

## **SHELDON BERNARD LYKE RESEARCH AGENDA**

My research agenda is driven by an interest in the intersection of law and society—specifically understanding the role of law and its institutions in the creation and amelioration of social inequality for marginalized and oppressed people. I often examine discrimination on the basis of racial and sexual identity. The analytics that link my research, and that I use to explore the intersection of law and society are territory, space, and property—three related concepts that are pervasive in social life. Territory, space, and property are also powerful metaphors for research because they touch on different aspects of social life, including physical, mental, “real”, intellectual, electronic, cultural, and political states. This “flexibility” is invaluable in my research of oppressed people and allows me to study legal rights and society in a comparative context in both a local and international setting.

As a socio-legal scholar trained in both the law and sociology, I often rely on systematic empirical observation to help explain legal phenomena. When collecting data, and/or performing analyses, I primarily use qualitative research methods. These methods include participant observation/ethnography, interviews, focus groups, and comparative historical case studies. Following are my current and proposed research projects:

### **CURRENT RESEARCH**

#### **Cosmopolitan Courts and Strange Laws: The Globalization of Courts and Human Rights**

My dissertation examines the globalization of human rights laws via judicial institutions. I argue that the world is witnessing the emergence of cosmopolitan courts (courts that look beyond provincial law when deciding domestic cases). The dissertation articulates the factors that are leading to this emergence, and argues that judicial cosmopolitanism is leading to new forms of legal innovation in judges' decisions. I theorize a sociology of transnational and global legal processes that interact with courts, relying on qualitative content analyses of national high court appellate decisions. in which it exists. Additionally, I explore American society's response to the judicial globalization. I analyze the backlash to these cosmopolitan activities which has lead to the social transformation of foreign law into a dangerous stranger, or what I label, strange laws. The dissertation links this transformation to other conservative movements that have constructed foreign national immigrants into illegal strangers who should be feared. My work argues that foreign laws and decisions are the new stranger.

I plan on revising my dissertation into a book that looks at courts and globalization.

#### **Public Health v. Private Freedoms: The Regulation of Commercial Sex Establishments**

This article looks at the regulation of bathhouses and other privately-owned commercial establishments that serve as locations that facilitate sexual activity between men. These businesses while privately-owned, are public establishments and therefore subject to public regulation. Over the past twenty years, bathhouses have been subject to closings and monitoring because some municipal public health departments consider them to be locations that facilitate the transmission of HIV. Relying on the Supreme Court's decision in *Lawrence v. Texas*, I argue that bathhouses are weird spaces; they are not public locations, but their public accommodation status doesn't afford them the same liberty protections as individual's private home. I examine the public/private

differences of property ownership and the liberty interests that attach to these spatial and more transcendent dimensions. In addition, I argue that closing these establishments violates individuals' liberty interests and do not further the government's interests. More effective and constitutional remedies include offering ample safer sex materials, consistent on-site HIV testing, and showers & other resources to promote client hygiene.

### **Legal but Persecuted: Prostitution in Tanzania**

This article is based on a three week mini-ethnography in Dar es Salaam, Tanzania performed in April and May of 1999 after the government passed the 1998 Sexual Offenses Act, which significantly modified the Tanzanian Penal Code. The law was passed to protect and safeguard women and children in matters pertaining to sex, including rape, defilement, sexual harassment, and genital mutilation. However, there were no legislative changes with respect to commercial sex workers. Prostitution in Tanzania is not a criminal offense, yet sex workers are arrested, detained, and fined for loitering. I found that prostitution, in a *de jure* sense, is not illegal, but *de facto*, it is treated in practice as a criminal act. I argue that this gap is problematic for the nation's legal system, and that it largely exists because sex workers constitute a forgotten and ignored class of women in Tanzania.

### **PROPOSED RESEARCH**

The following research projects represent scholarship that I want to pursue during my tenure in the program. The first project, *Tracking Brown*, is an extension of my dissertation research. The second project, *Virginity as Property*, continues my scholarship in sexuality. Both topics are related to my quest to understand the importance of territory, space, and property in understanding human rights and social inequality.

#### **Tracking *Brown v. Board of Education*: The Denationalization of an American Civil Rights Case**

There should be no surprise that there are a number of scholars who have debated and discussed the role of *Brown v. Board of Education*—the 1954 Supreme Court case that effectively ended *de jure* segregation—with respect to social change in the United States.<sup>1</sup> But what about *Brown*'s role outside the United States? One historian highlights the landmark case's foreign role. Mary Dudziak argues that *Brown* was a case intimately linked to the Cold War.<sup>2</sup> She states that *Brown* aided the US image abroad, because its formal legal change was seen as a blow to Communism because people around the world could see that the United States was fair and that democracy as a political system was just. But despite heightened globalizing processes, and an increase in the exchange of legal ideas, there is little scholarship on the international influence of *Brown*. This project seeks to fill that gap.

The purpose of this project is to examine the international influence of *Brown*; specifically how foreign national courts use *Brown* by examining what Anne Marie Slaughter has labeled transjudicial communications: instances when a court decision cites the decisions of another court or courts in a foreign country or countries. Scholars argue that, with respect to transjudicial communication, the US Supreme Court is in one-way "overseas trade" with other nations' courts. This means that many national courts consider the rulings of the United States with respect to issues on liberty—but that the

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1 See Gerald N. Rosenberg *The Hollow Hope: Can Courts Bring About Social Change?* (1991); James T. Patterson, *Brown v. Board of Education: A Civil Rights Milestone and Its Troubled Legacy* (2001);

2 Mary L. Dudziak, *Brown as a Cold War Case*, *Journal of American History* June 2004.

US Supreme Court does not refer to the judgments of the courts that refer to it.

For some scholars, the exchange of legal ideas is a means towards harmonization. This overseas exchange of ideas, however, is a form of legal cosmopolitanism that is increasingly on the rise. Under a cosmopolitan perspective, particularly as cosmopolitanism has been explained by Appiah in his book, *Cosmopolitanism: Ethics in a World of Strangers*, cosmopolitanism doesn't have to lead to consensus or harmonization.

The first goal of this project is to ascertain whether foreign courts cite *Brown* as an indicator of whether there is some degree of cosmopolitan legal exchange among courts. The second goal is to understand what happens to a case once it is denationalized and taken out of the context of the nation-state where it was decided. Specifically, I want to understand how foreign judiciaries consume *Brown*, and generally I hope to provide some insight into how foreign court construct meaning from *Brown*. While the first goal is more empirical, the second phase of the project is theoretical and will require an interpretative analysis where I code and typologize the ways in which foreign tribunals use *Brown*.

This project is a qualitative study of the use of *Brown* by the national high courts and constitutional courts of foreign countries. To do this, I plan on using legal electronic databases to find foreign decisions that cite *Brown*. This study adopts the basic techniques of citation analysis, with an analytical gloss. After obtaining a database of cases that cite *Brown*, I will then read those cases. This process of searching for mentions and then reading those mentions, analyzing the opinions that contain them, and coding the results is not unfamiliar to practicing lawyers. In this sense, citation analysis, despite its social scientific origins, also depends on the sort of doctrinal analysis that legal scholars are particularly suited to do.

### **Virginity as Property? Towards a Neo-Property Theory of Identity**

*A wife is property that one acquires by contract, she is transferable, because possession of her requires title; in fact, woman is, so to speak, only man's appendage; consequently, slice, cut, clip her, you have all rights to her.*

Honoré De Balzac (1799-1859) French novelist

Can we think of virginity as a form of new property? My research project will investigate how studying "virginity as property" can help trace power systems of gendered and sexual domination. Examining claims to virginity as property claims can reveal the various ways in which the law discriminates against homosexuals, bisexuals, and even heterosexuals. While the project focuses on virginity specifically, I am interested in exploring the larger question of whether we can conceive of various social identities in terms of property—moving towards a theory of neo-property.

This project is an extension of research by Margaret Radin who articulated a theory of personhood as property<sup>3</sup>, and the work of Cheryl Harris, who wrote the article, "Whiteness as Property."<sup>4</sup> Radin argues that as we embody ourselves in the world around us, some property, which she calls "personal,"

3 Margaret Radin, *Reinterpreting Property*. University of Chicago Press, (1993).

4 Cheryl I. Harris, "Whiteness as Property" in *Harvard Law Review* Vol. 106, No. 8, p. 1707 (1993).

becomes essential to our personhood. Other property is “fungible,” and can be bought and sold without harm to the personhood. Radin argues that the distinction between these two types of property matters because personal property should receive greater protection than fungible property. She also argues that some personal properties should be labeled inalienable so that their purchase and sale can be prevented.

Harris built on the work of Radin to construct a theory for understanding how the law operates to support racial stratification. Harris is also concerned with a property of personhood, but whereas Radin discusses tangible property, Harris focuses on property that is intangible—race (specifically whiteness). Harris argues that whiteness shares similar characteristics and functions of property. By unmasking "whiteness as property", Harris is able to discuss its subtle, yet heavy legacy. Whiteness as a property system has successfully frustrated attempts to remedy racial exploitation, because it has blinded society to systems of domination.

This project attempts to export Harris's logic to another context in order to understand systems of domination from a sexual perspective. But the larger agenda is to ask whether this idea can include other forms of identity (i.e. ethnicity) under a theory of neo-property. In addition to the work of Harris, I will draw on sociological theory in formulating a neo-property typology. The work of sociologist Pierre Bourdieu complements Harris's conceptualization of the intangible as property. In his highly influential article, “The Forms of Capital”, Bourdieu argues that there are three forms of capital: economic, cultural, and social.<sup>5</sup> Bourdieu's economic capital is immediately and directly convertible into money and may be institutionalized in the forms of traditional property rights. Cultural capital is largely institutionalized in the form of educational qualifications. Social capital consists of social obligations and an individual's relationships, networks, and group memberships. Following the analysis of Bourdieu, one could argue that whiteness, the property that Harris describes, is a form of social and/or cultural capital—or in a legal typology, social or cultural property. We see similar typologies with respect to human rights, where traditional property rights are usually classified as first generation civil and political rights (as opposed to second generation cultural, economic and social rights), however, we don't see similar distinctions in legal scholarship with respect to property.

With the exception of intellectual property, property theories focus largely on understanding tangible components. There is a need however to theorize neo-property, defined as the intangible elements of property (i.e., identity). Harris's work has demonstrated that using the lens of property to analyze identity can be a great tool for unmasking hidden domination and stratification processes. The "whiteness as property" argument illustrates a neo-property theory in its infancy that I hope to expand. My first goal is to extend this analysis into a context of gender and sexuality by asking whether virginity is a form of property.

### *Why virginity?*

In deciding on a property to analyze sexual domination, “heterosexuality as property” might have been the first choice if one was paralleling the work of Harris. Yet heterosexuality as an analytic might not be refined enough to explore the subtleties of sexual repression. Harris's "whiteness as property" analysis examined the way whiteness quietly subordinates minority racial categories in an age where

5 Pierre Bourdieu, “The Forms of Capital.” In *Handbook of Theory and Research for the Sociology of Education*, ed. John Richardson. New York: Greenwood Press (1986).

general society frowns upon overt racism. However, the same does not hold true for a “heterosexuality as property” analysis, because large segments of society overtly discriminate against minority sexualities. This discrimination is socially acceptable and legally mandated.

Instead of choosing heterosexuality, I tried to pick a type of property that would be ever present in sexual interaction, but also delicate enough to expose the hidden secrets of stratification. I chose virginity. Virginity is pervasive—everyone is born a virgin. But in defining virginity, I am not entirely focused on whether an individual has never had sexual intercourse, but on the *perception* of whether a person is a virgin. Virginity is contentious. Regardless of whether you are male or female it can be nearly impossible to prove (especially disprove) one’s virginity. Therefore, for the purpose of this project’s analysis, I want to emphasize the more symbolic aspects of virginity, and highlight the honor and innocence associated with this status

I am also arguing that several forms of virginity exist that can revolve around multiple identities. For example, a man who has had multiple sexual encounters with women is not a virgin in a traditional sense, but one could argue that he is a virgin with respect to same-sex encounters. Virginity can also focus on ethnic and racial identity. For instance, a black lesbian who has had sex with women but never with a Chicana could be thought to be a “virgin” with respect to Mexican-American women.

### *Research Plan*

The goal of this project is demonstrate how “virginity as property” operates to stratify and subordinate society on a variety of levels. As laws and rules regulate all forms of property, virginity neo-property is no exception. This project will examine the various ways in which virginity is regulated--by the state and non-state (yet still rule based society). Both of these sources work together and reinforce one another in producing a regime of domination. I want to organize my research around: (1) history of virginity as property, (2) the contemporary legal regulation of virginity in the United States, and (3) social understandings of virginity as property and non-state regulation. I discuss these future research categories briefly.

### *History*

The origins of property rights in the United States are rooted in gender and sexual stratification. Religion and history are filled with examples of sexual personal properties. The Bible in the Book of Deuteronomy discusses the wife as property of the husband. The husband was the sole marriage participant who could seek a divorce, and verifying her virginity was an option he could exercise. The Book of Deuteronomy also states that women must be virgins before marriage. The goal of my research would be to establish how these early ideas of the wife and female virginity laid the foundation for gendered economic subordination. This would take the form of early colonial and US laws and case law that establish duties and responsibilities surrounding the marriage contract.

### *Contemporary Legal Regulation*

In this section of research I want to explore contemporary laws with respect to underage “statutory rape” and adult rape prosecutions. I want to search for examples regarding the treatment of children. Even when children are not sexual virgins, society places them in a virginal category of innocence. My goal is to research the promulgation and enforcement of statutory rape laws. What language was used when these laws were enacted in legislative bodies? How do courts enforce statutory rape laws?

I want to explore the differences in action based on the sex and race of a child and the accused. Does the race of the victim diminish an individual's (or parents') claim to virginity/innocence? Can the race of the accused highlight one's claim to virginal honor? The genders of the victim and the accused are also important. Society's reaction is more severe when a teenage girl has sex with an adult man as compared to a teenage boy having sex with an adult woman. Yet if an adult man has sex with a teenage boy there is outrage.

I am also interested in studying the meaning of virginity in adult rape shield cases, particularly comparing and contrasting instances where the race and sex of the victim matches and differs from the accused. A popular, yet fictional account of a contemporary law case can be read in Harper Lee's *To Kill A Mockingbird*, where Bob Ewell (a poor white man) accuses Tom Robinson (a black field hand) of raping his daughter Mayella Ewell. One could argue that regardless of Mayella's actual virginity, Bob Ewell used the state courts to prosecute a black man for having sex with his white daughter. It was Mayella who had in fact kissed Tom Robinson, and her father used the legal system to gain restitution for Mayella's virginity—which directly implicates the honor of his family. It is unclear whether Mayella is actually a virgin. That is unimportant. It is clear that whether she has had sex with men in the past, she is supposed to maintain a certain virginity with respect to having sex with black men.

#### *Qualitative Analysis and Societal Understandings*

I would like to perform a qualitative analysis utilizing focus groups in order to understand how different people think about virginity and how it affects their lives. I am particularly interested in the language that people use to talk about sexual interaction and virginity. Do people talk about sex as though it is a tangible object?

Additionally, I want to understand how people across sexual orientation think about the maintenance and loss of virginity. As with all types of property, there are certain privileges and expectations that come with the ownership of property. What are the privileges, expectations, and rules that attach to virginity? I would like to examine a series of focus groups across gender, race and ethnicity, and sexual orientation in order to understand whether there are differences in expectations in “losing” and or “keeping” virginity. For example, do gay male stories and expectation of loss of virginity more closely mirror those of heterosexual females or heterosexual males? Are the experiences altogether disparate? Or is there a single system at work that dictates rules of control surrounding virginity and proper sexual behavior regardless of one's sexual orientation and ethnicity?

This project will attempt to follow in the tradition of critical race scholarship that looks at multiple identities.<sup>6</sup> Therefore while I am focused on understanding how virginity is used to organize subordination across sexual orientations, I am committed to including an awareness of intersectional identities that include race, gender, ethnicity and sexuality in my work.

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6 Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, (1995)