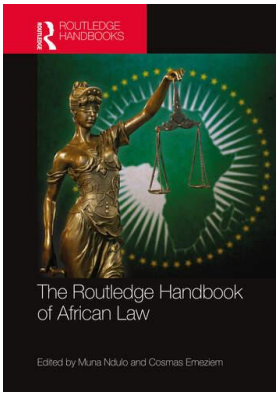

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African law and the rights of sexual minoritiesWestern universalism and African resistance

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AFRICAN LAW AND THE RIGHTS OF SEXUAL MINORITIES

Western universalism and African resistance

Nicholas Kahn-Fogel

Introduction

Thirty-two of 54 African countries criminalize same-sex sexual intimacy (Carroll and Mendos 2017, 37). The severity of the prescribed punishments for violation of these laws varies significantly, from a maximum of one year of imprisonment in Liberia (Carroll and Mendos 2017, 92), to life imprisonment in Sierra Leone and Tanzania (Carroll and Mendos 2017, 98, 101), to the death penalty in Mauritania, parts of Northern Nigeria, southern Somalia, and Sudan (Carroll and Mendos 2017, 94, 96, 99,100). African leaders have frequently defended such laws by characterizing homosexuality as alien to African culture, a foreign blight, and a neocolonial construction imposed on Africa by the West (Kahn-Fogel 2013, 326–27). Likewise, according to recent polls, large percentages of Africans believe homosexuality should not be accepted (Pew 2013; ILGA 2017).[1] Meanwhile, Western human rights advocates have pointed to the historical and contemporary anthropological record in asserting that homosexuality is, and has long been, a feature of African life (Murray and Roscoe 1998; Hoad 2007, xxii–xxiv). These advocates also note that laws proscribing homosexual activity are the true Western imposition; in many of the African countries that criminalize same-sex sexual conduct, colonial governments originally promulgated the anti-sodomy laws that Africans have now embraced and that Western governments and human rights activists now oppose (Human Rights Watch 2009). In advancing their claims, proponents of the rights of sexual minorities in Africa appeal to the liberal principles of autonomy and equality at the heart of international human rights law and enshrined in the constitutions of all modern democracies, including those of the African countries that continue to proscribe same-sex intimacies (Kahn-Fogel 2013). Many agree, however, that these appeals have often been counterproductive, spurring vigorous enforcement of laws that had been largely ignored for decades in some countries and leading to implementation of new laws detrimental to the interests of sexual minorities in other countries (Corey-Boulet 2012; Onishi 2015; Oluoch and Tabengwa 2017).

In this chapter, I will provide an overview of the state of African law regarding the rights of sexual minorities, and I will attempt to reconcile the competing narratives offered by many African leaders, on the one hand, and advocates for the rights of sexual minorities, on the

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other. The anthropological record and the anti-essentialist philosophy of queer theorists reveal that there is some truth in each perspective—although same-sex sexual activity has long been a feature of societies across the continent, contemporary conceptions of homosexual identity are largely a Western cultural construct. For many Africans, the lack of cultural resonance of essentialist characterizations of same-sex intimacy (including for many Africans who engage in such intimacies) may partially explain resistance to the nondiscrimination arguments that Western governments and human rights advocates have offered. Moreover, the deep communitarian roots of many African cultures may partially explain resistance to liberal claims based on both equality and autonomy. Any productive path forward must include an acknowledgment both of the long-standing existence of same-sex intimacy in African societies and of its lack of conceptual correspondence in many instances to the Western notion of homosexuality. Those invested in advancing the interests of sexual minorities in Africa must also develop an appreciation of the long, sordid history of Western attempts to impose universalizing norms on African societies, of the ways in which current advocacy reproduces important features of colonial discourse, and of the resistance that such efforts are likely to engender.

Advocates for African homosexual rights frequently note that colonial governments imposed the original prohibitions on same-sex intimacy in most of the countries that continue to criminalize such conduct. The British approach stemmed from the law applicable in England, where the 19th century Offences Against the Person Act had reduced the punishment for sodomy and other "unnatural" acts from death to 10-years-to-life imprisonment (Sanders 2009, 8). After introducing a version of the Act in India, Britain exported the law to all of its colonial possessions. The former British colonies in Africa that criminalize same-sex intimacy today have often retained much of the language that originated from §377 of the Indian Penal Code, "Unnatural offences," which reads:

> Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall be liable to fine.
>
> Explanation: Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.[2]

My own examination of public archives in Zambia reveals cases in which the British colonial government and its predecessor, the British South Africa Company, used a version of this law to prosecute same-sex intimacy. Although those cases often involved conduct that we would currently characterize as sexual assault or child molestation, the charges revealed that, for the British, the character of the offense was tied, at least in part, to same-sex sexual contact. These prosecutions represented merely part of a broader effort by the British to control African sexuality through counterparts to §377. For example, in 1942, in what is now Chipata, Zambia, the colonial government charged two men with attempting to have carnal knowledge of cows. Overall, the British were engaged in an extensive campaign to impose Western norms on the Indigenous populations they controlled through the colonial enterprise (Kahn-Fogel 2013, 324–26).

In contrast to the British, Belgian and French colonialists often adopted more permissive policies regarding Indigenous sexuality, and francophone African countries are far less likely today to criminalize same-sex intimacy than former British colonies in Africa. Nonetheless, some francophone African countries have criminalized homosexual conduct since independence, and others have higher ages of consent for homosexual intimacy than for heterosexual

intimacy (Kahn-Fogel 2013, 323–24). The Portuguese criminalized sodomy in their colonies and today Angola retains those prohibitions in its penal code, although Mozambique decriminalized homosexual intimacy in 2014 (Carroll and Mendos 2017, 27). South Africa unquestionably leads the African continent in protecting same-sex relationships—the 1995 Constitution was the first in the world to include an explicit prohibition of discrimination based on sexual orientation, and the Constitutional Court invoked that prohibition in its 2005 ruling that paved the way for same-sex marriage in the country.[3]

In addition to their reliance on this history, along with anthropological data, as a counterargument to claims by African leaders that homosexuality is an essentially un-African, Western import, advocates for homosexual rights in Africa also note the extrinsic origin of the religious principles African leaders regularly invoke in opposition to homosexuality (Alimi 2015). They point out that European missionaries and colonialists introduced Christianity to Africa. Likewise, they blame present-day Western evangelicals for fomenting anti-gay attitudes in Africa (Williams 2013).

Notwithstanding these arguments, African leaders have repeatedly characterized homosexuality as an un-African, foreign menace. In 1999, Zimbabwean President Robert Mugabe famously referred to Britain's "gay government," which he believed was attempting to impose homosexuality on Africans (Epprecht 2004, 4). The same year, Kenyan President Daniel arap Moi declared, "It is not right that a man should go with another man or a woman with another woman. It is against African tradition and Biblical teachings. I will not shy away from warning Kenyans against the dangers of the scourge" (Hoad 2007, xii). In Namibia, Alpheus !Naruseb, the secretary for Information and Publicity for the South West Africa People's Organization, asserted:

> It should be noted that most of the ardent supporters of these perverts are Europeans who imagine themselves to be the bulwark of civilisation and enlightenment. They are not only appropriating foreign ideas in our society but also destroying the local culture by hiding behind the facade of the very democracy and human right [sic] we have created.
>
> *Hoad 2007, 15*

In 2004, Nigerian President Olusegun Obasanjo declared homosexuality to be "unbiblical, unnatural and definitely un-African" (*New York Times* 2004). More recently, in 2014, Kenyan President Uhuru Kenyatta, responding to United States President Barack Obama's arguments in favor of homosexual rights, said, "there are some things that we must admit we don't share [with the US]. Our culture, our societies, don't accept" (Alimi 2015). Similarly, on his signing of a 2014 bill sanctioning "aggravated homosexuality" with life imprisonment, Ugandan President Yoweri Museveni said:

> It seems the topic of homosexuals was provoked by the arrogant and careless Western groups that are fond of coming into our schools and recruiting young children into homosexuality and lesbianism, just as they carelessly handle other issues concerning Africa … we Africans always keep our opinions to ourselves and never seek to impose our point of view on the others. If only they could let us alone.
>
> *Daily Monitor 2014*

In 2013, Senegal's president, Macky Sall, argued that Western attempts to promote homosexual rights in Africa are inconsistent with African cultural norms. " 'We don't ask the Europeans to

be polygamists,' Sall said. 'We like polygamy in our country, but we can't impose it in yours. Because the people won't understand it. They won't accept it.'" (*Associated Press* 2013).

Liberal Foundations of Western Advocacy

Liberal, universalist principles of equality and autonomy have typically served as foundational premises for the governments, human rights organizations, and individuals pursuing the interests of practitioners of same-sex intimacies in Africa. In May 2013, in response to an ongoing sodomy prosecution in Zambia, Human Rights Watch commanded, in a headline, "Zambia: Stop Prosecuting People for Homosexuality." Invoking the liberal foundations of Zambian and international law, the organization argued: "The Zambian government is obligated under international law and its own constitution to respect the private lives and personal liberties of everyone in the country, and to cease prosecuting people for consensual adult sex" (Human Rights Watch 2013). In November 2017, Human Rights Watch accused Egypt of "undermining universal human rights" for refusing to engage with an independent expert on violence and discrimination based on gender identity and sexual orientation, on the eve of the expert's report to a committee of the United Nations General Assembly (Reid 2017). Similarly, Amnesty International's director of law and policy has condemned anti-homosexuality laws across the African continent, stating, "These poisonous laws must be repealed and the human rights of all Africans upheld" (Conway-Smith 2013). In the legal academy, law review articles have frequently advanced liberal legal arguments for the protection of homosexual status in Africa (Kahn-Fogel 2013, 329–30). In 2013, two years after directing federal agencies to promote homosexual and transgender rights overseas, US President Barack Obama, while on a visit to Senegal, praised the Supreme Court's recent ruling that the Defense of Marriage Act was unconstitutional. "'The issue of gays and lesbians and how they're treated has come up and has been controversial in many parts of Africa, so I want the African people to hear just what I believe,' Mr. Obama said. 'People should be treated equally. And that's a principle that I think should be applied universally'" (Hinshaw 2013). Meanwhile, international bodies like the United Nations Human Rights Committee have repeatedly condemned laws that discriminate against homosexuals (Kahn-Fogel 2013, 331).

Western appeals for greater tolerance of homosexuality in Africa have sometimes been accompanied by implicit or explicit threats to cut aid to recalcitrant states, and Western governments have, on occasion, carried out such threats. In 2011, for example, British Prime Minister David Cameron stated plainly that he would slash assistance to countries that fail to respect homosexual rights. In the wake of Uganda's passage of its 2014 anti-homosexuality law, several countries, including Norway, Denmark, and the United States, cut aid to the country (*Guardian* 2014; Onishi 2015). Since 2012, the US government has also specifically directed many millions of dollars toward promotion of gay and transgender rights in Africa (Onishi 2015).

The consequences of liberal advocacy for gay rights in Africa have been mixed at best. To be sure, one looking for signs of progress can find scattered evidence to support the theory that efforts of human rights proponents have succeeded in some respects. Since 2012, Mozambique, Seychelles, and São Tomé and Príncipe have each dropped provisions from their penal codes that had criminalized homosexual acts (Carroll and Mendos 2017, 27). In the past few years, courts in Botswana, Kenya, and Zambia have issued opinions protecting gay rights advocates against threats to their freedom to organize and express opinions in favor of homosexual rights. Each of these judgments differentiated between freedom of expression, protected under the countries' respective constitutions, and engaging in homosexual acts, which remain subject to criminal sanctions in each country (Reid 2015). Eight African countries, including three that criminalize same-sex

intimacy, have extended protections against employment discrimination on the basis of sexual orientation. In some instances, moreover, courts have acquitted defendants charged under sodomy laws (Uppalapati et al. 2017, 686–87). Finally, the African Commission on Human and Peoples' Rights passed a resolution in 2014 condemning violence and other human rights violations against persons on the basis of their real or imputed sexual orientation or gender identity (Reid 2017).

Nonetheless, other African countries have seen renewed, vigorous enforcement of colonial sodomy laws that had been effectively obsolete for decades, and some, like Nigeria and Uganda, have passed new legislation with harsher penalties for same-sex intimacy than had existed before. In some countries, moreover, adopted or proposed constitutional amendments entrench official discrimination against homosexuals (Kahn-Fogel 2013, 388; Uppalapati et al. 2017, 655). In many parts of the continent, observers also have chronicled increased incidences of private violence directed at sexual minorities. There is widespread agreement, including among practitioners of same-sex intimacies and advocates for the rights of African sexual minorities, that the phenomena are largely attributable to backlash against perceived interference by the West and the increasing visibility of lesbian, gay, bisexual, and transgender (LGBT) issues (Itaborahy and Zhu 2013, 38; Kahn-Fogel 2013, 386–7; Onishi 2015; Oluoch and Tabengwa 2017, 150–4).

A deeper appreciation among human rights activists of the potential sources of this backlash might lead to more nuanced and more effective advocacy for the interests of African sexual minorities. As noted, the anthropological record that gay rights activists have marshaled in opposition to claims that homosexuality is fundamentally un-African, in fact, often reveals socially contingent forms of same-sex intimacies that belie essentialist notions of homosexuality as a fundamental aspect of personal and sexual identity. Under such conditions, essentialist claims may undermine rather than advance the interests of the people that human rights activists hope to protect. Academic queer theorists in the West have long questioned the efficacy of essentialist arguments (Ball 2001), and their perspective may have particular salience in societies in which many of the practitioners of same-sex intimacies would reject the labels their ostensible Western allies seek to apply to them. To the extent that essentialist claims conflict with the experiences and understandings of many Africans, liberal nondiscrimination arguments may also be less likely to succeed. Additionally, the deep communitarian roots of many African cultures may partially explain backlash to rights-based arguments in general.

Yet the appeal of liberal arguments is understandable. Liberal philosophy is so deeply and culturally ingrained in the West that, for many, putting epistemic pressure on liberal claims would be as counterintuitive as questioning the legitimacy of any empirically established ontological truth. It is also undeniable that the classical liberal principles at the heart of international human rights law and enshrined in the constitutions of modern democracies have led to profound advancements in human freedom. In particular, in recent years, human rights advocates have frequently succeeded in their reliance on liberal, rights-based claims to improve the status of sexual minorities in the West (Kahn-Fogel 2013, 332–34). Moreover, the characterization by communitarians and postmodernist philosophers (including queer theorists) of deontological claims as purely cultural constructions suggests the limited potential of those arguments to enhance minority interests (West 1998, 711; Ball 2000, 512–13). For these reasons, I do not argue here that advocates for the rights of African sexual minorities should abandon their liberal commitments entirely. Rather, if Western liberals hope to advance the interests of sexual minorities in Africa, a subtler understanding of the context I describe may help them to deploy their arguments more deftly and could lead exponents of liberal values to conclude more often that forbearance may be more effective than conspicuous advocacy.

The core tenets of liberalism date to the enlightenment philosophy of John Locke, whose commitments were predicated on his assessment of human nature. In short, Locke asserted

that humans are naturally free, essentially rational, and, in morally relevant respects, equal (Locke 1967, 4–5). Locke's perception of these universal human attributes served as the foundation for the core rights to which contemporary liberals continue to subscribe: if humans are essentially equal, then society should treat discrimination based on the false premise that some groups are inherently superior to others as morally and legally suspect; if all humans are basically rational, then individuals are likely to be in the best position to determine their own interests and to direct the course of their own lives (Kahn-Fogel 2013, 334). These principles of nondiscrimination and autonomy are critical features of modern fundamental rights jurisprudence. In the United States, for example, plaintiffs have successfully invoked the Equal Protection Clause of the Fourteenth Amendment to attack official discrimination against disfavored minority groups. Likewise, the United States Supreme Court's substantive due process jurisprudence has affirmed the sanctity of individual freedom to make basic choices regarding sexual autonomy and the family sphere (Kahn-Fogel 2013, 334–5, 347–8). In particular, the United States Supreme Court has repeatedly relied on each of these precepts to uphold the rights of homosexual claimants, culminating in the Court's 2015 proclamation, based on both substantive due process and equal protection arguments, of the right to same-sex marriage.[4] Similarly, courts in other Western countries have relied on constitutionally enshrined nondiscrimination and autonomy rights to advance the interests of homosexual claimants (Uppalapati et al. 2017, 691–2).

Advocates for homosexual rights have also successfully relied on regional and international human rights instruments. Over two decades before the United States Supreme Court came to the same conclusion, the European Court of Human Rights held, in 1981, that a law proscribing male homosexual sex contravened the privacy provisions of the European Convention on Human Rights.[5] Since then, the European Court has relied repeatedly on the Convention's nondiscrimination provisions to protect the interests of homosexuals (Kahn-Fogel 2013, 343). In 2012, the Inter-American Court of Human Rights invoked the nondiscrimination provisions of the American Convention on Human Rights to invalidate the Chilean Supreme Court's denial of custody to a mother on the basis of her homosexuality.[6] In 2018, the Inter-American Court referred to nondiscrimination and autonomy principles in ruling that the American Convention enshrines a right to same-sex marriage (Zwier 2018). In 1994, the United Nations Human Rights Committee, charged with assessing ratifying states' compliance with the International Covenant on Civil and Political Rights (ICCPR), held that a Tasmanian proscription of sexual intimacy between men violated the ICCPR's privacy provision. The Committee simultaneously determined that the law was in conflict with the ICCPR nondiscrimination article's prohibition of discrimination on the basis of sex, though the Committee asserted that its assessment of the issue was unnecessary to its holding.[7] Similarly, the United Nations Committee on Economic Social and Cultural Rights, which evaluates compliance with the International Covenant on Economic, Social, and Cultural Rights (ICESCR), has interpreted the Covenant's prohibition of discrimination based on "other status" as protecting against discrimination on the basis of sexual orientation.[8] Finally, the United Nations Human Rights Council, which conducts Universal Periodic Reviews (UPRs) of the human rights records of all member states, has expressed concern over acts of violence and discrimination against homosexuals.[9] Perfectly encapsulating the notion that Lockean rights to equal treatment and autonomy for sexual minorities are enshrined in international human rights law, former United Nations Secretary General Ban Ki-Moon asserted in 2012, "Let me say this loud and clear: lesbian, gay, bisexual and transgender people are entitled to the same rights as everyone else. They, too, are born free and equal. I stand shoulder to shoulder with them in their struggle for human rights" (Persad 2014, 337).

African constitutions, including those of countries that continue to criminalize same-sex intimacy, also contain guarantees of equality and autonomy. It is possible that African courts might use constitutional prohibitions of discrimination on the basis of sex or "other status" to protect practitioners of same-sex intimacies. That they have not generally done so requires explanation. Courts are more likely to offer broad protection against discrimination when they can characterize the status of the petitioner in essentialist terms. In the United States, for example, when those seeking the court's assistance are part of a discrete and insular minority and have experienced discrimination on the basis of an immutable characteristic, the Supreme Court is inclined to evaluate discriminatory laws with strict scrutiny. To the extent that Africans view same-sex intimacy as socially contingent, therefore, discrimination claims may carry less weight.

With regard to autonomy claims, while some African constitutions contain fairly broad language proclaiming the sanctity of family, home, and private life, others include much narrower protections for privacy, with specific emphasis on physical searches of the home and person. These latter sorts of provisions present courts with far more limited options than the United States Supreme Court's substantive due process jurisprudence offers for the discovery of unenumerated constitutional rights. As Justice Scalia averred in his critique of the Court's declaration of a right to same-sex marriage, substantive due process in the hands of the majority stood "for nothing whatever, except those freedoms and entitlements that this Court *really* likes."[10] Moreover, the constitutions of several African countries explicitly qualify fundamental rights provisions when limitation of rights is reasonable in the interest of public morality. This sort of language reflects communitarian sensibilities and suggests that courts in such countries would be less likely to reach the conclusion of the United States Supreme Court in *Lawrence v. Texas*, that moral opprobrium is insufficient to justify prohibitions on same-sex intimacy (Kahn-Fogel 2013, 343–6, 350–3).

Africa's regional human rights instrument, the African Charter on Human and Peoples' Rights, includes a nondiscrimination article equivalent to those found in international treaties, such as the ICCPR and the ICESCR. Although the African Charter safeguards autonomy in some respects with provisions regarding freedom of expression, freedom of association, freedom of assembly, freedom of conscience, and freedom of movement, it contains no article protecting broadly against interference with private, family, and home life—unlike the Universal Declaration of Human Rights and the ICCPR. Additionally, the African Charter tempers its proclamation of rights with a corresponding statement of duties that individuals owe to their communities, including the responsibility to exercise one's rights with due regard for "morality and common interest." Furthermore, the Charter declares that "[t]he promotion and protection of traditional values recognized by the community shall be the duty of the State" (African Charter 1981). Critically, the African Commission on Human and Peoples' Rights, charged with interpreting the Charter, can issue only nonbinding recommendations (Viljoen and Louw 2007, 8). And, although the Commission can also refer cases to the African Court on Human and Peoples' Rights, the court is empowered to hear individual complaints only against the eight countries that have submitted to the court's jurisdiction to hear such cases (Windridge 2018, 470–1). Unsurprisingly, the court has not acted thus far to protect the interests of African sexual minorities.

The vast majority of African countries have ratified the ICCPR, and most have also ratified the ICESCR. Nonetheless, several African nations have not ratified the First Optional Protocol to the ICCPR, which allows the Human Rights Committee to hear individual complaints against ratifying states. Even with regard to those countries that have adopted the First Optional Protocol, the Human Rights Committee has no enforcement mechanism, and its opinions are

technically nonbinding. Ultimately, states parties to the ICCPR are bound by the text of the covenant, not by opinions of the Human Rights Committee, and judges in countries whose populations are largely antagonistic to homosexuality may be less likely to interpret the treaty as providing the protections that human rights activists demand. The ICESCR faces similar enforcement problems. In fact, there is no definite sanction even for complete failure to comply with the Human Rights Council's UPR. Rather, the Council "would decide on the measures it would need to take in the case of persistent non-cooperation" (Kahn-Fogel 2013, 353–5).

The explanatory power of public opinion also cannot be discounted in assessing the likelihood of African courts' interpretations of their own constitutions or international human rights law as conferring significant protections for practitioners of same-sex intimacies. Contrary to the popular conception of courts as powerful bulwarks against majoritarian excess, American scholars have often observed that the United States Supreme Court has tended to sustain rights-based claims only when those claims have had significant public support. In 1986, for example, when the Court upheld Georgia's prohibition of homosexual sodomy, most Americans favored criminalization of same-sex intimacy. By 2003, when the Court decided *Lawrence v. Texas*, 60 percent of Americans favored legalization of homosexual sex, and only 35 percent favored criminalization. In the words of Professor Michael Klarman, *Lawrence* "reflected, at least as much as [it] produced, changes in social attitudes and practices" (Klarman 2005, 444). In the relatively few cases in which African courts have considered rights-based claims of homosexuals, the courts have often relied heavily on public opinion in rejecting the claims (Abebe 2012, 620–6).

Thus, even without additional context, the limited potential of liberal advocacy for homosexual rights in Africa is evident. As I have suggested, however, consideration of ideas outside the liberal legal paradigm can further illuminate the possible perils of pursuing the typical Western approach. The many strains of African communitarian thought and the correspondence of the ideas of queer theorists with much of the African anthropological record suggest that African resistance to liberal arguments could be more resilient than has been the case in the West. African characterization of homosexual advocacy as a form of neocolonialism must also be considered in light of the long history of Western attempts to impose universalizing norms on African minds and bodies.

Communitarianism

Although liberalism is a defining characteristic of international law and of modern, democratic legal systems, both in the West and in Africa, and although rights-based arguments have dominated popular discourse among those invested in advancing the interests of practitioners of same-sex intimacies, the pervasive influence of communitarian thought across a broad array of African cultures might partially explain why liberal arguments in favor of the interests of sexual minorities have been less successful in Africa than in the West. In the West as well, communitarian philosophers, who emphasize individual responsibilities to the larger social group rather than individual rights, have criticized liberalism as both conceptually incoherent and as causing harm to communities and the individuals they comprise (Ball 2000, 444–45; Sandel 1984, 1). While liberalism insists on its moral neutrality in the service of facilitating unfettered choice by atomistic individuals, each pursuing her own self-interest, those associated with communitarian thought have often noted the illusory nature of this sort of claim, both practically and conceptually.

Communitarian thinkers have frequently argued that assertions of liberal neutrality belie the manner in which decision-makers function in a liberal state. Michael Sandel, whose perfectionist philosophy is closely linked to communitarianism, has observed that decisions favoring same-sex marriage "cannot be made on nonjudgmental grounds." Rather, such arguments depend

"on a certain conception of the telos of marriage—its purpose or point" (Sandel 2009, 253–4). By way of example, Sandel discussed the 2003 decision of the Massachusetts Supreme Judicial Court in favor of same-sex marriage. Chief Justice Margaret Marshall's opinion initially declared the court's neutrality regarding the competing moral claims of those who believed marriage should be limited to unions of people of the opposite sex and of those who believed marriage should be open to same-sex couples. Ultimately, however, Marshall endorsed the idea that the essence of marriage is not procreation, but, rather, "an exclusive, loving commitment between two partners—be they straight or gay." This position is not neutral on the purpose of marriage; rather, it is a "rival interpretation of the institution" (Sandel 2009, 258–9). One could make identical observations about the United States Supreme Court's jurisprudence on gay rights. Despite the Court's assertion in *Lawrence v. Texas* that its obligation is "to define the liberty of all, not to mandate our own moral code," the Court's proclamation of a federal constitutional right to same-sex marriage in *Obergefel v. Hodges* represents an explicit moral judgment about the meaning of marriage. Moreover, "[i]f government were truly neutral on the moral worth of all voluntary intimate relationships, the state would have no grounds for limiting marriage to two persons, consensual polygamous partnerships would also qualify" (Sandel 2009, 257). Ultimately, communitarians argue that the very idea of liberal neutrality is illusory. The elevation of the fundamental liberal precepts of equality and autonomy over alternative values, such as group welfare, community solidarity, or civic responsibility itself, represents a moral judgment (Sandel 1984, 1).

In addition to this attack on the conceptual coherence of liberalism, communitarians urge that the liberal apotheosis of atomistic individualism has alienated individuals from the communities that historically promoted their welfare and resulted in a disenchanted, demoralized citizenry. Furthermore, the liberal emphasis on moral neutrality has deprived advocates for minority interests of opportunities to emphasize the positive moral good associated with their claims. According to Sandel, liberalism's rejection of any role for the state in promoting the moral good results in a "thin and fragile toleration" (Sandel 1995, 86). In other words, a liberal framework requires its adherents merely to put up with homosexuals, despite disliking them, "just like we have to tolerate all degenerates" (Snyder 2006, 140). Robin West has also observed that the liberal, universalist insistence on equality depends, at its core, on a denial of difference, which at times preempts reliance on arguments that would militate in favor of minority welfare. In the context of same-sex marriage, for example, homosexual rights advocates have argued that the functions of same-sex marriage are indistinguishable from heterosexual marriage and, therefore, that the right is fundamental regardless of the genders of those who wish to exercise it. In contrast, a philosophical paradigm that embraced overt moral claims and allowed for a focus on difference would facilitate arguments regarding the ways in which same-sex marriage is morally superior to heterosexual marriage: without the fraught history of patriarchy associated with heterosexual marriage, one can view same-sex marriage as a true partnership among equals, and because of the lack of procreative potential for same-sex couples, one might view same-sex marriage as more altruistic than an institution founded on the selfish imperative of propagating one's genes (West 1998, 727–8).

Ultimately, however, I have suggested that communitarian arguments have limited potential to promote minority welfare. In its most basic expression, liberalism's claims are essentially metaphysical; individuals are entitled to rights by virtue of their very nature, or in the words of the American Declaration of Independence, "all men" are "endowed by their Creator with certain unalienable rights." Communitarians, by contrast, deny the existence of any preconventional basis for deontological assertions. In other words, rights have no meaning other than that created and permitted by the communities in which individuals make such arguments (Kahn-Fogel 2013, 362). Of course, a pure communitarian perspective, with its focus on group welfare, definitionally prioritizes majoritarian interests over minority rights. Even Sandel's perfectionism,

which he distinguishes from true communitarianism based on his recognition of absolute moral goods extrinsic to community norms, offers insufficient protection for minorities (Sandel 1982, xi). Although Sandel urges overt use of moral arguments in judicial decision-making and has argued that this approach would foster explication of the positive moral good associated with protecting minority interests (Sandel 1996, 103–8), actual outcomes under this model depend on the moral perspectives of presiding judges. In the final analysis, Sandel has offered no reason to believe the judges tasked with overseeing such conflicts are any more likely to share his moral perspective than the voters and legislators who have often acted to the detriment of minorities. Without a basic commitment to liberalism's core precepts, there is simply no reason to listen to arguments in favor of minority welfare (West 1998, 711; Ball 2000, 512–3).

In the West, communitarian discourses often critique the perceived excesses of liberal individualism, which has unquestionably attained a position of dominance in Western culture generally and in Western legal culture in particular. By contrast, and despite the proclamation of liberal rights in African constitutions, communitarian norms have retained significant influence across a wide range of African cultures (Kahn-Fogel 2013, 369). In Africa's recent history, these norms have sometimes been formally enshrined in African legal systems, existing uneasily alongside liberal ideals. Thus, in the years after independence, numerous African leaders asserted group rights to economic development in justification of the subversion of individual rights (Nwabueze 1974, 106–10; Prempeh 2006, 1266–8). These communitarian commitments were reflected in Kenneth Kaunda's Zambian humanism, Julius Nyerere's *ujamaa*, Kwame Nkrumah's consciencism, and in southern African *ubuntu* philosophy. As discussed previously, even today, African constitutions often temper declarations of individual rights with qualifications based on "public morality." Additionally, countless authors have chronicled the communitarian roots of traditional cultures across sub-Saharan Africa (Senghor 1964, 49, 93; Menkiti 1984, 172; Wing 1993, 299; Bennett 2006, 651; Macfarlane 2007, 502–03; Forman 2008, 661; Kelley 2008; Harris Goodman and Traynor 2013, 248). This has particular salience, given the dominant role that customary law plays in the lives of many Africans. This phenomenon is partly a consequence of the underdevelopment of formal legal infrastructure. It is also a product, in some countries, of formal recognition of customary law as governing some kinds of disputes (Kahn-Fogel 2013, 372).

Perhaps the most prominent showcase of African communitarian norms is in the African Charter on Human and Peoples' Rights. Unlike typical human rights documents, the African Charter qualifies its rights provisions by articulating a range of duties individuals owe to their communities. These include obligations to "preserve the harmonious development of the family"; "[t]o serve [the] national community by placing [both] physical and intellectual abilities at its service"; "… [t]o preserve and strengthen social and national solidarity"; "[t]o preserve and strengthen positive African cultural values … and, in general, to contribute to the promotion of the moral well being of society"; to "contribute to the best of [one's] abilities … to the promotion and achievement of African unity;" and to exercise all rights with due regard for "morality and common interest" (African Charter 1981).

The deep communitarian roots of many African cultures may partially explain why liberal arguments for homosexual rights in Africa have been less successful to date than has been the case in numerous Western countries. In Western societies with firmly entrenched cultural and legal commitments to liberal individualism, even conservatives may feel compelled to tolerate behavior they find morally reprehensible. In cultures in which such commitments are not as thoroughly embedded, resistance to rights-based claims is likely to be more resilient. The correspondence of queer theory with much of the African anthropological record may explain why even Africans with significant liberal commitments might be less likely than Western liberals to accept nondiscrimination claims on behalf of sexual minorities.

Queer Theory and the Anthropological Record

As has been the case with communitarians, postmodernist philosophers, anthropologists, historians, sociologists, and literary critics have offered trenchant critiques of liberal assumptions since the latter half of the 20th century. In particular, academic queer theorists have questioned the essentialist basis for homosexual identity that has been a common feature of liberal claims. In *The History of Sexuality*, Michel Foucault, whose writings heavily influenced the development of queer theory, noted that the concept of homosexuality as a fundamental marker of personal and sexual identity emerged only in the latter half of the 19th century. Before that, while sodomy was considered a sin, "the sodomite had been a temporary aberration," a vice to which anyone might be susceptible (Foucault 1978, 43). It was only through 19th century discourses on science, medicine, and psychiatry that Western culture developed the notion of homosexuality as a stable, biological, and social category (Ball 2001, 272). As Foucault argued, these discourses transformed cultural conceptions of same-sex intimacy as an isolated transgression into a theory of the homosexual as a "species" (Foucault 1978, 43). Thus, the social construction of homosexual identity is a foundational premise of queer theory.

This assertion of homosexual identity as culturally constructed is descriptive; queer theorists contest the empirical assumptions of essentialist characterizations of homosexual identity as biologically determined. Queer theory, however, also contains a normative component. Essentialist characterizations of same-sex intimacy can advance liberal claims inasmuch as courts are more likely to view discrimination as invidious when a law draws distinctions on the basis of an immutable characteristic. Yet queer theorists observe that essentialism is a double-edged sword, that oppressive majorities can and have used essentialist arguments to subjugate disfavored minorities more often and more effectively than minorities have used such arguments as tools of liberation. Such majorities have embraced the notion that the targets of discrimination are fundamentally, irretrievably different (and inferior) as a justification for discrimination. For queer theorists, to endorse essentialism is to accept a discursive framework originally imposed to classify and dominate the disfavored and powerless (Rubin 1984, 267, 277; Seidman 1995, 126; Hoad 2007, xxvi). Instead, queer theorists argue that deconstruction of the essentialist models created by the dominant class holds the greatest liberatory potential.

Those interested in promoting the welfare of African sexual minorities might derive significant insights from both the empirical and normative claims of queer theorists. First, while the historical record demonstrates the prevalence of same-sex intimacies across the African continent, the practices anthropologists have chronicled and their social significance, including among those who have engaged in such practices, would often confound contemporary, Western conceptions of homosexuality. Because most African societies were preliterate until the late 19th century, European explorers and missionaries provided the earliest firsthand accounts of African sexual practices. Beginning in the 16th century, these observers described nonnormative gender roles and transgressive sexual behavior in African societies (Kahn-Fogel 2013, 379). Nonetheless, the notion that same-sex intimacy was foreign to African culture was widely accepted in prominent European accounts before the 20th century. Recent analysts have speculated that this predominant theme of African exceptionalism reinforced romantic notions of African innocence and bolstered narratives of African hypermasculinity that served the commercial imperatives of the slave trade (Hoad 2007, 4; Murray and Roscoe 1998, 12). Likewise, this perspective dovetailed with fears in the metropole that same-sex intimacy and other perversities were symptoms of modernity (Hoad 2007, 5).

Nonetheless, by the late 19th and early 20th centuries, a new strand of anthropological scholarship began to expose the diverse forms of same-sex erotic practices in cultures across

the continent. A comprehensive narrative of the myriad sexual practices and their cultural connotations in all African societies is unnecessary and infeasible in this chapter. A brief survey, however, demonstrates the lack of subtlety in both the claims of African leaders who assert the foreignness of homosexuality to Africa and in the counterarguments of Western human rights activists who insist that homosexuality is and has been a universal phenomenon, including in Africa.

In 1899, Michael Haberlandt described homosexual practices in Zanzibar. Haberlandt observed that Zanzibaris considered some practitioners of same-sex intimacies to be innately predisposed to favor homosexual sex. Although this seems to validate essentialist narratives, Haberlandt contrasted this class of "inborn contraries" with the "acquired contrariness" of Black Zanzibari sex slaves, who were "kept away from any work, well pampered, and systematically effeminized." These sex slaves continued to enjoy "normal sex acts," so long as they were not "used for too long as catamites." After long periods of enslavement, however, they could "find … pleasure only in passive pederasty" (Haberlandt 1899, 63–4).

Other accounts also suggest the inevitable distortions associated with any Procrustean endeavor to marshal African anthropological data in support of the universality of the Western conception of homosexuality. That is, these data often belie descriptions of same-sex intimacy as a fundamental and stable marker of personal and sexual identity, characterizing a subset of all populations who possess common psychological, physiological, social, or political characteristics. Rather, many of these narratives delineate evanescent, socially contingent forms of same-sex intimacies. Monica Wilson, who conducted fieldwork in the 1930s among the Nyakyusa, a Bantu group northwest of Lake Malawi, observed that adolescent Nyakyusa boys frequently engaged in same-sex relationships. The Nyakyusa tolerated these relationships, but Wilson noted that the relationships tended to end when the boys married and that married Nyakyusa men invariably preferred females. The few men who never married were "half-wits who ha[d] no kind of intercourse at all" (Murray and Roscoe 1998, 174–6).

Numerous authors have documented short-term, same-sex marriages among South African mine workers. A prominent account of these relationships by T. Dunbar Moodie and Vivian Ndatshe characterized these mine marriages as a form of resistance to proletarianization. According to this narrative, the mine workers viewed such marriages as a safeguard against the temptations of local women, whom they viewed as threats to their ambitions to return eventually to establish households with women from their ancestral communities (Moodie and Ndatshe 1994, 120, 135–36).

At the turn of the 20th century, Paolo Ambrogetti described age-defined, same-sex relationships between Eritrean boys and older men. These relationships were considered only minor transgressions, and the boys' families often encouraged the arrangements as a source of family income. Nonetheless, the boys generally ended these relationships and began courting women once they went through puberty (Murray and Roscoe 1998, 21–2). E. E. Evans-Pritchard famously described the sexual practices of the Azande, who live in parts of what are now Sudan, Central African Republic, and the Democratic Republic of the Congo. Evans-Pritchard recorded same-sex erotic relationships among Azande women in polygamous households. He described these relationships as socially contingent; Azande women in polygamous relationships often went for months without sharing their husbands' beds, and their seclusion prevented heterosexual adultery. Likewise, for Azande men, the primary form of same-sex intimacy was between warriors and their boy wives. According to Evans-Pritchard, these relationships disappeared when heterosexual marriage became easier with the dissolution of Azande military companies and the royal court in post-European times (Evans-Pritchard 1970).

In West Africa, in what is now Burkina Faso, Mossi chiefs, like the Eritreans and the Azande, engaged in age-defined, same-sex relationships. Chiefs would choose as pages the most attractive boys between seven and 15 years old. The chiefs would engage in sexual practices with their pages, especially on Fridays, when sex with women was forbidden. The pages, however, took female wives once they matured (Murray and Roscoe 1998, 91–2).

One must treat these accounts with some skepticism, for their authors' perceptions necessarily reflect the tropes that shaped their expectations. Additionally, of course, none of these narratives can resolve the question of whether desire for same-sex intimacy is a cultural construction or, alternatively, a product of an immutable, biological imperative. They can, however, shed light on the significance that African practitioners of same-sex intimacy have attributed to their relationships. In fact, even today, many Africans who engage in same-sex erotic practices reject Western notions of gay identity. Among the Hausa in Kano, Nigeria, for example, many men who have same-sex erotic relationships view those relationships primarily as a form of play, and they prioritize their reproductive obligations in heterosexual relationships as defining their identities (Gaudio 1998, 121). Others have also observed that, in general, West African men who have same-sex erotic relationships tend also to have heterosexual relationships, and that gay identity has no cultural resonance for them (Ajen 1998, 133–4). Traditionally, in these cultures, "[s]ex between men is not automatically labeled as homosexual behavior" (Roberts 1995). Also, in South Africa, men who engage in same-sex erotic relationships have often rejected homosexual identity as un-African and as a Western construct (Kahn-Fogel 2013, 384).

Under these circumstances, one might reasonably ask what Western rights advocates expect to accomplish in labeling as homosexual people who often reject that identity. Neville Hoad has noted the long tradition of Western supporters of homosexual rights "seeking … self-consolidating evidence from elsewhere to universalize and naturalize one's own experience" (Hoad 2007, xxv). Likewise, Ifi Amadiume critiqued Western attempts to portray marriages between Nnobi women as lesbian, which Amadiume asserted would be "shocking and offensive" to those women, "since the strong bonds and support between them do not imply lesbian sexual practices." Amadiume viewed Western characterizations of these relationships as "prejudiced interpretations of African situations to justify their choices of sexual alternatives which have their roots and meanings in the West" (Amadiume 1987, 7).

In fact, there is significant evidence that Western advocacy for homosexual rights in Africa has caused severe backlash, which has, in turn, endangered the ostensible beneficiaries of such activism. Western pressure has led to renewed prosecutions under laws that had, for decades, been in a state of desuetude. In some countries, moreover, legislatures have introduced or passed new, harsher laws, partly in reaction to perceived interference from the West. Overall, in the estimation of some, Western advocacy for the rights of African sexual minorities has caused more harm than good (Onishi 2015).

In the West, Michael Klarman has discussed the potential for backlash against countermajoritarian court decisions, which can increase the salience of controversial issues, incite anger against outside interference, and generate indignation over a sense that courts have altered the order in which social change would have occurred in the absence of interference (Klarman 2005, 473). Each of these concerns is relevant to Western attempts to improve the lives of African sexual minorities as well. Additionally, more than merely shining a spotlight on an issue that had previously received little attention, the influence of Western culture and activism has had a creative impact on the African imagination, generating a social category that, in many cultures, simply had not previously existed (Kahn-Fogel 2013, 389). Ironically, then, liberal activists may have reified the hierarchies they hoped to dismantle by labeling as homosexual

those who would often reject that classification, thus creating stable targets for reactionary forces, who have responded with both official discrimination and private violence.

This partial validation of the claims of queer theorists should not be taken as a wholesale endorsement of that philosophy. Like communitarians, queer theorists view rights as merely cultural constructions. They reject not just essentialist explanations of homosexual identity, but of human identity more broadly (Ball 2001, 283). Likewise, queer theorists have critiqued what they view as "liberal delusions of autonomy" (McWhorter 1999, xvi). If one believes rights are entirely culturally constructed, then recognition of minority interests can be only a matter of preference or grace. Nonetheless, the correspondence of much of the African anthropological record with the claims of queer theorists and the actual consequences of liberal advocacy for homosexual rights in Africa may illuminate the limits of traditional liberal strategies.

Reproduction of Colonialist Tropes

Finally, Western liberals must appreciate the long, sordid history of Western attempts to impose universalizing norms on Africans. At the height of colonialism, Westerners imposed Victorian-era laws that reflected the period ideology that heterosexuality was the natural norm and that homosexuality was biologically and morally deviant (Kahn-Fogel 2013, 318). Today, liberal advocates for homosexual rights in Africa attempt to impose their own universalizing rubric: homosexuality is a feature of all societies, and those societies must recognize the rights of sexual minorities to equality and autonomy. Just as before, moreover, Western discourses often deny agency to Africans. The British partly justified their colonial enterprise by arguing that any homosexuality in Africa was the product of an external menace, the morally licentious Portuguese and Arabs (Epprecht 2004, 8). Today, Western liberals often attribute African homophobia to the pernicious influence of Western evangelicals, who have, according to this narrative, manipulated Africans into parroting their destructive views (Williams 2013). This condescending perspective precisely replicates long-standing tropes that deny moral agency to the Africans who express antipathy toward homosexuality, instead viewing Africans as a proverbial blank slate, capable only of absorbing extrinsic influences, be they malevolent or salutary.

Given this history, it makes little sense to respond to African claims that homosexuality conflicts with African culture by pointing out that colonialists imposed the original proscriptions against same-sex intimacy in Africa and to assert the external origins of the Christian and Muslim ideology that drive much contemporary African distaste for homosexuality. No culture is static, and African society today has fully absorbed these perspectives. Of course, cultural dynamism cuts both ways. Even if there is some truth in African assertions that homosexuality is a Western construct, today there are many Africans who understand their identities in ways that are entirely consistent with Western notions of homosexuality. Given the inexorable influence of Western culture in a globalized economy, the number of people who think of themselves in such terms is likely only to increase.

Conclusion

The question, then, is what Western liberals should do if they hope to advance the interests of all sexual minorities in Africa. Available evidence to date suggests that the results of their advocacy have been mixed at best. The deep communitarian roots of many traditional African cultures, the correspondence of the claims of queer theorists with much of the African data on same-sex erotic practices, and the long history of Western attempts to impose universalizing

norms on Africans suggest that the strategies human rights activists have successfully deployed in the West may continue to produce unintended and undesirable consequences in this context. Such advocates cannot and should not abandon their foundational liberal commitments. Nonetheless, a more modest approach, which allows African liberals to stand alone on the front lines, can insulate human rights advocates against valid claims that the fight for homosexual rights in Africa is simply the latest instantiation of an age-old Western project to impose foreign norms on Indigenous populations. Likewise, a recognition that Western classification of all African same-sex intimacies as "homosexual" has had unintended, harmful consequences should lead Westerners to allow Africans who engage in same-sex erotic practices to define their identities for themselves. To do so would be consistent with the principle of self-determination at the heart of liberal ideology, and it might also be more effective than current strategies in advancing the welfare of the people Western rights advocates hope to protect.

Notes

1 Pew's 2013 poll of attitudes in eight African countries regarding whether society should accept homosexuality showed majorities of over 90 percent who believed society should not accept homosexuality in seven of the countries. Even in South Africa, which has explicit constitutional protection of sexual orientation, the poll showed that 61percent of respondents believed society should not accept homosexuality. ILGA's 2017 poll showed somewhat greater complexity. According to that poll, 38 percent of North African respondents and 51 percent of sub-Saharan African respondents believed equal rights protections should be extended to people "romantically or sexually attracted to people of the same sex" (ILGA 2017, 20). Nonetheless, for many of the respondents, equal protection apparently did not connote legalization of same-sex romantic or sexual activity; the poll showed that respondents who favored criminalization of same-sex sexual intimacy continue to outnumber those who favor legalization in North African countries and in sub-Saharan African countries.
2 Central Government Act, No. 45 of 1860, INDIA PEN. CODE (1860), §377.
3 *Minister of Home Affairs v. Fourie*, 2005 (1) SA 524 (CC) (S. Afr.).
4 *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015).
5 *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (ser. A) (1981).
6 *Atala Riffo and Daughters v. Chile, Inter-Am Ct HR* (judgment of Feb 24, 2012), online at www.unhcr.org/refworld/docid/4f840a122.html.
7 *Toonen v. Australia*, Comm. No. 488/1992, U.N. GAOR Hum. Rts. Comm., 49th Sess., Supp. No. 40, vol. II U.N. Doc. A/49/40 (1994).
8 U.N. Comm. on Econ., Soc., and Cultural Rights (CESCR), General Comment No. 20: Non-Discrimination in Economic, Social and Cultural Rights (art. 2, P2, of the International Covenant on Economic, Social and Cultural Rights), P32, U.N. Doc. E/C.12/GC/20 (July 2, 2009).
9 Human Rights Council Res. 17/19, Rep. of the Human Rights Council, 17th Sess., May 31–June 17, 2011, U.N. Doc. A/HRC/17/L.9/Rev.1 (June 15, 2011).
10 *Obergefell v. Hodges*, 135 S.Ct. 2584, 2630 (2015) (Scalia, J., dissenting).

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