

QUEERING INTERNATIONAL LAW

The panel was convened at 10:45 a.m., Thursday, March 29, by its moderator, Ralph Wilde of University College London, who introduced the panelists: Doris Buss of Carleton University; Aeyal Gross of Tel Aviv University; Diane Otto of the University of Melbourne; and Amr Shalakany of American University, Cairo.

INTRODUCTION

*By Ralph Wilde**

Towards the end of the twentieth century the discipline of international law was enriched as certain important developments in ideas more generally, such as feminism and post-colonial theory, began to be integrated into it. It is no longer tenable to understand international legal theory only in terms of its origins in liberal thought.

That said, the process of opening up international legal theory to hitherto ignored intellectual developments is an ongoing one, and a continuing gap in the intellectual canon of this discipline is the tradition of “queer theory”—an approach to ideas rooted in the experience of non-heterosexual sexualities in the world. Rather as feminist approaches seek to understand how ideas generally have been shaped by ideas of the relationship between women and men in particular, so queer theory interrogates how ideas of sexual orientations are implicated in, and affected by, ideas of the world more generally.

Although there is now a relatively established tradition of applying queer theory to law, its application to international law remains sparse, especially if one moves beyond the treatment of lesbians, gay men, bisexuals, and trans people in human rights law. Yet just as feminist approaches to international law involve much more than considering how international law literally treats women—also addressing, for example, how ideas of the state, the use of force and so on are gendered—so the application of queer theory to international law has a rich potential to enhance understandings of our discipline and intellectual tradition beyond the issue of rights.

Given the limited time frame and the richness of the topic, the objective in this panel is to try and explore this potential, by both looking across the range of possibilities and exploring select topics more deeply. Each of the four contributors is a pioneer in the exploration of queer theory and international law, and I am very grateful to them for giving up their time to provide their contributions and, within this, for engaging with the enterprise at hand in a collegiate and thoughtful manner.

“TAKING A BREAK”[†] FROM “NORMAL”: THINKING QUEER IN THE CONTEXT OF INTERNATIONAL LAW

By Dianne Otto[‡]

What does it mean to “queer” international law? For some, queering international law might mean extending the existing “normal,” normative framework of international law so

* Member, University College London, Faculty of Laws; ASIL Executive Council and Program Committee for the ASIL Annual Meeting 2007. Warm thanks are due to Hilary Charlesworth, Christine Chinkin, Catriona Drew, David Kennedy, and Chantal Thomas for their help and encouragement, and to Silvia Borelli for her practical assistance.

[†] Thanks to Janet Halley for the provocative idea of “taking a break.” JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006).

[‡] Assistant Professor, University of Melbourne Law School.

that it is inclusive of non-heterosexual experience and identities, but otherwise left unaltered—for example, by broadening the reach of human rights law so that it prohibits homophobic discrimination, recognizes gay marriage, and protects sexual expression as a private matter. However, I think that “queering” international law suggests something more than normative inclusion: it presents a fundamental challenge to the usual way of going about things. Ralph Wilde’s decision to identify this panel as “queer,” rather than “gay and lesbian,” indicates to me a more comprehensive critique of regimes of the “normal” than can be answered by equal rights. The terminology of “queer” also suggests a conscious concern with pleasure, thereby “taking a break” from the politics of hetero-normative injury, and imagines human sexuality as much more diverse and shifting than the dualism of heterosexuality and homosexuality implies. (In fact, whether or not “sexuality” provides an adequate foundation for queer theory is a matter of debate for some queer theorists, but for present purposes, let us accept that it does.)

So, what is the “normal” in international law that queer theory challenges? One way of answering this question is to “take a break” from “seeing normally” by engaging sexuality as a primary category of analysis—by which I mean stepping outside the normal presumption of heterosexuality. Just as when feminists insisted that gender become a primary category, and new ways of seeing gender in problems that had previously looked un-gendered emerged, so too does a queer perspective make visible the [hetero]sexual ordering that is taken for granted as an underpinning of the “normal” system of international law. Through a queer lens, heterosexuality emerges as the basic model for all dominant systems of social relations—it provides some of the building blocks for international law’s conception of “order.” Understood as the elemental, natural, “normal” form of human association, heterosexuality not only shapes how we think of “normal” interpersonal and familial relationships, but is also the presumed basis for all forms of “normal” community, including that encompassed by the “normal” nation-state, international law’s primary subject. A queer perspective also reveals how international law provides a conduit for the micromanagement and “disciplining” of everyday lives, including sexual pleasure, despite its many rules purporting to leave these matters in the domestic realm of jurisdiction.

Building on these thoughts, I will show how queer theory can highlight new problems in the definition of statehood and, then, how it can expose the “biopolitical”¹ reach of international law, by way of an example of a sexual panic.

On examining one of the traditional criteria of statehood from a queer perspective, the requirement of a “permanent population,” it is immediately apparent that it is defined and constituted by heterosexual family ties, especially marriage. Census forms, surnames, birth registration, tax arrangements, inheritance, and often housing and health care, are all organized along the grid-lines of heterosexual kinship relationships, giving a strong nod to reproductive continuity as the primary basis for a “permanent population.” Curiously, the debate about whether the Vatican can be properly called a “state” illustrates this nicely. One point that is made by those who want to deny its statehood is that its population lacks “permanency” because, as it is made up of celibate priests and nuns, it is not self-sustaining.² So the Vatican may provide a starting point for thinking through how a “queer” state might “look”—a thought that gives *me* pleasure. Seeing the links between reproductive continuity and the

¹ MICHEL FOUCAULT, 1 *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 140 (1990).

² M. H. Mendelson, *Diminutive States in the United Nations*, 21 *INT’L & COMP. L.Q.* 609, 611 (1972).

“normal” nation-state also helps to account for the often strong association between nationalism and homophobia. Superimposed on this foundational grid of heterosexuality, other layers of population definition may also be added, such as religious association, ethnicity, gender identification, and racial background. Like the underlying presumption of heterosexuality, most of these superimposed forms of association are also considered fixed and immutable. A queer perspective challenges the idea of the immutability of *any* aspect of identity and, perhaps unlike a gay rights perspective, theorizes these normal arrangements as disciplining *both* heterosexual and homosexual expressions of sexuality. While a gay rights perspective might focus its critique on the Vatican’s denial of gay and lesbian rights, a queer perspective might see, more broadly, that the Vatican itself is disciplined and structured by ideas of heteronormativity.

In queer experience, primary forms of association are much more fluid and mobile, and there are elements of choice and self-determination, as well as isolation and disconnection, that come with being able to decide when and where to “come out.” Many small signals communicate and perform queer association, like a particular flick of the wrist, inflection in the voice, a style of seeking pleasure. The heterosexual presumption has ensured that such fluid forms of association are considered marginal, yet arguably, non-kinship forms of association, like those that connect queer people with each other, are in the ascendancy in the world today. While I do not want to suggest that queering international law could—or should—save the nation-state from obsolescence, employing sexuality as a primary category reveals that it is based on an increasingly marginalized form of association. Queer theory suggests entirely different forms of association, which would be less concerned with patrolling territorial borders, defining populations, and defending the legitimacy of centralized governments, and more attentive to countering the disciplinary effects of modern forms of power, including the normalizing effects of presumed heterosexuality.

My second example is how queer theory can help us “see” how international law reaches much more deeply into the domestic jurisdiction of states than it claims—into the biopolitical management of our lives. This insight is not uniquely queer, but queer theorists are particularly attentive to the micromanagement of sexuality because sexuality is understood as a critical site for governmental power. The example I use here is the United Nations’ official response to widespread allegations of sexual exploitation and abuse in peace support operations to illustrate three things: (1) how law can proliferate in response to anxieties about sexuality; (2) how queer perspectives can conflict with certain feminist perspectives; and (3) how easily sexual anxieties can serve as a repository for the relocation of other, non-sexual concerns, which may be far more threatening to the “normal” order than the impugned sexual practices.

The official response that I am referring to is the ban on sex between peacekeepers and everyone in the “beneficiary” populations of peacekeeping missions, imposed by the UN Secretary-General in March 2003.³ This “zero tolerance of sex” policy is binding on all UN employees and is rapidly being made applicable to all other personnel in peace support operations. It is an instance of rapid expansion of law, effectively by executive fiat—something that has become extremely familiar in the “war on terror”—that goes to the heart of the sexual lives of peacekeepers and the populations they are sent to protect.

Such a vast extension of the biopolitical reach of the law is made possible by the peculiar productivity of a “sexual panic,” which makes it relatively easy to enact “protective” laws that extend the law’s power to regulate erotic behavior. The atmosphere of a sexual panic

³ SECRETARY-GENERAL’S BULLETIN, ST/SGB/2003/13 (Oct. 9, 2003).

makes it impossible to conceptualize the problem as something other than sex—as a problem of survival, or labor, or indeed pleasure. And here is where feminism becomes implicated, because a dominant feminist tendency has been to understand all (heterosexual) sex, practiced under conditions of women’s inequality, as harmful or dangerous to women. In this paradigm, sex itself becomes the harm, the total harm, divorced from the material conditions under which it takes place.⁴ The zero tolerance policy has clearly been heavily influenced by such “radical feminist” ideas. However, from a queer perspective, zero tolerance is a disciplinary response that relies on and reproduces “sexual negativity” in post-conflict societies, which is the idea that sex is a “dangerous, destructive, negative force,” unless performed pursuant to a narrow set of socially approved “excuses.”⁵

A queer approach to the problem of peacekeeping sex would not start from the premise that sexual exchanges between people who are materially or socially “unequal” are necessarily harmful. Instead, it would begin by trying to identify what fears and anxieties are being displaced onto sexual activity by examining the complex sexual economies that have emerged with post-Cold War peacekeeping efforts—by looking at the actual sexual transactions and what they mean to the participants. My hunch is that those displaced anxieties are about the distributional injustices of the international economic order that come to be reflected in the trade of peacekeeping sex, and deep problems with UN humanitarianism, which does not address these economic realities.

In sum, queering international law means “taking a break” from the ordinary way of doing things in international law, in order to open new ways of seeing international legal problems and expose some of the limitations of international law’s “normal” response to them, even when that normal response might be a feminist response. A queer perspective can bring an array of presently marginalized knowledge to bear on the taken-for-granted assumptions that underpin international legal doctrine and practice, asking different questions that may lead to solutions that will ensure—rather than threaten—the proliferation of diverse practices of freedom and pleasure.

QUEERING INTERNATIONAL LEGAL AUTHORITY

*By Doris E. Buss**

In my remarks I consider some questions queer theory might raise about international lawyers’ preoccupation with and sense of crisis about, the source, coherence, and future of international law’s authoritative promise.

In the epilogue of *The Gentle Civilizer of Nations*, Martti Koskenniemi narrates a parable about a father—liberal internationalism—and his attempts to navigate a responsible path between the demise of a liberal cosmopolitan ethic and the demands of his own financial and paternal responsibilities. Our father—described by Koskenniemi as a “professional gentleman, a barrister”—has two sons, both of whom vowing to continue their father’s social and political project, but each taking a divergent path. The good son shares the father’s ideals “and would teach himself to avoid his [father’s] mistakes so that he could one day

⁴ See also Dianne Otto, *Making Sense of Zero Tolerance Policies in Peacekeeping Sexual Economies*, in *SEXUALITY AND THE LAW: FEMINIST ENGAGEMENTS* 259 (Vanessa Munro & Carl Stychin eds., 2007).

⁵ Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in *PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY* 267 (Carole Vance ed., 1984).

* Associate Professor, Law Department, Carleton University.

come home with proof that the father had been right all along.’¹ The rebel son, in contrast, although loving his father, is angry at how unjustly he has been treated and so rejects his father’s approach. The sons are successful and come to represent the rhetorical attraction of love and charity, on the one hand, and “lust for power,” on the other.

For Koskenniemi, the sons represent divergent approaches to international law. My interest in Koskenniemi’s parable is with the depiction of Law the Father and what he signals about international law’s disciplinary anxiety over law’s authority and progeny. Koskenniemi’s depiction of international law’s authority in patriarchal terms is not surprising. International scholars have long been bedeviled by the uncertain origins and authoritative sources of international law, desiring, as Costas Douzinas says, a “Father or law-maker who is outside the operation of law.”²

For scholars like Koskenniemi and Douzinas, the emphasis on the gender of Law the Father is partly intentional, although not a problematic they explore. For Anne Orford, questions remain about the inheritance due the daughters of international law, or “what a mother might represent, within such a tradition.”³ But gender is only one structuring framework at play in making sense of Law the Father. Sexuality, the heterosexual nuclear family, reproduction, and paternity also organize the ways in which international law’s authority, crisis, and future are imagined within the discipline. And it is here that queer theory perhaps offers some useful points of intervention.

Queer theory, while relatively new, has mushroomed into a diverse, sometimes fraught field of theory, the very queerness of which is subject to debate. For present purposes, three aspects of queer theory are notable. The first is that queer theory is not just a theory for queers. It is a way of analyzing how gender, sexuality, and heterosexuality as organizing principles construct hierarchies of normal sexuality and intimacy. Setting itself a rather vague and ambitious task, queer theory aims to queer the normal—indeed, to challenge the very idea of normal.

Second, queer theory focuses not just on the private or intimate realm. It considers more broadly how sexual hierarchies structure “the architecture of the domestic, [and] the zoning of work and politics.”⁴ As a deconstructive theory, queer reveals “the fantasies structurally necessary in order to sustain [social reality].”⁵ Third, some queer theory has focused in particular on how heteronormativity structures social and political realities. Heteronormativity refers to institutionalized heterosexuality: the ways in which institutions, culture, and ideology position heterosexuality not only as the idealized norm of intimacy, but also as itself a coherent form of sexuality and way of being in the world.

In what follows, I consider some questions that queer theory might raise about international lawyers’ preoccupation with authority. First, which fantasies—about masculinity, patrimony, reproductivity, and family—are structurally necessary to sustain a world-view in which international law is in a state of crisis *and* in which crisis is imagined in terms of eroded authoritative promise? And how might heteronormativity *shape* conceptions about international law’s crisis of authority? *Where* do we look for authority and from where—or whom—do we find its challenges?

¹ NEED A CITE.

² COSTAS DOUZINAS, *THE END OF HUMAN RIGHTS* (2002), *quoted in* Orford at 455. [please provide a cite for Orford]

³ *Supra* note 1, at 464, fn. 152.

⁴ MICHAEL WARNER, *PUBLICS AND COUNTERPUBLICS* 203 (2002).

⁵ LEE EDELMAN, *NO FUTURE: QUEER THEORY AND THE DEATH DRIVE* 6–7 (2004).

My focus for considering these questions is an Agora entitled “Future Implications of the Iraq Conflict,” published in the July 2003 issue of the *American Journal of International Law*.⁶ This provides a provocative text for a queer reading of international law’s disciplinary conversation about crisis, authority, and the future of law. In the following, I explore how the contributors depict international law as being in a state of crisis defined by its failed masculinity/weakened paternity and for which the solution is to remasculate/reauthorize international law as head of the heterosexual family of nations.

This Agora is styled as a marketplace of viewpoints, containing nine submissions by academics and government lawyers. But it is better characterized as a Walmart than as a marketplace of ideas. The contributors are all U.S.-based, and the range of ideas on the shelf are somewhat limited. With a few notable exceptions, the contributors tend to agree on a set of assumptions.⁷ First, international law is in a state of crisis brought about, directly or indirectly, by changes to the international security situation, particularly the actions of rogue states and nefarious leaders. Second, this change has pulled the curtain back on international law to reveal a discipline crippled by a lack or deficiency—the word “gap” is often used—in its ability to respond forcefully to emerging security threats. And, third, strengthening international law, generally understood as expanding the legal avenues for use of force, is the best means to address international law’s inadequacies.

International law’s crisis is understood in gendered terms. Metaphors of masculinity, and its failings, are peppered throughout the Agora. The overwhelming image is of an emasculated international law, although the contributors diverge on the source of this emasculation. For some,⁸ international law’s possible irrelevance results from its own institutional lack of “collective spine.” Others⁹ see an “enormously weakened” international law, with a history of “ineffectual responses” to the scourge and ravages of international bad men. Many contributors paint a picture of a world that “is a dangerous, unruly, far too lightly managed and policed place.”¹⁰

Against the dark, rogue masculinity of the world’s “bad men,” the “fragile normative structure”¹¹ of international law has been dealt a further blow by the Bush Administration. For Thomas Franck, “the fig leaf of legal justification” for use of force has been “all but discarded.”¹² And herein lies the real crisis as depicted in the Agora: what will international law do in the face of this challenge to its authority, with its masculine pretensions—and failings—now on display for all to see? If, as the Agora contributors imply, international law in its “weakened and ineffectual” persona has just had sand kicked in its face by the bully on the beach (the Bush Administration), does it have the masculine fortitude to respond?

The Agora contributors diverge on what a remasculated international law looks like. Ruth Wedgwood’s contribution echoes current conceptions of international law and its future. Wedgwood argues a promising future awaits, one where international law—quoting Kofi Annan—“faces its responsibilities” and is “strengthened by commitments to human rights

⁶ 97 AJIL 553 (2003).

⁷ For a more detailed discussion of the Agora, see Doris Buss, *Keeping its Promise: Use of Force and the New Man of International Law*, in *EMPIRE’S LAW: THE AMERICAN IMPERIAL PROJECT AND THE ‘WAR TO REMAKE THE WORLD’* (Amy Bartholomew ed., 2006).

⁸ Such as Jane Stromseth, in *Law and Force After Iraq: A Transitional Moment*, 97 AJIL 628, 636 (2003).

⁹ Ruth Wedgwood, *The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*, 97 AJIL 576, 578, 581 (2003).

¹⁰ Tom J. Farer, *The Prospect for International Law and Order in the Wake of Iraq*, 97 AJIL 621, 627 (2003).

¹¹ Thomas M. Franck, *What Happens Now? The United Nations after Iraq*, 97 AJIL 607, 608 (2003).

¹² *Id.*

and democracy.”¹³ To get to this brighter future, international law must change course; it must, says Wedgwood, “rise to the occasion” to “retain its authority.”¹⁴

This language of responsibility and the more satisfying masculinity of a proactive international law is, of course, much in vogue and calls to mind examples like the Canadian government’s campaign for the “responsibility to protect” doctrine. Even U.S. President George Bush uses the language of responsibility to justify American use of force in the Middle East.¹⁵

Responsibility, particularly as it is invoked in the use-of-force context, anchors a new vision of international law’s authority in terms reminiscent of Koskenniemi’s Law the Father. The reinvigorated international law that “rises to the occasion” and “lives up to its responsibilities” is a new age law; sensitive, caring, but responsible. This is Law the Family Man. While the Agora contributions can be read as entrenched in and constitutive of gendered expectations of authority and responsibility, they also reflect a heteronormative world view. International law may be struggling to express its masculine authority, but the challenges facing international law, as depicted in the Agora, only take shape as *crises* when placed within the iconography of the nuclear family. That is, the threats to the future of international law, the gaps in its normative reach, become critical when constituting a threat to the authority of Law the Father. And if convictions about international law’s crises are rooted in heteronormative ways of understanding, then the subsequent debates about the *future* of international law may be similarly tethered to a vision of responsible patrimony.

Where does this leave queer theory and the authority of international law? It suggests a series of questions that attempt to challenge—possibly to queer—the normative foundations upon which debates about international legal authority and its future are premised.

Why is it that familialism—the ways in which we model and privilege certain forms of kinship—are the primary arena in which notions of authority are anchored? How might responsibility or obligation be imagined in ways not tethered to expectations about intimacy or the family (of nations)? And do we even need to hold on to our disciplinary fixation with international law’s authoritative lack? To what extent has our ability to imagine the future of international law been artificially circumscribed by “reproductive futurisms,” in which the legacy of international law is narrowly focused on law’s (biological) off spring, on the sons of Law the Father?

ON A CERTAIN QUEER DISCOMFORT WITH *ORIENTALISM*

By Amr Shalakany*

In *Split Decisions*, Janet Halley affirms the vital importance of “making theory” to enrich understanding of good sex and bad sex and assessments of sexual emancipation and sexual oppression, and, from this, to guide left-of-center engagement with sexual politics. Indeed, Halley finds theory so important that she starts the book by warning against the prescriptive deployment of one theory of sexuality or another to always indicate “all the crucial things

¹³ Quoted in Wedgwood, *supra* note 8, at 581.

¹⁴ *Id.*

¹⁵ George W. Bush, *Address to the Nation*, THE CROSS HALL (Mar. 17, 2003), quoted in Orford *supra* note ___, at 458, “This [the Security Council’s failure to authorize use of force] is not a question of authority, it is a question of will. . . . The United Nations Security Council has not lived up to its responsibilities, we will rise to ours.”

* Assistant Professor of Law, The American University, Cairo. I would like to thank Ralph Wilde for organizing this wonderful panel, and Alejandro Lorite, Tanya Monforte, and Chantal Thomas for generously discussing some of the ideas explored in my remarks.

we need to know about moral value and emancipation.’’¹ Instead, she invites us to appreciate an alternative attitude towards theories of sexuality, to give up on the idea that a coherently integrated single theory is better than many, and instead to seek creative stock and energy at the split edges of a ‘‘politics of theoretic incommensurability.’’

For many reasons, Halley singles out feminism as the biggest obstacle to adopting this alternative attitude—specifically, subordination feminism when prescriptively deployed and therefore privileged as emancipation itself. Hence the subtitle to her book: *How and Why to Take a Break from Feminism*—a break she also finds politically desirable since ‘‘we can’t make decisions about what to do with legal power in its many forms responsibly without taking into account as many interests, constituencies, and uncertainties as we can acknowledge’’²—and what better way to do so than to mine many theoretically incommensurable hypotheses for better political action?

This is at least how I’ve understood Halley, and if I got it right, then her invitation to ‘‘take a break’’ is not limited to feminism as such but, rather, extends to any and all prescriptively ordained subordination theories of sexual politics. So there could be other breaks to take out there, and if you’re interested in the politics of post-colonial sexuality, then I am almost tempted to propose *Orientalism* as one such break to consider.

Edward Said’s *Orientalism* first appeared in 1978, and it is just as difficult to imagine post-colonial scholarship without *Orientalism* today, as it is to think of women and gender studies without a feminist theory of sexuality. And just as feminism has been good to the left-of-center, so has *Orientalism*: By theorizing the political dynamics of Western knowledge production on the Orient during the classical age of colonialism, *Orientalism* span off into a series of theoretical practices that are compellingly identifiable in many fields, and with perhaps the most benefit in historiography, political theory, and literary criticism—a benefit I am certainly loathe to abandon. To put it short, I suspect letting go of *Orientalism* can feel just as hard as taking a break from feminism, hard intellectually and politically, and perhaps, above all, existentially.

And yet, if you’re interested in understanding post-colonial sexual politics and possibly redressing some of its injustices for a left-of-center politics, then my experience suggests that you might also, at some point or another, start reading in *Orientalism* a subordination theory of sexuality with a post-colonial kick, might start worrying that its prescriptive deployment on your poco-scholarship displays strikingly homologous dynamics to subordination feminism deployed elsewhere in domestic U.S. debates, and perhaps even sometimes, when you least expect it, you might develop a queer sense of discomfort with *Orientalism* as a strapping theoretical presence in your work—defining your descriptive engagements, guiding your normative assessments, and above all setting clear bars for the emancipatory aspirations of your discipline, your politics, and certainly the next article you’re about to write.

Let me be clear here: I am not proposing that we take a break from *Orientalism*, not just yet, and maybe never as well. Nor do I think a break à la Halley can be seriously considered until we first identify which theoretic practices, if any, are operational to *Orientalism*, when and how they are prescriptively deployed, and what impact subordination feminism has exercised over post-colonial discourse more generally. Obviously, these are very big questions, and I have no fixed answers to offer on them yet. What I have to offer, however, is just a hunch, a crude, anecdotal and possibly misguided hunch about a certain queer discomfort

¹ JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006) at 5.

² *Id.* at 9.

with *Orientalism*, a discomfort I experienced distinctly when following the debate surrounding the infamous Queen-52 case in Egypt. Perhaps this will become clearer if I share with you some details from the case.

On May 11, 2002, Egyptian police arrested 55 men at the Queen Boat, a Cairo discothèque moored on the east bank of the Nile, across from the island neighborhood of Zamalek. Eventually, 52 men were charged with the habitual practice of “*fujur*” or “debauchery”—a mercurial crime of post-colonial pedigree penalizing sex between men. As news of systematic torture in police stations and prisons trickled out, the Egyptian human rights community faced a stark choice: either defending the Queen-52 and risking being painted supporters of “sexual deviance” by the viciously homophobic press, or, alternatively, staying clear of the case and risking alienating colleagues from the international human rights community, not to mention foreign donors on whom many of these organizations rely for funding.

Now let us imagine that you were a human rights activist in Egypt at the time, and let us think together: What would you have done? Prof Joseph Massad at Columbia University offers what I think is the leading left/critical answer to this question, an answer I am intuitively drawn to accept because of its debt to *Orientalism*—but also an answer I am uncomfortable with intellectually and politically, and possibly because of *Orientalism* as well.

Massad coined the term “the Gay International” to describe an emerging agenda for the universalization of U.S. gay identity discourse, incited primarily by international human rights organizations with *Orientalist* views on the governance of sexuality in the Arab and Muslim Worlds. For Massad, the campaign of the Gay International misses the point, since “it is not same-sex sexual practices that are being repressed by the Egyptian police but rather the sociopolitical identification of these practices with the Western identity of gayness and the publicness that these gay-identified men seek.”³ Local human rights activists should keep a distance from this, otherwise they will assist the Gay International in spreading the straight/gay binary of Western identity politics when “most non-Western civilizations, including Muslim Arab civilization, have not subscribed historically to these categories [and therefore] their imposition is producing less than liberatory outcomes.”⁴

Whether heeding Massad’s warning or not, only one Egyptian NGO defended some of the arrested men, and did so only at the first trial phase. Hossam Bahgat, an activist with the Egyptian Organization for Human Rights, dared to publish an article criticizing the arrests as the act of an oppressive government seeking to shore up its religious credentials with an increasingly conservative public.⁵ He was fired the next day.

Two years later, Human Rights Watch issued a report on the Queen-52 case.⁶ In response to Massad’s critique, the authors adopted a number of identifiably queer moves to ward off the charge of *Orientalism*. To begin with, the report is chiefly concerned with the systematic use of torture in Egyptian prisons and police stations—and not on defending the “gay rights” of the Queen-52 victims. To underscore this point, the authors open with a section on “Methodology, Terminology,” which tells us the terms “gay” and “homosexual” are both modern inventions, and raise caution that “constructing a personal and public identity around the sex of the person one desires—is only one way of understanding the fact of homosexual

³ Joseph Massad, *Re-Orienting Desire: The Gay International and the Arab World*, 14 PUB. CULTURE 361, 382 (2002).

⁴ *Id.* at 383–84.

⁵ Hossam Bahgat, *Explaining Egypt’s Targeting of Gays*, at <<http://www.merip.org/mero/mero072301.html>>.

⁶ HUMAN RIGHTS WATCH, IN A TIME OF TORTURE: THE ASSAULT ON JUSTICE IN EGYPT’S CRACKDOWN ON HOMOSEXUAL CONDUCT, available at <<http://hrw.org/reports/2004/egypt0304>>.

conduct, and attaching meaning to it.’’⁷ And just in case Massad still worried about the *Orientalist* impulse of the Gay International, the report footnotes Michel Foucault’s *History of Sexuality, Volume One*.

None of this alleviated Massad’s concerns, however. In his recently published book *Desiring Arabs*, he employs a set of strict binaries to describe the power dynamics of the human rights engagement with sexual politics, and to assess the moral worth of various local and international human rights actors. At one end of these binaries, we find a super-ordinated Gay International, with its Western-missionary-white-male-dominated organizations, omnipotently inciting gay-identity discourse over the Queen Boat arrests, when the latter is nothing but a “Cairo location” where “Westernized Egyptian gay-identified men and their European and American tourist cohorts congregate.”⁸ Predictably, at the other end of Massad’s binaries we find the local and hopelessly subordinated human rights movement, with its activists either unwitting-brown-native-informants to the Gay International, or a compradora of “local Egyptians who contacted and helped the Gay International in their efforts during the Queen Boat episode [and thus] have also been generously rewarded with their own foreign-funded local organizations, such as Hossam Bahgat’s ‘Egyptian Initiative for Personal Rights.’”⁹

Are you feeling slightly uncomfortable so far? Well, I certainly am. To begin with, I happen to be a board member of the *Egyptian Initiative for Personal Rights*, and I happen to approve highly of its work, especially in helping to steer the Human Rights Watch report in the direction described above. And quite frankly, I simply don’t see why Egyptian men should be thrown in jail and tortured just for picking up other men in a Cairo bar—even if the latter is a Massad-dreaded sign of being infected by “Westernized-gay-identified” behavior.

But here is another reason to worry. The appendix to the report gives us a brief glimpse of the hierarchical legal structure governing sexual practices in Egypt today, locating the passive gay partner at the most socially demeaning and legally disempowered position available. Those found guilty in the Queen-52 case were convicted on the evidence of either “confessions” or “rectal examinations” proving their anuses was “used.” In other words, the Queen-52 case was not just a crackdown on Egyptian homosexual conduct—rather, it was a crackdown on specifically gay bottoms.

Of course, none of this is peculiar to Egypt—Foucault, for example, noticed that most homosexuals today, as in ancient Greece, find being the passive partner in a gay relationship to be in some way demeaning. And following Foucault, Leo Bersani has observed that “Historically, the invention of the homosexual as a type may have helped to breakdown the sexism in the earlier classifications according to acts alone.”¹⁰

For Massad, the universalization of U.S. gay identity discourse can only be a bad thing, intellectually and politically, everywhere and all the time. But if we take a break from *Orientalism* and follow Bersani instead, then perhaps we might see in U.S. gay-identity discourse some benefits for the Egyptian bottom. And if at the very heart of homophobia there is indeed a male horror of what Bersani calls the suicidal *jouissance* of taking sex like a woman, then we might also find anti-homophobic potential in the export of U.S. liberal

⁷ *Id.* at 4–5.

⁸ JOSEPH MASSAD, *DESIRING ARABS* 380 (2007).

⁹ *Id.* at 187.

¹⁰ LEO BERSANI, *HOMOS* 105–07 (1995).

identity politics, and along that support the export of the rule of law as its missing condition and attenuating circumstance in Egypt.

Bersani also mentions S&M sexual practices as another approach Foucault suggested that might redress the misogyny inherent in homophobia. Massad's theoretic practices, by contrast, leave us no room for sexual fantasies about the Orient—indeed, his prescriptive deployment of *Orientalism* would make it the ultimate crime to imagine an S&M fantasy between a foreigner and an Egyptian playing on the power dynamics of East/West, North/South, developed/third-world, U.S.-hegemony/Arab-subjugation, occupation/resistance, you name it.

As a white, female, American colleague of mine recently confessed, her fear of committing an *Orientalist* crime often stops her from fantasizing about the actual street on which she lives in Cairo: it's politically safer to have fantasies about Paris instead. And in censoring herself out of the local imaginary, it seems she might also blame *Orientalism* for further "other-ing" Egyptian sexuality beyond such colonial-era scholars as she hopes to avoid.

Yet I cannot blame her: she teaches human rights law, and perhaps she will find some S&M practices too close to some of the torture scenes described in the Human Rights Watch report. Indeed, S&M play is sometimes described as "contractual," so perhaps this radical emancipatory potential identified by Foucault and Bersani is itself conditional on playing in the liberal shadow of "the rule of law," where courts can be relied on to enforce contractual obligations.

So, to summarize and conclude, my hunch boils down to this: Liberal identity politics, and with it liberal legality itself, might all be queerly desirable in a context like Egypt—perhaps desirable enough to even consider taking a break from *Orientalism*.

QUEER THEORY AND INTERNATIONAL HUMAN RIGHTS LAW: DOES EACH PERSON HAVE A SEXUAL ORIENTATION?

By Aeyal Gross*

A week before this conference, a panel of experts adopted the Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity.¹ This development is part of a process which began in the mid-1990s, whereby issues of sexual orientation and gender identity "come out" into the world of international human rights. The comprehensive Yogyakarta Principles document examines twenty-eight human rights in the context of sexual orientation and gender identity. I will focus on only one of the principles established by the document.

Principle 3 deals with the right to recognition before the law and determines that "[e]ach person's self-defined sexual orientation and gender identity is integral to their personality and is one of the most basic aspects of self-determination, dignity and freedom."² The principles define sexual orientation broadly, but in a way that maintains an understanding of sexual orientation as a distinct component in the identity of the self, determined based on the similarity or difference between one's gender and the gender of one's object of desire. Sexual orientation thus defined is a feature of modern Western societies, but is not necessarily a feature of all human societies: this conception of sexual orientation is not characteristic of societies that do not subscribe to the modern Western concept of sexuality, which divides

* Member, Tel Aviv University, Faculty of Law.

¹ PLEASE PROVIDE A CITE.

² SHOULD HAVE A CITE.

people into hetero- and homosexuals. For example, in societies where men have sex with men, but not necessarily exclusively, and apart from any specific sexual identity, the idea that these men have a sexual orientation thus defined, which is integral to their humanity, represents an exportation of the Western model of sexual orientation.

Indeed, a major challenge for the international human rights movement for sexuality rights is to engage questions regarding the tension between globalization and the diversity of identities: The discourse of “Gay Rights are Human Rights” (as the slogan reads on the Amnesty International poster which I addressed at the ASIL Annual Meeting in 1999³) requires a unitary conception of both sexuality and rights. Queer theory, on the other hand, suggests that we not reify the category “gay” as a trans-historical and trans-social category, and that we understand that the idea of sexuality, as understood in the Yogyakarta Principles, is a product of Western modernity. Critical perspectives that addressed the development of international law in this area illustrated the need for new perceptions to subvert the notion of sexual identity as binary, unitary, and coherent.

One of the strongest such critiques came from Joseph Massad,⁴ who argued that it is the discourse of what he calls the “Gay International” which both produces gays and lesbians where they do not exist and represses same-sex desires and practices that refuse to be assimilated into its sexual epistemology. Massad argues that the Gay International campaign to universalize itself provoked a discourse on homosexuality. In the context of international human rights work conducted around the trials of men arrested in Egypt on the “Queen Boat” club on the Nile, accused of practicing “debauchery,” Massad argues that this crackdown followed an increasing visibility of Westernized, Cairo-based, upper- and middle-class Egyptian men who identified themselves as gay. The Gay International, argues Massad, misses this important distinction: that what is being repressed by the Egyptian police is not same-sex sexual practices but, rather, the sociopolitical identification of these practices with the Western identity of gayness. In his harsh critique of the international gay rights project, Massad argues that by exporting gay identity, this movement imposes the binary hetero/homo division on a society in which it does not exist, and incites discourse on homosexuality in a way that will actually make same-sex sex less feasible.

Against Massad’s argument, and following a distinction suggested by Baudrillard, we can consider whether international gay identity is indeed a product of “universalization” through human rights, or whether it is actually exported through “globalization,” i.e., through the globalized world of information, tourism, money, and media. I wish to examine this question through a reading of the Human Rights Watch’s report on what it calls “Egypt’s Crackdown on Homosexual Conduct.”⁵

This report details the crackdown in Egypt in the form of entrapment, police harassment, torture, trials and imprisonment of Egyptian men who have sex with men. The section entitled “Methodology, Terminology” discusses the Western origin of the words “gay” and “homosexual” and acknowledges that the identity of the “homosexual” is “a recent regional development” and that the concept of “sexual orientation”—a personal and public identity constructed around the sex of the person one desires—is only one way of understanding the fact of “homosexual conduct” and attaching meaning to it. Massad’s criticism is also cited, and the report concludes on this point that not all men who have sex with men,

³ Aeyal Gross, Kristen Walker, & Yishai Blank, *Liberalizing Markets and Sexuality*, 93 ASIL PROC. 222 (1999).

⁴ Joseph Massad, *Re-Orienting Desire: The Gay International and the Arab World*, 14 PUB. CULTURE 361 (2002).

⁵ HUMAN RIGHTS WATCH, IN A TIME OF TORTURE: THE ASSAULT ON JUSTICE IN EGYPT’S CRACKDOWN ON HOMOSEXUAL CONDUCT (2004).

in Egypt or elsewhere, regard themselves as “gay” or “homosexual.” However, since the right to define oneself is part of the language of rights, the report states that it tried to use the terms people used in self-description; when it calls men “gay,” that is “generally” because they called themselves that.

The testimony in the report reveals how same-sex sex in Egypt is conceptualized by the people interviewed along an axis that combines non-Western with Western models of sexuality. We can assume that this mixed conceptualization is the product of the globalization of identity through money, information, and tourism at least as much as it is the product of the universalization of gay rights.

The report describes the emergence of a Cairo subculture of men who call themselves gay, seeing this is a shared identity. A few themes that run through the report shed light on the construction of sexuality which is in the background to these events.

Khaled, one of the men arrested, tells the story of his arrest. The head of the Cairo Vice Squad, Embaby, asked him, “Are you gay?” Khaled says: “He used the term ‘gay’ in English. I said I didn’t know what the word meant. He used the word because he wants you to repeat it back to him as an answer. And if you know what it means, if you pronounce it in the English way, then you are definitely gay.” Khaled fell into the trap: he said he did not know what “gay” meant, but he pronounced the word, and his mere familiarity with it, his knowledge of how to pronounce it, was enough to “criminalize” him. We see here how the discourse about sexuality produces the sexualized subjects. Knowing how to say it right—how to pronounce it in the English, global, way—makes you gay.

Another recurrent theme is the way clothing, and especially underwear, serves as a “give-away” of a person’s “gayness.” Khaled says that Embaby made him unfasten his trousers, but that luckily he was wearing “ordinary underwear—white underwear, the same ordinary design and color as most Egyptians wear.” Embaby believed that colored underwear indicates a passive gay person. So when Khaled was seen to be wearing ordinary white underwear, Embaby said that he doesn’t get fucked, but maybe he still fucks others. Khaled says Embaby “picked out people who were wearing what in Egypt is considered ‘debauched’ dress—foreign or too-stylish clothes or jewelry.” Thus, clothing, colored underwear, serves as a signifier for “gays” or “homosexuals.” Gay identity is inscribed on the body by non-traditional underwear or foreign clothes. Gay identity is foreign, but is also commodified: It is through the wearing of certain commodities that it is identified, and the gay body is thus the foreign, capitalist, commodified body.

The report documents the fact that the offense of “debauchery,” traditionally used only against the “passive” partner in sex, has shifted, and now men are convicted of this offense regardless of their sexual roles. Thus, the Western model of homosexuality has overcome this distinction, and active and passive partners now share an identity.

The report demonstrates, then, a mixture of a globalized gay identity with local notions of sexuality: the blend of discourses attests to the mixed local/global forms of sexuality depicted by the report. Globalization is responsible for the exportation of gay identities, but the result, of course, cannot simply be the Western model of gayness implanted in Egypt but, rather, a mixture of local and global notions of sexuality. Clearly, the gay rights universalizing move reinforces the outcomes of globalization. But it is also a response to those processes. If we take seriously the idea that notions of sexuality change on axes of time and place, and that ideological constructions of sexuality are constitutive of the way we interpret and give meaning to our lives and actions, then we cannot, from a queer perspective, just say that the concept of sexual orientation is a Western one and that we should never think

of the events described in the report in these terms. This would be anti-essentialism of the worst kind; queer theory's project is not to say that there are no gay people in the world but, rather, to point to the fact that these are social constructions that are created through various discursive systems.

In the global context, it is thus necessary to do the complex work of seeing how identities and meanings given to sex are articulated. The report shows that the situation is not one in which pure indigenous constructions of sexuality exist. The questions concerning the ethical implications for human rights organizations are complex: how should human rights violations be addressed, without imposing the Western model of sexuality on one hand, but without ignoring the fact that globalization has already exported it and that the construction of sexuality outside the "West" is already a post-colonial one?

Considering Principle 3 of the Yogyakarta Principles, we should think about how to avoid confining our ideas of sexual freedom to language that deals with sexual rights in a way restricted to the concept of sexual orientation in the Western model. While the idea of "gayness" appears more than once in the Human Rights Watch report's account of the persecution in Egypt, we must also take account of the way in which speaking of rights to sexual orientation as integral to each person's personality, and as one of the most basic aspects of self-determination, dignity, and freedom, may blind us to the fact that for many people in many societies sex is not necessarily linked to sexual orientation, and that the idea of sexual orientation may sometimes be restricting rather than liberating.