

ON THE USES OF INTERPRETIVE ‘CHARITY’: SOME
NOTES ON APPLICATION, AVOIDANCE, EQUALITY
AND OBJECTIVE UNCONSTITUTIONALITY FROM THE
2007 TERM OF THE CONSTITUTIONAL COURT OF
SOUTH AFRICA*

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Charity is forced on us; whether we like it or not, if we want to understand others, we must count them right in most matters.¹

1 Introduction

To hear Stu Woolman tell it, disturbing lapses and weaknesses – an apparent ‘lack of analytical rigour’ suggesting what could be a ‘penchant for outcome-based decision-making’ – have been showing up recently in the work of a Constitutional Court whose prior record of performance has deservedly garnered widespread applause.² Woolman cites as evidence three decisions from the Court’s work in the year 2007: *Barkhuizen*,³ *Masiya*,⁴ and *NM*,⁵ and suggests that his reactions to these decisions are widely shared among South Africa’s well-informed Court-followers.⁶ He makes a worthy, illuminating, formidable case, one that the Court would do well to consult and ponder.

* I am indebted to Stu Woolman, and to two anonymous referees, for exceptionally helpful, trenchant comments. I hope that what follows shows the benefit of their efforts, even if I remain incorrigible on some points of difference.

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¹ D Davidson *Inquiries into truth and interpretation* (1984) 197 (*Davidson Truth*).

² S Woolman ‘The amazing, vanishing Bill of Rights’ (2007) 123 *South African Law Journal* 762 (Woolman ‘Amazing’).

³ *Barkhuizen v Napier* 2007 7 BCLR 691 (CC).

⁴ *Masiya v Director of Public Prosecutions* 2007 5 SA 30 (CC); 2007 8 BCLR 927 (CC) (‘*Masiya*’).

⁵ *NM v Smith* 2007 5 SA 250 (CC); 2007 7 BCLR 751 (CC) (‘*NM*’).

⁶ Woolman ‘Amazing’ (n 2 above) 762 (‘chattering classes’).

2 Uses of interpretive 'charity'

Formidable is not, however, conclusive. For reasons I shall come to shortly, I have chosen to devote this space to seeing what might be said on the other side, specifically with regard to *NM* and *Masiya*, on behalf of a Court that, I quite agree with Woolman, has left itself with a lot of explaining to do. The controlling opinions in these cases are indeed, as Woolman says, 'thinly reasoned',⁷ if by that we mean they are in some respects insufficiently explained. It is, however, another question whether these cases have been wrongly or irresponsibly managed, as measured by reasonably discoverable, valid considerations of law and legal administration.

In particular, I shall be questioning Woolman's diagnosis from these cases of 'a court uncomfortable with the direct application of the specific substantive provisions of the Bill of Rights' and 'in full flight from any meaningful engagement with Chapter 2 of the Constitution.'⁸ Whether a wider survey of the jurisprudence would warrant an over-all diagnosis of an excessive flight from substance is a question on which I hazard no judgment here. All I say here is that *NM* and *Masiya* do not, to my eye, support the diagnosis, nor is that, in my view, the best way for us to regard these cases. One feature common to both is the Constitutional Court's seeming gravitation to its inherent power to develop the common law in terms of Constitution sections 173 and 39(2) – as opposed to its judicial review power in terms of sections 8 and 172(1) – when undertaking modification of common law rules under pressure from the Bill of Rights. Woolman believes the Court moves too freely to the inherent power. He associates that tendency, as symptom or cause (or both), with excessive flight from substance. I aim to raise a doubt about any such connection.⁹

The main controversy over *Masiya* appears to me to turn, at bottom, more on a point of substantive disagreement between the Court and Woolman than on any notable disregard for Bill-of-Rights substance on the Court's part. The controversy over *NM* is more complicated, and more centrally my concern in these pages. It certainly is true that Woolman and the Court divide over when, if ever, the Constitutional Court ought to resort to an 'indirect' instead of a 'direct' application of the Bill of Rights to a common law doctrine or rule – the Court, in Woolman's view, making far too much use of

⁷ Woolman 'Amazing' (n 2 above) 762, 790 n 51.

⁸ Woolman 'Amazing' (n 2 above) 783.

⁹ I have nothing to say about another symptom or cause of flight that some might mention, to wit, the Court's readiness on some occasions to move to the 'justification' phase of a Bill of Rights case either without having decided the question of a substantive infringement, see, eg, *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) para 27, or, perhaps, having found an infringement on the basis of a merely 'notional' reading of the right in question. See S Woolman & H Botha 'Limitations' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2nd Edition, OS, 2005) ch 34 16-18.

‘indirect’. Such a division need not, however – or so I shall contend – reflect any reduced or absent sense on the Court’s part of responsibility to engage with the substance of Chapter Two and its several, rights-naming clauses. It might rather come down to a question of doctrinal good-housekeeping on which nothing of substance depends. The Court and Woolman are differing, I shall suggest, over how best to understand and sort out the respective offices of the Constitution’s two paths to judicial revision of the common law under constitutional pressure: revision as a remedy for constitutional violation pursuant to sections 172(1)¹⁰ and 8,¹¹ and revision in the exercise of judicial powers to develop the common law, with a view to promoting the spirit, purport, and objects of the Bill of Rights in terms of section 39(2). That filing-system question, I shall maintain, is entirely distinct from the one about when and how regularly the Court regards itself as on or off the hook for an elucidation of one or another of the specific clauses in the Bill of Rights.

In developing these claims, I shall be quite openly engaged in filling in passages of exposition and explanation that are missing from the Court’s opinions in *NM* and *Masiya*, to a degree that may sometimes strike readers as excessively indulgent of the Court, if not as entirely fanciful. In construing and re-presenting the work of the Constitutional Court in these cases, I take myself to be following something akin to what linguists and language-philosophers have called a ‘principle of charity’. ‘Something akin,’ not the genuine article, for this is not a work of philosophy, but rather an intended contribution to a lawyers’ kibitz on the work of the Constitutional Court.

The ‘principle of charity’, Wikipedia tells us,

¹⁰ 172.(1) When deciding a constitutional matter within its power, a court –
(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
(b) may make any order that is just and equitable ...

¹¹ 8.(1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
(2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.
(3) When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –
(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and
(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1) ...

4 Uses of interpretive 'charity'

is an approach to understanding a speaker's statements by interpreting the ... statements to be rational and, in the case of any argument, rendering the best, strongest possible interpretation of an argument.¹²

Donald Davidson, surely one of the principle's chief philosophical architects and expositors, also calls it 'the principle of rational accommodation,' and summarises as follows: 'We make maximum sense of the words and thoughts of others when we interpret in a way that optimises agreement.'¹³ Davidson meant 'optimise' as between thinking that the other must be holding to beliefs (and, relatedly, aims) that differ drastically from our own (else he couldn't have said what he did), and thinking that we must not have heard him right the first time.¹⁴

The philosophical underpinnings of the charity principle are far afield from our concerns here and need not delay us. All that matters from that department is the motivation for adherence to the principle, which the moniker 'charity' does not very well convey. The aim of interpretive charity is not generosity toward others, or anything like that. It is not to pay homage, deference, or respect to our interlocutors, or to avoid giving offense. It is not to demonstrate our own good manners, or to toe some Goody Two-Shoes line against critiques that are not 'constructive'. (I hold Stu Woolman's pull-no-punches style of court-watching to be entirely constructive and admirable.) No, the aim of 'charitable' interpretation is not any of those. The aim is to learn. It is aggressively to learn what there is to be learnt from puzzles the interlocutors pose to us, by assuming there is method in their madness and doing our best to ferret that out, using everything else we know or can guess (in part from their likeness and kinship to us) about where they are coming from. 'To see too much unreason on the part of others', Davidson says, is 'to undermine our ability to understand what it is they are so unreasonable about.'¹⁵ It is to risk missing issues that might merit our consideration.

There are hazards – normative pitfalls – in the way of such an approach to the construction of judicial opinions. For one: these writings enjoy among us the status of utterances of *law* by a socially recognised organ of authority to say what the law is. And maybe, therefore, it really does not do for us to go about pretending the writers have said things they did not mean to say (perhaps meant *not* to say), in our effort to make their writings accord with what we take

¹² http://en.wikipedia.org/wiki/Principle_of_charity (accessed 21 June 2008).

¹³ As above.

¹⁴ '[T]here is no deciding ... between the view that the Other has used words as we do but has more or less weird beliefs, and the view that we have translated him wrong.' Davidson *Truth* (n 1 above) 101.

¹⁵ Davidson *Truth* (n 1 above) 153.

to be legal reason – it being *they*, after all, and not *we*, who are the authorised law-sayers.

Lying just ahead are deep jurisprudential waters into which I do not choose to wade on this occasion. I mean only to grant up front the possible dangers from a ‘charitable’ approach, while pointing also to some possible gains. A close examination of *NM* and *Masiya*, from a methodological stance of all-but-last-ditch resistance against a conclusion of blatant error, failure of nerve, or flight from responsibility on the Court’s part, can demonstrate, I believe, some benefits of interpretive charity as a working disposition on our part – not necessarily suited, of course, to every moment in history or every judicial performance we may encounter. Such an examination can show how that posture may sometimes aid us in performing our task of getting at the truth of law or at any rate – more modestly – of developing culturally credible resources for the possible guidance of judicial performance in the future, with no less a view (here following Theunis Roux) to the judiciary’s ‘legal’ than to its ‘sociological’ and ‘institutional’ legitimacy.¹⁶

2 ‘Direct’ and ‘indirect’ application

Much of what is to follow turns on debates over when, if ever, the Constitutional Court ought to resort to an ‘indirect’ instead of a ‘direct’ application of the Bill of Rights to a common law doctrine or rule. Such debates sometimes risk falling into confusion and misunderstanding, because not everyone conceives or defines the distinction in exactly the same way, and perhaps some of us do not conceive or define it uniformly at every turn or in every context. It will, therefore, behoove us to survey briefly some of the variant senses of this distinction, and, in particular, to specify what Woolman – consistently – means by it in the work of his to which what follows is something of a rejoinder.

So far as I am aware, the distinction in South African legal discourse between direct and indirect application of the Bill of Rights

¹⁶ T Roux ‘Principle and pragmatism on the Constitutional Court of South Africa’ (2008) 7 I-CON 106 (Roux ‘Pragmatism’). In Roux’s vocabulary, the ‘legal legitimacy’ of judicial review rises and falls with perceptions of a court’s capacity to decide cases according to forms of reasoning acceptable to the legal community of which it is a part. Legal legitimacy refers to ‘the plausibility (rather than correctness) of a judicial decision or body of decisions according to applicable standards of legal reasoning.’ Thus defined, Roux explains, legal legitimacy is to be distinguished from two other sociological and institutional dimensions of the judiciary’s public standing, which Roux names ‘public support’ and ‘institutional security’ meaning the court’s capacity to resist political attacks on its independence. As above 109. Roux posits that a court presiding over a system of judicial constitutional review does well to act with an eye to all three dimensions of legitimacy. See as above 110-11.

first arose in regard to the question of so-called horizontal application of the Bill of Rights under the Interim Constitution (although, as we shall see, it has outgrown its context of origin). In terms of that debate, to apply the Bill of Rights 'horizontally' was to bring it to bear decisively, in a case in which (a) there was no state party and (b) it appeared that the pivotal legal doctrine or rule was (or might be) a rule or doctrine of the common law, as opposed to the terms of a statute.¹⁷ In such a case, either or both of the following would have to be true: A plaintiff bases a claim for relief on a rule or doctrine of the common law, and/or a defendant bases a defense (including the defense of 'absolution' or 'no cause of action') on a rule or doctrine of the common law. One or the other (or both) of the parties might question the compatibility with the Bill of Rights of the common law rule or doctrine on which the other relies. If that occurs, and the court rules in that party's favor on that basis, a horizontal application of the Bill of Rights will have taken place, under the definition we are now considering.

Consider, now, a case such as *NM*, in which the plaintiff charges the defendant with unauthorised disclosure of private information concerning the plaintiff, and the defendant seeks to respond by proving that she did not knowingly or intentionally publish without authorisation, but rather acted honestly (if mistakenly) in the belief that authorisation had been given. How might the Bill of Rights be brought to bear on this case, specifically section 14, which guarantees a right of privacy to everyone?

A court might proceed by drawing a standard of care from section 14, and then measuring the defendant's conduct by that constitutionally prescribed standard, with a view to holding the defendant liable for a delict if her conduct fails the constitutional test. Alternatively, a court might proceed by asking whether the extant common law rule – which absolves publishers of private information from tort liability where they did not intentionally or knowingly publish without authorisation – is consistent with section 14, with a view to possibly revising the common law rule in such a way that the defendant will be found liable for tortious conduct under the common law as revised to make it 'constitutional'. In the first instance, the court applies the Bill of Rights to *conduct*; in the second instance, it applies it to *law*.

¹⁷ See *Du Plessis v De Klerk* 1996 3 SA 850 (CC); 1996 5 BCLR 658 (CC) para 49 (Kentridge AJ) ('*Du Plessis*') (in effect, defining a 'vertical' case as one that either involves a state party or turns on a statute); S Woolman 'Application' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2nd Edition, OS, 2005) ch 31 (Woolman 'Application') 18 (similarly describing 'the traditional, vertical, view'); 4 (reporting general agreement that 'the heart of the application debate was whether the common law, when relied upon by a private party in a private dispute, was subject to constitutional review.')

This distinction – between testing *conduct* by a Bill of Rights standard, and testing *law* by a Bill of Rights standard – may have been what some early deployments of the direct/indirect distinction had at least partly in mind: application of the constitutional standard to conduct is ‘direct’ application, whereas application of it to law is ‘indirect’ application. If so, that usage of the distinction cannot survive today. As we shall see below, Constitution section 8(3) virtually rules out the immediate application of a Bill of Rights standard to any private person’s conduct, directing rather that all such applications be made, instead, to the legal rules and doctrines on which litigating parties rely to found their claims and defenses.¹⁸

Consider, then, another sort of choice that might confront a court in our invasion-of-privacy case, where the court is already committed to test only law, not conduct, under the Bill of Rights. A court disposed to rule in the plaintiff’s favor, despite the defendant’s proven defense of absence of intention to publish without authorisation, might proceed by first holding the extant, delictual law of privacy invalid by reason of inconsistency with a specific right guaranteed by some rights-granting clause in the Bill of Rights – here it would be section 14 (‘Everyone has the right to privacy ...’) – and then, by way of remedy for the unconstitutionality, directing a curative revision or ‘development’ of the common law. As explained further below, the court then would be acting under the aegis of Constitution section 172(1), or of Constitution section 8, or (perhaps it would be best to say) of both of those sections. Alternatively, the court might take its cue from Constitution section 39(2). It might then by-pass the question of the extant law’s possible invalidity by reason of inconsistency with a specific, rights-granting clause, and simply find the extant delictual doctrine unacceptably out of sorts with the overall ‘spirit, purport, and objects’ of the Bill of Rights. We might classify the first sort of judicial action as ‘direct’ application of the Bill of Rights, and the second sort as ‘indirect’.

We then would have severed any special connection of the direct/indirect distinction to cases involving horizontal application of the Bill of Rights, because the distinction as now defined is equally applicable

¹⁸ But the conduct/law distinction does survive in transmogrified form to post-section 8 debate. See, eg, H Cheadle ‘Application’ in H Cheadle, D Davis & N Haysom (eds) *South African constitutional law: The Bill of Rights* (2002) 19: ‘... [B]ecause generally stated rights are not appropriate vehicles for the imposition of standards of conduct, section 8 seeks to avoid application of the right to conduct of private persons by requiring either legislation or a common law rule ‘to give effect to the right.’ This constitutional motif of an intermediate law between the constitutional right and the conduct of the state or of the private actor repeats itself throughout the Bill of Rights.’ Woolman takes Cheadle to be saying, contentiously, that ‘the Bill of Rights rarely, if ever, applies directly to “conduct”. It applies to law.’ Woolman ‘Application’ (n 17 above) 155.

to cases that are incontestably vertical in nature.¹⁹ Take, for example, a case, which surely must be classed as vertical, in which the state prosecutes a person for alleged commission of the common law crime of sodomy. When that case came before the Constitutional Court, the Court employed the form of application of the Bill of Rights that we are now calling 'direct', so as to invalidate the crime of sodomy and erase it from the common law of South Africa.²⁰ Had the Court seen fit to do so, it could have achieved the same result 'indirectly', by holding that the common law of crime must be 'developed' so as to omit the crime of sodomy, in order to stay in tune with the overall spirit etc of the Bill of Rights.

To be as precise as possible about where we have come, we now have before us the following three, live possibilities:

- (a) 'direct' = declaration of invalidity followed by remedial development of the common law; 'indirect' = development of the common law to keep it attuned to the spirit etc. of the Bill of Rights, with no attendant declaration of invalidity.
- (b) 'direct' = a finding of the extant common law's inconsistency with norms or standards contained in one or another specific rights-granting clause; 'indirect' = no such finding, but only a finding of disharmony with the general spirit etc. of the Bill of Rights taken whole.
- (c) 'direct' = judicial action in terms of Constitution sections 172(1), 8; 'indirect' = judicial action in terms of section 39(2).

When Stu Woolman speaks of 'direct' versus 'indirect' application of the Bill of Rights, he tends to run these oppositions together. No doubt opposition 'b' must stand as his core, his official definition of the distinction.²¹ But Woolman sustains no effort to pry or to hold the three oppositions apart. Rather, he sometimes treats the three as a cluster, in which each opposition in some way entails, insinuates, attracts, or bleeds into both of the other two. Such a treatment flows naturally from Woolman's strongly held, carefully argued normative view that South African jurists *ought* to follow a discipline of holding the oppositions in fixed alignment. Woolman's construction is captured in the table below.²²

¹⁹ See Woolman 'Application' (n 17 above) 5 n 1 (observing that the 'application' debate must now be framed in terms of 'direct'/'indirect', not 'vertical'/'horizontal').

²⁰ See *National Gay & Lesbian Coalition v Minister of Justice* 1996 3 SA 850 (CC); 1996 5 BCLR 658 (CC) paras 73, 90 (*Sodomy Case*).

²¹ 'Direct challenges describe instances in which the prescriptive content of at least one specific substantive provision of the Bill of Rights applies to the law or to the conduct at issue. Indirect challenges describe instances in which the prescriptive content of no specific provision of the Bill of Rights applies to the law or to conduct at issue.' Woolman 'Application' (n 17 above) 5 n 1.

²² See generally Woolman 'Application' (n 17 above).

	‘direct’ (1)	‘indirect’ (2)
form of judicial power (a)	judicial-review power to declare invalidity and prescribe remedy involving revision of common law [1a]	inherent power to develop common law in normal course of adjudication [2a]
substantive test of inconsistency (b)	is common law inconsistent with requirements of a specific right in the Bill of Rights? [1b]	is common law inconsistent with general objects of Bill of Rights, even though not inconsistent with requirements of any specific rights? [2b]
controlling section of Constitution (c)	172(1) and/or 8 [1c]	39(2) [2c]

According to what Woolman urges as the best, overall, combined construction of the Constitution’s relevant texts and purposes, whenever a court chooses to proceed – or finds itself proceeding – in terms of any of 1a, 1b, or 1c, it ought to require itself concomitantly to proceed, on that occasion, in terms of other two members of triplet 1; and conversely, of course, for any court that finds itself proceeding in terms of any of the members of triplet 2.

Whether Woolman’s normative/textual arguments in favor of his preferred construction, and of a correspondingly disciplined juristic practice, entirely succeed is not our question here. My question will rather be whether the prism of Woolman’s preferred construction works to the overall advantage of clarity of analysis in approaching the work of the Constitutional Court. If the Constitutional Court should happen to be working with a different (and perhaps itself defensible) construction, then it may not. To be more specific: Suppose that (as I shall suggest the evidence shows) the Constitutional Court is quite comfortable combining 2a and 2c with 1b. Woolman finds that combination wrongheaded, or, at any rate suboptimal from the standpoint of assigning clear, distinct, and jurisprudentially cogent meanings to the several, relevant constitutional clauses. Call that the Court’s ‘construction error’. The construction error – 2a+1b+2c – cannot be counted as contributory towards a flight from meaningful engagement with the substance of the rights-naming provisions of Chapter Two, because one of its components – 1b – is entirely congenial to what Woolman means by engagement. The construction error and the ‘flight error’ (as we may call the latter) are two different things. Woolman sometimes seems to me to be detecting the flight error where only the construction error is clearly in evidence.

3 *NM v SMITH*

3.1 The case

Charlene Smith wrote a book about the public career of Patricia De Lille, an MP and a public figure. The book recounted De Lille's interventions on behalf of persons living with HIV/AIDS. These included an episode involving controversial drug trials at the University of Pretoria, in which the three women who became the plaintiffs in the case of *NM* – 'NM', 'SM', and 'LH' – were among the volunteer subjects. The three plaintiffs figure significantly in the book's account of the controversy, as persons living with HIV. They are in no way otherwise persons of the slightest public note nor would their names be recognisable by members of the public outside their own special circles of acquaintance.

Smith learned the plaintiffs' names from a copy of an in-house report of a professor's investigation of the medical-study controversy, conducted on behalf of the University and intended for restricted circulation. (No one complains of the means by which Smith obtained her copy.) The report refers to 'annexures' containing forms signed by the three plaintiffs, giving consent to the inclusion of their names in the report. The copy provided to Smith did not include the annexures. Smith's book, when published, identified the plaintiffs by name as persons living with HIV, as the report had done. Contrary to Smith's expectation, it emerged that the consents given by the plaintiffs to the report's author, Professor Strauss, were not general releases to disclose their medical information, with names attached, to the public at large, but only authorised a limited disclosure for purposes related to the University's investigation.

The plaintiffs brought an action against Smith for damages, claiming that her book's identification of them by name, without their consent, as persons living with HIV amounted to a violation of their common law rights to privacy, specifically in terms of the *actio iniuriarum*.²³ Under the common law as it then stood (and still stands, in the wake of the Constitutional Court's decision in *NM*), the plaintiffs could succeed only if Smith were found to have acted toward them in a manner that was not only objectively wrongful but also intentionally so.²⁴ Smith contended that any wrong she might have committed toward the plaintiffs, by way of publishing their

²³ In order to maintain clarity, I focus my examination of *NM* on the claims for damages against defendant Smith; I do not discuss the claims for other forms of relief, or the claims for damages against defendants Patricia De Lille and New Africa Books Ltd.

²⁴ See *NM* (n 5 above) para 55 (Madala J); para 151 (O'Regan J).

private information without their consent, was unintentional. The crux of her defense was that she acted in the honest (if mistaken) belief that the plaintiffs' consents, of which she read in the Strauss Report, covered unrestricted circulation of the information regarding them contained in the report. Apparently persuaded by Smith's testimony to this effect, the High Court absolved Smith of liability for tortious invasion of privacy.²⁵ The Supreme Court of Appeal refused review, giving no reasons, and the plaintiffs took their case to the Constitutional Court.²⁶

Three members of the Court – Langa CJ, O'Regan J, and Sachs J – concluded that the case against Smith disclosed a need to develop the common law so to remove an incompatibility with the objects of the Bill of Rights in the matter of protecting privacy. These members would have developed the common law so as to impose liability, on 'media defendants' only, for negligent (or unreasonable), wrongful disclosure of private information.²⁷ The Court's majority took a different tack. They joined an opinion by Madala J, holding that Smith's unauthorised disclosure of the plaintiffs' private information should be found intentional in terms of the extant common law standard of liability.²⁸ They accordingly ordered a judgment for damages against Smith²⁹ while declining to address any question of developing the common law.³⁰ Of the three justices who thought the common law must be developed, Langa CJ and Sachs J concurred in the order awarding damages to the plaintiffs, on the ground that the record showed negligence on the part of Smith.³¹ O'Regan J would have absolved Smith of negligence and, hence, of liability.³²

3.2 A Critique

Woolman's objections to the Constitutional Court's performance in *NM* are mainly directed to the decision and opinion of the majority. While the objections refer to specific, alleged deficiencies and missteps in this particular case, Woolman presents them as exemplary of broader, worrisome trends in the work of the Constitutional Court. These are most compendiously summed up as a 'lack of analytical rigour' suggestive of 'a penchant for outcome-based decision-making.'³³ In Woolman's view, the decision in *NM* 'appears to rest

²⁵ See *NM* (n 5 above) para 46 (Madala J); para 125 (O'Regan J).

²⁶ See *NM* (n 5 above) para 19.

²⁷ See *NM* (n 5 above) paras 92-94 (Langa CJ); paras 170-19 (O'Regan J); paras 203-04 (Sachs J).

²⁸ See *NM* (n 5 above) paras 58-65.

²⁹ See *NM* (n 5 above) para 90.

³⁰ See *NM* (n 5 above) para 57.

³¹ See *NM* (n 5 above) para 92 (Langa CJ); para 207 (Sachs J).

³² See *NM* (n 5 above) para 189.

³³ Woolman 'Amazing' (n 2 above) 762.

upon a deeply-felt offence to the majority's moral sensibility about how vulnerable persons in our society ought to be treated.'³⁴

Woolman's bill of particulars includes the following:

(1) The majority ended up acting 'as a trier of fact in a run-of-the-mill *actio iniuriarum* matter'³⁵ – a sort of task, Woolman evidently means to say, that the Constitutional Court was not created to do.

(2) The majority's crucial factual determination regarding Smith's intention is 'contrary to the evidentiary record', which 'cannot support a factual finding that the respondents had acted intentionally to harm the privacy and the dignity interests of the applicants.'³⁶

(3) The majority failed to provide an adequate explanation for why, once they had determined that the case would be disposed of by applying an unmodified, long-established common law standard of liability, they did not dismiss the appeal as being no proper concern of the Constitutional Court.³⁷

(4) The majority diminished the Constitution by declining to take up for consideration a possible 'challenge to the *actio iniuriarum* grounded in a specific substantive provision of the Bill of Rights' or the possible 'creation of a self-standing constitutional action grounded in the right to privacy or the right to dignity.'³⁸ This objection echoes prior pleas from Woolman, for a shift of the Court's emphasis away from 'indirect' application of the Bill of Rights pursuant to section 39(2) to 'direct' application pursuant to section 8.³⁹ The Court's penchant for section 39(2) is deplorable, Woolman maintains, because it plays into the false seductions of a so-called minimalist approach to constitutional adjudication that is unsuited to the present, early state of development of South African constitutional jurisprudence and culture.⁴⁰ It invites the Court to issue highly contextualised decisions that may feel right to the justices and many of those looking on, thus avoiding or postponing intracurial division and public controversy, but that remain unexplained on the level of principled, clause-by-clause exposition of the meanings of the rights-guarantees in Chapter 2 and the values underlying them.⁴¹ Yet the Court's presumed, special capacity for that more challenging – in part because potentially divisive – task of principled explication is its *raison d'être par excellence*. Performance of that task, Woolman perceives, is a service to the country that only the Constitutional Court

³⁴ Woolman 'Amazing' (n 2 above) 787.

³⁵ Woolman 'Amazing' (n 2 above) 783.

³⁶ Woolman 'Amazing' (n 2 above) 781.

³⁷ See Woolman 'Amazing' (n 2 above) 782 & n 40; Constitution of the Republic of South Africa, 1996 sec 167(3)(b) (The Constitutional Court 'may decide only constitutional matters, and issues connected with decisions on constitutional matters').

³⁸ Woolman 'Amazing' (n 2 above) 783.

³⁹ See generally Woolman 'Application' (n 17 above).

⁴⁰ Woolman 'Amazing' (n 2 above) 764-65 n 4, 784-87.

⁴¹ Woolman 'Amazing' (n 2 above) 784-86.

can provide, and that it must perform for the sake of the rule of law in South Africa.⁴²

(5) In sum, the majority's narrow, non-venturesome treatment of the case shirked a sort of service to the country that the Court was created to provide, to wit: authoritative delineation and explication of the principles animating the several specific substantive rights in Chapter 2, conveyed with definition sufficient to 'determine the actual validity of the rule being challenged in the instant matter and of similar rules challenged in subsequent matters'; also to enable citizens and government officials to 'ensure that their behaviour conforms to our Constitution', and also to equip lower courts and lawyers to 'identify the law and thereby settle, litigate and adjudicate, with some confidence, Bill of Rights cases.'⁴³ *NM*, Woolman concludes, 'shows a court in full flight from any meaningful engagement with Chapter 2 of the Constitution.'⁴⁴

Woolman's observations are eminently worth pondering, and by no means without warrant in the majority opinion in *NM*, as written. I mean to show, however, how the complaints turn on matters of interpretation that can be resolved in the Court's favour – with, no doubt, varying degrees of effort from the reader. The opinion in *NM* is indeed thin and chary of explanation, in places where it could and should be thicker and more forthcoming. Contrary to Woolman's view, however, I think the *NM* majority got to the right answer, by a proper path (although the path preferred by Langa CJ seems to me superior), and for essentially (and detectably) right reasons. I say so with utmost respect to the opinion in the case that most ambitiously addresses the task of substantive elucidation of constitutional rights that Woolman misses from the Court's work, the dissenting opinion of O'Regan J. Admirable as that opinion is in many ways, in the end it decides the case wrongly, in my view. Moreover, it perhaps does so for causes not unrelated to O'Regan J's evident commitment to (and talent for) the work of principled exposition of the contents of fundamental rights.

3.3 A pleading choice

In order to succeed with their case against Smith, the *NM* plaintiffs had to show that Smith's conduct not only had harmed them in fact, but had done so in a way that was liability-engendering, according to the terms of some law meant to protect persons in the plaintiffs' position against the sort of harm at issue. Of course, it would be up to the plaintiffs to say what law they had in mind. Their answer was: the common law of delict, and specifically the *actio iniuriarum*.⁴⁵

⁴² See Woolman 'Amazing' (n 2 above) 786-87.

⁴³ Woolman 'Amazing' (n 2 above) 763.

⁴⁴ Woolman 'Amazing' (n 2 above) 783.

⁴⁵ See *NM* (n 5 above) paras 22, 27-29.

A different response was also imaginably available. The plaintiffs might have pleaded as their cause of action Constitution section 14 ('Everyone has the right to privacy'), as rendered applicable to Smith's conduct by Constitution section 8(1) ('The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state') and 8(2) ('A provision of the Bill of Rights binds a natural ... person if, and to the extent that, it is applicable ...').⁴⁶ Rather than (or in addition) to claiming damages for a common-law tort, the plaintiffs might have claimed on the basis of a constitutional tort. They did not do so, and it will repay us to ask why they did not. The common-law path selected by the plaintiffs was not, after all, free and clear of evident obstacles. The plaintiffs (or their lawyers) would have known the list of conventionally established requirements for success in a claim for invasion of privacy based on the *actio iniuriarum*.⁴⁷ They would have known that among these was a showing of the defendant's intention (*'animus iniurandi'*) to commit, as against the plaintiff, the wrong consisting of a publication of private facts concerning the plaintiff, without the plaintiff's leave or against her will – where the category of 'private' facts includes any and all facts, not yet publicly available, whose disclosure to the public would be expected to 'cause mental distress and injury to anyone possessed of ordinary feelings in the same circumstances'.⁴⁸

Consider, then, a defendant who publishes a plaintiff's entire, anguished medical history (naming her), in the honest but false belief that the plaintiff has given leave for publication, or that the information has been previously (lawfully) published and hence is no longer private. Such a defendant will indeed have committed the wrong in question, 'objectively' described as above; her action will, in that sense, have been wrongful under the law. Missing from the case, however, will be the usual basis for an inference of the defendant's intention to mistreat ('wrong') the plaintiff in that way – to wit, the defendant's actual knowledge of all of the facts that, in combination, would render her action wrongful.

To put the matter simply: Under the common law of delict as it stood when the plaintiffs filed their case against Smith, negligent but non-intentional commission of the objective wrong of unauthorised publication of private facts was not deemed legally actionable, 'as a

⁴⁶ See *NM* (n 5 above) para 132 (O'Regan J) (confirming the applicability of Constitution sec 14 to private actors).

⁴⁷ See *NM* (n 5 above) para 55 (Madala J); para 151 (O'Regan J).

⁴⁸ *NM* (n 5 above) para 34 (Madala J), citing *National Media Ltd v Jooste* 1996 3 SA 262 (A); 1996 2 All SA 510 (A). O'Regan J preferred to leave open whether the Constitution might possibly require some expansion of this common-law test for the protected ('private') status of the facts disclosed, but she was clear that 'the publication of otherwise confidential information about a life-threatening illness is likely to cause distress to the person concerned', and thus falls under the common-law test for liability. *NM* (n 5 above) para 137.

rule'.⁴⁹ Plaintiffs might sometimes have succeeded on the basis of a rebuttable presumption of intention, once objectively wrongful publication was shown,⁵⁰ or by establishing a modified form of intention known as *dolus eventualis* (or reckless disregard) on the defendant's part,⁵¹ but a defendant who could satisfy a judicial fact-finder that her mistake was *bona fide*, although careless, would escape liability.

In *NM*, the available evidence was consistent (at least) with defendant Smith's claim of an honest belief that the plaintiffs had consented to unrestricted public naming of them as the persons (living with HIV) who had played certain, described roles in the drug-trial controversy. Whether that evidence could further support a claim of absence of negligence on Smith's part is much more doubtful, as we shall see. Thus there was, from the beginning, reason to calculate that the plaintiffs' prospect for success might depend on whether the body of law (the 'cause of action') they invoked to support their claim would impose liability on a merely negligent defendant.⁵² At the moment when the plaintiffs sued, the common law of delict evidently was against them on that potentially crucial point. By contrast, for aught anyone could then tell, the law of the putative constitutional tort based on section 14 of the Bill of Rights might have been with them. Even so, the plaintiffs chose to base their claim on the *actio iniuriarum*, and not on section 14 of the Bill of Rights. That choice requires explanation.

3.4 Two litigation agendas compared

In the view of Madala J, the plaintiffs were forced to their pleading choice by the Constitutional Court's 1997 decision in *Fose*.⁵³ *Fose* certainly does leave a doubt about when, if ever, 'constitutional damages' might be awarded in respect of a violation of a provision in the Bill of Rights. It seems to me, however, for reasons I am about to present, that a complete explanation for the *NM* plaintiffs' pleading choice would have to include the further point that a claim expressly and immediately invoking the prescriptive content of section 14 of the Bill of Rights, as a test of the legally actionable character of Smith's conduct, would have brought the plaintiffs to very much the same

⁴⁹ *NM* (n 5 above) para 55 (Madala J).

⁵⁰ See *NM* (n 5 above) para 65 (Madala J); para 93 (Langa CJ); paras 125, 155, 169 (O'Regan J).

⁵¹ See *NM* (n 5 above) para 155 (O'Regan J).

⁵² The summons issued by the plaintiffs makes clear they understood that this was so. See *NM* (n 5 above) para 124 (O'Regan J) (describing the summons).

⁵³ *Fose v Minister of Public Safety and Security* 1997 3 SA 786 (CC); 1997 7 BCLR 851 (CC); see *NM* (n 5 above) para 27.

pass, regarding the question of that conduct's intentionality, as resulted from their common-law claim.

This consequence follows inexorably from the mandate of Constitution section 8(3), as construed by the Constitutional Court.⁵⁴ That section provides:

When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court –

(a) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and

(b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1).

By this seemingly clear command of constitutional law, any court disposed to impose civil liability, in terms of standards of conduct drawn from one or another of the rights-guarantees in the Bill of Rights, is required to proceed in one of three ways, and not otherwise. Either (1) the court must decide the case in terms of legislation that gives due effect to the constitutional right in question; or (2) in the absence of such legislation, the court must decide the case in terms of applicable common law that gives due effect to the constitutional right in question; or (3) if the court decides that the applicable common law does not currently give due effect to the right, the court must decide the case in terms of the common law as developed by the court so as to cure the deficiency.⁵⁵

Accordingly, in *NM*, the result of a claim for a 'direct' application of section 14 to Smith's conduct would have been the Court's having to decide two principal issues in tandem: whether giving due effect to

⁵⁴ That is to say, it follows inexorably from the Constitutional Court's authoritative, 'black letter' construction of the three subsecs of sec 8, as announced in *Khumalo v Holomisa* 2002 3 SA 401 (CC); 2002 8 BCLR 771 (CC) ('*Khumalo*') paras 29-32 and precisely summarised by Woolman 'Application' (n 17 above) 6, 45. It would not follow from Woolman's 'preferred reading' of sec 8, summarised at Woolman 'Application' (n 17 above) 11, 45-46. But of course the *NM* plaintiffs' lawyers would have had to frame their case in the shadow of the Constitutional Court's reading, not that of any commentator.

⁵⁵ This directive carries out what logic would seem to require in its absence. We can use the *NM* case to illustrate. Suppose a court finds that Smith's conduct has 'limited' (ie, violated) NM's *prima facie* right to privacy under Constitution sec 14. Smith will seek refuge under Constitution sec 36(1). She will claim that she has acted in terms of law of general application, namely, the extant common law of delict, which – as she will claim – insulates her from liability as long as her conduct has not been knowingly and intentionally wrongful. The court, then, will have to decide whether that rule of the common law, bestowing a legal privilege to commit negligent (although objectively wrongful) publication of private information, is reasonable and justifiable in terms of Constitution sec 36(1). If the answer is 'no,' the court will have no option but to develop the common law so as to cure the defect.

section 14 requires that Smith be held liable in this case, given the evidence and what it shows; and whether (and, if so, how) the common law as it currently stands must be ‘developed’ to encompass at least some instances of non-intentionally but objectively wrongful invasion of privacy. The first question for decision surely would have been (a) whether Smith’s conduct was both objectively wrongful and *animo iniurandi* according to the pre-existing common-law standard. If yes, the plaintiffs would prevail.⁵⁶ If no, the next question would have been (b) whether the plaintiffs’ case against Smith discloses a need to expand common-law liability to catch at least some instances of non-intentionally but objectively wrongful publication of private facts, in order to vindicate fully the right of privacy guaranteed by Constitution section 14. If no, the defendant would prevail. If yes, the next question would have been (c) precisely what modification of the common law is required in order to give due effect to the constitutional right of privacy, in the light of possibly competing constitutional principles and values such as freedom of expression – a question that would have been decided by judges who were at the same time, inevitably, thinking about (d) whether one or another newly expanded zone of liability that the Court might approve would catch Smith’s conduct.

Compare that agenda with the one that plaintiffs basing their claim on the *actio iniuriarum* must anticipate. Taking the common law as it stands, they can succeed by establishing that (a) Smith’s conduct was both objectively wrongful and *animo iniurandi* in terms of the extant common law standard of liability.⁵⁷ Alternatively, given the court’s inherent power to develop the common law,⁵⁸ combined with the court’s duty to develop the common law so as to promote the spirit, purport, and objects of the Bill of Rights, imposed by Constitution section 39(2),⁵⁹ the plaintiffs can succeed by establishing, in the light of their case against Smith, all of the following: (b) that the common law’s current, blanket prescription of non-liability in all instances of non-intentionally but objectively wrongful publication of private facts is not acceptable to the Bill of Rights; plus (c) and (d) that when the common law is properly

⁵⁶ For completeness, we should note the possibility of the defendant persuading the court that the extant common law standard must undergo development in her favor, either in terms of Constitution sec 8(3) (in order to give due horizontal effect to the right of freedom of expression guaranteed by sec 15), or in terms of sec 39(2) (in order to keep the common law in tune with the objects of the bill of rights in the matter of freedom of expression).

⁵⁷ And also, if necessary, successfully defending that standard against complaint that it unduly constricts constitutionally valued freedom of expression.

⁵⁸ ‘The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to ... develop the common law, taking into account the interests of justice.’ Constitution sec 173.

⁵⁹ *Carmichele v Minister of Safety and Security* 2001 4 SA 938 paras 33-39, makes clear that a court is required to consider whether such development of the common law is required in any case where a party urges the point.

modified in order to give due effect to the constitutional right of privacy, in the light of possibly competing constitutional principles and values such as freedom of expression, Smith's conduct in this case will render her liable to the plaintiffs.

The two agendas look virtually identical.⁶⁰ Therefore (the bottom line): Since *Fose* suggests the possibility of special obstacles facing claims for constitutional damages, the plaintiffs' course of least resistance was to base their demand for damages on a claim of a common law violation of privacy under the *actio iniurarum*, with section 39(2) hovering overhead. To my mind, Madala J's opinion adequately (if somewhat elliptically) evinces a clear appreciation of the entire line of thought I have just been unpacking.⁶¹ At the very least, Madala J's opinion is in all respects consistent with this line of thought. If, as Woolman truly says, the opinion never poses the possibility of 'the [judicial] creation of a self-standing constitutional action grounded in the right of privacy',⁶² that is because the applicants, it would seem for sufficient reasons that the majority may fairly be taken to have understood, chose not to start up that particular formulation of their claim.

3.5 Jurisdiction

Although the plaintiffs thus chose to rely on a common law and not a constitutional cause of action, their appeal to the Constitutional Court was quite patently and undeniably one that fell within that Court's subject-matter jurisdiction – limited though that jurisdiction surely is to 'constitutional matters' and issues 'connected to' constitutional matters.⁶³ The overarching legal problem presented by the case is whether the common law of delict, in regard to invasion of privacy, requires some modification in order to keep it in line with the Bill of Rights taken as a whole. Involved, as one immediately sees, is not only a question about whether – and if so, how far – the common law *must* be altered so as to attach liability to at least some instances of non-intentionally wrongful disclosure of private facts, in order to keep faith with the Bill of Rights in regard to privacy and dignity. Equally involved is a question about whether – and if so, how far – the common law *may permissibly* impose such liability, having in mind the commitment of the Bill of Rights in regard to freedom of expression. These are obviously issues of full-scale constitutional import.

⁶⁰ Or very closely so. Arguably, there is a difference, which I will address at the close of my discussion of the *NM* case (see below part 3.10) and in my discussion, to follow, of *Masiya*.

⁶¹ See *NM* (n 5 above) paras 24, 27, 55-57.

⁶² Woolman 'Amazing' (n 2 above) 783.

⁶³ Constitution sec 167(3)(b).

Woolman sees *NM* as a case in which the Constitutional Court majority found no occasion to consider these constitutionally fraught issues of common-law development, because it decided the case, instead, by overturning the High Court's factual conclusion that Smith's objective violation of the plaintiffs' privacy was non-intentional and hence non-actionable under the extant common law standard. That might seem to invite a question about why the majority did not order the case dismissed for lack of jurisdiction, once it perceived that the case could and would be decided on standard, common-law grounds ('run-of-the-mill' grounds, Woolman calls them).⁶⁴ And indeed, the majority must be faulted for its own complicity in creating an impression of the irrelevance of the Bill of Rights to its disposition of the case.⁶⁵

That impression, however, is mistaken. We shall see that it is at least an open question whether the *NM* majority did not, in effect, 'develop' the common law in response to constitutional pressure. (In that regard, the majority may be faulted for misapprehending the implications and ramifications of its own decision in the case.) But suppose we say that it did not. The majority could still be right in affirming the Constitutional Court's jurisdiction in this case, even after reaching its conclusion against any constitutionally imposed need for adjustment of the common law. Jurisdiction would hold, as long as the case presented a fairly debatable question of such a need – including of a need to *weaken* the *actio iniuriarum* in deference to freedom of expression; for surely such a question is itself a constitutional matter. (Ask yourself: Does the Constitutional Court forfeit jurisdiction by deciding, after argument, to uphold as constitutional a plausibly challenged statute?)⁶⁶

The very presence of the dissents in this case would thus seem to settle in the affirmative the question of jurisdiction. At all events, the very question of how to construe and apply the extant common law to

⁶⁴ See Woolman 'Amazing' (n 2 above) 782 n 40: '[T]he court often accepts cases prior to the meaningful application of its collective "mind" to the question of whether or not the case genuinely raises a constitutional issue.' For an example of a jurisdictional dismissal, upon its becoming apparent to the Court that no constitutionally-pressured development of the common law is in the offing, see *Phoebus Apollo Aviation CC v Minister of Safety and Security* [2002] ZACC 26; 2003 1 BCLR 14 paras 10-12.

⁶⁵ See *NM* (n 5 above) para 69 (excusing the Court from considering the possible impact on freedom of expression from its decision to hold Smith liable, on the ground that 'this judgment is not extending the common law definition of intention to include negligence in relation to the publication of private medical facts').

⁶⁶ If, as I assert, the Constitutional Court is competent to hear any non-frivolous claim of a need (in terms of sec 39(2)) to develop a common-law rule on which a party to the case relies, the effect may be to extend the Court's jurisdiction too broadly for your comfort. If so, the fault lies not in the Court but in the drafters of the Constitution. See FI Michelman 'The supremacy of the Constitution and the rule of law' in S Woolman *et al* (eds) *Constitutional law of South Africa* (2nd Edition, OS, 2005) ch 11 7-9 (Michelman 'Supremacy').

facts of the sort presented by the case of *NM*, being determinative of whether the common law must undergo development in terms of section 8 or 39, is itself drenched in constitutional-legal considerations. All of the common-law-framed issues in the case – whether the facts concerning the HIV status of the plaintiffs were of ‘private’ quality and whether the private character of those facts had been fatally compromised by previous disclosure for allegedly limited purposes;⁶⁷ whether Smith’s conduct was intentionally wrongful in the relevant, legal sense;⁶⁸ whether that conduct was in any degree negligent, and, if so, in what specific respects⁶⁹ – stood to be decided in the shadow of the Bill of Rights and of the looming possibility that the common law might, depending on how they were decided, have to be developed under the mandate of section 39(2).

Madala J wrote for the majority as follows:

The dispute before us is clearly worthy of constitutional adjudication and it is in the interests of justice that the matter be heard by this Court since it involves a nuanced and sensitive approach to balancing the interests of the media, in advocating freedom of expression, privacy and dignity of the applicants irrespective of whether it is based on the constitutional law or the common law. This Court is in any event mandated to develop and interpret the common law if necessary.⁷⁰

The last sentence is crucial. In the light of what precedes it, it states why the case does ‘genuinely raise a constitutional issue’⁷¹ and it shows that the *NM* majority in this case necessarily undertook more (and did more) than merely ‘act as a trier of fact in a run-of-the-mill actio iniuriarum matter.’⁷²

I shall make these matters more concrete in discussion to follow below. For now, the point simply is that no one conversant with the established commitment of South African constitutional jurisprudence to a pervasive influence for the Bill of Rights throughout the length and breadth of the country’s law⁷³ could doubt that the knot of common-law controversies in *NM* deserved – if it did not demand – the attentions of at least one of South Africa’s two pinnacle courts, exercising a responsibility imposed on both of them (given how the plaintiffs chose to frame their case) by section 39(2). Had an appeal to the Supreme Court of Appeal been an open possibility in this case, and the Constitutional Court nevertheless

⁶⁷ See *NM* (n 5 above) paras 34-45 (Madala J); paras 135-137; paras 142-43 (O’Regan J).

⁶⁸ See *NM* (n 5 above) paras 58-65 (Madala J); paras 155-69 (O’Regan J).

⁶⁹ See *NM* (n 5 above) paras 100-11 (Langa CJ); paras 183-89 (O’Regan J).

⁷⁰ *NM* (n 5 above) para 31.

⁷¹ Woolman ‘Amazing’ (n 2 above) 782 n 40.

⁷² Woolman ‘Amazing’ (n 2 above) 783.

⁷³ See Michelman ‘Supremacy’ (n 66 above) 37-41.

accepted the case for hearing, I would have expected from the Court some careful explanation for its choice thus to allow circumvention of the SCA. That, however, was not the state of affairs confronted by the Constitutional Court when NM's application arrived at its doorstep. The SCA had already removed itself from the case by its summary refusal of leave to appeal.⁷⁴

3.6 A puzzle

The Constitutional Court divided sharply over assessment of the evidence concerning the intentionality of Smith's conduct. Writing for a majority of seven justices, Madala J concluded that Smith acted intentionally, within the terms of the doctrine then and here surrounding the *actio iniuriarum*.⁷⁵ In the views of Langa CJ and Sachs J, Smith's conduct, although not intentionally wrongful, was negligent or unreasonable (and thus liability-producing under the common law as they would have had it developed).⁷⁶ In the view of O'Regan J, Smith's conduct was entirely free of fault.⁷⁷ There are two divisions worth exploring here: first, the division between Madala J's majority and the three justices – Langa CJ, Sachs J, and O'Regan J – who rejected the majority's finding of intentionally wrongful conduct on the part of Smith; and, second, the division among those three over the question of Smith's negligence.

Smith had directed her trial testimony to explaining how she acted in the honest belief either that the plaintiffs' names had already been disclosed to the general public or else that the plaintiffs had fully and finally waived objection to any such disclosure. The High Court had absolved Smith of any intention to act contrary to the plaintiffs' wishes in this regard. As O'Regan J's extensive and careful summary amply demonstrates, such an inference is, at the very least, reasonably supportable from essentially unchallenged components of Smith's testimony.⁷⁸ But then a nagging question arises: How are we to explain the majority's apparent deviation from the established practice of deference by appellate tribunals to trial court findings on issues of fact? That looks to me like Sherlock Holmes's dog that did not bark: a puzzle we should probe, if we – I mean we as academics – mean to leave no stone unturned in getting to the innards of the problem presented to the Constitutional Court by the *NM* case. The question all the more strikingly demands our attention because the

⁷⁴ See *NM* (n 5 above) para 26.

⁷⁵ See *NM* (n 5 above) paras 58-65.

⁷⁶ See *NM* (n 5 above) paras 92-93 (Langa CJ); paras 205-07 (Sachs J).

⁷⁷ See *NM* (n 5 above) paras 155-69 (intention); paras 183-89 (negligence).

⁷⁸ See *NM* (n 5 above) paras 157, 159-64.

majority itself declined to address it, despite its having been pressed by O'Regan J in dissent.⁷⁹

Academics can speculate – sometimes profitably – about imaginable, realist-style explanations for such puzzling judicial silences. (Was the Court just hell-bent on imposing a result that it likes? Did some intracurial disagreement get in the way of full transparency?) In keeping with my general undertaking for this essay, I choose a different path of speculation – that of assuming (or pretending, if you like that better) that the *NM* majority thought the legal reasons for its action (here, overturning a lower court's factual determination) so obvious as not to require explanation. The idea is to see what we might learn about the *legal* problem presented to the court by the case at hand by giving the court every benefit of the doubt, working to make their judgment, as a follower of Ronald Dworkin might say, the best that it can be.

Approaching the matter in that spirit, we may discover that the majority's finding of intentionally wrongful action on Smith's part, disputable though it surely is, is no more flatly 'contrary' to the evidentiary record than an opposite finding is.⁸⁰ We may find that, *pace* all of Langa CJ, O'Regan J, and Stu Woolman, the record (as described by the opinion-writers in *NM*) can indeed 'support a factual finding that [Smith] had acted intentionally to harm the privacy and dignitary and dignitary interests of the applicants.'⁸¹ Judgment on this point may depend partly on what you mean by 'intentionally', but that feature in the case is, as I have already pointed out and shall explain further below, a part of what makes this case indubitably one of constitutional law for the Constitutional Court to decide.

3.7 'Incremental development' and Smith's 'intention'

Therefore, consider Constitution section 39(2). Remember how it goes?

When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

All right, then: Where there is fair room for disagreement over the proper gloss on statutory terminology, and the choice is outcome-determinative for the case *sub iudice*, courts are instructed by the Constitution to prefer the gloss that they find to be the more truly

⁷⁹ See *NM* (n 5 above) paras 125, 169.

⁸⁰ Woolman 'Amazing', (n 2 above) 781.

⁸¹ As above (invoking the opinions of Langa CJ and O'Regan J in *NM*).

promotive of the objects of the Bill of Rights. How goes it, then, when a like question arises with respect to common law terminology?

Please don't stand there painting me, along with Stu Woolman, into 'some ... benighted Hartian, positivist view'⁸² of the common law, or telling me that there is so such thing as 'common law terminology' to make a match with statutory terminology. I join Woolman in knowing – and you know, too – that there very obviously is such a thing, which is not to say that Woolman and I do not also fully understand the common law to be, at bottom, an assemblage of always open-ended principles, not of closed-ended rule-sentences. (We can leave aside whether the latter is any the less true of statute law.)⁸³ Where Woolman and I both stand our ground is on the point that lawyers and the rule of law cannot make do with a common law discourse that is not densely populated by rule statements, 'common law terminology'. We both – and so do you, Reader – 'work within a tradition ... of which South Africa is most avowedly a part', which 'recognises rules as a necessary feature of the legal [including the common law] landscape.'⁸⁴ Witness:

For the common law action for invasion of privacy based on the *actio iniuriarum* to succeed, the following must be proved:

- (a) Impairment of the applicants' privacy;
- (b) Wrongfulness; and
- (c) Intention (*animus iniurandi*).⁸⁵

The elements of the *actio iniuriarum* are the intentional and wrongful infringement of a person's *dignitas, fama, or corpus*.⁸⁶

Those are two somewhat variant, but essentially identical, renditions of the same, single instance of a genus that lawyers routinely call 'rules' of the common law. As such, they exemplify perfectly what I mean by my jurisprudentially obtuse expression, 'common law terminology', coined by way of analogy to 'statutory terminology'.

Now, cases arise in which statutory terminology is found unacceptably out of sorts with the Bill of Rights, on any reading of the statute falling within the outer limits imposed by a decent respect for grammar and lexicon.⁸⁷ In those cases, by constitutional command, a judicial declaration of the statute's 'invalidity' – unconstitutionality

⁸² Woolman 'Amazing' (n 2 above) 789.

⁸³ See generally, on these matters, R Dworkin *Law's Empire* (1986).

⁸⁴ Woolman 'Amazing' (n 2 above) 791.

⁸⁵ *NM* (n 5 above) para 55 (Madala J).

⁸⁶ *NM* (n 5 above) para 151 (O'Regan J) (citing both Voet *Commentary on the Pandects* 47 10 1 and *R v Umfaan* 1908 TS 62 at 66 (Innes CJ)).

⁸⁷ See, eg, *National Coalition for Gay & Lesbian Equality v Minister of Home Affairs* 2000 2 SA 1 (CC), 2000 1 BCLR 39 (CC) paras 25-26 (*Home Affairs*).

— must ensue.⁸⁸ How goes it with cases in which common law terminology is similarly found to be irreparably out of sorts with the Bill of Rights: say, because it would flatly restrict civil liability for certain sorts of wrongful harming to instances in which the wronging is intentional, when the Bill of Rights would be better satisfied by lifting that flat restriction? You might answer: In such cases, the common law is to be declared invalid as it stands and then remedially 'developed' so as to cure the defect. You might offer as an example of such a cure (passing, for now, the absence of any declaration of invalidity) the bit of terminological surgery supported by Langa CJ, O'Regan J, and Sachs J in *NM*, according to which the term 'intention (*animus iniurandi*)', where it appears in item (c) in Madala J's above recital of the elements of the civil cause of action for invasion of privacy, would be replaced (in some, if not all, categories of cases) by the term 'intention (*animus iniurandi*) or negligence'. We have there, as it were, a remedy of 'reading in'. (Compare it with a replacement of 'spouse', in a statute, by 'spouse or partner, in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support'.)⁸⁹

Have you begun to glimpse the point I am after? Section 39(2) contains an express instruction — call it a constitution-conforming instruction — to judges engaged in the interpretation of statutory terminology, according to which the judges must interpret with a view to promoting the spirit, purport, and objects of the Bill of Rights, presumably *before* deciding whether they must declare the statute invalid and resort (perhaps) to remedial reading-in. On its face, section 39(2) entirely omits any parallel, express instruction to judges engaged in the contextualised application (as opposed to any surgical alteration by excision or insertion of words) of common law terminology. Since such an instruction does appear in the Interim Constitution, one might pause for a moment to wonder whether the omission was intentional.⁹⁰ It is difficult, however, to conceive what the drafters might have intended by it. Are there, after all, no cases in which a due regard for the objects of the Bill of Rights would, or should, crucially affect a judge's interpretive shading and application

⁸⁸ See Constitution sec 172(1)(a).

⁸⁹ *Satchwell v President of the Republic of South Africa & Another* 2002 6 SA 1 (CC), 2002 9 BCLR 986 (CC) para 37.

⁹⁰ Compare Constitution of the Republic of South Africa Act 108 of 1994 (*Interim Constitution*) sec 35(2):

No law which limits any of the rights entrenched in this Chapter, shall be constitutionally invalid solely by reason of the fact that the wording used *prima facie* exceeds the limits imposed in this Chapter, provided such a law is reasonably capable of a more restricted interpretation which does not exceed such limits, in which event such law shall be construed as having a meaning in accordance with the said more restricted interpretation.

(The Afrikaans version has 'reg' where the English has 'law'; and so, by the reasoning used by Kentridge J in *Du Plessis*, it presumably means to cover common law along with statute law. See *Du Plessis* (n 17 above) para 44.)

of common law terminology *as it stands* to the facts of a particular case? Thus, without any declaration of invalidity and concomitant surgery on the terminology as received? If so, are not the courts plainly – if implicitly – required by section 39(2) to shade and apply in favor of the Bill of Rights? And is it not a part of the Constitutional Court’s responsibility – and jurisdiction – to speak the last word on whether lower courts have done so properly in a given case?

In a luminous opinion for the Court in *K v Minister of Safety and Security* (‘NK’),⁹¹ O’Regan J answered all of those questions with a resounding ‘yes’. In *NK*, the plaintiff, having been assaulted and raped by police officers, sued the Minister for damages on a theory of *respondeat superior*. The plaintiff stood ready to contend for ‘development’ of the common law, but only if her case would not succeed ‘on a proper application’ of the extant common law rule of vicarious liability.⁹² You can see why she had to argue thus in the alternative. As O’Regan J explained:

the common law [normally] develops incrementally through the rules of precedent ... [It sometimes happens that a court must] determine whether a new set of facts falls within or beyond the scope of an existing rule. The precise ambit of each rule is therefore clarified in relation to each new set of facts. A court faced with a new set of facts, not on all fours with any set of facts previously adjudicated, must decide whether a common-law rule applies to this new factual situation or not. If it holds that the new set of facts falls within the rule, the ambit of the rule is extended. If it holds that it does not, the ambit of the rule is restricted, not extended.⁹³

O’Regan J had no doubt that a court facing such a decision is bound by the mandate of section 39(2) – to heed the Bill of Rights when ‘developing’ the common law – even though no ‘new’ or ‘changed’ common law rule is in the offing:⁹⁴

The overall purpose of section 39(2) is to ensure that our common law is infused with the values of the Constitution. It is not only in cases where existing rules are clearly inconsistent with the Constitution that such an infusion is required. The normative influence of the Constitution must be felt throughout the common law. Courts making decisions which involve the incremental development of the rules of the common law in cases where the values of the Constitution are relevant are therefore also bound by the terms of section 39(2). The obligation imposed upon courts by section 39(2) of the Constitution is thus extensive, requiring courts to be alert to the normative framework of the Constitution not only when

⁹¹ [2005] ZACC 8; 2005 6 SA 419 (CC) (NK).

⁹² *NK* (n 91 above) para 14.

⁹³ *NK* (n 91 above) para 16.

⁹⁴ As above.

some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue.⁹⁵

By 'incremental development', O'Regan J plainly meant the process she had just previously been describing: 'A court [facing] a new set of facts, not on all fours with any set of facts previously adjudicated, [deciding] whether a [settled] common-law rule applies to this new factual situation or not.' In *NK*, O'Regan J held that the judicial work in such cases should count as 'development' of the common law for the purposes of section 39(2).⁹⁶ It seems she felt she had to say so, in order to establish firmly the Constitutional Court's jurisdiction in the case before her, which she saw as presenting a question about whether certain facts fell properly within the rule of *respondeat superior*, construing and applying that rule with due regard to the Bill of Rights.

Madala J's majority in *NM* found that defendant Smith's conduct fell under the head of 'intentionally' wrongful privacy-invasion – insomuch as (or so the majority found from the evidence) Smith 'at least foresaw the possibility that the consent had not been given to the disclosure'.⁹⁷ Might we not well understand them as having followed in the tracks of O'Regan J's work in *NK* – deciding, under pressure from the Bill of Rights, 'whether the common law rule applies to this new factual situation or not'? 'While the claim falls to be dealt with under the *actio iniuriaum*,' the majority had already reminded us, 'the Constitution must inform the application of the common law'.⁹⁸ Were they just vamping there, or might we take those words as a cue to understanding that the majority's application to Smith's conduct of the common law category of 'intention' (which, we must remember, already included *dolus eventualis*), was shaded or tintured with a view to bringing or keeping the common law doctrine in full conformity with the objects of Bill of Rights?⁹⁹

It is not impossible to see why the majority might have chosen such a path to judgment in Smith's case, in preference to a judicially declared, surgical replacement of the term 'intention' in Madala J's item (c) by 'intention or negligence' – even granting that the latter

⁹⁵ *NK* (n 91 above) para 17.

⁹⁶ See *NK* (n 91 above) paras 16, 17.

⁹⁷ *NK* (n 91 above) para 64 (Madala J).

⁹⁸ *NM* (n 5 above) para 28; see also para 50 ('If human dignity is regarded as foundational in our Constitution, a corollary thereto must be that it must be jealously guarded and protected.').

⁹⁹ I am not alone in thus understanding Madala J's opinion; I have Sachs J for company. See *NM* (n 5 above) paras 201-02 (Sachs J) ('It is in [the] human rights context [addressed by the Bill of Rights] that the competing interests at stake in the present matter must be dealt with. In a fittingly accessible manner, Madala J has indicated how in the particular circumstances of this case competing needs with respect to human dignity, on the one hand, and freedom of expression, on the other, should be reconciled.')

technique carries with it a more immediately accessible package of instruction to learners of the law.¹⁰⁰ Terminological replacement is inevitably – to some irreducible degree – done at wholesale, and it is – to that irreducible degree – inevitably a blunter instrument than pure case-by-case steering. If – to illustrate – we follow the carefully plotted line of thought in O’Regan J’s *NM* opinion (agreed to by both Langa CJ and Sachs J), a due regard for the Constitution’s privacy right calls for addition of negligence liability to the *actio iniuriarum* for privacy invasion.¹⁰¹ But hold the phone. A due regard for the Constitution’s freedom-of-expression principle calls for at-least initial or provisional restriction of the to-be-added negligence liability to a category of ‘media’ defendants, with ‘media’ defined expansively enough to include the authors and publishers of books as well as the more strictly journalistic, daily and periodical print and electronic media.¹⁰² There is nothing in itself wrong with such a definitional-categorical approach, conducted with the sort of caution and care evinced by O’Regan J’s opinion. But neither can it be thought indefensible for a judge to decide that the process of drawing the distinctions that contextual variations will require is better pursued, at least for the time being, through the inflections of case-by-case application of the extant rule and the operations of *stare decisis* (as explained by O’Regan J in *NK*) than through process of word-and-phrase-surgery-and-implant otherwise known as ‘development’ of the common law, even if the choice for pure, case-by-case adjustment entails some sacrifice of transparency to rote learners.

Transparency is not entirely foregone, after all, as long as *stare decisis* holds in measurable degree. That is why I say that Madala J spoke too hastily in saying that there was no need for him to consider any possible ‘chilling effect’ of his judgment on freedom on expression, given that (as he said) he was merely applying the common law of delict as it then stood, not ‘extending’ it to include liability for negligence.¹⁰³ As O’Regan J’s analysis in *NK* makes clear, the *NM* majority’s quite striking application of the ‘intention’ standard to the facts of the *NM* case cannot avoid making waves as a precedent, and so the question whether those waves will have a constitutionally significant chilling effect cannot be avoided.

As I am about to show, however, the right answer to that question is pretty plainly ‘no’ in Smith’s case, because the true and entirely

¹⁰⁰ ‘Clear and accessible norms’ in the words of Sachs J. *NM* (n 5 above) para 204.

¹⁰¹ See *NM* (n 5 above) paras 92, 95 (Langa CJ); paras 171-82 (O’Regan J); paras 203-04 (Sachs J). Sachs J speaks of the extended standard of liability as one of ‘reasonableness’, but he evidently has in mind approximately what Langa CJ and O’Regan J mean by ‘negligence’.

¹⁰² See *NM* (n 5 above) paras 92-93, 95, 98-99 (Langa CJ); paras 203-05 (Sachs J); paras 177-82 (O’Regan J).

¹⁰³ *NM* (n 5 above) para 69.

innocuous 'rule' of Smith's case can easily be taken to be this: If you are publishing an account of events and transactions including private facts about real persons, and you attach the true names of those persons to those facts, without having directly in hand and before your eyes proof-positive of their express permission to have you do so, *and you cannot adduce any credible reason to think that a public that knows the names is better informed or otherwise more enriched than a public that does not*, you are acting in culpable disregard (call it 'negligent', call it 'reckless') of those persons' presumptive interest in retaining control over dissemination of that private fact about themselves. Lest the bar and lower bench should be left in the slightest doubt about the lesson to be drawn, Sachs J took pains to point 'the moral of the story':

[U]nless overwhelming public interest points the other way, publishers should refrain from circulating information identifying the HIV status of named individuals, unless they have the clearest possible proof to consent to publication having been given.¹⁰⁴

That does not seem so hard to learn, even for 'second-year LL.Bs'.¹⁰⁵ I have little doubt of the message by now having found its way into every well-heeled South African publisher's and writer's in-box.

Of course, it is very far from a full treatise on the values served by the constitutional rights of privacy and freedom of expression, by comparison, say with the entirely welcome offerings we find in the opinion of O'Regan J – memorable passages on the values underpinning the constitutional rights to privacy and freedom of expression, of which I would not wish the South African constituency (or the world constituency, for that matter) to be deprived.¹⁰⁶ For those passages, or anything remotely comparable, the *NM* majority opinion can claim no credit. And yet it does not necessarily follow that the majority opinion fails to give 'identifiable content' to provisions in the Bill of Rights, or that it leaves the bar and lower bench without worthwhile new instruction about 'how the Bill of Rights might operate' in an important class of relevantly similar, future matters.¹⁰⁷ *NM* might still be treated as one of those occasions, mentioned by Woolman, of an 'opportunity' thrown up by the stream of cases with varying fact-patterns, to 'expand our understanding of how given rights function in given environments.'¹⁰⁸

¹⁰⁴ *NM* (n 5 above) para 209.

¹⁰⁵ Woolman 'Amazing' (n 2 above) 787 n 47.

¹⁰⁶ See *NM* (n 5 above) paras 126-34 (on the values underpinning the constitutional right to privacy); paras 144-46 (on the values underpinning the constitutional right to freedom of expression).

¹⁰⁷ Woolman 'Amazing' (n 2 above) 763.

¹⁰⁸ Woolman 'Amazing' (n 2 above) 765.

My proposed account of the *NM* majority's finding of liability-producing 'intention' on the part of defendant Smith has the further merit of providing an honorable explanation for the majority's refusal of deference to the High Court's contrary finding. When extant common law appears to require development in terms of section 39(2) or section 8(3), the Constitutional Court follows – and for good reason – a general practice of giving the High Courts and the Supreme Court of Appeal a first crack at the work.¹⁰⁹ No one, however, would suggest that the Constitutional Court should defer when it comes to deciding – as the Court had to decide, for example, in *Khumalo* – whether a common law solution reached by the common law judiciary (so to call them) is sufficiently in synch with the Bill of Rights as not to call for further correction. Nor, by the same token, should we expect the Constitutional Court to defer when it judges whether a lower court's in-context application of a common law rule has been carried out with due regard for the Bill of Rights – see *NK* – any more than when the Constitutional Court judges whether a lower court's in-context application of a statute has complied adequately with the command of section 39(2).¹¹⁰

3.8 Smith's negligence (or 'intention'?)

I turn now to the division among the three judges who thought the question of Smith's negligence should properly be decisive of the case. I do so with the expectation that our examination of this division will cast some further light on the majority's finding of Smith's tortious 'intention'.

Having found an absence of intentional wrongdoing by Smith, Langa CJ, Sachs J, and O'Regan J all had to confront the question of possibly developing the common law so as to impose liability for at least some instances of negligently wrongful invasion of privacy. All three agreed, at least tentatively, on the introduction of a negligence standard for 'media' defendants only, roughly on the model of the

¹⁰⁹ See, eg, *Masiya* (n 4 above) para 17 ('Ordinarily, constitutional matters involving the development of the common law should first be taken to the Supreme Court of Appeal before they reach this Court because of the breadth of its jurisdiction and its expertise in the common law.');

Carmichele (n 59 above) paras 55-56: The proper development of the common law under section 39(2) requires close and sensitive interaction between, on the one hand, the High Courts and the Supreme Court of Appeal which have particular expertise and experience in this area of the law and, on the other hand, this Court. Not only must the common law be developed in a way which meets the section 39(2) objectives, but it must be done in a way most appropriate for the development of the common law within its own paradigm. There are notionally different ways to develop the common-law under section 39(2) of the Constitution, all of which might be consistent with its provisions. Not all would necessarily be equally beneficial for the common law.

¹¹⁰ See, eg, *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs & Tourism* [2005] ZACC 8; 2005 6 SA 419 (CC) paras 72-98.

SCA's introduction in *Bogoshi*¹¹¹ of a 'reasonable-to-publish-even-if-false-in-fact' standard of defamation liability for such defendants,¹¹² approved by the Constitutional Court in *Khumalo* as an acceptable reconciliation of the potentially conflicting demands of the Bill of Rights regarding the rights to human dignity and to freedom of expression.¹¹³ Where the three came apart was over the application of a negligence standard to the evidence in the *NM* case.

Of the three, O'Regan J was by far the most outspoken on the point – which seems surely correct – that all such applications must be sensitive to all of the affected objects of the Bill of Rights, which in this case very saliently included freedom of expression.¹¹⁴ In order to avoid imposing too great a burden on freedom of expression, said O'Regan J, the law must leave journalists free to 'to publish information provided to them by reliable [published] sources without rechecking in each case whether the publication was lawful,' at least where 'there are no grounds for ... suspicion [of] a risk that the original publication was not lawful.'¹¹⁵ In the view of O'Regan J, grounds for suspicion were lacking in Smith's case. Therefore, to hold her liable,

one would ... have to find that wherever a reputable source has published [names of persons about whom private facts are disclosed], secondary publication may not take place without the existence of informed consent having been independently verified, so that in each case, the subsequent publisher would have to re-ascertain the facts.¹¹⁶

And such a rule, O'Regan J concluded, would impose an 'unacceptable burden on the dissemination of information.'¹¹⁷

There is an apparent flaw in this reasoning, and it lies in the word 'wherever' (as in 'wherever a reputable source has published ...'). Let us grant O'Regan J her premise (strenuously disputed by all the other justices) that grounds for suspicion of a lack of the plaintiffs' consent to unlimited public identification by name were entirely absent from the totality of the circumstances that Smith confronted.

¹¹¹ *National Media Ltd v Bogoshi* 1998 4 SA 1196 (SCA); [1998] 4 All SA 347 (SCA).

¹¹² See *NM* (n 5 above) paras 172-77 (O'Regan J).

¹¹³ See *Khumalo* (n 54 above) paras 43-45. It is interesting to note how *Khumalo* and the *NM* minority approach the 'reasonableness'/'negligence' standard from opposite directions. *Khumalo* approved a shift of the balance in favor of freedom of expression (and thus against *dignitas*) by moving away from a prior rule of strict liability for false-in-fact, defamatory publications, whereas as the *NM* minority would have shifted the balance in favor of *dignitas* (and thus against freedom of expression) by introducing negligence liability in respect of what had previously been treated as a strictly intentional tort.

¹¹⁴ See *Khumalo* (n 54 above) paras 1444-48.

¹¹⁵ *NM* (n 5 above) paras 185, 187.

¹¹⁶ *NM* (n 5 above) para 186.

¹¹⁷ As above.

(More on this below.) It still does not follow that holding Smith liable for negligence in this case would signal liability ‘wherever’ a journalist or book-writer follows reputable sources in publishing private facts about named persons, and consent from those persons unexpectedly turns out to have been lacking. It only follows that liability will attach to the conduct of the second publisher *when she has no sufficient reason for taking the slightest risk of invading privacy by including the names*. That is a far cry from ‘wherever’, and moreover it is exactly what is required by a general norm – we call it ‘negligence’ – of acting with due regard for other peoples’ interests at risk, very saliently including (in the South African legal order), their constitutionally recognised interests both in freedom of expression and in privacy.

O’Regan J was prepared to find from Smith’s testimony that Smith ‘simply did not entertain the possibility that either the University of Pretoria or Professor Strauss would have sent a report to a Member of Parliament in circumstances where the consent given was only of a limited variety in a publication that did not draw attention to that fact.’¹¹⁸ I take that to signify an ultimate finding by O’Regan J that, on a preponderance of the evidence, Smith was just sucked in unthinkingly by deceptive appearances that would have prevented the question of the scope of the plaintiffs’ consent from even arising in her mind or anyone’s.¹¹⁹

Yet the evidence on that point, as described by O’Regan J, seems to me quite open to an opposite construction. I have in mind a passage in Smith’s book, flagged by O’Regan J, that appears to say that Smith, while writing the book, decided to include the names after reflecting consciously on a series of events that led her to infer that the ‘consent’ referred to in the Strauss Report must have been ‘a general consent on which she could rely’.¹²⁰ By what seems to me a quite permissible reading, the passage in question shows Smith consciously deciding that she has a sufficient basis for inferring that a general consent had been given, and the names, therefore, can safely be included. I notice also Smith’s testimony ‘point[ing] to three facts

¹¹⁸ NM (n 5 above) para 184.

¹¹⁹ ‘On a preponderance of the evidence’ because O’Regan J allows that Smith carries the onus of establishing absence of negligence, given proof of the objective fact of her having publishing private facts without consent. See NM (n 5 above) para 179.

¹²⁰ ‘In the chapter concerned, Ms Smith recounts the story of the clinical trial. She then points to the fact that details of the applicants’ complaints were originally published in the New York Review of Books, though under pseudonyms. She then points to the fact that pseudonyms were not subsequently used in the Strauss Report but that the real names were given and she uses the real names. The chapter itself therefore suggests that she thought that after the New York Review of Books article had been published, the applicants had consented to the publication of their names by Professor Strauss and that that consent was a general consent on which she could rely.’ NM (n 5 above) para 166.

which grounded her belief that Professor Strauss had obtained general consent from the applicants for the publication of their names.¹²¹ If we take this testimony to mean that Smith adverted consciously to these facts in forming her belief, at a time when she was still writing her book, then the testimony amounts to Smith's admission that she knew then that she was choosing on the basis of something less than full and direct knowledge of consent to publication by her. To put the matter in language lawyers will understand, Smith was (her own testimony suggests) consciously choosing on the basis of circumstantial and not 'real' evidence.

The testimony as a whole (I mean as described by O'Regan J; I have not read the trial transcript) looks to me quite consistent with – I do not say it compels, but Smith has the onus – a finding that Smith, while writing, adverted consciously to the question of the scope of consent, attempted a judgment about that matter on the evidence she had, and judged erroneously. I do not say she judged that particular question irrationally, or with the slightest bad faith, or even without the very heavy odds in her favor. I do say she nevertheless acted irresponsibly, in an important sense that the legal notion of negligence precisely nails. I say that, under a negligence standard properly understood, Smith's mistake of judgment cannot be excusable, no matter how unlikely the error, when there was literally nothing worthwhile to be gained by taken any chance at all.

But was there really nothing to be gained? 'Freedom of expression,' states O'Regan J,

is important because it is an indispensable element of a democratic society. But it is indispensable not only because it makes democracy possible, but also because of its importance to the development of individuals, for it enables them to form and share opinions and thus enhances human dignity and autonomy. Recognising the role of freedom of expression in asserting the moral autonomy of individuals demonstrates the close links between freedom of expression and other constitutional rights such as human dignity, privacy and freedom. Underlying all these constitutional rights is the constitutional celebration of the possibility of morally autonomous human beings independently able to form opinions and act on them.¹²²

One concurs wholeheartedly, or at any rate I do. The question that stares one in the face, though, is how any of these interests in democracy, autonomy, or opinion-formation is compromised in the slightest (or 'chilled', if you like) by holding Smith liable for her borderline-inexplicable choice to publish the real names of three otherwise non-notable women who figured as persons living with HIV

¹²¹ NM (n 5 above) para 163 (O'Regan J).

¹²² NM (n 5 above) para 145 (O'Regan J).

in Smith's no-doubt highly informative account of Patricia De Lille's public career. What is the value-added by inclusion of these women's names? Smith's own explanation of the choice is that she included the names in order to give her book 'authenticity'.¹²³ Please! Would the book have been one whit the less authentic, the less informative, the less democracy- or autonomy-supportive, if Smith had fictionalised the names, explaining in a preface or a footnote that she had done so?¹²⁴ Surely a person acts negligently when she chooses a course of action that anyone can see has the capacity to injure others, and a reasonable member of society would perceive an obvious way to avoid the risk of injury, which is clearly of lesser cost to anyone than the injury might be to any who would suffer it.¹²⁵

In Smith's case, avoidance was available at the negligible cost of forbearing to include the names. The cost of avoidance thus would not have been that of the onerous detective work posited by O'Regan J, or of the delays in publishing publicly valuable content that such work might occasion; it would only have been the loss of the smidgin of novelistic coloration that Smith added to her book by inserting the publicly meaningless real names of three women who were otherwise living their lives entirely out of the public eye – a cost bordering on zero, it would seem, in a public perspective.

And now the circle closes. Consider that the effrontery of seeking to excuse the decision to name the plaintiffs by the appeal to 'authenticity' may have been instrumental in leading Madala J's majority to its conclusion that Smith's choice was 'intentional' in the pertinent, legal sense.¹²⁶ Sachs J, supporting a finding of negligence, remarked that 'if the slightest doubt existed, there was no need to publish the actual names of the defendants.'¹²⁷ I so not see why one

¹²³ See *NM* (n 5 above) paras 24, 61.

¹²⁴ If 'authenticity' really means scooping the competition, or showing what a superior gumshoe you are, it cannot, in the Constitution's scales, weigh tellingly against a risk to other people's privacy and dignity. If 'authenticity' means providing your readership with persuasive indication that you really have had access to authoritative sources, or to the sources you say you have accessed, it does weigh tellingly in principle, but not in application to this case. Smith had plenty of other concrete particulars to carry that burden, not to mention Patricia De Lille's endorsement of her book as an 'authorised' biography.

¹²⁵ 'The traditional test for negligence is axiomatic ... : negligence is established if a reasonable person in the position of the defendant would have foreseen the harm, the reasonable person would have taken steps to prevent it and the defendant did not take those steps.' *NM* (n 5 above) para 100 (Langa CJ), citing *Krueger v Coetzee* 1966 2 SA 428 (A) at 430E. It would seem that Langa CJ meant 'would have foreseen *some risk* [not the certainty or near-certainty] of harm'. Later on in his opinion, he wrote that the crucial question in the case was 'whether the reasonable journalist [in Smith's position] would have foreseen the possibility of absence of consent.' *NM* (n 5 above) para 105. I have suggested that the evidence is compatible with a finding that Smith did in fact foresee that possibility – granted that she, with good reason, regarded it as very slight.

¹²⁶ See *NM* (n 5 above) paras 54, 61, 65.

¹²⁷ *NM* (n 5 above) para 205.

should not go a bit further and say: Since there was nothing of value to be gained by publishing the true names (recall the possibility of openly fictionalising them), it was negligent to publish them without proof positive of consent, expressly directed to the would-be publisher in question.

For this reason, I am led to quibble with the statement of Langa CJ that 'the' crucial question to be decided in Smith's case was 'whether the reasonable journalist [in Smith's position] would have foreseen the possibility of absence of consent'.¹²⁸ That is, of course, a highly pertinent question for any judge approaching this case. To my mind, though, an equally crucial question is whether a responsible author, aware that she lacked proof-positive of the plaintiffs' consent to the inclusion of their names in her book (as distinguished from Professor Strauss's report), would have included the names. One can agree with O'Regan J that the reasonable author would not have 'foreseen' the possibility of a restricted consent, if by that we mean that the reasonable author would have rated that possibility extremely unlikely, and still find plainly negligent – plainly fraught with an unjustifiable risk of harm to others – the publication of private facts about named persons whom you do not know and with whom you have never met, whose full and clear consents you do not have in hand, and who might just as well have gone nameless in your publication, so far any anyone's legitimate interests are concerned. Are we perhaps verging here on 'reckless disregard'? Gaining, then, some further insight into the majority's finding of 'intentionally' wrongful conduct by Smith?¹²⁹

3.9 A 'minimalist' moment?

O'Regan J's opinion does not address at all this matter of the vanishingly low value for Smith's book of naming the plaintiffs, even though other justices raised it quite vividly in their opinions, and even though the omission leaves in limbo both O'Regan J's conclusion that Smith was not negligent and her complaint about the costs to freedom of expression of imposing liability in cases such as Smith's. If my analysis is sound, those costs are virtually nil. A flat rule of liability for publishing the names of persons attached to private facts, where the names are publicly meaningless and add nothing to the opinion-forming and autonomy- or democracy-supporting value of the published content, could easily be derived as a contextual specification of the negligence principle for cases to which it applies. Such a rule would seemingly be something of a gain for *dignitas* and

¹²⁸ *NM* (n 5 above) para 105.

¹²⁹ *NM* (n 5 above) para 125. O'Regan J construes the majority's finding of intentionality in terms of reckless disregard.

an utterly negligible loss for freedom of expression. It would thus seem to be a rule upon which all members of the Constitutional Court could agree: a triumph, one might say, of ‘minimalism’.¹³⁰

I am thinking here of the dimension of ‘width’, not ‘depth’,¹³¹ for (as I hope I have sufficiently shown) there is substantial depth in the solution I described for the *NM* case. In the list of possible benefits of a minimalist sensibility marshaled by Iain Currie (following Cass Sunstein),¹³² there is one that does not appear: Minimalism can be conducive to getting the answer right! I mean right *in principle*, getting a principle right. Judges whose habit it is to scan for possible narrow grounds of decision, in cases where their court or their country’s legal culture is evidently divided over broader-gauged terms of debate, may sometimes be the likelier to detect some set of relatively contextualised terms of decision that perhaps will not only induce a voting consensus, *but also may help to clarify for everyone concerned the true (or at any rate an agreed) meaning for the broader terms of contention* (here, ‘intention’ and ‘negligence’) that have been leading their debate into trouble.

Thus, a focus on a relatively contextual point in *NM* – the point that the inclusion of the plaintiffs’ names was sheerly gratuitous from the standpoint of the public informational and autonomy-supportive value of Smith’s account of Patricia De Lille’s career – might have helped clarify for everyone what the negligence principle really means and is all about. If your lines of reasoning get fixed at too wholesale a level – say, something like ‘negligence liability for publishing and freedom of expression do not mix’ – you not only may overlook a possibly consensus-forming resolution of the case before you, you may fail to see how your generalisations are leading you to a conclusion that traduces the true point and meaning of negligence as a legal concept, and of negligence liability’s value as an instrument for the advancement of the objective normative value system for which the Constitution of South Africa is supposed to speak.

3.10 A case of ‘direct’ or ‘indirect’ application?

A loose end still flaps in the breeze. In part 3.4 above, I compared the litigation agendas respectively implied by a constitution-based and a common law cause of action in *NM*. The Constitution-based action succeeds (if it does) by way of an exercise of the court’s power of

¹³⁰ See I Currie ‘Judicious avoidance’ (1999) 15 *South African Journal on Human Rights* 139 147-50.

¹³¹ A judicial decision is ‘narrow’ (as opposed to ‘wide’) when it is ‘minimal in impact on future decisions’. It is ‘shallow’ (as opposed to ‘deep’) when it is ‘minimally theorised’. See Currie (n 130 above) 147.

¹³² See Currie (n 130 above) 146-50.

judicial review: declaration of invalidity and ensuing, remedial modification of the common law.¹³³ The common law action succeeds (if it does) by way of a court's exercise of its inherent power to develop the common law in the ordinary course of adjudication, under pressure to conform the common law to the norms of the Constitution. Granting this notional difference in the respective judicial powers to be put into play, I concluded that the resulting litigation agendas would be virtually identical, whichever source of power would be chosen. I warned, however, of an arguable difference to be taken up later. Later is now; the arguer for the difference is Stu Woolman, and the difference argued for is this: Arriving at a declaration of invalidity, required for the plaintiffs' success in a constitution-based action, involves a court in a distinctly more rigorous and exacting mode of constitutional analysis and exposition than does arrival at a decision to exercise the inherent power to develop the common law.

Here it is in a nutshell:

... [T]he drafters intended for there to be two different processes. The first process – direct application – takes the [specifically named] rights and freedoms, and the general rules derived from them, as our point of departure for determining whether [some challenged parcel of common law doctrine] is invalid. The second process – indirect application – allows for a mode of analysis that neither specifies whether a particular right demands vindication nor permits a finding of invalidity. Instead, ... the courts operate under a general injunction to bring all law into line with the 'spirit, purport and objects' of the Bill of Rights and the 'objective, normative value system' made manifest in the text of the Constitution as a whole.¹³⁴

The framers, Woolman says, had a particular reason for their provision of these two, distinct processes – direct and indirect application – for measuring the constitutional acceptability of a challenged common law doctrine or rule. As he explains:

Section 8 does not mean that the prescriptive content of the substantive provisions in the Bill of Rights covers each and every legal dispute ... [W]hile the specific provisions in the Bill of Rights cover a large domain of law and conduct, they do not engage all law and conduct. The

¹³³ That is, owing to the command of sec 8(3), it does *not* succeed by way of damages imposed on Smith for a constitutional tort.

¹³⁴ Woolman 'Amazing' (n 2 above) 769.

independent purpose of s 39(2) is to engage law and conduct not engaged by any of the specific provisions set out in Chapter 2.¹³⁵

This reason for providing the two, distinct processes of direct and indirect application implies, as Woolman further points out, a definite order of march for courts called upon to consider the constitutional acceptability of one or another rule or doctrine of the common law:

... [O]ne must first ascertain what the ambit is of the allegedly applicable constitutional provisions [he means the several rights-granting clauses in the Bill of Rights]. Only when one has determined that ambit, and found that it does not speak to the issues raised by a [questioned] rule of [the common] law, can one turn to the more open-ended invitation of s 39(2). Analysis of the specific provisions of the Bill of Rights, and the consistency of law or conduct with those provisions, logically must be prior to the analysis of the common law in terms of the general spirit, purpose and objects of the Bill of Rights.¹³⁶

In other words, the marching order, logically implied by the Constitution's principle of division of labor between direct and indirect application is: direct application first, then indirect, but only if direct fails to engage the common law rule or doctrine in question.¹³⁷

But of course Woolman's point is not merely that the Constitution implies a particular order of priority of resort to direct and indirect application of the Bill of Rights. It is that the obedience of courts to this order of march – direct before indirect – is of crucial importance to the long-run interest in the proper elucidation of South African constitutional law. And that is because of a difference in the sorts and levels of explanatory rigour respectively exacted from courts by direct and indirect application. When applying the Bill of Rights directly in terms of section 8, the Court 'engages the content of the substantive provisions of the Bill of Rights' and 'articulates

¹³⁵ As above.

¹³⁶ Woolman 'Amazing' (n 2 above) 777. Woolman elaborates:

If we reverse the spin, and we first use sec 39(2) to bring the law into line with the general spirit, purport and objects of the Bill of Rights, there is simply nothing left to be done in terms of direct application. The reason is obvious. If the general spirit, purport and objects of Chapter 2, which embraces (at a minimum) the entire value domain reflected by the specific substantive provisions of the Bill of Rights, does not require a change in the law (or a change in conduct brought about by a change in the law), then no narrower set of purposes reflected in a single substantive provision of the Bill of Rights could be expected to do so.

¹³⁷ See Woolman 'Amazing' (n 2 above) 83 ('The logic ... is one that should require the courts to ... develop the common law in light of the general objects of the Bill of Rights *only* where no specific right can be relied on by a party challenging a given rule of common law ... ') (emphasis in original).

constitutional rules that amplify that content.¹³⁸ When applying the Bill indirectly in term of section 39(2), it does not.

Appropriately does not? *Obediently* does not? Well, Woolman wants us to read sections 8 and 39 as setting up two cleanly 'distinct modes of analysis'.¹³⁹ The suggestion would seem to be that a court, by choosing to frame its inquiry in terms of section 39(2), thereby *limits* itself to the detection of inconsistencies between the parcel of common law in question and what we might call the normative residue of the Bill of Rights, meaning whatever normative intimations a court can draw from the Bill of Rights as a whole but *cannot* trace or ascribe to any of the specific rights-naming clauses. If analysis of a rule's consistency with the specific provisions of the Bill of Rights 'logically must be prior' to analysis of its consistency with the normative residue, then the latter process – indirect application – must be reserved for cases in which the former cuts no ice. And conversely, then, if a court, in a private-on-private case turning on common law doctrine, *is* going to find a 'direct' inconsistency – meaning an inconsistency with something contained in one or another the rights-naming clauses – then that court really ought not, on that occasion, speak the name of 39(2).¹⁴⁰

But how, after all, can it be so important that this particular discipline be observed? I do not mean the discipline of searching for clause-based inconsistencies before turning to the question of residual inconsistencies, about which I raise no question here.¹⁴¹

I mean – and mean only – the discipline of not saying '39(2)' when a clause-based inconsistency is what you are after. For this specific practice rule, I can find no reason in Woolman's magisterial work on application (which is generally rich in jurisprudential and even philosophical reflection) beyond doctrinal tidiness and symmetry. The point is to avoid 'redundancy', 'surplusage', 'elision' in the constitutional text – or, in other words, overlap between the sorts of judicial performances respectively authorised by sections 8

¹³⁸ Woolman 'Amazing' (n 2 above) 768.

¹³⁹ Woolman 'Amazing' (n 2 above) 776; see Part II above.

¹⁴⁰ According to Woolman's preferred construction of secs 8 and 39(2) as a package, sec 39(2) should be understood to stand for the following proposition: Where no specific right can be relied upon by the party challenging a given rule or law or the extant construction of a rule of law the courts are obliged to interpret legislation or to develop the law in light of the general objects of the Bill of Rights. Woolman 'Application' (n 17 above) 12. See also at 80 (indicating that, on the preferred construction, 's 39(2) is not the intended engine for changes in the common law that flow from the direct application of the Bill of Rights').

¹⁴¹ A question could, however, be raised about it. See FI Michelman 'Unenumerated rights under popular constitutionalism' (2006) *University of Pennsylvania Journal of Constitutional Law* 121, 135-36, 152-53 (discussing views of Ronald Dworkin and John Rawls).

and 172(1), on the one hand, and 39(2), on the other.¹⁴² We would not want two constitutional clauses sharing any of the same work.¹⁴³

Some might wonder whether Woolman's interpretive construction of the framers' design – his strict correlation of clause-bound inspection to sections 8 and 172(1), and residual inspection to section 39(2) – perhaps proceeds from an unrealistically high expectation of formal tidiness and tightness in constitutional drafting. On that score, *NK* may give a hint. In *NK*, O'Regan J's flexing of the *respondet superior* standard plainly was driven, not by some normative residue detected in the Bill of Rights, but by attention to the prescriptive contents of several, specific clauses, including those ensuring rights to 'freedom and security of the person, and in particular, the right to be free from all forms of violence from either public or private sources as well as [the] right to dignity, right to privacy and right to substantive equality.'¹⁴⁴ O'Regan J plainly was engaged in the first of the two 'instances' of need for common-law development in terms of section 39(2), recalled by her from *Thebus*: the kind that arises when 'a rule of the common law is inconsistent with a constitutional provision'.¹⁴⁵ Was she, therefore, wrong to file the decision under the head of 39(2) rather than 8?

Might that depend on whether O'Regan J considered herself, after all, to be engaged in 'development' of the common law, as contemplated by section 8(3)? Does 'develop', there, encompass only an express, terminological re-writing, or does it also take in a court's choice about how to apply an established standard to an arguably 'new' set of facts, as in *NK*? Section 39(2) speaks to a court's

¹⁴² See Woolman 'Amazing' (n 2 above) 771, 777; Woolman 'Application' (n 17 above) 10, 11, 12, 55. The 'two instances' reading of sec 39(2) in *S v Thebus* 2003 6 SA 505 (CC); 2003 10 BCLR 1100 (CC) para 28 ('*Thebus*') (where one of the instances is 'when a rule of the common law is inconsistent with a constitutional provision') is objectionable to Woolman because it 'offends the "no surplusage" canon of constitutional interpretation by making parts of FC sec 8 redundant.' Woolman 'Application' (n 17 above) 79.

¹⁴³ Woolman adduces an incisive and entirely persuasive reason for not allowing sec 39(2) to suck up, exclusively or preemptively, the whole field of constitutionally propelled re-examination of the common law. That reason has to do with the currently imposed, substantial exclusion of the High Courts from such re-examination when conducted under the aegis of sec 39(2). See *Afrox Health Care v Strydom* 2002 6 SA 21 (SCA); *Ex parte Minister of Safety and Security v Walters* 2002 4 SA 643 (CC), 2002 2 SACR 105 (CC), 2002 7 BCLR 663 (CC). A like restriction cannot be, and has not been, imposed on High Court re-examination where 'a party has a colourable claim grounded in the direct application of a substantive provision of the Bill of Rights in terms of section 8'. It is, therefore, of crucial importance, Woolman argues, to resist an 'elision' in which sec 39(2) would, in effect, swallow up sec 8. Woolman 'Application' 10, 55-56, 64. This argument is, to me, entirely compelling. It does not, however, explain why courts should be barred from ever resorting to sec 39(2) when the detected inconsistency is with a specific provision, which is the issue that my text, above, addresses.

¹⁴⁴ *NK* (n 91 above) para 14.

¹⁴⁵ *NK* (n 91 above) para 16, citing *Thebus* (n 142 above) para 28.

'interpreting' law, whereas section 8(3) speaks to a choice between 'applying' and 'developing' law. Does that difference, perhaps, make section 39(2) more apt to the sort of work accomplished by the Court in *NK*?

It might seem so, to some; it certainly wouldn't have to, to all of us. But I do not mean my string of questions to constrain very strongly — much less lead ineluctably — toward a conclusion either way. I only mean it to confirm a truth that Woolman, more than anyone, has recognised and exposed through his meticulous, sterling, searching work on the application conundrum: When the question is that of parsing the exact relations and connections among this Constitution's several clauses on application and remedies, no fully neat and satisfying answer is to be had. 'Some surplusage seems inevitable.'¹⁴⁶ There are not shells to cover all the peas, and so it is a choice among imperfections — in that sense, a matter, as Woolman says, of 'interpretation'.¹⁴⁷

3.11 The proof of the pudding

But, as Woolman also rightly insists in the same place, it does not follow that grounds are lacking for preferring one interpretation — one construction — over another. One ground of preference might well be the differing ways in which the respective constructions cue and guide, concentrate and dissipate, the judiciary's deployments of its efforts and energies. Woolman notes that a 'muscular' use of section 39(2) 'could', in theory, produce the sorts of rights-based, rights-expounding work he finds the Court retreating from.¹⁴⁸ But he fears that, in practice, a Court that is allowed to give up too easily on section 8, or to slide too easily to section 39, will be (has been) a Court that too often fails to decide in terms of any of the specific, rights-naming clauses in the Bill of Rights, and accordingly fails too often to engage in the principled elucidation of those clauses that decision in such terms entails. That states a legitimate concern, on its face by no means implausible. Still, the claim is an empirical one, subject to testing as such. *NK*, I have just suggested, offers a bit of evidence against it. (So, for that matter, does *Thebus*, where the Constitutional Court, under the sign of section 39(2), considered in great detail whether a prosecutor's reliance on the common-purpose doctrine 'trenches on' or 'denies' the constitutional rights of a criminal accused not to be deprived of freedom without just cause and to be presumed innocent.)¹⁴⁹

¹⁴⁶ Woolman 'Application' (n 17 above) 71.

¹⁴⁷ See Woolman 'Application' (n 17 above) 13 n 1.

¹⁴⁸ Woolman 'Application' (n 17 above) 766 n 6.

¹⁴⁹ *Thebus* (n 142 above) paras 36, 42.

To what extent, we might ask, does the Constitutional Court's work in *NM* tend to bear out Woolman's empirical concern? Start with O'Regan J. Her *NM* opinion certainly exemplifies the sort of elucidation that Woolman associates with direct application pursuant to section 8.¹⁵⁰ If O'Regan J had given clear indication that she was proceeding in terms of section 39(2), as distinct from section 8, that would have told against Woolman's empirical claim. However, she did not. What might be a bit worrisome from Woolman's corner, though, is the further fact that O'Regan J did not ever bother to say under which set of constitutional auspices – 8 or 39(2) – she was undertaking to develop the common law. (But Langa CJ, concurring with O'Regan J's proposed development, did make clear that he understood himself to be proceeding in terms of section 39(2).)¹⁵¹ Neither did O'Regan J ever pause to declare invalid the extant common law of privacy invasion. All this perhaps does tell a bit against Woolman, inasmuch as it might suggest that O'Regan J believes it does not matter which auspices she invokes, which would contradict Woolman's insistence that it does matter, not just because an order of march has been prescribed, but because marching under section 39(2) has an effect on the justices of releasing them from the very work of clause-by-clause exposition that O'Regan J's *NM* opinion so clearly exemplifies.

What about the *NM* majority? Madala J, denying that he was engaged in any sort of modification of the common law, had no occasion to claim any set of constitutional auspices for modifying it. But suppose he had said directly that his finding of 'intention', on Smith's part, to disclose private facts without authorisation to do so from the persons concerned, resulted from a shading of the common law category of 'intention' under pressure of the Bill of Rights, specifically in the matter of privacy protection. What more could Madala J then have said by way of explaining his action, than that the disclosure went to the 'inviolable core' of privacy as previously defined in *Bernstein*,¹⁵² and that the privacy-protection principle of section 14 requires exposure to civil liability of anyone who publishes core-private facts when the publisher 'at least foresaw the possibility that the consent had not been given to the disclosure'?¹⁵³

Madala J did not say those things in that way, nor could he have, because he did not purport to be judging this case in terms of the Bill of Rights, à la *NK*. But can we not fairly guess from his opinion that he

¹⁵⁰ See *NM* (n 5 above) paras 126-35 (constitutional right to privacy); paras 144-46 (constitutional right to freedom of expression).

¹⁵¹ See *NM* (n 5 above) para 120.

¹⁵² *Bernstein v Bester* NO 1996 2 SA 751 (CC); 1996 4 BCLR 449 (CC) para 77. Compare *NM* (n 5 above) paras 33, 41-42.

¹⁵³ Compare *NM* (n 5 above) para 64.

would have said them, if he *had* undertaken to explain himself in such terms? If so, then *NM* is, to that very modest extent, a sign that section 39(2) does not necessarily, and does not always, function as a lure to a form of judicial decision-making that ignores and by-passes the regulative content of the rights-naming clauses of the Bill of Rights. *Masiya*, as we are about to see, provides some further evidence to like effect.

4 *MASIYA*

4.1 The case and a critique

The state charged *Masiya* with the common law crime of rape. Under the law as it then stood, rape was defined in terms of non-consensual, vaginal penetration (and thus could involve female victims only). The evidence in *Masiya's* case showed forcible, anal penetration of a nine-year old girl.¹⁵⁴ Anal penetration of a female or a male could support a conviction of indecent assault, but not of rape. Indecent assault is classified as the lesser crime, and it carries a lesser penalty than rape.¹⁵⁵

In the course of the state's prosecution of *Masiya*, questions arose as to whether the extant common law definition of rape fell to be declared invalid as inconsistent with the Constitution, and whether that law ought to be developed so as to cover *Masiya's* proven act of anal penetration.¹⁵⁶ The two questions are not unrelated, but neither are they necessarily coupled. In the event of an adjudicative

¹⁵⁴ See *Masiya* (n 4 above) paras 6, 13.

¹⁵⁵ See *Masiya* (n 4 above) para 15 (indicating that 'indecent assault attracts more lenient sentences than rape').

¹⁵⁶ There was, of course, a further question about retrospective application to *Masiya's* case of any extended definition the Constitutional Court might direct. The Court answered 'no' to that question, see *Masiya* (n 4 above) para 56, even as it also answered 'yes' to the question of whether the advent of *Masiya's* case before the courts offered an apt occasion for developing the definition. See *Masiya* (n 4 above) para 51:

If the definition of rape were to be developed retrospectively it would offend the constitutional principle of legality. However, if it was to be accepted that the principle of legality was a bar to the development of the common law, the courts could never develop the common law of crimes at all. Such a conclusion would undermine the principles of the Constitution which required the courts to ensure that the common law was infused with the spirit, purport and objects of the Constitution.

From a US constitutional lawyer's perspective, major worries remain, not only about prospective-only application of a common law ruling, but also, and relatedly, about South African constitutionalism's evident relaxation of what we would call a 'case or controversy' prerequisite to judicial jurisdiction. See generally R Fallon *et al* *Hart & Wechsler's the federal courts and the federal system* 5 ed (2003) 73-85. Woolman's critique of the Constitutional Court's *Masiya* decision being in no way directed to such worries, I say nothing more about them here.

declaration of the current definition's constitutional invalidity, corrective development of the common law might well follow on as a part of a just and equitable remedial order, in terms of Constitution s 172(1).¹⁵⁷ But even in the absence of such a declaration, a court might arguably still find itself bound by Constitution section 39(2) to develop the definition so as cover *Masiya's* case.¹⁵⁸

On what grounds, then, might the Constitutional Court, sitting in *Masiya's* case, have held constitutionally incompatible the extant common law of rape insofar as it fails to cover cases of anal penetration? Not, in the first place, on any theory of the law's infringement of *Masiya's* constitutional rights or those of other putative offenders covered by the definition. For, obviously,

the current definition of rape criminalises unacceptable social conduct that is in violation of constitutional rights. It ensures that the constitutional right to be free from all forms of violence, whether public or private, as well as the right to dignity and equality are protected.¹⁵⁹

In other words, any limiting effect of the law of rape on the liberty of putative rapists is obviously and amply justified in terms of Constitution section 36(1).¹⁶⁰ It easily follows that any declaration of the current definition's unconstitutionality would have to issue in contemplation of constitutionally protected interests, not of those who might find themselves charged with assaultive crime, but of the class consisting of all who might suffer sexual assault – the general public, more or less. Thus, it was with a view to 'afford[ing] society the full protection of the Constitution' that the trial court in *Masiya's*

¹⁵⁷ It seems that, in *Masiya's* case, Constitution sec 8 can also serve as the ground of an order to develop the common law, inasmuch as an antecedent declaration of the invalidity of the common law definition of rape might be said to result (in the terms of sec 8(2)) from an application of certain provisions in the Bill of Rights to the conduct (or to common law regulating the conduct) of Fanuel Sitakeni Masiya, a natural person. Since Woolman generally argues in terms of a choice between ss 8 and 39(2), as the constitutional authorisation to be invoked by the Court for some ensuing directive for common law modification, and since nothing seems to depend on whether a remedial order would issue in terms of sec 172(1)(b) or in terms of sec 8, I shall, in what follows, refer to the one or the other as the context most naturally suggests.

¹⁵⁸ See *Masiya* (n 4 above) para 33 (quoting from *Carmichele* (n 59 above) para 36, and also citing *Thebus* (n 152 above) paras 28-31): ... '[C]ourts must remain vigilant and should not hesitate to ensure that the common law is developed to reflect the spirit, purport and objects of the Bill of Rights ... whether or not the parties in any particular case request the Court to develop the common law under section 39(2).' Where there is deviation from the spirit, purport and objects of the Bill of Rights, courts are obliged to develop the common law by removing the deviation.

¹⁵⁹ *Masiya* (n 4 above) para 27.

¹⁶⁰ See also Constitution sec 12(1)(a): 'Everyone has the right to freedom and security of the person, which includes the right – (a) not to be deprived of freedom arbitrarily or without just cause'.

case took up *sua sponte* the question of extending the common law of rape to acts of anal penetration.¹⁶¹

For convenience, we might imagine that it would be the Director of Public Prosecutions who presses the claim for some development of the common law that would result in Masiya's conduct being punishable as rape.¹⁶² The DPP, pointing to the state's constitutionally imposed duty to protect and fulfil the rights in the Bill of Rights,¹⁶³ might charge the received definition of rape with a constitutional sin of omission, to wit, its omission to make acts of anal penetration punishable as rape. Impermissibly under-protected as a result of that omission, the DPP might say, are the right to freedom from private violence, conferred by section 12(1)(c),¹⁶⁴ and the right to have one's dignity respected and protected, conferred by section 10.¹⁶⁵ Alternatively or additionally, the DPP might urge a declaration of invalidity based on a sin of *commission* by the current law, to wit, commission of an unfair discrimination prohibited by Constitution section 9(3).¹⁶⁶ It is unconstitutionally unfair, the DPP might urge, for the state, through its common law, to offer lesser levels of recognition, and of protection-by-deterrence, to male than to female sufferers of forced, sexualised, bodily penetration, or (within the class of female victims) to sufferers of anal than to sufferers of vaginal penetration.

A judicial modification of the common law definition of rape, presented as a remedy for a constitutional violation declared on any of the grounds aforesaid, would be an instance of what Woolman classifies as 'direct' application of the Bill of Rights. But a court sitting in Masiya's case might also arguably be authorised and required to undertake an extension of the common law definition of rape to reach cases of anal penetration, even in the absence of any finding of the classical definition's inconsistency with any clause in the Bill of Rights. Start by setting aside the Bill of Rights entirely. Perhaps a court might simply decide that considerations of policy and justice call, under present social conditions, for extension of the common law definition of rape so as to take in cases of anal penetration, either of

¹⁶¹ *Masiya* (n 4 above) paras 8-9.

¹⁶² In point of fact the DPP did not urge any modification of the common law definition of rape but rather sought conviction for indecent assault. See *Masiya* (n 4 above) para 7. I make the opposite assumption for the sake of expository convenience.

¹⁶³ See Constitution sec 7(2): 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.'

¹⁶⁴ 'Everyone has the right to freedom and security of the person, which includes the right — ... to be free from all forms of violence from either public or private sources'.

¹⁶⁵ 'Everyone has inherent dignity and the right to have their dignity respected and protected.'

¹⁶⁶ 'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex ...'.

females only or of males as well. The court might then invoke its ordinary, inherent power to develop the common law as and when occasioned by the interests of justice.¹⁶⁷ In doing so, the court might or might not refer, beyond its general authority to keep the common law attuned to the times and to the interests of justice, to its more specific obligation, under section 39(2), to see to the conformation of the common law with the spirit, purport, and objects of the Bill of Rights.

In *Masiya*, the Constitutional Court, in an opinion by Nkabinde J, concluded by issuing an order directing a revision of the common law definition of rape to include acts of anal penetration of females.¹⁶⁸ It did so while (a) expressly declining to issue a declaration of the invalidity (unconstitutionality) of the non-extended definition, and (b) declining to decide whether acts of anal penetration of males would be covered in the extended definition of rape resulting from the adjudication in *Masiya*'s case – thus, in effect, retaining for the present a definition of rape in which only females can be victims.

Those two features of the Court's *Masiya* decision, (a) and (b), are the targets of vigorous complaint from Woolman. Both stand, in his view, as further documentation of the Constitutional Court's unaccountable habit – and that habit's doctrinally debilitating consequences – of refusal to engage in direct application of the Bill of Rights or to undertake the rule-like expositions of the contents of the several rights-protecting clauses that direct application is expected to induce.

As with Woolman's objections to the Court's performance in *NM*, these objections to *Masiya* seem to me in some part answerable. The main idea continues to be this: We want to see what happens if we strain to turn these very features in the judgment – the ones that we may initially find puzzling or disturbing – into keys to discovery of the Court's own understanding of the legal problem presented by the case; and perhaps, through that, to notice something true – I do not mean necessarily welcome – about the meaning and structure of the law. When we train that sort of effort on the Constitutional Court's work in *Masiya*, we may find that Woolman's objections lose some – though it will not be all – of their sting.

¹⁶⁷ See Constitution sec 173 ('The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.')

¹⁶⁸ See *Masiya* (n 4 above) para 74(5).

4.2 The decision's gravamen: Under-protection

In *Masiya*, the Constitutional Court concluded that the extant common law of rape, although not prone to a finding of invalidity, nevertheless fell to be developed under pressure from the spirit, purport, and objects of the Bill of Rights. By my reading – and this point is central to my examination of Woolman's critique – the decisive pressure came (in the Court's view) not from the Bill's prohibition against unfair discrimination, but rather from its positive commitments to protection of persons against violence and indignity. The Court does mention section 9 – 'flirts with' it, if you like¹⁶⁹ – but does not finally rest its action on considerations sounding in equality. As I have understood the Court's opinion, the decisive fault it finds in the common law lies not in any unfair discrimination committed by the law but rather in protection omitted from it: not in the law's perpetration of inequality, but in its under-protection of constitutionally guaranteed dignity and freedom from violence. A complaint of under-protection is, of course, a matter distinct in principle from a complaint of unequal treatment. By what I presume to offer as the 'charitable' reading of Nkabinde J's opinion, it is the under-protection complaint that carries the day in *Masiya*.

Oh, yes, to be sure, the 'issues raised' in the case included 'equality' – specifically citing section 9(1)'s guarantee to everyone of 'equality before the law' and 'equal protection and benefit of the law'.¹⁷⁰ And, yes, Nkabinde J made the comparative observation that the trauma associated with anal penetration is 'just as humiliating, degrading, and physically hurtful' as that associated with vaginal penetration.¹⁷¹ She said, as well, that inclusion of anal penetration in the definition of rape 'will increase the extent to which the traditionally vulnerable and disadvantaged group will be protected by and benefit from the law'.¹⁷² But all of those remarks are perfectly consistent with the view that the current law is constitutionally deficient in the specific respect that it under-protects the rights to dignity and freedom from violence. They could all easily have been written by a judge applying a bill of rights that contains no equality clause.

As Nkabinde J's opinion proceeds, we read the following: It is the office of the crime of rape to 'ensure[] that the constitutional right to be free from all forms of violence, whether public or private, as well as the right to dignity and equality are protected.'¹⁷³ It is

¹⁶⁹ Woolman 'Amazing' (n 2 above) 768 n 10.

¹⁷⁰ *Masiya* (n 4 above) para 18 & n 32.

¹⁷¹ *Masiya* (n 4 above) para 39.

¹⁷² As above.

¹⁷³ *Masiya* (n 4 above) para 27.

specifically with regard to these objectives that the current definition is fatally ‘under-inclusive’.¹⁷⁴ ‘Non-consensual anal penetration of women and young girls such as the complainant in this case constitutes a form of violence against them equal in intensity and impact to that of non-consensual vaginal penetration.’¹⁷⁵ Extending the definition to include anal penetration will ‘protect the dignity of survivors’.¹⁷⁶ It will ‘increase the extent to which [a] traditionally vulnerable and disadvantaged group will be protected’ against ‘humiliating, degrading and physically hurtful’ treatment, and ‘therefore’ – meaning, in that particular respect – it will ‘harmonise the common law with the spirit, purport and objects of the Bill of Rights.’¹⁷⁷

In sum, it is all about a constitutionally required level of protection, not about the distinct injury to the self or to dignity that flows from being subjected to second-class treatment. The Bill of Rights sections in the foreground here are 10 and 12, not 9. The Court convicts the current law of a constitutional sin of omission of due protection; it does not convict it of a constitutional sin of commission of unfair discrimination.

4.3 A case of judicious avoidance?

In Woolman’s view, this short-changing of section 9 counts as unmitigated vice in the decision. In mine, it can claim some support in ordinary judicial prudence. What, after all, is the context – the field – of the differential treatment that troubles Woolman?¹⁷⁸ It is the grading of crimes within nests of including and lesser-included offenses. (It is not as if Mr Masiya escapes conviction of crime – serious crime – if he is convicted of indecent assault and not rape.) What is involved is the schedule of penalties devised by the lawmaker for more and less aggravated variations on the same core offense. Plainly, it is not against the grain of the Bill of Rights, or contrary to any clause contained therein, for lawmakers to draw such lines. To the contrary, we should think it monstrous if they did not.

From an equality-clause standpoint, then, an important question presented to the Constitutional Court by the *Masiya* appeal was one of best judicial practice: whether it would be generally in the interests of justice, and conducive to long-term optimal performance

¹⁷⁴ As above.

¹⁷⁵ *Masiya* (n 4 above) para 37.

¹⁷⁶ *Masiya* (n 4 above) para 38.

¹⁷⁷ *Masiya* (n 4 above) para 39.

¹⁷⁸ Note that I am not yet dealing with the issue raised by the Court’s postponement of the question of the new rape definition’s application to cases involving male victims.

by the judiciary of its role in the over-all governmental order of a democratic South Africa, for the Constitutional Court to swing open its doors to complaints of unconstitutionally unfair discrimination, assertedly wrought by the lawmaker's choices of where and how to draw the lines required by the gradations of penalties (for more and less aggravated incidents of the same class of crime) that the Bill of Rights and the rule of law almost certainly demand.¹⁷⁹ If you think that is an easy question, it must be because you feel sure that answer is 'no'. If you feel the answer might well be 'yes', you must nonetheless grant that answer is not immediately self-evident. The Constitutional Court, I accordingly conclude, had respectable reason for hesitating to tackle the question in a case where the need for a challenged law's correction was sufficiently clear on constitutionally resonant grounds of substantive under-protection, equality considerations being held at bay.

4.4 A case of direct application?

In her *Masiya* judgment, Nkabinde J concludes that the extant common law definition of rape 'is not inconsistent with the Constitution'.¹⁸⁰ Accordingly, no declaration of invalidity is to issue, and no development of the common law definition of rape is to ensue in the guise of a remedy for constitutional invalidity.¹⁸¹ Rather, 'the definition is to be extended ... so as to promote the spirit, purport and objects of the bill of rights.'¹⁸² Evidently in play, then, is an exercise of the Court's inherent authority, in terms of sections 173 and 39(2), to develop the common law, as opposed to its judicial-review power, conferred by section 172(1), to declare invalidity and craft just and equitable remedial orders.¹⁸³ Just as Woolman says.

Let us next notice what stands immediately behind Nkabinde J's refusal to declare the extant rape law unconstitutional and hence invalid. Here is the crucial passage:

The current definition of rape criminalises unacceptable social conduct that is in violation of constitutional rights. It ensures that the constitutional right to be free from all forms of violence, whether public or private, as well as the right to dignity and equality are protected.

¹⁷⁹ I have in mind here a general standard of appraisal of the Constitutional Court's performance closely aligned to the one projected by Roux 'Pragmatism' (n 16 above).

¹⁸⁰ *Masiya* (n 4 above) para 27.

¹⁸¹ *Masiya* (n 4 above) para 51.

¹⁸² *Masiya* (n 4 above) para 27.

¹⁸³ See *Masiya* (n 4 above) para 45 ('[T]he extension of the common-law definition of rape to include non-consensual anal penetration of females will be in the interests of justice and will have, as its aim, the proper realisation by the public of the principles, ideals and values underlying the Constitution.').

Invalidating the definition because it is under-inclusive is to throw the baby out with the bath water. What is required then is for the definition to be extended instead of being eliminated so as to promote the spirit, purport and objects of the Bill of Rights.¹⁸⁴

We can all see the conceptual problem to which Nkabinde J is calling attention there. Woolman sees it and chalks it up to ‘fuzzy logic’, a point to which we shall return.¹⁸⁵

Nkabinde J suggests a comparison of the rape crime at issue in *Masiya* with the erstwhile common law crime of sodomy, at issue in the ‘Sodomy’ case.¹⁸⁶ Let us follow her lead. Decidedly *not* by way of ‘a process of developing the common law’, but by way of ‘a direct application of the Bill of Rights to a common-law criminal offence’, the sodomy crime was simply wiped off the books, declared ‘constitutionally invalid in its entirety’.¹⁸⁷ If there, why not here?

Because it is not true in *Masiya*’s case, as it was in the *Sodomy* case, that the parcel of common law at issue ‘subjected people to criminal penalties for conduct which could not constitute a crime in our constitutional order’,¹⁸⁸ and therefore could and should be declared null and void by reason of inconsistency with provisions in the Bill of Rights. Rather, the opposite is true. The rape crime, as historically defined, ‘criminalises unacceptable social conduct that is in violation of constitutional rights’.¹⁸⁹ Nullification of the sodomy crime as defined by the common law leaves all as it should be, constitutionally speaking. Nullification of the rape crime as defined by the common law leaves ... what?

Of course, legal insiders know how to spin out an acceptable answer: It leaves, we would say, the common law in need of remedial modification – say, by a remedy of ‘reading in’ – as a cure for its constitutional sin of omission, its defect of inconsistency with sections 10 and 12(1) of the Bill of Rights. That is the gist of Woolman’s complaint against Nkabinde J’s logic.¹⁹⁰ The complaint is entirely valid. And yet something also feels right about Nkabinde J’s detection of the insult to ordinary reason that lies in condemning, as inconsistent with the Constitution, a legal prohibition whose presence on the books the Constitution positively demands. A remedial authority that would subtend on such a strange-sounding declaration,

¹⁸⁴ *Masiya* (n 4 above) para 27 (citations omitted).

¹⁸⁵ Woolman ‘Amazing’ (n 2 above) 768 n 10.

¹⁸⁶ See *Masiya* (n 4 above) para 27.

¹⁸⁷ ‘Sodomy’ Case (n 20 above) para 90.

¹⁸⁸ *Masiya* (n 4 above) para 27.

¹⁸⁹ As above.

¹⁹⁰ See Woolman ‘Amazing’ (n 2 above) 768 n 10 (‘The court appears to conclude that a finding of invalidity of a rule of common law can result only in a simple declaration of invalidity.’).

she quite clearly conveys, ought not to be the first resort of the Court when some other resort is available, some other path of reasoning to a Constitution-satisfying outcome. And indeed another path is available, providentially supplied by the framers. The ram in the thicket (block that metaphor!) is section 39(2).

The choice for section 39(2) is understandable in those terms, if not fully defensible. My reason for drawing that distinction will soon be on the table, but first we should confirm why Woolman is right to criticise the choice. To work the question through, we can start by imagining that the Constitution had been so written as to foreclose recourse in this case to section 39(2); say, it flatly prohibited the courts from performing terminological surgery on the common law, except as a remedy for constitutional invalidity declared. With such a prohibition in place, should the Constitutional Court have been willing to declare invalid the extant common law rape crime, that being the only path left open to them to a judicial cure for what they see as a constitutionally unendurable sin of omission in the law, that is, its failure to impose appropriately severe condemnation and penalty on forcible acts of anal penetration? If you ask me, a Court sitting in a transformative constitutional order would have no choice but to do just that, awkward as the declaration of invalidity might feel to the Court.

The Constitutional Court, it seems, took the view that it did not have to perpetrate that awkwardness in Masiya's case. They had access to the omission-fixing cure in question via section 39(2), so why should they have engaged in the seeming doubletalk of declaring constitutionally invalid a constitutionally required parcel of the extant law – only in the next breath to restore what they have just condemned as unconstitutional, in the guise of an instantaneously ensuing 'remedy'? Why mangle straight-line, ordinary reason in that way, when the drafters have provided a fit alternative?

A conclusive answer to that question is prefigured by my imagined case of the constitutional prohibition on judicial rewriting of the common law, except as a remedy for declared constitutional invalidity. Notice that, with respect to statutes, such a constitutional prohibition is not imagined, it is actual! In terms of section 39(2), statutes are open to judicial interpretation but not to judicial 'development'. By its holding that the old rape definition's omission of anal penetration is 'not inconsistent with the Constitution', the Court has, in principle, disabled itself from curing an identically flawed act of Parliament should one ever happen to issue. And that, surely, is an unacceptable implication.¹⁹¹

¹⁹¹ I am indebted for this point, which I had failed to see, to an anonymous referee.

The *Masiya* Court thus erred in withholding a declaration of invalidity of the old common law of rape. Its error, however, consists only of resort to section 39(2) where section 172(1) seemed to the Court not to fit the case while section 39(2) seemed fully serviceable. The error is not at all symptomatic of a flight from the burdens of clause-by-clause exposition of constitutional content that attend upon direct application.

The focus of the crime of rape, writes Nkabinde J, ‘is on the breach of “a more specific right such as the right to bodily integrity” and security of the person and the right to be protected from degradation and abuse.’¹⁹² Presumably, there was something, some line of thought, that Nkabinde meant to convey by that direct allusion to O’Regan J’s opinion for the Court in *Dawood*. What, then? Well, that is the passage in *Dawood* where O’Regan J exactly differentiates between dignity as ‘a value that informs the interpretation of many, possibly all, other rights’ (or, in other words, dignity acting as a condiment in the spirit-brew of the Bill of Rights) and dignity as ‘a justiciable and enforceable *right* that must be respected and protected’. Dignity, then, as a target of ‘direct’, not ‘indirect’, application of the Bill of Rights, as Woolman understands those terms.

There, and in other passages I have quoted above, Nkabinde J’s opinion makes sufficiently clear that the *Masiya* Court’s modification of the common law is designed to respond, not to some spirit summoned from the vasty deeps of the Bill of Rights, but rather to certain, specifically identified, distinctly articulated demands of sections 10 and 12(1)(c) of the Bill – most particularly, the Constitution’s mandate to protect people against private violence. As used (however mistakenly) in the *Masiya* case, section 39(2) is not serving as an escape-hatch from the Court’s responsibility for clause-by-clause elucidation of the contents of the Bill of Rights. It is rather serving as a handy authorisation for a moderately drastic bit of judicial surgery on the common law, in circumstances where the Court finds inapposite section 172(1)(b)’s license to operate *qua* remedy for invalidity.

In making this use of section 39(2), Nkabinde J followed precedent set by the Constitutional Court in *Carmichele*. Just as the Court there chose not to condemn, as constitutionally out of line, whatever affirmative, protective duties were already imposed on the police by the extant common law of delict, so the Court in *Masiya* chose not to condemn, as constitutionally out of line, whatever liabilities to criminal conviction were already imposed on perpetrators of sexual

¹⁹² *Masiya* (n 4 above) para 25, quoting from *Dawood v Minister of Home Affairs* 2000 3 SA 936 (CC); 2000 8 BCLR 837 (CC) para 35.

violence by the extant common law of crimes. In both cases, the extant impositions of duty and liability were in order as far as they went. In both, the issue was one of broadening those impositions; there was no question of contracting, much less deleting them. Just as the Constitutional Court in *Carmichele* found that development of the common law under the aegis of section 39(2) was the apt course to take in those circumstances, so did the Court in *Masiya*. In both cases, moreover, the Court made sufficiently clear its view that a duty- and liability-extending modification of the common law was required not just by some immanent, residual, order of values to be distilled from the Bill of Rights as a whole, but also by an application of the Constitution's specific guarantees respecting dignity and freedom and security of the person.¹⁹³

It seems we might extract from the *Carmichele/Masiya* pair a general guideline of South African constitutional law, as follows: *When the constitutional fault detected in some duty- and liability-imposing parcel of the common law lies not at all in the imposition of duty and liability, but only in the failure to define the type of duty- and liability-raising conduct in question with sufficient protective effect, then the authorisation for judicial surgery on the common law is to be found not in the court's judicial-review/remedial power granted by section 172(1), but rather in its inherent power to develop the common law in terms of section 39(2).* The reason for this result is not any thought that under-protection in duty-defining laws can only offend against some residual 'spirit' of the Bill of Rights as a whole, but not against any clear, core, animating principle of any particular rights-naming clause. The reason for the result simply is that the section 172(1)(b) remedial power is expressly conditioned on an antecedent declaration of inconsistency of some law with the Constitution, and, in this class of cases – so thinks the Court – there is nothing to declare inconsistent.

In sum: At stake here is a notional distribution of the source of judicial authority and obligation to develop the common law, as between two clauses in the Constitution. Not at stake is a flight from direct application of the Bill of Rights, as Woolman defines 'direct'. Rather, the *Carmichele/Masiya* pair (and let us also recall *NK* and *Thebus*) shows the Constitutional Court rejecting Woolman's preferred construction of the relations among sections 8, 39(2), and 172(1), as outlined in Part 2 of this article.

¹⁹³ See *Carmichele* (n 59 above) para 44 ('[T]here is a duty imposed on the state and all of its organs not to perform any act that infringes these rights. In some circumstances there would also be a positive component which obliges the state and its organs to provide appropriate protection to everyone through laws and structures designed to afford such protection.');

Masiya (n 4 above) paras 25, 27, 37, 38, 39, reviewed above, text accompanying notes 169-177.

Woolman, of course, is fully aware of this gap between his own preferred construction and the Court's 'black letter' construction. He is nevertheless careful not to suggest that the gap must necessarily make a world of difference in practice.¹⁹⁴ To the contrary, he explicitly points out that the Constitutional Court, using its own construction, *could* make a 'muscular' use of section 39(2) that 'could generate the kinds of decisions and constitutional rules' he is looking for.¹⁹⁵ But he sees this possibility as 'entirely hypothetical', asserting that the Constitutional Court has not, in fact, 'deployed s 39(2) in the muscular fashion that would be necessary to rebut my primary arguments.'¹⁹⁶ One can assume, though, that *were* the Court, acting under the aegis of section 39(2), to search specifically for incompatibility between some challenged law and particular provisions of the Bill of Rights, that should count for Woolman as direct application.¹⁹⁷ I believe that *Masiya* – like *Carmichele* and *NK* – is most naturally read as just such a case, as opposed to a case of a non-differentiated appeal by the Court to some vaguely conjured 'spirit' of the Bill of Rights entire. If Woolman does not see the cases that way, that might possibly be because his normative commitments are getting in the way, by which I mean his insistence that section 8 and 39(2) must, on pain of redundancy, have mutually 'independent' purposes,¹⁹⁸ entailing distinct tests for the common law's liability to revision: incompatibility with 'the specific provisions of Chapter 2' under section 8, incompatibility with the normative residue under section 39(2).¹⁹⁹

4.5 The sex-discrimination issue: Easy or hard?

For several pages, now, I have been reflecting on the Constitutional Court's designation, in *Masiya*, of section 39(2) – and not section 8 or 172(1) – as the source of its authority to review the High Court's order in respect of developing the common law of rape. I turn now to another feature of the Constitutional Court's *Masiya* decision that has excited Woolman's concern, namely, the Court's postponement of the question whether the definition of rape, once extended to cover anal as well as vaginal penetration, must also be extended to cover penetration of males as well as females. My first suggestion (but then things will grow more complicated) will be that Woolman's difference with the Court in this regard depends on a substantive disagreement concerning the merits of a particular constitutional claim. More precisely, it has to do with a conflict between Woolman's and the

¹⁹⁴ See generally Woolman 'Application' (n 17 above).

¹⁹⁵ Woolman 'Amazing' (n 2 above) 766 n 6.

¹⁹⁶ As above.

¹⁹⁷ See as above.

¹⁹⁸ Woolman 'Amazing' (n 2 above) 769.

¹⁹⁹ See Woolman 'Amazing' (n 2 above) 769, 771.

Court's respective preliminary judgments regarding the merits of a claim against the rape definition's consistency with Constitution sections 9(1) and 9(3), if that definition, once extended to cover anal penetration of females, is not immediately extended again to cover anal penetration of males.

Of course, Masiya's case does not squarely present that question; only a prosecution for rape in a case of anal penetration of a male could do that. Woolman does not – and I doubt he ever would – raise a blanket objection to judicial hesitancy to reach for hard constitutional questions whose resolution is not necessary to a complete disposition of the case *sub iudice*. What he does clearly think is that the constitutional violation is, in this instance, so exceptionally and blatantly clear that the Constitutional Court could appropriately have resolved it on the spot.²⁰⁰ The hangup is that the Court apparently does not share Woolman's perception of the obviousness of the answer to the equality clause question thus posed. If the question really is debatable in light of the applicable precedents, then the Court's forbearance to decide on the spot will seem (to an American constitutional lawyer, at any rate) to be routinely predictable for any court in a constitutional democracy, disposing over an assigned power of judicial review; the forbearance simply cannot then qualify as probative for a general complaint about a judicial addiction to excessive minimalism. And the Court, I am about to suggest, had detectible reason to assess the equality clause question as debatable under its own precedents.

In the view of the trial court in Masiya's case – as well as in the apparent view of Woolman²⁰¹ – restricting the newly extended rape law's protection to women is 'irrational and totally senseless', an 'arbitrary discrimination'²⁰² – and thus, it would seem, a direct violation not only of section 9(3) but also section 9(1), according to the 'tabulation' for a section 9 inquiry laid down by Goldstone J in *Harksen*.²⁰³ In the view of the High Court, the restriction results in 'discriminatory sentencing', an apparent invocation of section 9(3)'s prohibition of unfair discrimination.²⁰⁴ What is more, the Constitutional Court agrees that 'non-consensual anal penetration ...

²⁰⁰ Having noted his agreement with Langa CJ's 'unassailable' view that 'it makes no sense to distinguish between men and women' with respect to the gravity of the crime of anal rape, Woolman goes on to say that 'in these circumstances' the Court was wrong to refrain from addressing the sex-specificity issue in a case whose facts did not require its resolution. Woolman 'Amazing' (n 2 above) 767.

²⁰¹ As above.

²⁰² *Masiya* (n 4 above) para 9.

²⁰³ See *Harksen v Lane NO* [1997] ZACC 12; 1997 11 BCLR 1489; 1998 1 SA 300 para 53 (item '(a)' in the tabulation).

²⁰⁴ *Masiya* (n 4 above) paras 2, 15.

is [no] less degrading, humiliating and traumatic' for males than for females.²⁰⁵ But, again, the hangup is that the Constitutional Court does not allow that it automatically follow from this equivalence that a gender-specific definition of rape must be unconstitutional.²⁰⁶

How could it not? The Court does not spell out its answer, but those conversant with the Court's equality jurisprudence can see one sitting there. Section 9(3) prohibits unfair discriminations on grounds of sex, but not all sex-based differentiations are unfair (and much less are all of them arbitrary and thus in violation of section 9(1)).²⁰⁷ According to the Court's carefully developed and precisely articulated doctrine, discrimination is 'unfair' when and insofar as it has the effect of impairing dignity or inflicting some comparably serious harm.²⁰⁸ That may not be uncontroversial doctrine or (for aught I know) the doctrine favored by Woolman, but substantive doctrine it surely is, quite carefully and elaborately wrought by the Constitutional Court.

So consider: In the view of the Constitutional Court,

it is ... widely accepted that sexual violence and rape not only offends the privacy and dignity of women but also reflects the unequal power relations between men and women in our society.²⁰⁹

Rape, said the Court, is understood in South Africa as being 'not simply an act of sexual gratification, but one of physical domination' – 'an extreme and flagrant form of manifesting male supremacy over females.'²¹⁰ Historically, said the Court, 'rape has been and continues to be a crime of which females are its systematic target.'²¹¹ In the prevailing societal view as reported by the Court, not only do females thus bear the major brunt of the degradation and brutality inflicted by sexual violence, but where such violence is consciously or unconsciously directed to the subordination of some sex or gender – as it somewhat systematically is, according to what the Court takes to be the dominant understanding – that sex or gender is the female or feminine, not the male or masculine.

Perhaps that all adds up to a controversial batch of observations about prevailing South African understandings. (I do not know and shall not try to say.) But let us ask: Accepting the observations as correct, do they really provide a grader of penalties for crimes with a

²⁰⁵ *Masiya* (n 4 above) para 30.

²⁰⁶ As above. ('That this is so does not mean that it is unconstitutional to have a definition of rape which is gender-specific.')

²⁰⁷ See *Harksen* (n 203 above) para 53.

²⁰⁸ See *Harksen* (n 203 above) paras 46, 50, 51(c).

²⁰⁹ *Masiya* (n 4 above) para 28.

²¹⁰ *Masiya* (n 4 above) para 36.

²¹¹ As above.

decisive reason to tilt the balance more favorably to liberty and mercy, as against prevention and condemnation, when sexual violence is directed against males? On first look, I find it far from obvious that they do. I cannot, however, deny that the question is a hard one that requires careful thought. The Court's observations do, then, point to a possible reason, not inherently injurious to the dignity of men or of women – any more than, in *Hugo*, President Mandela's reasons for restricting his commutation order to mothers were found injurious to the dignity of men or of women²¹² – why a lawmaker might decide to treat sexual violence toward women as a more seriously graded crime than sexual violence toward men. If not unfair in *Hugo*, why unfair here? One can so inquire in good faith, without for a moment doubting that that anal rape is a monstrous affront to the dignity and security of male as well as female victims – any more than any justice sitting in *Hugo* could have doubted that imprisonment is hard for men as it is for women.²¹³

Granted, 'strong arguments' could be made – and were, to the Constitutional Court in *Masiya's* case – 'to the effect that gender-specificity in relation to rape' must be deemed constitutionally unfair insofar as it undoubtedly reflects 'patriarchal stereotypes inconsistent with the Constitution.'²¹⁴ Exactly parallel arguments were made in *Hugo*, including by justices who found, contrary to the majority of the Constitutional Court, that the President's gender-specific deployment of his pardon power was indeed an act of unfair, sex-based discrimination.²¹⁵ In *Hugo*, the claims of constitutionally unacceptable stereotyping met up with both respectful consideration and formidable rebuttal from the majority side.²¹⁶ In *Masiya*, the Court did not reject the parallel arguments, it rather left them for another day.²¹⁷ Perhaps there are members of the Court engaged in, or open to, reconsideration of the position taken in *Hugo*. The matter at issue is obviously difficult, deep, and of major import for South African sex-equality jurisprudence. It may well currently divide the justices, just as it divided them in *Hugo*. If they wait, views might undergo maturation and moderation. Parliament may speak, and that could make a difference. In *Hugo*, the sex-discrimination question could not wait; if the discrimination were to be found unfair and unjustified, a remedial question would then arise that conceivably could have issued in Mr Hugo obtaining release from prison. In *Hugo*, the sex-discrimination question could not wait; Mr Hugo's claimed right against unfair, sex-based discrimination was directly and

²¹² See *The President of South Africa v Hugo* 1997 4 SA 1 (CC); 1997 6 BCLR 708 (CC).

²¹³ See Woolman 'Amazing' (n 2 above) 767.

²¹⁴ Woolman 'Amazing' (n 2 above) para 29.

²¹⁵ See *Hugo* (n 212 above) para 80 (Kriegler J); paras 93-94 (Mokgoro J).

²¹⁶ See *Hugo* (n 212 above) paras 37-39 (Goldstone J); para 113 (O'Regan J).

²¹⁷ See *Masiya* (n 4 above) paras 29, 36.

immediately at stake. In *Masiya*, by contrast, the question can wait; the prisoner at bar has nothing at stake in the resolution.

4.6 Objective unconstitutionality

But Woolman maintains that the question cannot wait, owing to the Constitutional Court's adherence to the doctrine of objective unconstitutionality.²¹⁸ Woolman puts the matter thus: '[I]f one cannot imagine the court's refusing [on some future occasion] to extend the 'new' rule to embrace coerced anal intercourse of men, then the new rule is objectively unconstitutional as of the moment it was announced.'²¹⁹ From this, Woolman apparently deduces that the Court is obliged to decide *now* (Woolman thinks in the affirmative) whether extension of the new rule to the protection of men is constitutionally required. But how, exactly, would that follow?

Consider this possible response: Under the doctrine of objective unconstitutionality, a court is not free to postpone to some future case a decision on the constitutionality of any law whose application to a pending case would be decisive, even if the putative constitutional defect in that law pertains strictly to rights of persons other than the parties to the pending case. ('The right to challenge the constitutionality of a statute which affects you directly cannot be made dependent on the finding of some other constitutional right on which to base the challenge. What if there is no such right?')²²⁰ Since the Court could never justify convicting *Masiya* in terms of an objectively unconstitutional law, it is obliged to face the question of the new rule's complete constitutionality as a part of its disposition of *Masiya's* case.

That cannot be Woolman's argument, for the simple and obvious reason that the Constitutional Court is not, as matters turn out, proposing to apply the new definition of rape to the pending prosecution of *Masiya*.²²¹ The only law the Court proposes to apply to him is the old, constitutionally unassailable law defining the crime of indecent assault, and so there is no way that an on-the-spot assessment of the constitutionality of the *new* rule can affect the prosecution's outcome. Insofar as the doctrine of objective unconstitutionality means to allow parties to pending cases to claim

²¹⁸ See, eg, *Home Affairs* (n 87 above) para 29:

On the objective theory of unconstitutionality adopted by this Court a litigant who has standing may properly rely on the objective unconstitutionality of a statute for the relief sought, even though the right unconstitutionally infringed is not that of the litigant in question but of some other person.

²¹⁹ Woolman 'Amazing' (n 2 above) 167 n 7.

²²⁰ *Ferreira v Levin NO* 1996 1 SA 984 (CC), 1996 1 BCLR 1 (CC) para 163 (Chaskalson P) ('*Ferreira*').

²²¹ See *Masiya* (n 4 above) paras 56-57 (deciding against retrospective application).

the benefit of the unconstitutionality (on whatever grounds) of rules and doctrines being then and there invoked against them, it can have no purchase in the pending prosecution of Masiya (nor in any imaginable future prosecution of him, unless in respect of some utterly hypothetical, future criminal act).²²²

Thus, on what we might call a precise or strict reading of the doctrine of objective unconstitutionality, it cannot have the effect of requiring a decision of the putative section 9(3) claim against the new rule, as a part of the Constitutional Court's disposition of the case of *Masiya v DPP CCT 54/06*. But is there, perhaps, some looser version of objective unconstitutionality that might have such an effect? I do not see what it would be. The doctrine of objective unconstitutionality cannot reasonably be taken to commit the Constitutional Court to on-the-spot adjudication of every conceivable claim of constitutional defect that might arguably afflict any of the rules and doctrines that in any way crop up in a case *sub iudice*. That way surely lies madness.

We can use a variation on *NM* to illustrate. Suppose the Court decides to take the case up for review, in the expectation that it cleanly presents a question about the consistency of the extant common law of privacy-invasion with Constitution section 14, inasmuch as the extant law flatly excludes liability for non-intentional, but negligent, unauthorised disclosures of private information. Upon study of the record, the Court discovers that it contains a binding stipulation from all sides, to the effect that the book-writer was not negligent or in any way at fault for her action – so all that could remain for the Constitutional Court to do would be to affirm the decision below on that ground. It seems Woolman would be among the first to insist (and I would agree) that the Court ought now to dismiss the appeal for want of jurisdiction. But why should that follow, after all? Why should not the Court rather say: 'There is still a question in the air about whether the extant common law of privacy-invasion is constitutional, inasmuch as it flatly excludes liability for negligence, so we really owe it to the country to decide that now, *per* the doctrine of objective unconstitutionality'. Is *that* how we want the Court to be conducting its affairs?

²²² Thus, this is not a case in which refusal to decide a constitutional question on the spot could possibly involve the Court in 'recognis[ing] the validity of a [law] in respect of one litigant, only to deny it to another.' *Ferreira* (n 220 above) para 26 (Ackermann J). Neither – owing to the non-retrospectivity ruling in *Masiya* – is it a case in which the postponement compromises 'legal certainty' to the disadvantage of any individual contemplating some or other course of action (as above). Of course, the objective-unconstitutionality argument *would* have bite in *Masiya's* case, *if* the Court had decided in favor of retrospective application of the new rule. But I do not take Woolman to be suggesting that the Court's ruling against retrospective application is itself symptomatic of a flight from substantive decisionmaking responsibility.

Nothing that I know of in the Constitutional Court's *oeuvre* suggests that the Court itself has ever thought so. The Court has rejected a 'narrow' approach to standing in constitutional cases.²²³ Accordingly, the Court will address constitutional challenges by or on behalf of any litigant – whether or not his or her own constitutional rights are at stake – who can show that 'he or she is directly affected by' the law in question, and in that sense has an 'interest in' the challenge.²²⁴ The Court has furthermore indicated that it will be generous in deciding whether such an interest has been shown.²²⁵ The Court has also, however, expressly recognised the factors militating against allowance of constitutional challenges by persons claiming only a 'hypothetical' or 'academic' interest:

The principal reasons for this objection are that in an adversarial system decisions are best made when there is a genuine dispute in which each party has an interest to protect. There is moreover the need to conserve scarce judicial resources and to apply them to real and not hypothetical disputes. The United States courts also have regard to 'the proper role of the Courts in a democratic society' which is to settle concrete disputes, and to the need to prevent courts from being drawn into unnecessary conflict with coordinate branches of government.²²⁶

These would seem to be reasons why 'few, if any, countries have at all times allowed all persons to invoke the jurisdiction of Courts to solve all legal problems.'²²⁷ South Africa does not draw the line nearly as strictly as some countries do (mine, for example),²²⁸ but a line there surely must be, and drawing it at the point where the litigant raising the challenge has something at stake in its resolution – that is, *qua* litigant, not just *qua* citizen – seems not a bad place to draw it. That, at any rate, is what I understand the doctrine of objective unconstitutionality to do. Woolman fears the doctrine may be falling into some degree of 'desuetude'.²²⁹ I respond only that *Masiya* cannot stand as evidence for that proposition.

4.7 The court's responsibility as lawmaker

Suppose you are persuaded that the doctrine of objective constitutionality, as currently propounded by the Constitutional Court, does not oblige the Court to address a section 9(3) claim

²²³ *Ferreira* (n 220 above) para 162 (Chaskalson P).

²²⁴ *Ferreira* (n 220 above) paras 165-66 (Chaskalson P).

²²⁵ 'It is for this Court to decide what is a sufficient interest in the circumstances.'
Ferreira (n 220 above) para 168 (Chaskalson P, rejecting Ackermann J's view that the Applicants lacked standing to raise a particular constitutional challenge).

²²⁶ *Ferreira* (n 220 above) para 164 (citation omitted).

²²⁷ *Ferreira* (n 220 above) para 31 (Ackermann J).

²²⁸ See, eg, n 154 above.

²²⁹ Woolman 'Application' (n 17 above) 50.

against the new rule, as part of its disposition of *Masiya's* case. That is certainly not yet to say that *nothing* so obliges it. What most likely would so oblige it, if anything does, is the simple fact that the Court is the author of the new rule, and we can rightly demand of the Constitutional Court that it – above all other agents in the South African constitutional order – take care, when it gets into the business of writing laws, to write only laws that are fully consistent with the Bill of Rights. I mean, just imagine that Cabinet, having decided to preempt completely the common law of sexually assaultive crimes with a new statutory code, tables before Parliament a draft that defines rape as the vaginal or anal penetration of females. It will most definitely be in order for objectors to demand that Parliament must now, before acting, decide whether, in its advised view, such a statute could pass constitutional muster under section 9(3). If that is so for Parliament, must it not be even more clearly so for the Constitutional Court?

Maybe not. To say so with perfect confidence is to lose sight momentarily of some differences between a court and a parliament in a constitutional democracy. When Parliament passes a bill, it, by necessary implication, clears that bill of constitutional defect so far as it can tell (no doubt subject to possible judicial correction). When the Constitutional Court declines to decide the constitutionality of a parliamentary enactment, in a case where nothing can possibly turn on that decision, it does not do that; it rather says 'I am a court, I am moderately self-restrained by habit that you [meaning the country] would not really wish me to shake off, and the time for that is not yet ripe.'

'But', you will justly reply, 'the new rule we are concerned with here is *not* a parliamentary enactment; it is the Court's own, direct creation; that is just the point! There is no inter-branch dialogue in progress here, no consideration of deference to democratic accountability, no ball in Parliament's court, to motivate or warrant postponement; there is only the Court refusing to confront itself!' I am on shaky ground here, owing to deficient understanding of the exact interplay between common law and statute law in the South African law of crimes. (The very idea of common law crime poses a major challenge to the American-trained constitutional-legal temperament!) My impression, though, from the *Masiya* case itself, is that Parliament has indeed, though the Criminal Procedure Act and its various schedules, quite concretely bought into the judiciary's historic definitions of the various crimes and, in a quite real sense,

made those definitions its own – including, specifically, the sex-differentiating aspect in the historic definition of the crime of rape.²³⁰ If that is correct, then the full set of normal, inter-branch considerations affecting the degree to which the Court reaches out for constitutional questions is operative here.

It is, to be sure, a set of considerations that can be cashed only through exercises of judgment in particular cases. The cost of waiting always must be among the factors to be considered. That there is such a cost involved in the choice that concerns us here cannot be doubted. If (as Woolman believes) the Court must eventually decide to extend the rape definition to cover cases of male victims, the next rape-like assault on a man still won't be prosecutable as rape. That is for sure, given the anti-retrospectivity ruling in *Masiya*; and that *could* make all the difference. But the odds don't seem overwhelmingly that way, indecent assault is still a serious crime; and the Court's public fidelity to its anti-imperialist habit is not in itself a negligible value. Had the Court grasped the nettle in *Masiya* that would not, in my view, have been over the line (given that there are common law crimes that the courts are responsible to define). But neither, in my view on present information, was the decision to wait an improper one.

How we judge that question may depend on how obviously and inevitably right we judge the section 9(3) claim against the new rule to be. Someone who sees the claim as irresistible is much likelier to fault the Constitutional Court for declining to decide it on the spot, than is someone, like me, who sees the claim as debatable under the precedents as they stand. In presenting the claim in that light, I have gone well beyond anything written in the Constitutional Court's opinion; no reference to *Hugo* or to *Harksen*, for example, appears there. But I have offered nothing that is not entirely consistent with what the Court did write, and perhaps nothing that is not more or less clearly indicated by what the Court did write, at least to those conversant with the body of the Court's other work. In other words, I have followed the course of interpretive charity. Whether with resulting net profit or loss to the project of the advancement of the benign rule of constitutional law in South Africa must be for the reader to judge.

²³⁰ See *Masiya* (n 4 above) paras 2, 7, 12.

