I. INTRODUCTION

International human rights law has only very recently begun to address issues of sexual identity. When international human rights law was being developed after World War II, in the shadow of the horrors of the Nazi regime, same-sex sexual activity was illegal in most nations.1 The status of gay men and lesbians as criminals and/or as mentally ill2 no doubt meant that rights associated with sexual identity were not even imagined as part of the corpus of international human rights law. This was the case despite the fact that lesbians and gay men were explicitly targeted by the Nazi regime in Germany and interned in concentration camps. Reform of the criminal law began in Britain in 1967,3 and the reform process has spread to most western countries. But many nations, including seventeen United States states, still criminalize same-

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1. In some countries, only male-male sexual activity was specifically criminalized; however, this did not mean that lesbians were not subjected to the criminal law. Lesbians were often arrested and prosecuted under more general laws dealing with sexual behavior.

2. Up until the 1970s, “homosexuality” was regarded as a mental illness in the United States, and it is still considered a mental illness in some nations today.

sex sexual activity. And gay and lesbian identity remains stigmatized in most countries, even those where decriminalization has occurred.

Notwithstanding the continued stigmatization and criminalization of same-sex sexual activity, in the last decade we have seen the emergence of gay, lesbian, and transsexual rights issues on the international stage. In Part (I), of this paper, I will provide a brief overview of the development of international human rights law in the area of sexual identity. In Part (II), I will look at refugee law as a case study that offers us some insight into the way in which this development has occurred. In particular, this section will highlight the way in which international human rights law has focussed very much on sexual identity, rather than on non-normative sexual behaviors. In Part (III), I will offer some thoughts on the direction international human rights law might take from here. I will suggest that it is desirable to move away from the identity model as the sole focus and towards a model that seeks to deal more generally with sexuality. One way in which this could be achieved is through the articulation of a right to sexual self-determination.

II. SEXUAL IDENTITY AND HUMAN RIGHTS: AN OVERVIEW

A. Europe

The development of international human rights law in the area of gay and lesbian sexuality began in the 1980s, in Europe, when the European Court of Human Rights held in two landmark cases that criminalization of consensual adult sex between men in private violated the right to privacy protected by the European Convention on Human Rights. Over the subsequent years, the European Court of Human Rights has developed a reasonably extensive jurisprudence on sexual identity and human rights, not all of it positive. Gay men and lesbians have been quite successful in invoking the right to privacy under the European Convention in cases ranging from the discriminatory age of consent in Britain to the ban on lesbians and gay men serving in the armed forces in Britain. Not all the privacy cases have succeeded, however. A challenge to the criminalization of consensual sado-masochistic (S-M) sexual practices in Britain failed.


7. Laskey, Jaggard and Brown v. United Kingdom, 1997 WL 1104639 (Eur. Ct. H.R., Feb.1997). Although the criminal law in question (the common law of assault) did not, at least on its face, discriminate on the basis of sexual preference, the British courts seemed to be influenced by this fact: the judgment in the
In contrast to the general success of privacy arguments, lesbians and gay men have been less successful in the areas of equality and respect for family life under European law. Discriminatory provision of employment benefits to heterosexual couples has been upheld by the European Court of Justice, and, to date, no gay or lesbian family arrangement has been protected under Article 8 of the European Convention, which provides for respect for family life, as gay and lesbian relationships, even those involving children, are not recognized as "family" under the Convention. However, there are some indications that this situation may change. The European Court of Human Rights ruled, as I was writing this paper, that the non-discrimination clause of the European Convention, Article 14, prohibits discrimination on the basis of sexual orientation. In the case in question, the applicant had been denied custody of his child because he was gay. He claimed interference with his private and family life under Article 8 and Article 14 of the Convention, and the Court upheld his claim. The fact that the extension of Article 14 to sexual orientation came in a case concerning family issues suggests that protection for lesbian and gay families may eventually emerge in the European system.

In contrast to the record of lesbians and gay men, transsexuals have been on the whole successful in Europe in invoking the right to equality, but unsuccessful in invoking the right to privacy and respect for family life. House of Lords contains some comments that suggest that the sexual preference of the participants was relevant to their conviction. See R. V. Brown, 2 All E.R. 75 (1993); and, in a different case concerning sadomasochistic activity between husband and wife, charges were dismissed, at least in part because they were married and the state ought not to interfere in the marital relationship. See R v. Wilson, Q.B. 47 (1996).


9. See Pieter van Dijk, The Treatment of Homosexuals Under the European Convention on Human Rights in KEES WAALDIJK AND ANDREW CLAPHAM (EDS), HOMOSEXUALITY: A EUROPEAN COMMUNITY ISSUE 179, 189-92 (1993). Van Dijk observes that the interpretation of "family life" in the heterosexual context has been broad, in contrast to the narrow and exclusionary interpretation in the context of same-sex relationships. Although the van Dijk piece is now six years old, there have been no subsequent cases that reverse the exclusion of lesbian and gay families from the notion of "family" under the European Convention. Indeed, in 1998 in Grant the European Court of Justice expressly reaffirmed that same-sex relationships do not constitute "family" under European law. See Grant v. Southwest Trains, All E.R. (EC) 193, ¶¶ 33-35 (1998).


B. The United Nations

In the United Nations human rights system, events concerning international human rights and sexuality have occurred mostly outside the judicial arena. Non-governmental organizations (NGOs) have played an important role in achieving visibility for lesbian and gay concerns in the international sphere. Two gay and lesbian NGOs, the International Lesbian and Gay Association (ILGA) and the International Gay and Lesbian Human Rights Commission (IGLHRC), have, for many years, tried to bring lesbian and gay issues into the international arena with mixed success. In 1993, ILGA was granted consultative status to the United Nations Economic and Social Council. This allowed ILGA, along with scores of other NGOs, to participate in United Nations conferences and some United Nations meetings, though not to participate in United Nations decision-making. This status was short-lived, however, as the United States led a campaign to oust ILGA from its consultative status based on the fact that some national member organizations, including the United States based North American Man-Boy Love Association (NAMBLA), advocated inter-generational sex. Although ILGA eventually expelled NAMBLA and two other national organizations from its ranks, its accreditation was nonetheless suspended, as one other national member organization was alleged to support pedophilia. As a result of the controversy, the United Nations AIDS program has indicated that it will not fund any project linked to ILGA. Currently, no gay and lesbian NGO has consultative status at the United Nations.

Mainstream NGOs have also begun, in the last 10 years, to play an important role in the area of sexuality and human rights. In 1991, Amnesty International included people imprisoned for their homosexual sexual activity

partner and their children did constitute a family for the purposes of Article 8 of the Convention. However, Article 8 imposes no obligation on states to recognize as the father of a child a person who is not the biological father of that child, hence there was no breach of the Convention).  

14. ILGA had been seeking consultative status with ECOSOC since 1991, but its application was extremely controversial, ultimately requiring the NGO Committee of ECOSOC to depart from its traditional consensus decision-making model and put ILGA’s application to a vote. See Wayne Morgan and Kristen Walker, Rejecting (In)tolerance: Tolerance and Homosex 20 MELB. U. L. REV. 202, 213-4 (1995).

15. For a detailed description and analysis of the events surrounding ILGA’s removal from consultative status, see Joshua Gamson, Messages of Exclusion: Gender, Movements and Symbolic Boundaries, 11 GENDER AND SOCIETY 178, 183-87 (1997).

or identity in its definition of "political prisoner," and since then, several other mainstream NGOs have begun to address lesbian and gay issues.

In terms of the United Nations itself, activity has been more recent still. In 1993, gay and lesbian rights issues were raised by activists at the Vienna Conference on Human Rights – this was the first time these issues had been spoken of at a major United Nations conference. In 1995, lesbian rights were raised by women's NGOs at Beijing and references to sexual orientation were included in the draft Platform for Action, although they were bracketed. All these references were ultimately removed from the final Platform for Action, however.

In the area of judicial or quasi-judicial decisions, there is but one within the United Nations system. In 1994, the United Nations Human Rights Committee handed down its views in the Toonen communication concerning Australia, where one state, Tasmania, criminalized private consensual sex between men. The Committee held that the Tasmanian law violated the right to privacy in the ICCPR. This was a significant milestone in the battle for gay and lesbian rights. There have not yet been further cases in the United Nations human rights system, but there is a pending case of interest, concerning New Zealand's refusal to allow same-sex couples to marry.


18. For example, the Lawyers' Committee for Human Rights, the International Human Rights Law Group, the International Commission of Jurists, Human Rights Watch and the Center for Women's Global Leadership. See Laurence Heifer and Alice Miller, Sexual Orientation and Human Rights: Toward a United States and Transnational Jurisprudence, 9 HARV. Hum. RTS. J. 61, n. 138 (1996).


Notably, most of the events described above center on sexual identity categories, rather than on non-normative sexual activity. This can be problematic, as it redefines existing identity categories and may also reflect culturally specific understandings of sexuality. It also excludes from human rights protection those whose sexuality is non-normative or stigmatized, but whom do not fit into sexual identity categories as traditionally conceived. For a more detailed illustration, I turn to the example of refugee law.

III. REFUGEE LAW AND SEXUALITY

The Refugee Convention provides that a refugee is a person who,

[o]wing to a well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group, or political opinion is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country.

It is now accepted by the major refugee receiving countries, including the United States, Canada, Britain, Australia, New Zealand, Germany, and the Netherlands, that gay men and lesbians may constitute a particular social group for the purposes of the Refugee Convention and thus are entitled to protection if they are persecuted because of their sexual identity.\(^23\) Canada has also accepted that transsexuals may constitute a particular social group.\(^24\)

The cases have generally treated homosexuality as something immutable or, in some cases, either unchangeable or something the individual should not be required to change. In all jurisdictions, the emphasis has been on the identity category "homosexual," rather than on the individual's sexual behavior. This emphasis on sexual identity is underscored by the fact that "mere" criminalization of same-sex sexual activity is not generally recognized as persecution.\(^25\) Rather, there must be some serious detriment to a person because of his or her identity or status as gay or lesbian, not just because of his or her sexual activity.

In this regard it is interesting to note that heterosexuals who violate social norms concerning sex — by engaging in sex outside marriage or sex for money,

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for example – have, to date, received less protection under refugee law than gay and lesbian claimants. In Australia there have, to date, been no cases where those engaging in sex work, adultery, or fornication have been accepted as constituting a “particular social group” for the purposes of the Refugee Convention, although both adultery and fornication have been the basis for several claims for refugee status.

A. Adultery

A woman who committed adultery in Iran successfully obtained refugee status in Australia. The basis was persecution on the basis of membership in the social group of “women in Iran who have refused to submit to the severity of the Islamic code as it is enforced by the (Iranian) government.”26 In contrast, a man who engaged in adultery was unsuccessful in claiming refugee status in Australia. He argued that the Iranian law against adultery constituted persecution on the basis of religious belief. The Australian Federal Court did not accept that the application of a generally applicable criminal law concerning adultery constituted persecution on the basis of religious belief, unless the application of the law was itself discriminatory.27

B. Fornication

Fornication, that is, consensual sex between unmarried adults, has been the basis for several claims for refugee status in Australia. However, these claims have not been based on the argument that “fornicators” constitute a particular social group and they have been unsuccessful. In one case, the claimant feared he would be killed by the family of the woman with whom he had sexual relations. The Australian Refugee Review Tribunal did not accept that this constituted persecution for a Convention reason.28 In Z v. Minister for Immigration and Multicultural Affairs,29 also concerning Iran, Z had engaged in fornication and was threatened with prosecution and punishment of stoning, or perhaps whipping, if he failed to marry the woman concerned. Here the social group, as argued by the applicant, varied from “single Iranians . . . required, on


penalty, to marry in consequence of relationship with a member of the opposite
sex” to “single adult male Iranians, inherently possessed of sexual drive.” The
Federal Court did not decide on the social group question, however, as it found
that the applicant’s fear was of the application of a law of general application,
which did not constitute persecution for a Convention reason.  

C. Sex Work

There have been no Australian cases of which I am aware in which a
claimant argued that “sex workers” constitute a particular social group or where
a person has claimed a fear of persecution based on his or her profession as a
sex worker. However, fear of “forced prostitution” has been argued as
constituting a well-founded fear of persecution. This was rejected by the
Tribunal in each case on the basis that the persecution alleged was not for a
Convention reason.

The failure to consider adulterers, sex workers, and fornicators to be
particular social groups seems to be, at least in part, because adultery,
fornication, and prostitution are seen as behaviors, not identities. Adultery,
fornication, and sex work are not seen as constituting particular kinds of people
in the way that same-sex sexual activity, for example, is seen as constituting a
particular kind of person, namely the “homosexual.” The sex of one’s sexual
partner is seen as something fundamental to one’s identity, something
immutable, difficult to change, or that one should not be required to change.
“Homosexual” is something a person “is.” In contrast, adultery, fornication,
and prostitution are viewed simply as “things a person does,” and thus, are not
seen as attracting the operation of the Convention in the same way. Although
protection has been given in some cases concerning adultery, this has been
based more on gender than on sexual behavior.

Thus, where sexuality is concerned, refugee law has protected those who
fit themselves within an identity category such as gay or lesbian. But it has not,
to date, protected those whose sexual behavior violates social norms and who
do not fit within a recognizable, essentialized identity category.


31. See, e.g., Australian Refugee Review Tribunal Decisions V97/06838 (1998) and N98/25996

32. This distinction between “things one does” and “things one is” has been drawn in a number of
cases. See Morato v. Minister for Immigration and Ethnic Affairs, 111 A.L.R. 417, 420, 422 (1992); Ram
v. Minister for Immigration and Multicultural Affairs, 130 A.L.R. 314, 319 (1997); Australian Refugee
IV. WHERE TO FROM HERE?

To date, most human rights activism and jurisprudence in the area of sexuality has been concentrated in several disparate locations. First, there is gay/lesbian/bisexual/transsexual rights activism, which has centered primarily on the right to privacy in the criminal law context; the right to equality, often in the area of relationship recognition; and the right of transsexuals to recognition of their new sex. Second, there is extensive work around women’s sexuality by feminist scholars and activists. Here, the focus has been broader and has included reproductive rights, rape, sexual trafficking, sexual health, and female genital mutilation – with some attention to women’s right to sexual autonomy and lesbian sexuality. Third, there has been some activism by sex workers at an international level. But this has not yet received a great deal of mainstream human rights attention, in part because sex worker rights are controversial within the feminist movement, a large segment of which seeks to end prostitution rather than champion sex workers’ rights.

Although there have been some coalitions between these various groups, there has not, to date, been any sustained action around sexuality more broadly conceived. Nor has there been, until recently, any attempt to articulate a rights framework specific to sexuality. Rather, rights work in the area of sexuality has generally focused on fitting sexuality issues within the existing human rights framework, particularly the rights of equality and privacy. While this work has produced some significant advances, it nonetheless has some limitations, as it often fails to challenge dominant conceptions of sexuality.

As an alternative approach, I suggest that we articulate a right to sexual self-determination, rather than either privacy or non-discrimination on the basis of sexual identity. Thus, rather than pursuing an international declaration or convention on sexual rights that simply adds sexual orientation as a category of non-discrimination to existing civil and political rights, we need to imagine and enumerate new rights claims around the area of sexuality. This does not mean that we cannot or should not use the language of identity categories – visibility of particular non-normative sexual activities and preferences is clearly


34. This is suggested by Eric Heinze. See ERIC HEINZE, SEXUAL ORIENTATION: A HUMAN RIGHT 289 (1995). For a more detailed discussion of Heinze’s approach and the limitations with it, see Walker, supra note 33.
important and can challenge the present heterosexism of human rights law. However, we must be careful to acknowledge the cultural specificity of such categories and their narrow focus. Sexual self-determination is not just about freedom and equality for lesbians and gay men, rather, it is about valuing sexual diversity.

My notion of sexual self-determination is thicker than a simple assertion of a right to liberty, although liberty is clearly an aspect of self-determination. Rather than merely seeking an absence of state regulation of behavior, sexual self-determination also seeks to achieve the conditions under which individuals can make choices about their sexuality—albeit choices constrained by local social and cultural traditions and knowledge. This involves not only the absence of criminal law regulating consensual sexual activity, but the fostering of social structures that recognize individual and joint choices about important relationships and permit the expression of sexuality by individuals, couples, and groups. This requires the creation of a society in which diversity of sexual expression is recognized as good and fostered; in which there is education on diverse sexualities; and in which we are not constrained in our sexual activities by poverty and sickness. It is, in short, a transformative social project not limited to simply claiming existing rights. I argue that any international instrument dealing with sexuality ought to proceed from the premise of sexual self-determination. It ought to enumerate a right to engage in consensual sex, including public sex, paid sex work, and a right to freedom of sexual speech and expression. It should provide for freedom from coercive sex, including sexual trafficking and freedom from violence because of sexual difference. It should provide for recognition of important sexual relationships and should recognize reproductive rights, including abortion. It should recognize rights for those with HIV or AIDS and should provide rights for those who violate traditional gender norms, including but not confined to transgender folk. It should also provide for sex education and sexual self-determination for young people.

35. As Dianne Otto has observed, "recognizing the risks of identity politics does not have to lead to its rejection. This recognition could also lead towards understanding and practicing identity in a different way—as always contested, as contingent and dynamic, rather than definitive and static." See Dianne Otto, Sexualities and Solidarities: Some Thoughts on Coalitional Strategies in the Context of International Law, 8 AUSTRALASIAN GAY AND LESBIAN L. J. 27, 33 (1999).

Any articulation of sexual rights needs also to acknowledge the links between economic and social rights and sexuality. For example, we need to recognize the links between poverty and sexual oppression, particularly for women. Similarly, rights to sexual health are essential, especially in the context of HIV and AIDS.

This list is not, and is not intended to be, comprehensive. It is, rather, a starting point for debate on these issues. It is important, I argue, for those of us working on sexuality issues from diverse perspectives to try to articulate the commonalities between us and also to assess our differences. Perhaps it will not be possible to develop a consistent formulation of a right to sexuality. Perhaps such a project is simply to broad or too abstract; or perhaps sexuality is too culturally specific to allow for a universal right to sexual self-determination. But, even if this is so, a dialogue on these issues can only advance our understanding of sexuality and the ways in which international human rights can protect sexual expression.

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37. See, e.g., Dianne Otto, Questions of Solidarity and Difference: Towards Transforming the Terms of Lesbian Interventions in International Law, forthcoming, in Victoria Brownworth and Ruthann Robson (eds), Seductions of Justice: Lesbian Legal Theories and Practices. (Manuscript on file with the author).