Feminist Legal Studies (2019) 27:7–31
https://doi.org/10.1007/s10691-018-9391-2

What's the Deal? Women's Evidence and Gendered Negotiations

Elsje Bonthuys[1]

Published online: 12 November 2018

Abstract

South African law has traditionally denied property sharing rights to people in non-marital intimate partnerships, but a series of new cases has created the possibility of enforcing universal partnership contracts to claim a share in partnership property. However, evidential biases within these progressive cases reflect a historical disdain for women's contributions to relationships and a widespread reluctance to believe women's testimony about the existence of agreements to share. These biases bear strong resemblances to the gender stereotypes which have been the subject of feminist critique in rape law. Central to both rape and universal partnerships is the issue of consent or agreement between men and women. This, in turn, depends on social beliefs about male and female entitlements in the realms of sex and intimate relationships. The paper highlights the commonalities and parallels between the legal treatment of women's evidence about the existence of contracts on the one hand, and the prejudice faced by complainants in rape cases.

Keywords Contract · Evidence · Property · Family relationships · Gender stereotypes · South Africa · Rape · Universal partnership

Introduction

In the past three decades family law systems worldwide have increasingly relied on contracts between spouses (in the form of prenuptial agreements and settlement agreements at divorce) and between unmarried cohabitants (cohabitation contracts) to distribute financial assets and allocate parental rights and responsibilities when relationships end (for instance Scherpe 2012; Singer 1992; Dewar 2000; Fehlberg and Smyth 2002; Leckey 2007).

✉ Elsje Bonthuys
Elsje.Bonthuys@wits.ac.za

[1] School of Law, University of the Witwatersrand, Private Bag 3, Wits, 2050 Johannesburg, South Africa

Since 2012 a series of judgments by the South African Supreme Court of Appeal[1] has revived interest in contracts as a mechanism for sharing partnership property outside of marriage. These judgments hold that unmarried cohabitants may claim a share of their partners' property on the basis of tacit universal partnership contracts. Parties to universal partnerships agree to contribute to a common enterprise and to share in the resultant profits and liabilities. Despite representing a generally progressive trend towards granting (mainly) female cohabitants rights to share in assets which had been amassed during the relationship, a closer reading of these cases shows various instances of courts' reluctance to believe female plaintiffs' versions of the agreements between the partners.

This article attempts to make sense of this reluctance by comparing, on the one hand, the legal treatment of women's testimony about asset-sharing cohabitation agreements with the treatment of women's testimony in rape cases on the other hand. Women's testimony in rape trials and in cohabitation contract cases are both essentially about the nature and presence of consent in archetypal gendered negotiations between men and women.[2] Rape cases, especially acquaintance and spousal rape, typically revolve around whether or not men and women agreed to have sex—or whether men reasonably believed that there was an agreement to have sex—while cohabitation contracts involve consent to exchanging women's caring labour for some of the wealth accumulated by men. While these negotiations take place 'in the shadow of' legal concepts of agreement and consent (Mnookin and Kornhauser 1979; Halley and Rittich 2010, 760), they also happen 'in the shadow' of deeply gendered social expectations. Embedded within legal notions of consent are numerous common-sense social scripts and gendered norms (Estrich 1986; Du Mont and Parnis 1999) about the things which men and women can negotiate about, how they would negotiate, which evidence would indicate agreement and the terms upon which they would tend to settle. Legal and social understandings about entitlement and property rights—which negotiating party is legally, morally and socially entitled to what—influence what negotiating parties and courts will consider to be a probable bargain and thereby determines courts' approaches to the evidence. In this sense the legal treatment of rape and cohabitation contracts reflects a gendered moral economy in which men are regarded as legally and morally entitled to material property and to women's sexual, emotional and intimate services, while women lack fundamental self-ownership and personal autonomy.

The ideas of consent and male entitlement as linking contract and rape law are not new. In *The sexual contract* (1988, 2) Pateman noted that:

> [t]he original pact is a sexual as well as a social contract; it is sexual in the sense that it is patriarchal—that is, the contract establishes men's politi-

[1] The Supreme Court of Appeal is the second highest court in the South African judicial hierarchy; and the judgments arose in the following cases: *Butters v Mncora* 2012; *Cloete v Maritz* 2014; *Ponelat v Schrepfer* 2012; *Steyn v Hasse* 2015.

[2] Although some men are victims and some women the perpetrators of sexual assault, the stereotypical male perpetrator and female victim remain statistically significant and male victims of sexual assault are subjected to the same gendered stereotypes and scripts about victims which apply to women. Moreover, women were claimants in all but two of the South African judgments on cohabitation contracts.

cal right over women—and also sexual in the sense of establishing orderly access by men to women's bodies.

Contract, and its central explanatory concept, of consent are therefore also central to understanding sexual assault and rape (for other comparisons between contract and rape see for instance Spence 2003; Popkin 2017). The converse is also true: the treatment of women's testimony in rape trials is, I argue, also reflected in other contexts, like cohabitation agreements.

Analyzing and critiquing the treatment of women's testimony in cases involving rape and sexual assault throughout many jurisdictions is a long-standing and iconic feminist legal project (Estrich 1986). The extensive feminist literature has confirmed that, throughout the world, women who allege that they have been raped or sexually assaulted are ignored, mistrusted and disbelieved by courts, law enforcement agencies and their communities at large. In the past many legal jurisdictions explicitly approached women's testimony with additional caution because it was believed that they would fabricate rape charges for a myriad of reprehensible motives like financial profit, to exact vengeance or to protect their sexual reputations. This general distrust of women's accounts of rape manifested in rules requiring corroborative evidence of physical struggle or injury, of 'hue and cry' or the immediate laying of criminal charges. In addition, a woman's credibility was directly linked to perceptions about her sexual and moral virtue, permitting evidence and cross-examination about her previous sexual experiences. The general tendency to disbelieve women, however, does not apply when 'virtuous' women alleged rape or sexual assault in certain circumstances (Estrich 1986). Contemporary feminist literature shows that the sexism embodied in these rules continue to influence police and courtroom practices even after their formal abolition in the latter part of the 20th century, thus reflecting and re-creating the persistent, widely held skepticism of women's accounts about sex and violence (Berliner 1991; Russell 2013; Lazar 2010; Reece 2013; Conaghan and Russell 2014; Russell 2016. In South Africa see for instance Modiri 2014; Gqola 2015).

Rosemary Hunter (1996) argues that, although the legal distrust of women's versions is most visible and notorious in rape cases, it also emerges in other legal areas which involve violence against women, like sexual harassment and domestic violence (Ronner 1997). These narratives and stereotypes about certain women as untruthful witnesses also extend to other legal areas like family law (Melville and Hunter 2001), influencing the allocation of parental rights and responsibilities and the allocation of child support duties (see for instance Fineman and Karpin 1995; Boyd 1989; Artis 2004). This paper extends this analysis by Hunter and others to demonstrate the existence of a similar legal distrust towards women's contractual claims for a share of partnership property in intimate relationships. Using the ostensibly progressive South African jurisprudence on contracts between unmarried cohabitants as a case study, I demonstrate that courts draw upon versions of the same pernicious gendered beliefs and stereotypes which—although no longer overtly—continue to characterise the evaluation of women's testimony in rape and sexual assault cases.

My comparison between the treatment of women's testimony in trials involving rape and cohabitation contracts leads to two conclusions: first, that the sexist skepticism about women's versions of what happened in rape trials is also reflected in the South African trials about cohabitation contracts. The second, related, observation is that the meanings of (men's) consent in contract is an inversion of what is understood as women's consent in rape trials. This juxtaposition is explained by gendered understandings of personhood and autonomy, and property-in-self.

From this, I hope to achieve at least one of two aims. The wider, more ambitious claim is that sexist bias against women's testimony in cohabitation contracts exposes the liberal notion of consent in contract as fundamentally implicated in social hierarchies of race, gender and class, similar to the concept of consent in rape law (Pateman 1980; Frug 1992; Hadfield 1998). To this claim it may be counter-argued that contracts between intimate partners are disguishable from standard commercial contracts by being negotiated and concluded in the intensely gendered family context. This context may transmit gendered social norms and stereotypes which distort the usual rules which apply to commercial contracts. The presence of gender bias in contracts between family members may therefore reflect the gendered nature of the family, rather than the wider concept of consent in contract. Thus, it could be argued that contracts between intimate partners cannot provide any instructive examples or valid observations about contracts in general. The second, more limited, claim of the paper is therefore that the existence of gender bias in courts' treatment of cohabitation contracts may limit the usefulness of contracts as tools for achieving justice between intimate partners and that the increased reliance on contract to achieve gender justice in family law systems may be unrealistic.

The next section clarifies what I mean by South African cohabitation contracts and explains the relevance of this body of law to other legal systems. I then recount the feminist theory on the gendered moral economy of legal personality and self-ownership, upon which, I argue, both the bodies of law relating to rape and cohabitation contracts are based. This moral economy means that men are entitled to women's sexual services and their emotional and physical labour within families. Male entitlement to female labour and sexuality has consequences for the credibility of women's testimony about what was agreed to in negotiations about sex, in rape cases, and asset sharing in cohabitation contract cases. I then turn to the comparison between the South African cohabitation contract cases and the existing literature on rape to draw out two themes in this regard. First, I contrast feminists' analyses of *women's consent* in rape law with the courts' treatment of *men's consent* to sharing in cohabitation contracts, showing how these two sets of contrasting but complementary legal rules structure a notion of consent which is grounded in deeply gendered understandings of human personality and autonomy. The first theme is therefore that the same gendered notions of autonomy and ownership are mirrored within both rape law and the law on cohabitation contracts. These gendered understandings undergird the fundamental distrust of women's versions of what was agreed to in negotiations of rape and contract. The second theme is that the distrust of women's evidence does not apply equally to all women. While women who are perceived as taking financial advantage of their partners will be treated like immoral women in rape law, 'good wives' or cohabitants may be believed in certain circumstances. The

paper concludes by setting out the implications of my argument for contract law in general, and for the use of contracts in family law.

Cohabitation Contracts in South African Law

South African law affords limited legal avenues for sharing in property amassed during unmarried intimate relationships, generally leaving unmarried female partners destitute when relationships end. This includes women who were unwittingly involved in bigamous marriages and also a larger group of women whose religious and traditional African marriages fail to satisfy the strict and often perplexing legal requirements for marriage. This latter group of women are mainly of Indian or African descent.

Whereas other jurisdictions regulate the distribution of partnership property between cohabitants by way of legislation, South Africa has no statutes for this purpose, leaving the issue to be dealt with by the courts. In England and Wales property sharing between unmarried partners would be governed by the equitable doctrine of constructive trusts, but the historical development of South African trust law has closed down this legal avenue (Cameron 1999), with the result that courts rely on contract law instead.

Early twentieth-century cases[3] started to use the universal partnership contract (usually associated with joint commercial ventures) within the family context to award property rights, particularly to Indian immigrants whose marriages did not comply with strict registration requirements in place at the time, and to bigamous marriages. A small number of cases (Fink 1945) also used these contracts to allow wives to share in the proceeds of businesses which they had run together with their husbands. However, the use of universal partnerships ended with the cases of *Kritzinger v Kritzinger* (1989) and *Katz v Katz* (1989) (for more historial detail of the cases see Bonthuys 2016). Twenty three years later in 2012 this early twentieth century strain of jurisprudence was revived by the Appelate Division to allocate property to women who cohabited with their partners, rather than being spouses in invalid marriages.

My reference to the South African cohabitation contracts is to this post-2012 body of cases, which adopt generous definitions of both partnership property and partnership contributions to include the non-financial contributions in homework, childrearing and family care usually made by women. In the leading case of *Butters v Mncora* (2012) for instance, a couple lived together for 20 years, while also being engaged to marry for half of that time. The female plaintiff maintained the home and cared for the defendant, his child from another relationship and the two young children who had been born to the parties, while the defendant established a successful business. The relationship ended when the plaintiff found her partner in her home with another woman upon her unexpected return from holiday. It turned out that the defendant had been secretly married to the other woman for more than

[3] *Annabhay v Ramlall* 1960; *Ex parte Soobiah* 1948; and *Ratanee v Maharaj* 1950

a year. The plaintiff successfully claimed a 30% share of the property acquired by her partner during the relationship on the basis of her contribution as caretaker and housekeeper. The court held that (par 23–24):

> they had entered into a partnership which encompassed both their family life and the business…[T]he defendant shared the benefits of the plaintiff's contribution to the maintenance of their common home and the raising of the children…[T]he contribution by both parties, be it financial or otherwise, was shared and consumed in the pursuit of their common enterprise.

The highest proportion of assets was awarded in *Cloete v Maritz* (2014). While the male partner continued with his salaried work, the female plaintiff raised money for, bought, managed and sold several businesses and other properties over a period of 15 years. These assets and their proceeds were registered in the man's name. Although she was awarded 50% of the defendant estate, her contribution arguably exceeded that. Other plaintiffs were less fortunate, with courts entirely dismissing the claim by the male ex-surfer who claimed a part of his female partner's assets (*McDonald v Young* 2012) and that of the elderly woman who cohabited for a number of years (either three or five, according to the parties' different versions) with a married man (*Steyn v Hasse* 2015). In *Sepheri v Scanlan* (2008) the court awarded only 25% of the assets to a cohabitant who had given up her own employment in order to join her partner's global peregrinations to further his own career, while the elderly cohabitant of 16 years who had contributed her income, the proceeds of the sale of her house and substantial administrative labour to various business ventures owned by the defendant, in addition to performing housekeeping tasks, received only 35% in *Ponelat v Schrepfer* (2012).

In the particular form of universal partnerships, South African cohabitation contracts differ doctrinally from cohabitation contracts in other jurisdictions. Nevertheless, the problems of proof and the gendered approach to women's evidence may well extend beyond the specifics of South African law, because they resonate with similar attitudes towards women's evidence in cases involving sexual and other forms of violence against women. They may therefore also be prevalent in contracts between cohabitants or spouses in other jurisdictions. Difficulties in proving cohabitation contracts in the progressive South African cohabitation contract cases thus contributes to the academic discussions on the usefulness of contract law to resolve intractable gender inequalities in other family law jurisdictions.

The Gendered Moral Economy: Property in Self and Entitlements to Women's Sexuality and Housework

In the introduction I suggested that rape trials and cohabitation contract cases can be viewed as prototypes of gendered negotiations between men and women. Courts will assess evidence about these negotiations in light of social beliefs about human personality, entitlement, property and legitimate exchange. These beliefs about who owns what and who, consequently, is likely to agree to exchange what, are deeply

gendered, as feminist theorists on property, contract and human personality have demonstrated, and may also be directly reflected in legal rules.

In this section I draw together the bodies of feminist thinking on rape and on women's work in intimate relationships to develop the proposition that the same gendered moral economy underlies negotiations between men and women about having sex—the subject of rape and sexual assault trials—on the one hand, and the typical exchange of financial assets for women's emotional, household and caring services—the subject matter of cohabitation contracts—on the other hand. I argue that when these negotiations are conducted within the private sphere, women's sexuality and their caring work are not regarded as commercially valuable property. Instead, discourses of love and feminine self-sacrifice entitle men morally, socially and legally to women's bodies and their caring work. This impairs women's ability to negotiate about sex and about sharing partnership property in exchange for housework. It also explains the relatively low percentages of the defendants' property which tends to be awarded even to successful plaintiffs (see the examples in the paragraph above).

Feminist theorists argue that property rights are gendered in the sense that the subject/owner of property is symbolically male while the economically valuable objects of property rights are symbolically female. This implicit gendering extends beyond property in material and immaterial things to the human personality itself, with the rational, separate, self-interested (male) part of the self seen as exercising property in and control over the (feminised) aspects of the self, like the body, emotions and sexual desires. This underlies the classical bifurcated structure of liberal personhood—in which property 'provides a metaphor for personal identity through the notion of self-ownership' (Davies 1999, 329).

In the public realm of the marketplace, a person can generate economic value by selling products of her or his physical, mental and even emotional labour to employers or by investing these aspects of the self in a commercial venture (Naffine 1998, 193; Pateman 2002). However, this logic of property-in-self and the commodification of certain parts of the self do not extend to the private spheres of sexuality and family life. In these areas—symbolically and practically associated with the feminine—values like love, altruism and nurturing are supposed to replace the self-interest, individualism and rationality associated with the public spheres of commerce and politics (Naffine 1998, 194; Pateman 1980, 204). Women's productive and reproductive labour and their sexuality can therefore not be treated like commercial property in intimate settings. Because the logic of property, contract and unrestricted commercial exchange does not apply to 'private' aspects of the self, women who exchange symbolically female aspects of personality like sexuality and caring family labour for money are stigmatised as prostitutes or gold-diggers (Pateman 2002, 34–35).

Women may therefore not sell sexuality and family care to the highest bidder; these are socially and morally reserved for and appropriated by male partners and children, either on the basis of romance, love or altruism, or on the basis that women freely consented to give of their sexual and family care. As in commercial transactions, negotiations about sex and family care on the basis of love or altruism assume that women consent to the exchange, but unlike in commercial transactions, women

cannot insist on commercial value in return (see Halley 2011a, b on the history and consequences of the doctrinal separation between contract law and family law). Instead of financial profits, the only permissible exchange for women's sexuality and caring work in the private sphere is reciprocal affection and the attainment of feminine moral and social worth. The insistence that women freely consented to these intimate exchanges deliberately obscures the social, cultural and material conditions which limit women's choices and punish those women who do not 'choose' altruism. Women's consent is therefore symbolic or imaginary rather than real (Pateman 2002).

The Gendered Moral Economy in Negotiations Between Women and Men

Thus far I have recounted feminist theory which shows that negotiations are based on, on the one hand, a logic of voluntary economic exchange in the public sphere and, on the other hand, a logic of altruism or love in the public sphere. If court cases about rape are about male–female negotiations about women's sexuality, and cases about cohabitation contracts involve male–female negotiations about women's caring and family labour, then the starting point of male entitlement, feminine altruism and moral worth affects the credibility of women's testimony on whether a particular situation amounted to rape, or to a contract to share. I will analyse each of these in turn.

The most overt legal expression of the social belief of male entitlement to women's sexuality (Gqola 2015, 8)[4] is the ancient rule that a man cannot be convicted for raping his wife. This rule was justified by the legal fiction that, when they get married, women give irrevocable consent to sex with their husbands for the duration of the marriage (O'Donovan 1993).[5] This was seen as an automatic and invariable consequence of marriage; it could not be excluded by agreement—for instance by way of a prenuptial contract—and it applied even in the face of clear evidence of a lack of actual consent—for instance when the spouses no longer lived together.

While husbands are entitled to their wives' sexual services, the logic of altruism or love in relation to sexuality entails that women who transgress the prohibition on receiving financial compensation for sexual services are legally unprotected. Men who rape sex workers usually escape legal consequences, while the women themselves are subject to social ostracism and even criminal prosecution. In their decision upholding the criminalization of sex work the majority of South African Constitutional Court in *S v Jordan* reasoned that (2002 par 83):

> [b]y making her sexual services available for hire to strangers in the marketplace, the sex worker empties the sex act of much of its private and intimate

[4] Jewkes et al. (2011, 5, 9) found that a sense of entitlement to women's sexuality was by far the most prevalent justification given by South African men who acknowledged having sexually assaulted women.

[5] The rule was articulated in South Aftican law by *S v Ncanywa* (1993) (1) SACR 297 (CkA), quoting extensively from English law. It was abolished by the Prevention of Family Violence Act 133 of 1993.

> character. She is not nurturing relationships or taking life-affirming decisions about birth, marriage or family; she is making money.

Nicole Fritz (2004, 235–239) argued that this judgment hinges on a distinction between 'civil sex'—aimed at procreation or maintaining mutually supportive intimate relations, on the one hand, and prostitution as 'uncivil' and therefore legally unsanctioned sex. She illustrated that the court's vision of permissible sex is not about women's pleasure or sexual autonomy, but about placing women's sexuality at the service of their relationships. 'Uncivil' sex shares in the stigma attached to sex work (Fritz 2004, 238) and exposes women to being disbelieved if they are raped. Her argument about sex work illustrates the point that acceptable female sexuality is defined as primarily belonging to (mostly male) intimate partners and children, and based on a definition of 'proper' feminine sexual desire as monogamous, nurturing and dutiful. Women who assert ownership of their own sexuality, whether by selling sex, having sex outside of intimate relationships, or even appearing to welcome 'uncivil' sexual encounters, risk being disbelieved when they are victims of sexual assault.

The opposite and ideal trope of female sexuality is motivated by romance, love and intimacy, as shown by the quote from the *Jordan* case above. However, feminists have long argued that these concepts so closely reflect norms of male sexual aggression and female submission that it is impossible to separate love and romance from the eroticization of patriarchal domination (Smart 1989, 30; Heath and Naffine 1994, 32–34; see however Segal 2007, 171–194). A non-patriarchal notion of female desire is virtually unthinkable, rendering women's submission to male sexual aggression virtually indistinguishable from women's consent to sex and explaining courts' reluctance to believe women's evidence in rape trials, apart from 'real rapes' of virtuous wives by strangers (MacKinnon 1989, 137):

> [W]hat is called sexuality is the dynamic of control by which male dominance … eroticizes and thus defines man and woman, gender identity and sexual pleasure.

Lazar (2010, 350) illustrates the point by showing how romance and intimacy can be used to reinforce rape myths and cast doubt on women's allegations of rape by husbands or intimate partners. In trials for intimate partner rape the argument is sometimes made that couples develop a unique system of conversations about sex, involving symbols and non-verbal signs—the 'language of relationships' which is so personal and distinctive that outsiders—like judges, prosecutors and juries[6]—cannot determine whether or not there was consent to sex on a particular occasion. Rather than improving communication of women's sexual desires and fears, the logic of romance thus creates the space for rape to be misunderstood as passion, and for submission to be understood as consent.

The differentiation between mercenary, selfish 'uncivil' sex and the ideal of female sexuality as altruistic monogamous, in the service of secure relationships—an

[6] Unlike some other common law countries, South Africa does not have a jury system.

understanding of sex almost as a form of housework—sets up the distinction, which I discuss in more detail below, between 'virtuous' women who will be believed if they are raped by strangers, but whose testimony about being raped by husbands or male partners is still questioned, and 'bad women,' whose decisions to have or not to have sex are always tainted with the stigma associated with loveless, selfish or mercenary sex. One of the functions of rape myths like the hue and cry rule or the belief that women who dress skimpily, get drunk or go home with strange men cannot be raped is to distinguish between 'good' women who must be believed, and 'loose' women whose accounts of sexual negotiations must be approached with caution (Temkin et al. 2018).

Turning from male–female negotiations about sex to negotiations about financial compensation for women's caring work, the parallel of the narrative of male entitlement to female sexuality is the widespread belief that men and children are entitled to their wives' or partners' unpaid affective and caring work in the home (Siegel 1994; Silbaugh 1998). Both men and women ascribe to this belief in South Africa and, as elsewhere, the greatest part of childcare and household labour continues to be performed by women, even when they also generate income outside the home (Budlender et al. 2001, table 13; Statistics South Africa 2013, figure 3.1, Dowd 2011). Men who share in these duties are praised for 'helping out,' indicating that wives have no similar entitlement to male household work (Drakich 1989; Leonard 2001).

Just as the social belief that husbands are entitled to sex from their wives finds legal expression in the rule that a man cannot be guilty of the rape of his wife, male entitlement to female domestic labour is articulated in legal rules. In South African law this entitlement has specifically been used to limit women's claims for property at the end of marriages and in unmarried cohabitation relationships (Bonthuys 2017b). It is articulated as a principle that a wife can only claim a share of her husband's assets on the basis of contract if she has contributed more than the household work which could legally be expected of a good wife (*Mühlmann v Mühlmann* 1984; *Fink v Fink* 1945). Courts have specifically held that a wife has a duty, in order to maintain the joint household, to assist in her husband's business without remuneration and without necessarily thereby obtaining a financial claim to a part of the business (*Plotkin v Western Assurance Co Ltd* 1955). Certain universal partnership cases have extended this rule and the associated assumptions to unmarried cohabitation relationships (minority judgment in *Butters v Mncora* 2012 par 37, but rejected by the majority par 29)[7]:

> When parties cohabit in a state of amity over a long period…it is likely that certain things will happen: the principal breadwinner will contribute substantially, either regularly or on an ad hoc basis, to the needs of the family by providing accommodation, food, clothing, education, transport and healthcare. To these will usually be added vacations and presents of various kinds. The other

[7] The rule itself is probably unconstitutional, and its extension from marriage to cohabitation completely indefensible. See Bonthuys (2017b).

> party, usually the woman, will stay at home or engage in lesser employment and oversee the needs of the family and the upbringing of children. These are the normal incidents of cohabitation, just as they are of marriage.

When caring and housework is done within the private sphere, it is seen as an expression of altruism and many women view their household work as an expression of affection for their families—a 'labour of love' as the Supreme Court of Appeal in *Mühlmann* (1984, 125A-B) put it. Another justification for the unpaid nature of this work is that women agree to it, but the conditions which compel this agreement are not interrogated. The fictitious nature of women's voluntary agreement to do unpaid household work is exposed by the refusal, in courts throughout the world, to enforce prenuptial contracts which would remunerate wives for household work (Silbaugh 1986, 74). If women are not permitted to agree to be paid for housework, their 'agreement' to do it for free must logically be coerced or at least involuntary.

These legal and social male entitlements motivate the judicial and social distrust of women's testimony in cases on rape and cohabitation contracts. The assumption that women's caring and cleaning and cooking belongs to their family members forms the backdrop against which contracts to share assets in cohabitation contracts must be negotiated; the assumption that men are entitled to sex from wives, girlfriends and even some casual acquaintances forms the backdrop against which sex between men and women is negotiated. The fundamental starting point of male entitlement means that women who withhold consent to sex deny the natural sexual order and their assertions of non-consent must be approached with caution and corroborated in various ways. Women's lack of consent to sex is therefore weighted against the assumption of male ownership of female sexuality. Similarly, if men are entitled to women's unpaid household labour they need give no commercial value in return. Men's consent to cohabitation contracts is therefore weighted against the embedded belief that they have indisputable rights to ownership of their own property, and to the emotional, domestic and sexual labour of their female partners.

In this section I have argued that within the private contexts of sexuality and family life, the interdependent logics of contract and property ownership which operate in the public sphere (Pateman 2002, 21; Davies 1999, 329)—both ownership of things and ownership of self—are replaced by a system of exchange based on romance, love and altruism on the one hand, and a concomitant suspension of the concept of commercially valuable property-in-self, at least in respect of female sexuality and caring work. Nevertheless, so resilient is the explanatory and legitimising power of contract (Pateman 2002, 158), that the concept of women's consent is routinely used to describe, disguise or justify the love/romance/intimacy-based system of exchange within the private spheres of sex and family life. The imaginary nature of this consent is most obvious when it has been encoded in (old) legal rules, like women's irrevocable consent to sex in marriage or the involuntary duty of female housework, but the logic of consent continues to be persuasive long after the abolition of the ancient rules. In the next section I turn to the gendered nature of consent in rape and universal partnerships.

Consent in Rape and in Cohabitation Contracts

Hurd (1996, 124) argues that the legal ability to give consent, and thereby to create or alter legal rights and duties, is a function of moral autonomy—of full human and legal agency. Consent is the paradigmatic avenue by which the liberal legal subject exercises property rights over commodities and control over commodifiable aspects of himself. The ability to give or withhold consent therefore establishes full legal and social personhood (Naffine 1998, 198). Consent or agreement is also central to the legal treatment of both sexual assault and contract.

In common law jurisdictions rape has traditionally been defined as sex to which the complainant does not consent (Smart 1989, 33). While consent may be less easily contested in stranger rape, conviction in rape cases between acquaintances or intimate partners often hinges upon the questions of whether or not the rape survivor consented to have sex or, typically, whether the perpetrator reasonably believed that she consented (Estrich 1986, 1093; Berliner 1991, 2688, 2693; Kahan 2010; Lazar 2010). In rape cases the question is typically therefore whether the *woman* consented to sexual intercourse or whether the man reasonably believed that there was consent—a reversal of the gender roles found in cohabitation contracts. The cohabitation cases are usually brought by women who allege agreements to share, and the focus is therefore on whether the *male* partner had consented to the agreement to share.

Because the absence of consent would result in criminal conviction, rape trials are usually focused on the the perpetrator's state of mind, specifically whether he had reasonably relied on the appearance of consent by the woman. This would explain a more fequent focus, in rape trials, on the more objective factors associated with establishing reasonable reliance as compared with the subjective focus on the intentions of the contracting parties in contracts. It does not, however, explain the total absence of the reliance doctrine which I show in my analysis of the South African cohabitation cases below.

Consent to sexual intercourse is usually conveyed either tacitly or orally, while written consent would be exceptional. In contracts, particularly commercial contracts, consent would more typically be indicated in writing or orally. Establishing tacit consent is understandably more difficult and provides more leeway to dispute the existence of consent than consent which is conveyed in writing or orally. Another factor which creates additional space for uncertainty is the fact that in rape the consenting parties usually know one another (except in stranger rape), while arguably consent to a commercial transaction between strangers would tend to be more formally established. Moreover, the doctrine of consent and the circumstances which would preclude consent are more developed in the contractual rules relating to duress, undue influence and misrepresentation than they are in rape cases.[8] These ambiguities and gaps in the doctrine of consent in rape trials motivate the calls for

[8] It is too soon to evaluate the sanguine expectation that the 2017/2018 MeToo movement's impact on popular stereoytypes about rape would filter through to the justice system in South Africa, where the intensity and impact of the movement was probably less pronounced than elsewhere.

legal reform, often along the lines of consent doctrine in contract law (Spence 2003; Gruber 2016; Popkin 2017).

In the rest of this section I highlight the gendered nature of consent by comparing and contrasting the legal treatment of women's consent in rape on the one hand, and men's consent in contract on the other hand.

In rape cases some women are assumed always to consent. Wives, for instance, are usually not believed when they say that they did not consent to sex with their husbands as are unmarried women who are raped by intimate partners (Lazar 2010, 358). Sex workers struggle to establish lack of consent because they are morally tainted by their profession, and their testimony is therefore distrusted. All other women, excepting virtuous matriarchs and very young children, are assumed to have consented, unless they clearly demonstrate the absence of consent by proving circumstances for which they cannot be blamed, such as overwhelming violence (MacKinnon 1989, 175). Merely yielding to male aggression or persistence is regarded as consent, because it fits so neatly into patriarchal concepts of 'normal' sex as feminine submission to dominant men (Heath and Naffine 1994, 33). Women's consent is therefore often associated with passivity or absence, rather than active assertion of agreement, 'a negative freedom; the freedom to "say no"' (Russell 2013, 269).

When women express lack of consent to sexual interaction, they are not necessarily believed, because they are taken to mean 'yes,' even while clearly saying 'no' (Pateman 2002; Kahan 2010). Often women's consent to a first or second step of physical intimacy is taken as consent to full sexual intercourse, or the fact that she had agreed to sex on a previous occasion is taken as an illustration of subsequent agreement. If a woman were to express what appears to be consent or acquiescence to sexual interaction, but, actually not want sex—in other words, harbour a mental reservation about having sex, she would be taken to have consented. There is, in other words, no need to establish actual consent. These assumptions reflect the pervasive legal ambiguity about women's status as fully autonomous moral beings, who are able to know and assert their own wishes authoritatively.

According to Lazar (2010, 253–256) one of the difficulties with prosecuting marital rape is the need, felt by lawyers, prosecutors and judges alike, to distinguish between 'real rape' and 'bad sex' or 'unwanted sex,' in which the woman didn't really want sex, but participated just to indulge her partner. Although 'real' marital rape, usually accompanied by violence, may be taken very seriously, there is a common belief that, in marriages women must sometimes submit to sex to keep men happy. This is reminiscent of the Constitutional Court's version of 'proper' female sexuality in the (*Jordan* 2002) case as serving 'nurturing relationships' and it reflects the widely-held expectation that women should maintain relationships or bolster male egos by having sex when they don't actually want to. Women also believe and frequently do this. In a context where, as I have demonstrated in the previous section, men feel entitled to sex from female intimate partners, the absence of real consent is always weighed up against social, cultural and even religious expectations that women's consent *ought* sometimes to be given.

An analysis of South African courts' treatment of men's consent in cohabitation contracts illustrates the differences between male and female consent. As compared with the frequent assumptions that women consented to sex, courts generally stress the need categorically to establish men's active and clearly expressed consent to share assets with their female partners. Male consent is sacrosanct.

Unlike women, men's ability to consent, or to refuse to consent appears to be unaffected by their general truthfulness or the morality of their behaviour in other respects.

In *Sepheri v Scanlan* (2008), for instance, an unmarried cohabiting couple agreed that the ownership of their home would be jointly registered. Contrary to this agreement, the man registered the property in his own name only. When the female partner insisted he amend the registration to include her, he agreed to do so, but later testified that he had never really intended to fulfil this promise (325E-F). Instead, he alleged that the incident illustrated *her* mercenary motives which somehow justified his breaking off their engagement (334E-G). The ultimate irony of this judgment is that despite accepting 'that defendant might have been untruthful at times,' (339H) the court nevertheless agreed that (339F-G):

> [t]he fact that defendant refused to transfer the property was indicative that no consensus had in fact been reached. The evidence is that the defendant steadfastly refused to transfer the property or to commit financially in this fashion, until such time as they were married.

This is a devastating endorsement of unqualified male decisional autonomy, the reverse of which is almost unthinkable. Imagine a court's reaction were a female rape complainant to testify that, even though she had said yes to sex, she had never meant it. In rape, therefore, women's consent is presumed, but in contracts to share, men's non-consent is presumed to a remarkable extent.

In rape a man's reasonable belief that the woman consented to sex can excuse him from criminal liability, even if he was mistaken and the woman had not actually consented. However, as Kahan (2010) demonstrates, what constitutes a reasonable belief depends on interpretations of the facts which, in turn, are deeply connected to cultural perspectives in particular societies. A judge who endorses patriarchal beliefs about what men are entitled to and who subscribes to stereotypical rape myths is likely to regard a man's belief that there was consent as reasonable.

The comparison with reasonable belief in contract is revealing. South African contract law will generally hold a party to a contract, even if there was no consent, if the person who asserts the existence of the contract reasonably relied on the appearance of consensus—reasonable reliance—as basis for contractual liability (accepted as a basis for contractual liability in *Sonap Petroleum SA (Pty) Ltd v Pappadogianis* 1992; *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958; *Brink v Humphries & Jewell (Pty) Ltd* 2005). By way of comparison, the failure even to mention reasonable reliance in the South African cohabitation contract cases is telling, especially in situations where parties had actually shared property for many years.

The minority judgment in *Butters v Mncora* (2012 par 27) notoriously accepted the man's assertion that he did not consent to sharing assets, even though he admitted to having shared all resources with his female partner for a period of 20 years. Instead, the minority judges held that (par 38):

> The duration of the cohabitation and the degree of financial dependence attaching to one of the parties may seem to render it more probable that one or both of them implicitly intends to share his or her all, but in fact both are just as likely to be attributable to a perceived obligation, inertia, boredom, disinterest or, simply, self-interest in preserving the status quo. Of themselves such factors are also, therefore, ambiguous.

Sepheri v Scanlan (2008) involved a relationship of 8 years, during which the female plaintiff gave up her secure employment in Helsinki to move around the world according to her partner's career moves. Despite accepting the evidence that the parties shared all their assets equally during the relationship, the court held that was no evidence that the defendant had the necessary intention to conclude a universal partnership.[9] This, it was held, negated the existence of a contract to share. However, the application of the reasonable reliance doctrine would have strengthened the plaintiff's case for sharing by focusing on the sharing behaviour during the relationship and the plaintiff's agreement to give up her own career as indications that there had either been agreement to share, or that the plaintiff relied on such an appearance and that her reliance was reasonable (see also *Ponelat v Schrepfer* 2012; *Cloete v Maritz* 2014; *Butters v Mncora* 2012; *Katz v Katz* 1989).

The quote from the minority judgment in *Butters* directly above illustrates three things: first, the reasoning that it was equally likely for the man to agree to share with his partner as not to share reflects an assumption that he was entitled to her household labour and that he was therefore under no legal or even moral obligation to compensate her for this. Second, the quote demands overt, positive consent from the male contracting party—insisting upon and enforcing full male moral authority. Male consent is not mere submission, habit or acquiescence in the usual ways of living over many years of cohabitation. Unless and until they say 'yes,' to sharing, men mean 'no'[10] and even when they say 'yes,' but mean 'no,' their legal and moral agency will sometimes be upheld. Third, women's reliance on the appearance of consent through many years is, it seems, not regarded as reasonable in the absence of men's actual and active consent.

It may be argued that using rape as the archetype of female consent is unfair and that the comparison with men's consent to universal partnerships is misguided. After all, the evidentiary burden in criminal matters—proof beyond a reasonable doubt—requires evidence to be more rigorously assessed in rape trials, than contractual claims which only have to be proved on a balance of probabilities. Moreover, in some jurisdictions[11] the presence of juries in rape trials may increase the influence

[9] 339A-J.

[10] On the movement to require the same level of active consent to sexual interaction from women, see in general Gruber (2016).

[11] South African trials never use juries. Lay assessors who are often technical experts in matters arising in the trial are sometimes used and the point may apply to them to some extent.

of rape myths as compared with civil trials in which legally trained judges preside. The irony is, of course, that some courts' steadfast resistance to finding male consent to universal partnerships in the face of credible evidence to the contrary and, despite the doctrine of reasonable reliance, resembles a strict application of the criminal evidentiary standard rather than the balance of probabilities required for contract.

Feminist authors like Naffine and Pateman have have argued that the problematic aspects of consent in rape exemplify general problems with consent in commercial and political spheres of public life. The use of agreement (or contract) in rape trials reflect the explanatory and vindicatory power of agreement or consent in an era when 'legitimate relationships are always and only generated through contract' (Pateman 2002, 27). The explanatory power of contract depends, in turn, on its assumptions of fair and voluntary bargaining between individuals who are equally situated and who exercise control and autonomy over their bodies, their work and their emotional attachments (Naffine 1998; Pateman 2002).

However, my comparison of rape and cohabitation contracts has demonstrated that the paradigm of contract obscures more than it illuminates. In the first place, using the logic of contractual exchange obscures the persistence of the logics of love, altruism and intimacy which govern interactions in the private spheres of sex and family. It obscures the suspension of the usual concept of property-in-self in the private sphere with the result that women's sexuality and their family labour are not regarded as commodities which women can exchange for money. It obscures men's persistent legal and social entitlements to these aspects of female identity. Most egregiously, contractual logic of free and voluntary exchange obscures the indisputable instances of non-consent embodied in family law rules like the wife's irrevocable consent to sex and the wifely duty to render household services—neither of which can be contractually altered.

Distrusting Women's Testimony: Cautionary Rules and Corroboration

In the previous section I argued that the pervasive male entitlement to women's sexuality and their domestic labour leads to a general distrust of women's testimony about what was agreed to in sexual interactions. In this section I show a similar dynamic in the South African cases on cohabitation contracts. My analysis highlights two sets of similarities with rape cases. The first is the persistent tendency to require evidence in addition to what would have sufficed in commercial partnership contracts—a higher than usual evidentiary burden which indicates a distrust of women's versions, similar to the cautionary rule and corroboration requirements in rape. The second feature is the dichotomy between 'good women' whose evidence may be believed in certain situations, and undeserving women, who are never believed because they are perceived as immoral and grasping.

Before embarking on this analysis I need to clarify that cohabitation contracts can be concluded either in writing, verbally or tacitly. Easiest to prove would be a written agreement, but these are rare. Oral contracts are proven by witnesses' testimony of what was discussed between the parties, as tested by cross-examination. Tacit contracts come into operation through the parties' behaviour and witnesses will also

give evidence of the surrounding circumstances and of the parties' subsequent conduct, but there will be no evidence of an oral or written agreement. The court will deduce the existence of the contract entirely from their evaluations of what is probable, given the particular surrounding circumstances and ensuing behaviour. A court will find that there was indeed a partnership agreement if, looking at all the evidence, the existence of a contract is more probable than the absence thereof (*Butters* 2012 paras 18, 19).

An analysis of the cases shows that courts often set, or attempt to set, requirements in addition to what would be necessary to prove universal partnerships in commercial contracts. Older cases held that partnerships between intimate partners could only be concluded by way of express oral or written agreements (*Annaba v Ramlall* 1960), thus excluding claims by women who could only prove tacit agreements. Although the Supreme Court of Appeal in *Butters* recently confirmed that universal partnerships between intimate partners could be concluded tacitly (2012 par 17), lawyers have persistently argued for additional requirements in this area. In the *Butters* case, there was an attempt to require that cohabitants also prove 'cohabitation, sharing of profits and freedom of accounting to each other' (2012 par 16) while in *Steyn v Hasse* (2015 par 20) the court emphasized that 'the parties have not established or maintained a joint household and appellant never contributed towards first respondent's expenses.' These are re-formulations of the additional requirements which were explicitly rejected in *Butters*, but which somehow made their way back into the jurisprudence in the guise of evaluating the credibility of female plaintiffs' testimony. Notoriously, courts have required that women, in order to establish universal partnership, must show that their contribution was that 'not simply that which is ordinarily to be expected of a cohabitee.' (*Ponelat* 2012 par 23, see also *Cloete v Maritz* 2014 paras 95, 98 and the minority judgment in *Butters* 2012 par 37). In *Cloete v Maritz* the court described the plaintiff's contribution as 'far more than that of just a passive partner who merely kept home for the defendant in order to create the opportunity for him to give his undivided attention to the various businesses' (par 95) in order to justify their award of half of the defendant's considerable estate to her. My reading of the facts indicates that the plaintiff's contribution was closer to 75%, but the quote indicates that a traditional housekeeping role would, despite the dictum from *Butters*, be regarded as insignificant.

Courts therefore apply higher standards or set additional requirements for women's claims for cohabitation contracts than would have been expected in financially motivated partnership contracts outside of intimate relationships, mirroring the need for corroborating evidence in rape trials.

Another mechanism demonstrating courts' distrust of women's claims is the distinction between proving oral and tacit partnership contracts. In three recent cases, the courts found that the female cohabitants were credible witnesses, while rejecting the men's testimonies as unreliable. In these cases the women testified that the men had repeatedly agreed to share all assets equally—thus providing credible evidence of oral contracts. In *Ponelat v Schrepfer* (par 5 2012) the plaintiff testified that the defendant had repeatedly asserted that what was his, also belonged to her. In *Sepheri v Scanlan* (2008 324E-F, 325H-I) the defendant admitted having made verbal

promises to share equally, and in *Cloete v Maritz* (2014 par 99) the oral agreement was even confirmed in writing.

Nevertheless, instead of basing their judgments on the existence of the oral agreements, all three of the courts enquired whether tacit agreements had been established. This is significant, because once evidence of an oral agreement is accepted there is no further need to consider additional factors which would establish the existence of a tacit agreement, like the surrounding circumstances or parties' subsequent conduct. Consideration of these factors enabled courts to hold that parties did not actually mean what their oral agreement clearly indicated. It appears that courts use the avenue of tacit agreements when it is unnecessary, and in effect require women to meet a higher evidentiary standard of proof, even when their testimony of oral agreements is credible (Bonthuys 2017a). This is similar to rape trials in which, even after the abolition of corroboration requirements, a woman's testimony is always vulnerable to disbelief on the basis that she did not struggle, that she did not lay a complaint at the first opportunity, that she dressed inappropriately or accompanied a man to his home (Russell 2013, 261).

Having argued that women's versions of what had been agreed upon tends to be regarded with distrust, there appears however to be a difference between the treatment of 'good' female claimants on the one hand, and those who do not deserve legal protection, on the other hand. Both the distinction and the lines along which it is drawn, echo and in many respects replicate the distinction in rape law, between 'real' victims' who are believed, and those women who are somehow to blame for the sexual assault (Estrich 1986; Russell 2013, 261; MacKinnon 1989, 175).

What constitutes a 'good' woman is deeply racialised and gendered on several levels. The invisibility of black women victims in rape law (Gqola 2015; Harris 1996, 340) is replicated in their absence as plaintiffs in cohabitation contract cases. Hitherto all but one of the cases were instituted by white women or women of Indian descent. Although cohabitation partnership contracts could provide financial relief to African women who are either married according to customary law or cohabiting with men who are married in custom (Bonthuys 2016; Mwambene and Kruuse 2013), no cases have yet been brought on this basis.[12] The implication is that African women have no entitlement to share assets with male partners on the basis of cohabitation partnerships. However, because no cases involving invalid customary marriages have yet been litigated, this might change in future.

Those plaintiffs who received shortest shift were the two men who claimed to have partnership contracts with wealthier women. In *Kritzinger* (1989) a husband asserted that he had curtailed his own career to enable his wife to become an affluent and influential businesswoman and that he therefore had a universal partnership

[12] The reasons for this are speculative, but could include the fact that, as a developing area of law which requires individual women to litigate, it may be beyond the limited resources available to the majority of African women. Moroever, the current litigation focus of non-profit organisations is giving full property rights to *married* African women. Another factor is the relative poverty of many African men, which would render fruitless even successful litigation and the fact that a large proportion of African women's cohabitation relationships co-exist with marriages. In such scenarios the married women's rights would take precedence over those of the cohabiting women.

agreement with her. The basis for the decision was that the husband had failed to prove that he had actually given up advancement in his own career to benefit his wife, but the court's assessment of the reasons for the marital breakdown were cutting: in response to the wife's allegation that her sexual infidelity was the result of a lack of sexual interest from her husband, the judge observed that (81A-C):

> It is possible that her success in her career compared with his own felt lack of distinction played a part in the unsatisfactory sexual relationship which undoubtedly developed between the parties… it may be significant that the sexual difficulties in the parties' married life really only began at about the time when the appellant's meteoric success in business commenced

The suggestion seems to be that he was so overwhelmed by his wife's professional success that his sexual virility suffered, reflecting the common association of male economic power with sexual potency. The elderly ex-surfer who tried to prove a universal partnership with a wealthy businesswoman with whom he cohabited fared no better, though at least his sexual prowess was not questioned (*McDonald v Young* 2012). Just as men worldwide find it very difficult to establish that they had been raped (Rumney and Morgan-Taylor 1997; Graham 2006), in South Africa they have not yet been able to prove claims to share in the wealth generated by their female partners. The explanation may lie in the anxiety produced by images of male vulnerability and female economic success. Men who cannot protect themselves from rape and men who depend on women for economic provision are both unthinkable and contemptible, because they threaten the logic of patriarchy upon which the laws of rape and marital property are founded.

Generally, courts have been willing to find universal partnerships when the female claimants are married or, unaware of the legal invalidity of their marriages, behave like stereotypically good wives. Govindamah Soobiah, for instance, bore ten children in a 36-year long invalid marriage (*Ex parte Soobiah* 1948), while the court in *Ratanee v Maharaj* (1950) expressed sympathy for a mother of eight children who had been forced into in an invalid marriage as a child. Impoverished, elderly, long-suffering and industrious wives elicit compassionate treatment, as do unmarried women who fit into the mold of self-sacrificing wifely virtue (*Butters v Mncora* 2012; *Cloete v Maritz* 2014; *Ponelat v Schrepfer* 2012). Younger women, women of independent financial means (*Katz v Katz* 1989; *Sepheri v Scanlan* 2012), sexually experienced or sexually voracious women (*Van Jaarsveld v Bridges* 2010 involved a woman who had been married four times) or women who knowingly live with married men (*Steyn v Hasse* 2015) are less like to be believed when they claim cohabitation contracts. The qualities of those women who are believed about sharing financial property overlap to a remarkable extent with the qualities the virtuous women who are regarded as 'real' rape victims.

The equivalent, in partnership contracts, of the prostitute who cannot be raped because she will never be believed (Heath and Naffine 1994), is the stereotypical 'gold-digger'—the pariah who wants a share of the man's wealth which she does not deserve (Thompson 2016). The example in the case law is the claimant in *Van Jaarsveld v Bridges* 2010, who was a four-times married, older woman who sued for

a share of a family farm from a naïve rural young man. This stereotype and its association with prostitution are perilously familiar to every woman, whatever her social and economic class. According to the High Court in *S v Jordan* (2001, 1058D-E):

> [i]n principle there is no difference between a prostitute who receives money for her favours and her sister who receives, for rendering a similar service, a benefit or reward of a different kind, such as a paid-for weekend, a free holiday, board and lodging for a shorter or longer period, a night at the opera…

By way of contrast, in commending the evidence of the female cohabitant in *Cloete v Maritz* (2014 par 75) the court emphasized that she:

> came across as an honest and genuine person, who did not contribute to and assist the defendant purely to gain financially, but because of her deep love, affection, admiration and loyalty she had for him. It was clear that it was never her intention when she entered into the relationship with the defendant to gain financially from it.

At first glance the reasoning seems valid. A wish to profit from a particular transaction could legitimately inspire skepticism of a witness's testimony. However, a comparison with other contract cases shows that parties to commercial contracts who aim to receive financial returns on their investments are not usually regarded as morally tainted or as unreliable witnesses because of this motive. I have not come across a single case in contract law in which a judge has dismissed the evidence of a contracting party only because he or she wished to profit from the contract. In contract law the profit motive is assumed, even acclaimed. Yet in claims for universal partnerships, the wish for financial security or compensation from a long-term intimate relationship is viewed as an indication of dishonesty.

Compare the script of mercenary, grasping women with the praise frequently heaped on men who share resources during relationships.

> The appellant said and did nothing to treat the respondent as other than an ad hoc recipient of the fruits of his labours according to his own generosity (or tight-fistedness) at any given time. (*Butters v Mncora* 2012 par 44)

Men's financial contributions are regarded as benevolent gifts, freely bestowed and without expectations of any return. In *Steyn v Hasse NO* (2015) the female partner took care of the man's house and managed his property by herself for 9 months of every year, yet the court emphasized that she lived 'rent free' (par 5, 12, 20), drew attention to her male partner's 'generosity' towards her (par 20) and repeated his testimony that he allowed her to stay in the house because he felt sorry for her (par 5). The minority judgment in *Butters* (2012) is even more direct. Describing a relationship of 20 years, during which the woman had kept house and cared for the defendant, his child from a previous relationship and their own two children, the minority judges described the woman's behaviour as 'an unacknowledged acceptance of such largess as he chose to bestow' (par 39). Not only was she fortunate to be financially supported, her lack of proper gratitude rankled. His behaviour, on the other hand—refusing to share any property

with his partner of 20 years after a secret marriage to another woman—was not regarded as self-serving in the least (par 43 per Heher JA with Cachalia JA concurring. All are men):

> Nor do I consider an intention to retain what is one's own to be contrary to good faith — there is no reason to doubt that, if the parties had not fallen out acrimoniously, the appellant would have maintained the respondent for the rest of her life.

The quote illustrates Thompson's point (2016) that the gold-digger stereotype is a reflection of men's rights as property owners: men's absolute and morally justified rights to the proceeds of their labour are always vulnerable to unscrupulous women who use intimacy and sex to take financial advantage of them. The same fears and stereotypes undergird the disbelief of women's evidence in rape and universal partnerships, because as the quote from the High Court judgment in *S v Jordan* (2001) illustrates, potentially, all women are gold-diggers (Thompson 2016, 1237, 1244) and potentially all men are the victims of feminine deceit (Smart 1989, 30).

Conclusion

In this piece I have compared partnership contracts with rape law to draw attention to the way in which the deep mistrust of women's versions about what was agreed to in rape trials extends, sometimes virtually unchanged, to women's evidence about agreements to share property in intimate relationships. Comparing contract with rape is useful because rape law contains the most long-standing and frequently-traversed instances of sexist evidential biases in feminist literature. Moreover, in dealing with the messy stuff of sex, bodies and desires, rape law appears to be the inverse of classical liberal theories of contract as exemplifying disembodied economic rationality and self-interested bargaining (Pateman 2002). To find the replication of the same sexist stereotypes, the familiar old rape dichotomies, the same mechanisms of erasing female experience in contract law is simultaneously shocking and somehow bleakly anticipated. After all, it makes sense that beliefs and attitudes about intimate negotiations between men and women will correspond, whether they relate to having sex or the financial sharing involved in cohabitation relationships. Stereotypes of women as untrustworthy, vindictive, and mercenary in sexual interactions are unlikely to be accompanied by scrupulous even-handedness when it comes to financial interactions. I have illustrated how the mistrust of women's evidence is grounded in pervasive, but unacknowledged presumptions of male entitlements to sex and domestic labour. Ultimately these assumptions and stereotypes protect male reputations and male economic accumulation at the expense of economic and criminal justice for women (Hunter 1996, 155; Modiri 2014, 153).

The presence of sexist bias in cases involving cohabitation contracts may also demonstrate the profoundly gendered nature of law and legal rights, whether based in contract or family law or any other legal area. A large body of feminist work has,

after all, exposed the fallacy of gender neutrality in other supposedly gender neutral areas like labour law and tort (Pateman 2002; Frug 1992; Hadfield 1998).

In family law systems worldwide there is a move towards increased use of contract to settle asset sharing between intimate partners. One of the expectations supporting this move is that increased party autonomy would lead to fairer distribution because people themselves are the best judges of what would be in their interests. The South African jurisprudence on cohabitation contracts represents such an attempt to use contract to challenge and shift the iniquitous consequences of male entitlement to women's productive and reproductive labour within the family. The effectiveness of this initiative may however be undermined by liberal interpretations of consent in contract law which fail to interrogate—and sometimes deliberately erases—the multifaceted and complex social and economic contexts in which consent is given. These contexts currently endorse men's legal and moral entitlements to any property which they have amassed and to women's domestic labour. Furthermore, it ignores the logic of love which dictates that within the private sphere women's physical and emotional work may not be exchanged for economic gain and stigmatizes women who transgress this taboo. Transposing the contractual logic of equal, independent legal subjects onto this social and legal landscape creates ambiguities, grey areas and slippages which operate to the detriment of women. On the one hand, the logic of contract requires them to behave as owners of their bodies and their labour—to display property-in-self—as would men in the commercial sphere. On the other hand, if they contravene the prohibitions on the commodification of love and sexuality courts will treat them as pariahs, gold-diggers and unworthy women. This interaction of liberal contract law and the persistent gendered moral economy makes it more difficult for women both to negotiate and to prove cohabitation contracts, because both women and men believe that men are entitled to women's work and, correspondingly, that women are not entitled to financial compensation for their work. Hopes of solving unequal distribution of family assets by way of contracts between intimate partners may, therefore, be unrealistic.

Acknowledgements My thanks to the members of my reading group, Marius Pieterse and the anonymous reviewers of this piece for insightful suggestions and comments.

References

Artis, Julie E. 2004. Judging the best interests of the child: Judges' accounts of the tender years doctrine. *Law & Society Review* 38: 769–806.

Berliner, Dana. 1991. Rethinking the reasonable belief defense to rape. *Yale Law Journal* 100: 2687–2706.

Bonthuys, Elsje. 2016. Exploring universal partnerships and putative marriages as tools for awarding partnership property in contemporary family law. *Potchefstroom Electronic Law Journal*. https://doi.org/10.17159/1727-3781/2016/v19n0a1192.

Bonthuys, Elsje. 2017a. Proving express and tacit universal partnership agreements in unmarried intimate relationships. *South African Law Journal* 134: 263–273.

Bonthuys, Elsje. 2017b. Has the time come to abolish or adapt the husband's common-law right to his wife's domestic services? *Stellenbosch Law Review* 28: 336–352.

Boyd, Susan B. 1989. From gender specificity to gender neutrality: Ideologies in Canadian child custody law. In *Child custody and the politics of gender*, ed. Carol Smart and Selma Sevenhuijsen, 126–157. London: Routledge.
Budlender, D., N. Chobokoane, and Y. Mpetsheni. 2001. *A survey of time use: How South African women and men spend their time*. Pretoria: Statistics South Africa.
Cameron, Edwin. 1999. Constructive trusts in South African law: The legacy refused. *Edinburgh Law Review* 3: 341–358.
Conaghan, Joanne, and Yvette Russell. 2014. Rape myths, law, and feminist research: 'Myths about myths'? *Feminist Legal Studies* 22: 25–48.
Davies, Margaret. 1999. Queer property, queer persons: Self-ownership and beyond. *Social & Legal Studies* 8: 327–352.
Dewar, John. 2000. Family law and its discontents. *International Journal of Law, Policy & the Family* 14: 59–85.
Dowd, Nancy E. 2011. Fatherhood and equality: Reconfiguring masculinities. *Suffolk University Law Review* 45: 1047–1081.
Drakich, Janice. 1989. In search of the better parent: The social construction of ideologies of fatherhood. *Canadian Journal of Women and the Law* 3: 69–87.
Du Mont, Janice, and Deborah Parnis. 1999. The pernicious effects of judging women. *Canadian Women's Studies* 19: 102–109.
Estrich, Susan. 1986. Rape. *Yale Law Journal* 95: 1087–1184.
Fehlberg, Belinda, and Bruce Smyth. 2002. Binding pre-nuptial agreements in Australia: The first year. *International Journal of Law, Policy & the Family* 16: 127–140.
Fineman, Martha Albertson, and Isabel Karpin (eds.). 1995. *Mothers in law: Feminist theory and the legal regulation of motherhood*. New York: Columbia University Press.
Fritz, Nicole. 2004. Crossing Jordan: Constitutional space for (un)civil sex? *South African Journal on Human Rights* 20: 230–248.
Frug, Mary Joe. 1992. Rescuing impossibility doctrine: A postmodern feminist analysis of contract law. *University of Pennsylvania Law Review* 140: 1029–1046.
Gqola, Pumla Dineo. 2015. *Rape: A South African nightmare*. Johannesburg: Jacana.
Graham, Ruth. 2006. Male rape and the careful construction of the male victim. *Social & Legal Studies* 15: 187–208.
Gruber, Aya. 2016. Consent confusion. *Cardozo Law Review* 38: 415–458.
Hadfield, Gillian K. 1998. An expressive theory of contract: From feminist dilemmas to a reconceptualization of rational choice in contract. *University of Pennsylvania Law Review* 146: 1235–1285.
Halley, Janet. 2011a. What is family law?: A genealogy part I. *Yale Journal of Law and the Humanities* 23: 1–110.
Halley, Janet. 2011b. What is family law?: A genealogy part II. *Yale Journal of Law and the Humanities* 23: 189–293.
Halley, Janet, and Rittich Kerry. 2010. Critical directions in comparative family law: Genealogies and contemporary studies of family law exceptionalism. *American Journal of Comparative Law* 58: 753–775.
Harris, Cheryl I. 1996. Finding Sojourner's truth: Race, gender and the institution of property. *Cardozo Law Review* 18: 309–409.
Heath, Mary, and Ngaire Naffine. 1994. Men's needs and women's desires: Feminist dilemmas about rape law "reform". *Australian Feminist Law Journal* 3: 30–51.
Hunter, Rosemary. 1996. Gender in evidence: Masculine norms v feminist reforms. *Harvard Women's Law Journal* 19: 127–167.
Hurd, Heidi M. 1996. The moral magic of consent. *Legal Theory* 2: 121–146.
Jewkes, Rachel, Yandisa Sikweyiya, Robert Morrell, and Kristin Dunkle. 2011. Gender inequitable masculinity and sexual entitlement in rape perpetration South Africa: Findings from a cross-sectional study. *PLoS ONE* 6: 1–11.
Kahan, Dan M. 2010. Culture, cognition and consent: Who perceives what, and why, in acquaintance rape cases. *University of Pennsylvania Law Review* 158: 729–813.
Lazar, Ruthy. 2010. Negotiating sex: The legal construct of consent in cases of wife rape in Ontario, Canada. *Canadian Journal of Women and the Law* 22: 329–363.
Leckey, Robert. 2007. Contracting claims and family feuds. *University of Toronto LJ* 57: 1–41.
Leonard, Madeleine. 2001. Old wine in new bottles? Women working inside and outside the household. *Women's Studies International Forum* 24: 67–78.

MacKinnon, Catharine A. 1989. *Toward a feminist theory of the state*. Cambridge Mass: Howard University Press.
Melville, Angela, and Rosemary Hunter. 2001. As everybody knows: Countering myths of gender bias in family law. *Griffith LR* 10: 124–138.
Mnookin, Robert H., and Lewis Kornhauser. 1979. Bargaining in the shadow of divorce: The case of divorce. *Yale Law Journal* 88: 950–997.
Modiri, Joel M. 2014. The rhetoric of rape: An extended note on apologism, depoliticisation and the male gaze in *Ndou v S*. *South African Journal on Human Rights* 30: 134–158.
Mwambene, Lea, and Helen Kruuse. 2013. Form over function? The practical application of the Recognition of Customary Marriages Act 1998 in South Africa. *Acta Juridica* 1: 292–317.
Naffine, Ngaire. 1998. The legal structure of self-ownership: or the self-possessed man and the woman possessed. *Journal of Law & Society* 25: 193–212.
O'Donovan, Katherine. 1993. *Family law matters*. London: Pluto Press.
Pateman, Carole. 1980. Women and consent. *Political Theory* 2: 149–168.
Pateman, Carole. 1988. *The sexual contract*. Stanford: Stanford University Press.
Pateman, Carole. 2002. Self-ownership and property in the person: Democratization and a tale of two concepts. *Journal of Political Philosophy* 10: 20–53.
Popkin, Kelly Jo. 2017. Meeting of the minds and bodies: Contract law and the mutuality of sexual exchanges. *De Paul Journal of Women & Law* 6: 1–23.
Reece, Helen. 2013. Rape myths: Is elite opinion right and popular opinion wrong? *Oxford Journal of Legal Studies* 33: 445–473.
Ronner, Amy D. 1997. The Cassandra curse: The stereotype of the female liar resurfaces in *Jones v. Clinton*. *University of California, Davis Law Review* 31: 123–191.
Rumney, Phillip, and Morgan Morgan-Taylor. 1997. Recognizing the male victim: Gender neutrality and the law of rape: Part one. *Anglo-American Law Review* 26: 198–234.
Russell, Yvette. 2013. Thinking sexual difference through the law of rape. *Law and Critique* 24: 255–275.
Russell, Yvette. 2016. Woman's voice/law's *logos*: The rape trial and the limits of liberal reform. *Australian Feminist Law Journal* 42: 273–296.
Scherpe, Jens (ed.). 2012. *Marital agreements and private autonomy in comparative perspective*. Oxford: Hart.
Segal, Lynne. 2007. *Slow motion: Changing masculinities, changing men*. London: Palgrave Macmillan.
Siegel, Reva B. 1994. The modernization of marital status law: Adjudicating wives' rights to earning, 1860-1930. *Georgetown Law Journal* 82: 2127–2211.
Silbaugh, Katharine. 1986. Turning labor into love: Housework and the law. *1996 Northwestern University Law Review* 91: 1–86.
Silbaugh, Katharine B. 1998. Marriage contracts and the family economy. *Northwestern University Law Review* 93: 65–143.
Singer, Jana B. 1992. The privatization of family law. *Wisconsin Law Review* 1443–1567.
Smart, Carol. 1989. *Feminism and the power of law*. London: Routledge.
Spence, Anne T. 2003. A contract reading of rape law: Redefining force to include coercion. *Columbia Journal of Law & Social Problems* 37: 57–90.
Statistics South Africa. 2013. *A survey of time use*. Pretoria: Statistics South Africa.
Temkin, Jennifer, Jacqueline M. Gray, and Jastine Barrett. 2018. Different functions of rape myth use in court: Findings from a trial observation study. *Feminist Criminology* 13: 205–226.
Thompson, Sharon. 2016. In defence of the 'Gold-Digger. *Oñati Socio-Legal Series* 6(6): 1225–1248.

Cases

Annabhay v Ramlall 1960 (3) SA 802 (N).
Brink v Humphries & Jewell (Pty) Ltd 2005 (2) SA 419 (SCA).
Butters v Mncora 2012 (4) SA 1 (SCA).
Cloete v Maritz 2014 JOL 32110 (W).
Ex Parte Soobiah 1948 (1) SA 873 (N).
Fink v Fink 1945 WLD 226.

Katz v Katz 1989 (3) SA 1 (A).
Kritzinger v Kritzinger 1989 (1) SA 67 (A).
McDonald v Young 2012 (3) SA 1 (SCA).
Mühlmann v Mühlmann 1984 (3) SA 102 (A).
National and Overseas Distributors Corporation (Pty) Ltd v Potato Board 1958 (2) 473 (A).
Plotkin v Western Assurance Co Ltd 1955 (2) SA 385 (W).
Ponelat v Schrepfer 2012 (1) SA 206 (SCA).
Ratanee v Maharaj 1950 (2) SA 538 (D).
S v Jordan 2001 (10) BCLR 1055 (T).
S v Jordan 2002 (6) SA 642 (CC).
S v Ncanywa 1993 (1) SACR 297 (CkA).
Sepheri v Scanlan 2008 (1) SA 322 (C).
Sonap Petroleum SA (Pty) Ltd v Pappadogianis 1992 (3) SA 234 (A).
Steyn v Hasse 2015 (4) SA 405) (WCC).
Van Jaarsveld v Bridges 2010 (4) SA 558 (SCA).