

## Abstract

*Although the term "sexual rights" has gained widespread currency, its concrete scope and content have not yet been fully defined. The need for definition is critical not only for promoting governmental accountability but also for ensuring that sexual rights can be claimed by diverse persons around the world. Ironically, the concept of "sexual and reproductive rights" poses a challenge to this effort; practices and people not traditionally addressed by reproductive rights work must be explicitly named and protected. This article considers how international norms have contributed to a gendered regulation of sexuality and of contemporary theories of "socially constructed sexuality," and it proposes a focus on the conditions that contribute to the ability to choose and on the links between sexuality, conduct, identity, social structures, and reproduction. Given the probable politically charged responses, global coalition-building is needed.*

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*Bien que le terme « droits sexuels » ait acquis un droit d'existence universel, sa portée et sa teneur sur le plan concret n'ont pas encore été complètement définies. Le besoin d'une définition est essentiel, non seulement pour promouvoir la responsabilité gouvernementale, mais aussi pour que toute personne de par le monde soit en mesure de revendiquer ces droits. Ironiquement, le concept de « droits sexuels et génésiques » pose un défi à cet effort ; il faut que les pratiques et les gens qui ne sont pas traditionnellement concernés par les travaux sur les droits génésiques soient désignés et protégés. Cet article tient compte de la façon dont les normes internationales ont contribué à une régulation de la sexualité en fonction de la spécificité sexuelle et de théories contemporaines de la « sexualité socialement construite », et il propose une focalisation sur les conditions qui contribuent à la possibilité de choisir et sur les liens entre la sexualité, le comportement, l'identité, les structures sociales et la reproduction. Étant données les réponses potentielles qui seront dictées par la politique, la mise en place d'une coalition mondiale est nécessaire.*

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*Aunque el término "derechos sexuales" se ha vuelto más y más corriente, su alcance y contenidos concretos aún no se han definido a fondo. La necesidad de definición es crítica no sólo para promover la responsabilidad de los gobiernos pero también para asegurar que los derechos sexuales se puedan reclamar a escala global. Irónicamente, el concepto de "derechos sexuales y reproductivos" es un obstáculo para este esfuerzo; hay que asegurar que las prácticas y las personas que tradicionalmente no se encuentran dentro del círculo de las obras de derechos reproductivos sean nombradas y protegidas de manera explícita. Este artículo examinacómo las leyes internacionales han contribuido a la regulación de la sexualidad basada en género tanto como de las teorías modernas sobre la "construcción social de la sexualidad," y propone un enfoque en las condiciones que contribuyen a la capacidad de escoger y en los enlaces entre la sexualidad, el comportamiento, la identidad, las estructuras sociales y la reproducción. Las respuestas políticamente cargadas que puedan resultar exigen el desarrollo de coaliciones a nivel mundial.*

# SEXUAL BUT NOT REPRODUCTIVE: Exploring the Junction and Disjunction of Sexual and Reproductive Rights

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**T**his article seeks to consider the specific implications for creating a claim to “sexual rights” out of the disparate conversations on sexuality and human rights occurring globally.<sup>1</sup> This journal sounded a challenge in 1997 to move beyond rhetoric to develop sexual rights as a meaningful tool for empowerment and to outline its scope so as to provide formal state accountability for the widest array of differently situated people.<sup>2</sup> This article will review briefly the diverse approaches to sexuality and human rights that arise in contemporary violations-focused human rights advocacy and case law, as well as the covert regulation-in-the-name-of-protection approach to sexuality found in international standards.

Following this historical overview, the article will examine women’s reproductive health rights advocacy as a case study because it is an important site from which claims to sexual rights have emerged. This examination seeks to identify the ways in which linking sexual and reproductive rights simultaneously contributes to and paradoxically hinders global work to develop a liberatory theory for sexual rights as an element of human rights.<sup>3</sup> The concept of reproductive rights has gained some global acceptance, albeit limited and contested. It incorporates some of the most

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powerful aspects of the health and human rights paradigm, which by its embrace of both promotion and protection embeds rights claims within broader social justice movements. This paradigm also contains a commitment to analyzing the effects of the social and material conditions of race, gender, and other aspects of identity as they impact on reproductive rights. However, the conflation of sexual rights with reproductive rights has, by and large, caused sexual rights to be viewed as a subset of reproductive rights, albeit with a less developed articulation. This subset status has “disappeared” an array of people of varying ages and non-conforming sexual identities, as well as non-reproductive sexual practices, and has often entirely neglected to consider men as rights holders, thus leaving many already marginalized people outside the framework of human rights protection in the context of sexual behavior. Another result of removing non-heterosexual, non-procreative sexual activities from human rights protection has been the surrender of these activities to moral, religious, or criminal regulation. Therefore, persons and practices not traditionally addressed within rights work must be explicitly named and brought within the circle of rights protection. Developing a coherent framework for sexual rights as human rights that can meaningfully apply to diverse persons requires understanding how some international norms have historically functioned to regulate sexuality by gender, race, age, and other axes of power. Such a framework also necessitates incorporating contemporary theories of socially constructed sexuality.

Various human rights standards have begun to address rights protection around some aspects of lesbian, gay, and transgender identities and conduct, but this work has not always incorporated the broader promotion and protection paradigms. Both nationally and internationally, the application of standards against sexual violence (primarily against women) in peacetime and during armed conflict has focused on prevention of and protection from violence and exploitation. Cases relating to same-sex sexual behavior or sexual violence have invoked standards based on a *violations* model, partly as a result of advocacy strategies. Often the standards invoked, and in some cases the advocacy work

around same-sex sexual rights, have focused on male lives and on the aspects of sexuality that emphasize freedom and expression, and have failed to address the complicated relationships between sexual “pleasure and danger” in the different ways they are experienced by persons differently empowered because of sex, gender identity, race, economic status, or nationality.<sup>4</sup> On the other hand, and often in different global venues, sexual health and reproductive rights claims have invoked an interconnected, systems analysis of rights *promotion*. A more comprehensive approach to sexual rights would therefore have to attempt to merge both violations and promotional models. Therefore, this article attempts to build from the powerful health and human rights framing of sexual rights—freed of a focus on reproduction and incorporating civil and political rights along with economic and social claims.

Neither the application of specific rights standards (generally, in the cases of gay and lesbian rights violations or of standards against sexual violence) nor the advocacy work that provokes these decisions (whether in the gay/lesbian rights or anti-violence work or in sexual and reproductive rights claims) have engaged with the implications of recent critical thinking around the social construction of sexuality. Work to advance the application of human rights to sexuality will benefit from a study of the conditions contributing to women’s and men’s capacity to explore the links between sexuality, conduct, identity, social structures, and reproduction, and their diverse results.<sup>5</sup> Creating the conditions necessary for choosing whether to link sexuality to reproduction, as well as for promoting different aspects of sexuality and diverse sexualities, could become a major focus of rights advocacy strategies.

Such an approach, however, will require a direct consideration of the explosive political ramifications of highlighting a rights-based approach to sexuality. Sexual rights claims in the local and global political struggles around gender and sexuality in the context of globalization, nationalism, and fundamentalisms have already served as a lightning rod for powerfully driven attacks on the concept of “rights” as an excessively individualized and atomistic

Western imposition that leads to irresponsible or feckless destructive sexual behavior—for example, in the contexts of the global HIV/AIDS pandemic, the destruction of the family, or globalization and the evils of so-called “sex tourism.”<sup>6</sup>

In the realm of activist strategies around human rights and sexuality, the complex relations of power within human sexuality may, if unexamined, operate perversely. For example, at times both feminists and anti-feminist conservatives have advocated for increased governmental regulation of sexual behavior as the best rights-protective response to abuse and violence. Attention must be paid to the multiple and sometimes contradictory ways in which the claims and language of sexual rights are progressing in the worlds of advocacy and activism and of standard setting and implementation.

The language of “sexual rights as human rights” must by definition engage with the concept of sexuality as a characteristic of all human beings—straight and gay, female and male, old and young across all countries, cultures, and religions. Yet human rights work is often ad hoc, driven by the politics of violations-based work and sectionalized by the simplistic application of the UN’s categorization of rights issues by such factors as race, sex, age, and nation.<sup>7</sup> Because of this situation, human rights norms have tended to be applied in ways that reflect the claims of specifically situated groups or individuals. Activists have not always had the luxury of connecting across sectors—or the political will to do so—yet achieving the most comprehensive and effective framework for “sexual rights” protection will require just such a coalition strategy.

### **Rights Work Faces Indeterminacy: The Challenges Posed by Incorporating Contemporary Understandings of Fluid and Socially Constructed Sexuality**

The contemporary struggle for sexual rights seeks to expose concepts of “power and resources: power to make informed choices about one’s own . . . sexual activity and resources to carry out such decisions safely and effectively,” in human rights terms.<sup>8</sup> As Jeffrey Weeks argues in *The Invention of*

*Sexuality*, understanding sexuality requires paying attention to the specific historical processes which define sexuality at any particular historical moment. Weeks' words suggest that those now arguing for sexual rights must address the question of how and why the domain of sexuality has achieved such a high level of importance at this moment.<sup>9</sup> Gayle Rubin notes that at times of social and political strife and repression, of dissolution of nations and nation-building, or of globalization, as we find today, "[c]ontemporary conflicts over sexual values and erotic conduct . . . acquire immense symbolic weight. Disputes over sexual behaviour often become the vehicles for displacing social anxieties. . . . Consequently, sexuality should be treated with special respect in times of great social stress."<sup>10</sup> Of course, human rights strategies are also called on precisely at such moments. How will existing human rights strategies respond to this moment—in ways that restrict or empower persons in developing and enjoying their sexualities? The following section sketches out features of contemporary work on sexuality, which poses an important challenge to the clear cases, named identities, prohibited categories, or "bright-line" classifications often associated with the law-related advocacy strategies commonly employed in rights work.

Within the growing interdisciplinary and cross-cultural conversation on sexuality, exciting conceptual work and research has begun to examine the shaping of identity, behaviors, and roles assigned to sexual identities in relation to the processes that concurrently and relatedly shape race, ethnicity, and gender within various cultures.<sup>11</sup> Still other disciplines and areas of study focus on visual images or representations and experiences of sexuality as mediated by and through the dominant discourses of media, religions, politics, law, and medicine. The breadth of this work should remind us that rights work must recognize sexuality as comprising more than physical or social sexual conducts or behaviors.

At the same time that rights work strives to assert its relevance to sexuality, however, it must also examine how its claims, such as the claims to universal applicability or

inherence in verifiable humanness, can affect concepts of sexuality. Carole Vance writes: "The hallmark of sexuality is its complexity: its multiple meanings, sensations and connections."<sup>12</sup> Will rights work in sexuality be able to protect fluid identities and a range of behaviors without forcing individuals to claim a fixed, "naturalized" identity made up of only one particular constellation of orientation, behaviors, and social role? Arguing that sexualities are produced, regulated, and imbued with meaning by historical processes does not, in Janice M. Irvine's words, "imply that [sexual] identities are so fluid as to be easily tried on and shrugged off . . . rather they insist on a recognition of the paradox that . . . social movements simultaneously challenge and reinforce the importance and meaning of identities."<sup>13</sup>

This challenge is especially clear in contemporary human rights work around emerging gay and lesbian claims. A framework for sexual rights that includes recognition of sexual identity, including gay identity, as worthy of such traditional rights protections as nondiscrimination and freedom from violence must also leave persons free to amend or change their sexual identity without loss of rights. Will it be possible to "deconstruct" and "defend" sexual identity at the same time?<sup>14</sup> Despite the importance of documenting abuses directed at persons for claimed or imputed gay identities, any movement to locate "gay rights" within human rights must also avoid artificially affixing rigid gay identities in the name of protection.

Concepts of sexual or bodily integrity are also basic to the development and application of gender-sensitive standards to end violence against women. The vast literature at the local, national, and international levels supporting the development of such standards highlights violence against women "as a manifestation of the historically unequal power relations between men and women," in the words of one UN resolution.<sup>15</sup> As Lorie Heise wrote in 1997, however, "regrettably [in the social sciences] . . . virtually no attempt has been made to investigate how violence affects women's sexuality."<sup>16</sup> Such research, informed by the current disciplines of socially constructed sexuality, is essential for the creation of an approach to violence against

women that can respond effectively and without assumptions that either hinder sexual equality or fail to address the nature of abuses.

Rights work must connect to the formation and assertion of sexual identities and manifestations (conduct, ideology, speech) and to the enabling conditions required for the formation and expression of diverse sexual identities. It should work to determine the content and limits of state accountability for creating the conditions for diverse sexualities to flourish, as well as to prevent restrictions on or abuses of sexuality, such as sexual abuse of children or sexual violence against women. Again, this work must also avoid limiting sexual agency in the name of protection from danger. The health and human rights model, which examines structures and systems using a broad interrelated rights promotion analysis to demand accountability, can contribute greatly to the formulation of the concept of sexual rights. Progressive rights claims as vehicles for state accountability will be discussed further below.

## **Sexual Rights Claims: A Protectionist History, a Liberatory Future?**

### **The Meaning and Rhetoric Attached to the Phrase “Sexual Rights”**

As a prelude to summarizing the historical approach of international standards to sexuality and examining current attempts to name some rights explicitly as sexual rights, it is useful to examine the uses of the phrase “sexual rights,” which currently functions as a place holder for a number of different human rights claims. For example, it is often used to signify rights claims *exclusively* for lesbian, gay, or transsexual identities or behaviors. Increasingly, the phrase is intended to carry the weight of demands for affirmative experiences of sexuality (“pleasure”) as distinct from protection from violence or exploitation. Calls to “sexual rights” also connote affirmative duties demanded from states and other actors to provide for diverse sexual activity and expression.

In addition, rights advocates use the phrase “sexual rights” to gain general recognition of and legitimacy for the

concept that *sexuality is worthy of rights protection*. In this context, global discussions over sexuality often use terms such as sexual identity, sexual orientation, sexual preference, and sexual minority interchangeably to refer to aspects of sexual identity, behavior, or association that should attract rights protection. However, these terms are often used without clarification as to content—for example, whether they refer to both heterosexual and homosexual orientations.<sup>17</sup>

Advocates also use the phrase “sexual rights” in arguments that *existing rights* (for example, to life, liberty, and security of the person, or to equality and nondiscrimination) would, if properly applied, protect certain forms of sexual activity and expression.<sup>18</sup> In this argument, privacy and freedom of expression may be understood as sexual rights. As will be discussed below, many such potential sexual rights have also been named by advocates in the reproductive rights context, such as rights to privacy, nondiscrimination, bodily integrity, freedom of information, access to health care, protection from epidemic diseases, and equality within the family, as well as rights to marry and found a family and to the highest attainable standard of mental and physical health.<sup>19</sup>

The plural form of the phrase “sexual rights” suggests that *more than one* right is needed to address sexuality (for example, freedom of expression or the right to privacy alone will not ensure sexual rights). It also suggests that more than one *kind* of right (civil and political, as well as economic, social, and cultural) is needed to safeguard the enjoyment or expression of sexuality. Legal equality, privacy rights, and freedom of information will not suffice to ensure diverse sexuality in the absence of the economic capacity to live independently of restrictive family settings or of social education that builds understanding of diverse sexualities.<sup>20</sup>

### **The Hidden History of Sexuality in International Standard-Setting**

While the term “sexual rights” is of relatively recent origin, the linkage of sexuality with human rights has a long and somewhat contradictory history. It is a fallacy that the

idea of attaching rights to sexuality sprang fully formed from the minds of a few feminists or gay rights activists during the International Conference on Population and Development (ICPD) in Cairo in 1994 or the Fourth World Conference on Women (FWCW) in Beijing in 1995. Excavating the history of this linkage reveals much about the complex ways in which formal human rights work develops—often, first through continuous elaboration and application of existing standards to specific situations, especially to emerging groups or claims, and then, at moments of critical political mass, through the creation of new standards.<sup>21</sup>

Critiquing the historical relationship between human rights and sexuality—highly racialized, gender-stereotyped, and protective—is an essential preliminary to building a framework for sexual rights that will fulfill the promise of the Universal Declaration of Human Rights. In the past, international standard-setting in relation to rights and (women's) sexuality focused on control or protection from sexual activity, on the view that rights were best protected by upholding social norms regarding honor and chastity.<sup>22</sup> For example, over 90 years of so-called anti-trafficking legislation (also known as “White Slavery” legislation in its early years) focused on the protection of an amorphous grouping of children, women, and “persons” from moving or being moved for “immoral purposes” to “gratify the passions of another” as a result of enticing, luring, hiring (“even with [their/]her consent”), coercion, force, restraint, or abuse of power.<sup>23</sup> Paradoxically, the remedy was often deportation back to the country of origin and the original forms of discrimination. Other standards, such as the 1956 Supplementary Convention on the Abolition of Slavery, Institutions or Practices Similar to Slavery, grappled with structures of “servile forms of marriage” as violating what many now view as sexual rights, which include choosing a partner or choosing whether to marry and have a sexual partner. These standards, however, stopped short of formal declarations of freedom and equality for men and women and failed to confront assumptions about the nature of marriage and sexual access for men and women, sexual activity outside of marriage, or underlying conditions of gender inequality.<sup>24</sup>

With regard to sexuality in international human rights documents, the 1979 UN Convention on the Elimination of All Forms of Discrimination Against Women (Women's Convention) and subsequent authoritative interpretive statements known as General Recommendations have contained a hybrid of protection and empowerment measures.<sup>25</sup> On the one hand, Article 6 requires protective steps to "suppress all forms of traffic in women and the exploitation of prostitution of women." General Recommendation 19, which places violence against women under the treaty provisions on discrimination, explicitly calls for protections against sexual violence and exploitation and notes that violence against women results in harms including mental, physical, and sexual suffering.<sup>26</sup> On the other hand, Article 16 uses the language of empowerment in prescribing that women should have the ability to control their role in reproduction and the "means to do so."<sup>27</sup>

The 1989 Convention on the Rights of the Child (CRC) contains protections against "sexual abuse and sexual exploitation" and specifies duties to act against "traffic" in children.<sup>28</sup> The drafters apparently did not care to consider the evolution of diverse forms of child or adolescent sexuality.<sup>29</sup> Aspects of the CRC's evolving jurisprudence, however, can be understood to support affirmative or non-protectionist approaches to sexual development across childhood and youth, for both girls and boys.<sup>30</sup>

No other major global or regional human rights treaties refer explicitly to sexuality, but many detail such rights as the right to marry and found a family—practices that are commonly understood to frame some aspects of sexual behavior. As noted below, the evolving interpretation of these treaties, through application to individual claims and, where relevant, through authoritative interpretive statements, reporting, and monitoring, increasingly but inconsistently acknowledges the centrality of sexuality to human development, particularly in relation to sexual violence and discrimination based on sexual identity, transsexual identity, or sexual orientation.<sup>31</sup>

### **Increasing Attention to Sexual Rights Claims in the International System: The Violations Model?**

A wide variety of judicial, quasi-judicial, and political bodies at the international and regional levels, whose authority may be based on specific human rights treaties or more generally on human rights norms, have applied these norms to many different abuses, and their work can be argued to have shaped a large part of the canon of what is formally understood to comprise sexual rights. A brief review of the last twenty years of this work as it applies to sexuality reveals important trends in the categories of rights held applicable to some aspects of sexuality, as well as some important gaps. Again, the political imperative to bring the protective function of human rights to sexuality is important, despite its many limitations: human rights, “one of the few moral visions ascribed to internationally,” should not leave out anyone because of sex, sexual identity, or sexual practice.<sup>32</sup>

For the most part, human rights treaty case law results only from specific complaints brought by advocates or individuals. Thus, treaty case law, in both the global system of the UN and the regional systems of Europe, the Americas, or Africa, is reactive to claims. Violations-based claims have been made on behalf of persons with various sexual identifications, including transsexuals and persons challenging the application of laws penalizing same-sex sexual conduct, and the concepts of protection of privacy, private and family life, and/or discrimination have been applied. Another stream of decisions has addressed sexual violence, including rape at home or in the community in peacetime and wartime, and harmful traditional practices, applying rights pertaining to private and family life, denials of privacy or equality in family life, protection from (sexual) violence as freedom from torture or as a cluster of bodily integrity rights, freedoms and limitations around sexual content in speech and education, and limitations on information on access to abortion or contraception.<sup>33</sup>

One quasi-judicial decision of international reach

(Toonen) issued by the Human Rights Committee applied both nondiscrimination and private life protections.<sup>34</sup> Many treaty-based rulings directed toward claims in same-sex, (presumed) heterosexual, or transsexual contexts have emphasized that meaningful rights in private life require *positive* steps by the state to ensure their full realization.<sup>35</sup> As most of these rulings have been in response to specific violative laws or failures to act by governments, the content of positive steps has been far too limited in its reach or comprehensiveness to promote, rather than merely allow, sexual diversity or sexual expression.

The European regional system of rights protection, which has the longest history and most detailed jurisprudence and norms regarding these issues, has dealt with cases concerning protection of (trans)sexual identity (through equality and nondiscrimination provisions).<sup>36</sup> It has also dealt with same-sex sexual practice (through privacy protections and, more recently, nondiscrimination provisions).<sup>37</sup> In non-judicial, non-treaty-based international human rights settings, such as the UN Commission on Human Rights, both governmental resolutions and independent experts authorized to research and produce reports on human rights issues have responded to egregious violations based on sexual identity or practice, primarily those brought to their attention by NGOs. The standards that have been called on to address these violations have included rights to be free from arbitrary detention and violence, including torture, as well as the right not to be arbitrarily deprived of life (specific contexts have included extra-judicial executions, death squads, and penal death sentences for same-sex sexual activity).<sup>38</sup>

Treaty-based decisions have labeled the rape of women in detention as a form of torture.<sup>39</sup> Independent fact-finders such as the UN Special Rapporteurs on Violence against Women and on Summary, Arbitrary, and Extra-Judicial Executions or Killing, as well as the UN Working Group on Arbitrary Detention, have applied other norms to several violations documented by NGOs: forcible virginity exams, sexual violence in armed conflict, and rape during peacetime, including in the context of domestic violence.<sup>40</sup> These

findings have condemned violations of aspects of sexuality for which the state is accountable, incorporating an explicit focus on concepts such as “due diligence” to capture the positive duty of the state to protect against harm. Importantly, these experts have begun to point to the critical role of unacceptable restraints on sexuality in “honor killings,” in which women have been violently attacked or killed by family members for alleged sexual transgressions.<sup>41</sup> They have also denounced state-sanctioned or state-imposed killings of persons for their (homo)sexual practices.<sup>42</sup> Interestingly, both women’s and gay/lesbian anti-violence groups share a common interest in pushing for the further development of the doctrine of state accountability for violence perpetrated by non-state actors that UN treaty bodies, independent experts, and other courts have articulated. While, surprisingly, the Working Group on Arbitrary Detention has not yet issued a statement on any cases of detention because of (homo)sexual conduct, the group has condemned one detention arising out of religious restrictions on marriage partners, citing violations of nondiscrimination, privacy, and freedom of religion and arguing for the freedom to choose an (opposite sex) intimate/marriage partner, regardless of religion or nationality.<sup>43</sup>

The narrow but symbolically powerful national-level remedy of asylum provides another example of a normative response to sexuality-based violations. For example, persecution on the basis of non-conforming sexual identities, such as homosexual orientation and transsexuality, has been the basis of successful claims to asylum under the rubric of rights to be free from persecution on account of social group.<sup>44</sup> International asylum case law vis-à-vis rights claims related to women’s sexuality (generally, heterosexuality) includes decisions on the impact of domestic violence, including rape and attacks against women because of alleged adultery; rape as torture; and female genital mutilation (FGM).<sup>45</sup>

During the recent cycle of UN-hosted world conferences, another site of public debates, countries have moved toward articulating sexuality as a subject worthy of rights standards. In a series of ground-breaking pronouncements,

the Vienna World Conference on Human Rights condemned sexual violence, sexual slavery, and forced prostitution as violations of women's human rights.<sup>46</sup>

Strategically, focusing on violations has seemed to help overcome resistance to addressing the contested and explosive realm of sexuality and diverse sexual identities and practices within conservative international standard-setting and monitoring venues. Nevertheless, these successes have come at a price: an inability to address needs broader than the need for protection against violence, and a narrow approach to sexuality as encompassing primarily a limited range of practices and identities that have been subject to violations and discrimination.

### **Conflating Sexual Health and Rights with Reproductive Health and Rights**

Sexuality as the subject of rights arises powerfully within reproductive health and rights work. The health and human rights approach has avoided many of the limitations of the violations approach by examining conditions, education, attitudes, and legal structures that determine the ability of women (and men) to control their bodies and the outcomes of reproductive sexual behavior. Much of the literature focuses on the constellation of rights and needs that promote women's autonomy and socially supported capacity for reproductive health and choice. The work in this field, however, has tended not to use the incident or violations models noted above, but rather to draw from ethnography, epidemiology, and demographics.<sup>47</sup> There is little international case law articulating specific sexual rights or duties within reproductive rights claims.<sup>48</sup> Importantly, most of the literature on the application of existing human rights treaty standards to reproductive rights primarily focuses on the lives of girls and women. Some policy language and programming is directed toward providing reproductive information (and changing gender roles) for boys and men, but neither homosexual nor heterosexual men are the targets of major human rights policy in the world of sexual and reproductive rights.

The processes and results of the ICPD and the FWCW

did much to advance sexual rights claims within the language and activities of reproductive rights. The ICPD Programme of Action addressed sexuality in the sections on reproductive rights and reproductive health, stating that “the purpose of [sexual health] . . . is the enhancement of life and personal relations, and not merely counseling and care related to reproduction and sexually transmitted diseases.”<sup>49</sup> As noted above, the Programme of Action also addresses reproductive rights, reaffirming that they rest on pre-existing rights.<sup>50</sup> The document evinces a concern for “equitable gender relations,” particularly in Chapter IV, “Gender Equality, Equity and Empowerment of Women,” and includes attention to adolescents, as well as to older men and women—this last being a critical point that had been lacking in the violations-focused protections described above.

In the human rights sections of the FWCW, the delegates grappled with (and ultimately dropped) the idea of prohibiting discrimination based on sexual orientation. They did, however, confront sexuality again in the context of health.<sup>51</sup> The much-quoted Paragraph 96 of the FWCW Platform for Action states:

The human rights of women include their right to have control over and decide freely and responsibly on matters related to their sexuality including sexual and reproductive health, free of coercion, discrimination and violence.<sup>52</sup>

The paragraph goes on to proclaim the equality of men and women “in matters of sexual relations and reproduction” in a way that some commentators conclude is meant to contextualize the claims regarding sexuality firmly within heteronormative relations.<sup>53</sup>

Many of the commitments to rights that arose at the ICPD and the FWCW have shaped the applications of rights by the UN treaty bodies and in other venues. For example, the Committee on the Elimination of All Forms of Discrimination Against Women and the Committee on Economic, Social and Cultural Rights have or are developing interpretive standards regarding governmental obliga-

tions on health under the treaties that include concepts of sexuality.<sup>54</sup> More and more often, the treaty bodies are asking questions regarding the gender-specific abilities of women and girls to exercise choice in reproductive contexts.<sup>55</sup>

### **Differently Situated Claims, Differently Invoked Rights?**

In sum, successful legal claims regarding (homo)sexual conduct and sexual identity have cited the rights to protection from invasions of privacy and protection from discrimination. Sexual rights claims regionally and internationally have also included such rights as freedom from torture, arbitrary killing and execution, and arbitrary detention. With regard to protection of persons, mostly women, from sexual violence, international humanitarian and human rights standard-setting and case law have emphasized the articulation of rights protecting bodily integrity, with a focus on developing a notion of “sexual harm” and moving toward state accountability for non-state actor violence.<sup>56</sup>

Conversely, work on reproductive health has proceeded, at least in its formal articulation, by invoking interrelated rights protections and state accountability for creating the conditions under which (reproductive) sexual behaviors can be controlled by individuals and couples.<sup>57</sup> The idea of a “sexual and reproductive rights” framework, drawing on the strengths of both approaches, thus holds great promise. But even the health and human rights approach has faced many constraints and attacks as it has sought to extend the currently limited umbrella of protection beyond reproduction, heterosexual relations, and, in its most conservative forms, marriage as the only context for protected sexual behaviors.

### **Examining the Junction of Sexual and Reproductive Rights**

#### **The Political Imperative to Incorporate Sexual Rights in Reproductive Rights Work**

A fully articulated reproductive rights analysis has the capacity to call on governmental obligations so as to trans-

form the relationships between public and private spheres and to change stereotyped beliefs about the roles of men and women, including sexual roles.<sup>58</sup> This approach has both limitations and strengths, and it is important to examine some of its limitations in order to respond to them or to change aspects of the approach.

The move to incorporate sexuality and the concept of sexual rights into reproductive rights arose as an attempt to address one such limitation. As Ruth Dixon-Mueller demonstrated in 1993, researchers and programmers in reproductive health services and family planning providers at that time conceptualized sexuality and power relations based on gender, race, age, class, or patronage in extremely limited ways, if at all.<sup>59</sup> The general fear of sex and sexuality translated into family planning programs without reference to sex. Geeta Rao Gupta writes:

Up to the International Conference on Population and Development in Cairo, . . . family planning programs worldwide managed to function without somehow acknowledging the central role sexual behavior played in contraception. As absurd as this may sound, it is a fact that sexuality and sexual health have remained outside the purview of family planning programs and policies worldwide for the past four decades.<sup>60</sup>

Gupta identifies the need to respond to the global AIDS pandemic as the force behind the new attention to sexuality in the field of public health. Initially, she notes, attention was focused on “risky individual sexual behavior, without recognition of the complex societal context within which such behavior occurs. . . .”<sup>61</sup> In recent years, global campaigns to end violence, including sexual violence against women, have helped to move sexuality into the ambit of family planning and, most powerfully, into the hands of reproductive rights advocates.<sup>62</sup>

Throughout, the linking of rights claims—and specifically sexual rights claims—with reproduction has been an attempt to ensure that centrally affected persons (especially women, who have often not been heard) would have a voice

and, in the words of Correa and Petchesky, a “power to make informed choices . . . and the resources to do so safely and effectively.”<sup>63</sup>

**Sexual Rights as a Subset of Reproductive Rights:  
“Disappearing” the Non-reproducing Other (and the Non-procreative Practices of Heterosexuals)**

In some ways, the phrase “sexual rights” appears to be a logical formation arising from the concept of “sexual and reproductive rights”: if the sexual can be linked to rights through reproduction, then, as a matter of transitive grammatical logic it should be able to link to rights on its own. But this very genealogy is permeated with constrictive associations to reproduction and heterosexuality. As Richard Parker writes:

[T]he ICPD Programme of Action explicitly included “sexual health” as part of an array of rights . . . [yet it remained] linked first and foremost to heterosexual reproduction. Nowhere in the Cairo document did sexual pleasure, freedom of sexual expression, or freedom of sexual orientation take shape as part of a more broad-reaching and emancipatory notion of sexual rights.<sup>64</sup>

Thus, incorporating sexuality within the discussion of reproduction—and sexual rights within the concept of reproductive rights—reflects a transformative desire to ensure rights to autonomy, dignity, and civic participation for women. Nonetheless, this approach does have its limitations.

For example, there has been a notable lack of elaboration of what “sexual rights” means in the context of “sexual and reproductive rights.” The language of bodily integrity, particularly as set out by Correa and Petchesky in their development of the concept of sexual and reproductive rights, seems to support the fullest articulation of sexual rights, as it suggests concepts of choice of partner, choice of sexual orientation, and freedom from coerced sexual activity.<sup>65</sup>

The frequent result, manifested in various documents and activist/advocacy pieces, is a conflation (or submersion) of sexual rights with reproductive rights that inadvertently erases entire sets of people—and, I would argue, the distinc-

tive nature of sexual rights themselves. Of course, this erasure is not due solely to the uncritical linking of sexual rights with reproductive rights, but it is emblematic of the erasure of nonconforming sexually active persons by human rights work generally. The dominant conservative political position that deems sex within (heterosexual) marriage for the purposes of procreation to be the only practice worthy of rights protection provides the political background against which sexual rights claims must be argued, thus leading to arguments that define sexual rights in the shadow of reproductive rights. Yet the submersion of sexual rights within reproductive rights has led to the disappearance of entire categories of persons—including lesbians, gay men, and others who claim different sexual identities and behaviors for themselves, or to whom others ascribe such identities and behaviors—and their claims of rights from within human rights discourse. At the same time, this framework also causes a wide range of non-procreative behaviors and interests among heterosexually identified persons and couples to be excluded from rights protection.

Heterosexuality in all cultures involves a wide range of non-procreative practices, such as mutual or solo masturbation, anal intercourse, or practices of bondage and other play-acting expressions of desire. The absence of these activities and desires in advocacy work for the protection of sexual and reproductive rights, which is otherwise premised on a socially embedded approach to the whole person, leads to a silence around rights-based claims for information on sexuality, for conditions of safety and respect for diversity, and for the empowerment needed for the enjoyment of sexual rights.<sup>66</sup> Similarly, the reproductive rights framework has failed to address, for example, the conditions necessary for non-stereotypical expressions of sexuality for children, pre-pubescent girls or boys, or postmenopausal women.

Even the punishment of heterosexual persons deemed to be engaging in consensual but not overtly procreative sex—for example, adults arrested under laws penalizing adultery or sexual activity for money—has failed to engage attention on the grounds of sexual rights. Rather, attention has focused on the abusive aspects of punishments (such as

stoning, flogging, or amputations) for adultery and not on the state's ability to criminalize sex outside of marriage.<sup>67</sup> Yet the criminal regulation of consensual sexual behavior is a problematic assumption of state power. With regard to commercial sex work, what human rights work exists has focused on forced prostitution and abuses in sex work exclusively within the violations model.<sup>68</sup> This recognition should provide an approach for questioning governmental limitations on sexual behaviors and restoring attention to the human in "human sexuality."

## **Rebuilding Sexual Rights**

### **A Dynamic Relationship to Reproductive and Other Rights**

There are two possible relationships between sexual and reproductive rights. One option is to consider them as intersecting sets of rights (that is, as a set of rights or concerns common to both sexual and reproductive realms) in a universe of civil, cultural, economic, social, or political rights. The second option is to posit that the two realms of sexual behavior and reproductive behavior may be linked or left disconnected. In this view, states have an obligation to create the conditions necessary for women and men to exercise meaningful choices as to whether to link sexuality with reproduction. The idea of disconnected sets should allow sexual rights claims to attend equally to a broader array of identities, practices, and conditions than can be protected by treating sexual rights solely as a subset of reproductive rights.<sup>69</sup>

Another politically tempting approach has been to promote sexual rights by focusing on the context of sexual health. Such an approach may well be a way of avoiding both progressive and conservative challenges around sexuality.<sup>70</sup> Many powerful actors, including the International Federation of Red Cross and Red Crescent Societies and the World Health Organization (WHO), have already begun to articulate concepts of sexual health as the integration of the physical, emotional, intellectual, and social aspects of sexuality in ways that positively enrich and promote personality, communication, and love. The linkage of sexuality to health, however, is inadequate and dangerous in that the

desire to view sex as a “healthy” practice can easily slide into a medicalization of all aspects of sexuality and/or a move to use health as a category that excludes non-normative practices as unhealthy or perverted.<sup>71</sup> An autonomous sexual rights approach, on the hand, will of necessity develop the concepts of sexual health, both mental and physical.

A number of principles that govern the functioning of rights discourse will be important to use in efforts to connect rights to fluid sexuality. Such principles include (1) nondiscrimination, (2) participation (that is, persons should play a role in the creation of the structures, laws, and norms that affect them), and (3) the principle that the exercise of rights can only be limited when proved necessary by rigorous scrutiny to protect the rights of others.<sup>72</sup> As with all standards, the key is the application and evaluation of justifications for limitations applied in specific situations. Sexuality will not be exempted from the contestation that always exists as to how exactly to apply human rights principles. This article, however, contends that the explicit linking of rights to sexuality will in fact bring the tensions between empowering and protecting sexuality to the surface in a constructive way, and that careful analytic attention will help to solve this dilemma.

### **Rights Claims as Vehicles for Obliging State Action and as Measures of Accountability**

Sexual rights claims entail the same triad of government obligations that all human rights do: to respect, protect, and fulfill.<sup>73</sup> Understanding these obligations is central to ensuring that sexual rights are premised on a fully analyzed understanding of what the state can and cannot do vis-à-vis sexuality. This highlights one of the central tenets of contemporary political analysis of state power—where law and rights language are invoked to protect, this also gives the state the power to regulate and control.<sup>74</sup>

In its opening paragraphs, the 1993 World Conference on Human Rights reiterated and reinforced the importance of interrelated understandings of civil, cultural, economic, political, and social rights.<sup>75</sup> The triad of state responsibility to respect, protect, and fulfill can be used to define rights

with attention to the dynamic relationship between the individual (of particular relevance is the concept of bodily integrity), the construction of private and public zones, and the economic and social determinants of rights—which shape, in Correa and Petchesky’s words, “one’s relationship to one’s children, sexual partners, family members, community . . . [as the] body exists in a socially mediated universe.”<sup>76</sup> This analytical framework will help attention to sexual identity, manifestation of sexual desire and fulfillment, and the necessary conditions for their realization to be articulated as rights and freedoms, with full regard to the way that other identities, such as race or ethnicity, operate to sexualize and stereotype bodies and determine roles and behaviors. As a construct for measuring government obligations, this framework requires all the structures of government (including law, administration, education, health provision and promotion, and budgeting) to take steps toward promoting and protecting sexual rights, as well as to be monitored in the process.

Concrete understanding of the nature of the state’s obligations to respect, protect, and fulfill will have to be developed with reference to specific case situations. Research must be framed to reflect the diverse needs of women and men; children, adolescents, and adults; and persons within and outside of traditional heterosexual relationships.

### **Applying State Obligations to the Elements of Sexual Rights Claims: Identity, Manifestation, and Conditions for Enjoying Rights**

The survey of existing rights work above revealed certain common elements or principles that can be understood to make up sexual rights. The primary groupings are integrity/autonomy rights (personhood), equality/nondiscrimination rights (diversity), bodily integrity/health rights, and participatory/empowerment rights.<sup>77</sup> Each of these groupings encompasses existing human rights guarantees.

Among the main components of sexuality that rights work must consider are identity, manifestation, and the conditions that enable diversity, choice (for example, as to identity or the intent to reproduce), and pleasure. Rights

work will of necessity struggle to comprehend all of these domains and to allow the connections between them to remain fluid. In other words, progressive rights work will accept that sexual identity may track conduct when the subject so claims it, but it will also encompass protections for either identity or conduct even when they do not line up, as when women self-identified as lesbians have sex for money with men, or when unmarried women do not wish to receive protections from society on the condition that they remain “chaste.”

Existing rights standards allow us to conceptualize some of the state’s duties in these contexts. For example, rights protections around identity, such as religious identity, tend to be absolute protections: persons cannot be forced to change their identity, nor can they be restrained from changing their identity.<sup>78</sup> In a sexual rights context, one responsibility of the state would be to respect sexual identity, including the developing identities of children, as a fundamental but potentially mutable aspect of all human beings.

Manifestation and expression of identity or opinion are, however, both the subject of rights (as freedom of expression) and the object of regulation (in the sense that states may limit some manifestations or practices in the name of specific objectives). State regulation may violate human rights if it unjustifiably violates private life, discriminates, and/or is restrictive of public or private life.<sup>79</sup> Restrictions are permitted in many situations but are subject to varying levels of scrutiny by such monitors as courts or treaty-based committees, as well as national courts applying internationally accepted principles. Differential treatment based on the prohibited categories of race, sex, and religion, for example, may receive a higher level of scrutiny.<sup>80</sup> States may also have specific obligations to regulate against actions that violate sexual rights within private life or on the basis of differential powers between sexual partners, as in the cases of marital rape and childhood sexual exploitation, or of persons in state custody. At the same time, regulations or other steps taken by states must be scrutinized to prevent unnecessary curtailing of sexual expression of protected parties, as

well as inappropriate reliance on stereotyped understandings of the power relationships.

One of the most critical concerns in fully developing a rights framework for sexuality relates to the creation of the conditions in which sexuality is formed, enacted, and then accepted, promoted, or stigmatized. These conditions must be understood as encompassing more than the mere provision of information or the absence of explicit coercion in the development or choice of sexual or gender identity or behavior. Having “freedom” to choose a status that is socially or legally degraded or stigmatized does not constitute empowered choice. Rather, empowered choice requires that none of the potential choices (e.g., sexually inactive adolescent boy or cross-dressing older woman) be inordinately stigmatized. The limitations of “tolerance” as a concept in rights protection is clear in this context as well. Without greater educational, legal, and budgetary supports for diverse sexual identities and behaviors, tolerance merely functions as “a mechanism of containment . . . in fact the language of tolerance is the language of subordination,” in the words of Wayne Morgan and Kristen Walker.<sup>81</sup>

Therefore, this article argues for emphasizing the conditions necessary for developing the many aspects of the person that comprise sexuality as a key element of sexual rights doctrine. The scope of conditions for sexual rights must be broad enough to respond to many different needs based on factors including age, race, gender, disability, and health status. The following discussion is meant to stimulate a broader cross-sectoral discussion of sexual rights needs in order to plant the seeds for concrete action.

One aspect of conditions that a sexual rights framework must support relates to the choice of one’s sexual—not necessarily reproductive—partner. The rights required for enabling intimate or casual partner choice include not only the classic freedoms from interference that respect autonomy (e.g., freedom from laws or practices that interfere with choice), but also affirmative infrastructural needs such as non-prejudiced community attitudes, economic sufficiency, information on the range of choices, and freedom of move-

ment and association. Partner choice invokes dignity, choice, and integrity concerns. The right to choose a sexual partner challenges traditional ideas that partners should be of the opposite sex, as well as many limitations on the capacity to choose a partner of a different nationality, religion, racial group, or age. A theory of sexual rights would also engage in a discussion of the other status-based exclusions found in most state policies proscribing sexual activity based on kinship (e.g., laws proscribing marriage between cousins or other family members or criminalizing sex between siblings as incest) or medical status (sterility or HIV status are two common exclusions) and would evaluate which exclusions can be justified as a matter of rights protections and which cannot.<sup>82</sup>

A full sexual rights framework would, at a minimum, require removing prohibitions directed at non-procreative sex. Protection against state or private-actor coercion, discrimination, and violence in the conduct of sexual activity will continue to play a critical role in rights protection, but protection from violence and abuse should not be the only criterion for state obligations to act. Noninterference with and, indeed, the promotion of the flow of information on the range of sexual behaviors between persons, including their health-related aspects, could be an aspect of state obligations concerning sexual rights. The goal is to allow more comprehensive discussions regarding the various conditions that support the diverse elements of sexuality, rather than attempts to prescribe the specific conditions that will create sexual fulfillment, sexual health, or “pleasure”—especially since so much of what creates pleasure and desire for one person may elicit disgust or disinterest in another. At the same time, the ability to say “no” to what one does not desire is hugely conditioned on the capacity to recognize, delight in, and respond to one’s desire to say “yes,” free of limiting stereotypes and with knowledge of the implications for one’s safety and contentment.<sup>83</sup>

The structural (legal, economic, etc.) conditions for sexual behavior must be addressed. For example, while many people would choose mutual intimacy and desire as the context of sexual activity, rights work must not require this context as a condition for protecting sexual activity. Similarly, a sexual rights

framework would not necessarily argue for or against heterosexual or same-sex marriage as the only structure for sexual intimacy, but it would require that marriage and other state-supported forms of sustained intimacy be evaluated in order to make the distinctions and benefits they confer available to all.

Another central aspect of sexual rights work must be to enable persons, particularly women, to choose whether to connect their sexual activity to desired reproductive ends. As noted above, much of the extensive reproductive rights literature has focused on making this linking and delinking possible, with reference to the full range of social, cultural, economic, civil, and political structures. Contextualizing this particular issue as one among many is not to downplay its vital role; rather, it is an attempt to move rights protections forward.<sup>84</sup>

### **Explosions, Attacks, and Strategic Coalitions The Dangers of Removing Sexual Rights from the Set of Reproductive Rights**

Some issues must be faced in making the connection/disconnection between sexual and reproductive rights. First, a majority of men and women are in heterosexual relationships and have procreation as a goal—although not necessarily the only goal—of sexual activity. Second, the conditions—material, medical, scientific, legal, and attitudinal—and the shift in power necessary for linking *and* delinking sexual rights to reproductive rights require the mobilization and renovation of a tremendous range of forces. While human rights as a doctrine can suggest directions, elements, and methods of accountability, it cannot alone be the engine. Indeed, rights claims in isolation tend to sound fantastical or atomistic.

There will of course be—and, indeed, there has already been—an explosion of attacks against sexual rights. Such attacks always follow attempts to break sexuality out of the charmed circle of heterosexual reproduction within traditional family life. Lynn Freedman writes:

This basic conception of the “uncontrolled woman as a dangerous and destructive force explains, in part, why

human rights, with its apparent defense of the individual as against the collective, has become so explosive, particularly when applied to women's reproduction and sexuality, the area in which control over women is guarded most jealously.<sup>85</sup>

To the extent that rights concepts are seen as secular and modern, they will always be in opposition to politically mobilized claims of "culture and tradition."<sup>86</sup> But contemporary activists and theorists critiquing cultural claims—in particular, claims made by fundamentalist groups—have taught us that it is a grave problem to take some of these claims at face value, "to reify the notions of 'culture' and customary law and deprive them of their political content," to quote Manuela Carneiro da Cunha.<sup>87</sup> Certainly the claims of "unchanging tradition" or religious doctrine at risk of destruction by gender-based assertions of rights have been revealed as strategic deployments of culture for reasons of political power. Different groups and persons position themselves within religion or secularity to argue both sides, and coalition-building allows for both strategies.<sup>88</sup> Part of the power of human rights is its appeal to the secular, and many local groups wish to keep public life secular, even as they seek to reconcile the claims of their own religions with human rights concepts.

### **The Need for and Meaning of Strategic Coalitions around Sexual Rights**

In using the human rights paradigm to develop the broadest possible framework of sexual rights, one goal is to mobilize the most diverse array of strategic partners "across the divides of nation, culture, class, race and religion and in support of each other and in pursuit of change."<sup>89</sup> Susana Fried and Ilana Landsberg-Lewis have echoed the work of many women's health, anti-violence, and reproductive rights activists in invoking "the unifying and coalition-building possibilities of a concept like sexual rights."<sup>90</sup> In addition, some part of the political work of human rights must be to prevent the essentialization of human rights claims to sexuality (for example, the mistaken notion that all women in same-sex affectional relationships worldwide

will define themselves identically as lesbians) as an ill-conceived way of countering appeals to culture and tradition.<sup>91</sup>

What are the implications for action and organizing that arise from calling on rights to promote and protect diversity in sexual behaviors and identities? One clear answer lies in strategic cross-cultural and cross-sectoral coalitions, between groups and persons who act or speak in different ways or from different sexual identities. Particular rights claims must be formulated so as not to eclipse the development of other temporarily silent claims. This process is neither simple nor easy, as many groups may see their interests as endangered or opposed in the short term, unless and until differences between particular gender-specific or sexual-identity-specific agendas are explicitly discussed and resolved. Some organizations, such as the Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM) and Profamilia in Latin America, have already begun explicitly to build bridges among heterosexual and homosexual rights advocates in their campaigning.<sup>92</sup> In closing, this article echoes Parker's call for "ethical principles [entailed by an emancipatory conception of sexual rights] which might include sexual diversity, sexual decision-making autonomy and gender equality."<sup>93</sup> Just as importantly, it also seeks to build on disparate developments in formal rights analysis around gay rights, anti-sexual violence work, and sexual and reproductive rights work in order to contribute to the development of a sexual rights framework that will benefit all, liberate all, protect all.

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Study of Sexuality, Gender, Health and Human Rights; Lynn Freedman of the Law and Policy Project; and the many members of the seminar on Sexuality, Gender, Health and Human Rights, whose stimulating discussions have had a huge influence on the formation of these ideas.

## References

1. This article is one element of a larger project to articulate the elements of an autonomous human rights claim to sexual expression and freedom working in conjunction with other activists and theorists globally. The title is meant to suggest other binaries to be explored for overlap and disjuncture. One might be “reproductive but not sexual,” which suggests an exploration of the interests and claims by individuals, infertile or not, choosing to engage in traditional reproductive sexual behavior, or by same-sex or heterosexual couples seeking access to reproductive technologies ranging from artificial insemination to more complex technologies. Another might be “sexual but not intimate,” a formulation posited in a presentation by Jo Doezema, Institute for Development Studies, University of Sussex, at a seminar hosted on February 22, 1999 by the Program for the Study of Sexuality, Gender, Health and Human Rights, Joseph L. Mailman School of Public Health, Columbia University, which noted that sexual behavior outside the context of intimacy or relationship-based rights is one of the greatest challenges for feminist/rights activists confronting the rights of sex workers.

2. A significant number of the scholarly articles addressing aspects of sexual rights or calling for the development of a sexual rights framework have appeared in this journal. See R. Parker, “Sexual Rights: Concepts and Action,” *Health and Human Rights* 1997, 2(3): 31–38; S. Abeysekera, “Activism for Sexual and Reproductive Rights: Progress and Challenges,” *Health and Human Rights* 1997, 2(3): 39–44; G. Rao Gupta, “Strengthening Alliances for Sexual Health and Rights,” *Health and Human Rights* 1997, 2(3): 55–64; and A. Miller, A. Rosca, and M. Satterthwaite, “Health, Human Rights and Lesbian Existence,” *Health and Human Rights* 1995, 1(4): 428–48.

3. No single list can do justice to the powerful array of voices embarking on this task, but any short list would need to include: S. Correa and R. Petchesky, “Reproductive and Sexual Rights: A Feminist Perspective,” in G. Sen, A. Germaine, and L. C. Chen (eds), *Population Policies Reconsidered: Health, Empowerment and Rights* (Cambridge, MA: Harvard University Press, 1994); Y. Tambiagh, “Sexuality and Human Rights,” in M. Schuyler (ed), *From Basic Needs to Basic Rights: Women’s Claims to Human Rights* (Washington, DC: Institute for Women, Law and Development, 1995); R. Copelon, S. Gruskin, and N. Toubia, “Toward a More Effective Implementation of Women’s Right to Health, with a Focus on Reproductive and Sexual Rights,” background paper pre-

pared for a Roundtable of Human Rights Treaty Bodies hosted by UNDAW/UNFPA/UNCHR (Glen Cove, 1996), on file with author; S. Fried and I. Landsberg-Lewis, "Sexual Rights: An Emerging Concept," in K. Askin (ed), *Women's Human Rights* (London: Transnational Publications, forthcoming); R. Petchesky, "Sexual Rights: Inventing a Concept, Mapping an International Practice," in R. Parker, R. Barbosa, and P. Aggleton (eds), *Framing the Sexual Subject: The Politics of Gender, Sexuality and Power* (Berkeley: University of California Press, 2000), 81–1103; and S. Y. Lai and R. Ralph, "Female Sexual Autonomy and Human Rights," *Harvard Human Rights Journal* 1995, 8: 201–28.

4. See C. S. Vance (ed), *Pleasure and Danger: Exploring Female Sexuality* (London: Pandora Press, 1992).

5. See, for example, E. Heinze, *Sexual Orientation: A Human Right* (Dordrecht: Martinus Nijhoff, 1995) and R. Wintemute, *Sexual Orientation and Human Rights: The United States Constitution, the European Convention and the Canadian Charter* (Oxford: Clarendon Press, 1995). See also G. Careaga Perez and J. Dorf, "Discrimination and Tolerance of Difference: International Lesbian Human Rights," in J. Peters and A. Wolper (eds), *Women's Rights/Human Rights: International Feminist Perspectives* (New York: Routledge, 1995); R. Rosenbloom (ed), *Unspoken Rules: Sexual Orientation and Women's Human Rights* (San Francisco: International Gay and Lesbian Human Rights Commission, 1995); and J. D. Willets, "Conceptualizing Private Violence against Sexual Minorities as Gendered Violence: An International and Comparative Law Perspective," *Albany Law Review* 1997, 60: 989–1050.

6. See, for example, the comments from the Vatican referring to the Cairo conference as "basically about a type of libertine, individualistic life style," in "Vatican Fights U.N. Draft on Women's Rights," *New York Times*, 14 June 1994. Another example is the attack on the ICPD by authorities at Al-Azhar University, Cairo, as encouraging prostitution and undermining parental authority; see "Muslims Protest U.N. Draft on Population," *New York Times*, 12 August 1994, cited in L. Freedman, "Reflections on Emerging Frameworks of Health and Human Rights," *Health and Human Rights* 1995, 1(4): 332.

7. For a critique of how simplistic application of this system obscures both the promise of the UDHR and the emerging understanding of intersecting identities, see L. Crooms, "Indivisible Rights and Intersectional Identities, or, What do Women's Human Rights Have to Do with the Race Convention?" *Howard Law Journal* 1997, 40: 619–40.

8. Correa and Petchesky (see note 3), p. 107.

9. J. Weeks, "The Invention of Sexuality," in *Sexuality* (London: Tavistock Publications, 1986), p. 23.

10. G. Rubin, "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality," in Vance (see note 4), p. 267.

11. A vast literature on queer studies, anthropology, sexology, feminist studies, lesbian and gay studies, cultural studies, history, and political philosophy has contributed to this effort. A few of the seminal authors are John D'Emilio, Michel Foucault, Mary Macintosh, Gayle Rubin, Sharon Thompson, Jeffrey Weeks, and Carole Vance.

12. Vance (see note 4), p. 4.
13. J. M. Irvine, "A Place in the Rainbow: Theorizing Lesbian and Gay Culture," *Sociological Theory* 1994, 12: 232–48.
14. For an examination of this dilemma in the United States, see N. Hunter, "Life after Hardwick," in L. Duggan and N. Hunter (eds), *Sex Wars: Sexual Dissent and Political Culture* (New York: Routledge, 1995), p. 96. Hunter borrows the terms from C. S. Vance's earlier formulation in *Social Construction Theory: Problems in the History of Sexuality*, presented at the 1988 Conference on Gay and Lesbian Studies.
15. Declaration on the Elimination of Violence against Women, UN G.A. Res. 48/104 (20 December 1993), Preamble, para. 6.
16. L. L. Heise, "Violence, Sexuality and Women's Lives," in R. N. Lancaster and M. di Leonardo (eds), *The Gender/Sexuality Reader: Culture, History, Political Economy* (New York: Routledge, 1997), p. 414. See also R. P. Petchesky and K. Judd (eds), *Negotiating Reproductive Rights: Women's Perspectives across Countries and Cultures* (New York: Zed Books, 1998), which discusses a seven-country ethnographic project conducted by the International Reproductive Rights Action Group (IRRRAG) documenting "the local contexts and ways of thinking in which women in their everyday lives negotiate reproductive health and sexual matters" (p. 1). The stories and expressions of sexual selves given by the participating women are an important contribution to questions about the relations of violence and women's experience of sexuality.
17. The concept of "sexual minorities" is variously used to include gay, lesbian, transgendered, transsexual, bisexual-identified, and fetishist persons, as well as practitioners of sadomasochism (S/M) and sex workers, even though these terms describe different aspects of sexuality, such as choice of object of desire/partner (orientation) and practice (S/M) or sex for money (sex work), which limits neither the partner nor the practice.
18. One recent example of this approach in the sexual and reproductive rights world can be found in the International Planned Parenthood Federation Charter on Sexual and Reproductive Rights (London: IPPF, 1996), p. 18.
19. A list of reproductive rights might include the right to decide responsibly the number and spacing of children. See, for a partial listing, the Programme of Action of the United Nations International Conference on Population and Development, Report of the International Conference on Population and Development, 5–13 September 1994, UN Doc. A/Conf/171/13 (18 October 1994), para. 7.3.
20. Martin Scheinin makes the additional point that it is a conceptual and doctrinal mistake to "equate a right with one specific provision in a human rights treaty." He postulates that the treaty provisions should be used to identify core obligations of legal rights attached (he uses the metaphor of "strings") to the ratifying State party but also to signal normative obligations connected to other third parties, such as intimate partners, that are enforced by the state. See M. Scheinin, "Sexual Rights as Human Rights," *Nordic Journal of International Law* 1998, 67: 17–35.
21. The strategic implications of proclaiming a "new right" versus arguing the application of existing rights to newly emerging facts are vast and

contentious. One of the critical issues must be the ability of the existing frame to respond to the new claim or claimant while remaining consistent with its principles of development. Feminists applying gendered analyses to rights frameworks, as well as other activists working on development and rights or indigenous peoples' rights, have critiqued the failure of current rights practice to live up to its own conceptual underpinnings of indivisibility, interrelatedness, and universality, and they have demanded new concepts of rights to reach previously ignored areas. For an alternative perspective, see P. Alston, "Conjuring Up New Human Rights: A Proposal for Quality Control," *American Journal of International Law* 1984, 78: 607–21.

**22.** Humanitarian law has also shown a preoccupation with female sexuality in the context of communal honor and personal chastity. The Geneva Conventions, for example, state that women shall be "especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault." Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 27, opened for signature 12 August 1949, 75 U.N.T.S.287, 305 (Geneva Convention IV).

**23.** International Agreement for the Suppression of the White Slave Trade (Paris, 1904), International Convention for the Suppression of the White Slave Trade (Paris, 1910), International Convention for the Suppression of the Traffic in Women and Children (Geneva, 1921), and UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949). For an analysis of the developments and rights implications of the history of treaty work against "trafficking," see, e.g., L. Lap-Chew and M. Wijers, *Trafficking in Women, Forced Labour and Slavery Like Practices* (Utrecht: Foundation against Trafficking in Women [STV], 1997). For an analysis of the recent human rights-based focus on force in anti-trafficking work and how it may obscure attention to the human rights abuses against those in prostitution who do not fall within the "forced" category, see J. Doezema, "Forced to Choose: Beyond the Voluntary v. Forced Prostitution Dichotomy," in J. Doezema and K. Kempadoo, *Global Sex Workers: Rights, Resistance and Redefinition* (New York: Routledge, 1998), 34–50.

**24.** Contemporary Forms of Slavery Convention (1954) and Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (1964). The drafters of these documents declared that marriage, and therefore sexual activity, must be based on "full and free consent" (Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriage, 521 U.N.T.S. 231, December 9, 1964, art. 1, also citing the Universal Declaration of Human Rights [UDHR], G.A. Res. 217A [III], UN GAOR, Res. 71, UN Doc. A/810 [1948], art. 16), but they failed to speak to the gender-specific enabling conditions in law, the economy, or the community necessary to make such concepts of choice meaningful. Also lacking was a conception of the sexually autonomous female outside of marriage.

**25.** Convention on the Elimination of All Forms of Discrimination against Women (Women's Convention), adopted by G.A. Res. 34/180, UN

GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46 (1979).

26. General Recommendation 19, UN Doc. HIR/GEN/1/Rev.2 (29 March 1996).

27. Article 16 of the Women's Convention (see note 25) states that women shall have the "same rights to decide freely and responsibly on the number and spacing of their children, and have access to the information, education, and means to do so." This principle is further elaborated in General Recommendation 21, UN Doc. HRIGEN/1/Rev.2 (2 March 1996).

28. Convention on the Rights of the Child, GA res. 44/25, UN GAOR, 44th Sess., Supp. No. 49, at 166, UN Doc A/44/25 (1989), art. 34 and 35. The author was present at an NGO meeting hosted by the UN Department of Public Information in 1988 at which a representative of a NGO gay and lesbian youth organization was met with incredulous looks by the drafters and NGO participating organizations when he asked if the treaty encompassed the right of a child to determine her or his sexual identity.

29. France and the Netherlands, for example, noted that the intent of Article 34 was "not to regulate the sexual life of children but rather to combat their sexual exploitation on the basis of concrete examples." See S. Detrick (ed), *The United Nations Convention on the Rights of the Child: A Guide to the "Travaux Preparatoires"* (Dordrecht: Martinus Nijhoff, 1992), p. 434. Thanks to Penelope Saunders for bringing this to my attention.

30. For an example of a progressive use of the CRC to support children's rights to evolving sexual capacity, see D. Tarantola and S. Gruskin, "Children Confronting HIV/AIDS: Charting the Confluence of Rights and Health," *Health and Human Rights* 1998, 3(1): 60-86.

31. The application of human rights standards to heterosexual and homosexual conduct has been paradoxical. For example, some adult consensual homosexual conduct outside marriage attract rights protections by definition, primarily through privacy rights and, in recent cases, nondiscrimination rights. Conversely, consensual adult heterosexual conduct outside of marriage (defined in various legal systems as adultery or fornication), heterosexual nonreproductive sex (through some sodomy statutes and other "unnatural sexual acts" statutes), and other adult sexual behaviors such as commercial sex work have never been the successful subject of a treaty based rights claim.

32. C. Bunch, "Women's Rights as Human Rights: Toward a Re-Vision of Human Rights," *Human Rights Quarterly* 1990, 12: 486-98.

33. On denials of privacy or equality in family life, see, for example, Abdulaziz, Cabales and Balkandali, ECHR, ser. A (1985).

On protection from sexual violence, see *X & Y v. The Netherlands*, 91 ECHR, ser. A (1985), which applied the established obligation to take positive steps to protect rights in private life to a case of sexual violence (holding that a legal structure that denied a young woman with mental retardation the capacity to seek prosecutorial redress for coercive sexual activity violated her rights to private life) at para. 33 and 34. See also *S.W. v. UK*, ECHR, ser. A, vol. 335B (1995), and *C.R. v. UK*, ECHR, ser. A, vol.

335C (1995), in which the Court ruled that the lack of statutory marital rape offenses was not a bar to their prosecution under the common law, as “the essentially debasing character of rape is so manifest . . . [that] the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife . . . cannot be said to be at variance” with the goals of the Convention (para. 42).

On sexual content in speech and education, see HRC, *Hertzberg v. Finland*, Comm. No. 14/61, UN GAOR Hum. Rts. Comm., 37th Sess., Supp. No. 40, UN Doc. A/37/40 (1982), and *Handyside v. UK*, 24 ECHR, ser. A.

On information on access to abortion or contraception, see *Open Door Counseling, Well Women Centre and Others v. Ireland*, 246 ECHR, ser. A (1992).

34. *Nicholas Toonen v. Australia*, UN GAOR, Hum. Rts. Cte., 15th Sess., Case 488/1992, UN Doc. CCPR/c/50/D/488/1992 (April 1994). The Human Rights Committee, which monitors the International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200 (XXI), UN GAOR, 21st Sess., Supp. No. 16, at 49, UN Doc. A/6316 (1966), is empowered to hear individual complaints through a special protocol. It stated that laws penalizing same-sex male sexual behavior violated Articles 2 (nondiscrimination) and 17 (privacy). This interpretation was made possible by holding that, in the list of prohibited categories of discrimination in Article 2, the word “sex” encompassed “sexual orientation.”

35. Among the cases that stress this point is *Rees v. United Kingdom*, 106 ECHR (ser. A) (1986), in which the Court held that there are “positive obligations inherent in an effective respect for private life,” although it also held that denial of the ability to change sex on a birth certificate for a post-operative transsexual was not a violation of Article 8.6

36. The European Court and Commission of Human Rights and the European Court of Justice have both addressed the rights of transsexuals. For a summary of the implications of these cases, see G. Niveau, M. Ummel, and T. Harding, “Human Rights Aspects of Transsexualism,” *Health and Human Rights* 1999, 4(1): 134–64.

37. The European Court, however, did not extend privacy protections to prohibit the prosecution of same-sex sadomasochistic behavior. In *Laskey, Jaggard and Brown v. UK*, 1 ECHR, ser. A (1997), also known as the “Spanner case,” the Court accepted the government’s rationale that its interference with private life was justified by the interest of protecting public health from “assaultive, injurious” behavior. It also disingenuously stated that it would have reached the same decision if the defendants had been engaged in heterosexual S/M practices.

38. See the Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. E/CN.4/1999/39 (6 January 1999), and the Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, UN Doc. E/CN.4/1997/47 (14 February 1997).

39. *Aydin v. Turkey*, ECHR (25 September 1997); *Raquel Martin de Mejia v. Peru*, Report No 5/96, Case 10.970, OEA/Ser.L/V/II.911 doc. 7 rev. (1996).

40. On forcible virginity exams, see Human Rights Watch/Women’s

Rights Project, *A Matter of Power: State Control of Women's Virginity in Turkey* (New York: Human Rights Watch, 1994).

On sexual violence in armed conflict, see T. Meron, "Rape as a Crime under International Humanitarian Law," *American Journal of International Law* 1993, 87: 424–28; Human Rights Watch, *Shattered Lives: Sexual Violence during the Rwandan Genocide* (New York: HRW, 1996); Amnesty International, *Bosnia and Herzegovina: Rape and Sexual Abuse by Armed Forces* (London: AI, 1993); and K. D. Askin, "Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals," *American Journal of International Law* 1999, 93: 97.

On rape during peacetime, see Human Rights Watch/Women's Rights Project and Africa Division, *Violence against Women in South Africa: State Response to Domestic Violence and Rape* (New York: HRW, 1995) and Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences (Violence in the Family), UN Doc. E/CN.4/1996/53 (6 February 1996).

**41.** Both the Special Rapporteur on Violence against Women, Its Causes and Consequences and the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions have in the last three years begun to highlight the extent to which female sexuality is controlled by coercion and fatal violence. See the Report of the Special Rapporteur, Ms. Asma Jihangir, on Extrajudicial, Summary or Arbitrary Executions (note 38), in which she discusses certain practices "where husbands, fathers, or brothers have gone unpunished after having murdered their wives, daughters or sisters. . . . [T]his practice is resorted to when a woman is believed to have engaged in a sexual relationship with a man . . . ." (para. 74). The Rapporteur on Violence against Women has also addressed "violence by the communities because of [women's and girl children's] sexuality and sexual behaviour." Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy (see note 38), para. 8. As rights activists highlight the importance of the formal rights system responding to these kinds of violations, they would do well to heed Uma Narayan's insight that global or outsider activists must be historically and politically acute in the retellings of such abuses, embedded as they are in politics and culture, to avoid simplifying them to "death by culture." U. Narayan, *Dislocating Cultures: Identities, Traditions and Third World Feminisms* (New York: Routledge, 1997), pp. 83–113.

**42.** Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (see note 38), paras. 76–77.

**43.** Opinion No. 2/1998 (United Arab Emirates), Opinions Adopted by the Working Group on Arbitrary Detention, UN Doc. E/CN.4/1999/63/Add.1 (9 November 1998).

**44.** For a recent review of the status of asylum claims based on sexual orientation or gay or lesbian identity, see "Symposium: Shifting Grounds for Asylum: Female Genital Surgery and Sexual Orientation," *Columbia Human Rights Law Review* 1998, 29: 467–531.

**45.** Several jurisdictions, including Australia, Canada, France, Sweden, the U.K., and the U.S., recognize potential claims on the grounds that

FGM causes severe pain and permanent physical harm. International advocacy on the health rights implicated in FGM, including sexual health rights, has suggested that some notion of sexual rights underpins these asylum decisions as sexual rights decisions, and in some cases the fact-finders do frame the claims in this way. But compare the difference in the breadth of rights affected in the analysis in N. Toubia, "Female Genital Mutilation," in A. Wolper and J. S. Peters (eds), *Women's Rights, Human Rights: International Feminist Perspectives* (New York: Routledge, 1995) pp. 224–37, with the conceptualization of harm in *In re Kasinga*, 35 I.L.M. 1145 (1996) BIA Appeals (13 June 1996) as "a severe bodily invasion" practiced in part "to overcome sexual characteristics of young women of the tribe . . ." (p. 11).

46. Vienna Declaration and Programme for Action, Vienna, June 1993, UN Doc. A/Conf.157/24 (1993).

47. See, for example, the description by L. Freedman, "Censorship and Manipulation of Reproductive Health Information: An Issue of Human Rights and Women's Health" in L. Coliver (ed), *The Right to Know: Human Rights and Access to Reproductive Health Information* (London: Article 19, 1995), 1–31.

48. The case law on reproductive rights arising in the regional human rights systems has primarily addressed abortion. See, for example, *Dublin Well Woman Centre et al v. Ireland*, 246 ECHR, ser. A (1992), or *Case 2141 (United States), "Baby Boy case,"* res. 23 (6 March 1981) doc. 9, rev. 1, OEA/Ser.L./V/II.54 in the Americas.

49. ICPD Programme of Action (see note 19), para. 7.2.

50. ICPD Programme of Action (see note 19), para. 7.3.

51. See D. Otto, "Lesbians? Not in My Country: Sexual Orientation at Beijing World Conference on Women," *Alternative Law Journal* 1995, 20: 288–90. See also the petition from the IGLHRC/Lesbian Rights Caucus calling for "Putting Sexuality on the Agenda of the World Conference on Women," reprinted in Rosenbloom (see note 5).

52. Platform for Action of the Fourth World Conference on Women, September 1995, UN Doc. A/CONF.177/20 (October 17, 1995), para. 96.

53. See Parker (note 2), Otto (note 51), and Miller, Rosga, and Satterthwaite (note 2).

54. Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 24 (20th sess., 1999) on women and health.

*Editor's note:* See C. Shalev, "Rights to Sexual and Reproductive Health: The ICPD and the Convention on the Elimination of All Forms of Discrimination Against Women," *Health and Human Rights* 2000, 4(2): 38–66.

55. For example, the Human Rights Committee recently asked critical questions of Poland regarding access to abortion and reproductive information. Summary record of the 1765th meeting: Poland, 04/08/99, CCPR/C/SR.1765 (SR).

56. For a review of sexual violence claims in the international tribunals, see K. Askin, "Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status," *American Journal of*

*International Law* 1999, 93: 97–123.

57. See, for example, R. Cook, "Human Rights and Reproductive Self-Determination," *American University Law Review* 1995, 44: 975–1016; R. Cook, "Gender, Health and Human Rights," *Health and Human Rights* 1995, 1(4): 350–66; L. Freedman (note 6); A. Hendriks, "Promotion and Protection of Women's Rights to Sexual and Reproductive Health under International Law: The Economic Covenant and the Women's Convention," *American University Law Review* 1995, 44: 1123–44; and D. Sullivan, "The Nature and Scope of Human Rights Obligations Concerning Women's Right to Health," *Health and Human Rights* 1995, 1: 368–98.

58. The obligation under Article 5 of the Women's Convention (see note 25) to use "appropriate measures" to modify the cultural beliefs of men and women has interesting potential here. Such measures could shift perspectives on women's lives so that they are no longer defined by their relationship to the ideal of "chaste daughter" or "good mother." Similarly, Article 7 of the Convention on the Elimination of All Forms of Racial Discrimination (Race Convention), UN G.A. Res. 2106A(XX) (1965), could also be used to modify racist assumptions about the sexuality of women or men of different ethnic or racial groups.

59. R. Dixon-Mueller, "The Sexuality Connection in Reproductive Health," *Studies in Family Planning* 1993, 24: 269.

60. Gupta (see note 2), p. 55. See also Freedman (note 6); J. M. Mann, S. Gruskin, M. A. Grodin, and G. J. Annas (eds), *Health and Human Rights: A Reader* (New York: Routledge, 1999); and Correa and Petchesky (note 3).

61. Gupta (see note 2), p. 55.

62. L. Heise, "Violence against Women: Translating International Advocacy into Concrete Change," *American University Law Review* 1995, 44: 1207–12, and S. Gruskin, "Negotiating the Relationship of HIV/AIDS to Reproductive Health and Reproductive Rights," *American University Law Review* 1995, 44: 1191–1206.

63. Correa and Petchesky (see note 3), p. 107.

64. Parker (see note 2), p. 34.

65. Correa and Petchesky (see note 3), 113–15.

66. See Rubin (note 10) for a radical reconceptualization of the good sex/bad sex hierarchy which leaves non-heteronormative sex outside of the framework of traditional feminist discourses on rights and sexuality. Personal communications with Carole Vance and Lynn Freedman have also helped the author to clarify the limitations of rights work that leaves persons "free" to choose a sexual option perceived to be degraded.

67. See, for example, Amnesty International, *Afghanistan: Cruel, Inhuman or Degrading Treatment or Punishment* (London: Amnesty International, 1999).

68. L. Schrage, Are Sex Worker Rights Human Rights? Keynote address to conference on Prostitution in a Global Context: Intertwined Histories, Present Realities, Aalborg University, Denmark, November 1999.

69. Of course, for heterosexual procreative practices, such de-linking relies on key interventions such as contraception and abortion and on

rights such as the right to choose not have sex without contraception, which are the staples of reproductive rights and health.

70. Gupta (see note 2) writes: “[H]ow should we state our cause to ensure the sexual health and human dignity of individuals? We must learn from the experience of the international women’s human rights movement. Casting women’s right to self-determination as an individual right was immediately used to create a discourse of false polarities and dichotomies . . .” (p. 59).

71. See note 37 above on the use of health concerns as the basis for intervening in consensual S/M practices. Extensive historical work on the medicalization and regulation of sexuality has demonstrated the dangers of this approach. Ambivalence toward the often very productive strategy of mobilizing around “healthy” sexuality, however, is more subtle. One clear challenge facing a human rights approach to sexual health as an element of sexual rights will be to grapple with the nature of structures that have promoted “enriching” concepts of sexual health without denying rights application to sexual encounters that occur outside of structures of intimacy, if that is what the participants choose, as in the edgy sexual practices of “cruising.” Erotic nontraditional but consensual sexuality may not always be so easy to describe once the apparently self-explanatory norms proscribing sex “free of disease” or “free of violence” are used to delimit the parameters of good sex.

72. Nondiscrimination is one of the fundamental norms of rights. It is found in Article 1.3 of the UN Charter, Articles 1 and 2 of the UDHR (see note 24), Articles 2 and 26 of the ICCPR (see note 34), and Article 2 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), G.A. Res. 2200 (XXI), UN GAOR, 21st Sess., Supp. No. 16, at 49, UN Doc. A/6316 (1966). It is also found in Article 3 of the ICCPR and Article 3 of the ICESCR with regard to equality of men and women, as well as in Article 2 of the CRC (see note 28). Nondiscrimination on specific bases is also contained within the Race Convention (see note 58) and the Women’s Convention (see note 25).

The limits on a government’s ability to restrict rights is bounded by a jurisprudence evaluating whether the limitation or restriction is necessary to secure the rights and freedoms of others or to meet the just requirements of public order, morality, and the general welfare or specific needs in times of emergency. Each of these limitations is subject to a review, determining whether it is the least invasive alternative and whether it is proportionate and consistent with the goals of the human rights treaty system. For a summary of legitimate restrictions relevant to health rights in particular, see International Federation of Red Cross and Red Crescent Societies and François-Xavier Bagnoud Center for Health and Human Rights, “The Public Health–Human Rights Dialogue,” in *AIDS, Health and Human Rights: An Explanatory Manual* (Boston: International Federation of Red Cross and Red Crescent Societies and Harvard School of Public Health, 1995), pp. 39–47.

73. The seminal statement setting out these obligations is found in A. Eide, “The New Economic Order and the Promotion of Human Rights,” in a Report by the Special Rapporteur on the Right to Food, UN Doc. E/CN.4/Sub.2/1987/23, para. 66–69. The concept has been widely accept-

ed throughout human rights work. See, for example, P. Alston, "Introduction," in *Manual on Human Rights Reporting*, UN Doc. HR/PUB/91/1 (UNCHR/UNITAR: Geneva: 1991).

74. See W. Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton: Princeton University Press, 1995) for a U.S.-focused development of this idea, in part derived from Foucault's work on sexuality and power.

75. Vienna Declaration and Programme for Action, Report of the World Conference on Human Rights, 14–25 June 1993, UN Doc. A/Conf./157/23, para. 5.

76. Correa and Petchesky (see note 3), p. 107.

77. Correa and Petchesky (see note 3) group these imperatives as "ethical content: bodily integrity, personhood, equality, and diversity" (pp. 113–18). Copelon, Gruskin, and Toubia (see note 3) group the human rights concerns as autonomy/capacity to make decisions, health/healthful conditions, non-discrimination/diversity, and participation/empowerment (pp. 7–27).

78. See, for example, Article 18 of the ICCPR (note 34), which states in part that everyone has the right "to have or adopt" a religion or belief of his or her choice and recognizes the link between religious identity and the freedom to manifest this belief. However, the Declaration of Human Rights in Islam, which does not hold the status of a government treaty but is nonetheless politically significant as a governmentally organized consensus statement (however disingenuous or nonrepresentative its processes), reiterates the conventional governmental position that the freedom to change religion is not a right. This example is not meant to imply that sexual expression analogous to religious expression, although some commentators are now making this argument. See D. A. J. Richards, "Sexual Preference as a Suspect (Religious) Classification: An Alternative Perspective on the UnConstitutionality of Anti-Lesbian/Gay Initiatives," *Ohio State Law Journal* 1994, 55: 491–552.

79. M. Scheinin (see note 20) argues that the private manifestation of sexuality has been accepted as protected by Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (opened for signature by the Council of Europe on November 4, 1950; entered into force on 3 September 1953) and Article 17 of the ICCPR (see note 34) but notes that not all consensual activity falls within absolute protections of private life. Recall that although S/M practices, as noted above, were held to be part of private life, health concerns were held to justify state intervention. Similarly, sex work has been found to be outside the sphere of private life protections, and adultery laws have not to the author's knowledge been challenged as violations of private life.

80. A. F. Bayevsky, "The Principle of Equality or Non-Discrimination in International Law," *Health Rights Law Journal* 1990, 11(1–2): 1–34. See also M. Nowak, *CCPR Commentary: UN Covenant on Civil and Political Rights* (Strasbourg: N. P. Engel, 1993) for a discussion of Article 17 privacy rights as "Identity, Integrity, Intimacy, Autonomy and Communication." Scheinin also notes Nowak's analysis as indicative of

the reach of private life to public practice.

81. W. Morgan and K. Walker, "Tolerance and Homosex: A Policy of Control and Containment," *Melbourne University Law Review* 1995, 20: 206.

82. See W. Eskridge, "The Many Faces of Sexual Consent," *William and Mary Law Review* 1995, 37: 47–67, for a discussion of the various conditions that invalidate consent, such as coercion, age, kinship, extramarital activity, mental disability, same-sex status, economic inducement, and form of sex (S/M, sodomy). Rubin's discussion of sex laws and hierarchies of good and bad sex challenges many assumptions of status around which policies, including human rights policies, are made (see note 10).

83. Judith Levine voiced this formulation in a presentation entitled *Girl Lured Off the Internet*, given in the Seminar on Sexuality, Gender, Health and Human Rights, 25 October 1999, Columbia School of Public Health.

84. For example, removing sexuality from the penumbra of reproduction may serve as a reminder that many older, post-menopausal women wish to exercise sexual autonomy and need rights protection. An important collaborative seven-country study by the International Reproductive Rights Action Group (IRRAG) found that many older women in countries as diverse as Nigeria, Brazil, and the U.S., after they produced their family, expressed "a sense of entitlement in reproductive and sexual decision making." Petchesky and Judd (see note 16), p. 210.

85. Freedman (see note 6) discusses the work of Fatima Mernissi, among others, on the implications of the Qur'anic concept of *nushuz* (women's rebellion) in relation to the fear of individualism as explaining "much about the rise of religious extremism and its focus on the behavior of women in some parts of the world today" (p. 346, note 28). See F. Mernissi, "Femininity as Subversion: Reflections on the Muslim Concept of *Nushuz*," in D. Eck and D. Jain (eds), *Speaking of Faith* (Philadelphia: New Society Publishers, 1993), p. 250.

86. R. E. Howard, "Dignity, Community and Human Rights," in A. An-Na'im (ed), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (Philadelphia: University of Pennsylvania Press, 1992) 81–102, for her provocative insights into lack of direct correlation between traditional concepts of dignity and justice and human rights.

87. M. Carneiro da Cunha, "Culture is not a Thing, It is a Path: Reflections on the Brazilian Indian Case," in An-Na'im (see note 86), pp. 276–94.

88. See C. Howland (ed), *Religious Fundamentalisms and the Human Rights of Women* (New York: St. Martin's Press, 1999) for examples of women arguing for rights, including sexual rights, within and outside or in distinction from religious traditions.

89. Freedman (see note 6), p. 338.

90. Fried and Landsberg-Lewis (see note 3).

91. Narayan (see note 41), pp. 43–55.

92. One example is the 1998 Declaration of Human Rights from a Gender Perspective: Contributions to the 50th Anniversary of Universal Declaration of Human Rights by the Latin American and Caribbean Committee for the Defense of Women's Rights (CLADEM), which

includes the following formulation of sexual and reproductive rights: “All human beings have the right to autonomy and self-determination in the exercise of their sexuality, which includes the right to sexual pleasure, the right to freedom of sexual orientation, the right to education and freedom of information on sexuality. . . .” Also notable in this field is the IGLHRC/Lesbian Rights Caucus petition (see note 51). Profamilia’s current campaign on sexual and reproductive health (Programa de Cooperación Sur-Sur en Salud Sexual y Reproductiva en Latinoamérica y el Caribe) includes a module on health and rights for explicit application across a diverse group of women.

93. Parker (see note 2), p. 35, citing Rosalind Petchesky’s work.