

THE MYTHOLOGY OF A HUMAN RIGHTS LEADER: HOW THE UNITED STATES HAS FAILED SEXUAL MINORITIES AT HOME AND ABROAD

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Most Americans develop a belief that the United States serves as a human rights leader and role model. This belief is instilled in us through our families, teachers, the media, and the United States government, among others. Similar to other types of mythology, it is based partially in fact and it is influenced by the way people would prefer to see the world. And like many types of mythology, it is not always true.

The United States is typically held to a higher human rights standard than other countries. It is not enough for the United States *to follow* other countries; the United States is expected *to lead* the charge. When it does not lead, other nations may lack the incentive to meet the highest human rights standards because merely meeting our level would be sufficient. They will point to the United States and say, “if it is good enough for them, it is good enough for us.”

This human rights mythology has been fostered by the concept that greater opportunities for equality exist in the United States. Millions of people came to this country because here they were able to achieve levels of financial and social prosperity that were unattainable in other nations. These immigrants believed in proverbs such as “if you work hard you can do anything in America,” and “it doesn’t matter who you are or where you come from in order to succeed in the United States.”

Our mythology is also derived from a number of legal premises, including the Declaration of Independence’s avowal that all men are created equal¹ and the equal protection² and due process³ clauses of the United States Constitution. While most people want to believe that these tenets will always be applied fairly, they, of course, are not.

The role of the United States as a human rights leader has evolved from our early isolationist policies to our increasing involvement in international activities during the twentieth century. The United States was seen as a hero to many for its involvement in both world wars, and the pictures of U.S. soldiers and tanks riding into European towns or rescuing people from concentration camps etched this new status into many peoples’ minds.

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1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

2. U.S. CONST. amend. XIV, § 1.

3. U.S. CONST. amend. V, § 1; *id.* amend. XIV, § 1.

Similarly, our involvement in the United Nations and other peacekeeping actions over the last fifty years,⁴ and our insistence on improving human rights as a prerequisite to our support of nations like China,⁵ have helped to raise our stature as a human rights leader.

Even though the mythology exists, there are many instances where the United States has not been a human rights leader. The United States has a history of discrimination that reaches back as far as our belief that America is the land of opportunity. There was a time when it was perfectly acceptable to openly discriminate against Irish, Italian, Chinese, Jewish, African American, and other groups in our country. While many of the same teachers who taught us about American success stories also taught us about the help wanted signs that stated “No _____ Need Apply,” the mythology of our country as a human rights leader usually prevailed. We would rather remember the hope that brought Japanese people to the United States than the internment camps in which they were held during World War II.

As a young child, I was enthralled with American history and I fully bought into the mythology of the United States as a champion of the underdog and the downtrodden. As an adult, the reality has proved disappointing. I still see the United States participating in international human rights efforts, but I feel as though the United States has failed people who are sexual minorities.⁶ It has failed me as a lesbian, a partner, and a mother. It has failed to grant me the same human rights and the same equality that I was taught to expect from the United States.

HUMAN RIGHTS AND SEXUAL MINORITIES

Many people incorrectly assume that the United States' dedication to human rights and equality extends to all disadvantaged groups. The United States has made advancements in human rights domestically and internationally in many areas, but it continues to fail on the issue of human rights for lesbian, gay, bisexual, and transgender (“LGBT”) individuals.

“[R]ecognition of the inherent dignity and of the equal and inalienable rights of all members of the human family” is the framework of the human

4. “Currently, the United States provides military observers and UN police for eight peacekeeping missions: Liberia (UNMIL), the Democratic Republic of the Congo (MONUC), Sudan (UNMIS), Ethiopia/Eritrea (UNMEE), Haiti (MINUSTAH), Timor-Leste (UNMIT), the Middle East (UNTSO), and Kosovo (UNMIK).” Bureau of Int’l Org. Affairs, Dep’t of State, U.S. Support for UN Peacekeeping, UN Sanctions Committees, and UN Counter-terrorism Efforts, <http://www.state.gov/p/io/pkpg/> (last visited January 24, 2008).

5. See Bureau of East Asian and Pacific Affairs, Dep’t of State, Fact Sheet: Increased Respect for Human Rights in China a U.S. Priority, <http://usinfo.state.gov/eap/Archive/2006/Apr/19-741526.html> (last visited Apr. 21, 2008).

6. *Sexual minorities* are individuals with sexual orientations and gender identities that do not conform with the majority. This includes people who are lesbian, gay, bisexual, or transgender.

rights movement.⁷ Human rights include the ability to work and provide the necessities of life for yourself and your family. These are not “special rights,” as they are often defined by conservatives who oppose LGBT equality,⁸ but the most basic ability of individuals to take care of themselves. As long as bias and prejudice against LGBT people exists without the benefit of legal protections, this basic level of human rights will be difficult for some people to attain.

The United States and many of our elected officials lag far behind the public when it comes to granting rights for sexual minorities. Only twenty states have non-discrimination laws prohibiting some level of discrimination against LGBT people,⁹ and no federal law prohibits this type of discrimination despite repeated attempts to pass the Employment Non-Discrimination Act¹⁰ in the United States Congress since 1994.

The lack of legislative support for LGBT-inclusive non-discrimination laws is surprising in light of the fact that eighty-nine percent of Americans believe that gay or lesbian people should have equal rights in terms of job opportunities.¹¹ This reluctance or unwillingness to pursue legislation that would protect LGBT people is often based on limited, but very vocal, opposition.

On the international level, other countries and regional bodies are leading the way against LGBT discrimination. In 2000, the Council of the European Union, for example, passed a resolution declaring that direct or indirect employment discrimination based on sexual orientation was prohibited.¹² Unlike countries in the European Union, the United States does not have external legal or political influences to move it towards prohibiting LGBT discrimination. In fact, the United States often refuses to acknowledge basic international law, and as a result, the advances in other

7. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

8. See, e.g., Concerned Women for America, Homosexual Special Rights, <http://www.cwfa.org/articledisplay.asp?id=932&department=CWA&categoryid=family> (last visited Apr. 21, 2008); Family Research Council, Oppose Special Rights Bill for Homosexual Conduct, <http://capwiz.com/frc/callalert/index.tt?alertid=10524841> (last visited Jan. 24, 2008).

9. California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, Wisconsin, and the District of Columbia have laws protecting gay, lesbian, and bisexual people from discrimination. Seven of these states prohibit discrimination only on the basis of sexual orientation and the remaining thirteen states cover sexual orientation and gender identity. These laws usually prohibit discrimination in the areas of employment, housing and public accommodations. National Gay and Lesbian Task Force, Issue Map: State Non-Discrimination Laws in the U.S. (Jan. 8, 2008), http://www.thetaskforce.org/downloads/reports/issue_maps/non_discrimination_01_08_color.pdf (last visited Apr. 21, 2008).

10. H.R. 3685, 110th Cong. (1st Sess., 2007). This version of the legislation prohibited sexual orientation discrimination, but did not include gender identity discrimination.

11. Lydia Saad, *Tolerance of Gay Rights at High-Water Mark*, GALLUP NEWS SERVICE, May 29, 2007, available at <http://www.gallup.com/poll/27694/Tolerance-Gay-Rights-HighWater-Mark.aspx>.

12. Council Directive 2000/78, Establishing a General Framework for Equal Treatment in Employment and Occupation, 2000 O.J. (L 303) 16 (EC), available at http://ec.europa.eu/employment_social/news/2001/jul/directive78ec_en.pdf.

parts of the world have little impact domestically. This bias was demonstrated in Justice Scalia's dissenting opinion in *Lawrence v. Texas*,¹³ in which he decried the majority opinion's discussion of international law as it related to LGBT people and sodomy laws.¹⁴

It is disappointing that the U.S. government and some of its judges are unwilling to acknowledge the human rights progress being made by other nations. Just because an idea does not originate in the United States does not make that idea a foreign fad without basis or merit.¹⁵ Since the federal government has not granted non-discrimination protections for LGBT people, progress will have to continue at the state level in order to create "home grown" support for recognizing the human rights of sexual minorities in the United States.

RELATIONSHIP RECOGNITION FOR SAME-SEX COUPLES

Some of the greatest disparities between human rights advances abroad and in the United States can be seen in relationship recognition issues. When it comes to relationship recognition rights, the United States is being left behind by most European nations and other countries that are considered to be leaders in this emerging human rights area.

Countries such as Canada, the Netherlands, Belgium, Spain and South Africa are leading the way for relationship recognition by granting marriage equality to same-sex couples.¹⁶ Other nations such as Denmark, Finland, France, Germany, Iceland, Israel, Norway, Portugal, Sweden, Switzerland, the United Kingdom and Uruguay do not grant the legal status of marriage to same-sex couples, but they grant some level of relationship recognition providing all or some of the rights often associated with civil marriage.¹⁷

International organizations have also ruled that denying relationship recognition rights violates their tenets. For example, the United Nations' Human Rights Committee ruled that Australia, in denying pension benefits to the surviving same-sex partner of a war veteran, violated anti-discrimination principles codified in the International Covenant on Civil and Political Rights.¹⁸

13. 539 U.S. 558, 586-605 (2003) (Scalia, J., dissenting).

14. In his dissent, Justice Scalia affirmed that constitutional entitlements do not "spring into existence . . . because *foreign nations* decriminalize conduct." *Id.* at 598.

15. Justice Scalia further states in *Lawrence* that "this Court . . . should not impose foreign moods, fads, or fashions on Americans." *Id.* (quoting *Foster v. Florida*, 537 U.S. 990, 990 (2002) (Thomas, J., concurring in denial of certiorari)).

16. See Hope Lozano-Bielat & David Masci, *Same-Sex Marriage: Redefining Legal Unions Around the World*, PEW RESEARCH CENTER (July 11, 2007), available at <http://pewresearch.org/pubs/541/gay-marriage>.

17. Marriage Equality USA, Get the Facts on Marriage, <http://www.marriageequality.org/meusa/facts.shtml?marriage-status> (last visited Apr. 17, 2008).

18. *Young v. Australia*, U.N. Human Rights Comm., Communication No. 941/2000, U.N. Doc. CCPR/C/78/D/941/2000 (2003).

The countries and international bodies cited above are at the vanguard of these human rights developments. Some nations are reluctantly joining them or being forced to join them by human rights directives outside their countries. Even countries such as Spain, where religious influence is strong, are enacting laws recognizing same-sex couples.¹⁹

At the same time as the above countries are granting relationship recognition rights to sexual minorities, other parts of the world face a very different reality. In much of the world, it is still against the law for people to engage in same-sex sexual activities,²⁰ and legal relationship recognition is unattainable for the foreseeable future. In some nations, lesbian and gay people are still routinely thrown in jail or sentenced to death because of their sexual orientation or for engaging in same-sex sexual activities or relationships.²¹ And other countries such as Nigeria are proposing even stricter laws against LGBT people.²²

The U.S. government is not acting as a human rights leader in the area of relationship recognition. In fact, it is bucking the trend of most other countries that are typically at the forefront of human rights. The United States not only lacks a national law granting any rights to same-sex couples, it has prevented same-sex couples from receiving federally recognized marriages by passing the Defense of Marriage Act ("DOMA") in 1996.²³ DOMA defines marriage as "only a legal union between one man and one woman as husband and wife, and the word 'spouse' refers only to a person of the opposite sex who is a husband or a wife."²⁴ DOMA not only limits the federal recognition of marriage to a man and a woman, but it further states that

[n]o State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State,

19. See Ley 13/2005, de 1 de julio, por la que se modifica el Código Civil en material de derecho a contraer matrimonio (Law of July 1 modifying the Civil Code in the area of contracting marriage) (B.O.E. 2005, 157), available at http://www.unex.es/unex/gobierno/direccion/vicedoc/archivos/ficheros/igualdad/legislacion/ley13_2005.pdf.

20. See Sodomy Laws Around the World, <http://www.sodomylaws.org> (last visited Jan. 24, 2008).

21. See, e.g., Dominic Kennedy, *Gays Should Be Hanged, Says Minister*, TIMES (London), Nov. 13, 2007, at 36 (discussing reported executions of gays in Iran); Lydia Polgreen, *Nigerian Anglicans Seeing Gay Challenge to Orthodoxy*, N.Y. TIMES, Dec. 18, 2005, § 1, at 3 (reporting that gay men and lesbians in Nigeria are often arrested and jailed).

22. A Nigerian law was proposed that may have made it illegal for any LGBT person to eat or socialize with someone of the same sex. See *New Law and Old Prejudices Threaten Nigeria's Gay Community*, INT'L HERALD TRIB., Dec. 11, 2006, available at http://www.iht.com/articles/ap/2006/12/11/africa/AF_FEA_GEN_Nigerian_and_Gay.php.

23. Defense of Marriage Act, 1 U.S.C. § 7, 28 U.S.C. § 1738C (1996).

24. 1 U.S.C. § 7.

territory, possession, or tribe, or a right or claim arising from such relationship.²⁵

The DOMA law is an example of the backlash that takes place whenever a step forward in the area of relationship recognition occurs in this country. Congress passed the federal law in response to a Hawaii Supreme Court decision holding that denying marriage rights to same-sex couples implicated equal protection concerns.²⁶ Shortly after the federal law was passed, state legislatures throughout the country began passing “mini-DOMA” laws prohibiting marriage equality in their states and, in some cases, “super-DOMA” laws, preventing any legal recognition of unmarried couples.²⁷ Additional states passed mini-DOMA laws²⁸ after Vermont began offering civil unions at the behest of its Supreme Court in 1999.²⁹ Currently, thirty-eight states have DOMA laws.³⁰

Another round of backlash legislation³¹ began after the Massachusetts Supreme Court ruled that same-sex couples must be granted the same rights and responsibilities of marriage as heterosexual couples.³² Some members of the United States Senate and House of Representatives have introduced “Federal Marriage Amendments” to prohibit relationship recognition for same-sex couples in the U.S. Constitution.³³ While the attempts to amend the U.S. Constitution in the last few years have failed, many states have successfully amended their state constitutions to prohibit marriage equality, and some states have gone even further by also prohibiting relationship recognition of any kind for unmarried couples.³⁴

As these efforts to strip LGBT people of basic human rights have continued, gradually more states are recognizing same-sex relationships in a vari-

25. 28 U.S.C. § 1738C.

26. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993); H.R. REP. NO. 104-664, at 2 (1996) (describing DOMA as a response to *Baehr*).

27. From 1996 to 1998, Arizona, Delaware, Georgia, Idaho, Illinois, Kansas, Michigan, Missouri, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Arkansas, Indiana, Maine, Minnesota, Mississippi, North Dakota, Virginia, Alabama, Hawaii, Iowa, Kentucky and Washington passed mini-DOMA laws. Alaska, Florida and Montana passed super-DOMA laws. National Gay and Lesbian Task Force, Issue Map: Anti-Gay Marriage Measures in the U.S. (Sept. 25, 2007), http://thetaskforce.org/downloads/reports/issue_maps/GayMarriage_09_25_07.pdf [hereinafter *Anti-Gay Marriage Measures*] (last visited Apr. 21, 2008).

28. Louisiana, California, Colorado, West Virginia and Missouri passed mini-DOMA laws from 1999 through 2002. *Id.*

29. See *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

30. *Anti-Gay Marriage Measures*, *supra* note 27.

31. New Hampshire passed a mini-DOMA law and Texas, Virginia and Ohio passed super-DOMA laws in 2003 and 2004. *Id.*

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

33. Eleven such amendments to the U.S. Constitution have been offered in the U.S. House or Senate since 2004. The only pending amendment is H.R.J. Res. 22, 110th Cong. (1st Sess. 2007).

34. Twenty-six states now have constitutional provisions prohibiting marriage equality or more. Twenty-three of these were passed after *Goodridge*, including Missouri, Mississippi, Montana, Oregon, Louisiana, Arkansas, Georgia, Kentucky, Michigan, North Dakota, Ohio, Oklahoma, Utah, Kansas, Texas, Colorado, Tennessee, Alabama, Idaho, South Carolina, South Dakota, Virginia and Wisconsin. *Anti-Gay Marriage Measures*, *supra* note 27.

ety of forms. Massachusetts is still the only state with full marriage equality, but six states now offer civil unions or some other legal status granting all of the rights and responsibilities of marriage, and three additional states and the District of Columbia have more limited recognition rights for same-sex couples.³⁵

It has been only five years since sodomy laws were held unconstitutional in the United States. Even though most states had stricken their sodomy laws by the time *Lawrence v. Texas* was decided, the Supreme Court's previous decision that there was no constitutionally protected right to homosexually sodomy³⁶ influenced relationship recognition laws around the country. After all, it is harder to argue for relationship recognition and human rights when the Supreme Court has ruled that it is permissible to treat sexual minorities like criminals.

The limited human rights advancements for sexual minorities in the United States largely stem from the increased visibility of LGBT people in the last forty years. As the number of LGBT people "coming out" has risen, there has been a corresponding increase in the acceptance of sexual minorities and demands to address the legal needs of same-sex couples.

The progress and simultaneous regression of relationship recognition for same-sex couples in the United States demonstrates the evolving nature of this issue. As the U.S. struggles with this issue in state and federal courts and legislatures, other countries are paving the way by granting relationship recognition to same-sex couples.

HUMAN RIGHTS AND "DON'T ASK, DON'T TELL"

The United States' ban against openly lesbian, gay, and bisexual service members sets it apart from many of its peer countries. While American service members are often asked to defend the human rights of individuals abroad, they lack some of the basic human rights that others enjoy. These Americans are forced to lie and hide their sexual orientation every day in order to keep their jobs or avoid harassment, assault, or in some cases death.

The current U.S. law concerning lesbian, gay, and bisexual service members in the military was passed in 1993.³⁷ What began as a compromise between strong-willed military and congressional leaders and a president who made a campaign promise to end the code of silence in the armed services has been a failure. Like many compromises, "Don't Ask, Don't Tell" has not met the objectives of either side in the debate. More than

35. National Gay and Lesbian Task Force, Issue Map: Relationship Recognition for Same-Sex Couples in the U.S. (Feb. 22, 2008), http://thetaskforce.org/downloads/reports/issue_maps/relationship_recognition_2_08_color.pdf (last visited Apr. 21, 2008).

36. See *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003).

37. See 10 U.S.C. § 654 (1993).

10,000 service members have been discharged under the law since its implementation³⁸ and critical, skilled jobs remain vacant when the country is at war.³⁹

Ironically, while “Don’t Ask, Don’t Tell” continues to silence United States service men and women, our forces are serving next to openly lesbian, gay, and bisexual members of other countries’ militaries. Twenty-two other nations with troops serving in Iraq allow openly lesbian, gay, and bisexual service members in their militaries.⁴⁰ Those individuals are working with United States service members and there have been no reports that their presence negatively impacts our troops’ ability to serve.

When defending the United States’ discriminatory policy in the past, military experts would point to the fact that England had a similar law on the books.⁴¹ In 2000, Britain began allowing lesbian, gay, and bisexual service members to serve openly after the European Court of Human Rights ruled that its military ban violated the European Convention on Human Rights.⁴² British military leaders predicted all types of problems with implementing the new law. None occurred.⁴³

Some people may believe that “Don’t Ask, Don’t Tell” has a limited impact on LGBT people in the United States. Its impact, however, is significant because the federal government has set the standard that it is permissible to proactively discriminate against people based upon their sexual orientation. As long as it remains the law, LGBT rights opponents will rely on “Don’t Ask, Don’t Tell” to discriminate in other areas, such as arguing that it is also permissible for private employers to discriminate against LGBT people.

38. Servicemembers Legal Defense Network, Fact Sheet: Total “Don’t Ask, Don’t Tell” Discharges 1994–2006, http://www.sldn.org/binary-data/SLDN_ARTICLES/pdf_file/3864.pdf (last visited Jan. 24, 2008).

39. See Stephen Benjamin, *Don't Ask, Don't Translate*, N.Y. TIMES, June 8, 2007, at A29.

40. Australia, Austria, Belgium, Britain, Canada, Czech Republic, Denmark, Estonia, Finland, France, Germany, Ireland, Italy, Lithuania, Luxembourg, Netherlands, New Zealand, Norway, Slovenia, Spain, Sweden and Switzerland allow lesbians and gay men to serve. Servicemembers Legal Defense Network, Fact Sheet: Foreign Militaries Which Allow Open Service, <http://www.sldn.org/templates/dadt/record.html?section=145&record=1904> (last visited Jan. 24, 2008).

41. In *Lustig-Prean v. United Kingdom*, the European Court of Human Rights reviewed the British laws:

By virtue of section 1(1) of the Sexual Offences Act 1967, homosexual acts in private between two consenting adults (at the time meaning 21 years or over) ceased to be criminal offences. However, such acts continued to constitute offences under the Army and Air Force Acts 1955 and the Naval Discipline Act 1957 (Section 1(5) of the 1967 Act). Section 1(5) of the 1967 Act was repealed by the Criminal Justice and Public Order Act 1994 (which Act also reduced the age of consent to 18 years). However, section 146(4) of the 1994 Act provided that nothing in that section prevented a homosexual act (with or without other acts or circumstances) from constituting a ground for discharging a member of the armed forces.

Lustig-Prean v. United Kingdom, 29 Eur. Ct. H.R. 548, ¶ 37 (1999).

42. *Id.* ¶ 105.

43. See AARON BELKIN, *Don't Ask, Don't Tell: Is the Gay Ban Based on Military Necessity?*, 33 PARAMETERS 108, 110 (2003), available at <http://www.carlisle.army.mil/usawc/Parameters/03summer/belkin.pdf>.

The United States cannot claim to be a true human rights leader until its soldiers, sailors, airmen and marines are able to do their jobs without fear of reprisal for being lesbian, gay, or bisexual.

CONCLUSION

As an attorney who works for equal rights in this country, it is disappointing to see state and federal laws ignoring or depriving the human rights of the people I serve. Since the framework for equality exists for LGBT people in the United States, I believe that sooner, rather than later, we will have the same rights, benefits and protections as others in our country. I also see a day when the United States will live up to its mythology as a human rights leader—a day when it joins other nations working to legally recognize the rights of sexual minorities internationally. Until that time, the United States' lack of leadership will prevent the evolution of human rights for sexual minorities in many other parts of the world because other countries will justify their own human rights failures by the minimal standards set in this country.

