

## SEXUAL RIGHTS, CONCEPTUAL ADVANCES: TENSIONS IN DEBATE

*Work presented by Alice Miller at the “Sexual, Reproductive and Human Rights Seminar” organized by CLADEM the past 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> of November, in Lima, Peru.*

### I. Introduction

Sexual rights are at a precarious and fascinating historical moment. The concept of these rights has achieved a potentially powerful, yet fragile public status. I welcome the opportunity to join this seminar, present this paper, and be in dialogue with you, as part of my participation in the rich, noisy, exciting, growing global conversation on human rights and sexuality. Understanding that contemporary movements to promote sexual rights take many different forms -- in law, in health policy, in cultural studies, in political platforms etc, I am here assuming that the formal and informal rights work share and complement each other in seeking to mobilize and transform political demands about justice into a specific tools for action. In service to this work to build effective tools of action, I focus on the implications of the thesis that “claims making may either reproduce or challenge social stereotypes”<sup>1</sup> as the central axes of my exploration of sexual rights theory-building and practice.

In this paper, I will examine sexual rights claiming across three styles of claims making, which I characterize the styles as *evolutionary*, *de-revolutionary* and *revolutionary*. Distinguishing these three styles is not meant to lead to rigid line drawing among categories, but to open up an examination of the various styles of sexual rights claiming that currently arise globally, at local, regional and international levels. Within many of these sexual rights claims there are factors that straddle categories—as I will note below, there are evolutionary claims that carry the seeds of revolution. Our task, in part as I see it, is to identify the tendencies toward status quo or exclusionary claims making, and the tendencies toward transformative or inclusionary sexual rights claims and build theoretical and functional sexual rights claims from the places of progressive potential.

By opening up sexual rights claims making, I hope to highlight the factors or elements in each kind of claims-making that tend toward the reproduction of stereotypes, and those that tend toward confronting and dismantling stereotypes. Yet even the enterprise of evaluating whether a sexual rights claim reproduces or challenges stereotypes will not be simple or straightforward. Before I present some examples of sexual rights claiming, I will try to explore some of the elements that complicate how we understand a sexual right claim and its relationship to stereotypes.

I address two key conceptual principles that underlie my work.

First, in evaluating the transformational power of sexual rights – as with all rights -- we must be concerned with multiple kinds of stereotypes. Secondly, I think we must

---

<sup>1</sup> Janice Irvine, “One Generation Post-Stonewall: Political Contests over Lesbian and Gay School Reform.” Martin Duberman (ed.) in *A Queer World* (New York: New York University Press, 1997): 585.

examine the particular complications that sexuality presents to human rights. Sexuality often confounds characterization because of the multiple domains and meanings it contains. I will try to explain each of these complications in turn, and then will allow my examples of evolutionary, devolutionary and revolutionary sexual rights claiming to further elaborate the contradictory 'play' of sexuality in regard to stereotypes.

First, the stereotypes implicated in sexual rights claims are not only gender stereotypes, but they include the ways that other differences are sexualized; and the ways that sexual stereotypes exacerbate other stereotypes and structures of subordination. Paying attention to this effect is critical for the political and legal implications of making sexual rights claims.

For example, women and men of different races, ethnicities and religions are sexualized differently within and across these groupings. For example, as critical-race feminist-based analysis of the operation of rape laws in the United States has revealed, the operation of rape law serves to control non-conforming women, yet white women are affected differently than black women. This analysis has demonstrated that "racial identification may serve as a proxy for non-traditional behaviour."<sup>2</sup> so that black women are marked as non-conforming (with aggressive, unbounded sexuality) by their color identity alone, while white women are distinguished and denigrated based on a range of conducts. By noting that a law against sexual violence may operate differently across color I am not saying that it operates well for white women, but that we must note its different operations, and pay attention to which of the various stereotypes it connects. And, then we can examine its content and the pattern of its enforcement in order to reveal how it differently regulates women of different colors. Thus, in regard to men, sexuality is also racialized, as in the fascist characterization of the effete, deceitful heterosexuality of the decadent Jewish man; or conversely the hyper-masculinized heterosexual stereotype of African men in European and American culture.<sup>3</sup>

Interestingly, sexualized understandings of racial difference, and racialized understandings of sexual difference can function both as in-group markers and outsider impositions. For example, in the current anxious nationalisms being deployed in southern Africa, certain national leaders such as President Mugabe of Zimbabwe are trying to 'race' the gay identity as white, and limit its identities to the Western and male<sup>4</sup>. Another example arises in a group which is both understudied and often left out of sexual rights discussions, women and women with development disabilities. In their case, the same marker -- mental retardation -- can create totally different stereotypes for men and women, and be inconsistent in the stereotypes it invokes within groups of women. For

---

<sup>2</sup> Kimberle Crenshaw, "Mapping the Margins: Identity Politics, Intersectionality and Violence against Women," *Stanford Law Review*. Volume 43 (July 1991): 1280.

<sup>3</sup> George Mosse, "Fascism and Sexuality," in *Nationalism and Sexuality: middle-class mortality and sexual norms in modern Europe* (Madison: The University of Wisconsin Press, 1988): 153-180.

<sup>4</sup> Vasu Reddy, "Institutionalizing Sexuality: theorizing queer in post-Apartheid South Africa." Delroy Constantine-Simms (Ed.) in *The Greatest Taboo: homosexuality in black communities* (Los Angeles: Alyson Books, 2001): 163-184; and Oliver Philips, "Constituting the Global Gay: issues of individual subjectivity and sexuality in southern Africa." Carl Stychin and Didi Herman (Eds.) in *Sexuality in the Legal Arena* (London: The Athlone Press, 2000): 17-34.

example, while sexually active men with development disabilities tend to be labeled – and criminalized – as unbridled, uncontrollable sexual predators, developmentally disabled women can flip back and forth equally between sexual innocents as victims, or sluts “who get what they ask for, and breed more imbeciles” . In the public debates on the sexual and reproductive rights of persons with mental retardation, the designation of lower intelligence is usually equated to ‘low class’ and ‘low morality.’<sup>5</sup>

Globally, the importance of recognizing the inter-secting powers of race, gender, class, and sexual identity has been recognized. Most recently, even the World Conference against Racism accepted the specific mechanics and harm of intersecting discrimination, especially in the operation of sexism and racism. Interestingly, a small but vocal group of governments from the Americas attached the following statement to the adoption of the Programme of Action: “...the United Nations already recognizes that sexual orientation is a human rights issue.....therefore, the delegations of Ecuador, Chile, Brazil, Canada and Guatemala re-affirm the importance of....address[ing] a serious form of multiple discrimination , which occurs when racism, racial discrimination, xenophobia and related intolerance intersect with discrimination based on sexual orientation” <sup>6</sup>

An important practical implication of understanding how inter-secting discriminations matter will be to test any sexual rights framework will be its capacity to serve equally well persons across different practices and identities: gender identity, sexual orientation, age, race, health status, disability etc. This means, whatever framework of sexual rights that we consider, we must walk through the implications not only for the groups around whose needs we have conceptualized the right – whether lesbians, transgender sex workers, heterosexual young women in indigenous communities, but also for groups that we assume do not need/would not be affected by this articulation of this aspect of sexual rights. Will this claim be neutral? Will it add to their enjoyment? Will it limit a capacity that they already have?

#### *First Principles: do no harm*

At any moment, my exploration of how sexual rights claiming fits within or contradicts stereotypes can function as a cautionary tale. I have begun to characterize a great deal of my principles around sexual rights advocacy as beginning with a “do no harm” position. Despite our best intentions, various experiences of sexual rights claims – particularly the supporting documentation and resulting law reform – have yielded unexpected negative results, linked I argue, to their relationship to pre-existing stereotypes which the form of the sexual rights claim leaves unchallenged.

---

<sup>5</sup> See, Deborah W. Denno, “Sexuality, Rape, and Mental Retardation,” *University of Illinois Law Review*. Vol. 1997 No. 2 (1997): 395.

<sup>6</sup> Statement issued by Ecuador, Brazil, Chile, Canada and Guatemala on the contested version of the Programme of Action for the World Conference Against Racism, Racial Discrimination, Xenophobia and other Related Intolerances (7 September 2001).

For example, some of the recent generation<sup>7</sup> of anti-trafficking initiatives – the exposure and denunciation of the horrendous harms suffered by women moving or moved in to the sex industry from Thailand or Nepal, resulted in initiatives in both countries to deny visas to young, single women seeking to travel abroad. Here, an effort to end sexual harm – and we should note that the violations focus is a specific form of sexual rights claiming -- resulted in other rights being denied, in this case freedom of movement and non-adverse discrimination. I would argue that the response of the Thai and Nepalese governments in the form of a denial of one set of rights in order to protect other rights -- was made more likely because the claim—end sexual abuse—was framed in such a way that it conformed to a stereotype: women must be protected. In this case, the state response of protection easily extended to invalidate a non-traditional right for women, the right to leave and return to their own country, in safety, with full information.

Sexual rights claims are likely to defy simple predictions of impact as “progressive” and “regressive”. One implication of this principle is that we should create careful documentations and histories of how legal and policy changes in fact strengthens or weakens sexual rights enjoyment: can we measure the intended and unintended affects of laws? How often do we carefully track the impact of law reform, first, for the intended beneficiaries, and second, for unintended negative impacts on other marginalized populations. For example, in the United States, careful historical work on the impact of reform of the statutory rape laws in the 1920’s demonstrated that the laws were most invoked by families when the male lover of a daughter was of the wrong class, race or other ethnic group.<sup>8</sup> As many HIV/AIDS and women’s rights activists contemplate invoking similar laws in Zambia, Swaziland and other countries to fight the phenomenon of “sugar daddies” – older men engaging in sex with younger women and girls with promises of economic assistance, clothes etc, are there other issues of state power, ethnic politics etc that must be considered?

A second major complication of bringing sexuality and rights claims-making together arises because of the impossibility of much of sexuality –its ideas and its practice -- to be characterized. Sex, in its practice, its idea-making, its categories of desire, its fluidities and pleasurable perversities defies categories of ‘goodness’ and ‘badness’. We have come to sexual rights to a large extent to a desire to end violence, destruction of dignity and discrimination; our move to claim affirmative sexual rights (or, as I will argue, to create the conditions for the enjoyment of sexuality) is an important and much needed expansion of rights work.

Given sexualities’ defiance of norms, however, I believe, we should be humble in our attempts to fit all of sexuality within a human rights framework. This humility has functional implications, which I will return to in my conclusions and its provisional framework for sexual rights claiming. It leads me to suggest a focus on process, power

---

<sup>7</sup> We can speak of the 90s activities of ant-trafficking work as the second generation, as the first generation of anti-white slavery” work preceded it during a wave of popular press and law making during the 1890’s and through the 1920’s.

<sup>8</sup> Mary Odem, *Delinquent Daughters: protecting and policing adolescent female sexuality in the United States, 1885-1920*. (Chapel Hill: University of North Carolina Press, 1995): 1-265.

and conditions for sexual rights, rather than any specific enumeration of acts, identities or advocacies.

### *A loose categorization of sexual rights claims*

I now turn to my loose categorization of sexual rights claims into evolutionary, devolutionary and revolutionary rights claims. As I explore a few examples of each category and note the aspects of the claim that re-inforce or resist stereotypes, I will also highlight some critical cross-cutting themes – including many paradoxes that arise in sexual rights claiming. These issues highlight some of the tensions inherent in the work of new rights claims in general, and sexual rights claims in particular. Many of these issues are important to pay attention to in the current political contexts for claims-making, particularly rights-oriented standard setting.

## **II. The categories and their contents**

I term the three types of claim making: evolutionary, devolutionary and revolutionary.

- A. Evolutionary: Generally speaking, the evolutionary claims style is one that seeks to apply existing rights to new claimants (lesbians, transgendered persons, sex workers) and new situations. Evolutionary claims making seeks to move the content of existing rights forward incrementally – it proclaims no new rights, and uses existing rights to respond to different aspects of sexual needs – often through ‘bundling’ or grouping rights.

For example, one particularly successful evolutionary approach in the European system, with some success in the UN treaty structure is the call for rights of privacy to encompass same-sex, sexual behaviour.<sup>9</sup> This extension of privacy has been extended in part to the decision of parents on behalf of a child with non-conforming genitals to not allow surgery in the Americas (Colombian case). Under this understanding, consensual same sex behaviour was protected from criminal penalties under the protection as a right to private life.

Yet, while privacy has been an important basis upon which to found sexual rights claims, it has certain limits. Within the European system, the attempt to claim privacy protections from prosecution for consensual gay male S/M behaviour failed – the behaviour was simply too non-conforming for the judges to understand how to extend a traditional way of seeing sex – entitled to be called ‘private’ because adults have the right to keep a zone of intimacy between two people – to an activity which was between more than two men, and had none of the trappings of intimacy or obvious pleasure.

In addition, we should note that privacy as a defining right for sexuality tends to reinforce the already naturalized, traditional idea that good sexuality ‘stays in the bedroom’ and is

---

<sup>9</sup> Dudgeon v. United Kingdom, 4 Eur. Ct. H.R. 149 (1981); and Nicholas Toonen v. Australia, UN GAOR, Hum. Rts. Cte., 15<sup>th</sup> Session, Case 488/1992, UN Doc. CCPR/c/50/D/488/1992 (April 1994).

protected from state interference. This notion defeats feminist work to re-conceptualize the public and the private (particularly the deference to male define zones of privilege and coercion as private life). It also mis-characterizes the extent to which sexuality is in fact created through public and private conduct –advocacy, art, the information which is needed in the public space for sexual health as well as to support diverse sexual identities. Most importantly, privacy alone fails to capture the discrimination that occurs in both public and private spheres. Thus, privacy claims can reinforce harmful stereotypes unless we simultaneously consider the gendered constructs of privacy, and simultaneously note the need to extend privacy to previously unprotected acts (same sex, sexual activity) and withdraw it from previously protected acts (coerced marital sexual activity).

Another critically successful evolutionary strategy in both women’s anti-sexual violence work and lesbian, gay, and transsexual rights work has been to focus on the rights of bodily integrity and protection from violence. From the work to end rape in war time, stop sexual violence in marriage, on to the exposure of extra-judicial executions of transgendered sex workers in Columbia, Argentina and elsewhere in the Americas, to the recent AI campaign to end torture on the basis of sexual orientation, the application of a fundamental human right to a new set of claimants has yielded wide-spread support.

The noted paragraph 96 of the Beijing Platform for Action highlighted the success of this approach: “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.” Yet, if not carefully constructed, the right to be free of violence can reinforce a norm of protectionism. I already noted the tendency to fall back on gender stereotypes in the remedies to “trafficking” that arose in Nepal and Thai cases above.

Indeed, even in the Beijing version, the threat of what are the terms of women’s protection – ‘responsible sexuality’, sexuality bounded by heterosexual relations – lies heavily underneath the rhetoric of rights. Most ironically, while the states may have accepted – in the context of health – the obligation to protect women from violence within the family, they have NOT accepted any limitation on their own right to exercise violence against non-conforming women and men. The most explicit example of this is writ in the penal adultery laws of countries in many regions – in the very fact that the state claims the right to criminalize sex outside of marriage (adultery).

The fact that human rights groups routinely object to the form the punishment takes: stoning, or flogging, only serves to hide the fact that the claim to forcible regulation of women and men’s sexuality is still unchallenged. In this case, the evolutionary claim against violence leaves untouched the legacy of ecclesiastical sex laws founded on punishment. Conforming women and men are protected fully, non-conforming women and men are partially protected from egregious, extra-state punishment, but not ironically from state power.

Many other evolutionary rights claims are being advanced in the context of sexual rights claiming: freedom of information as applied to contraception or protection against

HIV/AIDS; freedom of association for gay rights groups, etc. Many different successes regarding non-discrimination and equal protection of the law have arisen in LGBT work, in HIV/AIDS status, etc. Each of these claims have led to advances, but along or even ‘grouped’ they fail to up root some core boundaries that limit sexual rights claiming, in part because they may primarily conform to what the dominant sexual assumptions require for worthy rights claimants: intimacy, responsibility, privacy. Indeed, to some extent the focus on protection has tended to obscure the liberty interest of sexual rights – for good reasons I understand, in a violent and sexist/racist world. Yet, it has also reinscribed women as persons always in need of protection and not pleasure, and men as permanently out of control and in need of forcible restraint.<sup>10</sup>

B. Devolutionary. In this paper, I am using the term “devolutionary” to convey the process and impact of sexual rights claims becoming identified with specific sectoral claims. Some examples of this devolution are the tight linkage of sexual rights with women’s reproductive rights, the related but separate notion that sexual rights claims are best made as health rights claims in the context of both reproduction and HIV/AIDS, for example, or the ways in which sexual rights in other quarters is considered to be specifically and only gay/lesbian/transgendered and bisexual rights. By terming these as devolutionary, I am not diminishing their power –indeed, these three areas have been among the most powerful of sexual rights claims. However, I do wish to highlight some of the potential dangers of this form of rights claiming, in particular the way in which devolved rights can inadvertently serve to reinforce stereotypes and disappear difference.

[Note also that the many evolutionary techniques are used by groups employing a devolved sexual rights claim]

I will focus on two of these sites of devolved rights claiming: sexual and reproductive rights claiming in generally, and health as a site of sexual rights claiming for LGBT persons as well as (heterosexual) women.

The power of the sexual and reproductive rights articulation is undeniable: it combines the strengths of an affirmative demand for the conditions to enjoy sexual and reproductive health with a feminist commitment to challenge the sites of power and prejudice. It locates our work in the center of the patriarchal structures of power that dominate in women’s lives – even as we move to understand that women suffer – and benefit – differently within various patriarchal structures.

The move to articulate that sexuality is a part of reproduction was, as all of you know well, a radical claim. Numerous authors have pointed out the extent to which the traditional family planning models had conceptualized reproduction as if it happened without sex, and sexual acts when noted were conceptualized as if they happened

---

<sup>10</sup> Note the need to explore the extent to which the state’s interest in disciplining and punishing certain forms of masculine and feminine sexuality needs to be analysed in the light of the its effect in reinforcing the need of state power to control sexuality.....

without power differences, abuse or coercion on the negative side, or without sexuality as a potential site of pleasure on the positive side.<sup>11</sup>

However, the conflation of reproductive rights with sexual rights has inadvertently served to cause sexual rights to be seen as a subset of reproductive rights, although with a much less developed articulation of state obligations and gendered content. The notion that sexual rights is a sub-set of reproductive rights obscures the socially constructed processes that link heterosexuality to procreation and to marriage. In other words, it reinscribes reproduction as the main playing field for sexuality<sup>12</sup>.

More troubling this sub-set status ‘disappears’ both non-procreative heterosexual practices and non-heterosexual persons and their acts –and effectively removes them from the sphere of rights protection that attaches to “sexual and reproductive rights.”

Thus, the formulation if not carefully shaped can reinforce the erasure of non-conforming practices and persons – and ironically, even persons who otherwise might seem to be within the circle of protection: older women, past child bearing age – do they have sexual rights? Heterosexuality in all cultures involves a wide range of non-procreative practices – how are they protected in the framework of reproductive rights? [Of course, the HIV/AIDS movement has intersected powerfully at this point, and in many ways has forced attention to non-procreative but still potentially life-threatening sexual conducts within hetero and homo sexual behaviour – unprotected anal sex, for example.

In addition, although LGBT activists have attempted to claim the power of the sexual rights component of the formulation, they are often stymied by the underlying limitations of the forms of behaviour and the people who are protected in the circle of reproductive rights. Conversely, the notion of non-sexual reproductive rights – technologically assisted reproduction, whether as low-tech as self-impregnated lesbians or high-tech lab work would also be set free by dis-connecting the sets of sexual and reproductive rights. Indeed, the work to create the conditions of women’s ability to disconnect sexual behaviour, reproductive outcomes and economic implications has – as you all well know contributed a set of key elements in the work to articulate transformative grounds for sexual rights claiming. [In constructing our sexual rights claim, then, we know that we must create norms that protect conducts and diverse people, and while allowing the conditions for identity to be made out of conduct – the right to be gay by claiming same sex activity as a form of intimacy; we must also have a structure that allows the converse – protects same sex activities, or non-procreative activities without requiring that the person be deemed either non-reproductive rights worthy or prove that they are gay.../asylum claims]

---

<sup>11</sup> See Geeta Rao Gupta, “Strengthening Alliances for Sexual Health and Rights,” *Health and Human Rights* 1997, 2(3): 55-64; Sonia Correa and Rosalind 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); and Ruth Dixon-Mueller, “The Sexuality Connection in Reproductive Health,” *Studies in Family Planning* 1993, 24: 269-282..

<sup>12</sup> See, e.g. Richard Parker’s comments on para 96 from BPFA “Sexual Rights: Concepts and Action,” *Health and Human Rights*, 1997 2(3): 31-38.

I turn next to the devolution of sexual rights into sexual health claims. As “Carole Vance has been tirelessly repeating, “health can be a dangerous site for sexuality.” First, all of sexuality cannot be entirely comprehended in the category of health, or even in its broader kin of well-being.<sup>13</sup> While the definition of sexual health arising out of the International Conference on Population and Development in Cairo in 1994 is a powerful step forward, noting that sexual health contributes to “the enhancement of life and personal relations, and not merely counseling and care related to reproduction and sexually transmitted diseases”<sup>i</sup>, sexuality encompasses domains of desire, social conduct, communications which are outside of health policies. We must struggle against claims that appear to either reduce sexuality to the body alone, and challenge the historical medicalization of sexuality, which has been detrimental to women’s autonomy, racialized minorities who often fall under strictest public health ‘sanitary law’ regulation, and transgendered, trans-sexual and homosexual people.

Indeed, concepts of “sexual health” and “healthy sexuality” –despite their generally positive contribution to bringing sexuality into focus as a subject worthy of study and services<sup>14</sup>-- have dangerous tendencies to slide from denoting sexual behaviors carried out without coercion, violence, exposure to disease, etc., toward connoting “normal, naturalized” sex, and creating a hierarchy that excludes diverse—or to some, perverse --sexualities.<sup>ii</sup>

Finally, though I come out of 20 years of gay rights work, I wish to flag some the dangers of sexual identity as the primary basis of rights claiming. Human rights has a tendency to privilege identity –racial, cultural, gender, religious – as a basis from which to claim a right. Indeed, historically, identity claims are powerful sites of organizing movements for justice. As we seek to build a movement of sexual rights claiming, we must beware of the tendency to ‘find’ gay identities in diverse cultures and attach non-discrimination or other sexual rights claims to the found identity.

---

<sup>13</sup> see, TARSHI, “Talking About Sex” (December 1996) for a discussion of the strategic use of the concept of wellbeing to encompass broader political claims for equality between women and men and access to health services as part of sexual rights.

<sup>14</sup> note the ICESCR has been interpreted so that we understand that “The Covenant proscribes any discrimination in health care and underlying determinants of health, as well as the means and entitlements for their procurement, on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, physical or mental disability, health status (including HIV/AIDS), *sexual orientation*, and civil, political, social or other status, which has the intention or effect of nullifying or impairing the equal exercise of the right to health.”

As feminists we have been struggling against false universalisms and static roles as the basis of our rights claims. I am concerned, that although concepts such as “sexual minorities” have a powerful appeal with which to approach human rights claiming, they may also limit the full range of rights needed. For example, although the claim to freedom of (health) information for sexual minorities would seem to address needs to access information on safe sex, sex in the context of HIV/AIDS, other STDs etc, it would not successfully build the claim that conforming, questioning and self-identified queer youth ALL have the right to information on non-conforming sexual practices and their implications for health.

The strategy to mobilize sexual identities can, if not framed carefully, re-naturalize identities as always mapping onto specific practices and unchangeable. This form of mobilization often argues that sexual identities ought to be protected under human rights-based anti-discrimination norms (which they should) in part because they are in-born and immutable in the most simplistic sense. These strategies are in tension with the scholarly work that deconstructs identities according to specific historical processes, and highlights the fact that sexuality continues to defy categorization. And they engage us with the real political question as to whether it is possible to deconstruct and defend sexual identities at the same time, across cultures and vastly different structures of social organization. These claims also exemplify the need for sexual rights work to be part of contemporary attempts to make the universality of rights a contextualized and locally relevant claim.

### **c. Revolutionary**

As I noted at the outset, each of the sexual rights claiming strategies I explore have elements of conforming to limiting or exclusionary stereotypes as well as potentials for radical transformation.

I am a great believer in the power of political imagination to give shape to a universe out of which we shape specific, realistic strategic actions for new and transformative rights claims. In my closing remarks, I hope to move forward on some key elements for consideration in sexual rights claims making. I wish to make clear I am not proposing a specific sexual rights claim. And I look forward to talking about the geo-political realities of your current sexual rights campaign, and its intended results in law and policy.

But I would like to explore with you the implications of my review of sexual rights claiming for framing sexual rights in the future. I begin by re-iterating the notion that I understand the feminist project of imagining sexual rights to include imagining what the various rights claims will look and sound like in the mouths and bodies of differently situated persons. This could be structured almost as a set of research exercises across gender, age, (dis) ability, race, ethnicity, religion etc. with attention to the operation of privilege and disempowerment.

At this moment, we would want to consider the implications of human rights as the arena of struggle: as I said at the beginning, I would suggest be approach the human rights to

sexuality with humility: attaching the claim of rights to the concept does not describe everything about sexuality, nor is it free of costs.<sup>15</sup>

Additionally, given my stated concern that some form of rights claiming has resulted in over-protection, I would suggest we looking to comprehend both the protective and liberatory aspects of sexual rights. At the same time, I say this in full realization that we live and work in a world wherein states and non-state actors both over-protect women, based on gender stereotypes, and under-prosecute other kinds of harm committed against them. But our lessons from the work of substantive equality claims generally, and reproductive and other feminist campaigns has taught us the importance of enabling conditions. We should remember that the enabling conditions for sexuality must encompass their bodily/individualizes aspects and their social/associational and communally embedded aspects. Enabling conditions require changing cultural stereotypes, as both article 5 of CEDAW and article 7 of CERD would have states do, and attending to economic, social structures, scientific developments and legal protections.

I would suggest that one way to build in the construct of sexual rights as a rights exercised not only in oneself, but with others would be to construct an autonomy and dignity claim at the center --- with the notion that autonomy be conceived as an embedded claim, arising out of enabling conditions (including community and cultural surroundings).

Can we also build into the autonomy claim the common human rights principle that human rights are to be enjoyed and exercised up to the limit of when they become an obstacle to another's enjoyment of rights?

Immediately, I know this statement raises the fear of "who judges the limits". But I would suggest that a more specific, individualized notion of harm would be better than the current international law limitations of some expressive rights. For example, freedom of expression, freedom of religious expression, freedom of association are explicitly limitable on the basis of arguments of "public morals and health".<sup>16</sup> While some but not

---

<sup>15</sup> In other venues, I have developed the "why human rights is wrong for sexuality" more fully, noting the extent to which rights work requires intensified monitoring – surveillance – by the state; that it tends to reify identities and conduct; and that it tends to want to make the thing protected 'noble'.

<sup>16</sup> As rights are almost never absolute, the limitations imposed on their exercise—for example, limits in the interest of public health—must be strictly scrutinized for over-breadth, arbitrariness, effectiveness, e.g. This scrutiny is especially necessary in light of the historical abuses of the rights of sexually non-conforming people in the name of 'public health or morals' In 1994, an authoritative opinion was issued by the Human Rights Committee, the group of UN experts which reviews the implementation of the International Covenant on Civil and Political Rights (to which the US has bound itself). This opinion stated that the "criminalization of homosexual practices cannot be considered a reasonable means or proportionate measure to achieve the aim of preventing the spread of HIV/AIDS." They stated that the invasion of privacy and the discriminatory impact of Tasmania's sodomy laws was not legitimately justified by public health needs.

all of the treaty bodies have very carefully narrowed these grounds, I would suggest we want a barrier to the exercise of rights that harms the rights of others – a husband cannot be allowed to claim ‘sexual expression’ as the grounds for coercing his wife to sexual activity; but we do not want a barrier so vague as to be invoked in the name of any single religious or moral social norm or tradition.

I would also suggest we move – and this language of causing harm to the rights of others may help – we move away from the dangerously loaded term of “responsibly”. Responsibility has been attached to sexual and reproductive rights work since the first world conference on human rights in Tehran. While it is meant to suggest the duties that flow from rights, it has been so contaminated by moralistic judgements that I do not think it can be rescued. We can build from good examples of careful human rights evaluation, such as that suggested in the CRC when the treaty speaks of the evolving capacity of the child and has demonstrated the highly contextualized and specific evaluation that this standard requires. But the work to demonstrate the exercise of rights until the harm of others is also dangerous: first, it needs very careful diagnosis and documentation which we are barely beginning.

I also suggest we work with the radical potential of tripartite formation of state accountability:

**respect, protect and fulfill.**

Governments are required to *respect* rights, (the state and its agents must not through their own actions violate rights, such as through police torture, including rape of lesbians or gay men or the denial of public health facilities to transgendered persons); *protect* rights (the state must organize all branches to ensure that no other entity – private person, corporation – abuses human rights, such as landlords evicting persons based on real or perceived HIV status, husbands exercising marital “rights of access” etc, and *fulfill rights* (the state must also ensure that its actions, at all levels, make the enjoyment of rights possible – whether, in the case of (sexual) health, through taking steps to ensure that mechanisms are in place that adequately respond to epidemic diseases such as HIV/AIDS, or by setting in place the infrastructure for an open and diverse society, for example one would argue by ensuring that gay and lesbian advocacy groups, reproductive groups can carry out advocacy without legal strictures or fear of violence.

In particular, I consider the obligation of the state to fulfill rights, i.e., to create the enabling conditions for health for example, to provide us with a critical way of conceptualizing concrete obligations without locking ourselves into rigid criteria for “good sexuality.” We can look to the conditions under which ‘sexual expression’ – including conduct, but also including opinion/expression can be made independent of reproduction’ for a wide range of heterosexual women, including the protection of non-procreative sex for heterosexuals. And we can consider how conditions must be reviewed and assessed across genders and ages.

We need to reconfigure the notion of privacy to ensure that it is not impoverished privacy – zone of decision-making with no capacity to make variant decision (capacity consisting of the legal, economic, social means to do so, including not being stigmatized) In this formulation, privacy is not the pre-condition for sexuality, but an element of sexual rights. Public life rights, such as participation in cultural life, expression, and equality of legal identity thus become sexual rights as well.

We need to reconfigure our formulation of non-discrimination to ensure it does not require that identity map on to conduct in every case: both a non-conforming identity and non-conforming consensual acts must be protected. Thus it is not sufficient to protect sexual orientations but we must explore the range of conducts and identities that interact in diverse persons.<sup>17</sup>

In sum, our framework for sexual rights would recognize:

- ✍ the primacy of non-discrimination and equality; a focus on the dignity of the person, the understanding that all rights are inter-connected and inter-dependent in their realization,
- ✍ and the participation of individuals and groups in the determination of issues affecting them.

While I do have a provisional framing elements of the rights to sexuality, I will conclude here, with the sense that the most radical aspect of sexual rights claiming that most consistently defies stereotypes is through the participation of the persons most affected and most marginalized. This is not an easy answer – rights claims will conflict, and strategically one group may want to exclude another group as rights claimants. Yet, it will be a key element that ensures we do not assume protection where perhaps an enabling strategy is needed, or omit from discussion whole groups of us who are seeking to be alive, different, alone or in love, in lust or celibate and vote, live in a decent home, participate in our worlds to the best of our abilities.....

[ACKNOWLEDGMENTS: Many of the ideas in these remarks are drawn from discussions during the Seminars organized by the Program for the Study of Sexuality, Gender, Health and Human Rights, under the Direction of Carole Vance. I am very grateful to conversations with Dr. Vance and Lynn P. Freedman for further deepening my thinking on this issue. Thanks also to Kate Washburn for additional research assistance.]

---

<sup>17</sup> In my remarks, I have used the term sexuality deliberately to encompass diverse sexualities, including the variety of identities, gender constructs, orientations, practices, and the meanings attached to each of these aspects, with full recognition that identity and practice do not line up neatly in our lives. This formulation runs numerous risks: burying non-normative sexualities by integrating them into the discourse before their specific configurations are fully elaborated; or failing by exceptionalizing only homosexuality. Experience shows that ‘heterosexuality’ is not conjured up by reference to sexual orientations, and so escapes analysis of its “construction” and challenges to its privileges, just as references to “race” tend, in a racist society, to be heard as a cover for “black” and leave the position and privilege of white women and men under-analyzed. Experience also shows that the dominant analysis of (homo)sexuality tracks a culturally-produced form of male homosexuality and fails to capture the gender specificities of lesbian lives in particular, and many other non-normative men as well.

---

<sup>i</sup> Programme of Action of the International Conference on Population and Development, UN Doc. A/CONF.171/L.1 Section 7.2 (June 1994).

<sup>ii</sup> See, G. Rubin, "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality," in Carole Vance (Ed.), *Pleasure and Danger: Exploring Female Sexuality* (London: Pandora Press, 1992).