

June 2011

Fighting Over the Figure of Gender

Ali Miller

Follow this and additional works at: <https://digitalcommons.pace.edu/plr>



Part of the [Sexuality and the Law Commons](#)

Recommended Citation

Ali Miller, *Fighting Over the Figure of Gender*, 31 Pace L. Rev. 837 (2011)

Available at: <https://digitalcommons.pace.edu/plr/vol31/iss3/6>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

Fighting Over the Figure of Gender

Ali Miller*

In an early draft of this Essay, I accidentally typed “The *Figure* of Gender” instead of “The *Future* of Gender,” the correct title for my remarks at Pace Law School’s November 2010 Symposium, *After Gender?*. I have kept this mistaken title because I think it nicely captures a vexed aspect of “gender” in international human rights law (IHRL) today—who or what person is figured (imagined, addressed, elaborated, and maintained) with the use of the word “gender”? My comments on the panel took their impetus from suggestions about flirting made by cultural theorist and psychoanalyst Adam Phillips. Following his lead, I asked in my remarks, if we only flirt with serious things (madness, death, other people), then mustn’t we pay close attention to how, and indeed with whom, we as advocates and scholars flirt when we flirt with gender?¹ Or, as I describe below in my discussion about advocacy on gender in human rights legal settings, must we also pay attention to what happens when we fail to flirt with gender?

In this Essay, I use Phillips’ concern with the failure to

* Thanks go to the Symposium organizers, especially Darren Rosenblum for convening the conference, and my co-panelists Elizabeth Emens, Paola Bergallo, Aminu Gamawa, Dianne Otto, and Ralph Wilde, as well as my editors at the *Pace Law Review*. Special thanks are due to Mary Anne Case, Susana Fried, Amy Kapczynski, Cynthia Rothschild, and Carole Vance for their careful comments and grounded and principled critiques on earlier drafts of this Essay, and in particular for their suggestions of additional resources. Fried and Rothschild, as directly engaged participants in many of the U.N. events described in this Essay, contributed significantly to the information as well as the analysis I have developed. While thanks are due for their input—all concerns over errors in this Essay run back to me.

1. ADAM PHILLIPS, *On Flirtation: An Introduction*, in ON FLIRTATION, at xvii (1996). This Essay is drawn from remarks on a panel chaired by Elizabeth Emens and in preparation for which we exchanged short readings that could provide the conceptual underpinnings of our discussion. I chose two excerpts from Adam Phillips to guide my remarks.

flirt to guide my inquiry into the ways in which contemporary advocates reify, concretize, and turn gender into a project, a grant, or a territory with fiercely protected borders. I track an increasingly painful fault line visible in gender advocacy and policy at the global level. The fault line divides gender either into shorthand for attention to “women” deemed a unified, single category; or gender into shorthand for an aspect of gay (male), or more recently transgender, identity. Reductive and mutually exclusionary uses of one of these two versions of gender abound in advocacy on U.N. policy and programming, and in the resulting policy, norms, development, and programming itself.

These uses sit alongside frequently-voiced understandings of gender as a relational concept, one capturing the operation of situated rules and practices that constitute a range of masculine and feminine roles for bodies deemed male and female. These roles also assign resources and powers in all spheres of life. Yet despite the intentions of some non-governmental organization (NGO) advocates and a few U.N. agency staff to retain the more capacious scope of gender as an analytic frame attending to relations of power and beliefs governing the fullest range of persons, my sense is that the dominant institutional use of gender in the U.N., and among many advocates, is a flat, binary, and exclusionary one.

Moreover, in this binary, when figured as an attribute of women, gender has connotations of heterosexuality; when figured as an aspect of men, gender appears to signal homosexuality. Recently, however, on the gendered/gay man side of the institutional gender split one can find references to “gender identity” emerging as a protected aspect of persons. As used here, “gender identity” flags an aspect of identity linked to the sense of being male or female. In U.N. advocacy it generally signals transgender. Notably, it has emerged in IHRL advocacy on the (homo)sexual orientation side of gender.²

2. For more discussion about the reified phrase SOGI, or sexual orientation and gender identity, as well as the other exclusions such as sexually non-conforming women, including lesbians in this bifurcation, see *infra* Parts III and IV.

Moreover, beliefs about gender's un-severable link to sexuality increasingly permeate many deployments of "gender" in programming and advocacy at the U.N. The under-analyzed assumptions about sexuality, including the naturalization of expressions of gender non-conformity as always and only proxies for homosexuality, contribute to the further division of gendered rights in advocacy and norm building. This Essay will weave in and around the effects on gender claims of the presumed links between sexuality and gender, but for now, it is enough to say that the bifurcation of gender as a term in the U.N. rights work—parsed as if women identified through gender analysis must be heterosexual and men who can be analyzed with regard to gender must be homosexual—simultaneously relies on, and obscures, the sexual work that gender is being used to do. And by inviting in only sexuality to describe gender (and vice versa) our gendered conversations are both impoverished and oddly regressive.

To explore the question of who is figured in the use of the term "gender" in contemporary IHRL and to consider the strategic and social justice-hampering effects of these assignments, I focus first on evidence of a gender-split within NGO U.N. rights advocacy, and then on an example of this embodied schism of gender in a new norm on gender emerging from within a U.N. human rights treaty body. The effects of the gender division are mutually reinforcing in vicious/virtuous circles: NGO perspectives increasingly shape the making and implementation of international rights standards and policies at the U.N., while institutional imperatives and politically dictated channels of work also shape the direction and scope of gender rights advocacy.

This Essay's focus on the fault line of gender will first follow the evidence of the gender splits on their own terms, and then dig deeper into the political contexts and conceptual underpinnings, including ideas about sexuality, that enable them.

Overall, I am concerned that gender advocates are being driven farther apart from each other in alliance and discourse by the institutionalization of the gender fault lines, and that the resulting policies are weakening the progressive potential

of gender as an analytic tool which might benefit all.

I. Gender, Gender Territorialization and Some Implications of the U.N. as Site of Gender Struggle

The conflict over who owns gender—what I call “gender territorialization”—appears in multiple U.N. institutions and settings, and can have significant effects on the normative content of developing international human rights law. For example, if gender-based violence (GBV) is conventionally understood to be violence directed at women by men, then legal changes in sexual assault laws that are called for in campaigns on sexual and gender based violence (SGBV) need not attend to the rape or sexual assault of men, despite its ubiquity in both conflict and custodial contexts. GBV laws are left as “women specific” in their content and application.

This gender split can also have effects on policy and programming: who is prioritized for participation and funding in “gender-sensitive outreach, education and services”? (Heterosexual)women, trans persons, gay men? Who is squeezed out? Ironically, it appears lesbians do not register in this territorialization of gendered bodies, and normative masculine and (presumed heterosexual) men are perhaps left to shift for themselves (perhaps to retain existing power, or to fail to learn new roles and behaviors?).³ In this framework, the struggle among subsets of advocates (notably not all groups associated with gender for example, fall into these “sects”) is exacerbated by the U.N.’s silo-ing of issues (women’s rights and human rights, identity as mandate (race, child, women, etc.) and this U.N. institutional tracking in turn has effects narrowing the more capacious and transformative claims around gender overall.

My examples show two superficially distinct guises of gender territorialization in the U.N.: in one case, the turf fight is overt—a subset of advocacy groups representing “gender as identity/woman” struggle with a subset of groups representing

3. Kate Sheill, *Losing out in the Intersections: Lesbians, Human Rights, Law and Activism*, 15 CONTEMP. POLITICS 55, 57–60 (2009).

“gender as gay or trans identity/male” over priority in policy and funding, primarily in the worlds of health and anti-violence work. In the second case, the tension is discernible in a deafening silence—the parallel and non-referential advocacy carried out by the two camps, sometimes in silo-ed fora. These separate fora operate with agendas which may be understood as women specific versus human rights general, or race specific, or have sub-agendas that are understood as LGBT specific, or reproductive health specific. While specificity is critical to ensure appropriate tailoring of remedies for rights violations and services, my concern is that this “gender exclusionary” version of specificity has moved advocates’ analysis away from the common structures and forces that produce the specific gendered effects, and the resulting exclusionary analysis most definitely blocks strategic coalitions among the sub-groups facing the common gendered repression.

For example, reproductive health rights discussions focus on women who have sex with men, and HIV sexual health agendas sometimes focus on concentrated epidemics in so-called marginalized groups such as MSM and sex workers. It is interesting to note that women sex workers who sell sex to men are deemed non-reproductive during those transactions and fall outside of both conversations. In these silos, some women’s groups highlight only the victimization of women and their abuse by men, in their press for “gender equality,” or stress only attention to women in the need for education, services, and other protections from gender-based violence (a conflation accomplished in part by the replacement of the acronym for “violence against women” with GBV).⁴ Some of these groups

4. Effectively, heteronormative men are denied “gender” in these confluences and slides. The category of GBV also often picks up “violence against women and children,” a switch between gender/sex systems and age regimes, which is equally, but differently, troubling. The persistence of the quasi-legal grouping of “women and children” as a meaningful category (women take care of children? women are like children in lack of rights?) in programmatic and policy rhetoric remains evident in the U.N. The release of the Secretary General’s *Global Strategy for Women and Children’s Health* reveals this tendency. See *Global Strategy for Women and Children’s Health*, UNITED NATIONS, <http://www.un.org/sg/globalstrategy> (last visited Nov. 7, 2011). The persistent conflation occurs even as earlier work carefully pointed

raise concerns about the criminalization of *sex for women only outside of marriage*, highlighting criminal prosecutions under sex-specific discriminatory laws. On the other hand, another subset of groups focused on ending discrimination or violence directed at persons because of their sexual orientation and gender identity (SOGI) focus their “gender” advocacy on violence directed at gender non-conforming persons (gay men or transpersons, usually male to female/MTF) or call attention to the need to decriminalize of same-sex behavior (often codified as crimes in so-called sodomy laws) in the context of penalties for *sex outside of marriage*, including but often not limited to same-sex sexual behavior. They sometimes but not often work on issues and agenda items relating to women’s reproductive or sexual health.⁵

Both of these streams of activism and policy-making are carried out as part of human rights advocacy at the global level, such as in the U.N. Human Rights Council, or in meetings with, and reports to, the human rights treaty bodies.

out that health interventions for newborns and young children do not automatically translate into health benefits for their mothers, and vice versa. See *Who’s got the power: Transforming health systems for women and children*, U.N. MILLENIUM PROJECT, <http://www.unmillenniumproject.org/documents/maternalchild-complete.pdf> (last visited Nov. 8, 2011). However, the collapse of women and children into a single category in the context of violence may have a distinct sexualized aspect: the “violence against children” that is usually enumerated under the GBV rubric on closer inspection tends to be sexual abuse. For example, the old, historic crime of “trafficking” (initially defined in the “White Slavery Conventions” as the mere movement of persons into prostitution, i.e. “to gratify the passions of another”) encompassed “women,” “women and girls,” and “women and children” at different moments in history. Current anti-trafficking projects still often rhetorically start with women but will slide into talking about women and children, revealing the extent to which women are understood to be like under-age boys and girls in regard to their incapacity and the importance of protecting their chastity, and boys are like virginal girls in that they must be protected against sexual encounters with men, i.e. homosexual desire. For an introduction to this shifting terrain of legal scope, see ANNE T. GALLAGHER, *THE INTERNATIONAL LAW OF HUMAN TRAFFICKING* (2010).

5. Françoise Girard, *Negotiating Sexual Rights and Sexual Orientation at the U.N.*, in *SEX/POLITICS: REPORTS FROM THE FRONT LINES* 311, 315-16, 318-19 (Richard Parker, Rosalind Petchesky & Robert Sember eds. 2007), available at <http://www.sxpolitics.org/frontlines/book/index.php>.

I am concerned that the political culture of the advocates plus the institutional inertia of divided U.N. agendas leads to a failure of both streams of advocates to reference gender-diverse claims outside their own body of knowledge; it leads to a failure to learn from the analyses undergirding the different gender claims, and thus to a failure to build on the doctrinal implications of these claims. The intense, suffering-victim-subject focus of the subgroups (women-only versus sexual-orientation/sodomy law-focused groups) limits the parameters of the groups interested in more gender-relational advocacy.⁶ And the advocates are stymied by the tendency of the U.N. structures to assume a gender specificity/singularity even if the advocates have tried to explain differently.⁷ In a recent interpretive statement, the Committee that monitors the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) has broken this binary by explicitly integrating the SOGI rubric. This statement by CEDAW is the subject of my analysis of U.N. structures below in Part V and may be the exception that (so far) proves the rule of the binary divisions within gender.

As this Essay proceeds, fair warning: the acronyms will

6. See, e.g., *Statement of African Social Justice Activists on the Threats of the British Government to "Cut Aid" to African Countries*, WOMEN'S GLOBAL NETWORK FOR REPROD. RTS., <http://www.wgnrr.org/news/statement-african-social-justice-activists-threats-british-government-%E2%80%9Ccut-aid%E2%80%9D-african-countri> (last visited Nov. 8, 2011). The statement invites a comparison and ranking when it notes "a context of general human rights violations, where women *are almost as vulnerable as LGBTI* people." See *id.* (emphasis added). For an exploration of the victim subject as a central trope of women's human rights organizing, see Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1 (2002) (arguing that the international women's rights movement's focus on violence against women (VAW) has helped reinforce women as the victim subject).

7. See *infra* Part III for an elaboration on the U.N. structures. For a more complete discussion of the problem of the exclusionary siloes of U.N. work, see Alice Miller & Mindy J. Roseman, *Normalizing Sex and its Discontents: Establishing Sexual Rights in International Law*, 34 HARV. J.L. & GENDER iii (2011). See also Lisa Crooms, *Indivisible Rights and Intersectional Identities or, "What Do Women's Human Rights Have to Do with the Race Convention?"*, 40 HOW. L.J. 619 (1997).

continue to proliferate—VAW (violence against women), GBV (gender-based violence), SGBV (sexual and gender-based violence), LGBT (lesbian, gay bisexual and transgender), LGBTI (lesbian, gay, bisexual, transgender and intersex), MSM (men who have sex with men), SOGI (sexual orientation and gender identity). Advocates and scholars both bemoan the extent to which movements around gender and sexuality have become more known by their acronyms than their politics and principles: indeed one way to understand the conceptual problem around the narrowing sectarianism of the movements is to see the work done by the condensing power of the acronyms. But that is another essay.⁸

II. Gender as Solomon's Baby

I begin the mapping of “gender territorialization” with evidence of the overt struggle between advocates. While tensions over who owns gender have been rumored for some time, an explicit disagreement over gender came to a head in 2008-2009 in a process organized around the development of a Joint United Nations Programme on HIV/AIDS (UNAIDS) report, *Gender Guidance National AIDS Responses*.⁹ UNDP is a founding co-sponsor of UNAIDS (the joint structure in the U.N. through which resources, policies, and priorities of the U.N.'s coordinated response to HIV/AIDS are developed and managed).¹⁰ UNDP adds to HIV/AIDS responses beyond those of the health sector: it addresses “dimensions of HIV that relate to development planning and mainstreaming; governance of

8. Such an essay would take on the specific occlusions of ideas accomplished by these acronyms, and especially note those concepts and persons that are formally flagged in the acronym but nonetheless get short shrift in actual advocacy and policy, such as “lesbian” and “inter-sex,” as well as transgender persons and issues.

9. 22nd Meeting of the UNAIDS Programme Coordinating Board, Chiang Mai, Thai., Apr. 23-25, 2008, *Draft Gender Guidance for National AIDS Responses*, UNAIDS/PCB(22)/08.3/Rev.1 (Apr. 11, 2008) [hereinafter *Draft Gender Guidance for National AIDS Responses*].

10. *About Us*, UNITED NATIONS DEVELOPMENT PROGRAMME, http://www.beta.undp.org/undp/en/home/operations/about_us.html (last visited Nov. 1, 2011).

HIV responses; and law, human rights, gender equality and sexual diversity.”¹¹ UNDP was responsible for preparing the guidance for UNAIDS, as the lead agency on gender among the UNAIDS co-sponsors. The phrasing around “gender equality and sexual diversity” was a hard fought and precious aspect of UNDP’s rights orientation, and interestingly, included an unusual moment of U.N. agency perspicacity: a consensus within UNAIDS co-sponsors and secretariat that “gender” could be used in its broader, more relational sense to address issues arising among and for diverse women, men, and transpersons. The guidance note was meant to help governments, donors, the U.N. system, and civil society¹² understand why gender—especially gender inequalities—mattered to the spread of, and responses to, the epidemic.

Advocates from many different sectors who were experienced in global AIDS advocacy participated in a process of consultation in 2008 and 2009. Among other steps, a formally-constituted NGO delegation to the UNAIDS Program Coordinating Board (PCB) participated in considerations of direction and scope of the draft guidance note. Advocates have noted that the PCB is a rare site of solid civil society participation in the often closed-door U.N. system—one of what feels like a handful of open sites remaining, which also means that NGO participants responded to the outcomes with a feeling of high stakes.¹³ Representatives included women and women’s health’ groups, networks of people living with HIV or AIDS, sex worker groups, youth groups, gay identified and MSM groups, and transgender groups.

I will let texts excerpted from two related documents speak to the struggle for the territory of gender. The first excerpt is from the Executive Summary from the Guidance Note as issued by UNAIDS:

The guidance encourages countries to

11. *Id.*

12. The U.N. thinks in these categories of actors, and builds its processes around state interests first, and other groups second.

13. Special thanks to a close colleague for this observation from “within the trenches.”

understand how harmful gender norms and gender inequality contribute to the spread of HIV, and how HIV differentially affects women, men, girls and boys. It also points to the specific impact of gender norms on HIV amongst men who have sex with men, which affect this population directly as well as contributing to the broader epidemic, because many men have sex with both men and women.

....

In consultation processes during the development and pre-testing of the guidance, one of the issues discussed extensively was the degree to which the guidance should include attention to men who have sex with men and to transgender populations, given the direct relevance of gender norms and gender inequality to these groups. Many respondents asked for a full integration of these issues and populations, important in and of themselves as well as because many men have sex with both men and women. . . . However, others expressed concern that attention to men who have sex with men detracts from the importance of focusing on women and girls and their unequal relationships with men and boys, and suggested that it would be more appropriate to keep the guidance focused on the needs of girls and women and to develop separate guidance documents addressing sexual minorities.¹⁴

The Guidance note then proceeds to focus primarily on women and girls, but does make reference to the fact that their risks for HIV exposure are related to the risks born by men, including men who have sex with men, sex workers, and trans-populations.

The compromise's focus on women, with limited reference

14. *Draft Gender Guidance for National AIDS Responses*, *supra* note 9, at 7, 10.

to the epidemics' connections across populations of the Guidance Note, was the product of intense and painful divisions among NGO advocates behind the scenes, disagreements in which advocates questioned each other's trustworthiness and overall human rights interests, all based on their prioritization of groups (women, MSM, etc.) rendered vulnerable by gender. As evidence of the tenor of the internal dissension over gender I turn to quotations from a report (publicly circulating) of a 2010 "healing meeting" which was called by and meant to respond to the bad feelings generated in the process of the NGO participation in the PCB delegation. The report from the "healing meeting" says:

[I]n light of the tensions over the meaning of gender in discussions at the UNAIDS board meeting. The purpose of this meeting was to find common ground among activists in the pursuit of policies and programs that support multiple constituencies: all women and girls in their diversities and experience, gay and other men who have sex with men, transgender people, people who use drugs, people living with HIV, and sex workers.

....

... [They highlighted] the need to shy away from divisive debates over the term "gender" by highlighting specific populations. . . . just as the group agreed to specify women, gay men and other MSM, transgender communities rather than use the term "gender,"¹⁵

....

Funding and competition for funding were

15. Notably, in terms of content of policy approaches, "[p]articipants found areas of common ground around shared goals of: decriminalizing same sex relationships, unintentional HIV transmission, drug use, and ensuring access to comprehensive reproductive services that support a woman to make decisions about what happens with her body." NGO Delegation to the UNAIDS PCB, PCB NGO Delegation's "Common Ground" Meeting Report, 2 (Oct. 19-20, 2010), http://unaidspcbngo.org/wp-content/uploads/2010/12/CG-report_EN.pdf [hereinafter Common Ground Report].

discussed as underlying causes of tension for the communities. . . . earmarked for discussion in future work, as there was a feeling that this topic was not given the time it needed. The discussion focused not only on equal access to resources but also on the use of those resources

Participants talked about the way donor funding pits groups or communities against one another. . . . They discussed money as part of the power dynamic and its use to silence all communities.¹⁶

The NGO “healing meeting” report, while written in sometimes opaque and NGO-speak generalities, suggests first in its title, and then in its text, the depth of wounded alliances among advocate associated with women or with MSM/gay or transgender women. It closes with tense commitments about the assignment of gender to various groups for the future. Part of the compromise agreement is that the word “gender” as a modifier is to be avoided in favor of specification of communities: MSM, gay-identified persons, (hetero)sexual women, transpersons, and male, female or trans sex workers—an ironic result for advocacy groups constituted to think about a “gender guidance.”

The concern of advocates that to use gender is to divide the “baby” is so palpable that, in a world of multiple epidemics (concentrated among sex worker, MSM, or IDU populations or generalized throughout the population), gender as a term has become a *barrier to* attending to the inequalities and biases connected to gender stereotypes that govern the path of the epidemic. Moreover, it is understood that the path of money is gendered: funding for studies, for services, for outreach and education, and for advocacy follows specific priorities—including those set by the UNAIDS gender guidance note.¹⁷

It is worth noting that while each “gender camp” has certain kinds of access to power, none of the competing gender

16. *Id.* at 1, 3-5.

17. This struggle over money spans both prevention and treatment to use the two categories most commonly at play in funding debates.

advocates (women living with HIV, trans-women in sex work, married man having sex with men, etc.) actually controls the state or donor responses to their requests. Looking intersectionally, each of the differently situated “gender claimants” may have an aspect of privilege and an aspect of abjection: the “innocent infected wife” stands both as a viable, sympathetic public victim *and* as a person without full legal rights in many societies; the man having sex with men is both a man possibly facing risks of violence or blackmail and other forms of coercion in his town for his same-sex behavior, and, as a matter of law, maybe the head of his household and the holder of sexual privileges over his wife.

As a matter of “gender,” they are all affected by gender inequities and a set of organizing principles privileging certain forms of masculinity and femininity, but in the silo-ization of money and policy priorities, they can either address “women and girls” or “non-gender normative men” (code word: sexual minority). The histories and institutions of the work on these populations are different—all marginalized, but differently marginalized, commanding different supporters, agencies and rhetoric, and some (like lesbian identified women) simply invisible.¹⁸

III. Gender Steps Out¹⁹ and into the U.N.

I turn next to different institutional and historical rhetorics of gender: the practices initially locating—indeed fixing—women and gender, and *gender as women*, as a permanent, reified U.N. category, and then the splitting of the category of gendered rights into the mutually exclusionary (in some practices) claims of gendered (heterowomen) and gay men/transpersons (SOGI claims). To do this I present a brief and therefore partial institutional snapshot of the genealogy

18. Cynthia C. Rothschild, *The L and the G Word*, MUJERES ADELANTE, Aug. 8, 2008, available at http://www.aln.org.za/downloads/Mujeres%20Adelante_Friday.pdf.

19. This subheading invokes a chapter in a book by Jonathan Ned Katz, periodizing when “the heterosexual steps out.” See JONATHAN NED KATZ, *THE INVENTION OF HETEROSEXUALITY* 83 (1995).

and architecture of “gender as women” in the U.N., and then I track the rise of a new gender constituency—the SOGI constituency—and its surprisingly new integration into a previously “woman-as if only one kind of woman” (i.e. heterosexual bio-women) specific treaty, CEDAW.²⁰

CEDAW of course is only one of the many venues and structures that the U.N. has carved out over time and served up to the world as “addressing women.”²¹ These women-specific structures include: U.N. Charter-created political bodies (where governments speak in their national interest), such as the Commission on the Status of Women/CSW); independent expert treaty-based bodies, such as CEDAW (part of the U.N.’s human rights treaty body system); and U.N. agencies and funds (programmatic arms of the U.N. system constituted as arms of the U.N. bureaucracy, such as the old Division for the Advancement of Women/DAW or UNIFEM, a sub-agency of UNDP, and the United Nations International Research and Training Institute for the Advancement of Women (UN-INSTRAW). There are also special advisers on women to the Secretary General, Special Rapporteurs on women and various women-identified issues in the Human Rights Council, and a new Special Representative to the Secretary General on Sexual Violence in Conflict that provides reports to the Security Council.

Most recently, in 2010 the U.N. rolled all of its women-identified agencies into a single agency, the U.N. Entity on Gender Equality and the Empowerment of Women (U.N. Women). Pressure from advocates and states concerned that women and the programs serving them were still massively disenfranchised and disproportionately impoverished around the world, despite a proliferation of (minor) agencies and procedures dedicated to women, forced this consolidation and elevation (at least formally) of institutional attention to

20. *Convention on the Elimination of All Forms of Discrimination Against Women*, DIVISION FOR THE ADVANCEMENT OF WOMEN, <http://www.un.org/womenwatch/daw/cedaw/> (last visited Nov. 1, 2011).

21. For a critique of the very subject/object “woman” of CEDAW, see Darren Rosenblum, *Unsex CEDAW, or What's Wrong with Women's Rights*, 20 COLUM. J. GENDER & L. 98 (2011).

women.²² The NGO campaign to support this new agency marked itself as UNGEAR—U.N. Gender Equality Architecture Reform, and included groups that work on diverse sexualities and diversity among gender roles—but its product, i.e. what the Member States of the U.N. agreed to, was a U.N. agency on women.²³

The many other branches of the U.N. that address human rights, health, and development are of course formally “gender neutral.”²⁴ Historically, these branches, including the old U.N. Centre for Human Rights (now Office of the High Commissioner for Human Rights) and the U.N. Development Program, ignored both gender analysis and women in many contexts with a vengeance, at best including references to “women and children.”²⁵

The “gender fights” of 1995 at the U.N.’s Fourth World Conference on Women in Beijing simultaneously opened the U.N. to free-wheeling debates over the scope of gender (are there five genders? Is talking about gender really talking about homosexuality? What are the different ways to differently gender women? How are men and women gendered?) and, in practice, produced gender work in the U.N. system which solely meant work on women. This reduction (talking about gender equals talking about women) held for the next decade and is just breaking now, with SOGI-based rights work.

Following the Beijing Platform for Action, which stressed gender mainstreaming for the entire U.N. system, the non-women branches of the U.N. have been the targets of now

22. U.N. Entity for Gender Equality and the Empowerment of Women, G.A. Res. 64/289, U.N. Doc. A/RES/64/289 (July 21, 2010), http://www.un-ngls.org/IMG/pdf_Report_July_2010_N0947917.pdf.

23. GENDER EQUALITY ARCHITECTURE REFORM (GEAR) CAMPAIGN, <http://www.gearcampaign.org/> (last visited Nov. 8, 2011).

24. This means gender mainstreaming is directed to all the Charter-created political bodies of the Security Council, General Assembly, Commission, now Human Rights Council, and its special mechanisms (independent experts), the many agencies and funds (WHO, UNICEF, UNFPA, UNDP, UNESCO), the various ad hoc tribunals, and the ICC.

25. For an early review of the “faint” impress of gender analysis in the U.N. human rights bodies, see INTERNATIONAL HUMAN RIGHTS LAW GROUP, *TOKEN GESTURES: WOMEN’S HUMAN RIGHTS AND UNITED NATION REPORTING* (1993).

predictably regular *gender mainstreaming* resolutions, and plans calling on them to “ask the woman question” as an aspect of their work. Gender mainstreaming in IHRL drives funding for projects targeting and evaluations assessing women’s rights in the context of concerns for violence, health, and equality in political life, housing, and education. Overall, with some exceptions, remarkably little of the project of gender mainstreaming has addressed *background structural rules* organizing social relations between persons deemed male and female (according to presumed male-female biological sex differences), and very little in the U.N.—up until the UNAIDS gender guidance note—has attempted to address men in their relationships to each other, or women in their relationships to each other as “engendering,” or as a necessary component of gender mainstreaming.

Thus, although the “gender fights” of 1995 served to propagandize around fears that “gender” opened the door to homosexuality and bi-sexuality (and bestiality and pedophilia, in some delegation accounts), no one to my knowledge in the U.N. has worried about *gender mainstreaming* requiring attention to diversity of gender among men (i.e. men who have sex with men or trans persons). Notably a few opponents of gender mainstreaming in Europe have sought to call attention to the potential of gender mainstreaming work to challenge the status of hetero-normative men, and the notion of their fixed identities and behaviors.²⁶ A few self-avowed Christian-values groups have claimed a link between gender mainstreaming and the homosexual agenda in the Caribbean, but notably, the groups working on decriminalizing so-called sodomy laws do not use the term *gender mainstreaming* to capture their work.²⁷

26. It is notable that gender mainstreaming has targeted changing men (education, policies engaging with their sense of their roles) in only a few settings, and European examples of gender mainstreaming actually taking on education and roles of boys and men has been attacked for this by Vatican inspired critics. See, e.g., Gabriele Kuby, *Gender Mainstreaming—The Secret Revolution*, VATICAN MAG. (2008), available at http://www.lifesitenews.com/ldn/2008_docs/GenderMainstreaming.pdf. Thanks to Mary Anne Case for calling this work to my attention.

27. See, e.g., E-mail from The Belize Action Team to Colin Robinson (Oct. 30, 2011, 21:28 PDT) (on file with author) (“*The end goal is SAME SEX*”).

A few scholars have begun to point out that some new gender norms are finding their way into global programming outside the U.N. through gender mainstreaming, such as in lending programs of the World Bank, and its new vision of companionate marriage.²⁸ But overall, I would argue that gender sectarianism put blinders on both advocacy and programmatic work in the U.N., limiting gender functionally in U.N. programming to “asking about women.” And in the eyes of many rights advocates, not doing that very well.

Generally speaking, no one, including traditional women’s rights advocates, is happy with the current status of gender mainstreaming work, or with the status of the term “gender.” It turns out that the focus on women as sole owners of gender has not led to speedy global change, including reduction of “GBV.” Recent scholarship from feminists concerned about the lack of progress on women’s equality has begun examining the use of gender at the U.N. One piece in the stream of gender-as-feminism, by Valerie Oosterveld, is a magisterial piece canvassing all the uses of gender in the U.N. gender mainstreaming system. She describes the definitions of gender as either thick (full of elaborations on the meaning and relationships of gender and sex) or thin (undefined). She points out that U.N. agencies use thick ascriptions of gender, while thin is the mode of multilateral negotiations, in part because states cannot agree on what they mean by gender.²⁹ Yet the thick elaborations still produce relatively impoverished projects or at least in human rights, projects that merely add and stir

MARRIAGE in Belize and a broad HOMOSEXUAL AGENDA of what’s called “GENDER MAINSTREAMING,” making the gay & lesbian lifestyle accepted in our society & culture.”

28. See Kate Bedford, *Loving to Straighten out Development: Sexuality and Ethno-development in the World Bank’s Ecuadorian Lending*, 13 *FEMINIST LEGAL STUD.* 295 (2005), available at http://kar.kent.ac.uk/1693/1/Straighten_Out_30OCT07DP.pdf, for an innovative example of this kind of study; in this case, the Bank is reaching both men and women in order to re-configure heterosexual marriage around the world into a modern, companionate mode.

29. See Valerie Oosterveld, *The Definition of “Gender” in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice*, 18 *HARV. HUM. RTS. J.* 55, 66-70 (2005).

attention to women in service of gender equality.³⁰

However, my brief foray into tensions within gender advocacy circles suggests that fears over losing prioritization of funding for work on women, as well as some lingering tensions over how to trust attention to men (crudely put, does studying men and masculinity diverting attention from the abuse of women as well as re-center men as the hegemonic subject?) continue to operate. Ironically, this anxiety among advocates who are interested in changing gender roles, but are divided on whose gender to attend to, operates alongside and synergistically with another, distinctly conservative anxiety. This conservative anxiety arises within some governments and many religious structures that fear that gender analysis will ultimately *succeed* in changing the status quo on masculinity and femininity. Working paradoxically together, the divisions within progressive advocates coupled with the resistance among status quo conservatives operate to keep gender analysis and work constrained.³¹

Notably, Oosterveld canvassed the negotiated texts from U.N. member states in part to better interpret the scope of “gender-based persecution” in the crimes against humanity section of the Rome Statute of the International Criminal Court. This use of gender is the first codification of the term “gender” in international law making, here in a multilateral treaty establishing the International Criminal Court (I.C.C.). The word’s inclusion in the Rome Statute was hard fought and generated an annotation which reads: “For the purposes 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.”³² After the intensity of the fight over the inclusion of

30. See Hilary Charlesworth, *Not Waving but Drowning: Gender Mainstreaming and Human Rights at the United Nations*, 18 HARV. HUM. RTS. J. 1 (2005).

31. A new UNDP publication on this again proves the rule. See Myra Betron, Gary Barker, Juan Manuel Contreras & Dean Peacock, *Men, Masculinities and HIV/AIDS: Strategies for Action*, SONKE GENDER JUST. NETWORK (forthcoming 2011/2012) (on file with author).

32. Rome Statute of the International Criminal Court, art. 7(3), July 17, 1998, U.N. Doc. A/CONF.183/9 (1998), 37 I.L.M. 999, 1004-09.

the word gender as a mode of persecution (intense, because everyone understood they were fighting over the possibilities that gender could be unmoored from women as female, even as they radically disagreed on the usefulness and the *scope* of the un-mooring) the banality of the definition signals a lowest common denominator resolution, as one of my colleagues characterized it.³³ Moreover, it is an empty tautology.

Now that the dust has settled from the Rome Statute fight, I think the tautology would arguably allow an expansive reading of “gender-based persecution” as a crime against humanity, including attacks on persons because they failed to follow the rules defining what sexed (male- and female-identified) bodies are supposed to do, all other elements of the definition of the crime being met. Can we argue that the anti-gender-equality advocates’ attempt to close down gender in the Rome Statute produced a text that in fact leaves space for opening gender up to a more capacious reach of persons and bodies? As yet, we have not seen an operationalization of this capaciousness in the work of the court, however.

IV. Deafening (Gendered) Silence between “Women” and “SOGI”

Which brings this Essay back to the importance of who and what fills in the construct of gender. Whose life motivates gender advocacy? This query leads to a deeper engagement with my second indicator of gender territorialization: silence between gender claims and projects. As the proceeding sections suggest, contemporary advocacy claims are channeled into one of two gender streams in international human rights law work: either directed at women and often concerning violence and some aspect of sexual and reproductive health (including abortion, SGBV, and sexual exploitation) or now, under the new SOGI vehicle, directed at gay men or trans persons (often MTF) and embracing freedom from violence, and police or other

33. Compare Oosterveld, *supra* note 29, with Janet Halley, *Rape At Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 MICH. J. INT’L L. 1 (2008).

criminal justice interference with rights of privacy or expression.³⁴ The stream of work under which MSM, gay-identified global work has begun to proceed since around 2006 is SOGI, a formulation initially proposed as a way to move beyond Western-identified constructs of “gay” and the LGBT identity. SOGI has now been reified in global advocacy by a host of NGO texts, campaigns, and publications, including the Yogyakarta Principles on the Application of Human Rights Law to Sexual Orientation and Gender Identity (YyP),³⁵ a new case book on comparative legal decisions on SOGI at the national level by the International Commission of Jurists, and many other publications, including a new UN report by the Office of the High Commissioner for Human Rights.³⁶

The terms of SOGI’s application deserve much closer examination. The acronym stands in for, and obscures, a much more complex reality of diverse sexual and gender practices. For example, same-sex sexual practices under SOGI are understood to be evidence of a (homo)sexual orientation (SO), which is in turn unjustly targeted by the criminal law.

34. See INTERNATIONAL COUNCIL ON HUMAN RIGHTS POLICY, SEXUALITY AND HUMAN RIGHTS (2009); Girard, *supra* note 5; Alice M. Miller, *Sexual but Not Reproductive: Exploring the Junction and Disjunction of Sexual and Reproductive Rights*, 4 HEALTH HUM. RTS. 68 (2000), available at http://www.ichrp.org/files/reports/47/137_web.pdf; Ignacio Saiz, *Bracketing Sexuality: Human Rights and Sexual Orientation—A Decade of Development and Denial at the U.N.* (Sexuality Policy Watch, Working Paper No. 2, 2005). There is a compelling argument that sexual violence is now such a strong focus in rights advocacy that it deserves to be called its own “gender stream.” This point was flagged by one of my reviewers.

35. See THE YOGYAKARTA PRINCIPLES: PRINCIPLES ON THE APPLICATION OF INTERNATIONAL HUMAN RIGHTS LAW IN RELATION TO SEXUAL ORIENTATION AND GENDER IDENTITY 6-7 (Mar. 2007), available at http://www.yogyakartaprinciples.org/principles_en.pdf [hereinafter THE YOGYAKARTA PRINCIPLES].

36. INT’L COMM’N OF JURISTS, SEXUAL ORIENTATION, GENDER IDENTITY AND JUSTICE: A COMPARATIVE LAW CASEBOOK (2011), available at http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=23865. For the just released UN report, see UN Human Rights Council, REPORT OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS ON DISCRIMINATORY LAWS AND PRACTICES AND ACTS OF VIOLENCE AGAINST INDIVIDUALS BASED ON THEIR SEXUAL ORIENTATION AND GENDER IDENTITY (2011), available at www2.ohchr.org/English/bodies/hrcouncil/19session/reports.htm.

However, in reality, many of the laws criminalizing same-sex sexual conduct, or non-reproductive sexual conduct more generally, do not require any manifestation of a stable “orientation,” merely same-sex or non-reproductive sexual practice. However, we are now at an historical moment where advocates can reasonably claim that the *effect* of penalizing a conduct is also to penalize an orientation or an identity (a SOGI violation). This claim—that an emerging homosexual identity is being proscribed—is under-inclusive: some of those who are harassed or arrested under the criminalization laws may identify with a homosexual orientation, but many other may not. On the most basic level, the motivation of the criminalization ought not to matter, as consensual same sex sexual conduct ought to be free of criminal regulation regardless of its relationship to an expression of an identity. But it is not quite right to organize all opposition to these laws as if they only affect homosexual orientation.

Moreover, it is not always clear what the link to gender is (or is intended to be) vis-à-vis sexual orientation. Persons of non-traditional gender department and those who wish to have a distinct or new gendered identity may or may not also be oriented “homosexual.” In practice, however, they may be punished under laws and systems that act as if a bio-males’ donning of a skirt is evidence of homosexual behavior even if no actual evidence of same sex, sexual activity has been produced. However, today gender identity (GI) is sutured to sexual orientation in this SOGI phrase in ways that have so far also been non-productive for a cross-gender (i.e., across trans and bio-women) analyses and coalitions. For example, in the 2007 Yogyakarta Principles,³⁷ gender is included as “gender identity” and has the odd effect of being less immediately friendly to use by feminist (i.e. women) gender advocates. Perhaps some of

37. *The Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, THE YOGYAKARTA PRINCIPLES (Mar. 2007), http://www.yogyakartaprinciples.org/principles_en.pdf. I am a signatory of the Principles, participated in various steps of their drafting and work for their greater acceptance. I am also very aware of their flaws, which I have spoken to in various settings. See, e.g., THE WILLIAMS INSTITUTE, YOGYAKARTA PRINCIPLES WORKING GROUP MEETING SUMMARY 4-6 (Mar. 11-12, 2009).

this chill is due to the YyP's form: the YyP's betray a preference for classic civil and political rights, a focus on public life. I would argue that the Principles' failure to address gendered repressions within families, which affect so many bio-girls and women, among other aspects, produce a model of gender identity that is static. The YyP, despite their revolutionary and important character also produce a rather univocal stance on gender expression, as if built only in regard to a certain version of transgender.³⁸

Overall, within the Human Rights Council and the other venues (government ministries, UNHCR, etc.) that have taken up the SOGI approach, the direction of the work suggests that SOGI is understood to benefit MSM, gay identified men, and MTF trans persons. There is much less effort to link work on SOGI to work on women's rights and to gender mainstreaming. To counter this concern, *some* sexual rights/queer feminists in human rights advocacy have been dedicated supporters of the diffusion of the YyP in particular, and SOGI rights claims, more generally around the globe, and work against the tide to open up SOGI's lock on gender to merge it with a diversity of women's claims around gender expression and diversity, and to unpack "women" as a diverse category.

V. Whose Gender is Expressed through Gender Identity in a Woman's Convention?

This rare use of SOGI as a claim within women's human rights makes SOGI's sudden appearance in two new general recommendations adopted by CEDAW in late 2010 all the more startling, and worthy of interrogation: how did it get there, and does it mean something interesting for gender/sex in CEDAW that it did? Does it remedy the silence and bifurcation between gender-as-women and gender as gay-ish man?

CEDAW has been among the most resistant sites in the

38. Many of these flaws are being addressed by advocates, e.g., a recent Guide to Activists seeks to present ways to work through these problems. *An Activist's Guide to the Yogyakarta Principles*, http://www.ypinaction.org/content/activists_guide (last visited Nov. 1, 2011).

human rights treaty system for work on diverse sexualities or diversity of gender expression among women. This resistance, I have argued elsewhere, stems in part from the Committee's paralysis by its status as a symbol, even prize, of political struggles over gender equality.³⁹ It is hyper-scrutinized by conservative advocates who are often both anti-gender equality and anti-sexual rights: the Catholic and Family Human Rights Institute (C-Fam) and the Heritage Foundation have both made CEDAW a special target of attacks.⁴⁰

CEDAW's non-discrimination imperative (ensuring the ability of women to enjoy their rights on an equal basis with men) in Article 1 directs governments in Article 5 to eliminate "prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women."⁴¹ CEDAW's work follows the male-female binary as set up by its mandate: its work has been predictable, which is not to say unimportant—the practices of gender control of women are real and serious, and often deadly. In service to this concern, however, CEDAW focuses predominately on women's vulnerability to abuse at the hands of men, and to girls and women's exclusion from equality with men in spheres of public and private life, only some times touching on the

39. See Alice M. Miller & Mindy J. Roseman, *Sexual and Reproductive Rights at the United Nations: Frustration or Fulfillment*, 19 REPROD. HEALTH MATTERS 102 (2011).

40. For a discussion of how the U.N., and CEDAW in general, fear direct protection of women's sexuality, see GRACE SMITH MELTON, THE HERITAGE FOUND., *CEDAW: HOW U.N. INTERFERENCE THREATENS THE RIGHTS OF AMERICAN WOMEN* (2009), available at <http://www.heritage.org/Research/Reports/2009/01/CEDAW-How-UN-Interference-Threatens-the-Rights-of-American-Women>; Susan Yoshihara, *CEDAW Reality Check* (Catholic Family & Human Rights Inst., Briefing Paper No. 3, 2007), available at http://www.c-fam.org/docLib/20080626_CEDAW_Reality_Check.pdf. See also CYNTHIA ROTHSCHILD, INT'L GAY & LESBIAN HUMAN RIGHTS COMM'N & THE CTR. FOR WOMEN'S LEADERSHIP, *WRITTEN OUT: HOW SEXUALITY IS USED TO ATTACK WOMEN'S ORGANIZING* (2005), available at <http://www.iglhrc.org/cgi-bin/iowa/article/publications/reportsandpublications/8.html>.

41. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

discriminatory impacts of intra-gender regulation of women, for example at the hands of mothers-in law in some contexts.

CEDAW has strongly criticized exclusions and disadvantages to women which are produced by the constraints of social, family, and legal pressure to conform (e.g., in the manifestation of too few women in non-traditional women's work); and has deemed violence an aspect of enforcing conformity to be "good, traditional" women. However, it has been relatively chary in work on how gender-analysis works to protect the rights of "bad women" (i.e., women who transgress multiple gender roles or violate other social rules), such as women under prosecution for crime (including war crimes), women who sell sex,⁴² and for women who are too different (sexually or in gender performance) from other women. In regard to trans-women and lesbians, the Committee has on occasion praised state recognition of gender-diversity-within women as a group. For example, CEDAW has used its "concluding comments" (the public statements made by the treaty body as part of the evaluation of the country reports made by States party to the treaty to this effect⁴³ when rights

42. For an early concern about "bad women," see Radhika Coomaraswamy, *To Bellow like a Cow: Women, Ethnicity, and the Discourse of Rights*, in *WOMEN'S RIGHTS ARE HUMAN RIGHTS* 32 (Rebecca J. Cook ed., 1994).

43. A very recent set of comments to South Africa is particularly rich on sexual orientation:

39. The Committee notes that the State party has in its Constitution the prohibition of discrimination based on the sexual orientation of individuals. However, the Committee expresses grave concern about reported sexual offences and murder committed against women on account of their sexual orientation. The Committee further expresses its serious concern about the practice of so called "corrective rape" of lesbians.

40. The Committee calls on the State party to abide by its Constitutional provisions and to provide effective protection from violence and discrimination against women based on their sexual orientation, in particular through the enactment of comprehensive anti-discrimination legislation that would include the prohibition of multiple forms of discrimination against women on all grounds, including on the grounds of sexual orientation. The Committee further

issues on lesbians or trans women were raised by NGO submissions or state reports. Overall, however, the Committee's interpretive work has been very narrow vis-à-vis women and gender. One way to think of this narrowness is that CEDAW has accepted a gender-limited understanding of its role in protecting women's equality rights: that women should be able to pursue equality with men in the economic sphere, regardless of gender stereotype, but not that women or men should radically remake the rules of inequitable or repressed respectable society. I think it is fair to say that the Committee's vista of protection of women's rights under CEDAW has been limited by its own sexual and gender normativity, and it has measured women's equality with men in a limited register.

Advocates have been dancing gingerly around getting CEDAW to formally address non-hetero-normativity, especially sexual diversity, as a prohibited basis for discrimination against women for over fifteen years, (i.e., through a gender recommendation or interpretive statement).⁴⁴ Insider reports have made it clear that in the past some members of the Committee were ready to quit before allowing diversity of sexual orientation to be addressed as a matter of human rights laws' protections. Thus, while the concepts linked to gender identity or expression could be useful for a range of women, and therefore be key aspects of women's human rights analysis generally, they have not been used; moreover, trans women as rights holders under CEDAW did not garner attention as specific issues in the Committee's jurisprudence until recently,

recommends the State party to continue its sensitization campaign aimed at the general public, as well as providing appropriate training to law enforcement officials and other relevant actors.

U.N. Comm. on the Elimination of Discrimination Against Women, *Concluding Observations of the Committee on the Elimination of Discrimination Against Women*, 48th Sess., Jan. 17-Feb. 4, 2011, U.N. Doc. CEDAW/C/ZAF/CO/4 (Apr. 5, 2011).

44. For a discussion of CEDAW's silence on lesbianism, see generally INT'L GAY & LESBIAN HUMAN RIGHTS COMM'N, UNSPOKEN RULES: SEXUAL ORIENTATION AND WOMEN'S HUMAN RIGHTS (Rachel Rosenbloom ed., 1995); Julie Mertus, *The Rejection of Human Rights Framings: The Case of LGBT Advocacy in the U.S.*, 29 HUM. RTS. Q. 1036 (2007).

despite the efforts of advocates since the early 1990s.

Yet, in two general recommendations adopted by the Committee in December 2010, one on older women and one on state obligation under article 2 the Convention, the CEDAW Committee has now inserted “sexual orientation and gender identity” as part of their list of prohibited grounds of discrimination.⁴⁵ The two General Recommendations are a fascinating pastiche of terminologies: I think the use of the terms “sexual orientation and gender identity” in these 2010 statements reflects the march of the SOGI advocacy—this phrase appears in both recommendations, even as drafters initially reached for words like “sexuality different lifestyles” and “lesbian women” in their first debates over the terminology in the texts.⁴⁶ General Recommendation 28 (GR 28) elaborates the core commitments that states undertake in ratifying the treaty and is therefore a central doctrinal text, so I will focus on its terms. In GR 28, SOGI appears in the section addressing intersectional discrimination. The recommendation places SOGI in the midst of a list of characteristics of women, as in its list of other discriminatory grounds, i.e. “race, ethnicity, religion or belief, health, status, age, class, caste, and *sexual*

45. This section draws from a recently published article. See Mindy Jane Roseman & Alice M. Miller, *Normalizing Sex and Its Discontents: Establishing Sexual Rights in International Law*, 34 HARV. J. L. & GENDER 313 (2011). See also U.N. Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 27 on Older Women and Protection of Their Human Rights*, 47th Sess., Oct. 4-22, 2010, U.N. Doc. CEDAW/C/2010/47/GC.1 (Oct. 19, 2010), available at <http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW-C-2010-47-GC1.pdf>; U.N. Comm. on the Elimination of Discrimination Against Women, *General Recommendation No. 28 on the Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women*, 47th Sess., Oct. 4-22, 2010, U.N. Doc. CEDAW/C/2010/47/GC.2 (Oct. 19, 2010), available at <http://www2.ohchr.org/english/bodies/cedaw/docs/CEDAW-C-2010-47-GC2.pdf>.

46. For example, three of the twenty-three experts voted in favor of the term “sexuality or different lifestyles” in their discussion of terminology for the general recommendations. At other points during their debates, a majority initially chose the terms “lesbian women” and “women with different lifestyles.” See Rep. of the CEDAW, 46th-48th Sess., July 12-30, 2010, Oct. 4-22, 2010, Jan. 17-Feb. 4, 2011, U.N. Doc. A/66/38; GAOR, 66th Sess., Supp. No. 38 (2011), http://www.un.org/ga/search/view_doc.asp?symbol=A/66/38.

orientation and gender identity."⁴⁷ The rote inclusion has the strange effect of treating sexual orientation and gender identity differences as connected no more or less to sex as disability, ethnicity, or refugee status are connected. And it has the effect of assuming a permanent connection between (homo)sexual orientation and (non-conforming) gender identity for women, a connection between gayness and trans-ness which has already been naturalized for men.

It is entirely unclear to me what this inclusion of SOGI means to the Committee. For example what does it connote about the protections of CEDAW vis-à-vis the gender expression of fem lesbians (women who dress and comport themselves as socially stereotypical feminine women and are in lesbian relationships or claim a lesbian identity) or butch straight women (women who dress and comport themselves in ways society deems masculine, and are in heterosexual relationships or identify as heterosexual)? Will the Committee require full genital and breast creation surgery for transwomen to count as women under the Convention? We do not have enough information from its limited past work on gender diversity within women to know.

Each of the enumerated prohibited grounds for discrimination in CEDAW's list of terms has a unique and specific interaction with the treaty's focal ground of discrimination on the basis of sex. Inter-sectional analysis should require us to think through the mechanisms and the effects of each of these interactions, such as: age and sex; sex and race; or sex and refugee status, etc. The interactions can be cumulative: sex and sexual orientation and refugee status and national origin, for example. In working through the interactions of these axes of discrimination and the inclusion of SOGI, part of me applauds the Committee's inclusion of SOGI as just two sets of characteristics among many, thereby escaping the (false) imprisonment of all understanding of sexuality under the sex/gender matrix.

47. See *General Recommendation No. 28 on the Core Obligations of States Parties Under Article 2 of the Convention on the Elimination of All Forms of Discrimination Against Women*, *supra* note 45, at 5 (emphasis added).

However, given the questions and lack of an institutional history in engaging with diverse sexualities and gender in CEDAW's history, the more likely explanation for the rather wooden inclusion is a lack of in-depth discussion within the Committee on the nuances of the terms "sexual orientation" or "gender identity." I would posit that the political engine that was sufficient to overcome the log jam of CEDAW's self-protective fear of naming sexual diversity was also an engine that did not have the analytic tools to explain the connections, in part because the bifurcated gender advocacy practice I am describing in this Essay.

SOGI has proved itself to be a powerful neologism; it calls forth new advocacy but may also obscure past work on diversity of gender roles, expressions and conducts, as well as diversity of sexuality. Readers of earlier drafts of this Essay asked, what has happened to scholarly attention to the advocacy work to protect women who want to live without marrying men regardless of the direction of their erotic desire, or of persons who seek to have sex without erotic motivation, but for well-considered strategic and material advantage? My concern is that SOGI, and the attention to very particular persons that are now constructed as its objects, freezes gender into a singular identity, and may fail to protect a diversity of practices for persons across male, female spectra. Both advocacy and scholarship are constrained. I am hopeful but not confident that CEDAW's recent incorporation of SOGI, however wooden, may help unfreeze the rigidity of SOGI's attachment to bio-male bodies; for it to do so, however, requires supporting analysis of greater complexity than many advocates are currently deploying in their blinkered streams.

VI. Gender as if Sexuality⁴⁸

CEDAW's initial silence on gender diversity, and now its explosive shout out to gender *and* sexual diversity, calls our attention back to the constantly invoked, but today the far too

48. For an excellent introduction to sexual rights advocacy at the UN and its spillover effects on gender, see Girard, *supra* note 5.

rarely examined, link between gender diversity and sexual diversity. Here propagandists for the Vatican have named the beast best: Gabriele Kuby, a German advocate for the Vatican, flagged earlier for her unusual attention to gender mainstreaming as harming men, writes:

A specter is haunting the world, the specter of—gender! Hardly anyone knows this concept, although it is extremely powerful and has extended its influence over international and national institutions. The gender ideology is in the process of creating a new man, whose freedom should include the choice of his sex and sexual orientation. This means to arbitrarily decide whether he or she wants to be man or woman, heterosexual, gay, lesbian, bisexual, or transsexual (GLBT).⁴⁹

Kuby articulates a pan-gender-sexuality link, i.e. the way in which women and men, heterosexuality, and homosexuality are somehow uniquely and tightly linked as a set of practices and ideas: vary gender and you must create (perverse) variation in sexual orientation and sexual conduct. Yet the very advocates against whom she mobilizes Christian values are themselves not currently linking their work on gender across their silos of work on heterosexuality and homosexuality, or across regulation of women and regulation of men or regulation of trans persons. In calling for advocates to attend to the way their work on gender has implications across a great diversity of gender and sexuality I am not calling for a reversion to the simplistic MacKinnonite (or Kuby) framework that claims that all of gender can be explained simply by sexuality.

For advocates seeking freedoms around gender, sexuality is currently the prime site for attaching rights protections for many aspects of nonconformity. This is true for gender-nonconforming men, as if sexual conduct were the only aspect of their diversity worth rights protection. It is also true when sexuality is emphasized as *the* site of harm for women, as if

49. Kuby, *supra* note 26.

abusive sexual activity was the only acts through which women experience gendered harm. I am a sexual rights advocate, so I am not saying sex is *not* important, but we must re-incorporate other planes of injustice (material/market and cultural/political and racial/ethnic) to ensure that we have given up the territory of non-sexual struggles as places where we fight for equality and diversity.⁵⁰

I think advocates and scholars need to confront the ways that the deafening silences between gender advocates and advocates' fights over the Solomon's baby of gender are evidence of incomplete gender analysis and truncated political alliance building. Advocates in human rights can profitably research, document, and publicize the many kinds of links—and discontinuities—within gender, and between gender and sexuality in radically different contexts around the globe. Working from the understanding that gender and sexuality are linked but not congruent systems, such that gender contributes to but cannot alone account for sexual variation, and that paying attention to how gender and sexuality are linked not only to each other but also are implicated in other structures of power, could then return to gender analyses early potential as a tool for global justice for all persons.⁵¹

In this Essay I have sought to call attention to the way that gender non-conformity conduct challenges hetero-

50. See Alice M. Miller, *Sexuality, Violence against Women, and Human Rights: Women Make Demands and Ladies Get Protection*, 7 HEALTH & HUM. RTS. 16 (2004) (exploring the hyper-visibility of sexual violence against women in the women's rights movements).

51. My position relies on the insight Gayle Rubin initially laid out in her early and still powerful essay of 1986. Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267 (Carole S. Vance ed., 1987). For her later comments on gender as an analytic tool, see Judith Butler, *Against Proper Objects*, in FEMINISM MEETS QUEER THEORY 1 (Naomi Schor & Elizabeth Weed eds., 1997). I am grateful to many conversations over the last decade with Carole S. Vance for deepening my understanding of these complexities. Thus, in my scheme, trans-genderism is just that—transiting across gender (between or choosing masculine identities from feminine birth assignment or vice versa). It does not signal “gay” unless more factors of sexuality are added; however, in the U.N.'s institutionalization of gender, transgender is a “sexual minority.”

normative sexuality, but also note that we must distinguish when gender is doing work/being used to do work outside, or at least alongside, of the sexual in the sense of sexual conduct. The gender sectarianism of today's advocates makes these distinctions very hard to discern—the fissures obscure the many ways that gender is not all about/only about sex and vice versa.

VII. Gender as a Grant, an Agenda Item or as a Way Forward?

As Gita Sen has described, part of the current problem can be traced to the assimilation of gender to shorthand struggles within identity politics, rather than a use of gender analysis to focus on relational power constructs working through meaning ascribed on the basis of bio-sex differences.⁵² She highlights the way that in identity-based advocacy, gender appears in some contexts as the term substituting for the word “women,” or in other contexts gender flags gay men or transpersons but ceases to capture the systems of gender that operate at all levels to create vulnerabilities and privileges across these various categories.

I argue that CEDAW included SOGI not as part of a deep analysis of the structures of gender and the related systems of sexuality that but as a result of a mix of limited understanding and the pressure of internal and external politics. This process of uneven but potentially powerful or reductive inclusion of new ideas in the development of rights jurisprudence is of course not unique to CEDAW. In my experience accidental, inadvertent progress and some deliberate advance marks all of law making in which social movements, experts, and States interact at the U.N. The Committee was no doubt was trying to catch up with contemporary gender/sex concerns, but in its laboring over the politics of diversity it was led to use SOGI because this neologism now constitutes the set of terms that

52. Interview by Mindy Jane Roseman with Gita Sen, Public Policy Professor, Ctr. for Pub. Policy, Sir Ratan Tata Chair Professor, Indian Inst. of Mgmt., at Harvard Law School (Dec. 15 2009). For a short history of the “apolitical” use of the word “gender,” see Joanna Regulaska & Mindy Roseman, *What is Gender*, 5 *TRANSITIONS* 24, 24-29 (1998).

have become the most available words in the lexicon of rights, gender and sexuality. They are part of an important, influential, and funded campaign for rights associated with SOGI.

In the world of advocacy today, as foretold in a cautionary tale by Ann Snitow in 1999, “gender is a grant.”⁵³ Neither I nor Snitow mean attention to funding to be simplistically damning: it is rather a recognition of the multiple material realities that shape advocacy practice as a modern form, especially as it moves from volunteer elites to paid, more diverse albeit predominately but not exclusively middle class players. And such attention flags the costs of playing in the international spheres.⁵⁴

What I do intend to connote by “gender as a grant,” however, is that one of the effects of grant-making on the NGO practice of working with gender is a move toward activities that have continuity over grant periods, and strategies that produce measurable, goals. In reports to funders, NGOs must demonstrate that targets and goals can be met.⁵⁵ This push toward realizable strategies by itself is not a problem. (Nor is the main problem the grim new work of living from funder’s deadline to funder’s deadline, as described by one of Snitow’s

53. Ann Snitow, *Cautionary Tales*, 93 AM. SOC’Y INT’L L. PROC. 35, 40 (1999).

54. To speak of funding and grants in this way is emphatically not to be sucked into the over-heated notion that well-funded international and national NGOs are running the world, a la the critiques of Joseph Massad et al., calling out the “Gay International.” One can be concerned with the disproportionately Northern interventions and inaccurate renderings of complex gender/sex politics without granting them sole power in running the world, including by “disappearing” the actual and increasingly strong voices from the global South in these discussions, and without sliding into alliances with repressive regimes in the West and the East as they deploy claims of cultural purity and “Western Export” politics to silence dissidents.

55. The hugely ethically important question of “accountable to whom” is suggested but not addressed in this discussion. For an exploration of the reification of “accountability to beneficiaries” in the humanitarian world, see Meg Satterthwaite, *Indicators in Crisis: Rights Based Humanitarian Indicators in Post Earthquake Haiti*, 43 N.Y.U. J. INT’L L. & POL. 865 (2011). For a trenchant, if self-referential discussion of human rights “doing wrong,” see DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (2005).

colleagues in the Network of East-West Women.) However, I think part of the real problem is that “gender as a grant” requires an easily describable, mono-vocal past and a predictable, or at least, bench-markable, future. A problem in “gender as a grant” is that the process of working in this way, in defining benchmarks and elaborating where one’s “value-added” lies, exacerbates working with “gender as a territory.”⁵⁶ “Gender as a grant” requires asserting that your issue will be raised in a notable, stand-alone way, and it is further reified by the practice of advocating for specific agenda items in U.N. fora as evidence of the legitimacy of your issue.

In this institutionalization of identifiable success stories in gender, gender claims are rewarded when tagged to gender-as-women, in one part of the agenda (e.g., in the Human Rights Council), and rewarded again when gender is tagged to as gender identity and sexual orientation, linked to a different agenda item in that same Session.

As advocates, we fight to advance what we believe to be important, and our failures, and even more terrifyingly our successes, can be institutionalized and take on shapes and practices we did not intend. In short, we screw up. In the relative success of putting gender into institutional terms, we have created gender territories to be defended, and gendered issues as border territory to be overtaken through struggles among human rights advocates.

As scholars our critiques are useful to alert advocates to the collateral damage of successes, of “strategic essentialisms” about women, gender, transgendered persons, gay-ness, and to take measure of the moves under foot. But the usefulness of scholars has also been lessened by our tendency to critique from behind the walls of the academy, as well as by a tendency to discover a topic, elaborate, publish, and move on before hearing back from engaged advocates—in regard to their efforts to incorporate critiques. Perhaps some of this impetus

56. As Snitow also said over a decade ago: “Gender’ is not a nation to which anyone is required to migrate. It is, rather, a variable, a central one in the future ways in which labor, government power and economic activity are all going to be structured, not to mention daily psychic life.” Snitow, *supra* note 53, at 42.

also is driven by trends in funding in the academy—our own, “gender as a grant” problem.

As I asserted at the beginning, gender as an analytic tool can still perform important justice work, although not always by itself, but intertwined with attention to analytics of race, citizenship, age, sexuality, and other axes of power and difference. Some U.N. players seek to freeze gender as a binary of man/woman in service of their own politico-religious imperatives, such as the Holy See or the Organization of the Islamic Conference (OIC), and the George Bush administration (a position not yet fully corrected under President Obama).

But my analysis suggests that the Holy See’s position is a paradox: its advocacy leadership has figured out how to operationalize a duality: they preach about the rules of gender as if they were separate universes of law (the law of women, the law of men).⁵⁷ At the same time, resistant even to the use of the word “gender,” the Holy See’s advocates make a point of publicizing the structural and material links between gender diversities and sexual diversities, claiming vast conspiracies of gender advocates, in order to shut down diversity. Ironically the groups seeking to open up that diversity, by virtue of myopic sectarianism, have reduced their ability to unify across genders and sexualities, leaving (hetero)women squaring off as if against gay men.

I would argue that persisting in turf wars or disregarding the gender advocacy of others is to further the destruction of the very coalitions and political synergies that gender as an analytic tool initially made possible, and which could re-emerge as a productive lens with which to engage with human rights. That is to say, gender territorialization threatens to strike a mortal blow to gender as a politically useful rubric for expansive and generous social justice work in global human rights. This serious blow follows on and is exacerbated by another fault line within gender and rights, arising when

57. Pope Benedict XVI, *Message of His Holiness Pope Benedict XVI for the Celebration of the World Day of Peace: The Human Person, the Heart of Peace*, VATICAN: THE HOLY SEE (Jan. 1, 2007), http://www.vatican.va/holy_father/benedict_xvi/messages/peace/documents/hf_ben-xvi_mes_20061208_xl-world-day-peace_en.html.

gender frames fail to attend to the ways in which other systems of power organized around race, nationality, age, (dis)ability, language, or ethnicity themselves construct and are altered in turn by, gender, and at times by sexuality and thence distinguish and diminish access to resources.

“Intersectionality,” now a bit frayed as a theoretical frame, is nonetheless still a useful call in rights-oriented policy work, as using it can move advocates away from isolating or de-contextualizing solutions for silo-ed groups of victims and toward more structural and sustainable change, benefiting a greater diversity of persons.⁵⁸ By interrogating the dynamics of gender sectarianism in this Essay,⁵⁹ I hope to be part of a conversation and a practice that begins identifying and challenging these divisions from within different gender teams. Based on the way work that gender is also doing in ‘covering’ for sexuality, I think we must also challenge rights work on gender and sexuality to work more carefully with terms and assumptions around gender and sexuality.

Just as we must assure ourselves that we all benefit from justice across race, ethnicity, religion, age, and nation, I suspect fundamentally we may also have to reassure ourselves that we all benefit from liberation from gender binaries and sexual repressions.

This work to reflect and think critically within advocacy groups is important, because I think we can take as a given that the powers that oppose the capacious analytic tools of gender understand the stakes of the gender shifts. If we take

58. An Intersectional approach “analyz[es] the disempowerment of marginalized women [by] attempts to capture the consequences of the interaction between two or more forms of subordination. It addresses the manner in which racism, patriarchy, class oppression and other discriminatory systems create inequalities that structure the relative positions of women, races, ethnicities, classes, and the like. Moreover, intersectionality addresses the way that specific acts and policies operate together to create further disempowerment. *Background Briefing on Intersectionality*, WORKING GROUP ON WOMEN & HUM. RTS., <http://www.cwgl.rutgers.edu/globalcenter/policy/bkgdbrfintersec.html> (last visited Nov. 19, 2011).

59. This word is borrowed from a conversation with Carole Vance on the day of the Symposium. Thanks to her for helping with this insight.

the optimistic mode, that advocates do indeed seek gender equality for a diverse “all,” I think we benefit by paying attention to the tension playing out within gender advocacy, in that we might better understand the political stakes of *not* recognizing the links between the issues of gender non-conformity in any territory. As Mary Anne Case’s remarks in the Symposium⁶⁰ point out, the Vatican has figured out that homosexuality and abortion, access to condoms for married women and men having sex with men are conjoined politically and ideologically as issues of gender and sexual non-conformity, why can’t we?

Equally important, however, I hope this exposé ties back to the optimistic call of the original questions for this panel: what are the possibilities for the future? To answer this I turn again to the works of Adam Phillips and his approach to uncertainty as a form of maturity, and move beyond the questions about flirting with which I began the Essay. Looking to end the fight over gender, I think we need to consider how we proceed when we recognize that we are in a place that Phillips terms “the struggle between the commonsense struggle for survival and a struggle for the survival of the imaginative vision.”⁶¹

If there is an interest in challenging the current bifurcated and reified gender story being told on all sides, in creating space within rights advocacy to use gender in a capacious yet penetrating tool of analysis, then we have to develop a new way of working with, and flirting with, gender.

60. *After Gender? Examining International Justice Enterprises*, PACE L. SCH. (Nov. 12, 2010), <http://streamingmedia.pace.edu/edmedia/PLRSymposium11-12-10.wmv>.

61. ADAM PHILLIPS, *THE BEAST IN THE NURSERY: ON CURIOSITY AND OTHER APPETITES* (1998). Phillips finishes his thought by reference to “the wish, and whatever comes to meet it,” suggesting we are indeed able to call up new futures.