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Book Review, reviewing Robert Wintemute, Sexual Orientation and Human Rights: The United States Constitution, the European Convention, and the Canadian Charter (1995)

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BOOK REVIEW

SEXUAL ORIENTATION AND HUMAN RIGHTS: The United States Constitution, the European Convention, and the Canadian Charter. By Robert Wintemute. (Oxford: Clarendon Press, New York: Oxford University Press, 1995).

I. THE TOPIC AND ITS RELEVANCE

The legal issues surrounding sexual orientation are front and center today. In just the area in which I have been researching – domestic same-sex marriage law and theory – there has been a spate of law review articles[1] and books[2] in the past few years alone. It is thus remarkable that Professor Wintemute has assayed the much broader field of the rights of same-sex people, generally, and under three different law-giving documents. The book, which is organized by argument and by national source and not by substantive legal issue, covers such disparate subject areas as the (de)criminalization of sexual conduct between members of the same sex, economic equality in fields such as pension benefits and housing, and government-sponsored discrimination in marriage and military matters. Except for the United States, the volume appears to cover virtually all of the important decided cases in these areas, and it does so with stark economy – the book is only 260 pages, exclusive of appendices, bibliography and index. Still more striking is that this comprehensive treatment spans such diverse legal sources – the United States Constitution, the European Convention on Human Rights,[3] and the Canadian Charter of Rights and

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[1]For an exhaustive list of law review articles, current to the end of 1995, *see* Lynn D. Wardle, *A Critical Analysis of Constitutional Claims for Same-Sex Marriage*, 1996 BYU L. REV. 1, 96 (Appendix A). A few of the best articles since that time are Carlos A. Ball, *Moral Foundations for a Discourse on Same-Sex Marriage*, 85 GEO. L.J. (1997); Marc A. Fajer, *Toward Respectful Representation: Some Thoughts on Selling Same-Sex Marriage*, 15 YALE L. & POL'Y REV. 599 (1997); and Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501 (1997).

[2]*See, e.g.*, SAME-SEX MARRIAGE: PRO AND CON (Andrew Sullivan ed. 1997); SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE (Robert M. Baird and Stuart E. Rosenbaum eds. 1997); SEX, PREFERENCE AND FAMILY: ESSAYS ON LAW AND NATURE (David M. Estlund and Martha C. Nussbaum eds. 1996); WILLIAM ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE (1996).

[3] From an American perspective, the author's sketchiness on exactly what this Convention *is*, how it came about, and how it is enforced, is a drawback. What the reader does learn is that the Convention is a human rights treaty of "territorial application that exceeds that of the constitution of any single European country," Wintemute at 4, that it has, as of 27 August 1996, thirty-nine signatories, *id.* At vi. (preface to paperback ed.), and that its provisions are enforced somehow by two bodies, the European Court of Human Rights and the European Commission of Human Rights, id. & at 91-92. In fact, Wintemute should have recognized that the respective roles of these two bodies should be more clearly described, since he notes parenthetically that an *amicus* brief submitted in Bowers v. Hardwick, 478 U.S. 186 (1986) incorrectly "cit[ed] the Commission's report as the Court's judgment). This criticism notwithstanding, the cases that have come before these tribunals are clearly and incisively

Freedoms.[4]

The author's choice and defense of these source materials is convincing. First, only in the United States, Canada, Western Europe, Australia and New Zealand had legal issues concerning same-sex couples been seriously raised, and, of those, Australia and New Zealand at the time had no comprehensive bill of rights[5]. Further, the author's own experience has uniquely positioned him to understand the legal cultures in which these issues arise: a Canadian by birth, Wintemute earned his first law degree in Canada, practiced law in the United States, and did advanced studies in law in the United Kingdom.[6]

Assessing the relevance of any work is dicey, because the question should be: relevance to *whom?* For academics from the United States who specialize in domestic law, only those who have the time and the appetite to venture beyond the rich case law that has been developed in this area are likely to find this book particularly useful. This result would be unfortunate, for the same reason that the tendency of courts in the United States to overlook potentially useful examples from other nations is so limiting. For example, as Wintemute points out, the United States Supreme Court, in deciding *Bowers v. Hardwick,*[7] could have "learned something" from the European Court of Human Rights in the case of *Dudgeon v. U.K.*,[8] which supplied a ready example of judicial willingness to protect the most private acts by consenting adults. To the extent that a parallel reluctance to venture beyond domestic sources exists in other countries, this potentially useful book might fall short of its promise for reasons having little to do with the merits.

For the international scholar, the only discussion likely to be found specifically relevant is the author's treatment of the important decision by the United Nations Human Rights Committee in the case of *Toonen v. Australia,*[9] in which that tribunal found Tasmania's blanket proscription of sexual activity between men violated the International Covenant on Civil and Political Rights. Aside from this example, the international lawyer is

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discussed.

[4] This Charter, which "dates from as recently as 1982," id. at 4, is part of the Canadian Constitution.

[5] Id. The author mentions, id. at 5, that "New Zealand has since adopted the New Zealand Bill of Rights Act 1990, No. 109." He goes on to mention similar, though less universally applicable, initiatives in Australia, and in New Zealand, as well.

[6] Indeed, this book is "a revised and updated version of [his] University of Oxford D. Phil. thesis." Id. at xiii (original preface).

[7] 478 U.S. 186 (1986) (upholding Georgia's anti-sodomy law).

[8] Ser. A., No. 45 (1981) (agreeing with the Commission's earlier decision that prohibiting private homosexual acts between consenting adults over the age of 21 violates the Convention's protection of private life).

[9] (Commun. No. 488/1992) (31 March 1994) (50th Session), UN H.R. Committee Doc. No. CCPR/C/50/D/488/1992, 1 I.H.R.R. 97.

Wintemute's audience only indirectly, as he himself acknowledges. One attempting to win a case based on international human rights, though, might well follow the sort of "trickle up" theory that the author mentions in the book's final, and comparative, chapter.[10] Indeed, the relationship between comparative and international perspectives is so fluid that to rope one off from the other seems strained, artificial. A consensus on a human rights issue that develops among a sufficient number of nations is bound to one day be translated into a broader guaranty bearing the moral clout of the international community.

Of all readers, though, it is the comparative lawyer who is the book's most direct and obvious audience. The very architecture of the work underscores its mission of providing precisely parallel arguments from each of the three jurisdictions, and the book's final chapter, "Comparison and Conclusion," represents a credible attempt to link these pieces together. My reservations about the success of the comparative project are deferred until Parts III (Analysis) and IV (Conclusion). First, though, to the book, its structure and content.

II. The Structure and Content of the Book: Summary and Analysis

A. Introduction

The book's Introductory chapter merits a close read. There, Wintemute devotes three sections to detailed explanations of the central concepts to be employed throughout the work: the various definitions of sexual orientation; what is covered by the term "sexual orientation discrimination"; and the ways in which such discrimination might be protected by constitutional and human rights law.[11] Of these sections, the most carefully wrought, and the most useful, is the first.

One of the difficult, but often unseen, barricades to success in the movement toward sexual orientation equality is judicial inability (or disguised unwillingness) to understand the complex relationship between emotional attachment and the conduct in which it primarily finds expression. For example, in *Bowers,* the Court found no fault with Georgia's decision to criminalize *conduct* – homosexual sodomy.[12] But the decision avoids the question whether those whose primary *emotional attachments* run towards members of the same sex are unfairly singled out for discrimination by a

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[10] Wintemute at 230 ("the phenomenon of sexual orientation discrimination...displays a degree of universality....)

[11] *Id.* at 6-18.

[12] Bowers v. Hardwick, 478 U.S. at 191-94.

statute that punishes the physical expression of that attachment. Of course, the Court in *Bowers* was doubtless aware of the disparate impact its ruling would have on those of same-sex emotional attachment, but other cases suggest that courts can make the same mistake in good faith.

Wintemute seeks to impart precision by separating the categories, and by later using these specific definitions in his substantive criticisms of the cases. In the "first sense," sexual orientation refers to "the direction of [one's] emotional-sexual attraction."[13] In the second sense, sexual orientation refers to "the emotional-sexual conduct in which [people] actually choose to engage."[14] These two terms, he notes, although related, are not necessarily connected in any particular case: no conclusion can be drawn concerning one's conduct from one's emotional attachments, nor can conduct be relied on as revealing one's direction of attraction. Of course, the two are *often* connected; so that failure to understand the connection (as in *Bowers*) is probably the greater evil. But the connection can never be assumed in substitution for analysis of what the issue is in a particular case. A chilling example of judicial unwillingness to appreciate the need to separate the two concepts is the recent Eleventh Circuit *en banc* decision in *Shahar v. Bowers*,[15] in which the court felt free to infer from a ceremonial wedding between Shahar and her life partner that Shahar was likely to engage in homosexual sodomy (in Georgia, again – another tragic legacy of the *Bowers* Court letting the statute stand) in violation of state law. This "propensity" state Attorney General Bowers (the same) thought rendered Shahar unfit for the position of assistant state attorney. In this case, the court's willingness to accede to Bowers' conflating of emotional attachment and conduct allowed an absurd result. In effect, Shahar was punished because of her *attachment,* which the court took to be a sufficient proxy for her anticipated *conduct.*[16]

Wintemute then expands the point by noting that additional senses of sexual orientation can be found. For example, one might engage in a *specific act* of sexual conduct (whether same or opposite-sex) that might be divergent from both attachment and conduct (as with a sexual "experiment" with a member of the same sex), or consistent with one but not with the

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[13] Wintemute at 6.

[14] *Id.* at 7.

[15] Shahar v. Bowers, 114 F.3d 1097 (11th Cir. 1997), *en banc, rehearing denied*, 120 F.3d 211 (11th Cir. 1997), *en banc.*

[16] What is particularly distressing about the case is the court's turning a blind eye to the true issue in the case. The court did not concern itself with whether Bowers had withdrawn other offers, or discharged employees, for breaking state laws such as those prohibiting adultery or unlicensed gambling. (Or are we supposed to imagine that no examples of either of these types of conduct had never come to Bowers's attention?) That Bowers himself was later revealed to have been involved in an adulterous affair during his term as Attorney General – and therefore should have fired himself, according to his own pristine moral standards – provides an exclamation-point ending to the story.

other (as with a married man whose emotional attachments are primarily to other men, and who on one occasion expresses that attachment, but whose primary sexual conduct is with an opposite-sex partner (his wife)).[17] One criticism that might be made of these precise categories is that they seem to miss the central point of *identity*, which is the concept that many scholars have employed with profit to explain situations such as that of our "straight-identified" married man in the example above. But, for the author's purposes, which principally involve dissecting cases under provisions of constitutional and similar law, the decision to de-emphasize identity makes sense. Usually the question is whether a particular act of sexual-orientation discrimination is violative of rights. That act may discriminate against conduct or against attachment, and perhaps the gain in emphasizing identity is outweighed by the sacrifice of analytical clarity.

The next two sections are clear and unexceptionable. In defining sexual orientation discrimination, the author is concerned to make the point that the term is meant to include all discriminations that are based on sexual orientation – even those that might affect those of opposite-sex orientation. (For example, a law that recognized a right of same-sex couples to register as domestic partners without affording the same right to opposite-sex couples, despite its ameliorative intent of compensating for the denial of the right of marriage, would constitute a form of sexual-orientation discrimination.) On the other side, the term is meant to exclude discrimination based on the curtailment of sexual freedoms that are visited equally on everyone. A useful example in this context is that of polygamy, which is often the Grand Marshal in the Parade of Horribles that will supposedly march once same-sex marriage is permitted. Wintemute points out that such discrimination is a curtailment of *everyone's* sexual freedom, so that (at least) different issues are raised than in the case of same-sex marriage which, by its nature, discriminates on the basis of sexual orientation.

Finally, the section discussing the place of constitutional and human rights law in the debate over same-sex marriage houses the author's central premise: that the right to be free from discrimination based on sexual-orientation has much in "common with other human rights,"[18] and that the bodies charged with interpreting such documents have the responsibility of "providing a coherent, principled basis" for their decision on sexual-orientation discrimination. Here, he introduces the three core arguments that tribunals deciding sexual orientation cases have considered: sexual orientation is an *immutable status*; sexual orientation, expressed by conduct, is sufficiently central to one's happiness that it should be protected as a

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[17] Wintemute at 8.
[18] *Id.* at 15.

fundamental choice; and discrimination based on sexual orientation is also *sex discrimination*, and therefore worthy of protection for the same reasons.[19] Of course, none of these arguments is new. As the remainder of the work makes clear, though, the author's exhaustive and intellectually honest approach to the three chosen documents grounds these points firmly.

B. The United States Constitution (Chapters 2 and 3)

In an important way, the decision to begin with the United States dictates the order of the argument that Wintemute then follows through much of the book. As he notes, the sodomy prohibition in place in all 50 states as recently as 1960 was pressed into service by courts by way of justifying "many other kinds of sexual orientation discrimination, such as in employment, services, or child custody...."[20] In Western Europe, by contrast, 12 nations had done away with such bans by that time.[21] Probably because of this backdrop, domestic litigants pitched their arguments accordingly: sodomy laws (and other laws defended by reference to those laws) interfere with the fundamental choices people make about their most private conduct. In the United States, these arguments may be cast as involving either fundamental rights - primarily those granted under the doctrine of substantive due process, and those residing, broadly, within the First Amendment - or as falling within the equal protection of the laws promised by the Fifth and Fourteenth Amendments to the Constitution.

With this background in place, Wintemute can treat the cases under the overarching rubric of fundamental choice issues, noting only for completeness' sake whether equal protection or fundamental rights arguments dominated a particular case. This reconceptualization carries the transformative possibility that readers well-schooled in these decisions will be productively startled, perhaps opening themselves to rethinking the line of cases along the lines the author provides. These fundamental choice arguments are developed through the different legal theories found in the decisional law: the often-used right to privacy is the most fully realized of these presentations. Wintemute sketches out the right's judicial development, then turns to a careful and perceptive analysis of the Supreme Court's failure to take that right seriously in *Bowers v. Hardwick*. *Bowers*, in turn, is then sifted through the privacy jurisprudence in a way that exposes the Court's inconsistency. This presentation is critically impressive, as the author turns the cases over to examine them in different ways. For

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[19] *Id.* at 17.

[20] *Id.* at 20.

[21] *Id., citing* PETER TATCHELL, EUROPE IN THE PINK: LESBIAN AND GAY EQUALITY IN THE NEW EUROPE at 139 (1992).

example, he finds that *Stanley v. Georgia*,[22] in which the right to read or view obscene material in the home was held protected by the First Amendment, could equally be considered a privacy case. In fact, he notes, the Court had interpreted *Stanley* in that way *until* the *Bowers* decision.[23] Wintemute's contribution here, as in so many other places throughout the book, is the skillful re-presentation of material by its placement within the creative architecture of his arguments.

After concluding the privacy discussion with a brief treatment of the fate of state laws in the post-*Hardwick* era and the probably limited protection against sexual orientation discrimination that would have been achieved even had *Hardwick* been decided the other way,[24] Wintemute concludes the chapter with briefer discussions of other possible sources of protection under a fundamental choice model. Here, he discusses the possible uses, and limitations, of the First Amendment, and the right to participate equally in the political process.[25] As he notes, these cases sometimes create points of intersection between fundamental rights and the equal protection clause.

The next chapter brings the equal protection argument to the fore, as it focuses much of its effort on the author's second principal point: sexual orientation discrimination may be based on *immutable status*. Indeed, the immutability of status is one of the criteria employed by courts in deciding whether a group should be granted *suspect classification* status, thereby requiring of laws discriminating against that group a compelling state interest and no less restrictive means of realizing that interest. As I shall emphasize in Section II.D., *infra*, Wintemute ultimately does not believe that an immutable status argument is the best choice, both because he does not believe that the laws in question are typically based on status, but on conduct, and because he believes that people have the choice about what conduct to engage in, whatever their sexual orientation. This discussion of the United States jurisprudence, then, holds that point in abeyance, opting for a critical treatment of the point within the boundaries developed by the case law. Again, the author succeeds in achieving an insightful rethinking of the case law. As he notes, "the Supreme Court has...never provided a coherent theory explaining [the] purposes and relative importance" of the criteria used in determining suspect classification status.[26] So he sets out to

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[22] 394 U.S. 557 (1969).

[23] Wintemute at 39. This observation, as the author acknowledges, was first made by RICHARD MOHR, GAYS/JUSTICE: A STUDY OF ETHICS, SOCIETY AND LAW at 132, n. 20.

[24] Wintemute at 46-49.

[25] *Id.* at 49-60.

[26] Those criteria are gathered from the welter of Supreme Court equal protection cases. *Id.* at 62-63. It is telling that the criteria *need* to be "gathered" rather than definitively set forth from a leading case. Wintemute identifies the following requirements (although, as he goes on to note, some of them are secretly factors): the group has suffered a history of intentional unequal treatment; the

provide an analytical model for understanding and then criticizing the cases, one that groups the factors according to "the purposes they appear to serve."[27] Inexplicably, though, this model is then abandoned in favor of dissection of the three most controversial of the requirements: lack of political power; immutability; and irrelevance.

It is in the last two of these discussions that Wintemute's earlier care in differentiating between emotional-sexual attraction and conduct pays off. In the immutability section, he notes that those courts able to distinguish between attraction and conduct have been apt to find sexual orientation immutable, while those courts failing so to distinguish have focused on the behavior of those of same-sex orientation and held that "'[h]omosexuality is...behavioral and hence is fundamentally different from race, gender, or alienage....'"[28] The same applies, not surprisingly, to the irrelevance issue. One might wonder why the collapse of this distinction should make any difference: Whether the court regards the attachment (not chosen) or the conduct (chosen) as the issue, how can sexual laws distinguishing on the basis of sexual orientation be relevant to a legitimate government purpose? But recall that this section focuses exclusively on the *equal protection* arguments, not on fundamental choices that individuals make. Severed from the protection afforded such fundamental choices, victims of discrimination are left at the "mercy" of those who would regard same-sex conduct as "a behavior that one chooses like whether to drink alcohol or smoke...."[29] Here, the surgical separation of arguments that Wintemute works so hard - and effectively - to achieve might have been balanced by a reminder of the perils of this kind of legalistic walling off of potentially synergistic lines of attack.

The remainder of the argument from immutable status asks, sensibly enough, whether *Bowers v. Hardwick* forecloses the immutability argument and whether a rational basis standard of review might provide sufficient protection against sexual orientation discrimination. The conclusions are of course hedged, but Wintemute again supplies rich analysis of the cases. The section's effectiveness, though, is reduced through no fault of the author's: each of these points requires a treatment of the landmark *Romer v. Evans*

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classification stigmatizes, and brands as inferior, the group; the group has "been the object of widespread prejudice and hostility"; stereotypical assumptions about the group's abilities contributes to the unequal treatment; the group's political participation has been curtailed because of prejudice, and its members constitute a "discrete and insular minority"; the classification is based on an immutable personal characteristic common to the group; and that characteristic is irrelevant, both to the group members' ability "and to any legitimate public purpose."

[27] *Id.* at 63.

[28] *Id.* at 68, *quoting* High Tech Gays v. Defense Indus. Security Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990), *quoting* Woodward v. U.S., 871 F.2d 1068, 1076 (Fed. Cir. 1989).

[29] *Id.* at 69 (quoting Linda Chavez, *Civil-rights laws shouldn't cover sexual orientation*, Commentary, Chicago Sun-Times (Oct. 15, 1987), reprinted in The Native (Nov. 9, 1987).

decision,[30] in which the Supreme Court invalidated, based on rational basis equal protection analysis, that Colorado's Amendment 2, which sought both to repeal legislation outlawing sexual orientation discrimination and to constitutionally prohibit future legislative action to that same end. The paperback edition does mention *Romer* in the Preface,[31] but it was not possible to change the book's organic structure to reflect cases decided in the interim between initial and paperback publications.

The brief sex discrimination argument in this section is a sort of "teaser," providing the inkling of an argument to be developed with rigor in the analysis of the Canadian materials. Given the dearth of relevant domestic law on the subject, the section focuses on scholarly commentary and on a pithy discussion of the Hawaii Supreme Court's decision in *Baehr v. Lewin,*[32] in which the court found that denial of a same-sex couple's right to marry was a form of sex discrimination, and therefore justified only if the state could adduce a compelling interest.[33] This result seems at first counterintuitive - since both men and women have the right to marry, how can denial of same-sex marriage be sex discrimination? The argument for that conclusion turns out to involve a challenge to basic understandings of gender roles, and is developed by the author in the Canadian materials. The chapter then concludes with a brief assessment of the position of sexual orientation discrimination in the United States. The author's properly pronounced focus on *Bowers* resurfaces here, as he wraps up the point that the court's willingness to allow the continued criminalization of same-sex private conduct makes perilous any litigant's effort to obtain justice - especially if courts continue to conflate attachment and conduct.

C. The European Convention on Human Rights (Chapters 4 and 5)

Although these chapters are framed in the same way as the United States materials, the fundamentally different texts make the discussions quite dissimilar. The advantages a European litigant faces are substantial. First, the right to privacy, which the Supreme Court has cobbled from various places in the Bill of Rights,[34] is firmly rooted in Articles 8 and 12 of the European Convention which provide for "the right to respect for...private and family life" and the "right to marry and found a family," respectively. Further, the Court and the Commission charged with interpreting the

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[30] __ U.S. __, 116 S. Ct. 1620 (1996).

[31] Wintemute at v-vi.

[32] 852 P.2d 44 (Haw. 1993).

[33] In *Baehr v. Miike*, 1996 WL 694235 (Haw. Cir. Ct., Dec. 3, 1996), Judge Chang of the Hawaii Circuit Court held that the state had not in fact met this burden. The case is currently on appeal to the state supreme court.

[34] *See Griswold v. Connecticut*, 381 U.S. 479, 483-85 (1965).

Convention have made clear, in a series of decisions beginning in 1980, that the flat criminalization of same-sex sexual activity is not permissible.[35] This means that litigants have not had to start with the presumption that the conduct often associated with their sexual attachment is illegitimate. Fundamental choice arguments, then, would seem on surer footing than in the United States.

On the other hand, immutable status and sex discrimination arguments suffer from an infirmity that is striking to an American lawyer: Article 14 outlaws discrimination only in "the enjoyment of rights and freedoms set forth in this Convention." Although the groups protected against discrimination are, in theory, boundless (since the list of those who may not be discriminated against ends with "other status"), Wintemute points out that one must first identify a right that is otherwise protected under a specific section of the Convention before protection will attach. Thus, only a fundamental rights argument is likely to succeed. The "suspect classification" notion that has such remedial potential under American law is ineffective under the Convention, except insofar as it supplements a fundamental choice argument.[36] In fact, much of Chapter 5 (on immutable status arguments, primarily) is a sad trail of lost cases,[37] reflecting the tribunal's unresponsive stance towards arguments grounded in Article 14's anti-discrimination clause. At bottom, such arguments have been evaluated under something akin to a reasonable basis standard, and the Court and Commission have been just as willing as American courts to "roll over" in the face of purported justifications brought forth by the state once that deferential standard is in play.

But how have the fundamental choice arguments fared? Surprisingly, the answer is "little better than in the United States." Wintemute devotes separate sections to cases arising under Articles 8 and 12. The Article 8 cases, in turn, are divided between cases arguing an interference with private life and those raising the related issue of family life. Based on the number of cases arising under each, the lion's share of the analysis concerns itself with the private life issue. Here, success depends on the ability to make three showings: first, that the challenged law or decision involves private life in the first place; second, that the applicant's private life has in fact been interfered with; and third, that such interference was not justified.

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[35] Wintemute at 93. Since the decisions of these entities do not automatically come into force in all member states (applying only to the state from which the claim originated), the realization of this victory has occurred in stagger-steps. *Id.* at 93-95. In addition, the Court and the Commission have been willing to allow discriminatory differences in the ages of consent to survive. *Id.* at 95.

[36] *Id.* at 91, 120.

[37] *Id.* at 124 ("the complete failure of Article 14 arguments in cases of sexual orientation discrimination").

The ensuing discussion makes clear that the deciding bodies have been able to use the second and third requirements to defeat each most of the claims that go beyond the decriminalization of same-sex sexual conduct. The usual raft of disingenuous rationales has been offered in reaching these conclusions. For example, in one case[38] the Commission reached the intellectually embarrassing conclusion that same-sex partners of British citizens were properly deported from the U.K., and that such deportation did not fall within the couple's private life! The court "supported" this conclusion with the observation that, because the couple was "professionally mobile," they could be expected to find somewhere else to live. Nor was the Commission moved to find interference "in spite of the [non-citizen's] arrest, conviction, and fine for overstaying."[39] In another case, the court found that justification was present for interference with the applicant's home resulting from her eviction from her deceased partner's house. The justification was the landlord's rights under the contract, although these same rights would not have sufficed to permit eviction had the couple not been of the same sex.[40] This conclusion is particularly puzzling in light of one of the stated requirements for justification: that the interference is "necessary in a democratic society."[41]

The discussion of Article 12 is as brief as the dearth of case law requires. In a two-page discussion, Wintemute makes clear the disdain that both Court and Commission have for the notion that a same-sex couple, with or without children, could constitute a family. In so doing, the these bodies have followed the same definitional argument as the courts in the United States. In *Cossey v. U.K.*,[42] for example, the Court held that Article 12 "referred to the traditional marriage between members of opposite biological sex.," so that efforts to construct a family life argument were necessarily unsuccessful. Such language is redolent of the views expressed in cases such as *Singer v. Hara*,[43] in which the court articulated the definition of marriage as a "relationship...which may be entered into only by two persons who are members of the opposite sex." Thus, same-sex couples looking for encouragement from the European Convention on the issue of marriage will be disappointed.

Given the promise of the fundamental interest in private and family life that is anchored in the express language of the Convention, one emerges

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[38] X and Y v. U.K., 32 D.R. (1983) (Commission decision) *discussed in* Wintemute at 103-04.

[39] Wintemute at 104, n. 78.

[40] The case is Simpson v. U.K., 47 D.R. 274 (1986) (Commission decision), *cited in* Wintemute at 110.

[41] Wintemute at 105, *quoting* Dudgeon v. U.K., Ser. A, No. 45 (1981).

[42] Ser. A., No. 184 (1990), *discussed in* Wintemute at 112.

[43] 522 P.2d 1187, 1192 (Wash. Ct. App. 1974), *rev. den.*, 84 Wash. 2d 1008 (1974).

from this discussion looking for some key as to what went wrong. Among the most persuasive sections of this volume is Wintemute's discussion of the unwillingness of the Court and the Commission to act before a "consensus" on a particular question of rights has been reached. As he concludes, "there is no protection for a 'European minority' against a 'European majority' that rejects recognition of a right, but only for minorities in member states in which the local majority dissents from a 'European consensus' in favour of recognizing the right."[44]

In this context, the unwillingness of the Court and the Commission to go beyond basic decriminalization of same-sex sexual relations is not surprising: as Wintemute points out, the Commission had upheld a total ban on sexual activity between men, in 1966, when almost half (6 of 14) of the member states had such a ban. In 1980, when the Court decided that such a ban was in violation of the Convention, only 3 of 20 still had such bans. Beyond this issue, however, it is difficult to find consensus among member states, and the tribunals charged with interpreting the Convention have been generally immovable. This positivist viewpoint is buttressed with references to decisions in which this factor seeps into the language used by the Court or the Commission.[45]

This is a result that Wintemute endorses, with hesitation. Meting our rights by majority vote is certainly contrary to the broad consensus of what a rights-giving document is meant to do, but the approach is "probably...defensible," he thinks, since the Court's role is that of "an international court interpreting a voluntary, international treaty, and not that of [a] supra-national constitutional court."[46] But the point should be raised in opposition that courts that interpret constitutions sometimes need to take a difficult stand that might cause a drastic result, such as the drafting of a constitutional amendment, or, if the action were thought sufficiently extreme, precipitating a constitutional crisis. So the constitutional court husbands its political capital, deploying it only in rare cases. Perhaps a similarly incremental approach might allow the European Convention to realize its potential in leading its member nations to give greater effect to basic human rights.

D. The Canadian Charter of Right and Freedoms (Chapters 6, 7, and 8)

These three chapters mark a strong departure from the structure that had been followed thus far. Instead of boxing the arguments into immutable status, fundamental choice, and sex discrimination, Wintemute asks the

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[44] Wintemute at 138.
[45] *Id.* at 137-38.
[46] *Id.* at 139.

Canadian materials to assist him in developing his normative points about the proper presentation of sexual orientation discrimination claims. In general, the discussion in these chapters is richer, more complex and more fully developed than is so of the other materials. Although it is unclear just why Wintemute chose to emphasize the Canadian materials, the result makes for interesting, and highly recommended, reading.

This is not to say, of course, that he leaves out the document under discussion. In fact, he *begins* Chapter 6 by grounding the discussion in the two potentially relevant sections of the Charter: Section 7 ensures the rights of "life, liberty and security of the person" which are not to be deprived "except in accordance with the principles of fundamental justice," while Section 15 (1) provides "equal protection and equal benefit under the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability."[47]

In deciding which of these sections provides the best chance of a successful argument by an aggrieved party in a sexual orientation case, Wintemute descends into almost talmudic obscurity, presenting a dense argument that (in one paragraph) compares the Charter, the United States Constitution, and the European Convention to conclude that section 7, which does not mention any right of privacy, is less than useful in the greater number of the cases. Under section 15 (1), what he terms a "pure equality" argument is available, and therefore should be pressed into service.[48] This seems sensible, for in most cases a Canadian plaintiff will be raising a challenge to a law that "makes an express distinction between gay, lesbian or bi-sexual persons and heterosexual persons, or between same sex...and opposite sex emotional-sexual conduct."[49]

How, though, can section 15 (1) even apply, since sexual orientation is not one of the items targeted for protection? The Canadian Supreme Court has stated that the section's protection can be extended to "new" kinds of discrimination that are analogous to those enumerated.[50] Wintemute then devotes the remainder of Chapter 6 to the construction of a sturdy argument that sexual orientation is indeed an analogous ground: he first pieces together the criteria for determining analogous ground status;[51] next, he applies those criteria to sexual orientation, both in considering the decided cases and legal scholarship, both of which agree that sexual orientation

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[47] *Id.* at 151-52.

[48] *Id.* at 152-53.

[49] *Id.* at 152.

[50] Andrews v. Law Soc'y of British Columbia, 1 S.C.R. 143 (1989), *cited in* WINTEMUTE at 153.

[51] Wintemute at 154-62.

qualifies as analogous to protected categories,[52] and in building his own model. Under this model, the emphasis properly should lie with the immutable status or fundamental choice points he has been discussing throughout the work. Recognizing that focusing on these two potential criteria to the exclusion of others defies conventional analysis, he defends the choice by noting that only these two arguments get to the bottom of the difficult question presented by sexual orientation. It is the novelty of the Charter, and what he sees as its fluidity, that occasions this departure from critical analysis of positive law to the normative judgments provided in Chapters 7 and 8. While Chapter 7 makes the argument that sexual orientation is a fundamental choice, and *not* an immutable status, Chapter 8 attempts to ground protection against sexual orientation in one of the protections against discrimination that is enumerated in Article 15 (1), i.e., sex discrimination.

Chapter 7 (and indeed Chapter 8) could stand on its own as a well-reasoned, and creative, article. Here, his earlier care in separating emotional-sexual attraction from conduct bears the most fruit. He first considers, but ultimately rejects, the notion that sexual orientation discrimination is an immutable status, *even for attachment.* He is able to reach this result only by reading the "immutability" criterion as "impossibility of change,"[53] and then welding that interpretation onto the observation that "some people believe they can choose to change their sexual orientation" as direction of attraction.[54] This approach seems to me seriously mistaken. It now seems clear that many people of same-sex orientation (and many people of opposite-sex orientation, for that matter) regard their attraction as a "given" and one that would be, for practical purposes at least, impossible to change. Further, I don't believe Wintemute fully appreciates what is at stake in this concession. If even attraction is not immutable, then what would justify calling it sufficiently "basic" that the choice to engage in conduct emerging from that orientation would be immune from scrutiny?[55]

Wintemute's more central point, however, is that at least conduct – which is, after all, the basis of most of the discriminatory legislation that affects those of same-sex orientation – is in an important sense chosen. He concedes that the choice "may seem 'constrained' and therefore 'unfair'," but insists that any conduct traceable to same-sex orientation is nonetheless

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[52] *Id.* at 163-68.

[53] *Id.* at 177, n. 21.

[54] *Id.* at 177.

[55] Wintemute later tries to avoid the implications of this point. *See id.* at 180 ("[i]f an immutable status is the reason for desiring to engage in a particular kind of conduct, it may be seen as compelling that conduct and therefore strengthening the argument that the conduct is a fundamental choice").

a choice.[56] For him, then, the more successful path lies in seeing the choice as fundamental, and therefore not properly interfered with by the state.

This argument, however, is extremely nuanced and difficult to state briefly. Wintemute devotes some fifteen closely reasoned pages to the argument that sexual orientation should be so treated. Attempting to capture the flavor of this well-rendered argument would be futile, but a couple of points are worth drawing attention to. First, he spends some time discussing the connection between religion and sexual orientation as fundamental choices. These seem the two closest cases, because even though both could be repressed (or, more controversially, changed), repression of religious belief and its expression would be seen as deeply offensive. Then why should the case be different for sexual orientation? Second, the section contains a helpful discussion of the different levels of generality under which the expression of sexual orientation operates: one might move from a particular expression of same-sex affection, to a more general consideration of the direction of conduct, to even higher levels of generality that would take in the full "content" of one's sexuality.[57]

Although of limited use in legislative precincts, the sort of reflective argument Wintemute makes should find its way to courts called upon for the centrally important tasks of guaranteeing the fundamental rights of people of same-sex orientation. As the author concedes, the argument is stronger when the strength of attraction -- whether immutable or not – is factored in, because the connection between attraction and its expression fortifies the conclusion that sexual orientation is a fundamental right.

Finally, we come to Wintemute's point that sexual orientation discrimination is really a form of sex discrimination, too. The author cites some of the American scholarship that unearths the gender-based assumptions that fuel much of the objection to those of same-sex orientation.[58] In short, sexual orientation discrimination, by enacting assumptions about the proper "roles" for people of the male and female sex, restricts the possibilities for *both* sexes on the basis of sexual stereotyping. The rejection of such stereotypical assumptions about appropriate conduct for each sex has recently been strongly voiced by the United States Supreme Court: "[G]eneralizations about 'the way women are,' estimates of what is appropriate for most women, no longer justify denying opportunity to women whose talent and capacity place them outside the average

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[56] *Id.* at 178-79.

[57] *Id.* at 186-87.

[58] *Id.* at 206, and articles cited at n. 36. Probably the ground-breaking article on this issue is Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187 (1988). *See also* Andrew Koppelman, *The Miscegenation Analogy: Sodomy Laws as Sex Discrimination*, 98 YALE L.J. 145 (1988).

description."[59] In this (typically) exhaustively argued chapter, Wintemute also makes a compelling case that, even without the subtle problem of gender-based assumptions noted above, restricting one's choice of a partner - whether in housing, benefits, sexual conduct, or marriage - is sex discrimination, plain and simple. The argument against this conclusion is that, since men and women are equally affected by legislation prohibiting same-sex conduct, neither sex can claim it was discriminated against.[60] As suggested above, this approach is deficient by virtue of its focus "on the net effect of a set of distinctions on groups, rather than on the effect of the specific distinctions on the choices of individuals."[61] These options, in turn, are restricted for precisely the reasons noted above: they impermissibly assign proper and improper roles to men and women.

E. Comparison and Conclusion

This section might better have been called "Summary and Conclusion." The reader is better advised to read the full comparative treatment, because the author's style of close analysis does not lend itself well to the kind of comparison he attempts here. Having said that, I did find the section on justifications for discrimination, and how they might be countered, quite useful.[62] This utility probably stems from the section's emphasis on an issue that only arises after the prima facie case is made, and making that case was the primary mission of the author throughout the specific chapters.

In addition, the final section of the chapter contains a detailed and quite helpful discussion of the decision by the Supreme Court of Canada in the landmark decision in *Egan v. Canada*.[63] There, the Court decided, 5-4, that denial of benefits to a same-sex couple that had been living together for some 46 years, was constitutionally permissible. The Court was unanimous in finding that sexual orientation was an analogous ground under section 15 (1), and a 5-4 majority found that discrimination had, in fact, occurred, but the claimant lost the case when one of the five justices who found that discrimination had occurred also found that such discrimination could be justified by the limited funds he thought existed for this purpose. Presumably, the Court's decision arrived too late to be written into the text more fully, but the discussion of what will doubtless be a critical case in the movement to end discrimination based on sexual orientation is quite helpful.

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[59] U.S. v. Virginia, 518 U.S. 515, 116 S. Ct. 2264, 2284, 135 L.Ed.2d 735 (1996).
[60] Wintemute at 206.
[61] *Id.*
[62] *Id.* at 238-45.
[63] 2 S.C.R. [1995], cited in Wintemute at 254.

III. GENERAL COMMENTS AND CRITICISMS

A book such as this is perhaps best criticized as I have done throughout this review, i.e. by engaging the detailed arguments as they are presented. Nonetheless, it seems appropriate to offer a few final thoughts on this impressive work.

First, the book is very useful as a research resource. As mentioned in Section I, *supra,* Wintemute is quite thorough, both in selecting the cases for review, and in the analyses themselves. Readers unable to gain easy access to international sources may feel reasonably confident that the cases are deeply understood and treated with care. Also, abundant secondary literature is cited appropriately, augmenting the analysis without distracting from its thrust.

On the other hand, the detail in the case analyses was not always matched by sufficient background concerning the structure and function of the judicial and related organs that have primary responsibility for deciding these issues. For example, the author never discloses the relationship between the Commission and the Court that interpret the European Convention. Nor does he explain with precision the place of the Canadian Charter within that country's system of laws. This problem, I suspect, is the result of Wintemute's own facility in the three systems, which may at times lead him to take for granted the reader's knowledge. When assaying a comparison of this sort, though, one should assume the need to provide basic background information.

Overall, SEXUAL ORIENTATION AND HUMAN RIGHTS deserves a place in any library interested in the array of issues it presents. The author is not only thorough, but in parts (especially in the chapters on the Canadian Charter, where his original arguments are presented) he is inspired. This work is a pleasure to recommend, and pays a large dividend to the serious and patient reader.

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