

# Can International Human Rights Law Accommodate Bodily Diversity?

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## ABSTRACT

This article considers recent efforts by international bodies and advocacy groups to secure the human rights of individuals with intersex variation. Identifying that these efforts are constrained by powerful assumptions about binary sex, it argues that international rights discourse looks set to regulate intersex individuals by the same protective strategies applied to the last four decades of the women's rights movement. A frank reading of legal feminist scholarship indicates several possible risks for the nascent intersex campaign. Efforts to ensure the substantive enjoyment of rights (for all) need to move beyond the constraints of a binary system in which women and sexed/sexual minorities will always be produced as other. Having argued that human rights are not contingent on biological determinants, the right to non-discrimination on the basis of sex traits is considered.

**KEYWORDS:** international human rights law, intersex variation, women's rights, binary sex, sexual minorities, bodily diversity, non-discrimination

## 1. INTRODUCTION

In March 2014 intersex activists from around the world held the first United Nations (UN) side event on the human rights of people with intersex variations, with delegates calling on states and the international community to take concrete action to end the non-consensual 'normalizing' surgeries that violate the rights and the bodily integrity of children and adults with intersex variations. This initiative is but one of a number in recent years that urges greater action globally to halt human rights abuses against sexed/sexual minorities. This article situates recent efforts to secure the rights of sexed minorities, in particular, according to a critical reading of the biological dualism in which the doctrine and rhetoric of the international human rights system is mired. In so doing, I ask whether there is scope for the human rights system to either enshrine or substantively fulfil the rights of people with intersex variations,

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given that international human rights law fails to account, almost entirely, for bodily diversity.

The ubiquitous rhetoric about gender that has accompanied the human rights mainstreaming agenda conceals an entrenched refusal to acknowledge *sex* as a corporeal construct. The recent attention that international human rights bodies have paid to the rights of women and sexual minorities is emphatically restricted to gender and, more recently, gender identity and sexual orientation.<sup>1</sup> By conflating sex and gender, international legal discourse surreptitiously effaces sex, thus preserving the male/female binary of anatomical difference as an unexamined ontological and legal bedrock. With this gesture, the law exempts itself from acknowledging anatomy and the injurious assumption of its compulsory oppositionality. The failure to acknowledge that discrimination occurs on the grounds of *sex traits* disavows the root cause of rights abuses for both women and individuals with intersex variations.

The international law's naturalization of binary sex complicates recourse to human rights law for women and sexual minorities, and illustrates just how fundamental a challenge is required to ensure that the human rights system is capable of understanding, championing and fulfilling the rights of people with intersex variations in particular. In this article, I trace several 'moments' in the international campaign for intersex rights and, by casting these against the challenges faced by the women's rights movement, illustrate possible risks ahead for advocates of intersex rights. More positively, I argue that the campaign for intersex rights marks a renewed and specifically queer call for recognition of bodily diversity in international law; a call that opens a space in which to challenge the binary production of the sexed subjects of the law.

## 2. THE MARGINALIZATION OF WOMEN'S RIGHTS IN INTERNATIONAL LAW

Feminist legal scholars have long identified the exclusion of women from the doctrine, institutions and practices of international law.<sup>2</sup> Prior to the development of human rights doctrine, women and girls featured in international law only as 'the property, extension or dependents of men'.<sup>3</sup> Yet since 1945, with the drafting of various human rights instruments, there has been a general effort to ensure that the provisions enumerated in international law prohibit discrimination of many kinds, including against women on the grounds of sex.<sup>4</sup> In 1979, this universal prohibition was given more prescriptive form with the drafting of the Convention on the

1 See, for example, HRC Res 17/19, Human rights, sexual orientation and gender identity, 14 July 2011, A/HRC/Res/17/19 and; HRC Res 27/32, Human rights, sexual orientation and gender identity, 25 September 2014, A/HRC/27/L.27/Rev.1. See also, The Yogyakarta Principles: Principles on the application of international human rights law in relation to sexual orientation and gender identity (2006), available at: [www.yogyakartaprinciples.org/principles\\_en.htm](http://www.yogyakartaprinciples.org/principles_en.htm) [last accessed 29 September 2014].

2 See, for example, Charlesworth and Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000) at x.

3 Otto, 'Women's Rights' in Moeckli, Shah and Sivakumaran (eds), *International Human Rights Law*, 2nd edn (2013) at 345.

4 GA Res 217A(III), 10 December 1948, at 2; Articles 2(1) and 3 International Covenant on Civil and Political Rights 1966, 999 UNTS 171; Articles 2(2) and 3 International Covenant on Economic, Social and Cultural Rights 1966, 993 UNTS 3.

Elimination of Discrimination Against Women (CEDAW),<sup>5</sup> the first international legal treaty to specifically enshrine women's international human rights.

CEDAW is significant in that it has set new international legal standards about the prohibition of discrimination on grounds of sex. CEDAW has provided a language in which we can claim, at international law, that women are entitled to the same rights as males. Yet the mere existence of CEDAW has not delivered women substantive enjoyment of the rights enshrined in it. Indeed, contemporary feminist legal scholarship is riven with debates as to the inefficacies and limitations of not only CEDAW, but also of the subsequent mainstreaming agenda.<sup>6</sup> Some, indeed, have gone as far as to query the very usefulness of feminist analyses of international law.<sup>7</sup>

Underpinning these contemporary debates is a longstanding tension between two differing approaches to promoting women's rights. On the one hand, is the idea of women's rights as a largely unnecessary subset of universal rights. This view holds that women's rights should be pursued alongside those of men, by virtue of women's shared status as universal subjects of international law. On the other hand, is the idea that the specificities of female oppression are such that these require specific doctrinal recognition over and above the provisions of human rights that apply 'universally'. The drafting of CEDAW ultimately reflected the latter approach, in an acknowledgement that the specificities of oppression for women and girls warrant the enumeration of rights tailored to address the particularities of gender. Ostensibly prudent, this approach is now thought to have resulted in unintended consequences, the likes of which were foreshadowed at the time of CEDAW's drafting.

The Commission on the Status of Women, formed in 1947, ultimately gave rise to the idea that rights specific to women should be enshrined in law, for the fear that the specificities of women's lives would be overlooked by the universal provisions in human rights law.<sup>8</sup> This was not without controversy at the time, with detractors suggesting that lobbying for specific rights for women would undermine the 'universal' applicability of human rights, and result in a further marginalization of the issues relevant to women's lives.<sup>9</sup> There is a case to be made that these fears have largely been borne out. Dianne Otto argues that the rights violations that are experienced 'exclusively or primarily by women' are 'treated as a sub-category of the universal',<sup>10</sup> and a good number of feminist legal scholars concur.<sup>11</sup>

5 1979, UNTS 8.

6 See, for example, Otto, 'The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade' (2009) 10 *Melbourne Journal of International Law* 11 at 11.

7 Halley, *Split Decisions: How and Why to Take a Break From Feminism* (2006). For commentary as to why this break from feminism is not needed, see Otto, *supra* n 3; Charlesworth, 'Talking to Ourselves? Feminist Scholarship in International Law' in Kuovo and Pearson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance* (2011) at 17; and Raday, 'Gender and Democratic Citizenship: The Impact of CEDAW' (2014) 12 *International Journal of Constitutional Law* 512 at 516.

8 Otto, 'International Human Rights Law: Towards Rethinking Sex/Gender Dualism' in Davies and Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (2013) at 200.

9 *Ibid.*

10 Otto, *supra* n 3 at 345.

11 Charlesworth, Chinkin and Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613 at 644.

This marginalization is exacerbated by the fact that CEDAW, while widely ratified, is among the most heavily reserved of the international human rights treaties.<sup>12</sup> The high number of reservations to CEDAW is attributed to political, cultural and economic specificities, the exigencies of which completely confound the idea of a universal commitment to women's human rights.<sup>13</sup> Indeed, feminist scholars identify that the majority of these reservations strike at the heart of the object and purpose of CEDAW,<sup>14</sup> making something of a mockery of the near universal ratification of this convention.<sup>15</sup>

In light of this sobering fact, feminist legal scholars are now taking stock: questioning CEDAW's effectiveness; and scrutinizing the unintended consequences of the pursuit of specific rights for women based on principles of non-discrimination. One of the concerning claims that arises is that the language of gender mainstreaming has been harmful rather than helpful. Hilary Charlesworth refutes Janet Halley's claim that feminism and feminists now dominate the human rights establishment, arguing instead that use of the vocabulary of women and gender by international institutions has 'reduced feminist ideas to ritualised incantations'.<sup>16</sup> International feminist legal theory is having limited impact on the mainstream, according to Charlesworth, with feminism relegated to 'a scholarly ghetto in international legal scholarship'.<sup>17</sup>

### A. The Intractable Naturalization of Sex in International Law

The work of feminist legal scholars has clarified just how powerful a reliance the human rights system has on the binary logic of male self and female other. Many feminists and women's rights activists have fought long and hard to unfix the binary logic at the heart of the human rights system, only to find that this dualism continues to manifest powerfully in rhetorical gestures of protection and/or victimization that, at best, afford women formal equality with the intractable male subject of the law.<sup>18</sup> Among the problems with the binary logic of the international law is the abiding representation of women as universally vulnerable to sexual violence. Human rights law is beset by the 'persistence of protective representations of women'.<sup>19</sup>

The absence of statutory or interpretative acknowledgement that men can also be victimized by sexual violence<sup>20</sup> is not an accidental blind spot. The male subject of international law is impenetrable, an idealized representation that is predicated on the infinite vulnerability and penetrability of women as an othered object class. Women are defined as permanently vulnerable to violence and to the frailties inherent in their own corporeality.<sup>21</sup> Women's rights, not being held by the universal

12 Raday, *supra* n 7 at 516.

13 Lacey, 'Feminist Legal Theory and the Rights of Women' in Knop (ed.), *Gender and Human Rights* (2004) at 54.

14 *Ibid.* See also Freeman, *Reservations to CEDAW: An Analysis for UNICEF* (2009) at 1.

15 Otto, *supra* n 3 at 360.

16 Charlesworth, *supra* n 7 at 23.

17 *Ibid.* at 18.

18 For a description of this longstanding struggle, see Otto, 'Lost in Translation: Re-scripting the Sexed Subjects of International Human Rights Law' in Orford (ed.), *International Law and its Others* (2006) 318.

19 Otto, *supra* n 8 at 201.

20 *Ibid.* at 207.

21 *Ibid.* at 202.

subject, are coded as 'protective' measures rather than human rights.<sup>22</sup> Otto clarifies that this problem is far more than semantic, and that the protective discourses of international law 'deny women's (sexual) agency and autonomy'.<sup>23</sup>

The sexed dualism at the heart of the international human rights system fails to account, almost entirely, for bodily diversity. Indeed, feminist legal scholars continue to grapple with this problem, in a project that Otto describes as 'barely begun'.<sup>24</sup> Biological determinism is predicated on a logic wherein the irrefutable fixity and *a priori* status of sex is scientifically categorized as binary. The authenticity of the sexed subject is based on a chromosomal distinction of either/or. The physical markers of sex are understood to be the immutable hallmarks of identity, ontologically prior, and thus corporeal mooring points for determining the status of an individual as *either male or female*. Ambiguously sexed bodies, whether intersex, transgender or resistive of labels, fundamentally challenge the idea that the *truth* of the subject derives from genital difference that can be conceived in simple binary terms.

Although there have been some changes in domestic legislation to allow individuals to register their sex as 'x', including in Australia,<sup>25</sup> the law largely assumes, or explicitly requires, that sexes (bodies) be registered as either male, or female. Bodies that might be better described in terms of 'and', 'both' or 'neither' are unintelligible.

International law demonstrates a reliance on the 'intelligibility' of sex as both binary and fixed. The Rome Statute, for example, inscribes sex as prescriptively dual: 'For the purpose of this Statute, it is understood that the term "gender" refers to the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above.'<sup>26</sup> Here, the law makes a concerted effort to *fix* sex and gender according to normative expectations. By indicating that gender is, in fact, *binary biological sex*, the Statute insists that the only legitimate genders are the two that derive their authenticity from binary biology. The final sentence above expressly forecloses the possibility of shifting or multiple gender identifications.

By defining gender *as* sex, the Statute elides the distinction between sex and gender. This conflation is powerful. If sex and gender are one and the same then sex is the unquestionable determinant of gender. Male sex = male gender. Female sex = female gender. The highly prescriptive biological determinism in this Statute expressly denies the possibility of any sex other than male or female. These are

22 Otto, *supra* n 3 at 345.

23 Otto, *supra* n 8 at 203.

24 *Ibid.* at 211.

25 In 2011 the Australian Government introduced guidelines that allow individuals to be issued with passports that record their preferred gender: see Rudd and McLelland, 'Joint media Release: Getting a Passport Made Easier for Sex and Gender Diverse People', 14 September 2011, available at: [www.foreignminister.gov.au/releases/Pages/2011/kr\\_mr\\_110914b.aspx?ministerid=2](http://www.foreignminister.gov.au/releases/Pages/2011/kr_mr_110914b.aspx?ministerid=2) [last accessed 29 September 2014]. See also the High Court judgment on 2 April 2014 that found '[n]ot all human beings can be classified by sex as either male or female': *New South Wales Registrar of Births, Deaths and Marriages v Norrie* [2014] HCA 11 at para 1. In this case the Australian High Court found (at para 2) that the *Births Deaths and Marriages Registration Act 1995* (NSW) allowed that Norrie's sex be registered as 'non-specific'. It is important to note, however, that the Act makes the registration of a change of sex contingent upon the applicant being unmarried and having undergone a sex affirmation procedure: see section 32DA Births, Deaths and Marriages Act 1995 (NSW).

26 Article 7(3) Rome Statute of the International Criminal Court 1998, 2187 UNTS 90.

the prescriptions 'within the context of society'. The circularity of the second sentence imparts a sense that the matter is closed, with departures from definition impermissible.

### 3. DOES QUEER THEORY OFFER TRANSFORMATIVE POTENTIAL FOR INTERNATIONAL LAW?

Otto acknowledges that there is still much work for the feminist project in international law, but she allows room for hope, gesturing to the possibility that the feminist legal struggle might ultimately prove transformative. For Otto, this transformative potential is linked to the incomplete 'feminist project of denaturalising sex'.<sup>27</sup> The multiplicitous and fluid subjectivities that Otto sketches are made possible only by detaching 'sex/gender entirely from bodily parts'.<sup>28</sup> To effect this detachment is to acknowledge the arbitrary status of anatomy, and thus belie the fiction that the authenticity of all subjects emanates from genital oppositionality.

Suggestions of this kind are rare in international law, and the conceptual strength of Otto's provocation draws not from the law, but from post-structuralist feminism and from queer theory. In 1991 Butler articulated this idea in somewhat tentative terms:

Although compulsory heterosexuality often presumes that there is first a sex that is expressed through a gender and then through a sexuality, it may now be necessary fully to invert and displace that operation of thought. . . . If a regime of sexuality mandates a compulsory performance of sex, then it may be only through that performance that the binary system of gender and the binary system of sex come to have intelligibility at all.<sup>29</sup>

It is strange to re-read Butler's slightly hesitant tone here, given the purchase that these ideas now have in both queer and post-structuralist feminist thought. It must be said, however, that there is far from universal acceptance in legal feminism for the idea that anatomical sex is a normative *effect*, rather than an immutable origin. It is also important to consider the reasons why some legal feminists, and the law, are hesitant to embrace Butler's point, or to embrace the fluidity proposed by Otto.

Scepticism, or hostility, about seeing 'sex' as a social construct is evident in the long history of inter-disciplinary tensions about identity politics. I have said that Otto's provocation about fluidity in law reveals both feminist and queer influences. In evoking both feminism and queer theory here I am not suggesting that there is, or has ever been, complete compatibility between these projects. Contests as to the 'proper object of discourse'<sup>30</sup> pitch the anti-determinacy of queer's labile identities against feminist, gay or lesbian efforts to achieve recognition through category affirmation. Debate

27 Otto, *supra* n 18 at 355.

28 *Ibid.* at 355.

29 Butler, 'Imitation and Gender Insubordination' in Fuss (ed.), *Inside/Out: Lesbian Theories, Gay Theories* (1991) 13 at 28–9.

30 This term is drawn from Butler's paper on the issue of the feminist/queer struggle: see Butler, 'Against Proper Objects (More Gender Trouble: Feminism meets Queer Theory)' (1994) 6 *Differences: A Journal of Feminist Cultural Studies* 1 at 1.

abounds as to the sacrifices inherent in the proposed divestment of identity categories. Some feminists, and some gay and lesbian scholars, have argued that the hard won gains in equality will be imperilled by a queer fluidity that eschews identity politics.<sup>31</sup> Queer theorists counter with the claim that the free-floating significations of post-structuralism offer the opportunity to disrupt the very system that constitutes individuals as unequal on the basis of traits of sex, gender or identity.<sup>32</sup>

These tensions are more than inter-disciplinary battles about semantics. Otto, emboldened by the subversive possibilities of queer, also knows that to undermine the binary structure is to undermine the very ground on which the struggle takes place. Imperfect as CEDAW is, the very fact that women's rights are enshrined in law is the result of a longstanding struggle, fought on the grounds of gender. Otto gestures to the possibilities of queering the law, but ultimately thinks it necessary to continue to work with the strategic essentialism of current feminist approaches: 'I am jumping too far ahead. The rejection of gender as dichotomy and hierarchy would also mean the loss of conceptual tools that are necessary to make legal sense of the "gendered human rights facts" of the present.'<sup>33</sup> What language would we have to articulate instances of gendered violence in international law, for example, if queer fluidity were given full reign? Otto urges us to consider that it will not do to be blind to the practicalities of this problem.

### A. Do We Really Need a Break from Feminism, or Do We Just Need Inter-disciplinarity?

In recent years the terms of the queer/feminist debate have taken on particular significance in feminist legal scholarship. The American feminist legal scholar Janet Halley has claimed, with some influence, that we should 'take a break from feminism'.<sup>34</sup> Halley's proposal makes difficult reading for feminists, yet there are insights in her work that are useful in strategizing how to best theorize the rights of both women and sexed/sexual minorities. Halley claims that one of the reasons that we should 'take a break' from feminism is because we have come to presuppose that 'feminism will always be the origin and destiny of left politics on sexuality'.<sup>35</sup> While I am not swayed by the argument that we break from feminism, I do see two key reasons why we might follow Halley's suggestion that an interest in sex and gender is not, and should not be, the preserve of feminists.

The first reason to challenge the assumption that the sex/gender struggle is exclusively feminist stems from the need to promote an understanding that sex and gender are constructs that regulate *all* identities, not only those of women. Feminist legal scholars identify the conflation of women and gender in international law. 'Gender', in this context, is metonymic of women. The law's failure to conceptualize

31 Ryan, 'Introduction: Identity Politics, the Past, Present and the Future' in Ryan (ed.), *Identity Politics and the Women's Movement* (2001) at 4.

32 See, for example, Kosofsky Sedgwick, *Epistemology of the Closet* (1990) at 83; and Angelides, 'Rethinking the Political: Post-structuralism and the Economy of (Hetero) Sexuality' (1995) 1 *Critical inQueeries* at 28.

33 Otto, *supra* n 18 at 355.

34 Halley, *supra* n 7.

35 *Ibid.* at 60.

men as sexed and gendered subjects contributes to the powerful fiction that to be male is an unquestionable state of nature, and to be female is to be a departure (the gendered other and object of lack). One of the readers for an early draft of Halley's work commented: 'women don't own gender'.<sup>36</sup> I agree, and argue that if gender (and sex) remain the preserve of feminists then women's struggle will always be marginalized. If sex/gender is not understood as culturally constitutive of *all* identities then the prevailing assumptions will continue: to be 'gendered' is to be female, and sexed and gendered oppression are thus 'women's issues'. Scholars of gender and sex need to encourage a mainstream understanding that the sex/gender category of male is no less constructed than that of female.

The second advantage is really a corollary. To abandon the atomistic approaches of feminism, queer, gay, lesbian and a host of different theoretical approaches would be to acknowledge the inter-connectedness of our various projects. De-naturalizing sex and frustrating the binary stranglehold that this has on *all* genders and *all* sexes would be an outcome that would benefit women, queers, gays, lesbians, intersex individuals, transgender individuals, heterosexual men, heterosexual women, indeed all individuals, however they choose to identify. I argue, for example, that the campaign for intersex rights might benefit from a close reading of feminist legal scholarship, and the obstacles and unintended consequences of feminist efforts to campaign for specific rights for women. Informed by the feminist struggle, and armed with the theoretical tools of both queer and post-structuralist feminism, the campaign for intersex rights might just have the potential to unsettle the binary biological determinism at the heart of the law. This is a *shared* project, not an exclusively feminist one.

I am conscious that this may sound too ambitious and perhaps I, like Otto, find myself 'jumping too far ahead'.<sup>37</sup> There are certainly scholars that caution against too ready an embrace of the idea that social constructionism might prove transformative of law. Nicola Lacey identifies an 'incipient utopianism in legal feminism' despite the difficulties of challenging deeply entrenched socially constructed concepts. Otto herself is acutely aware of these challenges, as evinced by her reading of the gender mainstreaming report of the Special Rapporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism. Martin Scheinin, the Special Rapporteur, took seriously his obligation to adopt a mainstreaming approach in his 2009 report, offering a comprehensive gender analysis of counter-terrorism measures. His report prompted a backlash from some States, however, because he interpreted gender as a social construction that underlies the social organization of all men and women. A reading of gender as more than simply a *problem for women* is one that sparked 'furious discussion' in the Third Committee of the General Assembly.<sup>38</sup>

The international human rights community demonstrates deeply normative thinking in its reluctance to acknowledge gender as a socially constructed organizing

36 Ibid. at 65.

37 Otto, *supra* n 18 at 355.

38 Otto, 'Transnational Homo-Assemblages: Reading "Gender" in Counter-terrorism Discourses' (2013) 4 *Jindal Global Law Review* 79 at 81.



principle for all (rather than a problem of/for women). Reluctant discussions about gender and sexual orientation are being had in international human rights, but the idea of culturally constructed 'sex' remains unspeakable. It is precisely this intractability that prompts my suggestion that we abandon discursive battles about queer and/or feminist approaches. Free of these strictures we might better address the essentialist legal fixities that constitute as 'other' all *but* the universal subject.

#### 4. CHALLENGES IN ENSURING THE SUBSTANTIVE ENJOYMENT OF RIGHTS FOR SEXED/SEXUAL MINORITIES

It is in this spirit that I suggest that those campaigning for the rights of individuals with intersex variations might read cautionary significance in the observations of legal feminism. Women's rights have been enshrined in human rights law for more than 35 years, but the drafting and interpretation of these rights has proven partial and selective, and the implementation of CEDAW remains marginal to universal rights treaties.<sup>39</sup> While CEDAW articulates international standards about non-discrimination against women on the basis of sex, these norms are about equality and non-discrimination not about the substantive realization of rights based on the specificities of women's lives.<sup>40</sup>

Feminist legal scholars provide a compelling argument that non-discrimination creates a structural dynamic of comparison, whereby women's rights can only be conceptualized as far as these might match the rights enjoyed by males.<sup>41</sup> The subject of human rights, the universal 'he' to whom rights naturally adhere, is male, and analysis of CEDAW reveals, for example, that human rights for women can only be conceived in comparative terms.<sup>42</sup> The overall result is one in which women are offered formal equality, as objects of a protectionist law, rather than substantive rights bearers with full legal capacity.<sup>43</sup>

To identify these shortcomings is not to suggest that feminist efforts have been in vain. Rather, to take stock of the challenges in the field of women's rights is to address, with honesty, the question as to what it would take to ensure women's substantive enjoyment of rights. Identifying the limitations of norms of non-discrimination highlights important lessons going forward. These lessons will benefit feminists, who continue to strive against the tide of protectionism and biological determinism in the law, and they may also offer insight into some of the early challenges facing the campaign for intersex rights.

##### A. Contemplating Possible Risks

Feminist legal scholars identify that the biological determinism at the heart of human rights law significantly hinders the practical fulfilment of women's rights. Otto's work on the 'tenacious' protectionism of CEDAW, and the international human rights field generally, foreshadows possible hazards for those campaigning for the rights of

39 Otto, *supra* n 3 at 345.

40 Not all legal feminists agree. For a counterargument, see, for example, Raday, *supra* n 7.

41 Otto, *supra* n 3 at 345.

42 *Ibid.*

43 Otto, *supra* n 18 at 318.

people with intersex variations. Particularly salient is the risk that intersex individuals will be legally framed as ‘othered’ victims. To date, the intersex rights campaign has mobilized concepts of harm and victimization to claim non-consensual ‘normalization’ surgeries or sterilizations as human rights abuses. These non-consensual practices certainly constitute human rights abuses,<sup>44</sup> and claims pursuant to international law could certainly be made. Yet the challenges that women have faced in claiming rights (but not victimhood) warn of the possibility of unintended consequences from framing intersex rights claims as *only* claims for protection. In the sections that follow I identify three possible risks with basing rights claims on victimization.

(i) *Women and intersex individuals as objects of protection*

The first risk would be that individuals with intersex variations would be positioned as less than fully human, and as objects of the law’s protection, rather than intrinsic bearers of rights. Such a claim draws heavily on Otto’s analysis of the role of international law in producing women as an object class in need of protection from sexualized violence and, indeed, from the vulnerabilities assumed inherent to female corporeality (‘special protections’ required in pregnancy, for example).<sup>45</sup> If intersex campaigns challenge the binary normativity of international law, but the result is merely protective provisions against normalizing surgeries, then intersex individuals, denied the status of substantive rights bearers, are relegated to the category of ‘victimized other’.

(ii) *A deepening biological determinism*

This protective dynamic creates the conditions for a second setback for intersex rights. That is, the reification of intersex individuals as a victim class reinscribes the category of the sexed other, thus bolstering the subject of the law as male. This bears risks for all individuals othered by international law. The normative function of human rights law would be naturalized further by doctrinal or interpretive gestures that preserve or deepen the biological determinism of international law. In Section 5.C, I argue that this risk has recently been borne out, with international human rights bodies oblivious to the recent psychiatric diagnosis of intersex individuals as ‘disordered’.

(iii) *Transformative potential lost*

The third adverse impact of protective rights for intersex individuals would be one of a lost opportunity: the opportunity to subvert the biological determinism at the heart of international law. Although I do see this as a risk, and one that should be mitigated by a careful reading of the shortcomings of women’s rights in international law, I do not think it useful to consider this *only* in terms of risk. Rather, I am choosing to

44 See, for example, Méndez, Special Rapporteur, Report on torture and other cruel, inhuman or degrading treatment or punishment, A/HRC/22/53, 1 February 2013, at para 77. See also World Health Organization, *Eliminating forced, coercive and otherwise involuntary sterilisation: An interagency statement OHCHR, UN Women, UNAIDS, UNDP, UNFPA, and WHO* (2014) at 2.

45 Otto, *supra* n 8 at 197.

frame this in positive terms, identifying the possibility that campaigning for the rights of individuals with intersex variation may prove a destabilizing force in international law, unsettling the binary fixity to which the categories of the male subject and its others are moored.

## 5. CAMPAIGN ‘MOMENTS’ IN FOCUS: RISK OR TRANSFORMATIVE POTENTIAL?

This section considers three recent ‘moments’ in the campaign for the rights of sexual minorities. In the first ‘moment’ I will examine the parameters of the campaign for lesbian, gay, bisexual and transgender (LGBT) rights recently launched by the Office of the High Commissioner for Human Rights (OHCHR). I maintain that what appears a campaign for inclusion actually functions to police the boundaries of the norm. For the second ‘moment’ I argue that there is a risk that the campaign for intersex rights taken to the UN be used to (re)inscribe intersex individuals as the pathologized others of international law. Framing normalization surgeries and sterilizations as human rights abuses, while correct, of course, risks scripting intersex individuals only as victims and as objects in need of legal protection. The third ‘moment’ relates to the efforts of advocates of intersex rights to prevent the pathologization of intersex individuals as ‘disordered’, and formally categorized as such within the *The Diagnostic and Statistical Manual of Mental Disorders* (DSM).<sup>46</sup>

Finally, I will endeavour to reclaim these three examples as demonstrations of the excesses of the law and other normative regulatory apparatus in attempting to constitute the binary subject/object of law and of culture. Attention to this excess reveals that the ‘binary’ of biology is not natural, rather, it is a concerted effort on the part of multiple technologies of power. The institutional arms of the law, language and science work overtime to sculpt the fictive ‘opposites’ of male and female. ‘Sex’ is denaturalized if we observe the machinery that strives to produce, and maintain the powerful fiction of binary sex.

### A. OHCHR Free and Equal: Campaigning for Inclusion, or Policing the Norm?

In 2012 the OHCHR launched the global LGBT rights campaign *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law* (*Free and Equal*).<sup>47</sup> In her introduction to the report that outlines the obligations on states, Navi Pillay stipulates the individuals to whom human rights are ‘extended’. ‘The case for extending the same rights to lesbian, gay, bisexual and transgender (LGBT) persons as those enjoyed by everyone else is neither radical nor complicated. It rests on two fundamental principles that underpin international human rights law: equality and non-discrimination.’<sup>48</sup> It is a crushing disappointment that the opening line of this crucial report is defensive. The idea that a ‘case’ might need

46 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders, Five (DSM V)* (2013).

47 OHCHR, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law* (2014).

48 Ibid. at 7.

to be made as to why rights should be 'extended' to LGBT individuals signals two things. First, the international legal community fears a backlash for their work in advocating for the rights of sexual minorities. Secondly, the suggestion that these rights are being 'extended' to LGBT individuals implies that the rights are really the preserve of individuals of heteronormative status. These rights are *bestowed* to LGBT individuals because of a decision, '[t]he case for extending the same rights'. The idea that rights are bestowed by a reified normativity will prove a recurring point in my analysis of the OHCHR campaign, a campaign that I read as othering sexual minorities, and bolstering the unquestionable status of the universal subject of the law.

With the slogan 'LGBT Rights are Human Rights' the OHCHR issues a prescriptive list of those for whom rights will be extended. It is the rights of lesbians, gays, bisexuals and transgender people that *are human rights*. Using the acronym LGBT disavows the rights of intersex individuals and, indeed, individuals who might identify as queer. Could this not have been a campaign for lesbian, gay, bisexual, transgender and intersex (LGBTI) rights? Or for, indeed, for lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) rights? The effacement of rights for individuals with intersex variations is difficult to fathom in a discourse ostensibly designed to ensure the inclusion and 'legitimacy' of sexual minorities. The disavowal of intersex rights in myriad contexts of mainstream culture is deplorable, but can at least be explained (not excused) by fear, ignorance, confusion, religious teachings and cultural proscriptions of various other kinds. But why would the OHCHR disavow intersex rights in a campaign specifically designed to advance the rights of sexual minorities?

Is it possible that the OHCHR *forgot* about individuals with intersex variations? It seems that they did not forget entirely, as an explanatory note is offered as to what intersex 'is', and mention is made that intersex people 'suffer many of the same kinds of human rights violations as LGBT people'.<sup>49</sup> The conflation of lesbian, gay, bisexual, and transgender individuals as 'LGBT' is a spurious move that at once elides specificity, silencing claims that are fundamentally different, and also produces a homogenized category of sexed/gendered others that will, by structural necessity, always remain othered object to the legitimate subject of the law. Indeed, as part of this same campaign Navi Pillay draws special attention to the rights abuses endured by transgender individuals, stating 'The "T" in "LGBT" should never be silent'.<sup>50</sup> There is acknowledgement, then, of the risk that specificities be elided by the acronym LGBT. It is difficult to reconcile the apparent consciousness of the dynamic of disavowal, and yet the decision to relegate the rights of intersex individuals to one brief explanatory note.

Analysis of the broader campaign points to a possible explanation, with the first clue found in the title: *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law*. This campaign is *not* really about the rights of *all* sexual minorities. Rather, it is about two facets of identity only: sexual orientation and gender identity. By failing to acknowledge discrimination on the basis of sex

49 OHCHR, 'LGBT Rights: Frequently Asked Questions' *Free and Equal: United Nations for LGBT Equality*, available at: [www.unfe.org/en/fact-sheets](http://www.unfe.org/en/fact-sheets) [last accessed 28 September 2014].

50 Pillay, 'The "T" in LGBT Should Never be Silent', available at: [www.unfe.org/en](http://www.unfe.org/en) [last accessed 28 September 2014].

traits, *Free and Equal* is predicated upon, and perpetuates, the International legal system's disavowal of anatomical sex.

Feminists have claimed that the uptake of the vocabulary of gender in international law sees gender as synonymous with women.<sup>51</sup> To speak of gender, in international law, is to speak of women. The conflation of women and gender insulates the universal male subject from any of the troubling aspects of gender. Masculinity is not gendered, by this logic, it is unexamined and assumed to be the natural state. This also safeguards the invulnerable male subject from the taint of women's special protections. In international law it is gendered objects that require special protections.

Arguably, the OHCHR campaign builds on this logic of binary reductionism. The very important project of foregrounding gender identity in international law is taken but part way. Just as to speak of gender is to speak of women, so to is it that to speak of gender identity is to speak of LGBT identities. International law has expressed no interest in discussing the gender identity of heterosexual males. This blind spot functions to bolster the prevailing assumption that heterosexual masculinity is the universal norm.<sup>52</sup> The exclusion of heterosexual male 'gender identity' from *Free and Equal*, and from other recent UN materials,<sup>53</sup> implies that one has a 'gender identity' only when 'there is an inconsistency between [an individual's] sense of their own gender and the sex they were assigned at birth'.<sup>54</sup> The parameters of this campaign, and the international legal blind spot with regards to heterosexual masculinity, make a clear point. In international human rights law gender identity is, in and of itself, non-normative.

The *Free and Equal* campaign performs a similar sleight of hand with regards to its second object of analysis. 'Sexual orientation' warrants attention, and the extension of rights, only when that 'orientation' is contrary to the social norm. By failing to consider heterosexuality an 'orientation', the campaign reifies heteronormativity as the privileged context from which the rights of sexual others should be leveraged. To be clear, in suggesting that heterosexuality should be discussed I am not seeking to broaden the privilege for individuals who already benefit from the fact that their desires accord with the normative. On the contrary, I suggest that it befits international law to examine the naturalized assumptions that construct, bolster and patrol the boundaries of the norm, as great injuries are perpetrated in its safeguarding.

## B. 'Normalization' Surgeries and the Excess of Biopolitical Control

The first UN side event on the human rights of people with intersex variations was held in March 2014, and drew international attention to the non-consensual 'normalizing' surgeries that violate the rights and the bodily integrity of children and adults

51 Charlesworth, *supra* n 7 at 17.

52 *Ibid.* at 31.

53 HRC Res 17/19, Human rights, sexual orientation and gender identity, 14 July 2011, A/HRC/Res/17/19; HRC Res 27/32, Human rights, sexual orientation and gender identity, 24 September 2014, A/HRC/27/L.27/Rev.1; and HRC 19/41, Report of the HC—Study documenting discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity, 17 November 2011, A/HRC/19/41.

54 Office of the High Commissioner for Human for Human Rights, *supra* n 49 at 1.

with intersex variations. This event was preceded by an address by UK intersex activist Holly Greenberry to the clustered interactive dialogue with the Special Rapporteur on Torture and the Special Rapporteur on Human Rights Defenders.<sup>55</sup> Greenberry referred to the forced hormonal and surgical procedures endured by children as ‘genital mutilation’, evoking the language of torture to explain the discrimination experienced by individuals with intersex variations. The literature for the UN side event also told of the suffering of intersex individuals forced to undergo ‘normalizing’ procedures:

I was born with so called ambiguous genitalia. The doctors could not tell if I was a boy or a girl. At two and a half months they castrated me, they threw my testicles in the garbage bin. When I was seven they cut my genitals to make me look more like a girl. The doctors always lied to me and my parents. I spent my life in fear, pain and shame I wish I could have grown up without surgery and decided myself.<sup>56</sup>

Daniela’s story about the trauma caused by her forced surgeries is not dissimilar to that of many intersex individuals. The international group of intersex activists that organized the UN side event featured Daniela’s story in the media release for the event. To have led the campaign with stories of victimization was, perhaps, to follow the lead that international bodies had already extended.

Although this issue has only recently gained the attention of international human rights bodies there is growing recognition that non-consensual normalization surgeries and sterilization procedures for intersex individuals constitute human rights abuses. Led by the World Health Organization, an interagency paper on forced sterilizations finds that intersex individuals are among the groups especially vulnerable to state policies on sterilization. ‘Intersex persons, in particular, have been subjected to cosmetic and other non-medically necessary surgery in infancy, leading to sterility, without informed consent of either the person in question or their parents or guardians.’<sup>57</sup>

The institutional attention to intersex rights, limited as it is, has largely been the result of work by Special Rapporteurs attending to rights violations in medical contexts. The Special Rapporteur on Health cites the Yogyakarta Principles,<sup>58</sup> which provide for special consideration to ensure that the informed consent of sexual minorities is safeguarded in health and medical settings.<sup>59</sup> The Special Rapporteur on Torture finds that when children are forced to undergo surgery without their

55 Greenberry, Statement in the clustered interactive dialogue with the Special Rapporteur on torture and the Special Rapporteur on Human rights defender, 10 March 2014, available at: [oii.org.au/24756/intersex-human-rights-panel-meeting-un-human-rights-council/](http://oii.org.au/24756/intersex-human-rights-panel-meeting-un-human-rights-council/) [last accessed 28 September 2014].

56 Truffer, quoted in the *Media Advisory for the UN Side Event on the rights violations faced by intersex people around the globe*, 10 March 2014, available at: [blog.zwischengeschlecht.info/public/Intersex-Side-Event-Press-Advisory.pdf](http://blog.zwischengeschlecht.info/public/Intersex-Side-Event-Press-Advisory.pdf) [last accessed 28 September 2014].

57 World Health Organization, *supra* n 44 at 2.

58 The Yogyakarta Principles, *supra* n 1.

59 Grover, Special Rapporteur on the right to health, Report on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, A/64/272, 10 August 2009, at 46.

consent, or without the consent of their parents, these children are often left with 'permanent, irreversible infertility and...severe mental suffering'.<sup>60</sup>

The Special Rapporteur on Torture notes not only the rights abuses of intersex individuals but also those of transgender status. The extent to which sex underpins the legal ratification of identity is made clear in cases where transgender individuals are required to undergo sterilization surgery to have their preferred sex legally acknowledged. The Special Rapporteur on Torture reports that 29 European States require that a transgender person submit to a forced sterilization to have their preferred gender recognized legally.<sup>61</sup> In other countries, including 20 states of the United States, individuals are mandated to undergo sex reassignment surgery if they wish to register legally as another sex.<sup>62</sup> The various statutory requirements for sex reassignment surgery, or sterilization surgery, to register a change of sex have repeatedly been found to breach international human rights law.<sup>63</sup> Yet these laws persist, in a powerful reminder that the law ratifies identity only on the strength of anatomical sex. In such instances, the law *insists* that gender matches biology. An individual's biological authenticity is a prerequisite for full legal subjecthood. So powerful is sex as *the* determinant of identity and civic stature that the law demands that traces of the previous sex be viscerally excised and destroyed.

The very act of surgically altering the corporeality of individuals with intersex variations demonstrates that the reified binary of biological sex is not natural, but performative. Bodies with transgender or intersex characteristics that are forcibly 'sexed' are seen to accrue intelligibility only by virtue of surgical, chemical and psychological manipulations. The fact that the law requires these scientific interventions reveals not the *strength* of the binary of anatomical sex, but rather its *frailty*. As Butler argues, the non-essential status of binary normativity is evident in its need to constantly reiterate itself.<sup>64</sup>

Technologies of power demonstrate a paranoid need to efface all traces of sexed ambiguity. This makes plain the fact that the sexed categories of male and female are culturally constructed and rigorously patrolled. The excess of these measures in law and in science points to what Jonathan Dollimore describes as a 'surplus of control', an excessive display that lays bare the workings of power. 'Resistance from the margins seems doomed to replicate internally the strategies, structures, even the values of the dominant. Unless, that is, resistance is otherwise, and derives in part from the inevitable incompleteness and surplus of control itself.'<sup>65</sup>

Coercive measures to ensure normative anatomy actively construct the binary anatomical mandate for *all* subjects, not only those with inter or trans sex traits. In this sense, the surgical, chemical or psychological interventions act not only on the corporeality of the individual with intersex variations. The idea that 'male' and 'female' are discrete and oppositional can only be maintained by disavowing inter or trans sex anatomies. Statutory interference with anatomical sex is an example of legal

60 Méndez, *supra* n 44 at 77.

61 *Ibid.* at 78.

62 *Ibid.*

63 *Ibid.*

64 Butler, *supra* n 29 at 28–9.

65 Dollimore, *Sexual Dissidence: Augustine to Wilde, Freud to Foucault* (1991) at 81.

and scientific overreach, necessary only because the law *cannot* ensure anatomical sex as binary. The lengths to which science will go to efface ambiguously sexed corporality demonstrate that *all* sexed anatomy is performative.

### C. Pathologization and Injurious Language

Advocates of intersex rights have embraced the fact that international human rights bodies have acknowledged rights violations in medical contexts.<sup>66</sup> There is, however, an important aspect of biopolitical control that is largely overlooked by human rights discourse. That is, the formal pathologization of bodily diversity according to the disease model. *The DSM* is the American reference used internationally by psychiatric clinicians and researchers 'to diagnose and classify mental disorders'.<sup>67</sup> The most recent edition, the DSM-V, published in 2013, now allows for the 'diagnosis' of individuals with intersex variations. Described under the category of 'gender dysphoria', individuals with intersex variation are now diagnosed as having 'disorders of sex development' (DSD).<sup>68</sup>

This classification has two highly concerning consequences. First, advocates for intersex rights have identified the stigmatizing and pathologizing effects of the term 'disorder' for intersex variation.<sup>69</sup> DSD is a term that intersex individuals refuse. Secondly, the diagnosis of intersex individuals with 'gender dysphoria' retroactively disguises the trauma inflicted by 'normalizing' surgeries as being a 'disorder' inherent to the individual. When children are subjected to non-consensual 'normalizing' surgeries the medical profession often arbitrarily 'chooses' a sex assignment for that child. Later in life, the individual will be diagnosed with gender dysphoria if they 'fail' to identify with the arbitrarily assigned sex and the gender performance expected of them.

Transferring the pathology to the individual is a specious move. Discrimination and coercive medical intervention based on sex traits *do* give rise to trauma and dissonance, but these characteristics are not inherent to the individual with intersex traits. Rather, it is the sociocultural, and medico-legal failure to embrace bodily diversity that is pathogenic. By pathologizing intersex individuals as 'disordered', the DSM-V extends impunity to the various technologies of power that violate the rights of individuals with variations in sex traits. This is particularly concerning because it fails to challenge normalizing surgeries as harmful, and so these will continue. It is also concerning because the diagnosis of intersex individuals as 'disordered' ratifies the psychological and medical pathologization of intersex individuals for the life course.

While intersex activists find these issues highly concerning, human rights bodies have been silent on the pathologization of intersex individuals in the DSM-V. This is even after a call for action on behalf of intersex individuals. In 2012, an international collective of intersex advocates detailed their concerns about this in an open letter to

66 Greenberry, *supra* n 55.

67 American Psychiatric Association, *supra* n 46.

68 *Ibid.*

69 Tamar-Mattis, 'Leave Intersex Out of the DSM-V', *Bioethics Forum: Commentary on Issues in Bioethics*, 17 June 2011, available at: [www.thehastingscenter.org/Bioethicsforum/Post.aspx?id=5406](http://www.thehastingscenter.org/Bioethicsforum/Post.aspx?id=5406) [last accessed 28 September 2014].



the UN High Commissioner for Human Rights, Navi Pillay.<sup>70</sup> These concerns were made known to the OHCHR prior to the publication of the DSM-V, to no avail. In addition to their concerns about the DSM-V, the intersex collective urged the OHCHR to cease using the acronym LGBT, in favour of the more inclusive LGBTI. 'This exclusion from human rights rhetoric deems us invisible and thus even more vulnerable' they pleaded. Two years after receiving these concerns, the OHCHR chose to replicate the exclusionary acronym of LGBT in both the title and the text of its report on forced and coercive sterilization.<sup>71</sup> Forced sterilization is an issue that impacts on intersex individuals enormously, a fact only briefly acknowledged by the OHCHR in the report.<sup>72</sup> That advocates for intersex rights face ongoing challenges on these issues points to the fact that human rights bodies dangerously underestimate the power of language as a regulatory apparatus.

## 6. UNIVERSAL RIGHTS OR SPECIFIC RIGHTS CLAIMS?

Attention to the intractability of binary sex raises the controversial question as to whether rights claims based on specificity are the most appropriate means of achieving the substantive enjoyment of rights. In an era that some claim to signal 'the end' of human rights,<sup>73</sup> it is the rights that are speciously referred to as 'special' that are prematurely or particularly imperilled. A strain within the moral philosophy of human rights purports that the inclusion of special rights in the human rights catalogue is a consequence of discursive and institutional human rights 'overreach'.<sup>74</sup> Human rights, some scholars argue, are only those that are universally held, and those that are capable of practical fulfilment.<sup>75</sup> This argument holds that women's rights, the rights of sexual minorities and the rights of children are not really human rights at all, because they are special rights, not rights held universally by virtue of humanity. The drafting of treaties or provisions that enshrine 'special' rights, such as these, is thus a potentially precarious pursuit. Debates as to whether 'special' rights should be struck from the human rights catalogue point to the fact that these rights are already of marginal status.

Just as feminist legal scholarship highlights the challenges of campaigning for specific rights so too does the advocacy and legal action with respect the rights of homosexuals. The landmark 1994 decision in *Toonen v Australia*, for example, established that the criminalization of homosexuality constituted an arbitrary interference with privacy.<sup>76</sup> While landmark decisions such as that of *Toonen* might seem to galvanize advocates for homosexual rights, it would be a mistake to read this as evidence of a shift towards a zeitgeist that is more inclusive of sexual minorities. The reality is that

70 Vioria, 'Open Letter: A Call for the Inclusion of Human Rights for Intersex People', 10 December 2012, available at: [oii.org.au/21442/open-letter-un-high-commissioner-human-rights/](http://oii.org.au/21442/open-letter-un-high-commissioner-human-rights/) [last accessed 28 September 2014].

71 World Health Organization, *supra* n 44.

72 *Ibid.* at 7.

73 See, for example, Moyn, *The Last Utopia* (2012); Hopgood, *The Endtimes for Human Rights* (2013).

74 See, for example, O'Neill, 'The Dark Side of Human Rights' (2005) 81 *International Affairs* 427 at 427; and Beitz, *The Idea of Human Rights* (2009).

75 *Ibid.*

76 *Toonen v Australia* CCPR/C/50/D/488/1992, 4 April 1994.

consensual same-sex conduct is still criminalized in 76 countries globally, punishable by the death penalty in at least five countries<sup>77</sup> and, 20 years after the *Toonen* decision, the Australian government is just one of a number that emphatically refutes the right of same-sex couples to marry.<sup>78</sup> Advocacy for homosexual rights pursuant to international law has had limited success in destabilizing the heterosexism of the law in many domestic settings.

### A. Rights Claims by Intersex Individuals for Intersex Individuals

The forced surgeries and sterilizations for intersex and transgender individuals are in clear breach of international human rights law, as acknowledged by international human rights bodies and by various courts.<sup>79</sup> The extraordinary harm and suffering that this causes for individuals has also formed the platform for the recent intersex side event at the UN, the first such event for intersex rights.<sup>80</sup> While these arguments are an integral part of the claim for intersex rights, I am concerned about the possibility that intersex individuals be regarded as victims under international law. As it is, the Special Rapporteur on Torture has called for ‘special protection’ for LGBTI individuals in medical settings:

The Special Rapporteur calls upon all States to repeal any law allowing intrusive and irreversible treatments, including forced genital-normalizing surgery, involuntary sterilization, unethical experimentation, medical display, ‘reparative therapies’ or ‘conversion therapies’, when enforced or administered without the free and informed consent of the person concerned. He also calls on them to outlaw forced or coerced sterilization in all circumstances and provide *special protection* to all individuals belonging to marginalized groups.<sup>81</sup> (emphasis added)

Here, LGBTI individuals are offered special protection on the basis of a perceived vulnerability that is anatomically inscribed. This dynamic is a familiar one. Women are also extended ‘special protection’ in international human rights law.<sup>82</sup> The unintended consequences of women’s ‘special’ rights functions as a reminder of how readily the law constitutes others, and how these categories of victimized other serve to bolster the universal subject of the law.

Wendy Brown elucidates the risks associated with specific identity-based claims when she asks whether legal ‘protection’, in such instances, ‘discursively entrenches the injury-identity connection’. ‘Might such protection codify within the law the very powerlessness it aims to redress? Might it discursively collude with the conversion of

77 OHCHR, ‘Fact Sheet: Criminalisation’ *Free and Equal United Nations for LGBT Equality*, available at: [www.unfe.org/en/fact-sheets](http://www.unfe.org/en/fact-sheets) [last accessed 28 September 2014].

78 Australia asserts that its refusal to allow same-sex marriage is not inconsistent with its ICCPR obligations: see Explanatory Memorandum, Sex Discrimination Amendment (Sexual Orientation Gender Identity and Intersex Status) Bill 2013 (Cth) at 6.

79 HRC 19/41, *supra* n 53.

80 Greenberry, *supra* n 55.

81 Méndez, *supra* n 44 at 88.

82 Otto, *supra* n 3 at 354.

attribute into identity, of a historical effect of power into a presumed cause of victimization.<sup>83</sup> These questions about unintended consequences are valid for feminism, the context in which Brown's inquiry is focused. Legal feminists have powerfully argued that efforts to have women's equality specifically acknowledged by international law has constructed women as the 'victimized other' of the law.<sup>84</sup> As the international campaign for the rights of sexual minorities gathers momentum it may be prudent to critically reflect on the risks that Brown identifies.

Understanding the potential pitfalls of claims about harm does not indicate that these claims should not be made. The pursuit of the right to physical integrity for intersex individuals is urgent. It would also be spurious to suggest that the voices of intersex individuals be silenced. On the contrary, the stories of violence against intersex individuals need to be heard. This is not only to ensure that intersex individuals have substantive enjoyment of the right to freedom of expression, but also because the continued effacement of intersex individuals from the discourses that shape the law would only allow for the perpetuation of statutory violence against intersex individuals and other sexed/sexual minorities. Indeed, in her statement to the clustered interactive dialogue of the Human Rights Committee, Greenberry called on States to include 'intersex people in all decision-making processes affecting us, including consulting us on legislation and other measures concerning intersex issues'.<sup>85</sup> Greenberry's point underscores the fact that it is appropriate that intersex individuals determine the strategy for claiming intersex rights. It is certainly not for feminists to dictate the terms of this campaign, simply because feminists have hard won lessons from decades of struggle in endeavouring to shape international human rights law. I do, however, see potential in feminists and intersex advocates working together to challenge the biological determinism at the heart of the law.

Efforts to ensure the substantive enjoyment of rights (for all) need to move beyond campaigns for inclusion to a binary system in which women and sexual minorities will always be produced and re-produced as other. It is, finally, in endeavouring to broaden this base that I see merit in not only learning lessons from the feminist experience at law, but also from considering the potential that queer theory brings in problematizing the very foundations of legal categories of gendered identity. As Frug powerfully argues: '[o]nly when sex means more than male or female, only when the word "woman" cannot be coherently understood, will oppression by sex be fatally undermined.'<sup>86</sup>

## 7. CONCLUSION

As feminist legal scholars take stock of the achievements and challenges in advancing women's rights there are clear lessons to be learned. The ubiquity of the male comparator in CEDAW betrays the masculinist logic at the heart of the international human rights system. Women are afforded rights only in so much as these accord with the rights afforded to men. Women, as the universal subject's necessary other,

83 Brown, *States of Injury: Power and Freedom in Late Modernity* (1995) at 21.

84 Otto, *supra* n 18 at 318; Charlesworth, Chinkin and Wright, *supra* n 11 at 644.

85 Greenberry, *supra* n 55.

86 Frug, 'A Postmodern Legal Manifesto (An Unfinished Draft)' (1992) 105 *Harvard Law Review* 1045.

are objects in need of 'special protection'. Legal feminism shows that international law's entrenched biological determinism presents significant challenges for those now wishing to secure the substantive enjoyment of rights for people with intersex variation.

The nascent movement for intersex rights is both necessary and promising, but it is likely that there are challenges ahead. Early signs are that the entrenched dualism of the international system looks set to regulate intersex individuals by the same strategies applied to the last four decades of the women's rights movement. If the inclusion of bodily diversity on the human rights agenda is to do more than proliferate categories of victimhood then it will be important that the protective dimensions of human rights law be matched by substantive provisions that furnish sexual minorities with the substantive enjoyment of rights that are not contingent on male, female or any other genitalia. Feminists and intersex individuals, both of whom face discrimination and human rights abuses on the grounds of sex traits (not just gender), have much to gain from working together to unsettle the naturalized biological determinism at the heart of international human rights law.