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ESSAY

ARTICULATING LESBIAN HUMAN RIGHTS: THE CREATION OF A CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST LESBIANS

Nadine Gartner¹

“As lesbians, we are both outside the law and within it. And yet, we are always under it. Sometimes under it in the sense of being beneath notice, not deserving of legal recognition. And at other times, under it in the sense of being under a system that dominates, being under its power.” – Ruthann Robson²

“Lesbians have a radical social vision – we are the bearers of a truly new world order, not the stench of the same old world odor.” – Urvashi Vaid³

I. INTRODUCTION

Lesbians⁴ around the world suffer from a variety of human rights violations based upon their sexual orientation. FannyAnn

1. A.B., 2001, Bryn Mawr College; J.D. candidate, University of Michigan Law School, 2006. I thank Christine Chinkin and Catharine MacKinnon for teaching the course that inspired this project. Special thanks to Jay Surdukowski for reviewing an early draft.

2. RUTHANN ROBSON, *LESBIAN (OUT)LAW* 11 (1992).

3. Urvashi Vaid, *Let's Put Our Own House in Order, in LESBIANS, GAY MEN, AND THE LAW*, 566, 568 (William B. Rubenstein ed., 1993).

4. I use the term “lesbian” to connote women-identified individuals who engage in romantic and/or sexual relationships with other women-identified persons for any duration at any time of their lives. This is meant to be the broadest and most-inclusive definition so that women who identify as lesbian, bisexual, transgender or transsexual, heterosexual, or asexual may be considered, so long as they identify themselves as women and have been, are currently, or desire to be romantically and/or sexually engaged with other women.

Eddy, a prominent lesbian activist in Sierra Leone, is murdered brutally in the offices of the lesbian rights organization she founded.⁵ A woman in Norway undergoes "couch therapy," where a doctor instructs her husband to rape her in order to suppress her lesbianism.⁶ Two lesbians living together in China are detained for fifteen days on charges of "unruly behavior" (laws that criminalize homosexual activity apply to men only).⁷ Lesbians in Colombia are gunned down or seized by "death squads," in the name of "social cleansing."⁸

Human rights violations against lesbians comprise not only egregious physical violence, but also social, economic, and political harms. Mothers in Germany⁹ and the United States¹⁰ lose custody of their children because the courts hold that their lesbianism disqualifies them as parents. Two co-workers in the Philippines are fired from their jobs at a human rights organization because they are in a relationship with one another.¹¹ The editor of a Greek lesbian magazine is sentenced to five months in jail for publishing "indecent material."¹² Police in Peru stage a raid on a lesbian bar in cooperation with a local television station, forcing the seventy patrons to exit the bar one by one while the country watches on the evening news.¹³ As a result of this invasion, many women lose their jobs, some are beaten by their families, and at least two are raped on their way home from the police station.¹⁴

Due to implicit government cooperation and social stigmatization, many of the lesbians who suffer these abuses become in-

5. *A powerful voice is silenced*, THE ADVOCATE, November 9, 2004, at 22.

6. Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, in LESBIANS, GAY MEN, AND THE LAW, 32, 36 (William B. Rubenstein ed., 1993), citing a report from Norway that was submitted to the Brussels Tribunal on Crimes against Women in 1976.

7. AMNESTY INT'L USA, BREAKING THE SILENCE: HUMAN RIGHTS VIOLATIONS BASED ON SEXUAL ORIENTATION 31 (1994).

8. *Id.* at 11.

9. Rachel Rosenbloom, *Introduction*, in UNSPOKEN RULES: SEXUAL ORIENTATION AND WOMEN'S HUMAN RIGHTS, ix, ix (Rachel Rosenbloom ed., 1996).

10. Julie Dorf & Gloria Careaga Pérez, *Discrimination and the Tolerance of Difference: International Lesbian Human Rights*, in WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 324, 324 (Julie Peters & Andrea Wolper eds., 1995).

11. Rosenbloom, *supra* note 9, at xix.

12. Dorf & Pérez, *supra* note 10, at 324.

13. *Id.* at 327.

14. *Id.*

visible victims.¹⁵ Governments sanction the persecution of lesbians because they consider female homosexuality unnatural and abnormal.¹⁶ Officials in non-Western countries regard lesbianism as a Western disease that is foreign to their own culture.¹⁷ Leaders from all corners of the world refuse to protect lesbians, claiming instead “protection” of public morals and values.¹⁸ Many nations observe laws that empower government officials to imprison lesbians for advocating equality and for engaging in consensual, sexual acts in private between adults.¹⁹ Such laws criminalize *being* lesbian, as “sexual orientation is an integral part of a person’s identity, and the threat of detention impinges on a gay person’s entire life.”²⁰ Lesbians face tremendous barriers in challenging these discriminatory laws and acts because many governments use torture to suppress dissent and intimidate political activists.²¹ Homosexual activists in particular are targeted as “examples” to control their public identities and private lives.²² Even in nations where a lesbian may seek legal recourse, her “real or alleged sexual orientation may result in unfair trials.”²³

The failure of nations to report, monitor, and prevent human rights violations against lesbians stems from the failure of the global community to articulate lesbian human rights. Although existing human rights documents, namely the United Nations’ Universal Declaration of Human Rights (“UDHR”)²⁴ and women-specific instruments, like the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”)²⁵ and the Beijing Declaration and Platform for Ac-

15. AMNESTY INT’L USA, *supra* note 7, at 12.

16. Dorf & Pérez, *supra* note 10, at 324.

17. *Id.* at 325.

18. *Id.*

19. AMNESTY INT’L USA, *supra* note 7, at 19.

20. *Id.*

21. *Id.* at 14.

22. *Id.*

23. *Id.* at 32. See *Buttrum v. Black*, 721 F. Supp. 1268, 1294 (N.D. Georgia 1989), holding that a convicted murder’s sentencing phase was contaminated by psychologist’s testimony and press reports that defendant was a “bisexual” and a “sadist.”

24. Universal Declaration of Human Rights, *opened for signature* Dec. 10, 1948, G.A. Res. 217 (A) (III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948) [hereinafter UDHR].

25. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* July 17, 1980, G.A. Res. 34/180, U.N. GAOR, 34th Sess., U.N. Doc. A/34/830 (1979), [hereinafter CEDAW].

tion ("BDPA"),²⁶ supposedly apply to all women, they have failed to adequately represent, protect, and advocate for lesbians. The male-dominated gay rights movement also has disappointed lesbians by concentrating on issues specific to gay men and ignoring the dual discrimination that lesbians face as women and gay individuals. In order to draw attention to and stop the atrocious human rights violations that are committed against lesbians around the world, this paper proposes the adoption of a separate document, the Convention on the Elimination of All Forms of Discrimination against Lesbians ("CEDAL"). By creating a lesbian-specific text that focuses on the particular harms faced by lesbians, activists will inform these women of their irreparable human rights, educate government officials, encourage them to reform their discriminatory laws and practices, and morally and legally commit nations to respect and protect their lesbian citizens.

Part II of this Paper examines three pertinent human rights documents, namely UDHR, CEDAW, and BDPA, as well as the international gay rights movement, to illustrate that lesbians are invisible in the current human rights discourse. Part III argues that such invisibility precipitates the articulation of lesbian human rights through a lesbian-specific document. Part IV presents a draft of such a document and discusses my reasoning in choosing its particular subject areas and wording.

II. CURRENT HUMAN RIGHTS DISCOURSE RENDERS LESBIANS INVISIBLE

By ignoring lesbians and their concerns within its legal documents and rights movements, the global human rights regime has failed to recognize lesbians as individuals equal to heterosexuals and to protect them from human rights abuses. UDHR, the initial human rights treatise, purports to respect every individual's human rights, but frequent violations of those rights persist. As Amnesty International asserts, although UDHR "promise[s] to respect and ensure the human rights of ALL PERSONS . . . for a significant part of the world's population, this pledge has never been realized – or even acknowledged."²⁷ Certain communities within the United Nations ("UN") have responded by devising

26. *Beijing Declaration and Platform for Action*, Fourth World Conference on Women, U.N. Doc. A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995) [hereinafter BDPA].

27. AMNESTY INT'L USA, *supra* note 7, at 2.

separate human rights declarations that tackle a particular subject, like race, women, and children.²⁸ However, these documents, including the prominent women's rights instruments, CEDAW and BDPA, continue to ignore lesbian rights. The nascent international gay rights movement also disregards lesbian rights by focusing on issues specific to gay men. Due to this glaring absence of representation within human rights treatises and the gay rights movement, the lesbians of the world remain ill-informed of their rights and vulnerable to exploitation by public and private actors. A lesbian-specific declaration of rights fills that void and works toward fulfilling the UN's promise of protecting the human rights of every person.

UDHR, the groundbreaking treatise that defined human rights for the first time and initialized global discourse on the subject, renders lesbians invisible by failing to represent women adequately and completely ignoring issues of sexual orientation. UDHR paints women as "objects of international law[,] particularly in relation to their roles as wives and mothers."²⁹ Indeed, the only explicit call for equality between men and women arises in the discussion of marriage and family in Article 16, stating that the sexes "are entitled to equal rights as to marriage, during marriage, and at its dissolution."³⁰ As activist Jo Lynn Southard notes, "[e]ven though these areas require special protection, singling them out while ignoring other human rights for women perpetuates the belief that women's human rights revolve around the family."³¹ By portraying marriage and child-bearing as "the paramount roles for women,"³² UDHR minimizes the other roles that women play and marginalizes those who choose not to participate in these institutions. Lesbians especially challenge this limited view of womanhood by engaging in sexual relationships and creating families with other women, possibilities that UDHR

28. See generally International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Dec. 21 1965, 660 U.N.T.S. 195; CEDAW, *supra* note 25; Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, G.A. Res. 44/25, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc A/44/736 (1989).

29. Jo Lynn Southard, *Protection of Women's Human Rights Under the CEDAW*, 8 PACE INT'L L. REV. 1, 12 (1996).

30. UDHR, *supra* note 24, art. 16 ("Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.").

31. Southard, *supra* note 29, at 12.

32. *Id.* at 13.

never considers. Even more fundamentally, UDHR never acknowledges sexual orientation in its text. Whereas discrimination based on sex, race, religion, and other characteristics are explicitly banned in Article 2,³³ no mention of sexual orientation is ever made. To this day, the UN has yet to produce a single treaty or resolution on behalf of gay or lesbian rights,³⁴ prompting scholar Wayne Morgan to assert that “[h]uman rights law has developed . . . in the last fifty years, while keeping issues of sexuality firmly in the closet.”³⁵

In response to such a narrow representation of women, feminists pushed for a woman-specific instrument, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted by the UN's General Assembly in 1979.³⁶ As its name indicates, the treaty aims to eliminate discrimination against women in every area, “ranging from political participation, to employment, to the family.”³⁷ The document highlights women's reproductive rights and calls for modifying social and cultural patterns of conduct that lead to stereotypical gender roles and hierarchy between the sexes.³⁸ Feminist Noreen Burrows writes that CEDAW “aims to achieve a type of society throughout the world in which women will be treated on equal terms with men, a society in which traditional customs and prejudices will be questioned and new egalitarian forms of behaviour will be established.”³⁹ In order to achieve such a society, CEDAW requires that ratifying states adopt “legislation refraining from discrimination against women and taking all ‘appropriate measures’ to eliminate discrimination.”⁴⁰ Although the instrument is “largely a statement of principles rather than specific obligations,”⁴¹ it does require participating states to report to the UN every four years and receive suggestions for appropri-

33. UDHR, *supra* note 24, art. 2.

34. Wayne Morgan, *Queering International Human Rights*, in *LAW AND SEXUALITY: THE GLOBAL ARENA* 208, 209 (Carl Stychin & Didi Herman eds., 2001).

35. *Id.*

36. Rebecca J. Cook, *Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women*, 30 VA. J. INT'L L. 643, 643 (1989-90).

37. Elizabeth Jay Freedman, *Dueling Fates: Should the international legal regime accept a collective or individual paradigm to protect women's rights?*, 24 MICH. J. INT'L L. 347, 367 (2002).

38. *Id.*

39. Noreen Burrows, *The 1979 Convention on the Elimination of All Forms of Discrimination against Women*, 32 Neth.Int'l.L.R. 419, 459 (1985).

40. Freedman, *supra* note 37, at 368.

41. Burrows, *supra* note 39, at 459.

ate actions to be taken in the next four years.⁴² Some governments have adopted CEDAW domestically by incorporating its principles into their constitutions and statutes, but these nations, unfortunately, represent a small minority.⁴³ Although 179 countries have ratified the document,⁴⁴ “at least [23] of 100 states parties [made] a total of [88] substantive reservations,”⁴⁵ making it the most heavily reserved international document ever.⁴⁶ Some argue that these numerous reservations render the text “virtually impotent by the addition of reservations antithetical to its spirit and intent,”⁴⁷ but others consider it a “major step toward laying out not only passive provisions forbidding discrimination but also active provisions . . . for remedying historical inequality.”⁴⁸

CEDAW broadens the scope of women’s equality from the narrow, marriage-specific rights contained in UDHR, but it still fails to adequately represent lesbians and other women who do not serve as wives and mothers. The woman who emerges from CEDAW is heterosexual, married, with children, and primarily focused on her home.⁴⁹ If she is employed outside of the home, she works in subsistence farming or development planning.⁵⁰ Sexual acts are considered relevant only because of their connection to reproductive rights.⁵¹ These factors render lesbians invisible within the document because the provisions on marriage, family politics, and reproductive sex are irrelevant to them. Southard criticizes CEDAW for these very reasons, asserting that

42. Freedman, *supra* note 37, at 368.

43. *Id.* at 369-70.

44. United Nations Division for the Advancement of Women, *Convention on the Elimination of All Forms of Discrimination against Women* (Dec. 26, 2004), available at <http://www.un.org/womenwatch/daw/cedaw> (listing figures of States Parties as of Oct. 6, 2004).

45. Cook, *supra* note 36, at 644.

46. Southard, *supra* note 29, at 18.

47. Julie Peters & Andrea Wolper, *Introduction, in WOMEN’S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 1, 4 (Julie Peters & Andrea Wolper eds., 1995).

48. *Id.*

49. See generally CEDAW, *supra* note 25, art. 16 (“States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations”) and preamble (“Articles 10, 11 and 13, respectively, affirm women’s rights to non-discrimination in education, employment and economic and social activities. These demands are given special emphasis with regard to the situation of rural women, whose particular struggles and vital economic contributions, as noted in article 14, warrant more attention in policy planning.”).

50. *Id.*

51. *Id.*, art. 16(e) (stating that women should have equal rights “to decide freely and responsibly on the number and spacing of their children”).

the instrument's failure to discuss the rights of unmarried women "does a disservice, not only to heterosexual women who generally fit into a culture's dominant race or class but simply choose not to marry, but most especially to lesbian and bisexual women, for whom not marrying is more than a simple lifestyle choice."⁵²

Lesbians remained on the fringes of the international women's rights movement until the UN Fourth World Conference on Women in Beijing in 1995. Fueled by the discouraging World Conference on Human Rights in 1993, in which the final document of the conference made no references to "the historic neglect of the human rights of lesbians, gay men, and bisexuals,"⁵³ lesbian activists attempted to transport themselves literally from the margins of the women's movement into the heart of its texts. Advocates presented lesbian human rights declarations at the five regional preparatory meetings (only the European regional platform ultimately added "sexual orientation" to its text⁵⁴) and collected petitions signed by thousands of women from over two-hundred non-governmental organizations.⁵⁵ The women then submitted a draft of BDPA that banned discrimination based on sexual orientation and identified one's sexuality as a factor akin to race, religion, or other such characteristic.⁵⁶ The choice of the term "sexual orientation" over "lesbian" was a deliberate one, as the former "was the language used in the few relevant texts which could provide support as precedents – the European regional platform, . . . the draft Constitution of South Africa and the decision of the UN Human Rights Committee in the *Toonen* case."⁵⁷ The term was inserted into four strategic places within the document: in the two key statements regarding women's diversity, in the paragraph concerning legal safeguards for women, and in the section focusing specifically on employment discrimination.⁵⁸ Realizing that certain parties would consider these

52. Southard, *supra* note 29, at 74.

53. AMNESTY INT'L USA, *supra* note 7, at 2.

54. Dianne Otto, *Lesbians? Not in My Country*, 10 *Alternative L.J.* 288, 289 (1995) [hereinafter Otto, *Lesbians?*].

55. Rosenbloom, *supra* note 9, at x.

56. Ann M. Miller et al., *Health, Human Rights, and Lesbian Existence*, in *HEALTH AND HUMAN RIGHTS* 265, 269 (Jonathan M. Mann et al. eds, 1999).

57. Otto, *Lesbians?*, *supra* note 54, at 289. *Toonen v. Australia* held that a statute criminalizing sodomy in Tasmania, Australia was a violation of the right to privacy under UDHR.

58. *Id.*

changes controversial, the drafters placed each reference to sexual orientation in brackets.⁵⁹

These few references to sexual orientation remained in brackets throughout the conference until the early morning hours of the very last day. At 4 A.M. on September 15, 1995, the platform's drafters continued to struggle with "whether 'sexual orientation' would be acknowledged as an aspect of women's diversity and an actionable ground of discrimination."⁶⁰ Exactly one-half hour later, every bracketed reference was deleted,⁶¹ leaving no trace of lesbian inclusion within BDPA. The chair of the main working group, Patricia Licuana from the Philippines, rationalized the deletions by declaring that "the issue had elicited such strong opposition and it had not been aired in the UN before."⁶² Indeed, the Conference nearly fell apart over the issue, as it was "[t]he most heated controversy in Beijing."⁶³ Lesbian activists had hosted daily activities, discussions, and workshops throughout the Conference,⁶⁴ and such visibility had bred an incredible backlash from North American Christian evangelicals, the Holy See, and Muslim fundamentalists, whose "agenda was, clearly, to arrest what they perceived to be the widening horizons of acceptable female identities and firmly circumscribe the future possibilities."⁶⁵ Activist Dianne Otto describes the oppositional climate as one "of misinformation and fear-mongering,"⁶⁶ as "[i]t was widely contended that adopting the reference to 'sexual orientation' would mean endorsing pedophilia and bestiality."⁶⁷ As a result, the final version of BDPA, in which "the traditional role of mother remains central"⁶⁸ and "[a]lmost every mention of 'sex,' 'sexuality,' or 'sexual health/lives/information' is directly paired with reproduction,"⁶⁹ follows UDHR and CEDAW in rendering lesbians invisible.

59. *Id.*

60. *Id.*

61. *Id.*

62. Dianne Otto, *Holding Up Half the Sky, But for Whose Benefit?: A Critical Analysis of the Fourth World Conference on Women*, 6 AUSTL. FEMINIST L.J. 7, 25-26 (1996) [hereinafter Otto, *Sky*].

63. *Id.* at 25.

64. Otto, *Lesbians?*, *supra* note 54, at 289.

65. Otto, *Sky*, *supra* note 62, at 26.

66. Otto, *Lesbians?*, *supra* note 54, at 289.

67. *Id.*

68. Otto, *Sky*, *supra* note 62, at 27.

69. Otto, *Lesbians?*, *supra* note 54, at 290.

Failing to gain visibility within the women's community, one might suggest that lesbians join their gay brothers in building an international lesbian and gay movement. After all, as evidenced by the anti-lesbian forces at the Beijing Conference, who viewed the insertion of "sexual orientation" as a slippery slope towards endorsing pedophilia and bestiality, there is "a unity within the dominant homophobic discourse which demonises lesbians in the same language that it vilifies gay men."⁷⁰ In reality, however, lesbian concerns tend to be swept aside when merged with those of gay men, much like the marginalization of women's issues within the male-dominated human rights discourse. As poet and activist Adrienne Rich asserts, lesbians have been "deprived of a political existence through 'inclusion' as female versions of male homosexuality"⁷¹ because "equat[ing] lesbian existence with male homosexuality . . . is to deny and erase female reality once again."⁷² Indeed, as noted by some human rights scholars, "sexual orientation has been discussed apart from gender"⁷³ in the international realm, meaning that "the 'lesbian' in lesbian and gay rights has tended to disappear."⁷⁴ At conferences on the AIDS crisis, for instance, lesbians are either assumed to share the same challenges as gay men or are ignored all together.⁷⁵ In advocates' strategies to protect homosexuals from state-sponsored violence, lesbians are often left unprotected because "they are especially vulnerable to abuses in the private sphere by non-state actors."⁷⁶ Even the discourse on eliminating sexual orientation discrimination diminishes lesbian concerns by separating sexuality from gender, thereby failing to understand "gender as an axis of both identity and oppression."⁷⁷ Rich points out that "the lesbian experience . . . [is] a profoundly *female* experience, with particular oppressions, meanings, and potentialities we cannot comprehend as long as we simply bracket it with other sexually stigmatized existences."⁷⁸

This erasure of the "lesbian experience" is best illustrated by what homosexual rights advocates have set at the top of their

70. *Id.* at 289.

71. Rich, *supra* note 6, at 34.

72. *Id.*

73. Miller, *supra* note 56, at 272.

74. *Id.*

75. See Miller, *supra* note 56, at 272-73.

76. *Id.* at 272.

77. *Id.*

78. Rich, *supra* note 6, at 34.

agenda: repealing homosexual male-specific sodomy laws via the rubric of privacy. Although lesbians are not persecuted under these laws specifically,⁷⁹ which “should not be interpreted as a reflection of greater tolerance of lesbians, but rather of the inherent sexism of lawmakers and their failure to understand female sexuality,”⁸⁰ homosexual activists around the globe have devoted their time and resources to this single issue. Courts and legislators have dismissed these laws largely under the notion of privacy, arguing that the government may not interfere in the sexual conduct between consenting adults in a private home.⁸¹ Such reasoning poses a grave concern for lesbians because courts historically have used privacy to maintain the patriarchal status quo and to justify governmental non-interference in crimes against women, like domestic violence and marital rape.⁸² Even without these negative connotations, lesbians have yet to enjoy the privacy principle because it has not been extended to them explicitly.⁸³ Additionally, it has not reached beyond the realm of sexual acts: governments around the world continue to interfere in lesbians’ homes and family relationships by refusing to recognize foreign partners and lesbian parenting rights.⁸⁴

The absence of lesbians within human rights documents and the international homosexual rights movement has marginalized lesbians throughout the world. Without an explicit declaration of lesbian human rights, national leaders and non-governmental actors will continue to violate these women’s rights, and nations’ pledges to “respect and ensure the human rights of all persons”⁸⁵ will remain an empty promise.

79. Few laws explicitly ban lesbian sexual acts, but governments frequently persecute lesbians under other statutes, such as the “unruly behavior” charge in China, *id.* at 2.

80. Dorf & Pérez, *supra* note 10, at 328.

81. See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003); *Toonen v. Australia*, Communication No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (1994), available at <http://www1.umn.edu/humanrts/undocs/html/vws488.htm>.

82. See generally CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373 (2000); Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991); Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996); Nadine A. Gartner, *Restructuring the Marital Bedroom: The Role of the Privacy Doctrine in Advocating the Legalization of Same-Sex Marriage*, 11 MICH. J. GENDER & L. 1 (2004).

83. Miller, *supra* note 56, at 271.

84. *Id.*

85. AMNESTY INT’L USA, *supra* note 7, at 2.

III. LESBIAN-SPECIFIC DOCUMENT EXPOSES AND COMBATS DISCRIMINATION

In order to expose and combat anti-lesbian violence, bind states to eliminate all forms of discrimination based on lesbianism, and educate the world that lesbian rights are human rights, I propose the creation of CEDAL. As discussed above, lesbians are noticeably absent from all of the present human rights instruments, but human rights violations against lesbians are rampant. Drafting a lesbian-specific human rights document will delineate the specific rights that lesbians deserve and highlight the areas that require consideration of lesbian viewpoints. Garnering international support for such an instrument will give these rights governmental and public recognition, which, in turn, will bind public officials to prevent and prosecute against anti-lesbian bias. The adoption of CEDAL also will modify the current discourse and improve the lives of all women by expanding the world's limited conception of womanhood.

By characterizing lesbian rights as human rights, CEDAL signifies an enormous step forward in the lesbian struggle for equality. In the words of Wayne Morgan, a gay rights activist, "human rights law gives legitimacy to our claims to be treated equally,"⁸⁶ and the same holds true in regards to lesbian equality. In order to achieve that equality, advocates must first convince lawmakers and their citizenry to understand lesbian rights as human rights. As explained by a manual for women's rights activists, "[t]he history of human rights essentially traces two intertwining streams of human development: one stream represents the struggle to name previously unnamed rights and to gain their acceptance as human rights; the other stream represents the ongoing struggle to ensure the enforcement of established rights."⁸⁷ However, each struggle informs and enforces the other, as "[t]he process of gaining recognition of a right leads to better enforcement and the process of enforcing leads to greater recognition of the rights."⁸⁸ Since the world does not yet consider lesbian rights as "established rights," advocates find themselves in the first stream. CEDAL gives these advocates the space to articulate clearly the rights that lesbians deserve but currently lack. Creating such a text will lead to the world's acknowl-

86. Morgan, *supra* note 34, at 208-09.

87. WOMEN'S HUMAN RIGHTS STEP BY STEP 10 (Margaret A. Schuler & Dorothy Q. Thomas eds., 1997).

88. *Id.*

edgment of lesbian rights as human rights, which, in turn, will promote the enforcement of such rights and protect lesbians from discrimination.

In addition to establishing lesbian rights as human rights, CEDAL exposes and combats current harms committed against lesbians. First and foremost, the document will inform lesbians that they have certain rights and are entitled to enjoy them. Practically speaking, lesbians cannot meaningfully exercise their rights or challenge violations until they are aware of them. The articulation of such rights will help lesbians ascertain the cultural practices and national laws in their own countries that currently justify discrimination. Secondly, by following the examples set by prior human rights instruments, CEDAL will implement mechanisms to monitor nations' compliance and allow individuals to seek redress for violations. Doing so will give human rights advocates the necessary tools to investigate and prosecute crimes committed against lesbians. Thirdly, by delineating lesbian rights and forcing nations to implement compliance mechanisms, the public citizenry will, in turn, be educated about these issues. Although lingering homophobia may endure at first, greater acceptance of lesbians will increase over time and pressure nation states to improve the enforcement of lesbian human rights.

By ratifying CEDAL, member nations will bind themselves legally and morally to the elimination of discrimination against lesbians. Much like the Convention on the Elimination of all forms of Racial Discrimination ("CERD") and CEDAW, CEDAL will create and enforce the member states' obligations toward protecting their lesbian citizens. Such obligations could encompass everything from providing the right to marry to educating health care providers to banning negative portrayals of lesbians in the media. By complying with the monitoring mechanisms described above, the international community will identify governments that fail to uphold their obligations and coerce them to hasten the elimination of discrimination. Observing their governments' recognition and enforcement of lesbian human rights will sway the public's opinion away from the ills of homophobia and towards greater acceptance and appreciation of lesbians and their families. Over time, upholding the human rights of lesbians will be understood as not only a legal obligation, but a moral one as well.

Creating a separate human rights document focusing specifically on lesbian rights enables advocates to modify the current

human rights discourse and benefit all women. Instead of trying to insert lesbianism into the rigid representations of women in the instruments discussed previously, CEDAL provides the space to imagine broader and more diverse opportunities for women in general. By encouraging the approval and equality of various family structures, including single and married women, with or without biological or adopted children, working inside or outside the home in every sector, the opportunities for all women to choose how to conduct their lives expand dramatically. Women will no longer be restricted by the gender and sexual roles imposed upon them by the current human rights instruments. Such freedom will enable them to "begin to break down the hierarchies of oppression in international human rights law."⁸⁹

As I write this in the winter of 2004 in the United States, shortly after the re-election of an anti-lesbian president⁹⁰ and eleven states' adoption of anti-lesbian legislation,⁹¹ I understand that the chances of an international delegation drafting CEDAL and lobbying for its acceptance are slim. I further concede that, based upon certain nations' resistance to CEDAW and the rise of religious fundamentalism around the globe, the probability that a critical number of nations will ratify such a document is even slimmer. However, I still believe that the exercise of imagining and drafting CEDAL is extremely valuable because it enables lesbian activists to think deeply and articulate clearly what we want from our international community. We cannot begin to demand protection of our human rights and challenge existing discrimination without first delineating exactly what those rights encompass.

89. Morgan, *supra* note 34, at 225.

90. President George W. Bush, who supports amending the U.S. Constitution to ban homosexual couples from civil marriage, defeated Senator John F. Kerry for the presidency on November 3, 2004. During the presidential debates, the mere word "lesbian" caused a firestorm when Senator Kerry invoked the lesbian daughter of President Bush's running mate, Vice President Cheney, in responding to whether or not homosexuality is a choice. *See generally* Joe Garofoli, *Debate Flap: Kerry hit for mentioning Cheney's gay child*, S.F. CHRON., Oct. 15, 2004, at A1.

91. Eleven states in the U.S. voted to amend their state constitutions to ban homosexual couples from marrying in 2004. *See generally* State Legislation/Ballot Initiatives Affecting GLBT People, *available at* http://www.hrc.org/Template.cfm?Section=civil_Marriage&Template=/CustomSource/Law/LawLegislationSearch.cfm (last visited Mar. 24, 2004).

IV. EXPLANATION AND DRAFT OF CEDAL

By determining the fundamental principles of lesbian human rights and using CERD and CEDAW as blueprints, I compose my abbreviated version of CEDAL. The preamble encompasses several statements that originate from CERD and CEDAW,⁹² but I have expanded their scope to recognize lesbians and the intersections among various axes of identity. I then define “lesbian” and “discrimination against lesbians” in ways to achieve the broadest protections possible for all women who identify romantically with other women. The three substantive provisions explore rights to self-determination, sexuality, and health, which represent the bedrock tenets of a fully complete lesbian human rights doctrine. In order to discuss each of these sections, I break my draft of CEDAL into its various components and deconstruct each one-by-one. The document in full, which I present as an appendix to this paper, should be understood as only a portion of a potentially longer and more comprehensive instrument.

CEDAL’s preamble introduces the notion and importance of lesbian human rights in strong and unwavering language. By identifying the human rights instruments that exist currently, the preamble situates CEDAL into the natural progression of expanding human rights. In the words of activist Charlotte Bunch, “[h]uman rights . . . are not static, nor are they the property of any one group . . . their dynamism and ongoing relevance stem from the fact that more people are claiming them and, in the process, expanding the meaning of ‘rights’ to incorporate their own hopes and needs.”⁹³ The text of the preamble reads as the following:

Considering that the Charter of the United Nations is based on the principles of dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organization, for the achievement of one of the purposes of the United Nations, which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all,

Considering that the Universal Declaration of Human Rights affirms the principle of inadmissibility of discrimination and proclaims that all human beings are born free and equal in

92. See generally CEDAW, *supra* note 25; CERD, *supra* note 28.

93. Charlotte Bunch, *Transforming Human Rights from a Feminist Perspective*, in *WOMEN’S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES* 11, 13 (Julie Peters & Andrea Wolper eds., 1995).

dignity and rights and that everyone is entitled to the rights and freedoms set forth therein, without distinction of any kind, Considering that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination,

Considering that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of all human beings to enjoy economic, social, cultural, civil and political rights,

Concerned, however, that despite these various instruments, extensive discrimination against lesbians continues to exist,

Convinced that any doctrine of superiority based on sexual orientation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for homophobia, in theory or practice, anywhere,

Affirming that discrimination against lesbians violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of lesbians, on equal terms with heterosexuals, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of lesbians in the service of their countries and of humanity,

Alarmed by manifestations of anti-lesbian discrimination in most areas of the world and by governmental policies based on heterosexual superiority or hatred,

Emphasizing that the eradication of all forms of racism, racial discrimination, sexism, classism, ablism, religious discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of all human beings,

Affirming that discrimination between human beings on the grounds of sexual orientation, gender, sex, race, color, ethnic origin, religion, ability, or class is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State,

Convinced that the existence of any barriers due to sexual orientation, gender, sex, race, color, ethnic origin, religion, ability, class, or any other arbitrary criteria is repugnant to the ideals of any human society,

Convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of all human beings, regardless of sexual orientation,

Resolved to adopt all necessary measures for speedily eliminating discrimination against lesbians in all its forms and manifestations, and to prevent and combat anti-lesbian doctrines and practices in order to promote understanding between all

people and to build an international community free from all forms of discrimination,
 Determined to implement the principles set forth in the Declaration on the Elimination of Discrimination against Lesbians and to adopt the measures required for the elimination of such discrimination in all its forms and manifestations,
 Have agreed on the following:

I compose the preamble by adopting and combining provisions from both CERD and CEDAW. I intentionally refer to political, social, cultural, and civil rights, just as CEDAW does, in order to assert that lesbian human rights embody all of those forms.⁹⁴ However, whereas CERD and CEDAW indicate that prior human rights texts clearly prohibit discrimination based on race and sex,⁹⁵ CEDAW cannot make such a statement because there is no such ban against anti-lesbian bias. In response, I find it important to declare that discrimination against lesbians exists, that a doctrine on the superiority of one sexual orientation over another is a fallacy, and that discrimination on such a basis violates human rights. These statements are inspired by similar language in CERD and CEDAW, although altered appropriately to refer to lesbianism. CEDAW also motivates the reference to "family" in paragraph seven, but I use it here to embody broader derivations of the family structure than are accepted currently.⁹⁶ Ideally, the term encompasses same-sex partners with and without children, single parents, and other non-traditional versions of the nuclear family.

94. CEDAW, *supra* note 25, at ¶ 3: ". . . to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights . . ."

95. CERD, *supra* note 28, at ¶ 1: "Considering that the Charter of the United Nations is based on the principles of the dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organization, for the achievement of one of the purposes of the United Nations which is to *promo* and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion, . . ."; CEDAW, *supra* note 25, at ¶ 2: "Noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex, . . ."

96. CEDAW, *supra* note 25, at ¶ 13: "Bearing in mind the great contribution of women to the welfare of the family and to the development of society, so far not fully recognized, the social significance of maternity and the role of both parents in the family and in the upbringing of children, and aware that the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole, . . ."

The subsequent three paragraphs acknowledge the intersections that subsist among one's various and diverse axes of identity, including sexual orientation, race, sex, religion, class, ability, and ethnic origin. Such recognition is vital because discrimination against lesbians takes many forms and may cross multiple aspects of a lesbian's identity. Just as any woman may encounter discrimination based not only on sex but also on her religion or ethnicity, bias against lesbians is indelibly fused with discrimination based on sex, gender, race, ability, class, or any other arbitrary criteria. Positively appreciating a lesbian's multi-faceted identity also illustrates that she is a complex person who cannot be distilled to a single, identifying characteristic.

The preamble closes with two declarative paragraphs that call for nation states to end discrimination against lesbians by "adopting all necessary measures"⁹⁷ and implementing the provisions set forth in the document. Such language, lifted from CERD and CEDAW, demands that nation states proactively work towards ending discrimination against lesbians in order to promote a more peaceful and cohesive international community.⁹⁸ The particular areas to which nations must commit their efforts follow in the subsequent articles.

Article 1 of CEDAL defines "lesbian" and "discrimination against lesbians" in the broadest terms possible in order to ensure coverage of all women who identify romantically with other women. The text reads as the following:

For the purposes of the present Convention, the term "lesbian" shall mean any woman-identified person who engages in or is perceived to engage in any romantic and/or sexual relationship with another woman-identified person at any time in her life and for any duration of time.

For the purposes of the present Convention, the term "discrimination against lesbians" shall mean any distinction, exclusion or restriction made on the basis of sexual orientation and/or sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by lesbians, on a

97. *See id.* at 17.

98. CERD, *supra* note 28, at ¶ 10: "Resolved to adopt all necessary measures for speedily eliminating racial discrimination in all its forms and manifestations, and to prevent and combat racist doctrines and practices in order to promote understanding between races and to build an international community free from all forms of racial segregation and racial discrimination, . . ."; CEDAL, *supra* note 24, at ¶ 15: "Determined to implement the principles set forth in the Declaration on the Elimination of Discrimination against Women and, for that purpose, to adopt all the measures required for the elimination of such discrimination in all its forms and manifestations, . . ."

basis of equality of heterosexual men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or other field.

I specifically choose “woman-identified person” in order to embody transgender women: persons who are born male but identify as female. The phrase “engages in or is perceived to engage in” is meant to protect those who are thought by others to be lesbian, whether or not the woman identifies herself as such. I write “romantic and/or sexual relationship” to encompass everyone from asexual women who make female friendships prime in their lives to sexually active women who do not engage in extended relationships. Although the “lesbian experience”⁹⁹ extends beyond relationships with women,¹⁰⁰ the centrality of women in one’s life is a focal point and common denominator among lesbians. I purposefully add the temporal references in order to welcome a spectrum of sexualities and express women’s freedom to choose a romantic partner of any gender throughout their lives. Thus, CEDAL applies not only to self-identified or perceived lesbians, but also to bisexual and heterosexual women who may enter a romantic or sexual relationship with other women at some point in their lives.

The definition of “discrimination against lesbians” is a lesbian version of CEDAW’s definition of “discrimination against women.”¹⁰¹ In addition to discrimination on the basis of “sex,” I add “sexual orientation,” and I discuss the equality between heterosexuals and homosexuals, as opposed to strictly between men and women. I keep the reference to “sex” to illustrate that bias against lesbians fuses with sex discrimination, something that even gay rights activists tend to overlook.¹⁰² I do not make any other changes to that definition because it suffices by calling for complete equality in all spheres of human rights.

Article II offers the most important and fundamental principle of CEDAL: the right to lesbian self-determination. Although the right to self-determination is “not included in the human

99. See Rich, *supra* note 6, at 34.

100. See generally LILLIAN FADERMAN, *TO BELIEVE IN WOMEN: WHAT LESBIANS HAVE DONE FOR AMERICA – A HISTORY* (1999).

101. CEDAW, *supra* note 25, at art. 1: “For the purposes of the present Convention, the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

102. See *supra* Part II.

rights catalogues of the international and regional treaties dealing with human rights,"¹⁰³ it represents "[t]he principle which is basic in human rights and which underlies the various specific rights spelled out"¹⁰⁴ in such documents. As scholar Pieter Van Dijk declares, "[t]he right to self-determination of the individual is a basic human right,"¹⁰⁵ and it "is a pre-condition for an effective and full enjoyment of other human rights, both civil and political, and economic, social and cultural rights."¹⁰⁶ In order to enjoy any other rights, therefore, lesbians first must receive the same respect for their human dignity and freedom as non-lesbians, and a right to self-determination accomplishes these aims. I delineate lesbian self-determination in Article II with the following language:

States Parties undertake to adopt immediate and effective measures to ensure the self-determination of all lesbians, and, in particular, the right to:

- (a) openly express their lesbianism;
- (b) participate fully and openly in all aspects of society;
- (c) publicly associate and create lesbian-specific spaces;
- (d) legal recognition of partnerships and families;
- (e) equal treatment to that of heterosexuals under the law.

The five subsections to this provision highlight areas in which lesbian self-determination must be realized. Subsection (a)'s "openly express" encompasses everything from modes of dress¹⁰⁷ to public displays of affection between lesbians. The right to participate fully and openly in society, as declared by subsection (b), embodies public and private rights, such as the right to hold public office, to maintain a job, to vote, to enter into private relationships, and to raise a family. The right to publicly associate in subsection (c) refers to the freedom to gather for social events and to organize politically, whether it be in a public park or at a private lesbian bar. Legal recognition of partnerships and families in subsection (d) includes, among other things, the rights to civil marriage, to serve as foster and adoptive par-

103. Pieter Van Dijk, *The Treatment of Homosexuals under the European Convention on Human Rights*, in *HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE* 179, 183 (Kees Waaldijk & Andrew Clapham eds., 1993).

104. *Id.*, citing European Court of Human Rights Judge Martens' dissenting opinion in *Cossey v. U.K.*, 184 Eur. Ct. H.R. (ser. A) 1, 24-25 (1990).

105. Dijk, *supra* note 103, at 183.

106. *Id.*

107. Women may express their lesbianism by choosing clothing or hairstyles that do not follow accepted gender roles, such as wearing a man's suit or shaving one's head. See generally LILLIAN FADERMAN, *ODD GIRLS AND TWILIGHT LOVERS: A HISTORY OF LESBIAN LIFE IN TWENTIETH-CENTURY AMERICA* (1991).

ents, and to pursue alternative methods of pregnancy. Equal treatment under the law, stipulated by subsection (e), is fairly self-explanatory: current interpretation of laws unfairly discriminates against lesbians,¹⁰⁸ and such disparate treatment can no longer be tolerated.

Eliminating discrimination based upon sexual orientation generates the very idea of CEDAL, and Article III, which stipulates the right to lesbian sexuality, goes to the heart of that purpose. The prevalence of compulsory heterosexuality¹⁰⁹ and the women's rights movement's failure to acknowledge sexual rights beyond reproductive freedoms necessitate such a provision in CEDAL. Adrienne Rich, who coined the term "compulsory heterosexuality," asserts that "[h]eterosexuality has been forcibly and subliminally imposed on women, yet everywhere women have resisted it, often at the cost of physical torture, imprisonment, psychosurgery, social ostracism, and extreme poverty."¹¹⁰ At least one international legal authority has documented it: the Brussels tribunal on Crimes against Women named compulsory heterosexuality as one of the "crimes against women" in 1976.¹¹¹ The women's movement has failed to respond appropriately by refusing to appreciate lesbian sexuality.¹¹² Instead, feminists around the world have conflated reproductive freedom with sexual rights, leaving little or no room for non-procreative sexual acts. As some advocates observe, "[b]y linking sexual rights to heterosexual couples' reproductive rights, lesbians are effectively excluded."¹¹³

Article III aims to rectify that exclusion by acknowledging and valuing lesbian sexuality. The article declares the right to lesbian sexuality with the following terms:

States Parties undertake to adopt immediate and effective measures to ensure lesbians' right to be sexual, and, in particular:

- (a) respect lesbianism as legitimate and equal to heterosexuality;
- (b) repeal laws that explicitly criminalize same-sex acts and repeal or amend, where appropriate, laws that are construed specially to punish lesbianism;

108. *See supra* Part I.

109. *See generally* Rich, *supra* note 6.

110. Rich, *supra* note 6, at 36.

111. *Id.*

112. *See supra* Part II.

113. Miller, *supra* note 56, at 270.

- (c) prevent all forms of rape and sexual abuse, especially those that are meant to alter one's lesbianism;
- (d) regulate all forms of pornography, especially those that fetishize lesbians, and stereotyped and demeaning images of lesbians in the mass media.

Article III recognizes that lesbians deserve the freedom to develop and explore their sexuality privately and express it publicly. First and foremost, lesbianism must be regarded as equally legitimate and valuable as heterosexuality, as expressed by subsection (a). True social, political, cultural, and civil equality for lesbians will never be realized until lesbians' choices and lifestyles are as respected and cherished as those made by heterosexuals. Subsection (b) calls for an end to criminalizing same-sex acts; although few nations explicitly legislate against lesbian sex, many persecute lesbians for their sexual activities under the guise of other laws.¹¹⁴ Subsection (c) demands that nations stop all forms of rape and sexual abuse in order that women enjoy true autonomy over their bodies and sexual freedom. I add the clause "especially those that are meant to alter one's lesbianism" to highlight the axes of sex and sexuality upon which such a crime sits: men rape lesbians not only out of sex discrimination, but also on the basis of anti-lesbian violence. Finally, subsection (d) addresses the harmful effects of pornography and stereotypical images of lesbians in the media. BDPA contains similar language¹¹⁵ and inspires this provision, which is relevant here because discrimination against lesbians manifests and perpetuates itself in demeaning media portrayals.¹¹⁶

The fourth and final Article concerns the right to lesbian health. In the words of three health care activists, "'health' issues faced by lesbians are often inextricable from their most basic human rights."¹¹⁷ Around the world, medical professionals have understood lesbianism as a disease, one that may be treated by rape, other forms of physical violence, electrotherapy, or torture.¹¹⁸ Even in places where such violent measures are no longer executed, lesbians regularly encounter "ostracism, invasive questioning, rough physical handling, derogatory comments,

114. See *supra* Part I.

115. BDPA, *supra* note 26, at ¶ 243(f): "Take effective measures or institute such measures, including appropriate legislation against pornography . . ."

116. See generally <http://www.afterellen.com/> (tracking the portrayal of lesbians in entertainment and the media).

117. Miller, *supra* note 56, at 265.

118. See generally *id.*

breaches of confidentiality, shock, embarrassment, unfriendliness, pity, condescension, and fear in health care situations.”¹¹⁹ Lesbians respond to this mistreatment by delaying medical care or risking potential misdiagnosis by hiding their sexual orientation.¹²⁰ Even those professionals who do not harbor such bigotry may not be able to provide adequate care.¹²¹ A severe lack of knowledge about lesbian health plagues the medical community, and providers must rely upon information relating to heterosexual women, which “had been defined to a large degree in relationship to reproductive health.”¹²² As a result, “[l]esbians are an overlooked and underserved population whose health care needs are unique and must be met.”¹²³

Article IV of CEDAL seeks to remedy the medical community’s ignorance by guaranteeing all lesbians a right to health. The Article does so with the following language:

States Parties undertake to adopt immediate and effective measures to promote lesbians’ right to health, and, in particular:

- (a) ensure freedom from rape, torture, and other bodily harm;
- (b) prevent so-called “therapies” intended to alter one’s lesbianism;
- (c) prevent discrimination and prejudice by health care providers;
- (d) inform health care providers of lesbian-specific health concerns;
- (e) provide mental health counseling for all issues.

Subsection (a) calls for the freedom from rape, torture, and other bodily harm, all of which have been used by public and private actors against lesbians in feeble attempts to eradicate lesbianism.¹²⁴ Subsection (b) demands the cessation of another form of abuse, the supposed “therapies” employed to “cure” one’s lesbianism, such as electroshock treatment or rape.¹²⁵ Subsection (c)

119. Patricia E. Stevens & Joanne M. Hall, *A Critical Historical Analysis of the Medical Construction of Lesbianism*, in *WOMEN’S HEALTH, POLITICS AND POWER: ESSAYS ON SEX/GENDER, MEDICINE AND PUBLIC HEALTH* 233 (Elizabeth Fee & Nancy Krieger eds., 1994).

120. M. Morag Robertson, *Lesbians as an Invisible Minority in the Health Services Arena*, in *LESBIAN HEALTH: WHAT ARE THE ISSUES?* 65 (Phyllis Noerager Stern ed., 1993).

121. *Id.*

122. Miller, *supra* note 56, at 270.

123. Vicki A. Lucas, *An Investigation of the Health Care Preferences of the Lesbian Population*, in *LESBIAN HEALTH: WHAT ARE THE ISSUES?* 131, 138 (Phyllis Noerager Stern ed., 1993).

124. *See supra* Part I.

125. *Id.*

aims to end discrimination against lesbians by health care providers, thereby addressing the problems discussed above. This goal will only be accomplished by educating providers about lesbian-specific concerns, which subsection (d) makes explicit. Lastly, Article IV incorporates mental health as an integral part of lesbian health via subsection (e). Lesbians require mental health care to grapple with gender and sexual identity formation, coming out issues, and trauma from sexual assaults.¹²⁶

By asserting the rights to lesbian self-determination, sexuality, and health, my draft of CEDAL contains the fundamental principles of such an instrument. These areas represent the foundation upon which other provisions may be built, like those concerning economics, education, and religion. If CEDAL ever becomes a reality, its drafters must undertake these subjects and numerous others in order to create a detailed and comprehensive human rights document.

V. CONCLUSION

Discrimination against lesbians permeates every corner of the globe, and the existing human rights regime has done little to combat it. Whereas the major human rights instruments, including UDHR, CEDAW, and BDPA, purport to protect and respect all women, they render lesbians invisible by failing to acknowledge their lives or concerns. CEDAL rectifies that error by making lesbians its focal point, highlighting the rights that they deserve, and naming the abuses that afflict them. By informing lesbians of their rights, exposing the harms that they suffer, and holding nations accountable for combating such ills, CEDAL pushes and expands the current human rights discourse. Asserting that lesbian rights are human rights brings the world closer to its ultimate goal of respecting and ensuring the rights of all persons. As activist Charlotte Bunch declares, "[i]f the human rights of any group are left behind, the human rights of all are incomplete."¹²⁷ Therefore, achieving lesbian human rights will benefit not only lesbians, but all of the world's citizens.

126. See generally Susan E. Gentry, *Caring for Lesbians in a Homophobic Society*, in *LESBIAN HEALTH: WHAT ARE THE ISSUES?* 131, 138 (Phyllis Noerager Stern ed., 1993).

127. Bunch, *Forward*, *supra* note 9, at viii.

APPENDIX

CONVENTION ON THE ELIMINATION OF ALL FORMS
OF DISCRIMINATION AGAINST LESBIANS

The States Parties to this Convention,

Considering that the Charter of the United Nations is based on the principles of dignity and equality inherent in all human beings, and that all Member States have pledged themselves to take joint and separate action, in co-operation with the Organization, for the achievement of one of the purposes of the United Nations, which is to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all,

Considering that the Universal Declaration of Human Rights affirms the principle of inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to the rights and freedoms set forth therein, without distinction of any kind,

Considering that all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination,

Considering that the States Parties to the International Covenants on Human Rights have the obligation to ensure the equal rights of all human beings to enjoy economic, social, cultural, civil and political rights,

Concerned, however, that despite these various instruments, extensive discrimination against lesbians continues to exist,

Convinced that any doctrine of superiority based on sexual orientation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for homophobia, in theory or practice, anywhere,

Affirming that discrimination against lesbians violates the principles of equality of rights and respect for human dignity, is an obstacle to the participation of lesbians, on equal terms with heterosexuals, in the political, social, economic and cultural life of their countries, hampers the growth of the prosperity of society and the family and makes more difficult the full development of the potentialities of lesbians in the service of their countries and of humanity,

Alarmed by manifestations of anti-lesbian discrimination in most areas of the world and by governmental policies based on heterosexual superiority or hatred,

Emphasizing that the eradication of all forms of racism, racial discrimination, sexism, classism, ablism, religious discrimination, colonialism, neo-colonialism, aggression, foreign occupation and domination and interference in the internal affairs of States is essential to the full enjoyment of the rights of all human beings,

Affirming that discrimination between human beings on the grounds of sexual orientation, gender, sex, race, color, ethnic origin, religion, ability, or class is an obstacle to friendly and peaceful relations among nations and is capable of disturbing peace and security among peoples and the harmony of persons living side by side even within one and the same State,

Convinced that the existence of any barriers due to sexual orientation, gender, sex, race, color, ethnic origin, religion, ability, class, or any other arbitrary criteria is repugnant to the ideals of any human society,

Convinced that the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of all human beings, regardless of sexual orientation,

Resolved to adopt all necessary measures for speedily eliminating discrimination against lesbians in all its forms and manifestations, and to prevent and combat anti-lesbian doctrines and practices in order to promote understanding between all people and to build an international community free from all forms of discrimination,

Determined to implement the principles set forth in the Declaration on the Elimination of Discrimination against Lesbians and to adopt the measures required for the elimination of such discrimination in all its forms and manifestations,

Have agreed on the following:

Article 1

For the purposes of the present Convention, the term "lesbian" shall mean any woman-identified person who engages in or is perceived to engage in any romantic and/or sexual relationship with another woman-identified person at any time in her life and for any duration of time.

For the purposes of the present Convention, the term "discrimination against lesbians" shall mean any distinction, exclusion or restriction made on the basis of sexual orientation and/or

sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by lesbians, on a basis of equality of heterosexual men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or other field.

Article 2

States Parties undertake to adopt immediate and effective measures to ensure the self-determination of all lesbians, and, in particular, the right to:

- (a) openly express their lesbianism;
- (b) participate fully and openly in all aspects of society;
- (c) publicly associate and create lesbian-specific spaces;
- (d) legal recognition of partnerships and families;
- (e) equal treatment to that of heterosexuals under the law.

Article 3

States Parties undertake to adopt immediate and effective measures to ensure lesbians' right to be sexual, and, in particular:

- (a) respect lesbianism as legitimate and equal to heterosexuality;
- (b) repeal laws that explicitly criminalize same-sex acts and repeal or amend, where appropriate, laws that are construed specially to punish lesbianism;
- (c) prevent all forms of rape and sexual abuse, especially those that are meant to alter one's lesbianism;
- (d) regulate all forms of pornography, especially those that fetishize lesbians, and stereotyped and demeaning images of lesbians in the mass media.

Article 4

States Parties undertake to adopt immediate and effective measures to promote lesbians' right to health, and, in particular:

- (a) ensure freedom from rape, torture, and other bodily harm;
- (b) prevent so-called "therapies" intended to alter one's lesbianism;
- (c) prevent discrimination and prejudice by health care providers;
- (d) inform health care providers of lesbian-specific health concerns;
- (e) provide mental health counseling for all issues.

