

SEXUALITY, HUMAN RIGHTS, AND HEALTH

Alice M. Miller and Carole S. Vance

Sexuality can no longer be overlooked or ignored in work on health and human rights.¹ The growing diversity of rights-based advocacy and documentation, and new initiatives in public health, health policy, and service delivery, have inevitably engaged questions of sexuality. At the international level, UN human rights bodies are increasingly taking on new norms and laws relating to sexual diversity, health, and harm.² Local and national struggles for legal reform engage with sexuality and rights claims in the context of sexual violence, HIV/AIDS, and emerging demands for sexual non-discrimination. WHO has formulated newly revised definitions of sexual health and rights,³ and health policy-makers and planners increasingly address sexuality in their work. Health programmers recognize that effective health interventions require an understanding of complex sexualities, as well as of the constrained contexts in which many women and men exercise rights.

While sexuality can no longer be ignored, it is not entirely clear what the nature or terms of its inclusion will be. In her work on global feminisms, Uma Narayan emphasizes the need to examine terms of inclusion in order to do accountable and self-reflective work.⁴ How will sexuality be

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included in work on health and human rights? For advocates and policy makers, the answer is not simple or obvious. Sexuality carries with it powerful assumptions and self-evident “knowledge” that may be misleading, biased, or inaccurate. In addition, sexuality has hidden and sometimes unexamined connections to hierarchies or structures of power that are inimical to equality, diversity, and freedom. Most importantly, sexuality varies in complex ways across time and place in a manner we are just beginning to apprehend, despite its deceptively imagined “common sense” relationship to the body and allegedly unchanging and static nature.

In this brief reflection, we highlight several problems that arise at the intersection of sexuality, rights, and health. Without careful analysis and attention to sexuality—its histories and cultural meanings—our own responses can become part of the problem. In addition, we face the possibility of generating ineffective responses to denials and violations of rights in the context of sexuality, or even worse, harmful interventions, practices, and programs. As scholars and advocates, we have worked together for over six years, each with a different primary focus (for Carole Vance, sexuality and for Alice Miller, human rights). Many of the authors in this issue of *Health and Human Rights* have been part of an evolving conversation at the Program for the Study of Sexuality, Gender, Health, and Human Rights. During this time, three specific issues have persistently demanded critical attention: the sexual hierarchy; the unexamined enthusiasm among advocates for state regulation; and the role of innocence in sexual rights claims. These dynamics manifest themselves in specific rights abuses, but they also reappear in the health and human rights tools we bring to ameliorate violations, with adverse consequences for the well-being of the persons we seek to assist.

Sexual Hierarchy

Sexual hierarchies are important features of most cultures and vital for advocates to understand. Described by anthropologist Gayle Rubin, the sexual hierarchy resembles a class system, in which different sexual practices, expressions, identities, and communities are ranked, from the most normative and socially approved to the most stigma-

tized and despised.⁵ The concept of sexual hierarchy is an important analytic device for identifying how a culture evaluates sexual behaviors, relationships, and expressions. Its practical value lies in the way it lays bare the rules for evaluating “legitimate” and “illegitimate” sexuality, making them explicit and subject to evaluation from a human rights perspective.

The standards of sexual legitimacy, the organizing principles that members of a culture use for ranking, vary greatly and might include procreation, intimacy, consent, heteronormativity, personal fulfillment, or religious duty. Standards of sexual legitimacy are deeply implicated in all sexuality and rights questions, since the low-ranked members of a sexual hierarchy are usually subject to a wide range of abuse and discrimination. They are often ignored in the design of health programs, or their stigmatized difference is made the target of coercive policies. Moreover, the standards by which people are ranked must be subjected to rights-based scrutiny to ensure that harm and not difference is being sanctioned.⁶

Like a class system, a sexual hierarchy metes out rewards and deprivations, with material as well as symbolic resources. In addition, a sexual hierarchy intersects with other social hierarchies and inequalities, for example, class, caste, race, or gender. Different forms of stigma reinforce each other, as racial stigma may be compounded by ideas of “deviant sexuality” stereotypically associated with disfavored racial groups. From a human rights perspective, advocacy work, even which on its face is not about sexuality, nevertheless encounters sexuality. Advocates work with marginal groups that are not only denigrated by race, class, or caste, for example, but who are also often demonized as sexual Others. Sexual stigma and anxiety then intensify unacknowledged prejudices and disable claims for justice. Advocates working on the sexual rights of a stigmatized group often work to “promote” their group, that is, move them up a rung or two in the sexual hierarchy, from a more to a less penalized level. But all advocates should be critically interrogating the sexual hierarchy as a whole: Are its underlying principles defensible from a rights-based perspective? Do the standards of sexual legitimacy promote a

rights-enhancing culture? If the answer is no, advocacy must encompass the larger project of transforming the sexual hierarchy, or at the very least of not validating and strengthening it, when they advance the interests of their constituency.

Failure to identify the operation and influence of the sexual hierarchy may lead advocates to inadvertently harm a set of non-conforming persons, or exclude them from campaigns and policy reform efforts, because the stigma of non-conforming sexuality is perceived as a disabling burden or controversial handicap. Penelope Saunders' analysis reveals how the interests of sex workers, marginalized but centrally affected by HIV/AIDS policies, were sacrificed in NGO lobbying—and in the final legislation—with virtually no discussion, during the passage of the United States Leadership Against HIV/AIDS, Tuberculosis and Malaria Act of 2003. The greatest influence—and harm—of the sexual hierarchy, however, is found in the way it animates and is embodied in a range of state interventions, especially criminal law.

Human Rights as a Site of Struggle in its Engagement with the State

Human rights advocates have not had a full conversation about how to work comprehensively and coherently across culturally different sexual practices, identities, meanings, and power structures. The phrase “diverse sexualities” may be in use, but the implication of how to imagine and consider proposed interventions in relation to the range of people to be affected by them is an ongoing challenge. In addition, the term “sexual rights” is not a synonym for rights work connected to gays and lesbians or sexual orientation or women's reproductive health. The reach and promise of sexuality and rights includes individuals without names and identities, including the most conventional and privileged along with the most despised.

Even as we use human rights as a tool of struggle, it is also a site of struggle. The enterprise of human rights is the property of many, including both advocates working with formal norms and standards, as well as others deploying imaginative claims in grass-roots settings (using “t-shirt

rights," for example, like "love is a basic human right").⁷ At the same time, rights advocates and experts working in the formal system employ terms and concepts whose meanings and implications they themselves are still exploring. The lack of clarity is troubling, given their enterprise of turning claims into legal entitlements. What is meant by, for example, "the right to privacy" or "dignity" in regard to sexuality? Add to this complexity the politically explosive context of sexual rights claiming at the UN, an arena fraught with geopolitical disputes and post-colonial legacies. In his article, Ignacio Saiz explores many advances that have been made in the United Nations regarding sexuality and rights, but he points out the absence of cross-sectoral work and the resulting lack of shared concepts and strategy among groups. Thus, advocates concerned with health and rights are working in dangerous circumstances with tools that are incomplete and even inconsistent.

The relatively tentative and partial human rights conversation about the limits and purposes of state regulation of sexuality has not fully confronted the unrestrained, arbitrary (and often discriminatory) application of the law to diverse sexualities. In addition, while health professionals have identified some negative consequences for health in laws regulating sexuality (particularly in relation to HIV/AIDS), their critique of state regulation has been ad hoc and particular. Human rights as a practice and doctrine needs to consider the basis on which the state regulates sexuality through law, especially criminal law. State rationales for doing so vary considerably, within and across legal systems. In current international and national law, the grounds for regulating sex are hybrids of historically specific religious and secular frameworks. Although sexual norms and attitudes have changed significantly in many countries over the last century, law is often slow to register these changes; sex law itself is notoriously resistant to change.⁸

The lack of a comprehensive analysis of state regulation of sexual behavior has produced incoherent results. Consider, for example, the tension often felt by advocates between promoting equality (ensuring equal regulation in process or effect) and advancing freedom (challenging the

very notion that law can or should be used to punish non-coercive sexual activity). This lack of clarity has already played out in sexual rights claiming in dangerous ways for sexuality, which requires the dual approach of protection from harm and creation of the conditions for enjoyment of rights.

In 2002, the United Nations Human Rights Committee (HRC, the expert body that monitors governmental compliance with the International Covenant on Civil and Political Rights [ICCPR]) reviewed Egypt's report. In different sections of its concluding comments, the HRC embraced contradictory positions on laws regulating adult sexual behavior in private, without appearing to notice. In regard to the penal code's treatment of adultery, the HRC criticized Egypt for treating women much more harshly than men, citing the fact that ICCPR Articles 3 and 26, respectively, guarantee equality between men and women and the equal protection of the law.⁹ In the same document, the HRC criticized the application of "debauchery" laws to men having sex with men as a violation of privacy. The HRC applied Articles 17 and 26 (privacy and equal protection under the law) of the ICCPR and asserted that the state should "refrain from penalizing private sexual relations between consenting adults."¹⁰ Paradoxically, then, the HRC recommended *equalizing* criminal penalties for consensual sex outside of marriage for women and men, while it recommended *removing* criminal penalties for consensual sex between men. The inability of the HRC to think across issues is not unrelated to the ways in which NGOs produce and submit documentation to the UN, often organizing their information around specific constituencies and groups.

Advocates working on sexuality and rights want to eliminate the range of sexual discriminations and harms. But in this regard, what do they want the state to do? Do they seek to equalize the state's criminal regulation of sexuality (all types of persons receive equal penalties), or to limit regulation to where it is most necessary? What do we understand to be acceptable and rights-enhancing principles for such regulation: Moral guidelines for sexual activity, variously defined by religious texts and traditions? Procreation or the lack thereof? Consent, with recognition of age-

specific lack of or reduced capacity to give consent? Evidence of harm? Risk of disease transmission? Sexual behavior in the context of intimacy and ongoing relationships rather than recreational or commercial activity? As Alice Miller's piece explores in more detail, advocates' uncritical invocation of criminal law as the dominant response to sexual harm is potentially dangerous. Although a criminal law response may sometimes be appropriate and necessary, it may also perpetuate forms of injustice, including many prejudices and stigmas carried by the sexual hierarchy.

Representation and Innocence

Sexual hierarchies bedevil the professional practice of human rights and health advocates as they make daily decisions about how to address sexual rights issues. These decisions are far from routine when it comes to sex. Cultural anxieties about sensitivity, taste, and sensationalism make for increased caution and deliberation. In threading their way through these issues, advocates often settle on wholesome and respectable "victims," individuals suffering sexual rights abuses who are in every other way upright and free from the taint of sexual stigma. The preference for blameless victims often means—particularly in regard to women in many cultures—that they are "innocent" or sexually inexperienced.¹¹ The "innocent victim" does have undeniable and dramatic impact in documentation, public campaigning, and lobbying. These successful moments are soon overtaken, however, by the negative consequences of anchoring sexual rights campaigns in sexual innocence. Remedies and interventions honed with the innocent in mind often ignore the much larger group of individuals—sexually experienced, knowledgeable, often compromised in terms of the harsh judgments of sexual respectability—who also deserve human rights protections. The remedies they need, however, might be different and more diverse than those devised for those depicted as innocent. Though a rewarding media technique in the short term, advocates' unthinking preference for innocence inadvertently confirms and conforms to the power of the sexual hierarchy rather than challenging it.

Applying Tools, Expanding Rights

The contributors to this issue confront these problematic questions regarding sexual hierarchy, representation and innocence, and the state. Scott Long examines the medical profession as a site in which abuse occurs, with doctors as rights violators. He analyzes the way that medicalized torture plays a key role in the construction of the “sexual pervert” in contemporary Egypt; in addition, he shows that the “pervert” is linked to current cultural and political anxieties. Arvind Narrain analyzes the extent to which the sexual hierarchy thwarts HIV/AIDS and safe-sex education in India. Laws penalizing “unnatural sexual offenses” and the political climate created by Hindu right-wing nationalism stymie health interventions. Although the banner of health has often provided openings for sexual rights work (i.e., disease or “harm reduction” approaches underwrite safer-sex education), the unwillingness of most health activists in India to go beyond harm reduction to challenge laws penalizing same-sex sexual behavior constrains their effectiveness.

A more troubling obstacle is created when advocates or health programmers themselves design programs that preclude the most effective effective health interventions. Sealing Cheng examines various rights-oriented projects adopted by South Korean NGOs in response to the needs of migrant sex workers. She finds that their need to make women “innocent victims” of trafficking—and therefore without sexual agency or independent, socially transgressive interests—stands as a barrier to creating effective HIV/AIDS programs with this population. In her work with Vietnamese women in sex work, Joanna Busza explores the complex ways in which anti-trafficking interventions in Cambodia, including rescue, may not only be unresponsive to the health and workplace needs of the women but may inadvertently compound their risk of violence, debt, and isolation from health services

Cynthia Rothschild’s review of human rights approaches to reporting on sexual harm and difference suggests some initial elements of these necessary conversations among advocates. So, too, does the commentary by Lydia

Alpizar and Marina Bernal, which sketches out some innovative elements for young people's claims to sexual agency through a human rights framework in contemporary Mexico. Susana Fried's annotated bibliography illustrates the expansion of this global conversation, as well as its uneven and partial development.

Commentators document the ways in which "sexuality" is being defined and deployed in these claims, paying attention to the ways in which "sexual stories" are being put to work in contemporary politics and rights claims. Oliver Phillips examines the different ways that South Africa and Zimbabwe have deployed ideologies of gender, race, and sexual identity in order to patrol each category in service of specific concepts of citizenship. Progressive advocates, policy-makers, and legislators alike often make a "call to history" in order to welcome, validate, or document sexual diversity in their country or culture. Conversely, other histories of sexuality—often fictional and recently constructed narratives about the "authentic," "traditional," "natural," or "indigenous"—are deployed to justify the exclusion of sexual difference. Daniel Hurewitz explores that call to history in recent U.S. Constitutional decisions about sexuality and, more broadly, the ways in which advocates may use sexuality scholarship. The historical nature of sexuality—its fluidity and malleability over time and place—can complicate challenges to discrimination that assume sexuality or sexual identity is unchanging. Can we deconstruct and defend sexuality at the same time, as Vance has asked?¹²

Conclusion and Ways Forward

The human rights' encounter with sexuality, particularly in the context of health, thus requires us to engage in ongoing critical thinking. In part, human rights derives its power from the invocation of notions of dignity, and its creation of clear standards against which state action (and increasingly non-state action) can be judged. Yet sexuality in all of its diversity defies norms and turns to human rights to help it resist regressive standards. How do we develop rights-based policies that foster the ability to experience chosen sexualities, without coercion, and allow more di-

verse public conversations about what can be desired and done, without inadvertently reinforcing a single normative standard of sexuality or pleasure? How do we ensure that health interventions respect and protect diverse sexualities?

These pieces make it clear that work in rights, health, and sexuality still suffers from being ad hoc, sectoral, and reactive rather than strategic, multi-sectoral, and pro-active. Pro-active rights approaches to sexuality require conceptualizations that examine the operation of sexuality across and within heterosexuality and homosexuality, age, race, and cultural belief. In addition, these approaches must move across and converse with the varied forms and sectors of sexual rights and health work (anti-sexual violence; sexual and reproductive health and rights; queer, lesbian, gay, bisexual, and transgender rights; sex work; HIV/AIDS work; child sexual exploitation; among others). We need to examine the extent to which each category is implicated in the construction of the other, and thus remedies and interventions imagined for one category must be evaluated for potential impact on the other.

We do not claim to have answers, but we hope that our reflections and the work of the many authors presented here will stimulate deeper reflection about the ways in which sexuality, health, and rights might come together, whether in health programming and delivery, law reform, or human rights advocacy.

References

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2. I. Saiz, this issue of *Health and Human Rights*.

3. See O. Phillips, A. Narrain, D. Hurewitz, and L. Alpízar and M. Bernal, this issue of *Health and Human Rights*. The revised WHO working definitions appear on: http://www.who.int/reproductive-health/gender/sexual_health.html#4 [site last visited on June 22, 2004].

4. U. Narayan, *Dislocating Cultures: Identities, Traditions, and Third World Feminisms* (New York and London: Routledge, 1997), p. 45.

5. G. Rubin, "Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality," in C. S. Vance (ed.) *Pleasure and Danger: Exploring Female Sexuality* (Boston: Routledge, 1984), pp. 267-319.

6. We generally endorse contemporary principles of consent as the most rights-enhancing standard of sexual legitimacy, while acknowledging that some areas of consent are complex and require additional exploration.

7. According to Alice M. Miller, "t-shirt rights" are claims that are deployed in demonstrations and on t-shirts, drawing on an entitlement or rights paradigm; these claims, however, are without reference to and sometimes not validated by international norms.

8. G. Rubin (see note 5).

9. CCPR, Concluding Observations of the Human Rights Committee, Egypt, CCPR/CO/76/EGY (November 28, 2002), p. 10.

10. CCPR, (see note 9), p. 19.

11. For a more detailed discussion of innocence and representation in human rights, see C. S. Vance, "Innocence and Experience: Melodramatic Narratives of Sex Trafficking and Their Consequences for Health and Human Rights," forthcoming.

12. C. S. Vance, "Social Construction Theory: Problems in the History of Sexuality," in D. Altman and C. S. Vance et al. (eds.) *Homosexuality, Which Homosexuality?: International Conference on Gay and Lesbian Studies* (Amsterdam: An Dekker, 1989), pp. 13-34.