

**The Law, Race and Gender Research Unit
University of Cape Town**

and

Justice College

Curriculum Development Workshop

13 August 1999

Holiday Inn, Johannesburg International Airport



LRGRU1101

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ADDITIONAL REFERENCES TO READING MATERIAL NOT CONTAINED IN THIS READING PACK

FOR IDENTIFICATION OF SYSTEMS OF OPPRESSION

- * Adrienne Rich, 'Taking Women Students Seriously,' in *On Lies, Secrets and Silence, Selected Prose, 1966-1978*, (1979) New York: Norton & Co.
- * Arabella Koopman and Helen Robb, (1997) *Shifting Paradigms: using an anti-bias strategy to challenge oppression and assist transformation in the South African context*, a publication of the Anti-Bias Project, Early Learning Resource Unit.

FOR BRONWYN PITHEY AND LILLIAN ARTZ'S INPUT

- * Louise Fryer, 'Law versus prejudice: views on rape through the centuries,' SACJ (1994) 1 at pp 60 -77.
- * Robin West, 'Jurisprudence and Gender', reprinted in *Feminist Legal Theory: Readings in Law and Gender*, eds K Bartlett and R Kennedy, (1991) Westview Press at pp 201-234.
- * Violence Against Women in South Africa: The State Response to Domestic Violence and Rape, Human Rights Watch Africa/Human Rights Watch Women's Rights Project, (1995), USA.
- * The Convention on the Elimination of All Forms of Discrimination Against Women, 1979
- * The Domestic Violence Act 116 of 1998
- * Graeme Simpson and Janine Rauch, 'Reflections on the Notional Crime Prevention Strategy,' (draft)

QUESTIONS FOR PRESENTERS

One of the important aspects of social context training is to attempt to get students/the audience to begin a process of self-analysis in which they are able, not only to identify the prejudice or bias that exists 'out there', but to identify biases and prejudices that they themselves hold. Such perceptions could include ingrained stereotypes, such as 'blacks are lazy'; 'homosexuals are promiscuous', 'women are irrational'; 'Jews are tight with money'; 'Afrikaners are conservative,' 'men are violent,' etc. When you present your input, your audience will have a range of perceptions about you and your presentation that remain concealed. We would like to experiment with what would happen if we make these perceptions explicit.

As a way of linking the presentations together, and to expand on the theme of self-reflection, active listening and innovative teaching methodologies, we request that you consider the following questions and attempt to build in answers to them in the course of your presentation:

1. Can you identify what is unique or different about your presentation that challenges formalist notions of teaching in law institutions?
2. What, in your mind, are the barriers to people hearing what you are saying? or what might be difficult for people to hear in your presentation?
3. What methods or techniques do you employ to facilitate your audience's ability to hear what you are saying?

QUESTIONS FOR PARTICIPANTS

One of the important aspects of social context training is to attempt to get students/the audience to begin a process of self-analysis in which they are able, not only to identify the prejudice or bias that exists 'out there', but to identify biases and prejudices that they themselves hold. Such perceptions could include ingrained stereotypes, such as 'blacks are lazy'; 'homosexuals are promiscuous', 'women are irrational'; 'Jews are tight with money'; 'Afrikaners are conservative', 'men are violent', etc. When you listen to the inputs of your colleagues today, it is likely that you will have a range of perceptions about the presenters and the presentation that remain concealed. We would like to experiment with what would happen if we make these perceptions explicit. Your participation in this exercise will enable us to work towards a model for revisioning material.

Please fill in each section after the completion of each input from the various participants.

INPUT 1: ROBIN PALMER

- 1.1 Can you identify a new approach/idea/methodology/concept in this presentation that surprised you?

- 1.2 What were some of the obstacles to your being able to hear and be convinced by what the presenter was saying?

- 1.3 Could you imagine a way of incorporating anything you learned from this presentation into your teaching of your subject/s? If so, how?

INPUT 2: BRONWYN PITHEY AND LILLIAN ARTZ

- 2.1 Can you identify a new approach/idea/methodology/concept in this presentation that surprised you?

- 2.2 What were some of the obstacles to your being able to hear and be convinced by what the presenter was saying?

- 2.3 Could you imagine a way of incorporating anything you learned from this presentation into your teaching

of your subject/s? If so, how?

INPUT 3: FRANCOIS BOTHA

3.1 Can you identify a new approach/idea/methodology/concept in this presentation that surprised you?

3.2 What were some of the obstacles to your being able to hear and be convinced by what the presenter was saying?

3.3 Could you imagine a way of incorporating anything you learned from this presentation into your teaching of your subject/s? If so, how?

INPUT 4: NIC SWART

4.1 Can you identify a new approach/idea/methodology/concept in this presentation that surprised you?

4.2 What were some of the obstacles to your being able to hear and be convinced by what the presenter was saying?

4.3 Could you imagine a way of incorporating anything you learned from this presentation into your teaching of your subject/s? If so, how?

INPUT 5: JOANNE FEDLER

5.1 Can you identify a new approach/idea/methodology/concept in this presentation that surprised you?

5.2 What were some of the obstacles to your being able to hear and be convinced by what the presenter was saying?

5.3 Could you imagine a way of incorporating anything you learned from this presentation into your teaching of your subject/s? If so, how?

INPUT 6: ANGELO PANTAZIS

6.1 Can you identify a new approach/idea/methodology/concept in this presentation that surprised you?

6.2 What were some of the obstacles to your being able to hear and be convinced by what the presenter was saying?

6.3 Could you imagine a way of incorporating anything you learned from this presentation into your teaching of your subject/s? If so, how?

INPUT 7: JUSTICE COLLEGE

7.1 Can you identify a new approach/idea/methodology/concept in this presentation that surprised you?

7.2 What were some of the obstacles to your being able to hear and be convinced by what the presenter was saying?

7.3 Could you imagine a way of incorporating anything you learned from this presentation into your teaching of your subject/s? If so, how?

PROGRAMME: CURRICULUM DEVELOPMENT PROJECT: SOCIAL
CONTEXT IN THE TEACHING OF EVIDENCE

13 AUGUST 1999

10.00-11.00 IDENTIFICATION OF SYSTEMS OF OPPRESSION
EXERCISE

JOANNE FEDLER

10 minutes: introduction and orientation to the process and goal setting for the day

10 minutes: participants to fill in table and to identify systems of oppression in which they are located.

15 minutes: participants to discuss with neighbour and answer questions (what are the implications for you as a law teacher to be located on the scale you identified? How did it make you feel?)

25 minutes: debrief

11.00 - 11.15 TEA

11.15-1.00 INPUTS FROM PARTICIPANTS

15 minute inputs and 5 minutes discussion

11.15-11.35

Robin Palmer

(An introduction to 'concept' based teaching as opposed to 'content' based teaching)

11.35-12.05

Bronwyn Pithey and Lillian Artz

(Teaching rape and domestic violence to law students)

12.05-12.15

Francios Botha

(Teaching and training interventions for the judiciary: adding fuel to the fires of resistance)

12.15-12.35

Nic Swart

(Evaluation methodologies at the Practical Legal School)

12.35 - 12.55

Joanne Fedler

(Good sex and bad sex: the law of evidence and the representation of sexuality)

1.00-2.00 LUNCH

2.00 -3.00	CONTINUATION OF INPUTS
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2.00- 2.20	Angelo Pantazis (Lesbian and gay youth in law)
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2.20 - 3.00	JUSTICE COLLEGE (Social context revisioning of a set of Justice College notes on admissibility and compellability of evidence).
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3.00-4.00	CONCLUSION AND CLOSURE
	* WORKBOOK
	* LAW TEACHERS' CONFERENCE

ILZE OLCKERS

IDENTIFICATION OF SYSTEMS OF OPPRESSION EXERCISE

The table that follows was originally developed by Valerie Batts, Joyce Brown, Hilda Baldoquin and Julian Sonn and later adapted for South African use by Helen Robb as a working conceptualization of the forms of oppression that exist in society.

In this exercise, we would like you to identify whether you are a target for oppression in relation to any of these groups. If you are, you score 1 point. Count up your points at the end, and this will indicate where you are located on the index of oppression.

Then turn to a neighbour, and based on your 'oppression score', discuss the following questions:

1. How did it make you feel to explicitly locate yourself on this index (whether you scored high, medium or low) ?
2. What are the implications for you as a law teacher to be located as a target group for oppression or as a non-target group?

OPPRESSION	TARGET	NON-TARGET	YOUR SCORE
Sexism	Women	Men	
Racism	Black people	White people	
Classism/class oppression	Poor/working class people/ people with limited formal education	Middle/owning class/professionals	
Jewish oppression/ Anti-Semitism	Jewish people	Non-Jewish people	
Religious Oppression	African traditional religions, Hinduism, Islam, Buddhism, Judoism	Christian people	
Adultism	Young people	Middle aged people/ elders	
Ageism	Elders / people over 45	People under 45	
Heterosexism	Lesbian / gay / bisexual people	Heterosexual people	
Able-ism	Differently-abled people / people with disabilities	Temporarily able	
Linguicism	Black South African languages	English	

TOTAL SCORE _____

(Taken from Arabella Koopman and Helen Robb, *Shifting Paradigms*, a publication of the Anti-Bias Project, Early Learning Resource Unit, 1997, pages 11-12)

AZV 2395

MCINTOSH

White Privilege: Unpacking the Invisible Knapsack

I was taught to see racism only in individual acts of meanness, not in invisible systems conferring dominance on my group.

Peggy McIntosh

Through work to bring materials from women's studies into the rest of the curriculum, I have often noticed men's unwillingness to grant that they are overprivileged, even though they may grant that women are disadvantaged. They may say they will work to improve women's status, in the society, the university, or the curriculum, but they can't or won't support the idea of lessening men's. Denials that amount to taboos surround the subject of advantages that men gain from women's disadvantages. These denials protect male privilege from being fully acknowledged, lessened, or ended.

Thinking through unacknowledged male privilege as a phenomenon, I realized that, since hierarchies in our society are interlocking, there was most likely a phenomenon of white privilege that was similarly denied and protected. As a white person, I realized I had been taught about racism as some-

thing that puts others at a disadvantage, but had been taught not to see one of its corollary aspects, white privilege, which puts me at an advantage.

I think whites are carefully taught not to recognize white privilege, as males are taught not to recognize male privilege. So I have begun in an untutored way to ask what it is like to have white privilege. I have come to see white privilege as an invisible package of unearned assets that I can count on cashing in each day, but about which I was "meant" to remain oblivious. White privilege is like an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools, and blank checks.

Describing white privilege makes one newly accountable. As we in women's studies work to reveal male privilege and ask men to give up some of their power, so one who writes about having white privilege must ask, "Having described it, what will I do to lessen or end it?"

After I realized the extent to which men work from a base of unacknowledged privilege, I understood that much of their oppressiveness was unconscious. Then I remembered the frequent charges from women of color that white women whom they encounter are oppressive. I began to understand why we are justly seen as oppressive, even when we don't see ourselves that way. I began to count the ways in which I enjoy unearned skin privilege and have been conditioned into oblivion about its existence.

My schooling gave me no training in seeing myself as an oppressor, as an unfairly advantaged person, or as a participant in a damaged culture. I was taught to see myself as an individual whose moral state depended on her individual moral will. My schooling followed the pattern my colleague Elizabeth Minnich has pointed out: whites are taught to think of their lives as morally neutral, normative, and

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average, and also ideal, so that when we work to benefit others, this is seen as work that will allow "them" to be more like "us."

Daily effects of white privilege

I decided to try to work on myself at least by identifying some of the daily effects of white privilege in my life. I have chosen those conditions that I think in my case attach somewhat more to skin-color privilege than to class, religion, ethnic status, or geographic location, though of course all these other factors are intricately intertwined. As far as I can tell, my African American coworkers, friends, and acquaintances with whom I come into daily or frequent contact in this particular time, place, and line of work cannot count on most of these conditions.

1. I can, if I wish, arrange to be in the company of people of my race most of the time.

2. If I should need to move, I can be pretty sure of renting or pur-

chasing housing in an area that I can afford and in which I would want to live.

3. I can be pretty sure that my neighbors in such a location will be neutral or pleasant to me.

4. I can go shopping alone most of the time, pretty well assured that I will not be followed or harassed.

5. I can turn on the television or open to the front page of the paper and see people of my race widely represented.

6. When I am told about our national heritage or about "civilization," I am shown that people of my color made it what it is.

7. I can be sure that my children will be given curricular materials that testify to the existence of their race.

8. If I want to, I can be pretty sure of finding a publisher for this piece on white privilege.

9. I can go into a music shop and count on finding the music of my race represented, into a supermarket and find the staple foods

that fit with my cultural traditions, into a hairdresser's shop and find someone who can deal with my hair.

10. Whether I use checks, credit cards, or cash, I can count on my skin color not to work against the appearance of financial reliability.

11. I can arrange to protect my children most of the time from people who might not like them.

12. I can swear, or dress in second-hand clothes, or not answer letters without having people attribute these choices to the bad morals, the poverty, or the illiteracy of my race.

13. I can speak in public to a powerful male group without putting my race on trial.

14. I can do well in a challenging situation without being called a credit to my race.

15. I am never asked to speak for all the people of my racial group.

16. I can remain oblivious of the language and customs of persons of color, who constitute the world's majority, without feeling in my

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- The BUREAU does not charge schools any dues, membership fees or listing fees.

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culture any penalty for such oblivion.

17. I can criticize our government and talk about how much I fear its policies and behavior without being seen as a cultural outsider.

18. I can be pretty sure that if I ask to talk to "the person in charge" I will be facing a person of my race.

19. If a traffic cop pulls me over, or if the IRS audits my tax return, I can be sure I haven't been singled out because of my race.

20. I can easily buy posters, postcards, picture books, greeting cards, dolls, toys, and children's magazines featuring people of my race.

21. I can go home from most meetings of organizations I belong to feeling somewhat tied in rather than isolated, out of place, outnumbered, unheard, held at a distance, or feared.

22. I can take a job with an affirmative action employer without

having coworkers on the job suspect that I got it because of race.

23. I can choose public accommodation without fearing that people of my race cannot get in or will be mistreated in the places I have chosen.

24. I can be sure that if I need legal or medical help my race will not work against me.

25. If my day, week, or year is going badly, I need not ask of each negative episode or situation whether it has racial overtones.

26. I can choose blamish cover or bandages in "flesh" color that more or less match my skin.

Evasive and fugitive

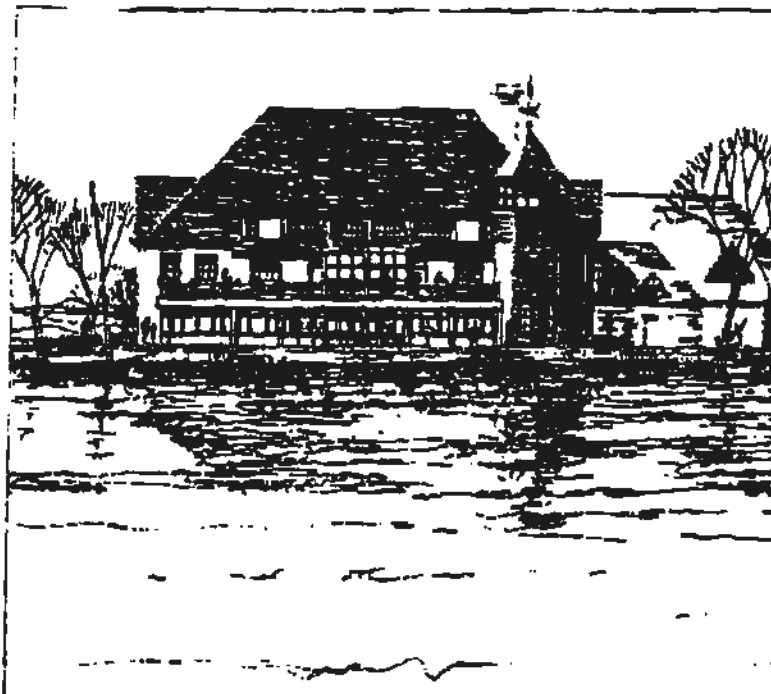
I repeatedly forgot each of the realizations on this list until I wrote it down. For me white privilege has turned out to be an elusive and fugitive subject. The pressure to avoid it is great, for in facing it I must give up the myth of meritocracy. If these things are true, this is not such a free country: one's life

is not what one makes it; many doors open for certain people through no virtues of their own.

In unpacking this invisible knapsack of white privilege, I have listed conditions of daily experience that I once took for granted. Nor did I think of any of these perquisites as bad for the holder. I now think that we need a more finely differentiated taxonomy of privilege, for some of these varieties are only what one would want for everyone in a just society, and others give license to be ignorant, oblivious, arrogant, and destructive.

I see a pattern running through the matrix of white privilege, a pattern of assumptions that were passed on to me as a white person. There was one main piece of cultural turf; it was my own turf, and I was among those who could control the turf. My skin color was an asset for any work I was educated to want to make. I could think of myself as belonging in major ways and of making social systems work for me.

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FROM: U of T - FAC OF LAW

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04-01-99 14:29 P.03

I could freely disparage, fear, neglect, or be oblivious to anything outside of the dominant cultural forms. Being of the main culture, I could also criticize it fairly freely.

In proportion as my racial group was being made confident, comfortable, and oblivious, other groups were likely being made unconfident, uncomfortable, and alienated. Whiteness protected me from many kinds of hostility, distress, and violence, which I was being subtly trained to visit, in turn, upon people of color.

For this reason, the word "privilege" now seems to me misleading. We usually think of privilege as being a favored state, whether earned or conferred by birth or luck. Yet some of the conditions I have described here work systematically to overempower certain groups. Such privilege simply confers dominance because of one's race or sex.

Earned strength, unearned power

I want, then, to distinguish between earned strength and unearned power conferred systemically. Power from unearned privilege can look like strength when it is in fact permission to escape or to dominate. But not all of the privileges on my list are inevitably damaging. Some, like the expectation that neighbors will be decent to you, or that your race will not count against you in court, should be the norm in a just society. Others, like the privilege to ignore less powerful people, distort the humanity of the holders as well as the ignored groups.

We might at least start by distinguishing between positive advantages, which we can work to spread, and negative types of advantage, which unless rejected will always reinforce our present hierarchies. For example, the feeling that one belongs within the human circle, as Native Americans say, should not be seen as privilege for a few. Ideally it is an unearned entitlement. At present, since only a few have it, it is an unearned advantage for them. This paper results

from a process of coming to see that some of the power that I originally saw as attendant on being a human being in the United States consisted in unearned advantage and conferred dominance.

I have met very few men who are truly distressed about systemic, unearned male advantage and conferred dominance. And so one question for me and others like me is whether we will be like them, or whether we will get truly distressed, even outraged, about unearned race advantage and conferred dominance, and, if so, what we will do to lessen them. In any case, we need to do more work in identifying how they actually affect our daily lives. Many, perhaps most, of our white students in the United States think that racism doesn't affect them because they are not people of color; they do not see "whiteness" as a racial identity. In addition, since race and sex are not the only advantaging systems at work, we need similarly to examine the daily experience of having age advantage,

or ethnic advantage, or physical ability, or advantage related to nationality, religion, or sexual orientation.

Difficulties and dangers surrounding the task of finding parallels are many. Since racism, sexism, and heterosexism are not the same, the advantages associated with them should not be seen as the same. In addition, it is hard to disentangle aspects of unearned advantage that rest more on social class, economic class, race, religion, sex, and ethnic identity than on other factors. Still, all of the oppressions are interlocking, as the members of the Combahee River Collective pointed out in their "Black Feminist Statement" of 1977.

One factor seems clear about all of the interlocking oppressions. They take both active forms, which we can see, and embedded forms, which as a member of the dominant group one is taught not to see. In my class and place, I did not see myself as a racist because I was



Margaret Logue
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taught to recognize racism only in individual acts of meanness by members of my group, never in invisible systems conferring unsought racial dominance on my group from birth.

Disapproving of the systems won't be enough to change them. I was taught to think that racism could end if white individuals changed their attitudes. But a "white" skin in the United States opens many doors for whites whether or not we approve of the way dominance has been conferred on us. Individual acts can palliate, but cannot end, these problems.

To redesign social systems we need first to acknowledge their colossal unseen dimensions. The silences and denials surrounding privilege are the key political tool here. They keep the thinking about equality or equity incomplete, protecting unearned advantage and conferred dominance by making these subjects taboo. Most talk by whites about equal opportunity seems to me now to be about equal

opportunity to try to get into a position of dominance while denying that systems of dominance exist.

It seems to me that obliviousness about white advantage, like obliviousness about male advantage, is kept strongly inculturated in the United States so as to maintain the myth of meritocracy, the myth that democratic choice is equally available to all. Keeping most people unaware that freedom of confident action is there for just a small number of people props up those in power and serves to keep power in the hands of the same groups that have most of it already.

Although systemic change takes many decades, there are pressing questions for me and, I imagine, for some others like me if we raise our daily consciousness on the perquisites of being light-skinned. What will we do with such knowledge? As we know from watching men, it is an open question whether we will choose to use unearned advantage to weaken hidden systems of advantage, and whether we will use any

of our arbitrarily awarded power to try to reconstruct power systems on a broader base. □

Peggy McIntosh is associate director of the Wellesley College Center for Research on Women. This essay is excerpted from Working Paper 189, "White Privilege and Male Privilege: A Personal Account of Coming To See Correspondences through Work in Women's Studies" (1988), by Peggy McIntosh; available for \$4.00 from the Wellesley College Center for Research on Women, Wellesley MA 02151. The working paper contains a longer list of privileges.

Permission to reprint this excerpt must be obtained from Peggy McIntosh at the address above or by calling her at 617-431-1453.

This excerpted essay is reprinted here from the July/August 1989 issue of Peace and Freedom, the bimonthly journal of the Women's International League for Peace and Freedom, based at 1213 Race St., Philadelphia, PA 19107.

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WOMEN AS LAW TEACHERS:
TOWARD THE "FEMINIZATION" OF LEGAL EDUCATION ★

by Carrie Menkel-Meadow*

I. Introduction

My identity as a woman law teacher presents me with several difficult, but interesting, dilemmas, dilemmas which also challenge legal education and the lawyering profession in general. These dilemmas have to do with the possibilities, the opportunities and the difficulties posed by the increased presence of women in law schools, as faculty members and students, and in the lawyering profession, as lawyers, judges and clients. The dilemmas are philosophical, psychological and political. To what extent are the legal institutions we deal with male-dominated, both in the values they reflect and the manner or means used to express those values? To what extent might the expression of feminine or female values, principles and qualities both in the ends desired and the means used to express those ends alter our legal institutions? How does the increased participation of women in these legal institutions move us toward or away from the realization of feminine values in the law? How can the men who dominate as actors in the legal institutions give expression to the feminine principles they value in themselves and in others? How can I as a woman law teacher, committed to values of justice, compassion, equality, self-determination and actualization, truly express these values in a law school or courtroom where masculine terms and norms have defined these values for so long? How can I communicate to my students, clients and colleagues that they can express new ways of being so that the legal institutions we inhabit can more fully express the variety in the human condition and, perhaps, find new ways to deal with, cope with or resolve the inevitable differences among us?

To begin to think about these dilemmas is to pose an unceasing series of questions about men and women, female and male qualities, legal institutions, socialization, and individual and societal development and change. What are the differences between men and women, male and female qualities? How are male lawyers or law teachers different from female lawyers or law teachers? How would the increased expression and legitimacy of feminine and female values and qualities broaden, enrich and deepen legal education and the legal institutions it feeds?

I must, of course, begin to answer these questions for myself, every day, from where I sit, from what I see, what I am, what I am becoming, and from where I must act. I bring my own perspectives and biases to these inquiries. First, sociologically, I am unusual, a

minority, a deviant¹ (there are proportionately even fewer women law teachers than there are women lawyers), and, therefore, study my own profession as somewhat of an outsider. Second, as a law teacher I have been socialized in a profession built by men that rewards achievement and rationality of a particular kind. Third, and finally, I am a woman and a feminist, adhering to some of the traditional values of the law teaching profession yet seeing myself as part of another population or constituency (unmankind) whose values may conflict with, or call into question, the traditional and male-dominated values of my profession. This paper looks at some of these dilemmas from my experience. It is my hope that this inquiry will excite and stimulate thinking about the issues raised; it may provoke.

For me, the purpose of such an inquiry is to begin to see and confront the increased possibilities in the feminization of legal education--both in the increased numbers of women in the profession and in the increased acceptance and pursuit of "feminine" qualities² in law, legal education, law students and lawyers--male or female. What follows is a personal statement--my reactions to what I perceive as good (increasing recognition and possibilities for women and feminine qualities in legal education) and bad (remaining subjugation of the feminine to the masculine--both in expression of those qualities in the law and in the devaluing of, or discrimination against, those who possess such qualities). I draw primarily from my experience as a woman law teacher struggling for a broader and deeper vision of what is possible in the world, and with the knowledge of the conflicts and uncertainty that such a struggle invites.

II. Male and Female Qualities in Legal Education

At the beginning of my class in Women and the Law³ I ask students to make a list of qualities or characteristics attributed to each of the genders⁴--both male and female. This list of adjectives usually

1. See Weisberg, D. K., Women in Law School Teaching: Problems and Progress, 30 J. of Legal Education 226 (1979) on the numbers of women law teachers. At the time of this writing there was one other woman law teacher at the law school at which I taught (U. of Pa. Law School) out of approximately 30 faculty members.

2. See discussion in the text and note 32 supra for specification of "feminine" qualities, which are those qualities either attributed to women by men and/or qualities more likely to be possessed by women.

3. This example is taken from my course Women and the Law, taught in the Spring 1979 Semester at the University of Pennsylvania Law School.

4. Throughout this paper I have used "gender" rather than "sex" to avoid the confusion of one of woman's behaviors with her whole identification.

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comprises a fairly comprehensive set of stereotyped expectations of gender attributes.⁵ For purposes of the course, we have created a vocabulary list from which we may measure legislators', judges', administrators' and other legal actors' stereotyped judgements and assumptions in statutes, decisions, opinions, and regulations. Women are viewed as "dependent, nurturing, emotive, weak, caring, small, egalitarian, intuitive, irrational, instinctual." Men are viewed as "rational, strong, hierarchical, aggressive, big, task-oriented, efficient."

Although many feminists prefer to argue that men and women are not different in terms of their abilities to perform certain tasks or functions, my own view is that there are differences in the way men and women see, react, think and behave. While the scientists pursue the debate of genetic versus socialized gender differences I will proceed, for the purposes of this paper, with the experiential assumption (mine) that, whatever their derivation, there are differences. I have labeled as "feminine" the qualities I and others have observed to occur more generally, but not exclusively, in women and "masculine" the qualities that are more often found in men. Obviously, these are generalizations which frequently are belied in their exceptions; there are women with masculine qualities and vice versa.

Legal education is marked by many of the same stereotypic notions. This semester I had students prepare a list of the qualities of legal education as they know it. The list included the following: logical, rational, rigorous, probing, inquiring, intellectual, thorough, analytical, difficult, exacting, detailed. This was then compared to the list of male attributes: analytic, strong, rational, active, argumentative, aggressive, instrumental; and then again to the list of feminine attributes: passive, emotional, intuitive, receptive, accommodating, dependent, supportive, creative, expressive, nurturant. We then constructed a list of qualities that reflect what education could or should be -- rigorous, creative, intellectual, receptive, analytic, insightful, active, enriching, and enlightening, noting the presence of both female and male qualities.

Why then is legal education so identified with maleness and masculine qualities to the exclusion of feminine qualities and female participants? The answer, I think, lies in the false dichotomization and opposition of the intellect or thinking (male) and the emotional or feeling (female). As a woman law teacher I have frequently felt a

5. There is an obvious danger in labeling qualities feminine and masculine in that I am contributing to the very stereotypes I think limit our ways of seeing each other. Such qualities are labeled this way because of convenience (there is not a perfect fit between these qualities and all members of either gender). Many men may see themselves in the description of feminine qualities. From where I sit, however, I see these gender differences as alive and well in most American law schools today. The reader should realize that this is my view at this point in time -- my own views, as well as the tenets of feminist ideology, are still evolving. For one view of how feminine qualities may be inconsistent with our traditional lawyering values, see Fox, *Goodbye to Came-*

nerd to conform to traditional expectations of law teachers by suppressing the latter and emphasizing the former in myself. (For example, I recently argued that a student requesting readmission to school had met all of the "statute's requirements" rather than argue that it seemed only "right," "fair" or "just," in my heart, to permit someone with two years of school and struggle behind him to be given a chance to try again.)

This polarization of intellect and emotion gives us an incomplete picture of human behavior. Developing an awareness of and dealing with one's emotions is a functional requirement of being a lawyer. Lawyers must be able to assess the emotional needs of the people with whom they interact -- their clients, those who are disputing with their clients, other lawyers, judges, juries, and witnesses. Lawyers must work with their own emotional reactions to cases, to clients, to opposing counsel and to judges and, similarly, must be aware of how judges, juries, clients and other lawyers are reacting to them.

In addition, the commitment to law and its principles of justice, fairness, order and control is itself a commitment based both on reason and belief with both a rational and emotional component. Exploring and examining the source and depth of emotions is as rigorous an enterprise as probing the logic and shape of ideas. By banishing the emotional or "soft" aspects of our experience from analysis in law schools we are denying the human motivations and connections that necessitate law in the first place.

A more fully integrated study of law would look not only at the concrete idea or logical form that describes a rule, but would explore the implication and impact of the rules on the people affected. So, for example, the study of a particular case would include not only the principles of decision of the opinion writer, but would explore what happened to the plaintiffs and defendants before and after they came to court, what motivated them in bringing their lawsuit, what was accomplished for them and what was not.⁶ This does not preclude a discussion of the case law, the policy considerations affecting a particular decision or the development of a particular doctrine. Examining the impact on the parties can make a legal analysis work "for human beings" rather than "on human beings."⁷

We must recognize as well the source of our affirmation of and faith in ideating and rationality. For our love of reason, since the eighteenth century, has been affect (and emotion) itself. We chose law because we like it; we believe it will do good for people about whom we care and make the world a better place (things which we desire or aspire

6. See e.g., Noonan, J., *Persons and Masks of the Law*, especially Chapter 4, (1976).

7. Rich, Adrienne, "Toward a Woman-Centered University" in *On Lies, Secrets, and Silence: Selected Prose 1966-1978* (1979).

to).⁸ We seek to instill in our students our like of, or faith in, the law and its processes -- even if that faith or affinity is to a "rational" system. Rejection of the emotional (and female) parts of our system of education gives us a very skewed view of the world.

The world proceeds in far more complicated ways. We may "know" something or learn about it by reading or studying, such as the rule which guarantees equal protection of the laws, but will not understand that rule until we have worked with it, experienced it and felt its impact on the human beings it is meant to affect. Thus, when we think about why we value equality or equal protection we can best explain or understand it by imagining or feeling ourselves unequally or unfairly treated or protected by the law. From the experience of this unfairness (real or imagined but felt) we can abstract to a value or higher principle that we hope will prevent others from experiencing that unfairness. Similarly, when one thinks about the values of justice and mercy one immediately senses the unity or cohesion of rightness and abstraction with compassion and particularity. It is the fusion of the intellect (mind) and emotion (heart) that is likely to give us the fullest knowledge and understanding⁹ of the law.

Thus, expanding our repertoire to include both the intellect of the legal method and the emotional texture of the law and those it governs will give us greater insight into the forces we seek to analyze and explain as legal educators. So, for example, as we look at why a judge ruled a particular way we could ask why he or she resolved doubts as to credibility one way or the other. We could then explore the combination of rational and emotional responses the judge had to the behavior observed in the human beings to whom he or she was listening and rigorously explore the validity of each. We could look at how different choices in question framing (leading or non-directive) express value choices that color the truth we receive from clients, witnesses, legislators, etc. By exploring and expanding our own natures, both male and female, rational and emotive, abstract and experiential, we can discover a richer and deeper understanding of the processes and people that make up our legal system.

Now more of these "feminine" qualities can be realized, recognized and embraced in our legal institutions is a question of both political and psychological implication. As an individual legal educator I must look at that of which I am aware, what I do and what I can do, and I must look at what legal education does and what it can do as an institution. I can identify what "feminine" qualities can best be expressed. By exploring how women legal educators attempt to express those qualities and what happens when they do we can begin to see the opportunities and the difficulties in feminizing, and thereby ultimately synthesizing, legal education.

8. We seldom recognize or articulate the fact that the reason we choose to do something or write or think about a subject is that we have an emotional affinity to it.

9. See Ayer, J., *Isn't There Enough Reality to Go Around? An Essay on the Unspoken Promises of Our Law*, 55 N.Y.U. L. Rev. 475 (1978).

In the sections that follow I discuss how I have experienced these opportunities and difficulties in a number of settings: in the classroom, in relationships with students and colleagues, in the courtroom and in the law itself. It is difficult, if not impossible, at the present time, to sort out the personal from the political, and the psychological from the social, aspects of these experiences, so I will not attempt to do so definitively here.

A. Women in the Classroom

As I face my own students I am aware of how strange it seems for me to be so active, so visible and so controlling. I face students and remember my own student days -- I was a very "feminine" student -- a passive receptacle of information, copiously recording the words of others, both teachers and students, into my notebooks. My notes were so good they became a useful commodity in the law school exchange. At the end of semester all of those students (mostly male) who had not come to class offered a variety of goods and services for my notes. Today, I look at the students before me and am conscious of how many more women than men students remain passive, speak softly, tentatively and haltingly, when they speak at all. They frequently seem to seek approval in the question-asking tone of their statements.¹⁰

I am confronted with similar dilemmas as a teacher. Speaking loudly and authoritatively seems unnatural; asking questions in Socratic fashion frequently seems false. I am waiting for answers I expect so they can be pierced and probed according to my plan in what I see as my penetration to the temple of traditional law teaching.¹¹ I am aware of conflicts in demonstrating to students, colleagues and myself my ability to "do it their way" (the "male" way). My own preference is to have a relaxed but searching conversation in which both I and my students say what we really think and test that, with mutual trust, against or with the thoughts of others. I want to open up or unlock the minds and mouths of those who sit silently but it seems such a violation of their privacy to call on them. I remember my own feelings of personal and intellectual violation when called on in class involuntarily.

I am informal, casual in class -- hoping my easy manner will proclaim I am different, you can talk to me -- yet I am conscious of stiffening, becoming more formal and controlling when I sense students want me to be a regular "law professor" or when one of my colleagues observes me. I am conscious of being watched intently -- a woman in front of the law classroom is rare and I sense (or project) that my most salient characteristic to the observer is not that I am a teacher but a woman. (Is it to me as well?) I become conscious of what I am wearing, my personal

10. Linguistic experts who have studied the sexism in language patterns have suggested this is a female mode of communication. Lakoff, R., *Language and Woman's Place* (1975).

11. This may be a generational rather than a gender-related phenomenon. There appear to be fewer and fewer teachers, both male and female, who are using the Langdellian version of Socratic dialogue exclusively.

preference for casual, comfortable clothes in which I think and feel better and my need for legitimacy -- to appear as a "teacher", distinguishing myself from students by suits and dresses. These concerns with the tone, decoration and style of my classroom strike me as "feminine" concerns with the "texture" of the class.

This feeling of being watched reminds me again of my student days when women law students were only a little less rare than women law teachers.¹² I remember my hesitancy at speaking in class as I feared letting women down in my capacity as Woman Law Student with all ears attentive to what she says.

I am aware of similar feelings as a woman law teacher. Will she make it? Is she as good as they (the men) are? Will I compromise my evaluation by appearing soft, weak, uncertain? Few male students or teachers speak for a constituency each time they teach or speak at a meeting (blacks and other minorities excepted). My desire to be heard as an individual rather than as a spokesperson for a constituency reveals my discomfort at being the only one, or one of the few, who expresses feminine values. Why don't some of the men express their weakness, insecurity and uncertainty?

I want students to enjoy their education and to engage each other, and I wish to facilitate this. My image of a successful class is the creation of a mixed salad with ideas as vegetables tossed in by students with me as the salad forks tossing, sorting and giving form to the process and product. (Now female a symbol of class discussion? Food preparation, sustenance and nurturance?) Such a discussion would give us all the satisfaction of a product jointly created and jointly consumed. Too often this ideal image is displaced by my need to control, to demonstrate my own knowledge and interpretation, to cover material so that I gain legitimacy in both my student's and my own eyes. I feel like a girl trapped into playing a man's game.

I am concerned with the process of the classroom in legal education. The man's game seems too poor -- substantively and methodologically -- one system of instruction for three years. Not all men are happy with it either.¹³ Might not a little variety in methodology and approach and style revitalize legal education without detracting from the importance of developing cognitive question-making skills of "thinking like a lawyer?" With the growing variety, both in demographic factors, practice styles and political persuasion of lawyers shouldn't "thinking like a lawyer" permit some variation

12. Jason, J., Moody, L., Schuerger, J., *The Woman Law Student: The View From the Front of the Classroom*, 24 Cleveland State L. Rev. 223 (1975).

13. See e.g. Himmelstein, J., *Reassessing Law Schooling: Towards a Humanistic Education in Law*, Humanistic Education in Law, Monograph 1, at 1 (1980), and *Reassessing Law Schooling: The Sterling Forest Group*, *Id.* at 49 (also appearing in 53 N.Y.U. L. Rev. 514, 561 (1978)).

in teaching, thinking and acting processes? Shouldn't a classroom make use of its increasing diversity of natural resources,¹⁴ as a family draws upon the differences of personalities and functions of its members. The increasing presence of a new group of students, who are women, produces a diversity in the classroom which is long overdue. Teachers using sexist hypotheticals and sexist teaching methods (remember Ladies Day?)¹⁵ will be forced to confront whether their examples make sense, comport with human experience or offend. There is nothing like the presence of a culturally stereotyped group to call into question those stereotypes and the jokes which follow. (It is now considered bad taste to make jokes about blacks, yet sexist jokes linger. Is being a woman that much funnier than being black?)

Thus, the increased presence of women in the classroom should be changing what goes on in those classrooms, yet I fear it has not yet happened. There should be exploration of new ways to have class discussion, such as in the "Women Centered University" described by Adrienne Rich,¹⁶ with more open, flexible, affective, cooperative and experiential conversation and with, perhaps, less authoritarian leadership, as is happening in Women's Studies departments throughout the country. Again, I am struck by the observation that it may be a peculiarly feminine concern to focus on the process or manner of education rather than focusing so exclusively on the instrumental ends of that education.

I do not intend a total rejection of traditional or "male" legal education. I want to think critically, use the Socratic method as appropriate, engage in rigorous analysis and write critically -- all of which can contribute to learning about the law. It is not as if women do not have logical skills or abilities or want to use them; it is just that there may be additional or different ways of expressing those qualities which might necessitate some restructuring in our thinking about how the classroom enterprise ought to proceed.

To the extent that nurturance, support and caring are considered feminine qualities, might not those qualities enhance the quality of classroom engagement if all students approached each other in a spirit of helping and contributing to each other's learning rather than competing for class attention, or worse yet (and more common today) avoiding and cringing from any real engagement with each other?

14. One of the theories behind the diversity of students principle in affirmative action admissions programs in *Bakke* was the increased variety in educational opportunities not only by the minority or "different" students but by the majority as well. This principle is also one on which the "separate is not equal" cornerstone of *Brown v. Bd. of Education* is based.

15. See Schwartz, H., *Lawyering* (1976).

16. Rich, A., *On Lies, Secrets and Silence* (1979).

As Jean Baker Miller has observed, some qualities which are thought to be weaknesses, such as the expression of vulnerability, may, in fact, be strengths, bringing us closer to ourselves and others and enabling us to deal more honestly with our interdependence.¹⁷

The increasing presence of women in the classroom encourages those men who want to give expression to those feminine qualities to do so. With the explicit acceptance of such qualities as concern and tenderness in the classroom those individuals who want to articulate or demonstrate such qualities will feel freer to do so without regard to sex role stereotypes.

B. Women as Colleagues

Women have been historically excluded from the workplace because of two stereotypically conceived notions of woman's primary roles -- women as nurturers, and women as sexual objects.¹⁸ These notions or archetypes die hard and daily affect the relationships of male and female law teachers. Instead of being viewed as some of the things women might do, these roles are seen as exclusive, precluding the recognition of other roles for women.

In their perceived role as nurturers women can be seen as temporary teachers, ready to leave work as soon as nature's call for children is heard. Yet child bearing is not necessarily the same as child rearing. Individuals may choose to bear children or not (and women are still the only ones who can do that), but men can bear the child rearing responsibilities. (Is it a fear that some men may have to take on these added responsibilities that causes them to want to keep women "down on the farm?") Even without children those women who do have a strong commitment to their work are too often doing double duty (taking on spousal care-taking functions at the end of the day). These stereotypical notions prevent many male law teachers from seeing their female colleagues as equally committed to their work. Worse yet, to the extent that seeing one's life as including more than work (or less work and more family relationships) is perceived as a feminine quality

17. Miller, J.B., Toward a New Psychology of Women (1976).

18. See Bradwell v. Illinois, 83 U.S. 130 (1873) and the by-now famous quote from Justice Bradley's concurring opinion:

13
"The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for so many occupations of civil life. The constitution of the family organization which is founded in the divine ordinance as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood."

It threatens the total commitment to the law that has been the male norm for so long. Again a possibility for growth and expansion in legal education in the form of collaboration or sharing of work may be overlooked by adhering to male norms of total full-time commitment to work.

Even when women are successful enough to become colleagues one must look at the roles they are performing for their colleagues. As Sylvia [unintelligible] has asked in the student context, we may ask in the teacher context "Who does the dishes?" is a very significant question in employment behavior. Cleaning house and making meals are functional tasks unrelated in their performance to being a woman. Yet how often are women law teachers the "clean-up" crew for the law school, acting as coffee preparers, faculty meeting hostesses, editors of male colleagues' manuscripts and other domestic caretakers? And what tasks do women administrators perform for their law schools?

The second stereotypic notion is even more insidious because it is less often acknowledged and more subtle. The notion of woman as sexual object leads to a combination of generalizations and fears about women's appropriate roles. Keeping women out of the workplace because of a fear of the disruption of work by sexual tensions punishes women, unjustifiably, for the foibles of men. For it is the commonplace notion, and equally stereotypic one, that men are more interested in sex than women so it is for their protection that we keep women out of the workplace.²⁰ The other side of this insidious coin is that intimacy at work is to be prevented at all costs (by shutting out half of the workforce) because of its threat to our strongly held values of work efficiency and family life and the necessity and desirability of severing the two.

For a long time (and I am not sure it is over yet), these notions prevented women from entering many workplaces at all, including the law school, by affecting hiring decisions.²¹ To the extent that women

19. Law, S., Personal and Professional Roles in Their Economic and Sexual Contexts, 53 N.Y.U. L. Rev. 628 (1978).

20. See Dothard v. Rawlins, 433 U.S. 321 (1977) where women prison guards were excluded from work because of the sexual tensions and potential assaults (no evidence of actual assaults was presented) that would result from placing them near sex-starved male prison inmates.

21. It could be argued that the real reason for lack of participation by women as law teachers was their unavailability -- few female law students and no "highly qualified" teacher candidates. The counter-argument, of course, is that stereotypic notions produced such results both by males making admissions and employment decisions and, to the extent such notions were socialized and internalized, by women themselves in the self-selection process.

do now participate in the law school workplace these stereotypic notions continue to affect collegial relations.

At faculty meetings and other gatherings women members seem not to participate as much as men. This may be attributed in part to many of the same factors discussed above in relation to women's participation in the classroom: passivity, fear of being noticed, pressures of the representative capacity, etc. But in faculty meetings another element, that of entrance into a forbidden tribal meeting, inhibits participation. Women may fear that the unspoken judgment, "you shouldn't be here," will color how any remark is heard. A woman faculty member knows that her high-pitched voice will call further attention to her and so she may feel that her contributions must be more insightful or significant than anything said before. I recently suppressed tears at a faculty meeting on an appointments issue because I feared that such an emotional display would diminish, if not destroy, my credibility on the substantive rational merits of a colleague's scholarship.

Other difficulties arise with colleagues in the establishment of mentor-mentee relationships. Much of the current pop psychology literature urges women to find and cultivate a mentor relationship with a successful male,²² yet the mentor relationship has great potential for exploiting rather than fostering learning relationships. This goes both ways. I am indebted to two of my mentors and have learned much from them but in return I have found myself playing a supportive, nurturing role to them, not unlike the stereotypic wife or mother. To the extent that this is a useful functional role (and I think it is — where is my "work-wife" and supporter?) why shouldn't the role be performed by males for males, females for females (there aren't enough of us yet, especially in the mentor category) and males for females? Again, difficulties with the role come from the blurring of gender quality assumptions (only women are seen as receptive, supportive, nurturing) with the functional roles (encouragement, intellectual validation, testing). Most dangerous in this sort of relationship is the power, dominance and possible sexual tension that results.²³ Indeed, one of the common folktales about discriminatory hiring in law firms is that wives of partners didn't want their husbands working so closely with young female attorneys. To the extent that mentors have the goodies mentees need and want, female mentees may be forced into traditional roles they would rather forget.²⁴ Finally, in such relationships as in all relationships one must again ask "Who does the dishes?"²⁵ both in the relation-

ship and in the law school. Are female mentees more likely to do unpleasant clean-up jobs (taking notes, playing secretary, arranging travel plans, etc.)?

Women as law teachers have other difficulties as colleagues. How often are they asked to perform their stereotypic roles with the expectation that they will provide the emotional texture in the law school (expressive rather than instrumental leadership)? For example, by acting as advisor to students (see below), as the social or political conscience of the faculty (reminding them of affirmative action requirements), in the courses taught (Family Law, Trusts and Estates, Women and the Law). (Why indeed are these courses considered the "soft" courses -- because they are taught by women or because they concern themselves with women's concerns, i.e. family, affective ties, personal relationships?) These are valuable functions to be performed, and yet the fact that they are so infrequently performed by men in the law school may characterize them as not the "serious" or "real" work to be done. It is no excuse for them to proclaim they do not have the necessary "emotional" or "expressive" experiences. They must acquire them as women must acquire other new experiences.

There are differences in the ways male and female colleagues reflect on and share their teaching experiences. As a woman, feeling partly as an outsider in a male institution, I express my doubts, I seek advice, I suffer and show it. My male colleagues, at least at the early stages of their careers, must feel insecurity. But, there seems to be a strong, almost warrior-like ethic about non-disclosure. Sharing one's insecurities and doubts, both with one's students and one's colleagues, can be a valuable learning experience, confirmation of the universality of doubt, insecurity and the need for approval, exposure to other teaching methodologies, suggestions and the exchange of ideas. The male individualistic academic success ethic seems to preclude much that is the touchstone of academic collegiality. Perhaps a woman's willingness to expose her need for approval can be effective in opening up direct communication with one's students and colleagues. If our basic need for approval is not met we will be trapped in doubt and unable to function fully. Women recognize this need and attempt to deal with it directly. Men are more likely to sublimate this need and are, therefore, sometimes unaware of their own inability to function at maximum capacity. Openly expressing a need to be loved, appreciated, cared for might do much to disarm the not-so-hidden agenda of debilitating, individualistic competition that pervades law schools.²⁶ More importantly, dealing directly with the need for approval might improve the educational process by providing more direct feedback to students and teachers. The sharing of ideas and feelings together might create the sense of connection and community that collegiality is intended to provide.

22. See e.g., Canale, J., The Women's Guide to Management Success (1979).

23. Illustrated by sexual harassment of students by teachers (i.e., the recent case filed against a Yale professor) and of employees by their supervisors (MacKinnon, C., Sexual Harassment of Working Women (1979)).

24. Much of what has been said here may be true of all unequal power relationships. I suggest only that there may be added dangers in cross-gender relationships.

25. Law, S., Id.

26. Savoy, P., Toward a New Politics of Legal Education, 79 Yale L.J. 444 (1970).

The absence of role-models may make behavior modeling more difficult for women novitiates than men. (Again, this is a conflict for me; I want both a functionally relevant model of a good law teacher, without regard to gender, from whom to learn and I want to know how someone like me (and maybe different from the others) made it.)

In placing work above family, or at least equal to it, does a woman law teacher open herself up for stereotypic sexist criticism? The law may be a jealous mistress for a male law teacher but it isn't quite the same as a jealous master for a woman; the male law teacher is still in control of his mistress (with sexual connotations) but the woman is controlled by her master.

These examples of difficulties highlight some of the ways in which women law teachers feel isolated from their male colleagues. To deal with the isolation women teachers, like women everywhere, have formed supportive networks with each other. This type of supportive collegiality with both intellectual and emotional support components might serve all legal educators as well.

C. Women with Students

There are dilemmas that women law teachers face with students both individually and in class. As a woman with stereotypically socialized nurturant characteristics I want to befriend and guide my students. This is verboten in the law school environment for many reasons: 1) one cannot be intimate or close with so many people; 2) stereotypic notions of sexual propriety may be violated; 3) there may be perceptions or feelings of inequalities among students and accusations of favoritism may be made; 4) dangers of exploitation along the mentor-mentee dimension may develop and are viewed as far less socially acceptable if the woman is the mentor; 5) student counseling is time-consuming and will not allow sufficient time for research and writing; and 6) teacher-student friendships in general violate social class norms within the law school. (Confidences may be spilled, etc. The teacher-student classes must always remain separate.)

Yet the potential of learning from and with bright and eager students is what brought me to law teaching in the first place. If I can't make the most of such relationships and learning what am I doing here? Once again I am faced with conflicts between my personhood and expectations of how I should play out my professional role in adapting to the norms of the tribe. The creation of nurturing and intimate relationships with children, with friends and with relatives is also considered a peculiarly feminine ability; yet the male law school environment discourages such relationships, unless, of course, they are based on male principles, i.e., athletic camaraderie. One need only look at the source of most learning, the family, to recognize the importance of intimacy in the learning process.

Even if I go my own way and happily accept my role of teacher-as-friend, as a woman teacher I may be faced with additional burdens. Once again I as Woman Law Teacher in my representative capacity. I am

asked to befriend or be a role model for many, if not all, of the women law students; I am asked to counsel them in their course selections, career choices and personal difficulties, and asked to speak at women's group symposia. All of this I want to do and yet by playing this woman's role I am left with little time to do much else -- once again imprisoned by my nurturing role (both because of the expectation that I will conform to stereotypic notions and my willingness to accept it). If others in the law school, i.e. more male teachers, would see the value in nurturance functions, those few of us who do most of it for the law school would be relieved of some of the burden while others would share in some of the benefit.

D. Women as Lawyers - In the Courtroom and in the Office

Because I am conscious of teaching students who will soon take their professional positions in the world, I am aware of the stereotypic notions of appropriate lawyer behavior my students will face upon leaving me. They will be faced with the double dilemma of not being considered to be strong enough to undertake "male" or aggressive roles in the office and courtroom and they will not have their "female" or interpersonal qualities properly credited as useful attorney skills. So long as both aspects of this gender-role stereotyping are perpetuated neither women nor men attorneys will be able to test what is really the most "effective" lawyering. We are just beginning to look at what makes some forms of lawyering more "effective" than others and a full range of individual, and not gender-restricted, expressions of lawyering skills and tasks would give us a better idea of what "works" in what circumstances.

I am faced with the dilemma of teaching my students to take chances in the courtroom, to refuse to deliver the gender stereotyped behavior, potentially at the risk of adversely affecting their clients, or to perpetuate a system which sees the lawyer only as a white male in a three piece suit with a booming voice. For example, recent scholarship in sociolinguistics tells us that women are expected to, and do, behave differently in the courtroom than do men. Women are expected to be even more deferential to judges and juries and they confirm such expectations by speaking softly, gesturing less frequently and by being less definitive in their arguments.²⁷ I remember an incident in which, at the risk of affecting my client's case, I refused to argue with the judge about the propriety of my hyphenated name. At the conclusion of the case, my client said, "If you won't stand up for yourself, how can you fight for me?" We must examine why courtrooms have been seen as arenas of harsh, warrior-like battle and why the male norm of conflict has prevailed so strongly in that arena, that "soft" or gentle women are seen as inappropriate or ineffective participants in courtroom litigation. What could the courtroom look like and sound like if Perry Masonesque harsh cross-examinations were not the rule? (In my experience witnesses seldom "break down" under the verbal brutality that is associated with male domination of the witness on television.)

27. Veach, S. "Linguistics and Women Attorneys in the Courtroom" in Eleventh National Conference on Women and the Law Sourcebook (1980).

In the office, as well, the full range of lawyering repertoires is not used to full advantage. Women who are supposed to be "good at detail" are happily utilized as researchers and less often employed as lawyers with client contact responsibility. To the extent that the stereotypes that women are "good with people" are true, shouldn't women be doing the initial interviewing that begins and perhaps controls the attorney-client relationship? Law offices tend to choose "tough and hard" (and, therefore, male) attorneys for negotiation tasks. Yet my own teaching and empirical research on negotiations²⁸ have demonstrated to me that a cooperative and problem-solving approach, used more frequently by women, may accomplish the same or better results, in shorter time periods, than the more competitive, zero-sum game approach used in negotiations by men.

My students must develop their fuller and less gender biased lawyering repertoires in law school, before the power of experienced role models in the workplace displaces all impulses away from conformity and toward creativity and innovation. While the number of women law students increases each year, the increase in aggregate numbers does not make individual choices about how to carry on as a lawyer any easier in a world which rewards repetition of old patterns. As long as apprenticeship remains the norm for professional education and socialization to the workplace, my students will learn their lawyering skills not in an increasingly feminized law school, but in the courtroom and law offices that remain the last bastions of male dominance in the law.

E. Women and the Law

No treatment of women in legal education can ignore the relationship of women to the subject matter of the law school -- the law itself. The development of a theory about the relationship of women to law is in its infancy and cannot, therefore, receive more than cursory treatment here. One view is that the law, as a man-made institution, is a means by which the social fact of patriarchy has been preserved, with the effect of disenfranchising women and forever alienating women from an understanding or appreciation of the law.²⁹ This view of law sees law as a device for the control of women, the subservient, by men, the powerful. Another view is that, although it may be man-made, law is a more neutral tool which can be used to empower and enfranchise the less powerful. This latter view has dominated much of the legal literature in the women's rights field and the legal strategies used to combat gender discrimination.³⁰

28. Menkel-Meadow, C., *Toward Another View of Legal Negotiations*, (forthcoming).

29. At least one commentator has argued that the law may be unable to absorb the feminine, as it has served to perpetuate the male-dominated rule of patriarchy. Rifkin, J., *Toward a Theory of Law and Patriarchy*, 3 *Harv. Women's L.J.* (1980).

Whether law is perceived as an agent of control and domination and therefore viewed hostilely by women or rather as a means to full participation in the world, with a more benign regard, women will, for the most part, see law as Other -- as created by men for their own ends. This is a perspective I have when I teach or look at virtually any subject matter. (It is most obvious in subjects such as property with its doctrine of coverture, male control over community property, etc.)

Yet law is also a process for achieving certain human ends; justice, mercy, fairness, equality, etc., and this process notion seems entirely compatible with the feminine qualities discussed above. So, in looking at the law in its most abstract forms or in the particulars of an area of legal regulation, I can ask how would this rule or doctrine be different, if at all, if it were drafted or conceived of with feminine values, qualities or principles in mind? How might the feminine concerns of *how* we do things as well as *what* we do, for what reasons, expand our conception of the law? How would the world be ruled if every court had a male and female judge,³¹ every legislature a balanced number of male and female consciousnesses and every law office a team of male and female decision-makers in every lawmaking and law-enforcing activity? As long as law remains primarily male made, enforced and dominated it remains difficult for me to embrace it fully. To the extent that hope remains that law can help us to be better to and with each other, it offers possibilities for bringing us together. That is why I continue to study it and why I think it is still a possible source of social, political and even, perhaps, psychological change.

III. Toward a Fuller and Feminized View of Legal Education

The age of total exclusion and discrimination against women as law students, law teachers, and lawyers is almost over. The increased presence of women does not necessarily resolve the issues raised by gender differentiation in the law or in legal education however. The discrimination against women as people and individuals was and is still based on a devaluing of feminine or female qualities: "softness, personal warmth, empathy, sensitivity, emotionalism, grace, charm, compliance, dependence and deference."³² To the extent that these qualities are perceived as inferior, dysfunctional or inconsistent with man-made law, and legal education, the presence of women will not necessarily change anything. Men desiring to exhibit these qualities will feel as put down as women who have them and as out of place as women who do not have them and want to be seen as tough, sharp and strong.

31. I am indebted to Janet Lederman for exposure to the practice of this very interesting idea.

32. Epstein, C., *Woman's Place: Options and Limits in Professional Careers* (1970); Cavanaugh, B., *A Little Dearer Than His Horse: Legal Stereotypes and the Feminine Personality*, 6 *Harv. Civ. Rts. L. Rev.* 260 (1971); Goldberg, C., "Issues of Special Concern for Women" in Gillera, S., ed. *Looking at*

The challenge for women law teachers is to choose, in adapting to new roles and situations, between conformity and innovation. Every day I feel the pressure to conform to stereotypic notions of the law teacher role -- aloof, tough, aggressive, controlling. Yet it is when I depart from these stereotypic qualities that I feel more fulfilled. Rigor is not inconsistent with warmth -- in fact, warmth may facilitate the engagement from which rigor may be pursued.

When we begin to look critically at the assumptions, projections and generalizations on which we operate, act and make judgments, we as individuals may be more likely to look at ourselves, our colleagues, our students and our institutional structures more closely. Some behaviors and attitudes may change. Groups or individuals who previously saw themselves in opposition might share work on areas of points of agreement and then, disagreement. New ways of interaction or more conscious and less reflexive interactions could develop. To the extent that women law teachers have insights, teaching methodologies and other qualities that are new to legal education and equally or more effective functionally in educating law students and teachers, legal education may be able to absorb and make use of these new qualities in a way which will both enrich legal education and the individuals in it. Once we begin to reduce the gender-stereotyping of human qualities we will broadly expand the teaching and lawyering repertoire.

Stereotypes and generalizations limit our view of the world and the people in it as well as limiting our behavior and relationships with others. As new individuals join the ranks of the white, middle-aged male profession of law teacher the challenge will be to expand our notion of what is appropriate law teaching, developing a repertoire of masculine and feminine qualities for all -- not to require the new entrants to the profession to conform to the old and outmoded conceptions of law teaching and lawyering. The possibility of ending discrimination is not just the "liberation" of women but the diversification and liberation of legal education, the lawyering profession and all of the human beings affected by the legal system, producing a more humane system for all.

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This will be the beginning of a long and developmental process for us all. For most of us this means looking closely at ourselves, at our own qualities, and seeing what we want more of and what we want less of in our gender-differentiated behavior and values. We must then, of necessity, turn outward and begin to see how the world and the institutions we inhabit permit, encourage or inhibit the full expression of our values and beings. We must then combine an individual, psychological inquiry with an institutional political struggle. For it is not enough that more women inhabit the law school. If emotion, nurturance, vulnerability, compassion, cooperation, attention to means and intimacy are to take their place beside rationality, competition, justice, strength, attention to ends and efficiency in the law school all those who join together in the study of law must find in themselves and in others the integration of the masculine and feminine principles that is the partnership of our humanity.

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ESSAY

The Legal Education of Twenty Women

Catherine Weiss*
Louise Melling**

I.

Powerful men made American law and American law schools by and for themselves. While law faculties and the legal profession remain overwhelmingly male,¹ law schools are admitting increasing numbers of women.² Many of these women find legal education alienating. This essay documents the experiences of twenty women in the Yale Law School class of 1987 who organized and sustained a women's group in which we revealed, explored, and confronted our alienation.³ The sections of this essay show four faces of alienation: from ourselves, from the law school community, from the classroom, and from the content of legal education. We write to further understanding of our experiences, to urge change, and to help others who have experienced law school in a similar way to move beyond self-doubt.

The introduction articulates the premises of this study, reviews empirical literature supporting these premises, and explains our methodology. It also tells the history of the women's group and introduces the

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1. In 1985, men composed 80.9% of all full-time and 81.8% of all part-time faculty at ABA accredited law schools. *A Review of Legal Education in the United States*, 1986 A.B.A. SEC. LEGAL EDUC. & ADMISSIONS TO THE BAR 66 [hereinafter *A Review of Legal Education*]. In 1985, 86.9% of all lawyers were men. B. CURNAN, K. ROWICK, C. CARSON & M. PUGGETT, SUPPLEMENT TO THE LAWYER STATISTICAL REPORT: THE U.S. LEGAL PROFESSION IN 1985 at 3 (1986).

2. In 1985, 40% of law students at ABA accredited law schools were women. *A Review of Legal Education*, *supra* note 1, at 66. In 1970, by contrast, only 8.6% of law students were women. *Id.*

3. We (the authors) helped to organize the group and joined in nearly all of its activities, bringing the number of regular participants to 22. Because we base this essay on our interviews with the 20 regular participants (other than ourselves, however, we treat the group as including 20 women).

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IDENTIFICATION WITH WHOM?

Katherine O'Donovan*

In Colm Toibin's novel The Heather Blazing! the protagonist is an Irish High Court judge. Central to the fleshing out of this man's character by the author is a depiction of his exercise of the judicial function. The High Court case to be judged is straightforward: an application for a court order instructing a convent school to re-admit a sixteen-year-old after the delivery of her child as a single mother. Both the mother-to-be and her own mother give evidence of their belief that stigmatization of unmarried parents is reserved for women, and that this youngster is the victim of injustice. The principal of the school argues that she has to protect the ethos of the school, despite its status as a state educational establishment. The judge is faced with a dilemma:

In the end he was not the legal arbiter, because there were so few legal issues at stake. Most of the issues raised in the case were moral; the right of an ethos to prevail over the right of an individual. Basically, he was being asked to decide how life should be lived in a small town. ...

He went to the window again and stood there looking out. How hard it was to be sure! It was not simply the case, and the questions it raised about society and morality, it was the world in which these things happened which left him uneasy, a world in which opposite values

lived so close to each other. Which could claim a right to be protected?²

The idea comes to him that the young woman and her child might be a family unit, entitled to protection under the Irish Constitution. The idea seems plausible, but would require a great deal of thought and research.³

"If he were another person he could write the judgment." But he feels safer with the judgment he has written, in favour of the school which,

would be viewed as eminently sensible and well reasoned. But he was still unhappy about the case because he had been asked to interpret more than the law, and he was not equipped to be a moral arbiter. He was not certain about right and wrong, and he realised that this was something he would have to keep hidden from the court.⁴

In puzzling over his judgment the judge is uneasy because he feels he is being asked to depart from what he sees as the judicial function. This is a matter of personal definition of his role, but it is also a matter which continues to fascinate judges and academic commentators. It is not always possible to draw a line between judging law and judging morals.⁵ It is with the role of adjudicator of law that the judge feels safe, with which he identifies. His view of his role is an internal view, yet he worries about the public reception of his decision. The author succeeds in presenting an external view of the the man, with a suggestion that a more imaginative, or even empathetic, judge would have asked counsel to address him on the constitutional aspects of the case.

A particular twist to the story is given when, on leaving court the judge goes

on holiday with his daughter, herself an unmarried mother. Throughout his cogitation about the case no reflections about his daughter's life enter his mind. He does not identify with her, or with his grandson, or so it seems to this reader. It is not intended, by this reading, to suggest that the judge *should* identify with unmarried mothers in particular, or in general. The literature on the role of the judge in a democracy constantly emphasises the need for objectivity. This paper has as its object a discussion of the development of a capacity for empathy in legal education, and in the lawyering and adjudicative processes. To this end the place of literature in illuminating the study of law is examined.

The argument that literature can enable imaginative leaps and empathy, thus developing a sense of justice, has not been put forward in a sustained way by writers on law and literature. There have been such suggestions.⁶ The case in favour posits that by allowing the reader to enter into the experiences of characters in drama or novel, in biography or autobiography, literature can broaden and deepen feelings of empathy. Arguments for the development of empathy in education are various. They include ethical arguments about deepening imaginative experience, sharing the feelings of others, understanding others, finding expression of one's own and others' experiences and emotions, foreshadowing and anticipating future experience of life.⁷ There are also arguments about improving legal skills and the lawyering function.

The major argument is a moral argument. To understand the consequences of our actions on others, we need to understand the perspectives of those others. 'Do as you would be done by', is one version of a moral code. In Kantian

terms this is expressed as follows: 'act only on that maxim through which you can at the same time will that it should become a universal law'.

Social and political aspects of what we think, who we are, our attitudes and values, may be opened up for exploration through the discussion of stories. Persons such as lawyers and politicians, who make decisions affecting others, may become better qualified to do so by such experience. As yet the importance of empathy, or at least sympathy, for a democratic society remains relatively unexplored. However it is often said that standing in the shoes of another, in one's imagination, facilitates social arrangements for sharing and for social justice. When theorists try to imagine a fair political or legal system their appeal may be on the level of "imagine how it would feel";⁸ or it may be "how would you like it if you were poor/stigmatised/ill?" The former appeal invites us to use our imagination in order to empathise with those less fortunate than ourselves; the latter appeal is closer to a Rawlsian strategy of risk aversion.

In discussing arguments about reading aiding the development of empathy I am conscious of objections. A critical assessment of such arguments is necessary. For example, entering into the experiences of another through imagination often involves identifying with the chosen subject. This suggests elements of choice for the reader. She may or may not identify with a particular character or dramatic persona. If citizenship of a society includes an obligation of abstraction - a stepping outside one's commitments and seeing one's point of view as one among many - then imagination is to be encouraged. But if we are limited persons, as indeed we are, we may lack the capacity to identify with those others who are radically different from us.

Or we may, for personal reasons, identify with the oppressors rather than with the oppressed. There are, doubtless, a number of ways in which empathy can be developed, including creative use of case law. Arguments for law and literature studies as developing empathy are scrutinised particularly through advancing counter-arguments. If a core of conviction remains in favour, then a case will have been made out.

empathy and experiences

'Legal decisions and lawmaking frequently have nothing to do with understanding human experiences, affect, suffering - how people *do* live.'⁹ Legal discourse precludes affective argument in the view of Lynne Henderson. The ideology of legal education and legal argument excludes emotion and arguments based on personal experience.¹⁰ In contrasting empathy and legality Henderson finds three phenomena captured by the language of empathy. She categorises 'feeling the emotion of another', and 'understanding the experience or situation of another, both affectively and cognitively' as ways of knowing; whilst the third form, 'action brought about by experiencing the distress of another' is presented as a catalyst.¹¹

In urging reading as an aid to empathy it is sometimes suggested that the reader may thus enter into the experiences of another. But it is doubtful whether this can occur fully. It is more likely that we relate what we read or hear to our own experiences. This has been expressed as follows by John McGahern in The Leavetaking:¹²

It's like an American breakfast. Except the coffee is better in the States," she said, and began to tell me her life. I

finger her words like worn coins as I remember her voice in the little café. I try to animate them by turning them into my own life, I garland them with memory, embellish them with what I know, and remember in some dismay that we can only love what we know.

A child is riding on a bus from her school in the Berkshires into New York. Her father is waiting for her at the terminal with tickets for a concert he has promised to take her to for her birthday. His eyes light on her gloveless hands as she gets off the bus and he is furious she is not wearing one of the pairs of white gloves he gave her for the birthday and he returns her to the school on the next bus back to the Berkshires. And that bus will be forever in my mind a green bus moving between the whitehorns of Ireland... and the child riding back to the Berkshires is not my beloved when she was young but some sister on a day a waxen head of a doll had shattered. I watched my own words too pass behind the mask of the lovely face across the table; and if that seachange happens to your coinage, my love, what may become of mine?

From this passage what emerges is that, even as we try to imagine the lives of others, we return to our own experiences in so doing.

identification

Sympathetic identification with others is a basis of ethical experience, but there is no law of reading which states that readers must identify with one character rather than another. So it is also in life. Peter Van Daan in his

wartime attic hiding-place confides to Anne Frank his uneasiness in being a Jew and how he would have found it much easier if he had been a Christian, and if he could be one after the war. His hope for the future is to go to the Dutch East Indies and live on a plantation.¹³ One interpretation of this desire for the future is that Peter hopes to find in colonial life an independence and power he cannot have as a Jew in Europe. This interpretation is not intended as a criticism of Peter. Given his miserable existence in hiding, and the threat to his life, it is hardly surprising that he dreams of another existence. Given the social stigmatization of his identity, it is not surprising that he seeks a different identity. But my interpretation is intended to illustrate the point that choice of identification is possible. Because of their stigmatization and victimization some identities are subordinate, or possibly dangerous. Such identities may not be identified with, even by those categorised by others as having such identities. So we may choose who we identify with and whether or not to identify with the victimized or the stigmatized. One of the more powerful arguments for reading imaginative literature is that it gives voices to those often not heard. It is in the pages of literature that we find the excluded.

It must also be acknowledged that the phenomenon of unreflective empathy exists, in which we identify with those persons or characters whom we perceive as being like ourselves.¹⁴ This has been recognised by decision-makers, such as judges, as limiting their neutrality or objectivity.¹⁵ It is not just that such understanding is so automatic that it goes unnoticed by the empathizer, but that literature offers opportunities for contested readings. How one reads may relate to one's own values.

A caveat must be entered to the theory that understanding always leads to morality and justice. For example, understanding the feelings of another may increase cruelty, manipulation and sadism. The bully may use his knowledge of his victims' vulnerability to inflict pain more successfully. Bernard Williams makes this point: "But one thing that must be true is that the insightful understanding of others' feelings possessed by the sympathetic person is possessed in much the same form by the sadistic or cruel person; that is one way in which the cruel are distinguished from the brutal or the indifferent."¹⁶ However, this is not an argument against empathy, but rather a caution; for as Williams says elsewhere, "sympathetic identification with others...[is] basic to ethical experience."¹⁷ Such experience may be lacking in law students at the beginnings of their working lives, who may nevertheless arrive at some understanding through reading.

our identities

Working out who and what we are is a major preoccupation in most lives. Some aspects might seem to be given: our genes, our bodies, sex, colour, appearance. Yet doubt has been cast on the extent to which such material aspects of the self are fixed. Geneticists, whilst positing that genes can be mapped and located for physical and mental traits, including criminality, also propose that DNA will enable the elimination of 'undesirable' genes. In other words some scientists argue that the fixedness of genetic inheritance can be changed through science.¹⁸ Significant academic writers also argue fluidity and even plasticity of the self.¹⁹ The relevance of this new 'fluid identity' is that it appears to deny the limitations of our actual identities - limitations to cognition of difference - limitations to empathetic identification with others. The agenda of choice presented includes not only

our outward and inward selves, but also the very material, DNA, of which we are made.

I have argued elsewhere that this is a mistaken agenda.²⁰ Firstly, most people have little or no choice about their genes. Secondly, parental choices about the genetic make-up of their children are largely negative choices. These are choices not to reproduce with a particular partner, or at all.²¹ Thirdly, the idea of changing genes, because of alleged criminality, for example, pre-supposes current beliefs in genetic essentialism.²² A debate about change starts from a premise of fixedness. An alternative method of analysis, I suggest, should start from the social interpretations placed on embodiment and external appearances. For purposes of this paper we must consider how such interpretations construct and limit the possibilities of what a person can be. It may be that empathy, or imaginative sympathy, developed through reading and discussion can challenge social interpretations which stigmatize and victimize. Whether this is expressed in terms of the 'neighbour principle' or of Kantian universalizability, is of lesser significance. At present, external interpretation allied with internal self-identity limits the possibilities of empathy for, or identification with, others.

I have already suggested that empathy requires a stepping-aside from our own self-interest, emotions, and immediate concerns. This does not necessarily involve leaving our own identities behind; for it is possible to build into our identities a capacity for empathy. I am deliberately presenting this as a social trait, a social choice, rather than as an inherent or genetic trait.

The stepping-aside under discussion here is intended to deal with a different scenario from the mind experiments involved in the Rawlsian social contract.²³ Rawls argues that his principles of justice will be chosen under a veil of ignorance because no one will want to risk ending up poor or oppressed. In a sense, Rawls assumes self-interest, albeit in a highly theoretical scene. This paper addresses the practicalities of the education of real people who already exist in a world of identities.

what has this to do with legal education?

Dissatisfaction with the current state of legal education has led to law and literature courses. There may be disagreement over the concept of justice and what it requires. These are moral arguments. So if a theory concerning the educative possibilities of law and literature can be elaborated, its value in teaching may go beyond the undergraduate classroom. However, the criticism may be levelled at existing advocacy of law and literature courses, that specificity of why, how and to what effect is lacking.²⁴

In relation to undergraduate legal education, I see a role for literature and drama in teaching legal ethics. The consultation paper on the initial stage of legal education published by the Lord Chancellor's Advisory Committee on Legal Education and Conduct includes the theme that "legal education should stress the ethical values upon which law is based."²⁵ Later the paper states that to "understand the law, it is necessary to understand its moral quality."²⁶ This is more than professional ethics, which occasionally may provide a cover for unethical actions. It is also more than deconstructing the content of substantive law for its moral content. It is self-evident

that study of, for example, criminal law will include a discussion of responsibility. But surely the teaching of legal ethics must go further? The consultation paper recognises that the lawyers, in the conduct of legal affairs may be open to criticism, but the moral content of the law may also be subjected to critical scrutiny: the ought in addition to the is. Moral dilemmas, of the kind posed regularly in law and medical ethics courses, do not necessarily permit of an absolute answer. Nevertheless classroom discussion is valuable where it permits the expression of plural perspectives, a variety of narratives, and differences. If this comes about it will be a change for law students; in general argument on levels other than the legal is not welcomed in the classroom.

A debate about the values and limits of law and literature studies continues in American legal education. Although there is consensus that the 'professional voice' with which students are taught to speak from their earliest days in law school is an impersonal abstract voice, there is disagreement as to the adequacy of this voice. "The magical moment at which the 'light dawns' and bewildered first-year students are transformed into lawyers occurs when this [the professional] voice becomes the student's own"²⁷ is seen by some as the moment when the human voice is lost. The professional voice has been criticised as using language which "removes some of the feeling and empathy that are part of ordinary human discourse"²⁸ and the argument has been advanced that to "represent people adequately a lawyer often must use her capacity for empathy".²⁹ Participants in this debate are agreed in their dislike of pompous rhetoric, unnecessarily technical language, and elitism. The doubts expressed concern the undermining of formal justice. The imposition of some form of order on differing claims and diverse voices is

advanced by defenders of current legal education as an inherent part of the task of law and lawyers.³⁰ A consensus about the need for both voices, the human and the professional emerges. The difficulty is to find appropriate places for each and to allow space for both.

This disagreement, explained above, touches on differing views of priorities in law's functions. Shared ground about the goals of legal education can be discerned. Others see a quite different role for law and literature studies, and offer a communitarian vision of law, "not as a system of rules or bureaucratic mechanisms, but as an activity of mind and language, to the understanding of which parallel activities can be helpful".³¹ This is a vision of law as a set of people talking to each other, using language, a rhetorical activity aided by the study of literature. Yet it can be presented as concerned with legal education. The major divide is between those who see literature as improving the present model of legal education and those who see such studies as providing a place from which to mount a critique of law.³² There may be possibilities to do both.

Thus far it has been argued that empathy is an important capacity to be developed in legal education, as basic to ethical experience, and as improving legal skills. The examination of empathy as providing a basis for critique will now be made. If a further step is made of understanding those whose perspectives and voices are excluded by law, whose subjectivity and experiences are not included in legal imaginings of how things should be, then this may provide an understanding from which to be critical. It is difficult to provide an external critique from an insider's perspective. Law has its own internal viewpoint, its own order, a relatively autonomous coherence.

Pointing out internal inconsistency is a different activity to pointing out injustice.

The consultation paper on legal education assumes that legal ethics can be learnt from law, that law is moral by definition.³³ If this is so, it becomes difficult to criticise law from the moral point of view, since the law itself is taken to be moral. Where can a place be found outside the law from which to be sceptical or critical? One answer offered is the analytic methodologies of the humanities of writing, reading and responding to narrative texts.³⁴ It is in this response that an empathic understanding of others may develop.

limits to identification: adjudication

Thus far it has been argued that personal identity may limit identification. There may be many reasons why this happens, including the tragic example of Peter Van Daan.³⁵ In order to empathise, particularly with those others whom we see as different from ourselves, we have to stand back from our own personal interests, identities, fears, emotions. This is what lawyers and judges claim to do in handling and judging law cases. Yet is it so easy for us to leave our identities behind when we don a particular garb? That garb marks us externally as 'lawyer' or 'judge'. That particular identity is part of our larger identities, but does the larger identity disappear?

This paper argues that it is not possible for us to abandon our larger identities by putting on one aspect of our identities. Furthermore our identities may limit the possibilities of empathetic identification as we listen or read. Nevertheless reading can involve some entry into the experiences of the characters or dramatis personae depicted. Many possible

examples to illustrate this are available, involving persons differentiated from the reader (or judge) by class, gender, race, religion, ethnicity. Given that hitherto, most members of the higher judiciary have been men with a particular background and training, questions of empathy unawares with persons identified as similar arise. Where future decision-makers are being educated the enhancement of their abilities to listen to others, to understand alternative viewpoints, to appreciate the human meanings of legal rules and processes is desirable. However the judicial role requires that a decision be made. It is unlikely therefore that the judge can move very far from his judicial identity. Judges know this and have particular ways of explaining this to themselves and others, a story about the judicial function.

Stories about the role of the judge can be told from a number of viewpoints. Of these the internal and the external dominate. From the internal point of view the process of adjudication is "entirely predicated upon the assumption that the judge's task is to find the right answer".³⁶ This is how judges think about what they are doing. In this story, the sources of the right answer are limited to principles which can plausibly be derived from earlier cases and from statutes. From the external vantage point things look rather different. Firstly, there are cases in which, by implication, judges admit that they were wrong in the past.³⁷ Secondly, there are cases in which the result is dictated by public policy, in which impartiality cannot be claimed. Thirdly, there are cases which may find the right answer from an internal viewpoint, but which are perceived as wrong externally. In the latter two cases it may be possible to say, "I am stating what the law actually is". However the first case is harder to account for.

An example of a series of cases in which the answer was wrong externally, if not internally, is the marital rape saga. A change in the law, recognising a wife's autonomy in decisions about her sexual relations with her husband, was covered in the bland phrase 'changed social conditions'.³⁸ Although the judges involved in previous decisions denying autonomy might have claimed that they were trying to find the right answer, or even that from an internal view that the answer was right, such claims are problematic from an external point of view. Not to recognise this, and to claim that the insights of the external view "are trivial and unhelpful",³⁹ is a failure of empathy. It is also a narrow definition of the judicial role. It cannot be denied that the very nature of judicial decision making as conceived of internally, involves exclusion.⁴⁰ Whether the internal viewpoint is distinguishable from the institutional viewpoint is open to question. The trouble for law is that external viewpoints have justice as their referent.

Each person's life is a story. Each trial, or law case, tells a story. Who is the narrator? Who is the interpreter? Who chooses between competing stories? Who is in command of language, definition and decision. These are questions about power.

The literary account of law can be about resistance. It can tell us what the coercive theory leaves out - how it feels to suffer under law. It offers a critique of law's injustice. It offers an external view. But literary works are themselves the creatures of a particular time and place. Textual representations of those silenced or excluded by law may enable an interrogation and cross-examination of law, but they are themselves limited. Nevertheless, in drawing attention to inequities arising from law's

exclusions, they are a valuable supplement to legal texts.⁴¹

identification unawares?

In a characterization of feminist work in law as motivated by love and rage, Robin West makes a distinction between the 'cognitive' position and the 'moral' position. The cognitive position is "that an empathic understanding of the differences of others... constitutes an important source of information about the totality of persons who will be affected by a legal decision."⁴² The moral position is "that empathic understanding of and sensitivity to the context in which differently situated others find themselves is but one aspect of a truly caring relationship with those others..."⁴³ West advocates the latter position as reclaiming love as the root of morality; going beyond understanding to lessening a burden. "Sensitivity to difference is part of the work of sympathizing with the pain of others to work towards lessening that pain."⁴⁴

There is much to admire in this advocacy. But it is directed to feminists working and writing in law. It does not confront the reality that most legal decisions are made by persons with a particular kind of embodiment and identity. If such decision-makers can be persuaded of the cognitive position, this will be a gain. But how is this to be done? Some writers have entered doubts on this question. Maria Aristodemou raises the question whether morality can be taught at all and, if so how.⁴⁵ As she points out such questions bring us to contested views of human nature, of knowledge and

learning, of the ideology of education, which is itself part of society. For her literature's service to legal studies may lie in providing a base from which to challenge the dominant ideology. In this the possibilities of subjective and contingent values are to be welcomed.⁴⁶

Thus far it has been argued that each person is limited by her or his own identity and may thus be precluded from identifying with others. Furthermore, faced with an opportunity of empathetic understanding we may refuse. Classroom discussion will not necessarily overcome resistance. Nevertheless, I want to argue that conscious refusal to identify with particular characters - perhaps precisely because they are victims - can be analytically distinguished from those identifications which we make unawares. It is these latter identifications which can be confronted and made explicit in successful discussion of literature. It is not necessary to make over-general claims about the beneficial effects of literature. I am aware that an academic assumption that reading teaches the reader is naive. Literary scholars deplore such a use of texts. Yet the idea that personal limitations of identity can be expanded in shared discussion of a text does have relevance to teaching of legal ethics. The multiplicity of readings adds to the possibilities, rather than hindering them.

It has become a truism of feminist and of critical legal scholarship to state that legal decision makers are not objective or neutral - in the sense that such a way of being is superhuman. The judiciary itself admits as much. Thus, Lord MacMillan has said that the lofty judicial duty of impartiality is not easy of attainment.

"The ordinary human mind is a mass of prepossessions inherited

and acquired, often, none the less dangerous because unrecognised by their possessors. Few minds are as neutral as a sheet of plate glass, and indeed a mind of that quality may actually fail in judicial efficiency, for the warmer tints of imagination and sympathy are needed to temper the cold light of reason if human justice is to be done."¹⁷

Embedded values, assumptions, beliefs based on experience form part of the identity of adult human beings. For most people this is part of their personality and poses few, if any, problems. But for the judiciary this is another matter. To maintain its legitimacy law must retain the confidence of those whose lives it governs. This argument is not confined to judges. Lawyers, too, need to see their clients as human beings, and to be able to present them, and their stories, as such to the judge.

Conclusion

Arguments have been advanced in this paper that empathy is basic to ethical experience, that empathy can be developed by reading imaginative literature, and that such readings can create a space outside legal texts from which to critique law. It is hardly a surprise that not everyone accepts such arguments. Some believe that interpretation of a literary text which draws support for ethical or political positions is invalid.¹⁸ This seems to be motivated by concern for the principle of freedom of speech, rather than as clarificatory of *which* texts, if any, may be legitimately be called upon in support of a moral point of view. That legal texts, such as statutes and precedent cases may be so drawn upon is not in doubt. But the exclusion of

literary texts as imaginary seems both arbitrary and ignorant of the effect that such texts have had in the past on changing the law.⁴⁹

Analytically, claims about ethical aspects of law may be internal or external. If law is seen by those internal to the legal system as coextensive with morality, that is an internal viewpoint. But if a law is seen and felt by those who suffer its attentions as unjust, those outsiders must be calling on another standard, external to this law itself. Such an external viewpoint may draw on many sources, including other aspects of law. The necessity to dispute the legitimacy of sources must depend on the forum in which they are cited. It is self-evident that literary works cannot be authorities in legal argument. Their role is supplementary. What they can do is to draw attentions to law's exclusions, and thereby develop empathetic understanding. This is an adequate justification for giving a place to literature in legal education.

*Professor of Law, Queen Mary and Westfield College, University of London.

I should like to thank the Law Faculty, University of Southampton for an invitation to spend a week there in early 1993, and particularly those members who spent an exhilarating two hours with me discussing this paper.

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2. Ibid., p.90.
3. Ibid.
4. Ibid., p.92. For similar thoughts about a different dilemma for English judges see note 5, below.
5. For example, in Airedale NHS Trust v Bland [1993] 1 All E.R. 821 Lord Mustill deals with the ethical aspects of the question of whether a patient in a persistent vegetative state should have his treatment withdrawn. In so doing he acknowledges that the line between law and morals is unclear and that the law is in an imperfect state. Lord Browne-Wilkinson reflects that the moral, social and legal issues raised in the case are more suitable for Parliament than for the courts: "The judges' function in this area of the law should be to apply the principles which society, through the democratic process, adopts, not to impose their standards on society. If Parliament fails to act, then judge-made law will of necessity through a gradual and uncertain process provide a legal answer to each new question as it arises. But in my judgment that is not the best way to proceed (at 879).
6. See for example, West, R., "Communities, Texts and Law: Reflections on the Law and literature Movement", 1 Yale Journal of Law and the Humanities, 129 (1988). Richard Weisberg, Poethics: And Other Strategies Columbia University Press (1992) makes a claim for law and literature in teaching ethics.
7. This paper makes a distinction between instrumental legal skills and the development of a capacity for empathy. Although it is tempting to define the latter, but not the former, as ethical, skills can serve the interests of clients and justice.
8. This was the approach of Prime Minister Paul Keating in asking Australians to understand and empathise with the history, experiences and feelings of the descendants of the original inhabitants of

Australia.

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13. The Diary of Anne Frank, Pan Books (1954) p.133.
14. Henderson, supra note 9, p.1381.
15. Scrutton, L. J., "The Work of the Commercial Courts", 1 Cambridge Law Journal 6 at 8 (1921) G. R. Winters (ed.) Handbook for Judges, The American Judicature Society (1973). Wilson, M.J., "Will Women Judges Really Make A Difference?" 28 Osgoode Hall Law Journal 307 (1990).
16. Williams, B., Ethics and the Limits of Philosophy 31 (1985) cited by Henderson, supra note 10 at 1585.
17. Ibid.
18. Hamer, D., and Copeland, P., The Science of Desire, Simon and Shuster (1994).
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22. Murray, C., and Herrnstein, R., The Bell Curve, Free Press (1994).
23. Rawls, J., A Theory of Justice, Oxford University Press (1973); Okin, S., Justice, Gender and the Family, Basic Books (1989).
24. Some academics offer lists of 'recommended books'. Very often these are for 'law in literature' courses, as opposed to 'law and literature' courses. For this distinction see S. Lee, "Law and Literature: Goodbye Austin, Hello Austen," 10 Oxford Journal of Legal Studies 252 (1990). Franz Kafka, The Hunger Artist, and most of Kafka's other short stories and novels are extolled. Dickens, Bleak House is an obvious choice, as are: Hermann Melville, Billy Budd; Shakespeare, The Merchant of Venice; Sophocles, Antigone; Arthur Miller, The Crucible and A View from the Bridge, Camus, L'Etranger. The communitarian strand of the law and literature movement looks to Mark Twain, Huckleberry Finn, Jane Austen, Emma. Then there are the commentaries: Ward, I., "The Educative Ambition of

- Law and Literature", 13 Legal Studies 323 (1993); M. Aristodemou, "Studies in Law and Literature: Directions and concerns" 22 Anglo-American Law Review 157 (1993) makes a distinction between law in literature and law as literature. Ward, I., "Law and Literature: A Feminist Perspective" 2 Feminist Legal Studies 133 (1994).
25. Lord Chancellor's Advisory Committee on Legal Education and Conduct, Review of Legal Education: Consultation Paper, June 1994, para. 1.25.
 26. Ibid., para. 4.14.
 27. Getman, J. G., "Voices" in "Colloquy: Human Voice in Legal Discourse", 66 Texas Law Review, 577 (1988) at p.577.
 28. Ibid., at p.578.
 29. Ibid., at p.583.
 30. M. G. Yudof, "'Tea at the Palaz of Hoon": The Human Voice in Legal Rules" 66 Texas L. Review 589 (1988) at p.590. For Yudof law "constitutes a distinct context of human knowing" (p.590). As a form of order, with a set of principles which transcend individual cases, law is, for Yudof, a means of ordering "the disparate human voices in any legal controversy" (p.590). He acknowledges that legal ordering is spun from the human imagination. His disagreement with Getman is over the idea that neglected human voices should be allowed to establish a form of substantive justice for individuals. To him this "undermines the very idea of formal justice for all"(p.591). ||*
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 33. Supra note 25.
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 36. Hoffman, L. H., Review of S. Lee, Judging Judges, 105 Law Quarterly Review 140 (1989) p.142. ||*
 37. R v R (rape: marital exemption) [1991] 4 All ER 481.

38. Ibid. The history of the marital exemption from criminal prosecution for rape undermines the idea that judges seek the right answer through an examination of legal principles. Where one principle such as the autonomy of adult subjects, conflicts with another principle such as the unity of conflicts with another principle such as the unity of spouses, a judge may choose the 'wrong' principle.
39. Hoffman, supra note 6, p.142.
40. This point was made to me by participants at a discussion of this paper at Southampton University Law Faculty.
41. Brook Thomas, "Reflections on the Law and Literature Revival", Critical Inquiry, Spring 1991.
42. West, R., "Love, Rage and Legal Theory", 1 Yale Journal of Law and Feminism 101 (1989) p.106. *
43. Ibid.
44. Ibid.
45. M. Aristodemou, supra note 24.
46. Ibid., See further Hirshman, L. R., "Brontë, Bloom and Bork: An Essay on the Moral Education of Judges", 137 University of Pennsylvania Law Review 177 (1988).
47. Lord MacMillan, quoted in L. R. Yankwich, "The Art of Being a Judge" in G. R. Winters (ed.) Handbook for Judges, The American Judicature Society (1975) cited by Madame Justice B. Wilson, "Will Women Judges Really Make A Difference?" 28 Osgoode Hall Law Journal 507, pp.508-509 (1990). //
48. Posner, R., Law and Literature: A Misunderstood Relation, Harvard University Press (1988). For disagreement, see M. Nussbaum, Supra note 32.
49. For example, works of literature, such as Harriet Beecher Stowe's Uncle Tom's Cabin, helped to change attitudes to slavery. The short stories of Nadine Gordimer gave a voice to oppressed South Africans. There is a long Irish Tradition of poetry and song of resistance. F. Tennyson Jesse's novel, A Pin to See the Peepshow challenged the conviction and capital sentence for homicide of Edith Thompson. Many writers, including Judge Posner, have used Susan Glaspell's short story, 'A Jury of Her Peers' to bring out alternative conceptions of justice.

EVIDENCE: LL.B (1999 1st Semester)**1. AIMS OF THE COURSE**

- 1.1 A thorough understanding of legal concepts relevant to the Law of Evidence;
- 1.2 An understanding of the rules of evidence relevant to trial procedures;
- 1.3 The ability to apply the rules of evidence to practical situations.

2. MATERIALS

- 2.1 Constitution of the Republic of South Africa, 1996
- 2.2 Principles of Evidence (Schwikkard, Skeen & van der Merwe) ("Bluebook")
- 2.3 Evidence Statutes (booklet)
- 2.4 Cases: Lists of cases to be prepared for Modules will be supplied during the course. The most important cases and readings will be placed on reserve in the library.

3. REFERENCE WORKS

- 3.1 Zeffertt & Hoffmann *The Law of Evidence* (4ed)
- 3.2 Schmidt *Bewysreg* (4ed)

3. EVALUATION AND EXAMINATION**3.1 Year Mark: (20%)**

TEST ON TUESDAY 13 APRIL 1999 AT 08h40 IN THE STUDENTS' UNION HALL (1½ hours)

[The format of, and modules to be covered for the test will be advised on Tuesday 30 March 1999]

3.2 Examination: (80%)

*Format:

- | | | |
|-----|---|-----------------|
| (1) | Essay question on policy issues relevant to Evidence: | 20 marks |
| (2) | True/false answers (plus brief explanation): | 20 marks |
| (3) | Problem questions based on a given set of facts: | <u>40 marks</u> |

Total: 80 marks

* Note that there will be no choices of questions in the examination: all questions must be answered.

3. COURSE ATTENDANCE

This course is conducted on a seminar basis, and all prior preparation (written or unwritten) allocated prior to the seminar must be completed as no formal lectures will be given. Lack of preparation will be considered non-attendance.

Note that attendance at seminars is compulsory for D.P. purposes - written permission for absences must be obtained. An attendance register will be circulated for signature by each student during each seminar. Students are warned not to sign the register on behalf of absentees, as those discovered doing so will be subject to disciplinary proceedings and possible disqualification from the course/university.

4. The November 1998 examination paper is attached to illustrate format and question types. Some of the seminar problems will also be taken from this paper.

ROBIN PALMER: Course Presenter: Room 76, Howard College, Telephone: 260 2558

COURSE OUTLINE

Module 1

- 1.1 Historical Survey
- 1.2 Sources & Basic Concepts

PREPARATION:

Bluebook: Chapters 1 & 2

Module 2

- 2.1 Sources of the SA Law of Evidence
- 2.2 The Law of Evidence and Substantive Law

PREPARATION:

Bluebook: Chapters 3 & 4

Module 3

Kinds of Evidence: Real Evidence, Documentary Evidence & Oral Evidence

PREPARATION:

Bluebook: Chapters 18, 19, 20 & 21

Module 4

The Burden of Proof in civil and criminal trials

PREPARATION:

Bluebook: Chapters 31 & 32

Module 5

The trial process in civil and criminal trials: opening statements; examination-in-chief; cross-examination; re-examination; argument & judgment.

PREPARATION:

Bluebook: Chapters 23 & 25.1 & 25.2

Module 6

The Evaluation of Evidence

PREPARATION:

Bluebook: Chapter 30

Module 7

Witnesses: Competence & Compellability

PREPARATION:

Bluebook: Chapter 22

Module 8

Special trial procedures

8.1 Hostile witnesses

8.2 Refreshing the memory of witnesses

PREPARATION:

Bluebook: Chapter 25.3

Module 9

Proof without Evidence:

Judicial Notice, Formal Admissions & Presumptions

PREPARATION:

Bluebook: Chapters 26, 27, 28 & 29

Module 10

ADMISSIBILITY (1): General test of Relevance

PREPARATION:

Bluebook: Chapter 5

Module 11

ADMISSIBILITY (2): Similar Fact Evidence

PREPARATION:

Bluebook: Chapter 7

Module 12

ADMISSIBILITY (3): Character Evidence

PREPARATION:

Bluebook: Chapter 6

Module 13

ADMISSIBILITY (4): Opinion Evidence

PREPARATION:

Bluebook: Chapter 8

Module 14

ADMISSIBILITY (5): Previous Consistent Statements

PREPARATION:

Bluebook: Chapter 9

Module 15

ADMISSIBILITY (6): Hearsay & *Res Gestae*

PREPARATION:

Bluebook: Chapters 13, 14 & 15

Module 16

ADMISSIBILITY (7): Confessions, Admissions & Pointings-out in criminal trials

PREPARATION:

Bluebook: Chapters 16 & 17
Criminal Procedure Act, 1977: Sections 217, 218 & 219A

Module 17

ADMISSIBILITY (8): Privilege: Private, State, Medical & Other

PREPARATION:

Bluebook: Chapters 10 & 11

Module 18

ADMISSIBILITY (9): Illegally and Unconstitutionally obtained Evidence

PREPARATION:

Bluebook: Chapter 12 (background only)
Constitution of the RSA (1996): Section 35(5)

DISCUSSION OUTLINE

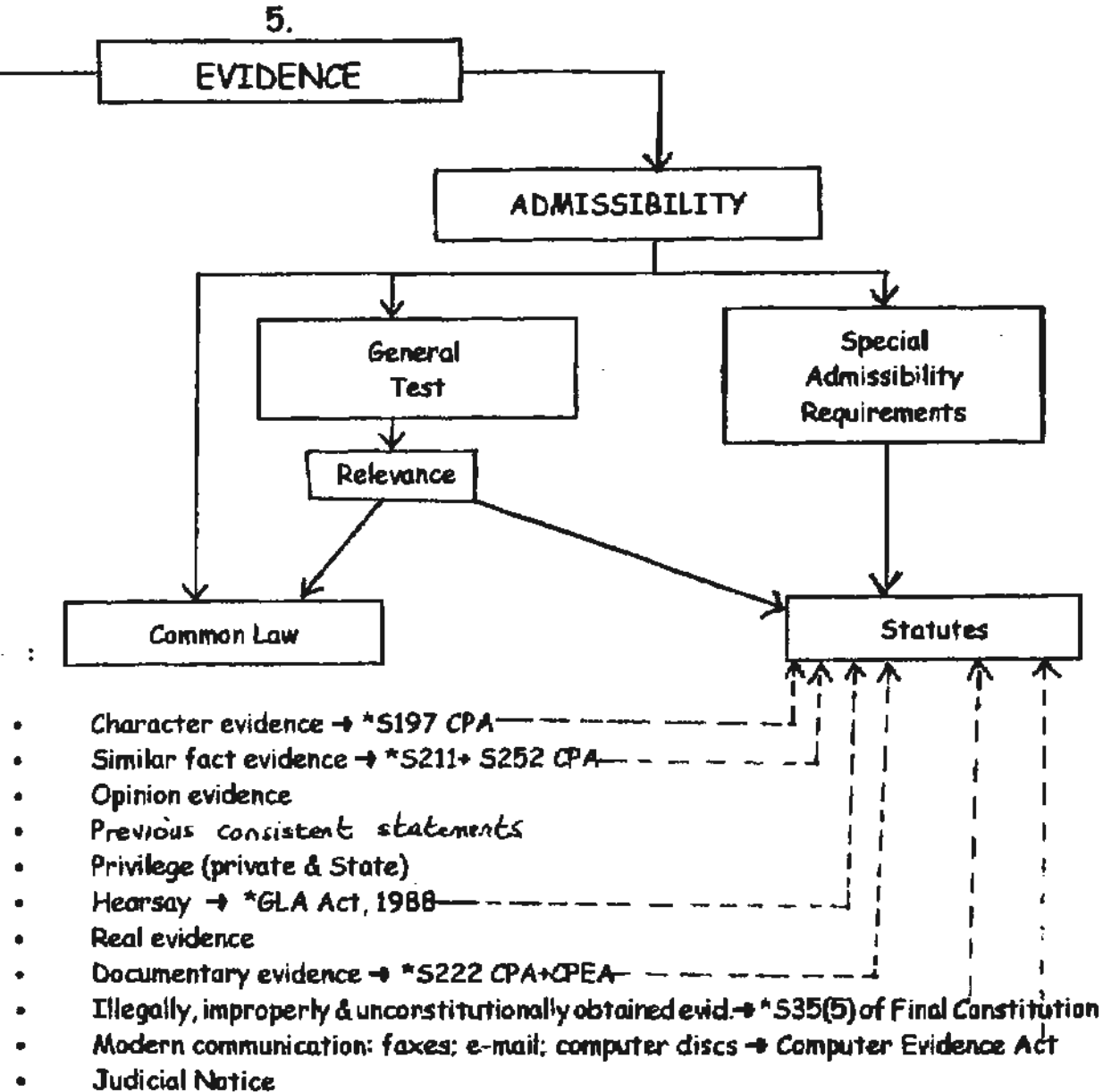
Evidence: Content, Context and Concepts

Robin Palmer (UND)

1. Traditional approach to evidence: content based (principles and cases).
2. Traditional emphasis: exclusionary rules vs procedure and evaluation.
3. Concept based approach:
 - 3.1 Concepts analysed and redefined, and then applied to:
 - 3.2 Practical context.
(Content limited to illustrative cases or case studies);
4. Structure: Two basic concepts underlying evidence are:
 - 4.1 Weight;
 - 4.2 Admissibility
[See diagram]

45 A

- Burden of proof (civil & criminal)
- Evaluation of evidence
- Rules of trial/motion procedure
- Witnesses
- Circumstantial evidence (etc.)



45 B

6. Example: Relevance

6.1 Concept of "relevance"^①:

1. Evidence^② is admissible^③ if it is relevant^①.
2. Evidence^② is relevant^③ if it has probative force^④.
3. Probative force^④ means the power to prove^⑤ factum probans^⑥ (essential element of the case);
4. Power to prove^⑤ must be a reasonable link^⑦ between the evidence^② and the element^⑧.
5. Reasonable link^⑦: this decision is based on common sense^⑨.
6. Common sense means a blend of logic^⑩ and experience^⑪.
7. Logic^⑩ → analogical; deductive; inductive; fallacies; etc.
8. Experience^⑪ → previous incidents/ coincidences, etc.

6.2 Context: [Use example: "a stolen video recorder is found in Abel's house"]

7. Other examples

45c

Outline of Lecture on Sexual Offences

Positive duties on the state to prevent violence against women

International instruments:

CEDAW

Declaration on the Elimination of Violence Against Women

Beijing Declaration and Platform of Action

National Law

South African Constitution - Section 12(1)(c)

The Prevention of Family Violence Act

The Domestic Violence Act

Sexual Assault in South Africa

Categories of Sexual Assault

- **Rape**
- **Indecent Assault**
- **Incest**

Problems with the Law relating to Sexual Assault

- **Definition of rape**
- **Law of Evidence:**
 - Cautionary rule**
 - First report**
 - Section 227 of Criminal Procedure Act**
 - Expert evidence**
- **Criminal Procedure:**
 - The rape complainant as ancillary prosecutor**
 - Sections 154 and 335A of the Criminal Procedure Act**
 - Section 153 of the Criminal Procedure Act**
 - Sections 170A and 158 of the Criminal Procedure Act**
 - Section 300 for the Criminal Procedure Act**

Criminal justice Issues

- **National Policy Guidelines for Victims of Sexual Offences**
- **Statutory Complaints Mechanisms**
- **Training of criminal justice personnel**
- **Bail and Sentencing Legislation**

UNIVERSITY OF CAPE TOWN

FACULTY OF LAW CRIMINOLOGY: CRI1504F

Course Outline

Broadly defined, this course sets out to explore the effects of radical political transitions from authoritarian to democratic forms of governance on the functioning of criminal justice systems. What, may we ask, have been the trials and tribulations of five years of transitional rule in South Africa and what are the most serious challenges facing the delivery of justice in the next millennium?

By way of introduction, broad parameters for understanding political transitions and their effects on the justice machinery are sketched. Here, a key objective is to come to grips with both the *commonalities* and *differences* in the organisational restructuring of the police organisation, the court system and prison complexes. Furthermore, we examine the ways in which new alliances between state and non-state agencies involved in the delivery of safety, justice and punishment have been forged.

In the second part of the course a number of selected topics are discussed. Specialists are invited to lead the discussion around topics such as: violence against women, juvenile justice and organised crime. In each case we:

- Examine changes in the social discourse pertaining to the topic. For example, how have we come to think about (conceptualised/construct) the phenomenon of violence against women?
- Explore changes of a legislative and procedural nature, which follow from the implantation of a new democratic system and new social discourses.
- Consider the **impact** of the new discourse as well as new sets of legal and administrative rules on the routine operation of the criminal justice system. It is the "reality check" which is at stake here. New policies and new legal rules need to be translated into enduring operational practice. What are the problems on this front? An how can a closer fit between theory and practice be engineered?

Prior to examining the issue of violence against women and the role of the legislature and the criminal justice system, the course looks broadly at political transitions and criminal justice reform. Readings and debates for this introductory section include:

- *The First 1000 Days* (Department of Justice);
- *Justice Vision 2000*; and the
- *National Crime Prevention Strategy*

Violence Against Women

The scene is then set to discuss issues relating to violence against women. Broadly, this component of the course examines recent legislative, policy, research and criminal justice developments on violence against women. It also considers changes in social discourse as well as the critical challenges facing legal and institutional reform. More specifically, this component of the course involves:

- Providing a profile of violence against women with available and current statistics on rape and domestic violence in South Africa (including recent reported incidents from CIMC; and research by experts such as Artz, Vetten, Rape Crisis and other non-governmental sectors)
- Contextualising violence against women in South Africa (see *The Extent of Violence Against Women in South Africa* by Human Rights Watch)
- Examining international instruments on relating to violence against women (CEDAW)
- Re-examining the NCPS from a feminist/gender perspective (Artz; Rauch & Simpson)
- Grounding theories on feminist jurisprudence or feminist/critical legal scholarship (Cain; West)

Introducing recent legislation on violence against women and debating the merits and limitations of the legislation (DVA 116 of 1998; Combrinck (a); Combrinck

POSITIVE DUTIES ON THE STATE TO PREVENT VIOLENCE AGAINST WOMEN

INTERNATIONAL INSTRUMENTS

Interpretation of the bill of Rights - Section 39(1)(b) - must consider international law

Binding nature of international agreements - Section 231

Convention on the Elimination of All Forms of Discrimination Against Women (Recommendation 19)

- Ratified by the South African government
- General Recommendation 19 states the general prohibition of gender discrimination; includes 'gender-based violence - that is, violence that is directed at woman because she is a woman or that effects women disproportionately'
- Confirms that violence against women constitutes a violation of women's human rights irrespective of whether the perpetrators are state officials or private individuals
- State must take all measures necessary to provide effective protection to women

NGO Shadow Report to CEDAW on Violence Against Women

Declaration on the Elimination of Violence Against Women

- Adopted by the UN General Assembly in 1994
- States should condemn all forms of violence against women
- Should pursue *all appropriate means and without delay* a policy eliminating violence against women

Beijing Declaration and Platform of Action

- Strategic Objective 1 - 'integrated measures to prevent and eliminate violence against women
- Strategic Objective 2 - relates to the study of the causes and consequences of violence against women and the effectiveness of preventative measures

NATIONAL LAW

South African Constitution - Section 12(1)(c)

- Entrenches the right to be free from all forms of violence from public or private sources

The Prevention of Family Violence Act

- Interdicts
- Obligation to report ill-treatment of a child
- Rape of wife by her husband

SOUTH AFRICAN POLICIES ON VIOLENCE AGAINST WOMEN

- Gender Policy Considerations - Department of Justice
- National Policy Guidelines for Victims of Sexual Offences - Justice, SAPS, Health, Welfare; Correctional Services
- Draft White Paper in Service of Safety - Department for Safety and Security
- National Crime Prevention Strategy
- Victim Empowerment Programme

SEXUAL ASSAULT IN SOUTH AFRICA

CATEGORIES OF SEXUAL ASSAULT:

- Rape
- Indecent Assault
- Incest

PROBLEMS WITH THE LAW RELATING TO SEXUAL OFFENCES

- Cautionary rule
- Definition of rape
- Previous sexual history
- Expert evidence
- Legal representation of sexual assault survivors at trial

NATURE AND INCIDENCE OF SEXUAL ASSAULT

- Statistics - national and provincial
- Age distribution

CRIMINAL JUSTICE ISSUES

- Wynberg Sexual Offences Court
- National Policy Guidelines for Victims of Sexual Offences
- Policing - training - Pilot Programmes
- District Surgeons
- Correctional Services

NATIONAL POLICY GUIDELINES

FOR VICTIMS OF SEXUAL OFFENCES



INTRODUCTION

Background

On 25 November 1996, International Day of No Violence Against Women, the Minister of Justice, Dr A M Omar, and the Deputy Minister of Justice, Dr M E Tshabalala-Msimang, launched a public campaign on preventing violence against women. The campaign was developed as a result of deep concern for the epidemic problem of violence against women in South Africa. It fits within the context of the commitments which the Department of Justice made in respect of implementing the Platform for Action which emanated from the United Nations Fourth World Conference on Women held in Beijing in 1995:-

The Department plans to take integrated measures to prevent and eliminate violence against women and to facilitate the prosecution of perpetrators of violence.

As with many other issues, there are no reliable statistics on the extent of violence against women, but, as the 1995 Human Rights Watch Report on Violence Against Women in South Africa states:-

What is certain... is that South African women, living in one of the most violent countries in the world, are disproportionately likely to be victims of that violence.

Various estimates have been made which suggest that perhaps as many as one in three women are assaulted by their male partners. South Africa also has one of the highest rates of reported rape in the world and there has been a rise from 105,3 per 100,000 in 1994 to 119,5 per 100,000 in 1996. Police estimate that reported rapes represent less than 3% of the actual rapes occurring. Further, less than one-third of reported rapes reach the courts, and only one-half of those prosecuted result in convictions. Between July 1993 and June 1996 there were 24,304 rape prosecutions and 11,901 convictions.

The campaign comprised two distinct components: public awareness and strategic planning within the Department of Justice and other relevant Departments. On the strategic level the Department organised a number of meetings with relevant role players to devise practical plans for improving the treatment of women within the legal system. The people involved included magistrates, judges, prosecutors, members of the South African Law Commission (SALC) and other personnel from within the Department, as well as parliamentarians and staff working with the Departments of Welfare and Safety and Security, the South African Police Service (SAPS) and relevant NGO's.

Establishment of Task Team

One recommendation which emerged was the need to establish a high level intersectoral Task Team to develop uniform national guidelines for all role-players handling rape and other sexual offence cases. The Department of Justice convened such a Team which comprised personnel from the South African Police Service, the Departments of Health, Welfare and Correctional Services, representatives from different aspects of justice - prosecutors, magistrates and appellate courts - and an NGO representative from the National Network on Violence Against Women.

The Task Team met over a number of months with each Department being responsible for the drafting of its own guidelines, but all members of the Team had the opportunity to comment and assess the manner in which the different guidelines worked together. The aim was to

compile a set of guidelines which would facilitate the development of an integrated and holistic approach across government and the NGO sector to deal with these offences.

Structure of Guidelines

Complete sets of the guidelines will be forwarded to central offices of relevant Departments in the provinces and to other places where they are accessible to people working in the field of sexual violence. At ground level departmental personnel will have available the guidelines which apply to their daily work. (eg. Police stations will have the police guidelines, health clinics will have the health guidelines).

The guidelines also contain an information brochure for victims which sets out in simple language the basic steps involved in the legal process. It is anticipated that victims will obtain additional information on the process and the resources available to them in their area from material prepared locally.

Future of the Guidelines

The present document is a first attempt at developing a cohesive framework for dealing with sexual offences. It must now be fully tested by the people who work in this area. The Department of Justice hopes that the guidelines will serve two main linked purposes:-

1. To assist service providers with their work by being a practical tool
2. Thereby to improve the experiences of victims in the legal system

If these goals are achieved the result should also be an increased conviction rate and appropriate decisions being taken on bail and sentences.

These guidelines are part of a process. As we all learn from our new approach to this work, they will need to be revised and reviewed.

Thank you to the members of the Task Team for your dedication and commitment. Good wishes to those of you who will rely on them to assist with your work.

Dr M E Tshabalala-Msimang
Deputy Minister of Justice



RAPE: THE POLITICS OF DEFINITION

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A notable characteristic of orthodox criminological research has been its preoccupation with a search for causes. The central question has been 'why does a person steal, kill, become addicted to drugs or alcohol?' and not 'why are certain kinds of behaviour considered deviant in the first place? What functions do such conceptions serve for various individuals and groups in society?'¹ These latter questions, representing an important shift in the focus of criminological inquiry, have only recently begun to be posed.

Similarly, much rape-related research has been organized around the question 'why do men rape women?' and has taken the definition of rape as given and unproblematic. Feminist- and non-feminist-oriented research alike are concerned with this question, but it is only from the feminist camp that a serious critique of and challenge to the legal definition of rape has arisen. In an effort to understand this social phenomenon, feminist research has refused to view it solely through the eyes of the law and has attempted to break free from the conceptual grip of the traditional, common-law definition. This represents a major contribution to contemporary research on rape. An attempt will be made here to outline the critique and to assess its contribution to current debates on rape.

According to the Anglo-American common law and the present South African law, the criminal act of rape consists in intentional, unlawful, sexual intercourse with a woman without her consent.² The key features of this definition are the following:

- (a) It involves 'sexual intercourse', requiring penetration of the vagina by the penis.³
- (b) Such intercourse must fall within the legally predetermined category of 'unlawful' intercourse. The law regards as unlawful every act of intercourse occurring between partners who are not married to each other.⁴ Sexual intercourse within marriage is thus the only instance of positively lawful intercourse.

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¹ Stuart L Hills *Demystifying Social Deviance* (1980) 2.

² P M A Hunt *South African Criminal Law and Procedure II: Common-law Crimes* 2 ed (1982) by J R L Milton 435.

³ *R v Theron* 1924 E11L 204; *R v Giles* 1926 WLD 211; *R v V* 1960 (1) SA 117 (T).

⁴ Although the intercourse is not punishable unless it contravenes a statutory provision, such as is found in the Immorality Act 21 of 1957, or falls within the definition of a common-law crime

- (c) The act of rape occurs between a man (the assailant/rapist) and a woman (the victim).
- (d) The distinguishing feature of this form of intercourse is that it takes place without the consent of the woman.
- (e) The act of rape must be an intentional act, that is, not negligent or purely 'accidental'.

It is apparent that a highly specific conceptualization of rape emerges from the legal definition: it is primarily a sexual encounter between a man and a woman (not his wife). The underlying model is one of 'normal' sexual intercourse, involving a specific form of sexual access—vaginal penetration by the penis. The only qualitative difference between rape and non-rape is found in the absence of the woman's consent to the act.

Feminist criticism of this definition may be directed along four lines:

- (i) The definition is too narrow. It is sex-, orifice- and instrument-specific, and it precludes the possibility of rape between spouses. Consequently, it excludes more than it includes. Every definition is an inclusionary and exclusionary process: the objection to the present definition, however, is that it excludes a great deal of behaviour which is remarkably similar to the act legally designated as rape and that such exclusion appears to rest on no logical or justifiable grounds.

The inadequacies of the definition may be highlighted by the following examples:

- (a) X, a total stranger, while holding a knife to Y's throat, forcibly penetrates her vaginally.
- (b) X and Z take Y to a lonely spot. They force her to perform a variety of sexual acts on both of them. X then penetrates Y anally. Afterwards Z forces his multi-ringed fist into Y's vagina and rips her internally.⁸
- (c) X, a male, assaults Y, a male, and forcibly penetrates him per anum.
- (d) X, a female, overpowers Y, another female, and forcibly subjects her to a variety of sexual acts.
- (e) X, an employer, informs Y that she will lose her job unless she agrees to have intercourse with him. Y, who desperately needs the job to support her family, acquiesces.
- (f) X, who is already married, goes through another marriage ceremony with the unsuspecting Y. X and Y have consensual intercourse, Y believing that she is X's lawful wife.

According to the present legal definition, only the first example constitutes an act of rape. The second, third and fourth examples are

⁸ The last-mentioned act is not the product of an overactive imagination; the facts are taken from an actual British case. See Steven Box *Power, Crime and Mystification* (1983) 157

categorized as acts of indecent assault and the last two examples constitute at most *crimen injuria*.

The behaviour described in the above six examples is obviously not identical in each case. However, there is an essential common factor in each: X gains sexual access to Y without Y's consent or where Y's 'consent' is not genuine, that is, not an informed consent or not freely given. Sexual access is gained because X can impose a sanction on Y for refusing, whether in the form of physical abuse or other sanction, or in circumstances in which, owing to X's trickery of Y, no threat of sanction is required. A form of compulsion is therefore always present. This is true of all of the abovementioned examples irrespective of the sex of the aggressor or of the victim, and irrespective of the orifice penetrated or of other sexual acts committed or of the instrument of penetration. The common factor of sexual access gained under coercion of some kind unifies these apparently disparate acts into a single conceptual category of rape behaviour. The gaining of sexual access by coercive means may be perceived as the essential form of rape acts and should be the basic insight upon which the legal definition of rape is based.

Underlying the current legal definition is a concept of rape as a 'special' crime, in two distinct senses: first, in that it is designed to protect only women; and secondly, in that it is sharply distinguished on a qualitative basis from the other 'sexual' offences. Only one form of sexual access is included in the definition—vaginal penetration by the penis. Acceptance of the principle that the essential characteristic of rape acts should be the gaining of sexual access without the genuine consent of one party, owing to the compulsion applied by the other party, necessitates a reconceptualization of rape from one form of sexual access to a category of rape behaviour in which the sex of the victim or assailant, the instrument used and the avenue of penetration are all irrelevant for definitional purposes. In Brown-miller's words,

... while the penis may remain the rapist's favourite weapon, his prime instrument of vengeance, his triumphant display of power, it is not in fact his only tool. . . . Sticks, bottles, and even fingers are often substituted for the "natural" thing. . . . Who is to say that the sexual humiliation suffered through forced oral or rectal penetration is a lesser violation of the personal private inner space, a lesser injury to mind, spirit and sense of self? . . . All acts of sex forced on unwilling victims deserve to be treated in concept as equally grave offences in the eyes of the law, for the avenue of penetration is less significant than the intent to degrade.⁹

Not only are the avenue and instrument of penetration irrelevant for acts of rape, but sexual access need not be equated with penetration of any part of the victim's body. Other sexual acts which do not involve penetration are also part of rape behaviour. The difficulty in separating the linked notions of sexual intercourse—

⁹ *Against Our Will* (1975) 378

penetration—rape—is testimony to the 'reified tyranny' of the legal definition on conceptual thinking about rape. In a sexual attack the difference between penetration and other 'sexual' acts is one of degree rather than essential nature.⁸

The present definition contains a major exclusion clause. Only unlawful sexual intercourse has the potential to be categorized as rape. Consequently, interspousal rape is legally impossible. In the United Kingdom, in over forty American states, in most mid- and southern European states, and possibly South Africa,⁹ husbands cannot be charged or convicted of the rape of their wives. Several explanations of the husband's immunity have been put forward:

- (a) The most widely accepted explanation is that on marriage a woman gives her irrevocable consent to intercourse with her husband. This is the rationale for the exemption in English, American and South African law.¹⁰
- (b) It is one of the legal consequences of marriage.¹¹
- (c) In terms of the unity-of-person principle, the legal identity of the wife is merged into that of the husband, and the husband cannot rape himself.¹²

None of these explanations is adequate. The 'irrevocable consent' of the wife is a fiction. Consent to marriage includes consent to grant the husband sexual access, but not at any and every time he pleases. The law of husband and wife defines instances when the wife is entitled to refuse her husband sexual access.¹³ The 'irrevocable consent' argument faces further difficulty in view of the fact that, even though the forced sexual intercourse might not be punishable as rape, the law allows the husband to be convicted of assault in respect of the force applied to his wife in compelling her to submit.¹⁴ The husband also enjoys no immunity in respect of other sexual offences committed on his wife.¹⁵

⁸ Box op cit note 5 at 126.

⁹ There is recognition of this proposition in South African law. In *Soucut Ally v R* 1907 TS 336 at 338 Innes CJ stated that 'rape is only the most aggravated form of indecent assault'. In addition, s 261 of the Criminal Procedure Act 51 of 1977 provides that common assault, indecent assault and assault with intent to do grievous bodily harm are all competent verdicts on a charge of rape.

¹⁰ See the dicta of Nienaber J in *S v H* 1985 (2) SA 750 (N) at 752. For the purposes of the marital rape exemption, 'marriage' includes customary unions. See J M T Labuschagne *Die Suid-Afrikaanse Verbruyngsreg: 'n Strafrechtsvergelykende Ondersoek* (unpublished LL.D. thesis Potchefstroom University for CHO 1972) 171-2.

¹¹ See Felicity Kaganas & Christina Murray 'Rape in Marriage—Conjugal Right or Criminal Wrong?' 1983 *Acta Juridica* 125.

¹² This appears to have been the theoretical basis of the exemption in Roman-Dutch law. See Kaganas & Murray op cit note 10 at 126. See also the remarks of Nienaber J in *S v H* supra note 9 at 753C-E.

¹³ See note (1977) 52 *New York Univ LR* 306 at 310, cited in Hunt op cit note 2 at 437.

¹⁴ Hunt op cit note 2 at 438; *Ainsbury v Ainsbury* 1929 AD 109; *Wyndham-Quin v Wyndham-Quin* 1978 (4) SA 843 (A).

¹⁵ *S v H* 1985 (2) SA 750 (N).

¹⁶ J M T Labuschagne 'Misdade Tussen Gades' (1980) 43 *TIRHR* 39. In this regard the Criminal Law and Criminal Procedure Act Amendment Bill of 1987 is to be welcomed: clause 1 of the Bill abolishes the marital rape exemption. However, a prosecution may be instituted only on the instruction of the Attorney-General (clause 1(2)).

The fiction of the irrevocable consent of the wife is clearly spurious. More revealing is the following justification:

'... if the wife is adamant in her refusal the husband must choose between letting his wife's will prevail, thus wrecking the marriage, and acting without her consent. It would be intolerable if he were to be conditioned in his course of action by the threat of criminal proceedings.'

This passage provides insight into another dimension of a marital relationship: it is also a power relationship. The asymmetry of the spouses' position is evident: allowing the wife's will to prevail causes the marriage to be wrecked; allowing the husband's will to prevail does not. It is intolerable that the husband's freedom of action be circumscribed by the law, while it is not intolerable for the wife's freedom of choice—to agree to or refuse intercourse—to find no legal protection at all. The wife's refusal is simply recalcitrant behaviour which gives the husband a choice whether to respect her wishes or his own. On this view, forced intercourse with the wife is the 'solution' to the marital deadlock. Irrespective of the preferred legal basis of the marital exemption, it constitutes the legal endorsement of the status of wives as sexual servants:

'The exclusion of married women raped by their husbands reflects the law's view of a wife as being her husband's property rather than an autonomous self-determining person and consequently husbands are provided with a licence to impose themselves on their wives whenever they choose, irrespective of the recipient's wishes.'

Thus the specificity of the present legal definition skews our perception of rape, for it selects only one form of conduct between certain parties as potentially rape. It excludes from its ambit large categories of persons and similar forms of conduct.

- (ii) However, even within the narrow confines of this skewed definition there is a distortion: the perception of rape which it contains is neither neutral nor innocuous, but demonstrates a distinctive male bias.

This bias is located in the identification of rape with sexual intercourse. In law the essence of the offence is perceived to be an act of 'normal' heterosexual intercourse minus the consent of one party. The model of normal sex on which it draws is itself a male model which views vaginal penetration by the penis as the central 'normal' activity.¹⁶ In this model of 'normal sex', and consequently in the legal perception of rape to which it gives rise, the concepts of 'sexual

¹⁶ Norval Morris & A L Turner 'Two Problems in the Law of Rape' (1952-5) 2 *Univ of Queensland LJ* 247 at 259.

¹⁷ Box op cit note 5 at 122.

¹⁸ Angela Hamblin 'Is a Feminist Heterosexuality Possible?' in S Cartledge & J Ryan (eds) *Sex and Love: New Thoughts on Old Contradictions* (1983) 108 states:

'Within the terms of the heterosexual ritual only penetration followed by penile thrusting and ejaculation is defined as "real" or "normal" sex, which at once asserts the primacy of the penis, renders the sexual pleasure of women irrelevant, and limits heterosexual practice to a series of repetitive acts which maximize the possibilities of pregnancy.'

See also Janice Moulton 'Sex and Reference' in Robert Baker & Frederick A Elliston (eds) *Philosophy and Sex* (1975) 34.

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intercourse'—penetration—rape—are linked to constitute an essentially male perspective. This perspective is made possible by the definition of both intercourse and rape around the requirement of penetration (the male activity) and the incorporation into both of an element of coercion. Several writers¹⁹ have characterized normal (hetero) sexuality as coercive, in that it is organized according to the differing sex-specific roles into which men and women are socialized. Male sexuality is linked to aggression, forcefulness and initiative, and female sexuality is constructed as passive and receptive. These sexual 'scripts'²⁰ for normal sexuality cast men in the role of predators and prime women for the role of victims. The basic elements of rape are thus already present in normal intercourse. On this view rape is not the polar opposite of normal sex, but an extreme form of it. Its deviance lies in its extremeness, not in its 'otherness'.

The dominant reality of rape, as encoded into the language of the law, is of a sexual experience for both the assailant and the victim. This 'reality' is a male reality; it interprets rape from the perspective of the dominant or ruling group which, in feminist terms, is the ruling class of men. The dominant ideology is not only class-based, but a gender-based, patriarchal ideology of which the present legal definition of rape forms a part.²¹ The patriarchal ideology is perpetuated through the practices of law and language, both under the control of the dominant group.

This group has not only institutional power such as lawmaking and control over law-enforcement practices but also the power to impose its perspective of the world as the dominant perspective. Mainly through the medium of language, this pervasive perspective is portrayed as the only reality for all members of society, whether of the dominant or of subordinate groups.²²

According to Dale Spender,²³ language is literally *man-made* and is therefore the biased construct of the dominant group:

¹⁹ See, for example, Susan Griffin 'Rape: The All-American Crime' in Duncan Chappell, Robley Geis & Gilbert Geis (eds) *Forcible Rape: The Crime, the Victim and the Offender* (1977); Diana E H Russell *The Politics of Rape* (1975); Lorraine M G Clark & Debra Lewis *Rape: The Price of Coercive Sexuality* (1977); Nancy Chodorow 'Being and Doing: A Cross-cultural Examination of the Socialization of Males and Females' in Vivian Gornick & Barbara K Moran (eds) *Women in Sexist Society* (1972).

²⁰ The scripts or role models constitute sets of socially approved expectations for appropriate masculine and feminine behaviour.

²¹ See Patricia Anderson *The Case for Abolishing the Crime of Rape and Reconstituting It as Assault: A Feminist Perspective* (unpublished work 1986). Anderson at 11 states this view succinctly:

'While society may be stratified along class lines and . . . ideological practices support the dominant class, men at all levels in the society are dominant over women. The system of male dominance operates for the benefit of all men although the extent of the dominance may vary according to a man's position in the class structure, and it operates most effectively for men who are members of the dominant class. Thus . . . all men, no matter what their class, benefit from patriarchy.'

²² Feminism adopts the Marxist view that 'the ideas of the ruling class are in every epoch the ruling ideas' (*The German Ideology in The Selected Writings of Karl Marx*), but takes it a step further by insisting that we recognize that the ruling class also rules as men.

²³ *Man Made Language* (1980) 58-9.

'Men have not supplied meanings which undermine their power, diminish their prestige, or detract from their image. Intentionally or otherwise they have formulated a semantic rule which posits themselves as central and positive, as the norm, and they have classified the world from that reference point, constructing a symbolic system which represents patriarchal order. . . . Both sexes have inherited their meanings and are required to accept them as the only reality, but they are the product of one sex's view of the world, and its own place within that world.'

The male point of view is presented as objective truth. When translated into law, it takes on the appearance of abstract universalism. In the name of neutrality it makes maleness the norm of what is human.²⁴ In the words of Catherine MacKinnon:²⁵

' . . . male dominance is perhaps the most pervasive and tenacious system of power in history. . . . Its point of view is the standard for point-of-viewlessness; its particularity the meaning of universality. Its force is exercised as consent, its authority as participation, its supremacy as the paradigm of order, its control as the definition of legitimacy.'

And further:

' . . . male power extends beneath the representation of reality to its construction: it makes women (as it were) and so verifies (makes true) who women "are" in its view, simultaneously confirming its way of being and its vision of truth. . . . Objectivity is the methodological stance of which objectification is the social process. Sexual objectification is the primary process of subjection of women.'²⁶

Male-centred reality, which presents itself as objective reality, negates alternative, non-male realities. It dichotomizes the world into 'the male' and the negativized 'other',²⁷ which it then obliterates.²⁸

Rape is constructed as an act of non-consensual sexual intercourse in which both the assailant and the victim experience and perceive the event in a similar (sexual) way. The available evidence, however, demonstrates that most victims do not experience rape as a sexual encounter but as a frightening, life-threatening attack.²⁹ Rape is precisely what the victim does not experience, but she has no other name with which to describe the event.³⁰ The victim is forced to use the language of the dominant group (with its encoded male bias) to interpret and make sense of the event. Without a language, she has no

²⁴ Ann C Scales 'The Emergence of Feminist Jurisprudence: An Essay' (1986) 95 *Yale LJ* 1373 at 1377.

²⁵ 'Feminism, Marxism, Method and the State: Towards a Feminist Jurisprudence' (1983) 8 *Signs: Journal of Women in Culture and Society* 635 at 638 (footnotes omitted).

²⁶ Catherine MacKinnon 'Feminism, Marxism, Method and the State: An Agenda for Theory' (1982) 7 *Signs: Journal of Women in Culture and Society* 1378.

²⁷ See Simone de Beauvoir *The Second Sex* (1972) 16-18.

²⁸ Feminism, on the other hand, starts from the principle that reality is socially constructed and that multiple realities can co-exist. See below.

²⁹ Ann W Burgess & Lynda L Holmstrom 'Rape Trauma Syndrome' (1974) 131 *American J of Psychiatry* 981 and *Rape: Crisis and Recovery* (cited in Anderson op cit note 21 at 51); A Kaufman et al 'Male Rape Victims: Non-institutionalized Assault' (1980) 137 *American J of Psychiatry* 221. Consequently, the reality of rape for the victim appears to be the experience of an assault and, at most, the victim is forced to participate in the sexual act of the assailant. (The experience might be different when sexual access is gained by fraud, not violence.) But even though rape has been identified here with the male perspective, it does not follow that the rapist himself invariably experiences the rape as a sexual act. Some studies have indicated that the rapist occasionally has difficulty in performing sexually (see, for example, Sylvia Levine & Joseph Koenig (eds) *Why Men Rape* (1982) 10-12 and Jean MacKellar *Rape: The Bait and the Trap* (1978) 71).

³⁰ Spender op cit note 23 at 180.

power to name the event for herself,³¹ and her experience and perception of it cannot be verified. On the contrary, they are invalidated by the dominant reality.³²

The feminist position is that the exclusive reality which we accept as objective truth is the social construct of the dominant group. Consequently, the construction of rape as a sexual event does not passively reflect a universal truth existing 'out there'.

The point is not simply that this construction is wrong or mistaken or merely unfortunate. Law and language, as ideological practices,³³ assist in the perpetuation of the dominant patriarchal ideology and social formation. One of the most successful mechanisms for the maintenance and reproduction of male power is the eroticization of violence, particularly as directed against women. In much the same way as pornography eroticizes and thereby renders acceptable certain forms of violence against women, the present legal definition 'sexualizes' rape. The dominant meaning of these phenomena is a sexual one, which invalidates the alternative view of them as forms of violence. In this way, the mystification of rape in the legal definition plays a part in the maintenance of male domination.

(iii) The issue of consent. As noted above, the law takes the view that the essence of rape is sexual intercourse and that the presence of violence, duress or fraud does not change the nature of the act from 'normal intercourse' to something else. The only legally significant factor which changes the nature of the act from normal sexual relations to rape is the state of mind of the victim: the crucial question of her consent.³⁴

The absence of consent is a definitional component and must be proved by the State beyond reasonable doubt. Apart from the notorious difficulty in proving a negative, the objection to this formulation is that it shifts the inquiry from the behaviour of the accused to that of the victim. Her non-consent, not his compulsion, is in issue. The nature and degree of compulsion exerted on the victim is part of the proof of non-consent.³⁵

³¹ 'Naming' is an important concept in feminism. It refers to the endeavour to find the appropriate words to bring a new world-view into existence, to describe the world from women's point of view. See Mary Daly *Beyond God the Father: Toward a Philosophy of Women's Liberation* (1973); Sheila Rowbotham *Women's Consciousness, Men's World* (1973).

³² This, in Spender's view, constitutes a further victimization of the victim. Op cit note 23 at 180.

³³ In the Althusserian sense. See 'Ideology and Ideological State Apparatuses' in *Lenin & Philosophy and Other Essays* (1977).

³⁴ Entrenched in the legal definition is the starting point that the event in question is sexual intercourse. Only if non-consent can be proved will the law view it as an act of 'rape'. Anderson op cit note 21 at i states the position succinctly:

'The act of rape is constructed, linguistically and ideologically, primarily as a heterosexual act of intercourse which is "natural" and spontaneous and which therefore must be consenting until proved otherwise' (emphasis mine).

³⁵ The law evaluates the behaviour of the accused by reference to the behaviour of the victim on the assumption that the event was an interaction in which both parties have similar positions of power and which has the same, shared meaning for both parties. It is submitted that this underlying and unarticulated assumption is erroneous (see note 28).

This requirement places a special burden on the State (and the complainant). In respect of other crimes such as theft, extortion, robbery or assault, the consent of the victim forms no part of the definition. 'Consent' therefore plays no part in the establishment of a prima facie criminal act. In the words of Vivian Berger,³⁶ the law 'simply enquires whether the accused took something from another person by violence or intimidation'. At most, the accused may raise it as a defence to rebut the prima facie unlawfulness of the act. The court will examine the validity of this defence with great care in the light of the established principles.³⁷ Until and unless the accused raises the defence, the victim's non-consent to the act is assumed; if the State can rebut the defence, it will fail.

Conversely, on a rape charge, if the State cannot prove non-consent beyond reasonable doubt, the prosecution will fail and the victim's consent is assumed.³⁸ It is not subject to the same careful judicial scrutiny for its validity.

While the defence of consent in delict and criminal law has specific requirements for validity which can be judicially scrutinized and tested, the concept of non-consent has not. Lucy Reed Harris³⁹ has pointed out the lack of clarity surrounding non-consent:

'[W]hile the central substantive element of rape is non-consent, the legal community has not yet developed a principled standard of effective non-consent in rape. Instead courts and legislators have tried to manipulate evidence and other rules around undefined issues, usually guided by questionable assumptions about rape complainants and rapists.'

Yet the concept is not simply a legal mistake which will be rectified by increased clarity. Its real iniquity is that it represents a distortion of the central issue: it is not so much the absence of consent as the presence of coercion.

'... In a situation where the female's choice is severely restricted by the male being able to impose sanctions for refusal, the question of consent should become secondary to his ability to coerce.'⁴⁰

This view represents a shift of focus of the utmost importance from the subjective state of mind of the victim to the imbalance of power between the parties on the occasion in question. One person may exercise various kinds of power over another: physical, emotional,

³⁶ 'Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom' (1977) 77 *Columbia LR* 1 at 8.

³⁷ See E M Burchell & P M A Hunt *South African Criminal Law and Procedure I: General Principles* 2 ed (1983) by E M Burchell, J R L Milton & J M Burchell 369-81.

³⁸ Patricia Anderson op cit note 21 at 81-2 notes an important consequence. For consent to succeed as a defence, the law requires that it be positive, real and manifest consent. Anything which falls below such standards is assumed to be non-consent. However, when one examines non-consent, the inquiry begins from a different base. The act which has to be proved is active non-consent. All conduct falling outside of such non-consent is regarded as consent. In this way many actions, attitudes and words are deemed to be consent 'which may not remotely approach the standard of consent in either delict or criminal law'.

³⁹ 'Towards a Consent Standard in the Law of Rape' (1975-6) 43 *Univ of Chicago LR* 613 at 613.

⁴⁰ Box op cit note 5 at 123.

psychological, economic, social or organizational power. Any of these (or a combination of them) can be brought to bear on the victim in the process of gaining sexual access. The *amount* of coercion or pressure exerted by the assailant is also crucial. Rape can occur in a variety of different circumstances; the position of the victim is not identical in each case. If the assailant physically overpowers the victim, for example by rendering her (or him) unconscious, or by tying her up or in a gang-rape where several assailants hold her down, the victim literally has no choice and the question of her 'consent' is meaningless. In other cases, the method of attack may well present the victim with a choice. In example (a) above Y's 'choice' is between submitting to the rape or having her throat slit; in example (e) her choice is between submitting or losing her job; even in example (f) Y's 'choice' has been constructed by X as the choice of sexual intercourse with her husband.

Violence takes many forms. A real threat of the loss of a job or of a withdrawal of a marriage promise or of loss of affection may be as devastating in its consequences to the victim as the holding of a knife to her throat. Submitting to the sexual attack may well be a choice of the lesser of two evils and, as such, the victim may be seen as acting in a state of necessity or under duress.

This reconceptualization of the position of the victim brings back into focus the coercion applied to the victim.⁴¹ This must at all times be the crux of the inquiry, not the victim's consent to the act, nor whether her will was overborne by his. The real issue for the law to consider is whether the accused has made improper and unacceptable threats to the complainant. P S Atiyah⁴² astutely remarks that once this is understood 'the very difficult question as to the permissible limits of coercion in our society has to be faced'.

(iv) The sexual ideology underlying rape and other 'sexual' offences. This is encapsulated in the following quotation:

... rape is a distinct sexual crime and is definitely to be distinguished from unnatural sexual intercourse in the sense of penetration in some other form—oral, anal or with an object. The interest protected in the case of rape (where normal sexual intercourse is involved) is the freedom of the individual to have sexual intercourse of his [sic] own free will, while in cases of unnatural sexual intercourse something is involved which is—be it with or without consent—against nature.⁴³

Underlying this view is a dichotomy deeply entrenched in traditional Western sexual morality: a division of sexual activity into natural and unnatural categories. This dichotomy, traced to biblical

⁴¹ It is not suggested here, as in (1952) 62 Yale LJ 55 at 56–7, that the presence of duress should negative the victim's consent. The presence of duress establishes that a certain kind and degree of compulsion was exerted by the assailant. Its relevance is to his behaviour, not the victim's.

⁴² 'Duress and the Overborne Will Again' (1983) 99 LQR 353 at 356.

⁴³ South African Law Commission Report on Women and Sexual Offences in South Africa Project 45 April 1985 § 2.16 pp 21–2.

roots, was accepted and developed by the early Christian church and was incorporated into its theological system. The criterion for classifying sexual acts into the natural or the unnatural has traditionally been located in the biological function of sex—reproduction of the species. Consequently, the only acts that are natural are those which themselves can result in reproduction, while those which cannot are unnatural and sinful, being the use of sexuality for an improper purpose.⁴⁴

This dichotomy of consensual intercourse has informed the construction of the legal categories of sexual deviance (see the above quotation). In its legal formulation, the natural/unnatural dichotomy appears as separate categories of deviance: rape, indecent assault and the so-called unnatural offences. Though there is an area of overlap between them, the law sustains a qualitative distinction between rape, on the one hand, and indecent assault and the unnatural offences, on the other, based on the received moral notions of naturalness in sexual activity.⁴⁵

The natural/unnatural sex dichotomy, so deeply woven into Western theology, morality and culture, has been a powerful instrument in the regulation and control of sexuality. Even though the concepts of 'the natural' and 'the unnatural' have changed over time, the *dichotomy* itself has remained. It has been instrumental in shaping our understanding of human sexuality and organizing sexual experience. It finds its counterpart as a basic regulator of sexuality in the institution of marriage. This institution has provided the arena in which socially approved sexual activity takes place. The law has channelled sexual conduct by approving of sex only within marriage and disapproving of and even punishing sex outside of marriage.⁴⁶ Thus, while the natural/unnatural dichotomy regulated the range of permissible sexual conduct, the institution of marriage prescribed the parties between whom such conduct could legitimately take place. By these twin mechanisms, society has attempted to regulate, channel and control sexual energy.

Traditional Western (Christian) sexual morality is therefore largely negative in character. Its emphasis is on abstinence and the prohibition of sexual activity except in certain forms and in a specific

⁴⁴ This is based on the Thomist view, which has exerted a pervasive and lasting influence on Christian thinking. According to Aquinas, all things are made by God and endowed with a specific nature and purpose. The use of things contrary to their nature or for an improper end is contrary to the will of God and therefore sinful. This means-end analysis of normal sexuality, while it has been cogently criticized (see, for example, Alan Sokol (ed) *The Philosophy of Sex: Contemporary Readings* (1988)), continues to shape cultural attitudes towards 'legitimate' sexual activity. It seems a wise observation that, while reproduction might be nature's purpose, it need not be ours.

⁴⁵ The immediate implication of this is that, if forcible anal penetration constitutes an 'unnatural' offence, forcible vaginal penetration—what the law calls rape—must be a natural offence. Vaginal 'rape' is more natural than anal 'rape'!

⁴⁶ As to the various forms of stuprum, see Hunt op cit note 2 at 431; Labouchague op cit note 9 at 53–9.

context. This sexual ethic is reinforced by the sanctions of the criminal law.

As regards current South African law, the evolution of the laws proscribing unnatural acts demonstrates that the category of unnatural offences has narrowed significantly since Roman-Dutch times.⁴⁷ Progressive deregulation has also been accompanied by a lessening in the severity of punishment for both consensual and non-consensual acts. However, a corresponding development is not traceable in the law of rape, so that today rape is seen as the most serious of the sexual offences. It is the only one which carries the possibility of the death sentence. The existence of the natural/unnatural dichotomy cannot itself explain why anal or oral penetration of an unwilling victim is categorized as less grave an offence than vaginal penetration. From the victim's perspective such 'unnatural' penetration may well be more traumatic than vaginal rape and may cause considerably more physical injury.

The relegation of these acts to the 'lesser' offences is a revealing indication of the values and interests underpinning the legal categorization of sexual deviance. The apparent anomaly of a hierarchy of sexual offences becomes intelligible only if one rids oneself of the assumption that these offences form a homogeneous category, designed to protect the legally recognized interest of personal sexual autonomy. Only the offence of indecent assault, a species of assault which developed as a substantive offence in South African law during the nineteenth century, specifically protects the physical integrity of the person against attack of an inherently indecent nature.

The central issue is what the law chooses to define as an assault. The South African law of rape, under the influence of English law, views rape as essentially a non-consensual sexual encounter and not a 'vaginal assault'. Forcible anal penetration, on the other hand, is viewed as an assault. Labuschagne concedes that the blameworthiness of the attacker who perpetrates anal assault may be equivalent to one who perpetrates vaginal assault. His 'solution' to this anomaly lies in recommending that rape no longer be a capital offence! While Labuschagne⁴⁸ sees certain merit in treating the two acts as identical offences, he believes that

'... normale geslagentelike gemeenskap misdaad sistematies afsonderlik behoort te bestaan. Die beskerende belang is in laasgenoemde geval tog basies die beskerming van die menslike vryheid om na eie wil geslagentelike gemeenskap te hou. In geval van onnatuurlike geslagentelike gemeenskap gaan dit om iets wat hetsy na vrye wil, hetsy onwillig steeds teen die orde van die natuur is.'

As Labuschagne indicates, the unnatural sexual offences do not give legal protection to the interest of sexual autonomy, as both non-consensual and consensual acts are punishable under this head.

⁴⁷ Hunt op cit note 2 at 270.

⁴⁸ Labuschagne op cit note 9 at 163.

The underlying aim is the repression of forms of sexual conduct which traditional morality, with its shifting content, regards as abhorrent and worthy of public censure. Labuschagne's appeal to 'nature' here, while it has the weight and authority of traditional sexual morality behind it, is not convincing. Surely forcible 'normal' intercourse is also against nature. Secondly, if freedom of choice in sexual matters is an interest worthy of legal protection, why should such interest be protected exclusively in terms of rape law? On this view, one is driven to the conclusion that different legal interests are protected with regard to different human orifices! The absurdity of such a position is evident: it is analogous to the contention that the nature of an assault depends on whether the victim's toes, leg, arm or ear suffers injury and that the interest protected in each case is essentially different.

Similarly, the origin and development of rape law demonstrate that it was never intended to protect the victim's freedom of sexual choice, but the proprietary interest of her legal guardian. For centuries rape was a species of property crime—the theft of virginity—perpetrated against the victim's guardian, who was the only person entitled to claim compensation for the rape. The victim herself had no claim, as she personally was not perceived to be the injured party. The wrong suffered by the guardian consisted in the reduced bride-price which a defiled, that is non-virgin, daughter could command on marriage. The compensation aimed to make good this loss.⁴⁹ Only gradually did laws come to recognize that other categories of women could be raped. This system reflects a conception of female sexuality as the property of men, that is, a legal object capable of being owned and controlled by those who have legal power over the victim, whose consent or non-consent was an irrelevant consideration. Rape laws and marriage laws were twin mechanisms in the legal regulation of men's rights over female

⁴⁹ Historically, rape law is closely linked with marriage laws and practices. For example, the Assyrian Code obliged the rapist either to marry the victim or to pay to her father triple her standard bride-price (see Louis M Epstein *Sex Laws and Customs in Judaism* (1948)); according to Deuteronomy 22:28-9, the father could compel his daughter and the male offender to marry. The standard bride-price of 50 shekels was payable as a fine to the father for the theft of his daughter's virginity from his estate. This rule applied even if the girl had consented to intercourse. Her consent or non-consent was irrelevant: she could not legally give away what did not belong to her. The 'wrong' to her father was the decrease in her value on the marriage market. The rape of a wife, on the other hand, was legally regarded as an act of adultery for which both parties were executed. Sentence of death would inevitably follow on conviction, even against the husband's wishes (see Leviticus 20:10; Exodus 20:14). It is clear that in ancient times rape laws were designed to protect the valuable property in the form of sexual access and female reproductive powers which was exchanged in marriage transactions and to encourage the peaceful and orderly exchange of women in marriage. Lorene M G Clark and Debra Lewis op cit note 19 at 117, note that

'rape laws were simply one of the devices designed to secure to men the ownership and control of those forms of property, and to provide a conceptual framework which would justify punishing men who violated the property rights of other men in this respect'.

Clark and Lewis (see at 110-24), among others, contend strongly that contemporary rape law has not yet freed itself from these origins

NB

History

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sexuality and reproductive powers. Only in the later Middle Ages, under the influence of canon law, did rape come to be seen as a wrong against the victim herself, for which she could demand compensation. Yet the form of the offence did not change to reflect this, and rape law retained its close connection with marriage and property laws. Historically women's freedom of choice in sexual (and other) matters has been repressed and denied, not protected by the law. In patriarchal societies, it seems that female sexuality is always controlled by men.⁶⁰ Rape law has formed part of the male armoury of control of female sexuality *as between men*.

Thus, the interest which Labuschagne claims is protected by rape law—the victim's freedom of choice, is manifestly *not* the interest in question. The traditional Western sexual morality encourages chastity and values virginity, particularly for women. It has never sought to encourage women's freedom of choice in sexual matters. It is only in very recent times that social mores have come to recognize greater freedom in this area as a value. Freedom to choose when and with whom to have sexual intercourse is therefore a recently articulated interest, which rape laws were never designed to protect. Labuschagne's view represents an attempt to infuse this value into the existing definition.

This attempt must ultimately fail, because the definition itself, which has not changed in any essential respects since the Middle Ages, continues to reflect male proprietary interests in female sexuality. As long as the present definition is retained, the antithetical interest of the personal and sexual integrity of the victim will not adequately be recognized or protected.

CONCLUSION

The critique of the legal definition of rape reveals that it is a skewed definition which produces a distorted official portrait of the crime, the criminal and the victim. By its narrowness and selectivity it renders legally invisible other similar forms of rape behaviour or relegates them to other categories of qualitatively different acts. Similarly, the categorization of socially sanctioned behaviour in the criminal law does not passively and faithfully reflect 'natural' categories of socially harmful acts having an objective and unproblematic existence in society. Instead, criminal-law categories are ideological constructs⁶¹ reflecting the interests of particular, powerful groups—in this case, men. The categorization of sexual offences

⁶⁰ See Kathleen Barry *Female Sexual Slavery* (1979) for support for this proposition, and Marielouise Janssen-Jurreit *Sexism: The Male Monopoly on History and Thought* (1984) part 6. No matriarchal societies are known to exist at present. Matriarchal societies are also patriarchal in nature: the matriarch simply channels the power held by males through female descent.

⁶¹ Colin Sumner 'Marxism and Deviance Theory' in Paul Wiles (ed) *Crime and Delinquency in Britain* vol 2 (1971), cited in Box op cit note 5 at 7. See also Colin Sumner *Reading Ideologies* (1979) chapter 8.

fractures forms of rape behaviour into apparently disparate phenomena and hinders the bringing of these various acts into a unified conceptual framework. This fragmentation conceals the political dimension to rape and thereby defuses a potential threat to the sexual status quo. Furthermore, the definition of rape implies a model of consensual intercourse which as a *general standard of sexual conduct* is illusory, but functional to men's interests. It is illusory because truly consensual sexual activity requires independent, equal parties and a context in which neither can coerce the other. Given the economic dependence of many women on men (or at least their relative economic weakness), and men's stronger social, organizational and physical power, the sexes can rarely meet on a footing of complete equality. The model ignores the dimension of power in sexual relationships, which is usually an imbalance in favour of men. These circumstances are conducive to a great deal of sexual bargaining.⁶² Secondly, the mutual-consent model of sexuality ignores the element of coercion which characterizes culturally approved 'normal' sexuality. The model is functional to the interests of men as a class, as it fosters the illusion of sexual equality and autonomy for women and conceals the power dynamic in sexual relationships under the cloak of 'normal sexuality'.

The criticism of the common-law definition proceeds from a radically different conception of rape, and forms part of a wider critique of society. The feminist enterprise has been to break free of the conceptual hold of the legal definition and to locate the problem not so much at the level of the victim-assailant interaction as within a broader understanding of sex stratification and female oppression. In this view, rape is not an isolated, deviant, sexual act but essentially an act of violence and oppression against women. It is a sexual attack which expresses male dominance and contempt for women. Rape is not one form of attack, but a category of behaviour which is structurally generated (by the power imbalance between the sexes) and culturally sustained (in a male supremacist ethos). It constitutes only one of the many forms of violence against women.

The origins of rape are anchored in the structured imbalance of power between men and women as social groups, that is, in their political relationship. The continued supremacy of the male group relies heavily on the construction of consensus around patriarchal institutions and values.⁶³ Ultimately, however, the domination of one group by another is maintained by the use or threat of violence. This observation in the present context renders visible the political

⁶² See Clark & Lewis op cit note 19 at 125–30.

⁶³ The patriarchal order can tap vast reserves in the manufacture of consensus: traditional Judeo-Christian morality, religion, myth, the social and physical sciences and ruling male ideology powerfully legitimate the socialization processes of the sexes and their different social and political statuses.

dimension to rape practices. Not all women are raped. But all women, irrespective of age, circumstance or social location have to contend with its possibility. This constitutes a form of control of women, limiting their activities and movement and encouraging dependence on men for physical safety. Independently of the perception of the individual rapist, the political meaning of rape is

... primarily a lesson for the whole class of women—a strange lesson in that it does not teach a form of behaviour which will save women from it. Rape teaches instead the objective innate, and unchanging, subordination of women relative to men.⁸⁴

Central to the feminist critique is a focus on the law of rape, not as a neutral arbiter or benign protector of all from harm, but as a contributor in upholding the present sexual status quo which is dependent largely on continued rape practices. The criminal law and its practical enforcement are themselves social control strategies which, in rape cases, aim more at control of the victim than the assailant.

That men as a class should benefit from the present rape law is not surprising. There is no doubt as to whose law this is and whose interests it serves primarily, even when the law is infringed.

The legal definition of rape is a site of feminist struggle. While the clash between the feminist and non-feminist conceptions of rape may take place at the level of the criminal law, it is not simply a legal battle. It is a struggle against the social power to maintain a male reality as the 'objective' and therefore the only reality. It is a struggle against the norm of maleness which appears as abstract universality in law. Lastly, it is a struggle for the recognition of an alternative reality, and recognition that the subjectivity of the definition is not the whole of reality.

BRIBERY OF JUDGES: OTHER COUNTRIES

'Even though judicial bribery has long been a non-subject in this country, the silence has not been absolute. In the great *Portuguese Bank Note* case in 1931 (*Banco de Portugal v. Waterlow & Sons Ltd.* (1931) 100 L.J.K.B. 465; varied [1932] A.C. 452), Waterlows were sued for an enormous sum by the Bank of Portugal for having printed and supplied Portuguese bank notes at the behest of a plausible rogue who had deceived them. In the Court of Appeal Slesser L.J. joined with Greer L.J. in awarding the Bank a substantial sum, whereas the presiding judge, Scrutton L.J., would have given only a trifling sum. Slesser L.J. afterwards recorded that "A leading Portuguese newspaper seriously wrote that Waterlows had been very foolish; they must have given the whole of their *douceur* [bribe] to Scrutton, not realising that Greer and I, to whom they gave nothing, would outvote him" [Sir Henry Slesser *Judgment Reserved* (1941) 254]. Sir Robert Megarry *Judges and Judging* (The Child & Co. Lecture 1977) 2-3.

⁸⁴ Barbara Mehrof & Pamela Keaton 'Rape: An Act of Terror' in Anne Koedt (ed) *Notes from the Third Year: Women's Liberation* (1971), cited in Alison M Jagger *Feminist Politics and Human Nature* (1983) 262. (Emphasis in the original)

Reddi "A feminist perspective of the substantive law of rape" in Jagwanth et al (eds) *Women and the Law* 159-177

5.1 A feminist perspective of the substantive law of rape

Managay Reddi

INTRODUCTION

In many ways, a woman's life is shaped by the persistent threat of rape: women hesitate to venture out at night without male escorts, to live alone, to hitchhike, to stay late at the office to work alone, or to take certain jobs.¹ Susan Griffin writes of her experience of living in America nowadays, 'I have never been free of the fear of rape'.² Male prisoners who live with the threat of homosexual rape are probably the only men in our society who experience a fear comparable to that felt by all women. 'The fear of rape not only inhibits the freedom of women, it also exaggerates the dependency of women upon men. The law concerning rape and the way it functions both influences and is influenced by the relationship between men and women in our society'.³

An analysis of the substantive and procedural laws of rape shows that rather than protecting women, the rape laws might actually be a disability for them, since they appear to reinforce traditional attitudes about social and sexual roles. 'Although societal attitudes no doubt are responsible for the present construction of rape laws, it is also true that this construction serves to reinforce those attitudes.

6.5

The NCPS: A New Direction for Crime Prevention and Management?

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What is the NCPS?:

- A national policy paper which aims to shift the way crime is to be understood and managed.
- The objective of the NCPS is to reduce the levels of crime and thus contribute to greater safety and security in South Africa. The NCPS sees this happening in the following ways:
 - ⇒ a policy framework to guide crime prevention activities of all state agencies
 - ⇒ the creation of a societal consensus on crime prevention
 - ⇒ the development of national programmes to address the causes of crime
 - ⇒ the mobilisation of community resources and the participation of communities in crime prevention activities.

History of the NCPS:

- A response by central government to the high levels of crime in South Africa
- The NCPS is located within the now almost forgotten RDP: Crime prevention was regarded as part of the wider transformation process towards improved economic growth and development.
- The NCPS recognises that crime presents a major threat to development, undermines reconciliation, impacts negatively on public confidence in government and investment in South Africa, and threatens the building of a human rights culture.

What is it not?

- The NCPS is more of a guideline outlining principles and structures for crime prevention, and less of an "operational programme".

What are the problems?

- Grand policy vision, not a strategic plan.
- Faulty implementation down line functions across all of the departments
- Neglects pragmatic skills and capacity building (i.e. police training)
- Budgetary constraints/poor fiscal planning and management
- Absence of time frames
- Lack of performance indicators, monitoring and evaluation
- Limited state capacity to manage partnerships with other departments and with civil society
- Promotes "prevention" but does not give enough attention to the criminal justice crisis (lack of resources for police; poor pay; poor morale; lack of or high rotation of prosecutors; problematic investigation practices/training)
- Audit of criminal justice "problem areas" has never been adequately undertaken.
- Gap between popular expectations and government performance.
- The neglect of offence specific programmes.
- General inattention to local and provincial crime prevention strategies
- Vague and contradictory assumptions about crime and criminality: **for example**
- Does not adequately address provincial differences and crime patterns or crime prevention priorities.
- Does not have effective measures to "anticipate" crime (crime prevention)

- Provides a list of factors which give rise to criminal offending, but little attention is given to the "enabling" factors for crime to occur.
- Root causes of crime do not really correlate with the types of crime being committed.
- Victims are seen as individuals who assume some degree of responsibility for their own safety and security.
- Victims of crime are expected to take initiative by investing confidence in the criminal justice system and provide the necessary information criminal justice agents. However, little is done by criminal justice and other state departments to equip victims with information about the criminal justice process.
- Does not effectively deal with the balancing of rights between the victim and the offender.
- Little mention is made of community policing, current and forthcoming legislation that deals with criminal justice, nor the Constitution. For example:
 - ⇒ Section 12 (1)(c) which specifically entrenches the right to be free from all forms of violence from public or private sources; and
 - ⇒ Section 7 of the Constitution which provides [in section 7(2)] that *the state must respect, protect, promote and fulfil the rights in the Bill of Rights*, implying that the state should not only respect the rights of women to be free from all forms of violence, but should take active steps to protect those rights
- The NCPS assumes that large sections of civil society has even basic access to justice related services.
- Civil society is seen as a "junior partner" in crime prevention.

The Victim Empowerment Programme [VEP] of the NCPS: An Example of How the VEP will Fail Victims of Violence Against Women

Our present understanding of how the NCPS and the VEP explains this is as follows:

- 1) By supporting and empowering victims, you reduce the possibility of a victim becoming an offender – the concept of 'taking the law into one's own hands' or choosing to operate outside of the system as 'crime pays'. Victim empowerment, as defined by the VEP model, will, in essence, increase victims' faith in the criminal justice system if they are part of that process of achieving justice.
- 2) By empowering the victim you reduce the possibility of that person becoming a victim again.
- 3) To break the cycles of violence (e.g. by intervening in domestic violence situations and empowering the child victims in that situation) you reduce the possibility of those children as adults becoming abusers themselves.

In the cases of (1) and (2) we do not believe that these motivations for victim empowerment, with regard to violence against women, is applicable. Firstly because few women as victims of sexual assault or domestic violence become perpetrators of abuse and secondly, because violent crimes against women are ones of opportunity and access. To use the analysis that empowerment will reduce the possibility of re-victimisation places the blame and effectively the responsibility of violence against women on women.

The motivation for victim empowerment, as it pertains to violence against women, requires a totally different analysis: the motivation for victim empowerment is that the more empowered a victim feels (i.e. made to feel that she is in control) the more co-operative she will be in the criminal justice process. This in turn will affect the quality of the investigation and the evidence which is collected by the police. An example of this is the statement that is taken by the police from a rape complainant - If the principles of victim empowerment are used in the procedure of statement taking a higher standard of the evidence will be gathered, which may in turn result in a higher probability of arrest and prosecution. This once again relates back to the two main tenants of the Paper - law enforcement and crime prevention - which incorporates deterrence as being central to these two approaches.

EMERGENCY FIRST AID OR LONG TERM CURE? A closer look at the new domestic violence legislation

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In 1995, author Saras Jagwanth posed the question whether the Prevention of Family Violence Act (1993) might be the legal equivalent of sticking a plaster on a broken leg - an inappropriate and temporary remedy for a serious ailment.* Experience has shown that this legislation was in fact in many ways flawed, and in November 1998 Parliament passed the Domestic Violence Act 116 of 1998, which, according to the accompanying memorandum, is aimed at addressing a number of the shortcomings in the existing legislation.

Who will be protected by the new Act?

The ambit of the legislation is broadened significantly by an extended definition of a 'domestic relationship' which includes, for example, parents and children, same-sex partners, siblings, or persons in an engagement or dating relationship. This places a protection order (referred to as an 'interdict' under the 1993 Act) within reach of partners to a wider range of domestic relationships.

What does 'domestic violence' mean?

The new legislation for the first time gives legal contents to the term 'domestic violence'. Any controlling or abusive act which harms (or threatens to harm) the health, safety or well-being of the victim should be regarded as domestic violence. Specific instances of domestic violence include sexual abuse, emotional or psychological abuse, physical abuse, harassment, intimi-

dation and stalking. Significantly, these concepts are defined in some detail, and it is hoped that this will eliminate the present lack of clarity on the extent of violence required for the court to issue a protection order.

Duties of state officials

The new Act sets out a number of the duties resting on state officials who encounter victims of domestic violence. Police officials, for example, are required (either on the scene of an incident of domestic violence or when an incident of domestic violence is reported) to assist victims of domestic violence. Clerks of the court should similarly provide applicants for protection orders with assistance and information.

Increased powers of arrest

Section 3 increases existing police powers of arrest. At present, police officials are not entitled to arrest perpetrators of domestic violence for the offence of assault without a warrant of arrest. This often leads to increased danger to the victim, since the police are not empowered to remove the perpetrator from the scene of violence (even temporarily) by means of arrest. While the new Act authorises arrest without a warrant for assault, it by no means mandates arrest in all cases and thus leaves a considerable level of discretion. Given the well-documented reluctance on the part of the SAPS to intervene in incidents of domestic violence, the question is whether this new provision will ultimately be of much assistance to victims.

Detailed process

The existing uncertainty regarding the procedure to be followed in granting an application for an interdict has been addressed through the formulation of a process which, in brief, authorises the granting of a 'temporary' protection order where the court is satisfied that the actions of the respondent pose 'imminent harm' to the victim of domestic violence. This order is issued with a return date, on which the respondent has to appear to show cause why the order should not be made final.

In the absence of a finding of imminent harm, the respondent will be issued with a notice to appear in court to contest the granting of a protection order. A point of concern is that the Act does not define 'imminent harm' in this context. A narrow judicial interpretation may deprive women of the protection offered by a temporary order.

If the respondent fails to appear on the set date, a temporary order may be made final, provided that the court is satisfied that the respondent has committed or is committing an act of domestic violence and that proper service was effected. If the respondent is present, and chooses to contest the granting of the order, the court will consider both sides and reach a decision. If satisfied that the respondent has committed, or is committing, an act of domestic violence, the court must grant a protection order.

What are the terms of a protection order?

The court may include any terms necessary to protect the health, safety and well-being of the appli-

cant. This may, for example, include an order for the respondent -

■ not to commit an act of domestic violence against the applicant;

■ not to go near the home or place of work of the applicant;

■ to be evicted from the shared home (this order will only be made if the court is satisfied that this is in the best interests of the applicant);

■ to continue making bond or rent payments for the shared home (even if the respondent is evicted);

■ to pay the applicant emergency monetary relief;

■ not to have any contact with minor children.

In addition, the court may order the police to seize an arm or dangerous weapon in the respondent's possession (subject to certain requirements) or to accompany the applicant to the shared home to collect her personal property.

How is the respondent informed of the order?

The protection order only comes into effect once it has been served on the respondent, which means that the applicant has no protection in terms of the order until service has been effected. According to the new legislation, either the clerk of the court, a member of the SAPS or the sheriff will be able to serve a protection order. However, the Act unfortunately does not make it sufficiently clear where the ultimate responsibility for service lies.

What happens if the respondent disobeys the protection order?

Together with the protection order, a suspended warrant of arrest must be issued. If the re-

spondent violates the terms of the order, the applicant must approach the police and make a statement under oath setting out that the order has been breached.

If the police official has a reasonable suspicion that the respondent has violated the order, and that there is a prospect of imminent harm to the victim, the respondent must be arrested and brought before court. However, if the police official does not believe that harm is imminent (but that the order has been breached), the respondent will be issued with a notice to appear in court in a specified date.

On the court date, the respondent (now the accused) will be tried for the criminal offence of violating the terms of a protection order, and if convicted, may be sentenced to a fine or five years' imprisonment. In terms of the Criminal Procedure Act, the court may also consider a suspended sentence or other sentencing options.

The criminal prosecution of the respondent is a significant departure from the present position. Currently, violations of domestic violence interdicts are dealt with by means of an enquiry by the presiding officer, and although this enquiry may result in a criminal conviction, the process can not be termed a criminal trial (for example, the public prosecutor is not involved at any stage).

Significantly, the new Act directs the National Director of Public Prosecutions to compile policy directives for the prosecution of domestic violence with six months after its commencement.

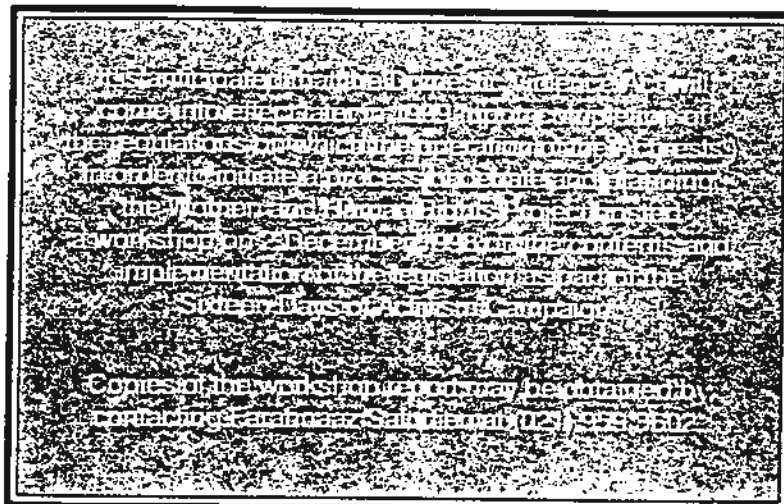
Conclusion:

will the new Act work?

As with any legislation, the success of the new Act will hinge on its implementation. The concept of 'implementation' has many facets, ranging from education of the public and training of state officials (most notably police officials and public prosecutors) to judicial interpretation of terms such as 'undue hardship' and 'imminent harm'. Many of these aspects are dependent on question of resource allocation, and this is ultimately to a large extent where the legislation will stand or fall.

It is vitally important for the South African government to acknowledge its obligations, both in terms of the 1996 Constitution and international human rights law, to provide women with protection against violence by facilitating the implementation of this legislation. Failing this, the Domestic Violence Act, on its face far-reaching and progressive, will remain an inadequate remedy.

* See Saras Jagwanth 'The Prevention of Family Violence Act: a feminist critique' SA Journal of Criminal Justice (1995) 1-11.



137. ZORA NEALE HURSTON, *How It Feels to Be Colored Me*, in *I LOVE MYSELF WHEN I AM LAUGHING . . . AND THEN AGAIN WHEN I AM LOOKING MEAN AND IMPRESSIVE* 152 (A. Walker ed. 1979).

138. *Id.* at 153.

139. *Id.* at 154.

140. *Id.*

141. *Id.*

142. Z. HURSTON, *What White Publishers Won't Print*, in *I LOVE MYSELF WHEN I AM LAUGHING . . . AND THEN AGAIN WHEN I AM LOOKING MEAN AND IMPRESSIVE*, *supra* note 137, at 169.

143. *Id.* at 179.

146. [Barbara] Johnson, [Thresholds of Difference: Structures of Address in Zora Neale Hurston, in "RACE," WRITING, AND DIFFERENCE, *supra* note 12], at 323-24.

151. TONI MORRISON, *SULA* 52 (1974).

152. As Andrew Ross has noted, even the female "collaborators" MacKinnon attacks with fury are seen as stupid, not as wrong or evil. Andrew Ross, *Politics Without Pleasure* (Book Review), 1 *YALE J.L. & HUMANITIES* 193, 200 (1989).

153. West, *supra* note 95, at 143.

154. B. HOOKS, *FEMINIST THEORY*, *supra* note 22, at 45.

155. Z. HURSTON, *supra* note 137, at 155.

156. *Id.*

160. Williams, *supra* note 111, at 829. [Joan] Williams, for instance, analyzes how women use women's culture against themselves, "as they do every time a woman 'chooses' to subordinate her career 'for the good of the family' and congratulates herself on that choice as a mature assessment of her own 'priorities.'" *Id.* at 830.

Black women have often actively embraced patriarchal stereotypes in the name of racial solidarity. See P. GIDDINGS, *supra* note 21, at 322-23 (discussing women's concessions to male chauvinism in the civil rights movement of the 1960s); A. LORDE, *supra* note 18, at 119-21 (discussing refusal to confront sexism and homophobia within the black community).

163. [Barbara] Smith & [Beverly] Smith, [Across the Kitchen Table: A Sister-to-Sister Dialogue, in *THIS BRIDGE CALLED MY BACK*, *supra* note 22], at 126.

164. Matsuda, *supra* note 13, at 9.

165. See, e.g., Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 *HARV. C.R.-C.L. L. REV.* 401 (1987); Williams, *supra* note 126.

166. Williams, *supra* note 126, at 24.

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Feminist Jurisprudence: Grounding the Theories [1990]

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Feminist Method and Feminist Legal Scholarship

Feminist Method

Recent feminist legal scholarship emphasizes the importance of feminist method. While it is not clear whether feminist method is, in fact, limited to consciousness-raising, nor whether it should be, there does appear to be general agreement that feminist method begins with the primacy of women's experience. Listening to women and believing their stories is central to feminist method. If we are careful to listen to women when they describe the harms they experience as women, we are likely to get the legal theory right (i.e., perceive the problem correctly and propose the right solutions).

Consider Carol Gilligan's pathbreaking work in psychology.²¹ Feminist method led Gilligan to suggest new theories regarding women's moral development. Gilligan's method was to listen to female experience as female experience—and not merely as other-than-male experience. Gilligan listened to women tell their own stories. She did not force the stories into pre-formed male categories. Because she really listened, she uncovered a "different voice" than that heard by her male colleagues. . . .

Catharine MacKinnon may be the feminist legal scholar who has most consistently focused on the importance of feminist method. Feminist method, for MacKinnon, means women listening to other women.²² Women, as they listen to each other, tend to discover a commonality of experience. Uncovering the fact of women's common experiences creates new knowledge.

MacKinnon listened to women's common experience of sexual harassment and built a legal theory that reflected that experience.²³ In May, 1975, Working Women United held a "Speak-Out" on sexual harassment.²⁴ Women told their

stories of being treated as sex objects at work. They spoke of the unarticulated job requirements for women, requirements regarding physical attractiveness and sexual availability. The organization reported that 70% of the women who responded to their survey had experienced some sexual harassment on the job.³¹ During this part of the 1970s, individual women also began to bring their claims regarding sexual harassment to the courts.³²

MacKinnon, beginning with the data of real women's experience,³³ and building on the arguments put forth by feminist litigators, developed a legal theory that characterized sexual harassment as a form of sex discrimination that ought to be covered by Title VII. A theory was necessary because existing jurisprudence did not recognize sexual harassment as a harm which the law should remedy.³⁴ The theory revealed the male bias of the law (ignoring harms that only occur to women) and proposed a revision: a remedy for sexual harassment harms under Title VII.

Feminist Legal Scholarship

... My particular concern is whether the "women's experience" that informs feminist legal theory excludes lesbian experience. I will briefly discuss what I consider to be the three stages of feminist legal scholarship³⁵ and will review what impact, if any, lesbian experience has had on the development of each of these stages.

1. Stage One: Formal Equality and Reproductive Rights

The period from 1963 to 1966 is generally cited as the beginning of the modern day women's movement, sometimes described as the second wave of feminism.³⁶ A number of important events occurred during this period.³⁷ Betty Friedan's book, *The Feminine Mystique*, was published in 1963. The same year, the Equal Pay Act was enacted.³⁸ In 1964, Title VII³⁹ was enacted, prohibiting sex discrimination in employment. Both statutes exhibit a commitment to the principle of equal opportunity. However, early evidence indicated that the Equal Employment Opportunity Commission was less than fully committed to the principle as applied to women.⁴⁰ For example, in 1965, the Commission ruled that employers could employ sex-segregated advertising, despite the clear statutory language to the contrary.⁴¹ In response, a new national women's activist group was formed in 1966, the National Organization for Women (NOW).⁴²

In the beginning, NOW's agenda focused on formal equality in the public arena. The organization avoided issues concerning sexual and reproductive freedom.⁴⁴ Some members became concerned when NOW began to consider supporting abortion rights. They split off and formed the Women's Equity Action League (WEAL).⁴⁵ NOW adopted a pro-abortion stance shortly thereafter.⁴⁶ However, its leaders found the issue of lesbianism to be more problematic.⁴⁷ Lesbian feminists who "came out" in the early days of the movement were "disinherited" by their sisters.⁴⁸ In the mainstream of the movement, the word "lesbian" was shunned.⁴⁹

In the late 1960s, as the modern women's movement rallied together and began to litigate for women's equality, fewer than 5% of all lawyers were women

and fewer than 2% of all law professors were women.⁵⁰ Feminist legal scholarship during this period, to the extent it existed at all, reflected the goals of the concurrent women's movement. Such scholarship tended to focus on equality in the public sphere and to argue that women should be treated the same as men.

Feminists who were concerned with reproductive freedom necessarily had to deal with the ways in which women were different from men. However, much early feminist legal scholarship was written from a viewpoint that implicitly approved the male norm. Specific concern for lesbian issues is missing from this scholarship. To the extent lesbians are no different from heterosexual women, they were, of course, silently included in the fight for equality.⁵⁴ But the differences between the experience of lesbians and heterosexual women were irrelevant in the fashioning of feminist legal theory during Stage One.

2. Stage Two: Women Are Different from Men

Once women began to be treated like men, people began to notice that women really are not like men. Women are most noticeably not like men when they are pregnant. Stage Two theorists began to develop theories of equality that could account for certain differences between women and men.⁵⁵ At a minimum, they argued, equality theory should account for the fact that women get pregnant.⁵⁶ Lesbians are as biologically different from men as heterosexual women are.⁵⁷ Thus, while the focus on difference remained limited to biological differences between women and men, lesbian experience had no special insights to offer.

Some theorists in Stage Two have suggested that women are different from men in ways that go beyond biology. Some cultural feminists,⁵⁸ for example, have claimed that the experience of mothering results in social and psychological gender differences.⁵⁹ Women, because they give birth and nurture, tend to be more connected and caring than men.

Following the lead of Carol Gilligan, some feminist legal theorists began to focus on ways that woman's "different voice" has been ignored by the law. They pointed out that, because the law is masculine, it reflects values of autonomy rather than connection and caring.⁶⁰ Then they argued that the law should recognize and protect specifically female values.⁶¹

Catharine MacKinnon, another Stage Two legal theorist,⁶² also has argued that men and women are different, but the difference is that men dominate and women are subordinate.⁶³ Which came first, dominance or difference, is an unimportant question, in her view. The important thing is to end the dominance.⁶⁴ Legal arguments that pose the issue as one of difference between the sexes are not likely to end the dominance. MacKinnon calls for a paradigm shift, away from differences in biology, differences in experience, differences in essence, to the only difference that really matters: the difference in power. Her "inequality" approach to sex discrimination recognizes the imbalance in power between men and women. "Practices which express and reinforce the social inequality of women to men are clear cases of sex-based discrimination"⁶⁵ Sexual harassment is one such practice.⁶⁶

One might expect cultural feminists and dominance theorists who engage in legal scholarship (such as Gilligan and MacKinnon, respectively) to acknowledge the relevance of lesbian experience in their writings. It is particularly surprising to discover the invisible lesbian problem in the work of cultural feminists. In disciplines other than law, feminist theorists working to reclaim women's culture and its values have often focused on lesbian community.⁶⁷ But in legal scholarship, discussions of female value focus on "woman as mother."⁶⁸

Robin West's article, *Jurisprudence and Gender*,⁶⁹ is a prime example of the problem. West posits that current (masculine) jurisprudence is based on the concept of human beings as separate from each other and that this "separation thesis" forms the core of both liberal and critical male legal theories. Feminist theory, in contrast, views human beings as primarily connected to one another. Both cultural and radical feminists use this "connection thesis." West begins her article with four examples of women's primary and material experience with connection: (1) pregnancy; (2) heterosexual penetration; (3) menstruation; and (4) breastfeeding.⁷⁰ Despite West's awareness of the pressure on all women to be heterosexual,⁷¹ her list of "connection" experiences ignores specifically lesbian experiences of "connection."

Furthermore, West's two categories of feminist thought, cultural and radical, are constructed in such a way as to exclude lesbian feminists. West defines cultural feminists as those who focus on the mother-child connection as the source of women's greater capacity for caring and nurturance. Professor West does not necessarily align herself with these cultural feminists.⁷² But I worry that in creating her two categories of feminists (cultural feminists and radical/dominance feminists), she ignores those lesbian feminists who are attempting to develop women's community (connections to other women)⁷³ and to reclaim feminist value as encompassing both separation and connection.⁷⁴

Dominance theorists also tend to ignore lesbian experience. Catharine MacKinnon, for example, has argued that women are constantly and always subordinated to men.⁷⁵ In MacKinnon's view, any special abilities for caring and connection come, not from the positive aspects of motherhood, but from the negative aspects of subordination.⁷⁶ Women build webs of connection to survive the subordination. "Women value care because men have valued us according to the care we give them . . ."⁷⁷

To the claim that lesbian experience is different, that lesbians are not subordinate to men, that their care is not male-directed, MacKinnon appears to have two different responses. Her first response is that exceptions do not matter. MacKinnon's intent is to offer a critique of the structural condition of women as sexual subordinates and not to make existential claims about all women.⁷⁸ It does not affect her theory that all women are not always subordinated to men.⁷⁹ Thus, for MacKinnon, lesbian experience of non-subordination is simply irrelevant.

Her second response is more troubling. It goes beyond the assertion that lesbian experience is irrelevant; it denies the claim that lesbian experience is free from male domination.

Some have argued that lesbian sexuality—meaning here simply women having sex with women, not with men—solves the problem of gender by eliminating men from women's voluntary sexual encounters. Yet women's sexuality remains constructed under conditions of male supremacy; women remain socially defined as women in relation to men; the definition of women as men's inferiors remains sexual even if not heterosexual, whether men are present at the time or not.⁸⁰

I find this passage objectionable for several reasons. My primary objection is that MacKinnon has defined lesbian sexuality to suit her purposes ("simply women having sex with women"—i.e., with nothing else changed except that a woman replaces a man). Although I do not dispute that lesbian couples can sometimes ape their heterosexual counterparts, I am infuriated by MacKinnon's silencing of the rest of lesbian experience. Where is MacKinnon's feminist method? To whom does she choose to listen? Would it not enrich her theory to recognize the reality of non-subordination that some lesbians claim as their experiential reality and ask about its relevance to her underlying theory?⁸¹ And yet, because her theory is premised on a single commonality among women, sexual subordination, MacKinnon fails to see the relevance of the lesbian claim to non-domination, even when it stands—literally—in front of her.⁸²

The exclusion of lesbian experience from feminist legal theory is also documented in Clare Dalton's recent summary of feminist legal thought.⁸³ Dalton describes present aspirations to feminist jurisprudence as falling within two camps: "woman as mother" theories and "woman as sexual subordinate" theories.⁸⁴ Neither camp embraces lesbian experience as central to the formation of theory. I suspect Professor Dalton's description is accurate. I can find no major "theory piece" by a legal scholar that focuses on the experience of adult women loving each other as the core experience for building a legal theory premised on caring and connection.⁸⁵ And although "woman as sexual subordinate" theorists⁸⁶ are more likely to acknowledge the fact of lesbian existence,⁸⁷ they focus on a critique of male dominance rather than on lesbian bonding as a possible alternative to male dominance.⁸⁸

3. Stage Three: Postmodernism

Borrowing from Clare Dalton, I call the third stage of feminist legal theory "postmodernism."⁸⁹ Postmodern thought challenges notions such as objectivity and universality. The postmodern "knowing self" is subjective, concrete and particular, constructed through the lived experiences of the subject.

Postmodern feminism is generally associated with French feminists, such as Helene Cixous, Luce Irigaray, and Julia Kristeva.⁹⁰ The influence of Simone de Beauvoir's work⁹¹ on these theorists is evident.⁹² Beauvoir's existential analysis of woman as "other" is conceived by postmodern feminists as enabling women to critique the dominant culture. Being "other" allows women to understand "plurality, diversity, and difference."⁹³

From a postmodern perspective, feminist theory is inadequate when limited by the perception that there is one essential commonality among all women. Cultural feminists who focus on "woman" solely as "mother" (actual or cultural) do not speak to the full complexity of female experience. Radical feminists,

such as MacKinnon, who focus on "woman" solely as "sexual subordinate" also speak limited truths.⁹⁴ Good feminist theory ought to reflect the real differences in women's realities, in our lived experiences. These include differences of race,⁹⁵ class, age, physical ability, and sexual preference.

Postmodern legal theorists will want to reject the limitations caused by any categorization. Although they will want to listen to the reality of lesbian experience, these theorists will not be inclined to build a grand theory based on the concept of "woman" as "lesbian." In the final part of this essay, I offer some thoughts about the potential relevance of lesbian experience to the postmodern development of feminist legal theory.

The Retelling

I believe that current feminist legal theory is deficient and impoverished because it has not paid sufficient attention to the real life experiences of women who do not speak the "dominant discourse."⁹⁶ Elsewhere I have urged that feminist law teaching ought to include "listening to difference" and "making connections."⁹⁷ Here I urge the same for feminist legal scholarship.

Most feminist legal theorists, by focusing on sameness and difference, have fallen into either the assimilationist trap (all women are the same as men/all women are the same) or the essentialist trap (all women are different from men in one essential way/all women are different, but what counts is their essential commonality). The only difference between assimilationists and essentialists is that the former ignore the reality of differences whereas the latter say that differences generally do not matter. The two concepts, assimilationism and essentialism, collapse into each other to the extent they treat women as a single class that is essentially the same.

Elizabeth Spelman describes the essentialist's solution to the "differences" problem in feminist theory: "The way to give proper significance to differences among women is to say that such differences simply are less significant than what women have in common. This solution is very neat, for it acknowledges differences among women only enough to bury them."⁹⁸ The difficulty arises when an individual essentialist theorist must determine the content of this commonality which is so significant that it trumps differences. When white, straight, economically-privileged feminists name the commonality, and ignore differences, the result may be that all women are assimilated into a single class of white, straight, middle-class women.

It is not enough to name the differences of race, class, and sexuality. The differences need to be understood. Much recent feminist legal scholarship includes the perfunctory footnote, dropped the first time the essential category "woman" is mentioned, which acknowledges the differences of race and class, and sometimes of sexual preference. Such politically correct footnotes name the differences, but I see no evidence in the accompanying texts that the differences matter. Scholarship that nominally recognizes differences, but still categorizes "woman" from a single perspective is stuck in the assimilationist/

I do not mean to ignore the importance of our commonalities. It is valuable to identify the similarities among all women. When we identify what we have in common, we begin to build bridges and connections. Yet if we ignore the differences, we risk distorting those connections, because any connection that fails to recognize differences is not a connection to the whole of the other self. A normative principle that honors only what I have in common with each of you fails to respect each of you for the individual woman that you are. To respect you, despite your difference, is an insult. Such respect is not respect for your difference, but only for our sameness. Such respect belittles your difference and says it does not matter. Such "respect" falls into the assimilationist/essentialist trap.

Let me give you an example. A white law professor says to her Black female colleague: "Sometimes I forget that you are Black. Sometimes I think of you as white."⁹⁹ The comment is meant as a compliment, but it denies the real life experience of the Black woman to whom it is addressed. It says, ultimately, "what I respect in you is only what you have in common with me."

Now let me give you an example out of lesbian experience. A lesbian college teacher proposes a course entitled "The Outsider in Twentieth-Century American Literature." The course is to include writings of lesbians and gay men, as well as other outsiders, such as persons who have been in mental institutions or prisons. In discussing the potential course, the teacher's (presumably) heterosexual colleagues dismiss the notion that an author's sexuality might be an important aspect of her or his writing, claiming that sexuality is no different from "a thousand other things" that might influence the writer.¹⁰⁰ None of the teacher's colleagues considers "having to live as a 'different' person in a heterosexist culture"¹⁰¹ as a factor important to one's writing.

Adrienne Rich, a lesbian poet, echoes the same theme in the following story:

Two friends of mine, both artists, wrote me about reading the "Twenty-One Love Poems" with their male lovers, assuring me how "universal" the poems were. I found myself angered, and when I asked myself why, I realized that it was anger at having my work essentially assimilated and stripped of its meaning, "integrated" into heterosexual romance. That kind of "acceptance" of the book seems to me a refusal of its deepest implications. The longing to simplify . . . to assimilate lesbian experience by saying that "relationship" is really all the same, love is always difficult—I see that as a denial, a kind of resistance, a refusal to read and hear what I've actually written, to acknowledge what I am.¹⁰²

There is a commonality between Adrienne Rich and her heterosexual artist friends. They all experience love and relationship. Yet even if some portion of the love experience is universal, the heterosexual world will never understand the gay and lesbian world if we all focus on the commonality, the universal. To claim that lesbians are the same as heterosexual women or that Black women are the same as white women is to fall into the assimilationist/essentialist trap.

them. Yet it is not enough to recognize and name the differences among us as women. We must also understand those differences.

I ask those of you . . . who are heterosexual to focus on an important love relationship in your life. This could be a present relationship or a past one, or even the relationship you hope to have. I ask you: how would you feel about this relationship if it had to be kept utterly secret? Would you feel "at one with the world" if a slight mistake in language ("we" instead of "I") could lead to alienation from your friends and family, loss of your job? Would you feel at one with your lover if the only time you could touch or look into each other's eyes was in your own home—with the curtains drawn? What would such self-consciousness do to your relationship?

I use the following exercise to demonstrate to my students our different points of view. First I ask each student to write down three self-descriptive nouns or adjectives, to name three aspects of her (or his) personal self.¹⁰¹ When they have finished writing, we go around the room and each student reads the three choices aloud. For my women students, the list almost always includes either the word woman or female. Thus, we share a perception of self as female. The meaning of female may vary, but it is significant that we all view the fact that we are women as one of the three most important facts about ourselves.

As to the rest of the list, there are important differences. For example, no white woman ever mentions race, whereas every woman of color does. Similarly, straight women do not include "heterosexual" as one of the adjectives on their lists, whereas lesbians, who are open, always include "lesbian" as one of the words on their lists. The point is, not only are we different from each other in such obvious ways as race and sexuality, but we perceive our differences differently.

The results of my exercise are not surprising. Because of the pervasive influences of sexism, racism, and heterosexism, white, heterosexual women think of gender as something that sets them apart, as something that defines them, whereas neither race nor sexuality seems to matter much. Yet if neither race nor sexuality matters much to a white, heterosexual woman, how can she begin to understand the ways in which it matters to others who are different from her in these dimensions?

I wonder sometimes whether heterosexual women really understand the role that heterosexuality plays in the maintenance of patriarchy. Indeed, I sometimes wonder whether lesbians really understand. And yet, if feminist legal theory is to provide meaningful guidance for the abolition of patriarchy, feminist theorists must understand heterosexuality as an institution and not merely as the dominant form of sexuality.

Adrienne Rich illuminated the problem years ago in her brilliant critique of heterosexuality:¹⁰⁴

[I]t is not enough for feminist thought that specifically lesbian texts exist. Any theory or cultural/political creation that treats lesbian existence as a marginal or less 'natural' phenomenon, as mere 'sexual preference,' or as the mirror image of either heterosexual or male homosexual relations, is profoundly weakened thereby . . .

. . . Feminist research and theory that contributes to lesbian invisibility or marginality is actually working against the liberation and empowerment of women as a group.¹⁰⁵

Adrienne Rich encourages us to look at heterosexuality from a new perspective, from the perspective of the "lesbian possibility." The invisibility of lesbian existence, however, removes the lesbian possibility from view. If there are no lesbians, the only possibility is heterosexuality. Men will assume all women are equally available as sex partners. Women will choose men and never question that choice.

If the choice is never questioned, can it be an authentic choice? Do heterosexual women really choose men or are they victims of false consciousness? And if they are victims of false consciousness, then how do we know that most women are heterosexual? Might they not choose otherwise if they were truly free to choose?¹⁰⁶

Marilyn Frye offers a challenge to feminist academics and I want to echo her in repeating it here for feminist legal theorists:

I want to ask heterosexual academic feminists to do some hard analytical and reflective work. To begin with, I want to say to them:

I wish you would notice that you are heterosexual.

I wish you would grow to the understanding that you choose heterosexuality.

I would like you to rise each morning and know that you are heterosexual and that you choose to be heterosexual—that you are and choose to be a member of a privileged and dominant class, one of your privileges being not to notice.

I wish you would stop and seriously consider, as a broad and longterm feminist political strategy, the conversion of women to a woman-identified and woman-directed sexuality . . .¹⁰⁷

Frye reports that a typical response by heterosexual women to such inquiries is that, although they may understand what she is saying, they cannot just up and decide to be lesbian.¹⁰⁸ I, too, have women colleagues and friends who similarly respond, with a shake of the head, that they are hopelessly heterosexual, that they just are not sexually attracted to women.

Frye says that she wants to ask such women (and so do I), "Why not? Why don't women turn you on? Why aren't you attracted to women?"¹⁰⁹ These are serious questions. Frye encourages heterosexual women to consider the origins of their sexual orientation:

The suppression of lesbian feeling, sensibility, and response has been so thorough and so brutal for such a long time, that if there were not a strong and widespread inclination to lesbianism, it would have been erased from human life. There is so much pressure on women to be heterosexual, and this pressure is both so pervasive and so completely denied, that I think heterosexuality cannot come naturally to many women; I think that widespread heterosexuality among women is a highly artificial product of the patriarchy. . . . I want heterosexual women to do intense and serious consciousness-raising and exploration of their own

personal histories and to find out how and when in their own development the separation of women from the erotic came about for them. I would like heterosexual women to be as actively curious about how and why and when they became heterosexual as I have been about how and why and when I became lesbian.¹⁰⁰

Silence

Engage in self-reflection.

[Did she really mean that? Am I supposed to sit here and consider lesbianism as a possibility? . . . Why not? . . . And if I do consider it, but choose men anyway, is my choice more authentic? What about tomorrow? Do I choose again?]

[She doesn't understand. I did choose. Twenty years ago I chose for the children. Does that make my choice inauthentic? What does my choice mean for me today?]

[What about those of us who choose to live alone, who reject intimacy altogether? Am I choosing to be lesbian if I reject men or only if I choose women? As a woman alone, how am I perceived?]

[To take lesbianism seriously, do I have to reject men? Can I choose both women and men?]

[What is all this about choice? I've been a lesbian all my life. I never chose it. I've just lived my life as it was.]

Connections

The most consistent feminist claim, at least since the publication of Simone de Beauvoir's *The Second Sex*, is that knowledge of reality has been constructed from a male-centered standpoint. From their position as outsider, women have questioned that reality, because women's life experiences differ—often dramatically—from those of men. The most cohesive and challenging critiques of male-centered reality have been made by women from standpoints that are exactly opposite, experientially, from those of men.¹¹¹ One such critique is made by cultural feminists from the "woman as mother" standpoint. Another is made by other radical feminists from the "woman as sexual subordinate" standpoint.

The fact that so many women can identify common life experiences that are ignored by the male version of reality makes any critique based on such common experiences compelling and powerful. But theorists ought to resist transforming a critical standpoint into a new all-encompassing version of reality. Indeed, my fear is that what started as a useful critique of one privileged (male) view of reality may become a substitute claim for a different privileged (female) view of reality.

Catharine MacKinnon, for example, critiques the patriarchy from a "woman as sexual subordinate" standpoint. As compelling as her critique is, it should not be viewed as the one and only existential reality for women. And yet MacKinnon herself is so committed to this standpoint that she sometimes seems

MacKinnon's theory is that woman's subordination is universal and constant, but not necessarily inevitable.¹¹³ She cautions against building theory on the basis of Carol Gilligan's discovery of woman's "different voice" because the women Gilligan listened to were all victims of the patriarchy. Thus, MacKinnon is wary of assigning value to their moral voice. As she explains,

[b]y establishing that women reason differently from men on moral questions, [Gilligan] revalues that which has accurately distinguished women from men by making it seem as though women's moral reasoning is somehow women's, rather than what male supremacy has attributed to women for its own use. When difference means dominance as it does with gender, for women to affirm differences is to affirm the qualities and characteristics of powerlessness. . . . To the extent materialism means anything at all, it means that what women have been and thought is what they have been permitted to be and think. Whatever this is, it is not women's, possessive.¹¹⁴

When MacKinnon espoused these beliefs regarding women's subordination and inauthenticity in a dialogue with Gilligan at the now somewhat infamous "Mitchell Lecture" at Buffalo, Mary Dunlap (a lesbian), who was also a speaker at the event, interrupted. Dunlap said:

I am speaking out of turn. I am also standing, which I am told by some is a male thing to do. But I am still a woman—standing.

I am not subordinate to any man! I find myself very often contesting efforts at my subordination—both standing and lying down and sitting and in various other positions—but I am not subordinate to any man! And I have been told by Kitty MacKinnon that women have never not been subordinate to men. So I stand here an exception and invite all other women here to be an exception and stand.¹¹⁵

MacKinnon has subsequently described this event as "a stunning example of the denial of gender,"¹¹⁶ claiming that Dunlap was saying, "all women who are exempt from the condition of women, all women who are not women, stand with me."¹¹⁷ I believe MacKinnon misinterpreted Dunlap's reaction. Dunlap's claim that her experiential reality is often free of male domination was not a denial of the existence of male power, nor a statement that she had risen above other women. It was merely a statement of fact about her reality, a statement she felt compelled to make because MacKinnon's description of "what is" had continued to exclude Dunlap's reality.

Dunlap's reality is not irrelevant to feminist theory. Mary Dunlap, and I, and other lesbians who live our private lives removed from the intimate presence of men do indeed experience time free from male domination. When we leave the male-dominated public sphere, we come home to a woman-identified private sphere. That does not mean that the patriarchy as an institution does not exist for us or that the patriarchy does not exist during the time that we experience freedom from male domination. It means simply that we experience significant periods of nonsubordination, during which we, as women, are free to develop

Nor do we work at this experience of nonsubordination and creation of authentic self to set ourselves apart from other women. We are not asserting a "proud disidentification from the rest of [our] sex and proud denial of the rest of [our] life."¹¹⁹ The struggle is to make nonsubordination a reality for all women, and the reality of nonsubordination in some women's lives is relevant to this struggle. The reality of nonsubordination in lesbian lives offers the "lesbian possibility" as a solution.

At the same time, I believe MacKinnon's claim that all women are subordinate to men all the time is a fair claim upon which to critique the male version of reality, because subordination is such a pervasive experience for women. Her claim gives her a valid standpoint for her critique even though it is not experientially true for all women. Similarly, I believe Robin West's claim that all women are "connected" to life is a fair claim upon which to critique the male version of the "separation thesis." But I do not believe that the "connection thesis" is true of all women.¹²⁰ Feminist legal theorists must be careful not to confuse "standpoint critiques" with existential reality. And the theorist who has not confused the two must also be careful to prevent her readers from making the confusion.

The problem with current feminist theory is that the more abstract and universal it is, the more it fails to relate to the lived reality of many women.¹²¹ One problem with much feminist legal theory is that it has abstracted and universalized from the experience of heterosexual women. Consider again Marilyn Frye's challenge to heterosexual academic feminists: "I wish you would notice that you are heterosexual. I wish you would grow to the understanding that you choose heterosexuality . . . that you are and choose to be a member of a privileged and dominant class, one of your privileges being not to notice."¹²²

Marilyn Frye's challenge was specifically addressed to heterosexual women. When I elected to adopt her challenge at the Women and the Law Conference (and in this essay), I was choosing a "lesbian standpoint" to critique the dominant reality in the same way that some cultural feminists have chosen a "mother standpoint" to critique patriarchy. My intent was not to convert a roomful of women to lesbianism. It was to raise everyone's self-consciousness about our different "standpoints." Feminist legal theory must recognize differences in order to avoid reinforcing lesbian invisibility or marginality, i.e., impeding "the liberation and empowerment of woman as a group."¹²³

My "lesbian standpoint" enables me to see two versions of reality.¹²⁴ The dominant reality, which I experience as "theirs," includes the following: lesbians are not mothers, all women are dominated by men, male relationships are valuable and female relationships are not, lesbian is a dirty word, lesbians are sick, women who live alone desire men, women who live together desire men, no one knows a lesbian, lesbians don't have families, all feminist legal theorists are heterosexual, all women in this room are heterosexual, lesbians are sex, most women are heterosexual and not lesbian.

By contrast, the reality that I live, the reality I call "mine," includes the following: some mothers are lesbian, many women are lesbian, many lesbian women are not dominated by men, many women do not desire men, lesbian

is a beautiful word, lesbians are love, love is intimacy, the heterosexual/lesbian dichotomy is false, all lesbians are born into families, lesbians are family, some feminist legal theorists are lesbian, lesbians are brave.

Why is the lesbian so invisible in feminist legal theory? Why is "my reality" so different from "their reality?" And which reality is true? For the postmodernist, the last question is meaningless. But the first two are not.

Notes

21. C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982).

27. For a full discussion of consciousness-raising as method and the relationship between method and politics, see chapters five and six of MacKinnon's most recent book. C. MACKINNON, [TOWARD A FEMINIST THEORY OF THE STATE 83-125 (1989) (hereinafter C. MACKINNON, FEMINIST THEORY OF STATE)].

29. This theory is advanced in C. MACKINNON [SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979) (hereinafter C. MACKINNON, SEXUAL HARASSMENT)].

30. Silverman, *Sexual Harassment: Working Women's Dilemma*, in BUILDING FEMINIST THEORY 84 (Longman ed. 1981).

31. Silverman, *supra* note 30, at 86. A subsequent survey conducted by Redbook magazine elicited 9,000 voluntary responses. Ninety percent of the respondents reported experiences of sexual harassment on the job. C. MACKINNON, SEXUAL HARASSMENT, *supra* note [29], at 26.

32. See, e.g., *Tomkins v. Public Serv. Elec. & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977); see also Taub, Book Review, 80 COLUM. L. REV. 1686, 1687 (1980) (reviewing C. MACKINNON, SEXUAL HARASSMENT, *supra* note [29]).

33. She credits her sources as including the files of Working Women United as well as individual cases of sexual harassment brought to court. C. MACKINNON, SEXUAL HARASSMENT, *supra* note [29], at xiv.

34. Sexual harassment claimants lost in the original round in the lower courts, but these cases were reversed on appeal. Taub, *supra* note 32, at 1687. The Supreme Court finally validated the theory that sexual harassment is a harm covered under Title VII in *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986).

35. These three stages track Clare Dalton's discussion of the development of feminist legal thought in Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, 3 BERKELEY WOMEN'S L.J. 1 (1988).

36. The first wave of feminism occurred at the end of the 19th century and marks the beginning of the women's movement. Some writers speak of the women's movement as though it began in the 1960s, thereby distorting history and ignoring a much longer feminist tradition. The goals accomplished in the first wave included the passage of married women's property acts and the enactment of the 19th amendment granting women suffrage. For a good, yet brief, discussion of feminist history (herstory), see Bender, [A Lawyer's Primer on Feminist Theory and Tort, 38 J. LEGAL EDUC. 3, 12-15 (1988)].

37. Although the modern women's movement owes much to the first wave of feminism, it also owes much to the civil rights and the peace movements of the late 1950s and the 1960s. See generally S. EVANS, BORN FOR LIBERTY 263-85 (1989).

38. Equal Pay Act of 1963, 29 U.S.C. § 206 (1982).

39. Civil Rights Act of 1964, 42 U.S.C. § [2000e] (1982).

40. "EEOC commissioners and staff . . . expressed a general belief that the addition of sex to the law had been illegitimate—merely a ploy to kill the bill—and that it did not therefore constitute a mandate to equalize women's employment opportunities." C. HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES 1945-1968, at 187 (1988).

41. *Id.* at 188.

42. *Id.* at 192-93. See also S. EVANS, *supra* note 37, at 277.

44. C. HARRISON, *supra* note 40, at 198-99.

45. S. EVANS, *supra* note 37, at 278.

46. B. FRIEDAN, [IT CHANGED MY LIFE: WRITINGS ON THE WOMEN'S MOVEMENT 120-22 (1976)].

47. See *id.* at 159. (At a 1970 national feminist demonstration at which participants were asked to wear lavender lesbian armbands as a symbol of solidarity, Friedan refused. "For me . . . the women's movement . . . had nothing whatsoever to do with lesbianism.")

48. S. EVANS, *supra* note 37, at 294. See generally LESBIANISM AND THE WOMEN'S MOVEMENT (N. Myron & C. Bunch eds. 1975).

49. NOW was the organization at the center of the women's movement and although its membership included many active lesbians, the organization itself consciously avoided lesbian issues in the early days. Such homophobic attitudes appear to have been worse on the East Coast than on the West Coast. See D. MARTIN & P. LYON, LESBIAN WOMAN 256-76 (1972).

50. Fossum, *Women Law Professors*, 1980 AM. B. FOUND. RES. J. 903, 906.

54. Lesbians differed from heterosexual women in one very noticeable respect, however. Lesbians were denied custody of their children because they were deemed unfit mothers. Thus, there is some early separate lesbian-feminist scholarship on custody. See e.g., Hunter & Polikoff, *Custody Rights of Lesbians*, 25 BUFFALO L. REV. 691 (1976); Hitchens & Price, *Trial Strategy in Lesbian Mother Custody Cases: The Use of Expert Testimony*, 9 GOLDEN GATE U.L. REV. 451 (1978-79).

55. See generally Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985); Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 265 (1984); Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 8 WOMEN'S RTS. L. REP. 175 (1982).

56. This was the thesis of Ann Scales' first article. Scales, [Towards a Feminist Jurisprudence], 56 IND. L.J. 375 (1980-81)].

57. The risk of pregnancy is lower for lesbians, of course. And, statistically, fewer lesbians get pregnant (while they are lesbians) than heterosexual women. Thus, accommodation for pregnancy, although relevant for some lesbians, has never been at the top of the lesbian agenda.

58. By "cultural feminist," I mean (loosely) those feminists who recognize the existence of a separate women's culture, which has values that ought to be reclaimed from the patriarchy. See generally Alison Jaggar's discussion of the politics of radical feminism, which focuses on the reinterpretations and re-conceptions of value by feminists who recognize how women's culture has been devalued by the patriarchy. A. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE 249-55 (1983).

Robin West uses the term "cultural feminist" to include those feminists who believe that "the important difference between men and women is that women raise children and men don't." West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 13 (1988). Thus, her use of the term is narrower than my understanding of the term. See *infra* notes 69-74 and accompanying text.

59. See e.g., Kuykendall, *Toward an Ethic of Nurturance: Luce Irigaray on Mothering and Power*, in MOTHERING: ESSAYS IN FEMINIST THEORY 263 (J. Trebilcock ed. 1984); Ruddick, *Maternal Thinking*, in MOTHERING: ESSAYS IN FEMINIST THEORY 213 (J. Trebilcock ed. 1984).

60. See West, *supra* note [58] at 1. West's claim that the law does not recognize harms that stem from the connected experiences of women is not totally true. Tort claims for loss of consortium are discussed by modern day courts in terms of injury to the relationship. See, e.g., *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal. 3d 382, 525 P.2d 669, 115 Cal. Rptr. 765 (1974). Of course, early recognition of such claims occurred in the days when wives were viewed as the property of their husbands. Thus, the theoretical basis for early claims was property damage rather than relational harm. See M. CHAMALLAS & L. KERBER, WOMEN, MOTHERS AND THE LAW OF FRIGHT: A HISTORY 5-6 (Legal History Program Working Papers Series 3, March 1989).

61. Leslie Bender asks, for example, "Why . . . do tort damages recognize financial loss and yet remain reluctant to recognize relational loss . . . ?" Bender, *supra* note [36], at 37.

62. I include in "Stage Two" all theorists who reject the liberal feminist approach of "Stage One," but do not (yet) embrace postmodernism. (See discussion of Stage Three *infra* (in the next section).) Because I do embrace postmodernism to the extent it eschews essentialism, universality, and the limits of categorization, I am wary of the categorization I create by placing theorists into what appear to be separate stages of feminist scholarship. I ask the reader to imagine the boundaries as more fluid than my brief identification of the categories/stages suggests.

63. C. MACKINNON, FEMINISM UNMODIFIED 32-45 (1987).

64. "[O]n the first day that matters, dominance was achieved . . ." *Id.* at 40.

65. C. MACKINNON, SEXUAL HARASSMENT, *supra* note [29], at 174.

66. *Id.*

67. See generally A. JAGOAR, *supra* note 58, at 249-302 and sources cited therein. In the field of philosophy, there are works that build ethical theory on women's bonding to other women. See, e.g., J. RAYMOND, A PASSION FOR FRIENDS: TOWARD A PHILOSOPHY OF FEMALE AFFECTION (1986); S. HOAGLAND, LESBIAN ETHICS: TOWARD NEW VALUE (1988).

68. Here, I mean mother in the broad social sense as a person who is nurturing and self-sacrificing.

69. West, *supra* note [58].

70. *Id.* at 3.

71. "Most women are indeed forced into motherhood and heterosexuality." *Id.* at 71.

72. Although she does not include herself in the list of legal scholars who have engaged in "cultural feminist" projects, she explains her "connection thesis," as applied to women, in terms of women's biological connection to pregnancy. Thus, West has been described by Joan Williams as a "biological determinist." Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 800 n.11 (1989).

73. See, e.g., M. DALY, PURE LUST (1984); M. DALY, GYN/ECOLOGY (1978).

74. See, e.g., S. HOAGLAND, *supra* note 67.

75. "[I]f you look at . . . whether women have ever not been subordinate to men, . . . as I see it, if bottom is bottom then look on the bottom, and there is where women will be." [DuBois, Dunlap, MacKinnon & Menkel-Meadow, *Feminist Discourse: Moral Values and the Law—a Conversation*, 34 BUFFALO L. REV. 11, 71 (1985) (hereinafter *Feminist Discourse*)].

76. C. MACKINNON, FEMINISM UNMODIFIED, *supra* note 63, at 39; *Feminist Discourse*, *supra* note [75], at 74.

77. C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 63, at 39.
78. See, e.g., C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 63, at 55-56, 305-06 n.6.
79. "Structural truths about the meaning of gender may or may not produce big numbers. . . . [T]o say 'not all woman [sic] experience that,' as if that contraindicates sex specificity, . . . is to suggest that to be sex-specific, something must be true of 100 percent of the sex affected." C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 63, at 55.
80. C. MACKINNON, *FEMINIST THEORY OF STATE*, *supra* note [27], at 141-42 (footnote omitted).
81. For example, the image of the lesbian in the dominant culture is that of a masculine, often predatory, character, the "butch" of the butch-femme lesbian couple. MacKinnon's references to lesbians often reinforce this stereotype. See, e.g., C. MACKINNON, *FEMINIST THEORY OF STATE*, *supra* note [27], at 119 (lesbian sex does not necessarily transcend the "erotization of dominance and submission"); C. MACKINNON, *SEXUAL HARASSMENT*, *supra* note [29], at 206 (positing a lesbian harasser). I believe MacKinnon does herself (as well as lesbians) a disservice by not acknowledging the reality of co-equal relationships that many lesbians experience. Indeed, the extreme dissonance between traditional male-created concepts of lesbian existence and the reality of much lesbian existence tells us that the patriarchy had constructed lesbianism in a way that supports its norm of enforced heterosexuality. Although MacKinnon recognizes this patriarchal response to lesbianism ("[l]esbians can so violate the sexuality implied in female gender stereotypes as not to be considered women at all," [C. MACKINNON, *FEMINIST THEORY OF STATE*, *supra* note 27,] at 110), she never reveals an understanding of lesbian existence different from the patriarchal image of the "butch."
82. I mean this statement literally. Mary Dunlap, a lesbian lawyer, was on a panel at the Buffalo Law School with MacKinnon (and others), entitled "Feminist Discourse, Moral Values and the Law." Responding to MacKinnon's view of "woman," silenced by a "man's" foot on her throat, Dunlap rose and said: "I am a woman standing . . . I am not subordinate to any man." MacKinnon failed to acknowledge the personal relevance of Dunlap's life experience as a lesbian to her claim of non-subordination. *infra* [text accompanying notes 115-117]; see also C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 63, at 221, 305-06 n.6.
83. Dalton, *supra* note 35.
84. These two camps parallel Robin West's prior categorization of feminists as moderate or cultural or radical. West, *supra* note [58].
85. But see Reese, *The Forgotten Sex: Lesbians, Liberation, and the Law*, 11 *WILLAMETTE L.J.* 354 (1975) (lesbian-centered critique of areas of the law that ignore the existence of lesbians).
86. E.g., Catharine MacKinnon. See, e.g., C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 63.
87. See C. MACKINNON, *FEMINIST THEORY OF STATE*, *supra* note [27], at 119; C. MACKINNON, *SEXUAL HARASSMENT*, *supra* note [29], at 206. MacKinnon claims that feminist jurisprudence would recognize that the question of gay and lesbian equality is a question of sex equality rights. C. MACKINNON, *FEMINIST THEORY OF STATE*, *supra* note [27], at 248. Unfortunately, she does not elaborate on this point or how to articulate the connection between discrimination based on sexuality and discrimination based on gender, a connection that is at the core of her theory.
88. See, e.g., C. MACKINNON, *SEXUAL HARASSMENT*, *supra* note [29], at 206 (discussing sexual harassment of gay and lesbian employees).
89. Dalton, *supra* note 35.

90. For an excellent overview of postmodern feminism, and of these three French theorists in particular, see R. TONG, *FEMINIST THOUGHT: A COMPREHENSIVE INTRODUCTION* 217-33 (1989).
91. S. DE BEAUVOIR, *THE SECOND SEX* (1952).
92. They have also been influenced by Jacques Derrida and Jacques Lacan. R. TONG, *supra* note 90, at 219-23.
93. *Id.* at 219.
94. See Dalton, *supra* note 35, at 7-8.
95. For an especially good critique of the failure of feminist legal theorists to acknowledge and understand the difference that race makes, see Harris, *Race and Essentialism in Feminist Legal Theory*, 42 *STANFORD L. REV.* 581 (1990).
96. I borrow the phrase "dominant discourse" from Martha Fineman, who argues that current theories of child custody are shaped by the "dominant discourse," a discourse which excludes the mother's experience. Fineman, *[Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking]*, 101 *HARV. L. REV.* 727, 730 (1988). Ironically, I am rebelling against a "dominant discourse" that privileges the experience of motherhood over other experiences of female connections. See also West, *supra* note [58], at 28, claiming that cultural feminism, which focuses on the mother-child connection, is "our dominant feminist dogma."
97. Cain, *Teaching Feminist Legal Theory at Texas: Listening to Difference and Exploring Connections*, 38 *J. OF LEGAL EDUC.* 165 (1988). See *id.* at 171, explaining that if students listen to each other in a way that encourages identification rather than contrast, then they will "connect" in ways that lead to deeper understanding.
98. Spelman recognizes the limitations of this solution, concluding, "But it doesn't carry them very effectively." E. SPELMAN, *INESSENTIAL WOMAN: PROBLEMS OF EXCLUSION* (FEMINIST THOUGHT 3) (1988).
99. This story comes most recently from Pat Williams, although I have heard it from other persons of color. Remarks by Pat Williams, Critical Legal Studies Conference on Racism, Pine Manor, Massachusetts (June 1985). I also have white friends who have made similar observations to me about persons of color.
100. Frances Olsen tells me that in 1960 at a Quaker peace camp, they sang the following: "Oh, there'll be no distinction there; / No, there'll be no distinction there. / We'll be white / In that heavenly light; / There'll be no distinction there." Letter from Frances Olsen to Patricia Cain (July 19, 1989).
101. Bulkin, *'Kissing/Against the Light': A Look at Lesbian Poetry*, in *LESBIAN STUDIES* (Cruikshank ed. 1982).
102. *Id.* (quoting Adrienne Rich).
103. An Interview with Adrienne Rich, quoted in Bulkin, *supra* note 100, at 44-45.
104. I do this in my feminist legal theory class. Most of the students are women.
105. Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 *SIGNS* 631 (1980), at 632, 647-48 (footnote omitted).
106. Rich asks why, "[i]f women are the earliest sources of emotional caring and nurture for both female and male children, . . . the search for love and tenderness does not originally lead toward women . . ." *Id.* at 637.
107. Rich, *A Lesbian Perspective on Women's Studies*, in *LESBIAN STUDIES* 194, 196 (Cruikshank ed. 1982).

111. See, e.g., Hartsock, *The Feminist Standpoint: Developing the Ground for a Specifically Feminist Historical Materialism*, in *DISCOVERING REALITY* 283-310 (S. Harding & M. Hirnikka eds. 1983), arguing that the material differences in men and women's lives determine their relative abilities to see reality.

112. "Although feminism emerges from women's particular experience, it is not subjective or partial, for no interior ground and few if any aspects of life are free of male power." C. MACKINNON, *FEMINIST THEORY OF STATE*, *supra* note [27], at 116.

113. Indeed, her theory of oppression is so complete that it has been described as "metaphysically perfect." *Feminist Discourse*, *supra* note [75], at 70 (comment of Ellen DuBois); see also Bartlett, *MacKinnon's Feminism: Power on Whose Terms?* (Book Review), 75 CALIF. L. REV. 1559, 1562-63 (1987). MacKinnon herself describes the system of male dominance as "metaphysically nearly perfect." C. MACKINNON, *FEMINIST THEORY OF STATE*, *supra* note [27], at 116 (emphasis added). For a refutation of the inevitability of women's subordination, see C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 63, at 305-06 n.6 ("If subordination had to be, it would surely be a waste of time to fight for women's rights.").

114. C. MACKINNON, *FEMINIST THEORY OF STATE*, *supra* note [27], at 51.

115. *Feminist Discourse*, *supra* note [75], at 75 (emphasis in original).

116. C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 63, at 305-06 n.6.

117. *Id.*

118. Because I believe the self is developed in relation to others, it matters who the "others" to my self are. If the most intimate "other" is a woman, then the self that I develop in relation to that other is more likely to be woman-identified.

119. C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 63, at 305-06 n.6.

120. Nor does West believe it is true of all women; she specifically disclaims such a position. West, *supra* note [58], at 71.

121. See generally E. SPELMAN, *supra* note 98.

122. Frye, *supra* note 107.

123. Rich, *supra* note 104, at 648.

124. And both versions of reality inform my knowledge of the world. As Nancy Hartsock explains: "The concept of a standpoint structures epistemology in a particular way. Rather than a simple dualism, it posits a duality of levels of reality, of which the deeper level or essence both includes and explains the "surface" or appearance, and indicates the logic by means of which the appearance inverts and distorts the deeper reality." Hartsock, *supra* note 111, at 285.

Further Reading for Part Two

Gender and Subjectivity

The most sophisticated analyses of the dilemmas posed by the category of "women" in feminist theory are Denise Riley's *Am I That Name? Feminism and the Category of "Women" in History* (Minneapolis: Univ. of Minnesota Press, 1988) and Elizabeth Spelman's *Inessential Woman: Problems of Exclusion in Feminist Thought* (Boston: Beacon, 1988). A number of essays reflecting the influence of poststructuralism have begun to redefine such basic concepts as "feminism," "identity," and "subjectivity." Many of these are collected in *Coming to Terms: Feminism, Theory, Politics*, ed. Elizabeth Weed (New York: Routledge, 1989); *Feminism as Critique: On the Politics of Gender*, ed. Seyla Benhabib and Drucilla Cornell (Minneapolis: Univ. of Minnesota Press, 1987); and *Feminist Studies/Critical Studies*, ed. Teresa de Lauretis (Bloomington: Indiana Univ. Press, 1986). In addition, a number of essays on gender and subjectivity from the groundbreaking British feminist journal *m/f* have been collected in *The Woman in Question: m/f*, ed. Parveen Adams and Elizabeth Cowie (Cambridge: MIT Press, 1990). For book-length treatments of similar themes, see Jane Flax's *Postmodernism in the Contemporary West* (Berkeley: Univ. of California Press, 1989) and Judith Butler's *Gender Trouble: Feminism and the Subversion of Identity* (New York: Routledge, 1989).

Recently, some feminist legal theorists have begun to incorporate poststructuralist and psychoanalytic theories into their critiques of law. In "Mind's Opportunity: Birthing a Poststructuralist Feminist Jurisprudence," 38 *Syracuse L. Rev.* 1129 (1987), Marie Ashe draws on the work of French theorists Jacques Lacan and Julia Kristeva in her attempt to introduce a psychoanalytic theory of subjectivity into feminist legal theory. In "The Doubly-Prized World: Myth, Allegory, and the Feminine," 75 *Cornell L. Rev.* 644 (1990), Drucilla Cornell combines this same tradition with recent Continental philosophy to develop a critique of feminist theories that equate the Feminine with the bodily experience of women; she urges feminists not to reject the Feminine as purely masculine fantasy, but to reconstruct it as the basis for a feminist ethics. On the much-debated question of whether psychoanalysis is friend or foe to feminism, see Juliet Mitchell's landmark work, *Psychoanalysis and Feminism* (New York: Vintage, 1975), which reappropriates Freudian psychoanalysis for feminism. For a critical overview of Lacan's work from a feminist perspective, see Elizabeth Grosz, *Jacques Lacan: A Feminist Introduction* (New York: Routledge, 1990). Several of Lacan's essays on femininity, edited, with excellent introductions, by Juliet Mitchell and Jacqueline Rose, are collected in *Feminine Sexuality: Jacques Lacan and the École Freudienne*, trans. Jacqueline Rose (New York: Norton, 1985). Some of the best recent essays on psychoanalysis and feminism are collected in *Between Psychoanalysis and Feminism*, ed. Teresa Brennan (New York: Routledge, 1989). In an interesting discussion of feminist critiques of a psychoanalytic analysis of rape,

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Amy Young**Positive State Duties to Protect
Women from Violence:
Recent South African Developments****Heléne Combrinck***

"A right provides the rational basis for a justified demand."¹

I. INTRODUCTION

In the past, attempts to improve legislative, judicial, and executive responses to violence against women in South Africa met with limited success at best.² For instance, in 1985 the South African Law Commission considered, and rejected, various submissions that were aimed at improving the state's approach to sexual offenses.³ In *S v. M.*,⁴ the Supreme Court (Witwatersrand Local Division) rejected a challenge to the rule of evidence

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1. HENRY SHUE, *BASIC RIGHTS: SUBSISTENCE, AFFLUENCE AND US FOREIGN POLICY* 13 (1980).
2. This article adopts the definition of violence against women set out in Article 1 of the Declaration on the Elimination of Violence against Women. Declaration on the Elimination of Violence Against Women, U.N. GAOR, 48th Sess., art. 1, U.N. Doc. A/Res/48/104 (1994) [hereinafter *Violence Declaration*]. "[T]he term 'violence against women' means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life." *Id.*
3. SOUTH AFRICAN LAW COMMISSION, *WOMEN AND SEXUAL OFFENCES IN SOUTH AFRICA* (1985). See also KATHRYN ROSS, *WOMEN, RAPE, AND VIOLENCE IN SOUTH AFRICA: TWO PRELIMINARY STUDIES* 12-15 (1993).
4. 1992 (2) SACR 188 (W).

that requires a judicial officer to regard the evidence of complainants in sexual offense cases with caution (known as the cautionary rule).⁵ In retrospect, one likely could attribute this situation on the one hand to a lack of political commitment to improve the position of women generally, and on the other hand to a lack of clarity on the government's duties towards women who are subjected to violence. Judicial insensitivity to gender reform also played a role.⁶

The 1993 Interim Constitution⁷ guaranteed a right to freedom and security of the person; however, *protection against violence* as an aspect of the right to security of the person was not explicitly mentioned.⁸ The question whether positive duties exist to protect individuals against violence (and whether such duties would apply in the case of violence against women) was unspecified and thus left to judicial interpretation.⁹

The adoption of section 12(1)(c) of the 1996 Constitution,¹⁰ which specifically entrenches the right "*to be free from all forms of violence from public or private sources,*"¹¹ has altered this position significantly. Although the inclusion of this right might have far-reaching implications generally, its effect likely will be felt most keenly in the area of violence against women.

The issue of state obligations has also been drawn into sharp focus recently by the participation of the South African government at the UN Fourth World Conference on Women held in Beijing in 1995, and the commitments undertaken by the Beijing Declaration and Platform of Action.¹² Subsequent to the Beijing Conference, the South African government also ratified the Convention on the Elimination of All Forms of Discrimination against Women.¹³

5. *S v. M.*, 1992 (2) SACR at 188. See generally L.H. HORTMAN & D. ZEFFERT, *THE SOUTH AFRICAN LAW OF EVIDENCE* 579-80 (1988).

6. See, e.g., *S v. Ncanywa*, 1993 (2) SA 567 (A) (finding that the "marital rape exemption" forms part of South African law, and precludes a conviction of a man on a charge of raping his wife). Section 5 of the Prevention of Family Violence Act 133 of 1993 has subsequently amended the legal position regarding marital rape by providing that a husband may be convicted of raping his wife notwithstanding any provisions in common law. § 5 of Prevention of Family Violence Act 133 of 1993, 1991-96 JSRSA.

7. S. Afr. CONST. (Interim Constitution, 1993).

8. *Id.* ch. 3, § 11(2) (protecting against torture of all kinds, but not specifically against violence).

9. *Id.* ch. 1, § 4(1).

10. S. Afr. CONST. (1996) ch. 2, § 12(1)(c).

11. *Id.*

12. *Fourth World Conference on Women: Action for Equality, Development, and Peace, Beijing Declaration and Platform for Action*, U.N. GAOR, U.N. Doc. A/Conf.177/20 (1995), reprinted in *REPORT OF THE FOURTH WORLD CONFERENCE ON WOMEN* (1995) (recommended to the UN General Assembly by the Committee on the Status of Women on 7 Oct. 1995) (hereinafter *Beijing Platform*).

13. Convention on the Elimination of All Forms of Discrimination Against Women, adopted

A civil action recently instituted by a rape survivor¹⁴ against the South African Ministers of Safety and Security and Justice raises a number of interesting questions regarding the state's duties to take particular steps to protect women against violence and liabilities that could arise from failure to take such action. The plaintiff in this matter, who was brutally raped and assaulted by two men, is alleging that various state officials were negligent in granting the two accused men bail on similar, though unrelated, charges before her attack.¹⁵

Against this background, this article aims to establish the combined influence of the South African Constitution and recent developments in the sphere of international human rights law on state obligations to address violence against women. It first examines the nature of state duties created by human rights generally. It evaluates the role of international law in the interpretation of the South African Bill of Rights, and subsequently analyzes the obligations created under a number of international human rights instruments. This analysis is then used as a basis for examining the effect of the inclusion of the right to be free from violence in the Final Constitution.¹⁶ The article finally draws conclusions regarding the scope and implications of this right and related duties created by international law.

II. THE NATURE OF OBLIGATIONS GENERATED BY HUMAN RIGHTS

As a general point of departure it is useful to examine the nature of duties created by human rights. Shue suggests a conceptual typology of duties that goes beyond the usual assumption that every right has "a correlative duty."¹⁷ He instead proposes that every basic right assumes three types of duties (all of which must be performed if the basic right is to be fully honored, though not necessarily by the same individuals or institutions): a duty to *avoid* violating the right in question, a duty to *protect* from violation of the right, and a duty to *aid* those whose rights have been violated.¹⁸ The right to physical security thus has three correlative duties:

1. duties not to eliminate a person's security (avoidance);
2. duties to protect people against deprivation of security by others (protection); and
3. duties to provide for the security of those unable to provide for their own (aid).¹⁹

Although Shue has employed his tripartite analysis successfully to illustrate the multilayered nature of social and economic rights (in the context of comparison with civil and political rights),²⁰ this classification also provides a useful analytical framework when examining state responsibility in international law for violence against women. The need for such a framework becomes apparent when one considers the specific nature of violence against women: in the vast majority of cases, the act of violence is not committed or sanctioned by a state agent acting in an official capacity, but by one private person against another. In this context, one could use a simplistic view of the nature of duties generated by human rights to absolve the state from responsibility, because "the state has not caused the harm."

However, under international law, state responsibility is generated when state conduct constitutes a breach of its international obligations, such as the obligations contained in customary or treaty-based human rights law.²¹ The "general" human rights treaties (like the International Covenant on Civil and Political Rights,²² the European Convention for the Protection of Human Rights and Fundamental Freedoms,²³ and the American Convention on Human Rights²⁴) all contain provisions that impose duties on state parties to "respect and ensure" the recognized rights of all individuals under their jurisdiction.²⁵ This general obligation is coupled with a duty to take the

34/36 (1980) (entered into force 3 Sept. 1981), reprinted in 19 I.L.M. 33 (1980) [hereinafter *Women's Convention*].

14. This article prefers the term "survivors" of violence against women rather than "victims."

15. Two other women have also recently announced the institution of actions against the Ministers of Justice and Safety and Security on similar grounds. See *Verkragter op Borgtog: Vroue Eis by Ministers (Rapist on Bail: Women Sueing Ministers)*, *DIE BURGER*, 25 Oct. 1996, at 4 (Capetown, S. Afr.).

16. S. AFR. CONST. (1996) ch. 2, §§ 9, 10 (guaranteeing the right to equality and human dignity respectively). The rights to equality and human dignity are also important in the context of providing women with protection from violence. However, this article specifically focuses on the right to be free from violence.

17. Shue, *supra* note 1, at 52.

18. *Id.*

19. See *id.* at 52-53.

20. *Id.* at 53. See also Craig Scott & Patrick MacKlem, *Constitutional Ropes of Sand or Justiciable Guarantees: Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1 (1992).

21. See THOMAS MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 155 (1989); Rebecca Cook, *State Accountability Under the Convention on the Elimination of All Forms of Discrimination Against Women*, in *HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES* 228, 237 (Rebecca Cook ed., 1994).

22. International Covenant on Civil and Political Rights, adopted 16 Dec. 1966, G.A. RES. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (entered into force 23 Mar. 1976) [hereinafter ICCPR].

23. European Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature 4 Nov. 1950, 213 U.N.T.S. 221, Europ. T.S. No. 5 (entered into force 3 Sept. 1953) [hereinafter *European Convention*].

24. American Convention on Human Rights, signed 22 Nov. 1969, O.A.S.T.S. No. 36, O.A.S. Off. Rec. OEA/Ser.LV/II.23, doc. 21, rev. 6 (1979) (entered into force 18 July 1978), reprinted in 9 I.L.M. 673 (1970) [hereinafter *American Convention*].

25. See ICCPR, *supra* note 22, art. 2(1); *European Convention*, *supra* note 23, art. 1; *American Convention*, *supra* note 24, art. 1(1); see also *The African Charter on Human*

necessary steps to adopt such legislative or other measures as may be necessary to give effect to the rights recognized.²⁶

Although it might be stated as a general principle that a state is responsible neither for all acts or omissions taking place in its territory nor for acts or omissions of private individuals not acting on the state's behalf,²⁷ the formulation of obligations in the human rights documents referred to above has two important implications:

1. states have positive obligations to establish and maintain the necessary legal and other institutions and remedies through which the rights can be guaranteed;
2. states should exercise due diligence to prevent violations by nongovernmental actors where the acts of private parties threaten to undermine the rights guaranteed.²⁸ The obligation to respect rights and to prevent violations is not confined to a restriction of governmental action, but must to some degree extend to positive government action to overcome violations of rights by private actors.²⁹

This was the approach taken by the Inter-American Court of Human Rights when it examined the responsibility of the government of Honduras for the unexplained disappearance of individuals in the *Velásquez Rodríguez* case.³⁰ The court stated that the obligation to ensure the free and full exercise of the rights recognized by Article 1(1) of the American Convention implied the duty of every state "to organize the governmental apparatus" in such a way that this goal could be juridically ensured.³¹ In addition, the obligation to ensure the exercise of rights included the requirement that states "prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation."³² The critical question, therefore, is whether the state demonstrated a lack of due diligence by allowing the act of violation to take

and Peoples' Rights, OAU Doc. HR/PUB/90/1, art. 1, reprinted in UNITED NATIONS, THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (1990) [hereinafter African Charter].

26. See ICCPR, *supra* note 22, art. 2; American Convention, *supra* note 24, art. 2(2); European Convention, *supra* note 23, arts. 1, 13.

27. See Miron, *supra* note 21, at 155.

28. See *id.* at 164.

29. See Cook, *supra* note 21, at 237-38.

30. *Velásquez Rodríguez Case*, ¶ 166, Case 7920, Ser. C, No. 4, Inter-Am. Ct. H.R. 35, O.A.S. Doc. OEA/Ser.L/V/II.19, doc. 13 (1988) (Judgment of 29 July 1988) [hereinafter *Velásquez Rodríguez Case*].

31. *Velásquez Rodríguez Case*, Case 7920, Ser. C, No. 4, Inter-Am. Ct. H.R. 35, ¶ 166 (discussing American Convention, *supra* note 24, art. 1(1)).

place, either with its support or acquiescence, or by failing to take steps to prevent the act or to punish those responsible.³³

In casu proviso the court held the government of Honduras liable for failing to guarantee the rights to life and security of the person under the American Convention. The state was responsible because it failed to exercise due diligence in preventing unexplained disappearances, and the court required the government to employ all means within its power to investigate the disappearances, identify the perpetrators, and impose punishment as provided by law.³⁴

Although the robust approach taken by the Inter-American Court is welcomed,³⁵ one should note that the horizontal applicability of states' obligations is still problematic,³⁶ often depending on the interpretation of the provision in question (i.e. language, context, purpose, and object).³⁷

The Shue analysis of threefold duties generated by human rights (avoidance, protection, and aid) accords with the interpretation in the *Velásquez Rodríguez* case, that the state is under obligation to prevent, investigate, punish, and compensate for all violations of human rights. This article will now examine how these obligations have developed in existing international instruments relevant to violence against women.

III. INTERNATIONAL HUMAN RIGHTS STANDARDS

A. Value of International Instruments in Determining Duties of the South African State under the 1996 Constitution

Prior to the adoption of the Interim Constitution, international law did not play a prominent role in the advancement of human rights in South Africa.³⁸ However, the Interim Constitution made it clear that international law was to be accorded more significance in South African law.³⁹ In terms of the 1996 Constitution, international law will (*inter alia*) play a role in the interpretation of the provisions of the Bill of Rights, because section 39(1)(b)

33. See Miron, *supra* note 21, at 171.

34. *Velásquez Rodríguez Case*, Case 7920, Ser. C, No. 4, Inter-Am. Ct. H.R. 35, ¶¶ 176-83.

35. See Cook, *supra* note 21, at 238.

36. See P. VAN DER & G.J.H. VAN HOOFF, THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 17 (1990).

37. See Miron, *supra* note 21, at 169.

38. See generally John Dugard, *The Role of International Law in Interpreting the Bill of Rights*, 10 S. Afr. J. Hum. Rts. 208, 208-10 (1994).

provides that a court "must consider international law" when interpreting the Bill of Rights.⁴⁰

The importance of this section lies in the fact that it does not limit a court's inquiry to treaties to which South Africa is party or to rules of customary international law that have been accepted by the courts. Dugard explains that this implies that South African courts will be required to consult all sources of international law recognized by Article 38(1) of the Statute of the International Court of Justice: international conventions, international custom, the general principles of law recognized by civilized nations, judicial decisions, and the teaching of publicists.⁴¹

This approach, which has been endorsed by the Constitutional Court in its consideration of the death penalty in *S v. Makwanyane*,⁴² has the advantage of not requiring an inquiry into whether a particular principle contained in one or more human rights conventions is backed by sufficient state practice and *opinio juris* to qualify as a customary rule binding on South Africa. Instead, guidance may be sought in the language employed in multilateral human rights conventions and the decisions of convention-interpreting bodies.⁴³

Accordingly, this article will examine certain international instruments in order to establish their legal nature in the context of public international law and the substance of obligations created by such instruments (i.e. whether the instrument creates obligations that are legally binding, or whether such norms, while nonbinding, may be taken into consideration in the interpretation of the Bill of Rights), and to establish the substance of obligations created by such instruments.

B. Convention on the Elimination of All Forms of Discrimination Against Women

1. Nature of Document

The Convention on the Elimination of all Forms of Discrimination Against Women has been described as the "definitive international legal instrument requiring respect for and observance of the human rights of women."⁴⁴ It

prohibits all gender-based discrimination that has the effect or purpose of impairing the enjoyment of fundamental rights and freedoms.⁴⁵

South Africa ratified the Women's Convention,⁴⁶ thus, in terms of international law, South Africa is bound by the obligations created by the Convention.⁴⁷ In addition to the direct implications of ratification of the Convention, the provisions of treaties may constitute evidence of international custom under certain circumstances.⁴⁸

2. Obligations Regarding Violence against Women

Article 1 of the Convention defines discrimination against women as any distinction made on the basis of sex that has the effect of impairing the enjoyment by women of human rights and fundamental freedoms.⁴⁹ Although "at least six articles of the Convention arguably" relate to violence against women, the Convention (surprisingly) does not expressly mention violence against women.⁵⁰

Because of pressure exerted by women's organizations,⁵¹ the Committee on the Elimination of Discrimination Against Women (CEDAW) adopted a general recommendation and comments that state how the Convention should be interpreted to cover violence against women and explain the nature of government obligations.⁵² General Recommendation 19 states that the general prohibition of gender discrimination includes "gender-based violence—that is, violence that is directed at a woman because she is a woman or that affects women disproportionately."⁵³ This Recommendation also confirms that violence against women constitutes a violation of women's human rights irrespective of whether the perpetrators are state officials or private individuals: "States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and to provide compensation."⁵⁴

40. S. Afr. CONST. (1996) ch. 2, § 39(1)(b).

41. Dugard, *supra* note 38, at 212–13 (enumerating sources of international law found in the Statute of the International Court of Justice, art. 38(1), concluded 26 June 1945, U.S.T.S. 993, entered into force 24 Oct. 1945, reprinted in 1 WESTON I.H.2).

42. 1995 (6) BCLR 665 (CC), §§ 686D–F.

43. See Dugard, *supra* note 38, at 213.

44. Fayeza Kathree, *Convention on the Elimination of All Forms of Discrimination Against Women*, 11 S. Afr. J. Hum. Rts. 421, 421 (1995).

45. Women's Convention, *supra* note 13, art. 1.

46. See First South African Government Report on the Convention for the Elimination of All Forms of Discrimination Against Women (1997), available on <<http://www.sacs.org.za/gov/welfare/docs>> (noting that ratification took place on 15 December 1995).

47. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 12 (1990).

48. See *id.* at 5, 12.

49. Women's Convention, *supra* note 13, art. 1.

50. Joan Fitzpatrick, *The Use of International Human Rights Norms to Combat Violence Against Women*, in *HUMAN RIGHTS: NATIONAL AND INTERNATIONAL PERSPECTIVES*, *supra* note 21, at 532. See generally Women's Convention, *supra* note 13, arts. 2, 3, 6, 11, 12, 16.

51. See Kathree, *supra* note 44, at 426.

52. See General Recommendation 19, U.N. GAOR, Committee on the Elimination of Discrimination Against Women, 11th sess., at 1, U.N. Doc. CEDAW/C/1992/L.1/Add.15 (1992).

53. *Id.* ¶ 7.

54. *Id.* ¶ 10.

CEDAW also found that in order to fulfil their duties under the Women's Convention, states must take all measures necessary to provide effective protection to women, including comprehensive legal, preventive, and other measures.⁵⁵

C. Declaration on the Elimination of Violence Against Women (Violence Declaration)⁵⁶

1. Nature of Document

This Declaration was adopted by the UN General Assembly in 1994. A resolution of the UN General Assembly is not a treaty, which states may ratify and by which they are bound, but rather a nonbinding statement that sets out a common international standard that UN member states should follow.⁵⁷ However, such declarations may provide a basis for the speedy consolidation of customary rules.⁵⁸

2. Obligations Regarding Violence against Women

The Declaration defines the term "violence against women" to include any act of violence against women "that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women . . .".⁵⁹ This definition thus places acts of violence committed by private actors squarely within the ambit of the Declaration. Article 2 confirms this proposition by setting out specific instances of violence occurring in the family, in the general community, and perpetrated or condoned by the State.⁶⁰

Article 4 of the Declaration declares that "[s]tates should condemn violence against women and . . . should pursue by all appropriate means and without delay a policy of eliminating violence against women . . .".⁶¹ It also lists a number of measures to be taken to achieve this result that are reminiscent of the legal, preventive, and protective actions set out under General Recommendation 19 of the Women's Convention.⁶²

55. See *id.* ¶¶ 1-3.

56. Violence Declaration, *supra* note 2.

57. See BROWNE, *supra* note 47, at 14. See also HUMAN RIGHTS WATCH, VIOLENCE AGAINST WOMEN IN SOUTH AFRICA 39 (1995).

58. See BROWNE, *supra* note 47, at 14.

59. Violence Declaration, *supra* note 2, art. 1.

60. *Id.* art. 2.

61. *Id.* art. 4.

62. *Id.* art. 4(a)-(g). For example, Article 4(d) enjoins states to develop penal, civil, labour

The Declaration places these obligations within the framework created by the Women's Convention and other human rights instruments in the sense that it obliges states to consider "ratifying or acceding to the Convention" where they have not yet done so,⁶³ and to include "information pertaining to violence against women and measures taken to implement the present Declaration" in their submission of reports as required under relevant human rights instruments.⁶⁴

D. Beijing Declaration and Platform of Action

1. Nature of Document

The Beijing Declaration and Platform of Action sees its function as "an agenda for women's empowerment."⁶⁵ According to Brownlie, the statement of conclusions of a conference of states may be a form of multilateral treaty, but even if it is only an instrument recording decisions not adopted unanimously, the result may constitute cogent evidence of the state of customary law on the subject concerned.⁶⁶ One may thus conclude that although the Platform is not legally binding *per se*, it may provide evidence of emerging norms of international custom.⁶⁷ At minimum, the Platform does constitute solemn political commitments by states.

One of the Platform's main themes is that there are areas of particular urgency that stand out as priorities for action. These special concerns have emerged from a review of progress since the Nairobi Conference in 1985.⁶⁸ For each of the critical areas of concern established in the Platform, the problem is diagnosed and strategic objectives are proposed with concrete actions to be taken by various actors in order to achieve these objectives.⁶⁹ The Platform proposes that all actors should focus action and resources on these strategic objectives. It also cautions that

[i]mmediate action and accountability are essential if the targets are to be met by the year 2000. Implementation is primarily the responsibility of Governments, but it is also dependent on a wide range of institutions in the public,

caused to women who are subjected to violence; Article 4(g) also requires states to work to ensure that women subjected to violence have specialised assistance, such as, *inter alia*, rehabilitation, counselling and health and social services.

63. *Id.* art. 4(a).

64. *Id.* art. 4(m).

65. Beijing Platform, *supra* note 12, ¶ 1.

66. BROWNE, *supra* note 47, at 14.

67. This is so except for provisions in respect of which reservations are noted.

68. See Beijing Platform, *supra* note 12, ¶ 45.

69. *Id.* ¶ 1.

private and non-governmental sectors at community, national, subregional/ regional and international levels.⁷⁰

The first step in the process of implementation of the Platform was to review objectives and programs in terms of the actions for which it called.⁷¹ The Platform asked governments to develop implementation strategies for the Platform, preferably by the end of 1995, and urged governments to have their strategies or plans of action developed by the end of 1996.⁷² "These implementation strategies should be comprehensive, have time-bound targets and benchmarks for monitoring, and include proposals for allocating or re-allocating resources for implementation."⁷³

South Africa participated officially in the Beijing Conference through a delegation led by Health Minister Dr. Nkosazana Dlamini-Zuma, and the South African government adopted all parts of the Platform without reservations. In a speech to the Conference, Dr. Dlamini-Zuma stated that the South African government "pledges itself to the full implementation of this programme as a major step to achieve the non-sexist South Africa, which is our ultimate goal."⁷⁴

2. Obligations Regarding Violence against Women

Violence against women is one of the critical areas of concern in which governments, the international community, and civil society (including nongovernmental organizations and the private sector) are called upon to take strategic action.⁷⁵ The Platform adopts the definition and scope of application of violence against women from the Violence Declaration,⁷⁶ and amplifies them. It adds that "[o]ther acts of violence against women include violation of the human rights of women in situations of armed conflict, in particular murder, systematic rape, sexual slavery and forced pregnancy."⁷⁷ Violence against women also includes "forced sterilization and forced abortion, coercive/forced use of contraceptives, female infanticide and prenatal sex selection"⁷⁸

70. *Id.* ¶ 286.

71. *See id.* ¶ 296.

72. *Id.* ¶ 297.

73. *Id.*

74. Department of Welfare, Report on the South African Government's Commitments Arising out of the Fourth UN Women's Conference, Beijing 3 (1995), at 3 (on file with author) [hereinafter Welfare Report].

75. *See Beijing Platform*, *supra* note 12, ¶ 46.

76. *See Violence Declaration*, *supra* note 2, art. 1. *Cf. Beijing Platform*, *supra* note 12, ¶ 113.

77. *Beijing Platform*, *supra* note 12, ¶ 114.

78. *Id.* ¶ 115.

The Platform describes its strategic objective D.1 as "integrated measures to prevent and eliminate violence against women."⁷⁹ These measures to some extent replicate the provisions of Article 4 of the Declaration as set out above,⁸⁰ with a number of additional provisions relating to various aspects of the obligations to prevent, investigate, punish, and compensate survivors of violence against women.⁸¹

Strategic objective D.2, which relates to the study of the causes and consequences of violence against women and the effectiveness of preventive measures, similarly includes a number of actions to be taken *inter alia* by governments and various other agencies.⁸² The third strategic objective relating to violence against women is to "[e]liminate trafficking in women and assist victims [of] violence due to prostitution and trafficking."⁸³

E. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women⁸⁴

1. Nature of Document

The Organization of American States (OAS) adopted the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (also referred to as the "Convention of Belém do Pará") in June 1994, but it has not yet come into force. The document recognizes a need to provide the Inter-American system with an international instrument that will address the problem of violence against women.⁸⁵ This Convention is significant in the sense that it is the first legally binding international treaty focusing specifically on violence against women. The Convention is only open to (and would only be legally binding on) OAS member states; however, it might also exert a broader influence in the generation of customary international law.

79. *Id.* ¶ 124.

80. Violence Declaration, *supra* note 2, art. 4.

81. *See Beijing Platform*, *supra* note 12, ¶ 124. For instance, states are required to "[a]dopt and/or implement and periodically review and analyse legislation to ensure its effectiveness in eliminating violence against women, emphasizing the prevention of violence and the prosecution of offenders" *Id.* ¶ 124(d).

82. *Id.* ¶ 129.

83. *Id.* ¶ 130.

84. Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, "Convention of Belém do Pará," adopted 9 June 1994, OAS/Ser.L.V/II.92/doc.31 rev.3 (1994) (not in force), reprinted in 33 I.L.M. 1534 (1994), available on <<http://oasunix1.oas.org/EN/PROG/CIM/paraie.html>> [hereinafter Inter-American Convention].

85. *Id.* pmbl.

2. Obligations Regarding Violence Against Women

The Convention essentially also adopts the definition⁸⁶ and scope⁸⁷ of violence against women as stated in the Violence Declaration.⁸⁸ Article 3 explicitly states that "[e]very woman has the right to be free from violence in both the public and private spheres."⁸⁹ In addition, "States Parties recognize that violence against women prevents and nullifies the exercise of" other fundamental human rights.⁹⁰ Article 6 links the right to be free from violence with "[t]he right of women to be free from all forms of discrimination."⁹¹

In terms broadly similar to Article 4 of the Violence Declaration, Article 7 sets out that state parties agree to pursue policies and legislation to prevent, punish, and eradicate violence against women. They also undertake to comply with a number of specific duties to achieve that result.⁹² The state parties also "agree to undertake progressively specific measures, including programs" aimed at the achievement of particular results.⁹³

The Convention includes several measures aimed at enforcement and accountability. State parties are required to include information on measures adopted (as well as any difficulties in applying those measures) in their national reports to the Inter-American Commission of Women.⁹⁴ State parties, as well as the Inter-American Commission of Women, may request an advisory opinion on the interpretation of the Convention from the Inter-American Court of Human Rights.⁹⁵ As well, "[a]ny person or group of persons, or any nongovernmental entity legally recognized in one or more member states of the Organization [of American States], may lodge petitions with the Inter-American Commission on Human Rights containing denunciations or complaints of violations of Article 7 of this Convention"⁹⁶

86. *Id.* art. 1.

87. *Id.* art. 2. The scope of application—especially Article 2(a)—differs slightly. *Id.* art. 2(a). However, the essence remains the same.

88. Violence Declaration, *supra* note 2, art. 1.

89. Inter-American Convention, *supra* note 84, art. 3.

90. *Id.* art. 5.

91. *Id.* art. 6.

92. *Id.* art. 7. For instance, state parties are required to "adopt legal measures to require the perpetrator to refrain from harassing, intimidating or threatening the woman" *Id.* art. 7(d).

93. *Id.* art. 8.

94. See *id.* art. 10.

F. Report Submitted by Special Rapporteur on Violence Against Women

In 1994, the UN Commission on Human Rights⁹⁷ appointed a Special Rapporteur on Violence against Women. Her task was to report on the causes and consequences of violence against women and to recommend ways of eliminating such violence.⁹⁸ The Special Rapporteur's first report (specifically dealing with domestic violence) describes state responsibility in the following terms: "In the context of norms recently established by the international community, a State that does not act against crimes of violence against women is as guilty as the perpetrators. States are under a positive duty to prevent, investigate and punish crimes associated with violence against women."⁹⁹

G. Summary

Comparisons of the instruments referred to above indicate areas of similarity as well as marked differences.

1. Point of Departure: Frameworks

CEDAW's Recommendation 19 and the Violence Declaration¹⁰⁰ both approach violence against women from an equality point of view,¹⁰¹ although the Declaration also considers violence against women a violation of human rights.¹⁰² The Beijing Platform essentially adopts this "dual approach" as well.¹⁰³ The Inter-American Convention recognizes a separate right to be free from violence,¹⁰⁴ in addition to acknowledging that violence against women is an offense against human dignity¹⁰⁵ that also undermines the enjoyment of other rights.¹⁰⁶

97. This is a non-treaty body set up by the Economic and Social Council under the UN Charter. See FRANK NEWMAN & DAVID WISSEBRODT, INTERNATIONAL HUMAN RIGHTS 5-6 (1990).

98. See HUMAN RIGHTS WATCH, *supra* note 57, at 42-43.

99. Preliminary Report submitted by the Special Rapporteur on Violence Against Women, Its Causes and Consequences, Ms. Radhika Coomaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 1994/45, U.N. ESCOR, Comm'n on Hum. Rts., 50th Sess., Agenda Item 11(a), at 18, U.N. Doc. E/CN.4/1995/42 (1995).

100. See generally Violence Declaration, *supra* note 2, art. 3; General Recommendation 19, *supra* note 52, ¶¶ 1, 7.

101. But cf. Fitzpatrick, *supra* note 50, at 533-40 (raising the interesting question of whether an equality paradigm is useful or counterproductive in addressing violence against women).

102. Violence Declaration, *supra* note 2, art. 3.

103. Beijing Platform, *supra* note 12, ¶ 112.

104. Inter-American Convention, *supra* note 84, art. 3.

105. *Id.* pmbl.

Fitzpatrick points out that these different frameworks lead to subtle differences in content.¹⁰⁷ For instance, CEDAW clearly defines sexual harassment (in the context of discrimination), whereas the Violence Declaration simply lists "sexual harassment and intimidation at work."¹⁰⁸

2. Legal Status of the Documents

The legal status of the documents is variant as well. Although the Women's Convention is binding on the South African state, the fact that the duties set out above are specified in General Recommendation 19 (rather than in the Convention itself), may impact their effect. In terms of practical implementation, one also has to consider the documented limitations of CEDAW and the Convention.¹⁰⁹

The Violence Declaration, on the other hand, "has the advantage of being universal in its coverage," but its immediate value is diminished by its legally nonbinding nature and by the inherent limitations of the other instruments upon which it relies.¹¹⁰

The primary importance of the Beijing Platform is that it makes the issue of violence against women a priority by identifying it as one of the "[c]ritical areas of concern."¹¹¹ Although the Platform does not establish legally binding norms, it does comprise formal political commitments that the South African government has endorsed in clear terms.

The Platform elaborates on the obligations set out in General Recommendation 19 and the Violence Declaration in the sense that although the ultimate obligation to prevent, investigate, punish, and compensate for acts of violence against women rests with governments, the Platform assigns responsibilities to other role-players (e.g., nongovernmental organizations).¹¹² It also builds on existing international instruments and places the various commitments in this framework (e.g., by indicating that the Women's Convention should be ratified by governments).¹¹³

The Inter-American Convention, although only binding on OAS member states, is significant in the sense that it contains innovative complaint and reporting measures that might form the basis for further developments

107. Fitzpatrick, *supra* note 50, at 556.

108. Compare General Recommendation 19, *supra* note 52, ¶ 23 with Violence Declaration, *supra* note 2, art. 2(b).

109. See Fitzpatrick, *supra* note 50, at 537 (noting that CEDAW's activities are hampered by paucity of resources and a lack of effective implementation powers); Cook, *supra* note 21, at 252 (noting that the Convention itself is weakened by numerous reservations).

110. Fitzpatrick, *supra* note 50, at 557.

111. Beijing Platform, *supra* note 12, ch. III, tit.

112. E.g., *id.* ¶¶ 126, 127.

113. *Id.* ¶ 125(f).

in the international context.¹¹⁴ The individual complaint mechanism is, for instance, an advance on the procedure provided for under the Women's Convention.¹¹⁵

The various international instruments clearly contain both legally binding obligations, as in the case of the Women's Convention, as well as persuasive guidelines, as in the case of the Violence Declaration, the Beijing Platform, and the Inter-American Convention. These provisions serve to entrench state responsibility to protect, investigate, punish, and compensate for acts of violence against women from both public and private sources.

In addition, various other provisions in international instruments could be indirectly applicable in this context. The Beijing Platform, for instance, identifies the promotion and protection of the human rights of women through the full implementation of all human rights instruments as a separate strategic objective.¹¹⁶ In addition, most of the instruments referred to above incorporate the principles of "broader" human rights instruments in their provisions.¹¹⁷ Other instruments may also be applicable either indirectly¹¹⁸ or by analogy.¹¹⁹

IV. RIGHT TO FREEDOM FROM VIOLENCE

A. Right to Freedom from Violence in the South African Constitution

During the process of negotiation preceding the adoption of the Interim Constitution, Article 7(4) of the Draft Bill of Human Rights of the African National Congress (ANC),¹²⁰ which provided that "the law shall provide remedies for sexual harassment, abuse and violence,"¹²¹ was discounted by the South African Law Commission on the ground that the common law already contained adequate remedies to address violence against women.¹²²

114. See Fitzpatrick, *supra* note 50, at 537.

115. See Fitzpatrick, *supra* note 50, at 537 n.40 (noting that CEDAW has no capacity to review individual complaints).

116. Beijing Platform, *supra* note 12, ¶ 230.

117. See, e.g., Violence Declaration, *supra* note 2, art. 3.

118. See, e.g., Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34, adopted 29 Nov. 1985, U.N. GAOR, 40th Sess., Annex, U.N. Doc. A/Res/40/34/Annex (1985).

119. See, e.g., Rhonda Copelon, *Intimate Terror: Understanding Domestic Violence as Torture*, in HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES, *supra* note 21, at 116 (arguing convincingly that domestic violence constitutes a form of torture that could be addressed under the various instruments dealing with torture).

120. African National Congress Draft Bill of Rights (1990) art. 7(4).

121. *Id.*

122. See Pat Singh, *Protection from Violence is a Right*, in THE CONSTITUTION OF SOUTH AFRICA FROM A GENDER PERSPECTIVE 136-37 (Sandra Liebenberg ed., 1995).

However, it has been shown that the common law remedies are in fact not adequate, due to devices such as the cautionary rule, applicable to complainants in sexual offense cases.¹²³ Singh has argued convincingly that under the Interim Constitution, existing legal provisions relating to rape, such as the cautionary rule, would have to be challenged on the basis that these rules violate the equality provisions of the Constitution—by discriminating unfairly on the grounds of sex.¹²⁴ She therefore recommended that the right to protection against violence should be entrenched in the final constitution,¹²⁵ rather than relying on the piecemeal reforms likely to result from constitutional challenges based on the equality clause: "[C]onstitutional recognition of women's right to protection from violence would oblige the government to take steps to ensure the right and to provide remedies when it is violated."¹²⁶ Against this background, it is significant that the right to freedom and security was revised in the 1996 Constitution to include the right to be free from all forms of violence from public or private sources.¹²⁷

The specific formulation of "the right to freedom and security" (in its different facets) is also significant. The combination of the right to freedom and the right to security in the majority of human rights instruments has led many to question whether these are in fact separate rights or whether they are "two sides of the same coin."¹²⁸

The European Commission has held that the term "liberty and security" must be read as a whole, and, in view of its context, as referring only to physical liberty and security.¹²⁹ "Liberty . . . of [the] person" in Article 5(1) of the European Convention thus means freedom from arrest and detention, and "security of [the] person" means the protection against arbitrary interference with this liberty.¹³⁰

123. See *id.* at 137–38; Desiree Hansson, *Working Against Violence Against Women, in PUTTING WOMEN ON THE AGENDA 185–86* (Susan Bazili ed., 1991).

124. See Singh, *supra* note 122. See generally S. ARR. CONST. (Interim Constitution, 1993) ch. 3, § 8. The Interim Constitution did not include the right to be free from violence as a distinct, separate right. *Id.* § 11(2).

125. Singh's article, written subsequent to the adoption of the Interim Constitution, initially formed part of the proceedings of a conference held by the Community Law Centre of the University of the Western Cape from 27–29 Jan. 1995 with the aim of devising recommendations for the drafting of the Final Constitution. See Singh, *supra* note 122, at 5–6.

126. Singh, *supra* note 122, at 140. It should be noted that this statement was specifically made in the context of discriminatory rape laws.

127. Cf. Women's Charter for Effective Equality, art. 10 (adopted at the National Convention of the Women's National Coalition during 25–27 Feb. 1994) (on file with author).

128. See, e.g., European Convention, *supra* note 23, art. 5; African Charter, *supra* note 25, art. 6.

129. *Adler and Blvas v. Federal Republik of Germany*, 1977 Y.B. EUR. CONVENTION ON H.R. at 102, 146 (Eur. Comm'n on H.R.).

130. *European Convention*, *supra* note 23, art. 5(1); *Dyer v. United Kingdom*,

Van Dijk and Van Hoof question the wisdom of the inclusion of the right of security of the person in Article 5(1), because the right to security would imply more than protection against limitation of liberty: states would also have to guarantee against other encroachments on the physical security of persons.¹³¹ In spite of the view expressed by the European Commission, it appears to be widely accepted that these are in fact different rights.¹³²

It is therefore meaningful that section 12 of the South African Constitution clearly sets out the various aspects of the rights to freedom and security—eliminating any suggestion that the right to security should only apply in a "due process" context, serving to guarantee freedom from arbitrary arrest and detention.¹³³ One might by way of comparison refer to section 7 of the Canadian Charter,¹³⁴ which states that deprivation of the right to life, liberty, and security of the person can only occur in accordance with principles of fundamental justice, allowing for a dominant "due process interpretation."¹³⁵ The same can be said of the US Constitution,¹³⁶ in which the right to liberty forms part of the "due process clause" of the Fifth and Fourteenth Amendments.¹³⁷

The formulation of section 12(1)(c) is also very clear in its reference to violence from both *public* and *private* sources.¹³⁸ Further, section 12 should also be read with section 7 of the Constitution, which provides in subsection 7(2): "The state must respect, protect, promote and fulfil the rights in the Bill of Rights."¹³⁹ This provision clearly implies that the state should not only respect the rights of women to be free from all forms of violence (in the sense of refraining from the commission of acts of violence against women), but should take active steps to protect this right.

131. VAN DIJK & VAN HOOFF, *supra* note 36, at 253.

132. See Lourens du Plessis & Jacques de Ville, *Personal Rights: Life, Freedom and Security of the Person, Privacy and Freedom of Movement*, in *RIGHTS AND CONSTITUTIONALISM* 235 (Dawid van Wyk et al. eds., 1994).

133. S. ARR. CONST. (1996) ch. 2, § 12. The various aspects of the rights to freedom and security thus include the right to be free from all forms of violence, not to be tortured in any way, and not to be treated in a cruel, inhuman, or degrading way. *Id.*

134. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 7.

135. Du Plessis & De Ville, *supra* note 132, at 234–35.

136. U.S. CONST. amends. V, XIV.

137. See du Plessis & de Ville, *supra* note 132, at 233.

138. S. ARR. CONST. ch. 2, § 12(1)(c). A comprehensive discussion of the horizontal application of the 1996 Constitution does not fall within the scope of this article.

139. S. ARR. CONST. ch. 2, § 1.

B. The Right to Freedom from Violence in Other Jurisdictions

The right to freedom from violence has been examined in US and Canadian law (in the context of failure of state agents to provide adequate protection from violence) as an aspect of the right to liberty under the Fourteenth Amendment to the US Constitution¹⁴⁰ and the right to security under the Canadian Charter,¹⁴¹ respectively. Important arguments have been made in cases advancing such rights.

1. United States

In *Thurman v. City of Torrington*,¹⁴² the plaintiff brought a civil rights action against the City of Torrington and its police officers, alleging that the actions of the defendants, in failing to protect her against threats and assaults by her estranged husband, deprived her of her constitutional right to equal protection of the laws.¹⁴³ The city argued that the equal protection clause of the Fourteenth Amendment of the US Constitution did not guarantee equal application of social services.¹⁴⁴

In denying a motion to dismiss the complaint, the court held that police officers are under an affirmative duty to protect the personal safety of persons in the community; it further held that this duty applies equally to women whose personal safety is threatened by individuals with whom they have or have had a domestic relationship, as well as to all other persons whose personal safety is threatened.¹⁴⁵ Police action is subject to the equal protection clause whether in the form of perpetration of violative acts (commission) or failure to perform required protective acts (omission).¹⁴⁶

In another case, *DeShaney v. Winnebago County Department of Social Services*,¹⁴⁷ the petitioner was a child who was subjected to a series of beatings by his father, with whom he lived.¹⁴⁸ The respondent, a county department of social services, received complaints that the child was being abused by his father and took various steps to protect him; they did not, however, act to remove the child from his father's custody.¹⁴⁹ His father

140. U.S. CONST. amend. XIV, § 1.

141. CAN. CONST. (Constitution Act, 1982) pt. 1 (Canadian Charter of Rights and Freedoms), § 7.

142. *Thurman v. City of Torrington*, 595 F. Supp. 1521 (D. Conn. 1984).

143. *Id.* at 1524.

144. *Id.* at 1526.

145. *Id.* at 1527.

146. *Id.*

147. *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

148. *Id.* at 191.

149. *Id.*

finally beat him so severely that he suffered permanent brain damage and was disabled.¹⁵⁰

The child and his mother sued the respondent, alleging that by failing to intervene to protect him against his father's violence, the respondent had deprived him of his liberty interest in bodily integrity, in violation of his rights under the Fourteenth Amendment's due process clause. The US Supreme Court held that a state's failure to protect an individual against private violence generally does not constitute a violation of the due process clause because the clause imposes no duty on the state to provide members of the general public with adequate protective services.¹⁵¹ The clause is phrased as a limitation on the state's power to act, not as a guarantee of certain minimum levels of safety and security. While it forbids the state itself to deprive individuals of life, liberty, and property without due process of the law, its language cannot fairly be read to impose an affirmative obligation on the state to ensure that those interests do not come to harm through other means.¹⁵²

The Court also held that there was no merit to the contention that the state's knowledge that the child might be in danger (and its expressions of willingness to protect him against that danger) created a "special relationship" giving rise to an affirmative constitutional duty to provide protection.¹⁵³ Certain "special relationships" assumed by the state with respect to particular individuals may give rise to an affirmative duty to protect, enforceable through the due process clause; however, this duty arises from the limitation that the state has imposed on the individual's freedom to act on his own behalf through imprisonment, institutionalization, or other similar restraints of personal liberty.¹⁵⁴ No such duty existed here, for the harms suffered occurred while the child was in the custody of his natural father.

While the state may have been aware of the dangers the child faced, it played no part in their creation, nor did it do anything to render him more vulnerable to them. Under such circumstances, the due process clause does not impose an affirmative duty to provide protection. The Court accordingly affirmed the dismissal of the claim.¹⁵⁵

150. *Id.* at 193.

151. *Id.* at 201-02.

152. *See id.* at 195.

153. *Id.* at 197-98.

154. *See id.* at 200.

155. *Id.* at 202. *See also* *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 698 (9th Cir. 1990) (following *DeShaney* and dealing with an action alleging violation of due process and equal protection rights arising from the failure of police to protect plaintiff against beating and harassment by her estranged husband).

2. Canada

The plaintiff in *Doe v. Board of Commissioners of Police for Municipality of Metropolitan Toronto*¹⁵⁶ was sexually assaulted by a man who had previously attacked several other women in her neighborhood.¹⁵⁷ The plaintiff sued the investigating officers in charge of the case, the police chief, and the Board of Commissioners of Police, raising two causes of action: the first was framed in tort, and the second was for a declaration that her right to security of the person and her right to equal protection of the law under sections 7 and 15(1) of the Canadian Charter had been violated.¹⁵⁸ A motion to strike the claim of action was initially dismissed,¹⁵⁹ and the defendants appealed against this decision.

The plaintiff alleged that her right to equal protection of the law under section 15(1) of the Charter was violated: the defendants had a legal duty to warn her of impending danger, yet they chose not to warn her because of a stereotypical (and therefore discriminatory) belief that as a woman, she and others like her would become hysterical and "scare off" the attacker. As a result, the police turned her into bait without her knowledge or consent.¹⁶⁰

The plaintiff also claimed that she was deprived of her right to security of the person under Canadian Charter section 7. The defendants chose a policy that favored the apprehension of the criminal over her protection as a potential rape victim and knowingly placed her security interest at risk. Therefore, she was deprived of her right to security of the person in a manner that did not accord with the principles of fundamental justice: "[t]hese principles, while entitled to broad and generous interpretation, especially in the area of law enforcement, could not be said to embrace a discretion exercised arbitrarily or for improper motives."¹⁶¹

The defendants in turn submitted that the Charter had no application, based *inter alia* on the following reasons: "(1) The purpose of the Charter is to limit state action . . . Here, there was no state action that caused injury to the plaintiff. The harm she suffered was caused by her attacker."¹⁶² The court agreed that the Charter placed no obligation on the state to ensure that life, liberty, or property did not come to harm through means other than state

action.¹⁶³ However, this case involved the imposition of a positive duty by the Police Act¹⁶⁴ to preserve the peace, prevent crimes, and apprehend offenders.¹⁶⁵ The court further found that the defendants' failure to perform a duty mandated by law for improper reasons may constitute an infringement of the rights guaranteed by sections 7 and 15(1) of the Charter.¹⁶⁶

The defendants also argued that

- (2) [e]ven if the failure to act on the part of the state could give rise to a Charter violation, such a claim should be narrowly limited to cases involving a special relationship between the state and the victim. This relationship can only exist when the victim is in the custody or control of the state.¹⁶⁷

In terms of this proposition, a constitutional duty to assume responsibility for the safety and well-being of an individual only arises when the state takes a person into custody and holds that person against his or her will. The court found once again that this argument did not apply here: "The positive duty here which requires government officials to act arises under s. 57 of the Police Act. Whether a special relationship exists or not will depend on the circumstances of each case. . . . the allegations here support such a finding."¹⁶⁸ Accordingly, the Ontario Divisional Court dismissed the appeal.¹⁶⁹

Although the value of this decision is limited by the nature of the proceedings (this was an application *in limine* and the court was at pains to point out that the decision merely entitled the plaintiff to continue her action), it offers an interesting approach to the issue of state responsibility where state agents fail to perform protective duties, especially when compared to the decision of the US Supreme Court in *DeShaney*.

3. Summary

The decisions discussed above allow for a number of useful observations. It appears that under US and Canadian law there are certain obstacles to a finding of state responsibility for failure of state agents to perform protective duties:

156. *Doe v. Bd. of Comm'rs of Police for Municipality of Metro. Toronto*, Marks, Derry and Cameron (1990), 1 C.R.R. (2d) 211 (Ontario Div. Ct.).

157. *Id.* at 211-13.

158. *Id.*

159. See *Doe v. Bd. of Comm'rs of Police for Metro. Toronto et al.*, [1989] 58 D.L.R. 396, 446 (Can.).

160. *Id.* at 431-32. The plaintiff argued that a man would have been warned and perhaps the choice of exposing himself to danger to help capture the criminal; she was

163. *Id.* at 217.

164. Police Act R.S.O. 1970, c. 381.

165. *Doe*, 1 C.R.R. (2d) at 218.

166. *Id.* at 218-19.

167. *Id.* at 216. In both arguments, the defendants cited the US decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989) in support. *Id.* at 217-18.

168. *Id.* at 218.

- (a) The reluctance of the US courts to recognize a general, affirmative duty to protect women and other vulnerable groups against violence (arising from the constitutional recognition of the rights to life, liberty, and property). The Canadian court overcame this difficulty by holding that such a duty arose from the Canadian Police Act.
- (b) The close association of the right to liberty (encompassing security of the person) with other so-called "due process" rights—facilitating the conclusion in *DeShaney* that the state only has a protective duty where a special relationship has been created by deprivation of liberty through arrest or detention.
- (c) The reluctance to acknowledge state responsibility for violence committed by private persons. (The US approach, taken to its logical extreme, would entail that as long as the violence is not caused or sanctioned by state action, the state has no duty to intervene.)

Although this will ultimately be a matter of judicial interpretation, the present formulation of section 12(1)(c) of the South African Constitution (read in conjunction with sections 7 and 39(1)(b)) should prevent similar difficulties in the South African context.

In the first place, the Constitution clearly separates the right to be free from violence from the "due process" aspects of the right to freedom and security. Secondly, section 12(1)(c) clearly includes violence from public or private sources in its ambit. In the third place, section 7 of the Constitution makes it clear that the state's responsibilities extend beyond a duty to refrain from violating this right through state action, additionally imposing a *positive duty* to protect this right as well. In the interpretation of section 12(1)(c), a South African court should also consider international law¹⁷⁰—in which case, the above-mentioned human rights instruments provide clear evidence of wide-ranging obligations to protect, investigate, punish, and compensate for acts of violence. This also accords with Shue's proposed model discussed earlier in which the state would have a duty to avoid violation of rights, to protect from violation, and to provide aid where the rights have been violated.¹⁷¹

V. IMPLICATIONS OF SECTION 12(1)(C) AND PROVISIONS OF INTERNATIONAL LAW

The implications of the inclusion of section 12(1)(c), in conjunction with the obligations imposed under international human rights law, are far-reaching.

170. S. Afr. Const. (1996) ch. 2, § 39(1)(b).

171. SHUE, *supra* note 1, at 13.

The duties resting on the South African state extend beyond responsibility for the failure of police and other state actors to take protective action. If one looks at the full ambit of the duties to protect, investigate, punish, and compensate, pervasive legislative and other measures are required to alleviate current shortcomings in South African law. This article does not seek to perform a comprehensive audit of existing provisions, policies, or practices in the different spheres of government activity that might be affected by the obligations to address violence against women. It is sufficient to note that these duties affect state action on both micro and macro levels, ranging from obligations to develop national plans of action to promote the protection of women from violence¹⁷² to effective intervention in individual cases.

One area in which South African law is currently deficient is the duty to punish violations. Strong evidence exists that the cautionary rule that applies in sexual offense cases¹⁷³ seriously undermines the successful prosecution (and by implication, punishment) of offenders in rape cases.¹⁷⁴ The cautionary rule permits the court "to exercise an excessive level of discretion in deciding whether to believe women who allege that they have been raped."¹⁷⁵ In obstructing the effective prosecution and punishment of offenders, this rule significantly undermines the right to be protected from sexual violence. In addition, the cautionary rule as it applies here also infringes on the provision prohibiting discrimination against women—especially the guarantee of equal protection of men and women under the law. Various parties, including Human Rights Watch,¹⁷⁶ have urged for the abolition of this cautionary rule.¹⁷⁷ The test used to evaluate evidence should be the same as for other assault offenses.

The implementation of comprehensive measures to address violence against women clearly will require a high level of commitment of government and other resources. Such measures will affect the activities of various government departments, such as Justice, Welfare, Health, and others.

172. See Violence Declaration, *supra* note 2, art. 4(e); Beijing Platform, *supra* note 12, ¶¶ 125(g), 125(j).

173. See HOFFMAN & ZIFFERT, *supra* note 5.

174. See Singh, *supra* note 122, at 137–38; Hansson, *supra* note 123, at 185–86; Ross, *supra* note 3, at 14.

175. HUMAN RIGHTS WATCH, *supra* note 57, at 102.

176. *Id.* at 103.

177. See, e.g., Hansson, *supra* note 123, at 186; Pamela-Jane Schwickard, *A Critical Overview of the Rules of Evidence Relevant to Rape Trials in South African Law, in WOMEN AND THE LAW 212* (Saras Jagwanth et al. eds., 1994). Interestingly, the same cautionary rule fell foul of the Namibian Constitution in *S v. D.*, 1992 (1) SACR 143 (Nm). An attempt to raise the same issue in South African law was unsuccessful. See *S v. M.*, 1992 (2) SACR 188 (W). It should be noted that this matter was heard before adoption of the Interim Constitution in 1993.

Therefore, the government must clearly acknowledge its obligations under international law and the implications of section 12(1)(c) and then effect integrated initiatives to translate these obligations into policy.¹⁷⁸

The next few months should prove to be indicative of the levels of the South African government's commitment in this regard. Under the Women's Convention, the government is due to report within a year of ratification.¹⁷⁹ The Beijing Platform also requires governments to have developed their implementation strategies by the end of 1996.¹⁸⁰ An examination of the reports submitted by the South African government under the Women's Convention and the Beijing Platform should indicate whether the government is meeting the standards set in the various international instruments.

One should not underestimate the participation of other roleplayers in ensuring that these commitments are met. Although the Human Rights Commission and the Commission on Gender Equality will be instrumental in overseeing compliance with these duties, nongovernmental organizations will continue to provide the major influence in galvanizing government action (and compiling information on noncompliance with obligations).¹⁸¹ Therefore, the government should incorporate cooperation and consultation with the various nongovernmental organizations and research institutions active in this field into its initiative.¹⁸²

The recognition of the right to be free from violence and the acknowledgment of concomitant obligations to prevent, investigate, punish, and compensate for acts of violence against women should merely be seen as the first step in the process; the South African government must now uphold its international obligations and "summon the political will"¹⁸³ to ensure that women are effectively protected from violence.

178. S. Afr. Const. (1996) ch. 2, §12(1)(c). The South African Department of Welfare has produced a post-Beijing report setting out the responsibilities of each government department under each strategic objective. Welfare Report, *supra* note 74, at 4-26. It is not, however, clear which government structure(s) will be responsible for overseeing implementation of these proposals. *Id.* at 3.

179. Women's Convention, *supra* note 13, art. 18.

180. Beijing Platform, *supra* note 12, ¶ 297.

181. See, e.g., Kenneth Roth, *Domestic Violence as an International Human Rights Issue*, in *HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES*, *supra* note 21, at 336-39 (noting the role of human rights and women's rights organizations in monitoring state compliance with human rights norms).

182. See Sharon Stanton & Margot Lochrenberg, *Justice for Sexual Assault Survivors* (Institute of Criminology, University of Cape Town, S. Afr.), 1994, at 68-69 (on file with author) (commenting on the institution of a specialized sexual offenses court at Wynberg (Cape Town) as an example of state "innovation" without sufficient prior consultation); see also *supra* note 57, at 119 n.24.

The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights

INTRODUCTION

On the occasion of the tenth anniversary of the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (hereinafter "the Limburg Principles"), a group of more than thirty experts met in Maastricht from 22-26 January 1997 at the invitation of the International Commission of Jurists (Geneva, Switzerland), the Urban Morgan Institute for Human Rights (Cincinnati, Ohio, USA) and the Centre for Human Rights of the Faculty of Law of Maastricht University (the Netherlands). The objective of this meeting was to elaborate on the Limburg Principles as regards the nature and scope of violations of economic, social and cultural rights and appropriate responses and remedies.

The participants unanimously agreed on the following guidelines which they understand to reflect the evolution of international law since 1986. These guidelines are designed to be of use to all who are concerned with understanding and determining violations of economic, social and cultural rights and in providing remedies thereto, in particular monitoring and adjudicating bodies at the national, regional and international levels.

I. THE SIGNIFICANCE OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS

1. Since the Limburg Principles were adopted in 1986, the economic and social conditions have declined at alarming rates for over 1.6 billion people, while they have advanced also at a dramatic pace for more than a quarter of the world's population.¹ The gap between rich and poor has doubled in the last three decades, with the poorest fifth of the world's population receiving 1.4 percent of the global income and the richest fifth 85 percent.

1. UNDP, *Human Development Report 1997*, at 10.

GOOD SEX AND BAD SEX: THE REPRESENTATION OF SEXUALITY IN THE LAW OF EVIDENCE

We all love to talk about sex. To think about it. Sexuality is one of the primary driving forces of all human behaviour. Even the law talks about sex. This presentation will focus on the way in which sexuality is depicted through an analysis of a number of evidence cases.

I want us to consider the following questions:

1. How is human sexuality constituted? Where does our information about sexuality come from? Is it primarily biological or social constructed?
2. How is sexuality represented or constructed in legal discourse? What does the law teach us about sex?
3. Should sexuality be regulated by the law? (normative question)

Sexuality is fundamental to the organization of human identity as well as to social relationships. It is the intersection between nature and culture and is a highly contested site. Consider that sexuality is:

- * the site of women's oppression (male sexual violence in the form of rape)
- * the site of difference between men and women (equality issues)
- * the site of potential connection between men and women (heterosexual sex)
- * the site of the private
- * the site of powerlessness and potential power
- * the site of privilege through the obeying of societal norms of heterosexuality, family, social institutions
- * the site of reproduction
- * the site of pleasure.

Feminism also has an ambivalent relationship to sexuality. Sexuality is contested by different feminists who disagree about whether sexuality is the source of women's oppression or women's power and liberation.

Catharine MacKinnon, a radical feminist legal scholar begins one of her most important pieces of writing called 'Dominance and Difference' by saying 'sexuality is to feminism what labour is to Marxism: that which is most one's own and that which is most taken away.'

Is this true? Is sexuality 'our own'? Where and how do we learn about sexuality?

- * parents
- * peers
- * sex education at school
- * pornography
- * erotic literature/movies/art/poetry
- * experience

From each of these encounters, we learned a 'sex rule.'

Can you write down in one sentence what you learned about sex from each of these sources.

- Eg.
- women do not have sex with women
 - men do not have sex with men
 - women do not take the sexual initiative
 - masturbation is wrong
 - only sex for the sake of reproduction is ok
 - sex should only take place in marriage
 - it is not important if I (as a woman) do not experience sexual pleasure as long as my partner does
 - sex should only take place between people of the same race/class/religion
 - oral sex is dirty
 - anal sex is sinful (Sodom and Gemorrah)

Do you notice that before you even experienced your sexuality that it was represented to you, and rules about sex were transmitted to you even if that rule was reinforced by the fact that you were born into a nuclear heterosexual family environment? These sex rules create a paradigm of GOOD SEX (marriage, reproduction, love) versus BAD SEX (for any other reason or in any other context).

HOW DOES THE LAW PARTICIPATE IN REINFORCING GOOD SEX V BAD SEX NOTIONS?

1. The law criminalizes certain sexual activity and this reinforces the idea that these forms of sexuality are bad: eg. Sex with minors, until recently gay sex, sex between family members (even when these sexual acts are freely chosen by consenting adults and the crimes are victimless).
2. The language law uses to talk about sex is confined to what is 'natural', 'decent' and 'moral.' Law thinks about sex in terms of morality, not in any other way (eg, in the language of erotic pleasure). The notions of 'indecent', and 'immorality' are never defined.
3. The law talks about certain forms of sexuality through the language of 'danger' and the need to 'protect' the sexuality of certain vulnerable members of society, so the law has rules about sex with children, animals and women without their consent.
4. There is an absence of the language of sexual pleasure in legal discourse.

SEXUAL OFFENCES ACT

Section 20A: Acts committed between men at a party and which are calculated to stimulate sexual passion or to give sexual gratification are prohibited. "Party" means any occasion where more than two persons are present. (Do you notice how your mind suddenly conjures up the scenario - like being told not to think about a purple elephant?)

Number of evidence cases which represent sexuality:

1. INFIDELITY/SEX ACROSS RACIAL BARRIERS

R v D 1958 (4) SA 364 AD

Facts: European male convicted on 4 counts of having illegal intercourse with different native females in contravention of the Act.

"In each case the native female testified that she was employed as a kitchen maid by the appellant's wife, that the appellant came into the kitchen at 5.30 am clad in his pyjamas and dressing gown, that he suggested intercourse and finally achieved his purpose in the pantry while his wife was still asleep in their joint bedroom." (At 368 D-F)

What messages about sexuality are transmitted?

- * language of secrecy, consent 'suggested intercourse' contrasted with the language of coercion 'finally achieved his purpose (male sexuality as uncompromising, driven)
- * Female sexuality as passive yet willing (Native females) or frigid and innocent (sleeping wife)

In this case, evidence of propensity is usually not allowed because it leads to forbidden line of reasoning that the person is of a bad character, therefore evidence of 4 other maids excluded (protection of male infidelity)

2. PORNOGRAPHY / INDECENT ASSAULT ON YOUNG GIRLS

R v W 1947 AD 708

Man charged with a number of accounts of indecent assault and rape with schoolgirls between ages of 12-16. Offences included him touching the girls high up between their legs/thighs.

Qu: could evidence of an extremely filthy book found in the accused's possession be led? Could it be reasoned that the possession of such a book could show that the possessor was a man with the same propensity as that of a man who indecently assaults young girls?

Reading judgement, we are never informed what the contents of the book are, but there is a baffling intrigue and mystique around the contents of the book which we are told are 'of an indecent character,' 'extremely filthy' and 'French.'

We are also told that the accused had semen stains on his trousers, which he explained away by informing the court that he and his cohabiting partner, Mrs Adinall (married? To whom - we are never told), had intercourse while he was wearing those trousers. The court upheld an objection to the question by the prosecution, 'Do you do anything else in your spare time at home except having intercourse with her?'

Sex rules?

- * possession of a book of this nature is bad (unhealthy)
- * having sex with a married woman is bad (Mrs Adinall)
- * whilst it is bad to have sex with young girls, the language used to describe these acts is sexually provocative
- * having too much sex is bad (especially where you leave traces of that activity on your trousers)

3. HOMOSEXUALITY / PAEDOPHILIA

Thompson v the King 1918 AC 221

Qu of identity of the accused who committed acts of indecent assault on young boys. On his person were found powder puffs and in a locked drawer in his room, indecent photographs of young boys.

He paid the boys and gave them each a shilling and told them to come back to 'do it again.'

When he was searched, powder puffs are found on his person. It is stated that powder puffs are some of the things with which persons who commit abominable and indecent crimes with males furnish themselves for the purpose of carrying out their criminal designs. For what purpose could the prisoner carry upon him on this day the powder puffs? He could not, by them, promote the cause of charity or cleanliness." (At 230)

Sex rules:

- * purpose of powder puffs is never revealed in the judgement, yet they are continually referred to in sinister tone. By not revealing the purpose of the powder puffs, one of 2 assumptions are made: either it is assumed that everyone already knows what they are used for or they don't want people to know because they might be encouraged to try them out for themselves.
- * Lord Atkinson says, "...it might have come into his possession when he was young and foolish, and that even if his character was then ever so depraved or reckless or criminal as the possession of the documents might indicate, he may have long since repented and reformed and become of blameless life and character." (Language of repentance, religious rebirth)
- * paying boys to do it again - this man's sexual urge as insatiable, wanting more.

4. INCEST

R v Ball 1911 AC 47

Brother and sister living together as husband and wife. Did incest take place on a particular night? Evidence that they lived together in a house with only one furnished bed: 'there was in the bedroom a double bed which bore signs of two persons having occupied it.' (What are the signs of 2 persons occupying a bed?)

Could evidence be led that they had a child together?

Held that the evidence was admissible for the object of the evidence was to establish that the defendants had a 'guilty passion' towards each other and to rebut

the defence of an innocent association as brother and sister.

Sex rules?

- * language of innocence and guilt - victimless crimes, nonetheless incest makes you guilty.

5. BUGGERY AND INCITEMENT TO BUGGERY

Boardman v DPP 1974 3 All E R 887

Schoolmaster inciting schoolboys to commit acts of buggery.

Court held that it was not 'merely a straightforward case of a schoolmaster indecently assaulting a pupil, but there was an unusual feature in that a grown man had attempted to get an adolescent boy to take the male part while he himself played the passive part in the acts of buggery.'

Sex rules?

- * court has ideas about what is a 'normal and straightforward' assault and the assailant should always be the penetrating party
- * male sexuality is aggressive and not passive

Implicitly, the law of evidence, through legal discourse has provided us with a series of sex rules which delineate which types of sexuality are acceptable and which are not. These judgements are laden with assumptions, stereotypes and an anxiety about too much sex, or the power of human lust. However, there is another assumption that is muted, which is that people should be engaging in sexual behaviour albeit under certain defined and contained circumstances. What about sexual abstention? Is this an acceptable form of sexuality or would the law regard this as aberrant sexual behaviour?

Should the law regulate sexual behaviour?

What principled reasoned grounds are there for state regulation of human sexuality?

Should all forms of human sexuality be expressible, regarded as legitimate sexual identities?

- * Should we legislate that desire for sex with a person of the same sex is prohibited (homosexuality?)
- * Should we legislate that certain forms of sexual play are not lawful?
Gayle Rubin: 'Ultimately, of what possible social significance is it if a person likes to masturbate over a shoe?' (Fetishism)
- * Should we prohibit sex between grown men and boys?
- * Should people be prohibited from having sex with animals?
- * Should brothers and sisters be prohibited from having sex? If so, why? What are we protecting? What are our social assumptions about incest?
- * Should people be prohibited from dressing up in whips and chains and engaging in sado masochistic sexual practices? If so, why? What are we afraid of?
- * Should oral or anal sex be regulated? Why?
- * If people want to urinate or defecate on one another as part of their sexual practice, should the law regulate this behaviour? If so, why?

LESBIAN AND GAY YOUTH IN LAW

by Angelo Pantazis

Draft. Not to be quoted or cited without the author's permission.

'I think the trick is to say yes to life.'

— James Baldwin¹

ASSUMPTIONS

In decisions concerning the rights of lesbian and gay parents, courts invariably assume that the children in question are heterosexual² and consider whether the parents' homosexuality might change their children's sexual orientation.³ The truth is that lesbian and gay youth do exist. By lesbian and gay youth, I mean youth who identify themselves as predominantly lesbian or gay or who will later come so to identify themselves, and do not include basically heterosexually-oriented youth who have incidental homosexual experiences.⁴ Adolescent homosexuality is usually put down to the confusion of immaturity and called a passing phase. While many homosexual children might never grow up into lesbian and gay adults and many lesbian and gay adults may never have had homosexual

¹ James Baldwin: *The Price of the Ticket* (documentary), quoted in Charles Kaiser *The Gay Metropolis* (1998) 3.

² *V v V* 1998 (4) SA 169 (C) at 190F-G:

'The article to which I have just referred obviously deals in the main with the rights of homosexuals to enjoy family rights which heterosexuals have enjoyed for centuries. It is largely concerned with the rights of the homosexuals and not the children, who form part of that "family unit".'

³ *Van Rooyen v Van Rooyen* 1994 (2) SA 325 (W) at 328H: 'With the nature of the material with which one is dealing, the question of sexuality of the children will in the case of the boy only commence as from now at some stage. This is not the stage yet when one can see the scars. If some damage was done, it will show in due course.'

The myth is that lesbians and gay men seduce or recruit children because they cannot have children of their own. The negation of this myth, if negation is needed, lies in the very context of lesbian and gay parents' rights vis-à-vis their children.

Generally on the assumptions of courts in custody and adoption cases in the United States, see Teemu Ruskola 'Minor Disregard: The Legal Construction of the Fantasy that Gay and Lesbian Youth Do Not Exist' (1996) 8 *Yale Journal of Law and Feminism* 269 at 290-302.

⁴ Dennis A Anderson 'Lesbian and Gay Adolescents: Social and Developmental Considerations' in Gerald Unks (ed) *The Gay Teen: Educational Practice and Theory for Lesbian, Gay, and Bisexual Adolescents* (1995) 17 at 17.

childhoods,⁵ the evidence of experience is overwhelmingly that there are homosexual children and that many of them assume lesbian and gay identities in adulthood.⁶

Apart from the assumption that homosexual youth do not exist, courts in custody cases also assume that it is undesirable for youth to be or become homosexual. In our world, the basic view is that heterosexuality is regarded not just as the better form of sexuality, but as the only form, as though there is no alternative.⁷ At best lesbians and gays are *tolerated*.⁸ Toleration means that heterosexuality retains its objectivity and superiority; lesbians and gays are lesser people. In the face of such homophobia, it may seem safer to lesbian and gay youth to be invisible, to be 'in the closet'. Invisibility justifies the assertion that the existence of homosexual youth is impossible. The assumptions that homosexual youth do not exist and that youth should not be homosexual are mutually reinforcing.

To assert the existence of lesbian and gay youth in the face of the assumption that youth ought not to be homosexual is thus to assert that youth ought to be homosexual. 'What do queers want?' asks one writer and his answer is 'not just sex' but 'a necessarily and desirably queer world',⁹ meaning one in which homosexuality is not a sign of non-existence or devaluation, but of equal value to heterosexuality, so that if, for example, lesbian and gay parents affected their children's sexual orientation, this would not matter.¹⁰

This article is basically in two parts. First, I look at the experience of lesbian and gay youth, which shows us that the stigma that causes lesbian and gay adults so much harm is similarly so for adolescents. The script for this sexual stigma is cultural and law is one of its authors. In part two, I suggest areas in which the law could be rewritten in order to improve the lot of lesbian and gay youth.

⁵ Ruskola op cit note 3 at 282n60.

⁶ This article does not advocate the prescription of a lesbian or gay, fixed identity for homosexual youth any more than it does for that of a heterosexual identity, but the desirability of the freedom to assume a lesbian or gay identity. 'Heterogeneous spheres must not only exist; they must be open and accessible, so that individuals are free to exit as well as enter them and so that immersion in one context does not exclude others.' (N Rosenblum *Another Liberalism: Romanticism and the Reconstruction of Liberal Thought* (1987) 126, as quoted in Jeffrey Weeks *Invented Moralities: Sexual Values in an Age of Uncertainty* (1995) 79)

⁷ Ruskola op cit note 3 at 279.

⁸ See Wayne Morgan & Kristen Walker 'Tolerance and Homosex: A Policy of Control and Containment' (1995) 20 *Melbourne University LR* 202 at 204-6; Larry Catá Backer 'Exposing the Perversions of Toleration: The Decriminalization of Private Sexual Conduct, the Model Penal Code, and the Oxymoron of Liberal Toleration' (1993) 45 *Florida LR* 755.

⁹ Michael Warner 'Introduction' in Michael Warner (ed) *Fear of a Queer Planet: Queer Politics and Social Theory* (1993) vii at vii, xvi.

¹⁰ See 'How to Bring Your kids up Gay: The War on Effeminate Boys' in Eve Kosofsky Sedgwick *Tendencies* (1993) 154.

LIFE

Jeffrey Weeks writes about the importance 'of basing values in lived experience, and of exploring the variety of human possibilities already apparent to us'.¹¹ This section summarizes the experience of lesbian and gay youth as it appears in the American social science research.¹² What little writing there is on the subject in South Africa paints a similar picture of a social and emotional development that is different to that of heterosexual adolescents.¹³ No account can paint a complete picture of the situation of lesbian and gay youth, any more than it can of lesbian and gay adulthood, for attraction to the same sex covers a wide range of people.

It is controversial and far from decided what creates a homosexual orientation, be it biology or socialization or some combination of the two. In recent years a lot of attention has been given to scientific research which finds that homosexuality is inborn. These 'scientific facts' have given rise to divergent responses. One is to tolerate lesbians and gays for being what they cannot help being, or to recognize a biological basis for the sexual diversity of actual experience. Another is to deny the relevance of the 'scientific fact' to the perceived immorality of homosexuality, and even to contemplate the eradication of homosexuality through the surveillance of foetuses with the 'gay gene'. The conflict of response to the same 'scientific fact' shows that 'biology is amoral; it offers no help distinguishing between right and wrong. Only people, guided by their values and beliefs, can decide what is moral and what is not.'¹⁴ It shows that it matters less what science tells us is the cause of homosexuality, and I accordingly do not grapple with the question in this article; it matters more what values we place in the sphere of homosexuality.¹⁵ Sexuality, as distinguished from sexual desire, is a

¹¹ Op cit note 6 at 53.

¹² Good surveys of the literature are made in Michael Radkowsky & Lawrence J Siegel 'The Gay Adolescent: Stressors, Adaptations, and Psychosocial Interventions' (1997) 17 *Clinical Psychology Review* 191; Clela L Dempsey 'Health and Social Issues of Gay, Lesbian and Bisexual Adolescents' (1994) 75 *Families in Society: The Journal of Contemporary Human Services* 160. An excellent journalistic account is Kurt Chandler *Passages of Pride: True Stories of Lesbian and Gay Teenagers* (1995). Fictive and non-fictive narratives are collected in Bennett L Singer (ed) *Growing up Gay / Growing up Lesbian: A Literary Anthology* (1994); Ann Heron (ed) *Two Teenagers in 20: Writings by Gay and Lesbian Youth* (1994).

¹³ Books: Gordon Isaacs & Brian McKendrick *Male Homosexuality in South Africa: Identity Formation, Culture, and Crisis* (1992); Mark Gevisser & Edwin Cameron (eds) *Defiant Desire* (1994), especially sections 3 and 6; Matthew Krause (ed) *The Invisible Ghetto: Lesbian and Gay Writing from South Africa* (1993). Newspaper articles: 'Young Homosexuals Want a Better Deal' *Cape Times* 7 April 1998; 'Gay, Lesbian Youth Battle to Come Out' *Cape Argus* 4 June 1998; 'Gay Pupils Harassed' *Natal Mercury* 12 April 1999.

¹⁴ Dean Hamer & Peter Copeland *The Science of Desire: The Search for the Gay Gene and the Biology of Behaviour* (1994) 214.

¹⁵ Weeks op cit note 6 at 8.

product of discourse, not science; it is political, which is why it is a site of such contestation.¹⁶

Regardless of the origins of homosexual desire, the scientific writing describes lesbian and gay identity formation as a series of stages in psychosocial development, mainly as remembered by lesbian and gay adults. One of the most commonly referred to models is the four-stage model of Richard Troiden.¹⁷ The stages are sensitization, sexual identity confusion, sexual identity assumption, and commitment. The first stage, *sensitization*,¹⁸ occurs before puberty¹⁹ and refers to the children's sense of being different from other children on the basis of their gender-inappropriate behaviour and interests, and rarely because they perceive themselves to be sexually different, having little or no sense of homosexuality and heterosexuality as categories.

The second stage, *identity confusion*,²⁰ spans adolescence, when lesbian and gay youth experience homosexual arousal, erotic imagery, romantic attachments and physical acts. Now they see themselves as sexually different and begin to associate this sense with being lesbian or gay. They have heterosexual experiences too. Their confusion during this time about their sexual orientation is less a matter of uncertainty about their true orientation and therefore not an opportunity to intervene to attempt to redirect sexual orientation;²¹ much more is it the

¹⁶ David M Halperin *Saint Foucault: Towards a Gay Hagiography* (1995) 40-2.

¹⁷ Richard R Troiden 'The Formation of Homosexual Identities' in Gilbert Herdt (ed) *Gay and Lesbian Youth* (1989) 43. There is nothing essential about the division of stages in Troiden's model; what is important is the development outlined, which is also reflected in other accounts of lesbian and gay identity formation. See also Anderson op cit note 4; Mary Jane Rotheram-Borus & M Isabel Fernandez 'Sexual Orientation and Developmental Challenges Experienced by Gay and Lesbian Youths' (1995) 25 *Suicide and Life-threatening Behaviour* 26.

¹⁸ Discussed in Troiden op cit note 17 at 50-2.

¹⁹ The social science research is specific about the age of lesbians and gays in the various stages of their development. I have chosen to be unspecific and to generalize by using terms such as puberty and adolescence, for three reasons. First, the specific ages vary from study to study. Second, the ages will vary between communities, for example there may be quicker development through the stages in urban communities which have a lesbian/gay subculture. Third, there is also a quicker development through the stages today than there was in the past, and this seems to accelerate with the years. It is in part for this reason that lesbian and gay youth are a relatively new phenomenon in life and a relatively new issue in lesbian/gay studies. On the last two reasons, see further the text below.

Generally, gay males pass through the various stages at lower ages than lesbians.

²⁰ Discussed in Troiden op cit note 17 at 52-8.

²¹ Richard A Isay *Becoming Gay: The Journey to Self-acceptance* (1996) 67. On the reverse situation, Isay at 69: 'whereas heterosexual adolescents may have occasional homoerotic impulses and fantasies, they enter adolescence believing they are heterosexual and generally remain convinced of this. Homosexual boys usually enter adolescence hoping that they are heterosexual, and it is only during late adolescence or early adulthood that they

result of attempting to reconcile their homosexual feelings with the negative stereotypes society presents to them of homosexuality and which they internalize. Isolation is one of the most serious problems of lesbian and gay adolescents.²² They have little access to accurate information on homosexuality and most of the information they come across stigmatizes them. With negative information, they may think poorly of themselves; with little information, they may find it hard to conceive of a future life (as a lesbian or a gay person). The inferiority that lesbian and gay youth feel may influence all aspects of their lives and make them insecure in their relations with others. It is difficult for them to discuss their sexuality with their family and peers. Those who are open about their homosexuality often face rejection (including being thrown out of the home), humiliation and violence — especially at home and in school.²³ Adolescents typically develop a coping strategy to deal with their stigmatization: they may deny their feelings to themselves or attempt to eradicate them; they may attempt to avoid those feelings by assuming heterosexual roles²⁴ and anti-homosexual poses; they may justify their homosexuality as 'just a passing phase'; or they may accept themselves as homosexual and seek out more information on homosexuality. Emotional isolation is pervasive: 'Am I the only one?' The adolescent may experience depression, lack of self-esteem, self-blame, and feelings of guilt and failure. Both those who are open and those who are not may react to the negative stance of society by withdrawing (including running away from home) from familial, peer, school and other social life; and by engaging in dangerous and destructive behaviour such as alcohol and drug abuse and prostitution; and by committing suicide.²⁵

The third stage of lesbian and gay identity formation, *identity assumption*,²⁶ is accomplished in late adolescence or early adulthood. Now lesbians and gays identify as lesbians and gays to themselves and to at least some others, mainly other lesbians and gays. This is the start of the process of 'coming out', a process which really never ceases because every new social encounter raises the issue of coming out. Lesbians tend to define themselves as lesbian through meaningful emotional involvements with other women; gay males as gay

are able to acknowledge their sexual orientation.'

²² On isolation, see A Damien Martin & Emery S Hetrick 'The Stigmatization of the Gay and Lesbian Adolescent' (1988) 15 *Journal of Homosexuality* 163 at 165-74.

²³ See Neil W Pilkington & Anthony R D'Augelli 'Victimization of Lesbian, Gay, and Bisexual Youth in Community Settings' (1995) 23 *Journal of Community Psychology* 34. At 55: 'These findings reflect the core psychological dilemma facing lesbian, gay, and bisexual youth. On the one hand, non-disclosure has been associated with feelings of alienation, dishonesty, frustration, shame, and futility, as well as health problems such as ulcers and hypertension On the other hand, disclosure results in victimization.'

²⁴ 'Even those who hide successfully are socially isolated because the fear of discovery becomes an integral part of their lives.' (Martin & Hetrick op cit note 22 at 170)

²⁵ See Gary Remafedi (ed) *Death by Denial: Studies of Suicide in Gay and Lesbian Teenagers* (1994).

²⁶ Discussed in Troiden op cit note 17 at 59-63.

in sociosexual contexts such as gay gathering places. Self-definition as lesbian/gay is almost inseparably linked with first social contact with other lesbians and gays. Where this contact is positive, be it with peers or adults, lesbians and gays obtain information about homosexuality which may cause them to re-evaluate their view of it in a more favourable light. 'Experienced homosexuals provide neophytes with role models from whom they learn: (a) strategies for stigma management; (b) rationalizations that legitimize homosexuality and neutralize guilt feelings; (c) the range of identities and roles available to homosexuals; and (d) the norms governing homosexual conduct.'²⁷ Lesbian- and gay-identified people now cope with their stigmatization by: not engaging in any homosexual activity (which may result in self-hatred and despair); or by leading double lives, being out only to certain people, mainly homosexuals; or by immersing themselves in the lesbian/gay subculture, which gives them a sense of belonging and ends their sense of isolation.

The fourth stage, *identity commitment*,²⁸ begins in adulthood, though many lesbians and gays do not reach this stage. Commitment means integrating their homosexual identity into a positive sense of self. Their sexual orientation is now more than just a matter of sexual attraction and more a way of life. Their sexual orientation is valid and normal, they are happy with it and most would not want to change it. A same-sex love relationship provides emotional satisfaction as well as physical gratification. They come out to more people, in widening circles that include heterosexuals. Lesbians and gays now manage the stigma that attaches to them: by neither announcing nor denying their lesbian/gay identities to heterosexuals, keeping their private lives private to the lesbian/gay subculture; or by taking care that their homosexuality does not assume undue importance and that it is respectable; or by celebrating their homosexuality, attempting to change the ways other think about it. Commitment to lesbian/gay identity is a continuous process that may waver over the years.

It should emerge from the above summary of lesbian/gay identity development that sexuality — sexual conduct and identity — is socially determined. Lesbians and gays try to understand the raw material of their sexual desires in terms of the various meanings society gives to those desires. It is as if desire were a fluid thing and society labelled it, stabilized it into patterns. Lesbians and gays come to see these patterns and take a stance towards them.²⁹ Ideally and basically, they learn that it is society which is at fault, not they, that their sexual orientation is healthy and normal, and that the problems they experience are the result of heterosexism in society.³⁰

The above summary is based on the backward glances of today's adults. A new phenomenon³¹ is teenagers who identify as lesbian and gay, who do not wait until their late

²⁷ Troiden op cit note 17 at 61.

²⁸ Discussed in Troiden op cit note 17 at 63-8.

²⁹ Troiden op cit note 17 at 44-5; Bill Marshall *Guy Hocquenghem* (1996) chap 2.

³⁰ Foreword by Gerry E Studds to George Weinberg *Society and the Healthy Homosexual* (1991) ix.

³¹ Much of this paragraph derives from Gilbert Herdt & Andrew Boxer *Children of Horizons: How Gay and Lesbian Teens are Leading a New Way Out of the Closet* (1996). See also Gilbert Herdt *Same Sex, Different Cultures: Exploring Gay and Lesbian Lives* (1997).

adolescence or early adulthood to come out. This lowering of the age of coming out is due to the presence of a larger, visible, more powerful community of lesbian and gay adults who have fought for important political and social changes. The new youth show us that homosexuality is not just 'a subjective state of individual desire for erotic contact with persons of the same gender', but also the basis for 'a significant cultural category of identity involving social, political, and economic practices and social institutions that are above and beyond individual actors'.³² They show us that coming out is not only a lone, personal act, whereby one acknowledges something to oneself and to others. It is also a social process that depends on role models, accurate, positive information and spaces in which to socialize as lesbian/gay. Youth can now conceive of growing up to lead lesbian and gay lives, instead of their homosexuality having internal life alone. When these youth are confused, it is not about whether they are homosexual or not, but how to build a socially acceptable role based on their homosexual desires that is also valuable to them. They really compress the second, third and fourth stages above into a shorter period of time. The adult lesbian and gay community has in large measure traditionally been ignorant of and indifferent to lesbian and gay youth in part because of a fear of being accused of seducing young people into homosexuality, for one of the myths about homosexuality is that of homosexual 'recruitment'.³³ There is some truth in this myth in this sense: Youth realize that they *are* homosexual (are born such, if you like) but they *become* lesbian or gay, they *learn* to be lesbian or gay. In this article I mostly use the word 'homosexual' to refer to a kind of desire and the words 'lesbian and gay' to refer to an identity that can be constructed on that desire. The lesbian/gay community and its influences on the larger community help homosexual youth conceive of lesbian and gay identities for themselves.

It was to combat this social influence that in the United Kingdom s 28 of the Local Government Act³⁴ was passed. It reads:

- '(1) A local authority shall not
 - (a) intentionally promote homosexuality or publish material with the intention of promoting homosexuality;
 - (b) promote the teaching in any maintained school of the acceptability of homosexuality as a pretended family relationship'

The language of this provision conceives of homosexuality in the social sense of lesbian/gay identity that I describe above. It implicitly recognizes the existence of homosexual desire but would not want the homosexual to develop, through 'teaching' and proselytization, into a lesbian or gay adult. Law is, of course, one aspect of the socio-cultural arrangements that 'define what sexuality is, the purposes it serves, its manner of expression, and what it means to be sexual'.³⁵ Should the attitude of the law in South Africa to the homosexuality of youth be to discourage the development of a lesbian and gay identity outlined above? No. The experience of lesbians and gays presented in the social science research says that it is

³² Herdt *Same Sex, Different Cultures* op cit note 31 at 12-3.

³³ See Glen Retief 'Keeping Sodom out of the Laager: State Repression of Homosexuality in Apartheid South Africa' in *Defiant Desire* op cit note 13, 99 at 105-6.

³⁴ 1988.

³⁵ Troiden op cit note 17 at 44.

important to the psychological and emotional good health of homosexuals that they be free to move beyond the suffering and condemnation I touch on in Troiden's second stage of identity confusion³⁶ and assume lesbian and gay identities which they incorporate into a positive self-acceptance. Whereas homosexuality is usually regarded as a developmental failure,³⁷ I suggest that the development from homosexual into lesbian and gay is a positive one.

There is support for this approach in the judgment of the South African Constitutional Court in *National Coalition for Gay and Lesbian Equality & another v Minister of Justice & others*.³⁸ In declaring various criminal prohibitions on gay sex to be unconstitutional, the court said that they reinforced already existing societal prejudice and increased the negative effects of such prejudices on gay lives.³⁹ The serious psychological harm for gays included anxiety, guilt and depression. It quoted the Supreme Court of Canada in *Vriend v Alberta*.⁴⁰

'Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is

³⁶ Some of the more recent research has criticized social scientists for emphasizing the *problems* of lesbian and gay youth at the expense of their *promise*. It is the lesbian and gay youth who suffer most whom clinicians encounter, and thus researchers 'clinicalize' lesbian and gay adolescence (Ritch C Savin-Williams *Gay and Lesbian Youth: Expressions of Identity* (1990) 182-5). One study, as an example of the contrary, has found that gay youths do not differ in self-esteem level from that of heterosexual male youths (Savin-Williams 'An Exploratory Study of Pubertal Maturation Timing and Self-esteem Among Gay and Bisexual Male Youths' (1995) 31 *Developmental Psychology* 56). '[T]here are clear signs that gay [and lesbian] youth do not passively accept this suffering and condemnation, but instead make very active paths to construct a gay [or lesbian] identity, to enter a gay [and lesbian] world, to work for acceptance, and even challenge the heterosexual assumption' (Ken Plummer 'Lesbian and Gay Youth in England' in *Gay and Lesbian Youth* op cit note 17, 195 at 209). This article argues that support be given to these efforts.

³⁷ Isay op cit note 21 at 64. Isay, a psychotherapist, puts the ideal goal thus (at 78):

'Properly conducted therapy helps the homosexual adolescent consolidate his sexuality by removing impediments that may have interfered with his acknowledging his sexual orientation; particularly, the negative self-perceptions that may have evolved from self-esteem injury due to early parental neglect or rejection, later peer rejection, and social stigmatization. At the close of adolescence, by 20, 21, or 22 years, the homosexual youth should have the capacity to accept a variety of homoerotic fantasies, to be able to fall in and out of love without too great disruption of his life, and to enjoy sex with other men. With positive self-regard, he will value his own health and be mindful of the health of his partners. Like the heterosexual adolescent, he should ideally be able to experience himself as a loving, sexual person.'

³⁸ 1999 (1) SA 6 (CC).

³⁹ Para 23.

⁴⁰ Unreported, file no 25285, delivered on 2 April 1998, para 102, quoted in para 23 of the Constitutional Court judgment.

the implicit message conveyed ..., that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetuates the view that gays and lesbians are less worthy of protection as individuals in Canada's society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination.'

The Constitutional Court clearly recognizes the severe impact of discrimination on the dignity, personhood and identity of gay adult men.⁴¹ If these are values to protect in adults, then surely they are also so in homosexual youth.

In a landmark book called *Centuries of Childhood*,⁴² Philippe Ariès attempted to demonstrate that only in the late seventeenth century did a conception of childhood start to be formed, that previously a child was not thought to have a particular nature. Although Ariès wrote about the history of France, his relevance to us is this: He is usually cited as authority for the proposition that childhood as a concept is just that — conceived, constructed; and to make the point, by contrasting it with the position in the past, that the modern conception of childhood is that the world of children is separate from that of adults. David Archard⁴³ summarizes the modern conception of childhood in terms of two models: the developmental model and the religious/literary ideal. '*Developmental science* views childhood as a stage on the road to adulthood, and the nature of the child as impelling it to the achievement of the adult capacities and dispositions it lacks.'⁴⁴ The typical stance of this view has been that homosexuality is an anomaly in the developmental process. The *religious/literary model* is cast in more obviously moral terms: The child is born innocent and ignorant, and is then corrupted by society (vide various religious texts and Rousseau), and sex education (including of homosexuality) is premature adult knowledge; but the child must grow to maturity if it is to survive in an adult world.⁴⁵ In the view of both approaches, 'the modern child is an innocent incompetent who is not but must become the adult. The "must" conveys both the necessity of human development and the ideal character of maturity.'⁴⁶

The Constitutional Court has affirmed the rights of gay (and impliedly lesbian) adults to equality, privacy and dignity. This finding is relatively uncontroversial. Far more controversial would be to conceive of lesbian and gay youth as having equivalent rights, for we separate childhood from adulthood, as explained above. In my summary of the social science research on lesbian and gay youth, I have tried to show that the lesbian and gay adults of today were the homosexual youth of yesterday. It is a distortion of their experience to separate the adults from the youth, to give legal cognisance and protection to the adults and

⁴¹ Para 26.

⁴² (1960).

⁴³ *Children: Rights and Childhood* (1993) chap 3.

⁴⁴ Archard op cit note 43 at 40-1 (my emphasis).

⁴⁵ A variant on the religious/literary model is that the child is inherently sinful, and needs a disciplinary upbringing (vide William Golding's novel, *The Lord of the Flies*).

⁴⁶ Archard op cit note 43 at 41.

ignore the existence of the youth and their needs. The law should do what it can for homosexual youth because, (1), of the potentially severe impact of societal stigma on them, as on adults in the eyes of the Constitutional Court, and (2), they grow into adults and the ideal condition of adulthood is one where a lesbian or gay identity is positively integrated into the conception of self.⁴⁷ Writing in non-homosexual terms, Archard argues that

'the valuation and understanding of childhood and adulthood are mutually interdependent.... Childhood is a preparation for adulthood but we can only know how to prepare the child if we know what is expected of the adult.

'It seems self-evident that the character of adult society will derive from the ways in which its children are brought up, and that, in turn, the nature of child-rearing will reflect the values and priorities of adult society. Yet political and social philosophy seems sometimes to have forgotten this fact, representing as merely natural development what is a choice of upbringing.'⁴⁸

It is to that choice of upbringing by the law that I now turn.

LAW

*The Age of Consent*⁴⁹

The Sexual Offences Act⁵⁰ makes it an offence for a male to have sexual intercourse with a girl under the age of 16 years or with a boy under the age of 19 years, and for a female to have sexual intercourse with a boy under the age of 16 years or with a girl under the age of 19 years. The heterosexual age of consent is thus 16 years and the homosexual age of consent is 19 years. The view has been expressed in regard to same-sex relations that the under-age partner is also liable for the commission of the crime, or, where two youth of the same sex

⁴⁷ See Stephen F Morin & Stephen J Schultz 'The Gay Movement and the Rights of Children' (1978) 34 *Journal of Social Issues* 137.

Children's rights are most frequently dichotomized into rights of protection and rights of self-determination. The former would protect the child against obvious harms; they are uncontroversial and are contained in the children's rights section, s 28, of the Constitution. The latter category of rights would give the child greater autonomy and treat her or him more like an adult; these rights are controversial, the more so the more the difference between adulthood and childhood is collapsed. (See MDA Freeman *The Rights and Wrongs of Children* (1983) 1-65.) The rights I would have the law accord to homosexual youth is a mix of the two categories: to protect the youth against the harms of prejudice is welfarist but also grants them the autonomy to prepare for a future lesbian/gay adult self.

⁴⁸ Archard op cit note 43 at 161.

⁴⁹ See Ronald Louw 'S v H 1993 (2) SACR 545 (C): Sexual Orientation and the Age of Consent' (1994) 7 *SACJ* 132; J Clifford Hindley 'The Age of Consent for Male Homosexuals' 1986 *Criminal LR* 595.

⁵⁰ Act 23 of 1957, s 14 (1) and (3).

engage in sexual relations, that both young people are guilty⁵¹ — based on the literal wording of the provision. But the Appellate Division⁵² has interpreted a prohibition on sexual intercourse between a man and a girl not to impose liability on the girl as an accessory to the man's crime — on the basis that the purpose of the prohibition was to protect the girl and there would be unfortunate consequences if the victim were criminally responsible. The homosexual age-of-consent crimes date from a time when homosexual intercourse per se was criminal, so that it was more plausible then to argue for the punishment of youth for lesbian and gay sex. Now that the Constitutional Court has decriminalized gay sex,⁵³ the more plausible way of reading the legislation in question is to protect the young person and not punish her or him in addition to the adult, if any is involved.

Whether the age-of-consent laws result only in the conviction of adults who have sex with them or also in the conviction of the young person or persons, they discriminate between heterosexual and homosexual youth.⁵⁴ It cannot be doubted that sexual experimentation and romantic attachments are as important to homosexual as to heterosexual youth. The laws that punish their adult partners and even them stigmatize homosexual youth just as the laws invalidated by the Constitutional Court had negative effects on gay adults. Such societal stigma may give homosexual sex and love an added importance:

'Satisfying sexual experiences motivate the adolescent or young adult who has a healthy self-image to come out to other gay [or lesbian] peers and adults and then to parents and close family members, consolidating his [or her] identity as a gay person [or lesbian]....

'...[I]t is the affirming love of another man [or woman] that is the most effective antidote to the "battered self-esteem" of most gay men [and lesbians] in our society. And it is the love of another man [or woman] over time that provides the greatest certainty and clarity about one's personal identity as a gay man [or lesbian].

Only then does being gay [or lesbian] become indispensable to one's happiness.'⁵⁵

A further effect of a higher homosexual age of consent may be to discourage lesbian and gay organizations from meeting the needs of homosexual youth who are for them 'jail bait'. The consequent shortage of information about lesbian and gay life, of adult lesbian and gay role models, and spaces in which to socialize as lesbian or gay may lead to the sense of isolation

⁵¹ John Milton 'The Sexual Offences Act' (1988) 1 *SACJ* 269 at 270-1.

⁵² *R v W* 1949 (3) SA 772 (A) at 778.

⁵³ Note 38.

⁵⁴ In *R v M (C)* (1995) 23 OR 3d 629 (as discussed by Donald G Casswell *Lesbians, Gay Men, and Canadian Law* (1996) 139-45) the Ontario Court of Appeal found that unequal age-of-consent laws violated the right to equality in the Canadian Charter of Rights and Freedoms. Two of the three judges based their decision on age discrimination. The third judge, Abella JA, found discrimination on the basis of sexual orientation: '[The law] perpetuates rather than narrows the gap for an historically disadvantaged group — gay men — it does so arbitrarily and stereotypically' (at 635-6, as quoted by Casswell at 142)

⁵⁵ *Isay* op cit note 21 at 8-9.

mentioned above.⁵⁶

The typical position in support of unequal age-of-consent laws is 'the protection of youth'.⁵⁷ The latter phrase can mean at least two things. One is that there is a concern that homosexual encounters may fix a young person's undecided sexual orientation into homosexuality or alter a young person's heterosexual orientation to homosexuality. While this seems doubtful, it should not matter if it were so: homosexual and heterosexual orientation should have equal moral validity. The second kind of protection could be that, accepting the equal validity of the two orientations, it is undesirable to give a young person the right to make decisions about actions which may put her or him in a stigmatized group. But it is the law itself, including the differential age-of-consent laws, along with other aspects of society, that creates the stigma. 'The law characterizes homosexuality as different and then cites that difference as a reason for continuing to treat it differently.'⁵⁸

Welfare

The White Paper for Social Welfare⁵⁹ states that one of the principles of national developmental social welfare strategy is non-discrimination:

'Social welfare services and programmes will promote non-discrimination, tolerance, mutual respect, diversity, and the inclusion of all groups in society. Women, children, the physically and mentally disabled, offenders, people with HIV/AIDS, the elderly, and people with homosexual or bisexual orientations will not be excluded.'⁶⁰

In the section on programmes to meet the special needs and problems of youth and young adults, 'homosexual and lesbian youth' are identified as 'youth with special needs'.⁶¹

The problems that lesbian and gay youth face have been touched on above. There is

⁵⁶ Plummer op cit note 36 at 201. Isay op cit note 21 at 72:

'Anonymous or random sexual encounters are not necessarily a symptom of an inability to form intimate attachments. Peer and parental pressure for heterosexual conformity, our society's unwillingness to permit gay youth to develop a system of courtship, and the ease with which two men can get off with one another contribute to the need of some adolescents and adults to express their sexuality covertly. Rest rooms and pornographic movie theatres or bookstores may also provide an opportunity to meet and talk with others like themselves.'

⁵⁷ See for example the cases before the European Commission of Human Rights on the subject, as discussed in Laurence R Helfer 'Finding a Consensus on Equality: The Homosexual Age of Consent and the European Convention on Human Rights' (1990) 65 *New York University LR* 1044.

⁵⁸ Archard op cit note 43 at 78-9.

⁵⁹ General Notice 1108 GG 18166 of 8 August 1997.

⁶⁰ Chapter 2.10.

⁶¹ Chapter 8.69(d).

much that welfare policy can do. An example of an American welfare programme is Project 10, which was begun in 1984 in Los Angeles as an 'in-school'⁶² counselling programme providing emotional support, information, resources, and referrals to young people who identified themselves as lesbian, gay, or bisexual or who wanted accurate information on the subject of sexual orientation'.⁶³ Workshops were arranged for school teachers, counsellors and other support personnel; support groups were set up on each senior high school campus for scholars who are dealing with sexual orientation issues.⁶⁴ Lesbian and gay youth support groups can do much to improve the self-esteem of youth:

'They provide opportunities for gay, lesbian, and bisexual teens to learn and practice social skills, share and exchange information, develop friendships, obtain peer support, explore the meaning of their sexual identity, and find positive role models.... Such groups decrease emotional and social isolation, help members clarify values, and encourage responsible decision-making....'⁶⁵

Lesbian and gay role models should also be important in decisions about fostering and out-of-home placement of lesbian/gay-identified youth.⁶⁶ As with all areas of South African life, poverty intersects with homosexuality to create special needs for lesbian and gay youth which need to be addressed: where the white community has more resources and young whites are in a better financial position to leave the parental home, there may be less privacy in the black community for lesbian and gay youth and fewer places for them to socialize in.⁶⁷

⁶² The White Paper op cit note 59 says that the Department of Welfare will negotiate with the Department of Education about the implementation of social support and development services in schools, including education regarding sexuality (chap 8.45(a)) (my footnote).

⁶³ Virginia Uribe & Karen M Harbeck 'Addressing the Needs of Lesbian, Gay, and Bisexual Youth: The Origins of Project 10 and School-based Intervention' in Karen M Harbeck (ed) *Coming out of the Classroom Closet: Gay and Lesbian Students, Teachers, and Curricula* (1992) 9 at 11.

⁶⁴ Virginia Uribe 'Project 10: A School-based Outreach to Gay and Lesbian Youth' in *The Gay Teen* op cit note 4, 203 at 204.

⁶⁵ Dempsey op cit note 12 at 166. See also Kristen E Robinson 'Gay Youth Support Groups: An Opportunity for Social Work Intervention' (1991) 36 *Social Work* 458.

⁶⁶ See T Richard Sullivan 'Obstacles to Effective Child Welfare Service with Gay and Lesbian Youths' (1994) 73 *Child Welfare* 291; Gary Mallon 'Gay and No Place to Go: Assessing the Needs of Gay and Lesbian Adolescents in Out-of-home Care Settings' (1992) 71 *Child Welfare* 547.

⁶⁷ Simon Nkoli & Mark Chesnut 'Out of South Africa' in Mark Blasius & Shane Phelan (eds) *We Are Everywhere: A Historical Sourcebook of Gay and Lesbian Politics* (1997) 761 at 765. For an article on homeless, poor lesbian and gay youth in South Africa, see *Cape Times* op cit note 13. Generally, see Eric Heinze 'Gay and Poor' (1995) 38 *Howard LJ* 433.

Parental Authority

It may be argued that social-welfare services such as those exemplified above and educational initiatives such as those advocated in the next section of this article interfere with the right of parents to bring up their children.⁶⁸ There is a series of cases in South Africa⁶⁹ in which the father of a minor applied for and was sometimes granted an interdict restraining a third person, whose association with the minor the father considered undesirable, from communicating with the minor. (Although the liaisons in these cases were sexual, none of them were lesbian or gay.) The law in these cases is that parental authority includes the right to decide whom the child associates with, so that anyone who interferes with such authority commits an injuria against the parent. Three questions were to be asked: (1) was the parental power extant? (2) if it was, what was its extent? and (3) was the power exercised reasonably? In view of the constitutional provision that '[a] child's best interests are of paramount importance in every matter concerning the child'⁷⁰ and the overriding principle in the law of children as a whole that the interests of the children are paramount,⁷¹ it is submitted that if such a case were to come to court today, the emphasis should not be on whether there was offence to the parent or on questions (1) and (2), but on what was best for the child or on question (3).⁷² 'The parental power, or natural guardianship, is today concerned more with duties than with powers, and may be described as an office in the nature of a trust.'⁷³ The caretaker thesis of parenthood says that a parent is the caretaker of her or his child because the child lacks the maturity and experience to make important decisions, and that the parent must act in the best interests of the child — as a child and as the adult the child will become.⁷⁴

The experience of lesbian and gay teens is that they are discriminated against not only

⁶⁸ See Patrick Henigan 'Is Parental Authority Absolute? Public High Schools Which Provide Gay and Lesbian Youth Services Do Not Violate the Constitutional Childrearing Right of Parents' (1996) 62 *Brooklyn LR* 1261.

⁶⁹ *L v H* 1992 (2) SA 594 (E), *Meyer v Van Niekerk* 1976 (1) SA 252 (T), *Coetzee v Meintjies* 1976 (1) SA 257 (T), *Gordon v Barnard* 1977 (1) SA 887 (C), *H v I* 1985 (3) SA 237 (C).

⁷⁰ Section 28(2).

⁷¹ *Segal v Segal* 1971 (4) SA 317 (C) at 324B-C, as referred to in PQR Boberg *The Law of Persons and the Family* (1977) 461n16.

⁷² See Alfred Cockrell 'The Law of Persons and the Bill of Rights' in *Bill of Rights Compendium* (1998) para 3E21. In *Coetzee* op cit note 69 at 261, the court said that it was not being asked to act as upper guardian in place of the father, but as a court of law intervening to prohibit an unlawful act. In *H v I* op cit note 69 at 243-4, the court said that it would interfere with the exercise of parental power if this was in the minor's interests and here the court would be acting as upper guardian. The latter view is preferable.

⁷³ Boberg op cit note 71 at 458.

⁷⁴ Archard op cit note 43 at 52-3.

by society but also by their families. At a time when they most need family acceptance of their homosexuality, they may meet with ridicule, isolation (including being thrown out of the home) and violence from their family if they disclose their homosexuality. The incentive to stay in the closet may lead to loneliness, shame, self-hatred and depression. Parents who learn that their child is lesbian or gay usually experience a sense of loss; they too feel stigmatized and ideally come to see that they, like society, need to change their attitudes towards homosexuality; they too have to 'come out', as parents of a lesbian or gay child, and grow into a positive acceptance of their child's sexuality.⁷⁵ Parents of lesbian and gay youth very often do not act in the best interests of their children: they contribute to their suffering as children and make harder the adjustment to mentally and emotionally healthy lesbian and gay adults. In the light of this experience in the family, as well as general societal homophobia, it is necessary for the state and other parties to provide welfare services and appropriate educational interventions. And if a parent applied to court to interdict a person of the same sex from romantic association with her or his child, the homosexuality per se of the relationship ought to be irrelevant to the court's determination of the child's interests.⁷⁶

*Education*⁷⁷

The most obvious site for intervention for lesbian and gay youth is education. The National Education Policy Act⁷⁸ has as one of the directive principles of national education policy the advancement of the right 'of every person to be protected against unfair discrimination within or by an education department or education institution on any ground whatsoever'. In Gauteng, regulations⁷⁹ specify, as one of the principles underpinning the governance of schools, that no learner or educator shall be unfairly discriminated against by the Gauteng Department of Education or by a school on the ground of, inter alia, sexual

⁷⁵ Flavia Krieg 'Just Say No to Involuntary Heterosexist Psychiatric Treatment: Towards Protecting the Mental Health of Gay, Lesbian, Bisexual, and Transgender Adolescents' (1995) 16 *Journal of Juvenile Law* 115 at 116-7. For a full treatment of the experience of parents, see Carolyn Welch Griffin et al *Beyond Acceptance: Parents of Lesbians and Gays Talk About Their Experiences* (1986).

⁷⁶ For a view that certain emotional abuse of lesbian and gay youth should be legally regarded as child abuse, see Sonia Renee Martin 'A Child's Right to Be Gay: Addressing the Emotional Maltreatment of Queer Youth' (1996) 48 *Hastings LJ* 167.

Our law recognizes the sexual autonomy of minors in at least one respect: s 5(3) of the Choice on Termination of Pregnancy Act 92 of 1996 allows for abortion without the consent of the minor's guardians.

⁷⁷ Generally, see Dan Woog *School's Out: The Impact of Gay and Lesbian Issues on America's Schools* (1995).

⁷⁸ No 27 of 1996, s 4(a)(i).

⁷⁹ Regulation 3(b) of the Regulations Relating to the Governing Bodies of Public Schools, in terms of the School Education Act 6 of 1995 (G): General Notice 786 *Gauteng Gazette* 331 of 28 February 1997.

orientation.⁸⁰

Education is more than the value-free transmission of knowledge and skills. In the schools students learn social values, both in the formal curriculum and in the hidden curriculum of daily social and classroom life. Covertly and overtly, youth are taught to be citizens, including sexual citizens.⁸¹ The new 'Curriculum 2005', which is being gradually phased in in South Africa's schools,⁸² 'sets a high value on the curriculum as an instrument for social change'.⁸³ In particular, one of the eight 'learning areas' is Life Orientation, which aims at 'a transformation of society in the interests of promoting a human rights culture, underpinned by the striving for a fully inclusive, egalitarian society free of all unjust discrimination, as underpinned by the Constitution'.⁸⁴ Pursuant to this philosophy, the Gender Equity Task Team has recommended to the Department of Education that schools be made safe for lesbians and gays and be sites for the critical and active promotion of all forms of human rights, including those based on sexual orientation.⁸⁵

In the United States, when there have been initiatives for lesbian and gay youth, they have often emphasized the *sturm und drang* aspect⁸⁶ of some teenagers' lives. They have focused on the violence lesbian and gay youth often suffer, especially at the hands of peers and in school, at the alarming statistics of lesbian/gay teen suicide, at their frequent homelessness and resort to prostitution, the shortage of professional help, the psychological damage of internalized homophobia, and their vulnerability to HIV/AIDS.⁸⁷ In the light of

⁸⁰ Section 9(4) of the Constitution requires parliament to pass national legislation to prevent or prohibit unfair discrimination. The Promotion of Equality Bill makes sexual orientation a prohibited ground of discrimination in the range of areas covered, including education.

Donna I Dennis & Ruth E Harlow 'Gay Youth and the Right to Education' (1986) 4 *Yale Law & Policy Review* 446 argue that the right to education in American state constitutions be used to enforce lesbian and gay students' rights to an equal, integrated education.

⁸¹ See Peter Redman 'Shifting Ground: Rethinking Sexuality Education' in Debbie Epstein (ed) *Challenging Lesbian and Gay Inequalities in Education* (1994) 131 at 141-2.

⁸² According to Department of Education Policy Documents for Grades R--9 (October 1997).

⁸³ 'Gender Equity in Education' Report of the Gender Equity Task Team for the Department of Education (October 1997) 225.

⁸⁴ As quoted in 'Gender Equity in Education' op cit note 83 at 100.

⁸⁵ 'Gender Equity in Education' op cit note 83 at 104.

⁸⁶ Savin-Williams *Gay and Lesbian Youth* op cit note 36 at 177.

⁸⁷ See the summary by Kelli Kristine Armstrong 'The Silent Minority Within a Minority: Focusing on the Needs of Gay Youth in Our Schools' (1994) 24 *Golden Gate University LR* 67 at 74-8; and 'Making Schools Safe for Gay and Lesbian Youth: Breaking

this understanding, initiatives are mostly welfarist or protectionist, such as the provision of gay-affirmative counselling services in public high schools, and the implementation of anti-harassment guidelines in schools.⁸⁸ There is a reluctance in presenting gay subject-matter in the schools, for this, it is feared, would be to proselytize, to teach youth to be lesbian or gay.⁸⁹ This is true in the sense I have already indicated: while schools cannot teach a homosexual orientation, they can teach students about lesbian and gay issues and make lesbian and gay students feel positive about their homosexuality⁹⁰ and stimulate them to imagine lesbian/gay

the Silence in Schools and in Families' Education Report of the Massachusetts Governor's Commission on Gay and Lesbian Youth (25 February 1993), reproduced in *Death by Denial* op cit note 25 at 151.

Concerning HIV/AIDS, research shows that youth who are more secure in their lesbian or gay identities are less likely to engage in risky sex (Kevin Cranston 'HIV Education for Gay, Lesbian, and Bisexual Youth: Personal Risk, Personal Power, and the Community of Conscience' in *Coming Out of the Classroom Closet* op cit note 63 at 247).

⁸⁸ The equivalent could be achieved in South Africa in the code of conduct for learners that the governing body of a public school must adopt in terms of s 8 of the South African Schools Act 84 of 1996. The Gender Equity Task Team op cit note 83 at 112 recommends that the Department of Education ensure that schools' codes of conduct address harassment and discrimination on the basis of sexual orientation. At 221 and 226 the Task Team further suggests that educational managers be vicariously responsible for ensuring a discrimination and harassment-free environment. In the American case of *Nabozny v Podlesny* 92 F 3d 446 (1996, United States Court of Appeals, Seventh Circuit), a high school student had been continually harassed and physically abused by fellow students because he was homosexual. A Wisconsin statute forbade discrimination in schools, including on the basis of sexual orientation, plus his school district had a policy prohibiting discrimination, including harassment and battery. The student reported the abuse to school officials, who turned a deaf ear. He was awarded a sum of money against them for being denied equal protection of the law, based on his gender and sexual orientation, that was extended to other students.

The most common form of legal action by lesbian and gay pupils in the United States is for the violation of their right under the first amendment to the American Constitution to freedom of speech and association. They have succeeded where the public expression or activity had a political nature, not because it was of inherently personal value. (See 'Developments in the Law — Sexual Orientation and the Law' (1989) 102 *Harvard LR* 1508 at 1584-95.) For example, in *Fricke v Lynch* 491 F Supp 381 (1980, United States District Court, Rhode Island), a student was refused permission by his school to bring a male date to the high school prom. The court found a violation of his right to free speech: attending the dance with another man was a political statement.

⁸⁹ Arthur Lipkin 'The Case For a Gay and Lesbian Curriculum' in *The Gay Teen* op cit note 4, 31 at 48.

⁹⁰ It may be thought that making students 'feel good' about themselves is not an appropriate goal for education. But 'feeling bad' about themselves is what education already does for many lesbian and gay pupils, by positive act or omission. The overall goal of Curriculum 2005 is 'to provide children with opportunities to develop to their full potential as

identities and lives for themselves. In America, where homosexuality enters the curriculum, it is usually in science, health and sex education classes, which can have the effect of remedicalizing homosexuality. Ideally, it should be integrated into the standard courses.⁹¹ This benefits not only lesbian and gay pupils, but is also a lesson to other pupils in their sexuality, socio-cultural arrangements and democracy. It teaches all students autonomy in the formation of their own identities and educates against prejudice.⁹² Anything short of this holistic approach smacks of segregation, the apotheosis of which (though a necessary one in the special circumstances of the case) is the public funding of a school for lesbians and gays only: the Harvey Milk School in New York City is for teenagers who cannot function in other schools for the abuse they have met and for whom the only alternative is no school at all.⁹³

active, responsible and fulfilled citizens who can play a constructive role in a democratic, non-racist and equitable society' (as quoted in 'Gender Equity in Education' op cit note 83 at 96).

⁹¹ Lipkin op cit note 89 at 40,42. An example of a history textbook for high school students is Kevin Jennings (ed) *Becoming Visible: A Reader in Gay and Lesbian History for High School and College Students* (1994).

⁹² Nancy Tenney 'The Constitutional Imperative of Reality in Public School Curricula: Untruths About Homosexuality as a Violation of the First Amendment' (1995) 60 *Brooklyn LR* 1599 argues that laws which are designed to impose an anti-gay slant to the curriculum impermissibly violate students' right under the first amendment to the United States Constitution to receive information.

⁹³ See Dennis & Harlow op cit note 80 at 453-6. According to an article in the *Natal Mercury* op cit note 13, pupils in a KwaZulu-Natal school were put in a separate class because of their sexual orientation.

Useful surveys of programmes for lesbian and gay youth in the United States are provided by Armstrong op cit note 87; James T Sears 'Challenges for Educators: Lesbian, Gay, and Bisexual Families' in Donovan R Walling (ed) *Open Lives, Safe Schools: Addressing Gay and Lesbian Issues in Education* (1996) 187 at 204-8. Programmes not already mentioned in the text above include: speakers' panels of lesbian and gay adults addressing classes; school support groups consisting of lesbian and gay students; equity training of educators (which is recommended by the Gender Equity Task Team op cit note 83 at 109); and the acquisition by school libraries of lesbian- and gay-related books.

Lesbian and gay teachers are valuable for lesbian and gay youth as role models and for all youth as expressive of diversity. Discrimination against such teachers thus violates not only the rights of those teachers but also of their students. In the case of *Gaylord v Tacoma School District No 10* 559 P 2d 1340 (1977, Supreme Court of Washington), an American court upheld the dismissal of teacher who was a 'publicly known homosexual' for fear that '[s]tudents could treat the retention of the high school teacher by the school board as indicating adult approval of his homosexuality' (at 1347). Precisely. For a summary of the American law on lesbian and gay teachers, see 'Sexual Orientation and the Law' op cit note 88 at 1595-1603. Generally on lesbian and gay teachers, see Kevin Jennings (ed) *One Teacher in 10: Gay and Lesbian Educators Tell Their Stories* (1994).

CONCLUSION

Lesbian and gay youth test the law's commitment to the equal dignity of lesbians and gays, and of children. Real acceptance of homosexuality requires not only the recognition of homosexuality in adults, when homosexuality seems inevitable, but also in youth, when it seems potential. I use the word 'seems' because I regard the ineradicableness or otherwise of homosexuality as irrelevant to my point, which is this: the 'potential' of homosexuality is that it can be the basis of a good way of living as a lesbian or gay child and as a lesbian or gay adult. It is this potential that societal opprobrium attempts to crush and often succeeds in crushing, and that the law has traditionally embodied and reinforced. Against the harming of lives, in this article I have argued that the law ought to recognize, protect and affirm the potential of adolescents' homosexual autonomy.

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COMPETENCE AND COMPELLABILITY OF WITNESSES

1. INTRODUCTION

The following statement by Milne J in *Maduma* 1978 (2) SA 777 (D) 783H sums up the duty of witnesses to criminal behavior very aptly

"... it is a fundamental principle of an ordered society and of a democratic society that witnesses can be compelled to testify as to what they know and that their evidence can be properly tested in a court of law. It may involve great hardship to the witness but the interests of society, or as the Chief Justice put it in *Weinberg's case* (1966 (4) SA 660 (A)) 'the demands of justice' (665H) require that he testify". See, however, the remarks by Grosskopf AJ in *Attorney-General v Kader* 1991 (4) SA 727 (A) 739 A. See also *Guzana v Council of State, Republic of Ciskei* 1993 (2) SA 445 (Ck A).

The administration of justice will be seriously impeded if a person, who can assist with the solution of a factual dispute, cannot be forced to give evidence in a court of law. For this reason a variety of common law rules, laws and acts of parliament regulate the competence and compellability of witnesses. It is important to note that most of these provisions apply to defence as well as state witnesses. Some of these provisions will be discussed hereunder. See also *Hlakwane* 1993 (2) SACR 362 (O) where it is said that the court must assist an accused to procure the attendance of witnesses, if necessary by utilising section 186 of the Criminal Procedure Act.

One must distinguish between a competent witness and a competent and compellable witness. The former may lawfully give evidence but cannot be forced to do so. The latter must give evidence and may be penalized if he/she refuses. (More about this later).

The rules applying to privilege must also be borne in mind when it comes to the compellability of a witness to answer certain questions. See *Hoffmann and Zefferdt* 369 and *Schmidt* 516 et seq.

This note will address the competence and compellability of witnesses in criminal cases only.

It is clear from the abovementioned judgements that the act of testifying can be very strenuous and that it can cause hardship. The witness finds him-/herself in a courtroom where very strict rules, both evidentiary and procedurally, apply. The witness knows these rules exist but most of the time has no idea what they are. This makes the witness feel vulnerable, especially since the prosecutor and the lawyer who questions him/her, does have the advantage of knowing what is allowed and what not.

Prosecutors often say their case is only as strong as the competency of the witness who testifies, or that the success of the prosecution depends on the competency and capability of the witnesses. Maybe this is only half the truth. We can have the best witness who gives very good evidence without any inconsistencies, but her evidence will amount to nothing if we have a prosecutor or magistrate who doesn't listen to what she says. This may sound strange since we always listen to witnesses when they testify - it is our job. The question is - how do we listen? We will come back to this aspect later.

When one sees quotes like the following you can not help to wonder whether this witness had any chance at all, irrespective of what he/she had said, to make a positive contribution in the case.

"The witness was not telling the truth, he failed to meet my eye and looked away while he gave evidence."

"The accused is a middle-aged woman going through a difficult period in a woman's life. That she lied I have no doubt."

2. LISTENING SKILLS

Before we look further into the competency of witnesses let's try to enhance our ability to listen to them.

2.1 The nature of listening

Listening is an art, a skill, and a discipline. As in the case of other skills, it requires intellectual, emotional and behavioural control. The individual must understand what is involved in listening and develop the necessary self-mastery to be silent and listen by subordinating his/her own ego and substituting a sense of humility.

Listening obviously is based on hearing and understanding what others say to us. Hearing becomes listening only, when we pay attention to what is said, follow it very closely and are able to correctly interpret what the other person is saying.

2.2 Barriers and Roadblocks in Listening

Here is a list of poor listening habits together with some suggestions as to how these habits may be corrected.

2.2.1 *On-Off Listening:* This unfortunate habit arises from the fact that most individuals think about four times as fast as the average person speaks. Thus the listener has three-quarters of a minute spare thinking time for each listening minute. Sometimes the listener uses this extra time to think about personal affairs, concerns and troubles instead of listening, synthesising and summarising what the speaker has to say.

2.2.2 *Red-flag listening:* To some individuals words are like the proverbial red flag to a bull. When we hear them we get upset and stop listening. These terms vary in every organisation. To some individuals words like 'communist, liberal, modern youth', etc. are signals to which we respond almost automatically. When this signal comes in, we tune out the speaker. We lose contact with his/her and fail to develop an understanding of him/her.

2.2.3 *Open ears-Close mind listening:* Sometimes we decide rather quickly that either the subject or the speaker is boring, and what is said makes no sense. Often we jump to conclusions that we can predict what he/she knows or what he will say - and so conclude that there is no reason to listen because nothing new will be said. It's much better to listen and find out for sure whether this is correct or not.

2.2.4 *Glassy-eyed listening:* Sometimes we look at a person intently and seem to be

listening although our minds may be on other things or in far distant places. We drop back into the comfort of our own thoughts. A glassy-eyed (if not dreamy) expression appears on our faces. We can tell when people look at us in this way. Similarly they can see the same in us - we're not fooling anyone. Postpone day-dreaming for another time.

2.2.5 *Too-deep-for-me listening:* When we are listening to ideas that are too complex and complicated we should force ourselves to follow the discussion and make a real effort to understand. It's quite possible that we might find the speaker and subject quite interesting when we listen and understand what he/she is saying.

2.2.6 *Matter-over-mind-listening:* Most of us do not like to have our pet ideas, prejudices and points of view overturned, nor do we like to have our opinions and judgements challenged. Consequently when a speaker says something that clashes with what we think, believe and hold firm - then we unconsciously stop listening or even become defensive and plan a counter-attack. Even if we want to do this, it is better to find out what she/he thinks, get the other side of the question so we can do a better job of understanding and replying.

2.3 Objectives in listening

The objectives when listening are both basic and simple:

- we want people to talk both freely and frankly;
- we want them to cover matters and problems important to them;
- we want them to furnish as much information as they can;
- we want them to gain greater insight and understanding of their problems, and
- as they talk it out we want them to try and see the causes and reasons for their problems and figure out what can be done about it.

2.4 Some DO'S and DON'T'S of listening

In listening we should try and DO the following:

- show an interest

- be understanding towards the other person
- express concern and understanding
- single out the problem; if there is one, listen for causes of the problem
- help the speaker to associate the problem with the cause
- encourage the speaker to develop competence and motivation to solve her/his own problems
- learn to be silent when silence is needed. Successful people usually know when to be silent and keep their counsel.

In listening DON'T do the following;

- argue
- interrupt
- pass judgement too quickly or in advance
- give advice. Present alternatives and help people to consider them
- jump to conclusions
- take the responsibility for decision-making away from the complainant

We live with a great complexity of problems involving people and situations.
The need for listening in order to understand is most urgent.

- We think we understand people when we don't listen to them.
- We think we understand a situation when we see only a part of the situation and experience even less of it.
- We think we understand the problems we are facing when we have only a surface acquaintance with their elements and relevance, and in actuality we may be dealing merely with symptoms and not causes.
- We should realise that listening is a key to knowledge and understanding.

2.5 Why active listening works

2.5.1 *The other person sets the pace.* You let them take the lead in the conversation. You don't push them faster than they want to go. This communicates respect and builds trust.

- 2.5.2** *The other person is completely free to be natural.* That's a rare chance for many people and they will probably take advantage of it by relaxing and behaving in the ways that are most real and honest to them. When you show that you can be trusted, others feel free to tell you about their hurts, secrets and ambitions. The result - you really get to know them.
- 2.5.3** *The other person explores the problem.* Active listening helps people sort out their concerns and problems. They can bring the situation into focus, understand it better, and then define the problem quite specifically and accurately.
- 2.5.4** *The other person expresses his or her feelings.* When you reflect their feelings and help them clarify those feelings, it helps them to get those feelings out of their system. They often feel they have unloaded a great burden by simply 'talking it out'.
- 2.5.5** *It keeps you out of trouble.* Active listening prevents you from imposing your own view of understanding of the problems or doing something else that is painful, punishing or hurtful to the other person.
- 2.5.6** *To actively listen is to give something valuable.* Active listening is hard work and the other person knows it. When you actively listen, you prove to the other person that you care.

2.6 ACTIVE LISTENING EXERCISE (in class)

(For prosecutors and magistrates)

Testimony of a woman: to be read by A to B:

(....) = pauses in speech; words in italics to be emphasized

'He came up the stairs and he was so *drunk*. Oh God he was drunk and he was (....) vicious. And he accused me of something and he called me names and he (....) I don't know what (....) and he took his clothes off and he got onto the bed and he said (....) he said something to the effect of 'Come here and open your

legs, you slut, you whore.' I don't know what he called me and I was *terrified* (....). Because I thought he's going to rape me now (....) according to what my definition of rape was then Violent. Force. Absolute force. And he absolutely tried to force and he was violent and he was - vicious ... and he hurt me. And he tried to get on top of me and I wriggled and I begged and I pleaded and I (....) and he was so drunk that he passed out and (....) to this day I'm convinced that God actually knocked him out (....) that God (....) made him pass out. I'm convinced of it. And he didn't actually penetrate me (....) I think that if he had, I would have (....) killed myself, I really do I cannot describe that (....) I cannot describe that for you (....) it was for me *the (....) very, very worst thing that has ever happened to me in my life (....) was that specific incident (....) in that bed, that very bed.* It was (....), for me the scariest, the scariest thing that has ever happened (....) the scariest scariest thing He was so vicious. He was unbelievably vicious an he came up the stairs I could just hear from the footsteps that he was drunk (....) cause he was stumbling Cause he was loud. I cannot tell you what he said, but I know (....) ag, he would call me the most hideous names, you *bitch* and you *whore* and you *slut* and you *fucking* (....) this and you're *dirt* and you're *filth* and you're (....) and he started as he came up the stairs with that stuff (....) and that's when I was scared. And then, he started (....) like (....) *shit* I think (....) he hit the cupboard (....) he *did* hit the cupboard And then he got onto the bed (....) and he took his clothes off and that's when he (....) when he (....) pulled me out and (....) I remember distinctly one thing that he said - he told me to open my legs (....) and I think (....) I think it was then that I thought, oh my God no. I would have preferred it if he'd hit me til sunrise (....) than (....) raped me. It would have been easier (....) you know (....) to cope with (....) than if he'd (....) penetrated me (....) and he didn't (....) But it was (....) absolute terror (....) Absolute (....) And I remember thinking (....) there was nothing (....) nothing I can do (....) nothing If he did it the next day (....) I couldn't do anything. And that (....) struck me (....) that absolutely terrified me senseless (....) ... I mean the whole bloody thing was a (....) the (....) a (....) *nightmare* (....) Was the worst (....) the worst (....) living

(....) nightmare. Like (....) it was (....) I felt so utterly, utterly helpless and defenceless and (....) I know I thought (....) if this happens I can't live anymore.

Taken from an interview in Sharon Kottler's Masters thesis 'Wife's Subjective Definition of and Attitudes Towards Wife Rape', UNISA, 1998

Form into groups of 3.

A reads excerpt to B and C.

B to tell C:

1. what happened to this woman? (Version 1)
2. what was she thinking? (Version 2)
3. what was she feeling? (Version 3)

A, B and C to reflect on:

1. what do version 2 and 3 add to the 'facts' (version 1)?
2. are version 2 and 3 legally 'relevant'?
3. how easy was it to listen to this testimony? What barriers made it difficult?
4. could you empathise with the speaker? Why or why not?

3. GENERAL COMPETENCE AND COMPELLABILITY

At common law each person was presumed to be a competent and compellable witness. The legislature, to a certain degree, adapted this basic principle.

Section 192 of the Criminal Procedure Act, Act 51 of 1977 (hereinafter the Act) provides that "Every person not expressly excluded by this Act from giving evidence shall, subject to the provisions of section 206, be competent and compellable to give evidence in criminal proceedings".

Section 206 provides that the law in force on 30 May 1961 (that is, the common law) shall

apply in those instances for which the Act or any other statute do not expressly provide.

Section 193 places an obligation on the presiding officer to examine the competence and compellability of a witness.

It is also significant that a witness who, in terms of the provisions of the Act, is an incompetent witness, may still be a competent witness by virtue of the provisions of some other act (see section 207 of the Act). The other act will thus "override" the Act, as far as competency is concerned. This note will only address those provisions in the Act which deal with the competence and compellability of witnesses.

3.1 Section 206

The law which related to competence and compellability prior to 30 May 1961, was English law. In *Ex Parte Minister of Justice : in re R v Demingo* 1951 (1) SA 36 (A) 40 Centlivres C J held that a witness who is incompetent in English law would also be incompetent in South African law. In all those cases which the Act does not "expressly" provide for, one will thus have to find guidance in English common law. See also *Taylor* 1991 (2) SACR 69 (C) 70J.

3.2 Section 193

It is the function of the court to decide whether a witness is competent and compellable. This function involves two questions, to wit:

- (a) is the witness a competent one and, if so,
- (b) can the witness be compelled to give evidence?

The prosecutor and the defence cannot agree to have an incompetent witness testify. In *Kumalo* 1962 (4) SA 432 (N) a witness was called by the state. This witness was the accused in a preparatory examination and against whom the charges had been withdrawn after he testified in the preparatory examination. The defence did not object to the record of the preparatory examination being read into the record of the subsequent trial. The

court held that the witness could only be called at his own request and not at the instance of the state.

The manner in which the competence and compellability of a witness is determined is usually determined by:

3.2.1 The court's observations of the witness

Before a witness is sworn, her/ his appearance, behavior or replies to questions may move the court to suspect incompetence. The presiding officer must then examine this aspect.

VIDEO EXERCISE : "COURT IN THE ACT" (In class)

(For Magistrates and Prosecutors)

CULTURE

Mental Health Inquiry

- Do you agree on the way in which Rashida explained the rights to the respondent, Ms Ngobeni?
- On what grounds was Rashida's decision to commit the patient for observation based?
- If this was a competency inquiry, what questions would you have asked Ms Ngobeni in order to:

- determine her ability to communicate (give a cogent recollection of the events)?
- determine her ability to understand the oath or the nature of the proceedings?
- How important was the fact that Ms Ngobeni's religious background differed substantially from that of the presiding officer (Rashida) in this matter?
- Assuming that the decision to commit the patient for observation was based on a lack of proper communication, how could this have been avoided?
- There is a school of thought that suggests that interpreters should have a broad role, which include providing courts with an understanding of different cultures. Do you agree? What dangers would this approach give rise to, if any?
- How can courts deal fairly with competency inquiries involving different cultural experiences and values?

Video produced and provided by Law, Race and Gender Unit, University of Cape Town

3.2.2 The evidence of the witness

If it becomes apparent to the court during the testimony of a witness, that the witness suffers from hallucinations or some other ailment, it must immediately enquire into the competence of that witness to testify. See *Thurston* 1968 (3) SA 284 (A); *Creinhold* 1926 OPD 151, 154.

3.2.3 A trial within a trial

If an objection is raised that a witness is not competent to testify, the court will have to enquire into this aspect. This will usually be done by way of a trial-within-a-trial. This means that the court, the state and the opposing party may examine the witness, other witnesses may be called to give evidence and any evidence relevant to the competence of the witness may be received. The same applies to paragraphs 3.2.1 and 3.2.2 above, although the mere appearance or demeanour of the witness may be sufficient to convince the court of the witness's incompetence to give evidence.

Competency is a question of law. This means that the presiding officer alone decides whether the witness is a competent one, even though she/he may be sitting with assessors. In English law the jury must be present during such proceedings. In South Africa the judge has a discretion whether to sit alone or with the assessors (section 145(4)(c) of the Act and see *Reynolds* (1950) 1 ALL ER 335.) See also *Malindi and Others* 1990 (1) SA 962 (A) for the position of an assessor who is found by the presiding judge to be unable to act as assessor and the interpretation of section 147(1) of the Act.

The enquiry as to competency may involve questions of fact, such as the witness's ability to understand the oath or the nature of the proceedings or the ability to give a cogent recollection of the events, but may not include questions relating to the issues in dispute or the merits of the case. In *Kgaladi* 1943 AD 255 the trial court questioned a feeble-minded complainant in a rape case to determine whether she was a competent witness. Her replies implicated the accused. Despite the trial judge's instructions to the jury to disregard what she had said, the Appellate Division held that a fatal irregularity had been committed and set aside the conviction.

A witness may be competent to testify, yet lack criminal responsibility. A child under the age of seven years is deemed in law to be *doli incapax*. The same child may, however, give evidence (see paragraph 5.2 below). The second requirement for criminal responsibility, to wit, to be able to act in accordance with one's knowledge of what is right and what is wrong, may overlap with the requirement for competency that the witness must not be "deprived of the proper use of (his) reason". It must be clear that such a deprivation has in fact occurred, before the witness becomes incompetent.

Similarly, the first requirement for criminal responsibility, that is to be able to distinguish

between right and wrong, may overlap with the requirement that a witness must be able to give a coherent version which he knows to be the truth. The fact that a witness cannot say whether certain conduct is unlawful or not (or wrong, for that matter), does not make him/her incompetent to testify thereabout. The witness must only be able to distinguish between what is true and what not - *T* 1973 (3) SA 794 (A).

4. GROUNDS FOR INCOMPETENCE

Some witnesses are incompetent from the outset and may not give evidence.

4.1 Section 194

Section 194 of the Act stipulates that there must be

- a cause ("afflicted with mental illness" or a laboring under any imbecility of mind due to intoxication or drugs or the like) and
- a degree of affliction (the witness must be "deprived of the proper use of reason") and that this condition must exist
- at the time of giving evidence before a witness is incompetent to testify.

The mentally deranged person who witnesses an offence may still testify at the trial if she/he is lucid at that time. It is only the probative force of his evidence which may then be suspect.

Before a witness envisaged by section 194 becomes incompetent to give evidence, it must be clear that the deprivation of his reason is as a result of his condition and that this absence of reason and condition exist at the time that the witness has to give evidence. The witness is only incompetent for as long as this condition exists. Once the condition no longer exists, the witness may testify. In *K* 1951 (4) SA 49 (O) a witness, who was accepted by the court to be an imbecile, was allowed to give evidence. See *Zenzile* 1992 (1) SACR 444 (C).

Although some benefit may be derived from decisions such as *Burger* 1938 CPD 37; *Davis* 1925 AD 32 and *Thurston* 1968 (3) SA 284 (A), it is important to note that section

194 of the Act sets the requirements for competency of a witness and that the section is peremptory.

If the witness becomes incompetent whilst she/he is giving evidence, that part of her/his evidence which is not in dispute and which was given before the witness became incompetent, will remain as part of the record. See *Vilbro* 1957 (3) SA 223 (A). If this happens whilst the witness is under cross-examination it seems logical that, in view of *Vilbro*, those areas of the evidence which had been tested by cross-examination, will also be valid evidence. See *Engles v Hoffmann and Another* 1992 (2) SA 650 (C) where the witness became incompetent before she could be cross-examined. The court ruled her evidence as not having been given at all. See also *Mokie* 1992 (1) SACR 430 (T).

5. STATUTORY PROVISIONS

5.1 The spouse as a witness for the State

At common law spouses could not give evidence against each other, irrespective of the fact whether it was a criminal or a civil matter. The legislature altered this position and in civil matters there is no restriction on the evidence of spouses. The position is different in criminal matters as this incompetence has only partially been lifted.

Section 195 of the Act creates two situations:

- offences where a spouse is competent but not compellable to give evidence against the co-spouse and
 - specific exceptions where the spouse is both competent and compellable to do so. These are
- "(a) Any offence committed against the person of either of them or of a child of either of them;
- (b) any offence under Chapter 8 of the Child Care Act, 1983 (Act 74 of 1983), committed in respect of any child of either of them;

- (c) any contravention of any provision of section 11(1) of the Maintenance Act, 1963 (Act 23 of 1963), or of such provision as applied by any other law;
- (d) bigamy;
- (e) incest;
- (f) abduction;
- (g) any contravention of any provision of section 2, 8, 9, 10, 11, 12, 12A, 13, 17 or 20 of the Immorality Act, 1957 (Act 23 of 1957), or,
- (h) perjury committed with or for the purpose of any judicial proceedings instituted or to be instituted or contemplated by one of them against the other, or in connection with or for the purpose of criminal proceedings in respect of any offence included in this subsection;
- (i) the statutory offence of making a false statement in any affidavit or any affirmed solemn, or attested declaration if it is made in connection with or for the purpose of any such proceedings as are mentioned in paragraph (h),

and shall be competent but not compellable to give evidence for the prosecution in criminal proceedings where the accused is charged with any offence against the separate property of the wife or of the husband of the accused or with any offence under"

"Any offence" in section 195(1)(a) means, according to our courts, an offence involving an assault. In *Dlamini* 1966 (4) SA 149 (N) 152 Milne JP states "It appears to me however that the Legislature in using those words was intending to refer to offences involving an assault." See the criticism of *Hoffmann and Zeffer* 387 of this decision. See also Schmidt 214. This criticism is supported. Although "any offence committed against the person" will normally involve an assault, it is not necessarily so (e.g. crimen iniuria or criminal defamation).

The dispensation with regard to spouses was radically changed by the Law of Evidence Amendment Act, 1988 (Act 45 of 1988). Whereas before this Act a spouse could not testify against a co-spouse, except for nine exceptions, a spouse is now competent but not compellable in all offences but for the nine exceptions. (Section 6 of Act 45 of 1988)

5.1.1 Competent but not compellable

The wife or husband of an accused (except for the nine exceptions) can decide whether to give evidence. The other spouse cannot object once that spouse decides to do so. It is not the marital status at the time that the offence is committed which is decisive, but the status at the time the evidence is to be received. In *Leepile (3)* 1986 (2) SA 352 (W) one of the state witnesses married one of the accused during the trial. The court held that the motive behind the marriage did not alter the principle that she could not give evidence. Under the new dispensation she is, of course, a competent witness and may testify. She can, however, not be forced to do so. See also *Taylor* 1991 (2) SACR 69 (C).

Former spouses are competent but not compellable witnesses. It does not matter whether the marriage ended in divorce or whether it had been annulled. See *Taylor* 1991 (2) SACR 69 (C) 72G.

If the spouse declines to give evidence he or she may not be called to give evidence against a co-accused. See *Mapatassa* 1912 TPD 91.

Due to the amendment of section 195 decisions such as *Batyi* 1964 (4) SA 427 (EC) and *Khanyapa* 1979 (1) SA 824 (A) are no longer authoritative. A spouse is now competent to testify in any offence and once she elects to do so, her evidence is admissible.

It is not clear what the position would be once the spouse elects to give evidence only on some of multiple charges brought against the co-spouse. It would appear that the prosecution will have to restrict itself to those offences for which the spouse agreed to testify. Should the accused spouse, however, solicit prejudicial replies to questions pertaining to those charges for which the spouse refused to testify, the replies will be admissible against the accused. This is so because the spouse is competent but not compellable to testify on all the charges facing the accused.

5.1.2 A spouse as a court witness (section 186)

In *Taylor* 1991 (2) SACR 69 (C) 73A-B, Selikowitz J states: "In my view the correct view is that the court can call any witness whom the parties could have called,- Where, as in this case, different rules apply in regard to the competence and compellability of

a witness who is called by the prosecution, or by the defence, the court's duty is to ensure that in the interests of justice the accused is not prejudiced. Although the court cannot at this stage know whether the evidence of Beverly Taylor will support the prosecution or the defence, the Court should nonetheless, in applying the provisions of either s 195 or s 196, take that course which best avoids prejudice to the accused. The Court should here treat the witness as competent but not compelled."

5.2 A spouse as a witness for the defense

Section 196(1) of the Act provides as follows: "An accused and the wife or husband of an accused shall be a competent witness for the defence at any stage of criminal proceedings, whether or not the accused is charged jointly with any other person: Provided that -

- (a) ...
- (b) the wife or husband of an accused shall not be a compellable witness where a co-accused calls that wife or husband as a witness for the defence."

The effect is that a spouse is competent to give evidence for an accused as well as a co-accused. The spouse is however not compellable and may refuse to give evidence if called by a co-accused of his/her spouse. Prior to the amendment of section 196(1)(b) of the Act by section 7 of the Law of Evidence Amendment Act, 1983, a spouse could only give evidence at the instance of the co-spouse. She could not volunteer to testify. See *Haibeb* 1993 (1) PH H 18 (Nm).

Once the spouse gives evidence on behalf of the defence, he/she is of course subject to cross-examination by the state. The witness is not obliged to disclose any communication made during the marriage, but may waive this privilege. Section 198(1); *Schreuder en 'n Ander* 1985 (1) SA 48 (SWA) 51H-I. In this case the state was in possession of sworn statements made by the spouses of the two accused. Strydom J at 52F, with regard to the question whether the prosecutor may use these statements to discredit the witness, states:

"Daar kan na my mening ook nie beswaar wees teen die gebruikmaking van so 'n verklaring deur die Staat vir doeleindes om 'n gade van 'n beskuldigde wat deur laasgenoemde opgeroep word as getuie, te diskrediteer nie." At 52G he continues: "Voorts word met sodanige optrede die geloofwaardigheid van 'n getuie aangeval en dien dit nie as bewys dat wat in die verklaring staan die waarheid is

nie"

5.2.1 What is meant by the "husband" or "wife"

According to section 195(2), for the purposes of the law of evidence in criminal proceedings, "marriage" shall include a customary marriage or a customary union concluded under the indigenous law and custom of any of the indigenous people of the Republic of South Africa or any marriage concluded under any system of religious law. Our law does not only recognize monogamous Christian marriages any more but also polygamous marriages.

As judicial separation no longer forms part of our law, a wife will retain that status until the marriage is annulled or dissolved by a court. See *Groesbeek (I)* 1969 (4) SA 383 (O).

CLASS EXERCISE

(For Magistrates and Prosecutors)

The Bill of Rights 108 of 1996 :

Sec.9 (1) "Every one is equal before the law and has the right to equal protection and benefit of the law."

Sec.9 (3) "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including sexual orientation,..... conscience, belief"

Sec.39 (2) "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

Read the following facts:

A has been living with B for the past three years in a same-sex union. They own a house, operate joint finances, are financially co-dependant, make joint decisions and has named each other as beneficiaries in their respective insurance policies. Their relationship is an abiding and serious one.

A is charged for theft in a Magistrates Court and B is called by the prosecutor to testify against A. B claims that he is the spouse of A and therefor competent but not compellable to testify for the state.

In groups of five discuss the following:
(Magistrates)

- Identify the criteria you may take into account in determining the compellability of B to testify against A.
- Consider how you would apply the provisions of the Constitution - given above - on the factual scenario.
- If B refuses to testify after you have ordered him to do so, would you apply section 189 of the Criminal Procedure Act? What criteria will you take into account in exercising your judicial discretion in terms of *this* section?
- If A and B were in a heterosexual cohabitive relationship as described in the above factual scenario, would it have influenced your discussions above? Motivate.

In groups of five discuss the following:
(Prosecutors)

- You are asked to address the Court on the compellability of B to testify for the state. Identify the criteria you may use in your address to the court.
- Consider how you would apply the provisions of the Constitution - given above - on the factual scenario during your address.
- If A and B were in a heterosexual relationship having a cohabitative

relationship as described in the above factual scenario, would it have influenced your discussions above? Motivate.

5.3 The accused as a witness

5.3.1 In his own defence

Section 196(1)(a) governs the position of the accused as a witness. The accused may only give evidence at his/her own request. This makes the accused competent but not compellable. The accused may even change his/her mind once he/she has elected to give evidence by deciding not to do so. If the accused does this before he/she has been sworn and has not said anything yet, the accused may not be cross-examined - *Ngcobo* 1987 (4) SA 300 (N). Once the accused has been affirmed or sworn and starts to testify and then decides not to go any further, it is submitted that he/she may be cross-examined on that part of his/her evidence which has already been given.

An inquest is not criminal proceedings and the suspect may not rely on section 196(1)(a) and refuse to testify. See *Wessels v Additional Magistrate, Johannesburg* 1983 (1) SA 530 (T). See also *Magmoed v Janse van Rensburg and Others* 1991 (1) SACR 185 (C).

The court may not bring undue pressure to bear on an accused person to testify. See *Khumalo* 1972 (4) SA 500 (O). A legal representative may not call her client (the accused) as a witness if the client is unwilling to give evidence. See *Assel* 1984 (1) SA 402 (C) 405 and section 196(1)(a) of the Act). The parent or guardian may also not force the accused to testify against her/his wishes.

Section 196(2) now provides that the evidence of an accused is admissible against a co-accused, also in those instances where that accused would have been an incompetent witness for the prosecution. For the position before the Law of Evidence Amendment Act 1988, see *Groesbeek* 1969 (4) SA 383 (O). If an accused person incriminates her/his co-accused, that evidence is admissible. The court must, however, treat such incriminating evidence with circumspection. See *Bagas* 1952 (1) SA 437 (A); *Radloff* 1978 (4) SA 66 (A).

5.3.2 As a witness for a co-accused

An accused is a competent, but not a compellable witness for the co-accused. If he decides to give evidence he may be cross-examined, also with regard to the part he played during the commission of the offence. See for instance *Langa* 1963 (4) SA 941 (N); *Ntuli* 1978 (2) SA 69 (A). As the accused is a competent (but non-compellable) witness for the defence at any stage of criminal proceedings, he may also not be forced to give evidence for a co-accused in a trial-within-a-trial. See *Chamane* 1962 (2) SA 428 (A).

If the trial of the accused is separated from that of the co-accused, he becomes a compellable witness both for the state and the defence. See *Zondi* 1968 (1) SA 709 (N). The same principle applies if the case is withdrawn against her/him. In *Shuma* 1994 (2) SACR 486 (E) one accused applied to have his trial separated from that of his co-accused in order to make the latter a compellable witness. The co-accused was not prepared to testify in the joint trial. The court held that the test to be applied is that of prejudice to the applicant. Separation was refused.

5.3.3 As a witness for the state

Generally the state may not call an accused person to testify against a co-accused. It may occur that the accused in reality "becomes a state witness" if he gives evidence and incriminates the co-accused (See for instance *Ntuli* 1978 (2) SA 69 (A) 74; *Radloff* 1978 (4) SA 66 (A)) as this evidence is admissible against the co-accused. See however *Zawels* 1937 AD 342 and also the justified criticism thereof of Hoffmann and Zeffertt 381. An accused person remains incompetent to give evidence for the state, even if she/he volunteers to do so - *Roberts* 1932 CPD 87.

If the state intends to call an accused person as a witness it will have to do one of three things:

5.3.3.1 withdraw the case against him/her

This is obviously done before the accused has pleaded. The state will then call the former accused as a witness and, should he give satisfactory evidence, he will be indemnified against prosecution for those offences of which he was informed prior to his testimony. This

requires that he replies frankly and honestly to (including self-incriminatory) questions (section 204 of the Act). See in general *Ndabeni* 1959 (2) SA 630 (E). If the attorney-general decides not to prosecute one of the accused in section 119 proceedings, that accused is not a co-accused of the accused person(s) charged in a later trial. See *Hendrix* 1979 (3) SA 816 (D). He is thus a competent and compellable witness and may, if section 204 of the Act is not applicable, refuse to give self-incriminatory replies to questions (section 203 of the Act). See also *Bosman* 1978 (3) SA 903 (A).

If the accused is not indemnified after having given evidence, he may be prosecuted anew.

5.3.3.2 stop the prosecution against the accused

If the prosecution is stopped in terms of section 6(b) of the Act, the accused is entitled to an acquittal. Once acquitted, he/she is no longer a co-accused and is thus a competent and compellable witness. See *Van Aardt* 1941 EDL 263; *Magqonsholo* 1948 (2) SA 222 (E).

5.3.3.3 separate his trial from that of the co-accused

This may be done in terms of section 157(2) of the Act, with the result that the person is no longer a co-accused. See *Van Kleist* 1923 TPD 52 at 55.

It is desirable that, before a former co-accused is called to give evidence, the case against him be finalised. See *Ex Parte Minister of Justice; in re R v Demingo* 1951 (1) SA 36 (A). The reason for this is obvious.

The unsentenced accused may use this opportunity to play down his own role in the crime and may thus jeopardize the case for the state.

If the accused pleads guilty, whilst the co-accused pleads not guilty, the court may question him and convict him if it is satisfied that he intended to plead guilty. Although this means that he is no longer a co-accused by virtue of the fact that there is no dispute between him and the state,

it is again (see the *Demingo* case, supra) desirable that his trial be separated from that of his co-accused and that he be sentenced, before he is called as a witness. See also *Zonele* 1959 (3) SA 319 (A).

The trial of one or more accused may also be separated from that of the other accused under the following circumstances:

- a change of plea (from not guilty to guilty) during the course of a trial. Once the presiding officer has applied section 220 of the Act and is satisfied that that accused is guilty, his trial must be separated from that of his co-accused.
- the absence of some of the accused at the trial date or during the course of a trial. The trial proceeds against the accused who are present. Once the absent accused are arrested, the case against them will proceed from the stage that they became absent.

A person may also be treated as a witness and be required to give evidence against another. At a later stage he may then be charged with an offence which emanates from the same facts to which he testified earlier. See *Coetzee* 1990 (2) SACR 534 (A) 541.

5.4 Parliamentary representatives and officials

They are competent and/or compellable in the same way as ordinary witnesses. It is only in civil cases that a special dispensation exist for them (Section 7(1) of Act 91 of 1963).

5.5 Diplomatic representatives and their personnel

Most diplomatic personnel (e.g. heads of government, trade representatives, ambassadors) are indemnified as witnesses and prosecution in criminal matters (section 2 of the Diplomatic Immunity and Privileges Act 1989, Act 74 of 1989).

6. COMMON LAW

6.1 Deaf and dumb witnesses

At common law this type of witness is competent as long as he/she can be communicated with, whether by signs or otherwise, in an intelligible manner. See *Ranikolo* 1954 (3) SA 255 (O). This communication may entail the appointment of a special interpreter. See *Naidoo* 1962 (2) SA 625 (A). Sign-language is regarded as viva voce evidence - section 161(2). See *Zenzile* 1992 (1) SACR 444 (C) in which the witness was hard of hearing and did not understand the questions, even simple ones. She was ruled as incompetent to testify.

The court must be satisfied that the interpreter is able to communicate properly with the witness. In *Pachcourie v Additional Magistrate, Ladysmith and Another* 1978 (3) SA 986 (N) 991B, Friedland AJ states: "... he must be present both in mind and body since many of the undoubted objects of the principle behind the provision that a trial must be conducted in the presence of the accused would be lost were he, although physically present, unable to hear and understand the import of the evidence being led at his trial". (The communication between the interpreter and the accused was imperfect).

The deaf and dumb witness must also understand the nature and impact of taking the oath - *Ranikolo* 1954 (3) SA 255 (O) - as well as what the consequences of taking the affirmation, or being warned to tell the truth, mean.

A few points of consideration when we deal with a deaf and dumb witness:

- Do we use simple language that will be easy to interpret?
- Do we realize that there are twelve different dialects in sign language?
- Do we give people the right to choose whether they want to make use of sign language?
- Do we assume that the witness and interpreter will understand each other when both have a knowledge of sign language, or do we enquire from them whether they have met before the case to ensure from each other that they use the same dialect?
- Are we tolerant and patient when the interpretation of the witness's evidence takes longer than usual?

CLASS EXERCISE

(For Magistrates and Prosecutors)

A who is 13 years old had been sexually assaulted by X. She is deaf and dumb and has never learned to use international sign language. A's mother can communicate with her by using signs she taught A herself. A has never attended any school.

Discuss the competency and compellability of A to testify.

6.2 Children

Any child, irrespective of age, is a competent witness if the child can:

- give an intelligent recollection (version) of the events and
- knows what it means to speak the truth.

It is incumbent upon the court to satisfy itself that the child is a competent witness, albeit by way of a trial-within-a-trial.

Once the court is so satisfied, it must then establish whether the child understands the nature and impact of the oath and, if not, the affirmation. Only if the answer is still in the positive, the court must warn the child to speak the truth (section 164 of the Act) and *N* 1996 (2) SACR 225 (C). Schreiner JA in *Manda* 1951 (3) SA 158 (A) 163, states as follows with regard to the trustworthiness of the evidence of children in this category:

"A child may not understand the nature or recognize the obligation of an oath or affirmation and yet may appear to the court to be more than ordinarily intelligent, observant and honest." (The children who gave evidence were 3 and 4 years old, respectively).

See also *Ndlela* 1984 (1) SA 223 (N) and *Mashava* 1994 (1) SACR 224 (T). If the witness is unable to distinguish between what is true and what is not, he is incompetent. See *T* 1973 (3) SA 794 (A).

Hoffmann and Zeffert summarise the "competency test" as follows: "In each case the judge or magistrate must satisfy himself that the child understands what it means to speak the truth. If the child does not have the intelligence to distinguish between what

is true and false, and to recognise the danger and wickedness of lying, he cannot be admonished to tell the truth - he is an incompetent witness."

Schwikkard, in her article "The abused child: A few rules of evidence considered", describes this as a "presumption of incompetency" because children, unlike any other witness, are required to pass a test before their evidence will be admitted. She says the fact that the "competency test" may operate to exclude reliable testimony and thus prohibit effective prosecution must be questioned. Truth and the duty to tell the truth are abstract notions, which a young child might not be able to understand or explain; but this does not mean they can't give a reliable account of relevant events. The finding as to whether a child is a competent witness is a difficult process, and an understanding of the developmental stages of children is required. Schwikkard states that provided an accused is afforded the opportunity of challenging the evidence of a child witness, it is difficult to see how the abandonment of the competence test could infringe the accused's right to a fair trial. On the other hand, the abovementioned test singles out some of society's most vulnerable members for treatment that effectively deprives them of the vindication and protection of the criminal justice system. The abandonment of the "competency test" will also increase the potential for successful prosecutions and will act as a buttress for a child's constitutional right to security and freedom from abuse.

The replies to questions put to a child witness, may not be repeated by the interpreter (or any other person) if the child speaks inaudibly. See *T* 1973 (3) SA 794 (A); *L* 1973 (1) SA 344 (C) 350. See also *Chaimowitz v Chaimowitz* (1) 1960 (4) SA 818 (C). In other words, the replies by the child, together with the interpretation thereof, must form part of the record. If any reply is inaudible, the child should be asked to repeat it.

This position was altered by section 170A of the Criminal Procedure Act. This section is essentially aimed at striking a balance between the protection of a child witness and the need to ensure that the accused is given a fair trial.

Section 170A provides that whenever criminal proceedings are pending before any court and it appears to such court that the proceedings would expose any witness under the age of eighteen years to undue mental stress or suffering if he or she testifies, the court may appoint an intermediary in order to enable such witness to give his or her evidence through that intermediary. This is a question of fact and the prosecution as well as the defence should be given an opportunity to address the court on this issue and, where necessary, evidence might have to be led.

Whenever an intermediary has been appointed, the witness concerned is in another room and does not hear the original questions as put by the prosecutor or the defence counsel. In terms of section 170A(2)(a) of the Act no examination cross-examination or re-examination of any witness in respect of whom the court has appointed an intermediary, shall take place in any manner other than through that intermediary. Only the court may question the witness without intervention by the intermediary.

Unless the court directs otherwise, the intermediary may convey the general purport of a question to the witness (s 2(b)). The impact of s 170A(2)(b) will be at its greatest in respect of the cross-examiner. The court may *mero moto* or in response to objections raised by any of the parties, direct the intermediary to put the original question or to make another attempt to convey the general purport of the original question.

Section 170A(3) of the Act provides that if a court appoints an intermediary in terms of section 170A(1), the court may direct that the witness concerned shall give his evidence at any place

- “(a) which is informally arranged to put the witness at ease;
- (b) which is so situated that any persons presence that may upset that witness, is outside the sight and hearing of that witness; and
- (c) which enables the court and any person whose presence is necessary at the relevant proceedings to see and hear, either directly or through the medium of any electronic or other devices, that intermediary as well as that witness during his testimony.”

The issue of the constitutionality of section 170A was considered in *K v The Regional Magistrate NO and others* 1996 1 SACR 434 (E). Two grounds of challenges were forwarded namely (a) that as the intermediary was only required to convey the general purport of a question put during cross-examination, the effectiveness of cross-examination is destroyed thus amounting to a violation of the accused's fundamental right to a fair trial; (b) the physical separation of the witness from the courtroom resulted in a violation of the accused's right to a public trial. The court rejected these arguments. The right to cross-examine witnesses is not absolute. It was conceded that the effect of cross-examination may be blunted to some extent but this does not mean that the accused is denied the right to a fair trial as the intermediary may be required by the court to convey the actual question and not merely its general purport. The mere fact that the witness gives evidence in a separate room does not violate the right to a public trial. Melunsky J held that a proper balance between the protection of a child witness

and the right of an accused to a fair trial could be achieved by permitting the witness to testify in congenial circumstances and out of sight of the accused.

In *S v Mathebula* 1996 (2) SACR 231 (T) an unrepresented accused had not been afforded the opportunity to object to an application that the provisions of section 170A be used. The Court held that this constituted an irregularity in the proceedings which led to a failure of justice.

In *S v Stefaans* 1999 (1) SACR 182 (C) the Court thought it advisable to lay down some guidelines as to how and in what circumstances section 170A should be invoked. The Court stated though that these guidelines can only be given in broad terms, as each case must be dealt with on its own merits.

The following general principles were stated:

- A court must be mindful of the dangers which are inherent in the use of an intermediary which might prejudice the right of the accused to a fair trial. These are:
 - that cross-examination through an intermediary may be less effective than direct cross-examination of a witness;
 - that an accused *prima facie* has the right to confront his accusers and be confronted by them;
 - that human experience shows that it is easier to lie about someone behind his back than to do so to his face.
- The provisions of this section will find application more readily in cases involving a physical or mental trauma or insult to the witness than in other types of cases.
- The giving of evidence in court is inevitably a stressful experience. In order to find application, the stress must be "undue" i.e something in excess of the ordinary stresses. It seems the younger and more emotionally immature the witness, the greater the likelihood that such stress will be "undue".
- A witness who is known to the accused and who knows the accused and is still prepared to testify is less likely to be unduly stressed by the need to testify before the accused than one who is unknown to the accused and may fear intimidation.
- If the application to use the section is not opposed, it may be more readily granted.
- An unrepresented accused should have his right to oppose the application carefully explained to him and, if any doubt exists as to the accused's understanding of the matter, the application should be treated as opposed.
- If the application is opposed the presiding officer should hear appropriate evidence to enable him to exercise a proper discretion as to whether the section should be invoked or not. Such evidence may, in cases of younger witnesses clearly undergoing mental

or physical trauma, consist of nothing more than evidence of the nature of the charge and the age of the witness. In other cases, evidence of a suitable qualified expert, whether that be a social worker, psychologist or psychiatrist, may be necessary.

- If the section is invoked the presiding officer should be aware of the risk that the efficacy of cross-examination may be reduced by the intervention of the intermediary. The judicial officer should be prepared to intervene to insist that the exact question rather than the import thereof, be conveyed to the witness.

The use of a mobile one-way screen has already been successfully implemented in the regional court. The child stays behind the screen for the duration of his/her time in the "witness stand", thereby avoiding eye-contact with the accused or subtle intimidation through the demeanour of the accused or his representative.

See *Woji v Santam Insurance Co Ltd* 1981 (1) SA 1020 (A) 1028, where Diemont JA sets out the approach to evidence given by a young child.

It is also very important that the child not be coerced or enticed into speaking the truth. In *Shabango* 1963 (1) PH H 99 (N) the magistrate showed a child-witness a twenty cent piece and said that he could have it if he spoke the truth. The conviction was quashed. See also *Jacobs* 1970 (2) PH H 152 (C) concerning the intimidation of a child witness.

EXERCISE FOR SMALL GROUP DISCUSSIONS IN CLASS

(For Magistrates and Prosecutors)

Section 164

"When unsworn or unaffirmed evidence admissible

(1) Any person who, from ignorance arising from youth, defective education or other cause, is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth the whole truth and nothing but the truth."

The accused is convicted of raping a 12 year old child. The child testified through an intermediary. The accused appeals on the basis that the child's evidence should not have been admitted as the presiding officer had made no attempt to ascertain whether the child understood the nature or import of the oath or, what it meant to speak the truth, but had only warned her in the following terms: " You are warned to tell this court the truth of what you know and not what you have been told by others to come and tell this court."

In small groups:

(Magistrates)

- Identify the portions of the provision that give scope for the exercise of judicial discretion.
- Identify the criteria that a judicial officer may take into account in exercising such a discretion.
- Consider how you would apply the provision to the factual scenario given.

In small groups

(Prosecutors)

- What is the role of the prosecutor in the abovementioned provision?
- What criteria will you use when you are asked to address the Court before she/he exercises her discretion in terms of the provision?

6.3 Judicial officers

6.3.1 The presiding officer

Logic dictates that the presiding officer is incompetent to testify in a trial in which he/she is involved. The following statement by Centlivres CJ in *Ex parte Minister of Justice : In re R v Demingo* 1951 (1) SA 36 (A) 43 suffices: "Today it is almost impossible to imagine a judge or a magistrate leaving the bench, going into the witness box to give evidence for or against a prisoner, returning to the bench, and at the conclusion of the evidence and argument, solemnly commenting upon the demeanour of himself in the witness box or without any comment accepting the evidence given by himself." This also applies to an assessor.

If the presiding officer recuses herself she may of course give evidence. See, for instance *Malgas* 1978 (1) SA 313 (NC).

An interesting case on recusation and the competence of attorneys to testify, is *Newell v Cronje and Another* 1985 (4) SA 692 (EC). The accused was charged with culpable homicide and drunken driving. The state led evidence that his gait was unsteady, his speech was slurred, his face was flushed and his eyes were bloodshot. The defence led medical evidence that these symptoms were also present at an examination a month after the incident and that the accused had not been drinking prior to this examination. The regional magistrate made certain personal observations about the accused's manner and speech in court and put these to the doctor who testified on behalf of the defence. These observations were basically that, apart from the bloodshot eyes, he observed none of the other peculiarities which was testified to. The defence then called the instructing attorney to give evidence of his knowledge and private observations of the accused. These were in direct conflict with those of the regional magistrate. Before the attorney could conclude his evidence, the magistrate recused himself "omdat my waarnemings deur die verdediging betwyfel was". In an application by the accused to have the recusal set aside and for an order directing the regional magistrate to continue with the case, Mullins J decided that the regional magistrate should continue with the case. At 699A he states: "...Maree does not profess to be an expert witness, but providing his evidence is credible and acceptable, it must be evaluated by the respondent in the light of his own observations. It would also, in my view, be proper for the first respondent, in evaluating such evidence, to bear in mind that his own observations have not been and can not be tested by cross-examination".

Without an in-depth discussion of judicial notice, the following bears mentioning: presiding officers often (sometimes deliberately) take "judicial notice" of facts which fall outside the ambits of admissible judicial notice. A magistrate may not, for instance,

establish the prevalence of an offence by referring to the recurrence thereof in the criminal record book without also referring to the number of convictions for that offence during the same period. The personal knowledge of the layout of a particular area within his jurisdiction is not susceptible to judicial notice without an inspection in loco being held and all the parties agreeing to what was observed and how it should be recorded.

Presiding officers should take care not to make themselves "witnesses" in this manner. The accused cannot test this knowledge and its prejudicial nature is obvious. See *Mantini* 1990 (2) SACR 236 (EC) and contra *Sibuyi* 1988 (4) SA 879 (T).

6.3.2 The prosecutor

It is highly irregular for the prosecutor in a trial to later preside as magistrate in that same trial (in terms of section 275 of the Act) and to sentence a convicted person, as happened in *Tampart* 1990 (1) SACR 282 (SWA). Strydom J at 283 states:

"Dat hierdie optrede onreëlmstig is, is feitlik vanselfsprekend. In die saak van *S v Louw : S v Noyila* 1981 (4) SA 939 (OK) stel die geleerde regter dit soos volg:

'A prosecutor is often in possession of information concerning the accused which would be inadmissible as evidence in a court of law and which is never placed before the court trying the accused. A prosecutor too, must, in the very nature of his duties as such, create the impression in court of being biased against the accused. He attacks his credibility in cross-examination and throughout espouses the version of the state witnesses in pertinently suggesting the guilt of the accused. Such is the very nature of the adversary system prevailing in our courts. For such a protagonist then to sit in final judgement on his opponent in the very case he has been prosecuting must clearly be grossly irregular.'"

The prosecutor is both a competent and compellable witness. See *Becker* 1929 AD 167. It is however undesirable that a prosecutor also testifies in a trial in which he is the prosecutor, for the same reasons as mentioned in *Louw; Noyila* 1981 (4) SA 939 (EC) 941 C-D. Consult *Nakedie* 1942 OPD 162; *Negrini* 1948 (4) SA 995 (C). The prosecutor also may not divulge, from the bar and in the form of a statement, information which he possesses. This would be inadmissible and unsworn evidence. In *Kirsten* 1950 (3) SA 659 (C), a "driving under the influence" case, the prosecutor suggested to the witness that he had been present when the incident occurred and later told the magistrate (from the bar) that he is available to be called as a witness and that his

evidence would refute that of another witness. *Ogilvie-Thomson J* at 965 states that this was irregular and extremely prejudicial to the accused. See also *Dunga* 1939 CPD 10.

6.3.3 The advocate or attorney

The attorney or advocate is a competent and compellable witness. See *Hendricks v Davidoff* 1955 (2) SA 369 (C). It is, however, undesirable that she gives evidence. It would, or may at least appear to do so, affect her impartiality, especially if she gives evidence against her client. Only where it is unavoidable, should the attorney or advocate be called to give evidence. See *Hlangotho* 1979 (4) SA 199 (B) 200-201 where Hiemstra CJ says: "Dit is nie wenslik dat die regsverteenwoordiger self getuig nie: Hy is wel 'n bevoegde getuie (*Middeldorf v Zipper NO* 1947 (1) SA 545 (SR) op 548) en kan getuig waar dit onvermydelik is."

In *Boesman and Others* 1990 (2) SACR 389 (E) the *pro deo* counsel were replaced after four witnesses had given evidence for the state. These (*pro deo*) counsel had put certain propositions to the witnesses. When the accused gave evidence they denied (under cross-examination) that they had instructed the *pro deo* counsel in the manner in which the propositions were made. The state then applied for re-opening of its case in order to call the two *pro deo* counsel.

Zietsman J at 396-399 finds that the two advocates are competent and compellable witnesses and that their evidence is "restricted to the statements put by counsel to the state witnesses, and to whether counsel were authorized by the accused to put such statements to them" (395A). The court nevertheless refused to hear the evidence of the two advocates on the grounds of public policy, which vests a discretion in the court to allow or disallow certain evidence. See also *Newell v Cronje and Another* 1985 (4) SA 692 (EC) 695I-J.

6.3.4 The interpreter

Although it is undesirable that interpreters should testify during the trial in which they are also the interpreter, they are competent to do so. See *Craig* 1904 NLR 153. In *T* 1973 (3) SA 794 (A) the mother of a five year old complainant gave evidence about the complaint made to her. When the child gave evidence she was too frightened to speak. Her mother was then called and she repeated the answers which the child gave. The

mother was not sworn. Botha JA held (at 795) that the (repeated) evidence of the child was inadmissible and that the danger existed that the mother could have been biased. This evidence may of course be of a hearsay nature or constitute a previous consistent statement. See also *Tshabalala v Lekoa Council* 1992 (3) SA 21 (A) where Grosskopf JA describes an interpreter as "not a witness in the ordinary sense".

6.3.5 The court orderly

The orderly is not "involved" in the trial and is therefore a competent witness. In the English case of *Mendy* (1976) 64 CR APP R 4 a policeman saw a person taking notes in court. Later the policeman, accompanied by the equivalent of our court orderly, observed that person conversing with the husband of the witness who was testifying at the time the notes were made. Under cross-examination the husband denies this. The court official was called to rebut this denial under one of the exceptions to the rule against collateral issues.

7. REFUSAL OR FAILURE TO GIVE EVIDENCE

7.1 Properly subpoenaed/warned witnesses

Sections 179 to 188 of the Act deal with the attendance of witnesses at court. Section 170(2) provides that a witness who fails to attend court after having been subpoenaed, is liable to a fine not exceeding R300 or to imprisonment not exceeding three months.

7.2 Recalcitrant witnesses

A competent and compellable witness can not refuse to give evidence or answer questions put to him. He/she also may not refuse to be sworn or take the affirmation. Section 189(1) of the Act provides that such a witness, depending on the offence for which he/she is required to give evidence, may be imprisoned for up to five years, if such person has no "just excuse" for the refusal or failure to give evidence or produce certain exhibits.

The term "just excuse" has been the subject of many decisions of our courts. See, in this regard *Heyman* 1966 (4) SA 598 (A); *Moloto* 1988 (2) PH H 76 (T) (1991 (1) SACR 617 (T)); *Sokoyi* 1984 (3) SA 935 (N); *Mthenjane* 1979 (2) SA 105 (A) 111; *Maduna* 1978 (2) SA 777 (D); *Sithole* 1991 (4) SA 94 (W); *Attorney-General, Transvaal v Kader* 1991 (4) SA 727 (A).

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| Schmidt | <i>Bewysreg</i> , 1989 |
| Hiemstra | <i>Suid-Afrikaanse Strafproses (Annotated)</i> , 1993 |
| Phipson | <i>On Evidence</i> , 1982 |
| Cross | <i>On Evidence</i> , 1979 |
| Du Toit, De Jager, etc. | <i>Commentary on the Criminal Procedure Act</i> |
| J A Robins | <i>Law of children and young persons</i> |
| P J Schwikkard | <i>"The abused child: A few rules of evidence considered", 1996 Acta Juridica 148</i> |
| Justice College | <i>Training Manual for Criminal Justice Personnel:
VIOLENCE AGAINST WOMAN : WOMAN
ABUSE AND SEXUAL ASSAULT</i> |
| Reading material: | |
| P J Schwikkard | <i>"The abused child: A few rules of evidence considered", 1996 Acta Juridica 148</i> |
| Tshepo L. Mosikatsana | <i>"The definitional exclusion of Gays & Lesbians</i> |

from family status", 1996 SAJHR 549

Pierre de Vos

"On the legal construction of gay and lesbian identity and South Africa's transitional Constitution", 1996 SAJHR 265

Neil van Dokkum

"Unwelcome assistance: parents testifying against their children" 1994 (7) SACJ 213

Brenda Grant

"Comments and cases on same-sex marriages" 1996 SAJHR 568

CASE LAW

National Coalition for Gay and Lesbian Equality V Minister of Home Affairs 1999(3) BCLR 280 (C)

TRANSITIONAL JURISPRUDENCE: FROM PUBLIC LAW TO PRIVATE LAW (LLM- JULY 1999)

CHRISTOPHER J. ROEDERER

Tuesday 5:30 - 7:00

Introduction

The point of the course is to expose students to the range of possibilities for transformation that are open to South Africa, the justifications for the various possibilities, the points at which the law can intersect with and either hinder or foster certain possibilities and at least the awareness of how students could effect change, or support the status quo if they so wish. This will be accomplished by looking at alternatives that other countries have chosen, the broader theoretical justifications set out in the introduction and the needs/wants of South African society.

The introductory weeks will explore the range of options open to regimes in transition. It will explore the relation between transitional justice and transitional jurisprudence. It will look at the full spectrum of rights from those largely endorsed by the right and those endorsed by the left. The main point of these weeks will be to set out the alternatives and theoretical justifications for those alternatives.

This will be followed by sections that are standard in the literature, namely the sections on international law, constitutional law, criminal law and the search for truth. The search for truth will be divided into a week relating back to amnesties and the criminal law and the other looking towards the opening of files and purging from public office. This will be followed by a chapter on restitution and compensation.

What follows is the more difficult terrain that is missing from the general literature on transitional justice/jurisprudence. This begins with a new look at the Constitution and in particular to the Horizontality clause. The Constitution mandates changes in the remaining areas of law, but the mandate is not clear. Here, the correct way forward is controversial. There will be an attempt during these weeks to look at what change, if any, has taken place, and what options are available for further transformation. The final week will look back over the proceeding semester as well as look at the role and/or potential role of citizens and lawyers in securing the future that they want.

Outline

1. Introduction: The Domain of Transitional Justice and Transitional Jurisprudence
2. The Domain of Transitional Justice and Jurisprudence Continued
3. International Law
4. Constitutional Change
5. Criminal Law: Punishing the Past
6. Truth and Reconciliation: The Amnesty Option
7. Truth and Reconciliation: Opening Files and Purging from Office
8. The Theoretically Easy Cases of Restitution and Compensation
9. From Public Law to Private Law: Horizontality and the Beginning of Hard Cases
10. The Transformation of Delict
11. The Transformation of Contract
12. The Transformation of Company Law
13. The Role of Customary Law in Transitions
14. Conclusions: The Role of Lawyer and Citizen in Transformation

Course Requirements

Students are required to write a paper that focuses on an issue in weeks 10 - 13. Topics are required the day of the seminar in week 5. Two copies of a typed rough draft of the work are due on the day of the seminar in week 9 so that copies can be made available to students for the presentations that follow. Students will be required to make a presentation of their work in the week that their topic most clearly falls under. Each student will be required to make comments on at least one other person's rough draft. This will be due two weeks after the rough draft is turned in.

Marks

Topic	5%
Rough Draft	15%
Comments	10%
Presentation	15%
Final Draft plus oral	55%

Lateness

As lateness could cause considerable disruption to the course, lateness will result in a 2% deduction in overall points per day, inclusive of weekends and holidays, unless there is a valid medical or other emergency on the day the assignment is due.

WEEKS 1-2

1. INTRODUCTION: THE DOMAIN OF TRANSITIONAL JUSTICE AND TRANSITIONAL JURISPRUDENCE
2. THE DOMAIN OF TRANSITIONAL JUSTICE AND JURISPRUDENCE CONTINUED

Samuel P. Huntington 'The Third Wave: Democratisation in the Late Twentieth Century' from Neil Kritz Ed *Transitional Justice: Volumes I-III* (1995) Volume I. Pages 65 – 81.

Juan E. Mendez Chapter 1 'In Defence of Transitional Justice' in A. James McAdams Ed *Transitional Justice and the Rule of Law in New Democracies* (1997) pp 1-26.

Ruti Teitel 'Transitional Jurisprudence: The Role of Law in Political Transformation' (1997) 106 *Yale LJ* 2009.

Christopher J. Roederer, 'LLM Notes on the Domain of Transitional Justice and Jurisprudence' (1999) pp 1-15.