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## Gender, Visibility and Public Space in Refugee Claims on the Basis of Sexual Orientation

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Jenni Millbank<sup>1</sup>

In recent years, many Western refugee-receiving countries have accepted that lesbians and gay men may be eligible refugee claimants through the “membership of a particular social group” category of the Refugees Convention.<sup>2</sup> Key receiving nations such as Germany,<sup>3</sup> the USA,<sup>4</sup> and Canada<sup>5</sup> in the late 1980s and early 1990s accepted that lesbians and gay men might belong to a particular social group.<sup>6</sup> Australia followed suit in 1994<sup>7</sup> and the UK, after many conflicting decisions, accepted eligibility only in 1999.<sup>8</sup> In 2002, the European Parliament voted to broaden the draft European Commission Directive on the definition of a refugee to explicitly include sexual orientation, gender identity and HIV status as elements of the particular social group category.<sup>9</sup>

However, eligibility to bring a claim is only the first step in the refugee determination process. Although the definition of refugee is universal and the elements of the decisions on particular social group claims based on sexual orientation are apparently straightforward (are lesbians and gay men a particular social group in the sending country?<sup>10</sup> is the person lesbian or gay? are they, or will they be, in danger of persecution on that basis?), the manner in which these questions are asked and answered is deeply inflected with gendered notions of the public and the private. The case law is full of gendered and sexualised assumptions about identity and public space that demand close analysis and critique.

In our comparative study of refugee decisions on sexuality from Canada and Australia<sup>11</sup> we found a stark contrast between lesbians trapped in their homes, persecuted by their families, and gay men *entrapped* in parks and toilets, persecuted by the police. Lesbians had great difficulty grounding their claims, as their experiences were “too private,” while the experiences

of gay men were often characterised as “too public.” Our initial sense was that lesbians and gay men occupied quite separate, gendered realms, with little to connect them. However, there was a clear theme across the cases: the “proper place” of *both* lesbian and gay sexual identity was in the private domain. Gay and lesbian presence in the public domain was repeatedly characterised as one of transgression. There echoed a profound disapproval of publicly declared gay or lesbian identity, both in the sending countries and in the Australian decisions. This exclusion from the public transcended gender and coalesced around the theme of visibility. It is through an analysis of the links between visibility and violence that I am drawn to argue that a feminist-centred refugee jurisprudence must recognise and respect sexual self-determination on the part of lesbian and gay asylum seekers.

The latter part of this paper makes a feminist argument for the protection of public gay sex by linking it to the overarching issue of sexual self-determination, which concerns both lesbians and gay men in the site of refugee jurisprudence. This analysis connects decision-makers’ policing of public expression with the continual process of bodily self-management and self-surveillance that lesbians and gay men undergo as part of their daily lives.

#### PRIVATE HOUSES

Research on the gendered nature of homophobic violence in Western receiving countries has documented that lesbians face significantly more private violence than gay men—they are more likely to be harassed and assaulted at home or at work rather than on the streets, and are more likely to be attacked by men known to them, such as neighbours or former partners.<sup>12</sup> Lesbians are also more likely than gay men to face sexual or sexualised forms of assault.<sup>13</sup> In this way, violence against lesbians demonstrates some similarities to violence against heterosexual women.

Much feminist refugee literature has explored the difficulties that women (who are presumably heterosexual)<sup>14</sup> experience in asylum claims.<sup>15</sup> The domestic or semi-private nature of the persecution of women, the use of sexual assault as a method of persecution and the difficulty of establishing a state nexus (for example, in situations of state indifference to domestic violence or rape) have been continuing themes in refugee claims by women in general. These factors were strongly present in the lesbian cases we analysed.

Lesbian claimants were remarkable firstly for their absence from refugee cases.<sup>16</sup> When lesbians did appear, they often failed to receive asylum, with an overall success rate that was considerably lower than that of men. However, this overall figure masked a sharp disparity: in Canada, lesbian claimants actually had a slightly higher success rate than gay men<sup>17</sup> while in Australia lesbian claimants were overwhelmingly unsuccessful.<sup>18</sup>

In the Australian tribunal, lesbian applicants frequently failed because their experience was characterised as “merely private.” A stunning example concerns a 1999 claim by a lesbian from Bolivia.<sup>19</sup> The claimant had been subject to violence, harassment and sexual assault by several men in her neighbourhood as a result of a male relative telling people that she was a lesbian, “because he hoped that if they all insulted and attacked her, she would change.” The tribunal held that it was:

...a purely private matter and...not exerted for reasons of the Applicant's membership of a particular social group of homosexuals. There is no evidence to suggest that...other homosexuals were threatened or harmed by him or his associates...The tribunal accepts that although Bolivian society, and many other societies or communities generally disapprove of homosexuality, the Applicant's relative's motivation to 'cure' her of homosexuality is directed solely at the Applicant, a family relation.<sup>20</sup>

The study found that the private had multiple impacts on lesbian asylum claims. The experience of violence in the private realm made it difficult for

many lesbian claimants to satisfy the public state nexus component of the refugee definition. In addition, decision-makers' projected conceptions of appropriate gender norms meant that what was characterised as private was shifting and unpredictable. Experiences that were arguably public (such as police harassment or failure to protect) and which ought to thereby satisfy the state nexus requirement, were re-construed as private in the sense that the experiences were viewed as individually motivated or as provoked by the lesbian applicant.<sup>21</sup> It was not simply that lesbian experience did not fit the pre-existing mould demanded by refugee law; our analysis suggested a continually shifting public/private divide in which the public side was as perilous as the private.

While the Canadian tribunal displayed considerable sensitivity to gender issues, the Australian tribunal rarely, if ever, appeared to consider the specific human rights of lesbian women. The Australian tribunal frequently subsumed lesbian women under the implicitly heterosexual category of 'women' or implicitly male category of 'homosexual.' Acknowledging and interrogating gender in lesbian refugee decisions is vital, as ignoring gender has systematically disadvantaged lesbian claimants. Yet, alertness to gender in sexuality-based claims should not obscure the links that arise *across* gender. These links revolve around the themes of choice, visibility and public space. While the lesbian cases clearly did reflect gendered assumptions about women's relationship to the private, they also reflected hetero-normative assumptions about queer sexuality as a sexualised rupture of the (natural) public order.

#### PUBLIC TOILETS

Male claimants in our study had both a much larger number of total claims and a higher rate of overall success in their claims than did women. In general, it was easier for gay men to make out the public aspects of their cases to establish a state nexus. They were more likely than lesbians to have come to the notice of the police and to have been persecuted directly

or refused assistance by them. However, gay men who experienced persecution as a result of their presence in gay cruising locales or ‘beats’—such as parks, public toilets or other public or semi-public locations—were in danger of being characterised by decision-makers as the deserving objects of neutral criminal law because of their own sexual (or sexualised) transgressions.<sup>22</sup> This approach is inexcusable. There is an enormous range of information available on the discriminatory enforcement of public order and public decency laws being used as a weapon of oppression against sexual minorities in a wide range of countries.<sup>23</sup>

Only when the applicant’s conduct could be construed as a result of necessity rather than choice was protection offered in the Australian case law. In a series of cases involving men who had been attacked on beats, decision-makers reasoned that if beats were the *only* available gay venue in the applicant’s locale, or the only *anonymous* (and therefore ‘safe’ or ‘discreet’) option available, the applicant’s presence in the beats could be a legitimate expression of identity, and by extension a legitimate use of public space.<sup>24</sup> Public identification, including sexual expression, short of actual sex, was thereby permissible in order to achieve sex in private. In this line of decisions, beats were lifted from the public and re-configured as a step on the road to private sex. As a result, beats were expressly protected because of their (real or imagined) proximity to the private. The propriety of excluding (homo)sexuality from the public was perversely reinforced by the public sex cases, many of which juxtaposed the permitted innate need of secretly visiting beats with the impermissible public homosexual conduct or flaunting, which involved a choice. The classic example of unacceptable homosexual choice was handholding in public.

Just as positive decisions for gay men erased the public, they also tended to erase sexual agency or choice. In an earlier article I posed several questions: Is it possible to articulate an expression of public sexuality in a human rights framework if it involves choice?<sup>25</sup> Is it possible to discuss public gay sex as an expression of *culture* as well as individual identity and

sexuality? And, is it possible to do so in a feminist manner? At first blush, the role of public sex has little, if anything, to do with lesbian experience. Public sex, and most especially anonymous public sex, is very much a male experience and few lesbians are ever likely to emulate it.<sup>26</sup> But, does the simple fact that lesbians are not (generally)<sup>27</sup> having public sex enough to preclude its relevance to lesbians or to feminist analysis?

#### I WANT TO HOLD YOUR HAND

Refugee protection routinely attaches to sexuality only where it is, or is seen as, the result of necessity and not choice. Applicants are protected because they cannot help being gay, and therefore cannot help being persecuted for being gay, because they cannot help expressing their gayness somehow. The language of public *visibility* particularly marked the suppression of choice. In the Australian decisions on sexuality, it was frequently repeated that there is no human right to publicly embrace, to flaunt, proclaim, parade or hold hands.<sup>28</sup> Gail Mason has argued that the trope of visibility is “the crystallisation of assumptions that circulate in contemporary western nations regarding the appropriateness, or otherwise, of expressions and representations of homosexuality.”<sup>29</sup> Mason continues:

We need look no further than the popular and longstanding refrain against those who ‘flaunt’ their homosexuality to realise that the very suggestion that homosexuality *can* be flaunted is itself the product of the social and political hush that has historically enveloped the subject of same-sex sexuality. Whilst the cultural mandate to conceal one’s homosexuality may have waned, the knowledge that it is possible to do so continues to serve as the favoured benchmark against which all representations of homosexuality are measured. (emphasis in original)<sup>30</sup>

Although Mason’s work on homophobia-related violence is located in Australia, her argument that it is not possible to consider the full social implications of such violence in isolation from sexual visibility is apposite. The benchmark of invisibility makes it possible in the case law for decision-

makers to produce such conundrums as a “thriving but discreet homosexual community” in Colombia where “homosexuality is practised freely in private” but “public displays...entail some risk.”<sup>31</sup> The Australian decision-makers’ expectations that homosexuality could and should be secret likewise enabled the paradoxical conclusion that a number of extremely repressive regimes, such as Iran, were “*tolerant*” of homosexuality (as long as it was kept completely invisible).<sup>32</sup>

The Australian tribunal has issued divided decisions, expressing an ongoing conflict over whether applicants must be discreet in their home countries so as to avoid persecution.<sup>33</sup> One third of Australian cases raised the issue of secrecy, or discretion, and one fifth expressly *required* it of applicants. The tribunal expressed the discretion requirement as a “reasonable expectation that persons should, to the extent that it is possible, co-operate in their own protection.”<sup>34</sup> This requirement effectively reverses the responsibility of a state to ensure protection from persecution and places the onus instead on the applicant.

The deeply embedded hetero-normativity of such a requirement is well exposed in the tribunal’s own words:

It is not an infringement of a fundamental human right if one is required, for safety’s sake, simply not to proclaim that sexuality openly. Individuals of a variety of sexual orientations live side by side in a society like Ghana and practise their sexual orientations privately without feeling a need to proclaim these orientations to the general public. The public manifestation of homosexuality is not an essential ingredient of being homosexual.<sup>35</sup>

The Australian tribunal confined homosexual identity to homosexual *sex*, and as a corollary sexualised all manifestations of homosexual identity. Public sex, kisses in the park, and handholding on the street all became merged under the rubric of “sexual displays.” While homosexuality was received as a display, a proclamation or a visual and sexual performance, heterosexuality disappeared into its own cultural cloak, and in the tribunal’s

understanding, was never public or performed. Heterosexuality is so naturalised that, even as a pretence undertaken by closeted gay people in fear of their lives, it was still posited as *normal*. In a 1998 case concerning a gay man from Sri Lanka, the tribunal wrote:

The evidence is that he can avoid a real chance of serious harm simply by refraining from making his sexuality widely known - by not saying that he is homosexual and not engaging in public displays of affection towards other men. He will be able to function as a *normal* member of society if he does this. This does not seem to me to involve any infringement of fundamental human rights (emphasis added).<sup>36</sup>

In its “discretion decisions,” the Australian tribunal expressly determined, and indeed policed, the boundaries of acceptable behaviour around a shifting public/private divide that centred on a concept of the visible. In marked contrast, in the vast majority of Canadian cases, the Canadian tribunal did not impose a discretion requirement. In 1995, the Immigration Review Board (IRB) rejected the “discretion” requirement in the strongest terms:

There are many ways of ‘hiding.’ One can conceal oneself in a cave, or an attic, or a friend’s apartment. One can also attempt to hide one’s race, religion, nationality or indeed any one of the attributes of the person which fall under Convention grounds—for example, by practising the official state religion in public and one’s own faith only in secret, or by carrying false identification and ‘passing’ for someone of another race or nationality.

At the heart of the Convention definition of a refugee is the concept that no person should face a reasonable chance of persecution because of her or his race, religion, nationality, membership in a particular social group or political opinion. To deny refugee status to someone who cannot or will not conceal one of these immutable or fundamental attributes, on the grounds that by such a concealment he or she could remove the fear of persecution, would make a mockery of the Convention.<sup>37</sup>

In 2000, the U.S. Court of Appeals for the Ninth Circuit considered the claim of a Mexican man who identified as gay but also sometimes cross-dressed as a woman. The applicant's claim was rejected at the first hearing and again on appeal to the Board of Immigration Appeals (BIA). The BIA held that the way the applicant appeared in public was a choice, and that therefore his "mistreatment arose from his conduct." (In the Australian parlance, he was a flaunter). The Court of Appeals forcefully rejected the premise that the onus was on the applicant to avoid the persecution:

Perhaps, then, by 'conduct,' the BIA was referring to Geovanni's effeminate dress or his sexual orientation as a gay man, as a justification for the police officer's raping him. The 'you asked for it' excuse for rape is offensive to this court and has been discounted by courts and commentators alike.<sup>38</sup>

The Canadian tribunal often explicitly credited applicants with the right to be publicly identified as gay or lesbian and connected being openly gay with concepts such as self-identity, self-respect and self-expression. However, visibility still arose as a major axis of understanding lesbian and gay experience in the Canadian decisions. For instance, the Canadian tribunal was prepared to assume that applicants who were resolutely closeted would continue to live that way indefinitely and that such lack of visibility would eradicate or reduce their risk of persecution. The tribunal would deny claims based on this assumption.<sup>39</sup> Although applicants were not required to hide their sexuality, if it appeared that they would blend into the background, the Canadian tribunal was content to leave them there.<sup>40</sup>

Eve Sedgwick has been much quoted on her claim that the closet is the defining metaphor of modern Western homosexuality.<sup>41</sup> Sedgwick and many others have demonstrated that this metaphor is an ill-fitting one, expressing a dichotomous and essentialised understanding of both identity and visibility.<sup>42</sup> In a recent UK case, a gay man from Pakistan explicitly argued that if *refouled* he would be in danger because he was an openly gay man. The English tribunal, and the Court of the Queen's Bench on appeal,

held that he was not *really* out because neither his work colleagues nor his family knew that he was gay. Hence, they reasoned, being out was not accomplished and being closeted back in Pakistan was still a viable option (which they thus imposed upon him).<sup>43</sup> In reality, one is never completely closeted or completely out, as if these are static, universal and opposing states. Rather, the degree to which a lesbian expresses her sexual identity encompasses a continual process of choice on her part. Moreover, the extent to which she is seen as a lesbian will depend upon the degree of surveillance to which she is subject, and upon the interpretative processes of those who are viewing her.

While one may be able to maintain a closeted life in Jordan or Bangladesh for weeks, months or years, the state of closeted-ness is always a potentially permeable one. An unconscious gesture, an inquisitive neighbour, a 20-year cohabitation with “a friend” or a change of heart render the state of closeted-ness always a potentially permeable one. Many applicants, from countries as varied as Malaysia, India, Bangladesh and Iran, testified that to remain unmarried through adulthood would in and of itself be interpreted as evidence that they were homosexual and expose them to risk. It is arguable that in such cultures even an applicant who desperately wishes to, and takes all possible steps to, remain closeted, in fact becomes increasingly visible with the passage of time. Yet both tribunals were prepared to accept—to different degrees—the closet as a stable, safe and permanent home to applicants.

Non-conformity is inextricably linked to the visible, as it is through being *seen* as different that the applicants were at risk. To return to Gail Mason’s work on the experience of homophobia related violence, she explored the extent to which subjects “managed” their own visibility and negotiated public space by asking about held hands. The question received a consistent, indeed overwhelming, response: “it depends.”

[I]t depends on the atmosphere and terrain of each and every situation as it arises; it depends on the possible repercussions; it

depends on the short-term and long-term significance of any negative responses; it depends on staying attuned to the situation, and so on. No one said, 'I always feel safe enough to display such affection.' No one said, 'I never feel safe enough to display such affection.' The decision to hold hands or kiss was always a question of weighing up the risks and rewards.<sup>44</sup>

This process of weighing up the risks and rewards of visibility against a background of threatened or experienced violence is one undertaken constantly by lesbians and gay men. These risks, wherever they occur in the world, are always a question of choice in the face of constraint. The constraints vary, but my argument is that whether undertaken in China or Bangladesh, in a home, a hotel room, a public street or a public toilet, such choices about risk and visibility are the applicant's, not the decision-maker's, to make.

#### CONCLUSION

This analysis of the role of the private in the lesbian domestic cases, the public sex aspect of the gay men's cases and the discretion requirement that has so disadvantaged both lesbians and gay men, leads me at the very least to urge a rethink on the use of privacy rights or privacy discourse as a tool for lesbians and gay men in international law. Wayne Morgan argues that privacy "cannot provide an analytic structure to theorise power," and goes on to argue that as a legal tool it reinforces the "dangerousness of homosex" and disempowers lesbians and gay men by reifying the view that queer sexuality has "no acceptable public face."<sup>45</sup>

A sense of ensnarement in a perilous public/private divide makes me greatly reluctant to use any concept of the private in defending lesbian and gay subjects, and makes me equally wary of abandoning gay men who are *too public* in their sexual choices. Moreover, many queer activists and theorists have warned against gaining inclusion for some *good* lesbians or gay men at the cost of producing outsiders.<sup>46</sup>

Kris Walker and Wayne Morgan have both proposed the concept of sexual self-determination in international law and argued that this concept embodies more than “a simple assertion of a right to liberty.”<sup>47</sup> Walker argues that this is a transformative project, not limited to formal equality or privacy claims. Her argument is that “[r]ather than merely seeking an absence of state regulation of behaviour, sexual self-determination also seeks to achieve the conditions under which individuals can make choices about their sexuality.”<sup>48</sup> This concept may well be a workable one to address the concerns outlined in this paper where choices about visibility and sexual agency were routinely denied both by persecutory regimes and by decision-makers, particularly those in Australia.

In this paper I have focused upon agency and visibility as key concepts in refugee law on sexuality. I argue that feminist-centred, or feminist-aware, refugee jurisprudence must protect lesbians and gay men as sexual subjects. In doing so, laws and processes must respect lesbian and gay choices and offer protection when, where, and if they choose to take chances.

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<sup>1</sup> Senior Lecturer in Law, University of Sydney. This paper is based on research devised and undertaken with Catherine Dauvergne, Canada Research Chair in Migration Law, University of British Columbia. This is a summary of the paper presented at Assimilation and Resistance: Emerging Issues in Law and Sexuality, held at Seattle University School of Law, September 20-21 2002, and I would like to thank the organisers for making my participation in that conference possible. Thanks to Tiffany Hambley, Arlie Loughnan and Georgina Perry for research assistance on the project.

<sup>2</sup> The legal definition of a refugee is a standard one, drawn from the refugee convention and adopted into the domestic law of the receiving nations. Article 1A(2) of the Convention defines a refugee as any person who:

[O]wing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it.

Convention Relating to the Status of Refugees, July 28, 1951, art. 1A(2), 189 U.N.T.S. 150, 152, as amended by the Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. 1, 606 U.N.T.S. 267, 268.

<sup>3</sup> *Verwaltungsgericht Weisbaden* [VGW], No IV/I E 06244/81, (Unreported, April 26, 1983). This unpublished decision of the Administrative Court in Weisbaden is summarised in Maryellen Fullerton, *Persecution Due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany*, 4 GEO. IMMIGR. L.J. 381, 408–10 (1990).

<sup>4</sup> *Matter of Toboso Alfonso*, 20 I. & N. Dec. 819 (1990).

<sup>5</sup> The first Canadian case to accept sexual orientation as an eligible basis under the particular social group definition was *Re R. (U.W.)* [Oct. 7, 1991] C.R.D.D. 501 I.R.B. U91-03331 (Immigr. and Refugee Bd. of Can., Conventional Refugee Determination Div.) (Note, however, that this case contained a sharp dissent). Several more cases were decided at tribunal level before this approach was confirmed at the judicial level in the Supreme Court of Canada obiter *Ward v Att’y Gen.*, [1993] 2 S.C.R. 689 (Can.).

<sup>6</sup> In 1995, the United Nations High Commission for Refugees (UNHCR) accepted that lesbians and gay men may constitute members of a “particular social group” and be eligible for protection under the terms of the Convention Relating to the Status of Refugees. United Nations High Commission on Refugees, *Protecting Refugees: Questions and Answers* (Feb. 1, 2002), available at <http://www.unhcr.ch>. Since then a number of European nations, such as Austria, Denmark, the Netherlands, Finland and Sweden have accepted lesbian and gay asylum seekers on the grounds of sexuality related persecution. See AMNESTY INTERNATIONAL, *CRIMES OF HATE, CONSPIRACY OF SILENCE: TORTURE AND ILL TREATMENT BASED ON SEXUAL IDENTITY* (2001), available at <http://www.amnesty.org>.

<sup>7</sup> In Australia, the first case was RRT Reference N93/00593 (Refugee Rev. Trib., Austl. Jan. 25, 1994). Some years passed (during which cases usually referred to the Supreme Court of Canada decision *Ward v. Att’y Gen.*, [1993] 2 S.C.R. 689) before this view was judicially confirmed in High Court obiter. *Applicant A v. Minister for Immigr. & Ethnic Affairs* (1997) 142 A.L.R. 331 (Austl.).

<sup>8</sup> *Regina v. Immigr. Appeal Trib. ex parte Shah*, 2 A.C. 629 (H.L. 1999). Prior to this time there were conflicting decisions. See Derek McGhee, *Persecution and Social Group Status*, 14 J. REFUGEE STUD. 20 (2001); MARK SYMES, *CASELAW ON THE REFUGEE CONVENTION: THE UNITED KINGDOM’S INTERPRETATION IN LIGHT OF THE INTERNATIONAL AUTHORITIES* (2000).

<sup>9</sup> The final decision remains with the European Council of Ministers, but if passed would cover all its member nations and so broaden considerably the range of countries evaluating, many for the first time, refugee claims on the basis of sexual orientation. See *Justice and Home Affairs: European Parliament Backs a Broader Definition of Refugee*, EUR. REP., Oct. 23, 2002.

<sup>10</sup> This step has been undertaken in a very cursory fashion in the Australian cases. See Catherine Dauvergne & Jenni Millbank, *Before the High Court: Applicants S396/2002 and S395/2002, A Gay Refugee Couple From Bangladesh*, 25 SYDNEY L. REV. 97 (2003).

<sup>11</sup> Focusing on the six-year period from 1994–2000. Of the decisions studied, 127 were Canadian and 204 were Australian. Considering all claims, 35% of decisions were favourable to the applicant. In Australia only 22% of claims overall were successful, while in Canada the figure was more than double that, at 54%. See Jenni Millbank,

*Imagining Otherness: Refugee Claims on the Basis of Sexuality in Canada and Australia*, 26 MELB. U. L. REV. 144, 148–49 (2002). See also Catherine Dauvergne & Jenni Millbank, *Burdened by Proof: How the Australian Tribunal System has Failed Lesbian and Gay Asylum Seekers*, 31 FED. L. REV. (forthcoming 2003).

<sup>12</sup> See Gail Mason, *Heterosexed Violence: Typicality and Ambiguity*, in HOMOPHOBIC VIOLENCE 23 (Gail Mason & Stephen Tomsen eds, 1997).

<sup>13</sup> *Id.*

<sup>14</sup> But note that there is a chapter on “Sexual Orientation” in HEAVEN CRAWLEY, *REFUGEES AND GENDER: LAW AND PROCESS* (2001).

<sup>15</sup> See, e.g., Krista Daley and Ninette Kelley, *Particular Social Group: A Human Rights Based Approach in Canadian Jurisprudence*, 12 INT’L. J. REFUGEE L. 148 (2000); Audrey Macklin, *Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims*, 13 GEO. IMMIGR. L. J. 25 (1998); Deborah Anker et al., *Women Whose Governments Are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence May Qualify as Refugees under United States Asylum Law*, 11 GEO. IMMIGR. L. J. 709 (1997).

<sup>16</sup> In the whole pool of cases only 14% of the Canadian claims and 21% of the Australian claims were brought by lesbians. Millbank, *supra* note 11, at 148.

<sup>17</sup> Lesbian claimants in Canada had a 66% success rate while gay men had a 52% success rate. *Id.*

<sup>18</sup> A mere 7% of lesbian claimants succeeded in Australia, compared to 26% of gay men. *Id.*

<sup>19</sup> RRT Reference N98/23425 (Refugee Rev. Trib., Austl. Apr. 28, 1999).

<sup>20</sup> *Id.* See also RRT Reference N99/27818 (Refugee Rev. Trib., Austl. June 29, 1999), where the applicant’s husband battered her and attacked her with a knife on finding out that she was in a lesbian relationship:

On her evidence her husband was only violent towards her and not towards other homosexuals. I consider it was pique and jealousy towards her as an individual that motivated his abuse of her. In stating this, I accept that the unfamiliarity of being supplanted by a female rather than the normal male lover would have caused him to resent the situation more. However, I am not satisfied that the applicant would not have been abused by him if she had been in a heterosexual extra-marital relationship.

In another case where the agent of persecution was a violent former husband the Australian tribunal stated: “[T]he Applicant does not claim, and I do not consider, that the particular problems she faces from her husband will be made worse by reason of the fact that she has formed a lesbian relationship as distinct from a relationship with a man.” RRT Reference N97/15064 (Refugee Rev. Trib., Austl. Nov. 4, 1997).

<sup>21</sup> See, e.g., RRT Reference V98/09498 (Refugee Rev. Trib., Austl. Mar. 30, 1999) and the partner’s case at RRT Reference V98/09501 (Refugee Rev. Trib., Austl. Mar. 31, 1999); RRT Reference N97/17155 (Refugee Rev. Trib., Austl. Sept. 23, 1998) and RRT Reference N99/27818 (Refugee Rev. Trib., Austl. June 29, 1999).

<sup>22</sup> E.g., a Chinese gay couple arrested having sex in a park and persecuted by the police and other authorities were held not to have been persecuted “for reason of their homosexuality per se.” RRT Reference N98/25853, N98/25980 (Refugee Rev. Trib.,

Austl. May 11, 1999); RRT Reference N97/14768 (Refugee Rev. Trib., Austl. Apr. 29, 1998). The latter was initially overturned on appeal but the Full Federal Court ultimately upheld the original decision. See *Minister for Immigration & Multicultural Affairs v. Gui* (1998) F.C.A. 1592 (Fed. Ct. of Austl.). See also RRT Reference V95/03188 (Refugee Rev. Trib., Austl. Oct. 12, 1995), which stated:

It may also be pointed out that if a person were penalized for certain acts, then this would not be persecution on the basis of homosexuality or membership of the social group consisting of homosexual men, but prosecution for particular acts; those acts might, it is true, be so profoundly bound up with that membership/homosexuality that the prosecution could still be for reasons of the membership/homosexuality, and so could be considered as persecution; but if it were merely the case that the prosecution were for the performance of these acts in public (for example), then this could not be said to be so.

In Canada, see *Re N.* (LX) (Apr. 9, 1992) C.R.D.D. 47, I.R.B. T91-04459 (Immigr. and Refugee Bd. Of Can., Convention Refugee Determination Div.) (dissent per Colle) regarding a public decency law, “The edicts govern the public behaviour of homosexuals and other groups because in Argentine society the sexual mores are such that public displays of certain behaviour is unacceptable. [These] edicts and their application may well involve harassment and discrimination of certain groups but they are not persecutory in nature.” *Id.*

<sup>23</sup> The use of “vagrancy” laws in Venezuela to target gay men and others was noted as persecutory in *Re X.M.U.*, [Jan. 23, 1995] C.R.D.D. 146, (QL), I.L.R. T94-06899 (Immigr. and Refugee Bd. of Can., Convention Refugee Determination Div.). The use of “public nuisance” laws to harass and detain gay men in India is notorious. See Aditya Bondyopadhyay, *State Sponsored Oppression and Persecution of Sexual Minorities in India*, NGO Briefing, U.N. Comm’n. on Human Rights (Apr. 8, 2002), at <http://www.iglhrc.org>; Anuja Gupta, *Testimony to the Int’l Trib. on Human Rights Violations Against Sexual Minorities*, Int’l Gay and Lesbian Human Rights Comm’n (1995). See also RRT Reference N98/21640, (Refugee Rev. Trib., Austl. Dec. 21, 1998); RRT Reference N98/26197 (Refugee Rev. Trib., Austl. May 11, 1999), finding evidence on the use of “hooliganism” laws in China where, “it would not be difficult for police to find some way to use the law against homosexuals if they wished to do so.”

<sup>24</sup> See, e.g., RRT Reference V95/03527 (Refugee Rev. Trib., Austl. Feb. 9, 1996); RRT Reference N96/10584 (Refugee Rev. Trib., Austl. May 15, 1996).

<sup>25</sup> See Dauvergne & Millbank, *supra* note 10.

<sup>26</sup> The editors of a collection of essays on queer space reflect, “Although we searched diligently to find a broad range of contributors, *Queers in Space* still reflects the dichotomy of women forging communality in space and men having sex in it.” *QUEERS IN SPACE: COMMUNITY, PUBLIC PLACES, SITES OF RESISTANCE* 10 (Gordon Brent Ingram, et al. eds., 1997).

<sup>27</sup> Nicole LaViolette notes an early Canadian case where a young lesbian couple from Israel were unable to afford housing together and met frequently in a public park. They were subject to physical and sexual assault. As in the cases discussed above concerning gay men, the lesbian applicants had their claims rejected on the basis that the violence

resulted from their use of public space rather than a convention ground. A. (E.C.) [1993] C.R.D.D. 238 (Immigr. and Refugee Bd. of Can., Convention Refugee Determination Div.), cited in Nicole LaViolette, *The Impact of Gender on Decision-Making in Cases Involving Sexual Orientation*, Address at the International Conference on Refugee Women Fleeing Gender-Based Persecution, (May 4–6 2001) (conference proceedings available from the Canadian Council for Refugees).

<sup>28</sup> See, e.g., RRT Reference V98/08356 (Refugee Rev. Trib., Austl. Oct. 28, 1998) (flaunt, parade, proclaim publicly), on appeal to Federal Court; Applicant L.S.L.S. v. Minister for Immigr. & Multicultural Affairs (2000) F.C.A. 211, ¶ 19 (Fed. Ct. of Austl.) (indiscriminate disclosure); RRT Reference V98/09564 (Refugee Rev. Trib., Austl. May 4, 1999), and RRT Reference V99/10323 (Refugee Rev. Trib., Austl. Apr. 14, 2000) (flaunt); RRT Reference N94/04854 (Refugee Rev. Trib., Austl. July 21, 1998) and RRT Reference V96/05496 (Refugee Rev. Trib., Austl. Jan. 15, 1998), (publicly proclaim). I am indebted to Julie Shapiro for making the connection that “flaunting” is also an overarching theme in the private law area where most lesbians appear, family court child custody disputes. See Julie Shapiro, *Custody and Conduct: How the Law Fails Lesbian and Gay Parents and Their Children*, 71 IND. L. J. 623, 671 (1996). This resonance around flaunting confirms my sense that although lesbians may be less visible in refugee cases, *being seen to be queer* is of comparable importance as an issue, and as a disciplinary presence in the law, for lesbians as it is for gay men.

<sup>29</sup> GAIL MASON, *THE SPECTACLE OF VIOLENCE* 78 (2002).

<sup>30</sup> *Id.* at 78–79.

<sup>31</sup> RRT Reference N96/12957 (Refugee Rev. Trib., Austl. July 28, 1997); RRT Reference N97/19492 (Refugee Rev. Trib., Austl. Dec. 17, 1998); RRT Reference N97/19983 (Refugee Rev. Trib., Austl. May 12, 1999).

<sup>32</sup> For the conclusion that Iran is “tolerant,” see, e.g., Applicant S.A.A.M. v. Minister for Immigration & Multicultural Affairs (2002) F.C.A. 444, para. 20 (Fed. Ct. of Austl.); Khalili v. Minister for Immigration & Multicultural Affairs (2001) F.C.A. 1404 (Fed. Ct. of Austl.), appeal to Full Federal Court reported as Applicant S.A.A.F. v. Minister for Immigration & Multicultural Affairs (2002) F.C.A. 343 (Fed. Ct. of Austl.); Nezhadian v. Minister for Immigration & Multicultural Affairs (2001) F.C.A. 1415 (Fed. Ct. of Austl.), appeal to Full Federal Court reported as Applicant W.A.B.R. v. Minister for Immigration & Multicultural Affairs (2002) F.C.A.F.C. 124 (Fed. Ct. of Austl.). The Federal Court has held that such conclusions are unreviewable:

The country information consulted by the RRT suggested that the Iranian authorities do not actively seek out homosexuals and the risk of prosecution for homosexuality is minimal so long as the activities are carried out discreetly. *This evidence may or may not be correct.* However, it was before the RRT and the RRT formed the view that it was appropriate to rely on it. That essentially is a question for the RRT, being a question of fact and degree as to the relative weight to be given to the assertions by the applicant and the independent country evidence which is referred to in the decision (emphasis added).

Gholami v. Minister for Immigration & Multicultural Affairs (2001) F.C.A. 1091, para. 14 (Fed. Ct. of Austl.).

<sup>33</sup> Note that the requirement was rejected as inherently discriminatory in Australia as early as 1996. RRT Reference V95/03527 (Refugee Rev. Trib., Austl. (Feb. 9, 1996). However, division continues at the tribunal level because of the limited role of precedent within that system. The question is one that will be considered in a forthcoming appeal to the High Court, *see* Applicant S114/2002 v. Minister for Immigration & Multicultural Affairs (Oct. 11, 2002) (High Ct. of Austl.), Transcript of Leave to Appeal. The case is now renamed S395/2002, S396/2002 and is discussed in Dauvergne & Millbank, *supra* note 10.

<sup>34</sup> RRT Reference V95/03527 (Refugee Rev. Trib., Austl. Feb. 9, 1996).

<sup>35</sup> RRT Reference N98/24718, (Refugee Rev. Trib., Austl. Mar. 19, 1999).

<sup>36</sup> RRT Reference V98/08356 (Refugee Rev. Trib., Austl. Oct. 28, 1998). Upheld on appeal to the federal court. Applicant L.S.L.S. v. Minister for Immigr. & Multicultural Affairs (2000) F.C.A. 211. This view was expressly endorsed by the Full Federal Court of Australia in *W.A.B.R. v. Minister for Immigration & Multicultural Affairs* (2002) F.C.A.F.C. 124 (Fed. Ct. of Austl.).

<sup>37</sup> *Re X.M.U.*, [Jan. 23, 1995] C.R.D.D. 146, (QL), I.L.R. T94-06899 ¶¶ 101–102.

<sup>38</sup> *Hernandez-Montiel v. Immigr. & Naturalization Serv.*, 255 F.3d 1084, 1098 (2000).

<sup>39</sup> *E.g.*, where a gay male applicant from Jordan gave evidence that he had “traditional views regarding family and society and does not wish to live as an openly gay man” the Immigration and Refugee Board of Canada (I.R.B.) took him at his word and held that he could live a secret sexual life without risk of persecution. *See Re E.P.O.* [Aug. 29, 1997] C.R.D.D. 188, I.R.B. T96-05863, (Immigr. and Refugee Bd. of Can., Convention Refugee Determination Div.).

<sup>40</sup> This approach was even more common in the Australian decisions where if applicants had secret lives up to the point of departure. *See, e.g.*, *Khalili v. Minister for Immigration & Multicultural Affairs* (2001) F.C.A. 1404 (Fed. Ct. of Austl.).

<sup>41</sup> EVE KOSOFSKY SEDGWICK, *THE EPISTEMOLOGY OF THE CLOSET* (1991).

<sup>42</sup> Judith Butler offers an example:

Is the “subject” who is “out” free of its subjection and finally in the clear? Or could it be that the subjection that subjectivates the gay and lesbian subject in some ways continues to oppress, or oppresses most insidiously, once “outness” is claimed? What or who is it that is “out,” made manifest and fully disclosed, when and if I reveal myself as lesbian? What is it that is now known, anything?

*See* Judith Butler, *Imitation and Gender Insubordination in INSIDE/OUT: LESBIAN THEORIES, GAY THEORIES* 15 (Diana Fuss ed., 1991).

<sup>43</sup> *See R. v. Special Immigration Adjudicator ex parte T.*, [2000] EWJ 3020. The tribunal continued, “His fear is of persecution should he return to Pakistan and behave there as an open and outed homosexual and in a promiscuous manner.” Appeal ¶ 11. The tribunal reasoned that as there weren’t gay clubs in Pakistan the applicant would probably return to “his former lifestyle” of occasional covert sex. “It is of course not a Convention reason that an asylum seeker returning to his own country is unable to enjoy the peripheral benefits of westernised and so called liberalised behaviour.” Appeal ¶ 12.

<sup>44</sup> Mason, *supra* note 29, at 89.

<sup>45</sup> See Wayne Morgan, *Identifying Evil for What It Is: Tasmania, Sexual Perversity and the United Nations* 19 MELB. L. REV. 740, 751–4 (1994). Ruthann Robson argues, in the U.S. context, that:

We need to be more critical of privacy not only because its vitality as a legal strategy is subject to criticism, but because its legal power threatens to domesticate both lesbian sex and lesbian lives. When we think of our sexuality in terms of the legal concept of privacy, we become confused. We want to be able to say that our sexuality is no one's business, and we want to be out of every closet.

Privacy discourse, Robson argues, can convince us that such desires are contradictory. See RUTHANN ROBSON, *LESBIAN OUTLAW: SURVIVAL UNDER THE RULE OF LAW* 64 (1992). See also Cheshire Calhoun's argument focused on US privacy jurisprudence, that "preoccupation with protecting gay and lesbian private sexual activity misses a more central political problem - the privatisation of all things lesbian or gay through their equation with sexual acts." CHESHIRE CALHOUN, *FEMINISM, THE FAMILY, AND THE POLITICS OF THE CLOSET: LESBIAN AND GAY DISPLACEMENT* 83, 83–87 (2000).

<sup>46</sup> See, e.g., Didi Herman, *Are We Family? Lesbian Rights and Women's Liberation* 28 OSGOODE HALL L.J. 789 (2000); SHANE PHELAN, *SEXUAL STRANGERS: GAYS, LESBIANS AND DILEMMAS OF CITIZENSHIP* (2001); Robson, *supra* note 44.

<sup>47</sup> Kristen Walker, *Capitalism, Gay Identity and International Human Rights Law* 9 AUSTRL. GAY AND LESBIAN L.J. 58, 70–71 (2000); Wayne Morgan, *Queering International Human Rights Law in SEXUALITY IN THE LEGAL ARENA* (Carl Stychin and Didi Herman eds., 2000).

<sup>48</sup> Walker, *supra* note 47, at 71. Interestingly, Walker expressly includes public sex in this formulation, *Id.* at 72.