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Comment: Mandatory Minimums Making Minimal Difference: Ten Years of Sentencing Sex Offenders in South Africa

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**LEXISNEXIS SUMMARY:**

... Reaching young men with economic development programs, access to alcohol and substance abuse treatment, education reform, and media campaigns promoting the perspective that "real men don't rape" may prove to be more effective at reducing sexual violence in South Africa than mandatory minimums, or even a perfect criminal justice system. ... They also revealed a deeper problem within the mandatory minimums system: Mbeki, judges, and other actors' attitudes toward rape, women, and culture shape their response (or lack thereof) to the "rape crisis." ... On average, judges have increased sentences for sex offenders, and judges at least pay lip service to the seriousness of rape in their opinions. ... The sentencing judge, Judge Kotze, found the following "substantial and compelling circumstances": that the complainants sustained no physical injuries and had suffered no psychological damage as a result of the rapes, and that they had not lost their virginity from the rapes as they had already been sexually active, one of them having had sexual intercourse two days before she was raped by the accused. ... The current system has "aggravating factors" built into the mandatory minimums algorithm: A life sentence is prescribed where a victim is raped more than once or by more than one offender, the offender has two previous convictions of sex offenses, the offender is HIV-positive, the victim is under sixteen years old, the victim is physically disabled or mentally ill, or where the rape entails the infliction of grievous bodily harm.

**TEXT:**

[\*213]

Introduction

For the last decade, international headlines have called attention to a "rape crisis" in South Africa. According to Naeema Abrahams and Rachel Jewkes, a 1995 Human Rights Watch report dubbed South Africa the "rape capital of the world," a phrase that has reverberated in national and international newsrooms [\*214] ever since. n1 Reported rapes doubled from 1994 to 1998 and remain consistently high. Perhaps understandably, President Thabo Mbeki and African National Congress (ANC) political leaders have reacted defensively to these headlines. Mbeki believes that the media

descriptions of rape are unhelpful and unpatriotic, threatening the success of the new democracy as a whole.<sup>n2</sup> As a result, when feminists and women's rights activists have called attention to rape, President Mbeki has called them racist.<sup>n3</sup> In 2000, the government even put a moratorium on the release of reported crime statistics, causing the public and the press to erupt with claims that the government was covering up the reality of escalating crime in South Africa.<sup>n4</sup>

The ANC's initial denial that rape was a problem in South Africa, however, only fueled a perception that the ANC was "soft" on rape. It is out of this political context that mandatory minimum sentencing for sex offenders in South Africa arose. As the public became increasingly distressed, the ANC responded to their outcries by giving the public what the ANC presumed they wanted: harsher penalties for sex offenders. But for ten years, mandatory minimums were also their only legislative response. A progressive and integrated Sex Offense Act stalled in Parliament for ten years, and a reduced version finally passed on December 17, 2007.<sup>n5</sup> This Article will examine the lessons learned during this ten-year window, namely, the inefficacy of mandatory minimum sentencing as the only legislative response to the rape crisis in South Africa. While many academics have written about the epidemiology of rape in South Africa,<sup>n6</sup> and another set of academics have [\*215] studied the effects of mandatory minimum sentencing,<sup>n7</sup> no one has yet focused on the role of rape as a catalyst for mandatory minimums in South Africa or on the specific application of mandatory minimums to rape.

South Africa's experience is rife with lessons for other post-conflict countries attempting to address disproportionately high levels of rape in their communities. From a women's rights perspective, severe penalties for rape may seem good: They symbolically establish that rape is a serious offense and that the government takes rape seriously. Such a strong stance may even change societal norms and correct traditional assumptions that rape is somehow acceptable or unremarkable. But ironically, extremely harsh mandatory minimums have actually resulted in even more perceived leniency in South Africa.

The law as it is currently constructed inadvertently forces judges to be lenient. The Criminal Amendment Act of 1997 created distinctions between two new, and relatively arbitrary, categories of rape. Part I rape - or rape involving a minor, multiple perpetrators, multiple rapes, an HIV positive offender, or extreme bodily harm - requires a life sentence. All other rape, or Part III rape, requires a drastically lower sentence of ten years. Judges retain discretion to depart from the mandatory sentence if they find "substantial and compelling circumstances."<sup>n8</sup>

Even within this binary framework, judges have attempted to sentence proportionately. They have used their right to depart for "substantial and compelling circumstances" to execute a range of sentences for what they perceive to be a range of sexual offenses. For Part I rapes, the minimum of life in prison is effectively a maximum sentence, so every departure is necessarily downwards. And every sentencing opinion, therefore, must focus on factors that justify a lesser sentence, rather than the aspects that render the crime particularly horrific. As a result, judges seem to make excuses for offenders in virtually every sentence for Part I rape.

During the first ten years that mandatory minimums were in place, judges reached to find these "substantial and compelling circumstances" in [\*216] inappropriate fact patterns, such as that the victim was not a virgin,<sup>n9</sup> that a father of a ten-year-old was "gentle" when he molested her several times,<sup>n10</sup> or that a husband was culturally chauvinist and thus was less culpable for kidnapping and brutally raping his wife.<sup>n11</sup> These cases made headlines and reinforced the public perception that rapists were not sufficiently punished in South Africa. They also revealed a deeper problem within the mandatory minimums system: Mbeki, judges, and other actors' attitudes toward rape, women, and culture shape their response (or lack thereof) to the "rape crisis."

This year, Parliament finally amended the law to prohibit judges from finding "substantial compelling circumstances" in the following categories: (i) the sexual history of the victim; (ii) the apparent lack of physical harm to the victim; (iii) the defendant's cultural or religious beliefs about rape; and (iv) the previous relationship between the defendant and the complainant.<sup>n12</sup> But so long as the "minimum" remains life in prison, judges will likely find other suspect reasons to justify lesser sentences for all but the most horrific cases.

This Article will argue that mandatory minimum sentencing was the easy way out for the government, allowing policy makers to postpone their attention to the real roots of the rape crisis in South Africa. Ten years after the law's enactment, mandatory minimums have made minimal difference.

The first Part of this Article will place rape in its historical and political context in South Africa. Rape has always been a highly-charged political issue, perpetuating a seemingly constant battle between the ANC, the public, and the media. Part II will present the mandatory minimum provisions of the Criminal Amendment Act of 1997 as a political, symbolic response to the public accusations that the ANC was soft on crime and especially soft on rape. Part III will

examine the ways in which mandatory minimums for rape have failed to meet the ANC's stated goals of reducing sexual violence, assuaging public fear, or establishing rape as a serious offense in the judiciary.

This Article will further argue that the new sentencing amendment will not solve the deeper problem in the mandatory minimums law: its binary structure. Part IV will examine the new amendment in context, and Part V will propose structural sentencing reforms. And finally, Part VI will highlight the limitations of the law more generally, arguing that the law will only be as good as the attitudes of the government actors who implement it.

[\*217]

## I. Sexual Violence and Public Perceptions of Crime and Justice in South Africa

### A. Sexual Violence and the History of Apartheid

From 1988 to 1996, during the period of transition from the apartheid regime to a new democracy led by the ANC, the number of rapes reported to the South African Police Services (SAPS) exploded from 19,308 to 50,481, causing public hysteria about rape. The public wondered: Why the sudden increase of violence against women at the dawn of the democracy? n13 It is unclear, however, whether the actual occurrence of rape increased, or whether the rise in reported rapes merely reflected women's growing trust and willingness to report offenses to a more present police force. n14 Regardless, the new statistics exposed an undercurrent of sexual politics that had long been brewing in the townships. During apartheid, the SAPS allowed violence and lawlessness to persist in black townships. n15 Daily violence became a form of resistance to the cruelty of the apartheid regime, and revolutionary actors intentionally rendered townships ungovernable. Violence was simultaneously a tool for the apartheid regime and a tool for the revolution.

In a hyper-masculine context of war and resistance, rape became a sport among warrior men and their young proteges. In the late 1980s, a well-known gang called the "jackrollers" abducted women in the community and raped them violently in public spaces. "Jackrolling" became a trend in the townships, as an increasing number of youth engaged in the "sport." n16 Similarly, the leaders of the black power movement embodied a heightened, militarized masculinity that proved dangerous to women in their communities. A former Self Defense Unit (SDU) member has explained that leaders of the resistance had easy access to women. He later reflected, "What we did, I guess you could call it rape." n17 Rape was treated as a sport, and the point of the game had less to do with the victim than with the perpetrators themselves. n18 As Naeema Abrahams and Rachel Jewkes from the Medical Research Council have written, "In a violent society, the use of sexual force to acquire desired relations becomes unremarkable." n19

[\*218] Ten years later, the national identity of South Africa is still entwined with remnants of violence alongside discourses of reconciliation. In the lives of women in the townships, it is impossible to pinpoint when the violence of resistance ended and when a new era of "freedom" began. As Bronwyn Harris from the Center for the Study of Violence and Reconciliation concludes, "The discursive shift between political and criminal violence over a period of transition keeps war violence consigned to the realm of the private for many women." n20

The personal violence persisted even after the end of apartheid, as men transitioned from their warrior-like roles. Evidence suggests that South African men's attitudes toward women changed little, if at all, during the transition. A study of 1,394 male workers in municipalities in Cape Town in 1999 found that fifteen percent of men reported having raped or attempted to rape a wife or girlfriend on one or more occasions during the ten years prior to the study. n21 The majority of men in the study indicated that shouting, swearing at a woman, humiliating a woman, or "breaking down her humanity" did not constitute a form of violence. n22 Similarly, a survey of men and women living in the greater Johannesburg area found that one in three young men believed that "forcing sex with someone you know is never sexual violence." n23

South Africa is not alone in its struggle to combat sexual violence during the transition to democracy. n24 In contemporary Africa, rape has become a symptom of a post-conflict nation, where poverty, intense political and personal frustration, nascent police services, and remnants of war combine to create a dangerous environment for women. n25

### B. The Reality: Rape Persists in South Africa

Whatever its roots, rape continues to be a serious problem in South Africa today, with 52,617 rapes reported in 2007. n26 Unfortunately, there is no evidence [\*219] that it is abating. Alarming reports suggest that the violence is most prevalent between adolescents. One recent study found that of twenty-four pregnant teenagers interviewed in a township, all but one described assault as a regular occurrence in their sexual behavior. n27 Young peoples' attitudes about "normal" violence and sex in the community suggest that widespread sexual assault will persist in South Africa with a

new generation. n28 At the same time, sexual violence against adolescents and children is also increasing. Forty percent of reported rape survivors are under the age of eighteen. n29 A national survey of youth in South Africa conducted in 2003 revealed that roughly one in three sexually active young women was forced to have sex her first time. n30

Meanwhile, the media's portrayal of rape in South Africa is even more alarming than the reality. The media describe an atmosphere of impending doom in which South Africans fear for their lives, with apparently rampant and wild sexual assault occurring all over the country. n31 Journalists have suggested that "rapes and assaults on women and older children are now so common as to pass un-remarked;" n32 that South Africa is a "rape-prone society;" n33 and that "rape has become a sickening way of life." n34 Of course the extensive media coverage of the issue disproves this claim that rape goes "un-remarked;" rape is noticed privately and publicly in both the national and international arenas. n35

[\*220]

### C. Denial and Frustration: The Response of the ANC

In the midst of this national angst there has been widespread criticism of the government's actions to combat rape and other crime. President Mbeki has been defiant about crime during his entire tenure: The rape statistics are not truly as bad as they sound; the media is sensationalist; there is no crisis. n36 In 1999, he publicly exploded over a television advertisement and a human rights report that used exaggerated statistics. n37 Although the numbers were questionable, President Mbeki's visceral reaction has raised concerns that, like his comments regarding HIV/AIDS, he was publicly denying a significant and very real problem in South Africa. Shortly thereafter, the government issued the moratorium on the release of SAPS crime statistics. n38

More recently, in July of 2007, Mbeki again minimized the problem by denouncing parts of the African Peer Review Mechanism Report (APRM) on South Africa. The report highlighted several problems in his administration, including its response to HIV/AIDS and violence against women. The APRM panel noted that South Africa ranked first in the world for rape, citing the SAPS statistic of 54,926 reported rapes in 2005 and 2006. n39 Mbeki "took issue with the report's suggestion that there is an unacceptably high level of violent crime." He warned that the panel's use of SAPS rape statistics could be misleading because they only included the rapes that were reported. Some of those reported rapes, he pointed out, "could have led to acquittals." n40

On several occasions, President Mbeki has openly described media reports of rape in South Africa as blatant racism. For example, Mbeki lashed out at activist Charlene Smith, who wrote in a Washington Post article in June 2000, "We won't end this epidemic until we understand the role of tradition and [\*221] religion - and of a culture in which rape is endemic and has become a prime means of transmitting disease, to young women as well as children." n41 In a 2004 letter to the public Mbeki responded, "In simple language she was saying that African traditions, indigenous religions and culture prescribe and institutionalise rape ... saying that our cultures, traditions and religions as Africans inherently make every African man a potential rapist." n42 Mbeki claimed that to describe rape in South Africa as a cultural phenomenon is to "define[] African people as barbaric savages." n43 And he continued, "It should come as no surprise that she writes that, "South Africa has the highest rates of rape in the world, according to Interpol." n44 Here, Mbeki even blames Smith for citing a simple fact: Interpol, the largest international police organization, released a study that found South Africa to have the highest incidence rate of rape in the world based on South Africa's own police statistics. n45

Mbeki believes media descriptions of crime to be inherently unhelpful and unpatriotic portrayals of his country, threatening the success of the new democracy as a whole. As he wrote in 2004:

In this situation, fear of crime becomes the concentrated expression of fear about their [whites'] survival in a sea of black savages, which they fuel by entertaining the mythology that whites are the primary targets merely because of their race... .

For some, the truth we will always tell about the progress we have made and will make, in the interest of all South Africans, black and white, will always lack credibility. n46

Similarly, Mbeki's March 2007 letter noted that the media's contemporary portrayal of crime in South Africa, and particularly rape, is reminiscent of the earliest "'prophets of doom'" at the dawn of the new democracy. n47 He cited Nelson Mandela's description at the time: "Their task is to spread messages about an impending economic collapse, escalating corruption in the public service, rampant and uncontrollable crime, a massive loss of skills through white emigration and mass demoralisation among the people ... ." n48 Mbeki also portrayed the fear of crime as a white racist attitude towards blacks: "Every reported incident of crime communicates the frightening and expected message that - the kaffirs are coming!" n49

[\*222] Mbeki incorrectly assumes, however, that those who fear crime or criticize the government's response to crime are mostly white. But in fact, the 2003 national victim survey revealed that over fifty percent of black, coloured, or Indian South Africans believe that the police are doing a poor job. n50 In 2003, 58% of South Africans indicated that they feel very unsafe walking in their area at night, up from only 25% in 1998. n51 The Survey of South Africans at Ten Years of Democracy, conducted in 2003, found that 83% of black South Africans said that crime is a serious threat to democracy in their country. n52 And yet President Mbeki flagrantly denies this public sentiment. In a recent television interview, Mbeki said, "Nobody can prove that the majority of the country's forty to fifty million citizens think that crime is spinning out of control." n53 However, the studies just cited suggest otherwise, and the public responses of President Mbeki and other ANC leaders do not reflect the real experiences of black South Africans who experience and witness crime in their communities. n54

It is not surprising, then, that South Africans trust the media more than the National Parliament, the SAPS, or local government. n55 While the media seems to portray the reality of crime in their communities, the government seems to be both ignoring the problem and killing the messenger. n56 But the media is not blameless either; their exaggerations can result in hysteria and widespread, escalating fear.

[\*223]

#### D. Public Cries for Harsher Penalties

As crime persists and public fear mounts, South Africans have publicly called for increasingly punitive measures to deal with perpetrators of crime. n57 Periodically, a catalyst rape case instigates public calls for the reinstatement of the death penalty or even the castration of sex offenders. n58 Women's rights activists have also contributed to the fear-mongering. In a public address, Eddie Mhlanga, National Director for Maternal, Child, and Women's Health, said, "The first time I saw someone having been violated, I felt the perpetrator should have his testicles cut off and thrown away." n59 In some cases, the public has actually taken the law into its own hands with vigilante justice. After police released an alleged rapist in one community, local women castrated him with a broken bottle. n60 These catalyst cases and the extreme reactions they provoke are not necessarily representative, but the media has created an illusion of generality.

Meanwhile, the National Victims of Crime Survey confirms what the media suggests: South Africans view the efficacy of the criminal justice system largely in terms of the punishment or sentencing of the perpetrators. n61 Asked to give reasons for their approval or disapproval of the court system, the majority of respondents answered in terms of sentencing. Of those who disapproved of the court system, one third stated that sentences were too lenient. n62

[\*224]

#### II. The ANC's Answer to the Public: Mandatory Minimum Sentencing

This public hysteria over rape - and the perceived inadequate punishment for its offenders - proved to be the catalyst for mandatory minimum legislation in South Africa. A series of rape cases in 1994 led to widespread criticism of the judiciary. Headlines broadcast the following ludicrous penalties: a \$ 1,000 fine for the gang rape of four young South African girls, community service for the molestation of an eleven-year-old girl, and a fine of \$ 2,000 for a rape of a prostitute at gunpoint. n63 In 1996, the Minister of Justice asked the South African Law Commission to investigate two issues: sexual offenses against children and sentencing. n64

The South African Law Commission (SALC) simultaneously released Issue Paper 11 (Project 82) outlining possible approaches to sentencing and Issue Paper 10 (Project 108) introducing legislation on child sexual abuse. n65 These initiatives had the same closing dates for public comment. Ironically, however, Parliament bypassed the Law Commission's recommendations altogether to enact a mandatory minimums sentencing regime. Before the closing date for public comment on the SALC sentencing paper, Parliament passed the Criminal Law Amendment Act 105 of 1997, creating

mandatory minimum sentencing for certain serious offenses of public import, including rape. n66 In contrast, the child sexual abuse issue paper and the legislation it proposed were amended, critiqued, and debated for close to ten years. n67 Finally titled the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, it was not executed until December 13, 2007. n68

The mandatory minimum provisions in the Criminal Amendment Act were introduced as temporary, emergency measures to combat crime. n69 It has been [\*225] widely noted that because of the rush, the Act was poorly drafted. n70 The Act was an emergency political measure to assuage the public's fears, rather than a well-developed strategy to combat crime. n71

#### A. The Criminal Law Amendment Act of 1997: Mandatory Minimums for Sexual Offenses

Sections 51 to 53 of the Criminal Law Amendment Act set out mandatory minimum sentences for drug offenses, fire-arm offenses, corruption and fraud, murder, terrorism, robbery in aggravating circumstances, and rape, unless "substantial and compelling circumstances" justify a deviation. n72

According to the Act, rape is divided into two categories: Part I and Part III offenses, as illustrated in Table A. Absent "substantial and compelling circumstances," an individual charged with a Part I rape is sentenced to life in prison, while an individual charged with a Part III rape is sentenced to ten, fifteen, and twenty years imprisonment for a first, second, and third offense, respectively.

[\*226]

Table A n73

| Part I (life in prison) | Part III (10, 15, 20 years)   |  |
|-------------------------|---|--|
| a. When committed       | i. in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;<br>ii. by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;<br>iii. by a person who has been convicted of two or more offenses of rape, but has not yet been sentenced in respect of such convictions; or<br>iv. by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;<br>b. Where the victim<br>i. is a girl under the age of 16 years;<br>ii. is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable; or<br>iii. is a mentally ill woman as contemplated . . . .<br>c. Involving the infliction | a. Rape in circumstances other than those referred to in Part I.<br>b. Indecent assault on a child under the age of 16 years, involving the infliction of bodily harm. |

|                            |   |
|----------------------------|---|
| Part I (life<br>in prison) | Part III (10, 15, 20 years)<br>of grievous bodily harm. |
|----------------------------|---|

The statutory differences between the two categories are relatively arbitrary and disproportionate. Raping a victim twice rather than once, or raping a sixteen-year-old rather than a fifteen-year-old, could result in a difference in sentence of anywhere between twenty and fifty years, depending on the age of the offender. The law currently contains no statutory gradations between ten years and life imprisonment.

The new minimum sentences created distinctions that did not previously exist in South African sentencing. n74 These distinctions reflected contemporary public outrage over child rape and HIV/AIDS in South Africa. The law, for example, requires an extraordinary increase in sentence if the victim is under the age of sixteen or if the offender is knowingly HIV-positive. As this Article argues, these provisions tend to be over-inclusive as well as under-inclusive; [\*227] the Act does not increase the sentence for other factors such as the use of a weapon or kidnapping.

Moreover, the Act prescribed "minimum" sentences that were much higher than the previous median sentences for the respective crimes. In fact, before the implementation of the Act, not a single median sentence for murder, rape, or robbery with aggravating circumstances exceeded the new minimum sentence. n75 In regional courts, where most cases are heard by magistrates, the pre-implementation median sentence for rape was 7.5 years. The median sentence in the High Courts, where the most severe cases are heard by judges, was 17.5 years. n76 The mandatory minimums for Part III rapes are thus now in line with the high courts' previous sentencing practices for the most extreme rape cases. n77

B.

"Substantial and Compelling Circumstances" Exception

These minimum sentences, however, are not strictly mandatory. The Act allows the sentencing court to depart from the sentence where "substantial and compelling circumstances" justify a deviation. n78 Though "substantial and compelling" is not defined in the Act, the South African Constitutional Court held in *S v Malgas* that

"Substantial and compelling circumstances" may arise from a number of factors considered together - taken one by one, these factors need not be exceptional. If the sentencing court considers all the circumstances and is satisfied that the prescribed sentence would be unjust, as it would be "disproportionate to the crime, the criminal and the needs of society," the court may impose a lesser sentence. n79

Lower courts have interpreted *Malgas* to allow judges to retain substantial discretion in sentencing.

Before mandatory minimums, judges enjoyed wide discretion in sentencing. Judges and magistrates imposed sentences according to what [\*228] became known as the Zinn triad: "the seriousness of the crime, the offender, and the interests of society." n80 Individual sentences were tailored to the particular crime and the particular offender to further the goals of deterrence, prevention, rehabilitation, and retribution. n81 Under the mandatory minimums regime, in contrast, sentencers are asked to assign penalties irrespective of the particular circumstances of a crime.

In fact, the remaining judicial discretion in the "substantial and compelling" exceptions clause ultimately saved mandatory minimums from constitutional scrutiny. n82 In *S v Dodo*, the Constitutional Court expressed its concern about the proportionality of punishment:

To attempt to justify any period of penal incarceration, let alone imprisonment for life ... without inquiring into the proportionality between the offense and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached ... they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence ... the offender is being used essentially as a means to another end and the offender's dignity assailed. n83

The Court concluded, however, that the "substantial and compelling" clause avoids this danger by allowing a judge to depart from the mandatory sentence if he finds it to be grossly disproportionate under the circumstances. Ironically, the judicial discretion that the Act accords in its "substantial and compelling" clause renders the Act constitutional but inherently less consistent.

Recent studies reveal that judges do in fact deviate from the mandatory minimum sentences in the majority of cases. n84 These deviations do not necessarily imply that the sentencing judges are not complying with the Act; they are merely finding, in the majority of cases, "substantial and compelling circumstances" that justify a departure. One advocate noted:

In a situation where the minimum is specified to be 15 years, in most instances it is possible to find substantial and compelling circumstances. Hence judges and magistrates feel they have to impose less than 15 years, because one should only impose 15 years where there are no substantial and compelling circumstances ... so the minimum is in effect operating as a maximum. n85

Indeed, the evidence suggests that in practice the mandatory minimums are actually operating as maximums for most crimes. And because the *Malgas* [\*229] decision did not specify the degree of the departure permitted, judges deviate from the mandatory minimum to varying degrees. As a result, mandatory minimums have actually increased sentence disparity. n86

At the same time, however, judges are still adhering to the spirit of severity. Since implementation of the mandatory minimums, the average prison term for violent crimes has increased from seven months to 126 months. n87 Even though the minimum is functioning as a maximum, judges are still imposing higher sentences than they previously would have imposed.

As the following Part will illustrate, the "substantial and compelling" framework has serious consequences in rape cases - particularly when it is combined with a mandatory minimum of life in prison for aggravated rapes.

### III. Ten years: Have Mandatory Minimums Made a Difference?

In the context of sexual violence, mandatory minimum provisions have failed to achieve their stated goals. Mandatory minimum sentencing was designed to reduce crime, to assuage public fear, and to establish severe and consistent punishment for serious crimes. n88 But in spite of ten years of mandatory minimums, the reported rape rate has remained relatively constant, and the public is more fearful of becoming victims of violent crime. n89 And while the mandatory minimums have resulted in longer sentences for sex offenders, the sentences are less consistent than before.

Despite good intentions, the structure and provisions of the Act have yielded perverse results. Not only have the mandatory minimums failed to achieve their affirmative goals, but ironically, they have created an illusion of greater leniency for sexual assault. Instead of condemning rape from the bench, judges have reinforced traditional norms concerning rape and women in South Africa.

#### A. The Prevalence of Rape and Public Fear

In 1997, government officials publicly hoped that longer, more severe sentences would reduce the prevalence of rape in South Africa. Indeed, internationally, many politicians believe that harsh mandatory sentences deter crime. n90 The Minister of Justice of South Africa reaffirmed this international sentiment: "If there is still no decline in the crime rate [after two years], the [\*230] operation of [these] sections can be extended by the President." He continued: "It is trusted that the imposition of minimum sentences will serve as a deterrent factor for offenders." n91

According to international studies, however, there is little evidence that suggests that harsher sentences do in fact deter crime. n92 Even deterrence advocates acknowledge that effective deterrence requires swift and certain punishment. Martin Schonteich, of the Institute for Securities Studies, argues that deterrence is based on three "Cs": "capability, credibility and communication." n93 The state must have the resources and capacity to identify, arrest, prosecute, convict, and punish the majority of serious offenders, and the government's threat of doing so must be credible. Furthermore, the state must effectively communicate that credible threat to the general public. n94

The criminal justice system in transitional South Africa does not come close to meeting the three "Cs." Only five to nine percent of serious offenses reported to the police result in conviction and a prison sentence. n95 Furthermore, rape

presents an even more difficult problem: Compared to other crimes, fewer sexual offenses are reported to the police in the first instance, and of those, fewer cases are prosecuted and convicted. The most conservative studies suggest that only half of all rapes in South Africa are reported. n96 A sexual offender in South Africa is thus not likely to be reported, much less apprehended, prosecuted, convicted, and sentenced. A 2003 survey of 1000 survivors of violence in all nine South African provinces found that only three percent of the most serious cases over the last five years ever went to court. n97 Because the likelihood of an offender reaching that final stage of the criminal process is so low, the threat of mandatory sentencing cannot effectively deter a sex offender.

[\*231] If the goal is to deter rape, then focusing on the sentencing of the few offenders actually apprehended for their crime is misguided. The Constitutional Court came to a similar conclusion in *S v Makwanyane*, a well-known death-penalty case. As Judge Chaskalson articulated:

The level of violent crime in our country has reached alarming proportions. It poses a threat to the transition to democracy ... It is a matter of common knowledge that the political conflict during this [transition] period ... resulted in violence and destruction of a kind not previously experienced ... . Homelessness, unemployment, poverty and the frustration consequent upon such conditions are other causes of the crime wave. And ... police and prosecuting authorities have been unable to cope ... . The greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished. It is that which is presently lacking in our criminal justice system; and it is at this level and through addressing the causes of crime that the State must seek to combat lawlessness. n98

In other words, because the police, prosecution, and judicial system are still recuperating from a violent conflict and slow transition to a new democracy, they have limited capacity to provide a clear and credible threat to potential offenders that they will be apprehended, convicted, and punished. Imposing mandatory and severe sentences is the easiest part of the equation for the government; improving the criminal justice system as a whole is far more difficult - especially with limited personnel and financial resources. And addressing the causes of crime, as Justice Chaskalson suggests, is harder still. n99

What is more, sex offenders are perhaps the least likely criminal offenders to be deterred by mandatory sentencing. SAPS calls rape and assault "social fabric crimes" because most of the offenses are committed by people who know one another. n100 According to Martin Schonteich, these crimes are committed "in a moment of passion, anger, thoughtlessness, spite or drunkenness. The fear of being punished harshly if they are caught and convicted, does little to prevent the criminal actions of such offenders." n101 Not surprisingly, then, ten years of mandatory minimum sentencing in South Africa [\*232] have neither deterred sex offenders nor reduced the incidence of rape. According to SAPS, reported rape rates stayed relatively level between 2001 and 2007. n102 Current reported rape prevalence varies by province, with the Eastern Cape experiencing an increase of 15.3% over the last six years. n103 While these statistics may reflect a rise in the reporting of sexual offenses rather than a rise in the actual rate of occurrence, it is clear that rape has not drastically decreased as the government hoped. If any strides have been made towards reducing sexual violence, they have been minimal.

Nor have mandatory minimums succeeded in the mission to reassure the public. Despite mandatory minimum sentencing, South Africans still fear crime, still do not believe that offenders are punished sufficiently severely, and are still outraged by disparate sentencing when it comes to rape cases. In 2003, at the ten-year anniversary of the new democracy, eighty-four percent of South Africans were "very worried" that they would be the victim of a violent crime. n104 Recent scandals in the police force have only exacerbated the situation. At the time of this writing in 2008, Jackie Selebi, the National Commissioner of the South African Police Force and the President of Interpol, has just stepped down from both positions and faces charges for corruption. Slow to respond to allegations of corruption in the police force, President Mbeki has been accused of obstructing justice. n105 This news reinforces local and international perceptions about crime and the criminal justice system in South Africa. As one recent CBS report noted:

Naeelah Scott, a 33-year-old beauty therapist in a sprawling Cape Town suburb infested with gangs and drugs, said the latest developments deepened her disgust with the police and justice system. "Who can we trust?" she said. "We are at the bottom. We try to fight. But we are not just fighting the criminals and gangsters, we are fighting the police," Scott said. n106

## B. Severe and Consistent Penalties for Rape

Even if mandatory minimums have not actually reduced crime or calmed the public's fears in the last ten years, one could argue that, at the very least, [\*233] they have had a strong symbolic impact. Severe sentences send the message that South Africa will not tolerate rape, and mandatory minimums may fulfill this expressive function within the judiciary. On average, judges have increased sentences for sex offenders, and judges at least pay lip service to the seriousness of rape in their opinions. n107 Evidence suggests, however, that the current sentencing regime is actually undermining the legislative attempt to establish rape as a serious offense.

Judges enforce the mandatory minimums only to the extent that they agree with the outcome. According to the law, judges should sentence all perpetrators of Part I rape, or at least the majority, to life in prison. But judges seem to have collectively decided to reserve the life sentence for only the most horrific cases. n108 In the name of proportionality, judges are excusing deviant behavior by reaching to find substantial and compelling circumstances in almost all cases. So although the mandatory minimums regime is intended to condemn offenders, judges find themselves looking for reasons to excuse offenders' behavior.

Rape has been an extreme outlier of general trends of mandatory sentencing. Of the various crimes to which mandatory minimums apply, there has been the most compliance in the category of Part III rape and the least compliance in the category of Part I rape. n109 Consistency has drastically improved for Part III, or "ordinary rape," where the median sentence post-implementation has been exactly ten years, the prescribed minimum. n110 Academics have offered various explanations for this phenomenon. They have pointed out that rape is the offense for which the mandatory minimum is most well known and rape sentences are most likely to be scrutinized by the media. n111 Yet these arguments imply that judges would also be most likely to adhere to the mandatory sentences for Part I rape. There has, however, been the least compliance for Part I rape, with only 17.7% of offenders receiving the minimum of life in prison. Instead of life, more than seventy-five percent of offenders are sentenced to less than half of the minimum in these cases. n112

One explanation for this disparity between judicial compliance with the mandatory minimums for Part I and Part III rape is that judges are merely attempting to sentence proportionately. Proportionate sentencing has been successful in Part III rapes, where judges have the latitude to give a sentence [\*234] above or below the mandatory minimum. n113 But proportionate sentencing for Part I rapes is almost impossible under the current framework. When the ceiling is life, there is more room for disparate sentencing. n114 Sentencing judges have indicated that a rape must be one of the most serious manifestations of the crime in order to merit a life sentence, which means that judges are constantly placed in the position of justifying sentences less than life in all but the most serious cases. n115 And because the law contains no statutory definition of the "substantial and compelling circumstances" that allow downward departures, judges have vast discretion to determine what they find to be "substantial and compelling" in a particular case. n116 A lower court's sentence may be overturned on appeal only if the appellate court finds that the sentence that it would have imposed, had it been the trial court, is so different that "it [the sentence] can properly be described as "shocking," "startling" or "disturbingly inappropriate." n117

Judicial justifications in some early and notorious cases were particularly appalling and disparaging to sex abuse survivors and to women more generally, ultimately leading to public cries for reform. The cases that follow illustrate the impact of mandatory minimums on the substance and tone of sentencing decisions during the first ten years of the law.

Father who raped his daughter was not a threat to society as a whole. In one of the earliest and most well-known cases, *S v Abrahams*, the judge determined that a father who raped his daughter should not be given a life sentence because he was not a threat to society as a whole. The Supreme Court of Appeal found that the trial court had erred in its determination that the threat to his family - and not to the general public - constituted a "substantial and compelling" circumstance. Perhaps even worse than the trial court, however, the appellate court also found "substantial and compelling" circumstances to justify a departure, in part because "the accused's daughter, apart from the ultimate intrusion and violation that are the essence of rape, was not physically injured." n118 As Justice Camaron articulated, "some rapes are worse than others, and the life sentence ordained by the Legislature should be reserved for cases [\*235] devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust." n119

Victims were not virgins. In *S v Mahomotsa*, the offender was sentenced for raping two school girls several times, the first with a gun to her head, and the second with a knife to her throat. The sentencing judge, Judge Kotze, found the following "substantial and compelling circumstances":

that the complainants sustained no physical injuries and had suffered no psychological damage as a result of the rapes, and that they had not lost their virginity from the rapes as they had already been sexually active, one of them having had sexual intercourse two days before she was raped by the accused. n120

According to the judge, the victims' non-virginity alone constituted a "substantial and compelling circumstance." On appeal, the court found that the sentencing judge had erred materially in concluding that the girls had not suffered any psychological damage because they were not virgins. The appellate court concluded again, however, that there were different "substantial and compelling circumstances." Judge Mpatisa stated that despite the use of weapons,

Except for a bruise to the second complainant's genitalia, no subsequently visible injuries were inflicted on them. According to the probation officer ... they do not suffer from any after-effects following their ordeals. I am sceptical of that but the fact remains that there is no positive evidence to the contrary. n121

The judge here established a dangerous precedent: A survivor should have to prove that she has suffered psychological or physical harm from the rape. n122

No evidence of psychological impact on ten-year-old victim. Sentencing judges in other cases have also found the lack of evidence of psychological impact to be a "substantial and compelling circumstance." Having raped a ten-[\*236] year-old girl, Saul Klaaste was sentenced to twelve years in prison rather than the mandated life sentence because there was no evidence of a psychological impact on the girl. n123 In *S v Rammoko*, the Supreme Court of Appeals overturned a life sentence for the rape of a thirteen-year-old girl because the trial judge had failed to solicit evidence about the victim's psychological well-being. Remanding the case to the trial court, Judge Mpati found the victim's emotional recovery or lack of severe emotional harm may constitute substantial and compelling circumstances to justify a downward departure. n124

Father was "gentle" when raping eight-year-old daughter. In a different case, the judge found that the father was "gentle" during the rape, even though the rapist had locked her in a room and threatened to cut her throat if she didn't stop crying, and even though she was bleeding afterwards. Reaching for a "substantial and compelling circumstance," the judge stated:

This was a very - I hesitate to use the word - but a "gentle" rape in the sense that certainly while he was preparing to rape the girl and removing her panties and, in fact, raping her, there does not seem to have been any violence in the sense of threats of beating her or undue lack of gentleness. n125

Offender was culturally chauvinist. Perhaps most disturbing of all, *S v Mvamvu* established that an offender's chauvinism could be a "substantial and compelling circumstance." After abducting his ex-wife and victim, the offender raped her eight times on two separate occasions. On the first occasion, he kept her hostage for two days, raping her six times. When she finally escaped, he followed her to her brother's house, dragged her into an abandoned abattoir and again raped her twice. At various points during these incidents, he hit her with a stick, threatened her with a knife, and threatened to douse her with gasoline and burn her. According to the trial court, the defendant showed no remorse. n126 However, the Supreme Court of Appeals affirmed the trial court's finding that there were "substantial and compelling circumstances" to justify a lesser sentence, noting that the prime objective of the accused was not to do the complainant harm, but to "subjugate the complainant to his will and to persuade her to return to him - a consequence of male chauvinism, perhaps associated with traditional customary practices." n127 According to the courts, the defendant's chauvinism explained his behavior in such a way as to justify a sentence less than the mandatory minimum. n128

[\*237] Yet while the Supreme Court of Appeals agreed that there were "substantial and compelling circumstances," it nonetheless overruled the trial court's sentence. Judge Mthiyane rebuked the trial court:

In imposing the sentences of 5 years' and 3 years' imprisonment for the two rapes (eight incidents) it would appear that the judge a quo reasoned, erroneously, that having found substantial and compelling circumstances to be present, he considered himself to have a free and unfettered discretion to impose any sentence he considered appropriate. In so do-

ing, he appears to have overlooked the benchmark indicating the seriousness with which the Legislature views offences of this type. n129

Even while rebuking the trial court, however, the appellate court still found chauvinism to be a mitigating factor and went on to give a sentence of ten years - much closer to the original sentence than to the statutorily prescribed life sentence. n130

The problem with these and other similar cases is the vast chasm between a sentence of zero and a sentence of life. The structure of the law forces the judge to justify departing downwards, but the statute provides no guidance about what qualifies as substantial and compelling or how much to depart. As these cases illustrate, when judges create their own indicators, gendered or cultural biases emerge in their decisions. The actual sentence a judge imposes may be proportional, but the judge's written opinion and reasoning may be deeply destructive. If he points to traditional or cultural reasons to justify a downward departure, he undermines not only the severity of the sentence in the particular case, but worse, the purpose of the mandatory minimums regime as a whole.

#### IV. The Criminal Law (Sentencing) Amendment Act of 2007

The foregoing cases made national headlines, reinforcing the public's perception that the criminal justice system does not treat sex offenders sufficiently severely. n131 The Consortium of Violence Against Women and other women's rights organizations were particularly outraged, and advocated that the law be amended to limit the factors that could constitute "substantial and compelling circumstances." n132 As a result of their activism, Parliament passed the Criminal Law (Sentencing) Amendment Bill ("the Amendment") in [\*238] December 2007, prohibiting judges from finding substantial compelling circumstances in (i) the sexual history of the victim; (ii) the apparent lack of physical harm to the victim; (iii) the defendant's cultural or religious beliefs about rape; or (iv) the previous relationship between the defendant and the complainant. n133

The Amendment is a direct response to the cases above, and it is by all accounts a step in the right direction. For the first time, the legislature has provided boundaries for what may constitute "substantial and compelling circumstances" - boundaries that protect victims' rights. The Amendment recognizes that inquiries into the degree of harm to the victim or into the victim's sexual history inappropriately shift the scrutiny from the offender to the victim. Focusing on the sexual history of the victim perpetuates an antiquated notion that the victim is deserving of rape or the offender is more or less culpable, depending on the victim's chastity. n134 This inquiry invades the rape victim's privacy, re-traumatizes the victim, and contributes to the anguish of a victim testifying. n135 This fear is even more powerful in traditional contexts where extramarital sexual activity is taboo. n136 Indeed, the Amendment is consistent with international norms that prohibit the consideration of "virginity" or sexual history of the victim in rape proceedings. n137

Symbolically, the Amendment also makes an important statement about tradition and culture. A defendant's religious, traditional, or social views that a man is the head of the woman, that a man owns his woman, that a woman does not have the right to leave, or that a husband has the right to rape his wife - all of which were evident in Mvamvu - do not excuse a sexual offense. The new law simultaneously recognizes the role of tradition and culture in rape in South Africa and establishes that judges must uphold legal standards of equality.

The Amendment, however, does not address the deeper problems in the mandatory minimum regime. Judges are still caught in an arcane structure: The [\*239] mandatory minimum sentence for some sex offenses is only ten years, but for relatively arbitrary reasons, the minimum for other sex offenses is life imprisonment. The recent Amendment does not change the structure that forces judges to be lenient; it merely limits the justifications they can use. To attempt to sentence proportionately within the same structure, judges will no doubt continue to reach to find "substantial and compelling circumstances" for most of the cases that mandate a life sentence under the Act.

While the worst kinds of justifications are now prohibited, the language of judges' written decisions will most likely continue to be unduly forgiving, focusing on the elements of a crime that somehow justify a lesser sentence rather than establishing the elements that render a rapist more culpable. The tone of the decisions will send a message that is contrary to the purpose of the Act: Instead of noting the gravity of the sexual offense and severely punishing an offender, the lenient language of downward departures excuses his behavior. n138 Dirk van Zyl Smit describes this burden placed on the judiciary:

What the indignant public reaction reflects is how the legislation has placed the judiciary at a disadvantage. Prior to the legislation a sentence of 18 years imprisonment ... accompanied by some stern words from the bench, would have drawn widespread public approval. To impose the same sentence now judges have to explain why the crime is relatively not so serious. In so doing, they run the risk of being perceived as being soft on crime, a perception which the political proponents of mandatory sentences can use to further their argument that such prescribed sentences are necessary because judges are too lenient and out of touch. n139

Before the mandatory minimums legislation, judges would never have contemplated a life sentence for rape. Now if a judge is to impose even a relatively severe sentence of twenty, thirty, or forty years, he is forced to provide justifications for why the crime is not so bad, rather than providing "stern words from the bench." The new Amendment does not address this conundrum.

Further, the Amendment cannot solve the judicial biases about women that creep into sentencing. Judges' own experiences and cultural understandings of rape and women infiltrate their decision-making. Even with the limitations of the Amendment, judges retain enormous discretion, and will continue to be influenced by their value systems. Though now prohibited at sentencing, evidence of the sexual history of the victim, the lack of physical harm, or the [\*240] chauvinism of the offender remains admissible during the trial, so judges may still be influenced by these factors. n140 Therefore, judges may find more subtle justifications for downward departures that are just as troubling but not as easy to identify and outlaw.

#### V. Sentencing Reform

There are, however, some redeeming aspects of the South African regime of mandatory minimums. While increasing the ceiling of sex offense sentences to life may increase the sentence disparity, it may also allow for an appropriate range. In distinguishing between Part I and Part III rapes, the Act rightly recognizes degrees of harm within sexual offenses. As the Sex Offence Committee of the South African Law Commission points out, "It is important to bear in mind that sex offenders are not a homogeneous group ... . Consequently, sentencing of sex offenders needs to take into account various levels of sexually criminal behavior and have different strategies to deal with those differences." n141 Certain aspects of sexual crimes render offenders more or less culpable. But the current two-part system does not allow for a range of sentences outside the "substantial and compelling circumstances" analysis.

Though the new amendment is progress, a more drastic reform is necessary to render the Act more proportionate for a range of offenses. The South African legislature should reevaluate what aspects of a rape justify harsher sentences and place these on a graduated, rather than a bifurcated, scale to create a range of sentences between ten years and life. The current system has "aggravating factors" built into the mandatory minimums algorithm: A life sentence is prescribed where a victim is raped more than once or by more than one offender, the offender has two previous convictions of sex offenses, the offender is HIV-positive, the victim is under sixteen years old, the victim is physically disabled or mentally ill, or where the rape entails the infliction of grievous bodily harm. n142 If just one of these criteria is met, then the offender is sentenced to life. A rape without any of these aspects is subject to a mandatory minimum of ten years.

In other words, the Act's list of factors is both under- and over-inclusive. Because the "aggravated" sentence begins at life, there is no room for increases to a sentence if, for example, more than one of these factors exist in a particular case. For example, imagine a situation in which all these aspects were present: [\*241] if a group of men, one of whom is HIV positive, gang-rape an eight-year-old girl who is both physically disabled and mentally ill, causing her severe bodily harm. Under the current Act, the offenders would receive the same sentence as a single offender who raped a fifteen-year-old once without excessive force. Disproportionate sentencing results from the all-or-nothing structure of the current Act.

The list of factors is also under-inclusive. It omits statutory sentence enhancements for abduction, the use of a weapon, the degree of injury (besides the unilateral determination of "grievous bodily harm"), or the custodial relationship between the offender and victim (i.e., a parent or caretaker's sexual abuse of a child). n143

To promote proportionality and consistency in sentencing, the Act should be completely restructured. Instead of beginning at the top, judicial analysis of a rape should begin at a base level and increase sentence severity for each additional aggravating factor. Sentencing opinions, as a result, would be focused on the aspects of the crime that render it blameworthy, rather than on a litany of suspect mitigating factors to justify a more lenient sentence. One may assume

that if sentences were relatively proportionate to the various aspects of a sexual crime, then the exception for "substantial and compelling factors" would no longer be used so excessively.

A new rubric, as outlined in Table B, would provide a more appropriate range of sentences that improve fairness, proportionality, and certainty of sentencing. If the base level were the mandatory minimum (and the current median sentence for non-aggravated rape) of ten years, the Act might require adding an additional one, two, or three years for each additional aggravating element. The most egregious offense, therefore, that includes the sum of all six level three aggravating elements, would receive a base sentence of twenty-eight years (ten years plus (six times three years)). If, on the other hand, an offender were to have raped the same victim twice, he would be sentenced to eleven years, rather than the current mandatory sentence of life in prison (ten years plus one year).

[\*242]

Table B n144

| Level                                       | +1 year (ea.)                  | +2 years (ea.)                               | +3 years (ea.)   |
|---|--------------------------------|--|--|
| Criminal History of Offender (Sex Offenses) | 1 offense                      | 2 offenses                                   | 3 offenses   |
| Weapon                                      |                                | Use of a weapon                              |  |
| Physical Injury to Victim                   | Victim sustained bodily injury | Victim sustained serious bodily injury       | Victim sustained permanent or life-threatening bodily injury |
| Age of the Victim                           | 13 to 16                       | 8 to 12                                      | Under 8  |
| Relation to the Victim                      |                                |  | Custodial relationship to the victim                         |
| Abduction                                   |                                | Rape occurred in the process of an abduction | Victim abducted and detained by force for more than 24 hours |
| Multiple Rapes                              | 2 to 3 times                   | 4 to 5 times                                 | 6 times or more  |
| Multiple Offenders                          |                                | 2 offenders                                  | Multiple offenders   |

Having completed this first analysis, a sentencing judge would still be required to examine the presence of "substantial and compelling" circumstances to justify an increase or decrease in sentence, should the prescribed sentence be disproportionate to the crime. The sexual history of the victim, sexism of the offender, and the lack of evidence of psychological trauma would be barred from consideration at this stage. Because other elements of the crime, including the degree of bodily injury and the criminal history of the offender, would already be factored into the analysis, one could [\*243] expect that consistency for similar crimes would improve as judges depart less frequently.

This system would continue to prioritize incapacitation and punishment for very serious sex crimes. Judges should, however, be able to mandate treatment alongside prison sentences. Section 296 of the Criminal Procedure Act of 1977 currently allows a sentencing court to issue a drug and alcohol treatment order, in addition to or in lieu of a sentence, requiring an offender to submit to a treatment center and provide test samples during the period of treatment. n145 The law further provides, however, that a treatment order may not be used in addition to any sentence of imprisonment unless the sentence is suspended. n146

The focus on imprisonment to the absolute exclusion of any other treatment disregards the restorative and rehabilitative goals of sentencing in South Africa. To balance the goals of sentencing, the most appropriate sentence may be a combination of different types of sentences, including confinement to a treatment facility, followed by a period of imprisonment. Or, alternatively, the government could develop drug and alcohol or psycho-social treatment programs within the prisons, to further the goals of rehabilitation and prevention. n147

These two measures - creating a range of sentences and introducing a combination of sentencing and treatment - would reintroduce proportionality, retribution, and rehabilitation into sentencing. In addition, the reforms may promote the original goals of the mandatory minimums as well: increasing consistency for similar crimes and further establishing rape as a serious offense. As judges have more guidance about what constitutes an aggravating or mitigating factor in sexual offense cases, they might become more educated about the particular nature of rape; we could expect that they

would depart less often. And because they would not constantly be forced into the position of defending a reduction in sentence, they may reassume their role of imposing fair, but severe, sentences for severe crimes.

[\*244]

## VI. The Limitations of the Law

South Africa's experience provides lessons for other post-conflict countries attempting to address disproportionately high levels of rape in their communities. The easiest response is to create the harshest penalties for sex offenses: life in prison, the death penalty, or castration. From a women's rights perspective, severe penalties for rape may symbolically establish that rape is a serious offense and that the government takes rape seriously. But not all sexual offenses are the same, and judges do not take kindly to a binary system that does not allow them to provide a range of sentences for a range of offenses. Over the last ten years, South Africa has seen extremely harsh mandatory minimums result in perceived leniency.

Even if the sentencing system were flawless, however, sentencing alone will not solve the sexual violence crisis in South Africa or any another post-conflict nation. Severe sentencing alone does not deter crime, largely because such a minute proportion of offenders is apprehended and convicted. Sentencing is merely the last step in the criminal justice process. No matter how proportionate, fair, or punitive a sentence may be, it only applies to the individual offender of an individual crime. The sexual violence crisis in South Africa is broader and deeper than the offenses reaching the sentencing phase suggest. Widespread sexual violence in South Africa presents a challenge not only to judicial officers, but also to police officers, investigators, doctors, and prosecutors. A full analysis of the South African criminal justice system's response to rape is beyond the scope of this Article, but lessons from the mandatory minimums suggest that programs and protocols fail where the actors themselves are not interested in promoting them. When the government, police force, prosecutors, or the judicial officers themselves harbor uninformed or sexist attitudes about rape or its survivors, they will not effectively implement progressive policies.

If the implementation of progressive policies against sexual violence depends in part upon the attitudes of state actors, progress may require new political leadership, or at least a change of attitude in the leadership. In South Africa, President Mbeki refuses to come to terms with the extent of sexual violence in his country. His letters to the public reveal a deeper problem than mandatory minimums or a failing criminal justice system: the attitude of male national leaders towards rape in general. Last year, the Minister for Security told Parliament that people who "whine" about crime should simply leave the country. n148

The most glaring example of male chauvinism in the executive branch may be the recent rape trial of then Deputy President Jacob G. Zuma. Zuma was [\*245] accused of raping an HIV-positive AIDS activist who was visiting his home in Johannesburg. On the stand, he claimed that he was obligated to have sex because his accuser was "aroused." n149 To deny her sex, he testified, would be tantamount to rape. He declared, "In the Zulu culture, you cannot just leave a woman if she is ready." n150 He did not use a condom, even though he knew that she was HIV-positive. He testified that he believed that the risk of contracting HIV was small, and he took a shower to "minimize the risk." n151 Zuma was later acquitted of rape, but his testimony is a staggering indication of the chauvinism and ignorance of a man who, as Deputy President, was the leading government official responsible for women's rights and the government response to HIV/AIDS. Zuma knowingly defended himself politically by appealing to traditional Zulu culture in order to justify his behavior. In fact, although he is fluent in English, the official language of the courtroom, he testified in Zulu. n152

Zuma's appeals to Zulu culture present a stark contrast to Mbeki's defiance about any relation between patriarchy, sexual violence, and African culture. The President and the ANC must come to terms with the role of culture and history in the prevalence of sexual violence in South Africa. Men - Western or African - are not inherently sexist. But cultural influences, a history of war and violence, emasculating poverty and unemployment, and the breakdown of traditional family structures can create an environment where violence becomes a norm in the relations between men and women.

The attitudes of the executive reveal the depth of the problem in South Africa and the limitations of the law. The ongoing tension between the public and the government about rape ultimately led to an ineffective mandatory minimum regime. Mandatory minimums were the easy way out for government officials who were unwilling to recognize the existence or breadth of rape in South Africa. Parliament, however, has recently passed the Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007 ("the Sexual Offences Act"). In addition to the Sentencing Amendment, the Sexual Offences Act makes great strides in developing South African criminal law on sexual violence, including expanding the definition of rape to include marital rape, same-sex rape, woman-on-man rape, and non-penile or non-vaginal forms of sexual violence. The Act provides for more services for victims and new investigatory tools for

the SAPS. Most importantly, the Act requires the government to develop a national framework to address sexual violence and [\*246] report its progress to the public annually. n153 Again, though, the law will only be as good as the actors who implement it.

In addition to reforming its sentencing system, South Africa should attempt to deal with the causes of sexual violence, including male attitudes about women and rape. This should start with the country's own political leaders. At the time of this writing, Zuma has recently become President of the ANC despite new charges of corruption and a looming indictment. n154 He is widely expected to be Mbeki's successor as president of South Africa. If he is elected, he will bring his own traditional attitudes - as evidenced in his rape trial - to his leadership. It is highly unlikely that he will do any better than President Mbeki in confronting the reality of rape in South African society.

#### Conclusion: Implications for Further Research

Positive responses to gender-based violence may lie not only in policy and law, but also in the cultural, social, and religious renegotiation of what it means to be a woman or a man in South Africa. To be tough on crime, perhaps the South African government should begin working with civil institutions to develop programs for the country's men. The emphasis on "women's empowerment" programs in Africa may have come at the expense of male empowerment. The structure in the new Sexual Offences Act for a national framework to address sexual violence provides an opportunity to develop an integrated approach to sexual violence that includes educational and civil institutions. Reaching young men with economic development programs, access to alcohol and substance abuse treatment, education reform, and media campaigns promoting the perspective that "real men don't rape" may prove to be more effective at reducing sexual violence in South Africa than mandatory minimums, or even a perfect criminal justice system. That Zuma is in the running for the presidency despite his record reveals that changes in South Africa will not happen overnight. But as mainstream patriarchal attitudes about sexual violence shift over time, so too may the attitudes of police officers, doctors, prosecutors, magistrates, and judges charged with implementing criminal law. Perhaps a new generation of political leaders will rise to the occasion.

#### Legal Topics:

For related research and practice materials, see the following legal topics:

Criminal Law & Procedure  
Criminal Offenses  
Sex Crimes  
Sexual Assault  
Abuse of Children  
General Overview  
Criminal Law & Procedure  
Criminal Offenses  
Sex Crimes  
Sexual Assault  
Rape  
Elements  
Criminal Law & Procedure  
Criminal Offenses  
Sex Crimes  
Sexual Assault  
Rape  
Penalties

#### FOOTNOTES:

n1. Naeema Abrahams & Rachel Jewkes, *The Epidemiology of Rape and Sexual Coercion in South Africa: An Overview*, 55 Soc. Sci. & Med. 1231 (2002).

n2. Thabo Mbeki, *When Is Good News Bad News*, ANC Today, Oct. 7, 2004, <http://www.anc.org.za/ancdocs/anctoday/2004/at39.htm> ("The psychological residue of apartheid has produced a psychosis among some of us such that, to this day, they do not believe that our non-racial democracy will survive and succeed. They dare not allow themselves hope for the future, because they know that the pain of having it dashed, which they are convinced will happen, will be too great. So they look everywhere for evidence of decline, in order that they cannot be disappointed. Crime in our country provides them with the most dramatic evidence of that decline, the evidence that they are right to foresee a hopeless future for our country, the proof that sooner or later things will fall apart.").

n3. See, e.g., Sharon Lafraniere, *After Apartheid: Heated Words About Rape and Race*, N.Y. Times, Nov. 24, 2004, at A4.

n4. An association of South African newspapers, Independent Newspapers, eventually brought legal action against the Minister of Safety and Security and the Commissioner of Police for the Western Cape Province, ar-

guing that the moratorium was unconstitutional. See Jean Comaroff & John L. Comaroff, Figuring Crime: Quantifacts and the Production of the Un/Real, 18 *Pub. Culture* 209, 221-22 (2006).

n5. Criminal Law (Sex Offences and Related Matters) Amendment Act 32 of 2007.

n6. See, e.g., *Why is There So Much Violence Against Women in Post-Apartheid South Africa?: Proceedings from a One Day Conference Held on 14 April 2003* (Somaya Abdullah et al., eds.) [hereinafter *Why is There so Much Violence*]; Shahana Rasool et al., *Violence Against Women: A National Survey* (2002); Abrahams & Jewkes, *supra* note 1; Graeme Simpson & Gerald Kraak, *The Illusions of Sanctuary and the Weight of the Past: Notes on Violence and Gender in South Africa*, 2 *Dev. Update* (1998), available at [http://www.csvr.org.za/index.php?option=com\\_content&task=view&id=572&Itemid=143](http://www.csvr.org.za/index.php?option=com_content&task=view&id=572&Itemid=143); Lloyd Vogelman & Sharon Lewis, *Gang Rape and the Culture of Violence in South Africa*, 2 *Der Uberblick* 39 (1993); see also Naeema H. Abrahams et al., "I Do Not Believe in Democracy in the Home": Men on Relationships with and Abuse of Women (1999); Ulrike Kistner, *Ctr. for AIDS Dev., Dep't of Health, Gender-Based Violence and HIV/AIDS in South Africa, a Bibliography* (2003); Katharine Wood & Rachel Jewkes, *CERSA-Women's Health, Medical Research Council, "Love Is a Dangerous Thing": Micro-dynamics of Violence in Sexual Relationships of Young People in Umtata* 6 (1998) [hereinafter Wood & Jewkes, "Love is a Dangerous Thing"]; Katharine Wood & Rachel Jewkes, *Violence, Rape, and Sexual Coercion: Everyday Love in a South African Township*, 5 *Gender & Dev.* 42 (1997) [hereinafter Wood & Jewkes, *Violence, Rape, and Sexual Coercion*].

n7. See, e.g., Michael O'Donovan & Jean Redpath, *Open Society Foundation for South Africa, The Impact of Minimum Sentencing in South Africa* (2006); Ron Paschke & Heather Sherwin, *SA Law Commission, Quantitative Research Report on Sentencing 10-11* (2000); Julia Sloth-Nielsen & Louise Ehlers, *Assessing the Impact: Mandatory and Minimum Sentences in South Africa*, 14 *S. Afr. Crime Q.* 15 (2005); S. S. Terblanche, *Mandatory and Minimum Sentences: Considering s. 51 of the Criminal Law Amendment Act 1997*, 2003 *Acta Juridica* 194 (2003).

n8. Criminal Law Amendment Act 105 of 1997 s. 51(3)(a).

n9. *S v Mahomotsa* 2002 (2) SACR 435 (SCA) at 441 (S. Afr.).

n10. See Judge Frees "Gentle' Child Rapist, *Sun. Times*, Nov. 17, 2002, cited in Helen Moffett, *Speaking the Unspeakable: Narratives Surrounding the Rape of Children* 3 (2003), <http://www.womankind.org.uk/upload/Speaking%20the%20Unspeakable%202003%20new.doc>.

n11. *S v Mvamvu* case 350/2003 (SCA) at 12 (S. Afr.), available at <http://www.saflii.org/za/cases/ZASCA/2004/90.html>.

n12. Criminal Law (Sentencing) Amendment Bill of 2007 s. 1(3).

n13. *Why Is There So Much Violence*, *supra* note 6, at 1.

n14. Comaroff & Comaroff, *supra* note 4, at 219.

n15. See Bronwyn Harris, *Ctr. for the Study of Violence and Reconciliation, Between a Rock and a Hard Place: A Consolidated View of the Violence and Transition Project 12-13* (2005) (on file with author); Bruce Baker, *Living with Non-State Policing in South Africa: The Issues and Dilemmas*, 40 *J. Mod. Afr. Stud.* 29, 33 (2002).

n16. Vogelmann & Lewis, *supra* note 6, at 39.

n17. Harris, *supra* note 15, at 39.

n18. Abrahams & Jewkes, *supra* note 1, at 1239.

n19. *Id.*

n20. Harris, *supra* note 15, at 14.

n21. See *Why Is There So Much Violence*, *supra* note 6.

n22. *Id.*

n23. Lisa Vetten & Kailash Bhan, *Violence, Vengeance and Gender: A Preliminary Investigation into the Links Between Violence Against Women and HIV/AIDS in South Africa* 8-9 (2001).

n24. Violence against women has persisted after the wars in Iraq, Bosnia-Herzegovina, Sierra Leone, Kosovo, Timor-Leste, Rwanda, Liberia, and the Democratic Republic of Congo. See Jeanne Ward & Wendy Marsh, UNFPA, *Sexual Violence Against Women and Girls in War and Its Aftermath: Realities, Responses, and Required Resources* 9-10 (2006).

n25. See, e.g., Ingrid Palmay, *Engendering Wartime Conflict: Women and War Trauma* (2005), <http://www.csvr.org.za/docs/gender/engender.pdf>; Jeanne Ward, *If Not Now, When?: Addressing Gender-based Violence in Refugee, Internally Displaced, and Post-Conflict Settings* (2002); Dorean Marguerite Koenig, *Women and Rape in Ethnic Conflict and War*, 5 *Hastings Women's L.J.* 129 (1994).

n26. South African Police Services, *Rape in the RSA for the Period April to March 2001/2002 to 2006/2007* (2008), <http://www.saps.gov.za/statistics/reports/crimestats/2007/pdf/category/rape.pdf>. The most recent United Nations international crime survey found that South Africa had the highest rate of reported rape per capita of all the participating member states in 2001-02. U.N. Office on Drugs & Crime, *Eighth United Nations Survey of Crime Trends and Operations of Criminal Justice Systems Covering the Period 2001-2002*, at 41 (2005), available at <http://www.unodc.org/pdf/crime/eighthsurvey/8sv.pdf>.

n27. Wood & Jewkes, *Violence, Rape and Sexual Coercion*, *supra* note 6, at 42 n.1.

n28. Wood & Jewkes, "Love Is a Dangerous Thing," *supra* note 6 (discussing the role of violence in adolescent romantic relationships).

n29. Abrahams & Jewkes, *supra* note 1, at 1233.

n30. *Reprod. Health Research Unit, HIV and Sexual Behavior Among Young South Africans: A National Survey of 15-24 Year Olds*, <http://www.health08.org/southafrica/upload/HIV-and-Sexual-Behaviour-Among-Young-South-Africans-A-National-Survey-of-15-24-Year-Olds.pdf> (last visited Apr. 1, 2008). In addition, a new crime trend of "baby rape" has emerged in South Africa. Some have suggested that baby rapes are occurring because of a well-known myth that sex with a virgin will cure HIV/AIDS. Rachel L. Swarns, *Grappling with South Africa's Alarming Increase in*

the Rapes of Children, N.Y. Times, Jan. 29, 2002, at A6. Note, however, that there is little evidence as to how widely this myth is believed. See, e.g., Moffett, *supra* note 10, at 10.

n31. For example, a Human Rights Watch report claimed that reported rapes account for only one in every thirty-five rapes in South Africa. Human Rights Watch, *Violence against Women in South Africa: State Response to Domestic Violence and Rape* (1995), available at <http://www.hrw.org/reports/1995/Safricawm-02.htm>. This statistic was later found to be fabricated. See Abrahams & Jewkes, *supra* note 1, at 1231.

n32. Stephanie Nolen, *In South Africa 60 Children a Day are Raped*, *Globe & Mail* (Toronto), Oct. 18, 2003, at F1.

n33. *Id.*

n34. Charlene Smith, *Rape Has Become a Sickening Way of Life in Our Land*, *Sun. Indep. (S. Afr.)* Sept. 26, 2004, available at <http://www.sundayindependent.co.za/index.php?fSectionId=1042&fArticleId=2238856>; see also Mbeki Slammed in Rape Race Row, *BBC News*, Oct. 4, 2007, <http://news.bbc.co.uk/2/hi/africa/3716004.stm> (describing the president's reaction to Charlene Smith's article).

n35. Abrahams & Jewkes, *supra* note 1, at 1239. Interestingly, the media representations almost always focus on the victim, rather than the perpetrator: "a woman was raped"; "a woman was gang-raped"; "a woman is raped every 26 seconds in South Africa." The passive voice ignores and excludes the rapist from the narrative. See Helen Moffett, *Womankind Worldwide, Stemming the Tide: Countering Public Narratives of Sexual Violence* 5 (2003), <http://www.womankind.org.uk/upload/Countering%20Public%20Narratives%20of%20Sexual%20Violence%20Mar%2003%20new.doc>.

n36. President Mbeki may have a legitimate concern. From an international diplomacy and economic development perspective, media portrayals of South Africa as the "rape capital of the world" are problematic; they may reinforce preconceived notions about African instability or the capability of a black government. The South African government has repeatedly partnered with the private sector to combat crime out of the belief that high crime rates discourage investment. To that end, the ANC has identified security to be a condition necessary for economic growth and social progress. The international attention to crime in South Africa thus undermines its capacity for economic development. See Bill Dixon, *Development, Crime Prevention and Social Policy in Post-Apartheid South Africa*, 26 *Critical Soc. Pol'y* 169, 180 (2006).

n37. Abrahams & Jewkes, *supra* note 1, at 1231.

n38. Statement by S. V. Tshwete, Minister of Safety and Security, *Optimisation of Crime Statistics* (May 31, 2001), available at <http://www.info.gov.za/speeches/2001/010817945a1001.htm>.

n39. See *African Peer Review Mechanism*, S. Afr. Country Review Report 5, 285 (Sept. 2007).

n40. *Id.* at 377. Mbeki ignored the well-known fact that rapes are widely underreported in South Africa as elsewhere. Because of historical and contemporary barriers to reporting, reported rapes are only the "tip of the iceberg" of violence against women in South Africa. See Abrahams & Jewkes, *supra* note 1, at 1233.

n41. Charlene Smith, *Their Deaths, His Doubts, My Fears*, *Wash. Post*, June 4, 2000, at B1.

n42. Mbeki, *When Is Good News Bad News*, *supra* note 2.

n43. Id.

n44. Id.

n45. Mbeki correctly noted that Interpol statistics may be distorted: Many of the world's most populous countries, including China, are not members of Interpol and thus are not compared for the study. Id.

n46. Id.

n47. Thabo Mbeki, Letter from the President: Freedom from Racism - a Fundamental Human Right, ANC Today, Mar. 22, 2007, available at <http://www.anc.org.za/ancdocs/anctoday/2007/text/at10.txt>.

n48. Id.

n49. Id.

n50. Patrick Burton et al., National Victims of Crime Survey 78 (2003), available at <http://www.issafrica.org/Monographs/No101/Contents.html>. Note that "coloured" is the South African term for a person of mixed racial descent.

n51. Id. at 50.

n52. Wash. Post, Kaiser Family Found. & Harvard Univ., Survey of South Africans at Ten Years of Democracy 32 (2003) [hereinafter Survey of South Africans].

n53. Robert Carmichael, In South Africa, Mbeki Faces Public Outrage Over Crime, World Pol. Rev., Feb. 19, 2007, <http://www.worldpoliticsreview.com/article.aspx?id=561>.

n54. Fourteen percent of South Africans have witnessed a murder, most of whom were between the ages of sixteen and twenty-five at the time. See Burton et al., supra note 50, at 59.

n55. Sixty-five percent of South Africans have a great deal or quite a lot of confidence in the media, while only thirty-eight percent have a lot of confidence in the police service. Survey of South Africans, supra note 52, at 41.

n56. The public's mistrust for the government's capacity to handle crime has deeper roots than Mbeki's public shenanigans. The new government in 1994 inherited the institutions of the apartheid regime, including the SAPS and the criminal justice system. Part of the bargain between the ANC and the outgoing government was a sunset clause, protecting incumbent civil servants for at least five years. Thus, not only did the ANC inherit the institutions of apartheid, but it also inherited the people who enforced the apartheid regime. Complicated issues of police legitimacy and trustworthiness have arisen as a result, and it should not be surprising that South Africans, and particularly people in the townships, are hesitant to trust these institutions to combat crime. See Harris, supra note 15, at 22.

n57. Research in the United States suggests that this phenomenon is not unique to South Africa. Support for the death penalty in the United States is directly correlated to the public fear of personal victimization. Where the public perception is that crime levels are high, the public is more likely to support the death penalty, even if the types of crime most prevalent are not violent crime. See Thomas J. Keil & Gennaro F. Vito, Fear of Crime

and Attitudes Toward Capital Punishment: A Structural Equations Model, 8 *Just. Q.* 447, 456 (1991); Mark Warr, *The Polls - Poll Trends: Public Opinion on Crime and Punishment*, 59 *Pub. Opinion Q.* 298 (1995).

n58. See, e.g., Phindile Ngubane & Robert Brand, Mbeki Slams "Speculative" Rape Stats, *The Star* (S. Afr.), Oct. 10, 1999 (on file with author); see also Carmichael, *supra* note 53; John Esbach, Letter to the Editor, *Communities Held Ransom by Rise in Crime*, *Cape Argus* (S. Afr.), Apr. 25, 2007, available at <http://www.capeargus.co.za/index.php?fArticleId=3800211>.

n59. Sara Melillo, *Young Rape Survivors Likely To Face It Again*, *The Star* (S. Afr.), May 8, 2003, available at <http://www.thestar.co.za/index.php?fArticleId=142556>. Mhlanga did note that he was not speaking on behalf of his department. *Id.*

n60. Bronwyn Harris, "As for Violent Crime That's Our Daily Bread": Vigilante Violence During South Africa's Period of Transition, 1 *Violence & Transition Series* 25 (2001), available at <http://www.csvr.org.za/docs/vigilantism/asforviolentcrime.pdf>.

n61. See Burton et al., *supra* note 50.

n62. *Id.* at 89. Note that this study was conducted in 2003, long after mandatory minimum legislation had been in place. Not a single respondent referred to the concept of a "fair trial" in their analysis of the system, which the survey's authors suggest may indicate that South Africans "will increasingly define the justice system's success in terms of how punitive it is in handling criminal offenders" rather than the fair treatment of defendants. *Id.* at 100.

n63. Human Rights Watch, *supra* note 31.

n64. See SA Law Commission, *Twenty-Fifth Annual Report* 64, 85 (1997); O'Donovan & Redpath, *supra* note 7, at 11.

n65. SA Law Commission Issue Paper 11: *Sentencing* (Aug. 1997); SA Law Commission, Issue Paper 10: *Child Sexual Abuse* (Aug. 1997).

n66. The mandatory minimum sentencing law was passed alongside other legislative and policy initiatives intended to deal with the perception that the government was not taking crime seriously, including the Parole and Correctional Services Amendment Act of 1997, which required prisoners to fulfill four-fifths of their sentence before being eligible for parole. Sloth-Nielsen & Ehlers, *supra* note 7, at 15; see also Dirk van Zyl Smit, *Mandatory Sentences: A Conundrum for the New South Africa?*, in *Sentencing and Society: International Perspectives* 90, 95 (Cyrus Tata & Neil Hutton eds., 2003). The government thus simultaneously answered the public's two primary concerns: that offenders were not receiving adequate sentences, and that they were being released on parole prematurely.

n67. See SA Law Commission Issue Paper 10: *Sexual Offences Against Children* (May 1997).

n68. *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 32 of 2007.

n69. See van Zyl Smit, *supra* note 66, at 98 (noting that the Minister of Justice told the Parliament that he was confident that mandatory minimums would only be "needed" for two years). At the legislation's first enactment, the Minister of Justice promised, "If there is still no decline in the crime rate [after two years], the operation of [these] sections can be extended by the President ... ." A. M. Omar, Minister of Justice, Commencement

of Sections 51 to 53 of the Criminal Law Amendment Act, 1997, <http://www.info.gov.za/speeches/1998/985050w0439810048.htm> (last visited Mar. 11, 2008). He thus made two predictions: First, that the crime wave would pass, and second, that the mandatory minimums would reduce crime. As this Article will illustrate, neither has proven true. The Criminal Law (Sentencing) Amendment Bill, released on December 31, 2007, will ameliorate some of the procedural issues, but as this Article suggests, the amendment does not address the root structural problems in the current regime.

n70. See, e.g., Julia Sloth-Nielsen & Louise Ehlers, *A Pyrrhic Victory? Mandatory and Minimum Sentences in South Africa* (Inst. For Sec. Studies Occasional Paper 111, 2005), available at <http://www.iss.co.za/pubs/papers/111/Paper111.htm>.

n71. *Id.*

n72. Criminal Law Amendment Act 105 of 1997 s. 51(3)(a).

n73. Criminal Law Amendment Act 105 of 1997 s. 511; see also O'Donovan & Redpath, *supra* note 7, at 19.

n74. Pashcke & Sherwin, *supra* note 7, at 11.

n75. *Id.* at 8.

n76. *Id.* at 9.

n77. The Criminal Amendment Act 105 of 1997 further created a bifurcated process for sentencing. Only judges in the High Courts had the jurisdiction to impose a life sentence. Accordingly, after the conviction of a Part I offense in a Regional Court, the magistrates would immediately stop the case and refer the offender to the High Court for confirmation of the verdict and sentencing by a judge. This bifurcated system created significant delays in sentencing. O'Donovan & Redpath, *supra* note 7, at 35-50. Anecdotal evidence suggests that some magistrates or prosecutors may have thwarted the system to keep matters within their jurisdiction. For example, a prosecutor would charge an offender with a Part III rape rather than a Part I rape to avoid sending the case to another court for sentencing. *Id.* at 38. The Criminal Law (Sentencing) Amendment Bill of 2007 has solved this problem by allowing regional courts to impose life sentences. The Amendment also includes a safeguard: Defendants sentenced to life by a regional court have an automatic right to appeal. See Criminal Law (Sentencing) Amendment Bill 2007 s. 6(a)(ii).

n78. Criminal Law Amendment Act 105 of 1997 s. 51-3a.

n79. *S v Malgas* 2001 (2) SA 1222 (A) at 1234-25 (S. Afr.).

n80. *S v Zinn* 1969 (2) SA 537 (A) at 540 (S. Afr.).

n81. *R v Swanepoel* 1945 A.D. 444 (A) at 445 (S. Afr.).

n82. *S v Dodo* 2001 (5) BCLR 423 (CC) at 60 (S. Afr.), 2001 SACLX LEXIS 70, archived at <http://www.constitutionalcourt.org.za/>.

n83. *Id.* at 57-58.

n84. Paschke & Sherwin, *supra* note 7, at 9.

n85. *Id.* at 55-56.

n86. *Id.* at 55.

n87. *Id.* at 51.

n88. See, e.g., Sloth-Nielsen & Ehlers, *supra* note 7, at 15; see also Terblanche, *supra* note 7, at 195.

n89. See South African Police Services, *supra* note 26; Sloth-Nielsen & Ehlers, *supra* note 7, at 20; Burton et al., *supra* note 50, at 40 (noting that "the number feeling very unsafe at night more than doubled between 1998 and 2003"); Survey of South Africans, *supra* note 52, at 39.

n90. Terblanche, *supra* note 7, at 195.

n91. S.A. Department of Justice, Commencement of Sections 51 to 53 of the Criminal Law Amendment Act 1997, <http://www.info.gov.za/speeches/1998/985050w0439810048.htm> (emphasis added) (last visited Apr. 11, 2008).

n92. Martin Schonteich, Does Capital Punishment Deter?, 11 Afr. Security Rev. (2002), available at <http://www.iss.org.za/pubs/asr/11no2/schonteich.html>

n93. *Id.* (citing P. Williams, Deterrence in Contemporary Strategy 70 (John Garnett ed., 1987)); see also Julian V. Roberts, Public Opinion and Mandatory Sentencing: A Review of International Findings, 30 Crim. Just. & Behav. 483, 488 (2003) (describing the sentencing goal of general deterrence).

n94. Schonteich, *supra* note 92.

n95. See O'Donovan & Redpath, *supra* note 7, at 26 (estimating that five percent of rapes result in prison sentences); see also Ros Hirschowitz et al., Statistics South Africa, Quantitative Research Findings on Rape in South Africa 24 (2000), available at <http://www.statssa.gov.za> (stating that 8.9% of all reported rape cases result in conviction, whereas half of drunken-driving or drug-related cases result in conviction). Note, however, that low reporting and conviction rates are not unique to South Africa. In the United Kingdom, fewer than 6% of rapes that are reported to the police result in a conviction, and evidence suggests that 15-20% of rapes are reported. O'Donovan & Redpath, *supra* note 7, at 26.

n96. See Hirschowitz et al., *supra* note 95, at 2; see also Rasool et al., *supra* note 6, at 112.

n97. Rasool et al., *supra* note 6, at 135. Note that these cases also included general physical abuse, not necessarily sexual assault.

n98. *S v T Makwanyane & Another* 1995 (3) SA 391 (CC) at 442-43 (S. Afr.).

n99. In addition to deterrence, there are two other means by which sentencing can reduce crime: incapacitation and rehabilitation. It is not likely that imprisoning the few sex offenders apprehended and convicted would result in a reduction in crime. As the Open Society Foundation report points out, "Imprisonment rates tend to re-

flect the impact of penal policy on that small minority of criminals convicted and sentenced. As a result, a link between imprisonment and crime rates should not be expected." O'Donovan & Redpath, *supra* note 7, at 34. In addition, mandatory minimum sentencing requires that the offenders be imprisoned long after the age at which criminologists would expect them to stop offending. At these ages, they are consuming scarce prison space without any real benefit of reducing their capacity to commit crime. Sloth-Nielsen & Ehlers, *supra* note 7, at 17. Finally, because the prisons are exceeding their capacity, contributing to inhumane conditions within the prisons, there is little hope of rehabilitation. With such long sentences, the convicted have "nothing to hope for," and are less likely to be rehabilitated. *Id.*

n100. Schonteich, *supra* note 92.

n101. *Id.*

n102. South African Police Services, *supra* note 26.

n103. *Id.*

n104. Survey of South Africans, *supra* note 52, at 39. Fear of crime has also increased according to the Institute for Security Studies victim survey, with significantly more people feeling unsafe in 2003 than they did in 1998. Burton et al., *supra* note 50, at 40; see also Sloth-Nielsen & Ehlers, *supra* note 7, at 20.

n105. See Scandal-Hit Interpol Chief Quits, BBC News, Jan. 13, 2008, <http://news.bbc.co.uk/1/hi/world/africa/7186024.stm>; Sam Sole, Stefaans Brummer & Adriaan Basson, Mbeki's Mad Dash to Save Selebi, Mail & Guardian (S. Afr.), Jan. 18, 2008, available at <http://www.mg.co.za/articlePage.aspx?articleid=329948&area=/insight/insightnational/>.

n106. SAfrica Top Cop Faces Corruption Charges, ABC News, Jan. 11, 2008, <http://abcnews.go.com/International/wireStory?id=4121679>.

n107. Paschke & Sherwin, *supra* note 7, at 57.

n108. See, e.g., *S v Abrahams* 2002 (1) SACR 116 (SCA) at 127 (S. Afr.) ("Some rapes are worse than others, and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling that such a sentence is inappropriate and unjust."); see also Sloth-Nielsen & Ehlers, *supra* note 70.

n109. Paschke & Sherwin, *supra* note 7, at 55-56.

n110. *Id.* at 567.

n111. See *infra* Part IV.

n112. Paschke & Sherwin, *supra* note 7, at 57.

n113. Evidence that the median of sex offense sentences after the implementation of the Act is exactly the mandatory minimum illustrates that judges and magistrates, on the whole, have bought into the Legislature's message that rape is a serious offense that should be punished severely - they find ten years to be, on average, an appropriate sentence for rape.

n114. Stephan Terblanche, Professor, University of South Africa, Sentencing: Changes and Effect Since 1994, Address at the Center for the Study of Violence and Reconciliation Criminal Justice Conference: Consolidating Transformation (Feb. 7-8, 2005) (transcript available at <http://www.csvr.org.za/wits/confpaps/terreblanche.htm>).

n115. See Sloth-Nielsen & Ehlers, *supra* note 70.

n116. The new Criminal Law (Sentencing) Amendment Bill of 2007 identifies four circumstances that cannot be considered "substantial and compelling." See *infra* Part IV.

n117. *S v Malgas* 2001(1) SACR 469 (SCA) at 478 (S. Afr.).

n118. *S v Abrahams* 2002 (1) SACR 116 (SCA) at 126 (S. Afr.).

n119. *Id.* at 127.

n120. *S v Mahomotsa* 2002 (2) SACR 435 (SCA) at 441 (S. Afr.).

n121. *Id.* at 443.

n122. Forcing the victim to prove physical or mental injury presents two problems. Most importantly, it inappropriately focuses the inquiry in sentencing on the victim, rather than on the offender. These inquiries exacerbate the impression that the victim herself is on trial. See *infra* Part IV. Second, it imposes a burden on the prosecution to present evidence of injury where injury, and particularly psychological injury, may not be readily apparent. Sexual assault is widely known to result in severe medical conditions and psychological trauma that develop over time. Medically, sexual assault victims have a high risk of sexually transmitted disease or infection, higher risk of pregnancy, headaches, eating disorders, gynecological symptoms, irritable bowel syndrome, and injury to the urethra, vagina, or anus. Psychologically, victims risk fear of death, anxiety and ongoing fears, feelings of low self-esteem, guilt, shock, confusion, and denial, and post-traumatic stress disorder. See Zoe Morrison, Antonia Quadara & Cameron Boyd, "Ripple Effects" of Sexual Assault, 7 ACSSA Issues 1 (2007). Sexual assault is also highly correlated with suicide. During the post-traumatic period of rape recovery, victims are nine times more likely than non-victims to attempt suicide, and one in four female suicide attempts is preceded by physical violence. See Lisa A. Goodman, Mary P. Koss & Nancy Felipe Russo, Violence Against Women: Physical and Mental Health Effects, 2 Applied & Preventive Psychol. 79, 80-81 (1993).

n123. Di Caelers, Experts Raise the Alarm as Courts Let Rapists Off Lightly, Cape Argus (S. Afr.), June 29, 2005, available at <http://www.capeargus.co.za/index.php?fSectionId=49&fArticleId=2604884>.

n124. *S v Rammoko* 2003 (1) SACR 200 (SCA) at 205 (S. Afr.).

n125. Moffett, *supra* note 10, at 3.

n126. *S v Mvamvu* (case 350/2003 (SCA)) at 4-7 (S. Afr.).

n127. *Id.* at 12.

n128. The Supreme Court of Appeals did determine that the trial court had erred in two ways: in finding mitigation because the victim "still had feelings for the accused" and because the complainant failed to tell her ex-husband's sister that she was being held captive. See *id.* at 9.

n129. *Id.* at 12-13.

n130. The resulting sentence happens to be equivalent to the mandatory minimum for a Part III rape offense, perhaps indicating that the judge believed elements of the crime distinguishing this Part I offense from a Part III offense (the multiple rapes and grievous bodily harm) were inconsequential.

n131. Particularly in rape cases, the South African media publicizes departures from the mandatory minimums, without referring to the quantitative reports which indicate that there has been an increase in consistency for Part III cases. As a result, the public is left with the impression that there is still widespread disparate sentencing occurring for sex offenders.

n132. See Deborah Quenet & Lillian Artz, Comments on Discussion Paper 91, Sentencing: A New Sentencing Framework (2000), <http://www.wlce.co.za/advocacy/submission7.php>.

n133. Criminal Law (Sentencing) Amendment Bill of 2007 s. 1(3)(aA).

n134. See Michelle J. Anderson, From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law, *70 Geo. Wash. L. Rev.* 51, 51 (2002).

n135. Anne-Marie L.M. de Brouwer, Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR 231 (2005). International courts exclude evidence of prior or subsequent sexual conduct in order to limit trauma, to encourage reporting and testimony, and to ensure that the scrutiny remains with the offender rather than the victim. The sexual history of the victim is now inadmissible under the rules of evidence and procedure in the United States, the International Criminal Court (ICC), and the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Tribunal for the Former Yugoslavia (ICTY). See *Fed. R. Evid.* 412; Rules of Procedure and Evidence for the International Criminal Court 71; Rules of Procedure and Evidence for the International Tribunal for Rwanda 96; Rules of Procedure and Evidence for the International Tribunal for the Former Yugoslavia 96.

n136. de Brouwer, *supra* note 135, at 234.

n137. See, e.g., Prosecutor v. Zejnil Delalic, Zdravko Mucic, Hazim Delic and Esad Landzo, Decision on the Prosecutor's Motion for Redaction of the Public Record P 48 (June 5, 1997), available at <http://www.un.org/icty/celebici/trialc2/decision-e/60605MS2.htm>; Kate Fitzgerald, Problems of Prosecution and Adjudication of Rape and Other Sexual Assaults Under International Law, *8 Eur. J. Int'l L.* 638, 646 (1997).

n138. The sentences themselves, however, do not necessarily reflect the leniency that the language of the decisions suggests. The Supreme Court of Appeal in *Mvamvu, Abrahams, and Mahomotsa* increased the sentences given by the trial court, despite finding "substantial and compelling circumstances." See *S v Mvamvu* (case 350/2003 (SCA)) at 14 (S. Afr.) (raising the sentence from five years to ten years); *S v Abrahams* 2002 (1) SACR 116 (SCA) at 128 (S. Afr.) (raising the sentence from seven years to twelve years); *S v Mahomotsa* 2002 (2) SACR 435 (SCA) at 446 (S. Afr.) (raising the sentences for two counts of rape from six and ten years, respectively, to eight and twelve years);

n139. van Zyl Smit, *supra* note 66, at 104.

n140. Previous versions of the Sexual Offences Act provided that the sexual history of the victim would be inadmissible in sex offenses proceedings, but the final version contains no such provision. Compare Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, with Criminal Law (Sexual Offences) Amendment Bill 50 of 2003 s. 26.

n141. SA Law Commission Project 107 Sexual Offenses Report 263 (Dec. 2002).

n142. Criminal Law Amendment Act 105 of 1997 s. 51; see also O'Donovan and Redpath, *supra* note 7, at 19.

n143. See, e.g., U.S. Sent'g Guidelines Manual § 2A3.1 (2007).

n144. This table is only a starting point for discussion. A commission of sex offense experts and judicial officers in South Africa would be well-equipped to create a similar rubric tailored specifically for their values, justice system, and sentencing practices (i.e., the relative and cumulative weight of specific factors). The elements in this table are based in part on the previous considerations in the Criminal Amendment Act of 1997 and the U.S. Federal Sentencing Guidelines. See Criminal Amendment Act 105 of 1997 s. 51; U.S. Sent'g Guidelines Manual § 2A3 (2007).

n145. Criminal Procedure Act of 1977 s. 296; see SA Law Commission, *supra* note 141, at 244.

n146. *Id.* at 245.

n147. The SA Law Commission's Committee on Sex Offenses has also supported the introduction of an order for long-term rehabilitative supervision after imprisonment for certain categories of "dangerous offenders." The supervision order would be imposed at sentencing to go into effect upon the offender's release from prison, promoting his eventual safe reintegration into society. See SA Law Commission, *supra* note 141, at 258. A sex offender could be determined to be "dangerous" if he has more than one conviction for a sexual offense, has been convicted of a sexual offense which was accompanied by violence or threats of violence, or has been convicted of a sexual offense against a child. *Id.* The five-year supervision would consist of a rehabilitative program, including community service hours, an accredited sex offense-specific treatment program, or alcohol or drug treatment. *Id.* at 18-20, 291. The order may also prohibit the individual from visiting a specified location or seeking employment of a particular nature. Used in conjunction with other sentencing strategies, long-term supervision could provide both re-entry support for the offender and protection for the community, particularly when the threat of repeated sexual violence is related to drug or alcohol abuse for which he could be treated.

n148. Is It a Crime to Whine?, SABC News (S. Afr), June 11, 2006, available at <http://www.sabcnews.com/fokus/whineE.html>.

n149. Michael Wines, A Highly Charged Rape Trial Tests South Africa's Ideals, N.Y. Times, April 10, 2006, at A3.

n150. *Id.*

n151. *Id.*

n152. *Id.*

n153. Criminal Law (Sexual Offences and Related Matters) Amendment Act of 2007. More controversially, the Act allows victims to apply for an order that the accused be tested for HIV at state expense. *Id.* at s. 28. The Act has come under scrutiny for criminalizing consensual sexual behavior for children under the age of fourteen, including kissing. Alice Lander, *Will SA Law Steal Teens' Kisses?*, BBC News, Jan. 9, 2008, <http://news.bbc.co.uk/2/hi/africa/7168597.stm>.

n154. See Moshoeshoe Monare, *Zuma Welcomes Mbeki into His Fold*, Cape Argus (S. Afr.), Dec. 21, 2007, available at <http://www.int.iol.co.za/index.php?set id=1&click id=3054&art id=vn20071221113700873C813030>; Timeline: Zuma's Legal Problems, BBC News, Dec. 28, 2007, <http://news.bbc.co.uk/2/hi/africa/7153378.stm>.