Quasi-Global Social Norms

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Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct.

—Lawrence v. Texas

I. INTRODUCTION

When Justice Kennedy penned these sweeping words in the preamble to the Lawrence decision, which struck down a Texas anti-sodomy statute as an unconstitutional violation of due process, he offered no authority upon which to rest his far-reaching proposition. Rather, the persuasiveness of these words, together with their authority, were seemingly derived from the words themselves. It is as if such a pronouncement on the contemporary concept of the meaning of liberty was so self-evident that Justice Kennedy (and the five member majority his opinion represents) did not deem it necessary to support this statement with citations to suitable authority.

While the contours of the meaning of liberty might have seemed obvious to Justice Kennedy, it is clear that the legal consequences of such meaning, prior to the issuance of the Lawrence opinion, were very much in question. Indeed, judging from Justice Scalia’s dissent as well as the deluge of criticism from legal quarters that followed the Lawrence ruling, the

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2 See id.

3 See id. at 586–605 (Scalia, J., dissenting).

legal consequences of the meaning of liberty were far from settled. This point is underscored by the fact that the holding of the *Lawrence* majority resulted in the overturning of another U.S. Supreme Court case, *Bowers v. Hardwick*,\(^5\) which had a mere seventeen years earlier tackled the same issue presented in *Lawrence*.\(^6\) Thus, the authoritativeness of the principle upon which Justice Kennedy relied in making the statement illustrated above was not to be found in legal precepts, but somewhere else.

That place is the realm of social norms. By emphatically announcing the contents of liberty at the outset of the *Lawrence* opinion, Justice Kennedy defined a universe that was drawn not from the legal world, but from a repository of collective consciousness present in contemporary society. Thus, the invocation to this repository needed no citation, as presumably its content represented values that were so near universal as to be accepted intrinsically as truths. In other words, "[l]iberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct" because society says as much.\(^7\) From this perspective, Justice Kennedy merely tapped into the stream that is commonplace societal thought and proclaimed an almost universal, or quasi-global, social norm.

Nevertheless, this invites the question: how was this tapping in achieved? And furthermore, how did the *Lawrence* majority presume to know, or even think to presume to know, society’s generally accepted concepts of liberty and freedom? Any answer to these questions must necessarily involve an explanation of a process by which law connects with the realm of social norms and becomes informed by it. In fact, because the very credibility of this sort of proclamation depends on a high level of consensus, the process which leads to this type of announcement better be rigorous else all respect for it be lost. The imperative and confident tone with which the meaning of liberty is defined at the beginning of *Lawrence* seems to suggest that the Court’s majority, in believing it was accurately reflecting societal mores, had reached this conclusion after careful consideration and a thorough process. This process is the identification, observation, and description of quasi-global social norms—that is, norms that are not only ingrained into the very fabric of society, but also are accepted and internalized by a high percentage of populations in this country and abroad so as to make these norms almost global in their scope.

This Article’s purpose is to describe the emergence and operation of quasi-global social norms and to demonstrate their impact on legal doctrine as exemplified in *Lawrence*.\(^8\) In light of this impact, an understanding of

\(^5\) 478 U.S. 186 (1986).
\(^6\) See *Lawrence*, 539 U.S. at 567–70.
\(^7\) Id. at 562.
\(^8\) While observations about social norms might be valuable per se to the social scientist, to the legal scholar, it is those norms’ interactions with law that are of paramount interest.
this present, but mostly ignored, force seems timely and essential. Part II of this Article briefly surveys recent social norm scholarship and defines the concept of "norm" as the term is currently adopted both in the domestic and international spheres. Part III introduces quasi-global social norms. These norms are shown to originate from a continuous feedback of interactions that is played out both in the private and public sectors. Almost any individual, social group or official institution has a role in the development of a quasi-global social norm, but the development of these norms is contingent on a large segment of society internalizing them to such an extent that most individuals become unaware of their existence. Moreover, given the almost universal aspect of quasi-global social norms, their formation cannot be circumscribed within national borders. Indeed, the complex interplay which leads to the origin of these norms implicitly includes interactions that take place outside the United States. Part III also explains the "quasi" element of this type of norm; that being a reflection of the pragmatic reality that a universal consensus on a particular social norm is almost impossible to achieve, and, that social norms pertaining to issues of fundamental liberties do arise nonetheless. This creation inevitably seeps into legal systems, which rely on constant feedback from the societies they mean to represent; hence, Part III concludes with a description of how this permeation occurs. Finally in Part IV, quasi-global social norms are observed at work. Fairness and liberty are selected as examples of these social norms, and their effect on shaping contemporary social and legal behavior is examined. Using the Lawrence opinion as an example, the existence and operation of these norms are used to explain the normative origin of certain court decisions which at first blush might seem unclear.

II. DEFINING SOCIAL NORMS

A. The Current Understanding of Social Norms

Contemporary scholarship shows a keen interest in exploring social norms. This interest, which has spiked over the last decade, seems primarily motivated by a desire to comprehend the forces that make individuals act in certain ways. One of the unintended consequences in this explosion of interest has been to create a methodological scattering that has resulted in a Tower of Babel where everybody talking about social norms has been speaking in different languages. This has led Eric Posner to remark that the "concept of a 'norm' is slippery," and that the literature often

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10 Id. at 339.
uses the term "social norm" actually to denote "many different kinds of behavior."\textsuperscript{12}

In introducing a particular sub-category of social norm, this Article defines "social norm" in the broadest of its various incarnations. In general, social norms are the forces which explain how "society shapes individual behavior."\textsuperscript{13} Thus, for social norms, this Article intends "rules and standards that impose limits on acceptable behavior."\textsuperscript{14} In other words, "[s]ocial norms are standards of control"\textsuperscript{15} where "social attitudes of approval and disapproval, specify[] what ought to be done and what ought not to be done."\textsuperscript{16} The key component of social norms which distinguishes them from other forces that shape behavior is their limiting aspect. That is, the "essential feature [of] norms [is that they] constrain one person's conduct in deference to the interests of others."\textsuperscript{17} However, the contexts in which social norms operate are not limited: "social norms [are] about nearly every aspect of human behavior."\textsuperscript{18}

Given the pervasive nature of social norms, and the increased awareness of their importance in the running of society, it is no surprise that numerous commentators have developed different theories to describe the origin, birth, development, and death of particular social norms. It is beyond the scope of this Article to describe in detail all the various expostulations on such topics. However, some understanding of the theories pertaining to the origin and development of social norms in general provides the necessary background for a contextual understanding of the origin and development of quasi-global social norms that I describe later.\textsuperscript{19}

One of the reasons why several different theories have been presented to describe the origin of social norms is that social norms are highly differ-


\textsuperscript{13} McAdams, supra note 9, at 339, 350 (referring to social norms as "obligations"). Others have offered narrower definitions. See, e.g., ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 128–30 (1991) (distinguishing social norms from legal rules); Melvin A. Eisenberg, Corporate Law and Social Norms, 99 COLUM. L. REV. 1253, 1255 (1999) (defining social norms as "rules and regularities concerning human conduct, other than legal rules and organizational rules"); Robert E. Scott, The Limits of Behavioral Theories of Law and Social Norms, 86 VA. L. REV. 1603, 1610 (2000) (distinguishing social norms from conventions, the latter of which are not backed up with an obligation to obey).


\textsuperscript{17} Jones, supra note 14, at 546; see also DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PERFORMANCE 83 (1990); Posner, supra note 11, at 1699 ("[A] norm con- strains attempts by people to satisfy their preferences.").

\textsuperscript{18} Sunstein, supra note 16, at 914.

\textsuperscript{19} See infra Part III.
entiated and contextual. Thus, even though it is possible to create an umbrella definition under which all social norms fit, the definition alone cannot account for the reason and process by which every single norm arises. Rather, each category of social norm will exhibit different characteristics both in its substance and in its birth and development.

In that light, various scholars have put forward proposals for how to categorize and sub-define behavioral patterns that fall under the rubric of social norms. The most important differentiation among social norms for the purposes of this Article pertains to the level of generality of the specific norm. That is, social norms can be categorized as pertaining to a concrete rule of conduct (such as “don’t litter”) or as relating to a more generic existential credo (such as “don’t lie”). The level of generality of a particular norm will also contribute to another form of norm classification, that is whether the norm is consciously engrained into the psyche of the individual and thus triggered by pondered reasoning, or whether it operates on a deeper subconscious level, thus being elicited through instinct or impulse. The level of generality of a social norm and its place of retention within an individual’s mind are connected in that the more abstract the norm becomes, the more likely it is stored on the subconscious level. As a result, these more abstract norms take longer to ingrain, but once so implanted, are more difficult to remove.

Apart from the types of categorizations illustrated in the paragraph above, several commentators have presented other ways to classify norms: thus we have intrinsic norms versus instrumental norms, good norms versus bad norms, and institutional norms (codified in law) versus non-institutional norms. These different categorizations have resulted in a laundry list of social norms such as the norms against selling one’s place in

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20 Others have similarly commented on this categorization using different examples. See Eisenberg, supra note 13, at 1276–77 (using loyalty as the general norm and listening to a neighbor as the specific norm); Russell Hardin, Law and Social Norms in the Large, 86 Va. L. Rev. 1821, 1821 (2000) (referring to the “norm of cooperativeness”—a “very general” norm of fairness applicable in multiple contexts).

21 This grouping of norms into those affecting the conscious mind versus those affecting the subconscious has been identified by various scholars albeit with a slightly different phraseology. See, e.g., Eisenberg, supra note 13, at 1256–57 (categorizing social norms into those that are purely reflexive, those that are conscious but do not engender a sense of obligation, and those that are conscious but do create a sense of obligation); see also Sunstein, supra note 16, at 914 (differentiating between norms that are the product of reflective judgment and norms that are intuitive).

22 The reasons for this will be explored infra Part III.A.

23 See Jones, supra note 14, at 546–47 (denoting intrinsic norms as “consumption” norms (such as prohibiting cruelty to animals), and instrumental norms as “production” norms (such as prohibiting sleeping on the job)).

24 See Sunstein, supra note 16, at 914 (giving manners as an example of a good norm and the former prohibition on interracial relationships as an example of a bad norm).

line, against selling services to a neighbor, supr
26 and the norms of voting, participating in government, cleaning the park, helping the needy, and treating others fairly.
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Because of the great disparity among social norm types (and their examples), any theory about the genesis and operation of social norms must either account for such disparity, or else focus on a certain defined subcategory. Thus, "social norms . . . may be the product of custom and usage, organizational affiliations, consensual undertakings and individual conscience." 28 Or else they may result from the efforts of "norm entrepreneurs," individuals or groups who push certain issues into the spotlight in an attempt to sway public opinion and create a "norm cascade," being a rapid ground swell of people adopting their point of view and proposed new social norm. 29 However, regardless of norm category, most contemporary scholarship presumes that the creation and sustenance of social norms is based on repeated personal interactions, so that social norms become identified as "practices that parties adopt and follow in an ongoing relationship." 30 Thus, a general requirement for norm origination is a certain degree of social "connectedness." 31 Although early norm scholarship required an almost intimate association between the members of a particular group as the prerequisite for norm creation and adoption, 32 as this scholarship has evolved, certain commentators have observed that ever larger definitions of groups can still create and sustain certain social norms. 33 Thus, any particular social norm is either "a reflection of the behavioral preferences of the majority of group members," 34 or the embodiment of a minority preference to which the majority of a defined group is indifferent. In either case, the group can consist of cattle ranchers in a county who interact on a regular basis or of millions of people who live on separate continents who, when taken individually, have a virtual statistical impossibility of interacting with each other even once in their lifetimes.

Another primary thread which holds together much thought on social

26 See Sunstein, supra note 16, at 914.
28 Jones, supra note 14, at 546. For example, within the context of international business transactions, norms are said to evolve through repeated dealings of the transactors or industry consensus enforced both privately and through legal avenues. David Charny, Illusions of a Spontaneous Order: "Norms" in Contractual Relationships, 144 U. PA. L. REV. 1841, 1841 (1996).
29 See Sunstein, supra note 16, at 909.
32 ELLICKSON, supra note 13, at 181.
norms is the notion that because norms are based on a sense of obligation, there has to be a mechanism by which compliance with a particular social norm is enforced.\textsuperscript{35} Such mechanisms are often externally imposed by individuals, groups, or society itself. This imposition takes place within the confines of a closely-knit group and consists of ostracizing the violating individual.\textsuperscript{36} This ostracizing is a consequence of the small size of the group in which many members are able to observe the abhorrent behavior and enact their sanctions through their repeated interaction with the violating party. Hence, sanctions such as shaming, "criticizing, blaming, refusing to deal or shunning" all play a role in ensuring compliance with a social norm in small groups.\textsuperscript{37} These are all examples of outwardly imposed control mechanisms.

However, "external, material incentives are not the only forces that govern behavior."\textsuperscript{38} Hence, a "central component of social norms is internalization."\textsuperscript{39} By internalization, one intends a control mechanism that exists within the individual. Guilt, self-bereavement,\textsuperscript{40} an "internalized sense of duty,"\textsuperscript{41} and a desire for esteem\textsuperscript{42} are all examples of endogenous forces that ensure compliance with social norms.

In sum, current legal scholarship describes social norms as patterns of behavior, created by the repeated interaction of certain players, which is normally exhibited by individuals who are members of a defined, relatively small group. These individuals conform to social norms through a sense of obligation which is controlled either by external pressure or through an internal self-enforcing mechanism. This description begins to set the stage in which quasi-global social norms appear. However, as will be discussed in Part III, quasi-global social norms do not fit neatly into the description of norms outlined in this section. Indeed, because of their global nature, a certain international aspect is inherent in the make-up of quasi-global social norms.

B. Norms in the International Arena

There does not seem to be in contemporary legal scholarship much


\textsuperscript{36} See id. at 88–91.

\textsuperscript{37} See Cooter, supra note 27, at 1580; see also Charny, supra note 28, at 1841 (characterizing the "ordinary rules of everyday conduct" as being "enforced by the gossip of neighbors and scolding of friends," and comparing such simple enforcement with the complex enforcement of norms of international business transactions).

\textsuperscript{38} Scott, supra note 13, at 1606.

\textsuperscript{39} Hasen, supra note 31, at 2147 (emphasis omitted).

\textsuperscript{40} Paul G. Mahoney & Chris W. Sanchirico, Competing Norms and Social Evolution: Is the Fittest Norm Efficient?, 149 U. PA. L. REV. 2027, 2030 (2001).

\textsuperscript{41} McAdams, supra note 9, at 340.

\textsuperscript{42} Id. at 381.
thought devoted to a conceptualization of international or global social norms. The few times that the term global social norm appears in international law literature, it seems more a figure of speech than a reference to the behavioral force described in the section above. Rather the term "norm" as it is used in international law circles tends to refer to legal norms. However, there does exist in the international law literature a description of a process whose operation closely resembles that of social norms. This process is known as "transnational legal process."

Transnational legal process is a "theory and practice of how public and private actors—nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals—interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law." Harold Koh summarizes this process as one of "interaction, interpretation, and internalization." He explains that transnational legal process has four characteristics: (1) it transcends traditional barriers such as those delineating the national and international arenas, and those separating the public and private spheres; (2) it is guided primarily by non-state actors; (3) it is a dynamic process; and (4) it is normative in nature, in that it is designed to change law.

Transnational legal process tends to be set in motion by "transnational norm entrepreneurs." These are either individuals or non-governmental organizations who: (1) create both popular and political support at home; (2) set up parallel non-governmental organizations or entice individuals to act as transnational norm entrepreneurs in other countries; and (3) persuade foreign individuals that a certain norm reflects "a widely shared or even universal moral sense, rather than the peculiar moral code of one society."


47 See Koh, supra note 44, at 184. Unlike many of their international law counterparts, international relations theorists have "reviewed the complex mechanisms by which state and nonstate actors interact within and across borders." Laurence R. Helfer, Overlegalizing Human Rights: International Relations Theory and the Commonwealth Carribean Backlash Against Human Rights Regimes, 102 Colum. L. Rev. 1832, 1845 (2002).

48 Koh, supra note 45, at 656 (borrowing Cass Sunstein's terminology).

these efforts, "[a]s transnational actors interact, they create patterns of behavior and generate norms of external conduct which they in turn internalize." In this context, internalization refers to the process of incorporating international law into domestic law through legislation, executive action, or judicial process. This creates an enmeshment between the domestic and the international which, through repetition, creates long-lasting effects. A visible and recent example of this process is the late Princess Diana’s efforts to rid the world of land-mines by using her high profile to bring a spotlight to the issue, set up local organizations to lobby individual governments to halt the practice, and ultimately, to get international law to ban the practice. This begins a trickle down effect where individual governments, in turn, will be pressured and coerced into doing the same.

From the above description, it is not difficult to spot aspects that transnational legal process shares with traditional social norms. Both rely on the repeated interaction of players within the confines of a specifically defined group. For traditional social norms, such a group might comprise the members of a country club, while for transnational legal process such a group might consist of the members of the foreign service departments of various nations. In addition, both transnational legal process and traditional social norms incorporate the notion of norm entrepreneurship where an individual or a group with a vested interest contributes to the shaping of specific norms. Lastly, transnational legal process operates with control mechanisms which resemble some of those present within social norms. Thus, as an individual might be shamed into complying with the “give candy to the kids on Halloween night” norm, so might a nation be shamed into complying with international law.

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50 Koh, supra note 44, at 204; see also Thomas Risse & Kathryn Sikkink, Introduction to THE POWER OF HUMAN RIGHTS: INTERNATIONAL NORMS AND DOMESTIC CHANGE 18 (Thomas Risse et al. eds., 1999) (describing the process in the context of the globalization of human rights where these transnational norm entrepreneurs bypass their own governments and attempt to influence domestic policy by interacting with their foreign counterparts who in turn will attempt to convince their own governments to bring pressure on the government originally bypassed by the transnational norm entrepreneur that began the whole process).

51 See Koh, supra note 44, at 204.

52 See id. at 205 (“Once nations begin to interact, a complex process occurs, whereby international legal norms seep into, are internalized, and become embedded in domestic legal and political processes.”).

53 See Jonathan R. Macey, Regulatory Globalization as a Response to Regulatory Competition, 52 EMBRY L.J. 1353, 1374 (2003) (citing Harold Hongju Koh, Why Do Nations Obey International Law?, 106 YALE L.J. 2599 (1997)) (identifying “[c]ooperation in the international sphere [as] a form of global social norm,” such cooperation driven by “[f]oreign policy generalists,” being those actors who transact in foreign affairs (the diplomatic corps), as a “goal in itself.”). In light of the fact that Macey links the goal of cooperation to the interactions between members of the foreign service departments of different nations, his analysis as to cooperation being “a form of global social norm” seems well placed.

54 See Koh, supra note 44, at 203 (“[A]ctors obey international law as a result of repeated interaction with other governmental and nongovernmental actors in the international system.”). Clearly, legal enforcement of international law through nongovernmental organizations provides an explanation for why nations comply with international law. However, this form of enforcement, being legal, separates such behavior
Key differences exist between transnational legal process and traditional social norms, however. First, transnational legal process primarily concerns itself with the permeation of legal mores throughout the world, while social norms, as the term suggests, deal mostly with extra-legal checks that society imposes on its members. Second, transnational legal process aims to affect governments, not individuals, unlike social norms. Thus even though the impetus behind norm generation in transnational legal process might start from the private sector, the targeted recipient is always a public institution. Third, transnational legal process presumes a certain deliberate purpose which is absent in the formation of social norms (whose formation path is more meandering). Finally, and most obviously, transnational legal process focuses on domestic incorporation of international law. Indeed, as stated above, the internalization referred to in transnational legal process is the domestication of international rules. On the other hand, social norms as currently explored in the academy do not entail much of an international component, but tend to be focused and examined on a very localized level.

Notwithstanding their differences, it is clear from both descriptions of social norms and transnational legal process, that the two share a common conceptual gene. This commonality, however, extends beyond the theoretical to encompass a present reality which operates within most contemporary societies. Given their similarities, it would seem artificial to expect social norms and transnational legal process to operate in cocoons without having any affect on each other. Indeed, the operation of social norms and transnational legal process is a force that can be combined. When other factors such as domestic legal practice are added to this combination, the present reality of quasi-global social norms begins to take shape.

III. INTRODUCING QUASI-GLOBAL SOCIAL NORMS

Quasi-global social norms are a very different breed of social norm compared to those discussed in contemporary scholarship, but they do maintain certain attitudinal affinities with other social norms. As a result, like other social norms, quasi-global social norms affect “[i]ntrinsic predispositions” being “the directions in which an actor would channel his or her efforts if left to his or her own devices.” However, as noted above, the

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55 Scholars have also referred to this process of internalization as “embeddedness.” See Robert O. Keohane et al., Legalized Dispute Resolution: Interstate and Transnational, 54 INT’L ORG. 457, 458 (2000).
56 Amitai Etzioni, Social Norms: Internalization, Persuasion, and History, 34 LAW & SOC’Y REV. 157, 161 (2000). The author explains that social norms “are a major fact among the elements that shape predispositions, the wants of people,” so that “social norms help people form (and re-form) the self, by profoundly influencing their identities, their worldviews, their views of themselves, the projects they undertake, and thus the people they seek to become.” Id. at 163.
typical paradigm of social norm described today in the academy consists of a fairly specific behavioral pattern derived from the repeated interaction of a relatively small group of people. Quasi-global social norms, on the other hand, do not arise and develop as the result of repeated interactions between individuals comprising a closely-knit group. Indeed, the interactions that form quasi-global social norms are more random and widespread than those characteristically associated with the birth of traditional social norms. Thus, quasi-global social norms arise in the least knit group possible, society itself.

As a result of the vast scale of both the interactions necessary to spawn a quasi-global social norm and the universe within which these norms form, quasi-global social norms are less specific than other social norms and concern more abstract and general behavioral concepts that define the self (which themselves tend to involve attitudes towards fundamental human rights and liberties). A consequence of this high level of generality and abstraction is that quasi-global social norms tend to be controlled through a process of internalization. This internalization process which embeds a quasi-global social norm within the psyche of the collective, is by necessity quite slow, thus making quasi-global social norms more stable than concrete norms. Another consequence of the generality and abstraction of these norms is that the behavioral conduct which they regulate takes place overwhelmingly in private, and thus is difficult to observe by any norm monitors making enforcement difficult. Thus, quasi-global social norms, although almost universal, “are typically weak because they cannot be effectively enforced through the exclusion of violators.” Specifically, “be fair” is an example of a quasi-global social norm, while “don’t park in parking places reserved for the physically challenged” is not.

The large area in which quasi-global social norms form means that their creative forces are both exogenous and endogenous, formal and informal, national and international, and operate within both the public and private spheres. In particular, quasi-global social norms form through a protracted course of interplay among individuals, groups, government, and

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57 See supra Part II.A.
58 In other words, quasi-global social norms are societal norms rather then group norms. See McAdams, supra note 9, at 386 (discussing distinction).
59 Id. at 383 (“The more abstract the norm, the more likely it is that it embodies the kind of sentiment... that commands immediate unanimous agreement.”).
60 Russell Hardin, Magic on the Frontier: The Norm of Efficiency, 144 U. PA. L. REV. 1987, 2008 (1996). Randal Picker has expressed a certain preoccupation with the fact that “too often society will end up with weak norms” which individuals are unable to rectify. Randal C. Picker, Simple Games in a Complex World: A Generative Approach to the Adoption of Norms, 64 U. CHI. L. REV. 1225, 1286 (1997). Paradoxically, the weakness of quasi-global social norms is not a sign of weakness, but an asset that contributes to these norm’s omnipresence and durability.
61 Eric Posner calls for different definitions of social norm types depending on the context. See Posner, supra note 12, at 797.
the media. This interplay causes a massive feedback loop where each player influences and is influenced by each other player. Hence, the multifaceted nature of the force giving rise to this type of social norm. Indeed, because the confluence necessary to create a quasi-global social norm derives from numerous sources, including law, the interaction between law and quasi-global social norms is both one of teaching and learning. Thus, unlike other social norms whose boundaries can be delineated as existing outside the law, quasi-global social norms exist both within and outside the law so that boundaries are more difficult to pinpoint. These difficulties are eased in situations such as in Lawrence where prior existing law (Bowers) was so at odds with the pertinent quasi-global social norm of liberty, that the impact of the norm on the law was clearly observable.

A. Describing Quasi-Global Social Norms

1. The Origin of Quasi-Global Social Norms

Identifying the origin of social norms has been a topic of discussion for some time. In general, there seems to be some consensus on the theory that social norms originate from external forces that shape individual preferences, even though there is some dispute as to what those forces actually are. Dennis Chong has identified social behavioral patterns as the product of "one's family, school, social class, church, and other groups and institutions that shape one's socialization experiences and cause one to internalize certain value and group identifications rather than others." For Melvin Eisenberg norms originate out of a certain societal necessity and a striving for efficiency. Other scholars however have posited the notion that the generating source of social norms might, in addition to the sources identified above, be found in places internal to each individual. For example, Richard McAdams has surmised that the "initial force behind norm creation is the desire individuals have for respect or prestige, that is, for the relative esteem of others." Eric Posner, however, has posited the possibility that social norms might have "biological origins," thus linking the birth and development of social norms to a certain evolutionary process.

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62 This concept is similar to Richard McAdams's articulation that "[n]orms matter to legal analysis because . . . sometimes norms and law influence each other." McAdams, supra note 9, at 347.
63 Chong, supra note 15, at 2081.
64 See Eisenberg, supra note 13, at 1262–63.
65 McAdams, supra note 9, at 342. His premise is derived from the fact that individuals care how they are evaluated in comparison to others, and thus their self-worth is caught up in how they think others perceive them. See id. at 355–56. He states that societal norms arising out of the individual desire for esteem "exploit the advantage of aggregation," meaning that societal norms rely on the fact that even though esteem by a stranger might be a weak force in itself, it is multiplied by the large amount of people representing the population at large. Id. at 389.
66 See Posner, supra note 11, at 1706, 1720, 1723 (identifying morality as a possible source of
Posner's thesis seems the best point of departure. The sources which give rise to quasi-global social norms are found in intrinsic processes rather than in any other external repository of behavior control mechanisms. This stems from the two factors identified above which characterize these norms: (1) their general abstract nature; and (2) the large number of people it takes to create such norms. Both of these factors combine to make quasi-global social norms a vehicle for the "the driving force of all societies[, namely] the human effort to survive and succeed." Therefore, as humans began to congregate and form associations with one another and develop a civilization, means of co-existing emerged. Submerged within this co-existence were certain rules of engagement or non-engagement which, through the passage of time, seeped into collective consciousness and functioned as unspoken guideposts of behavior. One such rule developed into the abstract norm of reciprocity, a quasi-global social norm. This norm was first experienced in small groups, then "as . . . habits of cooperation [were] formed and experienced, [it became] generalized into a more global disposition toward reciprocity." The more general the guidepost, the more likely it would be adopted by a larger number of people. Moreover, the high degree of abstraction of these norms ensured that their emergence could occur simultaneously in unconnected social environments. Therefore tenets against killing (without reason) or lying are found as bedrocks of many primitive societies which could not possibly have had interactions with one another. Those tenets obviously survive to this very day.

As humankind evolved and human associations became more varied and complex, so did the accompanying behavioral obligations. Nevertheless, even though more concrete norms would routinely develop according to social situation and cultural background, sometimes rather suddenly, quasi-global social norms would transcend this rapid transformation, but would continue on with their progress on a somewhat slower timetable. In fact, more concrete norms such as slavery and voting would often be dismantled or transformed as a result of the operation of deeper quasi-global social norms, such as fairness and liberty, against which the more concrete norms would be compared. Therefore, the evolution of social norms, and their quasi-global phylum, resembled that of everything else: over time those with more success survived, developed, and transformed, while those less successful waned and died. The measure of success is purely descrip-

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67 Jones, supra note 14, at 595; see also James Q. Wilson, The Moral Sense 193–200, 207–15 (1993) (noting that socialization through the arising of social norms was part of "the slow, uneven, but more or less steady expansion of the idea that the moral sense ought to govern a wide range—perhaps, indeed, the whole range—of human interactions").


69 Id. at 2065.
tive—i.e., a factual determination of whether a particular quasi-global social norm is alive or defunct.

This description of the genesis of quasi-global social norms has several implications. First, it subsumes a certain degree of randomness or accidental quality. That is, quasi-global social norms do not arise, and are not adopted, as a result of a deliberate process engineered at any particular point in time. Thus, in the present day, no matter how effective a particular norm entrepreneur might be, she would have a tall and ultimately doomed task of creating or dislodging any quasi-global social norm. Second, quasi-global social norms do not have a definitive starting point. This differs from Dennis Chong’s conception in that he theorizes that a “model of social conformity needs a starting point because not everyone can be reacting to external influences simultaneously and one cannot assume that all individuals are passive.”

In the case of quasi-global social norms, simultaneousness is not one of reaction but one of realization, as the collective coalesces around broad behavioral obligations. Third, because of the generality of quasi-global social norms, the number of these norms is not particularly large. Fourth, as noted above pertaining to the ancestral norms against killing or lying, many of these quasi-global social norms rest on principles which are almost immutable. The question then arises as to how these norms develop if they are vested with a certain immutability from their inception. The answer, discussed in further detail later on this Article, is that as generations succeed one another, quasi-global social norms become ever more encompassing and like magnets, they attract more concrete norms which eventually get fused to the underlying quasi-global social norms to become an updated version of that particular norm. For example, the liberty norm in 1776 was narrower in application than it is today.

An important facet of quasi-global social norms that distinguishes them from other types of norms is size. As adverted to earlier, most of norm scholarship theorizes that social norms usually arise in close-knit groups, i.e., “social network[s] whose members have credible and reciprocal prospects for the application of power against one another and a good supply of information on past and present internal events.”

Thus, social norms are held to generally evolve through repeated dealings between the members of small groups or industry consensus (again a small constituency). The fact that quasi-global social norms arise on a vast scale means that the method generally ascribed for the origin of norms within a small group cannot suf-

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70 Chong, supra note 15, at 2108.
71 ELICKSON, supra note 13, at 181. What defines a group might not necessarily be physical proximity but other features that people share, such as a common profession or a common love for a sport.
72 See Charny, supra note 28, at 1841.
fice to explain how quasi-global social norms arise.\textsuperscript{73}

Quasi-global social norms are born out of an internalized sense of correctness that is coupled with the daily absorption of messages from the outside (other people, government, the media, etc.) which then, usually in the intimacy of one’s own mind and in a subconscious manner, are assimilated over a period of time and taken on if compatible with the original internalized feeling. Consistent with the manner in which quasi-global social norms form is Eric Posner’s observation that “[t]he creation of a norm requires the coordination of a large number of people who react more or less unconsciously to the conduct in question and to the accumulation of spontaneous reactions by others to that conduct.”\textsuperscript{74} His observation that “all people participate in the creation of the norms that affect them” comports as well.\textsuperscript{75} Because quasi-global social norms by definition affect almost everybody, then almost everybody participates in their creation. Thus, quasi-global social norms represent the aggregate insights of a large amount of people acting through a process of “rational selection.”\textsuperscript{76}

Although quasi-global social norms gel through repeated interactions like other norms, these interactions tend to be indirect. The important consequence of this is that, with the exception of isolated circumstances, compliance with quasi-global social norms tends not to be an observable phenomenon (by others). Hence, direct group pressure, an important force in the creation of traditional social norms, is an insignificant factor in the waxing of quasi-global social norms. Rather, internal pressures such as “conformity, [the] herd effect[], or social solidarity,”\textsuperscript{77} are more at play in this context. Similarly, unlike traditional norm production, which can be manipulated by norm entrepreneurs,\textsuperscript{78} quasi-global social norm production is more difficult to manipulate because of the deep level at which these norms exist and the large amount of people one would have to manipulate before change can take place.

Once an internal seed has been implanted in enough individuals, a complex social interplay ensues which will determine whether the internal

\textsuperscript{73} For example, Lior Strahilevitz notes that the forces explaining genesis and development of social norms in loose-knit environments cannot be the same as those present in close-knit groups. Strahilevitz, supra note 33, at 362–64. Strahilevitz identifies signaling and desire for esteem as characterizing norm origination within close-knit groups and notions of imitation of others as providing the genesis of norms within loose-knit groups. Id.

\textsuperscript{74} Posner, supra note 11, at 1701.

\textsuperscript{75} Id.

\textsuperscript{76} Charny, supra note 28, at 1844–45.

\textsuperscript{77} Cooter, supra note 27, at 1585.

\textsuperscript{78} See Posner, supra note 11, at 1710. Cass Sunstein has explained that norm entrepreneurs rely on externally-generated norm shaping mechanisms such as the inculcation of shame to manipulate and move norms towards their direction. See Cass R. Sunstein, On the Expressive Function of Law, 144 U. Pa. L. Rev. 2021, 2030–31 (1996).
concept will ripen into a quasi-global social norm. This interplay, as mentioned before, occurs primarily within individuals and consists in a bombardment of messages from every imaginable quarter seeing that "[s]ocial reality is constructed by the operation of society itself [so that s]ocial facts are the product of the group life of the total operation of a society."80 The key here is that the effect on the individual is integral and non-severable. Notably, as stated above, because the reaction and processing of these messages takes place in private, manifestations of quasi-global social norms are rather difficult to observe, and consequently difficult to enforce by other private individuals. After all, what form will a private enforcement of a liberty norm take? Moreover, the privacy within which quasi-global social norms operate also leads to the possibility that "[p]eople's private judgments and desires [will] diverge greatly from public appearances."81 Nevertheless, because the messages which contribute to the creation of these norms are generally public, this disconnect will only impact the norm itself if the magnitude of the difference between public pronouncements and private thoughts is enormous.

In contemporary society, when a norm entrepreneur wants to attract adherence to her point of view, she publicizes her position and tries to reach as many people as possible. Most social norms scholars see this publicity as a generating force for traditional social norms. Indeed, "belief-systems that result from new information and reasoned persuasion play a fundamental role in the origin and adoption of social norms."82 So much so that "[t]he determinative obstacle to norm formation is frequently the fact that a consensus is not well known."83 Similarly, transnational norm entrepreneurs, being "[t]hose seeking to create and embed certain human rights principles into international and domestic law [seek to] trigger transnational interactions, that generate legal interpretations, that can in turn be internalized into domestic law of even resistant nations states."84 Within the context of quasi-global social norms, publicity will affect the rate of

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79 This process can be compared with the process in which customary international law ("CIL") forms. CIL is "the collection of international behavioral regularities that nations over time come to view as binding as a matter of law." Jack L. Goldsmith & Eric A. Posner, A Theory of Customary International Law, 66 U. CHI. L. REV. 1113, 1116 (1999). Thus, CIL ripens as opposed to being created. "[W]hether a 'seed' for new law actually produces a shift in customary international law depends in part upon the reactions of other states." John Alan Cohan, The Bush Doctrine and the Emerging Norm of Anticipatory Self-Defense in Customary International Law, 15 PACE INT'L L. REV. 283, 299–300 (2003).


81 Sunstein, supra note 16, at 912.

82 Eisenberg, supra note 13, at 1255.

83 McAdams, supra note 9, at 400.

progression of the norm, but rarely, if ever, will it affect the norm itself. We might be persuaded as to whether the equitable treatment of gays and lesbians should enter within our fairness norm, but we are much less persuadable as to whether we should even have a fairness norm.

The interplay of law as a generating force of quasi-global social norms is not straightforward. Eric Posner has remarked in general about the difficulties of ascribing to law a proactive role (as opposed to a reactive one)\(^85\) in the formation of social norms because officials, being “themselves subject to social norms,”\(^86\) would have to violate their office in order to change such norms. In that light, “causation issues [pertaining to the impact of law on norms or vice versa] are complicated, as norms and law interact through complex feedback mechanisms.”\(^87\) In other words, these mechanisms, akin to a vicious circle, make it quite difficult to identify where one factor begins and the other one ends. However, on a more basic level pertaining to quasi-global social norms, law does not generate the deep impulses that form the root of all these norms. For example, the general norm of liberty would exist with the law or despite any laws to the contrary.\(^88\) Indeed, “laws cannot themselves compel community acceptance. Passing a law cannot itself create a norm . . . .”\(^89\) Thus, “[i]f the law strays too far from the norms, the public will not respect the law, and hence will not stigmatize those who violate it.”\(^90\) The implication is that the dominant behavioral pattern will be the social norm rather than a contrary demanding law.

Nevertheless, law does play a peripheral role in the formation of quasi-global social norms. Law is one of the many components described above that bombards the individual with information to process. However, because of the inherent publicity that law generates, scholars have noted that law can create a focal point, a magnet that draws attention to whatever so-

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\(^85\) This will be explored infra Part III.B.


\(^87\) Scott, supra note 25, at 1930.

\(^88\) Richard McAdams has noted that “in some cases, new norms arise in the presence of different legal rules.” McAdams, supra note 9, at 340.

\(^89\) Paul H. Robinson & John M. Darley, The Utility of Desert, 91 NW. U. L. REV. 453, 473 (1997). In a very compelling article, William Eskridge, Jr., and John Fedroohn carve out an exception to this theory. They posit that in certain instances a law is passed with the specific intent “to establish a new normative or institutional framework for state policy” and after seeping into the public conscience for a while, such statutes “principles have a broad effect on the law—including an effect beyond the four corners of the statute.” William Eskridge, Jr. & John Fedroohn, Super-Statutes, 50 DUKE L.J. 1215, 1216 (2001). These laws, which they define as “super-statutes” are “not just a snap response to a fleeting-crisis; instead, [they] emerge[] after a lengthy period of public discussion and official deliberation.” Id. at 1231. This, they say goes some way to resolving “the tension between the desirability of normative updating and the need for it to be legitimate along lines of popular sovereignty . . . .” Id. at 1272. The difference between super-statutes and quasi-global social norms is the deliberate process which characterizes the emergence of a super-statute which is absent for a quasi-global social norm.

cial norm the law wishes to nurture. That is, law can "stimulate desirable changes through legal expression." Richard McAdams has noted that within the realm of traditional social norms, promulgators of law possess a certain self-predicting quality, in that "[t]hose who articulate law and its pronouncements . . . appear to predict behavioral change but are actually causing such change." As far as quasi-global social norms are concerned, law can bring them into the foreground, so that the development process becomes more conscious. Law can precipitate discussions as to whether a fairness norm should encompass people of different races going to school together or whether a liberty norm should include the right of women to vote. Again, the stress is on the development of the quasi-global social norm, rather than on its formation. Thus, unlike other social norms, the constitutive role of law on quasi-global social norms is limited—a limitation which is shed when law's focus is the shaping of these norms at their outer edges.

2. The Shaping and Enforcement of Quasi-Global Social Norms

As noted above, the essence of quasi-global social norms is that they are founded upon, first an instinctual, and then a reasoned, reaction to the aggregation of people and the concomitant necessities that such aggregations entail. However, "whether a [quasi-global social] norm is selected by evolutionary processes depends . . . on how well it does when mismatched with other norms." In light of their endurance, quasi-global social norms are very successful. Once they form, these norms seldom change at their core. This is because "[b]eliefs and values are rooted in emotions and sensibilities that are not easily controlled or altered voluntarily." Neverthe-

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91 Cass Sunstein draws on the uniqueness of law from this aspect, as well as his premise that it is difficult for society to spontaneously agree upon the adoption of a particular norm, to advocate a prime role for law as a norm manager, a sort of über-norm entrepreneur. See Sunstein, supra note 16, at 911.
92 Scott, supra note 13, at 1623. Others have underlined how "law may play a constructive role in producing and shaping . . . cultural norms." Ryan Goodman, Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics, 89 CAL. L. REV. 643, 727–28 (2001) (describing how law created the "demeaning and hostile environment for lesbians and gays" through anti-sodomy statutes whose effect was to influence the opinions of people outside the legal profession). Goodman is a strong proponent of the norm creation aspect of law, especially as it pertains to lesbian and gay identity. He believes that laws "influence the composition of, and relations between, social groups," and that "law may be said to help constitute membership within the group, the relation of the reference group, and the notions and salience of community." Id. at 735–36; see also Harcourt, supra note 80, at 182 (stating that laws "may, in fact, reconfigure—for better or for worse—the way that we perceive, think, desire, or interrelate with others and judge others").
95 Chong, supra note 15, at 2085; see also Posner, supra note 11, at 1738 (stating that "deeply internalized norms and beliefs . . . could not be shed . . . in an instant," and using dueling as an example of an internalized norm that was difficult to change despite of laws against it).
less they do undergo a process of development and mutation. The dynamic of this process consists of the amplification of the norm to include an ever increasing number of adherents and situations in which the norm makes its presence felt. This amplification is not a uni-directional process, thus the increasing reach of quasi-global social norms evolves "through an organic process of trial and error."96

Given their foundational quality, quasi-global social norms develop very slowly, so slowly in fact that developments within the core of the norm are very hard to measure. However, it is possible to gauge movement when it comes to the application of these norms to situations where the norm has traditionally not applied, or its application is somewhat controversial. In those circumstances, many of the traditional processes which have been associated with the shaping of traditional social norms come into play. However, because of the ingrained nature of quasi-global social norms, any new application will inevitably call for some sort of social change. This in turn will cause recalcitrance in segments of the population, resulting in a change "mainly as a result of generational replacement rather than conversion."97

Essentially the development of quasi-global social norms resembles the snowball effect in slow motion. In a very continuous fashion, situations will arise where individuals will try to latch onto the notions of certain quasi-global social norms in an effort to better their own welfare or the welfare of others. If these individuals, joined by many others similarly situated, can demonstrate "[t]he benefits obtained by clusters of individuals who successfully embrace the [new embodiment of the quasi-global social] norm, [this] will often lead that norm to be propagated throughout the entire population . . . ."98 In other words, the expansion of the quasi-global social norm to new situations occurs upon convincing a critical mass of people that the new application fits within "principles to which all right-thinking people would subscribe."99 This plays into the self-reinforcing nature of norms which elicit a sense of "comfort in numbers" so that even those who are consciously unwilling to apply the norm to the new situation, adhere anyway.

Even though quasi-global social norms pertain to very abstract self-defining notions such as fairness and liberty, the periphery of these notions gets tested by the occurrence of very concrete events. Thus, certain spe-

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96 Eskridge, Jr. & Ferejohn, supra note 89, at 1230, 1276 (relating to their concept of super statutes: "[t]he key to super-statutedom is acceptance in public culture [which] cannot be mandated, nor is it earned exactly [but instead] is a trial-and-error process which, when successful, creates its own gravitational field").
97 Chong, supra note 15, at 2118.
98 Picker, supra note 60, at 1286.
cific behavior implements an otherwise abstract norm.\textsuperscript{100} Examples drawn from gay rights issues help illustrate this process. Gay rights issues are especially pertinent to the development of the fringes of quasi-global social norms for the simple reason that many contemporary struggles pertaining to these norms, such as the norms of fairness and liberty, involve the evolving rights of gays and lesbians.

The intersection of norms of anti-discrimination and their application to gays is a case on point. The vast majority of people accept the truth of the notion of fairness. Suppose that at a certain point a gay individual, decides, for whatever reason, that she is going to live her life openly and thus comes out of the closet. The people with whom she interacts will then be confronted with a potential conflict. A more superficial norm might invite hostility towards gays whereas a more background norm would compel fair treatment of everyone. Of course, other individuals who have already resolved that conflict, or those who never had such a conflict to begin with have an instinctive reaction to the coming out. These people who react first will be observed by those who do not react immediately and at a certain point a tipping occurs which will determine, as to that individual, whether she will gain acceptance in her social circle or not. It must be noted that the observation of the process by undecided or conflicted people will not be the sole arbiter of the outcome pertaining to the newly declared homosexual. These observations will also be influenced by the societal bombardment that people will have received throughout the entirety of their lives.\textsuperscript{101} In fact, this bombardment will probably determine to a great extent whether they initially fall into the category of reactor or observer.

If the coming out process ends up tipping the fairness norm into applying to such individual, then this will create a "widespread recognition within [the individual’s] social group that a general consensus exists around the norm."\textsuperscript{102} The members of the group who first experience the conflict will amplify this new addition to the quasi-global social norm to the rest of society, which doubtless, in certain other specific places, was experiencing the same norm conflict because of the generality of the underlying social norm involved.

Regardless of the outcome in her particular situation, the individual who first came out will have gained adherents, who, in time, will interact with others who are not members of the original group, and the application

\textsuperscript{100} See McAdams, supra note 9, at 386 ("The social meaning of an abstract norm is defined by the set of specific behavioral norms one is obligated to follow to be considered in compliance with the abstract norm.").

\textsuperscript{101} This bombardment, as explained above, comes from religion, psychological discourse, "bureaucratic capitalism" and the media. See Goodman, supra note 92, at 719.

\textsuperscript{102} Chong, supra note 15, at 2079.
of the general norm to gays and lesbians will develop anyway. Hence, within a generation, the internalized norm of "be fair to everyone," will first morph into a more concrete norm of "be fair to everyone including gays and lesbians," to eventually become "be fair to everyone" again where gays and lesbians are automatically included without conscious thought.

The situation described in this paragraph can be recast in various other settings. For example, viewing in one's neighborhood or PTA meetings gay and lesbian couples raising children will trigger a process pitting a more general liberty norm against a more concrete "traditional family" norm, and so on.

What is clear from the above example is that a certain public event precipitates the norm discourse. However, it is important to distinguish this observable event with the general invisibility of the core of quasi-global social norms. In other words, it is not a daily occurrence for most people that they will be confronted with their attitudes on liberty or fairness, and thus, for most, these traits will remain effectively invisible to others. It is only when internal notions are challenged that one may observe the norm in action, but even then, it is clear that many may simply not reveal their attitudes or lie to curry favor with the prevailing revealed norm. Regardless of the truth of the revealed reaction to a challenge to a quasi-global social norm, the example of coming out of the closet reveals that norm challengers have to rely on a certain publicity in order to reshape the underlying quasi-global social norm.

Like for other social norms, publicity plays an important part in amplifying quasi-global social norms. Norm challengers will not succeed if people do not know that norms are being challenged. "Norms and rules, whether publicly or privately created, embody and convey information." Thus "they cannot be followed unless information is transmitted regarding their substantive content . . . " Publicity cuts through the "false consensus" factor, being the phenomenon whereby each individual, because she tends to associate with like-minded individuals and find reinforcement of her views within such circles, has an exaggerated or even unreal view as to what the content of the typical view of the world is, which she will most likely characterize as her own. Publicity attempts to counter the "irreducibly nonrational element in social conflicts [that stem] from the manner

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103 That is to say that "[c]oordination around emotions, beliefs, and attitudes revealed in ordinary conversation and socializing provides the foundation for possibly more significant coordinated action in the future." Chong, supra note 15, at 2113.

104 See Eisenberg, supra note 13, at 1277 (explaining that more concrete norms will flow from the more general norm).


106 Id.

in which people draw inferences and generalizations about those who are different from themselves and develop cultural theories based on such faulty assumptions.\textsuperscript{108} Publicity can come from many sources. In the above example publicity was generated by the norm challenger herself, but publicity can also come, for example, from the media which might promote shows which portray out-of-the-closet gays as individuals enjoying the full benefits of socialization, or else run news stories about gays and their families.\textsuperscript{109} Furthermore, in light of the universality of the substance of quasi-global social norms, publicity can come from foreign quarters, either from the processes akin to transnational legal process, or from the simple interactions between Americans and foreigners. Thus, like other norms, quasi-global social norms can be shaped both centrally or non-centrally.\textsuperscript{110}

One of those special forms of publicity coming from a central source is that provided by government and law. Because people may give “independent moral force to actions by the state,”\textsuperscript{111} “[l]aw can both cause individuals to converge on a particular convention more quickly than they otherwise would and upset the conventions that have already emerged.”\textsuperscript{112} The tools at government’s disposal are notable: education, providing information, persuasion, economic subsidies, imposition of restrictions, and outright coercion, all of which can be exercised at the national, state, and local levels.\textsuperscript{113} Through these means, law can express “a judgment about the underlying activity in such a way as to alter social norms.”\textsuperscript{114}

However, the relationship of law to quasi-global social norms is a little more complex than the notion that the state simply selects a particular norm and codifies it, with such codification resulting in a behavioral change pertaining to the newly-codified norm. It is true that “[s]ometimes the claim that the law affects norms is plausible” because “[p]revailing norms, like preferences and beliefs, are not a presocial given but a product of a complex set of social forces, possibly including law.”\textsuperscript{115} Nevertheless, “[w]hen we think legal intervention in norms is appropriate should turn on whether we believe that private ordering will result in inefficient or positively harmful norms.”\textsuperscript{116} In the case of quasi-global social norms, the

\begin{footnotesize}
\textsuperscript{108} Chong, \textit{supra} note 15, at 2083.
\textsuperscript{109} Of course, relying on the media alone for publicity in the norm arena might itself lead an individual to lapse into a “false consensus” because of the selective and skewed agenda that the media might portray.
\textsuperscript{110} See McAdams, \textit{supra} note 9, at 351.
\textsuperscript{111} Posner, \textit{supra} note 11, at 1729.
\textsuperscript{112} McAdams, \textit{supra} note 93, at 1652–53.
\textsuperscript{113} Cass Sunstein, an advocate of the role of government in shaping norms, has a distinct preference for such government norm management to occur at the local level. See Sunstein, \textit{supra} note 16, at 948–52.
\textsuperscript{114} Sunstein, \textit{supra} note 78, at 2034.
\textsuperscript{115} \textit{Id.} at 2026.
\textsuperscript{116} Picker, \textit{supra} note 60, at 1288.
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shaping affect of law is only felt at the periphery of the norm. In other words, the law is not going to help develop a liberty norm by having a constitutional clause or statute declare “thou shalt be free.” Rather, the law, either through constitutional principle (more common in the case of quasi-global social norms), or through statutes (or other means) will shape the contours of a quasi-global social norm by decreeing the terms of such norms’ concrete content.

William Eskridge, Jr. and John Ferejohn have described this process as it pertains to statutes, which they call super-statutes, meaning statutes whose principles have seeped into the collective thinking of society. They note that the normative structures of certain laws “are legitimated by the feedback from the populace, experts, and officials that allows these super-statutes to sink deeply into our normative consciousness,” and exert a “gravitational pull on constitutional” principles.\(^{117}\) This description is equally applicable to quasi-global social norms and their interactions with the law. That is, laws which attempt to define the outer edges of quasi-global social norms will be subject to constant feedback by the population which will result in the norm moving one way or another.

Indeed, it is important to stress that because quasi-global social norms are preserved on a very deep and foundational level by each individual, and are not really expressed outwardly very often, law might misjudge the strength of such norms and thus achieve an effect contrary to the law’s intent. For example if someone is punished for a crime that is contrary to social norms, resistance to the law will grow and strengthen the norm which supposedly contravenes the law.\(^{118}\) This boomerang effect likely explains why Prohibition laws—if they achieved anything—reinforced the quasi-global social norm of liberty encompassing the right to consume alcoholic beverages without interference from the government. Hence, Prohibition laws which presumably were meant to embody an abstinence norm, by running so contrary to a deeper quasi-global social norm, went the way of the dodo in the evolutionary process.

The relative effectiveness of all of the above processes (personal relationships, media representations, governmental absorption of international norms, and legal action), in steering the boundaries of quasi-global social norms is very much tied to how effective are the means of enforcement of the underlying norm as applied to the proposed new situation. Thus, “to serve societal interests” and “to remain viable, even the most elementary and noncontroversial of norms require reinforcement through regular social interactions.”\(^{119}\) Enforcement mechanisms for traditional norms are varied

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\(^{117}\) Eskridge, Jr. & Ferejohn, supra note 89, at 1217, 1236.
\(^{118}\) See Stuntz, supra note 90, at 1882.
\(^{119}\) Jones, supra note 14, at 569.
but usually rely on the presumption that norm violation is public information. Upon knowledge of a norm violation, enforcement can occur through “overt social pressure to conform . . . [even though] subtle, unconscious influences on the individual to adopt the group’s perspective on various matters are more common.”

Therefore, norm enforcement is a “complex process that [weaves] together compliance strategies based on coercion, self-interest, communitarian appeals, the perceived legitimacy of the rule, and . . . internalization . . . through legal process, political action, and socialization.”

Again, the public nature of the punishment, such as the public shaming of the violator, like the public nature of the violation, is seen as key to the successful propagation of social norms.

The enforcement of quasi-global social norms is somewhat more problematic because violations of the core of these norms are so rarely observed. This is because quasi-global social norms most often translate into existential credos rather than into behavioral attributes and it is axiomatic that “[b]ehavior is observable,” while “character is not.” Similarly, the problem of enforcement of quasi-global social norms is heightened when one considers that even on the rare occasion when a violation can be observed, the likelihood that a norm enforcer and the violator will interact in the future is so low that the incentives for enforcement are greatly reduced. After all, apart from deriving some sort of personal satisfaction from norm enforcement, there is not much benefit that the norm enforcer can derive. Therefore, in the rare event that a violation is observed, the enforcement must be immediate. Long-term sanctions will be ineffective because the groups within which quasi-global social norms operate are so large that the violating and enforcing party will likely never meet again. According to common social norms lore, the inability to observe violations of quasi-global social norms coupled with the fact that any violations would probably occur in settings where there is a low risk of future interaction between norm violator and enforcer, would make quasi-global social norms both weak (as it is thought that unobservable norms “can be far more fragile

120 See Hardin, supra note 60, at 2011.
121 Chong, supra note 15, at 2105.
122 Koh, supra note 45, at 633 (referring to mandatory seat belt laws).
123 See, e.g., Richard H. McAdams, Group Norms, Gossip, and Blackmail, 144 U. PA. L. REV. 2237, 2251 (1996) (“Public punishment of norm violators is a vivid means of signaling to children the group’s view as to the wrongfulness of certain conduct.”).
124 Scott, supra note 13, at 1635.
125 See Miller, supra note 99, at 897, 899–900 (“[T]he incentives and risks faced by individuals in complying with, violating, or enforcing social norms are quite different in the cooperative and noncooperative settings,” the former being “contexts in which people interact with one another frequently over an extended period of time,” and the latter describing “situations in which the interacting parties are strangers who do not expect to deal with one another again.”).
126 Id. at 903–04.
than is generally thought"\textsuperscript{127}) and ineffective at regulating behavior (because in most circumstances "[n]orms work least well when the power of future sanctions is eliminated or reduced"\textsuperscript{128}).

Notwithstanding the above, quasi-global social norms are both enduring and successful in steering behavior. Therefore, another control mechanism must exist which contributes to this endurance and success. In the above paragraphs, the focus has been on exogenous forms of norm enforcement, that is to say forces that act upon the norm violator from outside, such as shame.\textsuperscript{129} Quasi-global social norms, however, are more dependent on endogenous forms of control, being forces that act upon the individual from within, such as guilt and anxiety.\textsuperscript{130}

Endogenous forces operate on the individual through a process of internalization. Some scholars have affirmed that a social norm does not exist unless it is internalized.\textsuperscript{131} "Internalization is an element of socialization whereby the actor learns to follow rules of behavior in situations that arouse impulses to transgress and there is no external surveillance or sanctions."\textsuperscript{132} "Internalization theories posit that an individual acquires a preference for conformity to a behavioral standard and suffers some psychological cost . . . when she fails to conform, whether or not others are aware of her violation."\textsuperscript{133} Thus, there is a certain "unthinking obedience" to quasi-global social norms insofar as people will go along with them not because of external pressure but "for reasons of conscience and conviction."\textsuperscript{134} In other words, "most actors who have internalized an obligatory norm will apply the norm reflexively . . . rather than calculatingly."\textsuperscript{135} This means that a quasi-global social norm maintains a subconscious "grip on the mind,"\textsuperscript{136} and functions as part of a grand societal super-ego. Sometimes norm internalization is so effective that it transforms obligations into desires.\textsuperscript{137} Therefore, individuals will comply with the

\textsuperscript{127} Sunstein, supra note 16, at 912.
\textsuperscript{128} Rock & Wachter, supra note 30, at 1932.
\textsuperscript{129} Other examples of exogenous control mechanisms are example, advice, empathy, admonishment, stigma, confrontation, and retribution. Miller, supra note 99, at 915.
\textsuperscript{131} See Robert D. Cooter, Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant, 144 U. PA. L. REV. 1643, 1668 (1996); see also Eisenberg, supra note 13, at 1260 (noting "most obligatory norms will originate and stabilize only if they are internalized by a significant portion of the relevant group," and should this not occur, the norms will dissipate).
\textsuperscript{132} Etzioni, supra note 56, at 167; see also JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY 293 (1990) (describing internalization as the process where "an individual comes to have an internal sanctioning system which provides punishment when he carries out an action proscribed by the norm or fails to carry out an action prescribed by the norm").
\textsuperscript{133} McAdams, supra note 9, at 376.
\textsuperscript{134} Cooter, supra note 27, at 1577.
\textsuperscript{135} Eisenberg, supra note 13, at 1260.
\textsuperscript{136} Jon Elster, Norms of Revenge, 100 ETHICS 862, 864 (1990).
\textsuperscript{137} Etzioni, supra note 56, at 167.
norm because of an inherent sense of the intrinsic value of the norm and the self-satisfaction that arises with compliance.\footnote{See Miller, supra note 99, at 898, 908 ("Given the costs of norm enforcement and the fact that signaling and public esteem are largely absent in the noncooperative setting as benefits to enforcers, if we observe significant levels of enforcement in the noncooperative context, it must be because people believe the norm to be valuable in itself"); see also Etzioni, supra note 56, at 163 ("If norms shape people’s preferences, they will tend to abide by these norms because such adherence is a source of intrinsic affirmation."); Scott, supra note 13, at 1621 ("[I]n order for emotions, such as guilt, to work as self-enforcing commitments, satisfaction must be intrinsic in the act of compliance and not premised on the possibility that material gains may follow.").}

The question then arises as to how quasi-global social norms are internalized. This question is especially pertinent in the context of this type of norm because quasi-global social norms, “like most abstract norms,” are vague, such “vagueness . . . makes them easily internalized but provides little concrete behavioral guidance.”\footnote{McAdams, supra note 9, at 408.} Essentially, quasi-global social norms are internalized by observing society operate which, in turn, acts on an inherent biological predisposition toward norms possessed by most individuals. Richard McAdams has explained that internalization occurs “first at the abstract level.”\footnote{Id. at 383.} Thus, there are no specific behavioral mandates imposed on the forming mind pertaining to concepts of liberty or fairness. The beginnings of internalization thus merely consist in the absorption of general concepts like “liberty is good” or the Golden Rule.

However, as one’s awareness of society increases, so does one’s ability to receive society’s constant signals as to the content of these norms and the behavioral patterns that go with them. Initially these signals will occur through parental sanctioning. Thus, “[p]eople’s own moral rules and action proscriptions . . . generally experienced as internal forces,” arise during childhood, teaching that individuals “come to hold the moral standards of the cultures in which they are raised.”\footnote{Robinson & Darley, supra note 89, at 469–70.} Later, this process will progress to outside influences as one’s circle of contacts expands throughout life. Thus, it would be wrong to suppose that the wiring received as children will be the sole source of norm internalization throughout one’s life. If this were so, it would be very hard for quasi-global social norms to develop and expand because the almost universality of the experience received by almost all children would keep such norms identical ad infinitum.

Hence, even adults can be persuaded as to a new application of a quasi-global social norm, particularly because there will always be a point of reference to which each new application of the norm can be compared, i.e., the core content of the norm. Thus, factors such as “[l]eadership, mass hysteria, mob rule, and propaganda,” all of which “have elements of per-
suasion," can contribute to reshape the outer edges of the quasi-global social norm. However, given the foundational nature of quasi-global social norms, it would indeed be a rare case where an individual could overcome the core of the norm itself. Thus, through social internalization, at their core, quasi-global social norms acquire "so much public legitimacy that there is widespread general adherence" to them. This internalization by virtually everyone is what in turn contributes to the glacial developmental pace of these norms, such pace only to be rapidly accelerated by a major cataclysmic event.

As with the shaping of quasi-global social norms, law can help internalize these norms by indicating "appropriate behavior among some citizens." In other words, law can help make concrete the otherwise vague behavioral requirements of quasi-global social norms. Thus, "[i]f the law publicizes a consensus that certain behavior is required in order to comply with an abstract internalized norm, then violating the concrete . . . obligation will produce guilt," so that "the expressive function of law can work to define further the roles that are enforced by guilt." However, it must be recognized that law "makes no difference to the values internalized by citizens." In the context of quasi-global social norms this means that law will really not affect the substance of the core of the norm, but might play a role at the norm's fringes.

3. The "Quasi" Component

Quasi-global social norms are "norms [that] appear[] to prevail in all known cultures, including norms against murder and rape, norms demanding greater loyalty between family members than between strangers, and so on." In that light, "they may . . . reflect universal aspects of human nature." Because of the often universal nature of quasi-global social norms, some of the sources which influence their shaping and internalization will be found outside of the United States. Indeed, as noted above,

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142 Etzioni, supra note 56, at 170, 176 (stating also that "human nature allows elders and peers to constitute and reconstitute our preferences").
143 Koh, supra note 45, at 642.
144 See McAdams, supra note 9, at 393.
145 Scott, supra note 13, at 1624.
146 McAdams, supra note 9, at 407–08. Robert Cooter suggests that the law can change preferences of citizens through internalization by linking itself with morality, and relying on people's inherent respect for law and their ability to abide by it. See Cooter, supra note 27, at 1596. Other scholars have a slightly more limited view of the role that law can play in fostering norm internalization. See, e.g., Robinson & Darley, supra note 89, at 471 (stating that "law has no independent force," but can help determine what people think and what they internalize); see also Scott, supra note 13, at 1633 (indicating that some people "will obey the norm automatically because their respect for law causes them to obey the laws as an intrinsic value").
147 Cooter, supra note 27, at 1601 (referring to other kinds of norms).
148 Posner, supra note 11, at 1723.
149 Id.
interaction with foreign counterparts is an element of the shaping of quasi-global social norms. However, interaction also forms a part of the internalization of norms through legal process. Thus, Harold Koh has noted that "[i]n tracing the move from external coercion to internalized obedience . . . a key overlooked factor has been . . . repeated participation in the transnational legal process."\textsuperscript{150} Of course, Koh is referring to the internalized allegiance of governments to international law and in particular, to customary international law, which nations comply with "when they have accepted its legitimacy through some internal process."\textsuperscript{151}

One can apply Koh's concept of customary international law equally well to individuals internalizing quasi-global social norms. As with quasi-global social norms, customary international law also concerns the "universal law of society."\textsuperscript{152} "[C]oncepts like liberty, equality, and privacy are not exclusively American constitutional ideas but, rather, part and parcel of the global human rights movement."\textsuperscript{153} International opinions can therefore influence domestic legal pronouncements and those domestic pronouncements in turn, will internalize the norms underlying the relevant issues in the same way legal pronouncements affect norm internalization when international sources are not relied upon.

For customary international law to earn its title, and thus have binding force upon nations, it is not necessary for all nations to agree upon a particular practice. Rather, "customary international law is universal in the sense that its obligations bind all nations except those that 'persistently object' during the development of the customary international law norm."\textsuperscript{154} In fact, "the new customary international law of human rights makes no pretense of reflecting a universal behavioral regularity."\textsuperscript{155} Quasi-global social norms do not presume as much either, hence their denomination with the limiting "quasi." Thus, an absolute consensus within society is not necessary to attain a quasi-global social norm. From a practical and normative standpoint, only a "quasi" consensus needs to be present.

The practical implication of the quasi limitation is particularly pertinent to the social process of coalescence of a quasi-global social norm and its subsequent progress. In any delineated society, there will always be individuals who hold abhorrent thoughts, some of whom might put such thoughts into action. These defectors, who are anti-social and whose aim is to prevent normative progress, predominantly fail at their efforts in a de-

\textsuperscript{150} Koh, supra note 45, at 635 (emphasis omitted).
\textsuperscript{151} Id. at 680.
\textsuperscript{152} United States v. Smith, 18 U.S. 153, 161 (1820).
\textsuperscript{154} Goldsmith & Posner, supra note 79, at 1118–19.
\textsuperscript{155} Id. at 1173.
mocratic society, and therefore are irrelevant for the purpose of quasi-global social norm description. Indeed, William Jones correctly exclaims that he knows "of no ethical theory that can accommodate the views of tyrants and racists and purveyors of poverty, disease, and death."\textsuperscript{156}

The normative implication of the quasi limitation is more pertinent to the infusion of international opinion within domestic legal discourse and its consequent influence on the shaping of quasi-global social norms. The key to this infusion is that it need not come from the totality of foreign opinion but need only derive from a select portion of international opinion. In recent years, this selection has proved a controversial topic both on the Supreme Court,\textsuperscript{157} and in legal scholarship.\textsuperscript{158} In light of the recent Supreme Court opinion Roper v. Simmons, it appears that a solid Supreme Court majority has now endorsed foreign opinion as a legitimate source of persuasive authority for formulating domestic legal doctrine.\textsuperscript{159} Consequently, those judicial opinions that rely on foreign sources of authority, and which pertain to quasi-global social norms, will affect the direction of growth of those norms to which they pertain.

As mentioned above, the sources of persuasive authority on which U.S. courts will rely will not come from all nations, nor should they. Valid reasons and criteria exist for excluding some countries and not others. Given their almost universal substantive content in contexts pertaining to quasi-global social norms, this country need only concern itself with international opinion originating from countries that exhibit democratic and societal affinities with the United States.\textsuperscript{160} This is because such societies are based on a fundamental respect for human rights (many of which are derived from quasi-global social norm principles), and these "rights operate as constraints on norm management as on everything else that government does."\textsuperscript{161} On the other hand, a society which does not value human rights highly, "need not concern itself with . . . norms if it is prepared to endure poverty, disease, and large numbers of premature deaths."\textsuperscript{162} Thus, not much value to legal issues pertaining to the shaping of quasi-global social norms can be found in these places. Given the often stark differences between the societal make-up of different nations, it is possible to coherently select from the pool of nations, those nations whose laws we would want to

\begin{footnotesize}
\textsuperscript{156} Jones, supra note 14, at 596.
\textsuperscript{158} See, e.g., Alford, supra note 4, at 57; Ramsey, supra note 4, at 69.
\textsuperscript{159} See Roper, 125 S. Ct. at 1198–1201.
\textsuperscript{161} Sunstein, supra note 16, at 966. Sunstein adds that norm management is an appropriate process for governments to get involved in so long as they represent a "democratic society." Id. at 914.
\textsuperscript{162} Jones, supra note 14, at 595.
\end{footnotesize}
consult.\textsuperscript{163} Indeed, international law scholarship has already delineated categories of states depending on whether those nations comply or not with international law. Generally, those that do fit the profile are democratic liberal states,\textsuperscript{164} while those that do not are generally referred to as autocratic non-liberal “rogue” states.\textsuperscript{165} The former category will have law relevant to the shaping of quasi-global social norms.

B. The Legal Effect of Quasi-Global Social Norms

In the previous section, we saw that the shaping of the periphery of quasi-global social norms results from a “complex regime of social control that interacts with law in many different ways.”\textsuperscript{166} Thus, in determinate circumstances, a certain “social change through law” is achieved.\textsuperscript{167} It is important to note, however, that the interaction between quasi-global social norms and law, like for most other social norms, is not linear but somewhat circular.\textsuperscript{168} That is the process can be summarized as one where the development of a certain behavioral pattern blossoms into a deeply-felt quasi-global social norm which leads to the enactment of laws reflecting such norm which, in turn, affects behavioral patterns leading the cycle to begin all over again.\textsuperscript{169}

The prominence of law in shaping quasi-global social norms should not be over-emphasized however. As others have recognized in other contexts, the law is irrelevant when strong local norms evolve.\textsuperscript{170} Thus, law cannot create new quasi-global social norms, but can only have an effect on ones that already exist.\textsuperscript{171} In the realm of quasi-global social norms, law

\textsuperscript{163} See generally Glensy, supra note 160, at 401–39.

\textsuperscript{164} See generally Anne-Marie Slaughter, International Law and International Relations Theory: A Dual Agenda, 87 AM. J. INT’L L. 205 (1993) (discussing the role and relevance of international institutions and the juxtaposition between intra- and interstate laws).


\textsuperscript{167} See Sunstein, supra note 16, at 946.

\textsuperscript{168} But see LON FULLER, THE PRINCIPLES OF SOCIAL ORDER 231–32 (1981) (expressing the theory that norms follow law).

\textsuperscript{169} William Eskridge, Jr. and John Feiferjohn, within the context of their discussion of super-statutes, describe this circular process as one where “super-statutes [and the legal element] both contribute to and feed off social norms.” Eskridge, Jr. & Feiferjohn, supra note 89, at 1276 (noting that laws such as the Civil Rights Act of 1964 “were responses to developing social norms, yet they also did more than their part in ensuring that those norms would stick in the entire community”).

\textsuperscript{170} See ELICKSON, supra note 13, at 1–6 (pertaining to observations of the behavior of cattle ranchers in Shasta County, California).

\textsuperscript{171} Robinson & Darley, supra note 89, at 473.
cements more than it generates. This means that law can acknowledge a social fact that has already taken place outside the law but cannot precipitate a change in a quasi-global social norm. In other words, in the context of quasi-global social norms, law only has the ability of “speed[ing] up an evolutionary process already under way.”\textsuperscript{172} This usually takes the form of law propounding a concrete norm that defines “compliance with internalized abstract norms.”\textsuperscript{173}

It is important to note that the effect of the law on quasi-global social norms is minimal when compared to the effect of quasi-global social norms on the law. This is because these types of norms, like super-statutes referenced above, embody “a fundamental principle that has a claim to be deeply embedded in our national aspirations.”\textsuperscript{174} A law running contrary to a quasi-global social norm is thus ineffective at managing such norms so that “if the law is to have any value at all, it needs to stick close to the norms.”\textsuperscript{175} Viewed from the opposite angle, it is undesirable and futile to create laws that contravene quasi-global social norms.\textsuperscript{176} Indeed, the effects of laws which attempt to depart from a quasi-global social norm are “difficult to predict [because] self-conscious attempts by government officials to manipulate social norms may backfire.”\textsuperscript{177} Thus, because quasi-global social norms reflect a certain “wisdom and durability,” the “law would adopt [them] if enlightened and would oppose [them] at its peril.”\textsuperscript{178}

1. \textit{Permeation Within the Legal System}

Part of the role of law advocated by many scholars is that of norm manager, namely a system whereby government officials identify desirable social norms and enact laws to nurture or grow such norms. Cass Sunstein has remarked that “[i]ntentional norm management is a conventional and time-honored part of government.”\textsuperscript{179} With respect to quasi-global social norms, the norm management aspect of the law is somewhat less deliberate because, as stated above, these norms operate on a deep and abstract level thus making most individuals only aware of their operation at the subcon-
scious level. As a result, the effect of quasi-global social norms on law results more from the pervasiveness of these norms rather than a conscious effort to abide by them, even though at the periphery, there may be conscious attempts by law to apply a new situation to a quasi-global social norm.

The permeation of quasi-global social norms into the legal system, and their consequent effect thereon, is achieved on two fronts. The first being a bottom-up process where, through actions by individuals, society provides law with feedback as to the pervasiveness and strength of a particular quasi-global social norm. The second is more a top-down process, where lawmakers, motivated by the impact of quasi-global social norms on them, deliver legal rules in compliance with such norms. The key in this latter situation is that the quasi-global social norm has materialized long before the law sees fit to act upon it.

In both of these circumstances, these processes become more visible when there is an attempt to expand the reach of the norm, so that a norm battle ensues pitting a more concrete norm against the more abstract quasi-global social norm. This occurs when through the enactment of bright-line rules, “legal regulation [seeks] to particularize the broader behavioral standards embodied in social norms,” primarily “to clarify and amplify the normative prescription.” Ultimately, because of the evolutionary forces described above, the quasi-global social norm will emerge as the victor.

A fundamental aspect of the permeation of quasi-global social norms into the legal system is that such permeation by necessity must occur through legal actors who in many cases are judges. This raises a very interesting question, which is the relative ability of judges to analyze quasi-global social norms when they themselves, due to the pervasive nature of

180 See Eskridge, Jr. & Ferejohn, supra note 89, at 1216, 1221 (describing a feedback loop as to the process whereby statutes become super-statutes).
181 Examples drawn from the international law context illustrate the operation of this top-down process. See Koh, supra note 45, at 642. Koh explains that “an international norm is sometimes socially internalized before it is politically or legally internalized.” Harold Hongju Koh, On American Exceptionalism, 55 STAN. L. REV. 1479, 1502 (2003). Such internalization occurs through a “vertical process” where “international law norms are internalized into domestic legal systems through a variety of legal, political, and social channels . . . .” Id. Others have explained that international law dictates work best when “a change in global attitudes or social norms . . . with respect to human rights would certainly make policies that codify such norms more politically feasible.” Troy Rule, Note, Using “Norms” to Change International Law: UN Human Rights Laws Sneaking in through the Back Door?, 5 CHI. J. INT’L L. 325, 332 (2004) (arguing that the regulation of international business pertaining to human rights issues would stand a greater chance of success if “social norms . . . were to somehow change first”). The author notes that denoting this regulation as norms rather than rules might be an attempt “to stimulate or accelerate desired changes in societal norms in order to accelerate the pace of corresponding changes in the law.” Id.
182 Scott, supra note 25, at 1926–27.
183 However, judges are not the only legal actors in this process. Legislators and officials in administrative positions can and do make decisions directed by underlying quasi-global social norms.
such norms, are affected by them.\textsuperscript{184} Furthermore, judges are not only maneuvered by operation of quasi-global social norms, but also by both concrete legal rules and social norms pertaining to their roles as judges.\textsuperscript{185} The answer might lie in basic precepts pertaining to the role of judging and how judges operate. These precepts generally hold that a judge’s “behavior is guided not just by formal rules, but by the interaction between such rules and beliefs, social norms, values, cognitive means of processing information, psychological frames, and other factors.”\textsuperscript{186} Were this not so, and “a judge decides cases strictly based on legal values, then the judge’s political philosophy would not predict his decisions.”\textsuperscript{187} In fact, “empirical evidence . . . supports the theory that judges respond to values outside the narrow confines of the law.”\textsuperscript{188} These values are controlled in large part by quasi-global social norms which, because of their high level of generality, allow judges to accommodate their desire to follow precedent with evolving societal circumstances. Thus, the operation of quasi-global social norms makes judges act as citizens and encourages them neither “to see themselves as privileged guardians of a received constitutional order,” nor “to see themselves [as] different really than the rest of us,”\textsuperscript{189} but rather to connect themselves to the society in which they interact and adjudicate cases based on how these norms “intersect[] with the lives of ordinary people.”\textsuperscript{190}

From a practical perspective, quasi-global social norms will operate upon lawmakers the way they would operate on anyone else. Lawmakers interact with other people, they read, they listen to media outlets, they attend conferences with foreign counterparts, they watch television, etc. However, lawmakers and judges in particular are also subject to the concrete social norm of peer enforcement so that the “effect that social influence has on the disposition of an individual decisionmaker to enforce the law . . . adds dynamism to the aggregate behavior of decisionmakers over time . . . because behavior shaped by social influence is subject to feedback

\textsuperscript{184} In fact, although Richard McAdams believes that one of the values of law in facilitating norm development is that “the government officials who articulate legal rules—mostly judges and legislators—may develop a reputation for correctly predicting behavioral change,” he nonetheless thinks that U.S. Supreme Court “[]justices seem to be particularly ill-trained to make predictions of social change.” McAdams, supra note 93, at 1671. McAdams’s concerns vis-à-vis the interaction of quasi-global social norms and judging should be attenuated by the fact that quasi-global social norms are formed prior to decisions pertaining to them so that judges are acting more like reactors as opposed to predictors.

\textsuperscript{185} This has led a commentator to remark that certain legal rules can work as norms by “directly affect[ing] the motivations of judges and officers in the legal system.” Hardin, supra note 60, at 2009.

\textsuperscript{186} Pildes, supra note 68, at 2058.

\textsuperscript{187} Cooter, supra note 27, at 1599.

\textsuperscript{188} Id. at 1599–1600 (using strategic considerations pertaining to panel personnel as an example of a judge’s consideration operating “outside” the law).

\textsuperscript{189} Eskridge, Jr. & Ferejohn, supra note 89, at 1275 (applying this consideration to super-statutes).

\textsuperscript{190} Id.
effects." Thus, the main difference between lawmakers and everyone else is the fact that, because of their profession, they may encounter more situations in which such norms, through proposed legislation, litigation, or otherwise, are put to the test. Indeed, because a lawmaker’s role is primarily public, quasi-global social norms might actually constrain their pronouncements more than others. The average person might profess public acceptance and compliance with a particular quasi-global social norm (i.e., fairness), but in private harbor and actually express noxious racist attitudes. In the end, even though it will not always be possible to predict whether a lawmaker’s decision motivated by an underlying quasi-global social norm will be an accurate indicator of where society stands on those issues, due to the cautious attitude that tends to permeate the thinking of most lawmakers and the fact that they will operate through the constraints imposed by quasi-global social norms, their decisions should reflect some kind of societal coalescence in a particular area.

2. The Link to Comparative Analysis

Given the universalistic aspect of quasi-global social norms, it is natural that in our rapidly globalizing world those norms would operate both at home and abroad. Thus, interactions that take place between domestic and foreign individuals, or between foreign individuals alone, can have an impact on the shaping of quasi-global social norms domestically. This process is particularly heightened in the legal arena where the battles pertaining to the shaping of these norms primarily occurs. Therefore, part of the conscious effort to delineate the outer boundaries of quasi-global social norms will necessarily entail, depending on the context, some form of comparative analysis.

From this perspective, inquiry into the practices of foreign nations will usually entail “an analysis of the concrete implications of the abstract moral principles to which [the judges] assume their society is committed.” Domestic courts will consult “available foreign materials [that] primarily consist of statements or analyses of the basic moral commitments of the relevant societies and discussions of the concrete corollaries of those

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192 Elizabeth Scott has referred to this as “preference disguise,” the notion of “gaps between expressed public opinion and private preferences.” Scott, supra note 25, at 1966. Scott notes that “[p]reference disguise not only occurs when there is a dominant norm which many people dislike” but also “when public opinion is polarized on a sensitive topic and competition develops over appropriate attitudes and behavior.” Id. at 1967.
193 This, of course, might not always be the case. A runaway judge, or a legislature beholden to a very narrow group of special interests, might produce decisions divorced from the underlying reality of quasi-global social norms on the ground. Nevertheless, in a democratic representative society, most of these abhorrences, over time, will tend to be corrected.
basic commitments that are at issue in particular cases.”\textsuperscript{195} Despite the misgivings of many, this should not pose much of a practical problem because “lawyers specialize in the close reading of cases, examining the social impact of procedural rules, [and] understanding the power of norms in civil society,” and “a lens of transnational legal process [merely] calls upon lawyers to exercise all of [these] interdisciplinary tools.”\textsuperscript{196}

Comparative analysis seems especially pertinent when it comes to issues stemming from the operation of quasi-global social norms, because of the commingling reality of such norms which generally impact legal issues pertaining to human rights.\textsuperscript{197} Such issues generally arise in the context of constitutional challenges in this country. Thus, because “the content of constitutional doctrine ought to respond to changes in society and widely held values over time,” and quasi-global social norms pertain to societal changes, “international materials” should be consulted because they help document global societal change.\textsuperscript{198} Indeed, “the constitutional text itself is open-ended and invites the use of community standards as a means of interpretation,”\textsuperscript{199} such standards being reflected both in the domestic and in the world communities. In sum, “there ought to be no country, . . . including our own, that should regard its own instantiated commitment to social justice or human rights as absolutely pristine, in need of no wisdom that might be provided by external sources.”\textsuperscript{200} Thus, quasi-global social norm “concepts like ‘liberty,’ ‘equal protection,’ ‘due process of law,’ and privacy have never been exclusive U.S. property, but have long carried global meaning.”\textsuperscript{201} Comparative analysis achieves the goal of connecting quasi-global social norms to their global dimension in the ongoing effort to define the outer reaches of such norms.

\textsuperscript{195} Markovits, supra note 165, at 376.
\textsuperscript{196} Koh, supra note 44, at 206.
\textsuperscript{197} See Markovits, supra note 165, at 375 (“[M]oral-rights-related constitutional rights issues could be informed by discussions by foreign judges . . . or anyone else of the moral-rights commitments of foreign countries.”).
\textsuperscript{198} Michael Wells, International Norms in Constitutional Law, 32 GA. J. INT’L & COMP. L. 429, 431 (2004). The body of law that constitutes “international materials” comprises both foreign laws and international legal materials. The utility of comparative analysis will sometimes differ depending upon whether a foreign law is consulted as opposed to international law. Foreign laws presumably embody the societal ethos of the originating nation, albeit with the caveat discussed in this Article that there might be a disconnect between such societal ethos and the rules on the books. International law, on the other hand, might be more reflective of quasi-global social norms in that in many cases, particularly dealing with human rights, international law only attains its status as such upon acquiring a high degree of consensus among nations. Moreover, foreign and international law might not always point in the same direction, thus a principled mechanism for selection of appropriate comparative materials should be adhered to. See generally Glensy, supra note 160, at 361, 401–36.
\textsuperscript{201} Koh, supra note 153, at 47.
IV. QUASI-GLOBAL SOCIAL NORMS AT WORK

As mentioned above, on most occasions “it is difficult to untangle how much . . . law . . . [has] followed and how much it [has] led [to] . . . shifts [of norms].”\textsuperscript{202} However, with respect to quasi-global social norms, this difficulty is only confined to movement at these norms’ edges because law will never be responsible for creation or shifting of a quasi-global social norm at its core. That notwithstanding, legal pronouncements about the confines of quasi-global social norms are very important for a number of descriptive and normative reasons. From the descriptive angle, litigation about whether to include a new situation into the general principle on which a particular quasi-global social norm is based helps shine a reflector on the operation of those norms because in general, these norms “appear not to be present . . . because they are so taken for granted that they seem invisible.”\textsuperscript{203} From the normative angle, competition about the outer limits of quasi-global social norms and pronouncements about such limits are important because often a change in the shape of social norms plays a big part in ameliorating the human condition.\textsuperscript{204} In fact, because concrete norms that “operate as severe limits on autonomy or well-being . . . should not be treated as fixed or given,”\textsuperscript{205} litigation in which such norms are squared with the more abstract quasi-global social norm can have the long-term effect of increasing societal wealth for everyone. Indeed, it is the quasi-global social norm of tolerance that, from “both legal and social [aspects], make[s] it possible for critics to challenge existing [concrete] norms continuously.”\textsuperscript{206} The social impact of these challenges on Supreme Court rulings can be quite significant. As Cass Sunstein has remarked, “the close attention American society pays to the Court’s pronouncements is connected with the expressive or symbolic character of this pronouncement” in that the Court’s decisions are “often taken to be speaking on behalf of the nation’s basic principles and commitments.”\textsuperscript{207}

This section illustrates two examples dealing with cases where the motivating force of the Court’s pronouncements can be found by reference to quasi-global social norms. Both cases pertain to gay rights issues which, as explained above, is not a coincidence. The clash between concrete exclusive laws (or norms) and abstract inclusive quasi-global social norms is the modern embodiment of the progressive struggle for an incremental application of quasi-global social norms.

\textsuperscript{202} Robinson & Darley, supra note 89, at 474 (dealing specifically with criminal law).
\textsuperscript{203} Sunstein, supra note 16, at 912.
\textsuperscript{204} \textit{Id.} at 908.
\textsuperscript{205} \textit{Id.} at 947.
\textsuperscript{206} McAdams, supra note 9, at 397.
\textsuperscript{207} Sunstein, supra note 78, at 2028.
A. *Fairness as a Quasi-Global Social Norm*

Fairness is an attribute that compels most of us to treat one another with respect and without bias. It is a quasi-global social norm that forms part of those "norms founded on human compassion."\(^\text{208}\) It enhances societal cohesion and reduces social conflict. Fairness, viewed as "equality of opportunity and the amelioration of unequal results [is] vital to a productive and cohesive society."\(^\text{209}\) Consequently, we have internalized certain behavioral conduct such that "societal norms at least weakly condemn overt race discrimination,"\(^\text{210}\) as well as other forms of discrimination.

Against the background of the fairness quasi-global social norm there exist more concrete rules and social norms that seemingly run counter to the flow of the fairness norm. Thus, there are many examples in the past and present of laws arising out of pure antipathy, designed solely or primarily to be *unfair*, laws "driven by largely psychological motives, such as fear of the unknown or unusual . . . followed by prejudice, which subsequently drives actions that restrict the opportunities of the outgroup."\(^\text{211}\) Laws are not the only source of behavioral regulation that oppose quasi-global social norms. For example, "[i]n the areas of both race and gender, prevailing norms help constitute inequality."\(^\text{212}\) It could be that there is no ill motive behind a discriminatory social norm and that these concrete discriminatory norms are adhered to merely out of "habit or inertia."\(^\text{213}\) But habit and inertia should not be the controlling forces for society, especially if their effect has been to institutionalize "racism, sexism, and other exclusionary practices [that] have been important factors in bringing about and maintaining depressed economic conditions among the excluded classes."\(^\text{214}\) Indeed, the stifling quality of discriminatory norms which tend to squash minority identity has been observed for a long time, and has led to the notion that "there needs [to be] protection . . . against the tyranny of the prevailing opinion and feeling, against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them."\(^\text{215}\)

The prevalence of discriminatory laws and norms and individuals' difficulties in overcoming such tenets, has led many scholars, Cass Sunstein among them, to advocate a governmental role in the "promotion of social

\(^{208}\) Jones, supra note 14, at 584.
\(^{209}\) Id. at 545.
\(^{210}\) McAdams, supra note 9, at 379–80.
\(^{211}\) Chong, supra note 15, at 2127.
\(^{212}\) Sunstein, supra note 78, at 2043.
\(^{213}\) See Chong, supra note 15, at 2084.
\(^{214}\) Jones, supra note 14, at 574 (viewing the eradication of discrimination as a means to a more productive society).
\(^{215}\) JOHN STUART MILL, ON LIBERTY 7 (Currin V. Shields ed., Macmillan Publ'g Co. 1956) (1859).
equality” through norm management.\textsuperscript{216} This norm management by the government can operate in three fashions through: (1) the passage of anti-discrimination laws by the legislative branch; (2) the proclamation by the executive branch of the evils of discrimination; and (3) the striking down by the judicial branch of discriminatory laws.\textsuperscript{217}

Many scholars have described the effects that the passage of the civil rights laws of the 1960s had on society. Cass Sunstein has stated that anti-discrimination laws shifted “the social meaning of nondiscrimination,” embedding an internalized sense of discomfort in the discriminators.\textsuperscript{218} Richard McAdams has noted that “certain legal rules may efficiently interfere with dysfunctional norms, as one may regard antidiscrimination laws as usefully impeding enforcement of discrimination norms.”\textsuperscript{219} Moreover, William Eskridge, Jr. and John Ferejohn have indicated that civil rights acts were the trigger that ultimately allowed anti-discrimination norms to seep into collective consciousness.\textsuperscript{220} And Eric Posner similarly has noted that anti-discrimination became a norm due to government intervention.\textsuperscript{221}

The above descriptions of the effects of the 1960s anti-discrimination laws are essentially accurate but one more element must be added in order to fully understand how that effectiveness was achieved. This element consists of the acknowledgment that by the time such laws were passed, a sufficient proportion of the population had accepted the fact that discriminatory laws and practices targeted against African-Americans and other races did not gel with an underlying sense of fairness provided by the corresponding quasi-global social norms. Thus, it was not the laws that produced the quasi-global social norm of fairness, but rather, it was the norm of fairness that, after having sufficiently permeated society through its new application to racial discrimination, enabled legislators to tap into its pulse and move society forward via anti-discrimination laws.\textsuperscript{222}

\textsuperscript{216} Sunstein, supra note 78, at 2052.
\textsuperscript{217} See generally id.
\textsuperscript{218} Id. at 2043. Sunstein also added that “[a] society might . . . insist on an anti-discrimination law for expressive reasons even if it does not know whether the law actually helps members of minority groups.” Id. at 2027–28. He also has theorized that such laws altered behavior pertaining to racial discrimination by increasing the reputational costs of violating such laws (and the corresponding underlying quasi-global social norms). See Sunstein, supra note 16, at 916. This last point seems debatable in light of the fact that for such effect to actually take place, acts of discrimination have to both take place in public and have to be perpetrated by a rational actor. Both presumptions seem unlikely, in particular the second because those who hold stereotypes and discriminate on the basis of race, gender, or sexual orientation are, almost by definition, acting irrationally.
\textsuperscript{219} McAdams, supra note 123, at 2239. Cass Sunstein has articulated similar reasoning. Sunstein, supra note 78, at 2044 (“Antidiscrimination law is often designed to change norms so as to ensure that people are treated with a kind of dignity and respect that discriminatory behavior seems to deny.”)
\textsuperscript{220} See Eskridge, Jr. & Ferejohn, supra note 89, at 1238 (stating that the “public did not consider these ordinary cases”).
\textsuperscript{221} Posner, supra note 12, at 789–90.
\textsuperscript{222} Of course, history shows us that in some parts of the country, such laws produced backlashes. Ultimately, however, the backlash in turn produces a forward-lash which finally propels society to-
As noted above, legislative action is not the only method the government has of tapping into and using quasi-global social norms to foster social policy. Courts too are affected by these norms' influence and every so often, a case is presented where this influence can be observed. One such case is *Romer v. Evans*. In *Romer*, the U.S. Supreme Court was asked to evaluate the constitutionality under the Equal Protection Clause of a provision of the Colorado Constitution prohibiting "all legislative, executive or judicial action at any level of state or local government designed to protect . . . gays and lesbians." The Court ruled this provision unconstitutional. In doing so, however, the Court departed from its usual Equal Protection analysis and produced a mishmash which appeared to call into play different types of analyses under more than one level of scrutiny.

Even though the Court declared it was analyzing the Colorado constitutional provision under rational basis review, it used language more associated with a higher level of scrutiny. More importantly, in rebutting Colorado's argument that it was merely enacting a provision which prevented gays and lesbians from obtaining "special rights," the Court majority indicated that it saw nothing special about the rights taken away from this minority group. William Eskridge, Jr. and John Ferejohn note that the Court "cited nothing for this proposition—nor was citation necessary in light of the way the Civil Rights Act's antidiscrimination principle has saturated American social and political culture." In my view, the saturation referenced by Eskridge and Ferejohn was not caused by the Civil Rights Act, but rather by the quasi-global social norm of fairness which spawned the Civil Right Act and ultimately led the *Romer* majority to end the disconnect between this norm and the notion that gays and lesbians could be excluded from a whole host of benefits provided to everyone else. The Court couched its reasoning within legal doctrine, as all courts have to do, but the real normative force of the opinion is derived from its not-so-tacit acknowledgment that it was general notions of fairness (which need no citation to garner authoritativeness) that compelled the result it reached.

wards synchronization with the progressive flow of quasi-global social norms. See, e.g., Stuntz, supra note 90, at 1896 (arguing that the laws themselves actually produced a contrary effect so that the norms only changed when a groundswell of popular opinion pushed in the direction of norm change).

224 Id. at 624–25.
225 Id. at 623.
226 See id. at 633 (employing such terms as "narrowness" and "broadness").
227 Id. at 631 ("These are protections taken for granted by most people either because they already have them or do not need them; these are protection against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.").
228 Eskridge, Jr. & Ferejohn, supra note 89, at 1242.
B. *Liberty as a Quasi-Global Social Norm*

Liberty is possibly the most pervasive quasi-global social norm.\(^{229}\) It is also possibly the most frightening to many because it is by definition void of any structure and it gives an almost unlimited power to each individual. Perhaps because of its empowering nature, throughout the centuries, individuals and governments have persistently tried to deny liberty to others, either indiscriminately or by picking and choosing categories of people whom are deemed worthy or unworthy of enjoying its privileges. Gays and lesbians have often been classified within the category of those deemed unworthy.

Anti-sodomy laws were part of those packages of laws enacted to brand "lesbians and gays as socially and legally constructed miscreants."\(^{230}\) They were designed to stigmatize so as to communicate to all that gays and lesbians were "not quite human."\(^{231}\) Even though rarely enforced, these laws still had "an effect in shaping social norms . . . [because of the] general norm in favor of obeying the law."\(^{232}\) Clearly, for a long time, it did not occur to society that the quasi-global social norm of liberty encompassed adult gays and lesbians freely choosing sexual partners for themselves. Thus, for a long time, fearing criminal reprisals, gays and lesbians remained invisible.

But through the processes described in Part III, at some point gays and lesbians emerged from invisibility, and slowly, either through personal contact, or through the media, or in some other manner, more people began to interact and observe gays and lesbians not as the law said they should be viewed, but rather as they really were. Conduct which once seemed condemnable, soon began to seem harmless. Hence, a disconnect between the reality on the ground and the law began to emerge. Indeed, after some time, the disconnect was so great that it is likely that the vast majority of people were unaware that anti-sodomy laws targeting the consensual sexual conduct of adult gays and lesbians even existed. This disconnect posed a great problem because the "[c]riminalization of contestable, not-universally-condemned conduct is bound to produce unjust punishments sometimes."\(^{233}\) And because respect for the law is contingent on its good reputation,\(^{234}\) punishments perceived to be unjust undermine such respect. Thus, a collision course was set between society's perception of liberty as

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\(^{229}\) Liberty has been defined as the ultimate form of a non-interference norm. See Miller, *supra* note 99, at 902 ("People in non-cooperative settings demand only that others not get in their way.").

\(^{230}\) Goodman, *supra* note 92, at 688.

\(^{231}\) See Chong, *supra* note 15, at 2124 (noting that "the person with a stigma is not quite human").


\(^{233}\) Stuntz, *supra* note 90, at 1896 (emphasis omitted). "[A] system that aims to criminalize not only that which all of us condemn but also that which only most (or some) of us condemn, is a system bound to produce not justice, but its opposite." Id. at 1897.

\(^{234}\) See Robinson & Darley, *supra* note 89, at 474.
encompassing the sexual freedom of gays and lesbians and the law's statement to the contrary.

With this background came the case of *Lawrence v. Texas*. The facts of *Lawrence* were simple: two adult gay men were arrested for engaging in acts of sodomy while making love in the privacy of their own bedroom. The challenge was equally simple: did the Texas law criminalizing acts of sodomy between people of the same gender violate the federal constitution's Due Process Clause? In the majority opinion, before the Court even posed the above question, it opened with an extraordinary passage part of which was quoted at the very beginning of this Article and which reads as follows in its totality:

> Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. In our tradition the State is not omnipresent in the home. And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence. Freedom extends beyond spatial bounds. Liberty presumes an autonomy of self that includes freedom of thought, belief expression, and certain intimate conduct. The instant case involves liberty of the person both in its spatial and more transcendent dimensions.

This passage reads more like a societal credo than legal analysis. Indeed, the Court announced at the outset that it was aware that what the case was really about was that the State of Texas had attacked the quasi-global social norm of liberty and that the Court would resolve the case by aligning the law, which had gotten perilously out of synch with most of society, with the relevant social norm. This analysis of the Court's opinion is bolstered by the fact that, even in terms of Due Process jurisprudence, the *Lawrence* opinion is a very unusual read. First, the Court makes no attempt to identify a fundamental right to scrutinize as would be customary under the pertinent legal doctrine. Second, instead of using precedent to define a specific right grounded in the history and traditions of this nation, the Court uses precedent (such as *Griswold v. Connecticut* and *Roe v. Wade*) to subvert other precedent (*Bowers v. Hardwick*), thus all but acknowledging that traditional substantive Due Process doctrine was insufficient to reach the *Lawrence* result. Third, the Court consulted foreign

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236 Id.
237 Id. at 562.
238 381 U.S. 479 (1965).
241 See *Lawrence*, 539 U.S. at 565.
persuasive authority partly to indicate the global scope of the issues it was charged with analyzing. In recognition of the "quasi" component of the norm, the Court confined its consultation to nations that shared societal affinities with the United States. Fourth, the Court explicitly embraced a dynamic vision of the Constitution which sees the document as an embodiment of evolving norms: "[P]ersons in every generation can invoke its principles in their own search for greater freedom." Fifth, and most revealing, the Court did not ground the contours of its ruling in notions of privacy, but rather in notions of liberty, a broader concept than privacy. Therefore, by evoking the most universal norm that it could under the circumstances, the Court signaled that it was relying on the substance of the liberty norm in formulating its legal rule. As a result, at the very end of the game, after a substantial majority of the population had already reached its conclusion on the issue, the Lawrence majority tapped into this repository of collective consciousness and declared that the law should follow the prevailing norm.

V. CONCLUSION

Social norms are the "glue that holds . . . society together," and have a "puzzling staying power." Indeed, quasi-global social norms are especially sticky and durable. They are extremely pervasive and they help explain a variety of social processes, including some of those taking place within the legal arena. Thus, to properly understand and predict what moves a particular court or legislature to decide a matter in a certain way when abstract values, such as issues of fundamental human rights, are concerned, requires an understanding of this type of social norm. Without such an understanding, lawmakers, and judges in particular, will always be open to the charge that in cases pertaining to human rights, they are simply acting on a whim or giving legal voice to their own personal predilections. By exploring the reality of quasi-global social norms, such charges can be reduced to a lack of understanding of the societal forces that inevitably come into play when decisions of fundamental importance are made by any decision-making authority, be it an individual, a family unit, a social club, the legislative branch of the government, or a judge. There-

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242 See id. at 576.
244 Lawrence, 539 U.S. at 579.
245 In other words, they gave the law a "gentle nudge" in the direction of the pertinent quasi-global social norm. See Kahan, supra note 191, at 608.
248 This was indeed the criticism of Lawrence launched by some. See, e.g., Lund & McGinnis, supra note 4, at 1555.
Therefore, quasi-global social norms in many circumstances provide the answer as to why and how certain decisions are reached.

But quasi-global social norms are more than just a way to explain the normative impulse behind legal and non-legal decision making. They are a foundation of social order which affects society at the macro level. They help account for the evolution of society, and their progress and development is society's progress and development. As such, quasi-global social norms are a mirror in which society is reflected, the observation of which can only enhance the understanding that society has, and needs to have, of itself.