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Using International Human Rights Law to Advance Queer Rights: A Case Study for the *American Declaration of the Rights and Duties of Man*

MARK E. WOJCIK*

In addition to violating various provisions of federal and state constitutions, anti-gay ballot initiatives may violate international human rights norms. I see three reasons to invoke international human rights to challenge these initiatives. First, international human rights norms place the struggle for gay and lesbian rights in its proper context as a struggle for human rights. Second, some of the international human rights instruments provide both a source of legal obligation and an additional forum to challenge anti-gay ballot initiatives. Third and finally, if lesbian and gay activists in the United States establish that documents such as the *American Declaration of the Rights and Duties of Man* can protect the human rights of gay and lesbian persons, this will help gay and lesbian persons in other countries who also face discrimination on the basis of sexual orientation.

Part I of this Article discusses the legal basis for invoking the *American Declaration of the Rights and Duties of Man* ("American Declaration") as a source of legal obligation in the United States. Part II of this Article applies the *American Declaration* in a context that promotes queer legal rights in challenging anti-gay ballot initiatives. Part III concludes with additional observations of the premise of this article, with a view toward advancing the specific purpose of placing the struggle for gay and lesbian rights in its context as a struggle for human rights.

I. INVOKING THE *AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN* AS A SOURCE OF LEGAL OBLIGATION

After World War II, the United States became a signatory to the Charter of the Organization of American States ("OAS Charter").¹ The OAS Charter provides for "an Inter-American Commission on Human Rights, whose

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¹ Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, as amended Feb. 27, 1970, 21 U.S.T. 607.

principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters."² The United States is also a signatory to the *American Declaration of the Rights and Duties of Man*.³ Over the years, lawyers in the United States have attempted to invoke the *American Declaration* as a positive source of law binding on a U.S. court, in the same way as a treaty (conventional international law) is binding under the treaty clause of the U.S. Constitution,⁴ or in the way that customary international law should be binding in the United States.⁵

Previous attempts to invoke the *American Declaration* in U.S. courts have generally not been successful. For example, in the case known as *In re Alien Children Education Litigation*,⁶ the *American Declaration* was cited, along with other international human rights instruments, for the proposition that there is an international human right of all persons to literacy or to a free primary education. The *American Declaration* had been invoked because the state of Texas was denying the use of state funds to educate persons who were neither citizens of the United States nor lawfully admitted residents. The district court rejected the argument based on the *American Declaration* because there was no authority that "the federal recognition of human rights, by itself, prevents the states from interfering with the enjoyment of those rights."⁷ The court likewise denied a claim that the *American Declaration* was an expression of customary

² *Id.* art. 112.

³ O.A.S. Res. XXX, adopted by the Ninth International Conference of American States, Bogota, Colombia, Mar. 30–May 2, 1948, OEA/Ser. L./V/II.23/doc. 2 rev. 6 (English 1979) [hereinafter AMERICAN DECLARATION], reprinted in RICHARD B. LILICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 430.1–430.10 (2d ed. 1990).

⁴ "All Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST. art. VI, § 2. "Under this provision (the only one in the Constitution that speaks to the relation of international law to municipal law in U.S. courts), a self-executing treaty (or a non-self-executing treaty when implemented by Congress) supersedes all inconsistent state and local laws. Additionally, under the 'last-in-time rule,' a self-executing treaty supersedes earlier inconsistent federal laws." Richard B. Lillich, *International Human Rights Law in U.S. Courts*, 2 J. TRANSNAT'L L. & POL'Y 1, 2 (1993).

⁵ "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination." *The Paquete Habana*, 175 U.S. 677, 700 (1900); see also *Filartiga v. Pena-Irala*, 630 F.2d 876, 880–81, 887 (2d Cir. 1980); Lillich, *supra* note 4, at 2 ("Having the same status as treaty law, [customary international law] also supersedes all inconsistent state and local laws and, at least in principle, all earlier inconsistent federal laws.").

⁶ 501 F. Supp. 544 (S.D. Tex. 1980).

⁷ *Id.* at 594.

international law that would bind the state of Texas, but left open the possibility that the United States could be brought before an international tribunal for a claimed violation of customary international law.⁸

Other cases also illustrate past difficulties in invoking the American Declaration in U.S. courts. The *American Declaration* was invoked in *Sanchez-Espinoza v. Reagan*,⁹ but the court specifically declined to determine whether the *American Declaration* or any other human rights instruments created a legal foundation for the claims brought to contest U.S. actions in Nicaragua.¹⁰ The court dismissed the claims because there were significant factual and policy questions for which there were "no judicially discoverable and manageable standards," in addition to the potential for the case to impinge upon both national security and the powers of the legislative and executive branches to establish and implement foreign policy decisions.¹¹

The *American Declaration* was also invoked by the Chumash Indian people, who argued unsuccessfully in *United States ex rel. Chunie v. Ringrose*¹² that the *American Declaration* and other human rights treaties adopted after 1945 supported their claims of ownership of the Santa Barbara Islands. Finding that claims to these islands should have been brought under an 1851 Act pertaining to the Treaty of Guadalupe Hidalgo, the Ninth Circuit stated that any international human rights instruments adopted after 1945 could not "logically affect the operation of the Act of 1851."¹³ The court's view was that only those standards in effect at the time of the 1851 Treaty could have any relevance to the claims of ownership.

Yet another claim under the *American Declaration* was brought by an inmate facing the death penalty in *Celestine v. Butler*.¹⁴ He argued that the *American Declaration* and the OAS Charter superseded Louisiana law under the Supremacy Clause of the federal constitution. The Fifth Circuit refused to give any consideration to his claims, which were based upon asserted racial discrimination and the use of only those jurors who were not opposed to the death penalty. The court found that the resolution of the inmate's claims were "settled under American constitutional law."¹⁵ Denying that international

⁸ *Id.* at 596.

⁹ 568 F. Supp. 596, 601 n.6 (D.D.C. 1983), *aff'd*, 770 F.2d 202 (D.C. Cir. 1985).

¹⁰ See also *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1987 I.C.J. 188 (Nov. 18).

¹¹ *Sanchez-Espinoza*, 568 F. Supp. at 597-98.

¹² 788 F.2d 638 (9th Cir.), *cert. denied*, 479 U.S. 1009 (1986).

¹³ *Id.* at 647.

¹⁴ 823 F.2d 74 (5th Cir.), *cert. denied*, 483 U.S. 1036 (1987).

¹⁵ *Id.* at 79-80.

human rights laws had any applicability unless it was expressly incorporated into the domestic law of the United States, the court stated that "[n]ot a single argument is advanced directed at proving that the United States agreed to provide additional factors for decision or to modify the decisional factors required by the United States Constitution as interpreted by the Supreme Court."¹⁶ The court characterized the arguments based on the American Declaration as "ingenious," but found the content to be "wholly lacking."¹⁷

The *American Declaration* was also cited in *Nieves v. University of Puerto Rico*,¹⁸ but only to note that it was one of the models for the equal protection clause of the Puerto Rico Constitution, and that Puerto Rico's constitution provision is more liberal than the United States Constitution.¹⁹ The *American Declaration* was not invoked in that case other than as a historical reference.

These decisions from the federal courts in the United States found no substantive application for the *American Declaration*. The *American Declaration*, if anything, was only a declaration and not a source of legal obligation by any means. A possible exception to these cases might be implied from the decision in *Filartiga v. Pena-Irala*,²⁰ where the Second Circuit found that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights . . ."²¹ Considering the *American Declaration*, as well as other international human rights instruments, the court found that customary international law, "as reflected in treaties in declarations that are not self-executing," could be applied as substantive law.²² There was no pronouncement, however, that the *American Declaration* was a source of legal obligation upon the United States.

That pronouncement finally came in 1989, when the Inter-American Court of Human Rights²³ found that the *American Declaration* was "a source of

¹⁶ *Id.* at 80.

¹⁷ *Id.*

¹⁸ 7 F.3d 270 (1st Cir. 1993).

¹⁹ *Id.* at 275 (noting further that state constitutional provisions may provide more, but not less, protection than the federal constitution).

²⁰ 630 F.2d 876 (2d Cir. 1980); see also Karen E. Holt, *Filartiga v. Pena-Irala After Ten Years: Major Breakthrough or Legal Oddity?*, 20 GA. J. INT'L & COMP. L. 543 (1990).

²¹ *Filartiga*, 630 F.2d at 878; see also Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 note).

²² *Filartiga*, 630 F.2d at 889.

²³ The American Convention on Human Rights provided for the creation of the Inter-American Court of Human Rights, which sits in San José, Costa Rica. See generally SCOTT DAVIDSON, *THE INTER-AMERICAN COURT OF HUMAN RIGHTS* (1992); Thomas Buergenthal, *The Advisory Practice of the Inter-American Human Rights Court*, 79 AM. J. INT'L L. 1 (1985). The Court, like the Inter-American Commission of Human Rights, consists of seven members who

international obligation related to the Charter of the Organization [of American States].”²⁴ As such, the *American Declaration* is a source of legal obligation upon all members of the OAS, including the United States. What is especially surprising to many is that the *American Declaration* is now considered a source of legal obligation even though its drafters did not necessarily intend for the document to be anything more than a declaration of principles.

The *American Declaration* evolved from a non-binding declaration of principle into a binding source of legal obligation. The United States had appeared before the court to argue that the *American Declaration* had no legal effect. The United States argued that:

The American Declaration of the Rights and Duties of Man represents a noble statement of the human rights aspirations of the American States. Unlike the American Convention [on Human Rights], however, [the American Declaration] was not drafted as a legal instrument and lacks the precision necessary to resolve complex legal questions. Its normative value lies as a declaration of basic moral principles and broad political commitments and as a basis to renew the general human rights performance of member states, not as a binding set of obligations.

The United States recognizes the good intentions of those who would transform the American Declaration from a statement of principals [sic] into a binding legal instrument. But good intentions do not make law. It would seriously undermine the process of international lawmaking—by which the sovereign states voluntarily undertake specified legal obligations—to impose legal obligations on states through a process of “reinterpretation” or “inference” from a non binding statement of principles.²⁵

These contentions of the United States arose in a case brought by the Republic of Colombia before the Inter-American Court of Human Rights. Colombia requested an interpretation of Article 64(1) of the American Convention on Human Rights,²⁶ questioning whether the *American Declaration*

serve on a part-time, nonsalaried basis. Christina M. Cerna, *Remedies Under International Law: The Inter-American System*, in *INTERNATIONAL HUMAN RIGHTS LAW IN THE COMMONWEALTH CARIBBEAN* 23, 26 (Angela D. Byre & Beverley Y. Byfield eds., 1991). After a country has ratified the Convention on Human Rights, it must make a separate declaration accepting the compulsory jurisdiction of the Court. *Id.*

²⁴ Interpretation of the American Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights, Advisory Op. OC-10/89 of July 14, 1989, Ser. A, No. 10 (Inter-Am. Ct. Hum. Rts. 1989), *reprinted in* 11 *HUM. RTS. L.J.* 118, 126 (1990) [hereinafter Interpretation of the American Declaration].

²⁵ *Id.* ¶ 12.

²⁶ “The member states of the Organization [of American States] may consult the [Inter-American Court of Human Rights] regarding the interpretation of this Convention or of other

may be invoked as a source of legal obligation. The United States, which appeared before the Court in its capacity as a member of the OAS, argued that the *American Declaration* was "not a treaty, and that therefore the Court does not have jurisdiction under Article 64 to interpret it or determine its normative status within the inter-American human rights system."²⁷ Furthermore, because the *American Declaration* "is not and has never been a treaty, the United States believes that the Court has no jurisdiction to consider the present request [by the Republic of Colombia], and should therefore dismiss it."²⁸

The Inter-American Court of Human Rights rejected the U.S. contention that there was no jurisdiction to determine the legal status of the *American Declaration*.²⁹ The Court's interpretation of the American Convention allowed it to interpret *any* international instrument concerning human rights, whether or not the instrument is an OAS convention affecting an OAS member state.³⁰ The Court thus interprets its jurisdiction to include the Geneva Conventions, the United Nations human rights treaties, and other international human rights instruments.³¹

Having found that it could render a decision, the Court found that the American Declaration is not a "treaty" as defined by the Vienna Convention on the Law of Treaties,³² the Vienna Convention on the Law of Treaties among

treaties concerning the protection of human rights in the American states." American Convention on Human Rights, Nov. 22, 1969, art. 64(1), O.A.S.T.S. No. 36, at 1, O.A.S. Off. Rec. OEA/Ser. L/V/II.23 doc. rev. 2 (entered into force July 18, 1978), *reprinted in* 9 I.L.M. 673 (1970), *and in* RICHARD B. LILICH, *INTERNATIONAL HUMAN RIGHTS: DOCUMENTARY SUPPLEMENT* (1991). There are twenty parties to the American Convention on Human Rights: Argentina, Barbados, Bolivia, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Peru, Suriname, Uruguay, and Venezuela. The United States has not ratified the Convention. BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW: SELECTED DOCUMENTS* 451 n.* (1991).

²⁷ Interpretation of the American Declaration, *supra* note 24, ¶ 17.

²⁸ *Id.*

²⁹ *Id.* ¶ 47.

³⁰ *Id.*; see also Christina M. Cerna, *Access to Court in the Inter-American System*, in *INTERNATIONAL HUMAN RIGHTS LAW IN THE COMMONWEALTH CARIBBEAN* 132, 132-33 (Angela D. Byre & Beverley Y. Byfield eds., 1991).

³¹ This raises the possibility of invoking other human rights instruments in cases brought before the Inter-American Commission on Human Rights to challenge anti-gay ballot initiatives.

³² The Convention on the Law of Treaties defines a "treaty" as "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." Vienna Convention on the Law of Treaties, art. 2(a), May 23, 1969, U.N. Doc. A/CONF. 39/27 (entered into force Jan. 27, 1980), *reprinted in* BARRY E. CARTER & PHILLIP R. TRIMBLE, *INTERNATIONAL LAW: SELECTED DOCUMENTS* 51, 52 (1991).

States and International Organizations,³³ or Article 64(1) of the American Convention on Human Rights, which established the Inter-American Court of Human Rights.³⁴ Although the *American Declaration* was not a treaty, the court nonetheless found that it is a source of legal obligation related to the OAS Charter.³⁵ The Court reasoned that, because the American law of human rights has evolved since 1948, the Court should consider the inter-American human rights system "of today in the light of the evolution it has undergone since the adoption of the [American] Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948."³⁶

Using this standard, the Court found that the duty to respect certain essential human rights had evolved into an *erga omnes* obligation,³⁷ an obligation which must be respected by all nations.³⁸ The Court thus found that the OAS Charter empowered the Inter-American Commission on Human Rights³⁹ to protect human rights in the Americas, and that the specific human rights to be protected "are none other than those enunciated and defined in the *American Declaration*."⁴⁰ Thus, for members of the OAS, including the United States, the *American Declaration* is the test that defines the human rights referred to in the OAS Charter.⁴¹ The Court further found that the Commission's Statute⁴² defined its competence with respect to the *American*

³³ Vienna Convention on the Law of Treaties Between States and International Organizations or Between International Organizations, art. 2(1)(a), Mar. 21, 1986, A/CONF. 129/15, 25 I.L.M. 543 (1986).

³⁴ For further information on the Court itself, see DAVIDSON, *supra* note 23.

³⁵ Interpretation of the American Declaration, *supra* note 24.

³⁶ *Id.* ¶ 37.

³⁷ *Id.* ¶ 38.

³⁸ See, e.g., Barcelona Traction, Light and Power Co. (Belg. v. Spain), 1970 I.C.J. 3, 33 (Feb. 5).

³⁹ The Inter-American Commission on Human Rights is both an organ of the OAS Charter and an organ of the American Convention on Human Rights. DAVIDSON, *supra* note 23, at 11.

⁴⁰ Interpretation of the American Declaration, *supra* note 24, ¶¶ 39-41.

⁴¹ "There shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters." Charter of the Organization of American States, *supra* note 1, art. 112; see also *Organization of American States: Integrated Text of the Charter as Amended by the Protocols of Buenos Aires and Cartagena de Indias; The Protocol of Amendment of Washington; and the Protocol of Amendment of Managua*, 33 I.L.M. 981 (1994).

⁴² The Inter-American Commission on Human Rights' Statute outlines the Commission's purpose and powers. It was approved by Resolution 447 and adopted by the General Assembly of the OAS in October of 1979. See Interpretation of the American Declaration, *supra* note 24, ¶ 41.

Declaration, "with the result that to this extent the American Declaration is for these states *a source of international obligation* related to the Charter of the Organization [of American States]."⁴³

The failure of the *American Declaration* to rise to the level of a treaty thus did not compel a conclusion that the *American Declaration* lacks "legal effect."⁴⁴ Although it is not a treaty, it still represents a legal obligation on those OAS member states which have not ratified the American Convention on Human Rights.⁴⁵ The *American Declaration* thus can be a source of legal obligation for the United States and other members of the OAS that have not ratified the American Convention on Human Rights.

There are two ramifications to this observation. First, the *American Declaration* is a source of legal obligation that American courts should respect. Second, if domestic remedies are exhausted, a petition can be filed with the Inter-American Commission on Human Rights. Thus, specific articles of the *American Declaration* may be invoked initially in U.S. courts, and later before the Inter-American Commission on Human Rights.

II. APPLYING THE *AMERICAN DECLARATION* TO LESBIAN AND GAY RIGHTS

Specific articles of the *American Declaration of the Rights and Duties of Man* may apply to challenges against anti-gay ballot initiatives.

First, the *American Declaration* provides that "[e]very human being has the right to life, liberty and the security of his [or her] person."⁴⁶ This provision makes no distinctions on the basis of sexual orientation. All persons have these equal rights. Any action to restrict the rights of one group would violate the *American Declaration*. Anti-gay ballot initiatives which restrict

⁴³ *Id.* ¶ 45 (emphasis added).

⁴⁴ *Id.* ¶ 47.

⁴⁵ The *American Declaration* is also a source of subsidiary legal obligation for those states that have ratified the Convention on Human Rights. The Inter-American Court implicitly reaffirmed this view in an advisory opinion requested by the Republic of Argentina and the Oriental Republic of Uruguay. In that decision, the Court stated that "[t]he distinctions among human rights in the inter-American system are, principally, those related to the rights the States Parties to the Convention or Member States of the OAS who are not parties to the Convention have obligated themselves to protect; being in the latter case only those contained in the American Declaration of the Rights and Duties of Man and, in particular, those mentioned in Article 20 of the Commission's Statute . . . ; and those distinctions made in Article 27 of the Convention regarding the rights that cannot be suspended in 'time of war, public danger, or other emergency that threatens the independence or security of a State.'" Advisory Op. OC-13/93 of July 19, 1993, ¶ 22 (Inter-Am. Ct. Hum. Rts. 1993), *reprinted in* 14 HUM. RTS. L.J. 252, 253-54 (1993).

⁴⁶ AMERICAN DECLARATION, *supra* note 3, art. I.

liberties of gay and lesbian persons would thus violate this first article.

Second, the *American Declaration* provides that “[a]ll persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or *any other factor*.”⁴⁷ The *American Declaration* thus applies to “all persons,” which covers both gay and nongay persons. All persons are equal before the law and have the rights and duties established in the *American Declaration*. These rights are also made without distinction as to “any other factor.” Rights thus do not depend on a person’s sexual orientation, and discrimination based on sexual orientation would violate the prohibition against discriminating on the basis of “any other factor.” Similarly, another article provides for a right to recognition as a person having rights, and to enjoy basic civil rights.⁴⁸ Anti-gay ballot initiatives which permit restrictions against gay and lesbian persons would violate these provisions of the *American Declaration*, which guarantee civil rights to all persons without distinction.

Third, the *American Declaration* provides for freedom of investigation, freedom of opinion, freedom of expression, and for a freedom to disseminate the results of that investigation, opinion, and expression.⁴⁹ Anti-gay ballot initiatives which attempt to stifle any of these freedoms for gay and lesbian persons would thus violate this article of the *American Declaration*. For example, a measure that prohibits public expression of support for same-sex marriages would violate the *American Declaration*.

Fourth, the *American Declaration* provides a right to protection of honor, personal reputation, and private life.⁵⁰ Campaigns supporting anti-gay ballot initiatives have focused on these and other individual rights for attack. Gay and lesbian persons have been attacked personally and as groups. Their contributions to the communities in which they live are minimized if not denied. Their private lives have been the subject of false information about the loving and nurturing relationships that they actually have. The process of bringing an anti-gay ballot initiative, as well as the initiative itself, thus violates this provision of the *American Declaration*.

Fifth, the *American Declaration* provides a right to the benefits of the

⁴⁷ *Id.* art. II (emphasis added).

⁴⁸ *Id.* art. XVII (“Every person has the right to be recognized everywhere as a person having rights and obligations, and to enjoy the basic civil rights.”).

⁴⁹ *Id.* art. IV (“Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever.”).

⁵⁰ *Id.* art. V (“Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.”).

cultural life of the community.⁵¹ Gay and lesbian persons have long contributed to the cultural life of the communities in which they live. They participate in and produce much of the community's culture. Anti-gay ballot initiatives, as well as other measures such as the anti-gay-cultural ordinance in Cobb County, Georgia, violate this provision of the *American Declaration* because the ordinance can work to deprive gay and lesbian persons of their rights to participate in the cultural life of a community.

Sixth, the *American Declaration* provides for a right to work.⁵² Antidiscrimination ordinances have attempted to protect the employment rights of gay and lesbian persons. Anti-gay ballot initiatives have attempted to remove these protections. The right to work would therefore not be a right guaranteed to gay and lesbian persons. Anti-gay ballot initiatives thus violate this provision of the *American Declaration*.

Seventh, the *American Declaration* provides both a right to vote and a right to participate in government.⁵³ Anti-gay ballot initiatives violate this provision because they restrict the rights of gay and lesbian persons to participate in government. For the same arguments that ballot initiatives violate the First Amendment to the U.S. Constitution, because they restrict the abilities of elected officials to respond to the petitions of gay and lesbian citizens, these measures also violate the *American Declaration*. Similarly, the *American Declaration* assures that all persons "may resort to the courts to ensure respect for [their] legal rights."⁵⁴ This right might necessarily be limited by the availability of lawyers to promote the exercise of this right for gay and lesbian persons. Anti-gay ballot initiatives which restrict access to the courts for gay and lesbian persons would violate this provision of the *American Declaration*.

Eighth, the *American Declaration* provides for rights of assembly and association. The *American Declaration* guarantees a right of peaceful assembly in matters of common interest "of any nature."⁵⁵ The *American Declaration*

⁵¹ *Id.* art. XIII ("Every person has the right to take part in the cultural life of the community, to enjoy the arts, and to participate in the benefits that result from intellectual progress, especially scientific discoveries."). The Article also provides for intellectual property rights.

⁵² *Id.* art. XIV ("Every person has the right to work, under proper conditions, and to follow his vocation freely, in so far as existing conditions of employment permit. Every person who works has the right to receive such remuneration as will, in proportion to this capacity and skill, assure him a standard of living suitable for himself and for his family.").

⁵³ *Id.* art. XX ("Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.").

⁵⁴ *Id.* art. XVIII.

⁵⁵ *Id.* art. XXI ("Every person has the right to assemble peaceably with others in a formal public meeting or an informal gathering, in connection with matters of common interest of any

also guarantees the right to associate with others to promote political, social, and cultural interests.⁵⁶ These provisions can support arguments made under the federal constitution that anti-gay ballot initiatives restrict the freedom of association.⁵⁷ The right of groups to associate undeniably enhances effective advocacy of both public and private points of view in our democracy,⁵⁸ including advocacy to support the rights of gay and lesbian persons to be free from discrimination. Courts in the United States seem to have been troubled in the past where the perception of the goal of association was for sexual activity, or for activities that might lead to sexual activities.⁵⁹

Other provisions of the *American Declaration* also have potential application for gay and lesbian persons, for they may be raised by those bringing anti-gay ballot initiatives. These provisions, however, actually support the rights of gay and lesbian persons.

A first example of one such provision is that "[t]he rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy."⁶⁰ These limitations should not justify anti-gay ballot initiatives, for gay and lesbian persons do not seek their own civil rights at the expense of other groups. Gay and lesbian persons likewise pose no threat to the security of all, or to the general welfare,

nature.").

⁵⁶ *Id.* art. XXII ("Every person has the right to associate with others to promote, exercise and protect his legitimate interests of a political, economic, religious, social, cultural, professional, labor union or other nature.").

⁵⁷ While the freedom of association does not expressly appear in any provision of the federal constitution, courts have long found this freedom to be implicit in the other First Amendment freedoms of speech, assembly, and the right to petition governmental officials. *See, e.g.,* Student Coalition for Gay Rights v. Austin Peay State Univ., 477 F. Supp. 1267, 1272 (M.D. Tenn. 1979) (citing *Healy v. James*, 408 U.S. 169, 181 (1972)). Indeed, Alexis de Tocqueville observed that "[i]n no country in the world . . . , has the principle of association been more successfully used or applied to a greater multitude of objects than in America." ALEXIS DE TOCQUEVILLE, 1 DEMOCRACY IN AMERICA 191 (Bradley ed., 1948), *quoted in* David Fellman, *Constitutional Rights of Association*, 1961 SUP. CT. REV. 74, 76.

⁵⁸ *See* NAACP v. Alabama, 357 U.S. 449, 460 (1958) (court order to produce names and addresses of NAACP members denied due process in that the order restrained the members' right to freedom of association); *see also* NAACP v. Button, 371 U.S. 415 (1963); *Gay Student Servs. v. Texas A & M Univ.*, 737 F.2d 1317, 1326 (5th Cir. 1984), *cert. denied*, 471 U.S. 1001 (1985).

⁵⁹ *See* Donald M. Solomon, *The Emergence of Associational Rights for Homosexual Persons*, in *HOMOSEXUALITY AND THE LAW* 147, 148 (Donald C. Knutson ed., 1980) ("Applying these principles to homosexual persons has been a perplexing problem for many courts, because the courts see the principal claim of gay organizations as arising out of sexual conduct, which is not protected by the First Amendment.").

⁶⁰ AMERICAN DECLARATION, *supra* note 3, art. XXVIII (scope of the rights of man).

or to the advancement of democracy. Anti-gay ballot initiatives, conversely, do pose these threats because they limit civil rights on an impermissible basis.

A second example is the provision that "[e]very person has the right freely to profess a religious faith, and to manifest and practice it both in public and in private."⁶¹ Similarly, the *American Declaration* provides for "the right to establish a family, the basic element of society, and to receive protection therefor."⁶² These assertions of religious-based, family values drive anti-gay ballot initiatives.⁶³ The freedoms claimed are, however, the same freedoms

⁶¹ *Id.* art. III (religious freedom).

⁶² *Id.* art. VI (right to establish a family); see also Applicability of Article VI, § 22, of the Convention on the Privileges and Immunities of the United Nations, 1989 I.C.J. 177, 210-11 (Dec. 15) (separate opinion of Judge Evensen) ("The integrity of a person's family and family life is a basic human right protected by prevailing principles of international law which derive not only from conventional international law or customary international law but from 'general principles of law recognized by civilized nations.'").

⁶³ For example, in the current debates over the right of lesbian and gay persons to associate, we must also remember that the discrimination of the past has not vanished, but only assumed new forms. There are those who claim that there is a freedom *not* to associate with lesbian and gay persons. This freedom *not* to associate is the basis for many of the anti-gay ballot initiatives sweeping the nation. Consider, for example, the logic of one conservative Christian supporter of the Colorado Amendment that was found to be unconstitutional:

Why would anyone but a moralist . . . oppose a gay rights law? As it turns out, there are many good reasons. First, gay rights laws forbid discrimination based on a person's sexual orientation. Sounds harmless, but not so. Freedom of association is at risk here. Whether or not one agrees with the right *not* to associate with homosexuals, it remains an important freedom, an important choice in a free society. To remove this freedom is a serious step toward tyranny. . . .

. . . .
Or how about freedom of association based on family values? If a parent doesn't want their child exposed to homosexuality as a valid lifestyle in public school—they have no choice under gay rights ordinances. . . .

Landlords and employers risk lawsuit for dismissing homosexuals. Or for failing to rent to or hire a homosexual. Quota hearings become a real threat. The burden of legal proof comes to rest in the wrong places: on businesses, religious organizations, authorities, and individuals who object to homosexuality.

Gay rights laws are opposed largely because they try to make the courts the public solution to private problems. Private sexual values—except those which are criminal or where public health issues are concerned—should be sorted out in the private sector. That's where they belong. Who wants lawyers in their bedrooms?

STEPHEN BRANSFORD, *GAY POLITICS VS. COLORADO AND AMERICA: THE INSIDE STORY OF AMENDMENT 2*, 15-16 (1994). Michael Hardwick, the gay man arrested in his own bedroom in

being claimed by gay and lesbian persons. For example, gays and lesbians are seeking the right to establish their own families on terms equal to those enjoyed by heterosexuals.⁶⁴ Those opposed to marriages for lesbian and gay persons, for example, argue that they must be opposed because they have never been recognized by society. Examinations of scholarship on this point will disclose that gay marriages had been performed in the past,⁶⁵ and should be permitted again now, on terms equal to those enjoyed by heterosexuals.

A third example is the provision for a right to education based on "the principles of liberty, morality, and human solidarity."⁶⁶ Lesbian and gay persons are not opposed to these educational values. The principle of liberty, for example, is at the heart of the lesbian and gay liberation movement. We support education that promotes freedom for all individuals. Lesbian and gay persons also support education to promote morality, albeit not the manifest hate that sometimes passes as "morality" in the conservative Christian community. The flourishing of lesbian and gay religious institutions and groups, including those such as the Metropolitan Community Church or the Catholic Group Dignity, proves that there is no monopoly on morality. The third principle mentioned, human solidarity, is also at the core of the international struggle for lesbian and gay civil rights. Institutions such as the International Gay and Lesbian Human Rights Commission, for example, promote human solidarity with lesbian and gay persons who face oppression in countries all around the world. This solidarity, in fact, helps to place the struggle for lesbian and gay rights in the United States in its proper context as a struggle for human rights.

Georgia, would be better able to answer that last question. *See Bowers v. Hardwick*, 478 U.S. 186 (1986) (rejecting constitutional challenges to the Georgia sodomy statute). If the conservative religious right fears state intrusion into their bedrooms, it is a danger that gay and lesbian persons already know all too well.

⁶⁴ *See, e.g., Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

⁶⁵ *See JOHN BOSWELL, SAME-SEX UNIONS IN PREMODERN EUROPE* (1994).

⁶⁶ AMERICAN DECLARATION, *supra* note 3, art. XII ("Every person has the right to an education, which should be based on the principles of liberty, morality and human solidarity. Likewise every person has the right to an education that will prepare him to attain a decent life, to raise his standard of living, and to be a useful member of society. The right to an education includes the right to equality of opportunity in every case, in accordance with natural talents, merit and the desire to utilize the resources that the state or the community is in a position to provide. Every person has the right to receive, free, at least a primary education.").

III. ADDITIONAL OBSERVATIONS ON THE USE OF INTERNATIONAL HUMAN RIGHTS NORMS TO ADVANCE LESBIAN AND GAY RIGHTS

The provisions cited from the *American Declaration* may be raised in domestic courts or other domestic fora as additional support for other arguments such as those advanced under federal and state constitutions. Although it is not a treaty, and thus not binding as such under the treaty clause of the federal constitution,⁶⁷ it is a source of legal obligation upon the United States as a party to the OAS Charter.

One federal case illustrates how the *American Declaration* might thus be used as a derivative source of binding law. In *United States v. Steinberg*,⁶⁸ a man indicted for certain business crimes fled to Rhodesia after he testified before the grand jury. The United States did not move to extradite him because a United Nations Security Council Resolution forbade any member of the United Nations from recognizing the then-illegal Rhodesian regime. When the man voluntarily returned to the United States seven years later, he moved to dismiss the indictment because the delay violated both the Sixth Amendment and the Speedy Trial Act of 1974.⁶⁹ He argued that he had been living openly in Rhodesia, and that the government could have sought his extradition at any time. In denying his motion to dismiss the indictment, the court found that if it had sought extradition, the United States would have been recognizing the illegal government of Rhodesia. The court found that if the United States had sought extradition, it would have violated the United States' treaty obligations under the United Nations Charter. Although the United Nations Charter did not prohibit the United States from requesting extradition from Rhodesia, the United Nations Security Council Resolution did prohibit the request.

Noting that "[t]he United Nations Charter, a treaty ratified by the United States, is part of the supreme law of this land,"⁷⁰ the *Steinberg* court found that "[t]his country has a continuing obligation to observe with entire good faith and scrupulous care all of its undertakings under this treaty, including support of the resolutions adopted by the Security Council."⁷¹ The government thus "was not obligated to violate either the letter or spirit of the Charter of the United Nations, a treaty that lies at the foundation of this country's foreign policy."⁷²

The obligations to observe derivative obligations imposed by the OAS

⁶⁷ U.S. CONST. art. VI, cl. 2.

⁶⁸ 478 F. Supp. 29 (N.D. Ill. 1979).

⁶⁹ Pub. L. No. 93-619, 88 Stat. 2076 (codified at 18 U.S.C. §§ 3161-3174 (1988)).

⁷⁰ *Steinberg*, 478 F. Supp. at 33.

⁷¹ *Id.*

⁷² *Id.*

Charter is similar to the obligation to observe derivative obligations imposed by the United Nations Charter. A United States court, faced now with an issue fairly presented under the *American Declaration*, should apply the *American Declaration* as a source of legal obligation derived from United States membership in the OAS Charter, pursuant to the finding of the Inter-American Court of Human Rights.

The provisions of the *American Declaration* may also be used in a separate proceeding before the Inter-American Commission on Human Rights. An important condition for access to the inter-American system to protect human rights is the exhaustion of domestic remedies. "If the individual has a remedy at the national level, that remedy must [generally] be exhausted before any appeal to the international forum."⁷³ There are exceptions to this general rule, as when exhaustion of domestic remedies would be futile.⁷⁴ Another exception arises when the country admits liability for violation of human rights, effectively waiving its potential defense of the failure to exhaust domestic legal remedies.⁷⁵

The *American Declaration of the Rights and Duties of Man*, and indeed any other human rights laws that may also support challenges to anti-gay ballot initiatives, place the struggle for gay and lesbian liberation in its proper context as a struggle for human rights. In seeking freedom from discrimination based

⁷³ *Id.* at 27; see also M.E. TARDU, HUMAN RIGHTS: THE INTERNATIONAL PETITION SYSTEM, pt. 1, § IIIB, at 6-7 (1985) (Procedures of Regional Organizations: The Inter-American System).

⁷⁴ For further discussion of the principles of exhaustion of national remedies in international law, see Case Concerning Elettronica Sicula S.p.A. (ELSI) (U.S. v. Italy), 1989 I.C.J. 15, 47-48 (July 20).

⁷⁵ One recent example of this latter exception occurred with the nation of Suriname. On New Year's Eve of 1987, a group of soldiers in Suriname attacked unarmed civilians, the people known as the Maroons, on suspicion of belonging to a subversive group. Aloeboetoe Case (Reparations), Slip Op. at 2 (Inter-Am. Ct. Hum. Rts. Sept. 10, 1993). The soldiers allowed some of the Maroons to leave, but seven of them, including a 15-year-old boy, were blindfolded and thrown into a military vehicle. *Id.* The soldiers drove the Maroons some 30 kilometers, stopped the vehicles, and forced the seven captives to dig their own graves. *Id.* The soldiers murdered six of the Maroons at that site; the seventh was wounded in his escape attempt and died several days later. *Id.* at 2-3.

A petition before the Inter-American Commission on Human Rights was brought 15 days after the attack, without bringing any domestic proceedings in the courts of Suriname. *Id.* at 9, 33. The Commission did not dismiss the case for failing to exhaust domestic remedies, but instead submitted the proper reports which led to a subsequent proceeding before the Inter-American Court of Human Rights. At the public hearing convened by the Court, the new government of Suriname bravely accepted responsibility for the human rights violations of the previous government and thus for the murders committed by the soldiers. *Id.* at 4.

solely on who we are, gay and lesbian persons are not seeking any "special rights" not given to other citizens. We simply seek equal rights to be free of discrimination. Our struggle is one that international human rights laws should recognize and support. We may advance that cause by citing those international human rights standards in our arguments challenging the anti-gay ballot initiatives.