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## *Patrolling the Borders of Sexual Orientation: Bisexual Refugee Claims in Canada*

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Sean Rehaag\*

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Canada's current definition of a refugee includes those facing persecution on account of sexual orientation. This article demonstrates that the success rates for sexual-minority refugee 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 skepticism.

Drawing from the tradition of queer theory, the author concludes that refugee adjudicators should embrace an alternative understanding of sexual orientation that can accommodate a multitude of sexual-minority life stories. This understanding views sexual orientation as flexible and fluid. The author presents specific ways in which such an understanding may be applied to decision making regarding sexual-minority refugee claims. All encourage decision makers to focus not on the sexual identity of claimants but rather on evidence of their persecution on account of traditional gender roles and compulsory heterosexuality.

Au Canada, la définition d'un réfugié inclut ceux faisant face à la persécution en raison de leur orientation sexuelle. Cet article démontre que les taux de succès pour ces demandes sont similaires aux taux des demandes ordinaires de statut de réfugié. Néanmoins, une sous-catégorie de demandes d'asile provenant de minorités sexuelles, celles fondées sur la crainte d'être persécuté en raison de la bisexualité, ont beaucoup moins de chance d'être accueillies favorablement.

L'auteur soutient que les difficultés auxquelles font face les demandeurs de statut de réfugié bisexuels résultent en grande partie de l'idée prédominante parmi les arbitres selon laquelle l'orientation sexuelle est innée et est un trait de caractère immuable. Cette vision de l'orientation sexuelle sous-tend le droit canadien contemporain de l'immigration des minorités sexuelles. Les expériences de vie vécues par plusieurs de ces personnes bisexuelles sont toutefois difficilement compréhensibles selon cette conception. La situation mène plusieurs arbitres à faire preuve de scepticisme envers les récits de vie des personnes bisexuelles.

S'inspirant de la «théorie *queer*», l'auteur conclut que, dans le contexte du droit de l'immigration, les arbitres devraient adopter une conception alternative de l'orientation sexuelle qui serait en mesure d'accueillir une multitude de récits de vie des minorités sexuelles. Cette conception caractériserait l'orientation sexuelle comme flexible et fluide. L'auteur présente des moyens spécifiques d'appliquer cette conception aux décisions quant aux demandes de statut de réfugié venant de minorités sexuelles. Toutes ces méthodes encouragent les arbitres à mettre l'accent non pas sur l'identité sexuelle des demandeurs mais plutôt sur la preuve de leur persécution en raison de rôles traditionnels attribués aux sexes et d'une hétérosexualité obligatoire.

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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  
 Shlomit Segal<sup>1</sup>

sometimes men love women  
 sometimes men love men  
 and then there are bisexuals  
 though some just say they're kidding  
 themselves  
 Lalalala lalala ...  
 Phoebe Buffay, a character on the  
 sitcom *Friends*, singing a song she  
 wrote for children<sup>2</sup>

## Introduction

It is possible to claim refugee status in Canada by alleging a fear of persecution on account of sexual orientation. In this article, I demonstrate that the grant rates for refugee claims by members of sexual minorities 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 differing grant rates is the logic underpinning refugee jurisprudence regarding sexual minorities. I argue that this jurisprudence reflects an essentialist understanding of sexual identity as an innate and immutable personal characteristic. However, 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 principal aims of this article is therefore to set out suggestions to assist practitioners and adjudicators in accommodating the experiences of bisexual refugee claimants.

A second and more general aim 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 struggles by adjudicators to understand sexual orientation. In so doing, they offer a useful lookout over the terrain

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<sup>1</sup> “The Rules of the Game” in Leela Acharya *et al.*, eds., *Plural Desires* (Toronto: Sister Vision: Black Women and Women of Colour Press, 1995) at 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> Judith Butler, *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1990) [Butler, *Gender Trouble*].

on which other legal controversies involving sexual minorities are likely to take place.

It is with this second aim in mind that this article engages in undoing 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 identifiable innate and immutable sexual identities. In attempting to enhance the visibility of stories, acts, and identities of multiple sexual minorities, the article draws on the tradition of queer theory.<sup>5</sup> As such, beyond merely offering an account of judicial struggles in order to come to grips with “troubling” sexual identities, it 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 and literature engaging with bisexuality, I recommend a number of strategies to encourage the Canadian refugee 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” (Lesbian,

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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: W.B. Saunders, 1948) [Kinsey *et al.*, *Human Male*]; Alfred Kinsey *et al.*, *Sexual Behavior in the Human Female* (Philadelphia: W.B. Saunders, 1953).

<sup>5</sup> See generally Judith Butler, *Undoing Gender* (New York: Routledge, 2004); Michel Foucault, *The History of Sexuality: An Introduction*, trans. by Robert Hurley, vol. 1 (New York: Vintage Books, 1990); Carol Queen & Lawrence Schimel, eds., *PoMoSexuals: Challenging Assumptions About Gender and Sexuality* (San Francisco: Cleis Press, 1997).

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

Gay, Bisexual, and Transgender–Transsexual) 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 those of gays, lesbians, bisexuals, and trans persons.<sup>7</sup> Admittedly, any choice of terminology in this area is controversial. I acknowledge that many members of what I am calling queer and sexual-minority communities object to my chosen terminology on the grounds that it may underplay the long-standing political efforts of gays and lesbians to establish visible and politically recognized subject positions.<sup>8</sup> Though I share this concern, I believe the advantages of nonexclusionary terminology outweigh its costs.

## I. Canadian Sexual-Minority Refugee Law

Canada, like many other countries, has a shameful record when it comes to its treatment of sexual minorities. As names like Joe Rose,<sup>9</sup> Kenneth Zeller,<sup>10</sup> and Aaron Webster<sup>11</sup> attest, 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 extralegal forms. On the contrary, Canadian law, since its inception, has systemically mistreated sexual minorities.<sup>13</sup>

In spite of this history, Canada now has a deservedly progressive reputation on sexual-minority issues when compared with many other countries in the world.

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<sup>7</sup> Examples include, but are not limited to, pansexuals, asexuals, swingers, sado-masochist subjects, polyamorists, fetishists, cross-dressers, drag performers, two-spirited, intersexes, and those who simply refuse to have their sexuality defined.

<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 Cal. L. Rev. 3 at 346-50. See also Judith Butler, *Bodies That Matter: On the Discursive Limits of “Sex”* (New York: Routledge, 1993) at 223-42 [Butler, *Bodies*]. For a discussion of “subject positions” more generally, see Jukka Törrönen, “The Concept of Subject Position in Empirical Social Research” (2001) 31:3 Journal for the Theory of Social Behaviour 313 at 313-17.

<sup>9</sup> Joe Rose was stabbed to death on a Montreal bus by a group of youths shouting slurs such as “faggot”. See 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 at para. 5 (Ont. S.C.) (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, “Angry Vancouver Gays Mourn Victim of Slaying” *The Globe and Mail*, Toronto ed. (19 November 2001) A7).

<sup>12</sup> See generally Douglas Victor Janoff, *Pink Blood: Homophobic Violence in Canada* (Toronto: University of Toronto Press, 2005).

<sup>13</sup> See generally Kathleen A. Lahey, *Are We ‘Persons’ Yet? Law and Sexuality in Canada* (Toronto: University of Toronto Press, 1999).

Vibrant and visible sexual-minority communities exist in all Canadian urban centers. Openly queer Canadian business leaders, politicians, academics, and artists abound, as do representations of sexual minorities, both in the media and in popular culture.<sup>14</sup> While challenges remain, Canadian law now makes serious attempts to protect the human rights of 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>

In stark contrast, many countries around the world continue to criminalize same-sex sexual relations. Extralegal violence against those perceived to be queer is also commonplace in these countries, 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 fleeing human-rights abuses abroad. 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 outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each 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.

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

<sup>15</sup> See e.g. *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, 124 D.L.R. (4th) 609 [*Egan* cited to S.C.R.] (holding that sexual orientation is a prohibited ground of discrimination under equality provisions of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11); *Vriend v. Alberta*, [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385 [*Vriend* cited to S.C.R.] (reading sexual orientation into Alberta's human rights legislation).

<sup>16</sup> See generally Amnesty International Lesbian, Gay, Bisexual & Transgender Network, online: Amnesty International Lesbian, Gay, Bisexual & Transgender Network <<http://www.ai-lgbt.org>>; Human Rights Watch, "Lesbian, Gay, Bisexual, and Transgender Rights", online: Human Rights Watch <<http://hrw.org/doc/?t=lgbt>>; International Gay and Lesbian Human Rights Commission, online: International Gay and Lesbian Human Rights Commission <<http://www.iglhrc.org>>.

<sup>17</sup> S.C. 2001, c. 27 [IRPA].

<sup>18</sup> *Ibid.*, s. 96 [emphasis added]. This provision is based on the refugee definition set out in the *Convention Relating to the Status of Refugees*, 28 July 1951, 189 U.N.T.S. 2545, Can. T.S. 1969 No. 6 (entered into force 22 April 1954), art. 1.A(2).

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 Uruguayan authorities as a homosexual, he was repeatedly brutalized by police officers. While the two Immigration and Refugee Board of Canada (IRB) members hearing the claim found the claimant’s testimony credible, both held that he did not qualify for refugee status.<sup>23</sup>

The first IRB member, Rotman, accepted 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>24</sup> While Rotman acknowledged that those persecuted due to their homosexuality can, in principle, benefit from refugee protection, he nonetheless refused to accord refugee status in this particular case, on the grounds that the claimant could have obtained protection from persecution domestically. Rotman noted that the police attacks suffered by the claimant were illegal under Uruguayan law. He therefore suggested that the claimant’s appropriate recourse, rather than fleeing abroad, was to seek protection in Uruguay by complaining to Uruguayan local authorities about the police mistreatment.<sup>25</sup>

The second IRB member, Leistra, agreed with Rotman in the result. However, she disagreed with Rotman’s assertion that homosexuals form a particular social group

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<sup>19</sup> See e.g. *Re C.Y.T.*, [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 178-86.

<sup>20</sup> See generally Nicole LaViolette, “The Immutable Refugees: Sexual Orientation in *Canada (A.G.) v. Ward*”, Case Comment, (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 55-57.

<sup>22</sup> [1991] C.R.D.D. No. 501 (QL).

<sup>23</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 17, s. 163).

<sup>24</sup> *Re R. (U.W.)*, *supra* note 22, 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, 2005) at 4-5).

<sup>25</sup> *Re R. (U.W.)*, *ibid.*

for the purposes of refugee law. According to Leistra, prohibitions on deviant sexual behaviour are essential for preserving the heterosexual family, which is, in her view, the very foundation of society.<sup>26</sup> Leistra, moreover, asserted that international law recognizes the right of states to establish laws regulating sexual behaviour. While she accepted that this right is limited by international human-rights instruments prohibiting discrimination, she noted that, in these instruments, “[n]o mention of sexual orientation is made.”<sup>27</sup> Finally, although she acknowledged that states ought not to impinge on protected privacy interests in their regulation of sexual behaviour, she suggested 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>28</sup>

Leistra concluded that due to the legitimate authority of states to regulate public sex, those who suffer mistreatment because they “flaunt” their objection to these laws (i.e., uncloseted homosexuals) do not fall within the refugee-law definition of a particular social group.<sup>29</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 do.<sup>30</sup> For many, a key reason for considering homosexuals to be a particular social group was the notion that homosexuality is an “immutable” personal

<sup>26</sup> Leistra states:

From man's earliest recorded history we find that all human expression ... was directed by, ... laws based on religion. ...

All [such religious 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 (*ibid.*).

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.* [emphasis added].

<sup>29</sup> *Ibid.* 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 (i.e., “to flaunt”), 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>30</sup> See e.g. *Re T. (K.B.)*, [1992] C.R.D.D. No. 430 (QL); *Re L. (M.D.)*, [1992] C.R.D.D. No. 328 (QL); *Re J. (F.H.)*, [1993] C.R.D.D. No. 98 (QL); *Re N. (K.U.)*, [1991] C.R.D.D. No. 1140 (QL). See also LaViolette, “Immutable”, *supra* note 20 at 15-16.



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>31</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>32</sup>

Other IRB members, however, have refused to characterize homosexuals as a particular social group.<sup>33</sup> In one case involving a gay man from Poland, IRB member Lamoureux even went 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>34</sup>

Lamoureux went on to suggest that homosexuals fall into the former category because “heterosexuality is the very foundation of society, ensuring its continuity ... The group to which the claimant in the case before us belongs is an asocial group ...”<sup>35</sup> Interestingly, Lamoureux also rejected the notion that homosexuality is an immutable characteristic:

[H]omosexuals ... 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>36</sup>

In 1993, the Supreme Court of Canada put an end to this controversy in its landmark decision, *Canada (A.G.) v. Ward*.<sup>37</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

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<sup>31</sup> *Re N. (L.X.)*, [1992] C.R.D.D. No. 47 (QL), 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>32</sup> *Re V. (O.Z.)*, [1993] C.R.D.D. No. 164 (QL) [emphasis added].

<sup>33</sup> See LaViolette, “Immutable”, *supra* note 20 at 17-18.

<sup>34</sup> *Re X. (J.K.)*, [1992] C.R.D.D. No. 348 (QL), Lamoureux, rev’d [1994] C.R.D.D. No. 92 (QL).

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.* [emphasis added].

<sup>37</sup> [1993] 2 S.C.R. 689, 103 D.L.R. (4th) 1 [*Ward* cited to S.C.R.].

conscience led him to free hostages who were to be executed.<sup>38</sup> The Court took the opportunity to define systematically the term “particular social group”. Writing for a unanimous court, Justice La Forest noted that the particular social-group category involves a distinction between “what one *is* [and] what one *does*, at a particular time.”<sup>39</sup> Viewing this distinction through the lens of “human rights and anti-discrimination [themes] that form the basis for the international refugee protection initiative,”<sup>40</sup> Justice La Forest identified 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>41</sup>

La Forest gave specific examples of each type of group, noting that “[t]he first category would embrace ... gender, linguistic background and *sexual orientation*.”<sup>42</sup>

While these remarks were clearly *obiter dictum*, 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>43</sup> The Court in *Ward* thus put an end to the controversy over sexual-minority refugee claims by establishing that sexual orientation falls within the ambit of the social-group category in Canadian refugee law. Equally important for our purposes is that *Ward*, as with the prior positive decisions at the IRB level, indicated that sexual orientation falls within the particular social-group category *because* sexual orientation is an innate and unchangeable characteristic.

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

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

Since *Ward*, sexual-minority refugee claimants have enjoyed mixed success in their attempts 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

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<sup>38</sup> See *ibid.* at 689-701.

<sup>39</sup> *Ibid.* at 738-39 [emphasis in original].

<sup>40</sup> *Ibid.* at 739.

<sup>41</sup> *Ibid.* [emphasis added].

<sup>42</sup> *Ibid.* [emphasis added].

<sup>43</sup> See LaViolette, “Immutable”, *supra* note 20 at 22.

in Canada during the early post-*Ward* years, from 1994 to 2000.<sup>44</sup> They identified 127 such decisions, the majority of which involve gay men, with only 14 per cent involving lesbian claimants.<sup>45</sup> One case involved a bisexual claimant.<sup>46</sup>

According to the Dauvergne & Millbank study, the success rates in these cases were 52 per cent and 69 per cent for gay and lesbian claimants respectively,<sup>47</sup> leading to an overall success rate of 54 per cent.<sup>48</sup> To put these numbers into context, the average grant rate for all refugee claims made in Canada from 1994 to 2000 was 60 per cent.<sup>49</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 and 45 Federal Court decisions involving sexual-minority refugee claims from 2001 to 2004.<sup>50</sup> As with the Dauvergne & Millbank study, men were overrepresented in these decisions. Out of all 160 cases, only 30 (19 per cent) 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 rate in sexual-minority IRB decisions was a mere 9 per cent, representing 9 per cent for men and 10 per cent for women.<sup>51</sup> In the Federal Court cases, the rate of decisions in favour of sexual-minority claimants was somewhat higher: 31 per cent overall, representing 37 per cent for men and 10 per cent for

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<sup>44</sup> See Catherine Dauvergne & 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 at 72-77 [Millbank, "Visibility"]; Jenni Millbank, "Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia" (2002) 26 Melbourne U. L. Rev. 144 at 148 [Millbank, "Otherness"].

<sup>45</sup> Dauvergne & Millbank, *ibid.*

<sup>46</sup> Millbank, "Visibility", *supra* note 44 at 93, n. 98.

<sup>47</sup> Dauvergne & Millbank, *supra* note 44.

<sup>48</sup> *Ibid.* at 149.

<sup>49</sup> United Nations High Commissioner for Refugees, *Statistical Yearbook 2003: Trends in Displacement, Protection and Solutions* (Geneva: UNHCR, 2005) at Statistical Annex I, Annexes C. 7, C. 9, online: United Nations High Commissioner for Refugees <<http://www.unhcr.org/statistics.html>> (the average grant rate for all refugee claims from 1994 to 2000 was calculated by dividing the number of positive refugee decisions at first instance in Canada during this period (84,237) by the sum of positive and negative decisions (140,752)).

<sup>50</sup> The 115 IRB cases were obtained by reviewing 143 cases from 2001 to 2004 found by searching the terms "homosex! or lesbi! or bisex! or bi-sex! or gay or sexual orientation or transsex! or transx! 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 found by searching the terms "refugee and homosex! or lesbi! or bisex! or bi-sex! or gay or sexual orientation or transsex! or transx! or transgender" in Quicklaw's Federal Court, Group Source database.

<sup>51</sup> For the success rates of bisexual claimants, see Part I.C.

women. The combined success rate for published decisions on sexual-minority refugee claims at both the IRB and the Federal Court, then, was 15 per cent, representing 16 per cent for men and 10 per cent for women. Once again, to put these numbers into context, the average grant rate for all decisions on refugee claims made in Canada from 2001 to 2004 was 52 per cent.<sup>52</sup> The success rate in published decisions on sexual-minority refugee claims during this period was thus 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>53</sup> Most refugee decisions in Canada are unreported,<sup>54</sup> 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 “unusual” fact situations or a “new approach” to issues.<sup>55</sup> It is, therefore, likely that the selected decisions are highly unrepresentative.

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 accessible to the general public. As with other government records, however, these materials can be accessed through formal Access-to-Information procedures.<sup>56</sup>

According to materials provided by the IRB in response to an Access to Information Request,<sup>57</sup> 1351 sexual orientation-based claims were decided at the IRB in 2004.<sup>58</sup> Male claimants were again significantly overrepresented: only 19 per cent

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<sup>52</sup> See United Nations High Commissioner for Refugees, *Statistical Yearbook 2005: Trends in Displacement, Protection and Solutions* (Geneva: UNHCR, 2007) at Statistical Annex II, Annexes C. 8, C. 11 [UNHCR, *Yearbook 2005*], online: United Nations High Commissioner for Refugees <<http://www.unhcr.org/statistics.html>> (the average grant rate for claims was calculated by dividing the number of positive refugee decisions at first instance in Canada during this period (62,184) by the sum of positive and negative decisions (119,962)).

<sup>53</sup> “Otherness”, *supra* note 44 at 149.

<sup>54</sup> Moreover, refugee adjudicators are generally not required to provide written reasons for positive decisions unless specifically requested to do so by the party or the Minister of Citizenship and Immigration. See *Refugee Protection Division Rules*, S.O.R./2002-228, s. 61(1)-(2).

<sup>55</sup> Immigration and Refugee Board of Canada, “About RefLex” (June 2002), s. 3.4, online: Immigration and Refugee Board of Canada <<http://www.irb-cisr.gc.ca/en/decisions/reflex/>>.

<sup>56</sup> See *Access to Information Act*, R.S.C. 1985, c. A-1.

<sup>57</sup> See Letter from Immigration and Refugee Board of Canada to Sean Rehaag in response to an Access to Information Request by the author on 11 October 2006, IRB File Number A-2006-00061 (6 November 2006) [IRB Response] [unpublished, on file with author].

<sup>58</sup> To be more precise, this figure represents the number of refugee decisions at the IRB where the claimant was the principal applicant, where the claim was assessed at an early stage in the refugee-determination process as being based (at least in part) on persecution on account of sexual orientation, and where a decision was mailed to the claimant in 2004. Note that this information collected in the IRB database is used primarily for the administrative purpose of assigning cases to adjudicators. As a result, once a case has been assigned, the IRB does not take steps to correct erroneous characterizations in its database regarding the type of persecution involved.

of the decisions involved female claimants. The grant rates<sup>59</sup> in sexual-orientation cases in 2004 were 49 per cent overall, 48 per cent for female claimants, and 50 per cent for male claimants. That compares to a total 40,408 refugee claims decided at the IRB in 2004,<sup>60</sup> with an average grant rate of 45 per cent.<sup>61</sup>

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

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.

The Dauvergne & Millbank study also undertakes a particularly helpful 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 match adjudicators' preconceptions.<sup>62</sup>

Millbank cites one particularly disturbing example of this phenomenon in a case where the IRB denied a refugee claim brought by a Colombian lesbian. 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 physically obvious to intolerant and bigoted segments of Colombian society.<sup>63</sup>

The IRB could not hear the claimant's narrative of persecution because the claimant did not fit the IRB Member's stereotypical and fixed image of so-called butch lesbians. As Millbank notes:

Being visibly lesbian ... is ... strangely unquestioned as a static, essentialized appearance devoid of the possibility of choice or change. What if the applicant had just dressed up that day to impress the tribunal? What if she is a "femme?"

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<sup>59</sup> Throughout this paper, grant rates refer to the proportion of positive decisions relative to the sum total of positive and negative decisions. These figures exclude cases that were declared abandoned or withdrawn.

<sup>60</sup> See UNHCR, *Yearbook 2005*, *supra* note 52 at Annex C. 11 (the total number of decisions at first instance includes 5,223 abandoned, withdrawn or otherwise closed claims).

<sup>61</sup> See *ibid.* (the average claim grant rate was calculated by dividing the number of positive refugee decisions at first instance in Canada in 2004 (16,005) by the sum of positive and negative decisions (35,185)).

<sup>62</sup> "Otherness", *supra* note 44 at 177.

<sup>63</sup> *Re P.W.Z.*, [2000] C.R.D.D. No. 47 at para. 6 (QL).

lipstick lesbian ... ? What if Colombian lesbians do not look like Canadian lesbians? Or what if most lesbians do not look like lesbians?<sup>64</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 ... the man said to be his lover testified that: “[translation] 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>65</sup>

This view 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>66</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. The following comments in a recent case involving a man from Pakistan provide a good example:

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>67</sup>

Along similar lines, the IRB makes the following comments about a singular “gay reality” in 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 him if he

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<sup>64</sup> “Visibility”, *supra* note 44 at 103.

<sup>65</sup> *Re W.R.O.*, [2000] C.R.D.D. No. 284 at para. 5 (QL), aff’d *Atanassov v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 445, 105 A.C.W.S. (3d) 495.

<sup>66</sup> *Valdes v. Canada (Minister of Citizenship and Immigration)*, [2004] R.P.D.D. No. 140 at para. 29 (QL).

<sup>67</sup> *Akhtar v. Canada (Minister of Citizenship and Immigration)*, [2004] R.P.D.D. No. 804 at paras. 14-16 (QL) (the panel also noted the absence of documentation of the claimant’s sexual orientation in reaching their decision).

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>68</sup>

The problem with these comments is that they reflect stereotypical understandings of what sexual-minority members and lifestyles look like. However, as contemporary scholars of intersectional approaches to identity politics have persuasively demonstrated, identity cannot be imagined in such terms without erasing more complex subject positions.<sup>69</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 expensive 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 “homosexuality” 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>70</sup> Specifically, 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., in parks and in the vicinity of gay bars and clubs).<sup>71</sup> This private–public characterization poses different sets of problems for gay and lesbian claimants: gay men may be in danger of having their claims rejected on the grounds that they inappropriately transgressed social mores by displaying their sexuality too publicly; lesbians risk having their claims denied on the grounds that their persecution was “merely” a private matter.<sup>72</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>73</sup> It is thus perhaps not surprising that those sexual minorities (including gays and lesbians) who present their sexual identities as either

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<sup>68</sup> *Re K.Q.H.*, [2003] R.P.D.D. No. 136 (QL) at para. 11 [emphasis added].

<sup>69</sup> See generally Kimberle Crenshaw, “Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color” (1991) 43 *Stan. L. Rev.* 1241.

<sup>70</sup> “Otherness”, *supra* note 44 at 157.

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.* at 177.

<sup>73</sup> See text accompanying notes 37–43.

flexible or chosen encounter difficulties translating their life narratives into terms that fit in the legal categories established by this jurisprudence.

After reviewing sexual-minority decisions of the Australian Refugee Review Tribunal, 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>74</sup>

The same phenomenon appears to be present in the Canadian context. For example, in one particularly troubling case involving a man from Ukraine, the IRB member outright denied 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>75</sup>

The IRB member's inability to countenance the possibility that a *well-educated* man might adopt a gay lifestyle by choice 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. Together, these views serve to erase the sexual identity of a claimant who dares to forward an alternative understanding.<sup>76</sup>

Similarly worrying 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 identity as a member of a sexual minority.<sup>77</sup> The most troubling example of this phenomenon occurs when evidence of purportedly inconsistent sexual practices is used by the government in applications to vacate prior positive refugee decisions on

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<sup>74</sup> "Visibility", *supra* note 46 at 93 [emphasis added].

<sup>75</sup> *Kravchenko v. Canada (Minister of Citizenship and Immigration)*, [2004] R.P.D.D. No. 384 at para. 8 (QL) [emphasis added].

<sup>76</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>77</sup> See e.g. *Khrystych v. Canada (Minister of Citizenship and Immigration)*, [2004] R.P.D.D. No. 339 at paras. 6-8 (QL), rev'd 2005 FC 498, 138 A.C.W.S. (3d) 918 (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 para. 17 (QL) (holding that a claimant's long-lasting past marriages with women cast doubts on his contention that he was homosexual).



the grounds of fraud or misrepresentation.<sup>78</sup> In a recent case involving an application to vacate a positive sexual-minority refugee decision, the IRB upheld both the admissibility and relevance of evidence that the claimant engaged in post-hearing sexual behaviour that it viewed as incompatible with the sexual identity asserted at the hearing.<sup>79</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>80</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 initial refugee hearing. 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>81</sup>

Both the Dauvergne & Millbank study and my review of more recent published and unpublished refugee decisions thus support my assertion that sexual-minority refugee claimants appear, on average, 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 coincide with the judicially endorsed understanding of sexual orientation as an unchosen and unchangeable feature of personal identity.

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

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

The 1993 *Ward* decision established that persons with a well-founded fear of persecution for sexual orientation are, in principle, eligible for refugee protection.

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<sup>78</sup> See *IRPA*, *supra* note 17, s. 109.

<sup>79</sup> See *Re L.E.W.*, [2005] R.P.D.D. No. 19 (QL).

<sup>80</sup> *Ibid.* at paras. 18-19 [emphasis added].

<sup>81</sup> For a critique of this practice, see text accompanying notes 128-36.

However, it took a further seven years before the first published decision involving a bisexual refugee claimant, *Re B.D.K.*,<sup>82</sup> confirmed that *Ward* applies to bisexuals.

*Re B.D.K.* involved a Mexican bisexual transvestite who, in the words of the IRB member, “prefers relationships with men.”<sup>83</sup> The claimant, who had a wife and son, as well as a male lover, was beaten and sexually assaulted by the police when he came to the assistance of several other transvestites who were being similarly brutalized. The claimant was then singled out for further brutality when the police learned of the existence of his wife and child.<sup>84</sup> The IRB member accepted the claimant’s asserted sexual and gender identities,<sup>85</sup> noting that the claimant appeared at the hearing “dressed as a woman.”<sup>86</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. Without explicitly raising the question of whether bisexuals (or transvestites) constitute a particular social group, the IRB member simply found 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>87</sup>

That *Re B.D.K.* turns largely on the claimant’s identity as a transvestite is significant, for it constitutes the only published decision where an explicitly bisexual refugee claimant has obtained refugee status in Canada.<sup>88</sup> In the Dauvergne & Millbank study, of the 127 published decisions on Canadian sexual-minority refugee claims identified from 1994 to 2000, only *Re B.D.K.* involved a bisexual claimant.<sup>89</sup> More recently, of the published sexual-minority refugee decisions I identified from 2001 to 2004,<sup>90</sup> eight involved bisexual claimants.<sup>91</sup> Two additional published

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<sup>82</sup> [2000] C.R.D.D. No. 72 (QL).

<sup>83</sup> *Ibid.* at para. 1.

<sup>84</sup> *Ibid.* at para. 2.

<sup>85</sup> *Ibid.* at para. 5.

<sup>86</sup> *Ibid.* at para. 2.

<sup>87</sup> *Ibid.* at paras. 7-8 [emphasis added].

<sup>88</sup> But see *Romero v. Canada (Minister of Citizenship and Immigration)*, in which a bisexual claimant succeeded in a judicial review of a negative IRB decision (2005 FC 1705, 144 A.C.W.S. (3d) 1086). The review turned on an error committed at the IRB 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. Note that a successful judicial review does not lead to the claimant acquiring refugee status, but rather to a new hearing at the IRB.

<sup>89</sup> See Millbank, “Visibility”, *supra* note 44 at 93, n. 98.

<sup>90</sup> See text accompanying notes 50-52.

<sup>91</sup> See *Aire v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 41, 245 F.T.R. 187 [*Aire*]; *Christopher v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1128, 133 A.C.W.S. (3d) 151; *Re G.I.F.*, [2001] C.R.D.D. No. 138 (QL); *Re O.O.P.*, [2002] R.P.D.D. No. 139 (QL); *Re B.K.K.*, [2003] R.P.D.D. No. 2 (QL); *Re K.O.C.*, [2003] R.P.D.D. No. 420 (QL), rev’d *Rassan v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1279, 133 A.C.W.S. (3d) 855; *Romero v. Canada (Minister of Citizenship and Immigration)*, [2004] R.P.D.D. No. 840 (QL) aff’d 2005 FC 1705, 144 A.C.W.S. (3d) 1086; *Re S.C.E.*, [2004] R.P.D.D. No. 8 (QL). See also *Re O.H.R.*, [2002] R.P.D.D. No. 140 (QL) (the claimant initially alleged a fear of persecution on account of bisexuality, but at the

decisions involved refugees who alleged persecution on account of sexual orientation and were identified by adjudicators as being either possibly bisexual<sup>92</sup> or “confused” about their sexual orientation.<sup>93</sup> None of these cases resulted in a positive decision for the claimant.

As we have seen, published decisions are not representative of actual decisions at the IRB.<sup>94</sup> The IRB’s database of unpublished decisions, however, confirms that bisexual refugee claims are seldom successful. According to information provided by the IRB, 100 cases involving bisexual refugee claimants were decided at the IRB in 2004.<sup>95</sup> This compares to a total of 1351 sexual-minority refugee claims resulting in a decision that year. Bisexual refugee claims thus account for 7 per cent of sexual-minority claims decided in 2004. It is also worth noting that men were, once again, overrepresented in bisexual claims: only 15 per cent of bisexual refugee claims involved female claimants.

The grant rate for bisexual claims at the IRB in 2004 was 25 per cent overall (28 per cent for male claimants, and only 10 per cent for female claimants). This compares with 49 per cent for sexual-minority claims (50 per cent for men, and 48 per cent for women), and 46 per cent for refugee claims generally during the same period.<sup>96</sup> So while sexual-minority refugee claims in general were slightly more successful than traditional refugee claims, they were about twice as successful as bisexual refugee claims. Based on both the published decisions and the 2004 IRB statistics, it is thus 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 decisions. 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. When decision makers evaluated the testimony of the bisexual claimants against country-condition evidence,

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hearing he indicated that his narrative was a fabrication and he identified alternative grounds of persecution).

<sup>92</sup> *Valoczki v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 492, 130 A.C.W.S. (3d) 360 at para. 17 [*Valoczki*].

<sup>93</sup> *Gyorgyjakab v. Canada (Minister of Citizenship and Immigration)*, [2004] R.P.D.D. No. 698 at para. 43 (QL) [*Gyorgyjakab*].

<sup>94</sup> See text accompanying notes 53-55.

<sup>95</sup> IRB Response, *supra* note 57. To be more precise, this figure represents the number of refugee decisions at the IRB where the claimant was the principal applicant, where the claim was assessed at an early stage in the refugee-determination process as involving a bisexual claimant and as being based (at least in part) on persecution on account of sexual orientation, and where a decision was mailed to the claimant in 2004. Note that this information collected in the IRB database is used primarily for the administrative purpose of assigning cases to adjudicators. As a result, once a case has been assigned, the IRB does not take steps to correct erroneous characterizations in its database regarding either the type of persecution involved or the precise sexual identity of claimants.

<sup>96</sup> See text accompanying notes 59-63.

they drew exclusively in their written reasons on evidence relating to persecution on account of sexual orientation, without considering how experiences of persecution may vary across specific sexual minorities.<sup>97</sup>

The inattention to 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>98</sup>

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

[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>99</sup>

In this decision, the Federal Court neglected to discuss whether the error regarding the precise sexual identity of the claimant (i.e. bisexual rather than lesbian) necessitated a reconsideration of the claimant's ability to obtain protection against persecution in her home country. In particular, the court did not see the need to consider whether bisexuals face specific forms of persecution, or whether protection from persecution available to gays and lesbians was accessible to bisexuals.

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>100</sup> Indeed, adjudicators seem decidedly confused about how exactly to assess assertions of bisexuality. Particularly worrying are the

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<sup>97</sup> Of course, bisexual-specific evidence will often be unavailable because few of the organizations documenting human rights abuses against sexual minorities presently disaggregate their analyses. However, at a minimum, refugee adjudicators should explicitly note the lack of available bisexual-specific evidence and then explain to what extent the undifferentiated evidence can be relied upon in particular cases involving bisexuals. For a further discussion of bisexual-specific persecution and evidentiary issues, see text accompanying notes 147-59.

<sup>98</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 266.

<sup>99</sup> *Valoczki*, *supra* note 92 at para. 17 [emphasis added].

<sup>100</sup> See *ibid.* ("Ms. Valoczki's testimony regarding her sexual orientation was inconsistent and confusing, to say the least"); *Gyorgyjakab*, *supra* note 93 at para. 43 ("the claimant was asked if she was still confused about her sexual orientation").

cases in which evidence of cross-sex relationships is used as proof that the claimant is not, in fact, bisexual. The following comments in a case involving a woman from Iran provide a good example of this:

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 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>101</sup>

A similar use of such evidence also occurred in a case involving a woman from Hungary who claimed to have been persecuted on account of her bisexuality: [T]he evidence shows that *since last year she has been living with her boyfriend*.<sup>102</sup>

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

These figures contrast sharply with those for sexual-minority refugee claims 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 per cent of the 115 decisions. These rates did not vary significantly along gender lines: 33 per cent for female claimants, compared to 27 per cent for male claimants.

We can see, then, that in published decisions from 2001 to 2004, bisexual claimants were much more likely to have their asserted sexual identity disbelieved than other sexual-minority claimants. I reiterate that caution must be exercised in drawing conclusions based on the small number of published bisexual refugee cases. However, at a minimum, my analysis suggests the advisability of a further study examining unpublished IRB decisions. It would, in particular, be helpful to know whether, in unpublished decisions, assertions of bisexuality are disbelieved at a greater rate than assertions of gay or lesbian sexual identities. Considering the differences noted in the published decisions, as well as the higher rejection rate for bisexual claims overall, I predict such a study would reveal that bisexuals—and bisexual females in particular—are much more likely to have their asserted identities disbelieved.

In summary, 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 worrying 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.

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<sup>101</sup> *Re K.O.C.*, *supra* note 91 at para. 11 [emphasis added].

<sup>102</sup> *Gyorgyjakab*, *supra* note 93 at para. 43 [emphasis added].

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 foundation of sexual-minority refugee law in Canada.

## II. Toward a Queer Refugee Jurisprudence

As we have seen, the Supreme Court of Canada determined in *Ward* 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.<sup>103</sup> 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 or unchangeable personal characteristic.”<sup>104</sup>

Queer theory, an interdisciplinary forum examining the complex relations between gender and sexuality, characterizes such an understanding of sexual orientation as “essentialist”.<sup>105</sup> Essentialists hold that individuals easily fall 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>106</sup> Occasionally, essentialists recognize categories beyond straight and gay, including, for example, bisexuals and transgendered persons. The principle nonetheless remains that individuals fall into these categories naturally, completely, and unchangeably.

Queer theorists, on the other hand, contend that categories such as straight, gay, and lesbian are constantly reconstructed through socio-historical patterns of regulated social interaction.<sup>107</sup> Based on this understanding, queer theorists suggest that we should accord more attention to the power dynamics that produce (and exclude people from) particular subject positions relating to sexual orientation. As Brenda Cossman explains, “Queer theory ... seeks to shift the analysis from identity politics to the representational ... processes that constitute sexual identities.”<sup>108</sup>

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<sup>103</sup> *Supra* note 37 at 739.

<sup>104</sup> *Ibid.* See also text accompanying notes 37-43.

<sup>105</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>106</sup> See Carl F. Stychin, “Essential Rights and Contested Identities: Sexual Orientation and Equality Rights Jurisprudence in Canada” (1995) 8 *Can. J.L. & Jur.* 49; Nancy J. Knauer, “Science, Identity, and the Construction of the Gay Political Narrative” (2003) 12 *Law & Sexuality* 1; Matthew Waites, “The Fixity of Sexual Identities in the Public Sphere: Biomedical Knowledge, Liberalism and the Heterosexual/Homosexual Binary in Late Modernity” (2005) 8 *Sexualities* 539.

<sup>107</sup> See generally Butler, *Gender Trouble*, *supra* note 3; Janet E. Halley, “Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability” (1994) 46 *Stan. L. Rev.* 503.

<sup>108</sup> “Sexuality”, *supra* note 105 at 865-66.

Perhaps not surprisingly, queer theorists disagree about the precise reasons why essentialist understandings of sexual orientation are so prominent in contemporary society. Most agree, however, that an important place to begin in understanding this prominence is the foundational moment in queer social and political life: coming out.<sup>109</sup>

Simply put, 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 persona is an essentially queer substratum. What makes me queer is the presence of this substratum, irrespective of the sexual identity I publicly display.<sup>110</sup>

Given the reality of homophobia, many queer individuals experience their sexual identity in precisely this manner. These individuals go through long periods of being unable to publicly or even personally acknowledge what they ultimately come to see as their sexual orientation.<sup>111</sup> As Eve Sedgwick writes:

[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>112</sup>

One of the reasons, then, for the contemporary prevalence of essentialist understandings of sexual identity is that 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>113</sup>

In addition to these efforts to familiarize society with queer coming-out narratives, it is important to appreciate that advocates for sexual-minority rights (as

<sup>109</sup> See e.g. Kenji Yoshino, “Covering” (2002) 111 Yale L.J 769 at 816 (“What made Stonewall loom so large was that ... [t]he bar itself ... could be seen as a symbolic closet, over which gays had finally wrested control”).

<sup>110</sup> See especially Eve Kosofsky Sedgwick, *The Epistemology of the Closet* (Berkeley: University of California Press, 1990).

<sup>111</sup> For an accessible glimpse at individual struggles to come out of the closet, see e.g. “We’re Coming Out” *The Advocate* 948 (11 October 2005) 62.

<sup>112</sup> Sedgwick, *supra* note 112 at 68.

<sup>113</sup> See e.g. *Brokeback Mountain*, a film chronicling the tragic consequences of two queer American cowboys’ inability to publicly acknowledge their relationship (2006, DVD (Hollywood: Paramount Pictures, 2006)). Interestingly, the lead characters maintain long-term sexual relationships with both men and women. 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 and Mail* (16 December 2005) R6 (“Brokeback Mountain has been hailed for its historic importance as the first openly gay western”).

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.

Legal regulation of chosen (and deviant) sexual behaviour has both a long pedigree and a comparatively intelligible rationale. Resorting to sanctions in this context allows society simultaneously to mark the behaviour as deviant, and to discourage people from choosing to engage in the deviant behaviour by imposing costs on such a choice.<sup>114</sup>

However, once sexual orientation becomes seen as an innate psychosocial characteristic—better yet, a biological characteristic—its legal regulation 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>115</sup> In addition to violating this principle that links legal and moral responsibility,<sup>116</sup> sanctioning 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 and familiar narrative of liberal progress. This narrative recounts 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>117</sup> By pointing to what some have termed the “immutability defense”<sup>118</sup>—that queers cannot help but be queer—advocates for sexual minorities have thus 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>119</sup> Indeed, the immutability of sexual orientation was a key factor in *Egan*, the decision of the Supreme Court of Canada that brought sexual orientation into the ambit of constitutionally prohibited grounds of discrimination. The Court stated:

[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*

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<sup>114</sup> See generally Patrick Devlin, *The Enforcement of Morals* (Oxford: Oxford University Press, 1965).

<sup>115</sup> See Stychin, *supra* note 106 at 59; Halley, *supra* note 109 at 518.

<sup>116</sup> See generally H.L.A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968).

<sup>117</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, N.J.: Princeton University Press, 1996).

<sup>118</sup> Kenji Yoshino, “The Epistemic Contract of Bisexual Erasure” (2000) 52 *Stan. L. Rev.* 353 at 405 [Yoshino, “Bisexual Erasure”].

<sup>119</sup> Stychin, *supra* note 106 at 57.



*personal costs*, and so falls within the ambit of s. 15 protection as being analogous to the enumerated grounds.<sup>120</sup>

This passage, which has been picked up in other important cases addressing sexual-minority rights,<sup>121</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>122</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 sexual orientation and the skepticism displayed by IRB members toward 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 toward flexible and fluid sexual identities is partly constitutive of contemporary sexual-minority refugee jurisprudence. It is such a reading we will now turn to in 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 a phase”)**

One possible explanation for the low success rates of bisexual refugee 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 for refugee status on these grounds despite their apparently heterosexual behaviour (for example, having a cross-sex spouse or 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 of detecting fraudulent claims, grant rates for bisexual claimants are thus understandably low. This explanation has the added benefit of accounting specifically for the high rates at which bisexual refugee claimants’ asserted sexual identities are disbelieved in published decisions.

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

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<sup>120</sup> *Supra* note 15 at para. 5 [emphasis added].

<sup>121</sup> See *Vriend*, *supra* note 15 at para. 90; *M. v. H.*, [1999] 2 S.C.R. 3 at para. 64, 171 D.L.R. (4th) 577 [cited to S.C.R.]; *Halpern v. Canada* (2003), 65 O.R. (3d) 161, 225 D.L.R. (4th) 529 at para. 7.

<sup>122</sup> For a persuasive critique of how courts frame sexual-minority equality rights in these terms see Robert Leckey, “Chosen Discrimination” (2002) 18 Sup. Ct. L. Rev. (2d) 445.

choose a narrative that is so singularly unsuccessful. Would it not be strategically wiser to choose another type of persecution?<sup>123</sup>

Notwithstanding the forcefulness of this objection, it must be said that this explanation fits well with a widespread popular view that bisexuality is a “myth”, and that all people are, at least in the long run, either gay or straight.<sup>124</sup> Jennifer Baumgardner, a prominent bisexual activist, notes that this view commonly posits bisexuals are simply going through a “phase”, and “are actually straight but otherwise experimenting or are really gay but not able to own up.”<sup>125</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.<sup>126</sup> It is, of course, important to acknowledge that many lesbians and gay men have, in fact, experienced bisexuality as a transitional identity.<sup>127</sup>

The interesting question for our purposes, however, 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, which persists regardless of one’s actual sexual behaviour 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 by claiming that those sexual identities are not in fact genuine if some of the individuals who assert them later adopt a different identity?

To answer this question, it is helpful to consider social-scientific evidence indicating that sexual identity is complex and fluid. Studies of women who have sex with women, for example, often find that sexual practices are more complicated than neat labels would have it. For instance, a study undertaken by Lisa Diamond in 2003 found that two-thirds of women who reported having had sex with other women during a five-year period also reported having sex with men in the same period—a

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<sup>123</sup> Some might suggest that despite the low success rates, it is nonetheless reasonable to assume that fraudulent claimants would disproportionately choose to base their claims on bisexuality because the fluidity and flexibility of bisexuality makes it difficult to detect deception, particularly with reference to evidence of cross-sex sexual relations. This suggestion, however, untenably presupposes that other grounds for refugee protection—including persecution directed toward homosexuals and lesbians—are insufficiently flexible to accommodate such evidence. There are, for example, refugee decisions involving persecution on account of gay and lesbian sexual identities where claimants are successful notwithstanding evidence of sustained cross-sex sexual relations, including cases where cross-sex spouses accompany claimants to Canada. See e.g. *Re V.P.F.*, [1999] C.R.D.D. No. 191 (QL).

<sup>124</sup> See Yoshino, “Bisexual Erasure”, *supra* note 118 at 396. 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” *The New York Times* (5 July 2005) F1.

<sup>125</sup> *Supra* note 2 at 4.

<sup>126</sup> Yoshino, “Bisexual Erasure”, *supra* note 118 at 398.

<sup>127</sup> Claire Hemmings, *Bisexual Spaces: A Geography of Sexuality and Gender* (New York: Routledge, 2002) at 25-26.

finding that applied both to women who self-identified as lesbians and those who considered themselves to be bisexual.<sup>128</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>129</sup> As the famous study by Samuel S. Janus and Cynthia L. Janus in 1993 concluded:

[T]here is often a looseness of labeling relative to any particular sex 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 as well.<sup>130</sup>

Sexual identity is therefore 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 behaviour over time to cast doubt on the asserted sexual identities of sexual-minority refugee claimants.<sup>131</sup> Even more troubling is when the government uses evidence of purportedly inconsistent post-hearing sexual behaviour in applications to vacate successful sexual-minority refugee decisions on the grounds that the initial decision was obtained through fraud or misrepresentation.<sup>132</sup> Both of these practices are based on assumptions about the rigidity of sexual orientation that are at odds with social-scientific evidence, which indicates that sexual identity and sexual behaviour regularly diverge.

Notwithstanding the fluidity and flexibility of sexual behaviour 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 study in 1994.<sup>133</sup> Yoshino, after conducting an extensive

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<sup>128</sup> Lisa M. Diamond, “Was It a Phase? Young Women’s Relinquishment of Lesbian/Bisexual Identities Over a 5-Year Period” (2003) 84 *Journal of Personality and Social Psychology* 352 at 353. See also M. Michele Amestoy, “Research on Sexual Orientation Labels’ Relationship to Behaviors and Desires” (2001) 1 *Journal of Bisexuality* 91 at 94-95.

<sup>129</sup> See Preeti Pathela *et al.*, “Discordance Between Sexual Behaviour and Self-Reported Sexual Identity: A Population-Based Survey of New York City Men” (2006) 145:6 *Annals of Internal Medicine* 416; M. Ross *et al.*, “Concordance Between Sexual Behavior and Sexual Identity in Street Outreach Samples of Four Racial/Ethnic Groups” (2003) 30:2 *Journal of the American Sexually Transmitted Disease Association* 110; Ritch C. Savin-Williams, “Who’s Gay? Does it Matter?” (2006) 15:1 *Current Directions in Psychological Science* 40.

<sup>130</sup> Samuel S. Janus & Cynthia L. Janus, *The Janus Report on Sexual Behavior* (New York: John Wiley & Sons, 1993) at 70.

<sup>131</sup> See text accompanying note 78.

<sup>132</sup> See text accompanying notes 79-82.

<sup>133</sup> For a review of these studies, see Yoshino, “Bisexual Erasure”, *supra* note 118 at 378.

comparative review, finds that in these studies “bisexuals are estimated to comprise anywhere from 0.2 per cent to 15 per cent of the total population.”<sup>134</sup> The main reason for these wide-ranging estimates of the frequency of bisexuality is 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. However, 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 the incidence of bisexuality is understandably low.<sup>135</sup> While the total number of individuals identified as bisexual in these studies varied depending on the definition of bisexuality employed, according to Yoshino, the studies nonetheless share one surprising conclusion: each study identified a larger number of bisexuals than lesbians and gays.<sup>136</sup>

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>137</sup> In a study on 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>138</sup> If the Canadian legal academy can be taken as representative, it would appear that little has changed since this study was conducted. 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>139</sup>

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

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<sup>134</sup> *Ibid.* at 380 [references omitted].

<sup>135</sup> For a comprehensive discussion of the different possible definitions of bisexuality, see *ibid.* at 370-77.

<sup>136</sup> *Ibid.* at 380 [emphasis in original].

<sup>137</sup> See Hemmings, *supra* note 127 at 82-90; Robyn Ochs, “Biphobia: It Goes More Than Two Ways” in Beth A. Firestein, ed., *Bisexuality: The Psychology and Politics of an Invisible Minority* (Thousand Oaks, CA: Sage, 1996) 217 at 225; Yoshino, “Bisexual Erasure”, *supra* note 118 at 364-70.

<sup>138</sup> See “Bisexual Erasure”, *ibid.* at 368.

<sup>139</sup> These results were obtained on 5 March 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.

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>140</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>141</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 into which bisexual refugee claimants can fit themselves. As we have seen, sexual-minority refugee claimants succeed only to the extent that their sexual identities and experiences of persecution match the stereotypes held by refugee adjudicators.<sup>142</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 do not have a sense of what bisexuals might look like if they do exist. In my view, this goes some lengths toward explaining the low grant rates in bisexual-refugee claims in Canada.

One strategy to address this problem would be to work toward 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>143</sup> It would be advisable for advocates of sexual-minority refugee claimants to familiarize themselves with these materials so that they may communicate them to refugee adjudicators. The IRB could also contribute 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 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 even acting as facilitators in IRB training sessions or continuing-legal-education courses.

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<sup>140</sup> *Supra* note 137 at 225.

<sup>141</sup> *Ibid.*

<sup>142</sup> See text accompanying notes 62-81.

<sup>143</sup> For a comprehensive review of recent publications in this area, see Ronald C. Fox, “Bisexuality: A Reader’s Guide to the Social Science Literature” in Ronald C. Fox, ed., *Current Research on Bisexuality* (New York: Harrington Park Press, 2004) 161. See also Serena Anderlini-D’Onofrio, ed., *Women and Bisexuality: A Global Perspective* (New York: Hawthorn Press, 2003); Dawn Atkins, ed., *Bisexual Women in the 21<sup>st</sup> Century* (New York: Haworth Press, 2002); Baumgardner, *supra* note 2; William E. Burleson, *Bi America: Myths, Truths, and Struggles of an Invisible Community* (New York: Harrington Park Press, 2005); Loraine Hutchins & Lani Kaahumanu, eds., *Bi Any Other Name: Bisexual People Speak Out* (New York: Alyson, 1991); Merl Storr, *Bisexuality: A Critical Reader* (New York: Routledge, 1999).

**B. Heterosexual Privilege and Homosexual Behaviour (or doubling one's chances on a Saturday night)**

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

One frequently encounters assertions that bisexuals benefit from heterosexual privilege.<sup>144</sup> In particular, bisexuals are said to be able to access many civil rights, including family recognition, that are not accessible to gays and lesbians.<sup>145</sup> Indeed, some authors identify an entire category of persons, termed "defense bisexuals", who maintain cross-sex sexual relations precisely in order to obtain the benefits of heterosexual privilege, while also engaging in same-sex sexual activities.<sup>146</sup>

There are, nonetheless, 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 doubles one's chances for a date on a Saturday night.<sup>147</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 as well as exclusion from many queer communities.<sup>148</sup>

In homophobic environments, the distinction between bisexuality and other sexual-minority identities that challenge heteronormativity is seldom made.<sup>149</sup> Indeed, many violently homophobic individuals are likely insufficiently aware of the diversity of sexual identities in sexual-minority communities to be able to distinguish between them. To compound these difficulties, sexual-minority spaces where homophobia can be avoided are often unwelcoming toward bisexuals. Witness, for example, the refusal of some queer communities to allow bisexuals to participate in gay and

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<sup>144</sup> Marjorie Garber, *Bisexuality & The Eroticism of Everyday Life* (New York: Routledge, 2000) at 40; Hemmings, *supra* note 137 at 78-79.

<sup>145</sup> Hutchins & Kaahumanu, *supra* note 143 at 369.

<sup>146</sup> Michael Ross, "A Taxonomy of Global Behavior" in Rob Tielman *et al.*, eds., *Bisexuality and HIV/AIDS: A Global Perspective* (Buffalo, N.Y.: Prometheus, 1991) 21. See also Gerber, *supra* note 144 at 30.

<sup>147</sup> Paraphrased in Robert P. Kahn, "The New Book on Bisexuality" *The Boston Globe* (6 September 1995) 75.

<sup>148</sup> See generally Ruth Colker, "A Bisexual Jurisprudence" (1993) 3 *Law & Sexuality* 127 at 130-34 [Colker, "Bisexual Jurisprudence"]; Ochs, *supra* note 140; Patrick S. Mulick & Lester W. Wright Jr., "Examining the Existence of Biphobia in the Heterosexual and Homosexual Populations" (2002) 2:4 *Journal of Bisexuality* 45.

<sup>149</sup> See Ochs, *ibid.* at 222.

lesbian community organizations,<sup>150</sup> Pride celebrations,<sup>151</sup> or lesbian feminist spaces.<sup>152</sup> As Marjorie Garber notes:

[M]ost 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 refuge.<sup>153</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 neither exclusively heterosexual nor exclusively homosexual).<sup>154</sup>

Monosexism may sometimes be so serious as to raise the level of persecution. A good example can be found in the only published refugee decision where an explicitly bisexual claimant succeeded in obtaining refugee status in Canada. In *Re B.D.K.*, the claimant, who identified himself as a bisexual male transvestite who preferred men, was subject to police brutality after coming to the assistance of several other transvestites being attacked by the Mexican police.<sup>155</sup> When the police learned that the claimant had a wife and child they doubled their assaults and other brutality.<sup>156</sup> In other words, after being brutalized for violating gender norms and heteronormativity, the claimant was then subject to further persecution for violating the norm of monosexuality.

If we take seriously the possibility of monosexist persecution evidenced in *Re B.D.K.*, as well as the experience of monosexism recounted by bisexual authors, then we should reject the explanation that the low success rates for bisexual refugee claimants are due to the ability of bisexuals to avoid persecution by resorting to heterosexual privilege.

Perhaps more significantly, we should also question whether bisexual refugee claimants can automatically access institutions and spaces that provide some degree of protection against persecution for gays and lesbians. The exclusion from homosexual communities reported by some bisexual authors suggests the need to reevaluate the IRB’s common practice of relying on evidence that gays and lesbians in a particular country enjoy protection from persecution in order to conclude that

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<sup>150</sup> See Richard Morgan, “Campus Byways” *The Advocate* 904 (9 December 2003) 32.

<sup>151</sup> See Hemmings, *supra* note 137 at 53-97.

<sup>152</sup> See Colker, “Bisexual Jurisprudence”, *supra* note 148 at 129-30; Sharon Dale Stone, “Bisexual Women and the ‘Threat’ to Lesbian Space: Or What if All the Lesbians Leave?” (1996) 16:1 *Frontiers: A Journal of Women Studies* 101 at 101.

<sup>153</sup> *Supra* note 144 at 39.

<sup>154</sup> See e.g. Ruth Colker, *Hybrid: Bisexuals, Multiracials and Other Misfits Under American Law* (New York: New York University Press, 1996) at 16; Garber, *ibid.*; Yoshino, “Bisexual Erasure”, *supra* note 118 at 369.

<sup>155</sup> *Supra* note 82 at para. 2.

<sup>156</sup> *Ibid.*

bisexuals should seek similar protection.<sup>157</sup> Adjudicators should, instead, be encouraged to consider evidence that explicitly addresses conditions faced by bisexuals.<sup>158</sup>

For this to occur, advocates of bisexual refugee claimants must make sustained efforts to highlight the unreliability of country-condition evidence that fails to address bisexual-specific concerns. Moreover, organizations that report on the conditions faced by sexual minorities would need to disaggregate their analyses so that reliable bisexual-specific evidence is available. These organizations would include government research bodies such as the IRB Research Directorate.<sup>159</sup> They would also include nongovernmental organizations such as Amnesty International, Human Rights Watch, and the International 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 sexual-minority refugee jurisprudence in Canada. In fact, skepticism regarding the very existence of bisexuality is built into the foundational principle of this jurisprudence—that sexual minorities are entitled to refugee protection because, and only because, sexual orientation is an innate and unchangeable characteristic.

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”.<sup>160</sup> According to Yoshino, there is a link between the immutability defence and what he calls the “epistemic contract of bisexual erasure.”<sup>161</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. Yoshino contends 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>

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<sup>157</sup> See text accompanying notes 102-04.

<sup>158</sup> 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, etc. See e.g. Swink, *supra* note 98.

<sup>159</sup> The IRB Research Directorate provides research on country conditions for the use of IRB members: see Immigration and Refugee Board of Canada, *Research Program Mandate*, online: Immigration and Refugee Board of Canada <<http://www.irb-cisr.gc.ca/en/research>>.

<sup>160</sup> Yoshino, “Bisexual Erasure”, *supra* note 118 at 405.

<sup>161</sup> *Ibid.* at 362.

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



Bisexuality threatens essentialist understandings of sexual orientation and the immutability defence in two ways. 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 behaviour. Let us examine each of these points in greater detail.

Concerning 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 is that bisexuals often experience their sexual identities contextually, 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 whom 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 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 says: "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> The contingency should be noted 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) choice-worthy and overtly political sexual identity, is common to many bisexuals.<sup>168</sup>

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<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 ("[s]ince I was about eight years old, I have been involved with other boys as well as having girlfriends").

<sup>164</sup> See Yoshino, "Bisexual Erasure", *supra* note 118 at 405.

<sup>165</sup> See generally Donald Hall & Maria Pramaggiore, eds., *RePresenting Bisexualities: Subjects and Cultures of Fluid Desire* (New York: New York University Press, 1996).

<sup>166</sup> See M. King, "It Could Be Either" in Rose *et al.*, *supra* note 163, at 105 ("[h]aving lived my life 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"); Naomi Mezey, "Dismantling the Wall: Bisexuality and the Possibilities of Sexual Identity Classification Based on Acts" (1995) 10 Berkeley Women's L.J. 98 at 117 ("Stacey Young, who considered herself a lesbian, did not call herself bisexual until she had been with the man she had fallen in love with for three and a half years").

<sup>167</sup> Carol A. Queen, "The Queer in Me" in Hutchins & Kaahumanu, *supra* note 143, 17 at 21.

<sup>168</sup> See e.g. Simon Scott, "Politically Bi" in Rose *et al.*, *supra* note 163 at 236.

One way 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 an immutability defence that is built upon essentialist understandings of sexual orientation. This challenge is related to the way bisexuality complicates the link between sexual-minority identity and sexual-minority behaviour.

In order to move effectively from the notion that sexual orientation is an innate and unchangeable personal characteristic to the notion that sanctions against sexual-minority behaviour 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 behaviour. Prohibitions on sexual-minority conduct are thus not necessarily directed toward punishing individuals for matters beyond their control. The following comments by *inter alia* the then Cardinal Joseph Ratzinger are representative of such a view: “The Church teaches that respect for homosexual persons cannot lead in any way to approval of homosexual behaviour.”<sup>169</sup>

The link between sexual-minority identity and sexual-minority conduct 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 personal characteristic, the immutability defence provides less of a justification for the unfairness of requiring bisexuals to restrict their choice of sexual partners to members of the opposite sex than in the case of gays and lesbians, for whom such a restriction arguably entails forsaking a sexual life in its entirety.<sup>170</sup>

It is significant that out of the 160 sexual-minority refugee decisions from 2001 to 2004 that I identified,<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 his country with having “carnal knowledge of any person against the order of nature,” an offence that carried a maximum sentence of fourteen 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 noted:

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<sup>169</sup> Joseph Card. Ratzinger & Angelo Amato, “Considerations Regarding Proposals to Give Legal Recognition to Unions Between Homosexual Persons” (3 June 2003), online: Congregation for the Doctrine of the Faith <[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)>.

<sup>170</sup> See Stychin, *supra* note 106 at 63.

<sup>171</sup> See text accompanying notes 50-52.

<sup>172</sup> *Aire*, *supra* note 91 at para. 11.

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 persecutory law.<sup>173</sup>

While this case—which was, 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 being gay, and cannot help being persecuted for being gay because [they] cannot help expressing [their] gayness somehow.”<sup>175</sup> But as we have seen 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 behaviour.

#### **D. Queering Canadian Refugee Law (or beyond “sheep and goats”)**

We have seen in this article that the view of bisexuality as 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 for 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 defense, both of which are incorporated into contemporary jurisprudence on sexual-minority refugees.

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 and insist that, as Alfred Kinsey famously put it, “[t]he world is not to be divided into sheep and goats”?<sup>176</sup> 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>

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<sup>173</sup> *Ibid.* at paras. 12, 16 [emphasis added].

<sup>174</sup> See Catherine Dauvergne, *Humanitarianism, Identity and Nation: Migration Laws in Canada and Australia* (Vancouver: UBC Press, 2005) at 116.

<sup>175</sup> “Visibility”, *supra* note 44 at 93 [references omitted].

<sup>176</sup> Kinsey *et al.*, *Human Male*, *supra* note 4 at 639.

<sup>177</sup> See e.g. Butler, *Undoing Gender*, *supra* note 5 at 80.

I believe that there is potential for locating alternatives in three distinct sites in Canadian refugee jurisprudence: persecution on account of political opinion and religion, gender, and voluntary associations.

*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 of Canada 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 a political opinion 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* confirmed that it is not necessary that the agents of political persecution be state actors.<sup>182</sup> Taken together, and considering the prominence of assertions that the heterosexual family is the “fundamental unit in 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 of sexual-minority refugee claimants and by IRB members.

A similar argument can be made concerning the category of persecution on account of religion. Many religious authorities view heterosexuality as the only natural or religiously sanctioned form of human sexuality.<sup>184</sup> Where religious

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<sup>178</sup> See *IRPA*, *supra* note 17, s. 96.

<sup>179</sup> See text accompanying note 19.

<sup>180</sup> *Supra* note 37 at 693.

<sup>181</sup> See *ibid.* at 747.

<sup>182</sup> See *ibid.* at 716-17. See also *Klinko v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 327 at paras. 25-27, 184 D.L.R. (4th) 14.

<sup>183</sup> See e.g. *Egan*, *supra* note 15 at para. 28, La Forest J.; *M. v. H.*, *supra* note 121 at para. 181, Gonthier J., 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 100-03.

<sup>184</sup> See e.g. Geoffrey Chapman, *Catechism of the Catholic Church*, rev. ed. (Bath, U.K.: Bath Press, 1999) at para. 2357 (“[s]acred 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” [references omitted]).

authorities, with or without the acquiescence of the State, attempt to compel adherence to heterosexuality, targeted violence and other systemic human-rights violations directed toward 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, et cetera), claimants must demonstrate that they face persecution on account of heterosexuality.

#### *Persecution on Account of Gender*

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

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<sup>185</sup> See e.g. *Re C.X.S.*, [1995] C.R.D.D. No. 134 (QL) (“[t]he 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. ... [T]he ultimate penalty is death”); *Re P.L.Z.*, [2000] C.R.D.D. No. 97 at para. 12 (QL) (“[t]he 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 Jeffrey A. Redding, “Human Rights and Homo-secutuals: The International Politics of Sexuality, Religion, and Law” (2006) 4 NW.U.J. Int’l H.R. 436.

<sup>187</sup> *Supra* note 37 at 739.

<sup>188</sup> See *Women Refugee Claimants Fearing Gender-Related Persecution: Update*, Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the *Immigration Act* (Ottawa: Immigration and Refugee Board, 1996).

<sup>189</sup> Canada’s guidelines for gender-based claims preceded those of other countries. 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. See also Nicole LaViolette,

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. Firstly, sexual minorities may confront persecution on account of both gender and sexual identity simultaneously. 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 (for example, in the employment, housing or social-services sectors) 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 Nicole LaViolette notes:

Social, political, and legal disapproval of homosexuality is more often a reaction to the noncompliance 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>

A practical example of this phenomenon can be found in a decision involving a gay man from Mexico.<sup>194</sup> The claimant in question 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>195</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>196</sup> As such language indicates, homosexuality may be read as defective masculinity. Or, more generally, gender—as it is traditionally understood—is partly constituted by heterosexuality. To be a woman or a man *means* to embody a particular role in a heterosexual dynamic.<sup>197</sup>

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“Gender-Related Refugee Claims: Expanding the Scope of the Canadian Guidelines” (2007) 19:2 Int’l J. Refugee L. 169 at 178 [LaViolette, “Gender”].

<sup>190</sup> See Millbank, “Visibility”, *supra* note 44 at 77; LaViolette, “Gender”, *ibid.*

<sup>191</sup> See LaViolette, “Gender”, *ibid.* at 188.

<sup>192</sup> See generally Butler, *Gender Trouble*, *supra* note 3; 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 189 at 185-86 [references omitted].

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

<sup>195</sup> *Ibid.* at para. 3 [emphasis added].

<sup>196</sup> *Ibid.* at para. 13.

<sup>197</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, *Undoing Gender*, *supra* note 5.

Framing sexual-minority claims in terms of gender persecution, rather than persecution against particular unpopular minorities, would be helpful in several respects. First, it would encourage IRB members to consider how persecution on account of gender and sexual orientation may intersect to the disadvantage of particular refugee claimants. Second, it would draw decision makers' attention to the mutually constitutive relationship between enforced heterosexuality and traditional gender identities. Such an approach is able to accommodate sexual identities beyond just gays and lesbians because it addresses 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 members to consider how traditional gender roles may be enforced not only through 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>198</sup>

For the IRB to tackle these issues effectively, it would be helpful if the guidelines on gender-based persecution were amended to refer specifically to the relevance of gender in the context of sexual-minority refugee claimants.<sup>199</sup>

*Persecution on account of voluntary associations*

The third locus in Canadian refugee law in which alternatives to the current IRB approach can be developed is the basis upon which sexual minorities qualify as a particular social group for the purposes of the refugee definition. As we have seen, the Supreme Court of Canada in *Ward* 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>200</sup>

While the Court went on to say that sexual orientation falls within the first category, the second category is in my view more appropriate.<sup>201</sup> Sexual minorities ought to be entitled to refugee protection, not on the grounds that sexual orientation is an innate or unchangeable characteristic, but rather on the grounds that requiring

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<sup>198</sup> See *ibid.* at 80.

<sup>199</sup> For a highly persuasive argument in favour 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 189.

<sup>200</sup> *Ward*, *supra* note 37 at 739 [emphasis added].

<sup>201</sup> I am, of course, not alone in holding this view. See e.g. LaViolette, "Immutable", *supra* note 20 at 41; Kristen L. Walker, "Sexuality and Refugee Status in Australia" (2000) 12 Int'l J. Refugee L. 175 at 209.

sexual minorities to forsake their associations with one another is an affront to their human dignity. Shifting the basis for sexual-minority refugee protection in this way finds support in Canadian equality-rights jurisprudence,<sup>202</sup> as well as in refugee case law from several countries, including Australia,<sup>203</sup> New Zealand,<sup>204</sup> and the United States.<sup>205</sup>

I want to be clear here. To say that persecuted sexual minorities are entitled to refugee protection on the grounds that their association is 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. The relevant concern is thus not the motivations behind sexual-minority associations, but rather the principle that forcing sexual minorities to disassociate in order to avoid persecution would violate their fundamental human dignity.<sup>206</sup>

Moving away from the immutability defence toward the fundamental human dignity approach carries a number of advantages. Firstly, such a move would contribute to shifting the terms of the debate about sexual-minority rights away from the issue of chosen conduct versus innate and immutable personal characteristics, toward the relation between sexuality and fundamental human dignity.<sup>207</sup> I acknowledge that a number of positions can, in good faith, be taken on how best to

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<sup>202</sup> Much of this support is to be found in the human-dignity approach to sexual-minority equality rights articulated by Justice L'Heureux-Dubé. See e.g. *Egan*, *supra* note 15 at paras. 88-89; *Vriend*, *supra* note 15 at para. 186; *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772 at para. 69, 199 D.L.R. (4th) 1. For an excellent discussion of fundamental human dignity as a foundation for same-sex equality norms in Canadian constitutional jurisprudence, see Leckey, *supra* note 122.

<sup>203</sup> See especially *Applicant A v. Minister for Immigration and Ethnic Affairs*, [1997] HCA 4, 142 A.L.R. 331; *S395/2002 v. Minister for Immigration and Multicultural Affairs*, [2003] HCA 71, [2003] 78 A.L.J.R. 180.

<sup>204</sup> See especially *Refugee Appeal No. 1312/93* (30 August 1995), Refugee Status Appeals Authority Decision, online: Refugee Status Appeals Authority <[http://nzrefugeeappeals.govt.nz/PDFs/ref\\_19950830\\_1312.pdf](http://nzrefugeeappeals.govt.nz/PDFs/ref_19950830_1312.pdf)>; *Refugee Appeal No. 74665/03* (7 July 2004), Refugee Status Appeals Authority Decision, online: Refugee Status Appeals Authority <[http://www.nzrefugeeappeals.govt.nz/PDFs/REF\\_20040707\\_74665.pdf](http://www.nzrefugeeappeals.govt.nz/PDFs/REF_20040707_74665.pdf)>.

<sup>205</sup> See especially *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986); *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000).

<sup>206</sup> See *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 3 S.C.R. 593 at paras. 83-89, 128 D.L.R. (4th) 213, La Forest J., dissenting (noting the key to the second *Ward* category of particular social groups is not the voluntary nature of the association in question, but rather whether forced disassociation would violate fundamental human dignity). See also Audrey Macklin, "Canada (Attorney-General) v. Ward: A Review Essay", Case Comment, (1994) 6 Int'l J. Refugee L. 362 at 375.

<sup>207</sup> See generally Leckey, *supra* note 122.



understand this relation.<sup>208</sup> However, the legal and political conversations that would emerge from a consideration of 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 refine the right to sexual self-determination that appears to be slowly emerging in both constitutional and international law.<sup>209</sup>

Secondly, asking the IRB to consider whether claimants are persecuted because of their associations would minimize 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 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 problem is to some degree built into membership in a social-group category, because claimants must demonstrate that they are, in fact, members of the particular social group in question. However, the manner in which the social group is framed can significantly affect the level of scrutiny to which claims 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 individuals before them actually fall within those groups. As we have seen, this task leads IRB Members to rely heavily on stereotypes about how individual members of such groups act and live their lives. Such stereotypes work to the disadvantage of particular subsets of these groups. Those whose sexual identities are fluid, flexible, contingent, and partly chosen have particular trouble fitting into such narrowly framed groups.

The fundamental-dignity approach, however, casts the relevant social group much more broadly: those whose associations challenge heteronormativity. Under this approach, IRB members, instead of asking whether a person is truly a member of a particular sexual minority, 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 to inquire into alleged human-rights violations that are aimed at compelling claimants to forsake associations in the name of heterosexuality.

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<sup>208</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 Somerville, *supra* note 183 at 100-03.

<sup>209</sup> See e.g. Brenda Cossman, “Gender Performance, Sexual Subjects and International Law” (2002) 15 Can. J.L. & Jur. 281 at 294; Berta E. Hernández-Truyol, “Querying *Lawrence*” (2004) 65 Ohio St. L.J. 1151 at 1179; Millbank, “Visibility”, *supra* note 44 at 110; Kristen L. Walker, “Capitalism, Gay Identity and International Human Rights Law” (2000) 9 Australasian Gay & Lesbian L.J. 58 at 70-71.

Taken together, increased resort to the categories of persecution on account of political opinion and religion and persecution on account of gender, as well as the shift toward the fundamental-dignity approach to sexual-minority refugee law, would allow Canadian refugee law to accommodate sexual minorities beyond gays and lesbians better. None of these approaches reinforces either the immutability defence or its essentialist underpinnings. That is to say, none presumes that a naturally delimited set of unpopular sexual minorities must be protected from persecution because individuals are not to blame for their unchosen and unchangeable sexual identities. Instead, these approaches consider eligible for protection all those who are persecuted because they challenge heteronormativity and/or traditional gender roles, 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 behaviours, we can contribute to a central project of queer theory: directing critical gaze away from the question of what makes some people gay toward the question of what makes some people straight.<sup>210</sup> If sexual identity is complex, fluid, and at least partly related to voluntary 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>211</sup> In attempting to solve 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 suggests that these practices may be necessary for creating the (purportedly) heterosexual and gendered majority, necessary in turn for the emergence of compulsorily heterosexual<sup>212</sup> and compulsorily gendered subjects.<sup>213</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

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<sup>210</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.

<sup>211</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>212</sup> See e.g. Adrienne Rich, "Compulsory Heterosexuality" in *Blood, Bread, and Poetry* (New York: W.W. Norton, 1994).

<sup>213</sup> See e.g. Phyllis Burke, *Gender Shock: Exploding the Myths of Male and Female* (New York: Anchor Books, 1996).

seeks to explode the continuum by inquiring into how the existence of its poles might be contingent upon heterosexist and monosexist assumptions.

## Conclusion

Published bisexual refugee decisions frequently employ the term “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 is that a primary source of this confusion is the essentialist account of sexual orientation. Such an account, which views sexual orientation as an innate and immutable personal characteristic, is currently at the heart of Canadian sexual-minority refugee law. When decision makers confront the complexity of human sexuality in all its diversity, they cannot accommodate many nonheteronormative sexual identities within essentialist understandings of sexual orientation. The result is that recounted life experiences of sexual-minority refugee claimants 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. As long as persecuted sexual minorities are entitled to refugee protection only because sexual orientation is considered an innate and unchangeable characteristic, particular sexual minorities—including bisexuals—whose identities cannot be understood in these terms will encounter difficulties accessing their rights.

Fortunately, Canadian refugee law provides a number of loci 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, religion, and gender. Moreover, it is time to rethink the basis on which sexual minorities are included in 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 built 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 determine definitively 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 recommend places heteronormative persecution—the affronts to human dignity built into the enforcement of traditional gender roles and into 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>214</sup> But at least such an approach does not 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>214</sup> See e.g. Elizabeth Adjin-Tettey, “Reconsidering the Criteria for Assessing Well-Founded Fear in Refugee Law” (1997) 25 Man. L.J. 127; Robert Barsky, *Constructing a Productive Other: Discourse Theory and the Convention Refugee Hearing* (Philadelphia: John Benjamins, 1994); Dauvergne, *supra* note 174 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 Determination in the Refugee Context” in Jordan *et al.*, eds., *Realities of Refugee Determination on the Eve of a New Millennium* (Haarlem, Netherlands: International Association of Refugee Law Judges, 1999) 134.