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COMPARATIVE STUDY OF CRUEL & UNUSUAL PUNISHMENT FOR ENGAGING IN CONSENSUAL HOMOSEXUAL ACTS (IN INTERNATIONAL CONVENTIONS, THE UNITED STATES AND IRAN)

SANAZ ALASTI*

INTRODUCTION

This article undertakes a comparative study of cruel and unusual punishment for consensual homosexual acts, in the United States and Iran, based on the prohibition of these punishments in international conventions.

The primary object of this paper is to establish that the criminalization of consensual homosexual acts is arbitrary and as capricious as punishing other minorities. Furthermore, criminalization contradicts the object and purpose of the Universal Declaration of Human Rights and virtually every other law concerning sexual minorities. This article is further motivated by the novelty and necessity of the topic. Surprisingly little research has been done focusing on this issue, and existing works are far from comprehensive. Although my study should not be viewed as the ultimate source for reviewing the inhumane punishment of homosexuals throughout the world, it is hoped that other studies will continue this

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research by providing a more intimate look at actual cases in other countries, including anecdotal information.

This research is organized into six sections. Section One has two parts, defining cruel and unusual punishment at the national and international levels, using the United States and Iran as examples. Section Two discusses the criminal statutes prohibiting sodomy in Iran and the United States. Sections Three and Four examine the issues of execution and other corporal punishment of sexual minorities in Iran, and violations of international conventions in this regard. Section Five describes homosexuality as a status, and discusses whether punishing sodomy is cruel and unusual. Finally, Section Six challenges the proportionality doctrine and evolving standards concerning sodomy laws within society.

I. DEFINITION OF CRUEL AND UNUSUAL PUNISHMENT

“Throughout history, varying punishments were deemed cruel and unusual, including [corporal punishment,] surgical castration, vasectomies and certain forms of the death penalty.”¹ “The meaning of ‘cruel and unusual’ must draw from ‘the evolving standards of decency that mark the progress of a maturing society.’”² Therefore,

if a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then [the punishment is cruel and unusual].³

“Under this framework, we must consider under the totality of the circumstances whether the punishment is: (1) inherently cruel or severe; (2) excessive, disproportionate, or unnecessary; (3) unacceptable to society; or (4) inflicted arbitrarily.”⁴

The condemnation of cruel and unusual treatment or punishment is universal in international and national law because these practices, by definition, lie outside the rule of law. In this sense, cruel and degrading treatment or punishment is more widely prohibited under both national and international law than is exe-

1. Caroline Wong, Comment: *Chemical Castration: Oregon's Innovative Approach to Sex Offender Rehabilitation, or Unconstitutional Punishment?* 80 OR. L. REV. 267, 283 (2001) (citations omitted).

2. *Id.* (quoting *Gregg v. Georgia*, 428 U.S. 153, 172-73 (1976)).

3. *Furman v. Georgia*, 408 U.S. 238, 282 (1972).

4. Wong, *supra* note 1, at 283-84.

cution. (citation omitted). Nevertheless, the definition of what constitutes unusual and cruel and degrading treatment is highly subjective. After all, many countries consider the death penalty to be cruel and degrading punishment. (citation omitted). Yet, other countries with prohibitions against cruel and degrading treatment or punishment have the death penalty.⁵

A. THE PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENT UNDER INTERNATIONAL LAW

Numerous existing international human rights documents prohibit torture and cruel, inhuman, or degrading punishment: Article 5 of the Universal Declaration [of Human Rights] provides that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

Article 7 of the ICCPR [International Covenant on Civil and Political Rights] provides that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.” (citation omitted). Article 10, paragraph 1 of the ICCPR states that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.”

Article 5 of the African Charter [of Human Rights] provides: Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited.

Article 5 of the American Convention [of Human Rights] provides:

1. Every person has the right to have his physical, mental, and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment. All persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person.

5. James Wilts, *International Human Rights Laws and Sexual Orientation*, 18 *Hastings Int'l & Comp. L. Rev.* 1, 37-38 (1994) (citations omitted).

[Indeed], the prohibition of torture is a peremptory norm of international law which means it applies to all countries, whether or not they have consented to be bound by it. [Therefore], it can [apply in] a country that has not signed any of the international instruments prohibiting [cruel punishment].⁶

B. THE PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENT UNDER NATIONAL LAW

The Eighth Amendment to the U.S. Constitution provides that “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” This provision is applicable to the states through the Due Process Clause of the Fourteenth Amendment and similar provisions exist in some state constitutions. While some such state constitutional provisions are held to be of identical scope to that of the Eighth Amendment, some are deemed to afford greater protection than their federal counterpart. A textual parallelism between state and federal constitutional prohibitions against cruel and unusual punishment does not foreclose a more expansive interpretation of the state constitutional prohibition than of the similar federal provision. Conversely, textual dissimilarities between state and federal prohibitions do not bar a state court from looking to cases interpreting the federal provision for guidance in interpreting the state prohibition.⁷

In fact,

[T]he primary concern of the drafters of the Eighth Amendment’s prohibition on cruel and unusual punishments was to proscribe tortures and other barbarous methods of punishment. However, the Eighth Amendment is not tethered to modes of punishment that were thought to be cruel and unusual at [the] time the Bill of Rights was adopted; as concepts of dignity and civility evolve, so do the limits of what is considered cruel and unusual under the Amendment. Thus, the prohibition against cruel and unusual punishment is not “fastened to the obsolete,” but may acquire meaning as public opinion becomes enlightened by human justice. The Eighth Amendment proscribes more than

6. *Id.* at 38 (quoting Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. GAOR, 3rd Sess., art. 26, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration]; African Charter on Human and Peoples’ Rights, adopted June 27, 1981, O.A.U. Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982) (entered into force Oct. 21, 1986) [hereinafter African Charter]; American Convention on Human Rights, Nov. 22, 1969, O.A.S. T.S. No. 36, at 1, OEA/Ser. L./V/II.23 doc. rev. 2 (entered into force July 18, 1978) [hereinafter American Convention]) (citations omitted).

7. 21A Am. Jur. 2d Criminal Law 950 (quoting U.S. CONST. amend. VIII.).

physically barbarous punishments, and embodies broad and idealistic concepts of dignity, civilized standards, humanity and decency against which a court must evaluate penal measures. Punishments which are incompatible with evolving standards of decency that mark the progress of a maturing society, or which involve unnecessary or wanton infliction of pain, are repugnant to the Eighth Amendment. Among the unnecessary and wanton inflictions of pain prohibited by the Eighth Amendment are those that are totally without penological justification.⁸

Whatever the original intention of the Framers, the Supreme Court currently recognizes four situations in which a punishment may be struck down as cruel and unusual: 1) when the death penalty is imposed; 2) when an inhumane or barbarous type of punishment is imposed; 3) when the punishment is based solely on the "status" of the offender; and 4) when a sentence is grossly disproportionate to the crime committed.⁹

Many countries prohibit torture, but countries vary in the extent to which they legally permit what would be considered cruel and unusual punishment. In Iran, torture is prohibited for the purpose of extracting information, and cruel and degrading treatment of detainees is prohibited.¹⁰ But there is no specific provision defining cruel and unusual punishment. Instead, interpretations of punishments are based on Sharia law which, in Islam, assumes that criminal laws originated from God's Will. Islamic punishments are therefore fixed and, under an Islamic jurisprudential point of view, both usual and un-cruel.

II. CRIMINAL STATUTES PROHIBITING CONSENSUAL HOMOSEXUAL ACTS IN UNITED STATES AND IRAN

[I]n the late 1980s and the early 1990s, the European Court of Human Rights invalidated the sodomy laws of various European nations. It is legal in many Asian-Pacific and South American countries, including China, Japan, and Brazil. Additionally, there are no criminal sodomy statutes in Canada, Australia, Mexico, or New Zealand. However, approximately half of the African countries have criminal sodomy statutes, and a large majority of Middle Eastern countries also ban such acts.

8. 21A Am. Jur. 2d Criminal Law 951.

9. Drew Page, *Cruel and Unusual Punishment and Sodomy Statutes: the Breakdown of the Solem v. Helm*, 56 U. CHI. L. REV. 367, 370-71 (1989) (citations omitted).

10. All forms of torture for the purpose of extracting confession or acquiring information are forbidden. Compulsion of individuals to testify, confess, or take an oath is not permissible; and any testimony, confession, or oath obtained under duress is devoid of value and credence. Violation of this article is liable to punishment in accordance with the law. IRAN CONST., art. 38 (1979).

154 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XII]

Nevertheless, there seems to be an overwhelming consensus among the world, especially the western world, that sodomy should not be criminalized.¹¹

A. THE UNITED STATES

Most adults engaging in private, consensual homosexual activities in their own homes take comfort in the fact that the police are reluctant to patrol the activities of the bedroom, and thus, sodomy ... [is] not prosecuted. "In fact, since the 1950s, there have been only a handful of reported prosecutions in the states that criminalize these acts."¹²

Sodomy laws have existed since biblical times. Church law originally prohibited sodomy. In the sixteenth century, sodomy was made a crime under English common law. The Act of Henry VIII, which became part of American common law, removed sodomy from the jurisdiction of the ecclesiastical courts and placed it under the control of the common law.¹³

"[W]hen the Puritans settled in the American colonies, they brought criminal sodomy laws with them."¹⁴ In this era, sodomy was termed a "crime against nature" and defined as "the commission of anal intercourse."¹⁵ Over time, the definition "expanded to include oral sex as well as sexual contact with an animal."¹⁶

In 1968, every state in the United States except Illinois had a law on the books forbidding sodomy. From 1971 to 1983, there was rapid decriminalization of sodomy. During this time, the number of states with criminal sodomy laws dropped from forty-nine to twenty-five. Also, some states began to distinguish between heterosexual sodomy, which was being decriminalized, and homosexual sodomy, which retained its criminal classification. The trend towards decriminalization tapered off after 1983. It was during this time that the Court upheld criminal consensual sodomy statutes in *Bowers v. Hardwick*. However, in 1992, beginning with Kentucky, states began decriminalizing sodomy once again. Nevada, Tennessee, Montana, Rhode Island, and the District of Columbia

11. Melanie Falco, *The Road Not Taken: Using the Eighth Amendment to Strike Down Criminal Punishment for Engaging in Consensual Sexual Acts*, 82 N.C.L. REV. 723, 751-52 (2004) (citations omitted).

12. *Id.* at 734.

13. *Id.* at 748 (citations omitted).

14. Falco, *supra* note 11, at 748.

15. *Id.* Falco notes other labels such as "'infamous' crime against nature, the 'abominable and detestable' crime against nature, 'buggery,' 'unnatural intercourse,' and 'deviate sexual intercourse.'" *Id.* at 749 (citations omitted).

16. *Id.* at 748-49.

followed Kentucky's lead. During this period, many statutes prohibiting homosexual sodomy were specifically invalidated.¹⁷

Chart 1 – Sodomy in U.S.

State	Citation	Punishment	Classification	Explanation
Alabama	Ala. Code 13A-6-65	1 year/ \$2000	Misdemeanor	Sodomy laws apply to homosexuals and heterosexuals
Florida	Fla. Stat. Ann. 800.02	60 days/\$500	“	“
Idaho	Idaho Code 18-6605	5 years to life	Felony	“
Kansas	Stat. Ann. 21-3505	6 months/ \$1000	Misdemeanor	Same sex only
Louisiana	La. Rev. Stat. Ann. 14.89	5 years/ \$2000	Felony	Sodomy laws apply to homosexuals and heterosexuals
Michigan	Mich. Comp. Laws Ann. Ch. 750.158	15 years	“	“
Mississippi	Miss. Code Ann 97-29- 59	10 years	“	“
Missouri	Mo. Ann. Stat. 566.90	1 year/\$1000	Misdemeanor	Same sex only
North Carolina	N.C. Gen. Stat. 14.177	3 years	Felony	Sodomy laws apply to homosexuals and het-

17. *Id.* at 749-50 (citations omitted).

156 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XII

				erosexuals
Oklahoma	Okla. Stat. Ann. Tit. 21-886	10 years	“	Same sex only
South Carolina	S.C. Code Ann. 16-15-120	5 years/\$500	“	Sodomy laws apply to homosexuals and heterosexuals
Texas	Tex. Penal Code Ann. 21.06	\$500	Misdemeanor	Same sex only
Utah	Utah Code Ann. 76-5-403	6 months/\$299	“	Sodomy laws apply to homosexuals and heterosexuals
Virginia	Va. Code Ann. 18.2-361	5 years	Felony	“
U.S. Military	U.S.C. 10, § 47, Sub-ch. X, § 925. art. 125.	Court Martial	“	“

However, such offenses may be punished and the resulting consequences can be catastrophic. Individuals found guilty of violating statutes that criminalize consensual sexual acts suffer consequences when they apply for jobs and fight for custody of their children. States, such as Georgia, Texas, and Utah, have used their sodomy statutes to deny employment to job applicants.¹⁸

18. Falco, *supra* note 11, at 734-35 (citations omitted).

Moreover, prosecutors can use sodomy laws “to obtain a legal advantage for the state,” and convict “a person of a lesser offense when they are acquitted of” a more heinous charge.¹⁹

Even when a State does not bring a formal criminal charge for violation of sodomy statutes, the threat of prosecution remains a reality. Beside these effects, states can and often do punish such actions with jail time. Therefore, it is important to look at these statutes and consider whether punishing violators in this manner is constitutional.²⁰

Fourteen States, Puerto Rico and the military had sodomy laws until the ruling in *Lawrence v. Texas*.²¹ Before the *Lawrence* decision:

[T]en states, Puerto Rico, and the United States military had sodomy laws that applied to both heterosexuals and homosexuals. Four states, [...], had sodomy laws that only applied to homosexuals. The other thirty-six states repealed their sodomy laws through either legislation or litigation. The punishments for sodomy varied among the states that made sodomy a crime. ... [S]odomy [was] a felony in six of the fourteen states that criminalize the act. However, sodomy remained a misdemeanor in eight states.²²

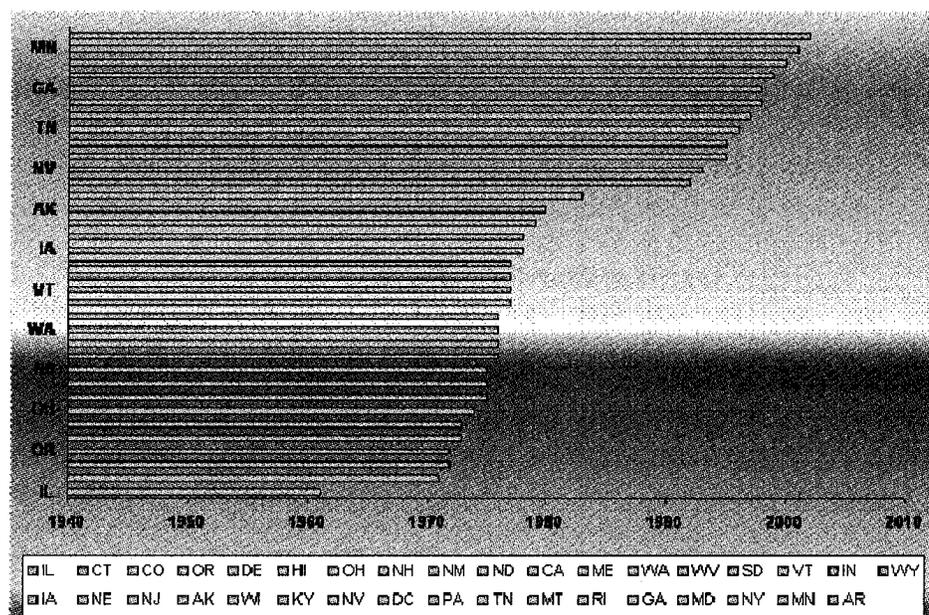
Chart 2 – Decriminalization of Sodomy Laws before *Lawrence v. Texas* in U.S.

19. *Id.* at 735-36 (citing *Parks v. State*, 249 S.E.2d 672, 672 (Ga. Ct. App. 1978) (illustrating convictions for consensual sodomy where the jury acquitted the defendant of rape based on finding of consent)).

20. *Id.* at 736 (citing Cathryn Donohoe, *Adultery: It's Not Just a Sin, It's a Crime*, WASH. TIMES, June 29, 1990, at E1, available at 1990 WL 3801767a).

21. See SODOMY LAWS, EFFECTS OF SODOMY LAWS, at <<http://www.sodomylaws.org/effects.htm>>.

22. *Id.* at 750-51 (Per Falco, at the time *Lawrence* was handed down, sodomy was a felony in Idaho, Michigan, North Carolina, Oklahoma, South Carolina, and Virginia. Idaho Code 18-6605 (Michie 2003); Mich. Comp. Laws Ann. 750.158 (West 2003); N.C. Gen. Stat. 14-177 (2003); Okla. Stat. Ann. tit. 21, 886 (West 2002); S.C. Code Ann. 16-15-120 (Law. Co-op. 2003); 33 P.R. Laws Ann. 4065 (2002). At the same time *Lawrence*, sodomy was a misdemeanor in Alabama, Florida, Kansas, Louisiana, Mississippi, Missouri, Texas, and Utah. Ala. Code 13A-6-65 (2002); Fla. Stat. Ann. 800.02 (West 2003); Kan. Crim. Code Ann. 21-3505 (West 2002); La. Rev. Stat. Ann. 14:89 (West 2003); Miss. Code Ann. 97-29-59 (2003); Mo. Ann. Stat. 566.090 (West Supp. 2003); Tex. Penal Code Ann. 21.06 (Vernon 2003); Utah Code Ann. 76-5-403 (2003)).



Finally, after “*Lawrence* was decided, existing laws prohibiting sodomy between both heterosexual and homosexual persons” became presumably void and “could have been struck down on Eighth Amendment cruel and unusual punishment grounds. A large majority of the states decriminalized sodomy, and the American public is in support of decriminalizing it.”²³ Moreover, sodomy has been decriminalized in many countries around the world and even many religious organizations consider it a matter of private morality.²⁴

B. IRAN

After the Islamic revolution of 1979, Iran’s modern legal system was replaced by an Islamic legal system based on the Shiite version of Sharia law. “This system of law ... formed in the early 1980s during the tenure of the Ayatollah Ruhullah Musavi Khomeini, replaced the secular system that the two Pahlavi monarchs had established in Iran during their consecutive reigns.”²⁵ Shi’ism has been particularly influenced by the opinions of the sixth Imam, Abu Abdullah Jafar bin Mohammad Sadegh, and hence its legal school is known as the Jafari School of Jurisprudence. According to the Jafari School, Islamic law is derived from the Holy

23. Falco, *supra* note 11, at 753.

24. *Id.* For more information regarding cruel and unusual punishments for consensual homosexual acts refer to Sections V and VI, *infra*.

25. HAMID KUSHA, THE SACRED LAW OF ISLAM 142 (Dartmouth Pub., 2002).

Book (Quran), tradition (hadith), the consensus of jurists (ijma), and reason (aql).

“Sex-related crimes are of special interest [in Iran] because the Islamic criminal justice system’s arrest and punishment mechanisms are thoroughly geared toward controlling and suppressing sexuality, a process that has been proven criminogenic insofar as the social reaction to the suppression of sexuality is concerned.”²⁶ Under Iran’s Islamic penal code there are two types of consensual homosexual acts that have been criminalized: *sodomy and lesbianism*. Sodomy is defined as sexual intercourse between males. In the case of sodomy, both the active and the passive persons will be condemned to punishment.²⁷ Punishment for sodomy is death; the Sharia judge determines how to carry out the execution. But punishment for any homosexual activity without intercourse is 100 lashes. Punishment will be carried out only where the convicted are mature, of sound mind and have free will. If a mature man of sound mind commits sexual intercourse with an immature person, the active person will be killed and the passive person will be subject to Ta’azir (discretionary punishment awarded by the judge) of 74 lashes, provided the act was not performed under duress. When the active person is non-Muslim and the passive person is Muslim, punishment for the passive person is death. If an immature person commits sexual intercourse with another immature person, both will be subject to Ta’azir of 74 lashes unless one of them was under duress.²⁸ (For more information regarding sodomy laws in Iran refer to Chart 3).

Chart 3 – Criminal Statutes Prohibiting Sodomy in Iran

Crime	Citation	Punishment	Explanations
Sodomy	Sections 108-120 Islamic Penal Code of Iran	Death Penalty	Sodomy is sexual intercourse with a male. If a mature man of sound mind commits sexual intercourse with an immature person, the mature man will be killed and the immature person will be subject to 74

26. *Id.* at 275.

27. Iran Penal Code [C. PEN] art. 108, 109 (1997).

28. Iran Penal Code [C. PEN] art. 110-113, 121 (1997).

			lashes if not under duress. If an immature person commits sexual intercourse with another immature person, both of them will be subject to 74 lashes unless one of them was under duress.
Tafhiz (the rubbing of the thighs or buttocks)	Sections 121-122 Islamic Penal Code of Iran	Flogging (100 lashes)	When the active person is non-Muslim and the passive person is Muslim, punishment for the passive person is death. If Tafhiz is repeated three times and punishment is enforced after each time, the punishment for a fourth conviction is death.
Being naked under a cover	Section 123 Islamic Penal Code of Iran	Flogging (99 lashes)	Where two men not related by blood stand naked under one cover without any necessity.
Kissing	Section 124 Islamic Penal Code of Iran	Flogging (60 lashes)	Where one man kisses another man with lust.

Methods of proving sodomy in court include:

1) Confessing four times to having committed sodomy. A confession made less than four times (to having committed sodomy) does not involve complete punishment but the confessor will be subject to Ta'azir (lesser punishments). A confession is valid only if the confessor is mature, of sound mind, has will and intention. If sodomy or other homo-

sexual acts are proved by confession and thereafter the confessor repents, the Sharia judge may request the leader (Valie Amr) to pardon him.²⁹

2) Proof by the testimony of four righteous men who might have observed the act. If less than four righteous men testify, sodomy is not proved and the witnesses shall be condemned to punishment for Qazf (malicious accusation). The testimony of women alone or together with a man does not prove sodomy. If one commits a homosexual act without intercourse or repents before the giving of testimony by the witnesses, his punishment may be quashed; if he repents after the giving of testimony, the punishment will not be quashed.³⁰

3) The Sharia judge may act according to his own knowledge which is derived through customary methods.³¹

Lesbianism (Mosaheqeh) is punished by hundred (100) lashes for each woman. Punishment for lesbianism will only be established against someone who is mature, of sound mind, has free will and intention. No distinction is made between the active and passive actor, nor between Muslim or non-Muslim participants.³² "If the act of lesbianism is repeated three times and punishment is enforced each time, death sentence will be issued the fourth time."³³ (For more information regarding lesbianism refer to Chart 4).

Chart 4 – Criminal Statute Prohibiting Lesbianism in Iran

Crime	Citation	Punishment	Explanations
Lesbianism	Sections 127-133 Islamic Penal Code of Iran	Flogging (100 lashes)	Homosexuality of women by genitals. There is no distinction between the active and passive subject as well as a Muslim or non-Muslim. If acts of lesbianism are repeated three times and

29. Iran Penal Code [C. PEN] art. 114-116, 126 (1997).

30. Iran Penal Code [C. PEN] art. 117-119, 125 (1997).

31. Iran Penal Code [C. PEN] art. 120 (1997).

32. Iran Penal Code [C. PEN] art. 127, 129, 130 (1997).

33. Iran Penal Code [C. PEN] art. 131 (1997).

			punishment is enforced each time, a death sentence will be issued the fourth time.
Being naked under a cover	Section 134 Islamic Penal Code of Iran	Flogging (99 lashes)	If two women not related by blood stand naked under one cover without necessity, they will be punished to less than 100 lashes. In cases of repetition an additional 100 lashes will be administered.

The methods for proving lesbianism in court are the same as those for sodomy. If an act of lesbianism is proved by confession and the confessor repents accordingly, the Sharia judge may request the leader (ValieAmr) to pardon her. "And if a lesbian repents before the giving of testimony by the witnesses, the punishment will be quashed; if she does so after the giving of testimony, the punishment will not be quashed."³⁴

III. EXECUTION OF PEOPLE ENGAGING IN CONSENSUAL HOMOSEXUAL ACTS

The right to life is the most sacrosanct of human rights. Even though international law prohibits the arbitrary deprivation of human life, countries are increasingly prohibiting the taking of life under any circumstance. [However, in some countries of the world, homosexuals] have been denied this most basic of rights through widespread, and sometimes systematic, murder. This section will discuss those instances where the rights of sexual minorities to life [...] have been denied through direct government action or inaction in the [execution of] sexual minorities.³⁵

34. Iran Penal Code [C. PEN] art. 128,132,133 (1997).

35. Wilets, *supra* note 5, at 26.

A. THE RIGHT TO LIFE UNDER INTERNATIONAL LAW

Article 3 of the Universal Declaration of Human Rights states that “[e]veryone has the right to life, liberty and the security of person.” Article 6, paragraph 1 of the ICCPR states:³⁶

1. Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.

2. In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes. ... (emphasis added).

Article 4 of the treaty, entitled “Right to Life,” specifically addresses capital punishment and delineates the international standards to which the parties agreed to adhere:³⁷

1. Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.

2. In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply.

3. The death penalty shall not be reestablished in states that have abolished it.

The African Charter states that “human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.”³⁸

36. Wilets, *supra* note 5, at 26, 27 (quoting Universal Declaration of Human Rights, G.A. Res. 217 A(III), U.N. GAOR, 3rd Sess., art. 3, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration]).

37. Ariane M. Schreiber, *States That Kill: Discretion And The Death Penalty – A Worldwide Perspective*, 29 Cornell Int’l L.J. 263, 281 (quoting in part the American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36, art. 4 (entered into force July 18, 1978) [hereinafter American Convention]).

The European Convention specifically protects the “right to life,” but only implicitly protects individuals from arbitrary imposition of the death penalty. The Council of Europe interprets Article 2 not “to protect unconditionally life itself or to guarantee a certain quality of life. Instead, these provisions [Article 2 and Protocol No. 6]³⁹ aim to protect the individual against any arbitrary deprivation of life by the State.”⁴⁰

As the below discussion demonstrates, “some countries have a more inviolable right to life than that found in international law, while other countries have a less protective right to life.”⁴¹

B. EXECUTION OF SEXUAL MINORITIES UNDER NATIONAL LAW

Although the death penalty has been used throughout the world for centuries, the concept of an international standard for the death penalty is relatively new. In the past, whether a country chose to resort to capital punishment was solely a domestic concern. ... “[i]nternational norms addressing the limitation and the abolition of the death penalty are essentially a post-Second World War phenomenon.”⁴²

In 1977, 16 countries were abolitionist, while the figure was 122 for the end of 2005. In more detail, 88 countries have abolished capital punishment for all offences, 11 for all offences except under special circumstances, and 29 others have not used it for at least 10 years. A total of 69 countries retain it.⁴³

Some countries continue to deny the right to life to sexual minorities by executing them under law, by deliberately encouraging the systematic murder of them by paramilitary groups which are frequently connected to the government, or by refusing to act in the face of widespread and repeated murder of sexual minorities.⁴⁴

Generally speaking, the execution of people for consensual homosexual acts is per se cruel and unusual because imposing death penalty is inherently severe.

38. African Charter, art. 4.

39. Council of Europe, Short Guide to the European Convention on Human Rights 17 (1991).

40. *Id.*

41. Wilets, *supra* note 5, at 27.

42. Ariane M. Schreiber, Note: *States that Kill: Discretion and the Death Penalty— a Worldwide Perspective*, 29 CORNELL INT'L L.J. 263, 274 (1996) (quoting WILLIAM A. SCHABAS, *THE ABOLITION OF THE DEATH PENALTY IN INTERNATIONAL LAW* 1 (1993)).

43. CAPITAL PUNISHMENT, http://en.wikipedia.org/w/index.php?title=Capital_punishment&oldid=89294890 (last visited November 21, 2006).

44. Wilets, *supra* note 5, at 28.

Several countries continue to violate international law by prescribing the death penalty for sexual minorities. In these situations, sexual minorities are defined by their conduct. The death penalty in such circumstances [is cruel and unusual and] violates the literal wording of the Universal Declaration and those provisions of the ICCPR and the American Convention which limit the death penalty to only the most serious crimes.

In Iran, Article 110 of the Islamic Penal Law provides that the “punishment for sodomy is killing; the Sharia judge decides on how to carry out the killing.” And Article 131 provides that “if the act of lesbianism is repeated three times and punishment is enforced each time, death sentence will be issued the fourth time.”⁴⁵

Although it seems the death penalty for sexual minorities is widely in practice, based on the extremely high standards of proof required for conviction, the application of sodomy laws are extremely rare.⁴⁶

If international law were to adopt the standard of countries who execute sexual minorities, it would be in contravention to International law. “Although... the death penalty [is] widely regarded as an exception to the right to life, the failure to incorporate this view in the UDHR supports the notion that abolition of the death penalty was seen as a goal of the international community and an emerging norm of international law.”⁴⁷ “But even under current international law, these death penalty provisions are illegal under those provisions of international law which prohibit the death penalty except for serious crimes. International law thus provides the world’s governments and NGOs a legal basis for condemning the executions of sexual minorities by certain governments.”⁴⁸

However, “domestic law provides grounds for domestic NGOs to protest” the execution of sexual minorities, because “[i]nternational law generally does not provide a higher level of legal protection than the domestic law of most countries” and “in some countries the murder of sexual minorities is illegal but occurs anyway, with government complicity.”⁴⁹ Thus “domestic law [is] insufficient to protect the rights of sexual

45. *Id.* (quoting Islamic Penal Code [C. PEN] arts. 110 & 131 (1997)).

46. Execution rates based on capital offences during 2005 & 2006 indicates, execution of sexual minorities is rare in Iran. For more information please refer to <<http://www.richard.clark32.btinternet.co.uk/world.html>>.

47. James H. Wyman, *Vengeance is Whose?: The Death Penalty and Cultural Relativism in International Law*, 6 J. TRANSNAT’L L. & POL’Y 543, 546 (1997).

48. Wilets, *supra* note 5, at 35 (citation omitted).

49. *Id.*

minorities to life, and international intervention seems absolutely essential.”⁵⁰

Amnesty International, the International Gay and Lesbian Human Rights Commission, and other human rights organizations have also expressed concern over the [execution of sexual minorities].⁵¹

The U.S. Department of State Human Rights Country Reports provide a basis for the U.S. government to evaluate the legality of foreign assistance under Title 22 of the U.S. Code.⁵²

Sec.701 (a) the United States Government, in connection with its voice and vote in the International Bank for Reconstruction and Development, the International Development Association ... shall advance the cause of human rights, including by seeking to channel assistance toward countries other than those whose governments engage in ... a pattern of gross violations of internationally recognized human rights, such as torture or cruel, inhumane, or degrading treatment or punishment, prolonged detention without charges, or other flagrant denial to life, liberty, and the security of person... . (emphasis added).⁵³

IV. OTHER CORPORAL PUNISHMENTS AND CONSENSUAL HOMOSEXUAL ACTS

Corporal punishment is punishment of the body, the most common methods being flogging, mutilation and amputation. Historically, it has been a punishment usually reserved for the low-born and often carried out in public. Public humiliation is an important component that adds to the pain; the offender is exposed to the potential abuse or violence of a hostile crowd. In some cases shaming is also used as a punishment in itself.⁵⁴

“At the beginning of the 21st century, corporal punishment is no longer a legal sanction in most countries around the world. ... At the same time, in some countries corporal punishment has been retrained and even ex-

50. *Id.*

51. Wilets, *supra* note 5, at 36 (citing James E. Garcia, *Anti-Gay Violence on Rise in Mexico*, *Austin-American Statesman*, Sept. 6, 1992; and James E. Garcia, *This Is not Justice*, *Austin-American Statesman*, Sept. 6, 1992, at H1).

52. *Id.*

53. *Id.* (quoting Human Rights and United States Assistance Policies with International Financial Institutions 22 U.S.C.S. § 262(d) (1994)).

54. LEWIS LYONS, *THE HISTORY OF PUNISHMENT* 85 (Lyon Press, 2003).

tended.”⁵⁵ For instance, flogging “has also been on the increase in the past ten or twenty years as more states and nations have adopted a strict and literal reading of Sharia law [Islamic law].”⁵⁶

A. APPLYING INTERNATIONAL LAW

International law is absolute in its condemnation of inhuman and barbarous treatment or punishment. Governments and international human rights NGOs therefore have the full authority of international law to intervene in countries where the practice occurs. In addition to the extensive work undertaken by the International Gay and Lesbian Human Rights Commission in identifying and publicizing those countries guilty of torturing sexual minorities by corporal punishments, other international human rights organizations – ones without specifically gay or lesbian mandates – have also responded to violations of this fundamental right.⁵⁷

Amnesty International opposes the use of corporal punishment as a violation of the right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment guaranteed by Article 5 of the Universal Declaration of Human Rights.⁵⁸ Amnesty International considers that the imposition of corporal punishment is also contrary to Articles 7 and 10(1) of the International Covenant on Civil and Political Rights (ICCPR): Article 7: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation”; Article 10: “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.” In its General Comment 20 on Article 7, the Committee emphasized that the absolute prohibition of cruel, inhuman or degrading punishment in Article 7 of the ICCPR “must extend to corporal punishment.” This contention is strongly supported by other expert bodies and international jurisprudence.⁵⁹

55. *Id.* at 101.

56. *Id.*

57. Wilets, *supra* note 5, at 42, 43.

58. See <www.amnesty.org>.

59. For example the UN Commission on Human Rights, Resolution 1997/38 of April 1997; Nigel Rodley, Special Rapporteur on Torture, in his report to the Commission on Human Rights, 10 January 1997 E/CN.4/1997/7; the European Court of Human Rights in *Tyrer v The United Kingdom*, Application No. 2865/72, European Court of Human Rights, Series B, No. 24.

“Human Rights Watch only recently changed its mandate to enable it to address the violation of sexual minorities’ right” through the imposition of corporal punishment.⁶⁰

The current Human Rights Watch policy statement regarding sexual orientation states as follows:⁶¹

Human Rights Watch opposes state-sponsored and state-tolerated violence, detention and prosecution of individuals because of their sexual identity, sexual orientation or private sexual practices. Human Rights Watch grounds this policy in the right to life, liberty and security of the person (Universal Declaration of Human Rights, Article 3; International Covenant on Civil and Political Rights, Articles 6 and 9), the right against arbitrary detention (UDHR 9, ICCPR 9), and the prohibition of discrimination on the basis of status (UDHR 2, ICCPR 2, 26).⁶²

B. CORPORAL PUNISHMENT FOR SEXUAL MINORITIES UNDER NATIONAL LAWS

Flogging is the punishment for certain types of consensual homosexual acts after the Islamic revolution in Iran. (Punishment for any homosexual activity without intercourse is 100 lashes; punishment for lesbianism is 100 lashes...)⁶³ Imposing corporal punishments such as flogging based on Islamic penal code of Iran is inherently cruel and severe. In addition, considering flogging is an inhumane and barbarous type of punishment, it is unacceptable to Iran’s society.

Therefore, it “will ordinarily be a cumulative one.”⁶⁴

If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict in-

60. Wilets, *supra* note 5, at 36.

61. *Id.*

62. *Id.* at 36-37 (quoting Human Rights Watch policy statement <www.hrw.com>).

63. See Iran Penal Code [C. PEN] art. 121-124 & 127-134(1997).

64. Wong, *supra* note 1, at 283.

human and uncivilized punishments upon those convicted of crimes.⁶⁵

For this reason, the solution for preventing a violation of the international conventions against inhumane punishment is found in *Conceptualizing Violence against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective*, where Professor James Willets argues that:

[I]n formulating international and domestic legal responses to violence against ... sexual minorities, one must understand the gendered nature of violence which is rooted in the assertion of patriarchal power... The difficulty for human rights activists trying to use international law to protect gays and lesbians from violence derives from a narrow reading of the state's role in the homophobic acts of violence. It is certainly difficult to prosecute governments for their active participation in violence against gays and lesbians because of the ability of states to rely on domestic law or practice as justifications for violence. For example, in Iran, the Shari'a commands that sodomy will be punished by execution... Even where crimes against lesbians and gays are violations of laws, rarely are they treated as international human rights violations. This may be changing, however. Countries throughout the world are modifying their domestic laws to protect the rights of gays and lesbians.⁶⁶

Yet international law undermines the protection of gay and lesbian rights by only sanctioning "violent acts committed by state actors rather than by private citizens... The importance of subjecting domestic laws to international legal scrutiny cannot be underestimated. Many domestic laws are based on cultural beliefs, mores, and religious interpretations that promote violence."⁶⁷ So there are "useful comparisons between legal responses to violence against women and sexual minorities... Although the adherence to a private/public distinction creates clear barriers to full privacy and equality rights for sexual minorities worldwide, there are promising signs that the distinction is breaking down in both domestic and international law."⁶⁸ It remains a question however, whether "inter-

65. *Id.* (quoting *Furman v. Georgia*, 408 U.S. 238, 282 (1972)).

66. Donna Young, *Conceptualizing Violence*, 60 ALB. L. REV. 907, 914-15 (1997) (citing James Willets, *Conceptualizing Violence against Sexual Minorities as Gendered Violence*, 60 ALB. L. REV. 989 (1997)).

67. *Id.* at 915.

68. *Id.* at 916.

170 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XII

national law can ... protect those disadvantaged because of sexual orientation, religion and gender.”⁶⁹

V. STATUS STATUTES AND CONSENSUAL HOMOSEXUAL ACTS

“Offenses have been traditionally defined in terms of acts or failures to act. However, some offenses are defined in terms of *being* rather than in terms of *acting*.”⁷⁰ For example, being a vagrant, a narcotic addict, an alcoholic, a prostitute or a homosexual.⁷¹ “Such statutes have long been attacked as unconstitutional, usually on the grounds that they excessively restrict liberty, are unconstitutionally vague, or are void because of over breadth.”⁷²

Despite the general rule that a crime requires a prohibited act or omission, certain atypical offenses, [like homosexuality], have at times been defined in terms of a person’s status or condition of being, rather than in terms of acts committed by him or her. The more recent tendency in the law seems to disfavor such statutes in favor of the notion that a person should be held criminally culpable only for specific acts. Thus, it has been held violative of the Eighth Amendment’s prohibition against cruel and unusual punishment to punish a person for his physical condition, as distinguished from an act.⁷³

A. ALL HOMOSEXUALS ENGAGE IN SODOMY? ARE THEY CRIMINALS?

“This assertion raises the fundamental question about homosexual identity: Is homosexuality properly equated with an individual’s sexual conduct or, instead, is homosexuality to be equated with an individual’s orientation, a status that is independent of that person’s sexual behavior?”⁷⁴ If homosexuality is a status, and sodomy is an act different from homosexuality, we can not use the explanation of status and cruel punishment for sodomy statutes.

“There are many homosexuals ... who choose not to engage in sodomy. Some individuals who self-identify as homosexual may lead lives of

69. *Id.*

70. LARRY BERKSON, *THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT* 97 (Lexington Books, 1975).

71. *Id.*

72. *Id.* (citations omitted).

73. 21 Am. Jur. 2d Criminal Law § 31 (footnotes omitted).

74. Terry Kogan, *Legislative Violence Against Lesbian and Gay Men*, 1994 UTAH L. REV. 209, 228 (1994).

celibacy.”⁷⁵ “Other self-identified homosexuals may engage in kissing, hugging, erotic massage, and/or mutual masturbation with same-sex partners”; some of which may be prohibited by sodomy statutes.⁷⁶ In spite of that, “based on their own perceived affectional attraction to persons of the same sex, all of these individuals consider themselves to be homosexual.”⁷⁷

In addition, equating homosexuality and sodomy creates confusion because of the fact that the definitions of sodomy vary by criminal sodomy statute. If homosexuality cannot be equated to sodomy, can it properly considered a status? Some homosexuals may [consider] their own sexual identity with particular behavior, though many who perceive themselves to be homosexual do not. Studies indicate that a significant majority of lesbians and gay men sensed same-sex affectional attraction long before they reached an age at which sexual conduct was even contemplated. For many of these individuals, homosexuality is perceived as an orientation. Still others who engage in sexual relations with same-sex partners may view themselves as heterosexual.⁷⁸

Thus, there is no simple way to resolve whether homosexuality is equal to conduct or status, or whether any individual is precisely portrayed as homosexual.⁷⁹

Second question: Is homosexuality involuntary or not? If we say it is voluntary, the explanation of depenalizing status crimes will not apply to homosexual acts.

If a legislator is asserting that when an individual engages in same-sex sexual conduct he or she “chooses” to engage in that conduct, that legislator is surely correct. Absent rape or similar duress, human sexual conduct is chosen action, as opposed to involuntary actions like breathing or choking. Sexual conduct entails intentional action, not action resulting from the autonomic nervous system. In this sense, heterosexual conduct is also chosen action, no different from homosexual conduct.

Of course, the assertion that homosexuality is chosen behavior assumes that ... homosexuality [is equal] with homosexual be-

75. *Id.* at 229.

76. *Id.*

77. *Id.*

78. *Id.* at 230.

79. *Id.*

havior. If ..., it is a distortion of homosexual identity to equate it in every case with homosexual behavior, then the question of choice becomes far more complex.

In fact, studies indicate that a significant majority of homosexuals describe their same-sex affectional attraction as having existed from a very young age, long before they were at a stage of development to engage in sexual behavior with other persons. This attraction manifested itself in dreams and fantasies during early stages of sexual identity.⁸⁰

The third question is whether homosexuality is a sickness like addiction and, is it cruel to punish that? Research shows that efforts "to change an individual's sexual orientation are often 'psychologically wrenching and sometimes physically painful.'"⁸¹ By focusing on the aspects of homosexuality: "the origins of sexual orientation and the possibility of reorientation," we can conclude that an "individual's homosexual orientation is generally beyond the individual's control."⁸² "[A homosexual's sexual identity is no more chosen than a heterosexual's sexuality identity. But there is a hidden rhetorical advantage in distorting the nature of human sexuality to describe homosexuality as a matter of choice."⁸³

B. EXPERIENCE OF STATUS STATUTES IN NATIONAL LEVEL

In this section, the issue is whether the penalization of consensual homosexual acts, is based solely upon the "status" of the offender, is cruel at the national level.

In Iran, homosexual acts, along with addiction, vagrancy and prostitution are all still crimes. Furthermore, the Iranian legal system does not have any applicable rationale regarding the decriminalization of status statutes. For this reason, in this section, examination of the U.S. experience prior to the *Lawrence* case is important.

"The [U.S.] Constitution forbids criminal punishment based on a person's qualities or status, rather than on his conduct."⁸⁴ "Status alone is generally insufficient to constitute a crime, and whether status is regarded as an offense in itself or merely an element of an offense is irrele-

80. *Id.* at 237.

81. *Id.* at 238 (quoting RICHARD GREEN, *SEXUAL SCIENCE AND THE LAW* 86 (1992)).

82. *Id.* at 238.

83. *Id.* at 238-9 (citations omitted).

84. 21 Am. Jur. 2d Criminal Law § 31 fn. 48 (citing *Steffan v. Perry*, 41 F.3d 677 (D.C. Cir. 1994)).

vant; a person should be convicted only for what he does, not for what he is.”⁸⁵

One instance in which the courts have been asked to intervene as a result of status based punishment is *Robinson v. California*.⁸⁶

In *Robinson*, the offense was the status of being addicted to narcotics, and the punishment authorized by the statute was a jail term of not less than 90 days nor more than one year. The defendant received the minimum sentence. The Supreme Court held the statute invalid under the eight amendment, on the ground that a state may not make criminal the *status* or *condition* of narcotics addiction, as apposed to the sale, purchase, or possession of narcotics or the commission of some other antisocial act within the state.

Precisely why the punishment of the status of narcotic addiction violates the cruel and unusual punishment clause is not clear from the court’s opinion. Two possible rationales have been suggested for the result in *Robinson*. The first is that all laws penalizing a mere status violate the eighth amendment. That is to say, a state may punish acts but not a status. ... In any event such an interpretation of *Robinson*, if correct, holds no potential at all for an attack on the sodomy laws, because these laws definitely penalize acts, not a status.

The second possible explanation of *Robinson* is that punishing a person for having an illness ... is unconstitutionally cruel.⁸⁷

“In 1964, Max D. Perkins and Robert E. McCorkle were convicted of ‘unlawfully, willfully, maliciously and feloniously committing ...[a] crime against nature with each other.’ Perkins was sentenced to between twenty and thirty years imprisonment. He appealed the sentence on Eighth Amendment grounds.”⁸⁸ The court held that “*Robinson* dealt with status and here ‘Perkins was convicted of an overt *act*.’”⁸⁹ “Thus, in the

85. 21 Am. Jur. 2d Criminal Law § 31 fn. 48 (citing *Profit v. City of Tulsa*, 617 P.2d 250 (Okla. Crim. App. 1980)).

86. *Robinson v. California*, 371 U.S. 905 (1962).

87. WALTER BARNETT, *SEXUAL FREEDOM AND THE CONSTITUTION* 269-270 (Univ. New Mexico Press 1973).

88. BERKSON, *supra* note 70, at 104 (quoting *Perkins v. State*, 234 F. Supp. 333, 337 (W.D.N.C. 1964)).

89. *Id.*

cases involving sexual offenses courts have emphatically refused to expand the *Robinson* doctrine to acts symptomatic of a status."⁹⁰

The parallels between homosexuality and either narcotic addiction or chronic alcoholism are obvious. All three have traditionally been regarded as matters of moral responsibility, and consequently as appropriate subjects for regulation by criminal law. ... There is widespread disagreement ... whether any of the three is properly classifiable as an illness, or merely a condition entailing unhappy consequences for the individual in society.⁹¹

"Trying to cure a homosexual by sending him to the prison is like trying to cure an alcoholic by locking him up in a distillery."⁹²

"However, it is not demonstrable that homosexuals are any more impelled by their condition to engage in public acts than are chronic alcoholics to get drunk in public, the chances of invalidating convictions for sodomy in public places under this authority are remote."⁹³ Thus, from *Robinson* to the *Steffan* case,⁹⁴ if not overruled or restricted to the mere prohibition of status crimes, it holds fair to overturn convictions of consensual homosexual acts for sodomy in private.

"With this background," one may ask what legislators expect to fulfill "by equating homosexuality with sodomy."⁹⁵ The answer –

that all homosexuals are sodomites and therefore criminals -- is ... influencing the ways in which society understands homosexuality and, in turn, the ways in which society treats those persons it considers to be homosexual. It should not be surprising that some react to an elected official's assertion that all homosexuals are sodomites by directing violent behavior toward lesbians and gay men should not be astonishing.⁹⁶

90. BERKSON, *supra* note 70, at 105.

91. BARNETT, *supra* note 87, at 275.

92. BARNETT, *supra* note 87, at 278 (quoting B. MAGEE, ONE IN TWENTY 20 (1966)).

93. *Id.* at 279.

94. *Supra* note 83.

95. Kogan, *supra* note 74, at 230.

96. *Id.* at 231.

VI. ARE CONSENSUAL HOMOSEXUAL ACTS DISPROPORTIONATE OR UNACCEPTABLE TO SOCIETY?

A. THE PROPORTIONALITY DOCTRINE AND CONSENSUAL HOMOSEXUAL ACTS

... Provisions against cruel and unusual punishment are aimed primarily at the kind of punishment imposed, not its duration. Nevertheless, where the duration of a sentence imposed on one convicted of a crime is so disproportionate to the offense committed as to shock the moral sense of the community, the punishment is prohibited.⁹⁷

By considering, “the nature of the offense, the character of the offender, the penalties imposed in the jurisdiction for other offenses, and the penalties imposed in other jurisdictions for the same offense” the courts will determine “whether the length of a sentence offends a prohibition against cruel and unusual punishment.”⁹⁸

U.S. Supreme Court doctrine states that the Cruel and Unusual Punishment Clause requires some measure of proportionality in criminal cases between the punishment imposed and the offense committed. This proportionality principle is not symmetric. That is, Court doctrine forbids only those punishments that are disproportionately severe, not those that are disproportionately lenient.⁹⁹

“While there are ... historical guidelines ... that enable judges to determine which *modes* of punishment are ‘cruel and unusual,’ proportionality does not lend itself to such analysis.”¹⁰⁰ Based upon Justice Powell’s assertion, disproportionality can be established by weighing three factors: “(1) the gravity of the offense compared to the severity of the penalty, ‘(2) the sentence imposed for commission of the same crime in other jurisdictions, and (3) the sentence imposed upon other criminals in the same jurisdiction.”¹⁰¹

97. 21A Am. Jur. 2d Criminal Law § 973.

98. *Id.*

99. Stephen Parr, *A New Perspective on the Cruel and Unusual Punishment Clause*, 68 TENN. L. REV. 41 (2000) (citations omitted).

100. Antonin Scalia, *The Eight Amendment Does Not Guarantee Proportionate Sentencing*, in THE BILL OF RIGHTS: FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT 106 (Kristin O’Donnell Tubb ed., 2005).

101. Parr, *supra* note 99, at 55 (quoting *Rummel v. Estelle* 445 U.S. 263, 295 (1980) (Powell, J., dissenting)).

“The Supreme Court explained that the Founders understood the Cruel and Unusual Punishment Clause primarily as a protection against barbarous punishments such as whippings and cutting off ears, but that the clause was also intended to encompass new situations and contexts that the Framers could not have foreseen.”¹⁰² “Time works changes, brings in to existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth.”¹⁰³ Thus in the application of the cruel and unusual punishment clause, “our contemplation cannot be only of what has been, but of what may be.”¹⁰⁴

During the 1980’s, the three proportionality cases decided by Supreme Court had an enormous role on the Eighth Amendment and legislative determinations of appropriate punishment: 1) In *Rummel v Estelle*,¹⁰⁵ the Supreme Court “held that it did not constitute ‘cruel and unusual punishment’ to impose a life sentence, under a recidivist statute,…”¹⁰⁶ 2) In *Hutto v Davis*,¹⁰⁷ the Supreme Court “rejected an Eighth Amendment challenge to a prison term of 40 years and fine of \$20000 for possession and distribution of approximately nine ounces of marijuana.”¹⁰⁸ 3) In *Solem v. Helm*,¹⁰⁹ the Supreme Court held as disproportionate:

a sentence of life imprisonment without the possibility of parole, imposed under South Dakota recidivist statute for successive offenses that included three convictions of third-degree burglary, one of obtaining money by false pretense, one of grand larceny, one of third-offense driving while intoxicated, and one of writing a ‘no account’ check with intent to defraud.¹¹⁰

Although some sentences are more severe than others, proportionality is a subjective principle, and determination of which sentence violates the Eighth Amendment is not simple.

102. Drew Page, *Cruel and Unusual Punishment and Sodomy Statutes: the Breakdown of the Solem v. Helm*, 56 U. CHI. L. REV. 367 (1989).

103. Joseph McKenna, *The Supreme Court Expands the Definition of Cruel and Unusual Punishment*, in THE BILL OF RIGHTS: FREEDOM FROM CRUEL AND UNUSUAL PUNISHMENT 36 (Kristin O’Donnell Tubb ed., 2005).

104. *Id.*

105. *Rummel v. Estelle*, 445 U.S. 263 (1980).

106. Scalia, *supra* note 100, at 104.

107. *Hutto v Davis*, 454 U.S. 370 (1982).

108. Scalia, *supra* note 100, at 105.

109. *Solem v. Helm*, 463 U.S. 277 (1983).

110. Scalia, *supra* note 100, at 105.

And, even if judges could determine the relative gravity of various crimes, how would they convert such gravities to years? It is one thing to distinguish between a life sentence without possibility of parole and a life sentence with parole, as the Court did in *Helm* and *Rummel*; it is another to distinguish between terms of years.¹¹¹

In *Solem v. Helm* the Supreme Court decided “a sentence of life imprisonment without the possibility of parole is cruel and unusual punishment. ... [Helm’s] sentence [life imprisonment without parole] is far more severe than the life sentence we considered in *Rummel v. Estelle*.”¹¹² “Although the *Helm* Court held that life imprisonment without parole was cruel and unusual, the Court has never held imprisonment simply for years to be cruel and unusual. ... Only one federal case has specifically considered a cruel and unusual punishment challenge to a sodomy statute.”¹¹³

By comparing sodomy with monetary fraud in the *Rummel* case,

[t]he crime of sodomy at least arguably approaches the seriousness of the monetary fraud crimes involved in *Rummel* ... [they] are both nonviolent, involving no threat of physical injury ... the magnitude of *Rummel*’s crime was small, involving a total of only \$ 229 ... [and] monetary fraud is not consensual, but the average punishment allowed for sodomy (ten years with the possibility of parole) is substantially lower than the sentence imposed in *Rummel* for fraud (life imprisonment with the possibility of parole). [Therefore,] sodomy statutes do not impose cruel and unusual punishment because the punishments they provide are more proportionate than the punishment upheld in *Rummel*.¹¹⁴

“For this reason, the Supreme Court in *Bowers v. Hardwick*, upheld Georgia’s sodomy statute” for consensual homosexual acts.¹¹⁵

The statute at issue in *Hardwick* did not involve the death penalty, inhumane or barbarous punishment, or punishment for status. Therefore, disproportionality is the only possible justification for striking down the

111. Page, *supra* note 102, at 380.

112. *Id.* at 388-89.

113. *Id.* at 393.

114. *Id.* at 389-90.

115. *Id.* at 367 (citing *Bowers v. Hardwick* 478 U.S. 186 (1986) and Ga Code Ann.s 16-6-2).

178 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XII

statute on cruel and unusual punishment grounds. This conclusion is consistent with Justice Powell's reasoning in *Hardwick*, in which he compared Georgia's sodomy penalties with penalties for other crimes in Georgia and with the penalties for sodomy imposed in other states.¹¹⁶

Several state and federal courts have considered Eighth Amendment challenges to sodomy statutes. These cases uniformly reject the cruel and unusual punishment challenge, although for a variety of reasons. Some older state court opinions rely on the argument that the courts cannot interfere with legislatively determined sentences. That the Helm decision did interfere with a sentence partially invalidates this reasoning. However, the explicit position of the overriding majority of cases, that courts should defer to legislative determinations of difficult punishment issues, particularly in the context of "moral" statutes dealing with crimes such as sodomy, remains valid.¹¹⁷

Following the Mosaic principle of an eye for an eye, a tooth for a tooth, the Quran also stipulates that the weaker members of the society cannot be used as substitutes for the punishment of the stronger social members. That is why the text advises the proportionality principle in the formula of: a free man for a free man, a woman for a woman, and a slave for a slave.¹¹⁸ This means that under Islamic law if someone is charged with a crime, he/she should be subjected to a proper punishment that fits the crime.

Under Iran's law, the infliction of punishment should be just and commensurate with the crime committed. Here justice is done only when the offender is appropriately punished without any excess. "It is an aspect of Islamic law of crimes that whatever punishment is to be meted out to or inflicted on the offender for committing the crime *should be proportionate to the harm inflicted by him without any excess.*"¹¹⁹

For example in the case of Qadhf [False Accusation of Unlawful Intercourse], anyone who commits it, according to the Holy Qur'an, is punished with 80 lashes. It means 80 lashes is awarded for this offence, the punishment is commensurate or

116. Page, *supra* note 102, at 371-72.

117. *Id.* at 391

118. See Shahid avval, Lomeh Demeshghieh, (translation by Ali Shyravani), Qom: Dar 'Fekr Qom publication, 1376 Solar Hejira [in Farsi].

119. YAHAYA YUNESA BAMBALÉ, CRIMES AND PUNISHMENTS UNDER ISLAMIC LAW 8 (Malthouse Press Ltd., 2003) (emphasis in original).

proportionate to the harm inflicted. But where the punishment awarded is 100 lashes or cutting of the tongue, it is not proportionate to the harm inflicted. Instead, it is inflicted in excess, and according to Quranic verses, this means transgressing beyond the limits set by Allah.¹²⁰

In summary, when a judge, in analyzing sodomy, relies only on her own moral values to determine the appropriate punishment of a non-violent crime, the judge fails to represent the views of each individual within her jurisdiction. Thus “challenges of state sodomy statutes as cruel and unusual punishment . . . should be brought to the legislatures, who are better equipped to make moral judgments and have actually lowered sodomy punishments in several jurisdictions.”¹²¹ “The legislature, because of the nature of representative government, better reflects the values and beliefs held by various elements of society.”¹²² Therefore, although “sodomy statutes cannot be challenged successfully on cruel and unusual punishment” per se, “the proportionality doctrine does apply to these statutes.”¹²³

B. EVOLVING STANDARDS OF DECENCY AND CONSENSUAL HOMOSEXUAL ACTS

“The evolving standards of decency that mark the progress of a maturing society” are the final resort for applying a cruel and unusual punishment definition to sodomy statutes.¹²⁴

The Eighth Amendment to the United States Constitution states that “excessive bail shall not be required, nor excessive fines imposed, nor cruel or unusual punishments inflicted.” This Amendment applies to actions of the federal government and was made applicable to the states in 1962. Two types of punishment are prohibited under the Eighth Amendment. First, the Eighth Amendment prohibits punishments that were considered cruel and unusual when the Bill of Rights was enacted in 1789. Second, punishments that run counter to the evolving standards of decency that mark the progress of a maturing society are pro-

120. *Id.*

121. Page, *supra* note 102, at 396.

122. *Id.*

123. *Id.* at 395.

124. *Penry v. Lynaugh*, 492 U.S. 302, 330-31 (1989), *overruled by* 536 U.S. 304 (2002).

hibited. The latter category will be the focus of this article, since the punishments at issue here do not involve those punishments considered cruel and unusual in 1789. According to the Court, the most reliable indicator of contemporary values and whether a punishment runs counter to evolving standards of decency is legislation enacted by the States.¹²⁵

The American public, legislators, scholars and judges have

frequently debated the constitutionality of executing persons with mental disabilities or retardation. In 1989, the Supreme Court in *Penry v. Lynaugh*¹²⁶ held that the execution of the mentally retarded was not a punishment that ran counter to “evolving standards of decency.” The Court stated that there was insufficient support to find a national consensus against the execution of the mentally retarded and thus declined to adopt a per se ruling stating that the execution of such persons constituted cruel and unusual punishment.¹²⁷

In the *Atkins* case,¹²⁸ the United States Supreme Court “held that the execution of persons with mental retardation was unconstitutional, thus overruling *Penry*.”¹²⁹

The Supreme Court later applied their *Atkins* analysis to state laws criminalizing consensual homosexual sexual acts in *Bowers v. Hardwick*.¹³⁰

In his concurring opinion in *Bowers*, Justice Powell reasoned that the Eighth Amendment might bar punishment under state statutes that criminalize consensual sexual acts between adults ... [and] agreed with the Court that there was no fundamental

125. Falco, *supra* note 11, at 725.

126. 492 U.S. 302 (1989).

127. Falco, *supra* note 11, at 726.

128. Per Falco at 724, “Daryl Renard Atkins was convicted of abduction, armed robbery, and capital murder, and was sentenced to death.”

129. *Id.* at 724 (citing *Penry v. Lynaugh*, 536 U.S. 304, 307-09 (2002)).

130. *Bowers v. Hardwick*, 478 U.S. 186 (1986), overruled by 123 S. Ct. 2472 (2003).

right to engage in homosexual sodomy under the Due Process Clause. However, he said that the respondent, Bowers, might be protected from punishment under the Eighth amendment ... [because] a prison sentence of twenty years for engaging in homosexual sodomy creates a serious Eighth Amendment issue because of cruel and unusual punishment concerns. Justice Blackmun's dissent in Bowers also faulted the majority for failing to consider whether the Georgia sodomy statute violated the Eighth Amendment.¹³¹

Following the U.S. Supreme Court's most recent decision in the *Lawrence* case,¹³² existing sodomy statutes are now presumably void in the U.S., but the status of criminal sodomy and lesbianism statutes in Iran is arguable. Although these statutes – which execute sexual minorities and impose other violence against them – are unacceptable to society and are rarely in practice, there is no chance for their abolition. As a general rule, the Islamic punishment to some extent belongs to the Arabs tribal system of punishment. In addition, “Imam Bukhari narrates a Hadith (tradition) on the authority of Ibn Abbas that the Law of Retaliation (al-Qisaas) was originally prescribed to the Israelites.”¹³³ It shows these punishments belong to many ancient cultures. But if a poll were conducted tomorrow in Iran and U.S., would we find considerable support for punishing sexual minorities?

Shi'i Islam, which follows a line of succession from the family of the Prophet rather than Sunni acceptance of the authority of the Caliphs, is better suited for flexibility in deciding legal issues. The main branch, Twelve Shi'ism, believed there were 12 imams who were the direct descendants of Mohammed and succeeded him as the true Caliph. The last disappeared while a child and is known as the “hidden Imam” who will eventually return to rule the Islamic world. During the occultation of the Twelfth Imam, the people are to be guided by mullahs who are empowered to interpret the laws. If they chose to engage in modern individual legal reasoning by a Muslim jurist (ijtihad) to resolve conflicts between traditional Islamic law and international human rights, the prominent

131. Falco, *supra* note 11, at 733-34.

132. *Lawrence v. Texas*, 123 S. Ct. 2472, 2476 (2003).

133. KUSHA, *supra* note 25, at 34 (citing Imam, Bukhari; *Shahih al Bukharai*, vol. 6, Hadith No. 25, pp. 22-23, Dar al Arabiyah, Beirut, Lebanon (1985)).

Shi'i clerics in Iran may be a positive force for safeguarding human rights in that country and an example to other Muslim governments. For instance former Iranian President Rafsanjani declared that stoning is not an appropriate punishment and is generally only imposed by tasteless judges. This could be an isolated remark; it could also be a first step toward a revival of Shi'i *ijtihad* in this area.

Thus, because personal dignity and humanity are highly valued in current societies, punishments that violate these values have to be deemed problematic and in contrast to the idealism embodied in the ban on cruel and unusual punishment.

CONCLUSION

The criminalization of consensual homosexual acts, and their attendant cruel and unusual punishments, assault the dignity of sexual minorities. As mentioned, the largest class of assaults to a person's dignity arises when that person is held in low esteem for widely irrelevant features and without regard to any thing he himself has done. This violates a person's essential desert to equal respect. Equal respect is violated because the person's desires, plans, aspirations, and sense of the sacred are not considered worthy of social care or concern on a par with those of others.

Although sodomy laws in the U.S. are now unconstitutional, anti-sodomy laws in Iran and other countries violated the privacy and non-discrimination provisions of the International Conventions.

Therefore, the presentation of effective mechanisms for campaigning against cruel and unusual punishment for consensual homosexual acts is necessary:

An immediate end to all executions of sexual minorities.

All existing violence against gay-lesbian to be commuted.

Such countries still having sodomy laws should decriminalize them, respecting their membership in international treaties prohibiting discrimination against sexual minorities.

Even in Iran, where sodomy & lesbianism laws continue to exist without substantial abatement, various evidentiary and procedural barriers serve to make the punishment of consensual homosexual acts a rarity. Religions, after all, have the ability to adapt themselves to new ideas. This is why all other Islamic countries have adopted a penal system in concert with the reason and knowledge of their people. So to, Iran's penal sys-

2006] CONSENSUAL HOMOSEXUAL ACTS 183

tem must change with the changing of time. For this reason it has been mentioned in the Bible that “*religions are for human beings, not human beings for religions.*”

