

Illegalized Sexual Dissent: Sexualities and Nationalisms

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Dangerous times implicitly authorize state violence and the use of a range of tactics to manage danger, restore order and protect the safety of the state and its citizens. National unity is called for, if not, demanded, and dissenters are excised as part of “them,” not “us.” To dissent is to collaborate with those who pose a danger to the state and its people. Almost inevitably the tactics of governance during dangerous times include the management of dissent.

Ordinarily, dissent is reactive in nature. The state assumes a posture in response to danger, and someone or a group of someones stand up and declare: “not in my name, not in our names.” In this sense, the dissenting subject emerges out of resistance to the exercise of political power. Whilst the state is actively involved in manufacturing consent to its policies, the dissenter is hard at work undermining or resisting those very policies. Thus, while the dissenter is an epiphenomenon of government action, he or she is not integral to the state’s aims, indeed, the dissenter’s subjectivity develops beyond the political horizon set by the state.

Dissent becomes a different, and in some ways more interesting, phenomenon when the dissenter emerges not from outside the political horizon drawn by the state, but rather from within it, and as an integral part of the state’s project of governance. In these cases, the state calls up a set of subjects who are in some fundamental sense positioned to gain state, if not public, disfavor. These subjects are then isolated, excised or otherwise managed in ways that

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further state interests. These Others, having had a subjectivity crafted for them by the state - usually by law - find themselves both assuming a marginalized identity and dissenting from government regulation or discipline in ways that are worth marking as different from that of the more common political dissenter. These outlaws, once marginalized, can be useful to state actors in managing periods of stress to the state, or dangerous times. In dangerous times, as in all other times, governance necessarily includes the creation of a range of governable subjects. In this essay, I discuss several circumstances in which the production of sexual outlaws proves to be a convenient method of managing periods of public, if not state, stress.

Even in periods when a nation can be understood to be taking significant steps toward expanding freedom, when fundamental reforms are undertaken to materialize a break with a prior ignoble regime, and when the story of a nation conforms to a liberal narrative of progress away from unfreedom and toward greater autonomy and equality, we can see the state anxiously managing stress and deploying technologies of governance that inscribe certain types of governable subjects and then disciplining their dissent.

We all know by now that sex is an especially dense transfer point for power.¹ Dangerous times teach us how these transfer points become key to the exercise of state power and control. In this essay, I examine how sex and sexuality can be used by the state during significant moments of transition, as well as periods of state formation and reformation, both in identifying danger and as a tactic of governance. In this essay I examine three instances when sex and sexuality have been particularly useful to the project of managing political instability or

¹ Michel Foucault, *The History of Sexuality Volume 1: An Introduction*, (New York: Vintage Books, 1990), p. 103.

transition. These examples illustrate how under some circumstances, in response to transitional stress, the state gains an official sexuality, sources of threat are sexualized, and the management of sex becomes a tool of governance that produces individual unfreedom in the name of expanding national freedom or independence. In each of these examples, an antagonism is set up between the interests of the nation and those of the outlaw, who ultimately assumes the role of dissenter. When set up in this manner, the singular must yield to the many.

First, I look at the sexual politics of rule of President Robert Mugabe in Zimbabwe. Mugabe has found the deployment of sex as a particularly useful wedge issue in his mission of national freedom - that is, freedom from colonial rule by the British. Mugabe has effectively undertaken brutally homophobic policies by framing them within a post colonial story that has enormous purchase with his people. Yet driving this deployment of a homophobic anti-imperialist program has been a shrewd plan to disempower a rapidly growing civil society in Zimbabwe. Mugabe's repressive campaigns attacking homosexuals have supported an ever radiating set of attacks against women, political opponents and white farmers. One way to read this trajectory is to see that the assault on homosexuality was the entry point in the creation of a culture of intolerance. Here, as elsewhere, sex has been looked to as a particularly useful transfer point for the consolidation of post colonial power.

Next I turn to Egypt and recent government-led campaigns of highly public and publicized criminal prosecutions of men alleged to be gay. It is tempting to read these public spectacles as events similar to those being undertaken in east African nations: the Egyptian government bluntly demonstrating its Islamic credentials to a domestic and pan Arab audience, and in so doing, consolidating its own power. Yet, closer examination reveals that these show

trials emerged as part of an ongoing post colonial struggle within Egypt that began in the 1930s with the repeal of British colonial laws licensing prostitution. Against this history, a set of homosexual social and legal subjects have been created by the Mubarak government, and once so formed and disciplined, “human rights” rides into the rescue to liberate these perversely formed dissenters from social and legal discipline. The (invited?) assistance of the international human rights establishment has further reinforced post colonial nationalist rhetoric that located individual rights as a Western norm that threatens to undermine authentic African culture.

Finally, I turn to the United States in the period immediately following the civil war, when the federal government undertook two enormously challenging tasks: reunifying the nation after a devastating civil war, and managing the transition of African Americans from enslavement to citizenship. Having identified itself with the fundamental values of freedom and equality, in contradistinction to the vanquished confederate states, the federal government demonstrated its commitment to these values in and through the way it managed the project of civilizing freed men and women. Remarkably, however, the practices of freedom undertaken by the federal government in the immediate post war period were focused, not entirely, but quite prominently, on the regulation of freed men and women’s sexual practices. A long-denied *right to marry* was awarded to African Americans immediately upon emancipation, however this new domain of freedom was soon revealed to be more a test administered by the state than a trump to be wielded against state infringement of individual autonomy. Successful participation in and compliance with the rules of the institution of marriage were the grounds upon which freed men and women were to prove that they deserved to be treated as citizens.

Thus the containment of freedmen’s sexuality into marriage, a “space of regulated

freedom,”² became one of the principle techniques of governance used by the U.S. government, to create particularly governable subjects.³

George Mosse, Ann Stoler and others have observed a productive, if not reproductive, relationship between sexuality and nationalism.⁴ Stoler has noted that “the distinction between normality and abnormality, between bourgeois respectability and sexual deviance, and between moral degeneracy and eugenic cleansing were the elements of a discourse that made unconventional sex a national threat and thus put a premium on managed sexuality for the health of the state.”⁵ My project here is to illuminate not only the validity of this observation, but also the circumstances under which a form of state-sponsored biopolitics calls up unconventionally sexed subjects in the service of managing stress to the state. Thus, sex can be usefully *put to work*, as I have discussed elsewhere, i) as a wedge issue that introduces a climate of intolerance by a state seeking to frustrate the growth of civil society (Zimbabwe); ii) as a structural

² Nikolas Rose, *Powers of Freedom* (Cambridge: Cambridge University Press, 1999), p. 22.

³ An essay plumbing the relationship between nationalism and sexuality in the United States could surely look to the persecution of homosexuality during the 1950's. I chose, instead, to focus on the late 19th century and the experiences of African Americans largely because their experiences have been underdocumented, and I saw little benefit in rehearsing the very good work already done by others on the homophobia of the McCarthy period. See e.g. John D'Emilio, “The Homosexual Menace: The Politics of Sexuality in Cold War America,” in *Making Trouble: Essays on Gay History, Politics, and the University* (New York: Routledge, 1989).

⁴ George L. Mosse, *Nationalism and Sexuality: Middle-Class Morality and Sexual Norms in Modern Europe* (Madison, WI: University of Wisconsin Press, 1985); Ann Laura Stoler, *Race and the Education of Desire: Foucault's History of Sexuality and the Colonial Order of Things* (Durham, NC: Duke University Press, 1995); Andrew Parker, Mary Russo, Doris Sommer and Patricia Yaeger eds., *Nationalisms & Sexualities* (New York: Routledge, 1992).

⁵ Stoler, *Race and the Education of Desire*, p. 34, referencing the work of Mosse, *Nationalism and Sexuality*.

component of post-colonial nation building (Egypt); or iii) to control and subordinate a population even when undertaken in the name of freedom for that same population (freed men and women in U.S. reconstruction). These sexual outlaws then find themselves both positioned as and drawn to the role of dissenter - resisting the process by which their subjugation has rendered them internal enemies of the state.

Comparative work of this kind always poses the risk of over-simplifying complex social histories and genealogies, if not worse, skimming to achieve coherence across cultures and times. I do not profess to be a scholar of either of the two non-U.S. examples I provide here, others are far more familiar with the double histories of nationalism and sexuality in Egypt⁶ and Zimbabwe⁷. I offer this comparative analysis for the limited purpose of illuminating how at key moments, and in three very different sites, the nation is imagined in ways that depend upon an interesting interdependence between national and sexual alterity.

I. Disciplinary Administration of African National Sexual Citizenship in Post Colonial

Zimbabwe

Benedict Anderson regards nationalism as best understood as more similar to kinship or

⁶ See e.g. Lila Abu-Lughod, *Remaking Women: Feminism and Modernity in the Middle East* (Princeton: Princeton University Press, 1998); Mervet Hatem, "Secularist and Islamist Discourses on Modernity in Egypt and the Evolution of the Post Colonial Nation-State," in *Islam, Gender and Social Change*, ed. Yvonne Haddad and John Esposito (New York and Oxford: Oxford University Press, 1998); Margot Dadran, *Feminists, Islam and Nation: Gender and the Making of Modern Egypt* (Princeton: Princeton University Press, 1995).

⁷ Oliver Phillips, "Constituting the Global Gay: Issues of Individual Subjectivity and Sexuality in Southern Africa," Carl Stychin and Didi Herman eds., *Sexuality in the Legal Arena* (London: Athlone Press, 2000); Oliver Phillips, "Zimbabwean Law and the Production of a White Man's Disease," *Social and Legal Studies*, 6 (4) (1997): 471-491.

religion than liberalism or fascism.⁸ Surely this is true of Robert Mugabe's approach to nation building in post colonial Zimbabwe. Mugabe has sold to his people a notion of an independent and sovereign Zimbabwe that has rested upon the idea of indigenization, yet where some people are more indigenous than others.⁹ While this is not an uncommon post colonial nation-building strategy, Mugabe has undertaken such a task in a manner that explicitly constructs "national identity not on the basis of its own intrinsic properties but as a function of what it (presumably) is not. Implying 'some element of alterity for its definition,' a nation ineluctably 'shaped by what is opposes.'"¹⁰ The difference against which Mugabe has constituted Zimbabwean kinship and nationalism has been, of course, racial in nature, but more than any sub-Saharan post colonial leader, Mugabe has used sexuality to consolidate power in a post-colonial regime threatened both extraterritorially by the likes of the World Bank, and domestically by expanding institutions of civil society.

In Zimbabwe, formerly Rhodesia, a white majority government declared independence from Britain in 1965, and whites grabbed the most valuable resources in the country, leaving blacks to struggle in extreme poverty on unproductive land. A protracted war for liberation ensued in which land redistribution was one of the central issues. In 1980 the British helped broker a resolution to the war for liberation from white rule, and when elections were held,

⁸ Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (London: Verso, 1983), p. 15.

⁹ Martin Meredith, *Robert Mugabe: Power, Plunder and Tyranny in Zimbabwe* (Johannesburg: Jonathan Ball, 2002), p. 129.

¹⁰ Andrew Parker, Mary Russo, Doris Sommer and Patricia Yaeger eds., *Nationalisms & Sexualities*, p. 5, quoting Perry Anderson, "Nation-States and National Identity," *London Review of Books*, May 9, 1991, p. 3 and John Breuilly, *Nationalism and the State* (Chicago: University of Chicago Press, 1982), p. 380.

Robert Mugabe, leader of the Zimbabwe African National Union-Patriotic Front (Zanu-PF), the dominant liberation movement, won a resounding victory.¹¹

For a short while Mugabe's government held out hope of offering the Zimbabwean people a peaceful and relatively prosperous transition away from British rule to independence. Promising reconciliation with the white Rhodesians who remained in the country after the elections, Mugabe initially reached out to the former white leadership in a manner that caught most white elites by surprise. Yet, after 18 months, Mugabe declared that "the honeymoon is over" and he unleashed vicious attacks against whites as well as his political competition.¹² Ongoing attacks against Mugabe from South Africa on account of his Marxist politics, and the adoption of an Economic Structural Adjustment Program (ESAP) in 1991 led to increases in interest rates and inflation, which problems were compounded by drought in 1992 and 1995. Land reform was not integrated into the ESAP, while large scale commercial farmers were the principal beneficiaries of reforms promoting agricultural exports. The stock market fell and manufacturing contracted by 40 percent between 1992 and 1996. By 1997, the Mugabe government was faced with a serious economic and political crisis, with attendant public strikes, increased violence and increasing demands to wrest control of the most productive land from white former Rhodesians who had been grandfathered out of land reform in the 1980 settlement brokered by the British.¹³

While Mugabe had always used racial and political differences to establish the

¹¹ Meredith, Robert Mugabe: Power, Plunder and Tyranny in Zimbabwe, p. 39.

¹² Ibid., pp.52-57.

¹³ See Human Rights Watch (October 2001), Egypt: Human Rights Background, <http://www.hrw.org/backgrounder/mena/egypt-bck-1001.htm>

authenticity and authority of his government, in 1995 he nominated a new threat to the identity of integrity of Zimbabwean society: homosexuality. Against a backdrop of escalating political, social and economic chaos, in 1995 Mugabe began a public campaign against lesbians and gay men, actively encouraging the national press to report negatively on issues relating to homosexuality, and speaking out himself in ways that invited violence against gay men and lesbians.¹⁴ That year he ordered the Zimbabwe International Book Fair to ban an exhibit by the civil rights group, Gays & Lesbians of Zimbabwe. Lesbians and gay men were "sexual perverts" who are "lower than dogs and pigs", claimed Mugabe. He warned homosexuals to leave the country "voluntarily" or face "dire consequences." Soon afterwards, Mugabe urged the public to track down and arrest lesbians and gay men. Since these incitements, men and women perceived to be gay or lesbian have been beaten up, fire-bombed, arrested, interrogated and threatened with death.¹⁵ Mugabe justified these remarks on the ground that homosexuality is "un-African", describing it as "coming from so-called developed nations," labelling homosexuality "a white problem." Surely, none of his domestic or international troubles could be traced back to same-sex sexual practices, yet Mugabe devoted considerable time and vitriol to the "problem" of gay people in Zimbabwe, and many observers, both domestically and internationally, held the view that Mugabe unleashed such homophobic vitriol as a way to

¹⁴ Bornwell Chakaodza, the editor of the state owned newspaper The Herald said the media should attack homosexuality in order to help protect Zimbabwean culture and family values. The Herald has also run advertisements placed by Dr. Michael Mawema, a prominent churchman, calling for a "crusade" against homosexuals, as "God commands the death of sexual perverts." BBC News, August 12, 1998, http://news.bbc.co.uk/hi/english/audiovideo/programmes/crossing_continents/newsid_143000/143169.stm.

¹⁵ Widney Brown, Introduction to South African Report, Human Rights Watch and the International Gay and Lesbian Human Rights Commission, (2002) (on file with author).

distract attention away from the government's growing economic and political problems. Of course, the growth in visibility of lesbians and gays in Zimbabwe in the mid-1990s provides some explanation for why Mugabe chose this group at this time to vilify in such a public way.

What is more, the aggressive imposition, if not, invention of traditional and authentic Zimbabwean culture through the assertion of heterosexuality arose at a time in which Zimbabwe had lost a normative antipodal anchor against which it had asserted its own superior identity: Apartheid South Africa. Prior to 1991, "not only did the apartheid government provide Zimbabwe with an external military, economic and political threat on which to focus, but it presented the Zimbabwean government with a moral high ground easily occupied. Both of these factors provided a moral-political impetus and a certain cohesion to government and society in a newly liberated Zimbabwe, as well as sometimes excusing or distracting from internal problems."¹⁶ The dissolution of apartheid in Zimbabwe's neighbor to the south withdrew the specter of an evil empire with which to contrast Mugabe's civic, African and political virtue.

By the mid 1990's, members of the ruling ZANU PF party in parliament spoke out against "the evil and iniquitous practice of homosexuality and lesbianism." One party member declared, "I would like to call for all traditional forces in this country to rally behind the State President in the eradication of homosexuality. I feel that all those who know homos in this country should make them be brought before the courts of law and be tried for their evil activity." Border Gezi, the governor of Mashonaland Central Province, declared that gays and lesbians have "something wrong in their heads" and that homosexuality is completely alien to Zimbabwean culture. "They have no right to practice homosexuality in our country," he says. "If

¹⁶ Phillips, "Zimbabwean Law and the Production of a White Man's Disease," p. 481.

they don't like it, they can leave."¹⁷ To cap it all off, in 1998, the Mugabe government successfully prosecuted the former President Canaan Banana for sodomy.

Of course, Mugabe's assertion of authentic African heterosexuality dissolves under the slightest pressure. Not only was there a broad array of same sex sexual practices between men in the pre-colonial period,¹⁸ but the notion that human beings possessed a sexuality, such that it could be organized into homo and hetero sexualities, was itself an artifact of British colonial rule.¹⁹ Prior to the civilizing missions of the colonial occupation in Rhodesia, human sexuality was understood in reproductive terms that were constitutive of kinship networks and familial wealth. The reproduction of patrilineal order was the organizing force behind human sexuality, not sexual identity of object choice framed in terms of desire. "What was important was consequential physical activity rather than projected cognitive desire."²⁰ Thus, the Mugabe government's assertion of an authentic, pre-colonial African sexuality presupposes an approach to sexuality that has no African roots, and the campaign against gay people in Zimbabwe was undertaken, in significant part, through the enforcement of, if not merely reference to, laws criminalizing homosexuality that had been enacted by the British during colonial rule.²¹

¹⁷ BBC News, August 12, 1998, http://news.bbc.co.uk/hi/english/audiovideo/programmes/crossing_continents/newsid_143000/143169.stm.

¹⁸ Phillips summarizes these traditions in "Zimbabwean Law and the Production of a White Man's Disease," p. 474.

¹⁹ Phillips, "Constituting the Global Gay," p. 24.

²⁰ Phillips, "Zimbabwean Law and the Production of a White Man's Disease," p. 475.

²¹ Phillips, "Zimbabwean Law and the Production of a White Man's Disease," pp. 476-77; International Gay and Lesbian Human Rights Commission, "Action Alert, Anti-Gay Rhetoric Escalates in Zimbabwe," (January 1996) available at: http://www.iglhrc.org/world/africa/Zimbabwe1996Jan_2.html.

While homo sex existed in Zimbabwe prior to Mugabe’s strategic interpellation of a gay threat, “he has introduced the word and concept of a ‘sexuality’ into a previously virginal public discourse; he has been a virulent propagandist for the whole concept of a binary division, where those boundaries were previously blurred. This is not to suggest that Zimbabwe is now flooded with self-identified same-sex lovers – it is simply to suggest that he has participated in the constitution of a new identity – one that is individualised, sexualised, and in this form, historically marginalised. Further, by publicising his homophobia President Mugabe has given an identity to many who were previously ignorant of or uncaring about it.”²² Most significant, for present purposes, Mugabe has creating a constituency of marginalized dissenters who have looked to international human rights as a source of protection from government policies. GALZ’s claims that its members should enjoy a right to protection against sexual orientation-based discrimination has been put to good use by Mugabe, who has used nationalism to frame the interests of Zimbabwean people, in contrast to the “individual freedom” of perverts and sodomists.²³ The rights of the singular must yield to the interests of the collectivity.

Human rights activists have critiqued the Mugabe government’s attacks on homosexuality as a means to distract attention away from the nation’s political and economic problems. So too, this campaign has been interpreted through a post colonial lens, playing to black Zimbabweans’ notions of authentic African sexuality and identifying gayness with other imperialist threats in the form of the World Bank, white landowners and other Rhodesian

²² Phillips, “Constituting the Global Gay: Issues of Individual Subjectivity and Sexuality in Southern Africa,” p. 31.

²³ Meredith, Robert Mugabe: Power, Plunder and Tyranny in Zimbabwe, p. 130.

residue. The perversity of the way in which homosexuality has been used by Mugabe in connection with his larger political projects is no better exemplified than his accusation that the British Government had set "gay gangsters" on him over his land reforms.²⁴ Mugabe thus sets himself up as a besieged African leader being undermined by the (gay) hand of a prior colonial power, while he tries to restore land to his black (male) constituents. Mugabe has effectively turned to sexuality to produce a normal heterosexual citizen set off against a gay threat to Zimbabwean society in such a way that "‘relations of subjugation can produce subjects,’ defined by their varied transgressions as ‘internal enemies’ of society and state."²⁵ These internal enemies have served as the antipodal point against which Mugabe’s Zimbabwe can define itself by reference to what it is not.

In some ways, what concerns human rights workers the most is the dexterity with which Mugabe has used the attacks on gay people as a stepping stone for broader attacks on his rivals and for consolidating his dwindling power. Mugabe correctly anticipated that the human rights community in Zimbabwe would not respond to the attacks on gay men and lesbians, indeed, many did not regard this as a human rights issue at all. Having met scant opposition to his policies attacking lesbians and gays, Mugabe moved on to gain further political advantage by undermining women’s rights. Given how fundamental land distribution and redistribution is to Zimbabwean politics, particularly to supporters of the ruling ZANU PF party, Mugabe undertook several of land reform policies that explicitly disempowered women. In 1998 the minister in

²⁴ "Mugabe: UK set 'gay gangsters' on me," BBC News, November 8, 1999, http://news.bbc.co.uk/1/hi/english/world/africa/newsid_508000/508712.stm.

²⁵ Stoler, *Race and the Education of Desire*, p. 35-36, quoting Michel Foucault, *Resumé des cours: 1970-1982* (Paris: Julliard, 1984), p. 85.

charge of resettlement, Joseph Msika, rejected women's demands for land permits to be automatically registered in the name of both spouses, and for the five million hectares earmarked for redistribution to be given to single, unmarried women or women heads of households. He justified these policies on the ground that granting women land rights would create domestic (household) unrest.²⁶

The government's policies on women and land ownership operationalized what had been long standing informal policy with respect to women's rights claims in Zimbabwe. Shortly after the Supreme Court held in the 1984 Katekwe case²⁷ that seduction damages (or loss of *lobola* or bride price) was a legal asset owned by the seduced female, not her male guardian, Mugabe joked in Parliament "that if his sister were to get married, he would demand *lobola* and if the intended husband pointed to the Katekwe judgement, he would say to him, 'O.K. That is the judgement. Do you want to marry my sister or not?'"²⁸

The government's official use of women as a wedge issue in land policy gained juridical power after Mugabe packed the Supreme Court with his supporters in 1999.²⁹ Immediately thereafter, the Supreme Court ruled on a woman's claim to a right to inherit her father's property

²⁶ *Zimbabwe Women Fight to Put Gender on the Land Agenda*, The Guardian, January 6, 1999.

²⁷ *Katekwe v. Muchabaiwa* 1984 (2) ZLR 112 (S).

²⁸ Welshman Ncube, "The Decision in *Katekwe v. Muchabaiwa*: A Critique," *Zimbabwe Law Review* 1&2, p. 217.

²⁹ Robert Rotberg, "In Zimbabwe a Reign of Terror," *Boston Globe*, November 21, 2001. Mugabe's support for the members of his Supreme Court, especially its white Chief Justice Anthony Gubbay, was short lived as he has sought to oust the entire judiciary since the Court ruled against Mugabe's seizures of white owned land. "Reluctant Judge Defies Mugabe," *The Guardian*, March 2, 2001. Since then, he has replaced three members of the Court, including the Chief Justice, with pro- ZANU PF judges.

after her half brother evicted her from her deceased father's house. The Court unanimously rejected her claim on the ground that the "nature of African society" dictates that women are not equal to men, especially in family relationships. Under customary law, only men can inherit and all family members are subordinate to the male head of the family. "Women should never be considered adults within the family, but only as a junior male or teenager."³⁰ The court carefully framed its ruling as necessarily driven by the customary law of the tribe in which the deceased father had been a member, and tersely dismissed domestic laws and international treaties that required sex equality as imposing colonial, not indigenous, law and norms on the Zimbabwean people.³¹ The ruling resulted in fifty-eight year old Venia Magaya being evicted from her home by her father's second wife's son, and it has had devastating implications for women in Zimbabwe given that 70 per cent of the agricultural labor force in Zimbabwe are women who work on the soil but cannot own land in their own right.

Mugabe moved on from there when he invited violence against his political opposition,³²

³⁰ Magaya v. Magaya, [1999] 3 LRC 35, (1) ZLR 100 (SC) 16 Feb. 1999.

³¹ The complexity of this issue revolves, in significant part, around Zimbabwean law that requires that disputes as to land succession or inheritance shall be governed by "the customs and usages of the tribe or people to which [the deceased] belonged." Section 68(1) of the Administration of Estates Act. Yet, this exception to the general rule of modern common or statutory law applying in legal disputes in Zimbabwe is an artifact of colonial rule. The British South African Company settled Rhodesia under a charter granted by Queen Victoria which held that in cases concerning 'natives', customary law would apply so long as the particular custom was not deemed to be "repugnant to natural justice or morality." 1889 Charter of the British South Africa Company. Mahmood Mamdani has noted this reservation of family and property law to the domain of customary law as characteristic of colonial approaches to governing the native. Mahmood Mamdani, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda*. (Princeton: Princeton University Press, 2001).

³² "'How to Rig an Election': Evidence of a Systematic Campaign to Rig a Free and Fair Poll," a report by the Zimbabwe Human Rights NGO Forum, November 2001. President Mugabe was named in a civil lawsuit in the U.S. seeking damages for orchestrating "murder, torture,

supported extrajudicial seizure of lands owned by white farmers³³ and defended the violence perpetrated against both the white farm owners and their black farm employees. In the wake of these escalating tactics, the Zimbabwean human rights community has become severely weakened and fractured.

Mugabe has demonstrated how effective it can be for a government under enormous pressure to create a climate of intolerance and lawlessness *by starting with sexual minorities* and working out from there to the rest of civil society. As Scott Long has observed about various Southern African leaders, “the government used the spectre of sexual perversion to discredit the whole of civil society.”³⁴ Just as “nationalist rhetoric makes ‘women’ the pure and ahistorical signifier of ‘interiority’”³⁵ it strategically renders sexual pervert as the ur subject of exteriority. While “‘woman’ becomes the mute but necessary allegorical ground for the transactions of nationalist history,”³⁶ gayness comes into focus not as ground but as figure - as other - whose assimilation into the whole is regard as a threat to the nation.

In Zimbabwe, the state has gained an official sexuality free from colonial contamination, threats to the ruling regime have become sexualized, and sexual discipline is revealed to be a

terrorism, rape, beatings, and destruction of property" against his political opposition in advance of the June 2000 parliamentary elections. *Tachiona v. Mugabe*, 169 F.Supp.2d 259 (S.D.N.Y. 2001).

³³ "We are going to take the land and we are not going to pay a cent for the soil." "Zimbabwe Women Fight to Put Gender on the Land Agenda," *The Guardian*, January 6, 1999.

³⁴ Scott Long, "Fundamentalist Sex: Sexuality, Privacy, and the State in a Global Economy," (2002)(draft on file with author).

³⁵ R. Radhakrishnan "Nationalism, Gender and Narrative," in *Nationalisms and Sexualities*, p. 84.

³⁶ *Ibid.*

very effective tool of governance for a state in dangerous times. All of this has produced a precinct of dissenting sexual outlaws, congealed into the constituency-based GALZ, whose job it is to give voice to that dissent.

II. The Moral Enclosure of Sexual Threats in Egypt

In May 2001, 52 men in Cairo, Egypt were arrested for suspected consensual same sex sexual acts. They were tried before an Egyptian Emergency State Security Court on charges of obscene behavior and contempt for religion, as Egyptian law does not explicitly criminalize homosexual conduct. The Emergency State Security Courts were created in 1981 after the assassination of President Anwar Sadat, and since then his successor Hosni Mubarak has ruled under a state of emergency authorizing suspension of a range of civil and political rights.³⁷

An unprecedented state-sponsored media campaign publicized the arrests and trials of the accused - their names, places of work and, in some cases, pictures were published in the state owned media.³⁸ The accused were arrested in the early hours of May 11, 2001, following a raid by police and State Security Intelligence personnel on a party held aboard the Queen Boat, moored on the Nile in Cairo's Zamalek district. Initial reports in the Egyptian media suggested that those arrested were part of a "Satanic cult" and that they were being held under charges of "exploiting religion to promote extreme ideas to create strife and belittle the revealed religions."

³⁷ Human Rights Watch (October 2001), Egypt: Human Rights Background, available at: <http://www.hrw.org/backgrounder/mena/egypt-bck-1001.htm> Human Rights Watch (October 2001).

³⁸ Hossam Bahgat, "Explaining Egypt's Targeting of Gays," Middle East Research and Information Project, Press Information Note 64. (2001), p. 2.

It subsequently became clear that the arrests were carried out because the men were suspected of engaging in consensual sexual activity with other men. The detainees were subjected to forensic examinations, apparently in order to determine whether they had engaged in anal intercourse.³⁹ In November, 2001, the defendants were brought into court and were promptly placed in a cage in the courtroom where they stood wearing masks and hoods they had constructed out of their shirts and underwear in order to disguise their identities from the media present in the court. Indeed, only the media was allowed in the courtroom when the judge read out the verdicts and sentences, families and friends of the accused were not permitted to be present, and their cries from the hall and banging on the courtroom doors rumbled in the courtroom as the judge began the proceedings. The judge read the court's verdict in a whisper that no one in the room could hear, indeed many defendants did not know whether they had been found guilty or what sentence they had been given for some days.

In the end, twenty three of the fifty two defendants were sentenced to between one and five years of hard labor.⁴⁰ However, in May, 2002 the State Security Office for the Ratification of Verdicts overturned most of the Cairo 52 convictions and released 21 of the men who had been found guilty of the "habitual practice of debauchery." The court took this action on the ground that this crime did not merit trial before the special emergency court, and ordered that these men, as well as those who had been acquitted in the Cairo 52 trial, be retried in a civilian

³⁹ International Gay and Lesbian Human Rights Commission, "Action Alert, Egypt: Emergency Court Trials for Homosexual Suspects," available at: http://www.iglhrc.org/news/press/pr_010703.html (2001).

⁴⁰ International Gay and Lesbian Human Rights Commission, "Action Alert, 23 Presumed Homosexuals Sentenced to Hard Labor," available at: http://www.iglhrc.org/world/africa/Egypt2001Nov_2.html (2001).

court.⁴¹

How to understand these very public scandalous show trials undertaken by the Egyptian government in the press, the Emergency Security Court, and now Egyptian civil courts? As in Zimbabwe, some have observed that the Mubarak government desired to divert public attention away from economic problems and a growing liquidity crisis while the government attempted to impose new sales taxes.⁴² One could also imagine that the government had ample reason to shore up its Islamic credentials domestically as it found itself increasingly allied with the U.S. government in its campaign against terrorism. Scandalous sex trials might do the trick. Some human rights groups have interpreted the prosecution of the Cairo 52 as an indicator of how Islamic societies treat sexuality.

Yet it may be that the Cairo 52 case represents something much more complicated than Mubarak's attempt to distract his people from domestic economic problems, or an instance of Islamic sexual repression. Situating this case in the history of both Islam and the legal regulation of sex in Egypt reveals how the public prosecution, *at this moment*, of men suspected of homosexual acts serves the interests of the Egyptian secular government's post-colonial struggle for independence - in the face of both domestic and international threats of instability. Indeed, these prosecutions may advance the Mubarak government's pattern of repressing Islamic activism on the one hand, and securing the symbolic purity of Egyptian culture on the other.

The laws under which the Cairo 52 were prosecuted find their roots in post-colonial

⁴¹International Gay and Lesbian Human Rights Commission, "Action Alert: Cairo 52 Acquitted Men Back In Court," available at: http://www.iglhrc.org/world/africa/Egypt2002Jun_2.html, (2002).

⁴² Bahgat, "Explaining Egypt's Targeting of Gays," p. 2.

campaigns against prostitution. Egyptian law does not expressly criminalize homosexual acts. However, the obscenity charges that were brought against these men came under Article 9(c) of Law No. 10 of 1961 on the Combat of Prostitution. When the British occupied Egypt in 1882, they imposed a form of “regulationism” of prostitution.⁴³ Rather than outlawing it, which would have comported with Christian colonial moralizing in evidence elsewhere, the British set out to regulate legalized prostitution - requiring the registration of prostitutes, weekly medical inspections of sex workers, and restricting the sex trade to certain licensed establishments.⁴⁴ In Egypt, as in many other areas colonized during this period, prostitution was legalized, in significant part, for the benefit of European settlers and soldiers.⁴⁵ Dunne’s research shows that the number of registered prostitutes in Cairo jumped from 921 in 1914 to 2,540 in 1915, and then fell off as the war wound down.⁴⁶ Legalized and regulated prostitution remained a vital part of Egyptian urban life through the remainder of British rule, notwithstanding reform and abolition campaigns undertaken during that same period in Britain and in many of its other colonies.

⁴³ Bruce Dunne, *Sexuality and the “Civilizing Process” in Modern Egypt*, unpublished dissertation, (Georgetown University, 1996), pp. 195-252.

⁴⁴ Karin van Nieuwkerk, “A Trade Like Any Other,” *Female Singers and Dancers in Egypt* (Austin: University of Texas Press, 1995), 45; Dunne, *Sexuality and the “Civilizing Process” in Modern Egypt*, p. 139.

⁴⁵ van Nieuwkerk, “A Trade Like Any Other,” p. 46-7 notes how laws regulating prostitution were grossly underenforced by British legal actors during World War I when Cairo became a significant site where British, Australian and other troops were stationed. See also Mario M. Ruiz, “The Pasha’s Prostitutes: Rethinking Women, the State, and Female Prostitution in Nineteenth Century Egypt,” Working Paper, (Institute for Research on Women and Gender, University of Michigan, 1997).

⁴⁶ Dunne, *Sexuality and the “Civilizing Process” in Modern Egypt*, p. 206. Eighty-four thousand British, Australian and New Zealand troops were deployed to Egypt in January 1915. *Ibid.*, p. 209.

Egyptian nationalists, however, seized on prostitution immediately after national independence as an example of the social ills that befell Egypt under British occupation.⁴⁷

Egyptian Feminist Huda Sha'rawi declared in the national newspaper *L'Egyptienne* in February of 1925 that the struggle against licensed brothels was a matter of national honor, and that the abolitionist cause was “patriotic and humanitarian.”⁴⁸

Shortly thereafter, Islamic nationalists began a campaign to link the abolition of prostitution to Egyptian nationalism and Islam.⁴⁹ The abolition of prostitution became a principle goal of de-colonization, and the ultimate repeal of laws legalizing prostitution after British occupation was explicitly understood to represent a rejection of the promiscuity of alien sexual culture, and the purging of alien sex workers from Egypt's urban spaces.⁵⁰

Yet the independent Egyptian government did not repeal the British laws licensing prostitution and regulating brothels until 1949, fully twenty seven years after independence.

⁴⁷ Yunan Labib Rizk, “A Diwan of Contemporary Life,” *Al Ahram Weekly On-Line* Issue No. 537 (2001).

⁴⁸ *L'Egyptienne* (February 1925), pp. 38-39; Dunne, “Sexuality and the “Civilizing Process” in Modern Egypt, p. 300. Omina Shakry has observed that turn of the century Egyptian feminists, like Sha'rawi, “situated their own projects as a defense of Islam and a critique of *taqlid*. Their projects were often conceptualized as an illustration that ‘true Islam’ –that is, Islam unadulterated by ‘traditional’ accretions, such as superstitious practices–was entirely compatible with modernity.” Omina Shakry, “Schooled Mothers and Structured Play: Child Rearing in Turn-of-the-Century Egypt,” in *Remaking Women: Feminism and Modernity in the Middle East*, ed. Lila Abu-Lughod, p. 148.

⁴⁹ Dunne, *Sexuality and the “Civilizing Process” in Modern Egypt*, p. 302.

⁵⁰ Those sex workers in Cairo who were foreign nationals, not a small number, could not be regulated by Egyptian law as Capitulations, bilateral treaties between Egypt and various European nations, contained provisions that immunized Europeans from Egyptian law and gave foreigners the right to be tried only in their own consular courts. van Nieuwkerk, “A Trade Like Any Other,” p. 45; Dunne, *Sexuality and the “Civilizing Process” in Modern Egypt*, pp. 143, 197-99; Ruiz, “The Pasha's Prostitutes,” p. 16.

Some of the delay can be attributed to the presence of allied troops in Egypt during the Second World War.⁵¹ And much time was devoted to the work of the Commission of Enquiry, charged in 1932 with the task of considering alternatives to regulated prostitution.⁵² The Muslim Brotherhood began to play a role in Egyptian politics in the 1930s, urging a reorientation of the culture in keeping with Islamic principles. Their influence took hold in the late 1940s and early 1950s. Prime Minister Ibrahim Abdel Hadi Pasha issued a military decree closing the brothels in 1949, in part in response to criticism the government had received from the Muslim Brotherhood regarding the government's policy permitting prostitution, gambling and drinking of alcohol.⁵³ Without question, legal reforms during this period were undertaken for complex sets of reasons, however two important concerns had a significant effect upon the government's approach to prostitution after independence: anti-imperialist Egyptian nationalism articulated as sexual purity, and the secular state defending itself against the growing power of the Muslim Brotherhood.

These two concerns figure prominently in the prosecution of the Cairo 52 under modern Egyptian criminal law targeting prostitution. First, the Emergency Security Courts in which these men were tried were originally set up to try Islamic fundamentalists. Since 1992 hundreds of civilians, mostly alleged members or supporters of *al-Gihad* (Holy Struggle, known abroad as Egyptian Islamic Jihad), *al-Gama'a al-Islamiyya* (Islamic Group), or the Muslim Brotherhood, have been referred to military courts. These trials, sometimes held en masse, have been criticized

⁵¹ van Nieuwkerk, "A Trade Like Any Other," p. 47.

⁵² Dunne, Sexuality and the "Civilizing Process" in Modern Egypt, pp. 306-311.

⁵³ Scott Long & Hossam Bahgat, Notes on the Regulation of Illicit Sexuality in Egypt, (draft, 2002, on file with author).

by Human Rights Watch and other human rights organizations for failing to meet international fair trial standards: basic rights, such as the right to appeal, have been routinely violated, even in cases where the defendants faced and were punished with the death penalty.⁵⁴ The well publicized prosecution of the Cairo 52 in these same courts sends a message to an international audience that the courts do not exist exclusively to harass and persecute the religious opposition. Indeed, these courts can be used to prosecute the very groups that the Islamists hate the most.

What is more, in recent years of national economic contraction, Islamic groups have stepped in to provide social services previously provided by the Egyptian state. As a result, the Muslim Brotherhood and similar organizations have gained popularity among the Egyptian people. Although officially banned by the Egyptian government since 1954, the Muslim Brotherhood has 17 seats in the Egyptian Parliament, making it the second largest party in the parliament after the ruling National Democratic Party.⁵⁵ Thus, the Mubarak government has ample incentive to undertake a public campaign to appease the supporters of the Brotherhood, and men accused of homosexuality would serve well. The government guessed correctly that the Egyptian human rights community would be reluctant to come to their aid.

What is more, anti-imperialist rhetoric has figured in the Cairo 52 prosecutions just as it did in the efforts to reform the colonial prostitution laws after independence. This time, the alien sexual culture to be kept at bay is the “west,” not merely the British. Then as now, “both nationalist and Islamist discourses have invoked ideals of Islamic morality and cultural

⁵⁴ Human Rights Watch, “Egypt: Human Rights Background,” available at: <http://www.hrw.org/backgrounder/mena/egypt-bck-1001.htm>, (October 2001).

⁵⁵ Amira Howeidy, “Watch This Space,” Al Ahram Weekly On-Line Issue No. 509, available at: <http://www.ahram.org.eg/weekly/2000/509/eg3.htm>.

authenticity to control and channel change.”⁵⁶ As Neville Hoad has pointed out, “Claims of authenticity and/or foreignness take place in an extremely vexed representational field.”⁵⁷

Thus, these prosecutions have been useful on a number of grounds: it appears “to be a calculated gamble by an insecure regime. The crackdown on gays, as diplomats and political analysts see it, reflects government concern about growing freedom of expression in Egypt - fueled by the proliferation of Internet chat rooms and Web sites beyond the regime’s control. The government may also have contrived the prosecutions to bolster its Islamic credentials at a time when Egyptians are angered by an imploding economy and the arrests of fundamentalists. The strategy may be working. Although condemned abroad, the trial of the ‘Cairo 52’ has met with nearly universal approval at home.”⁵⁸

In Egypt, as in Zimbabwe, the moral enclosure of sex - be it heterosexuality within monogamous marriage, prostitution or homosex - has proven to be an effective tool of governance by a state under stress. Prior to the mid-twentieth century, same sex sex between males was well know and wide spread in Egypt. But only the passive partner (constructed within the context of anal sex) was considered to be homosexual and was subject to criminal laws prohibiting homosexual acts.⁵⁹ Curiously, this definition of homosexuality has changed in

⁵⁶ Bruce Dunne, “Power and Sexuality in the Middle East,” *Middle East Report*, (1998), p. 10; Judith Tucker, “Gender and Islamic History,” (Washington D.C.; American Historical Association, 1993), pp.19-33.

⁵⁷ Neville Hoad, *Wild(e) Men and Savages: The Homosexual and the Primitive in Darwin, Wilde and Freud*, (Columbia University, unpublished dissertation, 1998) p. 36.

⁵⁸ Joshua Hammer, “Gay Egypt in the Dock: The Big Crackdown May Reflect Cairo’s Own Insecurities,” *Newsweek*, <http://stacks.msnbc.com/news/698817.asp#BODY>, (2002).

⁵⁹ Dunne, “Power and Sexuality in the Middle East,” pp. 9-10.

recent years. Through the Cairo 52 prosecutions, the government has demonstrated the adoption of a more “western” identity-based definition of gayness. Role no longer defines the crime, sex of object choice does - and this is new in Muslim society. Thus, at the moment that the Egyptian government has chosen to use (homo)sex to consolidate and rehabilitate its power, it has done so by first interpellating a western homosexual subject, and then caging him, parading him before the public, and excising him from Egyptian culture. The moral enclosure in which these gay outlaws in Egypt have been caged reflects a kind of territorialization, or social mapping by a governmental power on the sexualized body.

Here, as in Zimbabwe, “internal enemies” have been located within the political horizon of the state - not from without as would have been the case with foreign prostitutes or residual colonialists. So too, sexual accusation has supplied the mechanism of justification by which qualities deemed undesirable may be contained or excised. These domestic enemies emerge first as an abstract legal category “the sodomite” or “the pervert habituated to debauchery,” that is to be filled up with bodies - really, any bodies - through an act of nominal violence with profound epistemic effects. “You, and you and you,” commands the state as it arrests Egyptian men⁶⁰ off the street, often randomly. Through these public acts of law enforcement, sex is stamped on male bodies in an act whereby qualities deemed undesirable may be contained or excised through sexual accusation by the post colonial state in its attempts to define an idealized nation.⁶¹

⁶⁰ Foreign nationals who were picked up were released and not charged.

⁶¹ Geraldine Heng & Janadas Devan, “State Fatherhood,” in Andrew Parker, Mary Russo, Doris Sommer and Patricia Yaeger eds., *Nationalisms & Sexualities*, p. 355

III. Disciplinary Administration of African American Sexual Citizenship in the post Civil War South

The period in which African Americans entered the U.S. civil polity as citizens was, most assuredly, among the most complex periods of state (re)formation in the nation's history. The enumeration and enforcement of civil rights for freed men and women, beginning with the Civil Rights Act of 1866,⁶² played a central role in the creation of legal and political identities for African American people. But these political identities—as freedpeople—were not self-executing upon the ratification of the Thirteenth or Fourteenth Amendments. Rather, African Americans' status as citizens was an identity to be managed by various public and private actors in the immediate postbellum period. “Being a free citizen, he must act as one, carrying the burdens, if he so considers them, as well as enjoying the privileges of his new condition,”⁶³ cautioned the chief judge of the Georgia Supreme Court in 1881. Similarly, Freedmen's Bureau agents were “instructed to act as General Counsellors for the Freed-people within their respective districts, and to give them such advice as will tend most to their ultimate good, and make them honest and upright citizens.”⁶⁴ As I have discussed elsewhere, conformance with late-nineteenth-century marital norms was regarded by both Freedmen's Bureau agents and local Southern officials as one of the principal ways in which the freed men and women could be

⁶² Civil Rights Act of 1866, ch. 31, 14 Stat. 27.

⁶³ *Williams v. Georgia*, 67 Ga. 260, 263 (1881).

⁶⁴ Office of Assistant Commissioner, Bureau of Refugees, Freedmen and Abandoned Lands, Circular No. 6, Tallahassee, Fla. (Apr. 3, 1866), Record Group 105, M 826, Roll 28, National Archives, Washington, D.C.

civilized and prepared for the demands of citizenship.⁶⁵

Thus, for African Americans in this era, the transition from enslavement to freedom and citizenship meant a shift in the domain of personal governance, from that of an owner to that of state-monitored self governance. Indeed, rather than securing a domain of autonomy and freedom from government regulation, inclusion into the domain of rights as citizens signified a “politico-ethical project of producing subjects and governing their conduct.”⁶⁶ What form did this take for African Americans in the postbellum era? How was sexuality part of this politico-ethical project?

As Union troops moved through the South, enslaved people fled their owners for the safety of the Northern army’s encampments, seeking safety, food and shelter. Quickly overwhelmed by the numbers and needs of the black people seeking aid, the U.S. government quickly set up refugee camps, or “contraband camps” as they were called at the time,⁶⁷ in order

⁶⁵ See Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, *Yale Journal of Law & Humanities* 11 (1999): 251.

⁶⁶ David Scott, *Refashioning Futures: Criticism After Postcoloniality*, (Princeton: Princeton University Press:1999), p. 52.

⁶⁷ Notwithstanding the fact that the Fugitive Slave Act remained good law until mid-1864, Act of June 28, 1864, ch. 166, 13 Stat. 200 (repealing “the Fugitive Slave Act of eighteen hundred and fifty, and all Acts and Parts of Acts for the Rendition of Fugitive Slaves”), it was federal policy well before that time to treat escaped slaves as “contrabands” recognizing their status in-between confiscated property and human refugees. In May 1861, General Benjamin Butler declared fugitive slaves “contrabands,” on the ground that the Fugitive Slave Act did not apply in a foreign country—Virginia. See *The Contrabands at Fortress Monroe*, *Atlantic Monthly* 8 (1861): 626, 627; see also Leon F. Litwack, *Been in the Storm So Long* (New York: Vintage Books, 1979), pp. 52-53; Vernon Lane Wharton, *The Negro in Mississippi, 1865–1890*, (New York: Harper and Row, 1947), pp. 23-25.

to gain their liberty and the protection of Northern troops.⁶⁸ The destitution, disease, and need of these people, freed by circumstance, was overwhelming. Henry Rowntree, a representative of the federal agency hastily formed to address the needs of indigent black people, described the living conditions of various freedpeople at Vicksburg, Mississippi, in the spring of 1864 as follows:

I called at a cattle shed without any siding, there huddled together were 35 poor wretchedly helpless negros, one man who had lost one eye entirely, and the sight of the other fast going, he could do nothing.

Five women all Mothers, and the residue of 29 children, all small and under 12 years of age. One of the Women had the small pox, her face a perfect mass of Scabs, her children were left uncared for except for what they incidentally [received]. Another woman was nursing a little boy about 7 whose earthly life was fast ebbing away, she could pay but little attention to the rest of her family. Another was scarcely able to crawl about.

They had no bedding. Two old quilts and a soldiers old worn out blanket comprised the whole for 35 human beings. I enquired how they slept, they collect together to keep one another warm and then throw the quilts over them. There is no wood for them nearer than half a mile which these poor children have to toat as they could carry, hence they have a poor supply and the same with water, this has be carried the same distance and the only vessel they had to carry it in was a heavy 2 gallon stone jug, a load for a child when

⁶⁸ In 1862, John Eaton was appointed by General Grant to set up "contraband camps," settlements that housed Black fugitives in Tennessee and northern Mississippi. Herbert G. Gutman, *The Black Family in Slavery and Freedom, 1750- 1925*, (New York: Vintage Books, 1979), p. 57; see also W.E. Burghardt Du Bois, "The Freedmen's Bureau," *Atlantic Monthly* 87 (1901), p. 354-55.

empty.

They owned One Pan, and one Iron kettle amongst them, they had no tin cup, no crockery of any kind, no knives or forks, and certainly were the poorest off, of any I have met with being literally and truthfully destitute in every sense of the word.⁶⁹

This description was not atypical of the living conditions of the formally enslaved people who had escaped behind Union lines.

As the federal government deliberated over how to handle the sizable population of freed men and women, virtually all of whom were in desperate need of material aid, a key decision was made with respect to meeting that need. The needs of freed men and women, as well as the structure for their transition from enslavement to citizen, would be met not by providing them with material resources (such as land, food, or reparations), but by providing them with rights. In the end, law not land is what U.S. government felt the freedmen needed most. And that's what they got - lots of it. "Freedom" delivered cold comfort to those formerly enslaved people who sought the aid of federal officers at the end of the war.

Thus legal status, not material resources, was used to address the transition from enslavement to freedom for African American people. In this case, rights operated not only as the frame within which freed men and women were to exercise their new-found freedom, but

⁶⁹ Letter from Henry Rowntree to Contraband Relief Commission, Jefferson Davis Mansion (Apr. 13, 1864), RG 105, Entry 2150, at 10-11, National Archives. Rowntree's work documenting the state of the freed men and women is notable as he was employed both by the Contraband Relief Society of Cincinnati and the Society of Friends—private relief and missionary organizations that worked hand in hand with the nascent public relief agencies to rebuild the South after the war. See also James E. Yeatman, Western Sanitary Comm'n, A Report on the Condition of the Freedmen of the Mississippi (1864) (containing a report dated Dec. 17, 1863, describing the destitute conditions of freedmen throughout Mississippi).

also as a political horizon: "the just society." The Bureau Agents were there to define what these rights meant, and what obligations they imposed on freed men and women.

In the face of the overwhelming human suffering, illness and desperation that African American people presented when they sought refuge in contraband camps, Northern officials' first response was not to deliver food and shelter, but to insist that all adult couples be married, and that traditional family groupings be formed before anyone could gain entrance to the camps. In April 1863, Eaton reported that "all entering our camps who have been living or desire to live together as husband and wife are required to be married in the proper manner This regulation has done much to promote the good order of the camp."⁷⁰ In March 1864, the Secretary of War made Eaton's regulation official United States policy, and ordered Freedmen's Bureau agents to "solemnize the rite of marriage among Freedmen."⁷¹ Thereafter, superintendents of the contraband camps uniformly reported that "the introduction of the rite of christian marriage and requiring its strict observance, exerted a most wholesome influence upon the order of the camps and the conduct of the people."⁷²

Wholesomeness was not the only salutary consequence intended by the Freedmen's Bureau's marriage policy. Many Bureau officers expressed the widespread view that the transition from slave to citizen would require African Americans to internalize self discipline

⁷⁰ Report of John Eaton, General Superintendent of Freedmen, Department of Tennessee (Apr. 29, 1863), R.G. 94, M619, roll 200 (National Archives, Washington, D.C.), pp. 89-90 [hereinafter Eaton Report]. Gutman reports that "the earliest 'contraband marriage' for which a record exists occurred during the first week of September in 1861." Gutman, *The Black Family in Slavery and Freedom*, p. 412.

⁷¹ Special Orders, No. 15 (Mar. 28, 1864), in Eaton Report, pp. 89-90; see also Gutman, *The Black Family in Slavery and Freedom*, p. 18.

⁷² Report by Chaplain Warren (May 18, 1864), included in Eaton Report, p. 89-90.

and self governance for which they had never before demonstrated a capacity.⁷³ In hearings before the American Freedmen's Inquiry Commission--the federal commission created in 1863 to suggest methods for dealing with the emancipated slaves--Colonel William Pile, the administrator of the Vicksburg, Mississippi, contraband camp, testified to the Commission that

[o]ne great defect in the management of the negroes down there was, as I judged, the ignoring of the family relationship My judgement is that one of the first things to be done with these people, to qualify them for citizenship, for self-protection and self-support, is to impress upon them the family obligations.⁷⁴

Sexual discipline - communicated to Freed men and women as the celebrated right to marry - played a role in the governance of these new political subjects in ways that echo David Scott's observations about colonial governmentality in South Asia at roughly the same time. For African Americans in the U.S. the right to choose a sexual partner (only one at a time!) and the concomitant right to marry that partner, opened up "a new social and legal space for the desiring subject ... through the construction of a notion of rights, [colonial power] shift[ed] the site of agency such that it now came to be assigned to the private sphere of an individuality regulated not by the personal discretionary demands of a sovereign extracting tribute [or a slave master] but by the internal volitional agency of a rational free will." In colonial Sri Lanka, as

⁷³ Formal marriage performed the very important social function of taming wanton licentiousness and civilizing uncontrollable desire: "[T] he first object of marriage still is to regulate [sexual passion]." "Society and Marriage," *The Nation* 10 (1870): 332

⁷⁴ Statement of Col. William A. Pile, Testimony taken in Kentucky, Tennessee, and Missouri, November and December 1863, November and December 1863, the Am. Freedmen's Inquiry Comm'n, St. Louis, Mo., Record Group 94, M 619, roll 201, frame 139 (National Archives, Washington, D.C.).

well as the post bellum U.S. South, the new order “required that new habits of social discipline be acquired by the native population.”⁷⁵ Thus we witness John Eaton instructing federal officials running the contraband camps: "Among the things to be done, to fit the freed people for a life of happiness and usefulness, it was obvious that the inculcation of right principles and practices in regard to the social relations ought to find a place."⁷⁶ African American (hetero)sexuality thus became a focal point for their patrons from the North in a civilizing mission aimed at guiding them along path from slave to citizen. Rights made up one of the principle paving stones along this route,⁷⁷ although surely the freed men and women would have preferred something more sturdy, like land and a mule, beneath their feet.

Governance by the state and self governance by the individual became possible, in significant respects, by and through the institution of marriage. It created an intelligible domain within which governable subjects were called up - husbands and wives, but also adulterers, fornicators and bigamist. Husbands bore economic responsibility for their families,⁷⁸ thus

⁷⁵ Scott, *Refashioning Futures*, p. 47.

⁷⁶ Eaton Report, p. 89-90.

⁷⁷ I borrow this metaphor from Scott Long.

⁷⁸ Married African American men in South Carolina were forced by the state to support their families, and if they failed to do so, were subject to a judge forcibly binding them to work for renewable year terms--usually in the service of former slave owners. A South Carolina law provided that

[a] husband, not disabled, who has been thus convicted of having abandoned or turned away his wife, or has been shown to fail in maintaining his wife and children, may be bound to service by the district judge, from year to year, and so much of the profits of his labor as may be requisite applied to the maintenance of his wife and children.

Act of 1865, 1865 S.C. Acts 291, 292. See also Amy Dru Stanley, “Beggars Can't Be Choosers: Compulsion and Contract in Postbellum America,” *Journal of American History* 78 (1992), pp. 1283-88.

privatizing dependency and relieving the state of responsibility for the freedmen's destitution. As Nancy Cott observes of this period, "[h]aving and supporting dependents was evidence of independence."⁷⁹ So too, aggressive enforcement of bigamy, adultery and fornication laws against those who failed at this project of self-governance, filled southern state prisons with black male bodies who could be leased out to white planters at rock bottom prices in order to perform the agricultural work previously performed by slaves.⁸⁰ This is what freedom looked like for many black men in the post bellum south: performing the same work for the same white landowner as you had while enslaved, but as a fungible leased resource rather than a prized owned asset.⁸¹

Of course, it would be naive to understand state power in a context such as this as acting upon an undifferentiated mass of natives who are domesticated through a simple Althusserian form of call and response: the law beckons and you either answer the call as husband or wife, or refuse it at the price of prosecution for fornication or bigamy. Either way the law wins under this account, and the native is acted on as the object of the state's disciplinary power.

In the post bellum period, as in most other colonial encounters, the domesticating power of law renders agency and resistance a much more complicated story. Imperialist power is working at its best when the native is domesticated by internalizing, or self-inscribing imperialist

⁷⁹ Nancy Cott, "Marriage and Women's Citizenship in the United States, 1830-1934," *American Historical Review* 103 (1998), p. 1452.

⁸⁰ Franke, *Becoming A Citizen*, pp. 306-07.

⁸¹ Mississippi abandoned the convict lease system in 1890, Tennessee in 1895, Georgia in 1908, Florida in 1924, and North Carolina in 1933. F. Green, "Some Aspects of the Convict Lease System in the Southern States," in *The James Sprunt Studies in History and Political Science: Essays in Southern History* (1949), p. 121.

scripts and legal norms such that the object of imperial control becomes subject to its own self-discipline.⁸² Colonialism's power to cultivate self-governance in those to be governed takes place through a set of tactics of inscription that bring into existence the kind of social and legal subjects over which the state seeks to command control, such as husbands, wives and fornicators.⁸³

The evidence contained in the original indictments and prosecutions of African Americans in the immediate post bellum period indicate that criminal discipline imposed for violations of marriage laws, in many cases, were not initiated by white Northerners, or, for that matter, white Southerners. Rather, adultery, bigamy and fornication laws were being enforced largely from within the African American community. In Mississippi, for instance, quite often the indictment and accusatory affidavits were initiated by African American women against their husbands who had taken up with someone else. In Granville County, North Carolina, there was a spate of prosecutions against African American couples for fornication and adultery, and the principle witnesses on all the indictments were Willis and Chaney Chandler, a black couple who, census data reveals, were neighbors of the people they turned in to the authorities for living in sin. However, 9 months later, Willis and Chaney were turned over to the local prosecutor by their neighbors for fornication - it seems they too were not legally married.

The women of Granville County also made extraordinary use of a legal procedure

⁸² Gayatri Chakravorty Spivak, "Three Women's Texts and a Critique of Imperialism," *Critical Inquiry* 12 (1) (1985), p. 253.

⁸³ Nikolas Rose nicely assembles Althusserian notions of interpellation, Foucauldian concepts of discipline and various post colonial approaches to the production of native subjectivity in his concept of inscription devices. Rose, *Powers of Freedom*, p.37.

relating to bastardy. If a woman was not married to the father of her child, she could go to court and get an order naming him as the legal father, and then, ideally, obtain a court order of child support. Typically, the order of paternity would issue on the word of the woman alone. The Granville County records show such a large number of bastardy petitions filed by women, mostly black women, that at one point they opened up a special bastardy court that met on Saturdays and heard only these petitions. Curiously, however, very few of the cases resulted in an award of support – by and large the men were never served nor appeared in court as they had most likely left the county when they heard that their names appeared on a warrant. Notwithstanding the fact that these petitions resulted in very few orders of paternity or awards of child support, women continued to file them in great numbers – and the only significant legal or material consequence was that a legal document had been filed in court in which the women had admitted that their children were bastards.

How are we to understand the legal subjectivity of African American's when they go down to City Hall to register their marriages, turn to the local sheriff to prosecute their husbands for adultery, or file bastardy petitions against the fathers of their children? What sort of epistemic overhaul does this transition from enslavement to freedom signify? Are they social protagonists, or “good blacks” whose conformance to Reconstruction expectations of citizenship marks out a zone between those who are passing as citizens and those who aren't? Is there any room for agency in this account of citizenship, rights and interpellation? Can we understand African American's use of rights as a kind of mimicry or pastiche, the contains, or better yet, reveals within it a resisting subject?

There may be a plausible way to understand African American's resort to law and rights

as something other than passive interpellation. In this sense, Homi Bahbha's notion of ambivalency is helpful - for the role of law is not only the imposition of the rule of law, for surely it was resorted to strategically by freed men and women in this period. While we can't know this for sure, I have a very strong suspicion that a good number of the women in Vicksburg, Mississippi who resorted to legal authorities to get their husbands back in the house were doing so in order to avoid having their children apprenticed out to their former owners.⁸⁴ As single parents, they were more likely to be found unsuitable providers for their children's needs, and therefore sought to get their male partners back in the house so that his income could be deemed available for the children's support.

Explaining the bastardy petitions is a bit more difficult. Given that there were so many of them filed, and that so few of them resulted in actual cash payments for child support, I suspect that one of the Northern Benevolent Aid societies conditioned the award of cash grants to needy children and mothers upon the respectability of the mother. The filing of bastardy petitions might have been incentivized by this private welfare regime. That is, complying with a legal ritual, even if it were nothing more than a formality, may have been enough to demonstrate the fact that the woman and her children were deserving according to the Protestant norms at work in Boston.

⁸⁴ Parents of black children found themselves powerless to protect their children from an oppressive child apprentice system. Judges were permitted to bind to white employers those children whose parents were determined to be unable to support them. "To blacks, such apprenticeships represented nothing less than a continuation of slavery." Foner (1988): 201. The laws empowering judges to remove children from their parents, often after they had just been reunited at the end of slavery, "came close to legalized kidnaping in many instances, depriving parents of children if a white judge deemed it 'better for the habits and comfort' of a child to be bound out to a white guardian." Litwack, *Been in the Storm So Long*, p. 237.

Thus, for freed men and women, marriage was constructed by the state as a *site of freedom*, a legally defined space in which legally defined subjects could exercise rights. Thus African Americans were caught in the double bind of freedom that Saidiya Hartman has termed “burdened individuality,” whereby the granting of social and legal rights “resulted in the paradoxical construction of the freed both as self-determining and enormously burdened individuals and as members of a population whose productivity, procreation, and sexual practices were fiercely regulated and policed.”⁸⁵ Here as elsewhere, Eve Sedgwick has likely provided a productive way to think about the rule of law and the role of law in freed men and women’s lives: kinda subversive, kinda hegemonic.⁸⁶

From the state’s perspective, however, the granting of marriage rights to African Americans in this period was part of a kind of political rationality that sought to produce a set of governing-effects largely grounded in a notion of habituating the freedmen to a project of self improvement and self governance. This kind of governance emanates not from violent or coercive acts by a primitive state on a passive body to be governed, but as an activity or practice that regulates the “conduct of conduct,” that sets up a field of action for the governed.⁸⁷ The institutions of civil society, most prominently the family, should not, therefore, be understood as

⁸⁵ Hartman defines “burdened individuality” as the state of “being freed from slavery and free of resources, emancipated and subordinated, self-possessed and indebted, equal and inferior, liberated and encumbered, sovereign and dominated, citizen and subject.” Saidiya V. Hartman, *Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth-Century America*, (New York: Oxford University Press, 1997), p. 117.

⁸⁶ Eve Kosofsky Sedgwick, “Queer Performativity,” *GLQ: Journal of Lesbian & Gay Stud.* 1. (1993), p. 15.

⁸⁷ Colin Gordon, “Governmental Rationality: In Introduction,” in *The Foucault Effect: Studies in Governmentality* (Chicago: University of Chicago Press, 1991), p.3; Michel Foucault, “Governmentality,” in “The Foucault Effect.”

the binary opposite of the domain of the state, but rather are constructed as sites where social and civil subjects are called up in ways that can be organized and reorganized in ways that are useful to the state. These terrains are bounded by notions of freedom, consent and self-governance, and they oblige certain forms of conduct and forms of life to emerge. The glory of this form of governmentality is that the forms of conduct and life that are brought into being take place in “moral enclosures” that are understood to be expressions of individual freedom, consent and self-governance, not state coercion or violence.⁸⁸

Marriage and the family, thus understood, were useful terrains on which to control and manage African Americans in the post civil war era. The freedom that the right to marry operationalized required them to internalize certain forms of sexual discipline and self government. Indeed, freedom itself was made manifest in compliance with the disciplinary demands of marriage.

Thus, the *political* subject - the citizen - was the compliant freed man or woman who stood in contradistinction to the noncompliant *legal* subject - the fornicator, the adulterer, the bigamist. Here, as in the examples above, the interests of the many - the citizenry - took aim at the interests of the singular - the outlaw. Those who failed the tests that the inauguration of rights-bearing subjectivity implied found themselves on the opposite side of a fundamental political divide that had an explicit civilizing mission. Savage or citizen, the choice was the Freedmen's to make.

Those who failed the test because they clung to a different notion of what it meant to enjoy autonomy and liberty in one's intimate relations, found themselves legally caged (or

⁸⁸ Rose, Powers of Freedom, p. 25.

chained in this case) as dissenters from a norm to which they had chosen not to conform. Agency and discipline thus came packaged together in an era that made “unconventional sex a national threat and thus put a premium on managed sexuality for the health of the state.”⁸⁹

While the post-war U.S. government could have undertaken this project of freedom, submission and citizenship in a variety of ways, sexual discipline within the terrain of monogamous marriage was the first tactic they turned to. From the moment black people fled to the contraband camps, to the granting of the right to marry immediately after legal emancipation, to the prosecution of African American men for fornication and adultery, the regulation of African American sexuality and the performance of sexual discipline and self governance proved quite useful techniques of governance for the post bellum state. In this context, the regulation of sex proved to be of great service to both the practices of individual freedom and the practices of national reunification. As the U.S. government faced overwhelming challenges in bringing under its control the errant South as well as hundreds of thousands of freed men and women, sexual discipline and its structural frame - marriage - emerged quite quickly as an effective tool by which to manage this latter group.

Conclusion

I offer these three examples to show how in some circumstances it has proven useful to construct a narrative about the nation that contains an official national sexuality, and a nation that is populated by certain types of sexualized subjects and citizens. These examples illustrate how sexuality can help define political culture, and that certain forms of nationalism are

⁸⁹ Stoler, *Race and the Education of Desire*, p. 34.

operationalized through the management of threats that are easily imagined in sexualized terms. The epistemic violence of rule during dangerous times can be most effective when done through and by sex and sexuality.

The sexual accusation cultivated by the post colonial nationalism in evidence in Zimbabwe and Egypt reflects what might be understood as a form of reverse or internalized Orientalism. In both cases, the “object” of post colonial nationalist thought remains the Oriental, who “accepts and adopts the same essentialist conception based on the distinction between ‘the East’ and ‘the West’.”⁹⁰ In this post colonial context, the repressive resolution of identity is accomplished by framing local enemies that bear a metonymic relationship to the “West.” At least in the instances I examine in this essay, gays or perverts are interpellated through various legal techniques as new subalterns, produced as an effect of nationalist rhetoric. This sexualized threats then congeals in a certain kind of subjectivity that reads politically and socially as dissenting Others.

In all three examples, the dissenting, sexualized subject emerges from within the political and legal horizon created by the state. Thus, their origins and their social utility look quite different from that of the “ordinary” political dissenter.

⁹⁰ Partha Chatterjee, *Nationalist Thought and the Colonial World* (Delhi: Oxford University Press 1986), pp. 38-39.