

WHY HAVE YOU BEEN SILENT? THE CHURCH AND THE ABORTION BAN IN SOUTH AFRICA

*S. Talcott Camp**

Why have you been silent?

—Archbishop Desmond Tutu¹

Mr. A J LEON [sic] asked the Minister of National Health and Population Development:

- (1) How many women had legal abortions in 1989 in terms of the Abortion and Sterilization Act, No 2 of 1975;
- (2) what is the estimated number of women who had illegal abortions in that year?

The MINISTER OF NATIONAL HEALTH AND POPULATION DEVELOPMENT:

- (1) the number of legal abortions for the period January 1989 to December 1989 reported up to 1 February 1990 is 785;
- (2) no official figures on illegal abortions in the Republic of South Africa are available.

—South African House of Assembly²

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¹ Anglican Archbishop of Cape Town Desmond Tutu, confronting African church leaders about human rights violations in other African nations at the 1984 Vancouver Assembly of the World Council of Churches, quoted in Charles Villa-Vicencio, *Towards a Theology of Nation Building: Church and State in Africa Today*, 32 J. Church & St. 851, 856 (1990).

² House Assembly Proc. 556 (S. Afr.) (Mar. 20, 1990).

INTRODUCTION

The contributors to this book are vocal in their criticism of the church of [sic] preaching against apartheid while keeping structures which perpetuate the subordination of women intact. . . . The church failed to get involved with specific problems women were experiencing in their communities, such as . . . abortion

—Rhoda Kadalie³

Whether they perform the procedure on themselves or have someone else do it for them, South African women who resort to illegal abortion typically use sharp objects, such as knitting needles, or harsh chemicals, such as chlorides (sold as "Clorox" in the United States). Every year, 300,000 of South Africa's twenty million women undergo illegal abortions. They constitute about one in twenty-three fertile women. Many tens of thousands of the clandestine, unsterile operations result in infection or uncontrollable bleeding for the woman. The lucky ones receive life-saving medical attention, which often includes the removal of their septic abdominal organs. Others live, but suffer permanent medical trauma. The unluckiest ones die—1,500 to 3,000 every year.⁴ The discriminatory, interrelated forces that lead women to such fearful methods coalesce in South Africa's abortion ban, which is still in effect after the April 1994 free elections.

Despite the staggering proportions of the phenomenon, the church in South Africa has turned a blind eye and a mute tongue. What are the theological implications of that silence? How is the church called to respond to the medical fallout from South Africa's abortion ban? To follow its own tenets, what must the church do in the face of a law that, though it causes such anguish, was justified by the apartheid government in terms of Christian principles? In this Article, I argue that it is theologically imperative for the church to end its silence on several issues: the abortion ban, the apartheid government's use of Christianity to justify the ban, the ban's effect on women's lives, and the church's own tacit but powerful role in relegating women's well-being to the bottom of the heap of theological and political values. In ending its own silence, the church will also cease its enforcement of the silence with which so many South Africans continue to have illegal abortions.

³ Rhoda Kadalie, *Epilogue to Women Hold up Half the Sky: Women in the Church in Southern Africa* 391, 392 (Denise Ackermann et al. eds., 1991).

⁴ See *infra* notes 46–55 and accompanying text.

Examination of the church and the abortion ban involves medical, political, legal, and theological issues. In Part I of this Article, I discuss the theological imperative for the church to end its stubborn ignorance of women's reality as shaped by the abortion ban. Part II is a discussion of the multiple, complex forces that constituted apartheid. Part III addresses the medical impact of the illegality of abortion. In Part IV, I explain the law itself, and its operation in a still-divided society. Part V addresses the role of the church to date. The Conclusion applies the doctrinal concerns of Part I to the current political situation in South Africa.

As a preliminary matter, an explanation of certain terms and approaches will make the main part of this Article clearer. First, the "church" denotes the organized Christian community: the structures that link all South Africans who call themselves Christian,⁵ and who do so within the context of common worship—that is, within a denomination or an independent congregation. When I write of actions or omissions on the part of the church, the word refers to the various denominations and independent congregations, and, ultimately, to their leaders as well.

Second, the term "African" has a specific meaning in the context of South Africa, where it is impossible to find racial terms that are either accurate or inoffensive. Using such obscene methods as measuring people's noses, the architects of apartheid designated people as Black, white, Asian, or Coloured, meaning of mixed European and African descent. Following the current practice of many people who were called Black in apartheid vocabulary, I use the term African in its stead. South African statistics, like the society itself, remain largely divided into the four categories. For example, in their homes, almost all Africans speak an indigenous language, the most common ones being Zulu, Sotho, and Xhosa; almost all Coloured people speak Afrikaans; almost all Asians speak English; and almost all whites speak Afrikaans or English.⁶ Hence, in this Article, African does not include Coloured people, whites, or Asians.

Third, I use the term abortion "ban" even though the South African law is not, technically, an absolute prohibition on abortion. The law spells out five narrow circumstances in which abortion is legal and details the numerous steps a woman must take in order to obtain a legal abortion. These steps include convincing at least three doctors, and usually four, that she qualifies for a legal abortion. Even a woman who can meet all of these requirements is entitled to a legal abortion only if the pregnancy poses a serious threat to her physical or mental health, if the fetus is irreparably and

⁵ According to the 1991 population census, the majority of South Africans call themselves Christian. South African Institute of Race Relations, *Race Relations Survey 1993/94*, at 89 (1994) [hereinafter *Race Relations Survey 1993/94*].

⁶ *Id.* at 86.

seriously impaired, or if the pregnancy results from rape or incest. However, as the apartheid government intended, the law operates as a virtual ban: it results in about 1,000 legal abortions annually, most of them for white women.⁷ I therefore refer to the law as a ban, its five narrow exceptions notwithstanding.

Fourth, I use such statistics as are available. They are, in many important instances, estimates and extrapolations. At a few points, I have had to use two figures from different years in order to compute a third figure. This problem is inherent in any topic, like this one, that has been stalwartly ignored by those with the power to gather information and compile statistics. That official nonfeasance has caused an information vacuum, which makes talking and writing about abortion in South Africa difficult. This difficulty results in a silence which, in turn, serves only to expand the ignorance. These phenomena will continue, self-perpetuating, until people analyze the subject, as well as the silence and ignorance surrounding it, in spite of the paucity of information borne of obstructive official neglect.

Fifth, in light of this goal of fostering awareness and discussion, it would be ironic if this Article served to perpetuate a certain silence: that of African and poor women in South Africa. As a white, middle-class American, I risk merely substituting my own voice for theirs.⁸ However, I am not seeking to do that; rather, I am trying to address one of the sources of their silencing—the church. Moreover, I have in common with poor South Africans certain determinants of the laws that have shaped their lives and mine. For example, "[w]e may come from totally different backgrounds, but we share *one* Bible."⁹ Biblical gender oppression has greatly influenced South African and American law,¹⁰ and it is in the Bible that "man has named . . . God, in his own image."¹¹ The Bible, however,

⁷ See *infra* notes 95–101 and accompanying text.

⁸ See Gertrud Wittenberg, *The Song of the Poor Woman: The Magnificat* (Luke 1:46–55), in *Women Hold up Half the Sky*, *supra* note 3, at 3, 18 (quoting Letlaka-Rennert: "The alliance between black and white women at present is characterized by silence and dependency on the part of black women on white women If you continue in the long term to speak on the part of black women, you perpetuate, prolong, and protract their silence.").

⁹ Renate Cochrane, *Equal Discipleship of Women and Men: Reading the New Testament from a Feminist Perspective*, in *Women Hold up Half the Sky*, *supra* note 3, at 21, 25.

¹⁰ "The biblical representation of woman as subordinate to man operates to the detriment of women, both religious and non-religious, because it is replicated in the legal system." Angela L. Padilla & Jennifer J. Winrich, *Christianity, Feminism, and the Law*, 1 *Colum. J. Gender & L.* 67, 87 (1991).

¹¹ Denise Ackermann, *Being Woman, Being Human*, in *Women Hold up Half the*

also offers a more felicitous vision of commonality: "Because there is one bread, we who are many are one body, for we all partake of the one bread."¹² Being Christian, I partake of the bread, but hear Redemption in the news that we are all one body, regardless of faith. Just as I apply this vision to the need to break the silence about abortion in South Africa, an American theologian has applied it more generally:

We are One Body, a unity through mutual participation. . . . Genocidal practices waged against Armenians, Jews, . . . or South Africans assault us all. . . . Injustice is the breaking apart of the One Body. . . . Where there is no effort to create justice, there is no love.¹³

Finally, the theological implications of the act of abortion itself are not within the focus of this Article.¹⁴ I believe that discussion and knowledge of the ban's effects will lead to liberalization of the South African law, but that is not my initial goal. Instead, I am looking to the church—my church—to acknowledge and talk about the reality of women's lives. As a rule, Christian denominations have been silent on the South African abortion law and its impact. Those that have made statements on secular law¹⁵ have posited, as "the crucial question in the whole abortion debate[,] . . . 'Has the foetus a human Life?'"¹⁶ The church must begin incorporating in its deliberations—in addition to respect for religious liberty—full knowledge of real women's real lives, and awareness of the church's role in constructing those lives. In other words, the church must embrace women's reality. Once it does so, it will have to answer a different question in relation to secular law. Rather than focus exclusively on the status of the fetus, the church will have to address what it should support the state in requiring of women on behalf of fetuses. Whatever stance specific denominations take on the moral status of the fetus, they must ask themselves what is "of God"¹⁷ for them to pronounce on the

Sky, *supra* note 3, at 93, 97.

¹² 1 Corinthians 10:17 (Revised Standard).

¹³ Carter Haywood, *Speaking of Christ*, in *Speaking of Christ: A Lesbian Feminist Voice* 23, 25 (Ellen C. Davis ed., 1989).

¹⁴ For an excellent account of the theological foundation for reproductive liberty, see Beverly Wildung Harrison, *Our Right to Choose: Toward a New Ethic of Abortion* (1983).

¹⁵ Denominational positions on the *morality* (versus *legality*) of abortion and on the moral status of the fetus are separate, albeit arguably predicate, questions.

¹⁶ Presbyterian Church of Southern Africa, *Papers for General Assembly* 80 (1983).

¹⁷ The term is from an article by a South African theologian:

legal requirements the state puts on women. Regardless of the status it accords the fetus, a church that remains ignorant of and indifferent to the conditions of women's lives is engaging in the oppression of women.¹⁸

Given that the church has exhibited and thereby sown just such ignorance, this Article argues that, as South Africa yearns and reaches for God's justice beyond April 1994, the church has two positive obligations. First, it must repent of its silence about women's lives generally and about the effect of the abortion ban specifically. Second, it must recognize that part of its theological task is to insist that gender equality and awareness of women's lives be reflected in the reproductive laws of the New South Africa.

Because not everything in the Christian tradition and the Bible is liberatory, it must be theologically acknowledged that not all that is found there is 'of God' A distinction needs to be made between the residue of oppression found within the Christian tradition and those parts of that tradition which constitute the true message of liberation.

Villa-Vicencio, *supra* note 1, at 864.

¹⁸ What male theologians, even liberation theologians, often overlook or fail to emphasize is that the church's and the Bible's overt sexism is manifestly not "of God." See *id.* Numerous female theologians have pointed out that misogynist church structure and the excision of gender-inclusive gospels from the canon served the calculated purpose of establishing the kind of oppressive political authority Jesus opposes.

[F]ollowing Jesus' death and resurrection, gender roles and expectations were temporarily transcended

. . . By the end of the first century, itinerant preachers like Saint Paul and, later, bishops . . . demonstrated their authority by insisting on the exclusion of women from leadership roles. . . . Contraception and abortion were forbidden to married women Clearly, control of Christian women's roles, dress, and behavior were understood as central to male authority.

Margaret R. Miles, *Carnal Knowing: Female Nakedness and Religious Meaning in the Christian West* 22 (1989).

Yet all the sources cited so far . . . are among those not included in the select list that constitutes the New Testament collection. Every one of the secret texts which gnostic groups revered was omitted from the canonical collection, and branded as heretical by those who called themselves orthodox Christians. . . . [V]irtually all the feminine imagery for God had disappeared from orthodox Christian tradition.

What is the reason for this total rejection?

. . . .

. . . [W]omen's activity challenged the leaders of the orthodox community

. . . .

Elaine Pagels, *The Gnostic Gospels* 57, 64 (1979).

I. THE CALL TO THE CHURCH

Sin is blind.

—Albert Nolan¹⁹

In this time of constitution-writing in South Africa, there are many reasons why the church must end its blindness to women's lives as determined by the abortion ban. Two reasons stand out.

First, the ban causes grotesque suffering in a massive portion of South African women. According to its own precepts, the church has legitimacy only if it addresses suffering, for "[s]in is about suffering, about making people suffer, allowing them to suffer or *ignoring their sufferings*."²⁰ Hence, the suffering of the millions of South African women who have undergone illegal, unsafe abortions is an explicit call to action on the part of the church. Because "sin must be measured in terms of the amount of pain and suffering it causes,"²¹ the sheer number of women whom the ban forces to resort to desperate measures makes the call all the more urgent. Furthermore, the ban's terribly disparate impact on poor women also constitutes a special invocation to the church: "God has a special concern for the poor not because of their virtue but because of their suffering. . . . because they are the ones who are being *sinned against*."²² Given these factors—that blindness to suffering is sin, that God has special concern for the poor, and that the abortion ban causes great suffering among poor women—Christian leaders, as Christians, must at the very least undertake serious scrutiny of the ban and its impact. Because "theology's first task . . . involves uncovering the causes of suffering[,] . . . [t]he most important political task of the church is 'to tell the truth.' . . . It is to analyze political policy, to expose its consequences for the poor"²³ Since it is African women whom apartheid has disempowered most acutely,²⁴ the

¹⁹ Albert Nolan, *God in South Africa: The Challenge of the Gospel* 39 (1988).

²⁰ *Id.* at 38 (emphasis added).

²¹ *Id.*

²² *Id.* at 66.

²³ Villa-Vicencio, *supra* note 1, at 859–60.

²⁴ See, e.g., Albie Sachs, *Protecting Human Rights in a New South Africa* 57 (1990) ("the social deformities and injustices created by apartheid fall with special severity on women"); Race Relations Survey 1993/94, *supra* note 5, at 490 ("According to the National Council of Women in South Africa, . . . women were the worst

church's "truth-telling" should focus most particularly on those policies that cause suffering among African women, including the abortion ban.

Second, the church is called to address specifically the suffering caused by the abortion ban because the apartheid government justified it, as it justified apartheid generally, on the grounds that it accords with Christian morality. Commenting on the state's reliance on Christianity to justify apartheid generally, one South African Anglican priest has written that "in South Africa . . . Christians . . . have to face the reality of a faith which has been and continues to be used as a justification for oppression."²⁵ That the apartheid state used the same tactic to justify the abortion ban is also clear:

Incumbent ministers of health . . . have remained adamant that . . . Christian ethics preclude the government from allowing abortion on request.

. . . Churches base their opposition on the conviction that the moment of fertilization is synonymous with the creation of a new life and that liberalization of the abortion law will lead to wide-scale immorality. . . . [A]lthough it is not the function of the law generally to enforce religious dogma, the present legislature in South Africa does not readily legislate in opposition to the consensus of church opinion.²⁶

The onus that such governmental reliance on so-called Christian principles places on the church is evident in the Kairos Document. The Kairos Document, which first appeared and generated voluminous debate in 1985, is the work of Christian theologians, lay people, and church leaders. It declared that the theology of apartheid (the defense of apartheid on Christian grounds) was heresy, and that, with the Kairos in South Africa, the *church's* day of judgment was at hand. As the Document itself explains, "Kairos is the Greek word that is used in the Bible to designate a special moment of time when God visits . . . [God's] people to offer them a unique opportunity for repentance It is a time of judgment. It is a moment of truth, a crisis."²⁷ Reflecting on the apartheid state's claim of Christian justification, the Kairos authors wrote: "The oppressive South

affected by poverty because they were unable to obtain employment owing to lack of language and technical skills").

²⁵ Courtney Sampson, *The Bible in the Midst of Women*, in *Women Hold up Half the Sky*, supra note 3, at 55, 58.

²⁶ F.F.W. van Oosten & Monica Ferreira, Republic of South Africa, in *International Handbook on Abortion* 416, 421 (Paul Sachdev ed., 1988). See also Henriette Geldenhuys, *Politics Dominates Abortion Issue*, *The Argus*, May 15, 1992, at 8 ("[T]he Conservative Party believes abortion is a sin.").

²⁷ Institute of Contextual Theology, *The Kairos Document: Challenge to the Church* 33 n.1 (rev. 2d ed. 1986) [hereinafter *The Kairos Document*].

African regime will always be particularly abhorrent to Christians precisely because it makes use of Christianity to justify its evil ways."²⁸ Because the abortion ban remains grounded in purported Christian ethics, the church must speak up. It cannot simply reinforce the status quo through its own silence.

The Kairos Document, at its simplest, holds that Christian principles do not and cannot support oppression, and that, indeed, the work of the church is to bring about God's justice by opposing oppression. Should the church sail through its own day of reckoning, committed to building a non-racist, post-apartheid society, while nonetheless sitting in silent complicity with the inseparable component of apartheid oppression that is sexism, it will have missed the Kairos altogether. Unhappily, the church may well believe that meeting the challenge of the Kairos was complete with the ending of institutionalized racism. The error of that belief is clearest in its failure to acknowledge sexism as a bedrock of apartheid.

II. THE STRUCTURE OF APARTHEID

We are none of us free unless we are all free.

—Popular watchword of the
anti-apartheid movement

The anti-apartheid movement, both inside and outside the church, had a tradition of bifurcating its freedom fight by type of oppression. Essentially, many men asked the women not to seek an end to their oppression as women because doing so might split the anti-apartheid movement down the middle.²⁹ Women were rebuked by "the slogan that some people use[d] to sideline the rights of women, namely 'liberation first.'"³⁰ The argument was that issues of gender oppression had to wait

²⁸ *Id.* at 8.

²⁹ E.g., Christina Murray & Catherine O'Regan, Putting Women into the Constitution, in *Putting Women on the Agenda* 33, 37-38 (Susan Bazilli ed., 1991):

The ranking of discrimination against women as a secondary problem . . . is not altogether surprising. . . . [T]he charge of sexual oppression is directed not only at white rulers but also at men committed to liberating South Africa from apartheid rule. To a movement concerned with unity, the issue could easily be perceived as divisive rather than strengthening.

³⁰ Emma Mashinini, Women Between Church and Society, in *Women Hold up*

out the "main" battle over racism, lest the issue of sexism split the forces opposing apartheid. Women justly reacted, "I dislike the slogan, 'Liberation first, women's issues afterwards.' . . . I do not believe that the issue of equality of women should be delayed in case it divides people in the struggle."³¹

It is ironic that those men thought that bifurcating the liberation could unify the movement. It is equally ironic that they put such stock in constructing a hierarchy of oppression, for even if a hierarchy of oppression were possible, ending de facto apartheid while leaving sexism intact is not possible: "[T]he one issue does not take priority over the other as racial and sexual discrimination are interlocked manifestations of oppression."³² "[R]acism and sexism are inseparable. . . . [T]heir interlocking reinforces the very mechanisms which maintain them to the advantage of the oppressors. . . . [They] go hand in hand in maintaining oppressive structures"³³ If the men³⁴ building the New South Africa would realize that the heresy of apartheid was the bifurcation itself—of which the institutionalized racism was certainly the most explicit example—they would see that women's quest for justice is their own struggle as well. Unless the men take that step, the mission to heal the wounds of apartheid will fail, and the Kairos will pass by unrealized. Because "the social deformities and injustices created by apartheid fall with special severity on women, . . . the rights of women and the ending of apartheid are inextricably linked."³⁵

In other words, since apartheid was a tyranny of mutually reinforcing oppressions, those who thought it served the struggle to maintain unity at women's expense fundamentally misconstrued the enemy. After all the struggle, is it not the case that "we are none of us free unless we are all free"? Can it be, in South Africa today, that many men think they can be free even as most women remain oppressed?

In theological terms, it simply will not do to disavow the vision that "there is neither male nor female; for you are all one in Christ Jesus"³⁶ as a description of some other, after life. Since "the presence of the spirit of

Half the Sky, *supra* note 3, at 345, 348.

³¹ Brigalia Bam, *Seizing the Moment: Women and the New South Africa*, in *Women Hold up Half the Sky*, *supra* note 3, at 363, 366.

³² Murray & O'Regan, *supra* note 29, at 38-39.

³³ Denise Ackermann, *Women, Violence and Theology*, in *Theology and Violence: The South African Debate* 255, 256-57, 259, 261 (Charles Villa-Vicencio ed., 1988).

³⁴ Certainly there are women, in greater numbers than ever, participating in South African government, but I am addressing the stance of men.

³⁵ Sachs, *supra* note 24, at 57.

³⁶ Galatians 3:28 (Revised Standard).

love, the source of justice, [is] . . . ours to actualize,"³⁷—since the reign of God is most emphatically ours to build in this life—it is precisely "the task of the church to forward the coming of the Kingdom [the reign]."³⁸ The reign is not coming while women remain oppressed. Because the silence and ignorance that surround abortion in South Africa are part of that oppression, the task of the church includes addressing those phenomena. The obvious starting point for the church's analysis is its own complicit, powerfully generative silence on the suffering the ban causes.

Ultimately, what the church must realize is that "the impoverishment of the church is [not] the most important consequence of the sin of the oppression of women. It is much more fundamental than that. It is the heretical denial of the wholeness of the creation."³⁹ Through action and inaction, the church has oppressed women and thereby denied the wholeness of God's creation, and *that*, in a theological nutshell, is the sin of apartheid.

To those for whom my challenge to the church seems an affront, I can respond only that I love the church, but that "[l]ove without anger is not only pale and apathetic, it is not love at all. . . . Those who cannot get angry about what is happening in South Africa have no real love for people[,] . . . [and] no experience of God."⁴⁰ The Kairos Document and other declarations⁴¹ are proof enough that the church has pointed an angry finger at itself on account of its complicity in oppressive laws; as a Christian and a lawyer, I am addressing a lacuna in that finger's aim.

³⁷ Carter Haywood, *Living for the Living: Theological Lessons from Nicaragua*, in *Speaking of Christ*, *supra* note 13, at 26, 27.

³⁸ Phoebe Swart-Russell, *Towards Our Liberation: A New Vision of Church and Ministry*, 66 *J. Theology S. Afr.* 34, 42 (1989).

³⁹ Sheena Duncan, *Some Reflections on Rustenburg*, in *Women Hold up Half the Sky*, *supra* note 3, at 386, 387–88.

⁴⁰ Nolan, *supra* note 19, at 104.

⁴¹ See, e.g., *The Rustenburg Declaration*, 74 *J. Theology S. Afr.* 64 (1991). For an explanation of the Rustenburg Declaration, see Duncan, *supra* note 39, at 386.

III. THE MEDICAL FALLOUT FROM THE ABORTION BAN

It is clear that there can never be a reconciliation of medical needs with absolutist anti-abortionist views whether on ethical, religious or moral grounds. In any case, large sections of society do not seem to share these anti-abortion views as is evidenced by the number of women admitted to gynaecological wards for treatment of septic abortions

—L.S. Gillis⁴²

Seventy women—some as young as 14—were treated for botched abortions at Baragwanath Hospital this week.

—Ike Motsapi⁴³

There is another kind of silence about abortion in South Africa: the lack of information on the actual number of women who undergo the procedure illegally. "Negligible research has been undertaken in South Africa No comprehensive epidemiological studies have been undertaken of either legal or illegal abortions, and there is a lack of reliable information on morbidity and mortality rates" ⁴⁴ Since there has never been a systematic nationwide study, estimates rely on and extrapolate from hospital-specific statistics on admissions to gynecological wards for complications that stem from back-street or self-induced abortion. Despite the paucity of accurate nationwide statistics, there is no dispute that illegal abortion is a leading cause of death and morbidity among women, and a leading cause of gynecological hospital admissions.⁴⁵

⁴² L.S. Gillis, *Teenage Pregnancy*, 77 S. Afr. Med. J. 121, 121 (1990).

⁴³ Ike Motsapi, *Abortion Horror*, Sowetan, Nov. 22, 1991, at 1.

⁴⁴ Van Oosten & Ferreira, *supra* note 26, at 420. See also Hilda Bernstein, *For Their Triumphs and for Their Tears: Women in Apartheid South Africa* 51 (rev. ed. 1985); Desirée Hansson, *Working Against Violence Against Women, Recommendations from Rape Crisis (Cape Town)*, in *Putting Women on the Agenda*, *supra* note 29, at 180, 186; Desirée Hansson & Diana E.H. Russell, *Made to Fail: The Mythical Option of Legal Abortion for Survivors of Rape and Incest*, 9 S. Afr. J. on Hum. Rts. 500, 520 (1993) ("[I]ssues affecting women have been neglected in most spheres, including empirical research.").

⁴⁵ E.g., E.B. Melrose, *Maternal Deaths at King Edward VIII Hospital, Durban*, 65 S. Afr. Med. J. 161, 162 (1984).

On the basis of these extrapolated estimates, there is also some consensus in the medical community on the annual rate of illegal abortion: approximately 300,000 South African women undergo illegal abortions every year.⁴⁶ "From the few histories available it appears that abortion methods commonly used include intra-uterine injection via a catheter of chemicals such as chloroxylenol, washing blue or soapy solutions. Patients have also described the use of herbal enemas, knitting needles, oral quinine, castor oil and laxatives."⁴⁷ Assuming that half of South Africa's total population of 40.3 million⁴⁸ is female,⁴⁹ approximately one in sixty-seven females of all ages has an illegal abortion each year. Since the fertile female population (fifteen to forty-nine years old) is approximately seven million,⁵⁰ about one in twenty-three fertile women—4.5%—has an illegal abortion each year. Because there is so little information available about abortion in South Africa, it is impossible to know how many women have repeat abortions each year; whatever the repeat rate, however, the percentage of South African women who have at least one illegal abortion in their lifetimes is staggering—probably about 50%.⁵¹

Equally staggering is the number of women who die from them. Causes of death resulting from back-street abortions include: septicemia

⁴⁶ Helen Rees, *Women and Reproductive Rights*, in *Putting Women on the Agenda*, supra note 29, at 209, 213; ANC Pushes Ambitious Health Plan, *Chi. Trib.*, May 19, 1994, at 11N; Race Relations Survey 1993/94, supra note 5, at 130; Legal Resources Centre, *Handbook of Public Interest Law* 189 n.76 (2d ed. 1993). See also van Oosten & Ferreira, supra note 26, at 419; Hansson & Russell, supra note 44, at 522 (citing Rees); Christina Murray & Catherine O'Regan, *Women's Rights*, 3 S. Afr. Hum. Rts. Y.B. 244, 250 (1992).

⁴⁷ A. Richards et al., *The Incidence of Major Abdominal Surgery After Septic Abortion—An Indicator of Complications Due to Illegal Abortion*, 68 S. Afr. Med. J. 799, 800 (1985).

⁴⁸ This figure includes the former "homelands." Race Relations Survey 1993/94, supra note 5, at 82.

⁴⁹ This assumption—that 50% of the overall population is female—will have to suffice because female/male distribution statistics are not available for the former "independent homelands." However, the assumption is well founded: the distribution for the population excluding those areas is almost exactly 50%/50%. *Id.* at 85.

⁵⁰ 1990 SA Health Report, ARAG Newsletter (Abortion Reform Action Group, Natal, S. Afr.), Sept. 1991, at 2. The number of fertile women may sound low in light of the 40.3 million overall population, but it is not surprising given that 44% of that population is 19 years of age or younger. Race Relations Survey 1993/94, supra note 5, at 89.

⁵¹ Dr. Stanley Henshaw has estimated this figure—the overall abortion rate—to be around 30% to 50%. However, he bases that estimate on an annual abortion rate that I suspect is too low: approximately 230,000. For that reason, I have assumed that the top end of his estimate, 50%, is probably more accurate than the low end. Telephone Interview with Dr. Stanley Henshaw, Deputy Director of Research, The Alan Guttmacher Institute (Oct. 12, 1994).

(blood poisoning caused by infection), renal (kidney) failure, shocked lung, peritonitis (abdominal inflammation caused by infection), hemorrhaging, irreversible brain damage, and liver necrosis.⁵² Assuming a mortality rate of five to ten per 1,000,⁵³ approximately 1,500 to 3,000 South African women die annually because of illegal abortion. It is interesting to compare this figure with the estimate that a little over 2,000 South Africans died on average in "political violence" each year from 1985 to 1993.⁵⁴ In a sense, women who die because of unsafe abortion also die from political violence: it is the illegality of abortion, combined with poor women's inability to circumvent the law, that makes abortion fatal for women.

Whatever the exact number who die, a much higher number of women survive, but suffer serious and often permanent medical sequelae, otherwise known as morbidity. In addition to the conditions listed above as causes of death, survivors of illegal abortion also suffer infection, permanent sterility, gangrene of the cervix, hysterectomy, other medical damage,⁵⁵ and the psychological trauma of undergoing the operation under clandestine, dirty, and often wretched conditions.⁵⁶ Annually in South Africa, there are 35,000 to 40,000 operations for the removal of residues of pregnancy⁵⁷—that is, life-saving surgeries to clean out a woman's uterus after an incomplete abortion or miscarriage—and an estimated 90% of these residue removals result from illegal abortion.⁵⁸ Of course, the number of residue removals in hospitals does not begin to represent the extent of morbidity that results from illegal abortion. This is because poor women, African women, and rural women are least likely to obtain medical care even when suffering from morbidity associated with a botched abortion: health care is desperately inadequate for the non-white population.⁵⁹ The

⁵² Melrose, *supra* note 45, at 163.

⁵³ Van Oosten & Ferreira, *supra* note 26, at 420.

⁵⁴ Race Relations Survey 1993/94, *supra* note 5, at 27. The death toll from political violence was approximately 3,347 for 1992 and 3,706 for 1993. *Id.* at 653.

⁵⁵ Richards et al., *supra* note 47, at 800.

⁵⁶ Ingrid Norton, More Abortions in S Africa than in UK, *The Star* (S. Afr.), Feb. 10, 1984, at 6M.

⁵⁷ Murray & O'Regan, *Women's Rights*, *supra* note 46, at 250; 1990 SA Health Report, *supra* note 50, at 2.

⁵⁸ Van Oosten & Ferreira, *supra* note 26, at 419. See also Annual Report of the Department of Health and Population Development, ARAG Newsletter (Abortion Reform Action Group, Natal, S. Afr.), Aug. 1990, at 2; Editorial, Termination of Pregnancy on Psychiatric Grounds, 63 S. Afr. Med. J. 633, 633-34 (1983).

⁵⁹ See, e.g., 1990 SA Health Report, *supra* note 50, at 2 (the maternal mortality rate is three and one-half times higher for Africans than for whites); Race Relations Survey 1993/94, *supra* note 5, at 128 (the infant mortality rate is six times higher for Africans than for whites, and almost five times higher for Coloured people than for

anguish of women who receive no medical care has neither registered in hospital statistics nor, at least until quite recently, garnered any official recognition.

IV. THE LEGAL REGIME

[W]hen they went for examinations, as the first step in the difficult road to a legal abortion, they had been made to strip and lie with their legs up instirups [sic] while doctors examined them and then stood around discussing the merits of the abortion request, with the woman remaining in the same demeaning position.

—Charlene Smith⁶⁰

One of the features of the South African abortion law that marks it most clearly as a component of apartheid is the way it degrades and intimidates the citizenry. The Abortion and Sterilization Act of 1975 (the Act) replaced the Roman-Dutch common law in this area, under which

whites); *id.* at 120 (in 1991, 69% of whites had health insurance, as against 33% of Asians, 29% of Coloured people, and 7% of Africans); *id.* at 48 (47% of health expenditure benefits 23% of the population; 55% of doctors serve 30% of the population); *id.* at 107 (although there is on average one doctor for every 1,000 South Africans, the ratio ranges from 1 for every 10,000 to 1 for every 30,000 in the former "homelands"); Sachs, *supra* note 24, at 80 (life expectancy is 20 years lower for Africans than for whites).

Because of the existing inadequacy of health care for non-whites, and for Africans in particular, the drain that illegal abortion puts on scarce hospital beds, health care and, and blood supply is especially dire for Africans. See, e.g., Richards et al., *supra* note 47, at 800; Bernstein, *supra* note 44, at 51. See also South African Institute of Race Relations, *Race Relations Survey 1991/92*, at 123–25, 134 (1992) [hereinafter *Race Relations Survey 1991/92*] (describing shortage of hospital beds and blood supply the apartheid government made available for Africans).

Not surprisingly, white women also have much better access to contraceptives than do the majority of South African women. See, e.g., Mary Roberts and M.R. Rip, *Black Fertility Patterns—Cape Town and Ciskei*, 68 *S. Afr. Med. J.* 481 (1984) (discussing lack of access to family-planning services for African women). See also Rees, *supra* note 46, 209–12 (discussing not only lack of information about and access to contraceptives, especially in rural/"homeland" areas, but also inappropriate or forced administration of contraceptives to African women); *Contraception: Fighting for the Right to Choose, The Rock: Breaking the Culture of Silence* (African National Congress Women's League, Johannesburg, S. Afr.), Mar. 1992, at 8 (describing prescription of injectable contraceptive Depo-Provera without women's consent).

⁶⁰ Charlene Smith, *SA-Style Abortion Angers Women*, *Sunday Trib.*, Feb. 26, 1984, n.p. (on file with author).

abortion was legal only to save the life of a pregnant woman.⁶¹ On a superficial level, the Act expanded grounds for legal abortion. In practice, the law gives a series of legal and medical authority figures the power to interrogate the woman and to veto her decision to abort. "In South African society, in most cases these decision-makers are economically privileged, white men. . . . [w]ho are hardly well-equipped to understand the best interests of applicants who are likely to be black and/or economically disadvantaged girls or women."⁶² Not surprisingly, the commission that designed the Act was exclusively white and male.⁶³ That the abortion ban was part and parcel of apartheid becomes clear through an examination of "how [it] . . . manages severely to restrict women's access to abortion even in the few exceptional circumstances in which abortion is legally permitted."⁶⁴

Under the Act, a woman may obtain a legal abortion only from a registered medical doctor⁶⁵ in a state-controlled or state-designated hospital,⁶⁶ and only if:

- "continued pregnancy endangers the life of the woman concerned or constitutes a serious threat to her physical health";⁶⁷
- "continued pregnancy creates the danger of *permanent* damage to the woman's mental health";⁶⁸
- there is a "serious risk that the child to be born will . . . be irreparably seriously handicapped";⁶⁹

⁶¹ Van Oosten & Ferreira, *supra* note 26, at 416; Hansson & Russell, *supra* note 44, at 500; see generally S.A. Strauss, *Therapeutic Abortion: Two Important Judicial Pronouncements*, 46 S. Afr. Med. J. 275 (1972).

⁶² Hansson & Russell, *supra* note 44, at 507.

⁶³ *Id.* at 500; Law for Those Who Don't Get Pregnant, *Sunday Express*, July 29, 1984, at 8; Jeremy Sarkin-Hughes & Nancy Sarkin-Hughes, *Choice and Informed Request: The Answer to Abortion*, 1 Stellenbosch L. Rev. 372, 373 (1990); Dot Clemminshaw, *Giving Women a Better Law*, S. Afr. Outlook, Oct.-Nov. 1990, at 312, 313.

⁶⁴ Hansson & Russell, *supra* note 44, at 506.

⁶⁵ Abortion and Sterilization Act, No. 2, § 3(1) (1975), as amended by Act No. 48 of 1982.

⁶⁶ *Id.* § 5(1).

⁶⁷ *Id.* § 3(1)(a).

⁶⁸ *Id.* § 3(1)(b) (emphasis added).

⁶⁹ *Id.* § 3(1)(c).

- the "foetus is alleged to have been conceived in consequence of unlawful carnal intercourse,"⁷⁰ defined as "rape and incest";⁷¹ or
- the "woman concerned is due to a permanent mental handicap or defect unable to comprehend the consequential implications of or bear the parental responsibility for the fruit of coitus."⁷²

The penalty for performing or obtaining an abortion in violation of the Act is a fine of up to 5,000 rand⁷³ and/or a prison term of up to five years.⁷⁴ Prosecutions under the Act are infrequent, but every year prosecutors charge a few doctors,⁷⁵ others who perform abortions, and women who obtain abortions or self-abort.⁷⁶ Over eighty people were actually convicted under the Act in the three years from July 1988 to June 1991;⁷⁷ for the twelve-month period beginning in July 1990, thirty-three people were prosecuted, of whom ten were male; and for the immediately following twelve-month period, twenty-one people were prosecuted, of whom six were male.⁷⁸

To obtain a legal abortion, a woman must persuade the doctor who would perform an abortion to initiate a written application on her behalf,⁷⁹ although "finding an amenable doctor is usually an arduous and sometimes an impossible task."⁸⁰ The woman must then obtain written certification from two physicians, in addition to the doctor who will perform the abortion, that the exception applies in her case.⁸¹ Finally, she must obtain

⁷⁰ Id. § 3(1)(d).

⁷¹ Id. § 1.

⁷² Id. § 3(1)(e).

⁷³ In 1992, "the average monthly household income for Africans, coloured people, Indians, and whites was R912 [912 rand], R1793, R2880, and R5163 respectively." Race Relations Survey 1993/94, *supra* note 5, at 484.

⁷⁴ Abortion and Sterilization Act, No. 2, § 10(1) (1975), as amended by Act No. 48 of 1982.

⁷⁵ E.g., van Oosten & Ferreira, *supra* note 26, at 420; Doctors Doing Abortions, ARAG Newsletter (Abortion Reform Action Group, Natal, S. Afr.), Oct. 1992, at 4.

⁷⁶ For a detailed explanation of why each of those categories of people is vulnerable to prosecution, see C.R. Snyman, *Criminal Law* 388 (1984).

⁷⁷ Race Relations Survey 1993/94, *supra* note 5, at 130.

⁷⁸ Desirée Hansson, *Selected Statistics on the South African Criminal Justice System*, 6 S. Afr. J. Crim. Just. 337, 343 n.75 (1993).

⁷⁹ Abortion and Sterilization Act, No. 2, § 6(2) (1975), as amended by Act No. 48 of 1982.

⁸⁰ Hansson & Russell, *supra* note 44, at 506.

⁸¹ Abortion and Sterilization Act, No. 2, § 3(1)(a)-(e) (1975), as amended by Act No. 48 of 1982.

the written authority of the physician in charge of the hospital.⁸² Because the physician in charge of the hospital may be one of the two corroborating physicians,⁸³ the woman may be able to involve only three doctors, including the one who will perform the abortion. More commonly, however, the physician in charge is not one of the two corroborators, so the woman must persuade four doctors.⁸⁴ The two corroborating physicians and the head of the facility are all to employ such interrogation of the woman as they deem necessary to ensure that she qualifies for a legal abortion under one of the Act's exceptions to the general ban.⁸⁵

There are yet further requirements, making it all the more difficult for women to obtain legal abortions. The Act limits the pool of doctors who may make and support applications for legal abortions. Neither of the two corroborating physicians may practice with, or have the same employer as, the doctor who will perform the abortion, and neither may "participate in or assist with" the abortion.⁸⁶ One of the two must have practiced for at least four years.⁸⁷ If the woman is seeking a mental health exception, then one of the two corroborating physicians must be a psychiatrist employed by the state.⁸⁸ If she "alleges" that she conceived through rape or incest, then one of the two corroborating physicians must be the district surgeon (a state employee) who examined the woman when she reported the rape or incest, if she reported it.⁸⁹ In addition, a woman cannot obtain a legal abortion under the rape or incest exception unless a magistrate (from the district where the alleged violation took place) has certified several facts in writing: that the woman or someone else reported the unlawful intercourse to the police, or that there is a good reason, in the magistrate's opinion, why no one reported it;⁹⁰ that, based on police documents and the magistrate's own "interrogation" of the woman, the unlawful intercourse took place;⁹¹ that the woman has stated in an affidavit or in a sworn statement to the magistrate that the pregnancy results from the unlawful intercourse;⁹² and

⁸² Id. § 6(1).

⁸³ Id. § 6(3).

⁸⁴ Hansson & Russell, *supra* note 44, at 507 n.39.

⁸⁵ Abortion and Sterilization Act, No. 2, §§ 3(1)(a)-(e), 6(6) (1975), as amended by Act No. 48 of 1982.

⁸⁶ Id. § 3(2)(a).

⁸⁷ Id. § 3(3)(a).

⁸⁸ Id. § 3(3)(b).

⁸⁹ Id. § 3(3)(c).

⁹⁰ Id. § 6(4)(a)(i).

⁹¹ Id. § 6(4)(a)(ii).

⁹² Id. § 6(4)(b).

that, for incest, the woman and the man were closely enough related to justify an abortion.⁹³

In sum, a woman seeking a legal abortion must convince three or, more commonly, four doctors that she qualifies under the Act. If she seeks a mental health exception, one of the doctors from whom she gets a written certification must be a state employee. If she is pregnant as a result of rape or incest, she must get certification from the district surgeon, unless she did not report the incident, in which case she must convince a magistrate that she had a good reason for not reporting it. Whether or not she reported it, she must convince the two corroborating physicians and the magistrate that the unlawful intercourse took place and that it is the cause of the pregnancy.

Even for those who make it through that maze, only 40% are granted legal abortions.⁹⁴ Such disapproving, bureaucratic obstacles would deter even many privileged women. Predictably enough, African and non-white women generally—poor women, women without access to and sympathy from the majority of government officials, or women who speak neither English nor Afrikaans—do not obtain safe, legal abortions even when they fall under one of the Act's exceptions. There is, in understated terms, an "unequal opportunity for nonwhite women to obtain a legal" ⁹⁵

The complicated bureaucracy in obtaining permission for an abortion is the antithesis of a system which safeguards and promotes physical and mental health. Many women who would otherwise be entitled to an abortion even within the rigid restrictions of the act, often resort to backstreet abortions, because of the insensitive procedural complexity which impedes a woman's need for immediacy, empathy and confidentiality.⁹⁶

Indeed, since the Act's passage, its application has consistently resulted in about 400 to 1,000 legal abortions granted per year, the great majority of them on mental health grounds, and almost all of those for white women. Keeping in mind that South Africa's population of 40.3 million is 76% African, 13% white, 8% Coloured, and 3% Asian,⁹⁷ some statistics on the racial distribution of legal abortions will elucidate the enormous racial discrimination with which the apartheid government enforced the Act.

⁹³ *Id.* § 6(4)(a)(iii).

⁹⁴ Craig Lind, *Rape Thy Wife—Abort Thy Child?*, 18 *Businessman's L.* 158, 158 (1989); Anne Hilton, *Abortion: A Matter of Life and Death*, *Mayibuye: Journal of the African National Congress*, Aug. 1992, at 28.

⁹⁵ Van Oosten & Ferreira, *supra* note 26, at 419.

⁹⁶ Sarkin-Hughes & Sarkin-Hughes, *supra* note 63, at 375.

⁹⁷ *Race Relations Survey 1993/94*, *supra* note 5, at 84.

For the years 1983 to 1985, only 4% of the legal abortions were for African women, although Africans constitute 76% of the population; 80% of the legal abortions were for white women, although whites constitute only 13% of the population; and 13% and 3% of the legal abortions were for Coloured and Asian women, respectively.⁹⁸ For twelve-month periods in 1984 to 1985 and 1988 to 1989, there were 712 and 963 legal abortions, respectively. In the earlier period, 79% were for white women, 5.3% were for African women, and 609 women—presumably almost all of them white—went to Britain to obtain safe abortions. In the later period, the percentage of legal abortions that were for white women remained an almost constant 76%.⁹⁹ Other sources indicate that the proportion of legal abortions that were for white women was 73% in 1989¹⁰⁰ and 69% in 1990.¹⁰¹

The reasons why white women are so much better able to negotiate the Act's byzantine requirements are manifold and, to some degree, obvious. After all, disenfranchising all but the white minority was the explicit function of apartheid. Nonetheless, examination of how the Act functioned under apartheid—and how, to a large extent, it continues to function—provides a good example of why it is impossible to segregate gender from all the other planes on which apartheid operated, including race, financial means, class, cultural and linguistic heritage, faith, and educational level. These factors interact with the provisions of the Act to make legal abortion practically inaccessible to all but a few wealthy, mostly white women.

For instance, the mechanism for obtaining a mental health exception, which has been the most common justification for legal abortions under the Act,¹⁰² illustrates the multiple factors which make legal abortion a near impossibility for poor, African women. First, there is the scarcity of medical personnel. Because there are so few state psychiatrists—only twenty-seven in the mid-1980s,¹⁰³ and few, if any of them,

⁹⁸ Van Oosten & Ferreira, *supra* note 26, at 418–19.

⁹⁹ Sarkin-Hughes & Sarkin-Hughes, *supra* note 63, at 376; Annual Report of the Department of Health and Population Development, *supra* note 58, at 2. See also Di Caelers, *Clamour for Legal Abortion*, *Weekend Argus*, Nov. 1, 1992, at 8 (putting number of women who travel to Britain for abortions every year at 500).

¹⁰⁰ *Dying for Legal Abortions*, *The Rock: Breaking the Culture of Silence* (African National Congress Women's League, Johannesburg, S. Afr.), May 1992, at 11.

¹⁰¹ Hilton, *supra* note 94, at 28.

¹⁰² Lind, *supra* note 94, at 158; Women's Health Project, *Abortion 1* (on file with author); Hansson & Russell, *supra* note 44, at 521 n.130 (in 1992, 77% of legal abortions were on psychiatric grounds).

¹⁰³ Bernstein, *supra* note 44, at 51.

African¹⁰⁴—it is extremely difficult for poor women, and especially women in rural areas, even to see a state psychiatrist. That requirement adds to the expenses the woman must bear.¹⁰⁵ Furthermore, "there is a geographical maldistribution of medical personnel, with a shortage in rural areas and in the homelands."¹⁰⁶ For millions of rural South Africans, it would be extremely difficult just to contact three doctors, let alone get them to certify that an abortion request qualifies under one of the Act's exceptions. Second, there is the related factor of differential rates of urbanization: less than 50% of Africans live in cities, whereas over 80% of each of the other ethnic groups live in cities.¹⁰⁷ Given the shortage of medical personnel in rural areas, "[t]he loss of earnings, together with the financial outlay necessary for travel, as well as the numerous medical consultations and other procedures, places legal abortion out of the reach of . . . the vast majority of women"¹⁰⁸ Third, there is the language barrier. Even if a poor woman from a rural area could somehow get the money to travel to see a state psychiatrist—which would be very difficult given pay scales and unemployment rates in rural areas¹⁰⁹—it is unlikely that she would be able to communicate with that state employee unless she spoke English or Afrikaans. Fourth, since women seeking abortions must obtain written applications and certifications from doctors, literacy poses an obstacle for African women. According to one source, the illiteracy rate is 78% for Africans, 55% for Coloured people, 23% for Asians, and 2% for whites.¹¹⁰ While I have found no statistics on the racial breakdown of the women who actually request abortions through legal channels, the tenor and financial burden of the Act's administrative requirements, as reflected in the mental health exception, suggest that those who attempt legal abortion are disproportionately white, well educated, and urban.

The multiple, interlocking forces of apartheid are also evident in the operation of the Act's rape exception. In order for a woman pregnant as a result of rape to get a legal abortion, she must have either reported the

¹⁰⁴ The Church of the Province of Southern Africa, Summary of Report of CPSA Commission on Abortion 4 (1977); Women's Health Project, *supra* note 102, at 1–2 (citing Dr. G.G. Mbere).

¹⁰⁵ Hansson & Russell, *supra* note 44, at 520.

¹⁰⁶ Race Relations Survey 1993/94, *supra* note 5, at 122.

¹⁰⁷ See *id.* at 84, 95–96.

¹⁰⁸ Hansson & Russell, *supra* note 44, at 510.

¹⁰⁹ "[T]he poverty level in rural areas of South Africa . . . was approximately twice as high as in urban areas. In rural areas 68% of Africans lived below the minimum living level [R]ural areas were populated by a greater number of the unemployed and unemployable people" Race Relations Survey 1993/94, *supra* note 5, at 491.

¹¹⁰ Race Relations Survey 1991/92, *supra* note 59, at 213.

rape to the police or gotten a magistrate to certify that she had a good reason not to report. Tragically, South Africa has an extremely high incidence of rape: an estimated 350,000 women are raped each year, or about one woman in fifty-five.¹¹¹ The fact that the great majority of those women do not report the assaults¹¹² makes it all the more difficult for them to qualify for legal abortions under the Act.¹¹³ Indeed, only forty legal abortions took place under the rape exception in 1984,¹¹⁴ and only fifty took place in 1992, out of a total of 1,027.¹¹⁵ Because of factors similar to the ones that make legal abortion under the mental health exception inaccessible, the rape exception "is of little value to all but the most economically and racially privileged rape . . . survivors."¹¹⁶

Furthermore, rape by white, male employers of African, female, domestic workers is almost a cliché in South Africa.¹¹⁷ For example, in Athol Fugard's *Playland*, Gideon, a white character, describes the prevalence of the phenomenon to Martinus, an African character:

We've all done it. And just like you said, knocked on that door in the backyard, then drag her on to the bed and grind her arse off on the old coir mattress. That's how little white boys learn to do it. On your women!

And you want to know something else, Swapo? They like it from us! Your woman was crying crocodile tears. I bet you anything you like she had a bloody good time there with the baas humping away on top of her.¹¹⁸

¹¹¹ Jacklyn Cock, *Putting Women on the Agenda*, in *Putting Women on the Agenda*, supra note 29, at 27, 29 (estimating number of rapes per day at 1,000). See also Bernstein, supra note 44, at 52 (citing annual estimates of rape ranging from 146,000 to 300,000); Race Relations Survey 1993/94, supra note 5, at 297 (putting the rate of rape in South Africa at three times the U.S. rate).

¹¹² Hansson, supra note 44, at 186.

¹¹³ Hansson & Russell, supra note 44, at 511-14 ("[A] survivor who does not report rape . . . and later wishes to make application to legally terminate a resulting pregnancy, has a reduced chance of acquiring magisterial permission for a legal abortion.").

¹¹⁴ Hansson, supra note 44, at 186.

¹¹⁵ Hansson & Russell, supra note 44, at 521.

¹¹⁶ Id. at 506.

¹¹⁷ See, e.g., Melissa Cole, "Inthuthuko Means That We Are Going Forward": Hearing the Voices of Domestic Workers in South Africa, 2 Colum. J. Gender & L. 61, 93 (1992); Isabel Wilkerson, *Hard Life is Getting Harder for South Africa's Domestic Workers*, N.Y. Times, Oct. 17, 1994, at A1, A10 ("In the harshest cases . . . domestics . . . are beaten, raped or killed . . .").

¹¹⁸ Athol Fugard, *Playland* 50 (1992).

Despite this, one Anglican theologian has observed, "I have never heard a sermon on rape."¹¹⁹ Like the church, and because of the church, the women in question also remain silent. Given the desperate employment situation of domestic workers, who are generally very poor African women without specialized, marketable skills, the risk of job loss effectively deters them from reporting employer rape. Domestic workers are at risk of being dismissed for objecting to sexual advances,¹²⁰ and are often fired for just asking for a raise.¹²¹ The emotional and financial despair that apartheid caused are important to understanding the dynamic at issue here. As women and as Africans, these domestic workers, by government design, suffered particular educational deprivation because worker desperation was part of what kept the apartheid economy ticking. Even today, "[t]hey can't leave because it's the last stop. Some are illiterate. There are no other jobs for them."¹²² Domestic workers in South Africa suffer regular reminders that if they complain, fail in their duties, or ask for a raise, they can easily be replaced with one of countless other women looking for work. Many of them, then, endure endless cruelties, including rape, in silence. A woman pregnant under these circumstances, who has not reported her employer to the police, is not readily eligible for a safe abortion under the Act. Nor is she meant to be: she is a poor, African woman, and the apartheid government, out of intention, did not design the Act for her.

V. THE ROLE OF THE CHURCH TO DATE

I want to query the morality of organised religion . . . assuming it has a contribution to make to the spiritual reconstruction of our society . . . while it takes no cognisance of women's experience.

—Denise Ackermann¹²³

As noted in the Introduction, both the suffering caused by the abortion ban and the apartheid government's summary grounding of the ban on Christian principles constitute an explicit call to the church. This call the

¹¹⁹ Interview with Denise Ackermann, Senior Lecturer in Practical Theology, University of the Western Cape, in New York, N.Y. (Nov. 3, 1992).

¹²⁰ Cole, *supra* note 117, at 93.

¹²¹ *Id.* at 79.

¹²² Aubrey Lekwane, Deputy Regional Director, Lawyers for Human Rights, quoted in Wilkerson, *supra* note 117, at A10.

¹²³ Denise Ackermann, Women, Religion and a Democratic Society: Putting Women on the Agenda, in *Believers in the Future: Proceedings of the National Inter-Faith Conference on Religion-State Relations* 30, 33 (1991).

church has refused to answer. "There is an embarrassed silence from religious and political leaders. . . . [T]hose whose role it is in shaping public opinion are guilty of dereliction."¹²⁴

This abnegation on the part of the church is evident in an informal poll of church leaders I did in August 1992, with names provided by the South African Council of Churches. I telephoned and/or wrote to these leaders (all men, variously called general secretary, scribe, moderator of the general assembly, or simply leader) to ask whether their denominations had ever considered the abortion ban or its medical impact on women. Almost all of them were resistant to being quoted by name. In the interest of getting at least some response, I therefore did not push for permission to use their names. The denominations I actually reached include: The Zion Christian Church, which is one of the largest single denominations in South Africa and is almost entirely African;¹²⁵ The Evangelical Presbyterian Church in Southern Africa; The Evangelical Lutheran Church in Southern Africa; The Nederduitse Gereformeerde Kerk in Afrika (The African Dutch Reformed Church); The Nederduitse Gereformeerde Sending Kerk (The Coloured Dutch Reformed Church); The United Congregational Church in Southern Africa; The Reformed Presbyterian Church in South Africa; The African Methodist Episcopal Church; and The African Congregational Church. I also reached The Council of African Independent Churches. The following actual responses were typical:

- "We have made no statement."
- "We've never been asked to get involved in this issue."
- "We have no written statement, but strong, traditional views. We haven't discussed the medical results of illegal abortions."
- "We've had nothing in our hands that could help us make a statement—no research. We have not discussed it as such."
- No response, even when I fulfilled the leader's request for a detailed letter explaining the query and my interest in the subject.¹²⁶

In short, the church has, for the most part, resolutely ignored the medical impact of the abortion ban. Given the church's influence within South African society, its lack of concern or at least failure to respond—despite

¹²⁴ Cleminshaw, *supra* note 63, at 312.

¹²⁵ Race Relations Survey, *supra* note 5, at 89; Bill Keller, A Surprising Silent Majority in South Africa, *N.Y. Times*, Apr. 17, 1994, §6 (Magazine), at 34.

¹²⁶ Telephone Interviews, Aug. 10–13, 1992.

the profundity of the issue for women's lives—has contributed to women's silence as well.

The church's muteness, combined with the apartheid government's use of so-called Christian principles, has also contributed to other minority faith groups' fear to speak out about the ban's medical impact. But for the church's silence, the apartheid government would not have been able to command conformity on abortion, as on all fronts, through the claim to Christian underpinning. For example, a rabbi's statements to me, in an August 1992 interview, reveal the cowering effect of the state's reliance on the majority religion. Not wanting to be named, he asked to be quoted as "one of the pulpit rabbis in the Johannesburg Orthodox community." In response to my query about whether his synagogue, or the Jewish community generally, had any position on the abortion ban, he said, "It's not a Jewish issue." (He later added, "If a Jewish woman needs to make it happen safely, she does.") When I pointed out that hunger is also not directly a Jewish issue, but that the South African Jewish community actively supports hunger programs, he responded:

Well, abortion doesn't thrust itself in your face the way hunger does. It's a thin line: We can address hunger on socio-economic grounds; abortion would have to be political. Jewish moral consciousness rings loud, but we fear engendering anti-Semitism. We're afraid to speak up.¹²⁷

Similarly, there has been no statement and no action from the Muslim community,¹²⁸ the Hindu community,¹²⁹ or any other faith group, as far as my research indicated.¹³⁰ The church's response to illegal abortion makes clear that, no matter how prevalent a phenomenon is, it won't thrust itself in your face if you don't want to see it. The rabbi's comments indicate another source of blindness and muteness on abortion in South Africa: non-Christians' fear of engendering hostility in the Christian majority.

¹²⁷ Telephone Interview, Aug. 11, 1992.

¹²⁸ Interview with Fatima Hajaij, Welfare Officer, Central Islamic Trust, in Johannesburg, S. Afr. (Aug. 6, 1992) ("Islam regards abortion as taking life, and so permits it only if the woman's health is at risk. We haven't discussed the fact that Islamic women with health risks don't get legal abortions. This is because the family is a sacred unit, and we don't have forums. Justice is very important to us—it is a cornerstone of Islam—so we are very vocal about some issues. But we are only 600,000 in South Africa, and we just haven't gotten around to discussing abortion and women's health.").

¹²⁹ Interview with Yasmin Sooka, Vice-Chair of the World Conference on Religion and Peace and Human Rights Attorney, in Johannesburg, S. Afr. (Aug. 12, 1992).

¹³⁰ I did not contact any organizations of South African indigenous faiths, in large part because they tend to have non-institutional operations.

When Christian denominations have broken their silence on the ban, they have, except for the Catholic Church,¹³¹ commendably referred to the number of illegal abortions; however, they have prioritized other theological concerns over women's health. For example, the Anglican Church—so important to the anti-apartheid movement—set up a commission on abortion which issued an official statement in 1977. In it, the Commission answered the question "Should the law permit abortion simply on request?" It concluded: "The Commission would be unhappy about this. . . . The Commission would prefer other approaches to be made to reduce the problem of illegal abortions"¹³² Seventeen years and five million illegal abortions later, the church has evidently developed no such "other approaches," and has made no other official statement on the Act or on what the law ought to be in the New South Africa.¹³³

In another example, the latest word from the Presbyterian Church of Southern Africa comes from an ad hoc committee formed in 1982, which made interim and final reports in the Church's Papers for General Assembly 1983 and 1984. The committee observed that "[o]ne shudders to think of the illegal back-street methods Not a few women have lost their lives this way." It nonetheless concluded:

The Church must make its voice hear [sic] and proclaim that:

v. We would not like . . . [the Act] to become any more permissive.

vi. We stand totally against any attempt to legalize abortion on demand¹³⁴

¹³¹ Although it generally has a much more liberationist tone in South Africa than in the United States, the South African Catholic Church's position on the abortion ban is unequivocal and makes no mention of the Act's medical impact on women or of the number of illegal abortions that take place in South Africa. Southern African Catholic Bishops' Conference, *Statement on the Liberalisation of Abortion Legislation* (1990). This pamphlet also describes both an organized letter drive to respond to the government's 1990 call for public comment on the Act and plans for the SACBC to testify in Parliament about the Act. *Id.* at 3-4.

¹³² Church of the Province of South Africa, *Summary of Report of CPSA Commission on Abortion 5* (1977).

¹³³ Archbishop Tutu, to his credit, has spoken out in favor of the availability of contraceptives and of abortion in cases of rape, incest, and medical or psychological threat to the woman. He has rejected "abortion as a method of family planning," which presumably means abortion on request. He made these comments in relation to the U.N. population conference in Cairo, and did not refer to the law in South Africa. Population: Archbishop Tutu Supports Abortion, with Conditions, Inter Press Service, Aug. 31, 1994, available in LEXIS, Nexis Library, CURNWS file.

¹³⁴ Presbyterian Church of Southern Africa, *Papers for General Assembly 83-84* (1983).

The committee also felt it necessary to point out that showing compassion to women who are considering or who have undergone abortion "[d]oes not mean condoning or encouraging . . . sexual irresponsibility."¹³⁵ Women's health merited a shudder, but was evidently outweighed by more important concerns.

Moreover, insofar as certain denominations and congregations have acted, they have opposed any liberalization of the ban. For example, in 1990, Dr. Rina Venter, who was then Minister of National Health and Population Development, solicited written input from the public on whether or not the Act should be less restrictive. She then claimed that the government had received "letters from 48,846 people, 99% of whom were opposed to any reform."¹³⁶ At first glance, the disparity between the purported 1% of responses that called for liberalization and the huge percentage of South African women who have undergone illegal abortion is surprising. Two factors explain the disparity. First, in reality, Dr. Venter had received only 1,876 letters; the other 47,000 responses were signatures on 311 petitions, most of them from churches and church organizations.¹³⁷ Nevertheless, Dr. Venter made the unverifiable claim that "all major churches" responded.¹³⁸ Second, Dr. Venter made the call for public comment via newspapers,¹³⁹ which offers another illustration of the complex, interrelated levels on which apartheid functioned: Since 76% of the total population is African, and 78% of the African population is illiterate,¹⁴⁰ it is safe to say that the health minister's call did not reach the ears of those who suffer most under the ban.

Indeed, fear of jeopardizing church support for the anti-apartheid movement was part of what motivated a retreat by those who supported liberalization of the ban. At least until 1991, the African National Congress Women's League took a strong position in favor of abortion on request.¹⁴¹ The League drew back from that position in 1992, in part because of religious opposition: "Feminists and a handful of gender-sensitive males battled with moral and religious objectors But to no avail."¹⁴²

¹³⁵ *Id.* at 64.

¹³⁶ Race Relations Survey 1991/92, *supra* note 59, at 123.

¹³⁷ Pippa Green, *The Cosmopolitan Survey on Abortion*, *Cosmopolitan* (S. Afr.), Jan. 1992, at 80, 81. See also Hansson & Russell, *supra* note 44, at 502.

¹³⁸ Dr. Venter's written response to questions of Pippa Green, *Cosmopolitan* (S. Afr.) (on file with author).

¹³⁹ *Id.*

¹⁴⁰ Race Relations Survey 1993/94, *supra* note 5, at 84; Race Relations Survey 1991/92, *supra* note 59, at 213.

¹⁴¹ Submissions on the Abortion Act—An Exercise in Futility, ARAG Newsletter (Abortion Reform Action Group, Natal, S. Afr.), Sept. 1991, at 1.

¹⁴² Portia Maurice, ANC Sidesteps the Abortion Debate, *Weekly Mail*

After that, and even during constitutional negotiations, the League adopted an exceedingly conciliatory posture: "[M]ore discussion and debate [would be] needed before the ANC could adopt a policy on abortion."¹⁴³ Admittedly, the League made great efforts in educating people about the ban as part of male domination and about the morbidity that results from the large number of illegal, unsafe abortions.¹⁴⁴ In so doing, however, the League was fighting precisely the silence the church has had such a strong hand in maintaining. Even toward the end of 1993, the ANC still had no position on abortion *per se*.¹⁴⁵ Much, of course, has changed with the momentous events of April 1994.

CONCLUSION

[The Kairos] is a dangerous time because, if this opportunity is missed, and allowed to pass by, the loss for the Church, for the Gospel and for all people of South Africa will be immeasurable.

—The Kairos Document¹⁴⁶

The first few months of 1995 will be critical for South African women's health. The new Minister of Health, Nkosazana Zuma, has stated that she favors reforming the abortion law.¹⁴⁷ Various groups are now doing research on the extent of illegal abortion.¹⁴⁸ The new government supports the proposals in the Reconstruction and Development Programme, which include: "Every woman must have the right to choose whether or not to have an early termination of pregnancy according to her own individual beliefs."¹⁴⁹ Those who support reform have actually forestalled debate

(Johannesburg), June 5-11, 1992, at 25.

¹⁴³ Bringing Abortion Debate into the Open, *The Rock: Breaking the Culture of Silence* (African National Congress Women's League, Johannesburg, S. Afr.), Aug. 1992, at 13.

¹⁴⁴ See *id.*

¹⁴⁵ Telephone Interview with Anne Vincent, Political-Development Coordinator, African National Congress Women's League (Aug. 4, 1993).

¹⁴⁶ The Kairos Document, *supra* note 27, at 1.

¹⁴⁷ Bill Keller, Cape Town Journal: In Land of Smokers, Mandela Heads Resistance, *N.Y. Times*, June 2, 1994, at A4.

¹⁴⁸ Telephone Interview with Dr. Helen Rees, Director, Reproductive Health Unit of Baragwanath Hospital/Soweto and of the Johannesburg City Council, and National Chairperson, Planned Parenthood Association of South Africa (Sept. 22, 1994).

¹⁴⁹ African National Congress, The Reconstruction and Development Programme:

both in Parliament and among members of the public until there was a good alternative law to offer. Recently, a group of doctors and attorneys drafted such a bill, which they believe reflects the opinion of most South Africans. It would legalize abortion in the first trimester on request, in the second trimester on a broad range of bases, and in the third trimester to save the life of the woman. The first Parliamentary debate on abortion in the New South Africa will therefore take place in the session that begins in early 1995.¹⁵⁰

For the moment, however, the ban remains in effect. Prosecutions still occur; sharp objects and harsh chemicals are still frequent tools; women still die. For the moment, the same "liberation first, women last" mentality has led to yet more inaction:

Nelson Mandela's government has promised to address changing the abortion law, but a mountain of other matters have taken precedence. . . .

Lobbyists are frustrated by the agenda drafted by a Cabinet made up mostly of men. They say the new democratic government is more concerned with addressing racial inequalities than the abortion issue.¹⁵¹

Moreover, it is not at all clear that reform will take place. If it does, people opposed to legal, safe abortion may well challenge any liberalization of the ban as violative of the interim constitution's unqualified right to life clause.¹⁵² Whatever the outcome, if the reality of women's lives has no impact on the formation of the new law, the church will be partly responsible:

Pregnancy and abortion are the lot of women, yet until recent times their voices have been significantly silent. Male legislators made the laws on abortion, and male-dominated religions laid down moral codes about it.

. . . . Gender equity and women's participation in decision-making on abortion are essential. This would happen much more easily if religious institutions were to promote open and serious inquiry into abortion and related matters.¹⁵³

A Policy Framework para. 2.12.6.4 (1994).

¹⁵⁰ Telephone Interview with Dr. Helen Rees, *supra* note 148.

¹⁵¹ Judith Matloff, *Crowded Agenda Delays Review of S. Africa Abortion Law*, *Dallas Morning News*, Sept. 19, 1994, at 4A.

¹⁵² Telephone Interview with Dr. Helen Rees, *supra* note 148. S. Afr. Const. ch. 3, § 9 ("Every person shall have the right to life."). This tactic has been successful in keeping abortion illegal in other countries. Hansson & Russell, *supra* note 44, at 505.

¹⁵³ Dot Cleminshaw, *Abortion*, in *Doing Ethics in Context: South African*

How, ultimately, shall we describe the church's blindness to the suffering that the ban imposes on South African women? One South African theologian has called it moral turpitude.¹⁵⁴ It is in some senses a horrifying solipsism, except that it is a blindness not to some entity outside the church, but to a group very much within the church: women. Whatever its past actions and omissions, the time has come for the church to realize and act on its accountability to women for its role in keeping abortion illegal and dangerous.¹⁵⁵ At the very least, the church must recognize that taking no position is a position, and that any position not grounded firmly in the reality of women's lives is not only morally irrelevant,¹⁵⁶ but theologically bankrupt: "[U]ntil we come down to earth and give this idea of God's power in the world some real content in terms of our experience in South Africa today, it remains little more than an interesting idea."¹⁵⁷

The grounding in reality must start with the church's recognition of its complicity in creating silence and blindness around women's lives as shaped by the abortion ban. As Brigalia Bam, then Deputy General Secretary of the South African Council of Churches, has pointed out, it is easy for the church to be blind about abortion, because the government has made it illegal.¹⁵⁸ It was easy for the apartheid government, in turn, to have "no official figures" on illegal abortion because the church has set a pattern of silence, of indifference, of no official statements. The time has come for the church to end that silence, at least if there is any hope of "transform[ing] the church from the men's fellowship with a male God, which it now is, into that healed and restored community of all persons with their Creator-Spirit-God which it ought to be and once briefly was."¹⁵⁹ The Kairos for the church in South Africa was not resolved with the holding of elections in April 1994. The time has come, and has almost passed by.

Perspectives 166, 167, 172 (Charles Villa-Vicencio & John W. de Gruchy eds., 1994).

¹⁵⁴ Interview with Denise Ackermann, *supra* note 119.

¹⁵⁵ For an elaboration of the concept of the church's accountability to women, see Harrison, *supra* note 14, at 10.

¹⁵⁶ *Id.* at 155 ("[T]he selective perceptions operative in the historical judgments of Christian teaching on abortion are skewed, because women's well-being is not perceived as a central moral issue and women's experience and reality are not understood as relevant to a moral analysis of abortion.").

¹⁵⁷ Nolan, *supra* note 19, at 116.

¹⁵⁸ Interview with Brigalia Bam, Deputy General Secretary of the South African Council of Churches, in Johannesburg, S. Afr. (Aug. 13, 1992).

¹⁵⁹ Duncan, *supra* note 39, at 388.