

Virginity Testing and South Africa's HIV/AIDS Crisis: Beyond Rights Universalism and Cultural Relativism Toward Health Capabilities

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INTRODUCTION: VIRGINITY TESTING AND THE BATTLE AGAINST HIV/AIDS

People say to me, "Why, why are you doing this?" . . . And I say to them, "What have you done to stop AIDS, to limit abortion?" . . . "We are going ahead with our virginity testing because we have nothing else."¹

Nomagugu Ngobese, virginity tester and traditional healer

Virgins stand on the front lines in South Africa's war against HIV/AIDS. Traditional virginity "testers" examine South African children at community festivals to ensure that they have remained virgins; many believe virginity is

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1. Suzanne Daley, *Screening Girls for Abstinence in South Africa*, N.Y. TIMES, Aug. 17, 1999, at A3.

one of the “country’s greatest defense[s]” against the spread of HIV/AIDS.² Because South Africa is among the world’s worst affected countries,³ many communities celebrate virgins as “small victor[ies]” in the country’s battle with a virus that, by some estimates, has infected approximately 5.5 million of the country’s 48 million people.⁴

The Joint United Nations Program on HIV/AIDS (UNAIDS) identifies South Africa as “the country with the highest number of women infected with HIV/AIDS in the world.”⁵ In South Africa, a disproportionate share of those

2. Rena Singer, *Chastity Tests: Unusual Tool for Public Health*, CHRISTIAN SCI. MONITOR, June 2, 2000 (reporting on “transform[ation of] traditional prenuptial exam into a year-round AIDS prevention program” by community leaders); see also Mariam Isa, *Virginity Testing Revival Sweeps S. Africa*, REUTERS, Jan. 2, 2001, available at <http://www.globalhealth.org/news/printview-news.php3?id=694> (reporting on revival of an African tradition to fight AIDS and teen pregnancy); Dean E. Murphy, *A Time of Testing for Virginity*, L.A. TIMES, July 15, 1999, at A1, available at <http://www.aegis.com/news/lt/1999/LT990702.html> (reporting on estimates that “tens of thousands” participate in virginity testing as a “back-to-basics remedy” for South Africa’s AIDS epidemic); *Virginity Testing Makes Comeback in South Africa*, INT’L PLANNED PARENTHOOD FED’N NEWS, Jan. 8, 2001 (reporting on virginity testing advocates promoting the practice as “the most effective way to stop the spread of teenage pregnancies and the HIV virus”).

Acquired Immunodeficiency Syndrome (AIDS) is a disease of the immune system primarily caused by Human Immunodeficiency Virus (HIV). RUBIN’S PATHOLOGY 148 (Emanuel Rubin et al. eds., 4th ed. 2005); ROBBINS & COTRAN, PATHOLOGIC BASIS OF DISEASE 245 (Vinay Kumar et al. eds., 7th ed. 2005). HIV is generally introduced into the body through an exchange of bodily fluids, for example, through “sexual contact, parenteral inoculation, and passage of the virus from infected mothers to their newborns.” *Id.* at 245. HIV primarily affects the immune and central nervous systems. *Id.* at 248. The virus progresses from an “acute retroviral syndrome stage,” to a “middle, chronic phase,” and finally to “full-blown AIDS,” rendering the untreated infected individual vulnerable to life-threatening illness and death. *Id.* at 253. AIDS is the final stage of the virus and “is characterized by a breakdown of host defense, a dramatic increase in plasma virus, and clinical disease.” *Id.*

3. See generally Joint U.N. Program on HIV/AIDS, *South Africa 2006 Update: Epidemiological Fact Sheets on HIV/AIDS and Sexually Transmitted Infections* (Dec. 2006) available at http://www.who.int/GlobalAtlas/predefinedReports/EFS2006/EFS_PDFs/EFS2006_ZA.pdf [hereinafter UNAIDS, 2006 *S. Afr. Epidemiological Fact Sheets*]. For a discussion of the limitations of data collection, see Alan Whiteside, *AIDS in Africa: Facts, Figures and the Extent of the Problem*, in ETHICS & AIDS IN AFRICA 1, 1-14 (Anton A. van Niekerk & Loretta M. Kopelman eds., 2005).

4. UNAIDS, 2006 *S. Afr. Epidemiological Fact Sheets*, *supra* note 3, at 2; Murphy, *supra* note 2 (reporting on a virginity testing ceremony where the “youths are feted with traditional Zulu songs and dances and awarded certificates of virginity”); Singer, *supra* note 2 (describing virgins as victories).

5. Alexandra Suich, *Women and AIDS in South Africa: A Conflicted History Leads to a Dispiriting Present*, 43 U.N. CHRON. 12, 12 (2006), available at <http://www.un.org/Pubs/chronicle/2006/issue2/0206p12.htm>. UNAIDS, the Joint United Nations Program on HIV/AIDS, combines the efforts and resources of ten United Nations system organizations in order to develop a global AIDS response. Joint U.N. Programme on Aids [UNAIDS], 2006 *UNAIDS Annual Report: Making the Money Work*, at 7, UNAIDS/07.19E / JC1306E (June 2007), available at http://data.unaids.org/pub/Report/2007/2006_unaids_annual_report_en.pdf [hereinafter UNAIDS, 2006 Annual Report]. Based in Geneva, the UNAIDS secretariat has staff working in more than eighty countries worldwide. *Id.*

infected and affected by HIV/AIDS is female.⁶ South African females aged fifteen to twenty-four are reportedly “four times more likely” to be infected with HIV/AIDS than males in the same age group.⁷ Females comprise 56% of the HIV positive population.⁸

South African mortality rates are rising sharply as a result of HIV/AIDS.⁹ In addition, the HIV/AIDS epidemic has significantly reduced average life expectancy.¹⁰ According to the United Nations Children’s Fund (UNICEF), the life expectancy of a South African born in 2005 is only forty-six years.¹¹

Virginity testing has the distinction of being among the most celebrated—and politically charged—public health initiatives in South Africa’s battle against HIV/AIDS.¹² Virginity testing, a prenuptial custom traditionally conducted just prior to marriage, refers to the examination of females to ascertain whether or not they are sexually chaste.¹³ Virginity testers, usually older women, conduct vaginal exams to determine if a female’s hymen is intact and assess other physical features held to be indicative of the innocence and purity of the individual tested such as her muscle tone and the firmness of her breasts. Proponents of the practice emphasize total abstinence from sexual

6. See UNAIDS, 2006 Annual Report, *supra* note 5, at 11-13.

7. Joint U.N. Programme on HIV/AIDS, *AIDS Epidemic Update: December 2006*, at 11, UNAIDS/06.29E (Dec. 2006) available at <http://www.unaids.org/en/KnowledgeCentre/HIVData/EpiUpdate/EpiUpdArchive/2006/Default.asp> [hereinafter UNAIDS, 2006 *Epidemic Update*].

8. UNAIDS, 2006 *S. Afr. Epidemiological Fact Sheets*, *supra* note 3, at 2. In 2005, among the 5.3 million South African adults infected, 3.1 million were women. *Id.*

9. UNAIDS, 2006 *Epidemic Update*, *supra* note 7, at 11 (reporting that South Africa’s most recent “official mortality data show total deaths (from all causes) in South Africa increased by 79% from 1997 to 2004”). Experts believe that “[a] large proportion of the rising trend in death rates is attributable to the AIDS epidemic.” *Id.*; see also TONY BARNETT & ALAN WHITESIDE, AIDS IN THE TWENTY-FIRST CENTURY 10 (2002) (“AIDS now kills ten times more people a year than does war” in the whole of Africa).

10. See UNAIDS, 2006 *Epidemic Update*, *supra* note 7, at 11 (reporting that in three regions of South Africa “the increasing death toll has driven average life expectancy below 50 years”). U.N. Children’s Fund [UNICEF], *South Africa: Statistics*, http://www.unicef.org/infobycountry/southafrica_statistics.html (last visited Feb. 13, 2008) (showing a decline in life expectancy); see also Eric Neumayer, *HIV/AIDS and Cross-National Convergence in Life Expectancy*, 30 POPULATION & DEV. REV. 727, 737-38 (2004) (demonstrating that reduced life expectancy in countries most severely affected by HIV/AIDS is unmistakably attributable to HIV/AIDS).

11. See U.N. Children’s Fund [UNICEF], *At a Glance: South Africa: Statistics*, http://www.unicef.org/infobycountry/southafrica_statistics.html (last visited Oct. 7, 2007) (showing a decline in life expectancy). “For the first time, deaths among people in their thirties or forties have exceeded those of people in their sixties or seventies.” Michael Specter, *The Denialists; The Dangerous Attacks on the Consensus about H.I.V. and AIDS*, THE NEW YORKER, Mar. 12, 2007, at 38.

12. Singer, *supra* note 2; Steven Ntuli, *Virginity Testing a Celebration for Some, Concern for Others*, LOWVELD INFO, Aug. 14, 2002, available at <http://www.lowveldinfo.com/news/showstory.asp?story=2725>.

13. Singer, *supra* note 2 (reporting that “chastity tests were reserved for Zulu brides who had to prove their purity before their parents and future in-laws settled on a dowry”).

intercourse as a way to prevent HIV/AIDS.¹⁴ Virginity testing essentially serves as an abstinence only enforcement mechanism.

The resurgence and expansion of virginity testing—a cultural practice that disproportionately impacts young unmarried women and girls—presents a dilemma for South Africa’s pluralistic society. The South African government is a new constitutional democracy committed both to equality and the preservation of the customs and traditional practices of its many different cultures. These values often find themselves in tension. The South African Constitution, as well as various human rights treaties, guarantee political equality, yet also demand that South Africa recognize and protect “cultural rights.” In addition, social norms persist that often clash with gender equality. Balancing these values remains a persistent challenge in post-Apartheid South Africa, compounded by the country’s poverty, inadequate public health infrastructure, and an explosive HIV/AIDS epidemic.

As it has played out in South Africa, the debate over virginity testing and legislation to prohibit the practice exposes the persistent theoretical and practical tensions between human rights universalism and cultural relativism. In this regard, the debate over virginity testing is not unlike other contests over women’s human rights elsewhere in the world. However, the struggle over virginity testing is unique in that it promotes a return to traditional culture as a preventative public health measure to combat a modern plague.

The debates over virginity testing highlight the limitations of prevalent conceptions of rights (as rigid), culture (as static), and gender equality (as conflicting with cultural autonomy). The arguments advanced by testing abolitionists fail to appreciate the opportunities that culture may present for change. The arguments advanced by testing accommodationists ignore the fact that virginity testing practices have changed over time, and most recently in response to new social challenges. The common and disappointing feature that both sides of the debate share is the tendency to see virginity testing itself as the problem—and thus to frame the possible solutions as either abolition or accommodation of the practice.

Yet even if the South African legislature were to abolish virginity testing, the HIV/AIDS epidemic—and its disproportionate impact on women—would likely remain. Thus, the scope of the virginity testing debate must move beyond an argument over abolition. It must extend to altering the more pervasive cultural norms that foster gender inequality and fuel high HIV/AIDS infection rates among young women, and to adapting the practice in constructive ways. While the virginity testing phenomenon may appear to be the central human

14. Suzanne LeClerc-Madlala, *Virginity Testing: Managing Sexuality in a Maturing HIV/AIDS Epidemic*, 15 *MED. ANTHROPOLOGY Q.* 533, 533-34 (2001) (analyzing the “virginity testing movement” as a community response to the HIV/AIDS epidemic); Murphy, *supra* note 2 (reporting on the virginity testing revival “being promoted as a back-to-basics remedy for . . . the growing AIDS epidemic”).

rights violation at issue, I argue that a broader vision of human rights reveals the practice for what it is: a symptom of the challenges confronting a developing nation dealing with epidemic disease.

Understood as a public health measure, virginity testing presents two distinct challenges for human rights discourse. First, it highlights persistent divisions between two competing normative orders: rights universalism and cultural relativism. Second, the relative silence in the debates over the testing ban regarding South Africans' unrealized right to health speaks to the continuing difficulty classical liberal human rights discourse has in dealing with issues concerning economic, social, and cultural rights. I propose and apply a new theoretical framework incorporating the theories of capabilities and pragmatism as a means of mediating these persistent divisions in human rights discourse. This approach makes the content of the right to health substantive and potentially modifies traditional cultural practices in a manner that enhances gender equality, cultural autonomy, and the capability of those disproportionately infected and affected by the HIV/AIDS epidemic to avoid infection and premature death.

In this Article, I explore the tension between the politics of culture and the rights of women and girls to equality, privacy, and sexual autonomy in the context of epidemic disease. Specifically, this Article examines the political debate surrounding the resurgence of virginity testing, its widespread popular support in certain communities, and the South African government's recent efforts to prohibit the practice. This Article argues that the current debate over virginity testing, which focuses on abolition or accommodation of the practice, is misguided and polarizing. It argues that these perspectives on the debate increase the likelihood that the problem causing the testing resurgence—high rates of HIV/AIDS infection that disproportionately affect women and girls—will remain unresolved. Recognizing that the pending legislative ban on virginity testing will not actually end testing, this Article proposes a way to reframe the debate. I argue that there should be a public discourse on the recognition and realization of a robust right to health and the ethical obligation of government to provide accurate health information and adequate health services. But the government must provide these services in a manner sensitive to cultural differences, rather than focus on a presumed conflict between gender equality and cultural autonomy.

Part I explains the virginity testing procedure, tracks its revival, and discusses complications and concerns associated with testing. Part II situates virginity testing within the human rights debate between universalism and cultural relativism. This Part reviews the literature on gender equality and cultural self-determination and discusses the rights-based arguments advanced by both opponents and proponents of the practice. It considers the pertinent provisions of international human rights instruments and the South African Constitution. This Part further argues that stakeholders in the legislative battle

over virginity testing have drawn the wrong battle lines by failing to focus on the unrealized right to health, by viewing culture as unchanging, and by ignoring the broader challenges at play.

Part III proposes that the divergent positions taken by stakeholders in the testing debate can be reconciled not only by shifting toward realizing a substantive right to health, but also by adopting a pragmatistic approach to cultural pluralism and an understanding of both rights and culture as contextual and adaptable. Both these approaches could be enhanced by a human rights discourse informed by “capability theory,” which, through its appreciation of diversity and its emphasis on positive freedoms, would necessarily redirect the focus of government and civil society efforts on the issues underlying the virginity testing resurgence.¹⁵ This Article concludes by noting that the resurgence in virginity testing as a community self-help solution signals a systemic failure on the part of the South African government and the international community to adequately address the HIV/AIDS epidemic. This Article offers a pragmatistic approach to addressing the problems associated with cultural pluralism in diverse developing countries. It advances capabilities theory as a way to address the theoretical difficulty that socioeconomic rights present to human rights discourse, and to inform attempts to mediate the apparent conflicts between gender equality and cultural autonomy.

I

SOUTH AFRICA’S VIRGINITY TESTING REVIVAL AND ITS PROBLEMATIC HIV/AIDS POLICIES

For an extended period, the South African government appeared unwilling or unable to meet the challenges presented by the HIV/AIDS epidemic. It is within this context that the practice of virginity testing re-emerged, advanced by its proponents as both a return to African tradition and an HIV/AIDS prevention strategy.¹⁶ Meanwhile, the least powerful members of South African society—young girls—bear the disproportionate brunt of illiberal self-help solutions, such as virginity testing, that have arisen to fill this governance gap. This Part presents a brief overview of the political dynamics of the South African government’s response to HIV/AIDS and describes the traditional and contemporary practice of virginity testing. The Sections below provide an

15. Originally conceived as a challenge to classical development economics by Nobel Laureate in Economics Amartya Sen, and expanded by legal philosopher Martha Nussbaum, capabilities theory maintains normatively that economic, political, legal, and other social policies should be evaluated according to how they expand people’s capabilities to achieve freedom to function in ways they find valuable. See generally AMARTYA SEN, *INEQUALITY REEXAMINED* (1992); MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT* (2000).

16. See Fiona Scorgie, *Virginity Testing and the Politics of Sexual Responsibility: Implications for AIDS Intervention*, 61 AFR. STUD. 55, 56 (2002) (examining how communities engaged in virginity testing “frame and understand their activity as a form of AIDS intervention in South Africa”).

explanation of the virginity testing resurgence in its social context.

A. The Politics of HIV/AIDS Policy

Since the beginning of the epidemic, the HIV/AIDS issue in South Africa has been highly politicized and racially charged.¹⁷ Although recently there have been some improvements in the government's HIV and AIDS policies after years of neglect,¹⁸ several international and domestic commentators have strongly criticized the government for its early inaction and misdirection.¹⁹ A few commentators suggest that the government's stance, shaped by President Thabo Mbeki's early skepticism about whether HIV causes AIDS, created public confusion and fostered a climate of misinformation tantamount to "murder."²⁰ In 2000, after appointing an international advisory panel of HIV and AIDS experts and scientists that included a small group of dissident scientists who maintained that HIV is not the cause of AIDS, President Mbeki was criticized by mainstream scientists and medical experts.²¹ Concerned about the potential influence of AIDS dissidents on public health policy, the mainstream medical establishment produced the "Durban Declaration," which asserts: "The evidence that AIDS is caused by HIV-1 or HIV-2 is clear-cut, exhaustive and unambiguous, meeting the highest standards of science."²²

17. VIRGINIA VAN DER VLIET, *THE POLITICS OF AIDS* 49-50 (1996) ("[R]ight-wing politicians used the threat of an epidemic in the black community to stir up racial prejudice, win political support and demand renewed segregation, by suggesting that AIDS could be passed on in social or physical contact in desegregated facilities such as schools, hospitals and swimming pools."); see also Drew Forrest & Barry Streek, *Mbeki in Bizarre AIDS Outburst*, MAIL & GUARDIAN, Oct. 26, 2001, available at <http://www.aegis.com/news/DMG/2001/MG011021.html> (reporting on an address by Mbeki at the University of Fort Hare and attributing to him the following comments: "[O]thers who consider themselves to be our leaders take to the streets carrying their placards, to demand that because we are germ carriers, and human beings of a lower order that . . . [c]onvinced that we are but natural-born, promiscuous carriers of germs, unique in the world, they proclaim that our continent is doomed to an inevitable mortal end because of our unconquerable devotion to the sin of lust.").

18. *Chasing the Rainbow*, ECONOMIST, Apr. 8, 2006, at 5 ("[T]he government eventually caved in to domestic and international pressure and gracelessly introduced a comprehensive management regime involving anti-retroviral drugs to combat HIV/AIDS.").

19. See, e.g., *Mbeki Digs In On AIDS*, BBC NEWS, Sept. 20, 2000, available at <http://news.bbc.co.uk/2/hi/africa/934435.stm> (reporting "Mbeki has come under fierce international criticism from mainstream scientists and medical experts for his unorthodox views and lack of government action").

20. BARNETT & WHITESIDE, *supra* note 9, at 298 (arguing President Mbeki's dealings with "AIDS dissidents" to investigate "the cause of the immune deficiency that leads to death from AIDS" proved "confusing and damaging to South Africa's response to AIDS"); see also Specter, *supra* note 11, at 35 (quoting a leading U.S. government AIDS expert, Anthony Fauci, who referred to the promotion of dissident AIDS science as "murder").

21. *Hundreds Walk Out on Mbeki at AIDS Conference*, CNN.COM, July 10, 2000, <http://archives.cnn.com/2000/HEALTH/AIDS/07/10/aids.economics/index.html> (last visited Oct. 2, 2008).

22. *The Durban Declaration*, NATURE, July 6, 2000, at 15. Mbeki's policies led 5,000 leading international scientists to sign the "Durban Declaration." See Richard Pithouse, *Mbeki's AIDS Stance Slammed*, GREEN LEFT, July 26, 2000, <http://www.greenleft.org.au/2000/413/23244>

B. Origins, Evolution, and Practices of Virginity Testing

This shows I have not been touched by evil things.²³

Valentia Hlophe, age fourteen, virgin

For generations, certain ethnic groups in South Africa have engaged in the practice of virginity testing.²⁴ Virginity testing, most prevalent among members of the Zulu ethnic group, was originally intended to confirm the chastity of young brides prior to marriage. A potential bride's virginity was a factor in the negotiations between a bride's parents and her future in-laws to determine what amount of wealth was to be transferred from the groom's family to the bride's family, a prenuptial transaction known as an *ilobolo*.²⁵ Virginity testing apparently "fell into disuse" when migrant labor and forced migration "eroded family structures."²⁶ While there is a general consensus that virginity testing was rather widely conducted prior to its falling out of favor, there is still uncertainty regarding its frequency and the manner in which tests were conducted.²⁷

(last visited Feb. 13, 2008).

23. Chris McGreal, *Virgin Tests Make a Comeback*, DAILY MAIL & GUARDIAN, Sept. 29, 1999.

24. It should be noted that virginity testing is neither a recent phenomenon nor an exclusively African practice. Indeed, the condition of virginity has been contested throughout the ages. See KATHLEEN COYNE KELLY, PERFORMING VIRGINITY AND TESTING CHASTITY IN THE MIDDLE AGES ix (2000) (examining a variety of medieval and modern narratives across a number of genres in which virginity is ostensibly tested). Kelley concludes, "The gendered nature of virginity has been an inescapable feature of Western discourses on the body for more than two thousand years. How one goes about defining and verifying virginity may change over time, but the general belief that the body is readable, and virginity is verifiable, has remained fairly consistent." *Id.* Moreover, virginity testing exists in countries outside of Africa. See, e.g., HUMAN RIGHTS WATCH, A MATTER OF POWER: STATE CONTROL OF WOMEN'S VIRGINITY IN TURKEY (1994) (discussing the practice of virginity testing in Turkey).

25. LeClerc-Madlala, *supra* note 14, at 544; see also Eleanor Preston-Whyte, *Kinship and Marriage*, in THE BANTU-SPEAKING PEOPLES OF SOUTHERN AFRICA 177, 179 (W.D. Hammond-Tooke ed., Routledge & Kegan Paul, 2d ed. 1974) (explaining the significance of cattle "bridewealth" and the rights it transfers in a traditional marriage).

26. McGreal, *supra* note 23.

27. LeClerc-Madlala, *supra* note 14, at 543. In traditional cultures, chastity before marriage was socially regulated. See, e.g., Virginia van der Vliet, *Growing Up in Traditional Society*, in THE BANTU-SPEAKING PEOPLES OF SOUTHERN AFRICA, *supra* note 25, at 236-37 (discussing a "coming-of-age" ceremony, the *omula*, restricted to virgins and how "sexual relations are regulated within a strict social framework" and frowned upon prior to marriage). As demonstrated by the variance in *ilobolo* amounts, the virginity of a potential bride was highly valued. LeClerc-Madlala, *supra* note 14, at 543. The author explains the meaning of cattle exchange in the *ilobolo* transactions involving virgin brides as follows: "[t]he standard ten head of cattle could be supplemented by an additional head, the 'eleventh cow,' if the girl was found to be a virgin. This cow was known as *inkomo kamama*, mother's cow, and was given to the girl's mother as a sign of thanks from the in-laws for providing them with a 'pure' daughter-in-law." *Id.* at 544. *But cf.* EILEEN JENSEN KRIGE, THE SOCIAL SYSTEM OF THE ZULUS 131-32 (1936) (agreeing that fewer cattle are exchanged for less desirable partners, such as divorced women or mothers of illegitimate children, but observing that the cattle given to the mother of a virgin for ensuring her daughter's

In contrast to the testing procedures of the past, which were usually performed privately by a girl's mother or a community matriarch,²⁸ today virginity tests are public celebrations that may be conducted in a variety of different venues such as sports facilities, educational institutions, the "kraal²⁹ of a village chief," or community centers.³⁰ Girls who are publicly declared virgins may receive distinguishing certificates.³¹

While there is no formal governmental or cultural organization managing or directing virginity testing,³² the practice enjoys tacit support in some quarters and express enthusiasm in higher levels of government.³³ For example, "the provincial health department [of KwaZulu-Natal], while not officially

chastity is a separate transaction not related to bride-wealth exchange). Other forms of social control, in addition to virginity testing, helped to promote chastity. *Id.* at 105-06 (explaining that "after puberty . . . girls are strictly controlled by those older than themselves who will know all of their doings" and describing customs that ensure surveillance). For example, "[t]alking to girls about the importance of maintaining virginity before marriage formed part of the traditional puberty ritual known as *umhlonyane*." LeClerc-Madlala, *supra* note 14, at 544.

28. Van der Vliet, *supra* note 27, at 236-37 (stating that "girls are regularly examined by their mothers or the older women to ensure that they have not been deflowered"); Scorgie, *supra* note 16, at 61 (citing M. Kohler, *Marriage Customs in Southern Natal*, 4 ETHNOLOGICAL PUBLICATIONS (1933)) (mentioning that the practice was done privately by mothers and grandmothers).

29. A *kraal* is a central common space of a residential compound, which often also serves as a corral for livestock. The term *kraal* also refers to cultural patterns of some African communities. ENCYCLOPEDIA BRITANNICA ONLINE, Kraal, <http://www.britannica.com/EBchecked/topic/323087/kraal> (last visited Aug. 14, 2008).

30. See LeClerc-Madlala, *supra* note 14, at 538. The resurrection of the "*ukuhlolwa kwezintombi* [virginity testing] in KwaZulu-Natal" is thought to have begun around 1994. Scorgie, *supra* note 16, at 57. Contemporary virginity tests are sometimes conducted in connection with three days of celebration to honor the Zulu goddess *Nomkhubulwana*, who as the "source of growth and creation" is an "immortal virgin" deity. *Id.* "The annual three-day rite culminates in a celebratory sowing of seeds in a garden," the tradition that only virgins may perform this task is offered as a justification for testing. *Id.* Virginity testing festivals are promoted by individuals who have formed non-governmental organizations aimed at cultural preservation and fostering a return to tradition, such as Isivivane, AmaGugu, aseAfrika, IsiggiseSintu, and the All Africa Cultural Group, among others. LeClerc-Madlala, *supra* note 14, at 538. Presently, cultural organizations are reportedly conducting virginity testing among Zulu girls throughout the province of KwaZulu-Natal. See, e.g., Landiwe Dlamini, *Virginity Testing Reintroduced to Fight AIDS*, SUNDAY TIMES, Jan. 17, 1999 (reporting on the Vukuzakhe Youth Club's reintroduction of virginity testing in Mpumalanga Province with the assistance of a renowned tester from KwaZulu-Natal Province).

31. LeClerc-Madlala, *supra* note 14, at 540 (noting girls who pass virginity tests are marked with a "white dot" on their foreheads used to identify virgins); Singer, *supra* note 2 (reporting that virgins are awarded certificates).

32. LeClerc-Madlala, *supra* note 14, at 538-39.

33. Jacob Zuma, South Africa's former Deputy President, has reportedly expressed support for the testing revival and has attended community testing programs. See *SA Leader Urges Virginity Tests*, BBC NEWS, Sept. 23, 2004, available at <http://news.bbc.co.uk/2/hi/africa/3683210.stm>; Luxolo Tyali, *Zuma Takes a Stand on Virginity Testing*, MAIL & GUARDIAN ONLINE, Sept. 23, 2004, <http://www.mg.co.za/article/2004-09-23-zuma-takes-a-stand-on-virginity-testing> (last visited Oct. 1, 2008) (reporting on a speech by former Deputy President Jacob Zuma and head of "the moral regeneration movement" before the AmaMpondomise Heritage Celebrations).

advocating virginity testing, is [reported to be] actively involved in assuring that proper health measures are taken during genital inspection (by providing rubber gloves [for testers] and facilitating workshops to educate testers about female reproductive anatomy).³⁴

According to South African medical anthropologist Suzanne LeClerc-Madlala, "assessments [concerning virginity] are derived from indigenous rather than biomedical knowledge."³⁵ Therefore, in order to understand virginity testing among the Zulu, "one must be conversant in the metaphorical language used in the folk descriptions of the human body and human bodily processes."³⁶ Because the standards used by testers are not grounded in biomedical science, the fact that there is no medically accepted screening for virginity does little to deter traditional virginity testers.³⁷

Testers, according to LeClerc-Madlala, rely on "folk constructs of the body and ethnomedical beliefs of health and illness" in their chastity assessments.³⁸ For example, testers maintain that they can determine a virgin by identifying a "visible 'white dot' somewhere deep in the vaginal canal."³⁹ However, an examination of genitalia, while perhaps the most significant factor in a test procedure, is not the sole measure of virginity status employed by testers. Testers also report that a virgin's eyes must "look innocent," she should have "firm and taut" breasts, and "the muscles behind her knees should be tight and straight."⁴⁰

Although some of the political forces behind testing promote a return to African tradition and reject certain "Western" or "foreign" forms of knowledge, some testers have imported the use of letter grades into their practice:

An "A" is given to a girl who rates highly in all assessments associated with virginity. . . .

A "B" grade virgin may have had intercourse once or twice, or . . . "may have been abused." Active complicity in the sex act may mean the difference between a "B" and a "C." . . .

A "C" grade essentially means failure.⁴¹

Presently, testing practices vary greatly across the KwaZulu-Natal

34. LeClerc-Madlala, *supra* note 14, at 538-39.

35. *Id.* at 539.

36. *Id.*

37. *Id.* at 540.

38. *Id.* at 539; *see also* CECIL G. HELMAN, CULTURE, HEALTH AND ILLNESS 12 (4th ed. 2000) ("[T]he human body is more than just a physical organism fluctuating between health and illness. It is also the focus of a set of beliefs about its . . . structure and function.").

39. LeClerc-Madlala, *supra* note 14, at 540.

40. *Id.* at 540.

41. *Id.* at 539-40. To receive a "C" grade "is to be marked with shame and disgrace." *Id.* at 540. *But see* Scorgie, *supra* note 16, at 59 ("[V]irginity . . . is not regarded as a single moment in a girl's life where she makes an unambiguous shift from virgin to non-virgin. . . . [I]t is not perceived to be a point of no return.").

province, with testing now being conducted on children as young as four years old in some areas.⁴² In some communities, testing is performed at home, with the child inspected in the presence of her mother.⁴³ The mother is thus educated and equipped with virginity testing skills when inspections are started before the puberty stages (*ukuthomba*).⁴⁴ Testing advocates say this process prepares the child and her mother for better communication during puberty.⁴⁵ In most communities, however, tests are still conducted in public, though gender-segregated, forums.⁴⁶

C. Sources of Support for and Opposition to Virginity Testing

Our parents encouraged us. They want us to stay virgins. People are happy about what we are doing and they are encouraging us to carry on.⁴⁷

Susan Hadebe, age fifteen

I think the testing is good because they must stop AIDS. A lot of teenagers don't take care of themselves—they don't use condoms. And you mustn't have sex with just anyone who doesn't care.

But sex education could do the same thing as virginity testing. People should come and talk about sex in the schools.⁴⁸

Yvette Nhlanhla, age eighteen

Confidence that virginity testing may provide a “culturally appropriate” solution to the HIV/AIDS epidemic is shared across various levels of society. Proponents of testing claim they have revived the practice of virginity testing to prevent HIV infection and AIDS, to reduce teen pregnancy, to detect incest and sexual abuse, and to re-instill and promote lost African cultural values and traditions.⁴⁹ Indeed, “[m]any rural women, the most marginalized of South Africa’s population, see virginity testing as the *only* way to re-instill what they view as the lost cultural values of chastity before marriage, modesty, self-

42. Anton La Guardia, *Zulu Maidens Put Safety First*, DAILY TELEGRAPH, July 11, 2000, available at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2000/07/10/waid210.xml> (reporting that “[s]ome girls as young as four” involved in virginity testing).

43. LeClerc-Madlala, *supra* note 14, at 539.

44. *Id.*

45. *Id.* at 544.

46. Kathryn Strachan, *Going Back to Poisonous Roots*, HST UPDATE: YOUTH HEALTH (Health Systems Trust, Durban, S. Afr.), July 1999, at 14, available at <http://www.hst.org.za/uploads/files/upd44.pdf> (reporting that there have been unconfirmed reports of testing being carried out in medical clinics).

47. McGreal, *supra* note 23.

48. *To Test or Not to Test—That is the Question*, DAILY MAIL & GUARDIAN, Sept. 22, 1998.

49. COMMISSION ON GENDER EQUALITY, CONSULTATIVE CONFERENCE ON VIRGINITY TESTING REPORT 5 (2000) [hereinafter CGE, CONSULTATIVE CONFERENCE] (on file with author).

respect, and pride.”⁵⁰ Some members of South Africa’s political elite have also voiced support for testing as a return to tradition.⁵¹

The HIV/AIDS epidemic places stress on the extended family network for social support, as more elderly women confront the challenges of caring for a growing number of grandchildren along with their sick or dying parents.⁵² In addition, these grandchildren may need more care than ever before, since an increasing number of young children contract HIV from their infected mothers.⁵³ Grandmothers have become the “shock troops of the maturing AIDS epidemic, absorbing the initial social impact of AIDS-related death and the growing problem of orphans.”⁵⁴

With an estimated 1.2 million AIDS orphans under the age of seventeen in South Africa,⁵⁵ the care-giving burden being borne in significant part by elderly women is enormous;⁵⁶ “[i]t is therefore not surprising that the most vociferous voices advocating the back-to-virginity-testing ‘tradition’ are those of older women who themselves are heads of households supporting a number of young children.”⁵⁷ Community youth groups are also urging their members to be tested in an effort to combat the spread of HIV/AIDS.⁵⁸

There are no precise statistics on how many young women and girls participate in virginity testing.⁵⁹ However, testing events are regularly crowded and there often are long waits to be tested.⁶⁰ It is estimated that tens of thousands of girls are being examined each month.⁶¹ To date, however, no

50. LeClerc-Madlala, *supra* note 14, at 535 (emphasis in original).

51. See Angela Quintal, *Zuma: Virginity Testing Should be Encouraged*, THE STAR, Nov. 24, 2004, available at http://www.iol.co.za/general/news/newsprint.php?art_id=vn20041124034745381C946471 (reporting on remarks of former Deputy President Jacob Zuma regarding the need to support the traditional practice of virginity testing in the fight against HIV/AIDS: “As government, we support initiatives that could assist in the prevention of HIV and AIDS as long as they are in line with our national HIV and AIDS strategy”); *Zuma Calls for Virginity Tests*, S. AFR. PRESS ASS’N, Sept. 23, 2004, available at http://www.news24.com/News24/South_Africa/News/0,,2-7-1442_1593862,00.html (reporting on remarks made by Zuma regarding the role of traditional leadership and practices in HIV/AIDS prevention efforts); see also *supra* note 33.

52. LeClerc-Madlala, *supra* note 14, at 535.

53. *Id.*

54. *Id.*

55. UNAIDS, 2006 *S. Afr. Epidemiological Fact Sheets*, *supra* note 3, at 3.

56. Joint U.N. Programme on HIV/AIDS [UNAIDS], *Facing the Future Together: Report of the Secretary General’s Task Force on Women, Girls and HIV/AIDS in Southern Africa*, at 18, UNAIDS/04.33E (July 2004) (“One recent survey of households in South Africa revealed that two-thirds of caregivers were female, with almost a quarter of them over the age of 60.”).

57. LeClerc-Madlala, *supra* note 14, at 535.

58. Dlamini, *supra* note 30.

59. Singer, *supra* note 2.

60. *Id.*

61. See, e.g., Simpiwe Piliso, *Virginity Testing Chic but Condemned*, DISPATCH ONLINE, Feb. 12, 2001, <http://www.dispatch.co.za/2001/02/12/features/VIRGIN.HTM> (last visited June 11, 2008) (reporting on a tester claiming to have examined more than 11,000 girls; and noting that “[e]very month, thousands of teenagers undergo the test”); Murphy, *supra* note 2 (reporting that

official study of virginity testing's impact on infection rates among adolescents has been conducted.⁶²

For a time, virginity testing was openly conducted with the tacit approval of the KwaZulu-Natal education department, which encouraged testing conducted by teachers at several schools in Osizweni, an area in northern KwaZulu-Natal.⁶³ In 1998, with the support of parents and the local education superintendent, teachers in Osizweni administered tests to more than 3,000 girls and boys some as young as six-years-old, and tests were repeated as often as every three months.⁶⁴ The acting principal of one school reportedly said she supported the tests and did not "mind [female teacher testers] using school time or the school premises. After all, it is for a good cause."⁶⁵ Young unmarried teachers in Osizweni were also tested.⁶⁶ At the same time, however, sex education was not an option in Osizweni schools. One teacher explained: "We are against the use of condoms. We think condoms promote lust for sex. . . . I don't think we should teach children about such things."⁶⁷

The practice of virginity testing has expanded geographically and into different ethnic groups. Although the practice is believed to have originated with, and remains most popular among, Zulus in South Africa, communities outside of KwaZulu-Natal are increasingly using virginity testing.⁶⁸ Eastern Cape women's and children's rights organizations report the use of testing among Xhosa communities.⁶⁹ In the predominantly ethnic-Xhosa Eastern Cape Province, virginity testing has been introduced and is now part of festivities that run over a number of days.⁷⁰ Some testing events reportedly feature local dignitaries who deliver speeches celebrating the girls who have remained virgins.⁷¹ Virgins are awarded certificates and some reportedly receive education about women's health concerns.⁷²

Although virginity testing in South Africa enjoys popular support as a grassroots chastity movement, it is vigorously opposed by some African

one tester operating "under the auspices of the [KwaZulu-Natal] provincial Department of Traditional and Environmental Affairs" claims to have conducted 65,000 tests).

62. Singer, *supra* note 2.

63. Prega Govender, *School Kids in Virginity Test*, SUNDAY TIMES, May 17, 1998; *see also* HUMAN RIGHTS WATCH, SCARED AT SCHOOL: SEXUAL VIOLENCE AGAINST GIRLS IN SOUTH AFRICAN SCHOOLS 26 (2001) [hereinafter HUMAN RIGHTS WATCH, SCARED AT SCHOOL].

64. Govender, *supra* note 63.

65. *Id.*

66. *Id.*

67. McGreal, *supra* note 23.

68. La Guardia, *supra* note 42 ("The fashion may be spreading to other groups. Among the teenagers being tested last weekend there was an Indian girl.").

69. *Activists Challenge Girls' Virginity Testing*, INDEPENDENT, July 17, 2003, available at http://www.int.iol.co.za/general/news/newsprint.php?art_id=qw1058413321180B216&sf=.

70. Daley, *supra* note 1.

71. *Id.*

72. *Id.*

feminists, AIDS activists, and many medical experts.⁷³ These opponents argue that the practice is unconstitutional, unhygienic, counterproductive, and potentially dangerous; they also believe it violates the human rights of the children—predominantly girls—being tested.⁷⁴ The concerns about virginity testing are numerous and the practice is complicated by many factors.⁷⁵

The inequality of requiring that girls, and not boys, be subjected to virginity testing has raised claims of gender discrimination.⁷⁶ To address these claims, some virginity testers have started to test boys.⁷⁷ Critics of testing, however, maintain that there is no scientific method for determining whether either sex has engaged in sexual activity.⁷⁸

Commercialization and corruption have spread along with the popularity of virginity testing,⁷⁹ and for some, testing has become a commercial opportunity. For example, Nise Malange's research in Hlabisa among testers found that the commercialization of African culture has moved the custom of virginity tests out of the private realm and into the public arena.⁸⁰ At contemporary public celebrations, testers charge for their services; testing costs vary, although the basic price for an exam is typically ten cents, with an additional fee for a certificate of virginity.⁸¹ Aside from the commercial activities of traditional testers, nurses at several public clinics have reportedly been profiting from the resurgence by conducting virginity tests for a fee.⁸² As virginity testers profit from the revival of the practice, virgins too may reap financial rewards from some employers who have reportedly set aside positions reserved for virgins.⁸³

73. *Activists Challenge Girls' Virginity Testing*, *supra* note 69; Piliso, *supra* note 61.

74. *See, e.g., Virginity Testing Under Fire*, NEWS 24, July 17, 2003, www.news24.com/News24/South_Africa/News/0,,2-7-1442_1388713,00.html (last visited Aug. 14, 2008).

75. *See, e.g., Cleopatra Ndlovu, Virginity Testing Raises Many Questions*, 23 NETWORK 12, 12 (2005), available at http://www.fhi.org/en/RH/Pubs/Network/v23_4/index.htm (follow link "Network: Nonconsensual Sex") (raising concerns about the virginity testing revivals in African countries including South Africa).

76. HUMAN RIGHTS WATCH, SCARED AT SCHOOL, *supra* note 63, at 27; *see also* LeClerc-Madala, *supra* note 14, at 547.

77. Murphy, *supra* note 2; Ajith Bridgraj, *Much Ado About Virginity*, MAIL & GUARDIAN, Sept. 22, 1998 ("The power with which a boy urinates will indicate whether he is a virgin or not.") (internal quotations omitted).

78. *See, e.g., Daley, supra* note 1; Murphy, *supra* note 2; Singer, *supra* note 2.

79. *See, e.g., Emily Wax, Virginity Becomes a Commodity in Uganda's War Against AIDS*, WASH. POST, Oct. 7, 2005, at A01.

80. Ansuyah Maharaj, *Virginity Testing: A Matter of Abuse or Prevention?* 41 AGENDA 96, 96 (1999).

81. *See Daley, supra* note 1.

82. Prega Govender, *Outcry as Nurses Cash in on Virginity Testing*, SUNDAY TIMES, Mar. 28, 1999 ("Nurses carrying out the tests are not doing it out of the goodness of their hearts. They are definitely getting paid by parents.")

83. Amita Parashar, *Where Angels Fear to Tread*, MAIL & GUARDIAN ONLINE, Aug. 6, 2004, <http://www.mg.co.za/article/2004-08-06-where-angels-fear-to-tread> (last visited Aug. 14, 2008) (discussing commercialization, distortion, and corruption of traditional practices:

There have been allegations of corruption among some testers. In some instances, girls have given birth just a few months after being tested and declared virgins.⁸⁴ Many such “errors” have been attributed to corruption among testers. Indeed, “[a]mong the better known traditional testers in [KwaZulu-Natal], there seems to be a fair degree of rivalry and jealousy, and there reportedly have been attempts by some testers to undermine their rivals’ reputations and limit their practices.”⁸⁵

Opponents argue that virginity testing is often involuntary, in addition to being discriminatory and highly invasive. There are reports of young women and girls being forced to participate in testing.⁸⁶ Opponents of testing maintain that it is difficult to determine whether girls may opt out of testing in certain communities, where strong parental persuasion—whether in the form of praise or punishment—amounts to coercion, absent the freedom to decline testing without social sanction.⁸⁷

Further complicating the virginity testing issue is recent data suggesting that men who are HIV-positive may be more likely to target virgins for sexual assault.⁸⁸ Some South African researchers attribute the increase in sexual violence against young girls who are presumed to be virgins to a belief, gaining credence in some communities, that sexual intercourse with a virgin can “cleanse” men with HIV or AIDS of the disease.⁸⁹ Virginity testing opponents and some government officials blame traditional healers (*sangomas*) for encouraging this myth. Some traditional healers believe that obtaining an “infusion of clean blood” through intercourse with a virgin can cure the disease, as virgin girls are perceived as “clean” and “uncontaminated.”⁹⁰

“[V]irginity testing and virgin girls themselves have become commodities in a modern market economy”) (internal quotations omitted).

84. *Virginity Testing*, PPP NEWS, Aug.-Sept. 1999, at 8 [hereinafter *Virginity Testing*, PPP NEWS] (on file with author).

85. LeClerc-Madlala, *supra* note 14, at 539.

86. See, e.g., CGE, CONSULTATIVE CONFERENCE, *supra* note 49, at 27, 37 (questioning assertions that girls were voluntary participants in testing and asserting that freedom of choice not to participate in testing was reduced by social pressure). *But see* Parashar, *supra* note 83 (“[N]o reports . . . that girls are coerced into . . . tests”).

87. See CGE, CONSULTATIVE CONFERENCE, *supra* note 49, at 37; accord Piliso, *supra* note 61 (interviewing a virginity tester who explains: “[N]o one is forced to be tested, there are other kinds of pressures. Girls who refuse to be examined may be taunted by others who say the refusal shows they are not virgins.”).

88. See, e.g., B.L. Meel, *The Myth of Child Rape as a Cure for HIV/AIDS in Transkei: A Case Report*, 43 MED. SCI. LAW 85, 85-86 (2003) (discussing anecdotal evidence of belief in the “Virgin Cleansing Myth” contributing to child rape and the case of a nine-year old raped by an HIV-positive man); *The Virgin Rape Myth—What Is the Cause?*, CITY VISION, Dec. 14, 2001 (reporting on whether increase in rape is attributable to “virgin rape myth”) (on file with author).

89. Meel, *supra* note 88, at 86, 88.

90. Govender, *Child Rape: A Taboo Within the Aids Taboo*, SUNDAY TIMES, April 4, 1999; see also *The Virgin Rape Myth—What is the Cause?*, *supra* note 88. Some scholars suggest that the misconception that sexual intercourse with a virgin can cure disease is a long-standing and cross-cultural myth. Nora Ellen Groce & Reshma Trasi, *Rape of Individuals with Disability: AIDS*

Opponents of virginity testing fear that this myth is more prevalent than local authorities and HIV/AIDS educators are willing to acknowledge.⁹¹

Even older men without HIV or AIDS may be targeting young girls for sex. Researchers have found that younger girls are increasingly “sought as sexual partners by older men” to avoid contracting the HIV/AIDS virus from older sexually active women who may be infected.⁹² Independent of seeking a cure for HIV, some men have indicated a preference for sex with younger girls, reasoning that there is a lower chance that a younger and less-sexually-experienced girl will be infected with HIV.⁹³

Girls and young women who are not deemed virgins risk ostracism, and people in their community may even label them as prostitutes (*izeqamgwaqo*).⁹⁴ The family of a girl who fails her virginity test may be fined.⁹⁵ Girls found to have lost their virginity are often rejected socially and sometimes treated as a “contagion” capable of corrupting the girls who are virgins.⁹⁶ Girls who fail the test are reported to community leaders.⁹⁷ Outcast socially as unmarriageable, some of these young women are forced into prostitution, which places them at a greater risk of contracting sexually transmitted infections.⁹⁸

Child abuse counselors are concerned that virginity testing may burden children by increasing the threat of physical abuse. For example, in 1999, social workers at Childline, a child advocacy group that offers rape recovery and child abuse counseling services in Durban and other areas, reported seeing forty girls who failed virginity exams and were brought in by their parents.⁹⁹ Parents of

and the Folk Belief of Virgin Cleansing, 363 THE LANCET 1663, 1663-64 (2004) (“[A]ccounts of the belief are reported from sub-Saharan Africa, Asia, Europe, and the Americas”); see also Roger Davidson, “This Pernicious Delusion”: Law, Medicine, and Child Sexual Abuse in Early-Twentieth-Century Scotland, 10 J. HIST. SEXUALITY 62, 75 (2001) (offering a historical analysis of “the discourse surrounding belief in a ‘virgin cure’” in Europe). AIDS researchers in Zambia, Zimbabwe, Nigeria, and China have reported the existence of similar misconceptions. Christopher Stones & Mike Earl-Taylor, *Letter from Grahamstown: HIV/Aids, the So-Called “Virgin Cure” and Child Rape in South Africa*, GLOBAL ISSUES GATEWAY, Dec. 13, 2004 (explaining that the myth of the virgin cure has a “rich and culturally diverse history”).

91. Govender, *supra* note 90; Peter Dickson, *Myth of Virgin Cure Linked to Rape*, SUNDAY TIMES, Sept. 27, 1998. Conducting field research on sexual violence in South Africa, the author observed a poster in the Eastern Cape office of a specialized sexual crimes prosecutorial unit published by The National Prosecuting Authority debunking the virgin cure myth, which suggests that the government is now acknowledging the problem of the perception that sex with a virgin will cure HIV/AIDS (photo on file with author). *Id.*

92. ANNE BAKILANA ET AL., ACCELERATING THE EDUCATION SECTOR RESPONSE TO HIV/AIDS IN AFRICA: A REVIEW OF WORLD BANK ASSISTANCE 3 (2005), available at <http://siteresources.worldbank.org/INT/HIVAIDS/Resources/375798-1103037153392/EducandAIDS.pdf>.

93. Govender *supra* note 90.

94. Maharaj, *supra* note 80.

95. LeClerc-Madlala, *supra* note 14, at 540.

96. *Id.*

97. *Id.* at 539.

98. Maharaj, *supra* note 80.

99. Daley, *supra* note 1.

girls who fail virginity tests demand explanations from their daughters and have in some instances beaten them for information.¹⁰⁰ “Sometimes these inspections destroy the child and divide the family’ . . . ‘The children we have seen are quite frightened. There is so much [sexual] abuse out there and often it is not the girl’s choice.’”¹⁰¹ In one case reported to Childline, relatives of a girl who failed her virginity test broke both of her arms.¹⁰² Other children’s rights advocates have raised questions about the consequences of testing children who are not virgins because they have been sexually abused. They maintain that virginity testing could further contribute to these children’s existing and untreated trauma.¹⁰³

Opponents of virginity testing point to ways in which such tests may create new health risks. Opponents in the medical community fear that virginity testing may have an unintended effect: increasing the risk of adolescent HIV infection by possibly encouraging young people to engage in sexual conduct riskier than intercourse.¹⁰⁴ Adolescents who are sexually active may engage in anal sex rather than vaginal sex to avoid detection of their sexual activities, given the possibility of a periodic vaginal chastity screening.¹⁰⁵ Opponents also question the hygienic conditions of the tests. For example, if one girl inspected has a sexually transmitted infection and a person with unwashed hands or the same pair of gloves inspects the rest of the line of girls, then the entire group could be infected as a result of submitting to inspection.¹⁰⁶

Child welfare advocates also believe that testing may serve to facilitate “child abuse because children become confused about the rights they have over their bodies.”¹⁰⁷ As one children’s rights advocate explains, “We are trying to teach our children, ‘your body is your body’ and then we send them to a woman who invades it.”¹⁰⁸ Consequently, many fear that testers are not giving sufficient consideration to the negative messages the exams may communicate to children and adolescents about their bodies and sexuality.¹⁰⁹

100. *Id.*

101. *Id.*

102. HUMAN RIGHTS WATCH, SCARED AT SCHOOL, *supra* note 63, at 27.

103. Bridgraj, *supra* note 77.

104. *Virginity Testing: Increasing Health Risks and Violating Human Rights in the Name of HIV-Prevention*, SIECUS POL’Y & ADVOC., Sept. 2004 (“[T]he threat of these tests motivates some young women and girls to participate in ‘virginity-saving’ sexual practices that put them at risk for sexually transmitted diseases (STD), including HIV. In areas where there is rising social pressure to undergo virginity testing, some doctors report a rise of anal sex among young women, and hypothesize that this is related to the concurrent rise in HIV-infection rates in young women in these same areas.”).

105. *Id.*; Jo Stein, *Virginity Tests in AIDS War*, NEWS 24, Sept. 2, 2000.

106. Stein, *supra* note 105 (noting the same gloves are used to test many girls); Strachan, *supra* note 46.

107. *Activists Challenge Girls’ Virginity Testing*, *supra* note 69.

108. Murphy, *supra* note 2.

109. *Id.*

II

THE DEBATE: ABOLITION V. ACCOMMODATION

[W]e need to ask “is this something that leads to the respect of women?” . . . [W]hat values is it upholding, and if girls have to preserve themselves for marriage, are we asking the same of boys?¹¹⁰

Beatrice Ngcobo, Commissioner for Gender Equality, KwaZulu-Natal

This is about empowering the girl child to say no to sex, teaching her to care about her body. Some people see it as oppression. But we are burying our youth every Saturday here. We must do something.¹¹¹

Nomagugu Ngobese, tester

Duties to protect, promote, and preserve equality are enshrined in South African law, the South African Constitution, and the international human rights treaty obligations that have been assumed by South Africa’s government since the nation’s transition to democracy. Simultaneously, certain customary practices and social norms are entrenched in civil society and occasionally come into apparent conflict with the gender equality guarantees of constitutional rights. Virginity testing is one such practice. Indeed, the United Nations Committee on the Rights of the Child, a treaty-monitoring body for the U.N. Convention on the Rights of the Child, has raised questions about the practice of virginity testing in South Africa.¹¹² In its concluding remarks on the report submitted by the South African government on its implementation of the Convention, the Committee expressed concern about “the traditional practice of virginity testing which threatens the health, affects the self-esteem, and violates the privacy of girls.”¹¹³ It also suggested that the government should study testing further to determine its “physical and psychological impact on girls.”¹¹⁴ Subsequent to the U.N. Committee’s expression of concern over virginity testing and vocal opposition from domestic gender-equality advocates, the issue of virginity testing came to a head in the South African Parliament during debates over a children’s rights bill.¹¹⁵

110. Strachan, *supra* note 46.

111. Daley, *supra* note 1.

112. Committee on the Rights of the Child, *Concluding Observations of the Committee on the Rights of the Child: South Africa*, ¶ 33, U.N. Doc. CRC/C/15/Add.122 (Feb. 22, 2000) [hereinafter CRC]. The Committee also expressed concern about the practice of female circumcision. *Id.*

113. *Id.*

114. *Id.*

115. See, e.g., South African Human Rights Commission, *Harmful Social and Cultural Practices – Virginity Testing?*, Children’s Bill [B70-B2003], Submission to the Select Committee on Social Services (NCOP) (Oct. 2005). For submissions by the South African Human Rights Commission, the National House of Traditional Leaders, the Commission on Gender Equality and other civil society organizations on the issue of virginity testing at Parliamentary hearings on

This Part presents an overview of the major divisions in the virginity testing debate. It discusses how political tensions between those who would abolish testing and those who would allow for its accommodation mirror similar divisions in the larger debate in human rights law between rights universalists and cultural relativists. It then reviews the arguments available to both opponents and proponents of testing based on international human rights law and South African constitutional law. Finally, it argues that the prevailing conceptions of the conflict between rights and culture as illustrated by the legislative battle over virginity testing are too limiting. Stakeholders in this contest should not limit their concerns to the eradication or acceptance of a particular cultural practice, but must instead expand their concerns and consider addressing the public health crisis in which virginity testing occurs.

A. The Theoretical Frameworks: Rights Universalism and Cultural Relativism

The controversy over virginity testing in South Africa echoes a long standing debate in human rights discourse over the universal or relative character of the rights enshrined in major international human rights instruments. Virginity testing arguably violates some rights, including the right to gender equality, but it furthers other rights, such as cultural autonomy and self-determination. The arguments advanced by both sides of the legislative debate over the abolition or accommodation of virginity testing can find some support in international human rights instruments as well as in the South African Constitution.

Tensions between the “universal” and the “relative” character of rights have been a source of debate since these instruments were first framed.¹¹⁶ Although the Universal Declaration of Human Rights (Declaration) reflects an apparent consensus between universalism and relativism, because the framers primarily hailed from Western cultures, questions concerning whether the values predominant in international human rights treaties adequately allow respect for the standards and values of different cultures have persisted and are

October 11, 2005, see Children’s Institute, Site Search, Virginity Testing, http://www.ci.org.za/site/site_search_frameset.asp?mode=allwords&search=virginity+testing (last visited July 30, 2008).

116. For discussion of the universalism versus relativism debate, see generally ALISON DUNDES RENTELN, *INTERNATIONAL HUMAN RIGHTS: UNIVERSALISM VERSUS RELATIVISM* 12 (1990) (suggesting that failures on the part of the drafters of international human rights instruments “ensured future confrontations” because the significance of cultural diversity was underappreciated and “little effort was made to deal with culture,” with the end result that the rights treaties “laid the groundwork for subsequent disputes”); JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 89 (2d ed. 2003) (explaining and defending human rights as universal and contending that “culture poses only a modest challenge to the contemporary normative universality of human rights”); *HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVES* 2 (Abdullahi An-Na’im ed., 1992) (collecting contributions from non-European and minority cultural perspectives to discuss the universalism versus relativism debate and advancing a “cross-cultural approach to the universal cultural legitimacy of human rights”).

played out in rhetorical conflicts between rights universality versus cultural relativism, imperialism versus self-determination, and tradition versus modernity and westernization.¹¹⁷

International human rights treaties are animated by the principle that all individuals are entitled to certain human rights that must be understood as universal, fundamental, inalienable, and never to be violated by the state or overridden by cultural or religious traditions.¹¹⁸ Accordingly, birth into a particular social group, society, or culture is irrelevant to an individual's basic intrinsic worth and his or her entitlement to these fundamental rights.

Contemporary international human rights lawyers generally maintain that human rights are universal, and therefore, that the norms contained in U.N. conventions, and in other regional human rights instruments promulgated by the European, African, and Inter-American regional human rights systems,¹¹⁹ must be applied consistently despite cultural or religious differences across countries.¹²⁰ If human rights had different meanings in different countries and cultures, it is argued, the entire edifice of human rights law would be significantly undermined and possibly "rendered meaningless."¹²¹ Thus, universality informs the discourse and content of the rights in the Declaration and all subsequent basic human rights treaties.

Because most liberal rights universalists are committed to the principles that the individual is the relevant moral unit of concern for rights protection and that certain fundamental rights are inviolable, an abolitionist response to harmful traditional or discriminatory cultural practices easily follows from the enshrined fundamental rights and their theoretical foundations. From this perspective, a central challenge for women's rights activism in Africa and other developing countries is that while laws governing the public sphere have often been altered through colonial contact and reformed by post-independence constitutionalism, the norms and practices regulating the private sphere may serve to sustain gender inequality.¹²² Many liberal feminists view custom as perpetuating the subordination of women and impeding the implementation of

117. See, e.g., *supra* note 116, at 366.

118. *Id.* at 276, 278.

119. See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, as amended; African Charter on Human and Peoples Rights, June 27, 1981, 21 I.L.M. 58; American Convention on Human Rights, Nov. 22, 1969, 36 O.A.S. T.S. 1; see also THE AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS (Malcolm D. Evans & Rachel Murray eds., 2002) (offering an overview and analysis of the African Charter's implementation and practice); CLARE OVEY & ROBIN C.A. WHITE, THE EUROPEAN CONVENTION ON HUMAN RIGHTS (4th ed. 2006) (providing an overview of the European Convention system and a survey of European Court of Human Rights case law).

120. Elizabeth M. Zechenter, *In the Name of Culture: Cultural Relativism and the Abuse of the Individual*, 53 J. ANTHROPOLOGICAL RES. 319, 322 (1997).

121. *Id.*

122. Celestine I. Nyamu, *How Should Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?*, 41 HARV. INT'L L. J. 381, 384 (2000).

universal laws guaranteeing gender equality.¹²³ Nevertheless, feminists and human rights activists who claim universal rights in the face of the empirical reality of great diversity that diverges from asserted norms are unable to adequately respond to questions raised by cultural relativists.

The concept that human rights are universal, and the idea that the rule of law provides the best framework for constructing common norms across nations and cultures have proven rhetorically powerful and politically attractive. As human rights have gained broad international respect, states have increasingly accepted human rights norms; accusations of human rights violations are now among the most potent complaints in international relations.¹²⁴ While appealing in theory and widely accepted by many nations, rights universality has proven to be problematic in practice. Competing claims for legitimacy, recognition, and autonomy from subcultures within multicultural and multiethnic states are increasingly challenging the ideal of any universals.¹²⁵

Cultural relativism theory gained prominence in anthropological and social scientific literature in the years after World War II (WWII).¹²⁶ Originating in anthropology, cultural relativism denies the existence of absolute ethical, moral, or cultural truth.¹²⁷ Accordingly, it is difficult to make principled judgments across different cultures because all human judgments are inescapably ethnocentric.¹²⁸ Relativism emerged in the academic disciple of anthropology as a reaction against the then prevalent value-laden "ethnocentric assumptions" in anthropological research that maintained that Western civilization was superior to non-Western civilizations.¹²⁹ Early relativists

123. See, e.g., Susan Moller Okin, *Is Multiculturalism Bad for Women?*, reprinted in SUSAN MOLLER OKIN, *IS MULTICULTURALISM BAD FOR WOMEN?* 7, 12-17, 24 (Joshua Cohen et al. eds., 1999) (rejecting group and cultural rights as inconsistent with the basic liberal values of individual freedom and potentially reinforcing gender inequality); Annie Bunting, *Theorizing Women's Cultural Diversity in Feminist International Human Rights Strategies*, 20 J.L. SOC'Y 6, 10, 18 (1993) (considering how international human rights can better address diverse women); see also Karen Engle, *International Human Rights and Feminism: When Discourses Meet*, 13 MICH. J. INT'L L. 517, 544-46 (surveying different feminist approaches to the issue of culture).

124. See DONNELLY, *supra* note 116, at 1 (footnote omitted).

125. *Id.*

126. Just as there are different variants of liberalism, cultural relativism also takes a number of different forms, and may range from the epistemological position to the normative position to the descriptive empirical observation. The epistemological position states that "humans are shaped exclusively by their culture and therefore there exist no unifying cross-cultural human characteristics." Zechenter, *supra* note 120, at 323. The normative claim states that because "all standards are culture bound, there can be no trans-cultural moral or ethical standards" discovered or established. *Id.* The descriptive empirical observation embraces the theory that there are different cultures in the world whose cultural practices vary. *Id.*; see also Jack Donnelly, *Cultural Relativism and Universal Human Rights*, 6 HUM. RTS. Q. 400, 401 (1984) (discussing the difference between "strong" and "weak" cultural relativism critiques of universalism).

127. Zechenter, *supra* note 120, at 323.

128. *Id.* at 322-23.

129. *Id.* at 324.

rejected ethnocentrism, resisted making value judgments, and instead stressed that “even cultures placed at the bottom of the evolutionary scale were advanced and sophisticated in at least some aspects of their cultural development.”¹³⁰

Proponents of cultural relativism raise difficult questions about the concept of universal norms. They challenge “the theoretical validity and intellectual coherence” of the various liberal theories advanced to support a universal international human rights law.¹³¹ They sometimes argue that because human rights ideals were first recognized and developed by the victorious Western powers at the end of WWII, these ideals are alien and inapplicable to non-Western cultures.¹³² The development of international human rights law since WWII has primarily been led by Western nations, lending credence to the perception that the international human rights regime has been deployed in a manner that is ethnocentric and unjust.¹³³ Indeed, “cultural relativists have accused feminist human rights activists of imposing Western standards on non-Western cultures in much the same way that feminists have criticized states for imposing male-defined norms on women.”¹³⁴ Some relativist critics of universalism maintain that universal norms are simply impossible to defend in the face of the world’s diversity.¹³⁵ In their view, international human rights should be subordinate to local domestic social norms.¹³⁶

At the very least, the relativists’ normative commitments would necessitate an accommodation of virginity testing practices and possibly even active facilitation and encouragement of testing (were it shown to be central to the community’s cultural life). Anti-colonialism and cultural integrity arguments are politically potent in regions that have emerged from the colonial experience, especially in a nation like South Africa, with its history of

130. *Id.* at 324 (arguing that some relativists “focused so much on exposing seemingly vast cultural differences, that they tended to disregard data showing a significant degree of patterned similarities among human cultures”); see also Ellen Messer, *Pluralist Approaches to Human Rights*, 53 J. ANTHROPOLOGICAL RES. 293, 305-07 (1997).

131. *Id.* at 323 (reviewing the evolution of cultural relativism in social science theory and the challenge posed by different types of relativism).

132. See, e.g., MICHAEL IGNATIEFF, HUMAN RIGHTS AS POLITICS AND IDOLATRY 58-63 (2001) (reviewing the cultural challenges to human rights universalism raised by Islamic and Asian governments); Christina M. Cerna, *Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-Cultural Contexts*, 16 HUM. RTS. Q. 740, 741 (1994) (recounting proposals by non-Western countries challenging human rights as “ideological patrimony” of Western standards to which they should not be held to account).

133. Cf. Makau Mutua, *Savages, Victims and Saviors: The Metaphor of Human Rights*, 42 HARV. INT’L L.J. 201, 202, 208 (2001) (arguing that the human rights movement’s claim of universality is undermined by a history and rhetoric which is “biased and arrogant” and doomed to failure “because it is perceived as an alien ideology in non-Western societies”).

134. Tracy E. Higgins, *Anti-Essentialism, Relativism, and Human Rights*, 19 HARV. WOMEN’S L.J. 89, 97 (1996).

135. See, e.g., Zechenter, *supra* note 120, at 323 (describing the relativists’ critique of universalism).

136. *Id.*

Apartheid. Complaints about the perceived imposition of international human rights norms, asserting that the international human rights agenda reflects the ideology of the West and represents “another attempt at imperialist capitalist domination of the south,”¹³⁷ have gained currency from the relativist critique. The contingency of the cultural relativist approach is alarming to the liberal human rights advocate because “rights are reduced from universal values to either arbitrary products of power or particular cultural developments.”¹³⁸

1. Universalist Arguments for Abolition

As evinced by severe restrictions on virginity testing in pending legislation, the abolitionist position appears to have prevailed in South Africa—at least in part. Universalists presuppose that virginity testing does not significantly contribute to solving the AIDS crisis and regularly cite three rights-based arguments in favor of abolition. Numerous international human rights treaties and the South African Constitution support the position that abolition of virginity testing is necessary because, as presently practiced, it is discriminatory, represents an invasion of privacy, and violates bodily integrity.¹³⁹

137. Fareda Banda, *Global Standards: Local Values*, 17 INT’L J. L., POL’Y & FAM. 1, 3 (2003).

138. Michael Freeman, *The Philosophical Foundations of Human Rights*, 16 HUM. RTS. Q. 491, 512 (1994) (citing Joseph Raz who suggests that “in practical terms the specific role of rights is to ground duties in the interests of others. Assertions of rights are typically intermediate conclusions that exist between ultimate values and duties”). Indeed, consensus about interests and duties are forged in particular cultural contexts.

139. International human rights instruments offended include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC), the African Charter on Human and Peoples’ Rights, the African Charter on the Rights of the Child and the South African Constitution. South Africa has signed each of these international conventions including the provisions of the conventions that include protecting equality, privacy, and body integrity; it has also ratified all but the International Covenant on Economic, Social and Cultural Rights (ICESCR). For South Africa’s ratification of the ICCPR on December 10, 1998, see *Multilateral Treaties Deposited with the Secretary General*, at 177, U.N. Doc. ST/LEG/SER.E/24 (Dec. 31, 2005). For South Africa’s ratification of the CEDAW on December 15, 1995, see *id.* at 246. For South Africa’s ratification of the CRC on June 16, 1995, see *id.* at 320. For South Africa’s signature on the ICESCR on October 3, 1994, see *id.* at 159. The Vienna Convention on the Law of Treaties codifies the rules governing the validity, application and interpretation of international treaties. Vienna Convention on the Law of Treaties, art. 5, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (1969) *reprinted in* MARK W. JANIS & JOHN E. NOYES, *CASES AND COMMENTARY ON INTERNATIONAL LAW* 926 (3d ed. 2006) [hereinafter VCLT]. The Convention states that a government may express its consent to be bound by a treaty by “signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession,” or by other agreed means. *Id.* art. 11. Generally, a signature alone does not legally bind a State that has signed an international treaty. John K. Setear, *An Iterative Perspective on Treaties: A Synthesis of International Relations Theory and International Law*, 37 HARV. INT’L L.J. 139, 149 (1996). At minimum, a signatory is bound to “refrain from acts which would defeat the object and purpose of the treaty.” VCLT, *supra*, art. 18. Ratification often involves two procedural steps: (1) a domestic government procedure approving the treaty; and (2) an

a. Gender Discrimination

Because men and boys are for the most part not subjected to virginity testing, and because the testing burden falls predominantly on young unmarried women and girls, the practice is discriminatory. Both international human rights law and the South African Constitution broadly prohibit discrimination based on sex and recognize equality of the sexes. The Declaration provides that "all human beings are born free and equal in dignity and rights."¹⁴⁰ Everyone is entitled to the rights and freedoms under the Declaration "without distinction of any kind," including distinctions based on sex; and all are "equal before the law" and entitled to "equal protection of the law."¹⁴¹ The International Covenant on Civil and Political Rights (ICCPR), which South Africa has ratified, similarly requires respect for equal rights.¹⁴² Because virginity testing is predominantly practiced on females and not males, it inflicts a dignitary harm on equality.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which South Africa ratified in its entirety without registering any reservations or objections, offers a robust and expansive definition of sex-based discrimination:

[A]ny distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status on a basis of equality with men and women of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.¹⁴³

The CEDAW expressly calls upon state parties to condemn discrimination against women in all its forms and agree to pursue policies aimed at eliminating discrimination by implementing projects to include gender equality provisions in domestic constitutions; to enact legislation and policies barring discrimination against women; to avoid participating in practices or providing support for acts that discriminate against women; to require those acting on

international exchange of the approved treaty. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 582-83 (6th ed. 2003). Once a sufficient number of States, as provided by the terms of a specific treaty, have ratified it, a treaty enters into force. Setear, *supra*, at 149-50. It then becomes a legally binding obligation for States that are parties to it. VCLT, *supra*, art. 26. The UDHR is technically not an international legal treaty but it enjoys "indirect legal effect" by virtue of the importance policymakers place upon it. See BROWNLIE, *supra*, at 534-35.

140. Universal Declaration of Human Rights, G.A. Res. 217A, art. 1, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 10, 1948) [hereinafter UDHR] (emphasis added).

141. UDHR, *supra* note 140, art. 2.

142. International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), pmbl., art. 2-3, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR].

143. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, art. 1, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/36 (Dec. 18, 1979) [hereinafter CEDAW].

behalf of the state to similarly refrain from any such support for discrimination; to end discrimination against women by private individuals or associations; and to embark upon steps to reform or “abolish” discriminatory traditions, rituals, or legal rules.¹⁴⁴

Pursuant to the CEDAW, state parties are also required to take *affirmative measures* to “modify the social and cultural patterns of conduct of men and women . . . to eliminat[e] . . . prejudices . . . and all other practices that are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women.”¹⁴⁵ The Convention on the Rights of the Child (CRC) similarly includes an anti-discrimination provision requiring affirmative action, and calling upon state parties to respect and ensure the rights of all children irrespective of the child’s sex.¹⁴⁶ Were the government to fail to eliminate or alter virginity testing, because it is a discriminatory cultural practice, the state would be in breach of its affirmative obligations under the CEDAW.

The South African Constitution contains similar protections against discrimination. The Constitution is the supreme law of the country and any law or conduct inconsistent with it is invalid.¹⁴⁷ The legislature, the executive, the judiciary, and every organ of the state are all bound to respect, protect, promote, and fulfill the rights contained in the Constitution.¹⁴⁸ The South African Constitution states that “[the] Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”¹⁴⁹ South Africa’s Constitution also recognizes the importance of compliance with principles of international law by providing that any of the country’s domestic laws must be interpreted in a manner consistent with international law.¹⁵⁰

Equality, the foundation of South Africa’s constitutional democracy, is understood to encompass “the full and equal enjoyment of all rights and freedoms.”¹⁵¹ The Constitution prohibits the government from “unfairly” discriminating against anyone “directly or indirectly” on the basis of sex.¹⁵² It also requires the Parliament to enact national legislation consistent with the

144. *See id.* art. 2(a)-(f).

145. *Id.* art. 5.

146. Convention on the Rights of the Child, art. 2, Nov. 20, 1989, 1577 U.N.T.S. 3.

147. S. AFR. CONST. 1996. ch. I, § 2; *see also* G.E. DEVENISH, A COMMENTARY ON THE SOUTH AFRICAN BILL OF RIGHTS 10-11, 19 (1999).

148. S. AFR. CONST. 1996. ch. II, § 8(1).

149. *Id.* ch. II, § 7(1).

150. *Id.* ch. 14, § 233.

151. *Id.* ch. II, § 9(2).

152. *Id.* ch. II, § 9(3). For a discussion of South Africa’s incorporation of gender equality into its Constitution and analysis of the status of women, see generally Penelope E. Andrews, *From Gender Apartheid to Non-Sexism: The Pursuit of Women’s Rights in South Africa*, 26 N.C. J. INT’L L & COM. REG. 693 (2001); Penelope E. Andrews, *Striking the Rock: Confronting Gender Equality in South Africa*, 3 MICH. J. RACE & L. 307 (1998).

prohibition against unfair discrimination.¹⁵³ Under the South African Constitution, “[e]veryone is equal before the law and has the right to equal protection and benefit of the law.”¹⁵⁴ Unlike its U.S. counterpart, there is no state action requirement; the South African Constitution’s anti-discrimination provision reaches the conduct of private actors, including virginity testers, by providing that no person may unfairly discriminate directly or indirectly.¹⁵⁵ Constitutional provisions have been interpreted to apply horizontally (regulating the relationships among private individuals) as well as vertically (regulating the state’s relationship to the individual).¹⁵⁶ The fact that virginity testers are not formal state actors does not remove the practice or those engaged in it from constitutional scrutiny.

b. Violation of Sexual Autonomy and Bodily Integrity

Both international human rights law and South African constitutional law can be understood not only to protect bodily integrity, but also to protect sexual autonomy and the freedom to make choices concerning reproduction and childbirth.¹⁵⁷ The CEDAW obliges state parties to eradicate discrimination against women in the domain of marriage and the family. While the CEDAW is neutral on the issue of voluntary abortion, reproductive freedoms and education concerning matters of human sexuality are protected pursuant to the Convention.¹⁵⁸ It maintains that there is a right to information to facilitate

153. S. AFR. CONST. 1996. ch. II, § 9(4).

154. *Id.* ch. II, § 9(1).

155. *Id.* ch. II, § 9(4). The Constitutional Court’s webpage reaffirms this position by stating “the Bill of Rights doesn’t only apply vertically (from the state downwards, to its citizens)—it also applies, where applicable, horizontally (between one citizen or private body and another).” See Constitutional Court of South Africa, *Your Rights: The Bill of Rights*, <http://www.concourt.gov.za/site/yourrights/thebillofrights.htm#Vertical> (last visited Feb. 20, 2008); see DEVENISH, *supra* note 147, at 24. Devenish asserts that “[t]he pertinent issue is no longer whether the bill of rights operates horizontally . . . but what are the exact extent and nature of the horizontal application.” *Id.* at 19. Furthermore, “a provision of the bill of rights may, depending on the circumstances, bind a natural or a juristic person.” *Id.* at 24. See generally Johan van der Walt, *Progressive Indirect Horizontal Application of the Bill of Rights: Towards a Co-Operative Relation Between Common-Law and Constitutional Jurisprudence*, 17 S. AFR. J. ON HUM. RTS. 341 (tracing the use of horizontal application of the Bill of Rights from the 1993 Interim Constitution to the 1996 Constitution and its continued development in subsequent cases).

156. See, e.g., Stephen Ellmann, *A Constitutional Confluence: American “State Action” Law and the Application of South Africa’s Socioeconomic Rights Guarantees to Private Actors*, 45 N.Y.L. SCH. L. REV. 21, 35 (2001).

157. The ICCPR states that no one shall be subjected to “cruel, inhumane or degrading treatment or punishment. In particular, no one shall be subjected without his [or her] free consent to medical or scientific experimentation.” ICCPR, *supra* note 142, art. 7. General Comment 20, which further develops the meaning of ICCPR Article 7, specifically states that the aim of Article 7 “is to protect both the dignity and the physical and mental integrity of the individual.” U.N. Human Rights Comm., General Comment No. 20, art. 7, ¶ 2, 44th Sess. (1992), available at <http://www.unhchr.ch/tbs/doc.nsf/0/6924291970754969c12563ed004c8ae5?Opendocument>.

158. Comm. on the Elimination of Discrimination against Women, General Recommendation No. 19, art. 16 (and article 5), ¶ 22, 11th Sess. (1992), available at

women's ability to realize reproductive rights.¹⁵⁹ Similarly, the CRC requires state parties to safeguard children from neglect, physical violence, abuse, and sexual violations through the enactment of legislation, the establishment of administrative organs, and social reform and education programs.¹⁶⁰

Similar to the protections provided under international law, the South African Constitution recognizes a "right to bodily and psychological integrity" encompassing a "right to make decisions concerning reproduction" and protecting individuals' right "to security in and control over their body."¹⁶¹ For instance, South African courts have upheld legislation protecting a woman's right to abortion.¹⁶² Like the CRC, South Africa's Constitution guarantees rights for children, including the right "to be protected from maltreatment, neglect, abuse or degradation."¹⁶³ In all decisions concerning the welfare of children their "best interests" are to be accorded highest priority.¹⁶⁴

Reproduction and sexuality are fundamental to the core of certain entrenched traditional, religious, cultural, and ideological beliefs concerning female gender identity. While governments often are directly responsible for abuses in the course of implementing policies that regulate women's sexual and reproductive decision making, social and cultural norms also enforce or reinforce limitations on women's choices with respect to sexuality, reproduction, and childbearing.¹⁶⁵ Sometimes, policies infringing women's reproductive freedoms are arguably justified by governmental assertions about perceived state interests in economic development or population control, as is the case, for example, with China's one child policy.¹⁶⁶

In other instances, discriminatory social biases, when combined with

<http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom19>; Comm. on the Elimination of Discrimination against Women, General Recommendation No. 24, art. 12, 20th Sess. (1999), available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom24>.

159. CEDAW, *supra* note 143, art. 16(e).

160. CRC, *supra* note 112, art. 19.1, 34.

161. S. AFR. CONST. 1996. ch. II, § 12(2).

162. See, e.g., *Christian Lawyers Ass'n of S. Afr. v. Minister of Health* 1998 (12) BCLR 1434 (T) (S. Afr.).

163. S. AFR. CONST. 1996. ch. II, § 28 (1)(d).

164. *Id.* ch. II, § 28 (2). A "child" means a person under the age of eighteen years. See *id.* ch. II, § 28(3).

165. For a discussion on the use of human rights to promote women's sexual autonomy, see generally Sarah Y. Lai & Regan E. Ralph, *Female Sexual Autonomy and Human Rights*, 8 HARV. HUM. RTS. J. 201, 205, 218 (1995) (assessing limitations on human rights advocacy for promoting women's rights, examining virginity testing in Turkey, and child marriage in Nigeria as illustrations).

166. See Lesley Wexler, *Allowing Girls to Hold Up Half the Sky: Combining Norm Promotion and Economic Incentives to Combat Daughter Discrimination in China*, 7 CHI. J. INT'L L. 79, 83-84 (2006) (reviewing roots of daughter discrimination and son preference in China); Ellen Keng, Note, *Population Control Through the One-Child Policy in China: Its Effects on Women*, 18 WOMEN'S RTS. L. REP. 205, 206-07 (1997) (reviewing the motivations and impacts of the Chinese government's family planning policies).

economic pressures, constrain or influence women's childbearing choices without any formal state action. For instance, in certain areas of India, strong preferences for male infants over female infants influence sex-selective childbearing decisions and have resulted in an imbalanced sex ratio.¹⁶⁷ These violations are perhaps more pronounced and prevalent where governments fail to promulgate policies that foster gender equality and protect women's rights related to reproduction and sexuality. Thus, state complicity is largely found in government failures.

Virginity testing as presently practiced in South Africa impedes the free exercise of the right to sexual autonomy and bodily integrity. To the extent that the testing is physically invasive, it interferes with a girl's right to security in her body and sexuality. To the extent that being marked as a virgin may place a child at greater risk of sexual abuse or exploitation, the practice violates obligations to protect children from abuse. Finally, to the extent that testing is coercive, not accompanied by sex education, and presents abstinence as the only option available, a child may be placed at even greater risk of infection and transmission of HIV/AIDS because her ignorance may undermine her ability to protect herself against the disease.

c. Violation of Privacy

Both international law—in the Declaration, the ICCPR, and the CRC—and the South African Constitution protect privacy. The Declaration and the ICCPR use similar language to prohibit arbitrary interference with individuals' privacy.¹⁶⁸ Echoing the language of other human rights agreements, Article 16 of the CRC extends privacy rights protections to children under the age of eighteen.¹⁶⁹ Similarly, provisions of the South African Constitution protect a right to privacy.¹⁷⁰

Most relevant to the testing debate is the protection of informational privacy regarding chastity status. As presently practiced, virginity testing makes a public spectacle of private, personal, and intimate matters. Virginity test results become common knowledge within communities and undermine the reputations of those who are deemed to have failed their virginity tests. Even if testing were not coercive, results are often arbitrary and once revealed can have negative consequences for a child, whether she is said to "pass" or "fail."

167. See, e.g., Amartya Sen, *More Than 100 Million Women Are Missing*, N.Y. REV. BOOKS, Dec. 20, 1990, at 61-66, available at <http://www.nybooks.com/articles/3408> (estimating the number of women "missing" in parts of Asia attributable to inequality, culture, and gender discrimination); see also Andrea Krugman, Note, *Being Female Can be Fatal: An Examination of India's Ban on Pre-Natal Gender Testing*, 6 CARDOZO J. INT'L & COMP. L. 215 (1998) (examining India's gender ratio imbalance and the status of women).

168. UDHR, *supra* note 140, art. 3, 12; ICCPR, *supra* note 142, art. 17.

169. CRC, *supra* note 112, art. 16.

170. S. AFR. CONST. 1996. ch. II, § 14 ("Everyone has the right to privacy which includes the right not to have their person searched.").

2. Cultural Relativist Arguments for Accommodation

Opponents of the legislative prohibition of virginity testing reject the discrimination arguments advanced by women's rights advocates. Instead, they describe virginity testing as a cultural right that must be accepted and accommodated without intervention from the state. Community organizations that promote virginity testing accuse the Commission for Gender Equality and others of suppressing cultural rights and the right to self-determination. Testers insist that virginity testing is not imposed on unwilling girls. Far from being discriminatory, they assert, in some communities the testing practice is part of a celebration and is an expression of one's cultural background.¹⁷¹ Accommodationists turn to both international and constitutional law to defend the practice of virginity testing and their cultural rights.

a. Cultural Autonomy and Collective Rights to Associate and Assemble

Both international human rights law and the South African Constitution acknowledge a right to culture. The first basis for recognition of this right is found in a state's legal duty to guarantee the rights of minority populations, and particularly groups defined by culture, language, ethnicity, or religion. States are obliged to protect the existence and identity of minority groups, and to refrain from suppressing minority cultures. Article 27 of the Declaration proclaims that "[e]veryone has the right freely to participate in the cultural life of the community."¹⁷² In states containing minority groups defined by language, ethnicity, or religion, the ICCPR commands that "persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language."¹⁷³

The ICESCR, which South Africa has signed but not ratified, recognizes a right to participate in "cultural life" and urges governments to enable the dissemination, preservation, and advancement of cultures.¹⁷⁴ Article 30 of the CRC also protects cultural rights in the community.¹⁷⁵ Like the ICCPR and ICESCR, the CRC provides that "[i]n those states in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practi[c]e his or her own religion, or to use his or her

171. See Kerry Cullinan, *Virginity Testers Say They Will Never Quit*, HEALTH-E, Dec. 13, 2001, <http://www.health-e.org.za/news/article.php?uid=20010918> (last visited Feb. 16, 2008).

172. UDHR, *supra* note 140, art. 27.

173. ICCPR, *supra* note 142, art. 27.

174. International Covenant on Economic, Social and Cultural Rights, pmbl, art. 15, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

175. CRC, *supra* note 112, art. 30.

own language.”¹⁷⁶

Some commentators contest who is supposed to benefit from the minority cultural rights contained in international rights agreements.¹⁷⁷ The treaties speak of persons pursuing their rights, and it is generally accepted that while individuals are the principle rights holders, they can enjoy their culture only in community with the other members of their group. Some commentators suggest that this may signify that the community also has a legal interest in cultural association and expression as a given ethnic, religious, or linguistic group.¹⁷⁸

For those who reject the idea that a group can possess rights, a form of cultural rights expression can be located in an individual's right to associate and assemble with others.¹⁷⁹ The Declaration provides that “[e]veryone has the right to freedom of peaceful assembly and association,” but “[n]o one may be compelled to belong to an association.”¹⁸⁰ Similarly, the ICCPR provides that a “right of peaceful assembly shall be recognized” such that “[n]o restrictions may be placed on the exercise of this right other than those in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety . . . [and] public health or morals.”¹⁸¹ In Article 15, the CRC calls upon state parties to recognize rights of the child to freedom of assembly and association.¹⁸²

The South African Constitution is even more explicit than international instruments on the question of cultural rights.¹⁸³ It provides, “Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community to enjoy their culture, practise their religion and use their language; and to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.”¹⁸⁴ However, these cultural rights “may not be exercised in a manner inconsistent

176. CRC, *supra* note 112, art. 30.

177. See generally ERIC J. MITNICK, RIGHTS, GROUPS, AND SELF-INVENTION 19 (2006) (providing an analysis of legal and political debates concerning liberalism and collective group rights).

178. T.W. BENNETT, HUMAN RIGHTS AND AFRICAN CUSTOMARY LAW UNDER THE SOUTH AFRICAN CONSTITUTION 24-25 (1999). The Declaration does not expressly indicate whether the beneficiaries of these rights are groups or individuals.

179. See Chandran Kukathas, *Are There Any Cultural Rights?*, in THE RIGHTS OF MINORITY CULTURES, at 228 (1995).

180. UDHR, *supra* note 140, art. 20.

181. ICCPR, *supra* note 142, art. 21.

182. CRC, *supra* note 112, art. 15. See GERISON LANSDOWN, UNICEF, INNOCENTI INSIGHT: THE EVOLVING CAPACITIES OF THE CHILD (2005) (observing that childhood is not an undifferentiated period and analyzing how governments might apply universal human rights standards across diverse perceptions of childhood in a principled manner). “A 17-year-old has profoundly different needs and capacities than a 6-month-old baby, while being entitled to the same rights.” *Id.* at vii.

183. S. AFR. CONST. 1996. ch. II, § 30.

184. *Id.* ch. II, § 31(1).

with any [other] provision[s] of the Bill of Rights.”¹⁸⁵ For many engaged in the practice, virginity testing serves to promote cultural autonomy and the individual’s right to enjoy culture in community with others. For example, to the extent that virginity testing occurs in the context of celebrations, it may further build community among individuals who share a particular culture. Self-esteem may be enhanced for those virgins recognized and acknowledged for their contribution to the community. Arguably, a sense of gender empowerment may even be advanced to the extent females are believed to be protecting their communities from HIV/AIDS by making and maintaining a choice to abstain from sexual activity.

b. Self-Determination

As a result of the era in which they were drafted—when many nations were still subject to colonial administration—the international human rights instruments contain powerful statements supporting the right of self-determination. For instance, the ICCPR acknowledges, “All peoples have the right of self-determination [and may] freely determine their political status and freely pursue their economic, social and cultural development.”¹⁸⁶ Similarly, the ICESCR acknowledges, “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”¹⁸⁷ Many engaged in virginity testing see themselves as acting to save future generations. To the extent that HIV/AIDS is perceived to present a literal existential threat to the community, the power of a community to freely determine how best to confront such a threat is consistent with self-determination rights.

B. The Legislative Battle to Ban Virginity Testing

The South African government has taken legislative action to end testing. The legal and policy debates over virginity testing were structured as a choice between abolition or accommodation of the practice. In public hearings on provisions of draft legislation to protect children’s rights, testing proponents and opponents alike advanced arguments reflecting an oppositional conflict between culture and human rights. The legislative battle positioned women’s rights organizations and officials from South Africa’s Commission on Gender Equality (CGE)¹⁸⁸ against members of the National House of Traditional

185. *Id.* ch. II, § 31(2).

186. ICCPR, *supra* note 142, art. 1.

187. ICESCR, *supra* note 174, art. 1.

188. See Shashank Bengali, *South Africa to Outlaw Virginity Testing for Girls*, KNIGHT RIDDER, Nov. 8, 2005 (reporting that “it’s the clause on virginity testing [within the children’s rights bill] that’s stirred the most controversy, pitting rights groups against South Africa’s large and politically sensitive Zulu community and its traditional beliefs”); Bongani Mthethwa & Sibongile Khumalo, *Uproar as State Moves to Ban Virginity Testing*, SUNDAY TIMES, July 11, 2005 (reporting on opposition to ban by traditionalists, and support by constitutionalists and

Leaders.¹⁸⁹

To “promote and protect gender equality,” the CGE vigorously campaigned to criminalize all “harmful social, cultural, and religious practices” that affect women and girls.¹⁹⁰ Recently, their efforts have focused on the eradication of virginity testing and female circumcision. As early as 2000, however, the Commission, in cooperation with the South African Human Rights Commission,¹⁹¹ hosted a conference on virginity testing inviting all interested stakeholders to discuss abolition of the practice.¹⁹² Agreement and compromise between the different parties invited proved illusive at the time.¹⁹³

In June 2005, the National Assembly (Assembly), South Africa’s lower house of Parliament, passed South Africa’s first Children’s Bill, which was intended to give effect to children’s constitutional rights and to stipulate principles relating to the care and protection of children.¹⁹⁴ It provided that

women’s rights advocates). The Commission on Gender Equality is an independent statutory body established pursuant to Section 187, Chapter 9 of the South African Constitution and charged with promoting “the protection, development and attainment of gender equality” and empowered “to monitor, investigate, research, educate, lobby, advise and report on issues concerning gender equality.” S. AFR. CONST. 1996. ch. IX §§ 187(1), 187(2).

189. Press Release, Comm’n on Gender Equality, Cultural Groups to Protest at Commission on Gender Equality Offices about Children’s Bill Outlawing Virginity Testing (Sept. 15, 2005) [hereinafter Comm’n on Gender Equality Sept. 2005 Press Release], available at <http://www.info.gov.za/speeches/2005/05091610451007.htm> (reporting on protests by cultural organizations regarding the failure of lawmakers in the lower house of Parliament to consult them prior to banning virginity testing). The status of traditional leaders, institutions representative of traditional leadership, and customary law are granted recognition pursuant to Section 211, Chapter 12 of the Constitution of South Africa. S. AFR. CONST. 1996. ch. XII, §§ 211(1), 211(2).

190. Comm’n on Gender Equality, Submission to the Select Committee on Social Services (NCOP): Children’s Bill [B70B-2003], at 3 (Oct. 1, 2005) available at <http://www.ci.org.za/depts/ci/plr/docs/CGE%20Submission%20-%20virginity%20testing.doc>.

191. The Human Rights Commission is an independent statutory body established in terms of Section 184, Chapter 9 of the Constitution of South Africa and charged with promoting “the protection, development and attainment of human rights.” S. AFR. CONST. 1996. ch. IX § 184. The Commission annually reviews the measures taken by “relevant organs of state . . . towards the realisation of rights in the Bill of Rights concerning housing, health care, food, water, social security education and the environment.” *Id.* at § 184(3).

192. *Virginity Testing Debate Planned*, DISPATCH ONLINE, June 10, 2000, <http://www.dispatch.co.za/2000/06/10/southafrica/VIRGIN.HTM> (last visited July 31, 2003).

193. *Virginity Testing*, PPP NEWS, *supra* note 84; *see, e.g.*, CGE, CONSULTATIVE CONFERENCE, *supra* note 49, at 63-65 (disapproving testing and hoping that further discussions between stakeholders would yield consensus).

194. *See* Ben MacLennan, *Children’s Bill Approved by Assembly*, MAIL & GUARDIAN, June 23, 2005, available at <http://www.mg.co.za/article/2005-06-23-childrens-bill-approved-by-assembly> (reporting that the Children’s Bill “outlaws virginity testing”). The 2005 Children’s Rights Act will eventually repeal the 1983 Child Care Act, which was shaped by the Apartheid government before the democratic transition and prior to the enactment of the child protection provisions of the Bill of Rights. LUCY JAMIESON & PAULA PROUDLOCK, CHILDREN’S BILL PROGRESS UPDATE: REPORT ON AMENDMENTS MADE BY THE PORTFOLIO COMMITTEE ON SOCIAL DEVELOPMENT 2 (June 2005) [hereinafter CHILDREN’S BILL PROGRESS UPDATE JUNE 2005], available at <http://www.ci.org.za/depts/ci/plr/pdf/progress/27June2005.pdf>. Children’s rights groups maintain that the 1983 Act was not crafted with a children’s rights perspective in mind and does not start from a premise of equality for all children or promote the best interests of the child

“[c]ultural, religious and social practices that have the potential to harm children . . . [were to be] prohibited or regulated.”¹⁹⁵ After hearing submissions from the public, the Assembly decided to ban virginity testing in the draft Children’s Bill.¹⁹⁶ Over objections from traditional leaders,¹⁹⁷ the lower house of Parliament adopted an aggressive abolitionist stance and drafted provisions that would have prohibited all virginity testing.¹⁹⁸

Eventually, in response to pressure from traditional leadership, the National Council of Provinces (Council), the upper house of Parliament, reopened debates and called for additional rounds of public hearings on the Bill, mainly due to continuing controversy over provisions banning virginity testing.¹⁹⁹ The Council proposed amendments to the Bill, including a compromise on testing that included a minimum age threshold above which testing would be permitted instead of an outright ban, and returned the issue to the Assembly for reconsideration.²⁰⁰ The full Parliament, consisting of the National Assembly and the National Council of Provinces, later entertained and agreed upon a revised compromise measure.²⁰¹

Under the compromise in the Children’s Rights Act passed by the Assembly and Council,²⁰² testing is now prohibited on children under the age of sixteen.²⁰³ For girls and women over the age of sixteen, however, testing may be conducted provided that it is only performed in private, after

principle. *Id.*

195. CHILDREN’S BILL PROGRESS UPDATE JUNE 2005, *supra* note 194, at 3, 10-11 (reporting that Section 12 of the draft bill provides that “[e]very child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being, health or dignity of the child”; virginity testing of children was specifically banned in Section 12(4)) (internal quotations omitted). Female circumcision was also banned. *Id.* at 3. Male children now have the right to refuse to be circumcised. *Id.* (citing Section 12(5)). Anyone violating these provisions or who fails to protect the child from such an act is guilty of a criminal offense. *Id.* (citing Section 12(6)).

196. *Id.* (citing Section 12(5)).

197. Comm’n on Gender Equality Sept. 2005 Press Release, *supra* note 190.

198. Mthethwa & Sibongile, *supra* note 188 (reporting that the Bill would criminalize such conduct, “impos[ing] an outright ban on virginity testing” if approved by the upper house of Parliament); *see also* CHILDREN’S BILL PROGRESS UPDATE JUNE 2005, *supra* note 194, at 3, 11.

199. Bengali, *supra* note 188; Jonathan Clayton, *South Africa Ready to Ban ‘Degrading’ Virginity Tests*, THE TIMES (London), Dec. 14, 2005. The Council offered stakeholders who had not yet been heard by the Assembly an opportunity to make submissions. It heard from representatives of the National House of Traditional Leaders, the Commission on Gender Equality, and the general public on the social costs and benefits of virginity testing. Fienie Grobler, *Virginity Testing May Soon be Banned Custom*, MAIL & GUARDIAN, Dec. 13, 2005.

200. Christina Gallagher, *Bill Puts Clamp on Virginity Testing*, THE STAR, Dec. 24, 2005, at 1, available at http://www.int.iol.co.za/index.php?set_id=1&click_id=13&art_id=vn20051224091523135C979037 (reporting on the Council’s amendments to the Assembly’s testing ban to permit testing for those over sixteen).

201. Clayton, *supra* note 199 (covering Parliament’s debate on the proposed Bill to ban testing for children under sixteen).

202. Children’s Act 38 of 2005, available at <http://www.info.gov.za/gazette/acts/2005/a38-05.pdf>.

203. *Id.* at § 12(4).

counseling, and with consent.²⁰⁴ The test results may not be publicly disclosed, nor may the individual be marked in any way to indicate her passage or failure of a virginity test.²⁰⁵ Regulations to be drafted at a later date will prescribe the conditions under which the virginity testing procedure may permissibly be carried out on children above the age of sixteen.²⁰⁶

At this writing, additional procedural difficulties concerning certain provisions of the Children's Act have delayed implementation,²⁰⁷ and a second Children's Bill is working its way through Parliament, which will further delay implementation. One issue in the second Children's Bill is the age at which a child can access medical treatment or contraception without their parents' consent or knowledge.²⁰⁸ Eventually, when both Bills have passed both bodies of Parliament, they will be consolidated into a single Children's Act, and the partial virginity testing ban will be given effect.²⁰⁹ Most South African children's rights advocates believe that immediate implementation of a final Children's Act is unlikely.²¹⁰

The successful implementation of any new children's legislation will depend heavily on the cooperation of all levels of government as well as civil society. In any event, negotiating the conflict between cultural rights and human rights will remain a persistent challenge to the government. With respect to the virginity testing provisions of the Children's Act, the compromise does not resolve the conflict between abolitionists and accommodationists, nor

204. *Id.*

205. *Id.* at § 12(5).

206. *Id.* In pertinent part, with respect to virginity testing the legislation now provides: (1) Every child has the right not to be subjected to social, cultural and religious practices which are detrimental to his or her well-being . . . (4) Virginity testing of children under the age of 16 is prohibited. (5) Virginity testing of children older than the age of 16 may only be performed (a) if the child has given consent to the testing in the prescribed manner; (b) after proper counseling of the child; and (c) in the manner prescribed. (6) The results of a virginity test may not be disclosed without the consent of the child. (7) The body of a child who has undergone virginity testing may not be marked. *Id.*

207. See LUCY JAMIESON & PAULA PROUDLOCK, CHILDREN'S BILL PROGRESS UPDATE 1-2 (March 2006) [hereinafter CHILDREN'S BILL PROGRESS UPDATE MARCH 2006]. The Children's Bill containing the testing ban was passed as a Section 75 Bill. *Id.* at 2. The second Children's Bill, a Section 76 Bill, still must be passed before the ban is enacted. *Id.* For a detailed explanation of the different procedures the South African Parliament follows for different types of bills, see *id.* at 2, 6.

208. *Id.* at 8. The same constituency advocating virginity testing—the representatives of traditional leadership—opposes the proposed contraception access provisions as they currently appear in the companion Children's Bill. *Id.*

209. See, e.g., PAULA PROUDLOCK, CHILDREN'S BILL PROGRESS UPDATE 1-2 (July 2006) [hereinafter CHILDREN'S BILL PROGRESS UPDATE JULY 2006], available at <http://www.ci.org.za/depts/ci/plr/pdf/progress/ProgressUpdate3July2006.pdf> (reviewing the procedures for the Act to be entered into effect and projecting the year 2008 as the earliest that the Act might come into force); see also Children's Bill: Bills, <http://www.ci.org.za/site/includes/content/PolicyLawReform/bills.html> (last visited Feb. 14, 2008).

210. CHILDREN'S BILL PROGRESS UPDATE JULY 2006, *supra* note 209, at 1.

does it indicate that the two sides have moved closer together. For both sides, the compromise will be less than optimal because each side has staked its position based on the premise that protecting rights will require restraining either testers (who should not interfere with bodily integrity) or the government (which should not interfere with cultural autonomy). Even in a best case scenario, such a compromise is likely doomed.

C. The Limits of the Legislative Battle Lines: Forbearance, Not Performance

Having reviewed how political interest groups align to press for either the abolition or the accommodation of virginity testing, and having outlined the central theoretical division between rights universalists and cultural relativists to demonstrate how the legislative debates in South Africa reanimate this divide, I now consider the shortcomings of both sides of the testing debate. I argue that the rigid and limited conceptions of rights and culture that have been deployed by stakeholders in this conflict are inadequate to account for the challenge the virginity testing resurgence presents on a theoretical level. As a practical matter, I observe that virginity testing can be distinguished from certain other cultural practices that are harmful to women and girls. Explaining some of the central motivating factors driving resurgence of the practice, I argue that attempts to address virginity testing by legal prohibitions are unlikely to eradicate the practice. Finally, I call for a shift in the contemporary rights discourse toward a right to health.

Stakeholders in the legislative war over virginity testing have drawn the wrong battle lines. Arguments advanced by testing abolitionists are flawed because they fail to appreciate the opportunities that culture may present for positive change. Arguments advanced by those who maintain that testing should be accommodated unchanged ignore the fact that “traditional” testing practices have indeed changed over time. Unfortunately, common to both sides of the debate has been the tendency to see virginity testing itself as the problem and to frame abolition and accommodation as the only possible solutions.

The debates on virginity testing have thus been at once stimulating and impoverished, highlighting the limits of prevalent conceptions of rights as inflexible, culture as stagnant, and gender equality as incompatible with cultural autonomy. These conceptual limitations are not inevitable. Rights can be seen as complementary instead of conflicting. For example, realization of the right to education²¹¹ complements the right to participation in public affairs²¹² and may in turn strengthen respect for human rights and fundamental freedoms. Moreover, some conceptualizations of rights are not entirely absolute. Under international law, some rights may be derogated in times of

211. ICESCR, *supra* note 174, art. 13

212. ICCPR, *supra* note 142, art. 25.

emergency.²¹³ Similarly, the South African Constitution incorporates a “limitations clause” acknowledging that only a limited number of rights are always absolute.²¹⁴

Each side of the testing debate has demanded some measure of forbearance from interference with a favored basic right that is viewed as threatened by the other side’s ideological positions or actions. For example, advocates with the Commission for Gender Equality do not want traditional communities interfering with the privacy rights that young women and girls have over their bodies.²¹⁵ Traditional leaders representing testers do not want the government and other perceived outsiders to interfere with communities’ rights to express their culture through virginity testing.²¹⁶ To testing opponents, the children’s rights legislation is insufficient to protect gender equality. To testing proponents, the children’s rights legislation is a significant infringement on cultural freedoms.²¹⁷

Advocates on both sides of this debate, and the young women and girls at the heart of it, would be better served by *intervention* at local, national, and international levels, which would help to realize a meaningful right to health and prevent premature death and disease from HIV/AIDS. Arguably, in part, the South African government’s initial failure to adequately meet its obligations to realize health care rights gave rise to the resurgence of virginity testing.²¹⁸

213. The ICCPR provides that in “times of public emergency” where the existence and security of the nation is compromised, a state may “take measures derogating from their [usual] obligations,” provided such measures are “strictly required by the exigencies of the situation” and are not discriminatory. *Id.* art. 4(1). There can be no derogation with respect to the rights to life and equal protection under law as well as prohibitions against torture, slavery, ex post facto criminal prosecutions, and religious freedom. *Id.* art. 4(2).

214. S. AFR. CONST. 1996, ch. II, § 36. The limitations clause specifies that the rights contained in the Bill of Rights “may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable . . . taking into account all the relevant factors, including: (a) the nature of the right; (b) the importance . . . of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose.” See *Larbi-Odam v. Member of the Executive Council for Ed.* 1998 (1) SA 745 (CC) (S. Afr.) (holding that reasonableness and justification are dependent upon circumstances); *State v. Makwanyane* 1995 (3) SA 391 (CC) (S. Afr.) (formulating the factors for evaluating a policy limiting certain rights); see generally DEVENISH, *supra* note 147.

215. See Murphy, *supra* note 2.

216. See Fikile-Ntsikelelo Moya, *The Virginity Tester*, MAIL & GUARDIAN, Sept. 23, 2005, available at <http://www.mg.co.za/article/2005-09-23-the-virginity-tester>.

217. See, e.g., Louise Vincent, *Virginity Testing in South Africa: Re-traditioning the Postcolony*, 8 CULTURE, HEALTH & SEXUALITY 17, 18 (2006).

218. Cf. Steven Friedman, *On HIV/AIDS, Government Still Speaks With a Forked Tongue*, BUSINESS DAY (JOHANNESBURG), Feb. 8, 2006 (reporting the harmful effects of the government’s “mixed messages” in HIV/AIDS prevention); Tina Rosenberg, *For People with AIDS, A Government with Two Faces*, N.Y. TIMES, Aug. 30, 2006 (discussing an appeals court contempt order against the government for failing to provide available antiretroviral drugs as ordered); Singer, *supra* note 2 (citing testers who claim they test “because they have nothing else” available to combat the spread of AIDS).

Virginity testing has become an adaptive self-help solution where there are limited options for South African women and girls to successfully avoid infection and obtain treatment for infection. Stakeholder demands should be for *performance*, not forbearance and non-interference.

Classical liberal conceptions of rights differentiate between “negative” rights, which constrain state power to intervene, and “positive” rights, which impose duties upon the state to exercise its power to intervene.²¹⁹ While disappointing, it is not surprising that the virginity testing debate became so polarized and misdirected; both the gender equality and cultural autonomy positions are rooted in a human rights perspective that conceptualizes rights as requiring forbearance and non-interference. Such an approach is incomplete and ineffective because it risks entrenching the negotiating postures of both sides, and their perceptions of victory and defeat are reduced to a zero-sum contest. From these postures, the best that can be expected are more unstable compromises that will remain vulnerable to selective non-enforcement, popular rejection, and strategic outmaneuvering. In light of South Africa’s HIV/AIDS crisis, stakeholders must do better than unstable compromises. Had rights been conceptualized more expansively, the dialogue over virginity testing might have addressed the legal obligations of governments and communities to children under international and constitutional law in the context of an epidemic disease.

Regardless of when South Africa’s Children’s Act takes effect, the partial ban on virginity testing will not stop the practice.²²⁰ Testers and traditionalists who have vowed to continue testing have condemned the ban.²²¹ “In Pietermaritzburg and Durban, hundreds of . . . women . . . marched in opposition to the ban [and] Inkosi Mzimela, the chairperson of South Africa’s House of Traditional Leaders, an assembly of tribal chiefs, called the legislation [an] outrage[] and warned that communities would defy it.”²²² These objections serve as yet another reminder that specific rights may not be universally accepted, regardless of how well established they are in either

219. Jeanne M. Woods, *Justiciable Social Rights as a Critique of the Liberal Paradigm*, 38 TEX. INT’L L.J. 763, 765 (2003) (noting that “[t]he assumed dichotomy between [positive and negative rights] blurs the true dilemma that social rights pose for the liberal paradigm [which is] that rights implicating the redistribution of social resources are collective in charter and rooted in the common needs of human beings in society”).

220. Sharon LaFraniere, *Women’s Rights Laws and African Customs Clash*, N.Y. TIMES, Dec. 30, 2005 (“‘We will uphold our traditions and customs,’ said Patekile Holomisa, president of the Congress of Traditional Leaders, a political party in South Africa, ‘There are laws that are passed that do not necessarily have any impact on the lives of people. I imagine this will be one of those.’”).

221. *Id.* (reporting that Jacob Zuma, South Africa’s former Deputy President, personally attended a testing ceremony and supports virginity tests “as a way to shield African values against the corrosive effects of Western civilization”).

222. *Id.*; see also Zwelihle Memela, *Virginity Testers Fight for their ‘Cultural Rights’*, NATAL WITNESS NEWS, Dec. 6, 2000.

public international law or domestic constitutional law.²²³ Accordingly, lawmakers must consider to what degree a liberal constitutional democracy such as South Africa must, by virtue of its own commitments, take cultural justifications for departures from gender equality seriously when articulated by those most affected.²²⁴

The debate over virginity testing shares features of other women's human rights struggles in that it exposes the persistent theoretical and practical tensions between human rights universalism and cultural relativism when gender equality is at issue. It strongly resembles earlier controversies surrounding the attempted eradication of female circumcision in other African nations.²²⁵ Although the two practices are different in nature, feminists view both customs as socially oppressive, while those who engage in these practices view themselves as embracing self-constituting expressions of traditional culture. Both practices also depart from the classic rights violation paradigm in which governments constrain individuals' liberty; here, it is private individuals, operating without express government approval, who are arguably violating the rights of girls and young women. Feminists and human rights scholars have produced an extensive body of literature on the potential use of human rights law to eradicate female circumcision and other harmful traditional, cultural, and religious practices.²²⁶ Whether advancing abolition, accommodation, or cross-cultural conversations, the literature reflects deep conflicts about whether—when confronted with cultural beliefs held by women inside a particular community—the international human rights system can, given its “outsider” status, make ethical judgments about cultural practices and how these practices should be treated in domestic and international law.²²⁷

223. See Karen Engle, *Female Subjects of Public International Law: Human Rights and the Exotic Other Female*, 26 NEW ENG. L. REV. 1509, 1514 (1991).

224. See Higgins, *supra* note 134, at 91 (posing this question for feminists).

225. Female circumcision is practiced in approximately twenty-five countries in Africa. A form of female circumcision also occurs in Indonesia, Malaysia, and Yemen. Hope Lewis, *Between Irua and “Female Genital Mutilation”: Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1, 1 n.5 (citing U.N. ESCOR, Comm'n on Hum. Rts., Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, *Study on Traditional Practices Affecting the Health of Women and Children*, ¶¶ 9-10, 43d Sess., Provisional Agenda Item 4, U.N. Doc. E/CN.4/Sub.2/1991/6 (1991)).

226. See generally ROSEMARIE SKAINE, *FEMALE GENITAL MUTILATION* (2005); Katherine Brennan, *The Influence of Cultural Relativism on International Human Rights Law: Female Circumcision as a Case Study*, 7 L. & INEQUALITY 367 (1989); Isabelle R. Gunning, *Arrogant Perception, World Traveling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189 (1992); Kay Boulware-Miller, *Female Circumcision: Challenges to the Practice as a Human Rights Violation*, 8 HARV. WOMEN'S L.J. 155 (1985) (arguing that to challenge female circumcision on grounds of individual rights is to ignore culture and to be perceived by African women as imposing and judgmental, in contrast to the right to health approach, in which people are educated about associated health risks); Alison T. Slack, *Female Circumcision: A Critical Appraisal*, 10 HUM. RTS. Q. 437 (1988).

227. See, e.g., Lewis, *supra* note 225, at 13 (analyzing the “ambivalence and tension” in feminist literature on “female genital surgery” abolition efforts); see also Higgins, *supra* note 134,

Virginity testing can be distinguished from female circumcision in that it is a cultural practice that has changed its character and significance. It was uprooted from its origins in matrimonial preparation and established as a grass-roots public health movement. This change seems to have escaped some opponents of the practice who discount the new rationale accompanying the virginity testing resurgence. Thus, contemporary virginity testing adds a new dimension to the human rights discourse on the tension between rights universalism and cultural relativism. Here, advocates of the cultural practice at issue are changing (or supplementing) their rationale for performing the practice. The primary significance of this additional or alternative justification for testing evinces the ability of cultural practices to adapt and change from within in response to external challenges or threats. The practical effect of recasting virginity testing as a public health measure likely means that people are being tested for new and different reasons related to personal security and health, and not to measure their worth for marriage. If the stated motives and intentions of testers are to be believed, then their actions are not only moves to preserve past customs, but are also intended to protect future generations. Because the justifications offered for this cultural practice have changed, rights advocates troubled by virginity testing might need to reevaluate their analysis of the practice.

The legislative efforts to abolish virginity testing serve to determine and limit the terms of the public debate—to test or not to test. In South Africa, the area of public interest in the testing question needs to be wider, for even if virginity testing is effectively abolished by the legislative prohibition—which is highly unlikely—society will still need to address the gravity of the HIV/AIDS epidemic and its disproportionate impact on women. Accordingly, the scope of the attention aimed at eradicating the cultural practice of virginity testing needs to be expanded. Opponents and proponents of testing would do well to focus their attention on the prevalent and pervasive cultural norms that render young women and girls vulnerable to HIV infection.²²⁸

Legal anthropologists have observed that legislative efforts to end harmful cultural practices are seldom effective, because the competing norms of a community and bonds of membership in a given “social field” are often stronger than any law external to the community.²²⁹ It follows that the effective

at 89 (asking “[i]n the face of profound cultural differences among women, how can feminists maintain a global political movement yet avoid charges of cultural imperialism?”).

228. See Sally Engle Merry, *Global Human Rights and Local Social Movements in a Legally Plural World*, 12 CAN. J. L. & SOC. 247, 249-50, 268-69 (1997) (discussing the limitations of a “rights-based” approach to spousal abuse in traditional communities and exploring the significance of culture and need for changing cultural norms).

229. See Sally Falk Moore, *Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study*, L. & SOC’Y REV. 721, 723 (1973); see also EUGEN EHRlich, FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW 63-64 (2002) (“[T]he social association . . . is the source of the coercive power, the sanction, of all social norms, of law no more than of

implementation of any human rights norm will depend less on lawmakers and more on the extent to which a community's leadership chooses to embrace a particular right.²³⁰ Accordingly, in developing HIV/AIDS reduction strategies, lawmakers and health practitioners should remain mindful that any such strategies must also take into account social structures reliant upon "rules and obligations [which] may rival those of the state."²³¹

The way that virginity testing has been framed in the political process illustrates the limitations of a conception of rights as absolute and oppositional, and underscores the theoretical and political vulnerabilities of human rights universalism to cultural relativist critiques. Recasting the resurgence of testing more as a matter of preventative public health strategy, and less as a matter of culture and gender-based subordination potentially creates a new space for dialogue among the stakeholders in the legislative debates over the practice. Reframing the debate on practical conditions of human existence, such as the ability to be healthy, offers an avenue for common ground among stakeholders because objective improvements in base health status may be easier to reach consensus around and lead to more enduring cooperation in pursuit of a common goal rather than a weak compromise among conflicting interests.

III

BEYOND ABOLITION AND ACCOMMODATION: ACTUALIZING A RIGHT TO HEALTH AND ADAPTING CULTURE USING CAPABILITIES THEORY AND PRAGMATISM TO ALTER INEQUALITIES

The preceding Part described flaws in the forbearance conception of the rights at issue in considering the legal status of virginity testing and critiqued the limited terms of the debate, illustrating the need for stakeholders to expand the scope of their rights concerns. It also advanced the need for a focus on performance rights, and particularly the right to health. In this Part, I present capabilities theory (capabilities) and pragmatism as potential avenues for the expansion of stakeholders' sphere of concern. In doing this, I recast a divisive debate where gender equality appears to clash with cultural autonomy into a discussion of how to advance a right to health and adapt culture to promote both health and gender empowerment.

First, I present the theoretical frameworks of capabilities and pragmatism. I argue that, when taken together, these complementary approaches provide a means to address persistent theoretical tensions in human rights discourse, as

morality, ethical custom, religion [and] honor. . . . The state is not the only association that exercises coercion; there is an untold number of associations in society that exercise [coercion] much more forcibly than the state."); John Griffiths, *What is Legal Pluralism?* 24 J. LEGAL PLURALISM & UNOFFICIAL L. 1, 1-26 (1986); Merry, *supra* note 228, at 268-69.

230. Kathryn Bromley Chan, *From Legal Universalism to Legal Pluralism: Expanding and Enhancing the Human Rights Approach to HIV/AIDS*, 21 S. AFR. J. HUM. RTS. 191, 211 (2005).

231. *Id.*

well as the practical challenges posed by the resurgence of virginity testing. Next, I present the right to health as a performance right that obligates governments to provide the material and institutional conditions to enable a healthy existence and I explain how capabilities and pragmatism support this outcome. Finally, I explore how culture can be mobilized to better promote health.

As a practical matter, stakeholders must move beyond the “abolish or accommodate” paradigm, and seek *adaptation* through a pragmatistic approach that accounts for a social context that renders females vulnerable to disease and premature death. Applying insights from pragmatism in light of the South African Constitutional Court’s emerging jurisprudence on questions of equality, culture, and customary law, it is argued that *both* rights and cultural practices in an open, pluralistic society like South Africa are not rigid but rather “social and collective in character.”²³² This means that *both* can permit compromise, deliberation, and mediation of competing interests. In the abstract, the rights to equality and culture offer little guidance concerning how best to manage particular interests or decide between conflicting claims, as evinced by the virginity testing debate.²³³ Pragmatism alone, however, is insufficient to ground a robust positive rights obligation. Capabilities theory complements a results-oriented pragmatism by providing substantive and normative guiding principles. Taken together, these theories can mediate cultural pluralism, elevate the status of socioeconomic rights, and potentially ameliorate some of the conflict over virginity testing by encouraging adaptation of the practice. Ultimately, the objective is a constructive discussion that is more likely to alter the underlying inequalities that render women and girls disproportionately infected and affected by HIV/AIDS in South Africa.

A. Alternative Theoretical Frameworks for Addressing Virginity Testing

South Africa’s experience with virginity testing highlights the need for a more comprehensive framework in human rights discourse, a discourse grounded in socioeconomic rights that can mediate between competing gender equality and cultural autonomy rights claims. The “capabilities approach” offers an alternative conceptual framework that has great potential for strengthening the normative foundations of human rights theory and informing the practice of human rights advocacy. The approach maintains that assessments of well-being should be centrally concerned with what individuals are able to be and to do such that a capabilities theorist places “concentration on freedoms to achieve in general and the capabilities to function in particular.”²³⁴ Because capabilities theory explicitly acknowledges the

232. Cass R. Sunstein, *Rights and Their Critics*, 70 NOTRE DAME L. REV. 727, 730 (1995).

233. *Id.*

234. Amartya Sen, *Gender Inequality and Theories of Justice*, in WOMEN, CULTURE, AND DEVELOPMENT 259, 266 (Martha C. Nussbaum & Johnathan Glover eds., 1995).

significance of context, it better accounts for cultural differences, thereby responding to one of the primary criticisms of a rigid universal rights approach. Pragmatism can contribute to reframing the virginity testing debate because it redirects attention to context and consequences, thereby expanding the realm of possible solutions so that a better solution may be identified. Pragmatism may also prove a useful device for mediating between rights and customs, as it allows for both to be adapted to fit a particular context. However, pragmatism does not offer much guidance with respect to how to prioritize problems, what a society should be working toward, and how to select among different options that may work to solve a given problem. Advancing the freedom to achieve and the capability to function as an organizing principle for solving problems of inequality, the capabilities approach complements pragmatism because it offers precisely such guidance. Accordingly, capabilities theory may provide a pragmatistically productive way to mediate between gender equality and cultural autonomy when confronted by social problems, like virginity testing, which present conflicts between and among particular rights.

1. The Normative Goal: Capabilities Theory

The capabilities approach was developed by Nobel laureate economist Amartya Sen as a response to mainstream development economics' perceived failure to accurately assess the individual well-being that it purported to measure.²³⁵ For Sen, the utilitarian approach dominating the then-existing literature on inequality in economics "overlook[ed] everything other than total utility—aggregated over different types of utilities and different persons."²³⁶ Sen argued that development economics should examine deprivation using a metric other than utility or satisfaction.²³⁷ Specifically, capabilities theory uses "the metric of capabilities to function."²³⁸

Reformulating the traditional microeconomics framework, Sen suggested that to truly understand how individuals obtain or fail to obtain well-being, policymakers should focus on the freedom people *actually* have in life. When making or assessing various public policy choices or devising economic development policies, analysis should focus on people's capabilities to engage in activities and to achieve well-being. Policymakers must assess an individual's well-being and his or her freedom to pursue well-being in efforts to promote equality.

a. The Capabilities Approach

The two basic elements of the capabilities approach are "functionings"

235. Des Gasper, *Sen's Capability Approach and Nussbaum's Capabilities Ethic*, 9 J. INT'L DEV. 281, 283 (1997).

236. AMARTYA SEN, *RESOURCES, VALUES AND DEVELOPMENT* 308 (1997).

237. *Id.* at 309.

238. *Id.*

and “capabilities.”²³⁹ Sen explains that *functionings* are the “beings and doings” of a person, while *capabilities* are “the various combinations of functions (beings and doings) that [a] person can achieve . . . reflecting the person’s freedom to lead one type of life or another.”²⁴⁰ Put simply, “[a] functioning is an achievement, whereas a capability is the ability to achieve.”²⁴¹ Functionings are more directly related to lifestyle choices and activities since they assess features of living conditions. Capabilities, in contrast, are people’s *potential* functionings, and include such things as being fed, housed, healthy, and the ability to earn a living or to be employed. All capabilities together correspond to the freedom to live in dignity.²⁴²

To illustrate this point, Sen offers a hypothetical, adapted here, which compares two individuals who are starving.²⁴³ Imagine that one individual is an internally displaced victim of famine in North Korea, while another is on a hunger strike protesting the Iraq War. Although both individuals lack the function of being well-nourished, the freedom of each to avoid starving to death is critically different. A capabilities approach considers the individuals’ positive freedoms and real opportunities to create a particular lifestyle. While both individuals presently lack the achieved function of being well-nourished, the political protester easily has the capability to achieve such a functioning, while the North Korean famine victim does not.

As illustrated, the capabilities approach appreciates that an individual’s freedom to achieve certain ends and the means by which they may achieve them are often dictated by personal, social, and environmental factors. The capabilities approach suggests that one should have the capability and freedom to choose the type of life she wants to lead and to become the person she desires. Once individuals have these basic freedoms, they can choose to act on those freedoms in line with their own ideas of the kind of life they want to live. Thus, the capabilities approach respects different choices and conceptions of a “good life” in liberal theory. For example, “every person should have the opportunity to be part of a community and to practice religion; but if someone prefers to be a hermit or an atheist, they should also have this option.”²⁴⁴

Additionally, Sen maintains that, because they can strengthen and reinforce one another, different kinds of freedoms are empirically correlated. For example, where political freedoms are present in the form of freedom of expression and democracy, it is more likely that economic security will be promoted. Social opportunities (socioeconomic rights), in the form of education

239. Gasper, *supra* note 235, at 283.

240. SEN, *supra* note 15, at 39-40.

241. AMARTYA SEN, *THE STANDARD OF LIVING* 36 (1985).

242. *Id.*

243. *Id.* at 37.

244. Ingrid Robeyns, *The Capability Approach: A Theoretical Survey*, 6 J. HUM. DEV. 93, 95 (2005).

and health, facilitate economic participation. Likewise, it would follow that a lack of certain freedoms would diminish other freedoms.

To be “positively free” is to be in a position to live as one chooses and to have the effective power to achieve or function in ways to achieve the life one chooses. A good society, according to the capabilities approach, would provide the material and institutional conditions for both well-being and choice. Too often, however, this freedom is not available to women and girls in matters of equality, sexual autonomy, and privacy. Indeed, according to Sen, “[t]he issue of gender inequality is ultimately one of disparate freedoms.”²⁴⁵ A public policy directed toward protecting capabilities means eradicating the causes of women’s vulnerabilities, enabling empowerment, and increasing freedom.

b. The Contributions of a Capabilities Framework

Capabilities theory can help policymakers and stakeholders to better engage with the politics of pluralism in the context of HIV/AIDS. Feminist economists have embraced the capabilities approach because of its enormous potential for addressing feminist concerns—including “reproductive health, voting rights, political power, domestic violence, education and women’s social status”—or issues which are not solely a function of financial status.²⁴⁶ Human rights theorists and advocates also have reason to embrace capabilities theory because of its potential to enrich the discourse on how human rights law can best address cultural diversity, legal pluralism, and socio-economic rights; in addition, it provides a practical framework for evaluating a practice that looks to the impact of a policy on the substantive freedoms that people in a society enjoy. The capabilities approach “asks whether people are being healthy, *and* whether the resources necessary for this capability are present, such as clean water, access to doctors, protection from infections and diseases, and basic knowledge on health issues. It asks whether people are well nourished, *and* whether the conditions for this capability, such as having sufficient food supplies and food entitlements are being met.”²⁴⁷ The success of a society is evaluated by the substantive freedoms enjoyed by its members.

In the context of the resurgence of virginity testing resulting from the HIV/AIDS epidemic, capabilities theory contributes to the discourse in two ways. First, the capabilities approach encourages a more substantive appreciation of human diversity through its recognition of how an individual’s context—for example, their social status—influences the capabilities that an individual is able to access. Sen criticized earlier approaches in economics that assume that “all people have the same utility functions or are influenced in the

245. SEN, *supra* note 15, at 125.

246. Ingrid Robeyns, *Sen’s Capability Approach and Gender Inequality: Selecting Relevant Capabilities*, 9 FEMINIST ECON. 61, 62 (2003) (investigating how Sen’s capability approach can be applied to assess gender inequality in Western societies).

247. Robeyns, *supra* note 244, at 95-96 (emphasis added).

same way and to the same extent by the same personal, social and environmental characteristics.”²⁴⁸ The influence of social and environmental factors appreciated by the capabilities approach allows policymakers to take into account societal features that may impede an individual’s capability to function, such as social norms and discriminatory practices.

Under this view, cultural practices are not immediately banned or condemned out of hand for being illiberal or unconstitutional. Rather, the focus is on whether capabilities are enhanced or diminished by a given practice. It follows that cultural practices may be open to adaptation to enhance capabilities. In this way the capabilities approach could ameliorate concerns voiced by some feminists in developing nations that culture is too often condemned as oppressive instead of viewed as an opportunity for women’s empowerment.

In addition, capabilities theory’s “underspecified character” allows the approach to accommodate different ways of resolving issues surrounding cultural practices, so long as the practice is capability-enhancing.

The capabilit[ies] approach is a framework of thought, a normative tool, but it is *not* a fully specified theory that gives us complete answers to all our normative questions. It is not a mathematical algorithm that prescribes how to measure inequality or poverty, nor is it a complete theory of justice. The capabilit[ies] approach, strictly speaking, only advocates that the evaluative space should be that of capabilities.²⁴⁹

Rigid thinking about culture and rights shaped the debate over virginity testing and limited the “evaluative space” of the public’s discourse. In doing so, it may also have limited creative thinking about compromises and alternative solutions. Framing the problems of virginity testing as a conflict between gender equality rights and cultural autonomy rendered stakeholders blind to the underlying motivation to resume testing: girls’ and women’s compromised ability to be free from disease and premature death. With its flexible outlook, capabilities theory avoids this fate. An approach to virginity testing informed by capabilities theory would first identify the major impediments to the capacity to be disease free and then consider how the impediments might be removed. It could be that some capabilities to avoid HIV infection would be enhanced by certain aspects of virginity testing rituals. It could be that young women and girls feel more empowered to resist peer pressures to engage in early and unprotected sexual activity. In the context of virginity testing, the flexibility of approach encouraged by the capabilities framework may allow creative compromises or alternative solutions. For instance, it could be that the government health department works with testers to make their practices less

248. Robeyns, *supra* note 246, at 66.

249. *Id.* at 64 (emphasis in original).

invasive and more hygienic. Testers might be encouraged to receive more contemporary health training to complement their existing knowledge, or to invite those they test to submit to a voluntary HIV test.

The second important aspect of the capabilities approach is its appreciation of positive freedom as well as its understanding of the interrelationship and interconnection among freedoms and how they influence the exercise of capabilities and functionings. Capabilities theory's emphasis on positive freedom could help secure a theoretical foundation for a substantive and meaningful right to health as well as for other underdeveloped social and economic rights enshrined in the ICESCR and in the South African Constitution.²⁵⁰ Specifically, the capabilities approach would call for the creation of the institutional structures needed to allow people to function as healthy individuals, and would inform considerations of the reasonableness of any given policy course with regard to promoting HIV/AIDS eradication. Using a capabilities framework, stakeholders in the virginity testing controversy could, in the course of discussions to develop regulatory guidelines to govern testing, facilitate conversations about the content of the right to health, and about the affirmative obligations of government to create the material and institutional conditions to provide women greater freedom from disease. At a minimum, such a right would include accurate education and information about HIV/AIDS transmission.

By focusing on positive freedoms, capabilities theory links stakeholders' divergent normative commitments by turning their attention to a concern shared by traditionalists and feminists alike: the life prospects of future generations of South African youth. A joint solution crafted with a view toward expanding the capabilities of South African youth will have more legitimacy than a legislative ban on a popular cultural practice; a greater focus on developing a substantive right to health might encourage stakeholders to reconsider their divisions. The Constitutional Court's recent decisions on gender equality and cultural rights demonstrate that South Africa's legal culture is adept at mediation and adaptation. The adoption of a capabilities approach would be consistent with this emerging jurisprudence.

If the central foundation for human rights were capabilities, instead of classical liberalism, the distinction between universalism and relativism would collapse because the capabilities focus allows for choices and differences so long as capabilities are increased and freedom is enlarged. Similarly, the sharp

250. See Erika George, *Instructions in Inequality: Development, Human Rights, Capabilities and Gender Violence in Schools*, 26 MICH. J. INT'L LAW 1139, 1199-1201 (2005) (exploring how capabilities theory enhances understandings of socioeconomic rights, and illustrating a capabilities approach to the right to education); Jennifer Prah Ruger, *Health, Capability and Justice: Toward a New Paradigm of Health Ethics, Policy and Law*, 15 CORNELL J.L. & PUB. POL'Y 101, 105-06, 136-41 (2006) (advocating a capabilities approach to public health policy).

distinctions drawn between civil and political rights versus socioeconomic rights would dissipate because of a greater recognition of the material and institutional conditions that impede freedoms to develop capabilities and choose different functionings. Liberal rights to equality and autonomy in the abstract do not tell us how to resolve particular questions or decide between conflicting claims of rights. Capabilities theory, in contrast, mediates among different viewpoints and informs how best to balance conflicting rights by looking to capability enhancement. In countering challenges to human rights that are rooted in culture-based arguments, a capabilities approach encourages consideration of a more holistic understanding of the context in which cultural practices are embedded.

By their very nature, normative orders evolve as the people who live by them change their patterns of life. HIV/AIDS is changing the way people live in many parts of the world, and law and culture must concurrently evolve to meet affected communities' changing needs. In the context of a serious public health crisis, balances often are not struck in favor of rights. Given this unfortunate fact, a human rights regime grounded in capabilities concerns would be better able to account for and cope with the coming changes. Current legislative approaches to the intersection between culture, disease, and gender inequality would be greatly enhanced by taking more seriously the community, and social, material, and institutional factors that the capabilities approach encompasses.

2. The Instrumental Method: Pragmatism

In addition to a shift in the virginity testing debate toward a focus on health and expanding capabilities and other initiatives to combat HIV/AIDS, resolution of conflicting gender equality and cultural rights claims requires a pragmatistic approach to cultural pluralism. It also requires a constitutional interpretive mode informed by pragmatistic considerations that appreciates rights in context and allows for social and cultural change. A framework of pragmatistic legal pluralism that appreciates how both rights and culture are mobilized locally can facilitate a move beyond the dichotomies of the universalism versus relativism debate and the limited options of abolition or accommodation that have consumed the virginity testing controversy. This Section first outlines the theory of pragmatism in philosophy and law. It then examines recent South African Constitutional Court cases that demonstrate the ways in which the Court has mediated between culture and rights using a variant of pragmatism that recognizes both culture and rights as open to adaptation and evolution. Finally, I argue that pragmatistically approaching the debate over the legal status of virginity testing would redirect it more constructively.

a. The Pragmatistic Approach

At the most basic level, pragmatistic theorists observe and then seek to promote whatever works in practice. A pragmatistic approach considers what practical effects would flow from the application of a particular ideology or practice²⁵¹ and ultimately looks to the “concrete consequence[s]” of a given course of action or applied strain of thought.²⁵² The development of pragmatism was contemporaneous with the rise of the principle of scientific inquiry.²⁵³ A central project of pragmatism was to extend the principle of scientific inquiry to test all beliefs, therefore placing a premium on practical experience over ideas.²⁵⁴

Like pragmatistic philosophers, the legal pragmatist may share a skepticism of organizing theories to prescribe the law. As Michel Rosenfeld explains, legal pragmatism “shifts the focus from foundations to actual consequences, and prompts people to leave aside normative disputes to engage in the common pursuit of practical results. Thus, under pragmatism, justice according to law is measured by the practical consequences to which it leads.”²⁵⁵

The promise of pragmatism, with its orientation toward concrete solutions to problems and its rejection of principles for their own sake, is for some commentators also its pitfall: “pragmatism, in large measure owing to its great success has meant so many different things to such a large number of people as to raise as many questions as it answers.”²⁵⁶ For example, Michael Rosenfeld asks whether recourse to pragmatism in pluralistic societies would offer meaningful solutions or guidance as to which interpretation should be given to a law where different interpretations of a law would lead to different outcomes.²⁵⁷ Although pragmatism has been criticized for appearing “ad hoc,” I argue below that pragmatism’s ad hoc nature may be seen as an opportunity for adaptation.

251. See Louis Menand, *An Introduction to Pragmatism*, in PRAGMATISM, at xiii (Louis Menand ed., 1997).

252. William James, *What Pragmatism Means*, reprinted in PRAGMATISM, *supra* note 251, at 96 (“It is astonishing to see how many philosophical disputes collapse into insignificance the moment you subject them to this simple test of tracing a concrete consequence.”).

253. Menand, *supra* note 251, at xxvi.

254. For William James, “the pragmatic method” attempts to “interpret each notion by tracing its respective practical consequences. What difference would it practically make to anyone if this notion rather than that notion were true?” James, *supra* note 252, at 94 (explaining the history of the idea of pragmatism).

255. Michel Rosenfeld, *Pragmatism, Pluralism and Legal Interpretation: Posner’s and Rorty’s Justice Without Metaphysics Meets Hate Speech*, in THE REVIVAL OF PRAGMATISM 324, 325 (Morris Dickstein ed., 1998).

256. *Id.* at 324.

257. *Id.* at 340.

b. The Constitutional Court's Pragmatism: The Bhe and Fourie Cases

South Africa's constitutional structure is well equipped for fostering exactly the sort of internal and cross-cultural dialogue that an open, democratic, and heterogeneous society demands. South Africa's Constitution has been described as "a history bridge" leading from a past of prejudice and Apartheid to a future of democracy and *ubuntu*—an ethos of common humanity.²⁵⁸ Under the new democratic order, because fundamental equality rights were given significant priority, some commentators have expressed concern that African customary law has been undermined as a result.²⁵⁹

South Africa is a pluralistic legal society.²⁶⁰ The Constitution explicitly allows for pluralism by recognizing the validity of traditional authority, as well as the rights of persons "belonging to a cultural, religious or linguistic community" to engage in cultural practices.²⁶¹ The exercise of cultural rights is subject to constitutional law, however, in that cultural rights "may not be exercised in a manner inconsistent with any provision of the Bill of Rights."²⁶² Accordingly, practices that may be legitimate under customary law are open to challenge under the Constitution. In short, rather than a legal revolution, the

258. HEINZ KLUG, *CONSTITUTING DEMOCRACY* 164-65 (2000). For discussions of gender equality and cultural autonomy interacting in the spirit of *ubuntu* and mutual tolerance, see, e.g., Elsje Bonthuys, *Accommodating Gender, Race, Culture and Religion: Outside Legal Subjectivity*, 18 S. AFR. J. ON HUM. RTS. 41, 58 (2002) ("African women must no longer have to choose between culture and equality, for otherwise both rights will be rendered illusory.") (quoting Wayne Van der Medie, *Gender Equality v. Right to Culture: Debunking the Perceived Conflicts Preventing the Reform of the Marital Property Regime of the "Official Version" of Customary Law*, 116 S. AFR. L.J. 100, 112 (1999)). Bonthuys advises policymakers to measure the effectiveness of strategies for change against the changes brought about in the experiences of different women due to the different contexts in which women find themselves. *Id.* She explains that middle class African women may organize many aspects of their life according to Western structures and norms, but retain aspects of traditional identity that are advantageous in other contexts. *Id.*; see also Victoria Bronstein, *Reconceptualizing the Customary Law Debate in South Africa*, 14 S. AFR. J. ON HUM. RTS. 388, 389, 393 (1998); Van der Meide, *supra*, at 112 (1999) (arguing against legal interpretations that would "pit[] the right to equality against the right to participation in one's culture," and advocating that "[r]eform must instead be thought of as the pursuit of a society in which all people, [including women and girls], are able to realize their dignity and self-worth to their fullest potential").

259. Bonthuys, *supra* note 258, at 41-42.

260. Heterogeneity is a defining feature of South Africa; there are eleven official languages and several different racial and ethnic groups. S. AFR. CONST. 1996, ch. I, § 6(1). The eleven languages are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu. Since the first multi-party elections marking the country's transition to an open and democratic society in 1994, South Africans have sought to free themselves from this Apartheid legacy. They have done so by embracing a constitutional legal order that is based on democratic values, social justice, and fundamental rights. See KLUG, *supra* note 258, at 85-92 (2000) (explaining constitutional efforts to respond to the legacy of apartheid). The Constitution envisions a country where all South Africans are "united in [their] diversity." S. AFR. CONST. 1996, pmb. Accordingly, the Constitution, while explicitly committed to equality, also protects cultural, linguistic, and religious communities. *Id.* ch. II, § 31.

261. S. AFR. CONST. 1996, ch. II, § 31(1).

262. *Id.* § 31(2).

Constitution was a compromise that set in motion a more moderate process of transformation.²⁶³

i. The Evolution of Customary Law: The Bhe Case

South Africa's Constitutional Court recently confronted the challenge that traditional cultural norms present to gender equality. In the combined cases of *Nonkululeko Bhe v. The Magistrate of Khayelitsha and Others (Bhe)* and *Charlotte Shibi v. Mantabeni Freddy Sithole and Others (Shibi)*, the Court addressed the constitutional validity of the principle of male primogeniture as contained in the African customary law of succession and in Apartheid-era legislation.²⁶⁴

In the *Bhe* case, a widow, Bhe, brought an action challenging her inability to inherit her deceased husband's property under customary law and seeking relief from the Constitutional Court; she claimed that provisions of the statutes governing intestate succession in South Africa²⁶⁵ should be declared unconstitutional and invalid because they conflict with the Constitution's provisions on equality, dignity, and children's rights.²⁶⁶ Rejecting the argument that such laws should nonetheless survive scrutiny because they give recognition and effect to custom,²⁶⁷ the Court agreed with Bhe, finding that customary laws governing succession were incompatible with the Bill of Rights and an affront to human dignity.²⁶⁸

Writing for the Court, Justice Langa affirmed the significance of custom in South Africa explaining that "[c]ertain provisions of the Constitution put it beyond doubt that our basic law specifically requires that customary law should be *accommodated*, not merely tolerated, as part of South African law."²⁶⁹

263. Cf. Makau Wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63, 69 (1997) (offering a critical assessment of the Constitution's gradualist approach to change, Mutua writes, "Except for largely cosmetic effects, there is little possibility that the particular conceptualization of rights in the new South Africa will alter the patterns of power, wealth, and privilege established under apartheid").

264. Because the analysis in both *Bhe v. The Magistrate of Khayelitsha* 2005 (1) BCLR 1 (CC) (S. Afr.) and *Shibi v. Sithole* 2005 (1) BCLR 1 (CC) (S. Afr.) were similar, only the *Bhe* case will be discussed in depth.

265. See Intestate Succession Act 81 of 1987; Black Administration Act 38 of 1927. Section 23 of the Black Administration Act provides in pertinent part: "All moveable property belonging to a Black and allotted by him or accruing under Black law or custom to any woman with whom he lived in a customary union, or to any house, shall upon his death devolve and be administered under Black law and custom." Black Administration Act of 1927 s. 1. For a discussion of the legacy of discrimination against black women in South Africa, see Adrien Katherine Wing & Eunice P. de Carvalho, *Black South African Women: Toward Equal Rights*, 8 HARV. HUM. RTS. J. 57, 60-65 (1995).

266. *Bhe*, 2005 (1) BCLR 1 ¶ 47.

267. *Id.* ¶¶ 72-73. "[T]he rights to equality and dignity are the most valuable of rights in any open and democratic state. They assume special importance in South Africa because of our past history of inequality and hurtful discrimination." *Id.* ¶ 71.

268. *Id.* ¶¶ 68, 73.

269. *Id.* ¶ 41 (emphasis added).

Justice Langa noted that constructive and positive aspects of customary law had been neglected for too long:

Customary law places much store in consensus-seeking and naturally provides for family and clan meetings which offer excellent opportunities for the prevention and resolution of disputes and disagreements. Nor are these aspects useful only in the area of disputes. They provide a setting which contributes to the unity of family structures and the fostering of co-operation, a sense of responsibility in and of belonging to its members, as well as the nurturing of healthy communitarian traditions such as ubuntu.²⁷⁰

Yet customary law, he wrote, was not insulated from change; “[a]djustments and development [are required] to bring [customary law] provisions in line with the Constitution or [into] accord with the ‘spirit, purport and objects of the Bill of Rights.’”²⁷¹ The Court offered guidance in assessing whether a rule of customary law should be upheld or invalidated: “[A] critical issue in any constitutional litigation about customary law will therefore be the question whether a particular rule is a mythical stereotype, which has become ossified in the official code, or whether it continues to enjoy social currency.”²⁷² Accordingly, “[i]t is important to examine the context in which the rules of customary law . . . operated and the kind of society served by them.”²⁷³ The Court explained that “the rules [of customary law] did not operate in isolation. They were part of a system which fitted in with the community’s way of life. The system had its own safeguards to ensure fairness in the context of entitlements, duties and responsibilities.”²⁷⁴

Examining the history and context of the practice of male primogeniture, the Court found that, although succession rules once functioned to preserve and perpetuate the family unit, they have outlived their cultural usefulness.²⁷⁵ When property was collectively owned and the head of the family managed property for the entire family, customary rules provided that the heir assumed this managerial responsibility.²⁷⁶ The context that once justified the succession laws has changed over time. The Court observed, “Modern urban communities and families are structured and organised differently and no longer purely along traditional lines. The customary law rules of succession simply determine succession to the deceased’s estate without the accompanying social

270. *Id.* ¶ 45.

271. *Id.* ¶ 44. In addition to the Constitution’s commitment to equality, the Court noted the nation’s obligations under international law to protect the rights of women and abolish all laws that discriminate against them pursuant to a number of international instruments to which South Africa is a party. *Id.* ¶ 51.

272. *Id.* ¶ 86 (internal citations omitted).

273. *Id.* ¶ 75.

274. *Id.*

275. *Id.* ¶¶ 75-76, 80-82.

276. *Id.* ¶¶ 75-77.

implications which they traditionally had.”²⁷⁷ Accordingly, the Court concluded that customary law had not kept pace with how people live. The Court explained, “indigenous law is not a fixed body of formally classified and easily ascertainable rules. By its very nature it evolves as the people who live by its norms change their patterns of life. It has . . . ‘evolved and developed to meet the changing needs of the community.’”²⁷⁸

Based on this notion that custom in the constitutional system should be open to growth and adaptation, the Court held that the equality rights of those subject to male primogeniture were unreasonably and unjustifiably limited. Instead of a general adherence to primogeniture, social change suggested that the interest in sustaining the surviving family members should be paramount under the law.²⁷⁹

What is particularly noteworthy about *Bhe* is the Court’s pragmatic approach to cultural pluralism. The Court did not assume an inherent conflict between customary and constitutional law, but instead took a historical and time-honored tradition and examined it in the present context to determine how the rules are actually lived. The approach is anti-essentialist in that it emphasizes consequences instead of concepts, and it justifies results contextually. Indeed, Justice Langa offered contextual reasons for striking down male primogeniture, including the new economic activity of women, different forms of household arrangements, and changing values concerning gender roles.²⁸⁰ Maintaining the custom of male primogeniture would perpetuate the vulnerability of African women and children, already among the most vulnerable groups in South African society.

The pragmatic approach may provide a framework for approaching other issues, like virginity testing, in which custom and constitutional law come into conflict. As a normative matter, pragmatists take all truth to be experiential. They do not deny the existence of truth, as do cultural relativists, but rather hold that truth is discovered through experience.²⁸¹ Pragmatists look toward real-world consequences and empirical insights in proposing solutions, and then ask what is at stake, in the practical sense, when choosing between those solutions.²⁸² The *Bhe* case, which situates rights in the context of the

277. *Id.* ¶ 80 (noting that nuclear families have mostly replaced traditional extended family structures and that the male heir now “often simply acquires the estate without assuming . . . any of the deceased’s responsibilities”).

278. *Id.* ¶ 81.

279. *Id.* ¶¶ 43-46. Justice Langa opined, “Customary law has, in my view, been distorted in a manner that emphasizes its patriarchal features and minimizes its communitarian ones.” *Id.* ¶ 89. Customary law as administered under Apartheid had been denied “of its opportunity to grow in its own right and to adapt itself to changing circumstance[.]” contributing to a situation where “[c]ustomary law was lamentably marginalised and allowed to degenerate into a vitrified set of norms alienated from its roots in the community.” *Id.* ¶ 43 (footnote omitted).

280. *See generally id.*

281. *See* RICHARD A. POSNER, LAW, PRAGMATISM AND DEMOCRACY 59–60 (2003).

282. *See id.*

associated corollary responsibilities defined by custom, illustrates how the pragmatic approach may in some contexts lead to the determination that changes in society and in the status of women—changes which have disassociated these responsibilities from rights—render the claim of a customary right less compelling.

ii. The Evolution of Constitutional Rights: The Fourie Case

In addition to taking a pragmatic approach to cultural pluralism, the Constitutional Court has also determined that constitutional rights are flexible and adaptable. Addressing the issue of same-sex marriage, the Court's holding in the combined cases of *Minister of Home Affairs v. Fourie* and *Lesbian and Gay Equality Project v. Minister of Home Affairs (Fourie)* reflects the flexibility of rights.²⁸³

In *Fourie*, Marie Adriaana Fourie and Cecilia Bonthuys brought a facial challenge to the Marriage Act of 1961, claiming that the act unconstitutionally deprived gays and lesbians of the right to marry.²⁸⁴ The State defended the Marriage Act by relying on the U.N. Human Rights Committee's interpretations of Article 23 of the ICCPR, which recognizes the right of "men and women" to marry and found a family.²⁸⁵ The State argued that this language did not require South Africa to extend marriage to same-sex couples.²⁸⁶ The Court responded that the reference in Article 23 to "men and women" was "descriptive of an assumed reality, rather than prescriptive of a normative structure for all time."²⁸⁷ The Court concluded that "the failure of the common law and the Marriage Act to provide the means whereby same-sex couples can enjoy the same status, entitlements and responsibilities accorded to heterosexual couples through marriage, constitutes an unjustifiable violation of their right to equal protection of the law under section 9(1) and not to be discriminated against unfairly in terms of section 9(3) of the Constitution."²⁸⁸

The Court observed that while both the ICCPR and the Declaration state that the "family is the natural and fundamental group unit in society,"²⁸⁹ neither document attempts to define the family.²⁹⁰ The Court further stated:

283. *Minister of Home Affairs v. Fourie* 2006 (3) BCLR 355 (CC) (S. Afr.).

284. *Id.* ¶¶ 2-3, 34, 44.

285. *Id.* ¶ 99; see ICCPR *supra* note 142, art. 23(2).

286. *Fourie*, 2006 (3) BCLR 355 ¶ 99.

287. *Id.* ¶ 100. In the Court's opinion, the real purpose of Article 23 "is to forbid child marriages, remove racial, religious or nationality impediments to marriage, ensure that marriage is freely entered into and guarantee equal rights before, during and after marriage." *Id.*

288. *Id.* ¶ 114.

289. ICCPR, *supra* note 142, art. 23; UDHR, *supra* note 140, art. 16.

290. *Fourie*, 2006 (3) BCLR 355 ¶¶ 101, 103; The U.N. Office of the High Commissioner for Human Rights notes that "the concept of the family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition." U.N. Human Rights Comm., General Comment 19, art. 23, ¶ 2, 39th Sess., U.N. Doc. HRI/GEN/1 (1990).

Nor need [the family] by its nature be restricted intrinsically, inexorably and forever to heterosexual family units. There is nothing in the international law instruments to suggest that the family . . . be constituted according to any particular model. . . . Indeed, rights by their nature will atrophy if they are frozen. As the conditions of humanity alter and as ideas of justice and equity evolve, so do concepts of rights take on new texture and meaning. The horizon of rights is as limitless as the hopes and expectations of humanity. What was regarded by the law as just yesterday is condemned as unjust today.²⁹¹

The *Bhe* and *Fourie* cases demonstrate that, while the question of universalism in human rights defies easy resolution, South Africa's legal culture is one of compromise and negotiation. With its incorporation of international human rights law, South Africa's legal system is well equipped to construct a flexible position between the oppositional absolutes of universalism and relativism.

B. Recognizing the Right to Health: Performance, Not Forbearance

Both international human rights law and the South African Constitution recognize some form of a right to health. The Declaration proclaims a "right to a standard of living adequate for [] health and well-being" for all.²⁹² Similarly, the ICESCR recognizes a right "to the enjoyment of the highest attainable standard of physical and mental health."²⁹³ To fully realize this right, governments must, among other things, ensure the prevention of disease and manage outbreaks by establishing an environment where all who are ill may obtain medical treatment.²⁹⁴ South Africa has ratified the CRC, which recognizes the right of the child to "enjoy[] the highest attainable standard of health"²⁹⁵ and the CEDAW, which obligates the government to take steps "to ensure, on a basis of equality of men and women, access to health care services."²⁹⁶ The South African Constitution also enshrines a form of the right to health, the scope of which continues to be shaped by the Constitutional Court.

291. *Fourie*, 2006 (3) BCLR 355 ¶¶ 101-102.

292. UDHR, *supra* note 140, art. 25.

293. ICESCR, *supra* note 174, art. 12.

294. *Id.* art. 12(d).

295. CRC, *supra* note 112, art. 24. Article 24 provides that governments must "strive to ensure that no child is deprived of his or her right" of access to health care services. *Id.* Article 24 also outlines measures governments should pursue to attain full implementation of the health right. *Id.* Among other things, governments are "to ensure that all segments of society, in particular parents and children, are informed, have access to education and are supported in the use of basic knowledge of child health and nutrition." *Id.* art. 24(2)(e). States are also required "to develop preventive health care, guidance for parents and family planning education and services." *Id.* art. 24(2)(f). And they must "take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children." *Id.* art. 24(3).

296. CEDAW, *supra* note 143, art. 12. The state obligation to eliminate discrimination against women in health care also extends to health care associated with family planning. *Id.*

1. *The Right to Health Under International Law*

Under international law, the right to health encompasses freedoms requiring government forbearance, such as an individual's right to control his or her own body, to reject medical treatments, to refuse medical experimentation, and to be free from torture, *and* entitlements requiring government performance, such as equal access to public health care facilities, goods, and services.²⁹⁷ The "highest attainable standard of physical and mental health" formulation contained in many of the international human rights instruments does not expressly adopt the broad definition of health contained in the Constitution of the World Health Organization (WHO).²⁹⁸ However, it also does not limit the conception of the right to health solely to health care services.²⁹⁹ Rather, this formulation has been interpreted by international human rights monitoring bodies to encompass the causal determinants of health, including a "range of socio-economic factors that promote conditions in which people can lead a healthy life . . . such as food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment."³⁰⁰ Access to health-related information, including education concerning sexual and reproductive health, is also an important aspect of the right to health.³⁰¹ Thus, the health right can best be understood to contain a bundle of rights.

The "highest attainable standard of health" norm considers both "the individual's biological and socioeconomic preconditions and a State's available resources."³⁰² Thus, "[t]he right to health is not to be understood as a right to be *healthy*."³⁰³ Indeed, observing that many factors influence an individual's health, including genetic predisposition to disease and unsafe lifestyle choices, the U.N. Committee on Economic, Social and Cultural Rights (UNCESCR), the monitoring body for the ICESCR, has stated that "good health cannot be ensured by a State, nor can States provide protection against every possible cause of human ill health."³⁰⁴ Nevertheless, there are many aspects of health,

297. See Comm. on Economic, Social and Cultural Rights, General Comment No. 14, art. 12, ¶¶ 8, 12, 22nd Sess., U.N. Doc. E/C.12/2000/4 (2000). There are four essential elements to the right to health: "availability," "accessibility," "acceptability," and "quality." States must provide functioning and adequate public health services. *Id.* ¶ 8. The particular nature of health services to be provided will vary and depend on a State's level of development. However, where a State is able to make public health facilities available the facilities must be "accessible to everyone without discrimination." *Id.* ¶ 12(b).

298. The Constitution of the WHO conceptualizes health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity." CONST. OF THE WORLD HEALTH ORG. pmb1. (1946).

299. General Comment No. 14, *supra* note 297, ¶ 4.

300. *Id.*

301. *Id.* ¶ 11.

302. *Id.* ¶ 9.

303. *Id.* ¶ 8 (emphasis in original).

304. *Id.* ¶ 9.

such as certain causal determinants, that a State can and should influence.

Acknowledging that the resource constraints of many States may impede government attempts to immediately ensure the right to health, international law allows for “progressive realization” of the health right over time.³⁰⁵ However, States are legally obligated to make progress “expeditiously and effectively” toward actualizing the health right, and must take “deliberate, concrete and targeted” steps toward this end.³⁰⁶ Qualified by an appreciation of individual predispositions and financial constraints, state parties to international human rights treaties containing the health right are “obligat[ed] to *respect, protect and fulfill*” the right.³⁰⁷ Despite these qualifications, states assume “a core obligation to ensure the satisfaction of, at the very least, minimum essential levels” of economic, social, and cultural rights under international law.³⁰⁸ Among the minimum core obligations recognized by UNCESCR are five primary duties directly relevant to curbing the HIV/AIDS crisis in South Africa: (1) “[t]o ensure the right of access to health facilities, goods and services on a non-discriminatory basis”; (2) “[t]o provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs”; (3) “[t]o adopt and implement a national public health strategy and plan of action, on the basis of epidemiological evidence, addressing the health concerns of the whole population”; (4) “[t]o take measures to prevent, treat and control epidemic and endemic diseases”; and (5) “[t]o provide education and access to information concerning the main health problems in the community, including methods of preventing and controlling them.”³⁰⁹ At minimum, a state party to the ICESCR must provide these core components of the health right.

The actions or omissions of a State may result in a violation of the health right under international law. Either implementing laws that are patently irreconcilable with international or domestic norms or revoking laws central to

305. General Comment No. 14, *supra* note 297, ¶ 30.

306. *Id.* ¶¶ 30, 31.

307. *Id.* ¶ 33 (emphasis in original). Pursuant to the obligation to “fulfill,” States must acknowledge the right to health through enacting appropriate legislation, establishing a public health infrastructure and designing public health policies. *Id.* ¶ 36. To satisfy obligations to “protect,” States must regulate sales and promotion of medications and medical equipment and set and monitor compliance with standards to govern the education and ethics of medical practitioners and others practicing in the health care profession. *Id.* ¶ 35. The obligation to protect also includes a requirement that States “ensure that harmful social or traditional practices do not interfere with access . . . to health-related information and services.” *Id.* ¶ 35. Finally, the obligation to “respect” the right to health imposes the duty upon a State not to deny or impede equal access to health care, and in particular to abstain from discriminatory practices in the delivery of health services “relating to women’s health status and needs.” *Id.* ¶ 34. States must not censor, deny, or intentionally misrepresent information related to the public health. *Id.* ¶ 34. States must not restrict access to contraceptives and reproductive health services or information. *Id.*

308. General Comment No. 14, *supra* note 297, ¶ 43 (restating the minimum core concept).

309. *Id.* at ¶¶ 43–44. For a discussion of the UNCESCR’s understanding of the core of the right to health in the South African context, see Christopher Heyns & Gina Bekker, *Introduction to the Rights Concerning Health Care in the South African Constitution*, in *A COMPILATION OF ESSENTIAL DOCUMENTS ON THE RIGHTS TO HEALTH CARE* 1, 15–16 (Gina Bekker ed., 2000).

enabling realization of the health right would constitute a violation.³¹⁰ Failure to devise health policies or to enforce regulations tied to health or health care would be omissions in violation of the right to health as well.³¹¹ In sum, if it is to be realized, the right to health under international law is one that requires performance and active intervention by the government to improve the material and institutional preconditions supporting an individual's ability to obtain his or her optimum health.

2. *The Constitutional Right to Health in South Africa*

The South African Constitution includes a number of socioeconomic rights and guarantees the right "to have access to . . . health care services, including reproductive health care."³¹² The Constitution obligates the government to "take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of . . . these rights."³¹³ To date, the South African Constitutional Court has adjudicated two major health right cases, *Soobramoney v. Minister of Health*³¹⁴ and *Minister of Health v. Treatment Action Campaign*.³¹⁵ The Court has rejected the "minimum core" concept advanced under international human rights law³¹⁶ and has instead devised a "reasonableness approach" to the assessment and enforcement of

310. General Comment No. 14, *supra* note 297, ¶ 48. Significantly, violations of the health right may also occur when private non-state entities are insufficiently regulated by government and impede realization of the highest attainable standard of health for others. *Id.* ¶ 51. A State should defend people in its jurisdiction against private third parties that would infringe their health rights. *Id.* Accordingly, "failure to regulate the activities of individuals, groups or corporations so as to prevent them from violating the right to health of others" is a violation, as is "failure to discourage the continued observance of harmful traditional medical or cultural practices." *Id.*

311. *Id.* ¶ 49.

312. S. AFR. CONST. 1996 ch. II, § 27(1).

313. *Id.* § 27(2). The Constitution also provides that no one may be refused emergency medical treatment.

314. *Soobramoney v. Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (CC) ¶ 7 (S. Afr.).

315. *Minister of Health v. Treatment Action Campaign*, 2002 (10) BCLR 1023 (CC) ¶¶ 4-5 (S. Afr.).

316. See Comm. on Economic, Social, & Cultural Rights., General Comment 3, art. 2, ¶ 1, 10, 5th Sess., U.N. Doc E/1991/23. (1990); see also Limburg Principles on the Implementation of the International Convention on Economic Social and Cultural Rights, ¶¶ 21-28, Annex, U.N. Doc. E/CN.4/1987/17 (June 2-6, 1986), reprinted in 9 HUM. RTS. Q. 122 (1987); Maastricht Guidelines on Violations of Economic, Social and Cultural Rights, ¶ 9, U.N. Doc. E/C.12/2000/13 (Jan. 22-26, 1997), reprinted in 20 HUM. RTS. Q. 691 (1998). The minimum core approach to socioeconomic rights enforcement envisions the identification of subsistent levels of a given right and attaches an immediate obligation to meet that basic level. The minimum core has been said to represent a "floor" of immediately enforceable entitlements from which progressive realization should proceed. See Audrey R. Chapman, *Core Obligations Related to the Right to Health and Their Relevance for South Africa*, in EXPLORING THE CORE CONTENT OF SOCIO-ECONOMIC RIGHTS: SOUTH AFRICAN AND INTERNATIONAL PERSPECTIVES 35-37 (Danie Brand & Sage Russell eds., 2002).

socioeconomic rights.³¹⁷

In *Soobramoney v. Minister of Health (Soobramoney)* the Court dismissed the case of a chronically ill man, Soobramoney, whom the Court ruled failed to establish that the state breached its constitutional obligations.³¹⁸ Soobramoney, an unemployed diabetic with kidney failure and thus in need of regular dialysis, challenged a state hospital's decision to limit dialysis care to patients eligible for a kidney transplant.³¹⁹ Because he had a number of different complications that prevented his condition from improving, the hospital determined that treatment would prolong his life but not cure him; as such, Soobramoney was deemed ineligible for a transplant or for further dialysis treatment.³²⁰ The Court rejected Soobramoney's arguments that the constitutional right to health required the state to make additional resources available for dialysis treatment.³²¹ Applying a reasonableness test to the hospital treatment guidelines, the Court explained, "The state has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society."³²²

In *Minister of Health v. Treatment Action Campaign (TAC)*, AIDS advocacy groups sued the government claiming that its measures in the area of health care services to HIV-positive pregnant women were constitutionally deficient in two respects: (1) the government barred delivery of the antiretroviral drug, Nevirapine, in the public health sector outside of pilot research and training sites; and (2) the government failed to develop and implement a comprehensive and inclusive national program to avert mother-to-child transmission of HIV.³²³ The plaintiffs argued that these omissions violated the right to health.³²⁴

317. Marius Pieterse, *Resuscitating Socio-Economic Rights: Constitutional Entitlements to Health Care Services*, 22 S. AFR. J. HUM. RTS. 473, 474 (2006). Broadly, the reasonableness approach is an assessment of the rationality, coherence, flexibility, fairness, and inclusiveness of state policies aimed at the progressive realization of socioeconomic rights. See *Gov't of the Republic of S. Afr. v. Grootboom* 2000 (11) BCLR 1169 (CC) ¶¶ 39-44 (S. Afr.) (articulating the reasonableness standard and factors to be considered in the context of the right to housing). For a discussion of the Constitutional Court's treatment of socioeconomic rights, see generally Eric C. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*, 38 COLUM. HUM. RTS. L. REV. 321 (2007).

318. *Soobramoney*, 1997 (12) BCLR 1696 ¶ 36.

319. *Id.* ¶¶ 1-3.

320. *Id.* ¶ 4.

321. *Id.* ¶¶ 22-36.

322. *Id.* ¶ 31.

323. *Treatment Action Campaign*, 2002 (10) BCLR 1023 ¶ 44. The cost of Nevirapine was not an issue in the proceedings. *Id.* ¶ 71.

324. *Id.* ¶ 4. Nevirapine is a potent fast-acting antiretroviral drug used worldwide in the treatment of HIV/AIDS. In 2001, it was approved by the WHO for use by pregnant women to prevent mother-to-child transmission of HIV at birth. See WHO MODEL LIST OF ESSENTIAL MEDICINES 10 (15th ed. 2007), available at <http://www.who.int/medicines/publications/EML15.pdf>. The drug had been approved for these

The Court rejected the argument that a minimum core obligation similar to that defined by the UNCESCR in relation to the right to health under international law would require the government to provide Nevirapine as an “essential drug.”³²⁵ The Court declined to find that the Constitution imposed any minimum core obligation; it stated, “It is impossible to give everyone access to even a ‘core’ service immediately. All that is possible, and all that can be expected of the state, is that it act reasonably to provide access to the socio-economic rights . . . on a progressive basis.”³²⁶ Next, applying a reasonableness standard, the Court found that the government’s policy of restricting the availability of Nevirapine in the public health sector was unreasonable.³²⁷ In addition, the Court decided that the government had not reasonably addressed the need to reduce the risk of HIV transmission to infants at birth. The Court nevertheless qualified its decision, noting that “unreasonableness” should not be taken to “mean that everyone can immediately claim access to such treatment.”³²⁸

Some commentators maintain that the “reasonableness” test does not entirely foreclose “direct enforcement of socioeconomic rights.”³²⁹ Commenting on South Africa’s socioeconomic rights cases, Jeanne Woods has suggested that South African jurisprudence is evolving to embrace collective rights to general public health and reject individual claims for medical treatment.³³⁰ She states, “The South African case law has evolved from the rejection of individual rights claims . . . to recognition of collective rights to comprehensive government programs to address urgent social needs for

uses in South Africa.

325. *Treatment Action Campaign*, 2002 (10) BCLR 1023 ¶¶ 26-39. Nevirapine appears on the WHO’s list of essential drugs that should be provided as part of the minimum core of the right to health according to the UNCESCR. *Id.* ¶ 2 n.3; see also WHO MODEL LIST OF ESSENTIAL MEDICINES, *supra* note 324, at 10. It was also made available to the government free of charge. *Treatment Action Campaign*, 2002 (10) BCLR 1023 ¶ 4 n.5.

326. *Treatment Action Campaign*, 2002 (10) BCLR 1023 ¶ 35; see also *id.* ¶ 34 (“[T]he socio-economic rights of the Constitution should not be construed as entitling everyone to demand that the minimum core be provided to them.”).

327. *Id.* ¶¶ 67-73 (presenting considerations relevant to reasonableness inquiry); *id.* ¶¶ 93-95 (assessing the reasonableness of government actions); *id.* ¶ 122 (“In the present case we have identified aspects of government policy that are inconsistent with the Constitution. . . . The [government’s] policy as reformulated must meet the constitutional requirement of providing reasonable measures within available resources for the progressive realisation of the rights of [such] women and newborn children.”).

328. *Id.* ¶ 125.

329. See, e.g., Jonathan Klaaren, *A Remedial Interpretation of the Treatment Action Campaign Decision*, 19 S. AFR. J. ON HUM. RTS. 455, 455-56 (2003); see also Christiansen, *supra* note 317, at 374-76; Mark Kende, *The South African Constitutional Court’s Construction of Socio-Economic Rights: A Response to Critics*, 19 CONN. J. INT’L L. 617, 617-18 (2004); Pieterse, *supra* note 317, at 498 (arguing that “it is possible to recast . . . the TAC finding as an entitlement to receive safe and efficacious medical treatment where such treatment has been medically indicated, as long as the treatment is affordable and where capacity to administer it exists”).

330. Woods, *supra* note 219, at 790.

housing and health care.”³³¹ Further, Woods observes that South African jurisprudence has “more readily acknowledged rights and correlative state duties where there was a history of political struggle demanding their recognition.”³³² She notes that AIDS case law has been informed by its development against the background of domestic and international civil society movements.³³³

3. *The Right to Health and Virginity Testing: Capabilities Theory and Pragmatism Applied*

Having outlined the right to health, this Section considers how the capabilities and pragmatism frameworks highlight the performance obligations inherent in the health right. This enriched appreciation for performance obligations might shift the debate over virginity testing and affect the way it is practiced. Previous Sections have described weaknesses in the application of rights universalism to virginity testing—particularly its focus on forbearing rights interference. Capabilities theory and pragmatism can advance the human rights discourse by recognizing positive state performance as a means for rights realization.

Capabilities theory, with its normative aim that positive freedom be enlarged, provides guidance to policymakers with respect to *what* the right to health should contain and the nature of the state’s obligation to promote the right. Pragmatism provides guidance with respect to *how* a state, like South Africa, with a culturally plural civil society, might go about realizing the right to health in an effective manner. What each theory brings to bear on the meaning and realization of the right to health and perhaps the modification of the practice of virginity testing is discussed in turn.

Virginity testing has arguably reemerged as strongly as it has in some South African communities because women and girls do not enjoy the “capability” to be free from disease. The controversy surrounding the practice of testing became polarized, in part, because the theoretical foundation of human rights universalism proved itself impoverished when confronted by the empirical realities of a society burdened by a devastating epidemic.

331. *Id.* Woods reconciles the results in the *Soobramoney* and *TAC* cases as follows: Both kidney disease and AIDS are serious, life-threatening harms. However, the AIDS epidemic has all of the characteristics of a classic “public” health crisis: a communicable disease that threatens the entire population. As such, AIDS more readily falls within the traditional scope of liberal state responsibility. In contrast, kidney disease, no matter how widespread, is seen as a “private” misfortune; its victims, while generating sympathy, may even be deemed “undeserving” of an urgent public response because of their having made bad lifestyle choices. Notably, in [*TAC*], the beneficiaries of constitutional relief were not the infected mothers, but the innocent—and hence, “deserving”—infants to whom the disease was transmitted in utero. *Id.* (footnotes omitted).

332. *Id.* at 791.

333. *Id.*

Polarization over which rights to privilege, gender equality or cultural autonomy, eclipsed the ability of many to see beyond whether rights were being or would be offended in order to question the capability deficiencies that render females disproportionately susceptible to HIV infection. When human rights arguments are grounded in a capabilities perspective, however, the virginity testing problem may be defined and resolved more constructively.

Under a rights challenge to virginity testing that is informed by capabilities theory, the degree of inequality, repression of sexual autonomy, and violation of privacy associated with the practice is assessed in terms of how testing either enhances or hinders an individual's capabilities and functioning. Because the normative commitments of classical liberal universalism in which human rights are grounded more readily call for abolition of potentially discriminatory cultural practices, it cannot easily capitalize on existing opportunities within a given cultural normative order for actually facilitating women's empowerment. A capabilities framework is an improvement over classical liberal universalism because it can better capitalize on such opportunities and because it recognizes human diversity, emphasizes positive freedoms, and starts from the point of asking what it is a person is actually able to be and to do. This reorientation directs policymakers to consider the impediments to a person's ability to function in ways that would lessen the likelihood of susceptibility to infectious disease and premature death. In theory, it should also encourage policymakers to remove impediments by establishing an adequate health care infrastructure and implementing plans to combat HIV/AIDS. It may even encourage community leaders in civil society to alter cultural practices so that they enhance the capabilities of those who engage in such practices to remain disease free.

The capabilities approach has the potential to ground human rights discourse in ways that address the issues associated with virginity testing by expanding the sphere of concern beyond formal legal entitlements to actually enjoyed freedoms. In this way, a capabilities approach offers promise for bridging the divides that have persisted in human rights praxis between universalism and relativism as well as between forbearance and performance rights. Application of a capabilities framework would require that more serious attention be given to realizing a meaningful right to health and removing obstacles to achieving health.

The health right cases that South Africa's Constitutional Court has decided suggest that the government's actions must be reasonable and that preference of priority can favor those health threats, such as infectious disease, that potentially may spread to affect the public as a whole.³³⁴ The government acts unreasonably when it fails to undertake measures within its means in order

334. Woods, *supra* note 219, at 790-91.

to promote public health.³³⁵ Claims on the state to provide comprehensive information about HIV/AIDS prevention to those most affected would be a reasonable objective for stakeholders in the virginity testing debate.

It would perhaps be reasonable to demand that the government develop educational materials about HIV/AIDS in collaboration with those communities engaged in testing. If indeed the Court is advancing a collective right to general public health, the cultural practices of communities should be encouraged through health education to adapt in a way that promotes public health. Similarly, health education must be adapted to be sensitive to culture and traditional knowledge. While some virginity testers have voiced objections to education about sexual health because they perceive it to promote promiscuity, their concerns may in part be better addressed if testers are included as partners in the development and design of public health educational programs. The contributions from the virginity testing community to conversations about HIV/AIDS prevention may ultimately yield a sex education curriculum that not only includes accurate information about disease transmission but that is also not too inconsistent with the testing community's cultural values.

If the stakeholders in the debate over the legal status of virginity testing were to consider the right to health, the conversation would address what the State (and other non-state actors) could and should be doing to minimize threats to the health of South African females. Both gender equality advocates and traditionalists could find a common cause in the health risks that females face and in societal circumstances, such as prevalent sexual violence and ignorance surrounding infection, that leave women and girls vulnerable to HIV infection. Changing these conditions—in this case by promoting health and security—may adjust a culture's response to disease. If material and institutional conditions were improved to address the HIV/AIDS epidemic more effectively, the testing movement may be redirected. Aspects of testing practices have already evolved; for example, some members of the testing community have expanded their practices to include testing males after facing criticism from gender equality activists.

Approaching the problem of virginity testing from the inclusion of a capabilities orientation would direct that, rather than emphasizing some legal protection from interference, stakeholders on both sides of the legislative battle should embrace the right to health. This would allow them to focus their efforts on what they can reasonably demand the government to perform with respect to HIV/AIDS prevention. For instance, equality and autonomy advocates alike could agree to demand that the public health system provide accurate and culturally appropriate information about transmission, HIV testing, and even access to antiretroviral drug treatment where available. Given the informational impediment to the capability to remain free from infection, the virginity testing

335. *Treatment Action Campaign*, 2002 (10) BCLR 1023 ¶¶ 68-73.

debate might also include in its dialogue issues related to the right to education, another socioeconomic right guaranteed in international human rights accords, which appreciates that a central aim of education is to prepare children “for responsible life in a free society” and to develop “to their fullest potential” the mental and physical abilities of the child.³³⁶

Similar to the capabilities framework, pragmatism is theoretically appealing because it is not necessarily wedded to a forbearance conception of liberty, which was a mistake common to both proponents and opponents of testing. Being agnostic except as to outcome, however, pragmatism is not necessarily attached to a performance conception of rights either. Stakeholders in the debates would gain perspective from working pragmatically to identify possible avenues by which to adapt, adjust, and modify norms in ways that enhance the likelihood that both cultural practices and human rights advocacy will contribute to solutions to the HIV/AIDS epidemic.

Because a pragmatist appreciates context, the first step in a pragmatic approach would be to recognize as an underlying problem the disproportionate impact that HIV/AIDS has on women and girls. The next step would be to look to “what works” in solving the problem. Therefore, in considering the legal status of virginity testing, the pragmatist would ask whether the practice works and would consider as well the concrete consequences of the conduct.

Conceivably, because pragmatism “does not stand for any special results [and] is a method only,”³³⁷ a pragmatist would initially be agnostic between testing and banning testing, and then consider the context in which testing occurs as well as its consequences. In terms of social context, virginity testing is most popular in KwaZulu-Natal, the portion of the country with the highest rates of HIV infection, and testing is performed on young women who represent the portion of the population disproportionately infected. To date, there is no empirical evidence that virginity testing works to decrease rates of infection among young women and girls, and in fact, one reported consequence of virginity testing is that virgins may be at greater risk for sexual assault.³³⁸ Yet the motivations behind the testing practice are manifold, and may include a desire to instill cultural pride or to entrench certain forms of gender roles valued by the community.³³⁹

After considering the context in which virginity testing exists and the consequences that may flow from the practice, it may not be clear whether virginity testing works to curb rates of infection. Therefore, the pragmatic approach counsels that policymakers look for solutions that *could* work, thereby expanding their central sphere of concern beyond abolishing or accommodating virginity testing. Methodologically, a pragmatic approach

336. CRC, *supra* note 112, art. 29(d).

337. James, *supra* note 252, at 97.

338. See, e.g., Govender, *supra* note 90; Dickson, *supra* note 91.

339. See, e.g., Daley, *supra* note 1.

may even support demands for particular interventions by the State where such interventions by government could work to lessen the vulnerability of young women to HIV infection and premature death from AIDS. Taking the right to health as a central focus, or even as a supplement to the gender equality and cultural autonomy concerns raised by stakeholders in the virginity testing debate, pragmatism offers a strategy by which to foster adaptive solutions that are health promoting because pragmatism is comfortable with recognizing that rights and customs are alterable, and not absolute.

Thus far I have argued that the frameworks of capabilities and pragmatism are helpful in mediating the theoretical contest between universalism and relativism by elevating the status of the right to health; I now explore how these frameworks could help modify custom and cultural practices. Virginity testing may be adapted to focus on educational aims. For example, if one of the government's goals is to equip children with knowledge about responsible sexual behavior in a society experiencing an HIV/AIDS crisis, testers could protect children from disease and premature death by providing them with knowledge about HIV transmission. Equipping South African children with the information they need to protect themselves from infection would certainly be consistent with the aim of preparing children for "responsible life" in a society so dramatically affected by HIV/AIDS. Offering health education to testers could also be an advance in combating the HIV/AIDS epidemic among young South African females. Moreover, collaborations by stakeholders on HIV/AIDS educational programs could conceivably strengthen gender empowerment.

If the debate over testing became more centrally focused on health, some of the anxieties underlying the practice might be addressed. For instance, there may be ways to change virginity testing practices to promote health. International norms require states to ensure that traditional practices do not obstruct access to health related information or services.³⁴⁰ Testers appear not only to have great standing in their communities, but also to have access to and considerable influence among the young women and girls who participate in testing. Those engaged in traditional practices could be enlisted to assist in communicating health-related information to communities that normally would not have access to such information. A tester equipped with information about sexually transmitted infections could be in a better position to adapt her testing practices in ways that are less invasive than the present practices and more inclusive of information that could benefit an adolescent girl. The "problem" of culture practices could then become an effective part of the solution.

Both frameworks allow for flexibility and enrich the classical liberal conception of human rights. Pragmatism invites experimentation to identify workable solutions while capabilities mandates that a society continually work

340. See General Comment No. 14, *supra* note 297, ¶ 34.

toward expanding the concrete functioning potential of people, while appreciating the context of a given culture. The application of these frameworks to the virginity testing debate allows for the flexibility to create an adapted virginity testing practice or an alternative that advances health, gender equality, and cultural autonomy. Applying these frameworks to the right to health offers insight into what the right to health should encompass and how it might be realized in a way that will be effective, appreciate given cultural realities, and embrace those aspects of culture that can be enlisted to advance health and freedom from epidemic disease.

A right to health informed by capabilities and implemented pragmatically would mandate that the obstacles to a person's ability to achieve a state of functioning free of HIV/AIDS be removed. As ignorance concerning transmission of HIV is one impediment to a person's capability to remain free of infection, education would necessarily be included as a component of the health right that the state is obligated to provide. These educational obligations to disseminate information to children could be met through the school system. The government could provide education to testers and mandate that anyone conducting virginity testing provide education about sexually transmitted infections and subsidize the efforts of testers. Through educational engagement, testing practices might be modified by those engaged in it to be a less invasive and perhaps more effective weapon in the battle against HIV/AIDS. Under the frameworks proposed, in addition to education, the right to health would also be understood to encompass other related rights interests, such as the right to privacy. For instance, given the possible risk of rape associated with publicly being declared a virgin, regulations governing virginity testing should provide a remedy for virginity status disclosure. The government might also be obligated to prevent corruption, unfair competition, and deceptive trade practices among testers.

Assuming those engaged in testing are making choices and reacting in part to the inadequate material and institutional conditions they confront in South African society, a health-focused approach could prove appealing. Admittedly, there are many engaged in virginity testing who may have multiple motivations and who offer a variety of different justifications for promoting the practice, such as prevention of abortions or promotion of chastity. For such people, a focus on health may not change their core beliefs about the importance of chastity, the merits of virginity testing, or the need for testing. Even so, focusing on health expands the sphere of concern beyond individuals' autonomy to conduct virginity tests into asserting socioeconomic rights claims for these individuals. Among those testers for whom the primary or dominant impetus for promoting the practice is "because [there is] nothing else,"³⁴¹ other possible options to combat the disease may be illuminated through greater

341. Daley, *supra* note 1.

education or created by the State in response to community pressure. Gender equality advocates may find that virginity testing decreases as confidence increases in traditional communities that feel empowered to protect their children against infection in ways that are less discriminatory and less intrusive.

While not *all* differences of opinion would disappear between rights universalists and cultural relativists over equality, sexual autonomy, and privacy were the conversation reframed by a pragmatistic right to health approach informed by capabilities, I submit that the focus should not only be on making the problem disappear. I am encouraged, however, by what does appear when the approach I advocate is taken: new opportunity. Granted, a virginity testing accommodationist may well argue that realization of the right to health requires abstinence, while an abolitionist could maintain that the right to health requires easy condom access. The possibility remains that accommodationists would simply reproduce their anxieties in this new framework and protest that HIV/AIDS and sex education are contrary to traditional knowledge. While such differences may remain, there is still opportunity for movement that would advance the public debate about how to address the disproportionate impact HIV/AIDS has on South African females.

For instance, to mediate such a difference of opinion, a pragmatistic approach would look to the concrete effects of a given proposal, such as abstinence or condom access, for reducing HIV infection among the target population. A capabilities approach would counsel flexibility in selecting an approach depending on what obstacles exist for achieving the capability to remain free of infection. Condom access may be the solution for some populations, while abstinence would be the best option for others. At minimum, a capabilities framework acknowledges that providing condoms or imposing abstinence policies does not offer information about what the obstacles may be for people using either strategy effectively to protect themselves. Policymakers are charged with finding effective ways to remove obstacles so that people have true freedom to achieve health in general and the capability to function in a manner that allows them to avoid HIV infection in particular.

A capabilities approach improves upon the classical liberal universalism framework in that, like pragmatism, it looks to context and consequences. Capabilities theory thus complements the pragmatistic judicial analysis applied by the Constitutional Court to the question of customary law, an analysis that privileges consideration of context and the actual effects of a judicial rule on the potential functionings of individuals. However, unlike pragmatism, which offers little guidance for what a society should be normatively working toward, a capabilities approach necessarily maintains that policymakers should place a premium on expanding capabilities. Judicial deliberations could take into account impacts on capabilities and consider the concrete consequences of whether a ruling will serve to constrain or expand capabilities and ultimately what young women and girls are able to be and to do. The relevant inquiries

under this approach are whether women are reasonably secure from disease and premature death, and if not, why not? What are the impediments to their capabilities to avoid premature death from disease?

The approach I propose creates a new space for conversation that would not otherwise have existed between parties polarized over particular issues. While it would not eradicate all differences, it could take them out of direct and open conflict and perhaps demonstrate that stakeholders disagree over means, and not ends. I imagine proceeding from this position will accomplish more than a legislative ban on testing that is unlikely to be enforced—after all, elderly women who make up a sizable number of testers are already bearing a care burden for HIV/AIDS orphans, and it is unlikely that there will be strong support for putting grandmothers in prison. The proposed frameworks require a movement toward state and civil society performance instead of forbearance, and they also set parameters for performance. Actions taken to combat HIV/AIDS must enhance capabilities and be effective in bringing about concrete results. Thus, while not all differences will disappear, the proposed frameworks would operate to dissolve some of the entrenched ideological divide between accommodationists and abolitionists. I would expect more stable compromises to result from stakeholders oriented around advancing common goals instead of competing entrenched interests.

Reconsideration of the virginity testing controversy from a capabilities-informed right to health perspective would reexamine not only equality, sexual autonomy, privacy, and culture, but also the freedom to develop capabilities in a way that optimizes health. Under this approach, the focus of stakeholders in the virginity testing controversy is shifted to changing the material and institutional conditions that initially gave rise to the practice being redeployed as a weapon in the war against HIV/AIDS—disparate capabilities to be free from disease and death. In order to expand capabilities, leaders in society should be centrally committed to eliminating the obstacles that hinder the development of capabilities or diminish functionings.

C. Reconsidering the Role of Culture: An Opportunity, Not an Obstacle

By identifying culture as the root of repression, abolitionist approaches to cultural practices compromise the possibility of identifying avenues to adapt particular practices in ways that do not offend human rights norms. Legal bans, criminalization, and other forms of abolishing traditional practices decrease the chances of attaining a “holistic understanding of the context” in which those cultural practices are grounded.³⁴² These forms of abolition also pose barriers to the development of more-comprehensive solutions that reach the root of the

342. See Nyamu, *supra* note 122, at 393 (discussing the shortcomings of an “abolitionist approach” to discriminatory cultural practices).

problem.³⁴³ By “consign[ing] culture to the role of violator,”³⁴⁴ human-rights proponents risk missing opportunities to work in cooperation with members of those traditional communities who want to change their societies from within the culture.³⁴⁵ As a result of these failures to take advantage of existing opportunities, culture is not used as fully as it could be to promote positive reforms and greater gender equality.

To some, testing opposition and prohibition are evidence that South Africa’s new constitutionalism means characterizing traditional culture as an obstacle to gender equality.³⁴⁶ Feminists from developing nations have expressed concerns over similar calls to abolish traditions and customs in other parts of the world.³⁴⁷ The concerns expressed by these African feminists, in particular, stem in part from their experiences that abolitionist responses to traditional practices tend to erroneously discount the benefits that some traditional practices may entail for women, to eradicate familiar customs through law, and to impose unfamiliar, illegitimate alternatives to those customs.³⁴⁸

Traditionalist arguments defending virginity testing and demanding accommodation are not without their flaws. As African feminist Celestine Nyamu puts it, “[C]ulture is dynamic, responds to social change, and undergoes transformation over time.”³⁴⁹ Nevertheless, some traditionalists persist in presenting their “culture” as integrated, holistic, and static, so as to maintain that their cultural rights cannot be violated.³⁵⁰ In contrast, the understanding of culture that has emerged in contemporary anthropological literature is that “culture is fragmentary, contested, and shifting.”³⁵¹ Far from culture being something to be preserved for its own sake, frozen in time and place, anthropologists now see it as “connected to global systems of meaning and power, continually constituted and reconstituted through processes of

343. *Id.*

344. *Id.* at 406 (discussing failures by the human rights and development communities to better mediate gender equality and cultural identity and offering alternative ways of addressing cultural justifications for gender inequality.); see also Abdullahi An-Na’im, *Promises We Should All Keep in Common Cause*, in *IS MULTICULTURALISM BAD FOR WOMEN?*, *supra* note 123, at 60-66.

345. Nyamu, *supra* note 122, at 406.

346. See, e.g., Memela, *supra* note 222.

347. See, e.g., Lewis, *supra* note 225, at 28-33 (reviewing the scholarship of Western feminists and discussing the concerns of African feminists with respect to Western “eradication campaigns” against cultural practices).

348. Nyamu, *supra* note 122, at 393.

349. *Id.* (“‘People are not simply the naïve product of a rigid and static society,’ except in the uninformed imagination of some people in Western societies who view Third World societies as ‘stable, timeless, ancient, lacking in internal conflict, and premodern.’”); see also Katha Pollitt, *Whose Culture?*, in *IS MULTICULTURALISM BAD FOR WOMEN?*, *supra* note 123, at 27-29.

350. See, e.g., Moya, *supra* note 216.

351. Merry, *supra* note 228, at 249-50.

interpretation, invention, and imposition.”³⁵²

In a pluralistic legal setting like South Africa’s, confronting the politics of culture requires “understanding the flexibility and variation of custom in order to challenge the arguments that deploy culture as a justification for gender inequalities.”³⁵³ Nyamu advocates “critical pragmatic engagement” with culture instead of condemnation as a matter of course.³⁵⁴ She observes that, while the CEDAW calls for change, “it does not dictate the process for achieving change . . . [leaving] open the possibility of a flexible process of evaluating assertions of culture in context.”³⁵⁵ Flexibility is crucial in contexts where the divergence between formal legal rules and informal cultural norms make legal efforts to abolish traditional customs in effect “meaningless and unrealistic.”³⁵⁶

As a practical matter, South Africa’s Commission for Gender Equality would do well to identify avenues for embracing cultural practices adaptable to promoting health and equality. It is important for advocates to recognize and utilize the opportunities presented by cultural practices for promoting women’s well-being while simultaneously working toward expanding the sphere of concern around testing to include socioeconomic rights and securing the causal determinants of health.³⁵⁷ Arguing against virginity testing on the basis of its inconsistency with human rights standards and gender equality is inadequate. It may even be counterproductive if it generates a backlash to values perceived to be “Western.” For example, opposing popular cultural practices because they appear to violate human rights norms may make rights rhetoric less appealing to a broader public in diverse societies and developing countries. Human rights will be a less-useful tool for promoting human dignity where it is perceived to be alien and to necessitate the complete abolition of certain ways of life.

352. *Id.* at 250, 268, 270 (explaining how “rights and legal remedies offer a narrow definition of social problems such as gender inequality and provide a restricted and individualistic set of remedies” rather than addressing “the broader cultural productions that foster violence against women”); see also Ann-Belinda S. Preis, *Human Rights as Cultural Practice: An Anthropological Critique*, 18 HUM. RTS. Q. 286, 290 (1996) (discussing rights as cultural practice).

353. Nyamu, *supra* note 122, at 382.

354. *Id.* at 381.

355. *Id.* at 416.

356. *Id.* at 416-18 (arguing that “proponents of gender equality must engage with the specific politics of culture and that assertions of the rigid notions of custom must be met with empirical evidence of the flexibility, variety, and richness of contemporary local practice”).

357. See *id.*; see also Thandabantu Nhlapo, *African Family Law Under an Undecided Constitution: The Challenge for Law Reform in South Africa*, in THE CHANGING FAMILY INTERNATIONAL PERSPECTIVES ON THE FAMILY AND FAMILY LAW 617, 623-24 (John Eekelaar & Thandabantu Nhlapo eds., 1998) (warning against the estrangement caused by a rights-based strategy that abstracts women from their cultural and religious contexts); Abdullahi An-Na’im, *supra* note 344, at 62; Martha Nussbaum, *A Plea for Difficulty*, in IS MULTICULTURALISM BAD FOR WOMEN?, *supra* note 123, at 105-107; see also Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 10 (1989) (arguing for a reconceived notion of rights that emphasizes relationships and interdependence rather than estranging individualism).

It is not seriously contested that before the HIV/AIDS crisis virginity testing had fallen out of favor and had all but ceased due to pressures that had changed social structures.³⁵⁸ Virginity testing has reemerged in its current form largely in response to HIV/AIDS.³⁵⁹ Testers who have promised to continue testing children despite the law say they do what they are doing to save the women and children of South Africa and ensure a future for the nation, not solely to preserve culture per se.³⁶⁰ Bringing this understanding to the testing controversy, culture presents not just an obstacle, but also an opportunity to ensure that changes incorporate and advance women's equality. The testing phenomenon itself illustrates how reactive and adaptive communities can be. It is possible that without interventions that engage both gender equality and cultural autonomy, changes in cultural currents will remain harmful to women even after other aspects of society have evolved in a more progressive rights-respecting manner. Thus, the question becomes how to promote a more progressive adaptation of practices that improves the status of women. Pragmatic approaches to pluralism and socioeconomic rights informed by capabilities theory may offer an answer to this urgent question.

More likely than not, stakeholders will find that banning testing will not stop testing, and testing will not likely stop the spread of HIV/AIDS. Stakeholders must mobilize and demand that the South African government and the international community meet their obligations to realize the right to health and to protect the health of the public. More public debate, adjudication, and activism will help shape and define the scope and nature of government's performance obligations to ensure realization of the right to health in the midst of the HIV/AIDS epidemic.

CONCLUSION

In the context of HIV/AIDS, vulnerability to the epidemic has now been associated with the extent of realization of human rights. For as the HIV epidemic matures and evolves within each community and country, it focuses inexorably on those groups that before HIV/AIDS arrived, were already discriminated against, marginalized and stigmatized within each society.³⁶¹

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Human rights advocates should appreciate more fully how cultural legitimization and change occur within the political context of a society facing an enormous public health crisis. The reemergence of virginity testing is

358. See, e.g., Singer, *supra* note 2; McGreal, *supra* note 23.

359. See McGreal, *supra* note 23.

360. See, e.g., Cullinan, *supra* note 171; Memela, *supra* note 222; Moya, *supra* note 216.

361. Jonathan M. Mann, *Medicine and Public Health, Ethics and Human Rights*, in HEALTH AND HUMAN RIGHTS 439, 446 (Jonathan Mann et al. eds., 1999).

perhaps less the result of age-old tradition than of a contemporary political situation brought about in large part by the continued failure of the South African government and the international community to meet its health-related obligations. Going forward, all stakeholders in the virginity testing debate must unite to find common cause in order to fight a disease that disproportionately impacts young women and girls. The virginity testing controversy in South Africa highlights a tension within the contemporary human rights legal regime: on one hand, human rights law consists of an established set of proclaimed universal standards, but on the other hand, these standards have not been sufficiently theoretically grounded and so remain vulnerable to challenge by competing normative orders, such as those adhered to by the many diverse cultures in plural societies. Here, I theorize a practical and urgent problem in an effort to provide firmer footing for human rights approaches to gender equality and cultural autonomy against the backdrop of infectious disease.

This Article reconceptualizes the rights at stake for gender equality advocates and virginity testers from rights of forbearance into a rich and broad positive right to health in order to take the debate out of the typical abolition versus accommodation narrative. In reframing the debate, this Article intends, through application of the capabilities framework, to identify space for advocates to explore adapting cultural practices to more constructively confront the challenges posed by HIV/AIDS. This Article offers a pragmatistic approach to the practical problems of cultural pluralism in diverse developing countries, arguing that both rights and customs are subject to adaptation and must be appreciated in context. It also advances capabilities theory as a way to address the theoretical difficulty socioeconomic rights present to human rights discourse. These strategies can serve to assist those in South Africa—and beyond—who are concerned with gender equality and cultural preservation, helping them to identify areas of common interest and to imagine a variety of ways of resolving conflicts between their positions by appreciating the richness of the resources that rights and culture can provide.

