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### Human Rights Proxy Wars

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# HUMAN RIGHTS PROXY WARS

Johanna Kalb<sup>†</sup>

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## INTRODUCTION

In 2009, the Ugandan Parliament considered a piece of legislation aimed at “strengthening the nation’s capacity to deal with emerging internal and external threats to the traditional heterosexual family” that would have made sodomy a crime punishable by death.<sup>1</sup> International reporting around the Anti-Homosexuality Bill of 2009 highlighted the role that American activists played in building support for the legislation.<sup>2</sup> The bill provoked international outcry

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1. The Anti-Homosexuality Bill, Memorandum § 1.1 (2009).

2. In March 2009, American conservatives, Scott Lively and Don Schmierere, together with African Stephen Langa, conducted the ‘Seminar on Exposing the Homosexual Agenda’ in Kampala, Uganda. Kapyra Kaoma, *Colonizing African Values: How the U.S. Christian Right is Transforming Sexual Politics in Africa*, POLITICAL RESEARCH ASSOCS. 29 (2012),

and was initially tabled under intense pressure from the donor community. Nonetheless, the debate over gay rights in Uganda continued “with American groups on both sides, the Christian right and gay activists, pouring in support and money.”<sup>3</sup> A revised version of the bill was signed into law by President Yoweri Museveni in February 2014.<sup>4</sup> The new legislation eliminated the threat of death, but still imposed harsh sanctions for homosexual behavior and required life imprisonment for persons found to have engaged in homosexual acts with minors, the disabled, and persons with AIDS.<sup>5</sup> The passage of the law, which was later struck down by the Ugandan Constitutional Court on technical grounds,<sup>6</sup> made Uganda the latest in a series of African countries to enact anti-gay laws over the last several years.<sup>7</sup>

This Article situates the Ugandan contest over gay rights within the broader discussion about state compliance with human rights norms. As many scholars have noted, human rights advocacy is increasingly a global endeavor.<sup>8</sup> Part I examines the growing body of theoretical and empirical work that focuses on the importance of changing the social and legal environment in which states operate as a way of changing their human rights behavior. In these accounts, a primary driver of state compliance is the repeated invocation and interpretation of new rights norms, until they are internalized and accepted. Formal state recognition of new rights accelerates the process, mobilizing impacted communities and their allies and increasing the cost of non-compliance for recalcitrant states.<sup>9</sup> In an increasingly integrated world, this process is self-reinforcing over time. The

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<http://www.politicalresearch.org/wp-content/uploads/downloads/2012/10/Colonizing-African-Values.pdf>. Lively and Schmierere met with Ugandan parliament members and other Ugandan politicians and received access to state media to promote their views. *Id.* On October 14, 2009, shortly after Lively’s trip, Ugandan MP David Bahati presented the Anti-Homosexuality Bill 2009 to parliament with the support of many religious leaders. See Tim Walker, *How Uganda Was Seduced by Anti-gay Conservative Evangelicals*, *GUARDIAN* (Mar. 14, 2014), <http://www.independent.co.uk/news/world/africa/how-uganda-was-seduced-by-anti-gay-conservative-evangelicals-9193593.html>. Under the proposed bill, gay rights activists could receive up to five years imprisonment, and anyone who failed to report an LGBT person to the authorities could receive up to six months in prison. Gays and lesbians could be sentenced to life imprisonment or death. Jeffrey Gettleman, *After U.S. Evangelicals Visit, Uganda Considers Death for Gays*, *N.Y. TIMES*, Jan. 4, 2010, at A1.

3. Jeffrey Gettleman, *After U.S. Evangelicals Visit, Uganda Considers Death for Gays*, *N.Y. TIMES*, Jan. 4, 2010, at A1.

4. Alan Cowell, *Uganda’s President Signs Anti-Gay Bill*, *N.Y. TIMES*, (Feb. 24, 2014), <http://www.nytimes.com/2014/02/25/world/africa/ugandan-president-to-sign-anti-gay-law.html>.

5. *Id.*

6. Jeffrey Gettleman, *Uganda Anti-Gay Law Struck Down by Court*, *N.Y. TIMES*, (Aug. 1, 2014), <http://www.nytimes.com/2014/08/02/world/africa/uganda-anti-gay-law-struck-down-by-court.html>.

7. See *infra* notes 130-33 and accompanying text (listing new legislative and constitutional developments).

8. See *infra* Part II.

9. See BETH SIMMONS, *MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS* 355 (2009).

more these rights ideas are normalized, “in the sense of being less contested and increasingly shared,”<sup>10</sup> the more they contribute to the behavioral shift among other international actors and states. Ultimately, a “norm cascade” develops, making it increasingly difficult for outliers to continue resisting adoption of the now widely accepted principle and compelling adherence to the increasingly dominant legal rule.<sup>11</sup>

As Part II explains, this social account of human rights advocacy has implications for the geography of domestic advocacy campaigns. If international consensus around a human rights norm puts pressure on outlier countries to adopt it, then one powerful way to win acknowledgment of a right domestically is to win acceptance of that right abroad. Each additional victory—each national or international acknowledgment of the right—moves the issue closer to the “tipping point” at which additional national adoptions become more likely.<sup>12</sup> Thus, advocates facing closely contested domestic battles can bolster their efforts by securing international support for the debated norm. Porous national boundaries and the efforts of transnational advocacy networks mean that domestic disputes over rights cannot be hermetically sealed from the broader international conversation.

Less well-recognized is the possibility of the converse. One strategy for slowing the development of an “irresistible” norm may be blocking mobilization towards its acceptance abroad. Increasing awareness of these dynamics is reshaping transnational advocacy, bringing in a new set of actors who seek to influence the global dialogue as an essential component of a successful domestic strategy. Their emergence demonstrates a growing understanding that shifting the norm internationally is meaningful not just on its own terms, but also in the way it contributes to the framing of the domestic conversation. Part III describes the development of a transnational counter-network that borrows many of the traditional transnational advocacy strategies, but seeks to use them both to prevent the normalization of equality for gays and lesbians and to undermine the efficacy of the human rights regime more generally.

Through this lens, the escalation of the debate in Uganda can be viewed as a cultural “proxy war,”<sup>13</sup> wherein the opposing sides of the U.S. culture wars fight

10. Thomas Risse & Stephen C. Ropp, *International Human Rights Norms and Domestic Change: Conclusions*, in *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* 234, 266 (Thomas Risse et al. eds., 1999).

11. *Id.*

12. See Margaret E. McGuinness, *Medellin, Norm Portals, and the Horizontal Integration of International Human Rights*, 82 *NOTRE DAME L. REV.* 755, 766 (2006) (citing MALCOLM GLADWELL, *THE TIPPING POINT* 12-13 (2002)).

13. The war metaphor has been invoked by other authors describing these conflicts, picking up on the language of the “culture wars” in American domestic politics. See KAPYA KAOMA, *AMERICAN CULTURE WARRIORS IN AFRICA: A GUIDE TO THE EXPORTERS OF HOMOPHOBIA AND SEXISM* (2014); Christopher McCrudden, *Transnational Culture Wars*, 13 *INT’L J. CONST. L.* 434 (2015). I use the term “proxy wars” to highlight the power dynamics at play in these transnational network disputes.

out the same dispute on new terrain. And as is the case in military conflicts, these proxy battles can also have serious and damaging consequences for their hosts. Part IV challenges the generally positive and progressive narrative of transnational human rights advocacy by examining the social, institutional, and individual consequences of rival network activity. By drawing on powerful anti-gay sentiments, autocratic leaders can delegitimize international criticisms of their rights practice with respect to gays and lesbians and undermine the moral authority of the international legal system more generally. This final Part concludes by beginning to highlight some of the implications of counter-network activity for human rights advocates.

### I. THE GLOBAL CONTEXT OF HUMAN RIGHTS COMPLIANCE

International legal theorists have long been preoccupied with the question of why states comply with international human rights law. As Andrew Moravcsik explains, human rights law is fundamentally different from most other types of institutionalized international cooperation.<sup>14</sup> Unlike most kinds of international law which regulate interactions between states, human rights law provides external constraints that govern the ways in which a national government behaves inside its own borders.<sup>15</sup> Additionally, human rights law enables individuals to enforce legal norms both against states and beyond their borders through international courts and other quasi-judicial bodies.<sup>16</sup>

One view of the question of compliance places states at the center of the narrative. These theories seek to explain state observance of human rights law as a product of their interactions with each other.<sup>17</sup> According to realist theorists, human rights commitments are simply a reflection of hegemonic states' power and interest.<sup>18</sup> Thus, weaker states will accept human rights when coerced by more powerful states, while powerful states will accept human rights commitments in order to expand their global influence.<sup>19</sup> Liberal theory, by contrast, "emphasizes states' rational pursuit of national interests, interests which

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14. Andrew Moravcsik, *The Origins of Human Rights Regimes: Democratic Delegation in Postwar Europe*, 54 INT'L ORG. 217, 217-18 (2000). See also Susan D. Burgerman, *Mobilizing Principles: The Role of Transnational Advocates in Promoting Human Rights Principles*, 20 HUM. RTS. Q. 905, 906 (1998) ("Regimes of a moral or ethical nature do not conform to a model of cooperation based on functional contracts among states, such as would explain cooperation with trade or telecommunications regimes. Moral regimes are not self-enforcing, are not amenable to strategies based on reciprocity, and offer no intrinsic material incentives for cooperative behavior.").

15. Moravcsik, *supra* note 14, at 217.

16. Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1842 (2002).

17. McGuinness, *supra* note 12, at 764.

18. Helfer, *supra* note 16, at 1842.

19. *Id.*

reflect the preferences of their component constituencies and the ‘domestic and transnational social context’ in which they are embedded.”<sup>20</sup> Liberal theorists argue that states will adopt human rights commitments as a way of “reduc[ing] the political uncertainty that is an inevitable byproduct of popular sovereignty.”<sup>21</sup> For new democracies, sensitive to the possibility of backsliding, adopting international commitments can be a way of “locking in” democratic rule through the enforcement of human rights.<sup>22</sup>

As many scholars have noted, these accounts fail to explain a significant amount of observable state behavior, including changes in state behavior that precede formal adoption of treaty commitments.<sup>23</sup> Ryan Goodman and Derek Jinks contend that both realist and liberal approaches overemphasize the processes of persuasion and coercion and underestimate the impact of acculturation, which they define as “the general process by which actors adopt the beliefs and behavioral patterns of the surrounding culture.”<sup>24</sup> This occurs both through social and cognitive pressure, either real or imagined.<sup>25</sup> Goodman and Jinks, and other “constructivist” accounts of transnational behavior focus “on the role of ideas, norms, knowledge, culture and argument in politics, stressing in particular the role of collectively held or ‘intersubjective’ ideas and understandings on social life.”<sup>26</sup> As Margaret McGuinness has explained, these theories are helpful in understanding human rights compliance because they “offer[] a method for analyzing social interactions of states, NGOs, and individuals with one another and with legal structures that takes into account the power of norms and ideas,” and they provide “a framework for assessing the ways in which norms, ideas, and actors interact with domestic processes.”<sup>27</sup>

Both political scientists and legal theorists have contributed to theorizing how the acculturation process actually works. The most influential account is Thomas Risse’s and Kathryn Sikkink’s “spiral model” of human rights change, in which states move through five stages of behavior from repression to rule-

20. *Id.* at 1842-43 (footnote omitted).

21. *Id.* at 1843.

22. Moravcsik, *supra* note 14, at 220. See also Tom Ginsburg, *Locking in Democracy: Constitutions, Commitment, and International Law*, 38 N.Y.U. J. INT’L L. & POL. 707, 712 (2006) (finding that new democracies are “more open” to customary international law and “treaty-making structures that build on the logic of precommitment”).

23. See, e.g., McGuinness, *supra* note 12, at 764-67.

24. Ryan Goodman & Derek Jinks, *How to Influence States: Socialization and International Human Rights Law*, 54 DUKE L.J. 621, 626 (2004).

25. *Id.*

26. Martha Finnemore & Kathryn Sikkink, *Taking Stock: The Constructivist Research Program in International Relations and Comparative Politics*, 4 ANN. REV. POL. SCI. 391, 392 (2001).

27. McGuinness, *supra* note 12, at 765. Over a decade later, “the spiral model remains the reference for most studies on multi-level human rights politics and compliance with human rights norms.” Anja Jetschke & Andrea Liese, *The Power of Human Rights a Decade After: From Euphoria to Contestation*, in THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE 26, 41 (Thomas Risse et al. eds., 2013).

consistent behavior.<sup>28</sup> The spiral model incorporates the tactics of coercion, persuasion and acculturation at different stages.<sup>29</sup> “An instrumental logic of norm recognition dominates the early stages of the process as state actors are forced . . . to pay homage to human rights norms without truly internalizing them.”<sup>30</sup> Norm compliance deepens in the later stages as domestic policy makers are “convinced through argumentation that acting in accordance with human rights norms is the right thing to do.”<sup>31</sup>

In articulating the spiral model, Risse and Sikkink also began to identify the different agents of the acculturation process. They suggested that collaboration between national and international actors pushes the state through each stage of the spiral.<sup>32</sup> Internally, NGOs develop “‘compliance constituencies’ to pressure government officials to adhere to international commitments.”<sup>33</sup> Externally, “transnational advocacy networks” form, consisting of individuals, groups, and domestic and international government agencies and officials, who “are bound together by shared values, a common discourse, and dense exchanges of information and services.”<sup>34</sup> By linking up with these networks, domestic advocates can create “boomerang” patterns of influence on states from above and below.<sup>35</sup>

This acculturation phenomenon is self-reinforcing over time. Martha Finnemore and Kathryn Sikkink explain that “[t]he more these principled ideas become norms in the sense of being less contested and increasingly shared, the

28. Thomas Risse & Kathryn Sikkink, *The Socialization of International Human Rights Norms into Domestic Practices*, in *THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE* 1, 20 (Thomas Risse et al. eds. 1999). Under this model, the state engages sequentially in (1) state norm violation; (2) denial of norm legitimacy; (3) tactical concessions; (4) acknowledgement of the legitimacy of norms; and (5) institutionalization of norm consistent behavior. *Id.*

29. *Id.* at 11. These five stages take the state through three phases of socialization, which include (1) “adaptation and strategic bargaining;” (2) moral consciousness-raising, argumentation, and persuasion; and (3) “institutionalization and habituation.” *Id.* Although Risse and Sikkink did not use the language of acculturation, Jinks and Goodman note that the processes they describe are represented in the spiral model of compliance. See Goodman & Jinks, *supra* note 24, at 637 n.46.

30. Kelly Kollman, *Same-Sex Unions: The Globalization of an Idea*, 51 INT’L STUD. Q. 329, 331 (2007).

31. *Id.*

32. Risse & Sikkink, *supra* note 28, at 33.

33. Helfer, *supra* note 16, at 1845 (quoting Miles Kahler, *Conclusion: The Causes and Consequences of Legalization*, 54 INT’L ORG. 661, 675 (2000)).

34. MARGARET KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* 2 (1998).

35. Helfer, *supra* note 16, at 1846 n.55 (quoting Risse & Sikkink, *supra* note 28, at 18) (“According to Risse and Sikkink: ‘A boomerang pattern of influence exists when domestic groups in a repressive state bypass their state and directly search out international allies to try to bring pressure on their states from outside. National opposition groups, NGOs, and social movements link up with transnational networks and INGOs [international nongovernmental organizations] who then convince international human rights organizations, donor institutions, and/or great powers to pressure norm-violating states.’”).

more international actors and states sign up to them.”<sup>36</sup> Ultimately, a tipping point is reached and a norm cascade develops. A norm cascade occurs “[w]hen the lowered cost of expressing new norms encourages an ever-increasing number of people to reject previously popular norms, to a ‘tipping point’ where it is adherence to the old norms that produces social disapproval.”<sup>37</sup> This happens domestically as the different actors within a state gradually come to accept and enact a new norm<sup>38</sup> but it can also happen regionally, or even globally, as an increasing number of states internalize, acknowledge, and comply with it.<sup>39</sup> The more states adopt a particular norm, the more difficult that norm is to resist for the outliers.<sup>40</sup>

The human rights treaty regimes—and their institutions—are important agents in this process of state acculturation.<sup>41</sup> As Beth Simmons has illustrated, even governments that don’t intend to comply still ratify human rights treaties, especially when other countries in their region begin to do so, “because they want to enjoy praise and acceptance and avoid criticism,”<sup>42</sup> and because they underestimate the cost of ratification. While these ratifications are the product of strategy, not acculturation, the commitments once made can take on a life of their own. Ratification of the treaty can work to mobilize and focus domestic constituencies for compliance, by helping to focus and legitimate rights claims,<sup>43</sup> and increase the likelihood that mobilization is successful, by making new strategies, allies, and fora available to advocates for social change.<sup>44</sup>

In particular, treaty ratification opens up a new set of fora for articulating rights claims. Transnational legal process theory suggests that states come to obey international law as a result of repeated exposure to and interaction with other actors in the international legal system.<sup>45</sup> The interaction of transnational

36. Risse & Ropp, *supra* note 10, at 266.

37. CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 38 (1997) (Sunstein offers as examples, “the attack on apartheid in South Africa, the fall of Communism, the election of Ronald Reagan, the rise of the feminist movement, and the current assault on affirmative action.”).

38. McGuinness, *supra* note 12, at 766.

39. See Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 *INT’L ORG.* 887, 895 (1998).

40. See *id.* at 902 (“[A]t the tipping point . . . enough states and enough critical states endorse the new norm to redefine appropriate behavior for the identity called ‘state’ or some relevant subset of states (such as a ‘liberal’ state or a European state).”).

41. See Risse & Ropp, *supra* note 10, at 276-77 (arguing that joining international agreements is an important step towards domestic internationalization of human rights norms).

42. SIMMONS, *supra* note 9, at 355.

43. *Id.* at 139.

44. *Id.*

45. Harold Hongju Koh, *Why Do Nations Obey International Law?*, 106 *YALE L.J.* 2599, 2646 (1997). See also Ann Marie Clark, *The Normative Context of Human Rights Criticism: Treaty Ratification and U.N. Mechanisms*, in *THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE* 125 (Thomas Risse et al. eds., 2013) (finding that ratification in conjunction with U.N. targeting was sometimes associated with improvements in



actors provokes and “forces an interpretation or enunciation of the global norm applicable to the situation,”<sup>46</sup> which is then invoked by domestic advocates until it is successfully internalized into the legal and political systems of the targeted state party.<sup>47</sup> Through this “repeated cycle of interaction, interpretation, and internationalization,” international law begins to “acquire[] its stickiness,” and nation-states eventually “come to ‘obey’ international law out of perceived self-interest.”<sup>48</sup>

This social account of human rights compliance has implications for advocacy. If international consensus around a human rights norm puts pressure on outlier countries to adopt it, then a powerful way to create pressure for acknowledgment of a right domestically is to begin to win acceptance of that right abroad. Each additional victory—each national or international acknowledgment of the right—moves the issue closer to the tipping point at which additional national adoptions becomes more likely.<sup>49</sup> In the next Part, I demonstrate how these dynamics have shaped the advocacy strategies in the battle over same-sex relationship recognition.

## II. TRANSNATIONAL ADVOCACY NETWORKS AND HUMAN RIGHTS COMPLIANCE

As the previous Part demonstrates, the human rights environment in which a state operates shapes its choices and behaviors. A large literature documents cases in which progressive transnational advocacy networks (TANs) have been able to take advantage of the mechanisms of acculturation to promote domestic and global change.<sup>50</sup> TANs in this story, and in most of the scholarship to date, have been viewed as positive agents of change, helping to move countries

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human rights compliance).

46. Koh, *supra* note 45, at 2646.

47. Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 204 (1996).

48. Koh, *supra* note 45, at 2655.

49. See Sunstein, *supra* note 37, at 38; Finnemore & Sikkink, *supra* note 39, at 901; Laurence R. Helfer, *Nonconsensual International Lawmaking*, 2008 U. ILL. L. REV. 71, 124 (2008) (“[N]orm-affirming events eventually [reach] a tipping point beyond which a preference for rule-compliant behavior predominates.”). An extensive literature in law, political science, and sociology now documents the spread of a wide range of policies, from country to country, within regions, and globally. A few examples include KATERINA LINOS, *THE DEMOCRATIC FOUNDATIONS OF POLICY DIFFUSION: HOW HEALTH, FAMILY AND EMPLOYMENT LAWS SPREAD ACROSS COUNTRIES* (2013); SIMMONS, *supra* note 9; Finnemore & Sikkink, *supra* note 39; Judith Kelley, *Assessing the Complex Evolution of Norms: The Rise of International Election Monitoring*, 62 INT’L ORG. 221 (2008); Elizabeth Herger & Sharon E. Preves, *National Politics as International Process: The Case of Anti-Female Genital Cutting Laws*, 34 L. & SOC. REV. 703 (2000).

50. See generally Keck & Sikkink, *supra* note 34; SIDNEY TARROW, *THE NEW TRANSNATIONAL ACTIVISM* (2005); CLIFFORD BOB, *THE INTERNATIONAL STRUGGLE FOR NEW HUMAN RIGHTS* (2009); Richard Price, *Reversing the Gun Sights: Transnational Civil Society Targets Land Mines*, 52 INT’L ORG. 613 (1998).

(usually in the global South) through the spiral model towards human rights compliance. For activists in the target country, building TANs is viewed as a way of drawing the “attention of international colleagues to their situation” which “increas[es] their visibility and leverage” and may provide them with some protection from government retaliation.<sup>51</sup> Additionally, “material resources, expertise, and skills training flow into the country . . . furthering their organizational interests and adding to their political capital.”<sup>52</sup> Less attention has been focused on motivations driving activists from the global North.<sup>53</sup> Finnemore and Sikkink have described these actors as “norm entrepreneurs,” motivated by “altruism, empathy, [and] ideational commitment.”<sup>54</sup> These partnerships may also lend credibility to the work of advocates in the North by allowing them to argue that they are working with, and not just for, their southern counterparts.

Early accounts of the spiral model suggested that norm diffusion, while uneven, was ultimately inevitable.<sup>55</sup> In their early case studies, Risse and Stephen Ropp concluded that the spiral model functions differently in different places, and can stall at various stages.<sup>56</sup> They attributed the different paths of progress through the model to the presence of national blocking factors, which are “domestic forces that prevent the spiral model from moving forward toward the final stage of rule-consistent behavior.”<sup>57</sup> These blocking factors include “countervailing national norms and value structures which emphasize[] sovereignty and domestic cohesion more than human rights principles.”<sup>58</sup> Risse and Ropp also assumed, however, that blocking factors would only be temporarily successful in immunizing the state from progressive and rights-enhancing transnational pressure.<sup>59</sup> Subsequent experience demonstrated that some norms did ultimately fail to diffuse and a new line of scholarship began to explore the circumstances under which norms failed to take hold. Early “failure”

51. Burgerman, *supra* note 14, at 910.

52. *Id.*

53. Following Thomas Kelley, I use this term very generally to refer to the group of wealthy, Western countries that have historically set the development agenda and controlled its institution. See Thomas Kelley, *Wait! That's Not What We Meant by Civil Society!: Questioning the NGO Orthodoxy in West Africa*, 36 BROOK. J. INT'L L. 993, 993 n.2 (2011).

54. Finnemore & Sikkink, *supra* note 39, at 898.

55. As Risse and Ropp explained in their 2013 assessment of the spiral model's accuracy, they “did not pay sufficient attention to instances in which states got ‘stuck’ somewhere in the process or even experienced backlash.” Thomas Risse & Stephen C. Ropp, *Introduction and Overview*, in *THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE* 3, 11 (Thomas Risse et al. eds., 2013).

56. Risse & Ropp, *supra* note 10, at 258-66.

57. Helfer, *supra* note 16, at 1899.

58. Risse & Ropp, *supra* note 10, at 261.

59. *Id.* at 262 (Statement of Risse and Ropp: “[W]e assumed . . . that arguing and discursive interactions had a ‘unidirectional’ impact in that human rights advocates would always have the better arguments and that these arguments would eventually carry the day.”). See Risse & Ropp, *supra* note 55, at 35.

studies focused on norm characteristics that cause a norm to diffuse or fail<sup>60</sup> and the factors within the state that make it more or less receptive to transnational advocacy.<sup>61</sup> More recently, scholars have begun to examine the role that TANs can play in blocking norm adoption in target states.<sup>62</sup>

Over the last two decades, a new international network emerged that challenges the account of transnational advocacy as exclusively dedicated to enhancing a human rights agenda, and that views its agents as “white knights.”<sup>63</sup> While activists in the new network share some of the human rights advocates’ operating strategies, they aim to disrupt developing transnational human rights norms and law. Rather than linking transnational and national allies to promote human rights compliance, this network is focused on helping domestic actors enhance national blocking factors as a way of building up resistance to shifting transnational influence. Because its purpose and strategies are oppositional, designed primarily to deconstruct the international legal regime and the norms it promotes, I use the term “counter-network” when describing these organizations and their activities.<sup>64</sup>

The emergences of counter-networks make sense under prevailing theories of international human rights compliance. Given the power of commitment and

60. See Finnemore & Sikkink, *supra* note 39, at 905-09.

61. See, e.g., Ann E. Towns, *Norms and Social Hierarchies: Understanding International Policy Diffusion “From Below”*, 66 INT’L ORG. 179, 183 (2012) (describing norm acceptance as a function of the state’s social hierarchy).

62. Anders Blok, *Contesting Global Norms: Politics of Identity in Japanese Pro-Whaling Countermobilization*, 8 GLOBAL ENVTL. POL. 39 (2008); Clifford Bob, *The Global Right Wing and Theories of Transnational Advocacy*, 48 THE INT’L SPECTATOR 71 (2013); Phillip M. Ayoub, *With Arms Wide Shut: Threat Perception, Norm Reception, and Mobilized Resistance to LGBT Rights*, 13 J. HUM. RTS. 337 (2014).

63. SIMMONS, *supra* note 9, at 356 (noting that a handful of scholars have begun to document the activities of these new networks). See also CLIFFORD BOB, *THE GLOBAL RIGHT WING AND THE CLASH OF WORLD POLITICS* (2012) (describing the emergence and activities of what he calls the “Baptist-burqa” network); KAOMA, *supra* note 13 (2014) (documenting the activity of conservative American advocacy organizations in Africa); Louise Chappell, *Contesting Women’s Rights: Charting the Emergence of a Transnational Conservative Counter-network*, 20 GLOBAL SOC’Y 491, 492 (2006) (providing an early account of this network, describing the formation of a “transnational conservative patriarchal network” that works to disrupt the international advocacy efforts of women’s rights advocates).

64. My account of counter-networks builds upon the literature of domestic counter-movements. Tahi Mottl defines a countermovement as “a particular kind of protest movement which is a response to the social change advocated by an initial movement,” or as a “conscious, collective, organized attempt to resist or to reverse social change.” Tahi L. Mottl, *The Analysis of Countermovements*, 27 SOC. PROBS. 620, 620 (1980). To sociologist Richard P. Gale, a countermovement is a “complex, or formal, organization seeking to oppose movement objectives.” Richard P. Gale, *Social Movements and the State: The Environmental Movement, Countermovement and Government Agencies*, 29 SOC. PERSP. 202, 205 (1986).

In defining this network as a “counter-network,” I differ from Bob. I agree with his assessment that these are “powerful policy networks . . . rooted in long-standing, ideologically opposed blocs,” see BOB, *supra* note 63, at 19-20, but as I will explain, the transnational network activities of these policy networks are primarily reactive, designed to disable and dismantle the mechanisms of traditional TANs.

acculturation in reshaping state behavior, domestic advocates seeking to resist international influence should also attempt to block mobilization towards that norm abroad. In the last two decades, a new network of American conservative religious and legal organizations<sup>65</sup> has begun to invest heavily in international and transnational advocacy.<sup>66</sup> In international and regional institutions, these actors work to contest and endeavor to destabilize developing soft law norms. At the national level, they work both in the United States and abroad to build up resistance to “foreign” human rights norms and to promote the adoption of explicitly contradictory national and subnational laws. In so doing, the organizations in this network expose and exploit gaps between formal acknowledgment of human rights law and deeper commitment to human rights values.

The next Part introduces and illustrates the operation of this counter-network through a description of the strategies its actors have adopted to block the legal reforms advancing equality for gays and lesbians. The counter-network has adopted the same mechanisms that have been demonstrated to lead to human rights compliance as a way of trying to contest, slow, and block acceptance of these norms. I begin with a brief account of the changing landscape of law, both national and international, governing same-sex behavior and relationships and a description of the role that transnational advocacy has played in helping to develop and diffuse a more tolerant, rights-protective regime. I then describe the development of a transnational counter-network, launched to disrupt the developing norm cascade and examine the strategies it has employed, both in the United States and abroad.

### III. TRANSNATIONAL ADVOCACY FOR GAY AND LESBIAN RIGHTS

Over the last sixty years, there has been a revolution in civil rights protections for gays and lesbians in countries around the globe. Transnational advocacy networks have been widely credited with helping to generate the norm cascade responsible for this rapid rights expansion.

Until the early 1980s, homosexual intercourse was legal in only a handful of countries, mostly in Western Europe.<sup>67</sup> The decriminalization trend accelerated

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65. To be clear, while the American members of the counter-network are conservative legal and religious organizations, they represent only a fraction of the universe of such organizations and institutions. See KAPYA KAOMA, *GLOBALIZING THE CULTURE WARS* 6-8 (2009), <http://www.politicalresearch.org/wp-content/uploads/downloads/2012/11/africa-full-report.pdf> (describing the emergence of counter-network groups in the broader context of Christian outreach in sub-Saharan Africa).

66. See generally BOB, *supra* note 63 (describing the emerging litigation strategies of these groups).

67. This historical account draws from Aaron Xavier Fellmeth, *State Regulation of Sexuality in International Human Rights Law and Theory*, 50 WM. & MARY L. REV. 797 (2008). Denmark, Poland, Switzerland, and Sweden decriminalized homosexual conduct in the 1930s and 1940s. Most of greater Europe followed in the 1960s and 1970s. *Id.* at 817. England and

rapidly following two developments in Europe. First, in the early 1980s, the Parliamentary Assembly of the Council of Europe and the European Parliament adopted measures designed to promote more equal treatment of gays and lesbians in member states.<sup>68</sup> Also in 1981, the European Court of Human Rights (ECtHR) decided *Dudgeon v. United Kingdom*, decriminalizing sodomy.<sup>69</sup> The ECtHR judgment bound all forty-seven member states of the Council of Europe.

"A steady stream of liberalizations followed *Dudgeon* over the next two decades,"<sup>70</sup> as domestic advocates drew on the developing international human rights norms to frame domestic challenges to laws banning sodomy. Northern Ireland was the first country to decriminalize,<sup>71</sup> "while France repealed its law making homosexuality an aggravating circumstance in the offense of public indecency."<sup>72</sup> Cuba and New Zealand decriminalized same-sex intercourse in 1984 and 1986, respectively.<sup>73</sup> After the dissolution of the Communist bloc in the 1990s, almost all of the former Soviet Republics of Eastern Europe, the Baltics, and several in Central Asia adopted decriminalization laws.<sup>74</sup>

The trend continued to expand beyond Europe with the UN Human Rights Committee's 1994 decision in *Toonen v. Australia*,<sup>75</sup> finding that Australian prohibitions on homosexual intercourse constituted a violation of the privacy, equal protection, and non-discrimination provisions of the of the International Covenant on Civil and Political Rights.<sup>76</sup> Following *Toonen*, Australia decriminalized in 1994, Albania and Cyprus in 1995,<sup>77</sup> Colombia<sup>78</sup> and Iceland<sup>79</sup>

Wales decriminalized sodomy in 1967, with Canada following in 1969, and Scotland in 1980. *Id.* at 817-18.

68. In 1981, the Parliamentary Assembly of the Council of Europe encouraged member states to decriminalize homosexual intercourse and ensure equal treatment for gays and lesbians. This was followed in 1984 by the European Parliament's adoption of recommendations to end workplace discrimination based on sexual orientation. As Fellmeth explains, "These resolutions established the first Europe-wide public policy of treating some kinds of discrimination based on sexual orientation as inconsistent with state policies respecting personal freedoms and the limits of governmental regulation." *Id.* at 818.

69. *Dudgeon v. United Kingdom*, App. No. 7525/76, 4 Eur. H.R. Rep. 149, ¶ 60 (1981).

70. Fellmeth, *supra* note 67, at 819.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. U.N. GAOR, Hum. Rts. Comm., 50th Sess., Comm'n No. 488/1992, at 226, U.N. Doc. A/49/40 (Sept. 21, 1994).

76. *Id.*

77. See Int'l Gay & Lesbian Ass'n, Euroletter No. 44, Sept. 1996 (Alb. and Cyprus).

78. The Colombian Constitutional Court struck down the law criminalizing adult homosexual sex. See Corte Constitucional [C.C.] [Constitutional Court], abril 15, 1996, Sentencia C-098/96, Gaceta de la Corte Constitucional [G.C.C.] (Colom.).

79. See generally Int'l Gay & Lesbian Ass'n, *supra* note 77 (Iceland).

in 1996, and Ecuador<sup>80</sup> and China<sup>81</sup> in 1997. In 1998, the South African Constitutional Court, referencing *Toonen*, struck down a similar law on constitutional grounds.<sup>82</sup>

In 2000, the Council of Europe's Parliamentary Assembly announced a policy of accepting for membership only states that did not criminalize same-sex intercourse. Soon thereafter, Romania decriminalized homosexual intercourse on threat of sanctions from the Council of Europe. Then in 2003, the United States Supreme Court overruled *Bowers v. Hardwick*, which had upheld a state law criminalizing sodomy for seventeen years.<sup>83</sup> In reaching its decision in *Lawrence v. Texas*, that criminalizing adult consensual sexual intimacy in the home violates the liberty and privacy interests protected by the Due Process Clause of the Fourteenth Amendment, the Court cited approvingly to the *Dudgeon* decision as evidence of the practice of Western democracies.<sup>84</sup>

The spread of affirmative protections for gays and lesbians corresponded with this wave of decriminalization. In the area of relationship recognition, the norm cascade was particularly pronounced.<sup>85</sup> Denmark adopted a registered partnership model for same-sex couples in 1989, which in subsequent years was embraced by its Nordic neighbors.<sup>86</sup> "By the late 1990s, the idea of legalizing same-sex unions moved out of the Nordic region and onto mainland Europe. . . . In 2000, Germany adopted legislation that was similar to the Nordic registered partnership laws, but with more limited protections and benefits."<sup>87</sup>

The movement towards civil partnerships of various forms was quickly overtaken by the movement to extend full marriage equality to gays and lesbians. The Netherlands and Belgium extended marriage rights to same-sex couples in 2001 and 2003, respectively.<sup>88</sup> Five short months after the Supreme Court's decision in *Lawrence*, same-sex marriage found its first toehold in the United

80. The Constitutional Court struck down Ecuador's law criminalizing sodomy in Tribunal Constitucional del Ecuador [Constitutional Tribunal of Ecuador], noviembre 27, 1997, Sentencia No. 111-97-TC, Registro Oficial, Supp., (No. 203) (Ecuador).

81. The PRC repealed its laws banning "hooliganism" which had been used to harass homosexuals. Fellmeth, *supra* note 67, at 821-22 (citing Junling Cui, *China's Cracked Closet*, FOREIGN POL'Y, May 1, 2006, at 90).

82. Nat'l Coalition for Gay and Lesbian Equality v. Minister of Justice 1999 (1) SA 6 (CC)(S. Afr.).

83. See generally *Bowers v. Hardwick*, 478 U.S. 186 (1986).

84. See *Lawrence v. Texas*, 539 U.S. 558, 572-73 (2003) (explaining that Justice Kennedy's reference to *Dudgeon* in *Lawrence* was necessary to rebut Chief Justice Burger's decision in *Bowers*. As Kennedy noted, the "sweeping references" in that opinion "to the history of Western civilization and to Judeo-Christian moral and ethical standards did not take account of other authorities pointing in an opposite direction.").

85. See Kollman *supra* note 30, at 337 (describing the rapid convergence in same-sex union policies among western democracies).

86. *Id.*

87. *Id.*

88. Act Opening the Institute of Marriage, Burgerlijk Wetboek [BW][Civil Code] art. 30:1 (Neth.); Burgerlijk Wetboek [BW][Civil Code] art. 143 (Belg.).

States.<sup>89</sup> In *Goodridge v. Department of Public Health*, the Massachusetts Supreme Judicial Court held that denying gay and lesbian couples the equal right to marry violated the state's constitution.<sup>90</sup> Writing for the majority, Chief Justice Margaret Marshall cited approvingly to a recent decision by the Court of Appeal of Ontario, holding that limiting the definition of marriage to a man and a woman was unconstitutionally discriminatory.<sup>91</sup> In 2005, both Spain and Canada legalized marriage for gay and lesbian couples.<sup>92</sup> South Africa followed in 2006.<sup>93</sup> Since 2009, multiple countries have legalized same-sex marriage almost every year.<sup>94</sup> By June 2015, when the Supreme Court of the United States decided in *Obergefell v. Hodges* that the Fourteenth Amendment requires states to license and recognize the marriages of same-sex couples,<sup>95</sup> twenty countries had extended the right to marry to same-sex couples nationwide, while in one, Mexico, the right to marry was available in some states and regions.<sup>96</sup> Another sizable group of countries, primarily in Europe and South America, offered some set of protections short of marriage.<sup>97</sup>

Transnational networks played a significant role in encouraging the adoption of these reforms in Europe.<sup>98</sup> The 1970s witnessed an increase of the size and number of international gay and lesbian organizations, which in the late 1980s began to draw upon human rights frameworks to make claims for recognition, protection, and equal treatment.<sup>99</sup> These groups did not try to create new human

89. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

90. *Id.* at 948 (citing *Halpern v. Toronto*, [2003] 1'2 O.A.C. 276 (Can. Ont. C.A.)).

91. *Id.* at 969.

92. In Canada, the government chose not to appeal from the decision of the Court of Appeal of Ontario and then subsequently passed legislation extending the right to marry to same-sex couples nationally. See Fellmeth, *supra* note 67, at 853.

93. Nat'l Coal. For Gay & Lesbian Equal. v. Minister of Justice, 1998 (12) BCLR 1517 (CC) (S. Afr.).

94. See Freedom to Marry, The Freedom to Marry Internationally, <http://www.freedomtomarry.org/landscape/entry/c/international>. The exception was 2011.

95. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

96. See Freedom to Marry, *supra* note 94 (including The Netherlands (2001); Belgium (2003); Spain (2005); Canada (2005); South Africa (2006); Norway (2009); Sweden (2009); Portugal (2010); Iceland (2010); Argentina (2010); Denmark (2012); Brazil (2013); France (2013); Uruguay (2013); New Zealand (2013); United Kingdom (2013); Luxembourg (2014); Finland (2014); Ireland (2015); United States (2015). In Mexico, the right to marry was available in some states and regions).

97. *Id.* (including Andorra, Austria, Colombia, Croatia, Chile, Czech Republic, Ecuador, Germany, Greenland, Hungary, Liechtenstein, Malta, Slovenia, and Switzerland).

98. See Kollman, *supra* note 30, at 337. See also KELLY KOLLMAN, THE SAME-SEX UNIONS REVOLUTION IN WESTERN DEMOCRACIES: INTERNATIONAL NORMS AND DOMESTIC POLICY CHANGE 2 (2013) (arguing that "the processes of international norm diffusion and socialisation have been an important catalyst of SSU adoption in western democracies."). For an account of the organizations that worked domestically and internationally to advance the rights of gays and lesbians, see Jonathan Symons & Dennis Altman, *International Norm Polarization: Sexuality as a Subject of Human Rights Protection*, 7 INT'L THEORY 61, 77 n.10 (2015).

99. Kollman, *supra* note 30, at 338.

rights law or norms, but rather drew upon a “well-established body of national and international law” to argue that “sexual orientation should be recognized as a category of non-discrimination and . . . that relationship rights are human rights.”<sup>100</sup>

In the mid-1980s, a European network of national and international LGBTI groups launched a campaign to include sexual orientation in the European human rights regime. Lobbying by the International Lesbian and Gay Association of Europe (ILGA-Europe) was successful in pushing the European Parliament to publish reports condemning sexual orientation discrimination, first in the workforce and then more broadly. Then, in the 1990s, the European network gained official consultative status with the Council of Europe and convinced the European Intergovernmental Conference to include sexual orientation as a category of nondiscrimination in the Amsterdam Treaty, which came into force in 1999.<sup>101</sup>

In addition to changing the European regulatory framework, ILGA-Europe was also successful in winning favorable judgments at the ECtHR on behalf of gays and lesbians. These decisions required the inclusion of homosexuals in the military,<sup>102</sup> prevented the invocation of sexual orientation in custody battles,<sup>103</sup> and required governments to grant homosexual couples rights equivalent to the rights of nonmarried, heterosexual couples.<sup>104</sup>

Transnationally networked groups of gay and lesbian activists then worked to translate these regional norms into national policy, using wins at the international level to push for domestic reforms.<sup>105</sup> Based on interviews with activists in multiple Western democracies including the United States, Kelly Kollman concludes that the European human rights regime influenced domestic policy-making on same-sex unions through three separate processes: national agenda setting, elite learning, and direct policy harmonization.<sup>106</sup> Activists reported using norms developed at the European level to frame sexual orientation discrimination as a human rights issue domestically;<sup>107</sup> to persuade national policy elites;<sup>108</sup> and to push for binding legal reforms across the region.<sup>109</sup> Due to the success of these human rights-based arguments, this framing has partially replaced others such as “national civil rights conceptions” and “framings based

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100. *Id.* at 331.

101. *Id.* at 340.

102. *Perkins v. U.K.*, App. No. 43208/98, Eur. Ct. H.R. (2002).

103. *Salgueiro Da Silva Mouta v. Portugal*, 1999-IX Eur. Ct. H.R. 309, 327 (1999).

104. *Karner v. Austria*, App. No. 40016/98, Eur. Ct. H.R. (2003).

105. Kollman, *supra* note 30, at 341.

106. *Id.* at 340.

107. *Id.* at 341.

108. *Id.*

109. *Id.* at 342.



on gay and lesbian liberation and emancipation.”<sup>110</sup>

#### IV. BUILDING A COUNTER-NETWORK

The United States was relatively slow among Western democracies, first to decriminalize, and then to recognize same-sex relationships, and both developments were launched by court decisions that cited to foreign law and practice.<sup>111</sup> The potential power of comparative and international law did not go unnoticed by progressive or conservative advocates. Following *Lawrence* and *Goodridge*, the American Civil Liberties Union (ACLU) held a national conference in October 2003 to train lawyers in “using international law and human rights norms to advance justice in U.S. courts or on behalf of U.S. clients.”<sup>112</sup> Two months later, a set of internal memos from Center for Reproductive Rights (CRR) was leaked to the Catholic Family and Human Rights Institute (C-FAM), who passed them along to conservative allies in Congress. The memos articulated a plan to establish a human right to abortion through work with U.N. agencies and NGOs. “There is a stealth quality to the work,” the memo’s author noted.<sup>113</sup> “We are achieving incremental recognition of values without a huge amount of scrutiny from the opposition.”<sup>114</sup>

American conservative organizations also began to recognize that international law was reshaping domestic law and values, but contrary to the ACLU and CRR, some viewed this development as a threat.<sup>115</sup> These concerns grew when, two years after *Lawrence*, the Supreme Court decided in *Roper v. Simmons* that the Eighth Amendment prohibits the execution of children whose crimes were committed before the age of eighteen.<sup>116</sup> Again, the Court reversed its own relatively recent precedent,<sup>117</sup> and again Justice Kennedy, writing for the five-justice majority, looked to international and foreign law to support the Court’s decision.<sup>118</sup> In response to these decisions, and the broader perception

110. Ronald Holzacker, “*Gay Rights Are Human Rights*”: *The Framing of New Interpretations of International Human Rights Norms*, Am. Pol. Sci. Ass’n Ann. Meeting Paper at 1 2011, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1902165](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1902165).

111. See *Lawrence v. Texas*, 539 U.S. 558, 573 (2003); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

112. See Rachel Morris, *Crusaders in Wingtips*, LEGAL AFFAIRS, Mar./Apr. 2006, [http://www.legalaffairs.org/issues/March-April-2006/feature\\_morris\\_marapr06.msp](http://www.legalaffairs.org/issues/March-April-2006/feature_morris_marapr06.msp)

113. *Id.*

114. *Id.*

115. Judge Robert Bork wrote: “The problem [with international law] is not merely the anti-Americanism that grips foreign elites and shapes law; it is also the American intellectual class, which is largely hostile to the United States and uses alleged international law to attack the morality of its own government and society.” ROBERT BORK, *COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES* 21 (2003).

116. *Roper v. Simmons*, 543 U.S. 551 (2005).

117. See *Stanford v. Kentucky*, 492 U.S. 361 (1989).

118. Kennedy explained that the Convention on the Rights of the Child, ratified by every

that international law was evolving in ways that threatened American values,<sup>119</sup> conservative advocates began to adopt their own strategies to address the influence of international law. In contrast to progressives, however, the primary focus of their work was to disrupt the pathways through which international law norms could reshape domestic law.

#### A. Immunizing the United States from Foreign and International Law

A first set of strategies focused on trying to immunize the United States from the transformative impact of international human rights law by undermining the legitimacy of these norms and the institutions through which they develop.

While American conservatives have long had a fraught relationship with the U.N. human rights regime dating back to the 1950s,<sup>120</sup> these concerns were reinvigorated in the mid-1990s as religious advocacy organizations became aware of the ways that gay and women's rights advocates were raising questions of reproductive health and sexuality in U.N. institutions.<sup>121</sup> Thus, the first line of

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country in the world except for United States and Somalia, expressly prohibits capital punishment for crimes committed by juveniles under the age of 18. *Roper*, 543 U.S. at 576. He also noted that "only seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China," and that each of those countries had since abolished or disavowed the practice. *Id.* at 577.

119. As the Alliance for Defense Freedom, a Christian legal organization, wrote: More and more of America's freedoms will be sacrificed on the ACLU altar of international law. . . . Left unchecked, the ACLU's war to reshape America in its own image will almost be complete. Our precious freedoms—of speech, at least public religious speech, of association, of worship, or living our faith—will have all but vanished.

ALAN SHEARS & CRAIG OSTEN, *THE ACLU VS. AMERICA: EXPOSING THE AGENDA TO REDEFINE MORAL VALUES* 187 (2005).

120. In 1953, Senator Bricker of Ohio proposed a constitutional amendment to limit the scope of the Treaty Power to match Congress' domestic regulatory authority. 99 CONG. REC. 6777 (1953). The amendment failed, but narrowly, and only because the Eisenhower Administration agreed that the United States would not join international human rights covenants or conventions. See Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 348-49 (1995).

121. See Mary Ann Glendon, *What Happened at Beijing*, FIRST THINGS (January 1996), <http://www.firstthings.com/article/1996/01/005-what-happened-at-beijing> (describing "the situation that developed at the UN's 1994 Conference on Population and Development in Cairo, where an abortion rights initiative led by a hard-edged U.S. delegation pushed all other population and development issues in the background."); see also, *id.*

The significance of Beijing for human rights is mainly in the nature of a warning. As the fiftieth anniversary of the UN's 1948 Universal Declaration of Human Rights approaches, the Beijing conference appears to have been a testing ground for certain ideas and approaches that will be advanced again. We have not seen the last of the effort to make abortion a fundamental right, or of the attempt to depose heterosexual marriage and child-raising families from their traditionally preferred positions. Neither have we seen the last of selective use of rights language to advance an anti-rights agenda exemplified at Beijing by the emphasis on formal equality at the

response to developments at the international level was that these advocates, and their political allies, increased their attacks on the law and institutions of the United Nations. In January 1994, Senator Jesse Helms' staff learned that the U.N. Economic and Social Council had granted consultative status to the International Lesbian and Gay Association, an umbrella group that included the North American Man Boy Love Association (NAMBLA) as one of its members. "Describing NAMBLA as an organization 'catering to the twisted desires of pedophiles,' Helms introduced an amendment to the State Department authorization bill requiring that the United States cut \$119 million in U.N. funding until the president certified that the United Nations had no connections with groups promoting pedophilia."<sup>122</sup> Subsequently, for a period in the late 1990s, Helms was able to use his influence as chair of the Senate Foreign Relations Committee to block all U.N. funding from the United States government.<sup>123</sup>

Conservative groups also tried to undermine the credibility of U.N. law-making processes by characterizing them as an attack on American democracy and sovereignty. In 1999, Women for Faith & Family (WFF), an international organization of Catholic women, described U.N. activism by gay rights groups as nothing more than a "'maneuver' to 'by-pass ratification and avoid . . . confrontations' with states having 'contrary . . . national culture[s] and religious values.'"<sup>124</sup> On the reproductive rights front, "C-FAM termed U.N. treaty bodies 'opaque, complex, and largely unaccountable,' usurping proper policy-making institutions and undermining citizens' ability to control their own societies."<sup>125</sup> By reframing the processes for making international human rights law illegitimate, advocates hoped also to delegitimize its content.

*Lawrence, Roper, and Goodridge* presented another opportunity to mobilize popular opposition to foreign and international law. Tapping into longstanding concerns about American exceptionalism, foreign law citation became a surprisingly hot-button issue in the popular media and in academic circles.<sup>126</sup>

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expense of motherhood's special claim to protection, and by the elimination of most references to religion and parental rights.

122. WILLIAM A. LINK, *RIGHTEOUS WARRIOR: JESSE HELMS AND THE RISE OF MODERN CONSERVATISM* 413 (2008).

123. See Samantha Singson, *US Lawmakers File Bills to Cut Funding for Pro-Abortion UN*, LIFE NEWS.COM (Jan. 27, 2011), <http://www.lifenews.com/2011/01/27/us-lawmakers-file-bills-to-cut-funding-for-pro-abortion-un>; see also Bob Barr, *Protecting National Sovereignty in an Era of International Meddling: An Increasingly Difficult Task*, 39 HARV. J. ON LEGIS. 299, 309 (2002).

124. BOB, *supra* note 63, at 61.

125. *Id.*

126. These decisions have prompted a large literature on the normative justifications for and against the citation of foreign law and comparative practice. See, e.g., Vicki C. Jackson, *Constitutional Comparisons: Convergence, Resistance, Engagement*, 119 HARV. L. REV. 109, 118 (2005); Gerald L. Neuman, *The Uses of International Law in Constitutional Interpretation*, 98 AM. J. INT'L L. 82, 82 (2004); Austin L. Parrish, *Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, 2 U. ILL. L. REV. 637, 647 (2007); Nicholas Quinn Rosenkranz,

Following *Lawrence*, each nominee to the U.S. Supreme Court was questioned as to his or her position on the uses of foreign and international law as well as the threat it poses to U.S. sovereignty.<sup>127</sup> The issue gained more attention as a series of statutes and constitutional amendments were proposed, both at the federal level and in the states,<sup>128</sup> that purported to block the use of foreign and international law in the opinions of U.S. courts, or that made the citation of foreign law by American judges a punishable offense.<sup>129</sup> In 2010, seventy percent of voters supported the “Save our State” amendment to the Oklahoma Constitution, which directed the state’s judges not to “look to the legal precepts of other nations or cultures” and not to consider “international or Sharia Law” in their decision-making.<sup>130</sup> After the amendment provision was challenged and struck down on First Amendment grounds, the state legislature enacted a new statute that no longer mentioned Sharia but banned reliance on foreign law unless it provides “the same fundamental liberties, rights, and privileges granted under the United States and Oklahoma Constitutions.”<sup>131</sup>

The negative reception that greeted the Oklahoma amendment in federal court did little to discourage other states from considering international and

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*An American Amendment*, 32 HARV. J.L. & PUB. POL’Y 475, 479-82 (2009); Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1309 (1999).

127. See Nathan Koppel, *To Cite or Not to Cite?: Senators, Kagan, Spar Over Foreign Law*, WALL ST. J. L. BLOG (June 30, 2010), <http://blogs.wsj.com/law/2010/06/30/to-cite-or-not-to-cite-senators-kagan-spar-over-foreign-law>; *Sen. Coburn Questions Judge Sotomayor at Supreme Court Nomination Hearings*, WASH. POST (July 15, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/07/15/AR2009071501414.html>; *Transcript of U.S. Senate Judiciary Committee Hearing on Judge Samuel Alito’s Nomination to the Supreme Court*, WASH. POST (Jan. 11, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/01/11/AR2006011101148.html>.

128. See *Judicial Reliance on Foreign Law: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 112th Cong. 5 (2011) (statement of Rep. Lamar Smith, Chairman, H. Comm. on the Judiciary) (“Reliance on foreign law exacerbates judicial activism and empowers judges to impose their own policy preferences from the bench.”).

129. See generally Martha F. Davis & Johanna Kalb, *Oklahoma & Beyond: Understanding the Wave of State Anti-Transnational Law Initiatives*, 87 IND. L.J. SUPP. 1 (2011); Faiza Patel et al., *Foreign Law Bans: Legal Uncertainties and Practical Problems*, BRENNAN CTR. FOR JUST. (May 16, 2013), <http://www.brennancenter.org/publication/foreign-law-bans-legal-uncertainties-and-practical-problems>.

130. State Question Number 77/Legislative Referendum Number 355, Enr. H.J.R. No. 1056, Amending Oklahoma Constitution Art. 7, §1 (May 25 2010); see also Davis & Kalb, *supra* note 129 (describing the public debate and litigation around the Oklahoma constitutional amendment).

131. See OKLA. STAT. ANN. tit. 12, § 20B (West 2014),

Any court, arbitration, tribunal, or administrative agency ruling or decision shall violate the public policy of this state and be void and unenforceable if the court, arbitration, tribunal, or administrative agency bases its rulings or decisions in the matter at issue in whole or in part on foreign law that would not grant the parties affected by the ruling or decision the same fundamental liberties, rights, and privileges granted under the United States and Oklahoma Constitutions, including but not limited to due process, freedom of religion, speech, or press, and any right of privacy or marriage as specifically defined by the Constitution of this state.

foreign law bans. By 2013, variations on the Oklahoma model had been introduced in more than 100 other bills in thirty-one other states.<sup>132</sup> Different versions prohibit consideration of Sharia law, religious laws, foreign religious codes, legal precepts of other nations or culture, and international law. While only a handful of these bills have been adopted,<sup>133</sup> and their language makes their restrictions easy to evade, their popularity sends a clear message to jurists (particularly those who are elected in the states) about the potential costs of referencing these sources in their decision-making.

## B. Blocking the Transnational Diffusion of New International Norms

In parallel with these efforts to protect the U.S. from international legal influence, American lawyers began the project of helping to reshape national law in other countries in order to block the advancement of more tolerant norms governing sexual identity and to undermine the relationships between these countries and international human rights activists and institutions.

The countries of East Africa have been a particularly promising target for this activity. A 2006 survey from the Pew Forum on Religion and Public Life found that conservative views on sexuality were all but universal in parts of Eastern Africa; ninety-nine percent of Nigerians and Kenyans disapprove of homosexuality.<sup>134</sup> While most countries in Anglophone East Africa already had laws prohibiting “carnal knowledge against the order of nature” left over from

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132. *E.g.*, S.B. 62, 2011 S., Reg. Sess. (Ala. 2011); H.B. 88, 27th Leg., 1st Sess. (Alaska 2011); S. Con. Res. 1010, 50th Leg., 1st Reg. Sess. (Fla. 2012); H.B. 45, 151st Gen. Assemb., Reg. Sess. (Ga. 2011); H. Conc. Res. 44, 60th Leg., 2nd Reg. Sess. (Idaho 2010); H.B. 575, 84th Gen. Assemb., Reg. Sess. (Iowa 2011); S.J. Res. 16, 117 Gen. Assemb. 1st Reg. Sess. (Ind. 2011); S.B. 79, 84th Leg., Reg. Sess. (Kan. 2012); H.B. 386, Reg. Sess. (Ky. 2012); H.B. 785, Reg. Sess. (La. 2010); H.B. 811, 125th Leg., 1st Reg. Sess. (Me. 2011); H.B. 4769, 96th Leg., Reg. Sess. (Mich. 2011); S.B. 2281, 87th Leg., 2nd Reg. Sess. (Minn. 2011); H.B. 301, 126th Leg., Reg. Sess. (Miss. 2011); H.J. Res. 31, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011); Leg. B. 647, 102nd Leg., 1st Reg. Sess. (Neb. 2011); H.B. 1422, 162nd Gen. Ct., Reg. Sess. (N.H. 2011); Assemb. B. 919, 215th Leg., 1st Ann. Sess. (N.J. 2012); S.J. Res. 18, 50th Leg., 1st Sess. (N.M. 2011); H.B. 640, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011); H.B. 2029, 195th Gen. Assemb., Reg. Sess. (Pa. 2011); S.B. 444, 119th Gen. Assemb., 1st Reg. Sess. (S.C. 2011); H.J. Res. 1004, 86th Leg. Assemb., Reg. Sess. (S.D. 2011); H.B. 3768, 169th Gen. Assemb., Reg. Sess. (Tenn. 2010); H.J. Res. 57, 82nd Leg., Reg. Sess. (Tex. 2011); H.B. 296, 58th Leg., Gen. Sess. (Utah 2010); H.B. 631, Reg. Sess. (Va. 2012); H.B. 3220, 80th Leg., Reg. Sess. (W. Va. 2011); H.J. Res. 8, 61st Leg., Gen. Sess. (Wyo. 2011); *See also* Faiza Patel et al., *Foreign Law Bans: Legal Uncertainties and Practical Problems 1* (Center for American Progress, May 2013).

133. As of January 2015, five states had adopted some form of foreign law ban. *See* Judith Resnik, *Constructing the Foreign: American Law's Relationship to Non-Domestic Sources*, in *COURTS AND COMPARATIVE LAW* 437 (Andenas & Fairgrieve eds., 2015) citing ARIZ. REV. STAT. §§ 12-3101 to -3103 (2012); KAN. STAT. ANN. § 60-5103 (West 2012); LA. REV. STAT. ANN. § 9:6001 (2011); S.D. CODIFIED LAWS § 19-8-7 (2012); TENN. CODE ANN. §§ 20-15-101 to -106 (West 2012)).

134. *Spirit and Power—A 10-Country Survey of Pentecostals*, PEW RES. CTR. (Oct. 5, 2006), <http://www.pewforum.org/2006/10/05/spirit-and-power>.

British colonialism, beginning in 2006, several countries proposed or adopted new laws explicitly banning same-sex sexual contact and imposing severe sanctions (including death) on people convicted of violating the prohibitions.<sup>135</sup> In the last few years, Burundi, the Gambia, Malawi, and Nigeria have all passed anti-gay laws.<sup>136</sup> Zimbabwe adopted a new constitution banning gay marriage.<sup>137</sup>

American activists were involved in developing and promoting these laws. For example, while the Ugandan Anti-Homosexuality Bill was under debate, the American Center for Law and Justice (ACLJ)<sup>138</sup> opened offices in Kenya and Zimbabwe, which provided “a base for work in both countries and nearby Rwanda, Uganda, Tanzania, and South Sudan.”<sup>139</sup> According to a report by the progressive think tank Political Research Associates, the African offices were opened with the goal of “lobbying [African parliaments] to take Christians’ views into consideration as they draft legislation and policies.”<sup>140</sup> “In Zimbabwe, the Centre joined forces with the Evangelical Fellowship of Zimbabwe (EFZ), an indigenous organization, to promote constitutional language affirming that Zimbabwe is a Christian nation and ensuring that homosexuality remained illegal.”<sup>141</sup> The impact of American conservative politics has been visible in many of the proposed reforms, which also banned same-sex marriage and adoption of children by same-sex couples, issues that were not even on the agenda of indigenous gay rights activists.<sup>142</sup>

These political and legal interventions by American organizations have often

135. Kaoma, *supra* note 2, at 6, 8.

136. See *Gambina Leader Approves Anti-Gay Law*, GUARDIAN (Nov. 21, 2014), <http://www.theguardian.com/world/2014/nov/21/gambian-leader-approves-anti-gay-law>; Stephen Wandera, *Gay Rights Defenders Get Shs 5.b Donation*, DAILY MONITOR (Feb. 7, 2013), <http://www.monitor.co.ug/News/National/Gay-rights-defenders-get-Shs5b-donation/-/688334/1687022/-/c0a44pz/-/index.html>.

137. Nathalie Baptiste & Foreign Policy in Focus, *It's Not Just Uganda: Behind the Christian Right's Onslaught in Africa*, NATION (April 4, 2014), <http://www.thenation.com/blog/179191/its-not-just-uganda-behind-christian-rights-onslaught-africa#>.

138. Kaoma, *supra* note 2, at 10.

139. *Id.*

140. *Id.* As ACLJ explains:

In Zimbabwe, we partnered with the Christian churches to ensure that their collective voice is represented in the drafting of a new constitution. . . . [T]he partnerships in both Zimbabwe and Kenya arose because African Christians sought our help. The ACLJ is sensitive to Zimbabwe’s history and culture, which is why our Zimbabwean affiliates have always set their own agenda.

Jordan Sekulow, *Assisting Africans in Supporting Pro-Life and Pro-Family Values*, ACLJ, <http://aclj.org/united-nations/assisting-africans-supporting-pro-life-pro-family-values> (last visited Jan. 17, 2017).

141. Baptiste, *supra* note 137.

142. Kaoma, *supra* note 2, at 9. Interestingly, progressive activism may also have led to similar outcomes. There are a handful of African nations in which homosexuality is criminalized, but sexual orientation discrimination is also prohibited. See Samantha Spooner, *Forgive It. Africa Is Not Anti-Gay; The Continent Is Just Hopelessly Confused*, MAIL & GUARDIAN AFRICA (Aug. 23, 2014), <http://mgafrica.com/article/2014-08-22-africa-is-not-anti-gay-the-continent-is-plain-confused>.

been framed in terms of protecting African communities from the international gay rights movement. The “belief that western LGBT activists recruit young people into homosexuality is common across Africa.”<sup>143</sup> Sylvia Tamale, a professor at Makerere University in Uganda, reported that when she publicly supported the rights of gays and lesbians, both her friends and critics assumed that she “was involved in a campaign that was driven from the West.”<sup>144</sup> She explained that Ugandans “seemed to think that there was a network of homosexual organizations ‘out there’ with an explicit agenda to ‘recruit’ young African men and women into their ‘decadent, perverted habits,’” and “that money was going to pour in from gay and lesbian organizations in Western Europe and North America” to support her work.<sup>145</sup>

American activists have been able to capitalize upon and reinforce these existing concerns about homosexuality and its relationship to these countries’ colonial legacy. A spokesman for Human Life International (HLI), a Catholic pro-life organization, explained that his organization feels “that it is important for us to be [in Africa] because the assault on the natural African pro-life and pro-family values is coming from the United States, so we feel obligated to help them understand the threat and respond to it based on their own values and culture.”<sup>146</sup> He went on to argue that HLI speaks “to the deep and natural values of our brothers and sisters in Africa, and help[s] them resist the encroachment of very powerful western interests who think that there are too many children in Africa.”<sup>147</sup> Similarly, the ACLJ has argued (in response to criticism of its activities) that “even a cursory review of Kenyan and African cultures demonstrates it is western governments, not the ACLJ, that seeks to create a culture war in Africa.”<sup>148</sup>

### C. Disrupting the Development of International Legal Norms

As these efforts were ongoing to protect national law (both in the U.S. and abroad) from the pressure of international legal developments, some advocates began to argue that attacking the legitimacy of international law was insufficient to disrupt its norm-shaping effects. Brigham Young University law professor

143. KAOMA, *supra* note 63, at 15.

144. Sylvia Tamale, *Out of the Closet: Unveiling Sexuality Discourses in Uganda*, 2 FEMINIST AFRICA 42 (Feb. 2003), [http://agi.ac.za/sites/agi.ac.za/files/fa\\_2\\_standpoint\\_3.pdf](http://agi.ac.za/sites/agi.ac.za/files/fa_2_standpoint_3.pdf).

145. *Id.* Stephen Langa, director of the Uganda-based Family Life Network, stated at an anti-gay conference that “young people . . . were given a lot of money by gay activists in Uganda to recruit their colleagues into lesbianism.” IGLHRC Update: *More on the Anti-Gay Seminar in Uganda*, OUTRIGHT ACTION INT’L (Mar. 5, 2009), <http://iglhrc.org/content/iglhrc-update-more-anti-gay-seminar-uganda>.

146. David Smith, *US Evangelical Christians Accused of Promoting Homophobia in Africa*, GUARDIAN (July 23, 2012), <http://www.theguardian.com/world/2012/jul/24/evangelical-christians-homophobia-africa>.

147. *Id.*

148. Sekulow, *supra* note 140.

Richard G. Wilkins argued that “norms [are] being used to . . . deconstruct longstanding concepts of marriage and family.”<sup>149</sup> Wilkins “therefore advise[d] his own network ‘to avoid negative outcomes and promote positive ones.’”<sup>150</sup>

Thus around the same time period in the mid-1990s, a new set of tactics began to emerge that focused on contesting the development of new norms at the international level. Conservative advocacy organizations began to actively engage with international and regional institutions and courts, adopting (and co-opting) the language of human rights.<sup>151</sup> In 1997, the ACLJ, a prominent conservative public interest law firm,<sup>152</sup> opened the European Center for Law and Justice in Strasbourg expressly for the purpose of engaging with the United Nations and the Council of Europe, and for intervening in cases of the European Court of Human Rights that could impact the shape of family law, reproductive rights, and religious freedom in the United States. That same year, former Reagan appointee to the National Commission on Children Allan Carlson founded the World Congress of Families, “an international network of pro-family organizations, scholars, leaders, and people of goodwill . . . that seek to restore the natural family as the fundamental social unit and the ‘seedbed’ of civil society,”<sup>153</sup> and C-FAM was formed “to defend life and family at international institutions and to publicize the debate.”<sup>154</sup> These organizations worked to develop a coalition of religious conservative nations that would create a firewall in the U.N. against the acceptance of new resolutions, reports, or treaty interpretations that advance gay and lesbian rights. Austin Ruse, the leader of C-FAM, explained the strategy: “the future potential lies in the religious NGOs’ ability to build a permanent conservative block of U.N. member states dedicated

149. Richard G. Wilkins, *International Law, Social Change and the Family* (undated manuscript) (on file with author).

150. BOB, *supra* note 63, at 62 (quoting *Id.*).

151. As Doris Buss and Didi Herman document, this new strategy was an awkward adjustment for many of these organizations, which continued to view the U.N. with deep hostility. See DORIS BUSS & DIDI HERMAN, *GLOBALIZING FAMILY VALUES: THE CHRISTIAN RIGHT IN INTERNATIONAL POLITICS* 52-53 (2003). As these authors explain, implicit in all variants of Christian Right U.N. activism is a concern that the international realm—whether as a fundamentally anti-Christian space or an emerging power largely under the sway of antifamily forces—poses a threat to the domestic state both at “home” in the United States and in the “vulnerable third world.” This threat may be envisioned in different ways—as a move to world governance or as the secularization of all societies, domestic and international—but it shares a single feature: an attack on the power of individual nations to define their own religious and cultural practices. *Id.* at 53-54.

152. The ACLJ was founded in the United States in 1990 by Pat Robertson to be a counterweight to the ACLU. Kaoma, *supra* note 2, at 9. The ACLJ “positions itself as the legal arm of conservatives in the U.S. culture wars; the group defends ‘the sanctity of human life, and the two-parent, marriage-bound family.’” *Id.*

153. Benjamin Parker, *The World Congress of Families Responds to the Southern Poverty Law Center*, WKLY. STANDARD (July 27, 2015), <http://www.weeklystandard.com/the-world-congress-of-families-responds-to-the-southern-poverty-law-center/article/998441>.

154. *Mission Statement*, CTR. FOR FAM. & HUM. RTS., <https://c-fam.org/about-us/mission-statement> (last visited Jan. 16, 2017).



to conservative values.”<sup>155</sup>

These organizing efforts resulted in some unusual allegiances—as ADF Senior Legal Counsel Bradley Abramson explained, “At the United Nations, we find our allies where we can get them. We don’t support what Islamic countries are doing to Christians, but at the same time, they support us on the marriage issue, they support us on the life issue.”<sup>156</sup> At the 2000 Beijing + 5 Conference, WFF reached out to form alliances with “non-Western” countries, whose official views on abortion and sexual orientation more closely mapped to their own.<sup>157</sup> In some of those countries, WFF explained, certain “tribal excesses,” such as female genital mutilation, honor killings, and dowry deaths provided Western groups with “emotional clubs to cow the delegates into accepting gay rights.”<sup>158</sup> While rejecting those “excesses,” WFF argued that “solving” these “familial injustices” should not “be sufficient reason to dismantle traditional families worldwide.”<sup>159</sup> According to WFF, their organizing strategy was successful. The allied nations prevented the working sessions or “PrepComs” from settling on a draft document to be considered by the General Assembly.<sup>160</sup>

This conservative voting bloc has been successful on other occasions in preventing new soft law on abortion and gay rights from developing. For example, “[i]n December 2009, the U.N. General Assembly voted to delete a reference to gender identity and sexual orientation as categories of non-discrimination from a resolution.”<sup>161</sup> The successful coalition pushing for the alteration was made up of countries from Africa, the Islamic world, and the nations of the Caribbean.<sup>162</sup> In April 2015, for the first time in history, the United Nations Commission on Population and Development concluded without an outcome document. A bloc of conservative states, primarily African and Arab member states, “call[ed] for the complete deletion of abortion, ‘comprehensive

155. NORWEGIAN AGENCY FOR DEV. COOPERATION, LOBBYING FOR FAITH AND FAMILY: A STUDY OF RELIGIOUS NGOS AT THE UNITED NATIONS 10 (2013), <http://www.norad.no/globalassets/import-2162015-80434-am/www.norad.no-ny/filarkiv/vedlegg-til-publikasjonert/lobbying-for-faith-and-family.pdf>.

156. Alex Seitz-Wald, *Evangelicals are Winning the Gay Marriage Fight—in Africa and Russia*, NAT’L J. (Jan. 23, 2014), <http://www.nationaljournal.com/gay-washington/evangelicals-are-winning-the-gay-marriage-fight-in-africa-and-russia-20140123>.

157. Mary Jo Anderson, *WFF, Beijing + 5 Report*, WOMEN FOR FAITH & FAM. VOICES (2000), <http://archive.wf-f.org/Sum2K-Anderson.html>. I draw this account from BOB, *supra* note 63 at 45.

158. BOB, *supra* note 63, at 45-46.

159. *Id.*

160. *Id.*

161. NORWEGIAN AGENCY FOR DEV. COOPERATION, *supra* note 155, at 10. Austin Ruse, head of C-FAM believes that these alliances have been effective in defeating international declarations to support reproductive and gay rights. “On sexual identity, our coalition is really huge,” he says. Seitz-Wald, *supra* note 156.

162. NORWEGIAN AGENCY FOR DEV. COOPERATION, *supra* note 155, at 10.

sexuality education,' and population control language."<sup>163</sup> When this demand was not met, the African Group rejected the text in its entirety and the Commission concluded unsuccessfully. "In an unprecedented move, the island state of Nauru spoke from the floor to report that the United Nations Population Fund (UNFPA) had inappropriately pressured its government to change its stance on life and family and requested that this be put on record."<sup>164</sup>

At first, the network's efforts were primarily reactive, focused on preventing consensus from forming around new gender and sexuality norms. However, as advocates became more adept at operating on the international stage, the strategy evolved. Rather than just resisting new international law, American organizations and their international partners in civil society and government began to develop and advocate for alternatives.

These efforts took two forms. First, advocates began to seek out and create opportunities to "introduce a 'pro-family,' Christianized vision of the social order into international politics for the purpose of engaging with, and influence, global change."<sup>165</sup> As Clifford Bob explains it, "[t]he goal [became] to stuff the international system with soft law contradicting and counteracting that of the gay network . . . [to make it] hard to identify which of numerous contrary statements constitutes the norm . . ." and "difficult to shame reluctant states into joining a purported but nonexistent consensus."<sup>166</sup> For example, the 2004 Doha International Conference for the Family had all the characteristics of a typical U.N. convening except that its "ideological polarity . . . was switched."<sup>167</sup> Its working committee of NGOs included representatives of conservative groups like Brigham Young University's World Family Policy Center, the Family Research Council, and C-Fam. The resulting declaration, "quoting the Universal Declaration of Human Rights, reaffirmed the 'right of men and women' (only) to marry and the family 'as the natural and fundamental group unit of society.'"<sup>168</sup> In 2008, the U.N. Family Rights Caucus was founded "to ensure that the family is protected in all United Nations policies and agreements."<sup>169</sup> Then in 2015, the Human Rights Council passed a resolution which stated that "the family is the natural and fundamental group unit of society and is entitled to

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163. *Pro-Life and Family Member States Reject Outcome Document at U.N. Commission on Population and Development*, ADF INT'L, (Apr. 21, 2015), <https://adfinternational.org/detailspages/press-release-details/pro-life-and-family-member-states-reject-outcome-document-at-un-commission-on-population-and-development>.

164. *Id.*

165. Buss & Herman, *supra* note 151, at 136.

166. BOB, *supra* note 63, at 62.

167. "It was endorsed by a U.N. resolution, advertised by a worldwide call for participation, preceded by regional preparatory meetings, and attended by hundreds of state and non-governmental delegates." *Id.* at 55.

168. *Id.*

169. U.N. FAMILY RIGHTS CAUCUS, ABOUT US <http://www.unfamilyrightscaucus.org/about/> (last visited Jan. 16, 2017).

protection by the society and state.”<sup>170</sup>

In addition to working to generate more palatable “pro family” international norms, conservative activists also began to develop international law arguments to justify rights-violating behavior. Over the last decade, conservative advocates have made a consistent, and somewhat successful, push for UN recognition of the importance of “traditional values.” Their hope is to formalize respect for traditional values within international law, leaving open the space for each state to determine whether observing particular human rights norms is consistent with its national culture and tradition.<sup>171</sup> Critics argue that “traditional values” advocacy poses a fundamental challenge to the idea of universal human rights,<sup>172</sup> and can be used to justify discriminatory behavior, particularly with respect to women and members of the LGBTQ community.<sup>173</sup> Nonetheless, the Human Rights Council adopted three resolutions between 2009 and 2012 affirming the

170. *The U.N. and Family Values: A New Global Force is Fighting Liberal Social Mo- res*, THE ECONOMIST: ERASMUS (July 11, 2015), <http://www.economist.com/blogs/erasmus/2015/07/un-and-family-values>.

171. As explained by Metropolitan Kirill, former head of the Russian Orthodox Church’s Department for External Church Relations, in a 2008 speech before the U.N. Human Rights Committee:

[T]he development of the human rights institution has been increasingly affected in a monopolistic way by a limited range of ideas concerning the human nature, which are not shared by most people in the world. More often than not, international organizations involved in human rights tend to draw their conclusions from the opinions of a narrow circle of experts, functionaries, or noisy but well-organized minorities. Many national states appear to have fallen under the influence of these fellows, too, thus losing their ability to communicate the authentic attitude to values to characteristic of their own nation.

Vebjorn L. Horsfjord, *Negotiating Traditional Values: The Russian Orthodox Church at the United Nations Human Rights Council (UNHRC)*, in RELIGION, STATE AND THE UNITED NATIONS: VALUE POLITICS 62, 62 (Anne Stensvold ed., 2017).

172. See, e.g., Rosa Freedman, *United Nations Under Pressure to Protect ‘Traditional Families’ Over Individual Rights*, THE CONVERSATION (Sept. 17, 2014), <http://theconversation.com/united-nations-under-pressure-to-protect-traditional-families-over-individual-rights-31757>; Graeme Reid, *‘Traditional Values’ Code for Human Rights Abuse?*, CNN.COM: GLOBAL PUBLIC SQUARE (Oct. 17, 2012), <http://global-publicsquare.blogs.cnn.com/2012/10/17/traditional-values-code-for-human-rights-abuse/>; Cai Wilkinson, *Putting Traditional Values into Practice: Russia’s Anti-Gay Law*, 138 RUSSIAN ANALYTIC DIG. 5, 6 (2013).

173. See Graeme Reid, *The Trouble with Tradition: When “Values” Trample Over Rights*, HRW, <https://www.hrw.org/world-report/2013/country-chapters/africa> (last visited Sept. 7, 2016). And in fact, traditional values are already being used to justify discrimination against LGBT persons in Russia. In its submission to the UNHRC regarding the “traditional values” resolution, the Russian LGBT Network explained that: “Traditional values” in Russia are not just discourse. They are part of political and social reality. The use of traditional values rhetoric has served to justify a crackdown on dissent and the imposition of severe restrictions on the LGBT community.” Cai Wilkinson, *Putting “Traditional Values” Into Practice: The Rise and Contestation of Anti-Propaganda Laws in Russia*, 13 J. OF HUM. RTS 363, 364-365 (quoting Russian LGBT Network, “Best Practice” of Using the Concept of “Traditional Values” in Russia, U.N. DOC A/HRC/24/22 (Feb. 28 2012)).

importance of traditional values.<sup>174</sup> The 2012 resolution stated that “a better understanding and appreciation of traditional values shared by all humanity and embodied in universal human rights instruments contribute to promoting and protecting human rights and fundamental freedoms worldwide.”<sup>175</sup> Each of these resolutions has been presented by Russia, and supported by the conservative bloc of states from Central Asia, Africa, and the Middle East.<sup>176</sup> Notably, the same network of American conservatives has been active in Russia, both lobbying for anti-gay laws domestically and praising Russian leadership on traditional values advocacy at the U.N.<sup>177</sup>

In sum, while conservative advocates have engaged more actively with international law and institutions, their strategy still differs from traditional TANs in that the network’s continued (although not exclusive) focus is on weakening the universality of international human rights law. Nationally (in the U.S. and abroad), network agents advocate for laws and policies that attempt to immunize domestic law from international influence. Internationally, they work to slow the development of new norms preventing discrimination against gays and lesbians, and to generate alternative, or “counter-norms” that would excuse rights-violating behavior. The next Part examines the impact that this counter-network has had on rights diffusion, in the United States and in other sites of network activity.

174. Stefano Gennarini, U.N. Human Rights Council Affirms Traditional Values, CFAM (Oct. 4, 2012), [https://c-fam.org/friday\\_fax/un-human-rights-council-affirms-traditional-values/](https://c-fam.org/friday_fax/un-human-rights-council-affirms-traditional-values/). See also Wilkinson, *supra* note 172, 363-64 (describing the three resolutions).

175. Stefano Gennarini, *supra* note 174.

176. Human Rights Council Res. 12/21, U.N. DOC. A/65/53, at 43-44 (Oct. 2, 2009); Human Rights Council Res. 16/3, U.N. DOC. A/66/53 at 35-36 (Mar. 24, 2011), Human Rights Council Res. 21/3 U.N. DOC. A/67/53 Add. 1 at 18-19 (Sept. 27, 2012). See also NORWEGIAN AGENCY, *supra* note 155, at 10.

177. Kapyra Kaoma reports that in 2007, Scott Lively visited Russia to discuss the “homosexual political movement” and to encourage the “criminaliz[ation of] the public advocacy of homosexuality.” Kapyra Kaoma, Editorial, *How Anti-Gay Christians Evangelize Hate Abroad*, L.A. TIMES (Mar. 23, 2014), <http://www.latimes.com/opinion/op-ed/la-oe-kaoma-uganda-gays-american-ministers-20140323-story.html>. In 2013, Austin Ruse, of C-FAM, *supra* note 154, told the AP that he was planning to travel to Russia that summer to “let them know they do in fact have support among American NGOs . . . on social issues.” See David Crary, *Some U.S. Conservatives Laud Russia’s Anti-Gay Bill*, ASSOCIATED PRESS (July 1, 2013), <http://bigstory.ap.org/article/some-us-conservatives-laud-russias-anti-gay-bill>. He explained “You admire some of the things they’re doing in Russia against [homosexual] propaganda,” which “would be impossible to do” in the United States. *Id.* The World Congress of Families (WCF), see Parker, *supra* note 153, has also been very active in Russia, “host[ing] at least five major gatherings in Russia since 2010.” Hannah Levintova, *Did Anti-Gay Evangelicals Skirt U.S. Sanctions on Russia*, MOTHER JONES (Sept. 8, 2014). Managing director of WCF, Larry Jacobs, explained that WCF is “convinced that Russia does and should play a very significant role in defense of the family and moral values worldwide. Russia has become a leader of promoting these values in the international arena.” See MASHA GESSEN, *THE MAN WITHOUT A FACE: THE UNLIKELY RISE OF VLADIMIR PUTIN* 311 (2013).

## V. COUNTER-NETWORKS AND HUMAN RIGHTS PROXY WARS

The previous parts have articulated the idea of a transnational counter-network—and have illustrated the operations of one that was built to reshape the global legal regime governing the treatment of lesbian and gay communities. Now I turn to examine the impact of this counter-network and to ask how, if at all, its existence should reshape current understandings of the mechanisms of human rights compliance.

## A. Assessing the Impact of Counter-Network Activity on Norm Diffusion

As the previous part illustrates, the transnational counter-network of conservative American leaders, partnering with elites, religious leaders, and African civil society organizations, has been able to create or reinforce internal blocking factors to help slow the adoption or diffusion of human rights norms in East Africa. But a key purpose of this international and transnational advocacy has been to reshape the conversation about rights norms in the United States. Scott Lively, one of the American evangelicals who visited Uganda immediately prior to the introduction of the so-called “Kill the Gays” bill, was explicit about this strategy, which involves “going to other countries in the world that are still culturally conservative to warn them about how the Left has advanced its agenda in the U.S., Canada, and Europe—and to help put the barriers back in place”<sup>178</sup> and thereby to develop a firewall among friendly nations as a way of slowing or stopping the diffusion of equality norms globally.<sup>179</sup> The “goal is to build a consensus of moral countries to actually roll back the leftist agenda” in the United States.<sup>180</sup>

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178. Seitz-Wald, *supra* note 156.

179. Notably, there are some early indications that the blockade may not hold. The Kenyan Supreme Court recently held that the government’s decision not to recognize the National Gay and Lesbian Human Rights Commission as an NGO, simply because it included the words “gay” and “lesbian,” was unconstitutional. See Thom Senzee, *Score One for LGBT Rights in Africa*, THE ADVOCATE (May 5, 2015), <http://www.advocate.com/world/2015/05/05/score-one-lgbt-rights-africa>. In November 2015, the Botswanan High Court issued a similar ruling, holding that refusing to register the organization “Lesbians, Gays, and Bisexuals of Botswana” violated the applicants’ rights to freedom of expression, association, and assembly, and to equal protection of the law. See Anneke Meerkotter & Graeme Reid, *Africa Rulings Move LGBT Rights Forward*, JURIST (Aug. 5, 2015), <http://www.hrw.org/news/2015/08/05/africa-rulings-move-lgbt-rights-forward>. In May 2015, the Zambian High Court upheld the acquittal of Paul Kasonkomona, who spoke in favor of rights recognition for gays and lesbians on a private television station. He had been arrested and charged with “soliciting for immoral purposes.” The Court held that Kasonkomona was engaged in protected expression under the Zambian Constitution. *Id.*

Moreover, in other regions of Sub-Saharan Africa, there has been some movement towards decriminalization. Palau, Sao Tome and Principe, and Mozambique have all recently decriminalized homosexuality. 76 *Countries Where Homosexuality is Illegal*, ERASING 76, (Updated Aug. 12, 2016), <http://76crimes.com/76-countries-where-homosexuality-is-illegal>.

180. Seitz-Wald, *supra* note 156.

As Christopher McCrudden has recently documented, American members of the counter-network are increasingly present in U.S. Supreme Court advocacy, representing the comparative and international law arguments that they have helped to shape through their international and transnational advocacy.<sup>181</sup> For example, in *Ayotte v. Planned Parenthood of Northern New England*,<sup>182</sup> counsel for amicus curiae, the University Faculty for Life in support of petitioner was Richard Wilkins.<sup>183</sup> Its brief argued that:

Unlike other questions, for which a strong consensus exists, resort to international law regarding abortion provides little guidance for this Court. To the extent such guidance does exist, it supports the right of parents to be involved in the care and treatment of their daughters, and thus supports the petitioner in this case.<sup>184</sup>

Similarly, in *Hollingsworth v. Perry*,<sup>185</sup> a challenge to the legality of a voter-enacted ballot initiative that amended the California Constitution to prohibit same-sex marriage, a brief by international jurists and academics, submitted by Judge Georg Ross and by the Marriage Law Foundation, emphasized the significance of the ECtHR's jurisprudence in *Schalk and Kopf v. Austria* that the European Convention does not require Council of Europe member nations to permit same-sex marriage absent "a European consensus toward legal recognition of same-sex couples."<sup>186</sup> These same advocates have been instrumental in preventing a consensus in state practice from developing across Europe. In the Czech Republic, the ACLJ helped defeat legislation legalizing same-sex marriage.<sup>187</sup> In Romania, the ACLJ affiliate ECLJ has supported a constitutional provision defining marriage as being between a man and a woman.<sup>188</sup> ECLJ has also lobbied in the Council of Europe against expanding

181. See McCrudden, *supra* note 13.

182. 546 U.S. 320 (2006).

183. Wilkins was one of the most influential conservative strategists in the UN and an architect of the Doha Declaration, affirming international support for "traditional" family structures. See *supra* note 149 and accompanying text; Pam Squyres, *Pro-Life International*, MOTHER JONES (Nov. 21, 2000), <http://www.motherjones.com/politics/2000/11/pro-life-international>. See also Richard G. Wilkins, *The Principles of the Proclamation: Ten Years of Help*, 44 BYU STUD. Q. 5, 8 (2005).

184. Brief for University Faculty for Life as Amicus Curiae in Support of Petitioner, *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006) (No. 04-1144), 2005 WL 1912326, at \*1.

185. 133 S. Ct. 2652 (2013).

186. Amicus Curiae Brief of International Jurists and Academics in Support of Petitioner *Hollingsworth* and Respondent Bipartisan Legal Advisory Group Addressing the Merits and Supporting Reversal at 27, *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) (Nos. 12-144, 12-307) (quoting *Schalk*, 53 EHRR 20 (2011)).

187. Mariah Blake, *U.S. Evangelicals Aim to Influence European Law*, CHRISTIAN SCI. MONITOR (Apr. 17, 2007), <http://www.csmonitor.com/2007/0417/p01s03-woeu.html>.

188. *Romania: Debate on Human Trafficking and Family Values*, EUR. CENTRE FOR L. & JUST. (May 19, 2014), <http://eclj.org/romania-debate-on-human-trafficking-and-family-values>. For an account of network conflicts in Romania, see BOB, *supra* note 63, at 96-106.

legal protections based on sexual orientation.<sup>189</sup>

Thus, the fruits of the counter-network's activity are beginning to surface in American legal discourse. Through their work in international and regional courts, and in the courts and legislatures of other countries, American advocates have helped to create legal evidence to support their claims about global practice related to sexuality rights. Two decades later, however, this activity does not appear to have been successful in preventing U.S. acceptance of same-sex relationships. The Court's decision in *Obergefell* capped off a tremendous and rapid transformation both in the law and in public opinion. On Election Day in 2004, the year after the *Lawrence* decision, voters in eleven states adopted constitutional amendments banning same-sex marriage,<sup>190</sup> in many states with more than 70% of voters in favor.<sup>191</sup> By 2008, thirty states had a constitutional marriage ban.<sup>192</sup> Less than a decade later, both the law and public opinion had changed dramatically. In a poll conducted in February 2015, four months before *Obergefell*, 63% of Americans said that gays and lesbians have a constitutional right to marry.<sup>193</sup> This support extended to every region of the country, with 57% of Southerners, 67% of Americans in the West, 70% in the Northeast, and 60% in the Midwest supporting marriage.<sup>194</sup>

The U.S. experience is consistent with that in other liberal democracies. Over the last decade, fifteen countries in Europe, North, and Latin America have legalized same-sex marriage, while many others have taken steps towards same-sex marriage recognition. In May 2015, Ireland became the first country to allow same-sex marriage by popular referendum—with 62% of voters expressing support.<sup>195</sup> The vehement opposition of conservative religious nations in Africa, Eastern Europe, and the Middle East does not appear to have been successful in preventing the norm from diffusing among regional and cultural allies.

189. See *The PACE's Draft Resolution*, EUR. CTR. FOR L. & JUST. (Dec. 17, 2009), <http://eclj.org/COE/eclj-the-pace-draft-resolution-on-discrimination-on-the-basis-of-sexual-orientation-and-gender-identity-discriminates-and-threatens-fundamental-rights-of-other-people>.

190. Julie L. Davis, *State Regulation of Same-Sex Marriage*, 7 GEO. J. GENDER & L. 1079, 1087 (2006).

191. CNN.com, Election Results, <http://www.cnn.com/ELECTION/2004/pages/results/ballot.measures/> (Arkansas—74%; Georgia—76%; Kentucky—75%; Mississippi—86%; North Dakota—73%; Oklahoma—76%);

192. Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES (Nov. 5, 2008), <http://www.nytimes.com/2008/11/06/us/politics/06marriage.html>.

193. Jennifer Agiesta, *Poll: Obama's Approval Rating Stagnant Despite Economy*, CNN POL. (Feb. 19, 2015), <http://www.cnn.com/2015/02/19/politics/poll-obama-approval-rating-economy/index.html>.

194. CNN/ORC INTERNATIONAL POLL Feb. 12-15, 2015 at 19, <http://i2.cdn.turner.com/cnn/2015/images/02/19/rel2f.obama.and.domestic.issues.pdf>.

195. See Henry McDonald, *Ireland Becomes First Country to Legalise Gay Marriage by Popular Vote*, THE GUARDIAN (May 23, 2015), <http://www.theguardian.com/world/2015/may/23/gay-marriage-ireland-yes-vote>.

The failure of the counter-network to block acceptance of same-sex relationship recognition in the United States specifically, and among Western democracies more generally, suggests that a counter-network's success may turn on its ability to mobilize the national communities that are salient to its target. The briefing in *Obergefell* suggests the complicated politics of counter-network activity. The international law scholars' brief, penned by Harold Hongju Koh and colleagues and filed on behalf of petitioners in favor of a constitutionally-protected right to marry, draws heavily on the examples of Western European and South American states.<sup>196</sup> In a reference, perhaps to the developments in Eastern Africa and Russia described here, amici noted that:

Not all legislative and judicial decisions from the world community concerning the recognition of same-sex relationships provide models that this Court should follow. Decisions from nations that do not share our constitutional values for individual liberty, equality, and dignity may still be useful in that they provide "anti-models," i.e., decisions from which this Court should consciously depart.<sup>197</sup>

The brief then referenced the Court's decision in *Roper v. Simmons*, in which the majority observed that the United States' policy of executing juveniles placed the country in ignominious company.<sup>198</sup>

In response, the brief of international law scholars supporting the respondents, concluded that "[t]here is simply no 'emerging global consensus' for same sex marriage" noting that "any form of same sex marriage has only been adopted by 17 of the 193 member states of the United Nations."<sup>199</sup> By shifting the denominator<sup>200</sup> to include all countries of the United Nations, the brief paints a very different picture of the reach and depth of the marriage equality norm. The brief goes on to say, that "[m]ost of the remaining countries are not the 'anti-models' that Koh amici suggest, but are constitutional democracies that share our values of individual liberty."<sup>201</sup> However, the brief then does not list any of these

196. See Brief for Foreign and Comparative Law Experts Harold Hongju Koh et al. as Amici Curiae in Support of Petitioners, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-574), available at <http://sblog.s3.amazonaws.com/wp-content/uploads/2015/03/14-556-fcle.pdf>.

197. *Id.* at 12.

198. *Id.*

199. See Brief for 54 International and Comparative Law Experts from 27 Countries and the Marriage and Family Law Research Project as Amici Curiae in Support of the Respondent, *Obergefell v. Hodges*, at 3, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-575), <http://sblog.s3.amazonaws.com/wp-content/uploads/2015/03/14-55614-56214-57114-57454bsacInternationalAndComparativeLawExperts.pdf>.

200. See generally Ernest A. Young, *Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005) (describing the way in which the Court has relied on practices in foreign jurisdictions in order to expand the "denominator" in Eighth Amendment cases to support the argument that a practice is cruel and unusual).

201. See Brief for 54 International and Comparative Law Experts from 27 Countries and the Marriage and Family Law Research Project as Amici Curiae in Support of the Respondent, *Obergefell v. Hodges*, at 3, 135 S. Ct. 2584 (2015) (Nos. 14-556, 14-562, 14-571, 14-



allegedly analogous nations by name. Instead, the brief proceeds to focus on analyzing the jurisprudence of roughly the same subset of countries as the *Koh amici*.

The dynamics of the briefing in this case suggest a realization by American advocates on both sides of the conversation that not all models are likely to carry equal weight with the justices. The popularity of the “Kill the Gays” bill in Uganda<sup>202</sup> or the Russian anti-homosexual propaganda law,<sup>203</sup> for example, are unlikely to be persuasive, either to American legal elites or the American public. In fact, invocation of these deeply homophobic laws might be more likely to push the citizenry in liberal democracies toward drawing constitutional distinctions than to persuade them that the question of the lawfulness of sexual orientation discrimination is still open.

This is not to say that the counter-network is having no impact on the diffusion of rights to relationship recognition in liberal democracies. Andrew Guzman and Katarina Linos have argued that the relatively limited decisions of the ECtHR in *Schalk and Gas and Dubois v. France* have been influential in slowing the legalization of marriage for same-sex couples in the United Kingdom, a country in which there has been widespread support for gay rights.<sup>204</sup> They suggest that this is an example of human rights backsliding,<sup>205</sup> which occurs when human rights law “undermine[s] efforts to adopt or maintain high levels of protection in countries that would otherwise offer protections above the international norm.”<sup>206</sup> Similarly, they point to reductions in the level of protection accorded to criminal defendants in the United Kingdom, and to the parental leave time offered in Sweden, as cases of backsliding in response to lower European standards.<sup>207</sup> I am not suggesting that these latter examples represent the results of counter-network activity; rather I raise them in order to demonstrate that to the extent that a counter-network is able to reshape expectations in a relevant political community (as opposed to simply in the global one), its activities may be more effective.

## B. Counter-Network Activity and Human Rights Compliance

While American conservative advocates have thus far failed to block the

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575), <http://sblog.s3.amazonaws.com/wp-content/uploads/2015/03/14-55614-56214-57114-57454bsacInternationalAndComparativeLawExperts.pdf>.

202. See Baptiste, *supra* note 137.

203. Adam Federman, *How US Evangelicals Fueled the Rise of Russia's 'Pro-Family' Right*, THE NATION, Jan. 27, 2014, <https://www.thenation.com/article/how-us-evangelicals-fueled-rise-russias-pro-family-right>.

204. Andrew T. Guzman & Katarina Linos, *Human Rights Backsliding*, 102 CALIF. L. REV. 603, 618 (2014).

205. *Id.*

206. *Id.* at 605.

207. *Id.* at 606, 614-23.

diffusion of relationship recognition in the United States, they have arguably been quite successful in undermining perceptions of and engagement with the international human rights regime both domestically and abroad.<sup>208</sup>

Although polling results are mixed, in the United States, distrust of the “foreign” continues to grow. Over the last decade, American public opinion of the United Nations has, at least by some accounts, hit all-time lows.<sup>209</sup> According to polling by the Opportunity Agenda, a human rights advocacy organization, Americans are also deeply ambivalent about the human rights treaty regime, with 46% agreeing that “the U.S. should not sign and follow human rights treaties because ‘it would violate our sovereignty and our government’s right to protect our interests.’”<sup>210</sup> Two-thirds believe that “people in the U.S. should not try to interpret and enforce human rights for people living in other countries,” and more than half agree that “because of different culture and values, it is impossible to have rights that apply to everyone in the world.”<sup>211</sup> One of the two major political parties in the United States has made rejection of international law and its institutions a major focus of its agenda. The 2016 Republican Platform rejects a number of human rights treaties “whose long-range implications are ominous

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208. Notably, however, Americans “are more likely to favor the adoption of a policy when told that other countries have already adopted it, [and] especially when they hear that the United Nations (U.N.) recommends this policy for all countries.” Katerina Linos, *THE DEMOCRATIC FOUNDATIONS OF POLICY DIFFUSION: HOW HEALTH, FAMILY, AND EMPLOYMENT LAWS SPREAD ACROSS COUNTRIES* (2013), 176-77. Perhaps counterintuitively, Republicans are more positively influenced by a U.N. endorsement than Democrats, *id.* at 48, 51, at least when the endorsement is for a domestic social policy program, *id.* at 51. Linos posits that the availability of successful foreign models in peer countries helps to alleviate concerns about new domestic programs because foreign governments and international organizations can provide useful, impartial information. *Id.* This may explain why foreign examples continue to have persuasive weight in American policy discussions, even as Americans express doubts about foreign and international law more generally.

209. See Scott Clement, *The United Nations: Do Americans Still Hate It?*, WASH. POST (Apr. 26, 2012), [https://www.washingtonpost.com/blogs/behind-the-numbers/post/the-united-nations-do-americans-still-hate-it/2012/04/26/gIQANXPjt\\_blog.html](https://www.washingtonpost.com/blogs/behind-the-numbers/post/the-united-nations-do-americans-still-hate-it/2012/04/26/gIQANXPjt_blog.html).

210. THE OPPORTUNITY AGENDA, *HUMAN RIGHTS IN THE U.S.: OPINION RESEARCH WITH ADVOCATES, JOURNALISTS, AND THE GENERAL PUBLIC 6* (Aug. 2007), <https://opportunityagenda.org/pdfs/HUMAN%20RIGHTS%20REPORT.PDF>.

211. *Id.* at 6. By contrast, in a 2008 WorldPublicOpinion poll, seventy percent of U.S. respondents agreed that the U.N. should “actively promote human rights in member states.” COUNCIL ON FOREIGN RELATIONS, *PUBLIC OPINION ON GLOBAL ISSUES I* (Nov. 2009), [http://www.cfr.org/public\\_opinion](http://www.cfr.org/public_opinion). In a 2004 survey, three-quarters of Americans agreed, “If a country seriously violates human rights, the United Nations should intervene,” compared to 18% who said that “Even if human rights are seriously violated, the country’s sovereignty must be respected, and that the United Nations should not intervene.” *Id.* One possible explanation for the divergence between these two polls is that the Opportunity Agenda framed its questions more explicitly in the context of considering the role of international human rights law and its institutions in the United States, whereas the other polls asked more general questions about the role of the UN in the world. It’s plausible that Americans may react more negatively to human rights and international law when the focus is on the United States rather than the rest of the world.

or unclear”<sup>212</sup> including “the U.N. Convention on Women’s Rights, the Convention on the Rights of the Child, the Convention on the Rights of Persons with Disabilities, and the U.N. Arms Trade Treaty, as well as various declarations from the U.N. Conference on Environment and Development” and the “Law of the Sea Treaty.”<sup>213</sup> The GOP Platform also questions the financing of the U.N., attacks the legitimacy of the Human Rights Council and the U.N. Population Fund,<sup>214</sup> and highlights the problem of judicial activism “which includes reliance on foreign law or unratified treaties . . . .”<sup>215</sup> And despite their limited practical impact and doubtful legality, new states continue to consider and adopt foreign law bans.<sup>216</sup>

Another possible indicator of the counter-network’s influence has been the Supreme Court’s failure to cite foreign and international law in several of its recent high profile decisions. Despite international and comparative briefing on both sides of *Hollingsworth*, *Hobby Lobby*, and *Obergefell*, no member of the Court mentioned these arguments.<sup>217</sup> McCrudden has argued that this silence represents a success for the conservative advocates and organizations. By submitting their own briefs defining the state of international law, he contends, these advocates create ambiguity about the existence of a clear and relevant human rights norm.<sup>218</sup> Additionally, it is possible that the public backlash following cases like *Roper* and *Lawrence* has raised the stakes for judicial citation and caused the justices to reevaluate the weight they give to foreign law and practice, or at least to refrain from referencing it in their decisions.

More significant, however, has been the impact of the counter-network’s activities in partner countries, both in terms of mobilizing and legalizing hostility towards gays and lesbians, and also in undermining the international legal regime and its institutions and agents. Part of the success of American efforts to codify anti-gay norms into national law is undoubtedly due to the resonance of anti-gay

212. REPUBLICAN NATIONAL COMMITTEE, REPUBLICAN PLATFORM 2016 51 (2016), [https://prod-static-ngop-pbl.s3.amazonaws.com/media/documents/DRAFT\\_12\\_FINAL\[1\]-ben\\_1468872234.pdf](https://prod-static-ngop-pbl.s3.amazonaws.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf).

213. *Id.*

214. *Id.*

215. *Id.* at 10. In January 2017, a handful of Republican lawmakers proposed the *American Sovereignty Restoration Act of 2017*, which would “terminate” the United States’ membership in the United Nations and its institutions. Natasha Bertrand, *A Bill Has Already Been Introduced in Congress to Remove the US from the United Nations*, BUS. INSIDER (Jan. 23, 2017), <http://www.businessinsider.com/american-sovereignty-restoration-act-us-withdraw-un-2017-1>.

216. See, e.g., Jordan Schachtel, *South Carolina House Passes Bill Excluding Sharia Law from State Courts*, BREITBART (Jan. 28, 2016), <http://www.breitbart.com/big-government/2016/01/28/exclusive-south-carolina-house-passes-bill-banning-sharia-law> (reporting South Carolina’s adoption of exactly such a ban).

217. See Christopher McCrudden, *Transnational Culture Wars*, 13 INT’L J. CONST. L. 434, 460 (2015) (highlighting the absence of foreign and international law in the *Hollingsworth* and *Hobby Lobby* cases).

218. *Id.*

values in much of East Africa; however, this agenda has additional benefits for elites seeking to consolidate power.

Risse and Ropp point out that national blocking factors may sometimes be generated or enhanced by national leaders as a way to resist external pressures toward norm compliance more generally.<sup>219</sup> “To the extent that the domestic or international audiences find these arguments persuasive, governments [may] temporarily be able to fight off transnational processes.”<sup>220</sup> Leaders in East Africa who have openly embraced the partnership of American conservative advocates on gay rights include Yoweri Museveni of Uganda, Yahya Jammeh of Gambia, and Robert Mugabe of Zimbabwe,<sup>221</sup> all of whom have been the subject of domestic and international criticism for their failure to abide by international law.<sup>222</sup> By drawing on powerful anti-gay sentiments in their countries, these leaders delegitimize international criticisms of their treatment of gays and lesbians and undermine the moral authority of Western critics in other areas of governance.<sup>223</sup> Indeed, in some cases, they have been able to gain public international support from American conservatives in exchange for their continued commitment to anti-gay laws.<sup>224</sup>

219. See Risse & Ropp, *supra* note 10, at 262 (blocking factors can be employed “by norm-violating governments in a public discourse with their critics during the phases of denial or tactical concessions”).

220. *Id.*

221. See OUTRIGHT ACTION INT’L, NAMIBIA: NUJOMA ATTACKS HOMOSEXUALS (Jan. 1, 1997), <http://www.ighrc.org/cgi-bin/iowa/article/takeaction/resourcecenter/88.html>; Raymond Baguma, *Museveni Lauds Ugandans on Anti-Gay Stand*, NEW VISION (July 14, 2008), [http://www.newvision.co.ug/new\\_vision/news/1185501/museveni-lauds-ugandans-anti-gay-stand](http://www.newvision.co.ug/new_vision/news/1185501/museveni-lauds-ugandans-anti-gay-stand); *Homosexual and Hated in Zimbabwe*, BBC NEWS (Aug. 12, 1998), [http://news.bbc.co.uk/2/hi/programmes/crossing\\_continents/143169.stm](http://news.bbc.co.uk/2/hi/programmes/crossing_continents/143169.stm).

222. See Megan Duzor & Blessing Zulu, *U.S. Sanctions Against Zimbabwe to Stay in Place*, VOA (May 29, 2015), <http://www.voanews.com/a/united-states-sanctions-zimbabwe/2798784.html> (reporting on the extension of sanctions against Mugabe following reports of election tampering and human rights abuses); Ishaan Tharoor, *Gambia’s President Threatens to Slit the Throats of Gay Men*, WASH. POST (May 12, 2015), <https://www.washingtonpost.com/news/worldviews/wp/2015/05/12/gambias-president-threatens-to-slit-the-throats-of-gay-men/> (reporting cuts in foreign aid to Gambia in response to its human rights record); *Profile: Uganda’s Yoweri Museveni*, BBC NEWS, <http://news.bbc.co.uk/2/hi/africa/4124584.stm> (last updated Feb. 25, 2006) (describing international criticism of Museveni’s treatment of the political opposition in Uganda).

223. After signing the 2014 Anti-Homosexuality Act, Museveni responded to criticism by urging Western governments to “[r]espect African societies and their values.” Elizabeth Landau, Zain Verjee, & Antonia Mortensen, *Uganda President: Homosexuals Are ‘Disgusting’*, CNN (Feb. 25, 2014), <http://www.cnn.com/2014/02/24/world/africa/uganda-homosexuality-interview>. “If you don’t agree, just keep quiet,” he said in an interview with CNN. “Let us manage our society, then we will see. If we are wrong, we shall find out by ourselves, just the way we don’t interfere with yours.” *Id.* See also Tendai Dube, *Robert Mugabe Defends Mine Ownership Plan, Lampoons ‘Brutal’ West*, THE STUFF, <http://www.stuff.co.nz/world/africa/67659896/robert-mugabe-defends-mine-ownership-plan-lampoons-brutal-west> (last updated Apr. 9, 2015) (“Mugabe attacked the ‘reckless and brutal approach of the West’ towards Africa and the Middle East . . . and describe[ed] the United Nations as a ‘circus.’”).

224. Baptiste, *supra* note 137. See also PEOPLE FOR AM. WAY FOUND. GLOBALIZING

More generally, repressive leaders can draw on anti-gay sentiments to build popular support for national regimes—and to punish as disloyal or even treasonous, indigenous activists who try to draw on the support of transnational actors to promote domestic legal change. During the same period that the Anti-Homosexuality Act was being debated, the Ugandan Parliament (with the strong support of President Museveni) adopted the Public Order Management Act, which gave the police broad authority to permit or disallow any “public meeting,” which was defined as any gathering of three or more people in a public location where the “failure of any government, political party or political organization” is discussed.<sup>225</sup> The Public Order Management Act has reportedly been used to inhibit the activities of the political opposition and of human rights organizations.<sup>226</sup> In November 2015, a bill was adopted that would broaden the government’s ability to regulate the activities of Ugandan non-governmental organizations and would prohibit these groups from engaging in any activity that is “contrary to the dignity of the people of Uganda.”<sup>227</sup>

Similarly, the passage of anti-gay legislation in regions throughout Russia corresponded with the adoption of a law requiring any NGO that receives foreign funds to register as a “foreign agent.”<sup>228</sup> This law has been used to harass not only gay and lesbian NGOs,<sup>229</sup> but also Russia’s only independent monitoring organization and polling agency, as well as human rights organizations including Amnesty International and Human Rights Watch that have been critical of Putin.<sup>230</sup> By linking the “gay agenda” to international organizations, governments have been able to build domestic support for repressive laws that, if passed, work to disable the mechanisms of transnational advocacy more generally.

Thus, while the counter-network may have been unsuccessful in stopping

HOMOPHOBIA: HOW THE AMERICAN RIGHT SUPPORTS AND DEFENDS RUSSIA’S ANTI-GAY CRACKDOWN 3 (2014), <http://www.pfaw.org/rww-in-focus/globalizing-homophobia-how-american-right-supports-and-defends-russia-s-anti-gay-crackd> (listing statements by American conservative leaders in support of Russia’s government).

225. Maria Burnett, *Dispatches: A New Law Undermines Rights of Ugandans*, HUMAN RIGHTS WATCH (Aug. 6, 2013), <http://www.hrw.org/news/2013/08/06/dispatches-new-law-undermines-rights-ugandans>.

226. See AMNESTY INT’L, UGANDA: RULE BY LAW: DISCRIMINATORY LEGISLATION AND LEGITIMIZED ABUSES IN UGANDA, 7-8 (2014), <https://www.amnesty.org/en/documents/AFR59/006/2014/en>; AMNESTY INT’L, “WE COME IN AND DISPERSE THEM:” VIOLATIONS OF THE RIGHT TO FREEDOM OF ASSEMBLY BY THE UGANDAN POLICE, 6-7 (2015), <https://www.amnesty.nl/sites/default/files/public/ugandareport.pdf>.

227. *Parliament Passes Controversial NGO Bill on Eve of Pope’s Arrival*, DAILY MONITOR (Nov. 27, 2015), <http://www.monitor.co.ug/News/National/Parliament-passes-controversial-NGO-bill/688334-2974692-8n2col/index.html>.

228. Sean Guillory, *Repression and Gay Rights in Russia*, THE NATION (Sept. 26, 2013), <http://www.thenation.com/article/176368/repression-and-gay-rights-russia>.

229. *Id.*

230. See *Russia: Voters’ Group First Victim of ‘Foreign Agent’ Law*, HUMAN RIGHTS WATCH (July 3, 2013), <https://www.hrw.org/news/2013/07/03/russia-voters-group-first-victim-foreign-agent-law>.

the diffusion of the marriage equality norm, its activities are helping to build resistance to the international human rights regime in ways that may have wide-ranging impacts. While Risse and Ropp's early account conceptualized blocking factors as countervailing national norms,<sup>231</sup> more recent scholarship has highlighted the development of international counter-norms that governments can invoke to justify behavior that violates human rights.<sup>232</sup> For example, Kathryn Sikkink highlights the importance of counter-norms in helping the United States resist domestic and international criticism to rejects its reliance on torture as part of the "War on Terror." In her account, the Bush Administration was able to resist external pressures because "the anti-terrorism counter-norm was accepted by large parts of the US population and by some US allies abroad, lessening both domestic and international pressures for change."<sup>233</sup>

The network described here is helping to develop international counter-norms based on traditional values and sovereignty that challenge not just individual human rights norms, but the legitimacy of the broader human rights project.<sup>234</sup> While these arguments began at the national level as a way of building up domestic resistance to international pressures,<sup>235</sup> increasingly the network has begun to seek international recognition of these counter-norms as a way of shifting the global balance of power. For example, because of its leadership in the "traditional values" advocacy at the United Nations Human Rights Council, Russia has emerged as a state leader of the anti-gay transnational counter-network.<sup>236</sup> By expressing its support for traditional values on the international stage, and attacking the human rights regime as illegitimate, Vladimir Putin has been able to consolidate support for his regime domestically<sup>237</sup> and position Russia as a leader of religious, conservative nations internationally.<sup>238</sup> Sexuality

231. See *supra* notes 55-56, 58-59 and accompanying text.

232. See Anja Jetschke & Andrea Liese, *The Power of Human Rights A Decade After: From Euphoria to Contestation*, in *THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE* 26, 35-41 (Thomas Risse et al. eds., 2013).

233. Kathryn Sikkink, *The United States and Torture: Does the Spiral Model Work?*, in *THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE* 145, 146 (Thomas Risse et al. eds., 2013).

234. Ten years earlier, China adopted a similar strategy after Tianamen Square, challenging the universality and legitimacy of the international human rights regime by arguing for an alternative "Chinese human rights" based on so-called "Asian values." See Katrin Kinzelbach, *Resisting the Power of Human Rights: The People's Republic of China*, in *THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE* 164, 166-67 (Thomas Risse et al. eds., 2013).

235. See *supra* Parts IV.B. & IV.C.

236. See *supra* notes 172-74 and accompanying text.

237. The anti-homoproganda laws enjoy broad public support—68 percent as of November 2013 and have helped Putin earn the loyalty and support of the Orthodox church. See *id.* (citing Maksim Glikin, *Repressivny zakony ne vzyvayut u rossiyan vozmusheniya* (Nov. 23, 2013).

238. As this Article goes to press, there are some early indications that President Trump may adopt a similar strategy, lending the United States' authority and resources to the counter-network's activities. See Somini Sengupta & Rick Gladstone, *Donald Trump and the U.N.:*

rights have become another area of contestation and mobilization as Russia jockeys with the European Union for regional and global influence.<sup>239</sup> If successful, these counter-norms could destabilize the international human rights regime by challenging the core premise of the universality of basic human rights.

Finally, and most urgently, the counter-network's activism has also dramatically and devastatingly impacted the daily lives of gays and lesbians in these countries. In Uganda, gays and lesbians reported that prior to the introduction of the Anti-Homosexuality Bill of 2009, conditions had improved marginally and that they had been allowed to "hold news conferences and publicly advocate for their rights."<sup>240</sup> The months following the introduction of the bill saw a sharp increase in violence against LGBTI people.<sup>241</sup> A local tabloid paper published the photos and contact information of a number of gays and lesbians under the banner "Hang Them!"<sup>242</sup> In 2011, David Kato, a prominent and visible gay rights activist was brutally beaten to death.<sup>243</sup> Following the introduction and passage of the revised legislation in 2014, the tabloid again published the names of "Uganda's Top Homos," leading immediately to the murder of another person believed to be gay.<sup>244</sup> "[O]ther prominent LGBT activists [went] into hiding to avoid becoming victims themselves."<sup>245</sup> By

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*Signs of Clashing Views on Many Issues*, N.Y. TIMES (Nov. 19, 2016) (highlighting policy positions that Trump has taken that conflict with international human rights law); Harriet Alexander, *Donald Trump and the United Nations: A Fight Waiting to Happen?* THE TELEGRAPH (Jan. 19, 2017) (describing Trump's criticisms of the U.N.).

239. See Katja Kahlina & Dusica Ristivojevic, *LGBT Rights, Standards of Civilization and the Multipolar World Order*, E-INT'L RELATIONS (Sept. 10, 2015) <http://www.e-ir.info/2015/09/10/lgbt-rights-standards-of-civilisation-and-the-multipolar-world-order> ("In the larger context of on-going destabilizations of the post Cold-War world order and the increasing multipolarity of geopolitical power, the Russian case should be regarded not (only) as a resistance to gay conditionality, but as a strategy of the global re-position of a rising power in the emerging multi-polar world."); Erik Voeten, *Why Russia Tried to Curb Same-sex Partner Rights at the U.N. (And Why It Lost)*, WASH. POST (Mar. 25, 2015), <https://www.washingtonpost.com/news/monkey-cage/wp/2015/03/25/why-russia-tried-to-curb-same-sex-partner-rights-at-the-u-n-and-why-it-lost/> (speculating that Russia's anti-gay activity at the U.N. is a way of building allegiances with other countries that feel threatened by criticism of their LGBT rights policies and "challenging more liberal ideas about human rights embedded in international institutions . . .").

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

241. Owen Bowcott, *Uganda Anti-Gay Law Led to Tenfold Rise in Attacks on LGBTI People, Report Says*, THE GUARDIAN (May 11, 2014), <https://www.theguardian.com/world/2014/may/12/uganda-anti-gay-law-rise-attacks>.

242. Xan Rice, *Ugandan Paper Calls for Gay People to Be Hanged*, THE GUARDIAN, (Oct. 21, 2010), <http://www.theguardian.com/world/2010/oct/21/ugandan-paper-gay-people-hanged>.

243. Jeffrey Gettleman, *Ugandan Who Spoke Up for Gays Is Beaten to Death*, N.Y. TIMES (Jan. 27, 2011), <http://www.nytimes.com/2011/01/28/world/africa/28uganda.html>.

244. Sunnivie Brydum, *LGBT Ugandans Attacked, Killed as Tabloid Lists 'Top 200 Homos'*, THE ADVOCATE (Feb. 25, 2014), <http://www.advocate.com/world/2014/02/25/lgbt-ugandans-attacked-tabloid-lists-top-200-homos>.

245. *Id.*

generating a very public debate about the status of gays and lesbians in Uganda (often by stoking fears of HIV/AIDS and pedophilia), network activities forced this vulnerable group into an unwanted spotlight with horrific consequences.

A similar phenomenon has occurred in Russia. Russia's adoption of anti-gay laws coincided with its appearance on the international stage as a supporter of traditional values.<sup>246</sup> Although the anti-homoproganda laws began to emerge in Russia in 2006, with the passage of a local law fining persons who engaged in public acts aimed at the propaganda of homosexuality, it was not until 2012—three years after the first U.N. resolution on traditional values, that the passage of anti-gay laws gained traction nationally.<sup>247</sup> The federal law banning propaganda of homosexuality to minors was passed in 2013.<sup>248</sup> Gay rights activists in Russia report that these laws have encouraged “anti-gay abuse, discrimination and violence.”<sup>249</sup>

## VI. LESSONS FOR TRANSNATIONAL ADVOCACY

As these examples illustrate, rival network activity can disrupt the status quo in very destructive ways, producing a backlash that widens the space between state practice and rights norms with severe impacts on broader society. In the U.S. domestic context, scholars have long been preoccupied with movement-counter-movement interaction and its impact on the pace and direction of social change.<sup>250</sup> Cognizant of these dynamics, advocates have been strategic and

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246. Compare *supra* notes 175-77 and accompanying text (describing Russia's anti-gay activity in the U.N., starting in 2009), with Wilkinson, *supra* note 173, at 366 (dating the earliest subnational anti-gay laws to Ryzan Oblast in 2006 and Arkhangelsk and Kostroma Oblasts in 2011). Russia had previously decriminalized homosexual behavior in 1993 as part of the wave of liberalizations that occurred in Europe at that time. See John-Thor Dahlburg, *Russia Revokes Law Punishing Gay Sex*, LA TIMES (May 29, 1993), [http://articles.latimes.com/1993-05-29/news/mn-41287\\_1\\_human-rights](http://articles.latimes.com/1993-05-29/news/mn-41287_1_human-rights).

247. See Wilkinson, *supra* note 173, at 366.

248. *Id.* (citing Federal Law of the Russian Republic).

249. *Russia's LGBT Victimized By 'Gay Propaganda' Law*, AL JAZEERA (Sept. 14, 2015), <http://www.aljazeera.com/indepth/features/2015/09/russia-lgbt-victimized-gay-propaganda-law-150914082614488.html>. See also Nora Fitzgerald and Vladimir Ruvinsky, *The Fear of Being Gay in Russia*, POLITICO (Mar. 22, 2015), <http://www.politico.com/magazine/story/2015/03/russia-putin-lgbt-violence-116202>

250. Some influential contributions to this discussion include: 23 ROUTING THE OPPOSITION: SOCIAL MOVEMENTS, PUBLIC POLICY, AND DEMOCRACY (David S. Meyer et al. eds. 2005); Kenneth T. Andrews, *Movement-Counter-movement Dynamics and the Emergence of New Institutions: The Case of "White Flight" Schools in Mississippi*, 80 SOC. FORCES 911 (2002); Jocelyn Elise Crowley, *Fathers' Rights Groups, Domestic Violence and Political Countermobilization*, 88 SOC. FORCES 723 (2009); Marc Dixon, *Movements, Countermovements, and Policy Adoption: The Case of Right-to-Work Activism*, 87 SOC. FORCES 473 (2008); Michael C. Dorf & Sidney Tarrow, *Strange Bedfellows: How an Anticipatory Countermovement Brought Same Sex Marriage into the Public Arena*, 39 LAW & SOC. INQUIRY 449 (2014); Clarence Y. H. Lo, *Countermovements and Conservative Movements in the U.S.*, 8 ANN. REV. SOC. 107 (1982).



cautious about when and how to push for particular gains, whether with the public, in the legislatures, or in the courts. To date, the scholarship on transnational advocacy and human rights compliance has paid insufficient attention to the negative consequences of failed norm diffusion<sup>251</sup> or to the possibility of backlash.<sup>252</sup> Failures have “been conceptualized mostly as . . . ineffectiveness producing the internalization of the advocated norm in the target state,” or “the maintenance of the status quo in the target state.”<sup>253</sup> The Ugandan example highlights the possibility that failed norm diffusion can be dangerous. Making claims based on international rights commitments that have only thin popular support may work to undermine both the commitments and the claimants<sup>254</sup>—and may help to shore up domestic support for law-breaking regimes.

This possibility is particularly pronounced when actors in the counter-network are actively working to highlight the gaps between law on the books and law on the ground. The country’s international legal commitments are reframed as foreign (and even colonial) and domestic rights proponents are characterized as treasonous or corrupt. As a result, when treaty commitments are raised in national discourse and courts, rather than domesticating and institutionalizing the rights norm (as transnational legal process theory would predict), they can actually work to make the rights commitments and the broader legal system seem alien and illegitimate.<sup>255</sup> In Uganda, the competing claims by the network and counter-network about which set of laws represents “true” Ugandan values have exposed the tenuous legitimacy of all different forms of law in a country where democracy and constitutionalism are both weak.

Given the heightened stakes and risks posed by counter-network activity, rights advocates (both inside and outside government) should proceed with caution when considering strategies for advancing rights, cognizant of the ways

251. Fernando Nuñez-Mietz & Lucrecia Garcia Iommi, *Can Transnational Norm Advocacy Undermine Internalization 2* (2015) (unpublished manuscript) (on file with author).

252. Kathryn Sikkink, *The United States and Torture: Does the Spiral Model Work?*, in *THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE* 145, 145 (2013) (Thomas Risse et al. eds., 2013) (noting that the original spiral model failed to take into account the possibility “that a country which had already ratified and implemented human rights treaties on a core human rights norm could nevertheless have a profound backlash and reversal of these commitments, even when they are deeply embedded in both international and domestic law”).

253. Fernando Nuñez-Mietz & Lucrecia Garcia Iommi, *supra* note 251, at 2.

254. Lawrence Helfer has warned that the “overlegalization” of human rights may result in national backlash when the meaning of a state’s treaty commitments evolve over time in ways that create wide disparities between the state’s obligations under international law and its domestic policy preferences. See Lawrence R. Helfer, *supra* note 16, at 1891-94.

255. Following the Constitutional Court’s 2014 decision striking down the Anti-Homosexuality Act, one of the pastors who supported the legislation speculated in the press about “whether the ruling is in any way related to the president’s travel to America.” Elias Biryabarema, *Uganda’s Constitutional Court Overturns Anti-Gay Law*, MAIL & GUARDIAN (Aug. 1, 2014), <http://mg.co.za/article/2014-08-01-ugandas-highest-court-overturns-anti-gay-law>.

that rival network interactions can reshape domestic political conditions in unexpected and destructive ways. For example, certain moves, like the public withdrawal of aid to countries that adopt anti-gay laws—or refuse to endorse sexuality rights—may have the unintended impact of worsening the backlash, generating popular resentment against the human rights regime and consolidating support for national leaders who resist international pressure.<sup>256</sup> Even if these kinds of financial and social penalties are successfully in coercing a short term shift to norm-compliant behavior by government, they may undermine real internalization and acceptance of the norm.<sup>257</sup> In other words, compliance created by external pressures (as conceptualized in the spiral model) may actually undermine norm internationalization, at least in cases where domestic support for the rights norms is limited.

This critique of the spiral model is related to, but different from, the broad skepticism expressed by a range of commentators that the human rights regime “is little more than a front for Western imperialist values.”<sup>258</sup> Simmons has demonstrated persuasively that in practice, treaty commitments have the ability to mobilize impacted groups and individuals “to formulate and demand their own liberation.”<sup>259</sup> Her evidence suggests that international law works against existing power structures “in sometimes surprising ways.”<sup>260</sup> Katerina Linos has also challenged the notion that international influence is inconsistent with democracy by illustrating how electoral politics can lead to the diffusion and

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256. For example, following the introduction and adoption of anti-gay law in several African nations, the United States and European Union moved to condition development aid on the legal protection of gays and lesbians. Prior to the negotiations over the revision of the Cotonou Agreement, the European Parliament insisted that “actions conducted under the terms of the various partnerships be pursued without any discrimination on grounds of gender . . . sexual orientation or against people living with HIV/AIDS.” EUR. PARL. DOC. (COM B7-0693/2010). These demands were rejected by the African, Caribbean, and Pacific states who argued that the EU should “refrain from any attempts to impose its values” on homosexuality. Declaration of the 21<sup>st</sup> Session of the ACP Parliamentary Assembly on the Peaceful Co-Existence of Religions and the Importance Given to the Phenomenon of Homosexuality in the ACP-EU Partnership (Sept. 28, 2010). David Cameron’s threat to withdraw bilateral aid was condemned by African leaders “as paternalistic and an affront . . . to national identity and culture.” Symons & Altman, *supra* note 98, at 80.

257. As Goodman and Jinks explain, “[s]ocial and symbolic rewards are often perceived by actors as controlling and thus degrade their intrinsic motivation in some circumstances.” Ryan Goodman & Derek Jinks, *Social Mechanisms to Promote International Human Rights: Complementary or Contradictory?*, in *THE PERSISTENT POWER OF HUMAN RIGHTS: FROM COMMITMENT TO COMPLIANCE* 103, 113 (Thomas Risse et al. eds., 2013). They point to studies of apartheid South Africa, where the sanctions programs had the unintended consequence of building national unity and domestic resistance. *Id.* (quoting HERIBERT ADAM & KOGILA MOODLEY, *THE OPENING OF THE APARTHEID MIND* 57 (1993) (finding that “[t]he expected pressure by business on government as a result of sanctions has not occurred. In fact, sanctions brought business and government together in the patriotic cause of circumventing foreign interference.”)).

258. Simmons, *supra* note 9, at 6.

259. *Id.* at 7.

260. *Id.*

adoption of foreign models even in wealthy Western democracies that are relatively impervious to international pressures.<sup>261</sup>

The concern presented here is not that the human rights regime is inherently imperialist or anti-democratic, but rather that rival network activity can threaten the entrepreneurship of activists in target countries, undermining both their ownership of their own rights claims and their ability to frame them in a way that takes account of local context and process. Given how significant domestic ownership is for successful rights recognition, partners in human rights advocacy must be thoughtful to provide support in ways that do not feed these narratives—and co-opt domestic battles in favor of international ones.

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261. See LINOS, *supra* note 49, at 4-5.