored. In conclusion, although *Bowers* has never been overruled, its future is clear. However, it will be interesting to see which side will win this *Kulturkampf*, and whether it will be the Legislature or the Judiciary, which will further the advancement of gay rights on American soil.

4. Dworkin's Response to the Attack on Liberal Tolerance

In his essay on "Liberal Community," Dworkin criticizes the decision of the U.S. Supreme Court in *Bowers v. Hardwick* as a failure of the Court to understand the true meaning of liberal community of integrated citizens.²⁶¹ He uses this decision to demonstrate that communitarian arguments against liberal tolerance (and thus in support of *Bowers*) are profoundly erroneous. Step-by-step, he analyzes four such arguments - arguments, which also speak to natural law theory and the reasoning of the majority in *Bowers*.

First, Dworkin rejects the claim that democratic theory assigns the majority complete control of an ethical environment. He maintains that, a majoritarian argument, which is 'politically the most powerful argument against liberal tolerance' and the one, which prevailed in *Bowers*, has its limits. Dworkin argues that everyone should have the right to have a fair impact ("the same impact as any other single individual") – on an ethical environment because, according to Dworkin, this environment, just like an economic one, cannot be fixed in a 'winner-take-all fashion.' Integrity of the community, he concludes, will not suffer if the government allows citizens to make individual decisions

²⁶¹"Liberal Community," *supra* note 41.

that contribute to forming an overall ethical environment.²⁶² In Dworkin's view, collective decisions, should incorporate the views and concerns of all members of the community with equal consideration and respect.

Second, Dworkin dismisses the argument of 'legal paternalism,' which dictates that in "a genuine community, each citizen has a responsibility for the well-being of other members and should therefore use his political power to reform those whose defective practices will ruin their lives."²⁶³ In reaffirming his liberalist roots, Dworkin takes a leaf from Mill's 'harm principle,' condemning the use of state power to compel an individual to do or forbear certain lifestyles, which it is thought, would make his/her life happier. He argues that "political decisions about what citizens should be forced to do or prevented from doing must be made on grounds that are neutral among competing convictions about good and bad lives that different members of the community might hold."²⁶⁴

Dworkin further finds that the application of the argument of legal paternalism in *Bowers* was self-defeating. He enumerates two forms of paternalism: *critical* paternalism and *volitional* paternalism. Each is predisposed by two types of interests that are being coerced upon an individual to improve his/her own life. According to critical paternalism, to which communitarians usually appeal, the community is primarily concerned with how an individual "endorses [various components of his life] as serving his critical interests."²⁶⁵ By distinguishing between the acceptable and unacceptable circumstances of such endorsement, Dworkin shows that in the case of a homosexual,

²⁶²*Ibid.* at 481-5.

²⁶³*Ibid.*, at 479.

²⁶⁴Dworkin, *Foundations of Liberal Equality*, at 225.

²⁶⁵"Liberal Community," *supra* note 41.

even if an individual endorses the attempt of the state to change his or her sexuality, his or her choice would not be the result of a critical judgement, since homosexuality is prohibited and discouraged. He concludes: "Threats of criminal punishment corrupt rather than enhance critical judgment, and even if the conversions they induce are sincere, these conversions cannot be counted on as genuine in deciding whether [or not] the threats have improved someone's life."²⁶⁶ Such legal paternalism has been patently unsuccessful in its application.

Third, Dworkin rejects the claim that the stability and survival of the community are greatly dependant upon whether a given community achieves moral homogeneity.²⁶⁷ He shows that such a claim is contradicted by "the stubborn survival of famously tolerant political communities, such as Scandinavia."²⁶⁸ He further argues that by virtue of the fact that a community itself is comprised of people of different races, faiths, ethnicities, and sexual orientations, it is deeply implausible that any given community will "choose one faith or set of personal ambitions or ethnic allegiance, or one set of standards of sexual responsibility."²⁶⁹ In Dworkin's mind, therefore, even if one fundamental (intellectual) connection between everyone were to exist, it should have been based on a more tolerant and reasonable set of principles. He agrees that ethics must be objective, but concurs that "a morally homogenous community is the only possible anchor."²⁷⁰ For

²⁶⁶*Ibid.* at 486-7.

²⁶⁷*Ibid.* at 487 referring to Devlin's criticism of the Wolfenden Report. Devlin, *The Enforcement of Morals*, *supra* note 90. Wolfenden Report, *supra* note 57.

²⁶⁸"Liberal Community," *supra* note 41, at 487.

²⁶⁹*Ibid.*, at 497.

²⁷⁰*Ibid.*, at 490.

Dworkin, moral judgements are objective because they are reasonable and not because they are conventional.

Discussing arguments of the immorality of homosexuality, Dworkin asserts that the democratic political process should “sift through these arguments” to find reasonable ones and disregard those based on arbitrariness, prejudice, personal aversions, and rationalization.²⁷¹ This appeal to equal treatment of competing morals and exclusion of unreasonable prejudices from the democratic process is a critical difference, which would recommend Dworkinian liberalism as opposed to Finnis’ natural law for further application in Central and Eastern Europe. However, his liberalism is also not without fault.

5. A Critical Look at Dworkinian Liberal Equality

Critics of Dworkinian philosophy point out that his argument arises out of the fact that he narrows his definition of community to political community.²⁷² He does not offer a concrete answer to another important question, namely “what should be the reach of legislation, or of executive or judicial authority?”²⁷³ Moreover, his formula gives democratic assemblies too much power in “enforc[ing] a distinct, and fundamentally important, part of his community’s morality.”²⁷⁴ Whether justice will be achieved will solely depend on legislators’ wisdom and their ability and willingness to “sift through”

²⁷¹Dworkin, *Taking Rights Seriously*, *supra* note 43.

²⁷²He believes “that communal life is limited to political activities.” “Liberal Community,” *supra* note 41, at 487.

²⁷³P. Selznick, “Dworkin's Unfinished Task” (1989) 77 *Calif. L. Rev.* 505, at 506.

²⁷⁴*Ibid.* Dyzenhaus, at 308.

arguments against moral convictions and demands of the electorate-at-large in cases such as homosexuality.

Nevertheless, empirical evidence warrants a thorough consideration of Dworkin's deference to legislative bodies to enforce communal political morality (based solely on reasonable judgement and equal treatment of all competing morals). Legislatures in all democratic states are elected either upon a majoritarian ('first-past-the-post') or proportional representative formula, both of which mean that the majority of voters will determine the outcome of the election.²⁷⁵ The 'moral' composition of the legislature should logically therefore at least generally reflect the 'moral' composition of society. In such circumstances, imposing on the legislator the responsibility to act beyond or against the will of people seems undemocratic and unlikely to happen.

As Dworkin himself noted, legislators tend to rely on their own moral or religious beliefs when making laws. It is therefore doubtful that they will remain impartial in deciding upon issues that they themselves as well as the majority of people they represent firmly oppose. In Russia, where prejudice and discrimination against gays and lesbians continues to be the norm, such a resort to individual choice in legislative or judicial process might not be of much help to the position of sexual minorities. Dworkin's liberal community comprised of integrated individuals is therefore no more than a utopia. He himself does not deny the utopian character of his theory, but suggests that an integrated liberal community is an ideal he is trying to defend.²⁷⁶

²⁷⁵This is a general statement that excludes such practices as gerrymandering (*i.e.* drawing the lines of electoral districts in a certain way).

²⁷⁶"Liberal Community," *supra* note 41.

Indeed, despite its utopian nature, Dworkin's argument provides a crucial theoretical background for the gay rights cause in CEE countries as such a liberal community in general is also an ideal to strive for. Taking a neutral position, this would welcome any argument *pro* and *con* the further advancement of gay rights. In such a situation, the morality of the majority is the highest hurdle on the way to greater equality and understanding for gays and lesbians. In some cases it would appear to be an insurmountable challenge, the evidence of which becomes more and more apparent as gay rights around the world progress. The second approach, that is the advancement of gay rights beyond the decriminalization of sodomy (regardless of the morality of the majority), supported by such a powerful theory as Dworkinian liberal equality, must eventually be adopted by CEE countries not only because this is the cost of membership in a democratic world, but because it is the right thing to do.

CONCLUSION

During the transition from a Communist one-party state to a democratic rule-of-law state, Russia as well as other countries in Central and Eastern Europe borrowed heavily from the experience of Western democracies. They transplanted many centuries-old foreign ideas and doctrines into their soil. However, problems arise where the West does not have share an identical vision of certain contemporary problems. The case of homosexuality is one such example.

Homosexuality has long been viewed as wrong by morality, religion and the state. However, as society's attitudes toward homosexuality began to soften, leading to the decriminalization of sodomy in most European and other countries in the second half of the twentieth century, the issue of whether further progress is necessary arose. Western countries are themselves divided on this issue. In some jurisdictions, gay rights did not progress any further than the repeal of sodomy laws (the aforementioned mentioned 'first approach'). Other countries went a step further by giving homosexuals more rights, including the right to marry, adopt, and serve in army (the second approach).

These two approaches also had a theoretical dimension, as the further advancement of gay rights unleashed a heated debate among various scholars. Natural lawyers, previously struggling against the decriminalization of sodomy, have now united to stop any further progression of gay rights. Liberals, on the other hand, argued in favour of a more equal status for gays and lesbians thus celebrating the achievements of the gay rights movement in countries, which adopted the second approach. The underlying issue

separating these two viewpoints is whether the majority has the right to enforce its morality to the detriment of the minority. Natural Law theorists would argue that the majority does indeed have this right, whereas Liberals would argue not.

The CEE countries thus faced a dilemma as to which approach they should adopt. While historic, religious and moral attitudes towards homosexuality clearly speak in favour of the first approach, it is evident that the second approach represents the right choice for the newly minted democracies of the East.

Part I of this paper focused on the natural law position that homosexuality is inherently immoral. In his works, John Finnis, the leading contemporary natural lawyer, states that homosexuality is immoral based on, what he calls, “reflective, critical, publicly intelligible and rational arguments.”²⁷⁷ Among such arguments are the non-procreative nature of homosexual relationships and their perceived threat to the rest of society. However, both claims are without merit – the former due to logical incoherence and the latter, empirical disproof.

Moreover, Finnis’ description of the standard modern European position was found not only to be outdated (as is seen in continuing progress on gay rights), but also a misstatement of reality. Although the judges of the *European Court of Human Rights* agreed that morality was an important consideration in lawmaking, they stated that it would not save a law if outweighed by “[...] its detrimental effects [...] on the life of a person.”²⁷⁸ Morality was thus treated as one of many possible facts used by Courts in applying the proportionality test when examining claims of violations of rights. More

²⁷⁷“Law, Morality, and Sexual Orientation,” *supra* note 42.

²⁷⁸*Ibid.* See also *Norris*, and *Modinos supra* note 51.

importantly, seeing that in recent years the status of gays and lesbians in Europe has greatly improved, Finnis' theory (aimed at preventing precisely this from happening), has been a spectacular failure. The theory was also doomed to be inapplicable in CEE countries because it not only denied the existence of competing and conflicting morals, but legitimized institutional mistreatment of a significant portion of the population.

In Part II, the discussion concentrated on the works of the prominent liberal scholar, Ronald Dworkin, who argues in favour of liberal tolerance and presupposes further advancement of gay rights. In his mind, 'liberal community' is an ideal society in which all citizens do their utmost to reduce inequalities among their fellow members. According to Dworkin, however, this integration of individual and communal interests is limited to the political life of such community. He considers the U.S. Supreme Court decision in *Bowers v. Hardwick* to show how attempts at further integration failed.

In above-mentioned case, the sharply divided Court presumed that the majority of the Georgia electorate disfavoured homosexuality and therefore had a constitutional right to outlaw homosexual sodomy, which was not a fundamental right "implicit in 'the concept of ordered liberty' or 'deeply rooted in this Nation's history and tradition.'"²⁷⁹ The majority's narrow interpretation of this concept, history and the question of the constitutional inquiry enabled them to reach and justify their desired decision.

The Court's fear that the repeal of sodomy laws would lead to the decriminalization of other sexual offences was due to their failure to normatively evaluate such offences as well as give due consideration to the experiences of states and other countries where

²⁷⁹ *Bowers*, *supra* note 125.

sodomy laws had already been repealed. Therefore, when contemplating gay rights, CEE countries should pay special attention to the experiences of those Western democracies where gay rights found most support.

Moral disapproval of homosexuality by the majority remains the only true argument against the homosexual 'cause.' Therefore, despite its shortcomings, Dworkinian philosophy, which claims that equality is the most fundamental of all the principles of democracy should therefore be a great help when making decisions on furthering gay rights

In conclusion, all laws, whether based on 'morality' or not, must pass the proportionality requirement in order to satisfy democratic principles and values, which are universal, objective, and reasonable. Legislatures and courts would be well advised to follow the proportionality principle and attempt to place themselves in the position of the minority in question when deliberating such points. There is every reason to believe that responsible legislatures and courts, duly elected and appointed and governed by the principles of equality and proportionality will give a fair and proper hearing to the 'gay and lesbian cause' and that in less than the 500 years, which Ukrainian President Kuchma quoted, gay marriages will become a norm in all countries of the former Soviet Union as well as elsewhere.

APPENDIX I

Countries in Europe with a discriminatory age of consent for same-sex sexual activity²⁸⁰

	Age of Consent			Custodial Penalties	Section number of criminal code or applicable statute
	Female-female	Male-male	Opposite sex		
Albania	18	18	14	Up to 5 years	Art. 116
Austria	14	18	14	6 months to 5 years	Art. 209
Bulgaria	18	18	14	1 to 5 years	Art. 157 par. 3
Croatia	18	18	14	?	?
Cyprus ²⁸¹	None	18	13 or 16	Up to 7 years	Art. 171
Hungary	18	18	14	Up to 3 years	Art. 199
Ireland	15	17	15/17 ²⁸²	Up to 2 years	ss. 3, 4 C.L Act 1993
Liechtenstein	14	18	14	6 months to 5 year	Art. 208
Lithuania ²⁸³	14	18	14	3 to 8 years	Art. 122, par. 2
Moldova	16	16/18 ²⁸⁴	16	2 to 5 years	Art. 106
Portugal	16	16	14	Up to 2 years	Art. 175
Romania	18	18	14 ²⁸⁵	2 to 7 years	Art. 200, par. 2

²⁸⁰Age of consent laws vary considerably between countries, and are often complex in their details. This table shows only those aspects in which there is discrimination against same-sex acts. Situation of lesbians and gays in Council of Europe member states Doc. 8755 6 June 2000 Report Committee on Legal Affairs and Human Rights Rapporteur: Mr Csaba Tabajdi, Hungary, Socialist Group Source: Graupner, H. (1997). "Sexualität. Jugendschutz & Menschenrechte", Vienna: Peter Lang,

The changes have been introduced by the author following the harmonization of age of consent requirements in Estonia and UK. See *supra* notes 108 and 79 and accompanying text.

²⁸¹Minimum ages are for vaginal intercourse (16) and anal intercourse (heterosexual: 13, homosexual: 18).

²⁸²The age limit for heterosexual anal intercourse is 17; for vaginal intercourse, 17, except for women with boys, where it is 15; for all other heterosexual acts, 15; for all male homosexual acts, 17.

²⁸³Belarus, whose membership in the Council of Europe is suspended, has identical legislation.

²⁸⁴18 is only for male-male anal intercourse.

²⁸⁵The minimum age limit of 14 applies to the female partner in vaginal intercourse only.

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