

# Teaching Law Students about Sexual Orientation, Gender Identity and Intersex Status within Human Rights Law: Seven Principles for Curriculum Design and Pedagogy

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## I. Introduction

Over the past two decades, sexual orientation, gender identity, and intersex status (SOGII) have become important aspects of human rights law. However, this reality is not widely reflected in the curriculum of human rights law programs. The reasons for this are varied but may include wariness about causing offense by using the wrong terminology or language and concern about the complexities and sensitivities surrounding different issues. This article aims to assist law school educators to overcome these concerns by providing curricular and pedagogical guidance relating to the effective and comprehensive incorporation of SOGII into a human rights law program. In particular, it provides recommendations for educators who wish to establish a stand-alone course on SOGII and human rights, as well as for those who would like to incorporate SOGII-related issues into a more general human rights law course.

It begins with an overview of the existing scholarship concerning the incorporation of SOGII issues into the law school curriculum. This analysis provides insight into the importance of teaching law students about SOGII, as well as some recommendations on how to do so. However, it also highlights how little scholarly attention has been given to the teaching of SOGII issues in the human rights law setting.

The article then goes on to posit seven curricular and pedagogical principles on how to teach SOGII issues in the specific context of human rights law. Together, these principles provide a holistic and critical approach that responds to unique aspects of human rights law, including its international focus and

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the “living” nature of human rights law instruments. This method involves incorporating interdisciplinary topics such as the historical treatment of sexual and gender identity minorities, highlighting the relevance of international relations and political science to rights relating to SOGII, and developing an understanding of queer theory. It also entails examining a wide variety of international and regional human rights norms and processes, as well as applicable domestic laws. In addition, this method encourages an exploration of the role that local and international nongovernmental organizations (NGOs) play in protecting rights relating to SOGII.

## II. The Place of SOGII Rights Within a Law School Human Rights Program

While the scholarly exploration of the importance of incorporating the themes of SOGII into education has been substantial, the vast majority of this literature has focused on primary and secondary schools,<sup>1</sup> and to a lesser extent workplace training.<sup>2</sup> Where there is scholarship concerning the inclusion of SOGII issues within the higher education sector, it tends to be directed at gender or women’s studies,<sup>3</sup> or teacher education courses.<sup>4</sup> A body of scholarship concerning the incorporation of SOGII issues into the

1. See, e.g., Randy Hedlund, *Segregation by Any Other Name: Harvey Milk High School*, 33 J. L & EDUC. 425 (2004); Arthur Lipkin, *The Case for a Gay and Lesbian Curriculum*, THE HIGH SCHOOL JOURNAL 95 (1993); Catherine A. Lugg, *Sissies, Faggots, Lezzies, and Dykes: Gender, Sexual Orientation, and a New Politics of Education?*, 39 EDUCATIONAL ADMINISTRATION QUARTERLY 95 (2003); Thomas A. Mayes, *Separate Public High Schools for Sexual Minority Students and the Limits of the Brown Analogy*, 35 J.L. & EDUC. 339 (2006); Beth Reis, *A Guide to Teaching Actively About Sexual Orientation*, 26 SIECUS REPORT 5 (1998); Michael J. Reiss, *Teaching about Homosexuality and Heterosexuality*, 26 J. OF MORAL EDUC. 343 (1997); Kevin Rogers & Richard Fossey, *Same-Sex Marriage and the Public School Curriculum: Can Parents Opt Their Children Out of Curriculum Discussions about Sexual Orientation and Same-Sex Marriage?*, 2011 BYU EDUC. & L.J. 423 (2011); Caitlin L. Ryan et al., *Discussing Princess Boys and Pregnant Men: Teaching about Gender Diversity and Transgender Experiences within an Elementary School Curriculum*, 10 J. OF LGBT YOUTH 83 (2013); Susan K. Telljohann et al., *Teaching about Sexual Orientation by Secondary Health Teachers*, 65 J. OF SCHOOL HEALTH 18 (1995); Shawn Vecellio, *Enacting FAIR Education: Approaches to Integrating LGBT Content in the K-12 Curriculum*, 14 MULTICULTURAL PERSPECTIVES 169 (2012); Karen Yescavage & Jonathan Alexander, *The Pedagogy of Marking: Addressing Sexual Orientation in the Classroom*, 11 FEMINIST TEACHER 113 (1997).
2. See, e.g., Liz Winfield & Susan Spielman, *Making Sexual Orientation Part of Diversity*, 49 QUESTIA 50 (1995); Ed Mickens, *Including sexual orientation in diversity programs and policies*, 21 EMP’T RELATIONS TODAY 263 (1994); Pat Baillie & Julie Gedro, *Perspective on Out & Equal Workplace Advocates Building Bridges Model: A Retrospect of the Past, Present, and Future of Training Impacting Lesbian, Gay, Bisexual, and Transgender Employees in the Workplace*, 23 NEW HORIZONS IN ADULT EDUC. & HUMAN RESOURCE DEVELOPMENT 39 (2009); Shari Caudron, *Open the Corporate Closet to Sexual Orientation Issues*, 74 PERSONNEL JOURNAL 42 (1995).
3. See, e.g., Mary Bryson & Suzanne de Castell, *Queer pedagogy: Praxis Makes Im/perfect*, CANADIAN J. OF EDUC./REVUE CANADIENNE DE L’EDUCATION 285 (1993); Karen McGrath, *Teaching Sex, Gender, Transsexual, and Transgender Concepts*, 28 COMM’N TEACHER 96 (2014).
4. Steven Z. Athanases & Timothy G. Larrabee, *Toward a Consistent Stance in Teaching for Equity: Learning to Advocate for Lesbian- and Gay-Identified Youth*, 19 TEACHING AND TEACHER EDUC. 237 (2003).

law school curriculum is starting to emerge. This literature can be distilled into two distinct categories, namely, (A) the integration of SOGII into the traditional law school curriculum, and (B) the development of electives focused on SOGII issues, both of which are considered below.

*A. Integrating sexual orientation and/or gender identity  
and intersex into the traditional law curriculum*

The literature relating to the incorporation of SOGII issues into a law curriculum tends to focus on either the *need* to introduce these topics into the curriculum or *how* to introduce them. The scholarship that asserts a need for SOGII issues to be part of the law school curriculum is generally very practical, examining the importance of integrating these themes into the traditional curriculum, the difficulties associated with bringing up “controversial topics,” and recommendations for lecturers on overcoming such difficulties. In contrast, the literature focusing on how to address SOGII issues is inclined to be more theoretical: what is the best way to construct a queer legal pedagogy?

Professors Dark<sup>5</sup> and Randall<sup>6</sup> belong to the first group; they examine the practicalities of introducing sexual orientation into the traditional law curriculum. They consider that sexual orientation should be part of a wider discussion of the need for a diversity-conscious legal pedagogy in law schools. The premise of both scholars is that teaching diversity issues, such as sexual orientation, race, gender, class, and disability, to law students is necessary so that they are prepared for the diversity of their future clients or constituents (if they pursue a career in governance/lawmaking).<sup>7</sup> However, they also assert other bases for including such issues in the law school curriculum, among them the premise that learning about diversity helps students to improve their legal problem-solving skills, as well as their understanding of the law.<sup>8</sup> Likewise, Cotter argues in her piece “Teaching Law for the Real World” that “as the world changes, and hopefully progresses, and as laws change and evolve, so too should the teaching and learning of law for an ultimately better and cutting edge legal profession.”<sup>9</sup> She contends that lesbian, gay, bisexual, transgender, intersex, and queer (LGBTIQ) issues, along with other diversity-related topics, such as race, gender, religion, age, and disability, ought to be incorporated into the *core* law school curriculum to better serve future clients.<sup>10</sup>

5. Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching*, 32 WILLAMETTE L. REV. 541 (1996).

6. Vernellia R. Randall, *Teaching Diversity Skills in Law School*, 54 ST. LOUIS U. L.J. 795 (2009).

7. *Id.* at 795; Dark, *supra* note 5, at 553-55.

8. Dark, *supra* note 5, at 544-53.

9. Anne-Marie Cotter, *Teaching Law for the Real World: Bridging the Gap between Law School and the Legal Profession*, 4 ASIAN J. OF LEGAL EDUC. 72 (2017).

10. *Id.* at 75.

The work of Gilmore<sup>11</sup> and Infanti<sup>12</sup> considers the teaching of SOGII issues in very specific contexts. Gilmore examines the inclusion of sexual orientation into a first-year property law course, while Infanti considers bringing sexual orientation and gender identity into the teaching of tax law. In addition to making similar arguments as those propounded by Dark and Randall, they also each contend that including these topics within the traditional law school curriculum is beneficial because it can lessen the isolation of LGBTIQ students.<sup>13</sup>

All five of these scholars touch on the pedagogical difficulties involved in the inclusion of diversity issues into the traditional law curriculum. Gilmore, Infanti, and Dark, for example, all mention that a discussion of sexual orientation may evoke personal and emotional responses from students, rendering classroom discussion uncomfortable or heated.<sup>14</sup> Some students may be homophobic or racist,<sup>15</sup> or have concerns with the topic based on religious or personal grounds,<sup>16</sup> while LGBTIQ students in the class may feel vulnerable<sup>17</sup> or be offended.<sup>18</sup> In addition, both Gilmore and Dark note the personal difficulties that professors might encounter, such as their own feelings of vulnerability or discomfort.<sup>19</sup> Another area of concern, discussed by Gilmore, Dark, and Randall, is the common perception among students that diversity issues are not relevant to the study of traditional law.<sup>20</sup> Randall and Gilmore also touch on the difficulty of selecting texts or casebooks that incorporate the views of marginalized groups into the analysis of the law.<sup>21</sup>

Various suggestions about how to overcome these difficulties are put forward. For example, Dark, Gilmore, and Infanti all suggest that law educators should focus on their relationship with the students, listen attentively to them, and create an environment of respect.<sup>22</sup> However, other proposed recommendations are inconsistent. For example, Gilmore suggests not informing students of the inclusion of the topic of sexual orientation in advance:

11. Angela Gilmore, *Incorporating Issues of Sexual Orientation into a First Year Property Law Course: Relevance and Responsibility*, 32 NOVA L. REV. 595 (2007).
12. Anthony C. Infanti, *Bringing Sexual Orientation and Gender Identity into the Tax Classroom*, 59 J. LEGAL EDUC. 3 (2009).
13. Infanti, *supra* note 12, at 2-4; Gilmore, *supra* note 11, at 607.
14. Infanti, *supra* note 12, at 33; Gilmore, *supra* note 11, at 604; Dark, *supra* note 5, at 557.
15. Dark, *supra* note 5, at 557.
16. Gilmore, *supra* note 11, at 604.
17. *Id.* at 605.
18. Dark, *supra* note 5, at 558-59.
19. *Id.* at 559; Gilmore, *supra* note 11, at 605.
20. Dark *supra* note 5, at 558; Randall, *supra* note 6, at 804.
21. Randall, *supra* note 6, at 800; Gilmore, *supra* note 11, at 603-04.
22. Infanti, *supra* note 12 at 4; Dark, *supra* note 5, at 559-60; Gilmore, *supra* note 11, at 605.

I try not to interrupt the pedagogical flow, or in any other way signal to the students that we are about to discuss something unconventional or nontraditional, when the fact patterns involve gay men or lesbians.<sup>23</sup>

Randall, on the other hand, is critical of this strategy; “teaching diversity skills cannot be happenstance. Don’t try to sneak it in by bringing in a case here or a comment there.”<sup>24</sup> She prefers to make students aware of her diversity-conscious pedagogy at the beginning of the course by including it in the course’s goals and objectives.<sup>25</sup>

These scholars propose teaching methods that are useful for dealing with these kinds of topics, such as small-group discussions,<sup>26</sup> playacting,<sup>27</sup> the use of narrative,<sup>28</sup> and student self-evaluation.<sup>29</sup> However, only Gilmore and Infanti make suggestions on curricular content. Alongside her pedagogical suggestions, Gilmore goes through various property law topics, highlighting cases and hypothetical examples that demonstrate the intersection of property law and sexual orientation. Infanti goes even further by providing a body of raw material for bringing SOGII issues into the tax law classroom. He explores fringe benefits, attribution rules, medical expenses, property transfers, and income splitting as topics to which SOGII issues are highly relevant. For each of these areas, he gives background detail on the law, an explanation of how it applies to same-sex couples, and some discussion of policy issues. Disappointingly, Infanti is the only of one these five scholars to discuss the need to include gender identity, as well as sexual orientation, in the traditional law curriculum.<sup>30</sup>

The second subcategory of scholarship surrounding the inclusion of SOGII issues into the traditional law curriculum relates to queer theory.<sup>31</sup> This body of literature addresses *how* these topics should be taught from a queer perspective. Brooks and Parkes propose “a pedagogical approach that includes, reflects,

23. Gilmore, *supra* note 11, at 606.

24. Randall, *supra* note 6, at 799.

25. *Id.*

26. Randall, *supra* note 6, at 801; Dark, *supra* note 5, at 567.

27. Dark, *supra* note 5, at 566.

28. Infanti, *supra* note 12, at 4-5; Dark, *supra* note 5, at 547; Gilmore, *supra* note 11, at 604.

29. Randall, *supra* note 6, at 802.

30. Infanti, *supra* note 12, at 17. While Cotter notes the importance of incorporating LGBT issues into the law school curriculum, she does not expand on how this could be done in relation to transgender people. See Cotter, *supra* note 9, at 75.

31. Queer theory refers to a body of scholarship that challenges assumptions about “normal” and “valid” constructions of gender and sexuality. It came about in the late 1980s to early 1990s and draws on post-structuralism and feminist theory. For an overview of queer theory, see Katherine Watson, *Queer Theory*, 38 GROUP ANALYSIS 67 (2005).

and values queer lives.”<sup>32</sup> After reviewing an array of queer legal theory and outsider<sup>33</sup> legal pedagogy, they posit eight normative principles of queer legal pedagogy.

The first principle is “centering queer experience in all of its diversity.” This principle entails making queer experiences visible within legal education by increasing their presence in the cases the students read, in class discussions, and in both the faculty and student body.<sup>34</sup> The second principle, “denaturalizing heterosexuality,” requires that legal education move away from assumptions of heterosexuality and gender normativity by encouraging students to question sexual orientation and gender identity throughout the course.<sup>35</sup> The third principle, “cultivating community and coalition,” attempts to reduce the alienation of queer students via increased group work and community participation.<sup>36</sup> The fourth principle, “seeking connections between disciplines,” advocates for an interdisciplinary curriculum, not only to foster a better understanding of legal policy analysis, but also to broaden the focus from the legal status of queer persons to the position of the queer community in society at large.<sup>37</sup> The fifth principle, “advancing professional transformation,” holds that the advancement of queer equality requires a legal pedagogy that meaningfully links academy and activism.<sup>38</sup> This involves teaching about oppression and privilege and enabling students to effectively deal with social justice claims.<sup>39</sup> The sixth principle, “embracing activism as method,”<sup>40</sup> entails adopting a legal pedagogy that values and emphasizes activist and grassroots action.<sup>41</sup> The seventh principle, “uncovering perspectives,” involves resisting the notion that the law school curriculum is “neutral” and teaching students to unpack the ideologies and assumptions behind the material.<sup>42</sup> The final principle, “responding to changing contexts, periods and climates,” holds that queer legal pedagogy must adapt to changing circumstances and

32. Kim Brooks & Debra L. Parkes, *Queering Legal Education: A Project of Theoretical Discovery*, 27 HARV. WOMEN’S L.J. 89, 90 (2004).

33. By “outsiders,” Brooks and Parkes explain that they are referring to “members of groups that have not historically been powerful in society or have not traditionally been the ones fashioning, teaching, or adjudicating the law. When we talk about ‘outsider scholars’ we mean generally, critical race theorists, feminists, and those concerned with class oppression and subordination based on disability, along with theorists broadly characterized as queer.” *Id.* at 92, n. 15.

34. *Id.* at 119-22.

35. *Id.* at 122-24.

36. *Id.* at 124-25.

37. *Id.* at 125-27.

38. *Id.* at 127-30.

39. *Id.* at 128.

40. *Id.* at 130-32.

41. *Id.* at 130.

42. *Id.* at 132-33.

environments.<sup>43</sup> Brooks and Parkes propose that these eight principles be applied to the law school curriculum to illustrate what legal education might look like if it were rethought in a more queer way.<sup>44</sup>

Petersen takes a similar approach to Brooks and Parkes, offering seven principles that guide her practice of a lesbian-positive legal pedagogy.<sup>45</sup> Although her article is based more on her personal experience as a lesbian law teacher, her pedagogical principles provide guidance on how a law school can incorporate issues of sexual orientation into the curriculum. Her first three principles focus on increasing (lesbian) visibility. She aims to inform everyone at the law school of her sexual orientation,<sup>46</sup> she includes lesbian cases in her classes,<sup>47</sup> and she uses hypothetical examples involving lesbians to compensate for the lack of diversity of lesbian expression and experience in the existing case law.<sup>48</sup> Her fourth and fifth principles are intended to assist students to question the nature and assumptions behind the law by providing critical analysis of the heterocentricity (that is, lesbian invisibility in the law)<sup>49</sup> and the heterosexism of the law (that is, the law's promotion of heterosexuality and oppression of homosexuality).<sup>50</sup> Petersen's sixth pedagogic principle is to use hypothetical problems about lesbians, either in an assignment or examination, to evaluate the students' knowledge of the lesbian materials that they have been taught. Her final principle involves creating a classroom environment that is supportive of, or at least not hostile to, lesbians.<sup>51</sup> She argues that silencing hostile opinions is not the answer and that instead one must create a desire for students to "unlearn" as well as learn.<sup>52</sup>

In her book, *Sappho Goes to Law School: Fragments in Lesbian Legal Theory*,<sup>53</sup> Robson articulates a "pedagogical principle" that is quite different from the approaches proposed by Peterson, Brooks, and Parkes. Robson discusses lesbian legal pedagogy in law school as part of a wider exploration of the way in which legal scholarship approaches lesbianism. She argues that we must think outside the dominant model of education, and suggests that law schools consider a Sapphic method of teaching, which values artistic pursuits and muses, over

43. *Id.* at 133-35.

44. *Id.* at 117.

45. Cynthia Petersen, *Living Dangerously: Speaking Lesbian, Teaching Law*, 7 *CAN. J. WOMEN & L.* 318, 323-28 (1994).

46. *Id.* at 323-24.

47. *Id.* at 324.

48. *Id.* at 324-26.

49. *Id.* at 326-27.

50. *Id.* at 327-28.

51. *Id.* at 328.

52. *Id.*

53. RUTHANN ROBSON, *SAPPHO GOES TO LAW SCHOOL: FRAGMENTS IN LESBIAN LEGAL THEORY* (1998).

the Socratic method, which relies on argument in order to stimulate critical thinking and develop ideas.<sup>54</sup> Unfortunately, Robson gives little description of how this approach would work in practice.<sup>55</sup> For this reason, Brooks and Parkes describe Robson's work as "revolutionary, and its application undefined."<sup>56</sup> This is especially so in comparison to that of Petersen, whose principles they see as providing "a helpful starting place."<sup>57</sup> Brooks and Parkes situate their work between these two scholars; they describe their project as an attempt to "step out from Petersen toward Robson."<sup>58</sup> Nonetheless, Robson does provide some insights that are straightforward and concrete, especially in the final essay of her book, in which she describes the difficulties of teaching a course titled *Sexuality and the Law*. This essay is analyzed further in the next section, which considers law electives with SOGII-specific content.

*B. Teaching law electives that focus on sexual orientation,  
gender identity and/or intersex status*

The second category of scholarship on introducing SOGII into the law curriculum discusses law electives that either have a specific focus on SOGII-based content or are based on diversity issues more generally. Many of the pedagogical recommendations in this category are similar to those given by professors introducing these topics into the traditional law curriculum. Lester, for example, describes teaching about sexual orientation in an elective called *Intolerance, Culture and the Law*.<sup>59</sup> The pedagogical techniques that she employs to overcome polarized and sometimes-prejudicial student opinions echo the literature discussed above. She suggests setting ground rules for class discussions,<sup>60</sup> asking for personal views in assignments,<sup>61</sup> setting up student "expert panels" on class readings,<sup>62</sup> and utilizing classroom debates<sup>63</sup> and small-group discussions.<sup>64</sup>

Other scholarship highlights the differences involved in teaching these topics as part of an elective rather than in the traditional curriculum. Hing, for example, discusses raising personal identification issues, such as class,

54. *Id.*

55. Brooks & Parkes, *supra* note 32, at 102.

56. *Id.* at 103.

57. *Id.*

58. *Id.*

59. Toni Lester, *Talking about Sexual Orientation, Teaching about Homophobia—Negotiating the Divide Between Religious Belief and Tolerance for LGBT Rights in the Classroom*, 15 DUKE J. GENDER L. & POL'Y. 399 (2008).

60. *Id.* at 406-07.

61. *Id.* at 408.

62. *Id.* at 407.

63. *Id.* at 408.

64. *Id.* at 407.

race, ethnicity, gender, sexual orientation, physical disability, and age, in three law courses associated with the Law and Social Change curriculum at Stanford Law School.<sup>65</sup> He notes that the students who enroll in some electives, such as Lawyering Process for Social Change, are usually interested in eventually working with subordinated communities and are therefore, presumably, much more willing to learn about these areas.<sup>66</sup> As such, Hing provides fewer pedagogical suggestions for dealing with the “controversial” nature of these topics and instead launches into a description of the texts and exercises he uses in each week of the semester.<sup>67</sup> Hing concludes that his clinical course is the most effective in teaching students to deal with diverse clients.<sup>68</sup>

Robson’s essay on teaching a unit called Sexuality and the Law also demonstrates the differences that emerge when teaching an elective compared with teaching a core law subject. Her unit involves the consideration of the legal treatment of a range of sexual practices, from LGBTIQ-specific ones to non-LGBTIQ-specific issues, such as reproduction, rape, pornography, prostitution, bestiality, and incest.<sup>69</sup> Robson considers the difficulties she has experienced as a lesbian professor teaching about sex, which include students unburdening their private lives to her,<sup>70</sup> as well as students feeling uncomfortable or ashamed to talk about sex.<sup>71</sup> She finds talking about lesbian sex particularly difficult, “not only because non-heterosexual sex is more imbued with shame than heterosexual sex but also because the very language in which we speak is rooted in the denial of lesbian desire.”<sup>72</sup> Robson notes that these particular difficulties are less common in traditional law classes: “[L]aw school classes in tax, administrative law, civil procedure, or federal jurisdiction rarely suggest sexual analogies.”<sup>73</sup>

Nonetheless, both Hing and Robson provide pedagogical recommendations for their electives that are applicable to the law curriculum more generally. In addition to suggesting some pedagogical techniques similar to those given by the scholars writing on the traditional law curriculum,<sup>74</sup> Hing proposes that law

65. Bill Ong Hing, *Raising Personal Identification Issues of Class, Race, Ethnicity, Gender, Sexual Orientation, Physical Disability, and Age in Lawyering Courses*, 45 STAN. L. REV. 1807 (1993).

66. *Id.* at 1811.

67. *Id.* at 1811-22.

68. *Id.* at 1830.

69. ROBSON, *supra* note 53, at 216.

70. *Id.* at 217.

71. *Id.* at 220.

72. *Id.* at 215.

73. *Id.* at 217.

74. For example, Hing suggests using hypothetical examples that are based on believable facts, employing major news events of the day to discuss personal identification issues, using videotape to bring the community into the classroom, employing the experiences of the students, and asking students to write reflection pieces or keep a journal. In addition,

educators need to rectify their own language patterns to be more inclusive of diverse identities and to avoid assumptions about student experiences.<sup>75</sup> This involves using gender-inclusive language, such as alternating between “he” and “she” as well as giving groups equal weighting, for example using “men and women” over “men and ladies.”<sup>76</sup> He also suggests avoiding assumptive remarks, such as “now, when your parents were in college . . . .”<sup>77</sup>

Robson, like Petersen and Brooks and Parkes, discusses the role of the queer professor. However, unlike these scholars, Robson disagrees with using her own sexual identity as part of her queer pedagogy and chooses to never categorize herself as a “lesbian professor.”<sup>78</sup> She sees this as necessary to “facilitate among differing articulated standpoints.”<sup>79</sup> Robson has since reflected on this position in a 2017 article, “Educating the Next Generations of LGBTQ Attorneys,” in which she concedes that “[t]he professor’s own identities undoubtedly play a part in the classroom dynamics.”<sup>80</sup> However, she maintains that “if it were ever as simple as being ‘out’ . . . that is no longer true.”<sup>81</sup> In this regard, Robson observes that while “the number of LGBTQ law students and LGBTQ courses, and the breadth of LGBTQ course content, has multiplied” in recent years, she is “not convinced that the legal academy has been queered, at least sufficiently so.”<sup>82</sup> She argues that this is due to the insufficient amount of scholarly attention that has been devoted to developing a queer pedagogy in legal education.

Robson goes on to discuss how LGBTQ professors can empower students, LGBTQ or otherwise, covering issues of classroom dynamics, course content, and supervision. While she focuses largely on LGBTQ professors and students, her discussion of certain classroom strategies is broadly applicable. For example, Robson describes how incorporating sexuality and gender into role-playing “frees the students from . . . previous conceptions of ourselves and others in the classroom regarding our identities and politics.”<sup>83</sup> It is designed

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Hing adopts some familiar pedagogical suggestions drawn from the professional trainers of teachers. Like many of the scholars writing on this area, he supports the use of group work and wishes to create a respectful environment by, for example, speaking up if a student makes a distasteful remark, Hing, *supra* note 65.

75. Hing, *supra* note 65, at 1833.

76. *Id.*

77. *Id.*

78. ROBSON, *supra* note 53, at 220.

79. *Id.*

80. Ruthann Robson, *Educating the Next Generations of LGBTQ Attorneys*, 66 J. LEGAL EDUC. 502, 504 (2017).

81. *Id.* at 504.

82. *Id.* at 502.

83. *Id.* at 506.

to allow students to “disagree and debate in relatively . . . personal ways” and challenge their own perceptions in non-personal ways.

Other recent articles also examine how SOGII-specific units can be developed and improved. Lau, for example, explores the ways in which law teachers can enrich students’ experiences by incorporating transnational perspectives into classes on law and sexuality in the United States.<sup>84</sup> He argues that teachers can inject these perspectives into such electives by examining the extent to which the United States conforms to transnational norms, thereby illustrating cultural constructs in conceptions of sexuality, considering foreign ideas in discussions of law reform, and introducing students to international and regional human rights systems.<sup>85</sup> He provides relevant cases, texts, and examples that law teachers can use when implementing his four suggestions.

*C. Sexual orientation, gender identity and intersex status in human rights classes*

The above analysis of existing literature highlights an absence of any exploration of the incorporation of SOGII into a human rights law program. The scholarship concerning the integration of the topics of SOGII into the law curriculum focuses on the traditional law curriculum or LGBTIQ-specific electives, but not on how SOGII issues fit within a human rights law program.<sup>86</sup> This is so despite the fact that human rights law has become an important avenue through which SOGII-specific issues are incorporated into other areas of law. This article contributes to filling this gap in the scholarship by positing a number of pedagogical and curricular recommendations designed to assist teachers in tackling issues relating to SOGII in a human rights law setting.

While the insights offered by this article could also assist in the design and teaching of traditional law courses or LGBTIQ-electives, it is specifically aimed at teachers involved in human rights law education. In particular, this article provides guidance for those wishing to teach or design a stand-alone course on human rights and SOGII as part of a human rights law program, such as a Master of Human Rights Law, or educators interested in including SOGII-related issues into a general course on human rights law.

This focus on teaching issues of SOGII in the context of human rights law is important, as this area of law presents unique challenges. When most of the key human rights law instruments were created, SOGII issues were beyond the contemplation of the drafters. For example, when the International Covenant for Civil and Political Rights (ICCPR)<sup>87</sup> was drafted in the early 1950s, homosexuality was still a crime in a majority of states. The heterosexual

84. Holning Lau, *Law, Sexuality, and Transnational Perspectives*, 5 DREXEL L. REV. 479 (2012).

85. *Id.* at 481-95.

86. For example, although Lau sees the connection between human rights law and SOGII in legal education, he writes of using human rights law only as a way to broaden the study of sexuality and the law. *See* Lau, *supra* note 84.

87. Adopted by the United Nations General Assembly Resolution 2200A (XXI) of 16 December 1966; entered into force on 23 March 1976.

assumptions that underpin international human rights law are also present in other areas of law, such as property law or tax law, as Gilmore<sup>88</sup> and Infanti<sup>89</sup> point out. Yet human rights law is distinctive insofar as it is frequently contained in such instruments as treaties and constitutions, which cannot be amended with the same ease as legislation. Rather, international human rights treaties are considered to be “living instruments”; that is, they are adapted and developed through contemporary interpretation.<sup>90</sup> As Bernhardt explains, human rights instruments “. . . must be interpreted in an objective and dynamic manner, by taking into account social conditions and developments; the ideas and conditions prevailing at the time when [they] were drafted retain hardly any continuing validity.”<sup>91</sup>

As such, to fully grasp the application of human rights law to SOGII issues, students need understand the social and political context in which the law is currently situated. This involves equipping students with interdisciplinary knowledge of the history, politics, and theories relating to SOGII, as well as the critical tools necessary to unpack the changing assumptions within the law. It also entails developing an outward-looking, flexible, and purposive approach to legal interpretation. In this sense, the need for an analytical and holistic approach, as called for by Brooks and Parkes and Petersen,<sup>92</sup> is even more fundamental within a human rights context. This article offers some insights into how SOGII issues can be addressed in the law classroom in a manner that responds to these distinctive features of human rights law.

### III. Seven Pedagogical and Curricular Principles

This section outlines seven principles that can be used to guide the teaching of SOGII issues in a human rights law course in a critical and holistic manner. Unlike the principles developed by Brooks and Parkes and Petersen, which are almost exclusively pedagogical, the principles provided here vary in nature; some relate to method, while others are more focused on class content. In addition, while this article does not purport to provide a concrete chronological

88. Gilmore, *supra* note 11.

89. Infanti, *supra* note 12.

90. For cases affirming the “living” nature of such documents, see the European Court of Human Rights decision in *Tyrer v. the United Kingdom*, App. No. 5856/72, 26 Eur. Ct. H.R. 31 (1978), and for the Inter-American Human Rights Court, see Advisory Opinion No. OC- 10/90, 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, Inter-Am. Comm’n H.R., Report No. 10, (sec. A) 9191 § 37 (1989).

91. Rudolf Bernhardt, *Thoughts on the Interpretation of Human Rights Treaties*, in *PROTECTING HUMAN RIGHTS: THE EUROPEAN DIMENSION; STUDIES IN HONOUR OF GÉRARD J. WIARDA* 71 (Franz Matscher ed., 1988).

92. Brooks and Parkes recommend an interdisciplinary approach in their fourth and seventh principles, *see supra* note 32, while Petersen promotes it in her fourth and fifth principles, *see supra* note 45.



course outline, the principles are ordered in a manner that also informs the structure of such a course.

*Figure 1: Seven guiding principles for teaching SOGII issues within a human rights law curriculum*

The first three principles cover the importance of terminology, diversity in identities and perspectives, and adopting an interdisciplinary approach. These aim to give students an understanding of the theoretical, linguistic, political, cultural, and historical context in which the concepts of SOGII are situated. This holistic approach is important for three reasons. First, it is significant, as Brooks and Parkes note, because “law cannot be divorced from the society in which it operates and that it helps to construct.”<sup>93</sup> This is particularly so in the case of human rights law, which, as discussed above, is frequently contained in “living instruments” that interact with the society they govern. Giving students an understanding of LGBTIQ culture, politics, and history puts them in a position from which they can interpret and apply the law in a dynamic and outward-looking manner.

Second, by comprehending the theory and terminology underpinning SOGII issues, students are empowered with the language and ideas necessary to engage in these topics in a meaningful way, as well as in one that is much less likely to be offensive. This is significant, as Gilmore, Infanti, and Dark discuss, because SOGII issues can be a sensitive topic with the capacity to evoke emotive responses from students and professors alike.<sup>94</sup> Third, an interdisciplinary approach is important to the pursuit of equality more

93. Brooks & Parkes, *supra* note 32, at 127.

94. Infanti, *supra* note 12, at 33.

generally, so that persons of diverse sexuality, gender and bodies are not only seen as objects under the law, but also as participants in broader society.<sup>95</sup>

The fourth, fifth, and sixth principles are intended to provide students with a comprehensive understanding of the law, issues, and frameworks relevant to the human rights of people of diverse bodies, genders, and sexualities. There is wide variety in the SOGII-related human rights concerns around the world, as well as in the systems and strategies through which they are addressed. Comparing and contrasting these different issues is important to interacting with the “living” nature of human rights law, which develops according to realities on the ground. A comparative study of the different legal responses to these issues is useful to help assess what constitutes best practice in protecting the rights of LGBTIQ persons.

The final principle, “critical analysis,” is designed to assist students in unpacking and assessing the relevant human rights laws and frameworks. It enables them to utilize interdisciplinary and contextual information to determine if, when, why, and how human rights law applies to SOGII issues, as well as to break down any assumptions manifest within the law. This “critical” principle, together with the other six “holistic” principles, enables students to effectively learn about SOGII issues within the unique context of human rights law.

#### *Principle 1: Language: The Importance of Terminology*

Terminology relating to SOGII is often sensitive and highly politicized. As such, before they are exposed to the large volume of terms used to describe different sexual and gender identities, students should be informed about the importance of identity-based language, and how mislabeling someone can cause deep offense.<sup>96</sup> To many individuals, the words used to denote their sexual orientation and gender identity are significant because they describe characteristics that are often fundamental to their sense of self. What’s more, understanding the experiences of intersex people and not conflating them with sexual and gender identities is important in understanding the nature of their discrimination.<sup>97</sup>

Furthermore, preferences in terminology are often inextricably linked to a specific historical, political, and cultural context. In relation to some terms, this context may be one imbued with historical oppression and a struggle for rights, heightening their political potency. For example, the terms “transgender,” “intersex,” and “gay” are often favored over the terms

95. Brooks & Parkes, *supra* note 32, at 126.

96. See, e.g., Rebecca M. Young & Ilan H. Meyer, *The Trouble with “MSM” and “WSW”: Erasure of the Sexual-Minority Person in Public Health Discourse*, 95 AM. J. OF PUB. HEALTH 1144 (2005).

97. *Intersex is not a gender identity, and the implications for legislation*, INTERSEX HUMAN RIGHTS AUSTRALIA (March 21, 2012), <https://ihra.org.au/17680/intersex-sex-not-gender-identity/>.

“transsexual,” “hermaphrodite,” and “homosexual.”<sup>98</sup> In all three cases, this is due to a link between the rejected terms and the historical classification of diverse genders, sexual identities, and bodies as medical disorders.<sup>99</sup> An appreciation of the historical and political backdrop of certain words enables students to better understand the various linguistic nuances.

Before turning to terms of individual and collective identity, teachers should address certain fundamental concepts. The terms “sex,” “sexual orientation,” “gender identity,” and “gender expression” need to be explained and distinguished from one another.<sup>100</sup> Once students understand the differences among these four categories, they are in a position to be introduced to a comprehensive sample of SOGII-related terminology. Individual identity terms like “lesbian,” “gay,” “bisexual,” “transgender,” “intersex,” and “queer” should be clarified and differentiated from one another.

Rather than leaving offensive terms outside of the classroom, it is recommended that teachers address them so that students have a better comprehension of *why* such terms are considered derogatory. As Petersen notes, introducing students to the hostility that is directed at sexual and gender identity minorities may stimulate a desire to actively reject it.<sup>101</sup> Furthermore, these traditionally offensive words are particularly important in light of the fact that some of them, including “gay,” “queer,” “faggot,” and “dyke,” have been reclaimed by some parts of the LGBTIQ community as symbols of pride.<sup>102</sup> Students should learn about this process of reclamation. However, it is recommended that educators take particular care to note that, apart from the words “gay” and “queer,” most of these words can be used only as in-group

98. These terms are considered offensive by the Gay and Lesbian Alliance Against Defamation. For “homosexual,” see *GLAAD Media Reference Guide - Terms to Avoid*, GLAAD, [www.glaad.org/reference/offensive/](http://www.glaad.org/reference/offensive/) (last visited March 5, 2019). For “transvestite,” see *Glossary of Terms - Transgender*, GLAAD, <https://www.glaad.org/reference/transgender> (last visited March 5, 2019). For “hermaphrodite,” see *Media Reference Guide*, GLAAD 8 (7th ed. 2007).

99. This is explained for each term by the Gay and Lesbian Alliance Against Defamation. *Id.*

100. “Sex” refers to a person’s biological status as “male,” “female,” or “intersex,” based on a specific set of sexual anatomy. See generally Rose McDermott & Peter K. Hatemi, *Distinguishing Sex and Gender*, 44 PS: POLITICAL SCIENCE & POLITICS (2011). According to the Yogyakarta Principles, “sexual orientation” describes an individual’s emotional and sexual attraction to persons of a particular (or multiple) gender(s), while “gender identity” denotes an individual’s internal experience of gender, including his or her personal sense of body and other expressions of gender, such as behavior and dress, International Commission of Jurists, *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, 6 notes 1 & 2 (2007) [hereinafter Yogyakarta Principles]. “Gender expression” refers to an individual’s external display of gender through a combination of dress, speech, behavior, mannerisms, and other factors, generally measured on a scale of masculinity and femininity. See, e.g., *Sexual Orientation and Gender Identity Definitions*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/sexual-orientation-and-gender-identity-terminology-and-definitions>.

101. Petersen, *supra* note 45, at 328.

102. See, e.g., Robin Brontsema, *A queer revolution: Reconceptualizing the Debate Over Linguistic Reclamation*, 17 COLORADO RESEARCH IN LINGUISTICS (2004).

terms, and are still considered inappropriate when employed by persons who do not personally identify with them.<sup>103</sup>

In addition, it is recommended that students be acquainted with the collective terms used to describe the larger community of persons of diverse sexuality and gender. This discussion necessarily involves delving into some of the continuing debates regarding many of these terms. For example, the acronym “LGBTIQ” has been criticized because it includes only a limited number of identities, excluding, for example, persons who identify as pansexual or asexual.<sup>104</sup> Yet, longer variations of the acronym, such as LGGBTTIQAAP,<sup>105</sup> have been rejected as a complicated “alphabet soup.”<sup>106</sup> The term “queer,” which encompasses all non-heterosexual orientations and non-cisgender<sup>107</sup> identities, overcomes many of these identity-based concerns. However, it too has been criticized for not only endorsing a history of hierarchy and abnormality,<sup>108</sup> but also undermining the self-labeling of lesbian, gay, bisexual, and transgender people.<sup>109</sup>

Students should also learn that some of these collective terms might be considered inappropriate on the global level because they do not adequately describe non-Western expressions of sexual orientation, sex, and gender identity. For example, the acronym “LGBTIQ” is considered unsuitable by some third-gender identities, such as the hijra of India or the xanith of Oman, who cannot be labeled as “gay,” “transgender,” or “intersex.” The word “queer,” although sometimes embraced in non-Western contexts,<sup>110</sup> is also often rejected at the international level because of its Anglo-American

103. *Id.*; see also *Comprehensive List of LGBTQ+ Vocabulary Definitions*, ITS PRONOUNCED METROSEXUAL, <http://itspronouncedmetrosexual.com/2013/01/a-comprehensive-list-of-lgbtq-term-definitions/> (last visited March 5, 2019).
104. See, e.g., *The Case for GSRM over LGBT*, THE GLOBAL ECHO (Feb. 3, 2014), <https://theglobalecho.wordpress.com/2014/02/03/the-case-for-gsr-m-over-lgbt/>.
105. An acronym for lesbian, gay, genderqueer, bisexual, transgender, transsexual, intersex, queer, asexual, ally, and pansexual.
106. See, for example, Jacob Tobia, *LGBTQIA: A Beginner’s Guide to the Great Alphabet Soup of Queer Identity*, POLICY.MIC (March 2, 2013), <http://www.policymic.com/articles/28093/lgbtqia-a-beginner-s-guide-to-the-great-alphabet-soup-of-queer-identity>.
107. Cisgender denotes a person who identifies with the gender he or she was assigned at birth—for example, a person who was born female and continues to identify as female.
108. Brontsema, for example, contends that “[t]he resurgence of *queer*—by those who self-identify as such, by non-queer gays and lesbians, and by popular television—has not only *not* eliminated pejorative use of the term, but may actually have raised it from the dead of a linguistic memory, bringing back to life its injurious power.” Brontsema, *supra* note 102, at 13.
109. See Seidman’s discussion of the tendency of queer theorists to deteriorate into “vulgar anti-identity politics.” STEVEN SEIDMAN, *Introduction*, in *QUEER THEORY SOCIOLOGY 1* (Steven Seidman ed., 1st ed. 1996).
110. Matthew Waites, *Critique of ‘Sexual Orientation’ and ‘Gender Identity’ in Human Rights Discourse: Global Queer Politics beyond the Yogyakarta Principles*, 15 *CONTEMPORARY POLITICS* 137, 139 (2009).

origins<sup>111</sup>. Even though there are terms in other regions that also refer to all non-heterosexual and non-cisgender persons, such as the Māori term “takatāpui”<sup>112</sup> or the Chinese word “tongzhi,”<sup>113</sup> these terms cannot be viewed as synonymous to “queer,” as they do not have the same relational meaning of difference or its history of reclamation.

For these reasons, teachers should introduce students to some of the culturally neutral terms and phrases that have developed. For example, “SOGI,” which adopts the phrase “sexual orientation and gender identity,” has been endorsed by the Yogyakarta Principles,<sup>114</sup> with the addition of a second “I” making SOGII, inclusive of intersex persons,<sup>115</sup> and functional on a global level. In particular, it is useful in legal contexts to describe bases of discrimination. However, it is not appropriate to use the term SOGII as a descriptor for people; for example, to talk about “SOGII community” or “SOGII persons” is not only clumsy, but does not differentiate between the heterosexual/cisgender community and non-heterosexual/non-cisgender community. In these instances, the phrase “sexual orientation and gender identity minorities” may be a suitable alternative. Although this wording has been criticized for employing a minoritizing discourse,<sup>116</sup> it can be appropriate in a human rights framework that ordinarily engages with SOGII issues within a context of discrimination.

As no collective term enjoys universal acceptance, students should be encouraged to make up their own minds about which words to use, using strategies that assist in navigating the debates surrounding some of the terminology. For example, when discussing SOGII issues on the global level, it is advisable to favor collective terms that are as inclusive of diversity as possible. However, in particular social or cultural contexts, specifically targeted language is recommended. At an individual level, students should learn the importance of adhering to personal preferences by using labels

111. Rosalind P. Petchesky, *The language of “sexual minorities” and the politics of identity: a position paper*, 17 REPRODUCTIVE HEALTH MATTERS 105, 108 (2009).

112. Takatāpui is a traditional Māori word that means “devoted partner of the same sex,” which now is used as a broad term to refer to any Māori person of a diverse sexuality or gender identity. See David A.B. Murray, *Takatāpui, Gay, or Just HO-MO-sexual Darling? Māori Language*, in SEXUAL TERMINOLOGY AND IDENTITY IN AOTEAROA/NEW ZEALAND 163, 174 (William Leap & Tom Boellstorff eds., 2004).

113. The word “tongzhi” is used throughout Mainland China, Taiwan, and Hong Kong as a contemporary umbrella term for all non-heterosexual and non-gender-normative identities. It is a positive and popular contemporary self-descriptor that literally means “comrade.” See CHOU WAH-SHAN & EDMOND J. COLEMAN, TONGZHI: POLITICS OF SAME-SEX EROTICISM IN CHINESE SOCIETIES (2000).

114. Yogyakarta Principles, *supra* note 100.

115. For an example of this usage, see ‘A Note about Terminology’ in *Australian Human Rights Commission*, RESILIENT INDIVIDUALS: SEXUAL ORIENTATION, GENDER IDENTITY AND INTERSEX RIGHTS 5 (2015).

116. Petchesky, *supra* note 111, at 106.

with which an individual self-identifies. Helping students to develop this approach to language not only creates a supportive and inoffensive classroom environment, but also assists students to better deal with non-heterosexual/non-cisgender clients in their future careers.

*Principle 2: Diversity in Identities and Perspectives*

As the myriad of different terms demonstrates, there is a wide variety of SOGII identities and expressions around the world, as well as a range of distinct understandings of the nature of SOGII. A human rights law course that deals with SOGII issues should therefore attempt to be representative of this diversity. This can be achieved not only by using inclusive language, but also by discussing different identity categories and theories of sexuality and gender within the course.

The focus of any course dealing with SOGII should extend beyond the experiences of just gay men and lesbians to include bisexual, transgender, intersex, and queer persons.<sup>117</sup> This is particularly important in the human rights context, in which there are substantial differences in the human rights issues facing persons of different identity categories. For example, while a significant human rights concern for cisgender gay men is the number of countries that continue to criminalize consensual same-sex sexual conduct,<sup>118</sup> one of the biggest issues facing intersex persons around the world is non-consensual sex-assignment surgery on children and a lack of recognition of them as neither male nor female, or as both.<sup>119</sup>

Paying homage to the diversity of sexual and gender identities and the experiences of intersex people also entails addressing identity categories that are frequently excluded from the LGBTIQ acronym. For example, it is useful to discuss sexualities such as pansexuality, which denotes attraction to others regardless of gender, and asexuality, which is characterized by a lack of sexual orientation to any group of people. In addition to transgender and transsexual identities, there should be an exploration of non-binary gender identities, such as genderqueer, multigender, gender-fluid and agender, which all describe, in very broad terms, persons who do not identify exclusively as man or woman.<sup>120</sup>

117. Brooks and Parkes recommend that educators be conscious of which voices are missing and strive to include them. Brooks & Parkes, *supra* note 32, at 120.

118. See, e.g., Paula Gerber, *Living a Life of Crime: The Ongoing Criminalisation of Homosexuality within the Commonwealth*, 39 ALTERNATIVE LAW J. 78 (2014).

119. See generally Alice D. Dreger, *Intersex and Human Rights: The Long View*, in ETHICS AND INTERSEX 73 (Sharon E. Systma ed., 2006).

120. Typically, “genderqueer” is used more as an umbrella term to describe identities that do not fit within the gender binary. “Gender-fluid” refers to someone who experiences multiple genders in a more fluid way, for example feeling more like a man one day and more like a woman the next. “Multigender” is more commonly used to describe someone who experiences multiple genders at once. “Agender” describes someone who does not identify with any gender. For an excellent article on non-binary terms and identities, see Kaylee Jakubowski, *Too Queer for Your Binary: Everything You Need to Know and More About Non-Binary Identities*, EVERYDAY FEMINISM (Mar. 4, 2014), <http://everydayfeminism.com/2014/03/>

This is particularly important due to the growing legal recognition of a third-gender or third-sex category in a number of jurisdictions, including India<sup>121</sup> and Australia.<sup>122</sup>

It is also recommended that class materials and discussions go beyond Western identities, and address sexualities and gender identities that exist in other cultures. This should not be done only in language, as outlined in Principle I, but also in substance, as human rights law, especially at the international level, applies equally to non-Western countries and cultures. Introducing students to other cultural manifestations of SOGII is important to producing a future generation of culturally aware global human rights lawyers. For instance, developing an understanding of third-gender identities that do not fit within the Western gender/sexuality distinction,<sup>123</sup> such as those described in Section I, may encourage students to critique the distinction between “sexual orientation” and “gender identity” that currently exists in international human rights law,<sup>124</sup> or at least consider whether it should be applied so strictly in non-Western contexts.

Students should be given an opportunity to explore the range of theories relating to SOGII. The two dominant theoretical perspectives of essentialism and queer theory provide a good starting point. Essentialism sees SOGII as representing characteristics that are fixed and innate and that fall into discrete categories. Queer theory, on the other hand, sees sexual behavior and gender expression as socially constructed rather as determined by biology.<sup>125</sup> Focused on the relational, rather than the essential, queer theory is more open to fluid experiences of sexual orientation and gender identity<sup>126</sup> and encompasses broader ideas of sexuality, which may include polyamory and sadomasochism.<sup>127</sup> Both theories have their flaws and merits,<sup>128</sup> and thus provide a valuable opportunity for student critique.

Providing this theoretical background will help students to interpret and apply human rights law to the developing field of SOGII. For example, a class discussion of whether “sexual orientation” is a static characteristic or a “practice” enables students to work out whether, as a ground of discrimination

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too-queer-for-your-binary/.

121. Supreme Court of India, *National Legal Services Authority v. Union of India and others*, (2014), 400 SCR 2012 (India) (Writ Petition (Civil)), 604 SCR 2013 (Writ Petition (Civil)) (India).

122. *New South Wales Registrar of Births, Deaths and Marriages v. Norrie* [2014] HCA 11 (Austl.).

123. Waites, *supra* note 110, at 139.

124. *Id.*

125. Brooks & Parkes, *supra* note 32, at 97.

126. Lisa Duggan, *Making It Perfectly Queer*, 22 *SOCIALIST REVIEW* 11 (1992).

127. DAVID M. HALPERIN, *SAINT = FOUCAULT: TOWARDS A GAY HAGIOGRAPHY* 64 (1995).

128. See Brooks & Parkes, *supra* note 32, at 97-99.

in human rights law, it is better to treat it like “race” or like “religion.”<sup>129</sup> An introduction to queer theory may also encourage students to consider the scope of “sexual orientation” in current human rights law, and whether it should be defined according to gender or should encompass a wider understanding of sexuality.<sup>130</sup> This kind of critical engagement is useful when addressing this relatively new area of human rights law, in which there is still considerable scope to determine the direction it should take.

### *Principle 3: Interdisciplinary Approach*

An interdisciplinary curriculum is fundamental to a course on human rights relating to SOGII. Borrowing from such disciplines as history, cultural studies, political science, and international relations helps students to develop a better understanding of the contemporary human rights issues facing diverse gender and sexual minorities, as well as insight into how human rights law addresses these concerns.

On a pedagogical note, rendering a human rights law course interdisciplinary does not mean piling a colossal number of prescribed readings on students. Rather, it can be achieved by creating a classroom atmosphere in which interdisciplinary thinking is encouraged. Students should be motivated to engage in self-directed learning, and their discoveries should be shared with other students through open class discussions. However, a number of important historical, political, and cultural aspects will enrich class content. These are discussed below.

First, it is important to contextualize human rights law pertaining to SOGII within the history of both persecution and progress faced by diverse gender and sexual minorities. The change in position of SOGII issues in human rights law, from being something beyond the contemplation of the law to a protected ground of nondiscrimination, is the product of a complex historical narrative. Up until the mid-twentieth century, same-sex attraction was classified as a psychiatric illness by the medical profession,<sup>131</sup> and laws that criminalized homosexuality were commonplace in the West.<sup>132</sup> It was primarily colonialism that spread the oppression of same-sex-attracted persons, and in particular

129. For a discussion of the different analogies in relation to sexual orientation, see DAVID A.J. RICHARDS, *IDENTITY AND THE CASE FOR GAY RIGHTS: RACE, GENDER, RELIGION AS ANALOGIES* (1999).

130. Waites, for example, is critical of the limited scope of the notion of “sexual orientation” in international human rights law. See Waites, *supra* note 110, at 145-47. For a discussion on the narrowness of the concept of “sexual orientation,” see generally EVE KOSOFSKY SEDGWICK, *EPISTEMOLOGY OF THE CLOSET* 8 (1990).

131. For example, homosexuality was removed from the *Diagnostic and Statistical Manual of Mental Disorders* (DSM) by the American Psychiatric Association in 1973, and many other Western countries followed suit shortly thereafter. RONALD BAYER, *HOMOSEXUALITY AND AMERICAN PSYCHIATRY: THE POLITICS OF DIAGNOSIS* (1987).

132. See generally Michael Kirby, *The Sodomy Offence: England's Least Lovely Criminal Law Export*, 1 J. OF COMMONWEALTH CRIMINAL LAW 61 (2011).

anti-sodomy laws, to other parts of the world.<sup>133</sup> In the current human rights law framework, in which the West is often painted as “progressive” in terms of its laws relating to SOGII, while the non-West is portrayed as “backward” and “oppressive,”<sup>134</sup> it is enlightening for students to learn about the European origins of many homophobic laws and policies around the world. As Tomlins notes, when advocating for an interdisciplinary approach to law, “The task of history is to attempt in its myriad ways to identify that which conceals in order to open up to discovery that which is concealed. Nothing is more concealing than legality, the magical power that makes so much—including itself—disappear.”<sup>135</sup>

Unveiling the historical background of oppression on the basis of a person’s SOGII helps students to dissect the human rights abuses that currently face LGBTQ people. For instance, an awareness of the colonial origins of anti-sodomy laws can help them to pull apart contemporary cultural or nationalist justifications for such laws. Similarly, knowing about the rise and fall of the classification of homosexuality as a disorder can assist in invalidating medical arguments advanced by some as a basis for these discriminatory laws. This process of deconstruction will arm students with the necessary skills to combat SOGII-related human rights violations and push for legal reform in their future careers.

Addressing the historical struggle for rights by LGBTQ people is equally important. The entrance of SOGII issues into human rights law is the result of a number of social movements that have taken place over the past sixty years. In the United States, these have been the “Homophile Movement” of the 1950s and ’60s, the “Gay Liberation Movement” of the late 1960s into the mid-1980s, the “Gay Rights Movement” from the late 1970s onward, and the “Queer Movement,” which came into being in the late 1980s.<sup>136</sup> Giving students a historical account of movements such as these not only helps to explain the increased attention on SOGII issues in human rights systems over the past few decades, but also sheds light on the way SOGII is currently framed in human rights law. The use of liberal rights-based tactics by the Homophile and Gay Rights movements, in comparison with the focus on liberation in the Gay Liberation and Queer movements,<sup>137</sup> is a leading reason that the theory

133. *Id.*

134. Momin Rahman, *Queer Rights and the Triangulation of Western Exceptionalism*, 13 J. OF HUMAN RIGHTS 274 (2014); see also Ainsley Jenicek & Alan D. Wong, *Dangerous Shortcuts: Representations of Sexual Minority Refugees in the Post-9/11 Canadian Press*, 34 CANADIAN J. OF COMM’N 635, 636 (2009).

135. Christopher Tomlins, *Foreword: “Law As . . .” II, History as Interface for the Interdisciplinary Study of Law*, 4 UC IRVINE L. REV. 1, 18 (2014).

136. See generally ROBERT McRUER, *THE QUEER RENAISSANCE: CONTEMPORARY AMERICAN LITERATURE AND THE REINVENTION OF LESBIAN AND GAY IDENTITIES* (1997).

137. CRAIG A. RIMMERMAN, *FROM IDENTITY TO POLITICS: THE LESBIAN AND GAY MOVEMENTS IN THE UNITED STATES* 11-12 (2001); see also Nick J. Mul, *Equality’s Limitations, Liberation’s Challenges: Considerations for Queer Movement Strategizing*, 2 CANADIAN ONLINE J. OF QUEER STUDIES IN EDUC.

and politics of the two former movements dominate contemporary human rights law relating to SOGII.<sup>138</sup> For example, it explains the prioritization of gay and lesbian concerns over bisexual, transgender, and intersex issues,<sup>139</sup> as well as the preference for essentialist over queer understandings of sexuality and gender in law.<sup>140</sup> This history allows students to uncover the assumptions and biases that are “concealed,” to use Tomlins’ language, within the contemporary human rights law paradigm. This places students in a better position to critically analyze human rights law as it currently stands and to consider possible legal reforms.

In addition to history, it is useful for a human rights course on SOGII to borrow from cultural studies. As alluded to above, learning about the complex relationship between cultural identity and views about SOGII can help students to uncover the causes of ongoing human rights abuses experienced by LGBTIQ persons around the world and, in turn, the ways in which human rights law should respond to these violations. The relevance of culture may be demonstrated to students through the relatively recent increase in homophobic laws in countries including Russia and Uganda. In both these states, the decision to introduce new anti-gay laws can be viewed, at least in part, as a cultural rejection of “neocolonialist impositions.”<sup>141</sup> The political rhetoric surrounding these laws is framed in terms of cultural oppositions; homosexuality is repeatedly referred to as “un-African,”<sup>142</sup> or contrary to Russian “traditional values,”<sup>143</sup> and the laws are characterized as attempts to distance their countries from Western liberalism.<sup>144</sup> This cultural context can help students consider strategies that could increase the effectiveness of human rights law relating to SOGII issues, for example, avoiding Western-centric language and ideas in the law.

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(2006).

138. Many queer ideas sit uneasily with human rights law relating to SOGII. See, e.g., Teemu Ruskola, *Gay Rights versus Queer Theory: What is Left of Sodomy after Lawrence v. Texas?*, 23 SOCIAL TEXT 84 (2005); Ryan Richard Thoreson, *The Queer Paradox of LGBTI Human Rights*, INTERALIA: PISMO POŚWIĘCONE STUDIOM QUEER (2011).
139. “Gay rights” proponents actively sought to exclude from their movement the “misfit” groups who were perceived to represent the negative stereotypes associated with gays and lesbians, from transgender to bisexual persons. Jillian Todd Weiss, *GL vs. BT: The Archaeology of Biphobia and Transphobia within the U.S. Gay and Lesbian Community*, 3 J. OF BISEXUALITY 25 (2004); see also Duggan, *supra* note 126, at 217.
140. For a critique of the essentialism in human rights law in Europe, see TAMSIN WILTON, SEXUAL (DIS)ORIENTATION: GENDER, SEX, DESIRE AND SELF-FASHIONING 183-84 (2004).
141. Rahman, *supra* note 134, at 280.
142. Thoreson, *supra* note 138, at 27; see also Kristen Cheney, *Locating Neocolonialism, “Tradition,” and Human Rights in Uganda’s “Gay Death Penalty,”* 55 AFRICAN STUDIES REV. 77, 78 (2012).
143. Cai Wilkinson, *Putting “Traditional Values” Into Practice: The Rise and Contestation of Anti-Homopropaganda Laws in Russia*, 13 J. OF HUMAN RIGHTS 363, 368 (2014).
144. *Id.* at 365; Cheney, *supra* note 142, at 79.

It is useful for students to learn about the ways in which domestic politics and international relations can influence and shape the law, especially at the international level. An example that demonstrates the importance of understanding the political forces at play in international human rights is the 2012 Russian-sponsored resolution in the United Nations Human Rights Council to recognize the importance of “traditional values” in the human rights framework.<sup>145</sup> As the Russian LGBT Network highlighted, Russia’s initiative should be viewed within the national context of “traditional values” being used in the Russian Federation to justify “severe restrictions of rights and freedoms, especially for the LGBT community.”<sup>146</sup> This example illustrates the danger of viewing and accepting human rights initiatives within the UN system in a manner divorced from domestic political context.

International relations are also a necessary component in the study of international human rights law pertaining to SOGII. The nature of international human rights law, which is based on the principle of state consent<sup>147</sup> and lacks strong enforcement measures,<sup>148</sup> dictates that one key way of achieving compliance is through the use of diplomatic measures. The examples of Russia and Uganda, again, provide a useful illustration of international relations being used to protect and promote the human rights of LGBTIQ persons. In response to the persecution of sexual and gender minorities in the Russian Federation, a number of states, such as the United States, Germany, France, and Poland, chose not to send high-ranking officials to the opening ceremony of the Sochi Winter Olympics in 2014.<sup>149</sup> Similarly, attempts to introduce anti-gay laws in Uganda saw foreign aid cuts to that country by some European states, including Norway and Denmark.<sup>150</sup>

145. *Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind: Best Practice*, U.N. Human Rights Council Res. 21/3, UN Doc. A/HRC/21/L.2 (Nov. 5, 2012), <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/G12/173/96/PDF/G1217396.pdf?OpenElement>.

146. *Summary of Information from State Members of the United Nations and Other Relevant Stakeholders on Best Practices in the Application of Traditional Values while Promoting and Protecting Human Rights and Upholding Human Dignity*, Inter-Am. Comm’n H.R., Report No. A/HRC/24/22 (2013) § 71.

147. The International Court of Justice has provided that “it is well established that in its treaty relations a State cannot be bound without its consent.” See *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J. Rep. 15 (May 28).

148. For most international human rights treaties, for example, state compliance is monitored by committees that have no power to punish states for their failure to comply with the treaties. See Yvonne M. Dutton, *Commitment to International Human Rights Treaties: The Role of Enforcement Mechanisms*, 34 U. PA. J. INT’L L. 1, 12 (2012); see also Henry J. Steiner, *Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?*, in *THE FUTURE OF UN HUMAN RIGHTS TREATY MONITORING* 15, 36-37 (Philip Alston & James Crawford eds., 2000).

149. Tanya L. Domi, *Obama rightly joins political boycott of Winter Olympics*, AL JAZEERA (Dec. 18, 2013), <http://america.aljazeera.com/opinions/2013/12/russia-gay-rights-lgbtsochiwinterolympics.html>.

150. Martin Plaut, *Uganda donors cut aid after president passes anti-gay law*, THE GUARDIAN (Feb. 25, 2014), <http://www.theguardian.com/global-development/2014/feb/25/>

Touching on these important aspects of historical, cultural, and political studies in a human rights course on SOGII not only assists students in gaining a deeper understanding of why the law is formed and applied in the way it is, but also facilitates an understanding of the abuses that international human rights law seeks to address.

*Principle 4: The Three Tiers of Human Rights Law*

Learning about the human rights of sexual and gender minorities should span all three tiers of human rights law, namely:

1. International law;
2. Regional law; and
3. Domestic law.

This is necessary because of the variance in the way SOGII issues are addressed in these different systems. In particular, changes can sometimes occur earlier in domestic human rights law than in international and regional human rights law because of international institutions being accountable to their member states. For example, while some domestic courts, including those in Canada,<sup>151</sup> South Africa,<sup>152</sup> and the United States,<sup>153</sup> have all found that a prohibition on same-sex couples marrying constitutes discrimination in breach of human or constitutional rights, both the European Court of Human Rights<sup>154</sup> and the UN Human Rights Committee<sup>155</sup> have rejected human rights claims relating to same-sex marriage. However, this approach now appears to be changing on the regional level. In January 2018, for example, the Inter-American Court of Human Rights issued an advisory opinion providing that same-sex couples must have access to all family rights, including marriage.<sup>156</sup> Moreover, in June 2018 the European Court of Justice held that a same-sex couple who had married in Belgium in 2010 had the right to reside in Romania, ruling that the term “spouse” was gender neutral.<sup>157</sup>

Similarly, domestic human rights systems have been quicker than regional ones to remove (medical) prerequisites to legally changing one’s

uganda-donors-cut-aid-anti-gay-law.

151. See *Halpern v. Canada* (2003) 225 D.L.R. 4th 529 (Can. Ont. C.A.).
152. *Minister of Home Affairs and Another v. Fourie and Another (Doctors for Life International and Others, Amicus Curiae)*, Case CCT 60/40; *Lesbian and Gay Equality Project and Eighteen Others v. Minister of Home Affairs and Others*, Case CCT 10/04 [2005] ZACC 19; 2006 (1) SA 524 (CC).
153. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).
154. *Schalk & Kopf v. Austria*, App. No. 301414/04 Eur. Ct. H.R. (2010).
155. *Joslin et al. v. New Zealand*, Comm. 902/1999, UN Doc. CCPR/C/75/D/902/1999 (HRC 1999).
156. *Advisory Opinion OC-24/17 Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017)*.
157. *Case C-673/16, Coman and Others v. Romania*, 2018 E.C.R. 2.

gender identity.<sup>158</sup> For example, a range of countries, including Argentina,<sup>159</sup> Denmark,<sup>160</sup> Ireland,<sup>161</sup> Malta,<sup>162</sup> and Norway,<sup>163</sup> had all legislated for gender self-identification before the European Court of Human Rights eventually held, in 2017, that a requirement for surgical reassignment and/or sterilization in legal gender recognition violates the European Convention on Human Rights.<sup>164</sup>

In these instances, in which some systems have adopted a stance different from the others, it is useful to compare and contrast the differing approaches to determine whether there is a need for change in any of the systems. In particular, where a certain approach no longer represents prevailing thinking, there may be reason to question its appropriateness in contemporary society. As Lau argues in relation to comparing U.S. sexual orientation law with that in other parts of the world, the “United States should not blindly follow norms that emerge among its peers; however, if the United States falls out of line with its peers, that deviation should be cause for critical questioning.”<sup>165</sup> Even in situations in which the legal variance in law is not necessarily an issue of progressiveness but rather a difference in strategy, a comparative approach is useful to working out best practice. As Waaldijk points out, different sets of human rights law concerning SOGII all essentially aim to address one basic problem: that a segment of the population is same-sex attracted, and a segment of the population objects to intimate behavior and/or relationships between members of the same sex.<sup>166</sup>

At the international level, students should learn about the key articles of the ICCPR that apply to SOGII issues, such as Articles 2(1) and 26, which protect

158. For some of the most progressive domestic gender identity laws, see Argentina’s The Gender Identity and Health Comprehensive Care for Transgender People Act of 2012 and Uruguay’s Ley No. 18.620 Derecho a la Identidad de Género y al Cambio de Nombre y Sexo en Documentos Identificatorios. A number of other jurisdictions have also removed some medical barriers to gender recognition, including the United States and Australia. For an overview of different laws and policies, see Jack Byrne, *License to Be Yourself: Laws and advocacy for legal gender recognition of trans people*, THE OPEN SOCIETY FOUNDATION (2014), <https://www.opensocietyfoundations.org/sites/default/files/license-to-be-yourself-20140501.pdf>.
159. See Argentina’s The Gender Identity and Health Comprehensive Care for Transgender People Act of 2012.
160. See Denmark’s 2014 Amendment to the Act on the Central Registration.
161. See Gender Recognition Act 2015 (Act No. 25/2015) (Ir.), <https://tgeu.org/wp-content/uploads/2015/08/IRELANDGender-Recognition-Act-2015.pdf>.
162. See Malta’s Gender Identity, Gender Expression and Sex Characteristics Act (2015).
163. See Norway’s Law on Change of Legal Gender, Legislative Decree 71 (2015-16).
164. A.P., Garçon and Nicot v. France, App. Nos. 79885/12, 52471/13 and 52596/13, Eur. Ct. H.R. (2017).
165. Holning Lau, *Sexual Orientation & (and) Gender Identity: American Law in Light of East Asian Developments*, 31 HARV. J.L. & GENDER 67, 78 (2008).
166. Kees Waaldijk, *The Right to Relate: A Lecture on the Importance of Orientation in Comparative Sexual Orientation Law*, 24 DUKE J. COMP. & INT’L L. 161, 170 (2013).

the right to nondiscrimination, Article 17 relating to the right to privacy, Article 19 regarding the right to freedom of expression, and Article 23 containing the right to marry. It is also useful to go beyond the ICCPR to other human rights treaties, including, inter alia, the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>167</sup> the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW),<sup>168</sup> the Convention for the Rights of the Child (CRC),<sup>169</sup> and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).<sup>170</sup> Analyzing these treaties illustrates that at the international level, human rights are not limited to civil and political rights, and other international instruments are tools that can be effectively used to protect the rights of LGBTIQ persons.

As soft law is also a key component of international human rights law,<sup>171</sup> a consideration of nonbinding international instruments relating to the human rights of persons of diverse sexuality and gender identity is also recommended. These include the 2015 report of the Office of the High Commissioner for Human Rights on sexual orientation and gender identity,<sup>172</sup> as well as the 2018 report of the independent expert on protection against violence and discrimination based on sexual orientation and gender identity.<sup>173</sup> The Yogyakarta Principles<sup>174</sup> are also worthy of consideration, as they provide comprehensive, expert guidance on how international human rights law protects SOGII rights.<sup>175</sup>

Because there is no global human rights court in the international human rights system, students should learn about the role and function of various UN bodies in protecting the rights of LGBTIQ people. While all the treaty bodies that monitor compliance with the aforementioned conventions have engaged in SOGII issues to some extent, it is the Human Rights Committee that has worked most extensively in this area.<sup>176</sup> Important Human Rights

167. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

168. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3.

169. Convention for the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

170. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

171. See generally Michèle Olivier, *The relevance of "soft law" as a source of international human rights*, 35 COMPARATIVE AND INT'L LAW J. OF SOUTHERN AFRICA 289 (2002).

172. *Discrimination and violence against individuals based on their sexual orientation and gender identity*, U.N. Human Rights Council Res. 29/23, U.N. Doc. A/HRC/29/23 (Dec. 4, 2014).

173. Report of Victor Madrigal-Borloz submitted pursuant to Human Rights Council Resolution 32/2 (May 11, 2018).

174. Yogyakarta Principles, *supra* note 100.

175. Michael O'Flaherty & John Fisher, *Sexual Orientation, Gender Identity and International Human Rights Law: Contextualising the Yogyakarta Principles*, 8 HUM. RIGHTS L. REV. 207, 207 (2008).

176. For example, between March 2003 and March 2013, the UN Human Rights Committee

Committee cases concerning SOGII issues include *Toonen v. Australia*,<sup>177</sup> *Young v. Australia*,<sup>178</sup> *Joslin v. New Zealand*,<sup>179</sup> and *Fedotova v. Russian Federation*.<sup>180</sup> Resolutions of the Human Rights Council<sup>181</sup> and General Assembly<sup>182</sup> on SOGII-related issues should also be considered.

At the regional level, the European Court of Human Rights has handed down a significant number of decisions relating to SOGII matters. These span a range of issues from the criminalization of homosexuality<sup>183</sup> and differing ages of consent<sup>184</sup> to the right to change one's legal gender identity,<sup>185</sup> as well as family rights, including same-sex relationship recognition<sup>186</sup> and marriage,<sup>187</sup>

mentioned SOGII issues in the Concluding Observations of 33.8% of states reviewed. See Paula Gerber & Joel Gory, *The UN Human Rights Committee and LGBT Rights: What Is It Doing? What Could It Be Doing?*, 14 HUMAN RIGHTS LAW REVIEW 403, 407 (2014).

177. *Toonen v. Australia*, Communication No. 488/1992, UN Doc. CCPR/C/50/D/499/1992 (1994). In this case, the Human Rights Committee found Australia's last anti-sodomy law in breach of the right to privacy and the right to nondiscrimination.
178. *Young v. Australia*, Communication No. 941/2000, UN Doc. CCPR/C/78/D/941/2000 (2003). In this case, the Human Rights Committee held that differential treatment for same-sex partners on pension payments constituted discrimination.
179. *Joslin et al. v. New Zealand*, Communication No. 902/1999, UN Doc. A/57/40 (2002). In this case, the Human Rights Committee held that a prohibition on same-sex marriage was not in breach of the ICCPR.
180. *Fedotova v. Russian Federation*, Communication No. 1932/2010, UN Doc. CCPR/C/106/D/1932/2010 (2012). In this case, the Human Rights Committee held that Russia's "homosexuality propaganda" law violated the right to freedom of expression and the right to nondiscrimination.
181. See, e.g., *Human Rights, Sexual Orientation and Gender Identity*, U.N. Human Rights Council Res. 17/L.9, U.N. Doc. A/HRC/17/L.9/Rev.1 (June 15, 2011); *Human Rights, Sexual Orientation and Gender Identity*, U.N. Human Rights Council Res. 2732, U.N. Doc. A/HRC/27/L.27/Rev/1 (Sept. 26, 2014).
182. See, e.g., *Joint Statement on Human Rights, Sexual Orientation and Gender Identity*, GENERAL ASSEMBLY (2008), [http://www.ishr.ch/sites/default/files/article/files/joint\\_statement-text\\_final\\_18\\_dec.pdf](http://www.ishr.ch/sites/default/files/article/files/joint_statement-text_final_18_dec.pdf).
183. *Dudgeon v. United Kingdom*, App. No. 7525/76, Eur. Ct. H.R. (1981); *Norris v. Ireland*, App. No. 10581/83, Eur. Ct. H.R. (1988).
184. The European Court of Human Rights has found that a differing age of consent for homosexual relations constitutes discrimination. See, e.g., *S.L. v. Austria*, App. No. 45330/99 Eur. Ct. H.R. (2003).
185. The European Court of Human Rights has held that preventing a postoperative transsexual person from changing legal gender identity constitutes a violation of the right to private life and the right to marry. See *Christine Goodwin v. United Kingdom*, App. No. 28957/95 Eur. Ct. H.R. (2002).
186. The European Court of Human Rights has recognized a right to same-sex relationship recognition. See *Valliantos v. Greece*, App. Nos. 29381/09 and 32684/09, Eur. Ct. H.R. (2013); *Oliari and Others v. Italy*, App. Nos. 18766/11 and 36030/11, Eur. Ct. H.R. (2015).
187. The European Court of Human Rights has found that the ECHR does not oblige states to legalize same-sex marriage. See, e.g., *Schalk & Kopf v. Austria*, App. No. 301414/04, Eur. Ct. H.R. (2010); *Hämäläinen v. Finland*, App. No. 37359/09, Eur. Ct. H.R. (2014).

child custody,<sup>188</sup> and adoption.<sup>189</sup> Useful cases for students to focus on include *Dudgeon v. United Kingdom*,<sup>190</sup> which was the first case of any human rights system to find sodomy laws to constitute a breach of human rights law; and *Schalk and Kopf v. Austria*,<sup>191</sup> which provides an example of how the court's interpretive techniques of European consensus and the margin of appreciation can limit the application of European human rights law to SOGII issues.<sup>192</sup> In promising developments, the Council of Europe Parliamentary Assembly, in 2017, passed a resolution titled "Promoting the human rights of and eliminating discrimination against intersex people."<sup>193</sup> This resolution demonstrates how discrimination against intersex people violates a number of provisions of the European Convention on Human Rights, and it calls for member states to introduce anti-discrimination legislation that "effectively applies to and protects intersex people."<sup>194</sup>

In the Inter-American system, students should consider the landmark 2012 case of *Atala v. Chile*,<sup>195</sup> in which the Inter-American Court of Human Rights found that denying custody rights to a mother based on her sexual orientation constituted discrimination. It is also useful for students to consider the Inter-American Commission on Human Rights' establishment, in 2014, of the world's first rapporteurship focusing exclusively on the rights of LGBTI persons.<sup>196</sup> Other decisions of the Inter-American Court of Human Rights that students could usefully analyze include the 2016 case that recognized that sexual orientation and gender identity are categories protected from discrimination under the American Convention of Human Rights<sup>197</sup> and the 2018 advisory opinion issued at the request of Costa Rica stating that same-sex marriage should be recognized in all states signatory to the American Convention on Human Rights.<sup>198</sup> This includes countries such as Bolivia, Cuba, Dominican Republic, Honduras, Paraguay, and Peru, which have not recognized either

188. The European Court of Human Rights found that the denial of child custody to a father on the grounds of his sexual orientation is a violation of the ECHR. See *Salgueiro da Silva Mouta v. Portugal*, App. No. 33290/96 Eur. Ct. H.R. (1999).

189. The European Court of Human Rights has recognized gay and lesbian adoption rights in relation to individual adoption. See *E.B. v. France*, App. No. 43546/02, Eur. Ct. H.R. (2008); *Gas and Dubois*, App. No. 25951/07, Eur. Ct. H.R. (2012).

190. *Dudgeon v. United Kingdom*, App. No. 7525/76, Eur. Ct. H.R. (1981).

191. *Schalk & Kopf v. Austria*, App. No. 30141/04, Eur. Ct. H.R. (2010).

192. Lau, *supra* note 84, at 493.

193. Council of Europe: Parliamentary Assembly, *Resolution 2191*, 10 Dec. 2017, 2191 (2017).

194. *Id.* at s. 7.4.

195. *Atala and Daughters v. Chile*, Inter-Am. Comm'n H.R. No. 239 (ser. C) (2012).

196. For the official website of the Rapporteur on the Rights of LGBTI Persons of the Organization of American States, see <http://www.oas.org/en/iachr/lgtbi/>.

197. *Flor Freire v. Ecuador*, Inter-Am. Comm'n H.R., Report No. 315, OEA/Ser.C. (2016).

198. Advisory Opinion OC-24/17 Inter-Am. Ct. H.R. (ser. A) No. 24 (Nov. 24, 2017).

same-sex marriages or same-sex civil unions. The African human rights system has few SOGII-related human rights cases. However, in 2014 the African Commission on Human and Peoples' Rights adopted a landmark resolution condemning violence and discrimination against LGBTI people.<sup>199</sup>

Finally, relevant domestic law concerning SOGII rights should be addressed. The content of this area of study depends on where the course is being taught. If it is in the United States, for example, it would be useful to juxtapose the 1986 decision of *Bowers v. Hardwick*,<sup>200</sup> which held that the criminalization of "sodomy" was not contrary to the U.S. Constitution, and *Lawrence v. Texas*,<sup>201</sup> which, less than twenty years later, found that it was. Some cases concerning marriage equality, such as *Goodridge v. Department of Public Health*,<sup>202</sup> which resulted in Massachusetts' becoming the first state to legalize same-sex marriage, as well as the U.S. Supreme Court case of *Obergefell v. Hodges*,<sup>203</sup> which provided for marriage equality across the whole country, are also recommended. It is also useful to consider cases from other domestic jurisdictions, for the sake of comparison. Lau argues that a comparative analysis of domestic laws enriches conversation about law reform and assists students to question the cultural assumptions behind their domestic law.<sup>204</sup>

In relation to all three tiers of human rights law, the fact that there is no explicit mention of SOGII in any of the relevant treaties and constitutions should be highlighted. It is enlightening for students to compare the ways that different human rights systems have interpreted these instruments to include SOGII, thereby giving effect to their "living" nature. For example, while the UN Human Rights Committee found that sexual orientation fell under "sex" as a ground of nondiscrimination in *Toonen v. Australia*,<sup>205</sup> the European Court of Human Rights has tended to frame sexual orientation within the residual ground of "other status."<sup>206</sup> This former approach is perhaps less effective, because, although discrimination based on sexual orientation is frequently linked to sex, the characteristics are ultimately distinct. Such comparisons provide students with insight into the most effective methods for interpreting and adapting human rights law to engage with SOGII issues.

199. 275 *Resolution on Protection against Violence and other Human Rights Violations against Persons on the basis of their real or imputed Sexual Orientation or Gender Identity*, AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS (2014), <http://www.achpr.org/sessions/55th/resolutions/275/>.

200. 478 U.S. 186 (1986).

201. 539 U.S. 558 (2003).

202. 798 N.E.2d 941 (Mass. 2003).

203. 135 S. Ct. 2584 (2015).

204. See generally Lau, *supra* note 8.

205. *Toonen v. Australia* (1994), Communication No. 488/1992, UN Doc. CCPR/C/50/D/499/1992 (1994), at § 8.

206. See, e.g., *Salgueiro da Silva Mouta v. Portugal*, App. No. 33290/96 Eur. Ct. H.R. (Dec. 21, 1999), at § 28.

*Principle 5: Diversity in Human Rights Issues*

To develop a comprehensive understanding of the realities to which human right law must respond, it is recommended that students be given an opportunity to explore the range of human rights issues facing sexual and gender minorities around the world. This requires class content to represent the diversity of human rights concerns affecting different groups, as well as across different regions. A holistic approach to this area of study also entails going beyond high-profile human rights issues and considering less well-known ones, such as undertaking gender-assigning surgery on intersex infants. Such analysis helps students to grasp the broad scope of human rights law.

As discussed in Principle 2, there is variation in the human rights concerns of different sexual and gender minorities. In particular, the human rights issues facing transgender, intersex, and bisexual persons differ from those of cisgender gays and lesbians because of binary conceptions of sex and gender.<sup>207</sup> For example, it is not uncommon for transgender persons to continue to be subjected to legal and social discrimination in countries with good records on gay rights.<sup>208</sup> Students should be given an opportunity to explore these differing experiences and the way human rights law responds to them.

There is also regional variance in human rights issues relating to SOGII. Given the global application of international human rights law, it is important to acknowledge the range of different concerns experienced by sexual and gender identity minorities around the world. For example, although marriage equality has become a priority issue for many same-sex couples in the West, state-based relationship recognition is far from an immediate concern in other regions, where same-sex sexual conduct is still criminalized or where the freedom of expression of LGBTIQ persons is severely repressed. As such, while it is important to acknowledge the recent success of the campaign for marriage equality in places such as Australia, Ireland, and the United States, students should be reminded that the victory is limited to a very small number of countries. For instance, only thirteen percent of countries worldwide have marriage equality,<sup>209</sup> and the number of states that permit same-sex couples to marry is a fraction of the number of states that continue to criminalize consensual same-sex sexual conduct.<sup>210</sup>

Nonetheless, relationship recognition is an interesting area to study through the lens of human rights. In both law and academia, how marriage

207. Cai Wilkinson & Anthony J. Langlois, *Not Such an International Human Rights Norm? Local Resistance to Lesbian, Gay, Bisexual, and Transgender Rights—Preliminary Comments*, 13 J. OF HUMAN RIGHTS 249, 252 (2014).

208. *Id.* at 252.

209. Rosamond Hutt, *This is the state of LGBTI rights around the world in 2018*, WORLD ECONOMIC FORUM (June 14, 2018), <https://www.weforum.org/agenda/2018/06/lgbti-rights-around-the-world-in-2018/>. This figure was calculated using 195 countries, including Palestine and the Holy See.

210. At the time of writing, twenty-six states permit same-sex marriage, compared with seventy-four states that criminalize homosexuality.

for same-sex couples fits into the human rights paradigm is not clear-cut. While in some jurisdictions it has been accepted as a fundamental aspect of the right to nondiscrimination,<sup>211</sup> in other forums a lack of access to marriage for same-sex couples is not seen to contravene human rights.<sup>212</sup> Furthermore, although same-sex marriage is often characterized as the “last step”<sup>213</sup> in the process of attaining legal equality for gays and lesbians, many queer theorists criticize the extension of marriage to same-sex-attracted persons as further marginalizing those who do not conform to the monogamous, long-term relationship model.<sup>214</sup> A useful assignment for students would be to consider whether or not there is, or should be, a human right to marry for all.<sup>215</sup> As part of this, students could undertake a comparative analysis of the different forms of relationship rights and recognition offered throughout various countries.<sup>216</sup>

In terms of addressing human rights concerns relating to SOGII outside of the West, the criminalization of homosexuality is a good place to start. Currently in seventy-three states same-sex sexual conduct between consenting adults is considered a criminal offense,<sup>217</sup> and in five of those states it is punishable by death.<sup>218</sup> Rather than repealing these laws, some states, such as

211. See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *Halpern v. Canada* (2003) 225 D.L.R. 4th 529 (Can. Ont. C.A.).
212. See, e.g., *Schalk & Kopf v. Austria*, App. No. 301414/04 (June 24, 2010); *Hämäläinen v. Finland*, App. No. 37359/09, Eur. Ct. H.R. (July 16, 2014); *Joslin et al. v. New Zealand*, Comm. 902/1999, UN Doc. CCPR/C/75/D/902/1999 (HRC 1999).
213. See, e.g., Kees Waaldijk, *Legal recognition of homosexual orientation in the countries of the world*, INT’L LESBIAN AND GAY LAW ASS’N (2009).
214. Jyl Josephson, *Citizenship, Same-Sex Marriage, and Feminist Critiques of Marriage*, 3 PERSPECTIVES ON POLITICS 272 (2005); see also Francesca Romana Ammaturo, *The Right to a Privilege? Homonormativity and the Recognition of Same-Sex Couples in Europe*, 23 SOCIAL & LEGAL STUDIES 175 (2014).
215. For an argument that such a right should exist in international human rights law, see Paula Gerber et al., *Marriage: A Human Right for All*, 36 SYDNEY L. REV. 643 (2014).
216. For example, in a number of jurisdictions, although same-sex couples are not permitted to marry, different forms of relationship recognition are offered, such as “civil unions” in Germany. Furthermore, in a number of countries same-sex couples are entitled to all the same rights as heterosexual married couples, despite not having formal access to marriage. Nonetheless, many argue these measures are still discriminatory because they promote a “separate but equal” doctrine. See, e.g., Adiva Sifris & Paula Gerber, *Same-Sex Marriage in Australia: A Battleground for Equality*, 25 AUSTRALIAN JOURNAL OF FAMILY LAW 96 (2011).
217. For up-to-date information on the criminalization of homosexuality worldwide, see Paula Gerber, *Countries that still criminalise homosexuality*, <http://antigaylaws.org/> (last visited March 1, 2019).
218. Sudan, Iran, Yemen, and Saudi Arabia all actively apply the death penalty for homosexual relations. See Aengus Carroll & Lusas Ramón Mendos, *State-sponsored homophobia. A world survey of laws criminalising same-sex sexual acts between consenting adults*, ILGA 40 (12th ed. 2017), <https://ilga.org/state-sponsored-homophobia-report>. In 2019, Brunei introduced the death penalty for “sodomy,” but there are no reports that it has so far been used. See Paula Gerber, *Why boycotts against Brunei’s new anti-gay laws won’t be effective, but regional pressure might*, THE CONVERSATION (April 11, 2019), <https://theconversation.com/why-boycotts-against-bruneis-new-anti-gay->

Burundi, Gambia, Liberia, Nigeria, Uganda, and South Sudan, have recently endeavored to further criminalize homosexuality.<sup>219</sup> While this has put Africa in the media spotlight in recent years, attention should be drawn to the fact that homosexual conduct is also still criminal in many states in Asia, the Americas, the Middle East, and the Pacific. An analysis of how these criminal laws violate international human rights law is a useful exercise for students to undertake.<sup>220</sup>

Of course, a human rights course in the area of SOGII should also address human rights issues that are common to all regions, such as hate-based violence and discrimination. Throughout the world, sexual and gender minorities are subjected to murder, beatings, kidnappings, rape, psychological violence, and arbitrary deprivations of liberty.<sup>221</sup> In addition, in many countries, sexual and gender minorities are subject to discrimination in accessing education, healthcare, and employment. Although a number of states now have laws that prohibit discrimination on the basis of sexual orientation, gender identity, and intersex status, many more states do not.<sup>222</sup> A class discussion comparing the different legal responses with the violence and discrimination facing sexual and gender minorities around the world would provide students with an opportunity to determine what constitutes best practice.

Also important to the study of human rights relating to sexual and gender minorities are claims for asylum based on SOGII. Since the mid-1990s, it has been accepted in many Western countries, as well as by the UN High Commissioner for Refugees, that refugee status is available to persons who are persecuted, or fear persecution, because of their sexual orientation.<sup>223</sup>

laws-wont-be-effective-but-regional-pressure-might-115067(last visited March 12, 2019).

219. *Making Love a Crime: Criminalization of Same-Sex Conduct in Sub-Saharan Africa*, AMNESTY INTERNATIONAL (2013), [https://www.amnestyusa.org/sites/default/files/making\\_love\\_a\\_crime\\_-\\_africa\\_lgbti\\_report\\_emb\\_6.24.13\\_o.pdf](https://www.amnestyusa.org/sites/default/files/making_love_a_crime_-_africa_lgbti_report_emb_6.24.13_o.pdf).
220. *Discriminatory Laws and Practices and Acts of Violence Against Individuals Based on Their Sexual Orientation and Gender Identity*, U.N. Human Rights Council Res. 19/41, UN Doc. A/HRC/19/41 (Nov. 17, 2011), at § 44.
221. U.N. Human Rights Council Res. 29/23, *supra* note 172, at § 20.
222. In Africa, only six states (South Africa, Cape Verde, Mauritius, Botswana, Mozambique, and the Seychelles) have anti-discrimination legislation in place that gives some protection for LGBTI persons. Similarly, in Asia, employment-based anti-discrimination laws can be found only in Taiwan, South Korea, Thailand and Israel. In Europe, there are no anti-discrimination laws for LGBTI persons in Lichtenstein, Belarus, Russia, Macedonia, Moldova, or Monaco. See Aengus Carroll & Lusas Ramón Mendos, *State-sponsored homophobia. A world survey of laws criminalising same-sex sexual acts between consenting adults*, ILGA 40 (12th ed. 2017), <https://ilga.org/state-sponsored-homophobia-report>.
223. For an example of the general acceptance of these types of claims, see generally *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, U.N. Human Rights Council Res. 12/09, UN Doc HCR/GIP/12/09 (Oct. 23, 2012). For the development of the acceptance of sexual minority claims since the mid-1990s, see Catherine Dauvergne & Jenni Millbank, *Burdened by proof: How the Australian Refugee Review*

However, difficulties continue regarding the credibility assessments of such applicants, including the use of Western stereotypes,<sup>224</sup> invasive and explicit questioning,<sup>225</sup> and the conceptualization of sexual orientation as fixed and linear, to the detriment of bisexual and other applicants with a fluid experience of sexuality.<sup>226</sup> Students should be introduced to these problems, as well as to proposed methods through which they may be overcome. It may be interesting, for example, for students to discuss the “difference, stigma, shame, and harm” (DSSH) model, which is designed to move away from humiliating and intrusive questioning of LGBTIQ claimants by focusing on their “narrative of difference.”<sup>227</sup> However, this model, while a welcome development, still fails to overcome an essentialist ontological construction of non-heterosexuality and a focus on public harm, neglecting the gendered private forms of persecution that affect same-sex-attracted women.<sup>228</sup>

In addition to addressing the diversity of human rights issues according to identity and region, teachers should also attempt to take students beyond mainstream SOGII human rights concerns. As described above, international human rights law is made up of an array of treaties that address a range of issues, from civil and political rights in the ICCPR and torture in the CAT to economic, social, and cultural rights in the ICESCR. There are also treaties specific to different groups, such as women (CEDAW) and children (CRC). To adequately represent the far-reaching scope of human rights law, the course should focus on human rights situations that relate to the differing content of these conventions. For instance, students can learn about the right to housing in the context of SOGII; a number of U.S. studies have found that same-sex

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*Tribunal has failed lesbian and gay asylum seekers*, 31 FEDERAL L. REV. 299, 300 (2003).

224. See, e.g., Fadi Hanna, *Punishing Masculinity in Gay Asylum Claims*, 114 YALE L.J. 913 (2005); Jenni Millbank, *From discretion to disbelief: Recent trends in refugee determinations on the basis of sexual orientation in Australia and the United Kingdom*, 13 INT'L J. OF HUMAN RIGHTS 391 (2010).
225. See Rachel A. Lewis, “Gay? Prove it”: *The politics of queer anti-deportation activism*, 17 SEXUALITIES 962 (2014). In *A, B, C v. Staatssecretaris van Veiligheid en Justitie*, C-148/13 to C-150/13, sexually explicit questioning in the cases of individuals pursuing refugee claims based on sexual orientation or gender identity was found to be a violation of human dignity and the right to privacy. See Jasmine Dawson & Paula Gerber, *Assessing the Refugee Claims of LGBT People: Is the DSSH Model Useful for Determining Claims by Women Based on Sexual Orientation?*, 29 INT'L J. OF REFUGEE LAW 292-322 (2017).
226. See generally Sean Rehaag, *Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada*, 53 MCGILL LAW J. 59 (2009); Sean Rehaag, *Bisexuals need not Apply: A Comparative Appraisal of Refugee Law and Policy in Canada, the United States, and Australia*, 13 INT'L J. OF HUMAN RIGHTS 413, 415 (2009).
227. Dawson & Gerber, *supra* note 225, at 4. The DSSH model was developed by S. Chelvan in 2011 and was endorsed by the United Nations High Commissioner for Human Rights in 2012. See *supra* note 223, at § 62.
228. Dawson & Gerber, *supra* note 225, at 4.

couples<sup>229</sup> and transgender people<sup>230</sup> have significantly more difficulty finding housing than heterosexuals do.

Also often neglected are the human rights concerns facing children pertaining to SOGII. For example, minors of diverse sexual orientation or gender identity can suffer from discrimination, harassment, and violence, leading to increased drug and alcohol use, depression, and suicide rates.<sup>231</sup> Moreover, children with LGBTIQ parents are at risk of their rights being violated via restrictive custody practices and the denial of family and relationship rights to same-sex couples.<sup>232</sup> Considering a wide variety of concerns relating to SOGII will give students insight into the breadth of situations that this emerging area of human rights law must address.

*Principle 6: Diversity of Actors: The Role of NGOs*

To give students a comprehensive understanding of how the different human rights systems function, it is important to shed light on the roles various actors play. While human rights law primarily governs the relationship between the individual and the state, these are not the only two groups of players involved in the human rights system, especially at the international and regional levels. As outlined in Principle 4, international organizations, like the UN and the European Court of Human Rights, are extremely important in protecting human rights, as they provide a platform to interpret and adjudicate the law. Perhaps less obviously, NGOs also play a significant role in the international and regional human rights frameworks. Because of their independent nature, NGOs are able to act as intermediaries among individuals, states, and international organizations.<sup>233</sup> This has put them

229. In 2013, a U.S. Department of Housing and Urban Development report found that same-sex couples were significantly less likely than heterosexual couples to get favorable responses to inquires about advertised rental housing. Samantha Friedman et al., *An estimate of housing discrimination against same-sex couples*, U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT, OFFICE OF POLICY DEVELOPMENT AND RESEARCH (2013). This study was based on 6833 e-mail correspondence tests conducted in fifty metropolitan markets across the United States in which two e-mails were sent to the housing provider. Each e-mail inquired about the availability of the advertised housing, the only difference in each being the applicant's sexual orientation.

230. This is also a problem for the gender-diverse community. A 2011 U.S. study of nearly 6500 transgender and gender-nonconforming people found that nineteen percent were denied housing, eleven percent were evicted from their housing, and twenty-nine percent were turned away from homeless shelters based on their gender identity. Jaime M. Grant et al., *Injustice at Every Turn. A Report of the National Transgender Discrimination Survey*, NATIONAL CENTER FOR TRANSGENDER EQUALITY, NATIONAL GAY AND LESBIAN TASK FORCE (2011), [https://transequality.org/sites/default/files/docs/resources/NTDS\\_Report.pdf](https://transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf).

231. *Id.*

232. Dr. Loveday Hodson, *The Rights of Children Raised in Lesbian, Gay, Bisexual or Transgender Families: A European perspective*, ILGA-EUROPE (2008), [http://www.ilga-europe.org/sites/default/files/Attachments/childrens\\_report\\_03.pdf](http://www.ilga-europe.org/sites/default/files/Attachments/childrens_report_03.pdf).

233. Steve Charnovitz, *Nongovernmental organizations and international law*, AMERICAN J. OF INT'L LAW 348, 348 (2006).

in an influential position, allowing them to contribute to the development, interpretation, and enforcement of international law.<sup>234</sup>

Moreover, in addition to playing an important part in the development of human rights law generally, it was NGOs that put SOGII on the human rights agenda. In particular, the adoption of SOGII issues in the early 1990s by mainstream human rights NGOs, such as Amnesty International and Human Rights Watch, played an important role in the application of international human rights law to the problems faced by sexual and gender minorities.<sup>235</sup> Thus, for students to truly understand how human rights law works in relation to SOGII, it is recommended that they consider the role of NGOs alongside that of states and international organizations.

Students can study the way that NGOs participate in human rights law. In the international human rights law framework, NGOs partake in UN conferences, submit “shadow reports,”<sup>236</sup> and make oral presentations to treaty bodies about human rights violations in states. They also help individuals to bring complaints of human rights violations to UN treaty bodies.<sup>237</sup> In addition, NGOs participate in the Human Rights Council’s universal periodic review of states by sending information to the council concerning a state’s human rights situation and by taking the floor at the Human Rights Council during the adoption of the report.<sup>238</sup>

At the regional level, NGOs submit complaints on behalf of individuals under the European Convention on Human Rights, the American Convention on Human Rights, and the African Charter on Human and Peoples’ Rights.<sup>239</sup> In many domestic jurisdictions, NGOs are able to bring cases as affected

234. *Id.* at 352.

235. Julie Mertus, *The Rejection of Human Rights Framings: The Case of LGBT Advocacy in the US*, 29 HUMAN RIGHTS QUARTERLY 1036, 1045-47 (2007).

236. Human rights NGOs have, through express treaty language or by practice of treaty bodies, been permitted to participate in this process by, for example, submitting “shadow reports” that are “alternative to” and that counter states’ own reports, and then traveling to the United Nations in New York or Geneva and orally presenting the reports to the UN treaty bodies. See George E. Edwards, *Assessing the Effectiveness of Human Rights Non-Governmental Organizations (NGOs) from the Birth of the United Nations to the 21st Century: Ten Attributes of Highly Successful Human Rights NGOs*, 18 MICH. ST. U. COLL. L. J. INT’L L. 165 (2010).

237. *Id.*

238. *Role of NGOs*, UNIVERSAL PERIODIC REVIEW, <http://www.upr-info.org/en/how-to/role-ngos> (last visited March 5, 2019).

239. Edwards, *supra* note 236, at 189-90.

parties<sup>240</sup> or to participate as *amici curiae*.<sup>241</sup> They also play a significant role in the promotion and protection of the rights of sexual and gender minorities by lobbying governments, providing submissions to inquiries, and educating the public.

There are many real-life examples of NGOs working in the field of SOGII that students can learn from. For example, the international NGO the International Gay and Lesbian Human Rights Commission successfully campaigned for the inclusion of SOGII issues in the human rights work of Amnesty International in 1991 and the U.S. State Department in 1993, assisted in the first successful application for asylum based on sexual orientation in 1992, ensured that lesbian issues were included in the official discussions at the UN Fourth World Conference on Women in 1995 and helped secure the release of eleven gay men being held on account of their sexual orientation in Cameroon in 2006.<sup>242</sup>

It may also be illuminating for students to discuss the significant barriers that LGBTIQ NGOs experience in their attempts to engage with the UN human rights system. For example, although the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) was the first LGBTIQ rights organization to be granted consultative status in the UN Economic and Social Council (ECOSOC) in 1993, it was stripped of this status in 1994. ILGA is an umbrella association of multiple LGBTIQ groups, and it was expelled because of the controversial nature of a number of its members, such as North American Man/Boy Love Association, which condoned intergenerational sex.<sup>243</sup> Despite responding to these criticisms and expelling such members, over the following decade consultative status was repeatedly denied to ILGA until it was finally reinstated in 2011.<sup>244</sup> Other LGBTIQ NGOs have encountered similar difficulties in their attempts to engage with the international human rights system.<sup>245</sup> These examples highlight not only the extent to which the

240. For an example of a case in which an NGO applied to the European Court of Human Rights as a victim, see *Identoba and Others v. Georgia*, App. No. 73235/12, Eur. Ct. H.R. (May 12, 2015), which concerned the failure of police to protect participants in a march against homophobia from violent attacks of counterdemonstrations.

241. For example, in the recent case of *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which legalized same-sex marriage throughout the United States, a considerable number of NGOs submitted *amicus* briefs. For the full list, see *Amicus Briefs on the Merits*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/ObergefellHodges/AmicusBriefs/> (last visited March 4, 2019).

242. For a timeline of these achievements, see *A reflection on 20 years of partnership for LGBT human rights 1990-2010*, INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION (2010), <https://iglhrc.org/sites/default/files/509-1.pdf>.

243. Mertus, *supra* note 235, at 1040-41.

244. *Gaining the Right to Speak in Our Own Name at the United Nations: the ECOSOC Campaign*, THE INTERNATIONAL LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX ASSOCIATION (2013), <http://ilga.org/gaining-the-right-to-speak-in-our-own-name-at-the-united-nations-the-ecosoc-campaign/>.

245. For example, the Danish Association of Gays and Lesbians (LBL) (*Landsforeningen for Bøsser*

position of SOGII has changed within the mainstream human rights systems over the past twenty years, but also the uphill battle represented in achieving many of these changes. The tireless efforts of a number of NGOs have been a driving force behind the extension of human rights law to the specific concerns of sexual and gender minorities.

*Principle 7: Critical Analysis*

The final principle involves encouraging students to critically analyze the assumptions behind human rights law, the nature of the human rights system, and the work of key human rights bodies. Human rights law, more so than other bodies of law, is frequently left unquestioned. Although a growing body of literature critiques human rights law, noting, among other points, how it can be used to advance a neo-imperial agenda,<sup>246</sup> this is rarely taught in human right law courses. Moreover, such critiques are still quite infrequent in the context of SOGII rights.<sup>247</sup> This may be due to the purported universal and inalienable nature of human rights. It could also be the result of human rights law being perceived as “progressive” because of its revolutionary origins, its relatively modern nature, and its situation between the individual and the state. No matter the cause, critical analysis in relation to human rights law sometimes does not extend beyond the violations of the law, to the law itself. However, claims of scholars such as Crenshaw,<sup>248</sup> Robson,<sup>249</sup> and Brooks and Parkes<sup>250</sup> that the law is not neutral but instead reflects particular values and viewpoints holds true in relation to human rights law, even if it is not to the extent of other areas of law.

Petersen contends that students should be given an opportunity to critically analyze the heterocentricity and heterosexism of the law.<sup>251</sup> This means considering the invisibility of sexual orientation and gender minorities in the law and the way that the law promotes heterosexuality as “normal.” In terms of human rights law, this can be seen, for example, in the wording of

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*og Lesbiske*) was denied consultative status alongside ILGA in 2006. Mertus, *supra* note 235, at 1041. For an overview of the difficulties encountered by LGBTIQ NGOs in other UN activities, see O’Flaherty & Fisher, *supra* note 181, at 228-29.

246. See, e.g., COSTAS DOUZINAS, *HUMAN RIGHTS AND EMPIRE: THE POLITICAL PHILOSOPHY OF COSMOPOLITANISM* (2007); DAVID KENNEDY, *THE DARK SIDE OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2004); MAKAU MUTUA, *HUMAN RIGHTS: A POLITICAL AND CULTURAL CRITIQUE* (2d ed. 2013); ANNE ORFORD, *READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW* (2003).

247. There are, however, some notable exceptions to this. For a recent critique of human rights law relating to SOGII, see RATNA KAPUR, *GENDER, ALTERITY AND HUMAN RIGHTS: FREEDOM IN A FISHBOWL* (2018).

248. Kimberle Williams Crenshaw, *Foreword: Toward a Race-Conscious Pedagogy in Legal Education*, 4 S. CAL. REV. L. & WOMEN’S STUD. 33, 35 (1994).

249. RUTHANN ROBSON, *LESBIAN (OUT) LAW: SURVIVAL UNDER THE RULE OF LAW* 181 (1992).

250. Brooks & Parkes, *supra* note 32, at 108-09.

251. Petersen, *supra* note 45, at 323-28.

Article 23(2) of the ICCPR which provides, “the right of men and women of marriageable age to marry and to found a family shall be recognized.”<sup>252</sup> This has been interpreted to mean that only heterosexual persons are guaranteed the right to marry.<sup>253</sup> The underlying heteronormative assumption behind this assertion is that heterosexual relationships are somehow more legitimate than same-sex ones. Moreover, by referring to only “men” and “women,” this article reinforces the cultural construct of the sex binary and excludes intersex status and non-binary gender identities.

Students should also be given the space to consider the “homonormativity” behind the recent legal advances in the rights of sexual and gender minorities. Homonormativity refers to a gay politics “that does not contest dominant heteronormative assumptions and institutions but upholds and sustains them.”<sup>254</sup> This can be seen, as discussed in Principle 5, in the legalization of marriage for same-sex couples in a number of countries. While this is often painted as a success in terms of the human rights pertaining to SOGII, it has also been criticized because it simply incorporates gays and lesbians into an exclusory institution rather than dismantling the concept of marriage and all the problematic ideas and values behind it.

Educators may also wish to discuss even more contentious divisions within the LGBTIQ community about how human rights law should apply to SOGII-related issues, such as ongoing debates concerning the definitions of “gender” and “sex.” For example, there is a dispute in some Western countries between sectors of the radical feminist community and the transgender community about whether the categories of “man” and “woman” should be understood biologically or through self-identification.<sup>255</sup> This is relevant to the study of human rights law, which prohibits discrimination based on “sex”<sup>256</sup> and, on the international level, has a treaty directed entirely toward the rights of “women.”<sup>257</sup> However, raising such debates in the classroom can be confronting and offensive for some students, especially transgender students, who may experience a public discussion of the radical feminist position as contributing to their marginalization and erasure.

This does not necessarily mean that teachers should remain silent on such issues. As discussed in the context of language in Principle 1, there can be benefits to raising issues that cause offense in the classroom, especially insofar

252. *International Covenant on Civil and Political Rights*, *supra* note 87.

253. *Joslin et al. v. New Zealand*, Comm. 902/1999, UN Doc. CCPR/C/75/D/902/1999 (HRC 1999).

254. LISA DUGGAN, *THE TWILIGHT OF EQUALITY?: NEOLIBERALISM, CULTURAL POLITICS, AND THE ATTACK ON DEMOCRACY* 50 (2012).

255. For a recent overview of this debate, see Sally Hines, *The Feminist Frontier: On Trans and Feminism*, 28 J. GENDER STUDIES 145 (2017).

256. *See, e.g.*, Articles 2(1) and 26 of the *International Covenant on Civil and Political Rights*, *supra* note 87.

257. *Convention for the Elimination of All Forms of Discrimination Against Women*, *supra* note 169.

as it enables a discussion about *why* certain viewpoints may be experienced as derogatory. Nonetheless, if teachers wish to address such debates, they should ensure that the classroom remains an inclusive and respectful environment. This may be achieved by teaching students in advance about the harms of exclusionary politics, as well as the importance of civility in debate. It is also advisable that teachers provide a “content warning” before the session to give students the option of not attending that class if they prefer not to participate in such a contentious discussion.

In addition to critically analyzing the way the law is formed in relation to SOGII, students should be given the opportunity to question the very applicability of human rights law to issues of SOGII. For example, students can consider the cultural relativist critique of human rights law relating to SOGII.<sup>258</sup> Framing sexual orientation and gender identity rights as human rights implies that they are universal. However, this was not the view of the original drafters of the relevant human rights conventions, nor is it the view of many states around the world today. As already noted, a number of countries view homosexuality as a Western product that is incompatible with their local culture. Students should be encouraged to question the purported universality of the application of human rights law to SOGII or whether it is an aspect of Western cultural imperialism.

Finally, the effectiveness of the work of UN bodies and other organizations on SOGII should also be critically analyzed. This may include a discussion, for example, of flaws of the political UN bodies, such as the General Assembly and the Human Rights Council, which both struggle to effectively engage with controversial human rights issues, especially in relation to SOGII. For example, in 2012, when the Human Rights Council held a panel discussion on sexual orientation and gender identity, several members walked out.<sup>259</sup> Moreover, in 2010, the General Assembly passed a resolution, backed by the African group, to remove the words “sexual orientation” from a previous resolution concerning extrajudicial, summary, or arbitrary executions.<sup>260</sup> However, it has since been reinserted.

258. For an introduction to universalism and cultural relativism with regards to human rights pertaining to SOGII, see Lau’s article on the cultural relativist stance the U.S. has taken in relation to sexual orientation, compared with strong universalist position in other areas of human rights. Holning Lau, *Sexual orientation: Testing the Universality of International Human Rights Law*, 71 U. CHI. L. REV. 1689 (2004).

259. Deborah Brown, *A Showdown on LGBT Rights in Geneva*, UNITED NATIONS ASSOCIATION OF THE UNITED STATES OF AMERICA (2012), <http://www.unausa.org/news-publications/article/a-showdown-on-lgbt-rights-in-geneva>.

260. The original resolution called upon member states to properly investigate “all killings committed for any discriminatory reason, including sexual orientation, racially motivated violence leading to the death of the victim,” see *Extrajudicial, Summary or Arbitrary Executions: Resolution Adopted by the General Assembly*, UN General Assembly, UN Doc. A/RES/57/214, (2003), at § 6. However, it was removed in 2010, following an amendment sponsored by Benin on behalf of the African group. See John Fisher & Sara Perle, *Governments remove sexual orientation from UN resolution condemning extrajudicial, summary or arbitrary executions*, ARC INTERNATIONAL &

Critical analysis involves not only deconstruction of the law, but also consideration of potential models for reconstruction. Students should be encouraged to consider possible reforms to resolve some of the outstanding issues concerning the application of human rights law to SOGII issues. This involves rethinking the way the law is framed and interpreted so that it may better protect the rights of sexual and gender identity minorities. It may also entail considering structural changes for human rights bodies so that they are in a better position to engage with SOGII issues. Thinking about the way forward will prove invaluable to students should they wish to pursue a career in this emerging area of human rights law.

#### IV. Conclusion

Human rights law relating SOGII issues is no longer considered a peripheral aspect of this discipline. Over the past few decades the rights of sexual and gender minorities have become a significant concern of international and regional human rights bodies, domestic courts, and legislatures alike. Law schools should reflect this reality by incorporating this topic into the teaching of human rights law in a meaningful and appropriate way. This will serve to enrich students' understanding of contemporary human rights concerns and the scope of application of human rights law. Moreover, as noted by a variety of scholars, incorporating SOGII into the law school curriculum is beneficial in other ways, including better-preparing students for the diversity of their future clients<sup>261</sup> and lessening the isolation of LGBTIQ students.<sup>262</sup>

However, teaching about SOGII in the context of human rights presents unique difficulties. Unlike other areas of the law, human rights treaties cannot easily be amended and instead need to be interpreted according to changing social realities. This distinctive feature of human rights law is particularly important in relation to SOGII, as the law has only recently specifically recognized the right of LGBTIQ people to be protected against discrimination on the basis of their SOGII. An understanding of the culture, politics, history, language, and theory surrounding human rights law is fundamental to understanding its current application to SOGII, as well as how it might apply into the future.

Principles 1-3 facilitate such an interdisciplinary approach to this area of study. Principles 4-6 show how this holistic approach can also extend to the teaching of the human rights framework itself. These principles suggest ways of exploring the differing legal systems, human rights issues, and the various actors involved so that students have a better understanding of the scope and functioning of the law. Principle 7 arms students with a critical approach

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INTERNATIONAL GAY AND LESBIAN HUMAN RIGHTS COMMISSION (2010), <http://iglhrc.org/content/governments-remove-sexual-orientation-un-resolution-condemning-extrajudicial-summary-or>.

261. Randall, *supra* note 6, at 795; Dark, *supra* note 5, at 553-55.

262. Infanti, *supra* note 12, at 4-5; Gilmore, *supra* note 11, at 607.

to this emerging area of human rights law so that they can identify areas for potential reform.

Increasing the prevalence of human rights law courses that address SOGII issues in a substantive way is a necessary step to securing the future protection of human rights of sexual and gender minorities around the world. Providing students with the knowledge and skills they need to engage with this area of human rights law in their future careers will not only help to effect necessary change in the legal profession, but will also serve to advance LGBTIQ equality in society at large.