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CURING CORRECTIVE RAPE: SOCIO-LEGAL PERSPECTIVES
ON SEXUAL VIOLENCE AGAINST BLACK LESBIANS IN
SOUTH AFRICA

WARUGURU GAITHO*

ABSTRACT

Corrective rape can be defined as a hate crime that entails the rape of any member of a group that does not conform to gender or sexual orientation norms, where the motive of the perpetrator is to “correct” the individual, fundamentally combining gender-based violence and homophobic violence. In the South African context, these biases intersect with systemic racism, producing a disproportionate impact on Black, queer, womxn. While the legal framework has evolved to better address sexual violence crimes, Black lesbians remain prone to falling through the legal cracks, and South African society continues to sanction the homophobia and misogyny that form the bulwark of continued unchecked violence against them. This Article utilizes a socio-legal approach to analyze both law and society in an effort to elucidate the complex interplay between both, in addressing—or failing to address thereof—corrective rape. The analysis shows the inherent need to employ a multifaceted approach that gives equal weight to societal transformation as it does legal protection, and further demonstrates the utility of looking to, and borrowing from, the field of public health to successfully engineer social change.

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INTRODUCTION

In early March of 2020, shortly before Capetonians celebrated the Cape Town Pride festival, a lesbian woman was attacked by three men on her way to a shop in Lotus River, a suburb in Cape Town.¹ They proceeded to force her into a nearby shack, hold her down, and gang-rape her to "correct her sexuality."² This is not a novel phenomenon. Nearly fifteen years earlier, Zoliswa Nkonyana, a nineteen-year-old lesbian in Khayelitsha, had been followed from a tavern she frequented by a group of young men who stoned her then took turns stabbing her with the same knife to "finish [her] off."³ Less than a

1. Monique Duval, *Boys Bust for Raping Lesbian*, DAILY VOICE (Mar. 3, 2020), <https://www.dailyvoice.co.za/news/boys-bust-for-raping-lesbian-43994634> [<https://perma.cc/NXN5-M29U>].

2. Akinwale Akinyoade, *Teens Rape Lesbian to Try "Correct" Her Sexuality*, GUARDIAN NIGERIA (Mar. 3, 2020, 8:37 PM), <https://guardian.ng/life/teens-rape-lesbian-to-try-correct-her-sexuality> [<https://perma.cc/Q25Y-Q5GL>].

3. Mandy De Waal, *We'll Make You a "Real" Woman—Even If It Kills You*, DAILY MAVERICK (Dec. 9, 2011), <https://www.dailymaverick.co.za/article/2011-12-09-well-make-you-a-real-woman-even-if-it-kills-you> [<https://perma.cc/HML4-NALU>].

year later, on July 7, 2007, in a field close to the Johannesburg township where they lived, Sikazele Sigasa and Salome Massooa's bodies were discovered,⁴ tied up with their underwear, having been gang-raped and tortured, before being shot execution style through the head.⁵ Despite the heinous nature of these events, this pattern of targeted violence was only named in 2008, when the lifeless body of Eudy Simelane, a member of South Africa's national soccer team, an activist and one of the first "out"⁶ lesbian women in the Kwa Thema region, was found naked and face down in Johannesburg near a drainage ditch, having also been gang-raped, brutally beaten, and stabbed twenty-five times.⁷ Simelane's notoriety, the savagery, and motivation behind the attack galvanized the coinage of the term "corrective" rape.⁸

Originally, corrective rape referred to rape perpetrated against lesbians by straight heterosexual men with the intent of "curing" their homosexuality, which was perceived as "unnatural."⁹ Along that vein, Mieses described it as sexual and brutal sexual punishment of "lesbians and other women who have sex with women (WSW) . . . for being gay and violating traditional gender representation."¹⁰ Verbal abuse by the perpetrators before, during, or after violation of the victim makes the motive apparent, with overt statements such as "teaching a lesson," or "showing them . . . 'what a real man tastes like.'"¹¹ One survivor described it as an attempt by a male perpetrator to "turn you into a real African woman."¹² The term has now evolved to broadly encompass, per Doan-Minh, "the rape of any member of a group that does not conform to gender or sexual orientation norms where the motive of the perpetrator is to 'correct' the individual."¹³

4. ANDREW MARTIN, ANNIE KELLY, LAURA TURQUET & STEPHANIE ROSS, ACTIONAID, HATE CRIMES: THE RISE OF "CORRECTIVE" RAPE IN SOUTH AFRICA, 9 (2009), <https://shukumisa.org.za/wp-content/uploads/2017/09/hate-crimes-the-rise-of-corrective-rape-report.pdf> [<https://perma.cc/B9DB-27K3>].

5. *Id.*

6. *Id.* at 9–10. Being "out" refers to the state of openly living as a queer person, typically as a result of self-disclosure of sexual orientation or gender identity. *Coming Out as an Adult*, STONEWALL (June 10, 2015), <https://www.stonewall.org.uk/help-advice/coming-out/coming-out-adult-1> [<https://perma.cc/9762-ZGMJ>].

7. Alexa Mieses, *Gender Inequality and Corrective Rape of Women Who Have Sex with Women*, GMHC: TREATMENT ISSUES, Dec. 2009, at 1, 1.

8. Sarah Doan-Minh, *Corrective Rape: An Extreme Manifestation of Discrimination and the State's Complicity in Sexual Violence*, 30 HASTINGS WOMEN'S L.J. 167, 167 (2019).

9. Roderick Brown, *Corrective Rape in South Africa: A Continuing Plight Despite an International Human Rights Response*, 18 ANN. SURV. INT'L & COMP. L. 45, 45–46 (2012).

10. Mieses, *supra* note 7, at 2.

11. *Id.* at 2.

12. Yolanda Mufweba, *Corrective Rape Makes You an African Woman*, IOL (Nov. 7, 2003), <https://www.iol.co.za/news/south-africa/corrective-rape-makes-you-an-african-woman-116543> [<https://perma.cc/4DV7-ARKJ>].

13. Doan-Minh, *supra* note 8, at 167.

Yet, the nature of corrective rape, including the specific vulnerabilities of particular groups, must also be elucidated and highlighted within its definition. Therefore, in addition to the “curative” intent element, corrective rape must also be described as a hate crime that combines gender-based violence and homophobic violence.¹⁴ In the South African context, this intersects with systemic racism due to its disproportionate impact on Black women.¹⁵

Corrective rape is not unique to this geographical context; Eudy Simelane’s death and the consequent mainstreaming of this atrocity in academic discourse and media reporting shone a spotlight on this. In the USA, for example, a lesbian in Georgia filed a civil lawsuit after she was raped by a county police deputy.¹⁶ The officer had forced her into her apartment at gunpoint and raped her, vowing to “teach her a lesson”¹⁷ and that “the world needed . . . one less dyke and he was going to make sure that happened.”¹⁸ “[I]n Zimbabwe, a young lesbian woman was locked up by her family and forced to submit to rape by an older man to ‘correct’ her orientation.”¹⁹ She was raped until she fell pregnant.²⁰ In Jamaica, the attack of a lesbian and her friend in Kingston brought attention to the regular occurrence of corrective rape on the island.²¹ In India, the use of family members by parents to orchestrate the “correction” of their homosexual children, which makes legal recourse all the more difficult,²² has been reported.²³ In Cameroon, an eighteen-year-old girl deemed a lesbian

14. Luis Abolafia Anguita, *Tackling Corrective Rape in South Africa: The Engagement between the LGBT CSOs and the NHRIs (CGE and SAHRC) and Its Role*, 16 INT’L J. HUM. RTS. 489, 490 (2012).

15. See, e.g., Helen Wells & Louise Polders, *Anti-Gay Hate Crimes in South Africa: Prevalence, Reporting Practices, and Experiences of the Police*, 67 AGENDA: EMPOWERING WOMEN FOR GENDER EQUITY 20, 23 (2006).

16. AMNESTY INT’L, USA: STONEWALLED: POLICE ABUSE AND MISCONDUCT AGAINST LESBIAN, GAY, BISEXUAL AND TRANSGENDER PEOPLE IN THE U.S. 60 (2005), <https://www.amnesty.org/en/documents/amr51/122/2005/en> [<https://perma.cc/PUK8-UEZC>].

17. *Id.*

18. *Id.*

19. Radhika Coomaraswamy, *Rep. on the Integration of the Human Rights of Women and the Gender Perspective: Report of the U.N. Special Rapporteur on Violence against Women*, 29, U.N. Doc. E/CN.4/2002/83 (Jan. 31, 2002).

20. *Id.*

21. David McFadden, *Jamaica Woman Brings Attention to Rapes Targeting Lesbians*, AP NEWS (Apr. 28, 2015), <https://apnews.com/11dbdc605810419a9328311d8cc999b1> [<https://perma.cc/TQ4Y-RXLP>].

22. Rupam Jain, *Parents Use ‘Corrective Rape’ to ‘Straight’en Gays*, TIMES INDIA (June 1, 2015), <https://timesofindia.indiatimes.com/life-style/relationships/parenting/Parents-use-corrective-rape-to-straighten-gays/articleshow/47489949.cms> [<https://perma.cc/382P-4KUQ>].

23. Rohini Chatterji, *Horrible: Parents in India Are Using “Corrective Rape” to Cure Homosexual Children*, FIRSTPOST (June 1, 2015, 4:14 PM), <https://www.firstpost.com/india/horrifying-parents-india-using-corrective-rape-cure-homosexual-children-2273030.html> [<https://perma.cc/FS3Z-NYS8>].

“witch” was chained to a wall and raped by a man who they then forced her to marry.²⁴

That being said, this Article delves into both South African law and society as they pertain to this *sui generis* phenomenon; a calculated choice to examine the context where its nomenclature was birthed. By conducting an in-depth analysis of both, in tandem, a clearer picture is drawn on the fundamental factors that enable and support corrective rape, and critical questions such as how they interact with each other to sustain or disrupt the current reality, are explored. The law on the books and the reality on the ground are considerably divergent, and social norms and attitudes lean heavier toward homophobia and reprobation of Black lesbians than they do toward equal treatment and acceptance.²⁵

While various scholars have made the case for the law as the fulcrum on which making meaningful progress rests, at present, most legal scholars studying corrective rape do not make the case for societal transformation as inseparable from legal developments.²⁶ The solutions, perhaps unsurprisingly, are therefore often one dimensional, without consideration for the degree of complexity that the synergy between law and society produces. The observable inertia in the lived realities of Black lesbians in South Africa further strengthens the argument for the utility of a socio-legal approach. This Article therefore seeks to fill this specific gap, interrogating various issues in this relatively underexplored area via social-legal study.

Consequently, Part I situates corrective rape in South Africa by examining prevalence rates, and various related disparities, before analyzing how mainstream society perceives the LGBTQIA+ community, of which Black lesbians are an integral part. Part II hones in on the national legal framework of South Africa, reviewing national legislation and discussing the prosecution and adjudication of the crime of corrective rape under the criminal justice system. Potentialities for protection of Black lesbians under both the current legislative framework and an amended regime are explored. Part III then tackles societal transformation, by examining root causes of homophobia, gender-based violence, and systemic racism in South

24. *Lesbian “Witches” Chained and Raped by Families in Cameroon*, THOMSON REUTERS (Oct. 8, 2018), <https://www.reuters.com/article/us-cameroon-lgbt-rape-idUSKCN1MC001> [<https://perma.cc/LPL8-ZJMA>].

25. See Peter Fabricius, *Just How Serious Is South Africa About Gay Rights?*, ISS TODAY (Feb. 27, 2014), <https://issafrica.org/iss-today/just-how-serious-is-south-africa-about-gay-rights> [<https://perma.cc/6LZL-LMWB>].

26. See, e.g., René Koraan & Allison Geduld, “*Corrective Rape*” of Lesbians in the Era of Transformative Constitutionalism in South Africa, 18 P.E.R. 1930, 1935, 1945 (2015) (explaining that confronting violent discrimination against LGBTQIA+ persons starts with implementing legal frameworks).

Africa, followed by an investigation into social interventions and their impact. The final section evaluates the outcomes of the study, broadly concluding that legal reform must be applied in tandem with social transformation, in order to be effective. To that end, a dual-pronged, cross disciplinary approach that effectively bridges the law-society divide is proffered.

Before proceeding further, several caveats must be discussed. First, it is important to note that corrective rape as the preferred lexicon has been contested due to the risk of being misconstrued as supporting the notion that lesbian women (and all other individuals who are subjected to corrective rape) should be, and are capable of, being cured.²⁷ Mulaudzi argues that this in fact speaks to the way that homosexuality is perceived in South Africa.²⁸ In this Article, the term corrective rape is used, as it is the most widely recognized parlance for describing this particular type of violence, but it should be read paying mind to this dissonance, as well as its nuanced meaning. Second, attention must be accorded to the terms “victim” and “survivor” which in and of themselves carry complex connotations. Spry asserts that these concepts “construct hegemonic linguistic categories” that deny a woman narrative agency by perpetuating a phallogentric perspective of their experiences, and by being reductive of the intimacy and diversity of sexual violence experiences.²⁹ Essentially, feminist theory demands that self-identity be a central part of this discourse, and as far as third-party storytelling goes, there is no consensus (sans context) as to which terminology is preferable.³⁰ Accordingly, this Article consciously uses both terms—victim and survivor—interchangeably, and if indicated, will respect the labels used by the womxn who have undergone this experience. Finally, womxn will be used interchangeably with women, as a nod to intersectional feminism and in recognition of the inclusion of trans women and women-aligned non-binary individuals in this research study. To be clear, the use of womxn is not aimed at invalidating the womanhood of trans women, or erasing the distinct identity of non-binary individuals, but is rather intended as an expansive and inclusive term that does not center cis-men.

27. Mutondi Muofhe Mulaudzi, *Corrective Rape and the War on Homosexuality: Patriarchy, African Culture and Ubuntu* § 2.2 (2018) (Master's Thesis, University of Pretoria).

28. *Id.*

29. Tami Spry, *In the Absence of Word and Body: Hegemonic Implications of “Victim” and “Survivor” in Women's Narratives of Sexual Violence*, 13 *WOMEN & LANGUAGE* 27, 29 (1995).

30. See Kate Harding, *I've Been Told I'm a Survivor, Not a Victim. But What's Wrong With Being a Victim?*, *TIME* (Feb. 27, 2020, 8:20 AM), <https://time.com/5789032/victim-survivor-sexual-assault>.

I. SITUATING CORRECTIVE RAPE IN SOUTH AFRICA:
A BRIEF CONTEXTUAL OVERVIEW

A. Rape, Sexual Violence, and Racial Disparities: Prevalence Rates & Reporting

The gender inequality created and perpetuated by deeply rooted patriarchy in South Africa has, unsurprisingly, led to rampant sexual violence.³¹ Dubbed the rape capital of the world,³² South Africa's figures on rape and gender-based violence are some of the highest globally for a country not at war.³³ The number of sexual offenses reported in the period of 2018–2019 was 52,420, a near 5% increase from the previous year.³⁴ At 90.9 per 100,000, this places South Africa's recorded sexual offenses rate as one of the top rates per capita in the world.³⁵ Distinct from other sexual offenses, the police recorded 41,583 rapes during this period, averaging 114 rapes daily.³⁶ However, these statistics are far from accurate due to low reporting rates, influenced not only by gender disparities, but also astoundingly low conviction rates which deter women from reporting in the first place.³⁷ Additionally, recent data is not available as there is no nationally representative estimate of annual rapes in South Africa.³⁸ The statistics on corrective rape specifically are scanty and outdated at best, and non-existent at worst.³⁹ Despite this dearth of information, one source placed the annual number of victims of corrective rape in South Africa at “[at least] 500,”⁴⁰ and a sociological study reported that on average, ten women are correctively raped each week in South Africa.⁴¹ For the few cases reported, there is a large disparity

31. Brown, *supra* note 9, at 49.

32. Jackie Nagtegaal, *Surge in Sexual Assault and Violence Has Led to South Africa Being Dubbed “The Rape Capital of the World”*, S. COAST HERALD (Sept. 7, 2018), <https://southcoastherald.co.za/314591/surge-sexual-assault-violence-led-south-africa-dubbed-rape-capital-world>.

33. Helen Moffett, *These Women, They Force Us to Rape Them: Rape as Narrative of Social Control in Post-Apartheid South Africa*, 32 J. S. AFR. STUD. 129, 129 (2006).

34. Africa Check, *FACTSHEET: South Africa’s Crime Statistics for 2018/19*, THE CITIZEN (Sept. 12, 2019), <https://citizen.co.za/news/south-africa/crime/2178462/factsheet-south-africas-crime-statistics-for-2018-19> [<https://perma.cc/82XP-3DAP>] (finding 50,108 sexual offenses in 2017–18 and 52,420 sexual offenses in 2018–19).

35. *Id.*

36. *Id.*

37. Brown, *supra* note 9, at 49.

38. Africa Check, *supra* note 34.

39. Brown, *supra* note 9, at 46.

40. Jonah Hull, *The South African Scourge*, ALJAZEERA (Feb. 20, 2011), <https://www.aljazeera.com/features/2011/2/20/the-south-african-scurge> [<https://perma.cc/H62Q-BRJB>].

41. Kammila Naidoo, *Sexual Violence and “Corrective Rape” in South Africa*, 8 GLOB. DIALOGUE: MAG. INT’L SOCIO. ASSOC. (Mar. 22, 2018), <http://globaldialogue.isa-sociology.org/sexual-violence-and-corrective-rape-in-south-africa> [<http://perma.cc/4R2L-H2FB>].

between accusations and convictions.⁴² In 2009, *Action Aid* reported that since 1998, thirty-one homophobic murders of lesbian women had been reported, yet of these, only two had made it to the courts, and only one conviction had been obtained.⁴³ The other case was postponed at least thirty times, eventually being tossed out for insufficient evidence.⁴⁴ A study found that only a third of hate crimes, which are crimes or acts of violence that are motivated by prejudice against a specific actual or perceived trait of a victim (such as race, religion, or sexual orientation),⁴⁵ and of which corrective rape is a part, were reported to the police.⁴⁶ Moreover, only one in ten complaints was properly investigated.⁴⁷ Further, a hate crime was identified in only sixteen out of sixty-two convictions.⁴⁸ In terms of racial disparities, a recent study of anti-gay hate crimes in Gauteng showed that Black lesbian women are 2.5 times more likely to experience sexual abuse or rape than white lesbians.⁴⁹ Women living in townships form the majority of victims, indicating that class is also a contributing factor.⁵⁰

B. Perceptions of the LGBTQIA+ Community by Mainstream Society

Despite extensive legal protection and recognition of gender and sexual minorities, public attitudes around homosexuality perpetuate intolerance and more than 55% of South Africa's Lesbian, Bisexual, Gay, Transgender, Queer, Intersex, and Asexual (LGBTQIA+) citizens live in fear that they will experience discrimination due to their sexual orientation or gender.⁵¹ A 2016 national representative survey,

42. MARTIN ET AL., *supra* note 4, at 13.

43. *Id.*; see also Kamban Naidoo & Michelle Karels, *Hate Crimes Against Black Lesbian South Africans: Where Race, Sexual Orientation & Gender Collide (Part 1)*, 33 OBITER AFR. J. 236, 250 (2012).

44. Naidoo & Karels, *supra* note 43, at 250.

45. Key Sun, *The Legal Definition of Hate Crime and the Hate Offender's Distorted Cognitions*, 27 ISSUES IN MENTAL HEALTH NURSING 597, 597 (2006).

46. Yolanda Mitchell & Juan Adriaan Nel, *The Hate and Bias Crimes Monitoring Form Project: January 2013 to September 2017*, HCWG RESEARCH SUB-COMMITTEE, June 10, 2017, at 16 (reporting on a study conducted in five provinces: Gauteng, Eastern Cape, Kwa Zulu Natal, Western Cape, & Limpopo).

47. Kay Goodall & Mark Walters, *Legislating to Address Hate Crimes against the LGBT Community in the Commonwealth*, HUM. DIGNITY TR., May 2019, at 10.

48. *Id.*

49. Wells & Polders, *supra* note 15, at 23 (finding a prevalence rate of 10 anti-gay hate crimes against Black lesbian women compared to a rate of 4 against white lesbian women).

50. Lea Mwambene & Maudri Wheal, *Realisation or Oversight of a Constitutional Mandate? Corrective Rape of Black African Lesbians in South Africa*, 15 AFR. HUM. RTS. L.J. 58, 67 (2015).

51. *Majority of LGBT South Africans Live in Fear of Discrimination*, TIMES LIVE (Nov. 29, 2016), <https://www.timeslive.co.za/news/south-africa/2016-11-29-majority-of-lgbt-south-africans-live-in-fear-of-discrimination> [<https://perma.cc/7ZTG-2BZU>].

which consisted of over 3,000 interviews with South Africans across the country (an unprecedented scale on the continent), revealed that seven out of ten South Africans, a sizeable majority, “feel strongly that homosexual sex and breaking gender dressing norms is simply ‘wrong’ and ‘disgusting.’”⁵² Eight out of ten South Africans stated that “they h[ad] not—nor would they ever consider—verbally or physically abusing someone who was gender non-conforming.”⁵³ But alarmingly, based on the extrapolation of survey findings to the whole South African population, it was estimated that close to half a million “South Africans h[ad] physically harmed women ‘who dress and behave like men in public’ in the prior 12 months.”⁵⁴

That being said, some of the findings showed a shift toward progressive, inclusive attitudes, mainly among younger well-educated South Africans.⁵⁵ For example, even though 72% of individuals regarded homosexuality as immoral, 51% believed that gay people should have the same human rights as all other citizens.⁵⁶ Additionally, 2 in 4 South Africans said they would accept a gay family member, even though only one in four could identify a homosexual friend or family member.⁵⁷ Further, between 2012 and 2015, the number of people who “strongly disagreed” with same sex marriage was halved.⁵⁸ Some of the hypothesized factors for this shift in personal attitudes included personal experience of sexual orientation, gender identity, gender expression, and sex characteristics (SOGIESC),⁵⁹ contact or awareness with an LGBTQIA+ family member or community,⁶⁰ gaining knowledge or understanding of SOGI⁶¹ and an individual’s moral frame,⁶² with a particular emphasis on tradition, religion, and culture.⁶³

Per the head of the Human Sciences Research Council, the seemingly antithetical results of the study, i.e., where a majority of South

52. CARLA SUTHERLAND, BEN ROBERTS & NEVILLE GABRIEL, THE OTHER FOUNDATION, PROGRESSIVE PRUDES: A SURVEY OF ATTITUDES TOWARDS HOMOSEXUALITY & GENDER NON-CONFORMITY IN SOUTH AFRICA 7, 37 (2016), https://theotherfoundation.org/wp-content/uploads/2016/09/ProgPrudes_Report_d5.pdf [<https://perma.cc/Z6ME-53BN>].

53. *See id.* at 33.

54. *Id.* at 37.

55. Faraaz Mahomed & Guy Trangoš, *An Exploration of Public Attitudes Toward LGBTI Rights in the Gauteng City-Region of South Africa*, 63 J. HOMOSEXUALITY 1400, 1403 (2016).

56. SUTHERLAND ET AL., *supra* note 52, at 3.

57. *Id.*

58. *Id.* at 54 (reporting that 48.5% “strongly disagreed” in 2012 compared to 23.5% in 2015).

59. *Id.* at 18.

60. *Id.*

61. *Id.*

62. SUTHERLAND ET AL., *supra* note 52, at 18.

63. *Id.*

Africans believe LGBTQIA+ persons should have equal human rights protections, but also believe that same sex relations are morally wrong, are an indicator of the work that remains to be done “to ensure that society understands and respects the rights of LGBT people in the country.”⁶⁴ An examination of the lived realities of sexual and gender minorities in South Africa supports this sentiment. A 2018 study revealed that in their lifetime, ⁶⁵ 73% of LGBTQIA+ individuals had experienced verbal harassment, 55% physical violence, and 48% sexual violence, with a significantly higher prevalence amongst gender minorities, i.e., transgender, intersex, and gender nonconforming persons, specifically.⁶⁶

II. IN PURSUIT OF JUSTICE: PITTING SOUTH AFRICA’S LEGAL FRAMEWORK AGAINST CORRECTIVE RAPE

Corrective rape is not an inexplicable aberration within the typologies of crime in South Africa. Instead, it exists at the intricate nexus of hate crimes and sexual assault crimes which are varyingly addressed under the law. Part II hones in on the national legal framework of South Africa, in particular reviewing the 1996 Constitution, the Equality Act, and current rape law. The examination seeks to answer the question of the content of the legal framework in South Africa regarding rape and hate crimes, in a bid to establish whether the framework sufficiently tackles corrective rape. This is then followed by an evaluation of what modifications can be made to better position the state to prosecute perpetrators of corrective rape, both in terms of the existing framework and new elements that ought to be introduced. Overall, though difficult, reimagining justice and protection for Black lesbians using the South African legislative machine is carefully mapped and deemed feasible.

A. An Audit of the Law: Constitutional Guarantees, Related Legislation and Rape Law Reform

The post-apartheid South African Constitution “provides a legal structure based on human rights and a framework for anti-prejudice,

64. *African Attitudes towards Homosexuality Revealed in Unprecedented Survey*, ALL. MAG. (Sept. 26, 2016), <https://www.alliancemagazine.org/blog/african-attitudes-towards-homosexuality-revealed-in-unprecedented-survey> [<https://perma.cc/4LZJ-5BVC>].

65. ALEX MÜLLER & KRISTEN DASKILEWICZ, S. & E. AFR. RSCH. COLLECTIVE ON HEALTH, TECHNICAL REPORT: ARE WE DOING ALRIGHT? REALITIES OF VIOLENCE, MENTAL HEALTH, AND ACCESS TO HEALTHCARE RELATED TO SEXUAL ORIENTATION AND GENDER IDENTITY AND EXPRESSION IN SOUTH AFRICA 41–45 (2019).

66. *Id.* at 43.

while its political message is one of tolerance and non-discrimination.”⁶⁷ Lauded for being one of the most progressive in the world,⁶⁸ the South African Constitution sets out an aspirational protective legal framework for LGBTQIA+ persons, most notably as the first Constitution in the world to include sexual orientation as a class in its national non-discrimination clause.⁶⁹ Following its promulgation, a successful decade-long battle to strike down any provisions of law, policy, or procedure that would limit the rights of the LGBTQIA+ citizenry ensued.⁷⁰ To date, South Africa prominently remains the only country in Africa to have legalized gay marriage.⁷¹ Apart from the equality clause wherein race, gender, and sexual orientation are listed grounds upon which discrimination is prohibited, section 12 of the Constitution explicitly guarantees the right to freedom from all forms of violence from either public or private sources.⁷² The insertion of the words “from either public or private sources,” is significant because it extends protection for acts such as domestic violence and—particularly relevant to corrective rape discourse—sexual assault, which are “predominantly committed in contexts, spaces, and relationships that are traditionally viewed as private.”⁷³

Additionally, the Constitution recognizes the right to life for everyone,⁷⁴ and provides for the inherent dignity of every individual and the right to have that dignity respected and protected,⁷⁵ as well as the right to bodily and psychological integrity which includes the right to security in, and control over, their body.⁷⁶ The South African Constitutional Court held that at the heart of the prohibition of unfair discrimination, lay the recognition that the purpose of the

67. Juan Nel, *Hate Crimes: A New Category of Vulnerable Victims for a New South Africa*, in VICTIMOLOGY IN SOUTH AFRICA 243 (Linda Davis & Rika Snyman eds., 2005).

68. In 1996, Constitutional Affairs Minister Mohammed Valli Moosa noted of the South African Constitution: “[it] is a document that will no doubt serve as a beacon of constitutionalism not only here, but internationally” See Lorenzo Di Silvio, *Correcting Corrective Rape: Carmichele and Developing South Africa’s Affirmative Obligations to Prevent Violence Against Women*, 99 GEO. L.J. 1469, 1473 (2011).

69. S. AFR. CONST., 1996 § 9(3).

70. Adam Rosenbloom, *LGBT Discrimination in South Africa*, 5 KALEIDOSCOPE INT’L J. 54, 54 (2014).

71. Sharon LaFraniere, *South African Parliament Approves Gay Marriages*, N.Y. TIMES (Nov. 14, 2006), <https://www.nytimes.com/2006/11/14/world/africa/14cnd-safrica.html> [<https://perma.cc/ZZZ2-XELC>].

72. S. AFR. CONST., 1996 § 12(1)(c).

73. Dee Smythe, Lillian Artz, Helene Combrinck, Katherine Doolan & Lorna J. Martin, *Caught Between Policy and Practice: Health and Justice Responses to Gender Based Violence*, in CRIME, VIOLENCE AND INJURY PREVENTION IN SOUTH AFRICA: DATA TO ACTION 175–76 (2008).

74. S. AFR. CONST., 1996 § 11.

75. S. AFR. CONST., 1996 § 10.

76. S. AFR. CONST., 1996 § 12(2)(b).

Constitution and democratic order was “the establishment of a society in which all human beings [would] be accorded equal dignity and respect regardless of their membership of particular groups.”⁷⁷ The constitutional court further held that “the right to dignity is not subject to abrogation or subordination” to other rights.⁷⁸ An individual examination of various incidences of corrective rape clearly shows the violation of all the above rights by the perpetrators, including an impairment of the right to dignity, which is impermissible.⁷⁹

In the *Carmichele* case, which involved the sexual assault of the applicant by a man who had been released pending trial for the attempted rape of another woman, the constitutional court established the state’s positive obligation to protect and uphold the right to life, human dignity, and security of the person through laws and structures designed to afford such protection.⁸⁰ In adopting the famous *Osman* test,⁸¹ the court held that this included “tak[ing] preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.”⁸² The state’s failure to take pointed measures to protect would-be victims of corrective rape, both at the judicial and policy level, thus constitutes a fundamental breach of these provisions.

Another critical piece of legislation for consideration is the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA/Equality Act), which manifests South Africa’s commitment to equality.⁸³ Crucially, it non-exhaustively lists the grounds upon which discrimination is prohibited, including sexual orientation.⁸⁴ The Act further enumerates special measures to promote equality with regard to race, gender, and disability,⁸⁵ including the condition that

77. President of the Republic of South Africa and Another v. Hugo, 1997 (6) BCLR 708 (CC) at ¶ 41.

78. Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 99 (2011).

79. *See id.* at 100.

80. *Carmichele v. Minister of Safety & Security* 2001 (4) SA 938 (C C) ¶ 44.

81. The European Court of Human Rights stated that in order for the State to be found to be in breach of its duty to prevent the violation of the right to life by private actors, it must be established to its satisfaction that the authorities knew, or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

Osman v. United Kingdom, App. No. 87/1997/871/1083, ¶¶ 115–16 (Oct. 28, 1998).

82. *Carmichele*, 4 SA 938 at ¶ 45 (citing *Osman v. United Kingdom*, App. No. 87/1997/871/1083 (Oct. 28, 1998)).

83. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (S. Afr.), at Preamble.

84. *Id.* § 1 (defining “prohibited grounds”).

85. *Id.* § 28.

during prosecution, proof of unfair discrimination on the aforementioned grounds as having played a part in the commission of an offense be considered an aggravating factor.⁸⁶ That being said, the grounds do not include discrimination based on sexual orientation.

Turning to rape law reform in South Africa, in December 2007 specific amended sections of the Sexual Offences Act passed into law after a protracted eleven-year reform period.⁸⁷ The sweeping changes were largely driven by the feminist struggle to alter the South African criminal justice system's responses to gender-based violence, the very site that has "historically treated sexual assault victims with indifference, suspicion and, at times, hostility."⁸⁸ The amendments were largely focused on substantive legal rules relating to sexual offenses in South Africa.⁸⁹ Chief among these, the repeal of the common law offenses of rape and indecent assault, and their replacement with a materially wider range of statutory offenses.⁹⁰ Statutorily, rape is broadly defined and is gender neutral.⁹¹ However, there is no specific mention of corrective rape as an offense "committed out of malice" against the victim's identity.⁹² Sexual penetration is a crucial element of the offense and encompasses all acts of penetration, without distinction as to penile versus other penetration (such as oral genital violation) and includes the use of objects.⁹³

Another important definition introduced in the Act relates to "sexual violation" since it covers "every other conceivable sexual act that one person could do to another, which does not involve penetration."⁹⁴ Inextricably linked to this, the Act also repeals the common law offense of indecent assault, replacing it with a new statutory offense of sexual assault, applicable to all forms of sexual violation without

86. *Id.* § 28(1).

87. See Act No. 32 of 2007: Criminal Law (Sexual Offences and Related Matters) (S. Afr.); Shereen W. Mills, *Consent and Coercion in the Law of Rape in South Africa: A Feminist Transformative Approach*, 28 CAN. WOMAN STUD. 81, 81 (2010).

88. Catherine Albertyn, Lillian Artz, Heléne Combrinck, Shereen Mills & Lorraine Wolhuter, *Women's Freedom and Security of the Person*, in GENDER, LAW AND JUSTICE 307 (E. Bonthuys & Cathi Albertyn eds. 2007).

89. See Philip N. S. Rumney & Charnelle van der Bijl, *Rape, Attitudes and Law Enforcement in South Africa*, 13 NEW CRIM. L. REV. 826, 827 (2010).

90. Lillian Artz & Dee Smythe, *Should We Consent?*, in SHOULD WE CONSENT? RAPE LAW REFORM IN SOUTH AFRICA 8 (Lillian Artz & Dee Smythe eds. 2008).

91. Act No. 32 of 2007: Criminal Law (Sexual Offences and Related Matters) (S. Afr.) ¶ 3 ("Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offen[s]e of rape.")

92. Koraan & Geduld, *supra* note 26, at 1939.

93. Act No. 32 of 2007: Criminal Law (Sexual Offences and Related Matters) (S. Afr.) ch. 1.

94. Nikki Naylor, *The Politics of a Definition*, in SHOULD WE CONSENT? RAPE LAW REFORM IN SOUTH AFRICA 49 (Lillian Artz & Dee Smythe eds. 2008).

consent.⁹⁵ Similarly noteworthy is the criminalization of any attempt, conspiracy, or incitement to commit a sexual offense.⁹⁶ Regarding rules of evidence and procedure, the Act determinately scrapped the cautionary rule in sexual offense cases.⁹⁷ Previously, the evidence of a rape complainant had to be treated with caution on the sole basis of being a victim of a sexual offense.⁹⁸ Furthermore, the presumption that delayed reporting is an indicator that a claim was false and which was typically used to discredit the victim, was banned.⁹⁹ Accordingly, the court may not draw any negative inference from such delay.¹⁰⁰ These evidentiary and procedural reforms reflect an increased awareness of, and sensitivity towards, the way victims respond to rape trauma, including how this affects reporting patterns.¹⁰¹

Finally, with regard to sentencing, the Criminal Law Amendment Act prescribes minimum sentences for specific serious crimes, including rape.¹⁰²

B. Reimagining Justice: Potentialities for Protection of Black Lesbians in South Africa

1. Transformative Constitutionalism

Klare introduced the term “transformative constitutionalism” into the South African legal landscape in his seminal work *Legal Culture and Transformative Constitutionalism* over two decades ago.¹⁰³ In the poignant piece, he defines it as “a long-term project of constitutional enactment, interpretation, and enforcement committed . . . to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.”¹⁰⁴ Through transformative constitutionalism, large-scale social change could be introduced through “nonviolent political processes grounded in law.”¹⁰⁵ For this to be successful, he argues

95. Act No. 32 of 2007: Criminal Law (Sexual Offences and Related Matters) (S. Afr.) § 5.

96. *Id.* § 55.

97. *Id.* § 60.

98. See Artz & Smythe, *supra* note 90, at 9.

99. Act No. 32 of 2007: Criminal Law (Sexual Offences and Related Matters) (S. Afr.) § 59.

100. See *id.*

101. Dee Smythe, *Moving Beyond 30 Years of Anglo-American Rape Law Reforms: Legal Representation for Victims of Sexual Offences*, 18 S. AFR. J. CRIM. JUST. 167, 170 (2005).

102. Criminal Law Amendment Act 105 of 1997 (S. Afr.) § 51.

103. See Karl E. Klare, *Legal Culture and Transformative Constitutionalism*, 14 S. AFR. J. HUM. RTS. 146, 150 (1998).

104. *Id.*

105. *Id.*

for a post-liberal account of the law, in which adjudication is politically and morally engaged.¹⁰⁶ A post-liberal reading of the Constitution would mean that the South African Constitution is “social, redistributive, caring, positive, at least partly horizontal, participatory, multicultural, and self-conscious about its historical setting and transformative role and mission.”¹⁰⁷ Applied to the situation of corrective rape in the South African context, Koraan argues for the use of the law to transform the heteronormative South African society and its institutions.¹⁰⁸ Despite the fact that there have been numerous cases of corrective rape and murder of Black lesbians, only three have gone to trial successfully.¹⁰⁹ In one of these, the previously highlighted case of Eudy Simelane, when her murderers were brought to trial, the judge did not want to use the word “lesbian” at all, and asked the prosecutor if there was an alternative word he could use instead.¹¹⁰ There was no mention of hate crime, and though the judge convicted two out of the five men responsible for her death, on sentencing, he stated that her sexual orientation had “no significance” in her rape or murder.¹¹¹ Simelane’s case was the first of the corrective rape cases to result in conviction, but during sentencing, her killers just laughed.¹¹² Examining the conduct of the actors on both sides of the bench sheds some insight on the insidiousness of the problem. Corrective rape, per Doan-Minh, is “political, systemic, group-based violence.”¹¹³ Laws that are therefore specifically targeted and “politically and morally engaged,” are the appropriate vehicle for large-scale social transformation.

Along this vein, Di Silvio considers the aforementioned horizontal reach of the South African Constitution, submitting that under the 1996 Constitution, the state is under an affirmative duty, and “must prevent, investigate, and punish corrective rape”¹¹⁴ He bases this off a synthesis of the landmark *Carmichele* case and argues that only such imposition of affirmative obligation would allow women like Simelane “to fully and freely exercise their rights and enjoy the premise of a post-apartheid South Africa.”¹¹⁵ He thus proposes bringing

106. *Id.*

107. *Id.* at 153 (emphasis removed).

108. Koraan & Geduld, *supra* note 26, at 1944.

109. Mwambene & Wheal, *supra* note 50, at 62.

110. Victoria A. Brownworth, Op-Ed, *The Other Ex-Gay “Therapy”*, ADVOC. (July 10, 2013), <http://www.advocate.com/commentary/2013/07/10/op-ed-other-ex-gay-therapy> [<https://perma.cc/2GSA-3QMW>].

111. MARTIN ET AL., *supra* note 4, at 11.

112. See Brownworth, *supra* note 110.

113. Doan-Minh, *supra* note 8, at 167.

114. Di Silvio, *supra* note 68, at 1473.

115. *Id.*

a public interest suit against the government, preventatively challenging the constitutionality of the state's failure to protect women at risk of corrective rape.¹¹⁶ This is made feasible by the broad standing rights granted by the Constitution for anyone wishing to bring suit under the Bill of Rights.¹¹⁷ An alternative action, he suggests, would be to bring a delictual claim (similar to negligence under tort law)¹¹⁸ against the state, piggybacking on the *Carmichele* ruling. In *Carmichele*, the court, with due regard to the "spirit, purport and objects of the Bill of Rights" held that the police and prosecuting authority had a constitutional duty to protect the public in general and women in particular from violent crime,¹¹⁹ a duty to prevent harm developed in comport with the Bill of Rights.¹²⁰ Knowledge and foreseeability on the part of the state is one of the factors that would be taken into account in considering the duty on the government to protect women from corrective rape.¹²¹ Given the statistics on violence against women in South Africa, and the specific vulnerability of Black lesbians, Di Silvio argues that one can infer the state's awareness of the pattern of violence against women, and the unique position that it is in to end this violence.¹²² Therefore, with regard to corrective rape, a compelling case can be made that the requirements of *Carmichele* have been triggered.¹²³ Juxtaposed against Klare's theory, Di Silvio's proposals are effectually transformative constitutionalism in action, providing a roadmap for legislating against the state by using the Constitution to argue that the government has not met a sufficient standard of protection for Black lesbians, and thereby demanding more positive action by the state to realize the same.¹²⁴

2. Hate Crime Legislation

According to Breen and Nel, the existing legal framework does not provide sufficient tools to address hate crime.¹²⁵ Hate crimes are "message" crimes that are designed to terrorize the group of people

116. *Id.* at 1499.

117. S. AFR. CONST., 1996 § 38.

118. Di Silvio, *supra* note 68, at 1500.

119. *Carmichele v. Minister of Safety & Security* 2001 (4) SA 938 (CC) ¶¶ 34,62.

120. *Carmichele v. Minister of Safety & Security* 2001 (4) SA 938 (CC) ¶ 33.

121. Di Silvio, *supra* note 68, at 1501–02.

122. *Id.* at 1502.

123. *Id.*

124. *See id.*

125. Duncan Breen & Juan A. Nel, *South Africa—A Home for All?: The Need for Hate Crime Legislation*, 38 S. AFR. CRIME Q. 33, 33 (2011).

who share similar traits to that of the victim.¹²⁶ In the South African context, this terrorization is evident in the results of a survey of Black lesbians, which revealed that a 86% of them “lived in fear of sexual assault.”¹²⁷ As such, hate crimes, as Iganski argues, are distinct from the same underlying crimes because they cause greater harm.¹²⁸ He categorizes these harms as occurring in waves, affecting not just the individual victim, who experiences deep psychological trauma because of being specifically targeted on the basis of immutable innate traits, but also the victim’s close social circle, then the wider victim’s group in the neighborhood, other targeted communities, and finally the larger society.¹²⁹ In a country built on the ideology of the “rainbow nation”—a metaphor for unity among, and acceptance of, all the diverse people in the nation¹³⁰—corrective rape strikes against this core societal value.¹³¹

This extra harm justifies punishment of bias and prejudice motivation behind crimes.¹³² Currently, the South African legal system does not differentiate between acts of violence committed out of prejudice, and other violent acts.¹³³ Therefore, in addition to not criminalizing hate crimes as a substantive criminal offense, South African criminal law also does not expressly require enhanced penalties when a crime is motivated by hate.¹³⁴ The corrective rape of lesbians is thus investigated and prosecuted as ordinary rape, regardless of any perpetrator bias.¹³⁵

In jurisdictions where hate crime legislation exists, corrective rape (and murder committed with a hate/prejudiced motive) would be prosecuted under this law. Naidoo and Karels categorically state that the lack of hate crime legislation is “a further reason for the lack of reliable statistics and quantifiable data on the phenomenon of ‘corrective rape’ and murder of lesbian women in South Africa.”¹³⁶ Mwambene and Brown therefore consider the passing of hate crime laws as critical

126. Goodall & Walters, *supra* note 47, at 13.

127. Annie Kelly, *Raped and Killed for Being a Lesbian: South Africa Ignores ‘Corrective’ Attacks*, GUARDIAN (Mar. 12, 2009), <http://www.theguardian.com/world/2009/mar/12/eudy-simelane-corrective-rape-south-africa> [<https://perma.cc/GQ3F-KGQJ>].

128. Paul Iganski, *Hate Crimes Hurt More*, 45 AM. BEHAV. SCIENTIST 626, 627–28 (2001).

129. *See id.* at 629 fig.1.

130. Valerie Møller, Helga Dickow & Mari Harris, *South Africa’s “Rainbow People”, National Pride and Happiness*, 47 SOC. INDICATORS RSCH. 245, 246 (1999).

131. Iganski, *supra* note 128, at 631.

132. *See id.* at 632.

133. Ines Gontek, *Sexual Violence Against Lesbian Women in South Africa*, OUTLIERS, Spring 2009, at 1, 9 (2009).

134. Koraan & Geduld, *supra* note 26, at 1941.

135. *Id.*

136. Naidoo & Karels, *supra* note 43, at 259.

to turning the tides on this phenomenon.¹³⁷ If corrective rape were to be considered a hate crime and not merely a crime of rape, Mwambene argues that it would be easier to successfully prosecute perpetrators of this offense.¹³⁸ To continue to prosecute it as just rape ignores the underlying prejudice that motivates the crime and as explained earlier, the greater harm generated.¹³⁹ Action Aid further calls for the placing of hate crimes against lesbian and trans women in a specific crime category, bolstered by the requisite resources to ensure investigation, prosecution and conviction.¹⁴⁰ Further, this would shine a much-needed spotlight on corrective rape, and its continued large radius of harm.

However, the framing of such proposed legislation is a key consideration. There are two conflicting schools of thought, based on two models, as to how one ought to approach hate crimes in the criminal justice system.¹⁴¹ The first model is the “hostility model,” which regards hate crimes as crimes motivated by hatred for, or hostility toward, certain protected characteristics (such as race).¹⁴² Conviction based on this model requires evidence of such hatred.¹⁴³ The second model is called the “discriminatory selection model” and is more expansive in its definition of hate crime; whereby a “perpetrator’s deliberate selection of a victim based on . . . [a] protected characteristic would constitute a hate crime.”¹⁴⁴ Under this model, mixed motivation for perpetrating a crime is allowable, and such crimes would still constitute hate crimes.¹⁴⁵ The first school of thought advocates that evidence of hate ought to be presented during the trial in order to prove it was a hate crime, whereas the other contends that such evidence ought only to be presented as an aggravating factor during sentencing.¹⁴⁶ Though making hate an element of the crime may appear logical, women’s advocate Sanja Bornman argues that in practice this is challenging, and creates a heavier evidentiary burden.¹⁴⁷ The second model is thus preferable from an evidentiary standpoint, but also draws criticism for creating perhaps

137. See Mwambene & Wheal, *supra* note 50, at 82; Brown, *supra* note 9, at 63.

138. Mwambene & Wheal, *supra* note 50, at 82.

139. See *id.* at 82–83.

140. See MARTIN ET AL., *supra* note 4, at 17.

141. Mwambene & Wheal, *supra* note 50, at 84.

142. Breen & Nel, *supra* note 125, at 34–35.

143. *Id.* at 35.

144. *Id.*

145. *Id.*

146. See Mwambene & Wheal, *supra* note 50, at 84.

147. Rebecca Davis, *SA’s Gay Hate Crimes: An Epidemic of Violence Less Recognised*, DAILY MAVERICK (June 27, 2012), <https://www.dailymaverick.co.za/article/2012-06-27-sas-gay-hate-crimes-an-epidemic-of-violence-less-recognised> [<https://perma.cc/FT5V-DFVR>].

too wide a berth for defining hate crimes, compared to the hostility model's far narrower parameters. That being said, the discriminatory selection model is also functionally bolstered by the Equality Act, as discussed earlier.¹⁴⁸ This approach was also applied in the *Zoliswa Nkonyana* case—the second conviction on the corrective rape and/or murder of a Black lesbian—where the presiding judge named and recognized sexual orientation as an aggravating factor, after a guilty verdict had been entered.¹⁴⁹

As discussed in Part I, the dissonance between reporting and convictions is a large part of the problem, and with the lower threshold of culpability established by the discriminatory selection model, more convictions can be secured, while also guaranteeing enhanced punishment when hate is proven during sentencing. Regardless, Bornman emphasizes that “[w]hether an element of the crime, or an aggravating factor, it is critical to have the hate element exposed and interrogated in open court.”¹⁵⁰

In further contemplation of such legislation, Brown suggests another crucial component: that there must be specific sanctions for state agents, such as police officers and prosecutors, who fail to carry out such hate crime legislation in good faith.¹⁵¹ This is in order to guarantee that the law is enforced to its fullest extent when possible.¹⁵² He proposes a “reasonable professional standard” to determine whether a state agent acted in good faith, and asserts that the consequent penalties will prevent authorities from “allowing . . . friends . . . [and] colleagues to go unpunished.”¹⁵³

III. ANCHORING CHANGE IN SOCIETAL TRANSFORMATION: A CROSS-DISCIPLINARY APPROACH

In 1999, with the post-apartheid “new” South Africa only five years old, a media campaign on gender-based violence featuring South African actress Charlize Theron was broadcast on TV and in some commercial cinemas.¹⁵⁴ This was the first time in the history

148. See Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, *supra* note 83, at 28(1).

149. See *South Africa Lesbian Zoliswa Nkonyana's Killers Sentenced*, HUFFINGTON POST (Feb. 1, 2012, 4:34 PM), https://www.huffpost.com/entry/south-africa-zoliswa-nkonyana-lesbian-killed-sentencing_n_1247320 [<https://perma.cc/WQ8A-BCTN>].

150. Davis, *supra* note 147.

151. Brown, *supra* note 9, at 64.

152. *Id.*

153. *Id.* It is also important to note that whereas the resounding position with regards to corrective rape is pro-hate crime legislation, such legislation is not without its problems, including, for example, that it assesses mens rea through a moral judgement lens.

154. Moffett, *supra* note 33, at 132.

of anti-rape campaigns in South Africa that rapists or potential rapists had been directly addressed; prior to this, campaigns addressed potential victims only, by, for example, telling women to avoid “dark alleys” and “short skirts.”¹⁵⁵ The campaign drew overwhelming backlash for being “offensive to South African men”¹⁵⁶ by stereotyping them as “either being involved in rape or being complacent about it”¹⁵⁷ and was subsequently banned, never airing again. As Moffett observes, the Theron ad campaign had “all the markers of a South African society transformed not only in racial but gender terms, reflecting the constitutional enshrinement of equality for all.”¹⁵⁸ This led to a flawed assumption that “this amounted to a socially endorsed and cohesive view that, in such a society, women should not be raped, and men should be held responsible for their acts of violence.”¹⁵⁹ Gontek describes this disparity as a “[f]ield of [t]ension between [the] [l]iberal Constitution and [s]ocially [s]anctioned [g]ender [r]elations.”¹⁶⁰ Understanding therefore that corrective rape is a complex phenomenon requiring the application of a multifaceted strategy, this penultimate third section begins by disinterring and investigating the root causes of homophobia, gender-based violence and systemic racism in South Africa, which have cultivated and facilitated this epidemic. With the goal of understanding how to engineer a change in social attitudes, this is then followed by an exploration of two social interventions that aimed to achieve a shift in socio-cultural norms.

A. Identifying Root Causes of Homophobia, Gender-Based Violence and Systemic Racism in South Africa

1. “Deviant” Desire, Lesbian Masculinities & Sexual Violence: Of Patriarchy, Heteronormativity and Related Concepts

Patriarchy is a social system set up to “promote male privilege by being male dominated, male identified and male centered.”¹⁶¹ In its wider definition, patriarchy means the “manifestation and institutionalization of male dominance over women and children in the

155. *Id.*

156. *Id.* at 132.

157. *Id.* (quoting W. Johnson, *Are Whites (and Men) Ready for Democracy?* 14 (2003) (unpublished paper) (presented at the Centre for African Studies at the University of Cape Town)).

158. *Id.* at 133.

159. *Id.*

160. Gontek, *supra* note 133, at 2 (emphasis removed).

161. ALLAN G. JOHNSON, *THE GENDER KNOT: UNRAVELING OUR PATRIARCHAL LEGACY* 5 (Temple Univ. Press 2005) (arguing that in order to maintain power relations, this society is “organized around an obsession with control and involves as one of its key aspects[,] the oppression of women”) (emphasis removed).

family and the extension of male dominance over women in society in general.”¹⁶² This ideology of superiority and dominance is so powerful, and is so ably reinforced by institutions such as the church, the family and school, that women are convinced of, and consent to, their own oppression.¹⁶³ Under this system, “women’s labour [sic] power, women’s reproduction, women’s sexuality, women’s mobility and property and other economic resources—are under patriarchal control.”¹⁶⁴

Heteronormativity and heterosexism are closely related to patriarchy.¹⁶⁵ The former is predicated on a consistent pairing of men with women, assigning specific gender roles, wherein women are subordinate to men, and rules to each sex,¹⁶⁶ including the demarcation of women’s bodies as male property.¹⁶⁷ The latter embodies the belief that one way of loving is superior to all others.¹⁶⁸ Under this framework, “sexuality has often been regarded as a source of male power and female oppression,”¹⁶⁹ and rape in general,¹⁷⁰ is the “violent instantiation of a patriarchal logic within which women’s bodies are not their own.”¹⁷¹

Central to this discourse is heterosexuality, whose definition may appear deceptively simple but is the fulcrum on which this system turns: attraction for the opposite sex, but also, an attraction for the opposite gender as well.¹⁷² This distinction arises from the understanding that sex is biologically intractable and gender is culturally and socially constructed.¹⁷³ Accordingly, the importance of heterosexual desire and its practices is to regulate gender as a

162. Abeda Sultana, *Patriarchy and Women’s Subordination: A Theoretical Analysis*, 4 ARTS FAC. J. 1, 3 (2012).

163. *Id.*

164. *Id.* (quoting SYLVIA WALBY, *THEORIZING PATRIARCHY* 20 (Wiley-Blackwell ed. 1990)).

165. See SYLVIA WALBY, *THEORIZING PATRIARCHY* 127 (Wiley-Blackwell ed. 1990).

166. See Heather Oesterreich, “Outing” *Social Justice: Transforming Civic Education Within the Challenges of Heteronormativity, Heterosexism, and Homophobia*, 30 THEORY & RSCH. SOC. EDUC. 287, 288–89 (2002) (arguing that consequently, heteronormativity limits full participation in democratic society by individuals who fail to conform, for example getting married, having children, and contributing in the workforce).

167. Mwambene & Wheal, *supra* note 50, at 58.

168. Oesterreich, *supra* note 166, at 288.

169. Renu Khanna & Janet Price, *Female Sexuality, Regulation & Resistance*, in POPULATION AND REPRODUCTIVE RIGHTS 29, 34 (Caroline Sweetman & Kate de Selincourt eds., 1996).

170. Larry Baron & Murray A. Straus, *Four Theories of Rape: A Macrosociological Analysis*, 34 SOC. PROBS. 467, 467 (1987) (arguing feminist theory positions rape as a “function[] . . . of social control in patriarchal societies”).

171. Madhumita Lahiri, *Crimes and Corrections: Bride Burners, Corrective Rapists, and Other Black Misogynists*, 15 FEMINIST AFR. 121, 129–30 (2011).

172. Jimmie Manning, *Heterosexuality*, in ENCYCLOPEDIA OF GENDER AND SOCIETY 413, 413 (Jodi O’Brien ed., 2009).

173. See Judith Butler, *Performative Acts and Gender Constitution: An Essay in Phenomenology and Feminist Theory*, 40 THEATRE J. 519, 522 (1988).

binary relation, differentiating the masculine from the feminine.¹⁷⁴ Heterosexuality can thus both be defined as a “sexual or relational identity (belonging to individuals or groups) and also as a social institution (which structures daily life).”¹⁷⁵ Heterosexist discourse pathologizes homosexuality and attaches perversion to same-sex relationships,¹⁷⁶ normalizing hate and prejudiced behavior toward queer individuals (homophobia).¹⁷⁷ Lesbianism is thus perceived as a threat to patriarchy and heteronormativity, evidenced by the increased risk faced by masculine-presenting “butch” women.¹⁷⁸

As Sanger posits, “this violence should be understood as centrally located within heteronormative values,”¹⁷⁹ because lesbians often challenge gender expectations through their sexuality as well as their expression of masculinity.¹⁸⁰ In South Africa, this means increased visibility within their communities, which in turn puts them in grave danger; the men perceive them as “both threatening and unavailable” which often results in corrective rape and physical attacks.¹⁸¹ At their core, these acts are punitive and “corrective” because lesbians, by their very existence, undermine “monolithic notions of masculinity,” and heteronormativity, by resisting the demarcation of their bodies as male property.¹⁸² Equally important but less explored, lesbians expose the vulnerabilities of male masculinities, since “putatively successful masculinity depends on men’s need to control women and force them to follow gendered conventions of heterosexual conduct.”¹⁸³

At the intersection of discourse on masculinity and violence pertinent to understanding corrective rape, is Kimmel’s insightful observation that “violence is often the single most evident marker of manhood.”¹⁸⁴ Men often default to violence when they feel that

174. See JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 31 (Routledge 1990).

175. Panteá Farvid, *Heterosexuality*, in *THE PALGRAVE HANDBOOK OF THE PSYCHOLOGY OF SEXUALITY AND GENDER* 92, 92 (Christina Richards & Meg John Barker eds., 2015).

176. Wells & Polders, *supra* note 15, at 21.

177. See *id.*

178. See Mufweba, *supra* note 12. For Zanele Muholi’s research where 24 out of 33 participants who were either corrective rape survivors or who had been subjected to other related hate crimes were masculine presenting, see *id.*

179. Nadia Sanger, *The Real Problems Need to Be Fixed First: Public Discourses on Sexuality and Gender in South Africa*, *AGENDA*, 2010, at 114.

180. Amanda Lock Swarr, *Paradoxes of Butchness: Lesbian Masculinities and Sexual Violence in Contemporary South Africa*, 37 *J. WOMEN CULTURE & SOC’Y* 961, 962 (2012).

181. *Id.*

182. *Id.*

183. *Id.*

184. MICHAEL S. KIMMEL, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, in *THEORIZING MASCULINITIES* 119, 132 (Harry Brod & Michael Kaufman eds., 1994) (ebook).

their power or privilege are challenged or under threat.¹⁸⁵ Violence as an appropriate response to this transgression of norms is legitimized by South Africa's history, the culture, and norms of acceptance.¹⁸⁶ Ultimately, homophobic violence, and in this specific context violence against lesbians, is driven by a fundamental "fear of deviance from normative masculinities."¹⁸⁷ The lesbian body is a "body out of control in a heteropatriarchal sense,"¹⁸⁸ and corrective rape is a drastic, violent "attempt to bring these bodies back under the control" of the heteropatriarchal society.¹⁸⁹

2. Aggression, Emasculation & Control: Of Apartheid, Colonization & African Culture

While the egregious regime of white imperialism and racial segregation that was apartheid may have come to an end, its legacy continues to color the South African landscape, especially as regards to racialized violence against women.¹⁹⁰ The current rape crisis, as Anderson argued, was facilitated by apartheid's cruel history.¹⁹¹ Race as a socio-cultural, economic and political concept was created by apartheid as a mechanism of violence.¹⁹² Through it, operated repression and violence and racism was "institutionalised, legalised and internalised."¹⁹³ Before apartheid, slavery and colonialism laid the foundation upon which apartheid would build.¹⁹⁴ Both were rooted in the violation of, and violence against, Black bodies; the "tearing apart of families," "the negation of some lives," for example, people who dared to resist, non-able-bodied persons, and "the ingraining of self-hate."¹⁹⁵

The white minority government's response to pro-democracy political organizing was "repressive, excessive and indiscriminately violent,"¹⁹⁶ and ultimately fostered a culture of violence in the country,

185. Thabo Msibi, *Not Crossing the Line: Masculinities and Homophobic Violence in South Africa*, AGENDA, 2009, at 50, 52.

186. Gontek, *supra* note 133.

187. Msibi, *supra* note 185, at 53.

188. Doan-Minh, *supra* note 8, at 170.

189. *Id.*

190. Di Silvio, *supra* note 68, at 1475.

191. Michelle J. Anderson, *Rape in South Africa*, 1 GEO. J. GENDER & L. 789, 790 (1999).

192. Bronwyn Harris, *Arranging Prejudice: Exploring Hate Crime in Post-Apartheid South Africa*, CTR. STUDY VIOLENCE & RECONCILIATION (2004), <http://csvr.org.za/docs/racism/arrangingprejudice.pdf> [https://perma.cc/QCG8-WFUQ].

193. *Id.*

194. J.F. Ade Ajayi, *Unfinished Business: Confronting the Legacies of Slavery and Colonialism in Africa*, SEPHIS & CSSSC, 2002, at 17.

195. PUMLA DINEO GQOLA, *Ruling Violence*, in RAPE: A SOUTH AFRICAN NIGHTMARE 54, 60 (2015).

196. Anderson, *supra* note 191, at 790–91.

normalizing and legitimizing it in both the public and private sphere.¹⁹⁷ For example, children who ran away from security forces or who dared to throw stones at armored vehicles were shot on sight.¹⁹⁸ Penning down what he had observed in 1992, South African writer Allister Sparks stated:

Neither these police nor any others I have seen in similar situations in South Africa carried riot shields or batons the way crowd controllers do everywhere else in the world. They wore camouflage battle dress and carried only lethal weapons—12-gauge shotguns loaded with buckshot and submachine guns. It meant shooting was their first, not their last, resort in case of trouble.¹⁹⁹

Beyond employing it themselves, the South African government also sanctioned the use of violence, in order to obtain and maintain control.²⁰⁰ Due to “enforced conscription that helped prop up” the apartheid state, the government ensured that white South Africans were heavily armed.²⁰¹ However, apartheid capitalized not only “on the physical violence of contestation,” but also on structural economic violence; Black people were systematically brutalized “through various forms of impoverishment, displacement, disenfranchisement and military occupation. . . .”²⁰² Children were therefore socialized into societies that had violence interwoven into their very fabric.²⁰³ Thus, the failure to dismantle what Cock refers to as the “ideology of militarism”²⁰⁴ which “regards violence as a legitimate solution to conflict and a crucial means of obtaining and defending power”²⁰⁵ in a new South Africa is, Gqola asserts, “directly implicated in what ails post-apartheid South Africa.”²⁰⁶

Not only was the apartheid state violent in its bones, but it was also defined at its core by antagonistic social identities.²⁰⁷ These

197. *Id.* at 791.

198. See LAWS, COMM. HUM. RTS., *THE WAR AGAINST CHILDREN: SOUTH AFRICA'S YOUNGEST VICTIMS*, 5 (Dec. 1986), <https://projects.kora.matrix.msu.edu/files/210-808-4338/ESLLCHR12-86opt.pdf> [<https://perma.cc/QK8M-7N27>].

199. *Relating to Ongoing Violence Connected with Apartheid in S. Afr.: Hearing on H.R. 497 Before the Subcomm. On Afr. of Comm. on Foreign Affs.*, 102d Cong. 77 (1992) (Opinion Editorial of Allister Sparks).

200. Brown, *supra* note 9, at 50.

201. GQOLA, *supra* note 195, at 60.

202. *Id.*

203. *Id.*

204. JACKLYN COCK, *Light Weapons Proliferation: The Link Between Security and Development*, in *FROM DEFENCE TO DEVELOPMENT: REDIRECTING MILITARY RESOURCES IN SOUTH AFRICA* 122, 127 (Jacklyn Cock & Penny Mckenzie eds., 1998) (ebook).

205. *Id.*

206. GQOLA, *supra* note 195, at 60.

207. See Nevin T. Aiken, *Post-Conflict Peacebuilding and the Politics of Identity: Insights*

were based not only in the obvious racial identities, but also functioning in contrast to and in concert with, the gendered dimension.²⁰⁸ To both Black men and Black women, apartheid applied a policy of rendering “adult Africans as designated boys and girls, legally and economically infantilized.”²⁰⁹ This was perceived as an attack on African male masculinity and “left deep seated feelings of aggression.”²¹⁰ Traditional male masculinity, which was conceptualized as independence and autonomy, was challenged reprehensively through the consistent “policing and surveillance of [B]lack men’s daily lives and the violent assertion of state authority in demeaning ways.”²¹¹ The emasculation of Black men took many forms, and resulted in—as Matshoba writes of himself—“that component of me which is man has died countless times in one lifetime.”²¹² The aim of the state, through its “calculated and specific assertion of . . . authority,” was to deny Black men the ability to manifest their masculinity “as protectors and economic providers.”²¹³ Masculinities were also framed in relation to and dependent on women: whether in labeling African men as “hypersexual, innately lascivious, sexually violent and physically strong”²¹⁴ or in meting out punishment to men through the subjugation and dehumanization of African women.²¹⁵

Meanwhile, Black women were impacted very specifically by this authoritarian regime: coupled with colonization, apartheid ravaged and depleted the democratic strength remaining in African traditions, emphasizing “vertical power and patriarchy” and leaving African women in what Romany describes as the “pitiless zone where the different patriarchies meet.”²¹⁶ On the one hand, apartheid’s laws and system of migrant labor “devastated [B]lack women’s everyday lives,” making decent work of depriving them of companionship and support and rending their families,²¹⁷ while its enforcers used the

for *Restoration and Reconciliation in Transitional Justice*, 40 CAN. J. PEACE & CONFLICT STUD. 9, 17 (2008).

208. See Linzi Manicom, *Ruling Relations: Rethinking State and Gender in South African History*, 33 J. AFR. HIST. 441, 442 (1992).

209. Tameshnie Deane, *Sexual Violence and the Limits of Laws’ Powers to Alter Behaviour: The Case of South Africa*, 19 J. INT’L WOMEN’S STUD. 84, 88 (2018).

210. *Id.*

211. Swarr, *supra* note 180, at 964.

212. MTUTUZELI MATSHOBA, *CALL ME NOT A MAN AND OTHER STORIES* 18 (1979).

213. Swarr, *supra* note 180, at 964.

214. *Id.* at 964–65.

215. See MATSHOBA, *supra* note 212, at 18 (describing as part of the demeaning treatment of Black men that “sometimes calling my sisters into the game to get amorous with my captors, allowing myself to be slapped on the mouth in front of my womenfolk and getting sworn at with my mother’s private parts[.]”).

216. Celina Romany, *Black Women and Gender Equality in a New South Africa: Human Rights Law and the Intersection of Race and Gender*, 21 BROOK. J. INT’L L. 857, 865 (1996).

217. *Id.*

threat of, and actual, sexual violence as a tool of political control.²¹⁸ On the other hand, the driving of violence into intimate and domestic spaces, perceived by Black males as a way to reassert their masculinities in areas where they still had power,²¹⁹ led to the proliferation of sexual violence against Black women in their homes.²²⁰ Resultantly, rape statistics escalated exponentially but went unaddressed.²²¹ Additionally, the police apparatus, created for the protection of whites on the one hand, and the control and neglect of Blacks on the other, meant that violence against women in the isolated, poor, repressive townships (ergo Black women) went unchecked and uninvestigated.²²² Permitting violence in the townships, as Di Silvio argues, was also in part due to the fact that “reports of violence fueled pro-segregation sentiments, an important underpinning of apartheid.”²²³ Today, the criminal justice system is not faring much better: victims, who are predominantly from the townships, are often too scared to report anti-gay hate crimes, especially if they are Black or womxn.²²⁴ This is at least partially attributable, according to Wells’ study, to the racialized schism in experiences with police, which is disproportionately negative amongst Blacks.²²⁵ For those that do, they are subject to secondary victimization by the police—their testimonials are rife with narratives of violence peppered with homophobia, such as being told that “[t]hey are raping you because you act as a man.”²²⁶

Social relations, down to the nuclear family unit, were constructed to comply with apartheid’s white-centric rubric: aversion to racial integration was closely linked to the “preservation of the white, heterosexual reproductive family.”²²⁷ However, this centering of whiteness also made space for, and extended to homosexual desire, wherein white male homosexuality was presented as normal and

218. Anderson, *supra* note 191, at 791.

219. Maurice Dunański, *Gender-Based Violence in South Africa: A Crisis of Masculinity?*, E-INT’L RELS. (Apr. 27, 2013), <https://www.e-ir.info/2013/04/27/gender-based-violence-in-south-africa-a-crisis-of-masculinity> [<https://perma.cc/MAT4-VYVW>].

220. Moffett, *supra* note 33, at 139.

221. Sue Armstrong, *Rape in South Africa: An Invisible Part of Apartheid’s Legacy*, FOCUS ON GENDER, 1994, at 35.

222. Di Silvio, *supra* note 68, at 1476.

223. *Id.*

224. See Wells & Polders, *supra* note 15, at 27.

225. See *id.* at 26–27.

226. HUMAN RIGHTS WATCH, “WE’LL SHOW YOU YOU’RE A WOMAN:” VIOLENCE AND DISCRIMINATION AGAINST BLACK LESBIANS AND TRANSGENDER MEN IN SOUTH AFRICA 47 (2011), https://www.hrw.org/reports/southafrica1211ForUpload_0.pdf [<https://perma.cc/ZQK6-HZLY>].

227. Megan E. Morrissey, *Rape as a Weapon of Hate: Discursive Constructions and Material Consequences of Black Lesbianism in South Africa*, 36 WOMEN’S STUD. COMM’N 72, 75 (2013).

acceptable in South African society.²²⁸ A direct response, then, following emancipation from the oppressive racial regime, was a construction of heterosexuality as a “*natural* South African characteristic,”²²⁹ and the cultural acceptance of homosexuality solely as the province of whiteness.²³⁰ Bajaha terms this phenomenon “post-colonial amnesia”²³¹—a choice to ignore the proven existence and acceptance of homosexuality on the African continent long before colonization and Western influence.²³² This amnesia is propped up by colonial and post-colonial evangelizing.²³³ Since culture determines acceptable behavior and identities, the entrenched “homosexuality is un-African” ideology is particularly harmful, further marginalizing Black queer identities.²³⁴ Speaking specifically to the situation of Black lesbians, cultural rhetoric has for decades been filled with accusations that they are “betraying their traditional roles as bearers and reproducers of cultural traditions.”²³⁵ During apartheid, lesbians remained largely invisible to the state government, because they were assumed to be far fewer compared to homosexual men.²³⁶ Today, the visibility of African lesbians, facilitated in part by a protective Constitution, has acquired, according to Currier and Migraine-George, “a punitive quality.”²³⁷ This is bolstered by the “cultural valorization of corrective rape,”²³⁸ further entrenching the normalization of this form of violence in South African society. As Deane aptly puts it, corrective rape is viewed as a “‘rite of passage’ back into African culture,”²³⁹ and thus acceptable as it fulfills the role of bringing these womxn back to their “‘proper’ role in society.”²⁴⁰

The complex interplay between African culture, and the legacy of apartheid and colonization, birthed hierarchical social stratifications, violent masculinities, pernicious heteronormative underpinnings of

228. *See id.*

229. *Id.* (emphasis added).

230. *Id.* at 75–76.

231. Binta Bajaha, *Postcolonial Amnesia: The Construction of Homosexuality as ‘un-African’* 18 (unpublished working paper) (on file with London School of Economics and Political Science, Dep’t of Gender Stud.), <http://www.lse.ac.uk/gender/assets/documents/research/graduate-working-papers/Postcolonial-Amnesia.pdf> [<https://perma.cc/JTL3-W26A>].

232. *See* RUTH MORGAN & SASKIA WIERINGA, TOMMY BOYS, LESBIAN MEN AND ANCESTRAL WIVES: FEMALE SAME-SEX PRACTICES IN AFRICA, at 17 (2005) (ebook).

233. Brown, *supra* note 9, at 51.

234. Finn Reygan & Ashley Lynette, *Heteronormativity, Homophobia and “Culture” Arguments in KwaZulu-Natal, South Africa*, 17 *SEXUALITIES* 707, 708 (2014).

235. Ashley Currier & Thérèse Migraine-George, “Lesbian”/Female Same-Sex Sexualities in Africa, 21 *J. LESBIAN STUD.* 133, 143 (2017).

236. *Id.*

237. *Id.*

238. Morrissey, *supra* note 227, at 74.

239. Deane, *supra* note 209, at 89–90.

240. *Id.* at 90.

social relations, vitriolic patriarchal imperatives, repressive silence, elusive justice and stifling poverty, amidst other outcomes, that have, and continue to, determine the fate of Black lesbians in South Africa.

B. Social Interventions and Their Impact: Assimilating Public Health Strategies

1. Education-Entertainment as a Powerful Force for Change

To successfully tackle corrective rape, disrupting heteronormativity and the violent, hierarchical masculinities it breeds in the South African context, is mandatory. This is part of the huge project that is the dismantling of patriarchies globally.²⁴¹ Education is paramount to such disruption. Over the last couple of decades, the use of education-entertainment (edutainment or infotainment) has emerged as an effective intervention in tackling various socio-political problems.²⁴² In South Africa, the television and radio entertainment program “Soul City” that airs weekly, has been extremely successful at addressing intimate partner violence and was labelled a “transformative force” due to the change in thinking, cultural and social norms that it instigated.²⁴³ In fact, it is the most well-developed and studied edutainment program targeting gender norms,²⁴⁴ and as such its impact has been widely measured and analyzed. An initiative of the non-profit organization Soul City Institute for Health and Development Communication, the core of Soul City’s strategy is “harnessing popular culture and communication to bring about social change.”²⁴⁵ One particular storyline centering around the character of a well-respected teacher who chronically abused his wife was pivotal, highlighting the initial reactions from the community and her family and the subsequent progressive shift in perceptions around the abuse, from being in favor of the teacher to expressing support and protection of the wife.²⁴⁶ Soul City targets what are known as

241. Moffett, *supra* note 33, at 144.

242. See Viola Milton, *Edutainment Television Programmes: Tackling HIV/AIDS on the South African Broadcasting Corporation*, in HEALTH COMMUNICATION IN SOUTHERN AFRICA: ENGAGING WITH SOCIAL AND CULTURAL DIVERSITY 113, 115 (Luuk Lagerwerf, Henk Boer & Herman Wasserman eds., 2009).

243. Phillip Birch & Irena Colakova Veljanova, *Raising Awareness, Improving Victim Safety*, in THE ROUTLEDGE INTERNATIONAL HANDBOOK OF HUMAN AGGRESSION: CURRENT ISSUES AND PERSPECTIVES 238, 242 (Jane L. Ireland, Philip Birch & Carol A. Ireland eds., 2018).

244. ELIZABETH LEVY PALUCK, LAURIE BALL, CHLOE POYNTON & SARAH SIELOFF, INT’L RESCUE COMM., SOCIAL NORMS MARKETING AIMED AT GENDER BASED VIOLENCE: A LITERATURE REVIEW AND CRITICAL ASSESSMENT 22 (2010).

245. World Health Organization, “*Edutainment*” in South Africa: A Force for Change in Health, 87 BULL WORLD HEALTH ORGAN. 578, 578 (2009).

246. *Soul City: A Strategy for Small-Screen Education*, SOUTH AFRICAN INSTITUTE OF

injunctive norms, a person's belief about what others will look at with approval or disapproval,²⁴⁷ by portraying neighbors who disapprove of a man who abuses his wife,²⁴⁸ thereby communicating the notion that domestic violence or interpersonal violence (IPV) should not be acceptable in such a community.²⁴⁹ It also seeks to replace old norms with new ones, by "modeling desirable community responses to domestic violence."²⁵⁰ For example, the neighbors begin to disapprove vocally of the teacher's abusive behavior by banging pots and pans outside his door.²⁵¹ The show also utilizes key characters to erode harmful descriptive norms, one's belief about how others will behave such as the normalcy of domestic abuse.²⁵²

Media-stimulated change has been studied extensively in India, including through an impact analysis of a radio soap opera which challenged casteism.²⁵³ Here, there is a distinction between first- and second-order social change.²⁵⁴ First-order change "occurs within the given system which itself remains unchanged,"²⁵⁵ while second-order change is changing the system itself.²⁵⁶ The latter traverses behavioral modification to encompass a change in values—a value modification.²⁵⁷ For value modification to occur, several conditions must be met. First, audience members must be introduced to new stories that resonate with their own realities,²⁵⁸ which prompts them to reflect on the characters' actions, helping them to identify behavioral alternatives in their lives.²⁵⁹ These stories must "embody dramatically different solutions to old problems,"²⁶⁰ and these solutions must be comprised of techniques that deal with the "here and now"

INTERNATIONAL AFFAIRS (Apr. 24, 2008), <https://saiaa.org.za/research/soul-city-a-strategy-for-small-screen-education> [<https://perma.cc/GM5N-799Q>].

247. Beniamino Cislighi, Elaine K. Denny, Mady Cissé, Penda Gueye, Binita Shrestha, Prabin Nanicha Shrestha, Gemma Ferguson, Claire Hughes & Cari Jo Clark, *Changing Social Norms: The Importance of "Organized Diffusion" for Scaling Up Community Health Promotion and Women Empowerment Interventions*, 20 PREVENTION SCI. 936, 937 (2019).

248. PALUCK ET AL., *supra* note 244, at 23.

249. *Id.*

250. *Id.*

251. *Id.*

252. Cislighi et al., *supra* note 247, at 937; PALUCK ET AL., *supra* note 244, at 24.

253. Arvind Singhal, Nagesh Rao & Saumya Pant, *Entertainment-Education and Possibilities for Second-Order Social Change*, 1 J. CREATIVE COMMUN. 267, 269–70 (2006).

254. *Id.* at 271.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.* at 273.

259. Michael J. Papa, Arvind Singhal, Sweetie Law, Saumya Pant, Suruchi Sood, Everett M. Rogers & Corinne L. Shefner-Rogers, *Entertainment-Education and Social Change: An Analysis of Parasocial Interaction, Social Learning, Collective Efficacy, and Paradoxical Communication*, 50 J. COMMUN. 31, 34 (2000).

260. Singhal et al., *supra* note 253, at 273.

to effect a change.²⁶¹ However, learning new behaviors through media is merely the first step; clarifying any fears or doubts about enacting the new behavior is crucial to their seamless introduction into the social context.²⁶² This is best addressed through collective efficacy because such change is “embedded within a network of social influences.”²⁶³ Collective efficacy is rooted in the belief that as a group, individuals can execute actions geared toward joint goals.²⁶⁴ Discussions among audience members regarding the media content bolster their will to act collectively.²⁶⁵ Afterward, a new “critical action” must be introduced that “reframes an existing reality.”²⁶⁶ For example, the banging of pots by neighbors in Soul City inspired a neighborhood in a local township to intervene in a domestic abuse situation, which within a year spread to other neighborhoods across the country.²⁶⁷ Once a second-order change has gained legitimacy in any social setting, “amplification” occurs.²⁶⁸ This involves the spread of that norm to a different setting through a natural modification. For example, disapproval of intimate partner violence outside the home, for example at a bar, may take the form of banging bottles as opposed to pots and pans.²⁶⁹ Eventually, amplification leads to the normalization of new “values, norms and actions” in a society.²⁷⁰

However, social change is non-linear and rather proceeds in a circuitous manner.²⁷¹ Individuals may develop collective efficacy but jointly devise an ineffective solution.²⁷² Further, there may be community resistance to new behaviors.²⁷³ Additionally, power and power distributions mediate the extent to which one can overcome restrictions to change, and where one is situated in a social system, is determinative of how and to what extent one can resist and subvert the system.²⁷⁴ Scholars emphasize that this is a complex interplay and encourage further study of the same.

Applied to socio-cultural attitudes on lesbianism and corrective rape in local communities in South Africa, edutainment appears to

261. PAUL WATZLAWICK, JOHN WEAKLAND & RICHARD FISCH, *CHANGE: PRINCIPLES OF PROBLEM FORMATION AND PROBLEM RESOLUTION* 83 (Reprint edition, W. W. Norton & Company 2011).

262. Singhal et al., *supra* note 253, at 273.

263. Papa et al., *supra* note 259, at 36.

264. Singhal et al., *supra* note 253, at 273.

265. *Id.* at 274.

266. *Id.*

267. *Id.*

268. *Id.*

269. *Id.*

270. Singhal et al., *supra* note 253, at 274.

271. Papa et al., *supra* note 259, at 37.

272. *Id.*

273. *Id.*

274. *Id.*

hold the potential to instigate second-order social change. By targeting injunctive norms around homophobia and gender-based violence—for example by portraying an accepting community that is welcoming of visibly “out” lesbians—and challenging harmful prescriptive norms such as the banality and frequency of corrective rape especially of masculine presenting “butch” lesbians, or the “un-African” nature of homosexuality, South Africans can begin to challenge their biases and prejudices. New injunctive norms can then replace old norms, for example by assigning a protective role to community members who carry out citizens’ arrests of known perpetrators, corroborate survivors’ testimonies and fundamentally denounce bigotry.

2. Shifting Community Discourse Through “Organized Diffusion”

Despite education being a powerful avenue for change, Nel argues that it is insufficient, and he instead advocates for “community rhetoric disruption” aimed at tackling intolerance present in communities.²⁷⁵ Such interventions have been analyzed by global health experts with regard to changing social norms in order to improve health outcomes in communities.²⁷⁶ An effective tool that is widely accepted is community discussions where “members of the same group identify local harmful practices and the norms that sustain them, eventually renegotiating both to achieve greater health, well-being, and empowerment for themselves and others in their group.”²⁷⁷ However, community dialogues are limited in reach, due to their resource and labor-intensive nature.²⁷⁸ As a modification, some argue for “organized diffusion.”²⁷⁹ Here, program participants, encouraged by health practitioners, lead the sharing of knowledge with non-participants such that discussions are diffused further and wider in communities.²⁸⁰ This aligns with Lundgren’s emphasis on stakeholder engagement as critical to successfully scaling up change.²⁸¹ Mackie and LeJeune identified six phases in the knowledge diffusion process,²⁸² which have been summarized as follows:

275. Mitchell & Nel, *supra* note 46, at 24.

276. *See id.* at 5.

277. Cislighi et al., *supra* note 247, at 936.

278. *Id.* at 937.

279. *See, e.g., id.*

280. *Id.*

281. NAT’L ACAD. SCI., ENG’G, & MED., ADDRESSING THE SOCIAL AND CULTURAL NORMS THAT UNDERLIE THE ACCEPTANCE OF VIOLENCE: PROCEEDINGS OF A WORKSHOP—IN BRIEF 3 (2018) [hereinafter SOCIAL & CULTURAL NORMS].

282. GERRY MACKIE & JOHN LEJEUNE, SOCIAL DYNAMICS OF ABANDONMENT OF HARMFUL PRACTICES: A NEW LOOK AT THE THEORY 12–14 (2009).

Phase one includes the discussions happening before the program, as rumors about the intervention generate curiosity. Phase two refers to the creation of the new knowledge with a selected group of participants. In phase three, participants share their knowledge with one 'adopted' member in their community: usually a family member with whom they discuss what was interesting to them during project activities that day. Then, in phases four to six, information spreads out from the intervention community to new communities, eventually reaching people across the entire larger group (ethnic group, region, or country).²⁸³

Applying this theory to three interventions mostly focused on violence against women, Cislighi et al. demonstrate the potential for organized diffusion, finding that it did indeed increase the positive changes in behaviors which were sustained by social norms that were harmful.²⁸⁴ For example, findings from one of the interventions showed that "[l]iving in a high diffusion community was associated with greater odds of assisting a survivor. . . ."²⁸⁵ The efficacy of organized diffusion rests on communication; for the listener's opinions to be affected, the speaker needs to tailor an appropriate message.²⁸⁶ Diffusion is facilitated better when the parties know each other well, for example a spouse or neighbor.²⁸⁷ Additionally, "a core group of motivated activists" who can increase awareness of individual and collective dissatisfaction of the status quo is crucial.²⁸⁸ As more people are reached in the community, conversations generate new visions of a transformed status quo, and this in turn strengthens the collective will to address the dissatisfaction.²⁸⁹ The success of diffusion is also predicated on participants being properly equipped with the skills and knowledge to engage others in their network of transformative conversations.²⁹⁰

The effectiveness of organized diffusion is supported by research findings that "community-level norm change holds great promise for substantially reducing the perpetration of interpersonal violence (IPV) in low-resource settings,"²⁹¹ and that "community norms have a significant role in mediating violence."²⁹² Transposing these findings

283. Cislighi et al., *supra* note 247, at 937.

284. *Id.* at 944.

285. *Id.* at 941.

286. *Id.* at 943.

287. *Id.* at 944.

288. *Id.*

289. *See* Cislighi et al., *supra* note 247, at 944.

290. *Id.*

291. SOCIAL AND CULTURAL NORMS, *supra* note 281, at 2.

292. *Id.*

to corrective rape, community interventions in the impoverished townships—which have the worst rates of hate crimes against lesbians—may benefit greatly from incorporating not only community dialogues but also organized diffusion. This would mean participants cultivating increased accountability of community members they influence, and challenging them to protect lesbians in their neighborhoods, moving toward zero tolerance of corrective rape.

CONCLUSION

Corrective rape is not a novel phenomenon. While the term was coined in 2008, reports citing the existence of this particular form of targeted, abhorrent violence emerged as early as 2006 and had likely begun much earlier. The definition of corrective rape has evolved since, and broadly encompasses two key features, *viz*: a corrective or curative element, and a component of hate or prejudice that determines who is targeted by a perpetrator, and why. Corrective rape is therefore best described as such: a hate crime entailing the rape of any member of a group that does not conform to gender or sexual orientation norms where the motive of the perpetrator is to “correct” the individual, fundamentally combining gender-based violence and homophobic violence. In the South African context, these biases intersect with systemic racism, producing a disproportionate impact on Black, queer, womxn. This Article strives to reconcile South Africa’s seemingly robust legal advancements with a society whose mores and attitudes do not reflect the same progressiveness. This is done by identifying the substantive and procedural gaps that have allowed this specific type of violence against Black lesbians to go unabated, as well as by diving deep into the historical and sociological background of modern-day South African society.

In interrogating the legislative framework and criminal justice system of South Africa, the complex, contrarian-in-nature relationship that exists between the state and the victim of a sexual offense was highlighted.²⁹³ In particular, the dual role played by the state as both “a locus of control over women’s sexuality and agency, as well as a site for protection, liberation and justice.”²⁹⁴ Constitutional entitlements as well as the reform of rape laws can, on the one hand, be described as the long-awaited and needed catalyst to revolutionize criminal justice responses to victims of sexual offenses.²⁹⁵ However, on the other hand, significant omissions such as “sexual orientation”

293. Artz & Smythe, *supra* note 90, at 16.

294. *Id.*

295. See Koraan & Geduld, *supra* note 26, at 1932.

as a ground contemplated in the “special measures” clause of the Equality Act, and the failure to expressly, and separately, outline corrective rape in the criminal law amendment Act, severely denigrate the impact of these laws, as applied to corrective rape in particular.²⁹⁶ Further, the absence of hate crime legislation entirely ignores the waves of extra harm caused by corrective rape, beyond the individual. That being said, the law can still be a site for protection; the enactment of hate crime legislation, framed pragmatically, as well as constitutional challenges to the state’s current failure to curb this phenomenon, may yet be the portended elixir for a nation with a sexual violence pandemic.

With regard to society, the roots of homophobia, gender-based violence and systemic racism in South Africa run deep. While colonialism and apartheid are ostensibly dead, their legacies persist, intersecting with a strict post-colonial/apartheid conception of African culture to legitimize the worst forms of violence against women, specifically Black lesbians. While undeniably instrumental, uprooting these entrenched systems and structures cannot solely be the law’s province. Social interventions are therefore inherently necessary to change patriarchal, heterosexist and homophobic socio-cultural norms that facilitate and endorse at worst, and tolerate at best, the corrective rape of Black lesbians in South Africa. Further, not only would changing attitudes reduce the crime rate, but also trigger greater prosecution within law enforcement, and reduce secondary victimization of survivors. However, adopting a new cultural narrative and unlearning traditional norms around gender and sexuality takes time,²⁹⁷ and as demonstrated by the Theron Campaign, merits a very careful consideration of context.²⁹⁸ Two proven social interventions, edutainment and organized diffusion, are analyzed and found to be suitable, albeit unexplored, strategies to effectively transform social norms and attitudes around the corrective rape of Black lesbians in South Africa. That being said, the study of societies and community behavior is a complex field, and an appreciation of the intricacies involved in societal transformation warrants further research before the implementation of serious interventions to deal with corrective rape (and other social issues).

296. See Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, *supra* note 83, at 28(1); Koraan & Geduld, *supra* note 26, at 1939.

297. Erika Carpenter, Impact of School-Based Sex Education on College Students’ Rape Myth Acceptance: An Exploratory Analysis (Apr. 2017) 2 (Master’s thesis, Virginia Commonwealth University).

298. See Moffett, *supra* note 33, at 133.