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# Patrolling the Borders of Sexual Orientation: Bisexual refugee claims in Canada

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**KEYWORDS:** Sexual Minority; Bisexual; Refugee; Border Control; Canada; Queer Theory; Human Rights

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**ABSTRACT:**

It is possible to claim refugee status in Canada alleging a fear of persecution on account of sexual orientation. This article demonstrates that the success rates for such claims are similar to the success rates for traditional refugee claims. However, one subset of sexual minority refugee claimants, those alleging a fear of persecution on account of bisexuality, is far less successful.

The author contends that a major cause of the difficulties bisexual refugee claimants encounter is the dominant understanding of sexual orientation as an innate and immutable personal characteristic. This view of sexual orientation underlies contemporary Canadian sexual minority refugee law. The life experiences of many bisexual asylum seekers, however, cannot be easily located within such an understanding. This leads many refugee adjudicators to approach accounts of bisexual life narratives with scepticism.

The author concludes that adjudicators in the refugee law setting should embrace an alternative understanding of sexual orientation that can accommodate bisexual and other sexual minority life stories. Such an account can be drawn from the tradition of queer theory.

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INTRODUCTION.....	3
I. CANADIAN SEXUAL MINORITY REFUGEE LAW.....	5
<i>A. The Refugee Definition: Immutably Queer</i> .....	6
<i>B. A Mixed Success: Claims based on Sexual Orientation</i> .....	10
<i>C. A Dismal Failure: Claims based on Bisexuality</i> .....	16
II. TOWARDS A QUEER REFUGEE JURISPRUDENCE.....	21
<i>A. The “Myth” of Bisexuality (or “it’s just a phase”)</i> .....	24
<i>B. Heterosexual Privilege and Homosexual Behavior (or “doubling your chances on Saturday night”)</i> .....	29
<i>C. Bisexual Erasure (or “but I didn’t choose to be gay”)</i> .....	31
<i>D. Queering Canadian Refugee Law (or “beyond sheep and goats”)</i> .....	34
CONCLUSION.....	40

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we they us come together  
in a somewhat different combination  
as we discover we are also they  
and they may not be who they seem to be

-S. Segal<sup>1</sup>

sometimes men love women  
sometimes men love men  
and then there are bisexuals  
though some say they're just kidding themselves  
Lalalala lalala

-Phoebe, a character on the sitcom, *Friends*, signing a song written for children<sup>2</sup>

## INTRODUCTION

It is possible to claim refugee status in Canada alleging a fear of persecution on account of sexual orientation. In this article, I demonstrate that the grant rates for sexual minority refugee claims are similar to the grant rates for traditional refugee claims. However, one subset of sexual minority refugee claimants, those alleging a fear of persecution on account of bisexuality, is significantly less successful.

This article contends that one cause of these differential grant rates is the logic underpinning sexual minority refugee jurisprudence. In particular, I argue that this jurisprudence reflects an essentialist understanding of sexual identity as an innate and immutable personal characteristic. I suggest, however, that the life experiences of many bisexual refugee claimants challenge or “trouble”<sup>3</sup> such an understanding of sexual identity. The results are potentially devastating: bisexual refugee claimants are at serious risk of having their cases improperly assessed because their life experiences are easily misunderstood. One of the principle aims of this article is, therefore, to set out suggestions to assist practitioners and adjudicators to better accommodate the experiences of bisexual refugee claimants.

A second and more general aspiration of the article is to argue that the difficulty in reading the lives of many bisexual refugee claimants against an essentialist understanding of sexual identity lends these cases a broader significance. Bisexual refugee claims mark a border – an unruly edge – in judicial struggles to understand sexual orientation. In so doing they offer a useful lookout over the terrain against which other legal controversies involving sexual minorities are likely to be mapped.

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<sup>1</sup> Shlomit Segal, “The Rules of the Game” in *Plural Desires* (Toronto: Sister Vision: Black Women and Women of Colour Press, 1995) 43.

<sup>2</sup> Cited in Jennifer Baumgardner, *Look Both Ways: Bisexual Politics* (New York: Farrar, Straus and Giroux, 2007) at 6.

<sup>3</sup> I borrow the terminology from Judith Butler. Judith Butler, *Gender Trouble: Feminism and the subversion of identity* (New York: Routledge, 1990) [Butler, *GT*].

It is with this second aspiration in mind that this article engages in an undoing of essentialist approaches to sexual identity. To this end, I do not merely advocate a more inclusive homo-bi-hetero spectrum as a replacement for the prevalent homo-hetero binary approach to innate sexual identities.<sup>4</sup> Rather, I argue that we must pay more attention to those – whether bisexual or otherwise – who do not display easily readable innate and immutable sexual identities. In attempting to enhance the visibility of a multiplicity of sexual minority stories, acts and identities, the article is situated in the tradition of queer theory.<sup>5</sup> As such, beyond merely offering an account of judicial struggles to come to grips with “troubling” sexual identities, the article aspires to celebrate and take pleasure in the exciting destabilization and disorientation of gender and sexuality.<sup>6</sup>

The article proceeds by first examining the context in which bisexual refugee claims are embedded. To this end, I survey the development of Canadian sexual minority refugee jurisprudence. I contend that this jurisprudence reflects an essentialist view of sexual orientation as an innate and unchangeable personal characteristic. I also demonstrate that, on average, this understanding has served most sexual minority refugee claimants reasonably well. I then disaggregate my analysis, turning to the specific context of bisexual refugee claimants. I show that bisexual claimants face disproportionate difficulty communicating their stories of persecution to adjudicators, often because their experiences challenge the judicially endorsed account of sexual orientation. Finally, drawing on queer theory, as well as literature engaging with bisexuality, I recommend a number of strategies to encourage the Canadian refugee determination system to better accommodate the full diversity of sexual minority refugee claimants.

Before moving on to the analysis, it is worth making a brief note about terminology. Throughout this article I use the terms “queer” and “sexual minorities” interchangeably to cover a wide range of sexual and gender identities that challenge heteronormativity. I choose to avoid the more conventional label “LGBT” due to a concern that such language is unnecessarily restrictive. The terms queer and sexual minorities serve my present purposes because their boundaries are blurred and explicitly invite contestation. As such, they can accommodate unconventional sexual and gender identities beyond gays, lesbians, bisexuals and trans persons.<sup>7</sup> Admittedly, any choice of

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<sup>4</sup> Alfred Kinsey famously articulated an understanding of sexual orientation whereby exclusive heterosexuality and exclusive homosexuality are viewed as poles on a spectrum of sexual preferences. According to Kinsey, a substantial proportion of the American population find themselves, during at least some periods of their lives, somewhere between these poles. See generally Alfred Kinsey *et al.* *Sexual Behavior in the Human Male* (Philadelphia, PA: W.B. Saunders, 1948) & Alfred Kinsey *et al.* *Sexual Behavior in the Human Female* (Philadelphia, PA: W.B. Saunders, 1953).

<sup>5</sup> See generally: Judith Butler, *Undoing Gender* (New York: Routledge, 2004) [Butler, *UG*]; Michel Foucault, *The History of Sexuality, Vol. 1*, trans. by Robert Hurley (New York: Vintage, 1990); Carol Queen & Lawrence Schimel, eds., *Pomosexuals: Challenging assumptions about gender and sexuality* (San Francisco: Cleis Press, 1997).

<sup>6</sup> *Ibid.*, Butler, *UG* at 80 (“sometimes it is the very disjunction between gender identity and sexual orientation... that constitutes for some people what is most exciting and erotic”).

<sup>7</sup> Examples include, but are not restricted to, pansexuals, asexuals, swingers, S&M subjects, polyamorists, fetishists, cross dressers, drag performers, two spirited, intersexed, and simply those who refuse to have their sexuality defined.

terminology in this area is controversial. I acknowledge, in particular, that many in what I am calling queer and sexual minority communities object to my chosen terminology on the grounds that it may underplay the longstanding political efforts of gays and lesbians to establish visible and politically recognized subject positions.<sup>8</sup> While I share this concern, in my view, the advantages of non-exclusionary terminology outweigh its costs.

## I. CANADIAN SEXUAL MINORITY REFUGEE LAW

Canada has a shameful record when it comes to its treatment of sexual minorities. As haunting names such as Joe Rose,<sup>9</sup> Kenneth Zeller<sup>10</sup> and Aaron Webster<sup>11</sup> attest, too many Canadians have paid with their lives for being queer.<sup>12</sup> Moreover, the violence visited upon sexual minorities has by no means been restricted to extra legal forms. To the contrary, Canadian law, since its inception, systemically mistreated sexual minorities.<sup>13</sup>

In spite of this history, today, Canada has a deservedly progressive reputation on sexual minority issues when compared with many countries in the world. Vibrant and visible sexual minority communities exist in all Canadian urban centers. Likewise, openly queer Canadian business leaders, politicians, academics and artists abound, as do representations of sexual minorities in both the media and in popular culture.<sup>14</sup> While serious challenges remain, Canadian law has slowly begun to come to terms with the changing social landscape regarding sexual minorities. Perhaps most significantly, discrimination on the basis of sexual orientation is now prohibited, either explicitly or implicitly, in all Canadian human rights legislation.<sup>15</sup>

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<sup>8</sup> For an excellent discussion of the debates surrounding queer terminology, see Francisco Valdes, "Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of 'Sex,' 'Gender,' and 'Sexual Orientation' in Euro-American Law and Society" (1995) 83 Calif. L. Rev. 3 at 346-350. See also, Judith Butler, *Bodies that Matter: On the discursive limits of "sex"* (New York: Routledge, 1993) [Butler, *Bodies*] at 223-242.

<sup>9</sup> Joe Rose was stabbed to death on a Montreal bus by a group of youths shouting slurs such as "faggot". Cynthia Petersen, "A Queer Response to Bashing: Legislating Against Hate" (1991) 16 Queen's L.J. 237 at 246.

<sup>10</sup> Kenneth Zeller was killed in a Toronto park popular among gay men by a group of five youths who had previously told witnesses they were going "faggot beating". *R. v. H.J.J.*, [1985] O.J. No. 2008 (QL).

<sup>11</sup> Webster was beaten to death by a group of men who came upon him naked in a Vancouver park known as a meeting place for gay men seeking sex. Robert Matas, "Vancouver gays outraged by killing" *The Globe & Mail* (19 November 2001) A11.

<sup>12</sup> See generally, Douglas Janoff, *Pink Blood: homophobic violence in Canada* (Toronto: U. Toronto P., 2005).

<sup>13</sup> See generally, Kathleen Lahey, *Are We 'Persons' Yet?: Law and Sexuality in Canada* (Toronto: U. Toronto P., 1999).

<sup>14</sup> See generally, Terry Goldie (ed.), *In a Queer Country: Gay and lesbian studies in the Canadian Context* (Vancouver: Arsenal Pulp P., 2001); Alex Spence, *Gay Canada: A bibliography and videography* (Toronto: Canadian Scholars' Press, 2002).

<sup>15</sup> See, e.g. *Quebec Charter of Human Rights and Freedoms*, R.S.Q. c. C-12, s.10; *Human Rights Act*, S.Nu. 2003, c.12 s. 7(1); *Egan v. Canada*, [1995] 2 S.C.R. 513 [*Egan*] (holding that sexual orientation is a prohibited grounds of discrimination under equality provisions of the *Canadian Charter of Rights and Freedoms*); *Vriend v. Alberta*, [1998] 1 S.C.R. 493 [*Vriend*] (reading sexual orientation into Alberta's human rights legislation).

In stark contrast, in many countries around the world same-sex sexual relations continue to be criminalized, extra-legal violence against those perceived to be queer is commonplace, and sexual minorities are forced to remain underground to avoid persecution and prosecution.<sup>16</sup>

In this context, Canada has become something of a destination state for sexual minorities abroad fleeing human rights abuses. On arrival, many such sexual minorities make refugee claims.

### ***A. The Refugee Definition: Immutably Queer***

Canada's *Immigration and Refugee Protection Act*,<sup>17</sup> defines a refugee as:

a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion... is unable or, by reason of that fear, unwilling to avail themselves of the protection of those countries.<sup>18</sup>

Refugee claimants must, therefore, demonstrate a connection between the harm feared in their home country and a listed ground of persecution. This list does not explicitly include sexual orientation.

Some sexual minority refugee claimants – particularly gay rights activists – have succeeded in characterizing the mistreatment they fear in their home country as involving persecution on account of political opinion or religion.<sup>19</sup> The vast majority of sexual minority refugee claimants, however, attempt to fit themselves into the residual category of those facing persecution on account of their “membership in a particular social group.”

Initially, this strategy met with some resistance.<sup>20</sup> The first published<sup>21</sup> Canadian sexual minority refugee decision, *Re R. (U.W.)*,<sup>22</sup> reflects the early ambivalence of refugee adjudicators on the question of whether sexual minorities constitute particular social groups for the purposes of refugee law. The case involved a Uruguayan gay man who had been caught in a police raid. In the years following his identification by

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<sup>16</sup> See generally, Amnesty International, *Lesbian, Gay, Bisexual & Transgender Network*, online: <<http://www.ai-lgbt.org>> (accessed: December 30 2006); Human Rights Watch, *Lesbian, Gay, and Transgender Rights*, online: <<http://hrw.org/doc/?t=lgbt>> (accessed: 30 December 2006); International Gay and Lesbian Human Rights Commission, *Where Having Sex is a Crime: Criminalization and Decriminalization of Homosexual Acts*, online: <<http://www.iglhrc.org>> (accessed: 30 December 2006).

<sup>17</sup> *Immigration and Refugee Protection Act*, S.C. 2001, c.27 [IRPA].

<sup>18</sup> *Ibid.* at s.96 (emphasis added).

<sup>19</sup> See e.g., *C.Y.T. (Re)*, [1998] C.R.D.D. No. 186 (QL). For a further discussion of the possibility of using political opinion and religion as a basis for sexual minority refugee claims see text accompanying notes

<sup>20</sup> See generally, Nicole LaViolette, “The Immutable Refugees: Sexual Orientation in Canada (A.G.) v. Ward” (1997) 55 U.T. Fac. L. Rev. 1 at 15-18 [LaViolette, “Immutable”].

<sup>21</sup> Only a small fraction of decisions in the refugee field are published. For a further discussion see text accompanying notes

<sup>22</sup> *Re R. (U.W.)*, [1991] C.R.D.D. No. 501 (QL).

Uruguayan authorities as a homosexual, he was repeatedly brutalized by police officers.<sup>23</sup> While the two Immigration and Refugee Board ["IRB"] Members hearing the claim<sup>24</sup> found the claimant's testimony credible, both held that he did not qualify for refugee status.

The first IRB Member, Rotman, accepts that, "[h]omosexuals... form a particular social group. It is [a] right of conscience or human dignity that... individuals should not be required to change their sexual preference."<sup>25</sup> However, Rotman goes on to find that the claimant did not have a well-founded fear of persecution, because the police attacks were prohibited under Uruguayan law. The claimant's appropriate recourse, according to Rotman, was to seek protection in Uruguay by complaining about the police mistreatment to local authorities, rather than to flee abroad.<sup>26</sup>

The second IRB Member, Leistra, agrees with Rotman in the result. However, she goes on to hold that homosexuals do not form a particular social group for the purposes of refugee law. According to Leistra, prohibitions on deviant sexual behavior are essential for preserving the heterosexual family, which is, in her view, the very foundation of society.<sup>27</sup> Leistra, moreover, asserts that international law recognizes the right of states to establish laws regulating sexual behavior. While she accepts that this right is limited by international human rights instruments prohibiting discrimination, she notes that, in these instruments, "[n]o mention of sexual orientation is made."<sup>28</sup> Finally, although she acknowledges that states ought not impinge upon protected privacy interests in their regulation of sexual behavior, she suggests that privacy rights apply only to sexual acts committed within the home:

Sexual activity... falls under the laws that guarantee privacy of the family and the home. If sex, partaken of in public places or in public houses, is prohibited by law in a country then that law is to be obeyed by the citizens of that country... It would be foolhardy to flaunt ones sexual preference in the face of one's country's legally established laws which prohibit expression of open sexual activities... judged... to be objectionable.<sup>29</sup>

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<sup>23</sup> *Ibid.*

<sup>24</sup> When Canada's new immigration legislation came into effect, in June of 2002, it put an end to refugee hearings with two IRB Members presiding. *IRPA*, *supra* note [redacted] at s.163.

<sup>25</sup> *Re R. (U.W.)*, *supra* note [redacted] (per Rotman). This reasoning reflects the principle that refugee protection is offered only as a surrogate form of protection, that is to say, when protection from persecution cannot be obtained locally. James Hathaway, *The Rights of Refugees Under International Law* (Cambridge, Cambridge University Press, 2006) at 4-5.

<sup>26</sup> *Ibid.* (per Rotman).

<sup>27</sup> *Ibid.* (per Leistra):

From man's earliest recorded history we find that all human expression... was directed by... laws based on religion... All [such laws]... admonish their adherents to refrain from certain sexual expressions... [T]hey all speak about the fundamental value of the family as a unit in the pyramid of society. No... nation could function without this basic unit.

<sup>28</sup> *Ibid.* (per Leistra).

<sup>29</sup> *Ibid.* (per Leistra) (emphasis added).

Leistra concludes, then, that because states may legitimately regulate public sex, those who suffer mistreatment because they “flaunt” their objection to these laws – i.e. uncloseted homosexuals<sup>30</sup> – do not fall within the refugee law definition of a particular social group.<sup>31</sup>

In the years following this decision, the case law continued to reflect sharp disagreement over whether sexual minorities fall within the refugee law definition of a particular social group. Some IRB Members concurred with Rotman’s holding that homosexuals constitute a particular social group.<sup>32</sup> For many, a key reason for considering homosexuals to be a particular social group was the notion that homosexuality is an “immutable” personal characteristic. The following comments in a positive decision involving a gay man from Argentina are typical: “If I accept that homosexuality is an immutable characteristic, that alone, in my opinion, suffices to place homosexuals in a particular social group.”<sup>33</sup> Similarly, in a case involving a gay man from Cuba, the IRB Member noted:

Homosexual men are a particular social group insofar as they share an immutable characteristic... Especially telling for this claimant, is that his grandmother took him for medical treatments in the attempt to change his behaviour (the way he talked and his body language) but that this proved impossible.<sup>34</sup>

Other IRB Members, however, refused to characterize homosexuals as a particular social group.<sup>35</sup> In one case involving a gay man from Poland, IRB Member Guy Lamoureux even goes so far as to distinguish between “asocial” groups and “social” groups:

A group will be asocial... if the human beings who form it are not adapted to the social life of the society in which they live. A group will be social... if the human beings who form it interact harmoniously with the social structures in which they live.<sup>36</sup>

Lamoureux goes on to suggest that homosexuals fall into the former category because, “heterosexuality is the very foundation of society, ensuring its continuity... The group to

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<sup>30</sup> It must be said that Leistra’s reasoning here is decidedly problematic. Among a plethora of possible objections is the way she curiously imagines that by failing to hide one’s sexual preference (ie. “flaunting”), one is, in effect, objecting to laws regulating public sex. Apparently, for Leistra, to be (openly) homosexual *means* to engage in (or at least to support) public sex.

<sup>31</sup> *Re R. (U.W.)*, *supra* note [redacted] (per Leistra).

<sup>32</sup> See e.g. *T. (K.B.) (Re)*, [1992] C.R.D.D. No. 430 (QL); *L. (M.D.) (Re)*, [1992] C.R.D.D. No. 328 (QL); *J. (F.H.) (Re)*, [1993] C.R.D.D. No. 98 (QL); *N. (K.U.) (Re)*, [1991] C.R.D.D. No. 1140 (QL). See also LaViolette, “Immutable”, *supra* note [redacted] at 15-6.

<sup>33</sup> *N. (L.X.) (Re)*, [1992] C.R.D.D. No. 47 (QL) (per Teitelbaum) (emphasis added). A second IRB Member, Colle, dissented in the result, but concurred on this particular point, noting: “I find that the claimant is a member of a particular social group because of his homosexual orientation. I conclude this constitutes an innate and fundamental personal characteristic.” *Ibid.* (emphasis added).

<sup>34</sup> *V. (O.Z.) (Re)*, [1993] C.R.D.D. No. 164 (QL) (emphasis added).

<sup>35</sup> LaViolette, “Immutable”, *supra* note [redacted] at 17-8.

<sup>36</sup> *X. (J.K.) (Re)*, [1992] C.R.D.D. No. 348 (QL) (per Lamoureux).

which the claimant in the case before us belongs is an asocial group.”<sup>37</sup> Interestingly, Lamoureux also rejects the notion that homosexuality is an immutable characteristic:

Homosexuals... constitute a group of persons having certain common characteristics... The complexity of homosexuality does not allow us to find that homosexuals have no control over these characteristics.<sup>38</sup>

In 1993, the Supreme Court put an end to this controversy in its landmark decision, *Ward v. Canada*.<sup>39</sup> In *Ward*, the Court had to determine whether the category of membership in a particular social group was sufficiently flexible to accommodate a group defined by its members’ former involvement in terrorist organizations. The case involved a claimant whose life was at risk in the United Kingdom because he deserted an Irish terrorist organization after a crisis of conscience led him to free hostages who were to be executed.<sup>40</sup> The Supreme Court took the opportunity to systematically define the term “particular social group.”

Writing for a unanimous court, La Forest J. notes that the particular social group category involves a distinction between “what one *is* [and]... what one *does*, at a particular time.”<sup>41</sup> Reading this distinction through the lens of “human rights and anti-discrimination that form the basis for the international refugee protection,”<sup>42</sup> La Forest J. identifies three types of particular social groups:

- (1) groups defined by an innate or unchangeable characteristic;
- (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
- (3) groups associated by a former voluntary status, unalterable due to its historical permanence.<sup>43</sup>

To clarify further, La Forest J. gives specific examples of each type of group, noting that, “[t]he first category would embrace... gender, linguistic background and sexual orientation.”<sup>44</sup> While these remarks are clearly obiter, subsequent to the decision there was no longer any serious contention at the IRB that those fleeing persecution on account of sexual orientation are ineligible for refugee protection.<sup>45</sup>

In the 1993 *Ward* decision, then, the Supreme Court put an end to the controversy over sexual minority refugee claims, establishing that sexual orientation falls within the ambit of the particular social group category in Canadian refugee law. Equally important

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<sup>37</sup> *Ibid.*

<sup>38</sup> *Ibid.* (emphasis added).

<sup>39</sup> [1993] 2 S.C.R. 689 [*Ward*].

<sup>40</sup> *Ibid.* at 669-701.

<sup>41</sup> *Ibid.* at 738-9.

<sup>42</sup> *Ibid.* at 739.

<sup>43</sup> *Ibid.* (emphasis added).

<sup>44</sup> *Ibid.* (emphasis added).

<sup>45</sup> LaViolette, “Immutable”, *supra* note [redacted] at 22.

for our purposes, however, is that *Ward*, as with the prior positive decisions at the IRB level, indicates that sexual orientation falls within the particular social group category *because* sexual orientation is an innate and unchangeable characteristic.

As we will now see, partly due to the way that sexual orientation came to be included into Canadian refugee law, some sexual minorities have a particularly challenging time accessing refugee protection.

### ***B. A Mixed Success: Claims based on Sexual Orientation***

Following the *Ward* decision, sexual minority refugee claimants have enjoyed mixed success in their bids to obtain refugee status.

In the most extensive study of its kind, Catherine Dauvergne and Jenni Millbank examined all published decisions involving sexual orientation based refugee claims in Canada during the early post-*Ward* years, from 1994 to 2000.<sup>46</sup> They identified 127 such decisions, the vast majority of which involve gay men, with only 14% involving lesbian claimants.<sup>47</sup> One case involved a bisexual claimant.<sup>48</sup>

According to the Dauvergne & Millbank study, the success rates in these cases were 52% and 66% for gay and lesbian claimants respectively,<sup>49</sup> leading to an overall success rate of 54%.<sup>50</sup> To put these numbers into context, the average claim grant rate for all refugee claims made in Canada from 1994 to 2000 was 60%.<sup>51</sup> Thus, the success rate in published sexual minority refugee decisions was only slightly lower than the overall grant rate for all refugees during the same period.

To see whether this pattern continued, I identified and reviewed 115 published IRB refugee decisions, as well as an additional 45 Federal Court decisions, involving sexual minority refugee claims from 2001 to 2004.<sup>52</sup> As with the Dauvergne & Millbank

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<sup>46</sup> Catherine Dauvergne and Jenni Millbank, “Burdened by Proof: How the Australian Refugee Review Tribunal has Failed Lesbian and Gay Asylum Seekers” (2003) 31 Fed. L. Rev. 299 at 302. See also Jenni Millbank, “Gender, Sex and Visibility in Refugee Claims on the Basis of Sexual Orientation” (2003) 18 Geo. Immigr. L.J. 71 [Millbank, “Visibility”] at 72-7; Jenni Millbank, “Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia” (2002) 26 Melbourne U. L.R. 144 at 148 [Millbank, “Otherness”].

<sup>47</sup> Millbank, “Otherness”, *supra* note [redacted] at 148

<sup>48</sup> Millbank, “Visibility”, *supra* note [redacted] at 95, n98.

<sup>49</sup> Millbank, “Otherness” *supra* note [redacted] at 148.

<sup>50</sup> *Ibid.* at 149.

<sup>51</sup> This grant rate is based on figures from United Nations High Commission for Refugees, *Statistical Yearbook*, online: <<http://www.unhcr.org/statistics.html>> (accessed: 20 December 2006) [UNHCR, *Yearbook*]. The rate was calculated by dividing number of positive refugee decisions in Canada during this period (84,237) by the sum of positive and negative decisions (140,752).

<sup>52</sup> The 115 IRB cases were obtained by reviewing 143 cases from 2001 to 2004 with the terms “homosex! or lesbi! or bisex! or bi-sex! or gay or sexual orientation or transsex! or transex! or transgender” in Quicklaw’s Canada Immigration and Refugee Board, Refugee Protection Division Decisions database. The 45 Federal Court cases were obtained by reviewing 73 cases from 2001 to 2004 with the terms “refugee and homosex! or lesbi! or bisex! or bi-sex! or gay or sexual orientation or transsex! or transex! or transgender” in Quicklaw’s Federal Court, Group Source database.

study, men were over-represented in these decisions. Out of all 160 cases, only 30 (19%) involved women.

The success rates for sexual minority claimants in these decisions were significantly lower than the rates identified in the Dauvergne & Millbank study. In fact, the success rates in sexual minority IRB decisions were a mere 9%, representing 9% for men and 10% for women.<sup>53</sup> In the identified Federal Court cases, the rate of decisions in favor of sexual minority claimants was somewhat higher: 31% overall, representing 37% for men and 10% for women. The combined success rate for published sexual minority refugee claim decisions at both the IRB and Federal Court, then, was 15% (16% for men and 10% for women). Once again, to put these numbers into context, the average claim grant rate for all refugee decisions made in Canada from 2001 to 2004 was 52%.<sup>54</sup> That is to say, the success rate in published sexual minority refugee claim decisions during this period was significantly lower than the grant rate for refugee claims in general.

As Millbank correctly points out, however, it is difficult to draw conclusions based on such statistics.<sup>55</sup> The vast majority of refugee decisions in Canada are unreported, and no effort is made to ensure that reported decisions are a representative sample of the larger pool of decisions. To the contrary, decisions are selected for publication by the IRB when they raise “interesting” or “novel” issues. It is, therefore, likely that the selected decisions are highly unrepresentative.<sup>56</sup>

To address this methodological challenge, information from the IRB’s internal database can be used to supplement the analysis of reported decisions. This database is not directly publicly accessible. As with other government records, however, these materials can be accessed through formal Access to Information Request procedures.<sup>57</sup>

According to materials provided by the IRB in response to an Access to Information request,<sup>58</sup> there were 1351 sexual orientation-based claims decided at the IRB in 2004.<sup>59</sup> Male claimants were once again significantly over-represented: only 19% of the decisions involved female claimants. The grant rates<sup>60</sup> in sexual-orientation cases in 2004 were 49% overall, 48% for female claimants, and 50% for male claimants. That

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<sup>53</sup> For the success rates of bisexual claimants, see text accompanying notes [redacted].

<sup>54</sup> UNHCR, *Yearbook*, *supra* note [redacted]. The rate was calculated by dividing number of positive refugee decisions in Canada during this period (62,184) by the sum of positive and negative decisions (11,9962).

<sup>55</sup> Millbank, “Otherness”, *supra* note [redacted] at 149.

<sup>56</sup> *Ibid.*

<sup>57</sup> *Access to Information Act*, R.S.C., 1985, c. A-1.

<sup>58</sup> Immigration and Refugee Board, Letter in response to an Access to Information Request by the author (November 6, 2006) IRB File#: A-2006-00061 (on file with author) [IRB, *Response*].

<sup>59</sup> To be more precise, this figure represents the number of refugee decisions at the IRB where the claimant was the principle applicant, where the claim was based (at least in part) on persecution on account of sexual orientation, and where a decision was mailed to the claimant in 2004.

<sup>60</sup> Thorough this paper, grant rates refer to the proportion of positive decisions as the sum total of positive and negative decisions. These figures exclude cases that were declared abandoned or withdrawn.

compares to a total of 40,408 refugee claims decided at the IRB in 2004,<sup>61</sup> with an average grant rate of 45%.<sup>62</sup>

Thus, we can see that the startlingly low grant rate in published IRB sexual minority refugee claims from 2001-2004 (9% from 2001 to 2004) is not representative of the actual IRB grant rate for sexual minority refugee claims (49% in 2004). In fact, the actual grant rate for sexual minority claimants exceeds the average grant rate for all refugee claims.

It would appear, then, based on both the Dauvergne & Millbank study covering the 1994-2000 period as well as the 2004 internal IRB statistics, that *sexual minority refugee claims are, on average, approximately as successful as traditional refugee claims.*

In addition to its quantitative analysis, what makes the Dauvergne & Millbank study particularly helpful is that it undertakes a qualitative analysis of sexual orientation decisions. After reviewing the 127 decisions identified for the 1994-2000 period, Millbank concludes that refugee adjudicators often have a difficult time hearing the stories of sexual minority claimants whose identities do not map onto adjudicators' preconceptions. Millbank contends that,

decision makers are unable to see the other, the applicant, and cannot receive stories from them in any real way. Decision-makers... impose... self onto other... To date, this projection has had disastrous consequences for lesbian and gay asylum seekers.<sup>63</sup>

Millbank cites one particularly disturbing example of this phenomenon in a case where the IRB denied a refugee claim brought by a Columbian lesbian.<sup>64</sup> In that case the IRB Member stated:

The claimant presents as an articulate, professional, well-groomed, and attractive young woman. Based on all of these considerations... the panel cannot conclude that the claimant's sexual orientation would be... obvious to intolerant and bigoted segments of Colombian society.<sup>65</sup>

In essence, the IRB cannot hear the claimant's narrative of persecution because the claimant does not fit the IRB Member's stereotypical and fixed image of butch lesbians. As Millbank puts it:

Being visibly lesbian... is... strangely unquestioned as a static, essentialized appearance devoid of the possibility of choice or change.

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<sup>61</sup> UNHCR, *Yearbook*, *supra* note [redacted]. An additional 5,223 claims were abandoned or withdrawn by the claimant.

<sup>62</sup> *Ibid.* The rate was calculated by dividing number of positive refugee decisions in Canada during this period (16,005) by the sum of positive and negative decisions (35,185).

<sup>63</sup> Millbank, "Otherness", *supra* note [redacted] at 177.

<sup>64</sup> Millbank, "Visibility", *supra* note [redacted] at 102-3.

<sup>65</sup> *Re PWZ*, [2000] C.R.D.D. No 47 (QL), cited in Millbank, "Visibility", *supra* note [redacted] at 102-3.

What if the applicant had just dressed up that day to impress the tribunal? What if she is a "femmey" lipstick lesbian...? What if Colombian lesbians do not look like Canadian lesbians? Or what if most lesbians do not look like lesbians?<sup>66</sup>

Problematic stereotypes are not, of course, restricted to lesbians. Some IRB Members, for example, appear to imagine all gay men as effeminate. Such a view is evident in the following comments in a case involving a gay man from Bulgaria:

The panel does not believe that [the claimant] was beaten... by skinheads on account of his homosexuality, since he does not openly display it. Even... his lover testified that, "He is not effeminate. I love him. He looks very masculine"... The panel considers that... the claimant does not look like a homosexual, which would have motivated skinheads to beat him.<sup>67</sup>

This view of gay men as effeminate was also reflected in a case involving a claimant from Mexico, where the IRB Member stated,

Counsel also made reference that if the claimant returned to Mexico, that now that he is openly gay, he would be more obvious as being a homosexual due to how he dresses and carries himself. However, I note that the claimant at his hearing presents as a very masculine, athletic man.<sup>68</sup>

In addition to these stereotypes about the effeminacy of gay men, some IRB Members seem to believe that all gay men – regardless of age, race, class, linguistic background or immigration status – spend a great deal of time in gay bars and clubs. Those who do not, especially during their time in Canada, are likely to have their sexual identity questioned by the IRB. Consider, for example, the following comments in a recent case involving a man from Pakistan:

When asked if he was aware of the gay community in... Toronto... the claimant said he knew there were bars but he could not go as it was too expensive... Because the claimant could not name any... gay bars... the panel draws an adverse credibility inference.<sup>69</sup>

Along similar lines, consider the following comments about a singular "gay reality", drawn from a recent case involving a man who feared persecution in Mexico on account of his sexual orientation:

[W]ith the goal of determining whether... the claimant is gay, the panel asked him about his social activities since arriving in Canada. We asked

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<sup>66</sup> Millbank, "Visibility", *supra* note [redacted] at 103.

<sup>67</sup> *W.R.O. (Re)*, [2000] C.R.D.D. No. 284 (QL) at ¶4-5, *aff'd Atanassov v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 709 (QL).

<sup>68</sup> *Valdes v. Canada (Minister of Citizenship and Immigration)*, [2004] R.P.D.D. No. 140 (QL) at ¶29.

<sup>69</sup> *Akhtar v. Canada (Minister of Citizenship and Immigration)*, [2004] R.P.D.D. No. 804 (QL) at ¶14-16.

him if he went to the gay bookshop and he answered "No"... We asked him if he went to gay bars or discotheques in Montreal... The claimant explained... that he went more often to the downtown bars. Because of his... ignorance of the gay reality... I find that the claimant is not credible.<sup>70</sup>

The problem with all these comments is that they reflect stereotypical understandings of what sexual minority bodies and lifestyles look like. As contemporary scholars of intersectional identity politics have persuasively demonstrated, however, identity cannot be imagined in such terms without erasing more complex subject positions.<sup>71</sup> Thus, for example, to speak of “*the gay reality*” as being built around queer bookstores and discotheques, demonstrates a serious lack of sensitivity to intersectional considerations such as gender, race, class, linguistic background and immigration status. Such a view fails to consider that some sexual minority refugee claimants may simply inhabit different gay realities. In these realities, high-end English and French language bookstores and pricey bars and clubs may play a less than central role.

A concern for such intersectional considerations leads Millbank to suggest that in order to understand how refugee adjudicators treat sexual orientation claims, it is essential to disaggregate one’s analysis. In particular, she notes that while refugee adjudicators commonly employ the term “homosexual” generically, “there are stark gender differences in the experiences of lesbians and gay men and the subsequent translation of these experiences into legal categories.”<sup>72</sup> In particular, violence against lesbians is often coded as occurring in the “private” sector (i.e. in families and homes), whereas violence against homosexuals is understood to occur mainly in “public” spaces (i.e. parks and in the vicinity of gay bars and clubs).<sup>73</sup> This private-public characterization poses different sets of problems for gay and lesbian claimants:

If [claimants] are too public... they are transgressive, repellent and in danger of being rejected as deserving of the abuse they have experienced. If they are too private, they risk their claims not qualifying as persecution: the persecution is characterised as merely private and/or readily avoided.<sup>74</sup>

In addition to differences between the experiences of lesbians and gay men, there are also differences in how various subsets of sexual minorities have their identities translated into legal categories. As we have seen, the notion that sexual orientation is an innate and immutable characteristic played a central role in the development of Canadian refugee jurisprudence.<sup>75</sup> It is thus perhaps not surprising that those sexual minorities – including gays and lesbians – who present their sexual identities as either flexible or chosen encounter difficulties translating their life narratives into terms that are readable in the legal categories established by this jurisprudence.

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<sup>70</sup> K.Q.H. (Re), [2003] R.P.D.D. No. 136 (QL) at ¶11 (emphasis added).

<sup>71</sup> See generally Kimberle Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color” (1991) 43 *Stan. L. Rev.* 1241.

<sup>72</sup> Millbank, “Otherness”, *supra* note [redacted] at 157.

<sup>73</sup> *Ibid.*

<sup>74</sup> *Ibid.* at 177.

<sup>75</sup> See text accompanying notes [redacted].

In this regard, after reviewing Australian refugee tribunal sexual minority decisions, Millbank expresses concern about the reaction of refugee tribunals to refugee claimants who present their sexual identity as chosen or flexible:

In situations where the applicant was seen as having some choice, or their sexuality in any way fluid or temporary... the Australian tribunal, in particular, was very reluctant to accept them as actually gay and therefore eligible under the social group category.<sup>76</sup>

The same phenomenon appears to be present in the Canadian context as well. For example, in one particularly troubling case involving a man from the Ukraine, the IRB Member outright denies the possibility of “choosing” to be gay:

When asked if his mother knew [about his sexual orientation], the claimant replied that she understood correctly his choice. The claimant was asked to confirm that he made the choice to be gay and he did so. I do not accept this as reasonable. The claimant is a well-educated man who understood the consequences of being gay. It is unreasonable that such a man would choose a life style which would inevitably cause him problems.<sup>77</sup>

The IRB Member’s inability to countenance the possibility that a *well-educated* man might see something choiceworthy in a gay lifestyle is profoundly disturbing. Here we see the confluence of the view of sexual orientation as innate and immutable with an implicitly negative view of homosexuality, which together serve to erase the sexual identity of a claimant who dares to forward an alternative understanding.<sup>78</sup>

Similarly concerning is that where a sexual minority refugee claimant’s sexual behaviour shifts over time, the IRB may read such changes as indicative of fraud and misrepresentation. It is common, for example, for the IRB to cite evidence of a history of cross-sex sexual relations as a reason for doubting a claimant’s asserted sexual minority identity.<sup>79</sup> The most troubling example of this phenomenon occurs when successful sexual minority refugee claimants have their refugee status withdrawn due to evidence of purportedly inconsistent post-hearing sexual practices. The way this works is that the government may apply to have a positive refugee determination vacated on the basis of

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<sup>76</sup> Millbank, “Visibility”, *supra* note [redacted] at 92-3 (emphasis added).

<sup>77</sup> *Kravchenko v. Canada (Minister of Citizenship and Immigration)*, [2004] R.P.D.D. No. 384 (QL) (emphasis added).

<sup>78</sup> Notwithstanding such attempts at erasure, many sexual minority writers insist that they have chosen their sexual identities. See e.g. Vera Whisman, *Queer by Choice: Lesbians, Gay Men, and the Politics of Identity* (New York: Routledge, 1996).

<sup>79</sup> See e.g. *Khrystych v. Canada (Minister of Citizenship and Immigration)*, [2004] R.P.D.D. No. 339 at ¶6-8 (QL) (holding that the claimant’s account of his homosexuality was not “credible or trustworthy”, partly on the basis that he did not offer a satisfactory explanation for evidence of sexual relationships he had maintained with women in the past); *Davydyan v. Canada (Minister of Citizenship and Immigration)*, [2004] R.P.D.D. No. 288 at ¶17 (QL) (holding that a claimant’s long lasting past marriages with women cast doubts on his contention that he was homosexual).

that the initial positive determination was a result of fraud or misrepresentation.<sup>80</sup> In a recent case involving an application to vacate a positive sexual minority refugee determination, the IRB upheld both the admissibility and the relevance of evidence that the claimant engaged in post-hearing sexual behavior that it viewed as incompatible with the sexual identity asserted at the hearing.<sup>81</sup> In upholding the admissibility of the evidence, the IRB noted:

[T]he fact that the respondent has had girlfriends after he became a refugee would seem relevant to the issue of his homosexuality which, of course, was one of the grounds upon which he was granted refugee status... While generally speaking events that occur after the period before one obtains refugee status would be irrelevant the case is different when what is being referred to is not "static" but a "continuing" situation, such as sexual orientation... In these situations current evidence may be of use to assess an earlier story.<sup>82</sup>

In other words, because sexual orientation is presumed to be immutable, evidence of sexual practices that depart from an asserted sexual orientation are relevant to establishing fraud and misrepresentation, even if those practices occur a significant amount of time after the assertion. It would seem, then, that when claimants' asserted sexual identities or sexual practices change over time – much as when claimants assert that their sexual identity is partly a matter of choice – the IRB believes that they must be lying.<sup>83</sup>

All of this to say, then, that based on both the Dauvergne & Millbank study as well as my review of more recent published and unpublished refugee decisions, sexual minority refugee claimants on average appear to enjoy success rates similar to those of traditional claimants. However, where sexual minority refugee claimants' narratives regarding their sexual identities depart from the stereotypes of refugee adjudicators the IRB often finds that the claimants lack credibility. This problem is particularly acute when claimants' recounted narratives do not map onto the judicially endorsed understanding of sexual orientation as an unchosen and unchangeable feature of one's personal identity.

As we will now see, bisexual refugee claimants have especially problematic run-ins with adjudicator's stereotypes in general, and with the notion of the innate and immutable nature of sexual orientation in particular.

### ***C. A Dismal Failure: Claims based on Bisexuality***

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<sup>80</sup> *IRPA*, *supra* note [redacted] s.109.

<sup>81</sup> See e.g., *L.E.W. (Re)*, [2005] R.P.D.D. No. 19 (QL).

<sup>82</sup> *Ibid.* at ¶18-19.

<sup>83</sup> For a critique of this practice see below at text accompanying notes [redacted].

The 1993 *Ward* decision established that those with a well-founded fear of persecution on account of sexual orientation are, in principle, eligible for refugee protection. However, it took a further seven years before the first published decision involving a bisexual refugee claimant, *B.D.K. (Re)*,<sup>84</sup> confirmed that *Ward* applies to bisexuals.

*B.D.K. (Re)* involved a Mexican bisexual transvestite who, in the words of the IRB Member, “prefers relationships with men.”<sup>85</sup> The claimant, who had a wife and son, as well as a male lover, was beaten and sexually assaulted by the police who came across him in the company of several other transvestites.<sup>86</sup> The claimant was singled out for further brutality when the police learned of the existence of the wife and child.<sup>87</sup> The IRB Member accepted the claimant’s asserted sexual and gender identities,<sup>88</sup> noting that the claimant appeared at the hearing “dressed as a woman.”<sup>89</sup> The IRB Member also accepted the claimant’s account of persecution at the hands of the police, relying on country condition documentary evidence establishing that police persecution of transvestites was common.<sup>90</sup> Without explicitly raising the question of whether bisexuals (or transvestites) constitute a particular social group, the IRB Member simply finds that, the claimant “would be persecuted in Mexico because of... membership in a particular social group, that is, a bisexual man who prefers men and being a transvestite.”<sup>91</sup>

It is significant that *B.D.K. (Re)* turns largely on the claimant’s identity as a transvestite, because it is the only published decision where an explicitly bisexual refugee claimant has obtained refugee status in Canada.<sup>92</sup> In the Dauvergne & Millbank study, out of the 127 published Canadian sexual minority refugee claim decisions identified from 1994 to 2000, only *B.D.K. (Re)* involved a bisexual claimant.<sup>93</sup> More recently, in the published sexual minority refugee decisions I identified from 2001 to 2004,<sup>94</sup> there were 9 cases involving bisexual claimants.<sup>95</sup> Two additional published decisions involved

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<sup>84</sup> [2000] C.R.D.D. No. 72 (QL).

<sup>85</sup> *Ibid.* at ¶1.

<sup>86</sup> *Ibid.* at ¶2.

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.* at ¶5.

<sup>89</sup> *Ibid.* at ¶2.

<sup>90</sup> *Ibid.* at ¶7.

<sup>91</sup> *Ibid.* at ¶8 (emphasis added).

<sup>92</sup> In 2005, a bisexual claimant succeeded in a judicial review of negative IRB determination. The review turned on an error committed at the IRB erred with respect to the claimant’s ability to avoid persecution by moving to a third country to which the claimant did not have an automatic right of entry. *Romero v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1705, [2005] F.C.J. No. 2102 (QL). A successful judicial review, however, does not lead to the claimant acquiring refugee status, but rather to a new hearing at the Immigration and Refugee Board.

<sup>93</sup> Millbank, “Visibility”, *supra* note [redacted] at 93, n98.

<sup>94</sup> See text accompanying notes [redacted].

<sup>95</sup> *Aire v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 41, [2004] F.C.J. No. 75 (QL); *Christopher v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1128, [2004] F.C.J. No. 1370 (QL); *Rassan v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1279, [2004] F.C.J. No. 1528; *G.I.F. (Re)*, [2001] C.R.D.D. No. 138 (QL); *O.O.P. (Re)*, [2002] R.P.D.D. No. 139 (QL); *B.K.K. (Re)*, [2003] R.P.D.D. No. 2 (QL); *K.O.C. (Re)*, [2003] R.P.D.D. No. 420 (QL); *Romero v. Canada (Minister of Citizenship and Immigration)*, [2004] R.P.D.D. No. 840 (QL); *S.C.E. (Re)*, [2004] R.P.D.D. No. 8 (QL). In an additional case, *O.H.R. (Re)*, [2002] R.P.D.D. No. 140 (QL), the claimant initially alleged a fear of

refugees alleging persecution on account of sexual orientation identified by adjudicators as either possibly bisexual<sup>96</sup> or “confused” about their sexual orientation.<sup>97</sup> None of these cases resulted in a positive decision for the claimant.

Of course, as we have seen, published decisions are not representative of actual decisions at the IRB.<sup>98</sup> The IRB’s database of unpublished decisions, however, confirms that bisexual refugee claims are seldom successful.

According to information provided by the IRB in response to an Access to Information Request, there were 100 cases involving bisexual refugee claimants decided at the IRB in 2004.<sup>99</sup> That compares to a total of 1351 sexual minority refugee claims resulting in a decision that year. Thus, bisexual claims account for 7% of sexual minority claims decided in 2004. It is also worth noting that men were, once again, over-represented in bisexual claims: only 15% of bisexual refugee claims involved female claimants.

The grant rate for bisexual claims at the IRB in 2004 was 25% overall, 28% for male claimants, and only 10% for female claimants. This compares with 49% for sexual minority claims (50% for men, and 48% for women), and 46% for refugee claims generally during the same period.<sup>100</sup> That is to say, *sexual minority refugee claims were slightly more successful than traditional refugee claims, and about twice as successful as bisexual refugee claims.*

Based on both the published decisions and the 2004 IRB statistics, then, it is evident that bisexuals – particularly female bisexuals – fare poorly in Canada’s refugee determination process.

Because of the small number of published decisions involved, it is difficult to offer a substantial qualitative analysis of reasoning employed by the IRB in bisexual refugee determinations.

Notwithstanding this limitation, a number of tentative observations are in order. Firstly, in none of the published bisexual cases did the decision-maker consider documentary evidence specific to bisexuals. In other words, in their written reasons, when decision makers evaluated the testimony of the bisexual claimants against country condition evidence, they drew exclusively in on evidence relating to persecution on account of undifferentiated sexual orientation.

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persecution on account of bisexuality, but at the hearing he indicated that his narrative was a fabrication and he identified alternative grounds of persecution.

<sup>96</sup> *Valoczki v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 492; [2004] F.C.J. No. 612 (QL) at ¶17.

<sup>97</sup> *Gyorgyjakab v. Canada (Minister of Citizenship and Immigration)*, [2004] R.P.D.D. No. 698 (QL) at ¶43.

<sup>98</sup> See text accompanying notes [redacted].

<sup>99</sup> IRB, *Response*, *supra* note [redacted]. To be more precise, this figure represents the number of refugee decisions at the IRB where the claimant was the principle applicant, where the claim was based (at least in part) on persecution on account of sexual orientation, where the claimant identified as bisexual, and where a decision was mailed to the claimant in 2004.

<sup>100</sup> See text accompanying notes [redacted].

The lack of attention to the specific conditions faced by particular sexual minorities has been decried in the context of gay and lesbian claims:

Country conditions evaluations which generalize about the experiences of sexual minorities over time, within a given country, or without regard to the different social experiences of lesbians as opposed to gay men fail to provide an accurate picture of the social context in question.<sup>101</sup>

The failure to consider bisexual-specific country condition evidence in the published bisexual cases raises similar concerns. It is particularly problematic that, in a case where the Federal Court acknowledged that the IRB had mistakenly assessed a bisexual claimant's sexual identity at the hearing, the Court went on to uphold the IRB's finding that the claimant could obtain state protection from persecution nonetheless:

[W]hile the Board's finding that [the claimant] was not a lesbian was probably technically correct, the Board did not consider the very real possibility that [she] was bisexual. However, given the Board's findings on the issue of state protection, I am satisfied that this error did not have any impact on the ultimate outcome of the case.<sup>102</sup>

In other words, the Federal Court holds – mistakenly in my view – that the precise sexual identity of the claimant (i.e. bisexual rather than lesbian) is *irrelevant* to the evidentiary question of whether the claimant is able to obtain protection against persecution on account of her sexual orientation in her home country. The court simply does not see the need to examine whether bisexuals face specific forms of persecution, or whether protection from persecution available to gays and lesbians is accessible to bisexuals.<sup>103</sup>

In addition to this lack of attention to bisexual-specific country condition evidence, another problematic feature of published bisexual refugee decisions is the frequency with which decision-makers disbelieve claimants' assertions about their sexual identity. In the reasons offered in support of such findings, the term “confusion” appears frequently.<sup>104</sup> Indeed, adjudicators seem decidedly “confused” regarding how exactly to assess allegations of bisexuality.

Particularly concerning in this regard is that in some cases evidence of cross-sex relationships is used as proof that the claimant is not, in fact, bisexual. Consider, for example the following comments in a case involving a woman from Iran:

The claimant arrived in Canada with a male companion... In response to the question as to whether they were planning to get married, the claimant

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<sup>101</sup> Arwen Swink, “Queer Refuge: A Review of the Role of Country Condition Analysis in Asylum Adjudications for Members of Sexual Minorities” (2006) 29 *Hastings Int'l & Comp. L. Rev.* 251 at 265.

<sup>102</sup> *Valoczki v. Canada (Minister of Citizenship and Immigration)*, *supra* note [redacted] at ¶17 (emphasis added).

<sup>103</sup> For a further discussion of why such practices are problematic, see text accompanying notes [redacted].

<sup>104</sup> *Ibid.* (“Ms. Valoczki’s testimony regarding her sexual orientation was inconsistent and confusing to say the least”); *Gyorgyjakab v. Canada (Minister of Citizenship and Immigration)*, *supra* note [redacted] at ¶43 (“the claimant was asked if she was still confused about her sexual orientation”).

replied, "So far there is a commitment but officially we haven't signed a paper or anything." ... [The claimant's] actions are those of a heterosexual woman.<sup>105</sup>

And, in a case involving a woman from Hungary:

The claimant came to Canada because allegedly she was persecuted, among other reasons, on account of her sexual orientation. However... the evidence shows that since last year she has been living with her boyfriend.<sup>106</sup>

This problem seems particularly acute for bisexual women, as the IRB seldom indicates similar concerns in the cases involving bisexual men. For example, in a case involving a bisexual man from Costa Rica, the IRB accepted the claimant's sexual identity despite his having brought his wife and children with him to Canada.<sup>107</sup>

On the whole, claimants' allegations regarding their sexual identity were disbelieved in 63% of the 11 published bisexual refugee decisions from 2001 to 2004 that I identified. Female claims were disbelieved with greater frequency: 83% for female claimants, compared to 40% for male claimants.

These figures contrast sharply with those for sexual minorities more generally. In the published IRB sexual orientation claims I identified during the same period, the claimant's asserted sexual identity was disbelieved in 29% of the 115 decisions. These rates did not vary significantly along gender lines: 33% for female claimants, compared to 27% for male claimants.

We can see, then, that in the published decisions from 2001 to 2004, *bisexual claimants were much more likely to have their asserted sexual identity disbelieved than was the case for sexual minority claimants more generally.*

I reiterate that caution must be exercised in drawing conclusions based on the small number of published bisexual cases. However, at a minimum, my analysis suggests the advisability of a further study examining unpublished IRB decisions, perhaps obtained through Access to Information Request procedures. It would, in particular, be helpful to know whether in unpublished decisions assertions of bisexuality are disbelieved at a greater rate than are assertions of gay or lesbian sexual identities. Considering the differences just noted in the published decisions, as well as the higher rejection rate for bisexual claims overall, I predict that such a study would reveal that bisexuals – and bisexual females in particular – are much more likely to have their asserted identities disbelieved.

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<sup>105</sup> *K.O.C. (Re)*, *supra* note [redacted] at ¶11.

<sup>106</sup> *Gyorgyjakab v. Canada (Minister of Citizenship and Immigration)*, *supra* note [redacted] at ¶43 (emphasis added).

<sup>107</sup> *B.K.K. (Re)*, *supra* note [redacted].

All of this to say, then, that based on both the published decisions and the IRB statistics regarding unpublished decisions, bisexual refugee claimants are significantly less successful than sexual minority claimants in general. Particularly concerning is that the IRB appears to neglect the possibility that bisexuals face risks distinct from those confronting other sexual minorities. Moreover, if the small number of published decisions are reflective of the overall trend, it would appear that bisexual claimants – especially female bisexual claimants – have a particularly difficult time convincing decision makers that their alleged sexual orientation is, in fact, authentic.

As I will now suggest, inquiring into how we might think about the challenges encountered by bisexual refugee claimants highlights the need to rethink the very foundation of sexual minority refugee law in Canada.

## II. TOWARDS A QUEER REFUGEE JURISPRUDENCE

We have seen that, in *Ward*, the Supreme Court determined that sexual minorities are “members of a particular social group”, and that when they are persecuted for being members of such a group, they are, in principle, eligible for refugee protection. The Court’s rationale for concluding that sexual minorities constitute a particular social group hinged largely on its determination that sexual orientation is an “innate and immutable personal characteristic.”<sup>108</sup>

Queer theory, an interdisciplinary forum examining the complex relations between gender and sexuality, characterizes such an understanding of sexual orientation as “essentialist.”<sup>109</sup>

Essentialists hold that individuals fall unproblematically into categories such as gay and straight, based either on biological or early-childhood psychological factors. As a result, essentialists understand sexual orientation as inflexible and unchangeable.<sup>110</sup> Occasionally other sexual identities are added to the list of possible categories into which one can fall, including, at least nominally, bisexuals and transgendered persons. What remains, however, is the principle that one falls into these categories naturally, completely, and unchangeably.

Queer theorists, on the other hand, contend that categories such as straight, gay and lesbian are constantly re-constructed through socio-historical patterns of regulated social interaction.<sup>111</sup> Based on this understanding, queer theorists suggest that we ought to accord more attention to the power dynamics that produce (and exclude people from) particular sexual subject positions. As Brenda Cossman explains:

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<sup>108</sup> See text accompanying notes [redacted].

<sup>109</sup> For a general discussion of essentialism, see Diane Fuss, *Essentially Speaking: Feminism, Nature & Difference* (New York: Routledge, 1989). See also Brenda Cossman, “Sexuality, Queer Theory, and ‘Feminism After’: Reading and Rereading the Sexual Subject” (2004) 49 McGill L.J. 847 at 866 [Cossman, “Sexuality”].

<sup>110</sup> Stychin, “Essential”, *supra* note [redacted]; Knauer, *supra* note [redacted].

<sup>111</sup> See generally, Butler, *GT*, *supra* note [redacted]; Janet Halley, “Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability” (1994) 46 Stanford L. Rev. 503.

Queer theory... takes as its point of departure a critique of the essentialist notions of identity that informed gay and lesbian studies. Queer theory is critical of... the very dichotomy between "homosexual" and "heterosexual" that produces the identity and the subordinate position of those on the homosexual side of the dichotomy. Queer theory then seeks to shift the analysis from identity politics to the representational... processes that constitute sexual identities.<sup>112</sup>

Perhaps not surprisingly, queer theorists disagree about the precise reasons for the contemporary prominence of essentialist understandings of sexual orientation. Most agree, however, that an important site of investigation is the foundational moment in individual and collective queer social and political life: "coming out".<sup>113</sup>

To dramatically oversimplify, the logic of coming out is that, whether or not I choose to emerge from the closet, I am always already queer. When I am in the closet I am hiding something fundamental about who I really am. It is only by acknowledging my true identity, first to myself, and later publicly, that I can begin to lead an authentic and full life. Such logic presumes that I have a "true" identity. Lurking beneath my presumptively heterosexual public personae is an essentially queer substratum. What makes me queer is the presence of this substratum, irrespective of the sexual identity I actually publicly display.<sup>114</sup>

It is worth noting the obvious here: given the reality of homophobia, many queer individuals experience their sexual identity in precisely this manner. That is to say, many go through long periods of being unable to publicly – or even personally – acknowledge what they ultimately come to see as their sexual orientation.<sup>115</sup> As Eve Sedgwick puts it:

[The closet] is still the fundamental feature of [gay] social life; and there can be few gay people, however courageous and forthright by habit, however fortunate in the support of their immediate communities, in whose lives the closet is not still a shaping presence.<sup>116</sup>

One of the reasons, then, for the contemporary prevalence of essentialist understandings of sexual identity is because they correspond to the life experiences of many sexual minorities. Moreover, sexual minority activists, artists, and other prominent cultural figures have put significant energy and resources into increasing mainstream society's familiarity with these experiences.<sup>117</sup>

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<sup>112</sup> Cossman, "Sexuality", *supra* note [redacted] at 866-7.

<sup>113</sup> Kenji Yoshino, "Covering" (2002) 111 Yale L.J 769 ("What made Stonewall loom so large was that... [t]he bar... could be seen as a symbolic closet, over which gays had finally wrested control") at 816.

<sup>114</sup> See especially Eve Sedgwick, *The Epistemology of the Closet* (Berkeley: U. Calif. P., 1990).

<sup>115</sup> For an accessible glimpse at individual struggles to come out of the closet, see e.g., "We're Coming Out" *The Advocate* (11 October 2005) at 62.

<sup>116</sup> Sedgwick, *supra* note [redacted] at 68.

<sup>117</sup> Consider, to take only one many possible examples, the recent Hollywood film, *Brokeback Mountain*. A. Lee (dir) (Hollywood, CA: Paramount, 2006). The film chronicles the tragic consequences of the inability of two American queer cowboys to come out and publicly acknowledge their relationship.

In addition to these efforts to familiarize society with queer coming out narratives, however, it is important to appreciate that advocates for sexual minority rights – as well as progressive judges – have strong incentives to frame their arguments in essentialist terms. It is easy to see why this would be the case.

On the one hand, legal regulation of chosen (and deviant) sexual behavior has both a long pedigree and a comparatively intelligible rationale. Resort to sanctions in this context allows society simultaneously to mark the behavior as deviant, and to discourage people from choosing to engage in the deviant behavior by imposing costs on such a choice.<sup>118</sup>

On the other hand, legal regulation of an innate psychosocial characteristic – or better yet, a biological characteristic – runs afoul of several central norms in the major western legal traditions. Perhaps the most notable of such norms is the prohibition on criminal sanction for matters beyond an individual’s control.<sup>119</sup> In addition to violating this principle that links legal and moral responsibility,<sup>120</sup> to sanction a person on the basis of an innate characteristic seems about as useful as “punishing” water for running downstream. Even more significant is that such sanctions conflict with an important narrative of liberal progress. This narrative is the familiar story about the gradual expansion of the list of ascriptive characteristics on the basis of which differential treatment is prohibited, beginning with feudal status, and moving to wealth, race, gender, and beyond.<sup>121</sup>

By pointing to what some have termed “the immutability defense”<sup>122</sup> – by saying queers can’t help but be queer – advocates for sexual minorities have successfully tied queer rights claims into each of these important norms and narratives.

When the increased cultural familiarity with sexual minority coming out narratives is combined with the strategic advantages of framing rights claims in essentialist terms, it should come as no surprise that an essentialist understanding of sexual orientation played a pivotal role in the development of Canadian sexual minority rights jurisprudence.<sup>123</sup> Indeed, the immutability of sexual orientation was a key factor in

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Interestingly, the lead characters maintain long-term sexual relationships with both men and women in the film. While the film has widely been characterized in the media as the first “gay western”, it is worth thinking about why it was not characterized as a “bisexual western”. See e.g. Liam Lacey, “Out of the closet, into the campfire” *The Globe & Mail* (16 December 2005) R6 (“Brokeback Mountain has been hailed for its historic importance as the first openly gay western”).

<sup>118</sup> See generally, Patrick Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1965).

<sup>119</sup> Stychin, “Essential”, *supra* note [redacted] at 64; Halley, *supra* note [redacted] at 527;

<sup>120</sup> See generally, H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon P., 1968).

<sup>121</sup> The actual history of who is included and excluded from liberal communities is, of course, decidedly more complicated. See generally, Seyla Benhabib, ed., *Democracy and Difference: Contesting the boundaries of the political* (Princeton: Princeton U.P., 1996).

<sup>122</sup> Kenji Yoshino, “The Epistemic Contract of Bisexual Erasure” (2000) 52 *Stan. L. Rev.* 353 at 405 [Yoshino, “Bisexual Erasure”].

<sup>123</sup> Stychin, “Essential”, *supra* note [redacted] at 57.

*Egan v. Canada*, the Supreme Court decision that brought sexual orientation into the ambit of constitutionally prohibited grounds of discrimination. As the Court put it,

[W]hether or not sexual orientation is based on biological or physiological factors, which may be a matter of some controversy, it is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of s. 15 protection as being analogous to the enumerated grounds.<sup>124</sup>

This passage, which has been picked up in other major sexual minority rights cases,<sup>125</sup> is only slightly less essentialist than the assertion of absolute immutability made in *Ward*. While the passage concedes that sexual orientation *may* not be entirely biological, it justifies extending equality rights to sexual minorities solely on the basis that sexual minorities cannot – or can only with great difficulty – change their sexual orientation.<sup>126</sup>

Queer theory, preoccupied as it is with how sexual identity is constructed, offers a helpful perspective on the relation between this judicially endorsed understanding of the relatively rigid nature of sexual orientation and the skepticism displayed by IRB Members towards sexual identities that are fluid and flexible. Indeed, when one reads the low success rates of bisexual refugee claimants through the lens of queer theory, one can see that skepticism towards flexible and fluid sexual identities is partly constitutive of contemporary sexual minority refugee jurisprudence. It is to such a reading that we will now turn, by taking a closer look at how we might account for the low success rates of bisexual refugee claims made in Canada.

### ***A. The “Myth” of Bisexuality (or “it’s just a phase”)***

One possible explanation for the low success rates in bisexual claims is a simple one: there is no such thing as bisexuality. Because bisexuality does not exist, allegedly bisexual refugee claimants must really be economically motivated migrants making fraudulent claims. Migrants, this reasoning runs, are aware that those fleeing persecution on account of their sexual orientation are eligible for refugee status. In order to qualify to refugee status on these grounds despite their apparently heterosexual behavior (e.g. a cross-sex spouse, a history of cross-sex sexual relations), they fabricate stories about fearing persecution on account of bisexuality. Because the IRB does a relatively good job at detecting fraudulent claims, the grant rates for bisexual claimants are understandably low. This explanation also has the added benefit of accounting specifically for the high rates at which bisexual refugee claimants’ asserted sexual identities are disbelieved in published decisions.

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<sup>124</sup> *Egan*, *supra* note [redacted] at 528-9 (emphasis added).

<sup>125</sup> *Vriend*, *supra* note [redacted] at ¶90; *M. v. H.*, [1999] 2 S.C.R. 3 at ¶64; *Halpern v. Canada* (2003), 65 O.R. (3d) 161.

<sup>126</sup> For a persuasive critique of the way courts frame sexual minority equality rights in these terms see e.g. Robert Leckey, “Chosen Discrimination” (2002) 18 *Supreme Court Law Review* (2d) 445.

There is, however, an obvious problem with such an explanation: if claimants wish to fabricate false narratives of persecution, it seems strange that they would choose a narrative that is so singularly unsuccessful. Would it not be strategically wiser to choose another type of persecution?

Notwithstanding the forcefulness of this objection, it must be said that this explanation tracks quite closely onto the widespread popular view that bisexuality is a “myth”, and that all people are, at least in the long run, either gay or straight.<sup>127</sup> Jennifer Baumgardner, a prominent bisexual activist, notes that one of the common forms of the contention that there is no such thing as bisexuality is the argument that bisexuals are simply going through a “phase”:

The common assertion is that so-called bisexuals aren’t truly attracted to both sexes but are actually straight but otherwise experimenting, or are really gay but not able to own up. In other words, it’s a phase, and one that is generally disparaged at that.<sup>128</sup>

The view that all people are, in the long run, either essentially straight or gay appears to be especially common in sexual minority communities, where bisexuality is often viewed as a phase on the path to homosexuality. As Yoshino puts it,

The belief that bisexuals are protohomosexuals is a particularly prevalent one among gays... Like straights, gays have observed ‘bisexuals’ subsequently come out as gay. But presumably unlike self-identified straights, some self-identified gays have gone through this phase themselves. This experience may lead them to become suspicious of those who claim bisexuality as a stable identity.<sup>129</sup>

It is, of course, important to acknowledge that many individual lesbians and gay men have, in fact, experienced bisexuality as a transitional identity.<sup>130</sup> The same, however, could also be said of heterosexuality.

The interesting question for our purposes, then, is not whether expressed sexual identities change over time – they clearly can. Rather, the question is whether it is appropriate to equate an authentic sexual orientation with an underlying essential characteristic that persists regardless of one’s actual sexual behavior and irrespective of the sexual identity that one both personally and publicly acknowledges. In other words, is it appropriate to respond to assertions of particular sexual identities, that those sexual identities are not in fact genuine if some of the individuals who assert them later adopt a different identity?

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<sup>127</sup> Yoshino, “Bisexual Erasure”, *supra* note [redacted] at 395. For a prominent example of the argument that all people (or at least all men) are either straight or gay, see e.g. Benedict Carey, “Straight, Gay or Lying? Bisexuality Revisited” in *The New York Times* (5 July, 2005) F1.

<sup>128</sup> Baumgardner, *supra* note [redacted] at 4.

<sup>129</sup> *Ibid.* at 398-9.

<sup>130</sup> *Ibid.*

To answer this question, it is helpful to consider social scientific evidence that indicates that sexual identity is complex and fluid. Studies of women who have sex with women, for example, often find that sexual practices are rather more complicated than neat labels would have it:

[T]wo thirds of... women who reported a female sexual partner in the previous 5 years also reported having a male partner during the same period... [T]hese patterns of non-exclusive attractions and behavior are found even among women who considered themselves lesbian (rather than bisexual).<sup>131</sup>

Studies involving men who have sex with men have produced similar findings regarding the complexity of sexual identity: many gay men regularly have sex with women, and many straight men regularly have sex with men.<sup>132</sup> As the famous Janus & Janus study in 1993 concluded:

[T]here is often a looseness of labeling relative to any particular sexual activity... [A]lthough there were respondents who identified themselves as heterosexual and reported having homosexual relations, there were also a number of respondents who identified themselves as homosexuals and reported that they have heterosexual relations.<sup>133</sup>

In other words, sexual identity is best understood to involve a degree of fluidity and flexibility. It is, in this respect, decidedly problematic that the IRB employs evidence of changes in sexual behavior over time to cast doubt on sexual minority refugee claimants' asserted sexual identities.<sup>134</sup> Even more troubling is the possibility that sexual minority refugees may have their successful refugee determinations vacated on the basis of fraud or misrepresentation, where evidence of purportedly inconsistent post-hearing sexual behavior comes to the attention of authorities.<sup>135</sup> Both of these practices are based on assumptions about the rigidity of sexual orientation that are at odds with social scientific evidence indicating that sexual identity and sexual behavior regularly diverge.

Notwithstanding the fluidity and flexibility of sexual behavior and sexual identity, it remains important to appreciate that many bisexuals experience their subject positions as relatively stable. A number of large-scale studies on sexual orientation have attempted to measure the frequency of relatively stable bisexuality in the population. Such studies include the Kinsey studies in 1948 and 1953, the Masters & Johnson study in 1979, the Janus & Janus study in 1993 as well as the Wellings study and the Laumann

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<sup>131</sup> Lisa Diamond, "Was it a Phase? Young Women's Relinquishment of Lesbian / Bisexual Identities Over a 5-Year Period" (2003) 84 *J. of Personality and Social Psychology* 352

<sup>132</sup> Michelle Amestory, "Research on sexual orientation labels' relationship to behaviors and desires" (2001) 1 *Journal of Bisexuality* 91.

<sup>133</sup> Samuel Janus & Cynthia Janus, *The Janus Report on Sexual Behavior* (New York: Wiley, 1993) at 70, cited in Naomi Mezey, "Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts" (1995) 10 *Berkley Women's L.J.* 98 at 105, n29.

<sup>134</sup> See text accompanying note [redacted].

<sup>135</sup> See text accompanying notes [redacted].

study in 1994.<sup>136</sup> Yoshino, after conducting an extensive comparative review, found that, in these studies “bisexuals are estimated to comprise anywhere from 0.2% to 15% of the total population.”<sup>137</sup>

The main reason for these wide-ranging estimates of the frequency of bisexuality relates to variations in the way bisexuality is defined. If for example, bisexuality is defined as the possibility of responding sexually to individuals of either sex, then virtually everyone is bisexual. On the other hand, if bisexuality is only taken to refer to those people who engage in a precisely equal number of sexual acts with men and women – or even more narrowly, those who engage only in sexual acts with men and women simultaneously – then of the incidence of bisexuality will be understandably low.<sup>138</sup>

According to Yoshino, however, regardless of the definition employed in these studies and despite their wide-ranging results, the studies share one surprising conclusion: “each study found that the incidence of bisexuality was greater than or comparable to the incidence of homosexuality.”<sup>139</sup> That is to say, while the total number individuals identified as bisexuals varied from study to study, the finding that bisexuals outnumber gays and lesbians was consistent. The myth that there is no such thing as bisexuality should, therefore, be rejected.

If these studies’ conclusions regarding the incidence of bisexuality are accurate, why does the commonplace view that bisexuality is a myth persist? One possible explanation can be located in a persistent theme in the literature engaging with bisexuality: bisexuals are largely invisible in both mainstream and sexual minority communities.<sup>140</sup>

In a study of academic and popular media sources in 2000, Yoshino, found that the term “homosexuality” appears more frequently than the term “bisexuality” by several orders of magnitude.<sup>141</sup> If the Canadian legal academy can be taken as representative of the overall trend, it would appear that little has changed since Yoshino conducted his research. As of 2007, the Index to Canadian Legal Literature lists 133 law journal articles and texts discussing homosexuals, 128 discussing lesbians, but only 3 discussing bisexuals.<sup>142</sup>

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<sup>136</sup> For a review of these studies, see Yoshino, “Bisexual Erasure”, *supra* note [redacted] at 388.

<sup>137</sup> *Ibid.* at 380.

<sup>138</sup> For a comprehensive discussion of the different possible definitions of bisexuality, see *Ibid.* at 370-377.

<sup>139</sup> *Ibid.* at 380.

<sup>140</sup> Hemmings, *supra* note [redacted], at 82-90; Ochs, *supra* note [redacted] at 225; Yoshino, “Bisexual Erasure”, *supra* note [redacted] at 364-370,

<sup>141</sup> Yoshino, “Bisexual Erasure”, *Ibid.* at 368.

<sup>142</sup> These results were obtained on 5 March 5, 2007, searching for the terms “homosex!”, “lesbian!” and “bisex!” in Quicklaw’s Index to Canadian Legal Literature. Searches of full-text sources offer a somewhat higher proportion of legal articles touching on bisexuality. For example, a search on the same date for the same terms in LEXIS’ Canadian Law Journals database offered 275 articles referring to homosexuals, 272 referring to lesbians, and 62 referring to bisexuals. The vast majority of the references to bisexuals in these articles, however, were only in passing. Frequently, the term was employed only as part of designations of LGBT communities.

Robyn Ochs contends that one of the reasons for this lack of attention to bisexuality is that social conventions render individual bisexuals invisible:

In a culture that assumes that we are all either gay or straight, the presumed sexuality of an individual bisexual person is usually determined by the person with whom he or she is or has been known to be romantically involved.<sup>143</sup>

Ochs also notes that there are few spaces in which a person will be presumed to be bisexual: “In most families, for example, members are presumed to be heterosexual; conversely, at a women’s bar all the women present are presumed lesbians.”<sup>144</sup>

Beyond propagating the myth that there is no such thing as bisexuality, bisexual invisibility has further troubling implications for bisexual refugee claimants: as a result of this invisibility, there are few popular images or stereotypes of bisexuality that bisexual refugee claimants can fit themselves into. As we have seen, sexual minority refugee claimants succeed only to the extent that their sexual identities and experiences of persecution map onto the stereotypes held by refugee adjudicators.<sup>145</sup> Bisexual refugee claimants are thus in the impossible position of having to substantiate their sexual identity to adjudicators who might not believe that bisexuality exists, and who don’t have a sense of what bisexuals might look like if they do exist. In my view, this goes some lengths towards explaining the low grant rates in bisexual refugee claims in Canada.

One strategy to address this problem would be to work towards enhancing the visibility of the bisexual community. In the past few years there have been some positive steps in this direction. Bisexual life narratives are receiving more attention than they did in the past, by virtue of the concerted efforts of bisexual writers and activists.<sup>146</sup> It would be advisable for advocates for sexual minority refugee claimants to familiarize themselves with these materials so that they may communicate them to refugee adjudicators. The IRB could also contribute in this regard by publishing positive decisions involving bisexual refugee claimants. Such a move would not only increase the familiarity of refugee advocates with the specificity of bisexual claims, but also signal that bisexual cases will be taken seriously. Finally, those involved in bisexual communities might helpfully take an active role in engaging with those working in the refugee field. Such engagement could take the form of preparing scholarly articles specific to bisexuality and migration, serving as expert witnesses at refugee hearings, or

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<sup>143</sup> Ochs, *supra* note [redacted] at 225.

<sup>144</sup> *Ibid.*

<sup>145</sup> See text accompanying notes [redacted].

<sup>146</sup> For a comprehensive review of recent publications in this area, see Ronald Fox, “Bisexuality: A reader’s guide to the social science literature” in Ronald Fox (ed), *Current Research on Bisexuality* (New York: Harrington Park P., 2004) 161. See also, Serena Anderlini-d’Onofrio (ed.), *Women and Bisexuality: A global perspective* (New York: Hawthorn P., 2003); Dawn Atkins, *Bisexual Women in the 21<sup>st</sup> Century* (New York: Haworth P., 2002); Baumgardner, *supra* note [redacted]; William Burleson, *Bi America: Myths, Truths, and Struggles of an Invisible Community* (New York: Harrington Park P., 2005); Loraine Hutchins & Lani Ka’ahumanu (eds.), *Bi Any Other Name: Bisexual People Speak out* (Boston: Alyson Pub., 1991); Merl Stor, *Bisexuality: A critical reader* (New York: Routledge, 1999).

even acting as facilitators in IRB training sessions or professional legal education courses.

### ***B. Heterosexual Privilege and Homosexual Behavior (or “doubling your chances on Saturday night”)***

Supposing that we reject the contention that bisexuality is a myth, another possible explanation for the low grant rates for bisexuals refugee claimants is that although bisexuals may exist, they are not subject to persecution because they have access to heterosexual privileged. As a result, bisexual refugee claimants’ assertions of persecution are likely fraudulent, and these fraudulent claims are accurately detected by the IRB, thus producing the low grant rates.

In the literature on bisexuality, one frequently encounters the notion that bisexuals do not face persecution. In fact, in this literature, there is an entire category of persons, termed “defense bisexuals”,<sup>147</sup> whose bisexuality supposedly allows them to take “advantage of heterosexual privilege while engaging in clandestine homosexual activity.”<sup>148</sup>

In my view, there are serious reasons to question whether bisexuals can, in fact, enjoy the advantages of belonging to heterosexual and homosexual communities simultaneously. Woody Allen famously quipped that bisexuality allows one to “double one’s chances on a Saturday night.”<sup>149</sup> However, most bisexual writers suggest that their experience is exactly the contrary. Rather than enjoying heterosexual privilege, such writers contend that bisexuals simultaneously confront homophobia from straight quarters, compounded with exclusion from many queer communities.<sup>150</sup>

On the one hand, in homophobic environments, the distinction between bisexuality and other sexual minority identities that challenge heteronormativity is seldom made.<sup>151</sup> Indeed, many violently homophobic individuals are likely insufficiently aware of the diversity of sexual identities in sexual minority communities as to be able to distinguish among them.

On the other hand, sexual minority spaces where homophobia can be avoided are often unwelcoming towards bisexuals. Witness, for example the refusal of some queer communities to allow bisexuals to participate in gay and lesbian community

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<sup>147</sup> Yoshino, “Bisexual Erasure”, *supra* note [redacted] at 371-2.

<sup>148</sup> *Ibid.* at 429.

<sup>149</sup> Woody Allen, cited in *Ibid.* at 421.

<sup>150</sup> See generally, Ruth Colker, “A Bisexual Jurisprudence” (1993) 3 *Law & Sexuality* 127 at 130-134 [Colker, “Bi Jurisprudence”]; Robyn Ochs, “Biphobia: it goes more than two ways” in Beth Firestein (ed.), *Bisexuality: The psychology and politics of an invisible minority* (Thousand Oaks, CA: Sage, 1996); Patrick Mulick & Lester Wright, “Examining the Existence of *Biphobia* in the Heterosexual and Homosexual Populations” (2002) 2:4 *Journal of Bisexuality* 45.

<sup>151</sup> Ochs, *Ibid.* at 222.

organizations,<sup>152</sup> Pride celebrations<sup>153</sup> or lesbian feminist spaces.<sup>154</sup> As Marjorie Garber puts it:

Most bisexuals... describe their isolation or ostracization from the gay or queer community, and their sense of apartness from the world of “heterosexual privilege” in which many gays and lesbians have thought them to be seeking.<sup>155</sup>

Taken together, this experience of simultaneous exposure to homophobia and exclusion from homosexual communities leads many to suggest that bisexuals confront not only heterosexism but also *monosexism* – i.e. discrimination against those whose sexual orientation is not exclusively heterosexual or exclusively homosexual.<sup>156</sup>

If we take seriously these concerns regarding monosexism, we should reject the explanation that the low success rates for bisexual refugee claimants is due to the ability of bisexuals to avoid persecution by resort to heterosexual privilege.

Perhaps more significantly, we should also be skeptical of the notion that bisexual refugee claimants can automatically access institutions and spaces that provide some degree of protection against persecution for gays and lesbians. That is to say, we should question the IRB’s common practice of relying on evidence establishing that gays and lesbians in a particular country enjoy protection from persecution to conclude that bisexuals are able to access similar protection.<sup>157</sup> Instead, adjudicators should be encouraged to consider evidence that explicitly addresses the conditions faced by bisexuals.<sup>158</sup>

For this to occur, advocates for bisexual refugee claimants must make sustained efforts to highlight the unreliability of country conditions evidence that fails to address bisexual specific concerns. Moreover, organizations that report on the conditions faced by sexual minorities will need to disaggregate their analyses so that reliable bisexual specific evidence is available. This would include government research bodies such as the IRB Research Directorate.<sup>159</sup> It would also, however, include non-governmental organizations such as Amnesty International, Human Rights Watch, and the International

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<sup>152</sup> Richard Morgan, “Campus Byways: Bisexual students at several colleges say they face discrimination from campus gay groups – so now they’re striking out on their own” *The Advocate* (9 December 2003) 32.

<sup>153</sup> Claire Hemmings, *Bisexual Spaces: A geography of sexuality and gender* (New York: Routledge, 2002) at 53-97.

<sup>154</sup> Colker, “Bi Jurisprudence”, *supra* note [redacted] at 129-130; Sharon Stone, “Bisexual women and the ‘threat’ to lesbian space: Or what if all the lesbians leave?” (1996) 16(1) *Frontiers* 101.

<sup>155</sup> Marjorie Garber, *Bisexuality & the Eroticism of Everyday Life* (New York: Routledge, 2000) at 39.

<sup>156</sup> See e.g. Ruth Colker, *Hybrid: Bisexuals, Multiracials and Other Misfits Under American Law* (New York: N.Y.U.P., 1996) at 16; Marjorie Garber, *Bisexuality & the Eroticism of Everyday Life* (New York: Routledge, 2000) at 39; Yoshino, “Bisexual Erasure”, *supra* note [redacted] at 369.

<sup>157</sup> See text accompanying notes [redacted].

<sup>158</sup> And, in fact, the country condition information should be further disaggregated in order to account for other intersectional considerations such as gender, race, class, able-bodiedness and so on. See e.g. Swink, *supra* note [redacted].

<sup>159</sup> The IRB Research Directorate provides research on country conditions for the use of IRB Members. Online: <<http://www.irb-cisr.gc.ca/en/research>> (accessed: 20 December 2006).

Gay and Lesbian Human Rights Committee, all of which prepare reports that are regularly employed as evidence in sexual minority refugee hearings.

### ***C. Bisexual Erasure (or “but I didn’t choose to be gay”)***

Unfortunately, efforts to bring greater attention to the specific challenges faced by bisexuals, as well as to enhance bisexual visibility more generally, cannot be easily accommodated in existing Canadian refugee jurisprudence. In fact, skepticism regarding the very existence of bisexuality is built into the foundational principle of this jurisprudence, namely, that sexual minorities are entitled to refugee protection because, and only because, sexual orientation is an innate and unchangeable characteristic.

As we have seen, queer theorists characterize this type of argument – i.e. sexual minorities are deserving of protection against persecution because they cannot choose their sexual orientation – as the “immutability defense”. According to Yoshino, there is a link between the immutability defense and what he calls the “epistemic contract of bisexual erasure.”<sup>160</sup> This epistemic contract is the result of an interest shared by queer and straight communities alike in stabilizing essentialist understandings of sexual identity. Straight communities have an obvious interest in stabilizing sexual orientation, because heterosexuality is a privileged identity.<sup>161</sup> Yoshino contends, moreover, that “gays also have... [an] interest in guarding the stability of homosexuality, insofar as they view that stability as the predicate for the ‘immutability defense’.”<sup>162</sup>

Bisexuality poses a threat to essentialist understandings of sexual orientation and to the immutability defense in two senses. First, many bisexuals experience their sexual orientation as fluid, flexible, and partly chosen, thereby undermining the essentialist account of sexual orientation. Second, bisexuality complicates the relationship between sexual orientation and sexual behavior. Let us examine each of these points in greater detail.

With respect to the first point, it is, of course, important to acknowledge that some bisexuals experience their sexual identity as innate and unchangeable: they are bisexual, always have been bisexual, and always will be bisexual.<sup>163</sup> As such, bisexuality need not pose a direct challenge to essentialist accounts of sexual orientation. Instead, bisexuality could simply be imagined as another possible innate and unchangeable personal characteristic, in addition to heterosexuality and homosexuality.<sup>164</sup>

The problem with such a view, however, is that a common theme in much bisexual literature is that bisexuals often experience their sexual identities contextually,

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<sup>160</sup> Yoshino, *supra* note [redacted] .

<sup>161</sup> *Ibid.* at 361.

<sup>162</sup> *Ibid.*

<sup>163</sup> See e.g. Wayne Roberts, “The Making of an Australian Bisexual Activist” in Sharon Rose et al (eds.), *Bisexual Horizons* (London: Lawrence & Wishart, 1996) 149 at 149 (“Since I was about eight years old, I have been involved with other boys as well as having girlfriends”).

<sup>164</sup> Yoshino, *supra* note [redacted] at 405.

contingently, and fluidly.<sup>165</sup> In particular, many bisexuals experience shifts in their sexual identities over time as their desires, fantasies, or sexual and life partners change.<sup>166</sup> Bisexual identities may also shift depending on who one happens to be conversing with, and the degree to which one's interlocutors are familiar with the diversity of sexual minority identities.

Moreover, many bisexuals are partly attracted to bisexuality precisely because of its potential to offer a fluidity that may be difficult to locate in other sexual identities. As queer activist Carol Queen puts it: "If a bisexual community can form with no need to define itself in relation to its 'opposite', perhaps there I will have my coming-out place. Until then, home is not a place, but a process."<sup>167</sup> Notice the contingency here. Queen is saying that *if* bisexual communities offer sufficient fluidity and avoid the pitfalls of essentialism, *then* she may be willing to adopt a bisexual sexual identity. This notion, whereby bisexuality is viewed as a (potentially) choiceworthy and overtly political sexual identity is common to many bisexuals.<sup>168</sup>

One way that the life experiences of (some) bisexuals challenge essentialist accounts of sexual orientation, then, is by virtue of the fluidity and chosen nature of (some) bisexual identities.

The second challenge bisexuality poses is to partly undermine the immutability defense erected upon essentialist understandings of sexual orientation. This challenge is related to the way that bisexuality complicates the link between sexual minority identity and sexual minority behavior.

In order to effectively move from the notion that sexual orientation is an innate and unchangeable personal characteristic to the principle that sanctions against sexual minority behavior amount to discrimination or persecution, there must be a strong link between sexual identity and sexual conduct. Opponents of sexual minority rights frequently seek to challenge this link. Even if it is the case, their reasoning runs, that people cannot choose their sexual orientation, that does not mean they cannot choose whether to engage in particular sexual behavior. Prohibitions on sexual minority conduct are thus not necessarily directed towards punishing individuals for matters beyond their control. As representative of such a view, consider the following comments by Cardinal Joseph Ratzinger (as he then was): "The Church teaches that respect for homosexual persons cannot lead in any way to approval of homosexual behavior."<sup>169</sup>

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<sup>165</sup> See generally, Donald Hall & Maria Pramaggiore (eds.), *Representing Bisexualities: Subjects and cultures of fluid desire* (New York: New York U.P., 1996).

<sup>166</sup> See M. King, "It could be either" in Rose, *supra* note [redacted] 105 at 105 ("Having lived for a number of years as a heterosexual and then for an equally long period as a lesbian, I have lately arrived at a kind of bisexual synthesis"); Mezey, *supra* note [redacted] at 117 ("Stacey Young, who considered herself a lesbian, did not call herself a bisexual until she had been with the man she had fallen in love with for three and a half years").

<sup>167</sup> Carol Queen, cited in Mezey, *supra* note [redacted] at 103.

<sup>168</sup> See e.g. Simon Scott, "Politically Bi" in Rose, *supra* note [redacted] 236.

<sup>169</sup> Joseph Ratzinger & Angelo Amato, "Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons" (23 June 2003) online: <[http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20030731\\_homosexual-unions\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20030731_homosexual-unions_en.html)> (accessed: 4 September 2006).

The link between sexual minority identity and sexual minority conduct, however, becomes even more attenuated when bisexuals are added to the mix. Bisexuals living in homophobic societies could, in principle, choose to engage only in cross-sex sexual activity, thereby avoiding persecution while still leading a sexual life. In such circumstances, even if bisexuality is an innate and immutable person characteristic, the immutability defense provides less a justification for why it would be unfair to require bisexuals to restrict their choice of sexual partners to members of the opposite sex than it does for gays and lesbians, for whom such a restriction arguably entails forsaking a sexual life in its entirety.<sup>170</sup>

It is significant in this regard that out of the 160 sexual minority refugee decisions that I identified from 2001 to 2004,<sup>171</sup> the only decision that turns on a split between sexual identity and sexual conduct involved a bisexual claimant. In that case a bisexual man from Nigeria faced the possibility of being charged in Nigeria with having “carnal knowledge of any person against the order of nature”, an offence that carried a maximum sentence of 14 years.<sup>172</sup> The IRB denied the claim on the basis that the claimant faced not persecution on account of his sexual orientation but prosecution pursuant to lawful sanction. On judicial review, the Federal Court notes:

While the applicant describes this as a law against homosexuality, it is actually a law against certain types of conduct... not tolerated between any citizens, regardless of their sexual orientation. I find no reason to interfere with the Board's conclusion that a law... which prohibited certain types of sexual behaviour was not a persecutorial law.<sup>173</sup>

While this case – which is, in my view, wrongly decided – is something of an outlier, it is surely not a coincidence that this reasoning appears in one of the few published bisexual refugee decisions, whereas it is absent from the much larger number of gay and lesbian refugee decisions.<sup>174</sup>

According to Millbank, sexual minorities who suffer mistreatment on account of their sexual orientation are offered refugee protection because they “cannot help but be gay [and] cannot help being persecuted for being gay because [they] cannot help expressing [that] gayness somehow.”<sup>175</sup> As we have seen, however, some bisexuals explicitly say that they have chosen to be bisexual. Moreover, even those bisexuals who “cannot help but be bisexual”, can, at least according to the reasoning of the Federal Court, avoid expressing their “gayness” and thereby avoid persecution: they can simply refrain from engaging in prohibited same-sex sexual behavior.

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<sup>170</sup> Stychin, “Essential”, *supra* note [redacted] at 63.

<sup>171</sup> See text accompanying notes [redacted].

<sup>172</sup> *Aire v. Canada (Minister of Citizenship and Immigration)*, *supra* note [redacted] at 11.

<sup>173</sup> *Ibid.* at 12 (emphasis added).

<sup>174</sup> Dauvergne, *Humanitarianism*, *supra* note [redacted] at 116.

<sup>175</sup> Millbank, “Visibility” *supra* note [redacted] at 92.

#### *D. Queering Canadian Refugee Law (or “beyond sheep and goats”<sup>176</sup>)*

We have seen, then, that the view that bisexuality is a myth, the invisibility of bisexual subject positions, and the contention that bisexuals enjoy heterosexual privilege, all produce serious challenges for bisexuals in general, and bisexual refugee claimants in particular. While bisexual communities have worked to increase awareness of these challenges, their efforts are hampered by an epistemic contract of bisexual erasure, a contract built upon essentialist understandings of sexual orientation and upon the immutability defence, both of which are incorporated into contemporary sexual minority refugee jurisprudence.

What then are the alternatives? How can we enhance the visibility of alternative sexual identities? How can we challenge the epistemic contract of bisexual erasure? How can we develop a sexual minority refugee jurisprudence that can better accommodate those of us who experience our sexual identities as fluid and flexible – indeed, those of us who find the fluidity of sexuality to be its most appealing and exciting feature?<sup>177</sup>

I believe that there is potential for locating alternatives in three distinct sites in Canadian refugee jurisprudence.

##### *Persecution on account of political opinion & religion*

First, more use could be made of the refugee law categories of persecution on account of political opinion and persecution on account of religion. Recall that refugee claimants must demonstrate a connection between the harm that they fear in their home country and one of the listed grounds of persecution, namely race, religion, nationality, membership in a particular social group or political opinion.<sup>178</sup> While most sexual minority refugee claimants attempt to fit their claims into the residual category of membership in a particular social group, as we have seen, some sexual minority refugee claimants – especially queer rights activists – have successfully asserted that they fear persecution on account of their political opinion.<sup>179</sup>

In *Ward*, the Supreme Court set out a broad definition of political opinion for the purposes of refugee law. Political opinion covers, “any opinion on any matter in which the machinery of state, government, and policy may be engaged.”<sup>180</sup> *Ward* also held that the political opinion in question could be one that is either expressed by refugee claimants themselves or imputed to them by the agents of persecution.<sup>181</sup> Moreover, *Ward* also reiterated that it is not necessary that the agents of political persecution be state actors.<sup>182</sup> Taken together, considering prominent assertions that the heterosexual

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<sup>176</sup> As Alfred Kinsey famously put it in his study on male sexuality, “The world is not to be divided into sheep and goats.” Kinsey, “Male Sexuality”, *supra* note [redacted] at 639.

<sup>177</sup> Butler, UG, *supra* note [redacted] at 80.

<sup>178</sup> *IRPA*, *supra* note [redacted], s.96.

<sup>179</sup> See text accompanying notes [redacted].

<sup>180</sup> *Ward*, *supra* note [redacted] at 693.

<sup>181</sup> *Ibid.* at 747.

<sup>182</sup> *Ibid.* at 716-717. See also *Klinko v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 327; [2000] F.C.J. No. 228 (QL) at ¶25-27.

family is the “fundamental unit” of society,<sup>183</sup> violence and discrimination targeting those who challenge heteronormativity can reasonably be characterized as persecution on account of political opinion. This category is thus not restricted to sexual minority rights activists, and should be considered with greater frequency both by advocates for sexual minority refugee claimants, as well as by IRB members.

A similar argument can be made with respect to the applicability of the category persecution on account of religion to the sexual minority refugee setting. Many religious authorities view heterosexuality as the only natural or religiously sanctioned form of human sexuality.<sup>184</sup> Where religious authorities – with or without the acquiescence of the state – attempt to compel adherence to heterosexuality, targeted violence and other systemic human rights violations directed towards sexual minorities can easily result.<sup>185</sup> While it is possible to characterize such human rights violations as persecution on account of sexual orientation, it is equally feasible to categorize them as persecution on account of religion.<sup>186</sup>

Increased resort to the categories of persecution on account of political opinion and persecution on account of religion would be helpful in the sexual minority refugee context because these categories focus attention away from scrutinizing the precise sexual identity of claimants. Instead, they highlight the way that political and religious authorities engage in systemic human rights violations in order to enforce heterosexuality. Such an approach can accommodate diverse sexual minorities because, rather than being required to prove that they are in fact members of specific unpopular groups (i.e. gays, lesbians, etc.), claimants must instead demonstrate that they face persecution on account of heterosexuality.

### *Persecution on account of gender*

The second site that offers helpful alternatives to the essentialism of contemporary Canadian refugee law is the possibility of framing sexual minority refugee claims in terms of gender-based persecution. *Ward* confirmed that those persecuted on account of gender are eligible for refugee protection.<sup>187</sup> Partly in response to this

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<sup>183</sup> See, e.g., *Egan*, *supra* note [redacted] at (Per La Forest) ¶27-28; *M. v. H.*, *supra* note [redacted] at ¶181 (per Gonthier, dissenting). For a sophisticated – though to my mind highly problematic – argument that heterosexuality ought to remain a central social institution, see Margaret Somerville, *The Ethical Imagination* (Toronto: House of Anansi Press, 2006) at 100-103.

<sup>184</sup> See e.g. *Catechism of the Catholic Church* (1997) 2357 (“Sacred Scripture... presents homosexual acts as acts of grave depravity, tradition has always declared that ‘homosexual acts are intrinsically disordered.’ They are contrary to the natural law”).

<sup>185</sup> See e.g. *C.X.S.(Re)*, [1995] C.R.D.D. No. 134 (QL) (“The intent of the sodomy law in Iran is to proscribe sexual activity that is considered a crime against God. With regard to the government’s own pronouncements and statements about homosexuality, it is clear that the authorities view homosexuality as one of the worst possible sins against God... the ultimate penalty is death”); *P.L.Z.(Re)*, [2000] C.R.D.D. No. 97 (QL) at ¶12 (“The legal system in Algeria is based on the precepts of Islamic religious Shari’a law. Under Shari’a law, homosexuality is considered to be an absolute and condemnable sin”).

<sup>186</sup> For a compelling argument that there are many underutilized possibilities for working with freedom of religion in the context of sexual minority rights at the international level, see Jeffery Redding, “Human Rights and Homo-secutuals: The International Politics of Sexuality, Religion and Law” (2006) 4 *Northwestern J. Int’l Hum. Rights* 436.

<sup>187</sup> *Ward*, *supra* note [redacted] at 739.

decision, the IRB developed guidelines for cases involving gender-based persecution<sup>188</sup> that have been widely influential in increasing the sensitivity of refugee determination systems around the world to gender-related issues.<sup>189</sup>

While the guidelines do not explicitly mention sexual minorities, gender-based persecution is relevant to sexual minority refugee claims in at least two distinct ways. First, sexual minorities may confront persecution on account of both gender and sexual identity simultaneously. Thus, for example, in addition to persecution on account of sexual orientation, lesbians frequently face amplified gender-persecution, ranging from rape, to family-based violence, to forced marriages.<sup>190</sup> Similarly, lesbians may be hindered by gender-based discrimination – in the employment, housing or social services sectors, for example – when they attempt to flee persecution on account of their sexual orientation.<sup>191</sup>

Secondly, it is possible to understand persecution against sexual minorities as persecution aimed at non-compliance with gender norms.<sup>192</sup> As LaViolette puts it,

Social, political, and legal disapproval of homosexuality is more often a reaction to the non-compliance to gender and social roles than a simple expression of contempt for the sexual practices of homosexuals. Generally, gender roles are based on a heterosexual orientation. Non-conformance with gender norms by gay men, lesbians, and transgendered persons implies a refusal to behave in ways dictated by their biological sex and social classification.<sup>193</sup>

As a practical example of this phenomenon, consider a decision involving a gay man from Mexico where the claimant began experiencing gender-based violence as a child when “classmates in primary school had insulted him and even beaten him... ‘to make a man of him.’”<sup>194</sup> Later in his life, when he reported receiving homophobic death threats, the police refused to take his case seriously, telling him, “Be a man.”<sup>195</sup> As such language indicates, homosexuality may be read as defective masculinity. Or, to put this same point in more general terms, gender – as it is traditionally understood – is partly constituted by

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<sup>188</sup> *IRB Chairperson's Guideline 4*, Women Refugee Claimants Fearing Gender-Related Persecution, Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act, Update, Effective November 13, 1996.

<sup>189</sup> See e.g. Karen Musalo, “Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence” (2003) 52 DePaul L. Rev. 777 at 779-80.

<sup>190</sup> Millbank, *Visibility*, *supra* note [redacted] at 77.

<sup>191</sup> Nicole LaViolette, “Gender Related Refugee Claims: Expanding the Scope of the Canadian Guidelines” (forthcoming) 19 International Journal of Refugee Law [redacted] [LaViolette, “Gender”] at [redacted].

<sup>192</sup> See generally, Butler, *GT*, *supra* note [redacted]; Sylvia Law, “Homosexuality and the Social Meaning of Gender” (1988) Wis. L. Rev. 187; James Willet, “Conceptualizing Private Violence Against Sexual Minorities as Gendered Violence” (1997) 60 Alb. L. Rev. 989.

<sup>193</sup> LaViolette, “Gender”, *supra* note [redacted] at [redacted].

<sup>194</sup> *Garibay Aguilar v. Canada (Minister Citizenship and Immigration)*, of [2004] R.P.D.D. No. 79 (QL) at ¶3 (emphasis added).

<sup>195</sup> *Ibid.* at ¶13.

heterosexuality. To be a woman or a man *means* to embody a particular role in a heterosexual dynamic.<sup>196</sup>

Framing sexual minority claims in terms of gender persecution rather than persecution against particular unpopular minorities would assist IRB decision makers to consider how persecution on account of gender and sexual orientation may intersect to the disadvantage of particular refugee claimants. Moreover, it would draw increased attention to the mutually constitutive relations between enforced heterosexuality and traditional gender identities. Such an approach is able to accommodate sexual identities beyond just gays and lesbians, because it is concerned with persecution against all those who defy traditional gender roles, regardless of their particular sexual identities. Finally, in the specific context of bisexual refugee claimants, a gendered approach would encourage IRB decision makers to consider how traditional gender roles may be enforced not only by heterosexist persecution, but also monosexist persecution. Bisexuality, after all, poses a simultaneous threat to the notion that individuals are naturally heterosexual and to the necessary connection between gender and sexuality.<sup>197</sup>

For the IRB to effectively consider these issues, it would be helpful if the guidelines on gender-based persecution were amended to specifically refer to the relevance of gender to the sexual minority refugee claimant context.<sup>198</sup>

#### *Persecution on account of voluntary associations*

The third site in Canadian refugee law where alternatives can be developed relates to the basis on which sexual minorities qualify, in themselves, as a particular social group for the purposes of the refugee definition. As we have seen, in *Ward*, the Supreme Court set out three possible bases for qualification as a particular social group for the purposes of Canadian refugee law:

- (1) groups defined by an innate or unchangeable characteristic;
- (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
- (3) groups associated by a former voluntary status, unalterable due to its historical permanence.<sup>199</sup>

While the Court went on to say that sexual orientation falls within the first category, in my view, the second category is more appropriate. According to this view, sexual minorities ought to be entitled to refugee protection, not on the grounds that sexual

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<sup>196</sup> Of course, as queer theorists persuasively demonstrate, the relation between gender and sex is decidedly more complex than such traditional understandings would have it. See generally, Butler, UG, *supra* note [redacted].

<sup>197</sup> Butler, UG, *supra* note [redacted] at 80.

<sup>198</sup> For a highly persuasive argument in favor of updating the IRB's gender guidelines to explicitly include sexual minority refugee claims, and for recommendations as to the content of those amendments, see LaViolette, "Gender", *supra* note [redacted].

<sup>199</sup> *Ward*, *supra* note [redacted] at 739.

orientation is an innate or unchangeable characteristic, but rather on the grounds that asking sexual minorities to forsake their associations with one another is an affront to their human dignity.<sup>200</sup>

I want to be clear here. To say that sexual minorities associate in a manner fundamental to their human dignity is not to concede that one necessarily *chooses* one's sexual orientation. An individual's associations might be explained by any number of factors, ranging from physiological factors, to psychological considerations, to political commitments, or simply to quirks of character or accidents of personal history. It is, therefore, not the motivations for sexual minority associations that are relevant, but rather the right to engage in those associations as a matter of fundamental human dignity.

Moving away from the immutability defense – the principle that sexual minorities ought to be protected from persecution because they cannot help but be queer – towards the fundamental dignity approach carries a number of advantages.

Firstly, such a move would contribute to shifting the terms of the debate in the sexual minority rights field more generally away from the issue of chosen conduct versus innate and immutable personal characteristics, towards the question of the relation between sexuality and fundamental human dignity.<sup>201</sup> I acknowledge that there are a number of positions that can, in good faith, be taken with respect to how to best understand this relation.<sup>202</sup> However, the legal and political conversations that would emerge from a conversation about this relation would surely be more constructive than the current “we can't help it” / “yes you can” shouting match. In particular, such conversations would help to further refine the right to sexual self-determination that appears to be slowly emerging in both constitutional and international law.<sup>203</sup>

Secondly, asking the IRB to consider whether claimants are persecuted because of their associations minimizes the degree to which the IRB must scrutinize claimants' sexual identities. As we have seen, queer theory takes issue with the essentialist notion that individuals have true or authentic sexual orientations. As a result, for queer theorists, it is problematic that, under the current innate and immutable approach to sexual orientation refugee claims, IRB Members attempt to assess whether the claimants before them are “really” gay, lesbian, or some other asserted innate and immutable sexual identity. Admittedly this problematic is to some degree built into the membership in a social group category, because claimants must demonstrate that are, in fact, members of the particular social group in question. However, the way the social group is framed can

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<sup>200</sup> For a similar argument in the context of Canadian constitutional equality jurisprudence, see Leckey, *supra* note [redacted].

<sup>201</sup> See generally, Leckey, *supra* note [redacted].

<sup>202</sup> For an example of what I would term a good faith – though to my mind highly problematic – conservative view of the relation between sexuality and human dignity see Sommerville, *supra* note [redacted] at 100-103.

<sup>203</sup> See e.g. Brenda Cossman, “Gender Performance, Sexual Subjects and International Law” (2002) 15 *Can. J.L. & Juris.* 281 at 294; Berta Hernandez-Truyol, “Querying Lawrence” (2004) 65 *Ohio St. L.J.* 1151 at 1179; Millbank, “Visibility”, *supra* note [redacted] at 110; Kristen Walker, “Capitalism, Gay Identity and International Human Rights Law” (2000) 9 *Australasian Gay and Lesbian L.J.* 58 at 70-71.

significantly affect the level of the scrutiny to which allegations of membership in the social group are subject.

The innate and immutable approach frames the relevant social groups very narrowly: gays, lesbians, and, at least in principle, other groups with innate and immutable sexual minority identities. IRB Members must then somehow work out whether the persons before them actually fall within those groups. As we have seen this task leads IRB Members to draw heavily on stereotypes about what individual members of such groups are like, stereotypes that work to the disadvantage of particular subsets of these groups. Among such subgroups are those whose sexual identities are fluid, flexible, contingent, and partly chosen, fit only with difficulty into groups framed in this narrow manner.

The fundamental dignity approach, on the other hand, casts the relevant social group much more broadly: those whose associations challenge heteronormativity. Under this approach, instead of asking whether a person is truly a member of a particular sexual minority, IRB Members simply need to determine whether a person is likely to associate – or to be perceived as associating – with others in a manner that challenges the inevitability or desirability of exclusive heterosexuality. As a result, rather than mandating the suspect exercise of assessing refugee claimants’ “true” or “authentic” sexual identities, the fundamental dignity approach directs IRB Members towards the task of inquiring into alleged human rights violations aimed at compelling claimants to forsake associations in the name of heterosexuality.

Taken together, increased resort to the categories of persecution on account of political opinion and religion, persecution on account of gender, as well as the shift towards the fundamental dignity approach to sexual minority refugee law, would allow Canadian refugee law to better accommodate sexual minorities beyond gays and lesbians. None of these approaches reinforce either the immutability defense or its essentialist underpinnings. None, that is to say, presumes that there are a certain number of naturally delimited categories of unpopular sexual minorities who must be protected from persecution because individuals are not to blame for their unchosen and unchangeable sexual identities. Instead, under each approach, all those who are persecuted because they challenge heteronormativity and/or traditional gender roles are eligible for protection – including those whose sexual identities are fluid, flexible, contingent and partly voluntary.

By building a sexual minority refugee jurisprudence that can accommodate the complexity and fluidity of (some) sexual minority identities and behaviors, we can contribute to a central project of queer theory: directing critical gaze away from the question of what makes some people gay towards the question what makes some people straight.<sup>204</sup> If sexual identity is complex, fluid and at least partly related to voluntary

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<sup>204</sup> This project can occur in many legal sites simultaneously. For an argument that there are interesting opportunities to engage in such a project in the family law context, see Richard Collier, “Heterosexual(izing) Family Law” in Carl Stychin & Didi Herman, eds., *Law and Sexuality: The Global Arena* (Minneapolis: University of Minnesota Press, 2001) 164.

association, then the issue of why it is that many people understand their sexual identity in innately and unchangeably heterosexual terms becomes a puzzle to be explored.<sup>205</sup> In attempting to work out this puzzle we must confront the question of whether heterosexuality is both enforced and constituted by the mistreatment of those who challenge heteronormativity. In other words, a more flexible approach to sexual minority refugee jurisprudence encourages us to move beyond thinking of homophobic violence as mere persecutory reactions to an unpopular minority. Instead, it emphasizes that these practices may be necessary for creating the (purportedly) heterosexual and gendered majority, necessary for the emergence of compulsorily heterosexual<sup>206</sup> and compulsorily gendered subjects.<sup>207</sup>

It is for this reason that a sexual minority refugee jurisprudence attentive to political and religious persecution, to gender based persecution, and to fundamental human dignity is a queer jurisprudence. It is a jurisprudence that does not merely seek to carve out new discrete spaces on a continuum of legally protected sexual identities with homosexuality and heterosexuality as the poles of the continuum. Rather, it seeks to explode the continuum by inquiring into how the existence of the poles themselves might be contingent upon heterosexist assumptions.

## CONCLUSION

Published bisexual refugee decisions frequently employ the terms “confused” to describe claimants’ testimony regarding their sexual identities. In this article, however, I have suggested that it is Canadian refugee law that is confused in its approach to sexual minority refugee claims.

My major contention has been that a primary source of this confusion is the essentialist account of sexual orientation as an innate and immutable personal characteristic that is at the heart Canadian sexual minority refugee law. When decision makers confront the complexity of human sexuality in all its diversity, they cannot accommodate many non-heteronormative sexual identities within essentialist understandings of sexual orientation. The result is that sexual minority refugee claimants’ recounted life experiences that depart from judicially endorsed understandings of sexual orientation are subject to heightened scrutiny. Bisexuals are an example of a particular subset of sexual minorities that face such heightened scrutiny, in large part because bisexuals frequently present their sexual identities not as innate and immutable, but rather as flexible, fluid and contingent. It is thus not surprising that bisexual refugee claimants experience dramatically lower grant rates relative to both sexual minority claimants and traditional refugee claimants. So long as sexual minority refugee jurisprudence protects sexual minorities fleeing persecution because, and only because, sexual orientation is viewed as an innate and unchangeable characteristic, particular sexual minorities –

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<sup>205</sup> See e.g. Didi Herman, “Are We Family? Lesbian Rights and Women's Liberation” (1990) 28 Osgoode Hall L.J. 789 at 813.

<sup>206</sup> See e.g., Adreinne Rich, “Compulsory Heterosexuality” in *Blood, Bread, and Poetry* (New York: Norton Paperback, 1994).

<sup>207</sup> See e.g., Phyllis Burke, *Gender Shock: Exploding the myths of male and female* (New York: Anchor Books, 1996).

including bisexuals – whose identities cannot be understood in these terms will encounter difficulties accessing their rights.

Fortunately, Canadian refugee law provides a number of sites in which to develop a more flexible approach to sexual minority refugee law. In particular, sexual minority refugee claims should increasingly be framed as involving persecution on account of political opinion, on account of religion, and on account of gender. Moreover, it is time to rethink the basis on which sexual minorities are eligible for refugee protection by virtue of the residual category of persecution on account of membership in a particular social group. The reason sexual minorities ought to qualify as a particular social group is because sexual minorities associate for reasons fundamental to their human dignity, not because sexual orientation is an innate and unchangeable personal characteristic.

A new sexual minority jurisprudence erected upon these foundations would be a queer jurisprudence. Rather than merely attempting to carve out spaces in which particular sexual minorities can access their rights, this jurisprudence would highlight the ways in which enforced heterosexuality may be necessary to constitute contemporary gender and sexual identities.

One of the central advantages of building a queer refugee jurisprudence in this manner is that it avoids putting refugee adjudicators in the impossible position of attempting to definitively determine the “true” or “authentic” sexual orientation of those who appear before them. Instead of scrutinizing the sexual identities of queer refugee claimants, the approach I have recommended places heteronormative persecution – the affronts to human dignity built into enforced traditional gender roles and compulsory heterosexuality – front and centre in sexual minority refugee adjudication.

Of course, making conclusive findings about whether a person is likely to suffer persecution on such grounds is, like all factual determinations in the refugee field, challenging.<sup>208</sup> But at least, unlike the existing process built upon the innate and immutable approach to human sexuality, it is a task that does not require refugee adjudicators to subject sexual minority refugee claimants to the indignity of having their sexual identity measured against a standard that flows from the very same compulsory heterosexuality that led them to Canada in the first place.

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<sup>208</sup> Elizabeth Adjin-Tettey, “Reconsidering the Criteria for Assessing Well-Founded Fear in Refugee Law” (1997) Man. L.J. 127; Robert Barsky, *Constructing a Productive Other: Discourse theory and the Convention refugee hearing* (Philadelphia: John Benjamins Pub. Co, 1994); Dauvergne, *Humanitarian*, supra note [redacted] at 97-117; France Houle, “Le fonctionnement du régime de preuve libre dans un système non-expert: le traitement symptomatique des preuves par la Section de la protection des réfugiés” (2004) 38 R.J.T. 263; Audrey Macklin, “Truth and Consequences: Credibility in Refugee Determination” in International Association of Refugee Law Judges, *Realities of Refugee Determination on the Eve of a New Millennium* (Haarlem: IARLJ 1999).