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

Kristina Scurry Baehr†

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.

† Yale Law School, J.D. expected 2008; Princeton University, A.B. 2004. Many thanks to Judge Nancy Gertner, Professor Dennis Curtis, and Professor Kate Stith for the course on comparative sentencing that inspired this Comment. Thanks to Rebecca Engel and Elizabeth Simpson for their endless patience and flexibility. Special thanks to Professor Robert Solomon for his mentorship throughout law school and to my husband, Evan Baehr, for his encouragement along the way.

Copyright © 2008 by the Yale Journal of Law and Feminism
ever since. 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 unhopeful and unpatriotic, threatening the success of the new democracy as a whole. As a result, when feminists and women’s rights activists have called attention to rape, President Mbeki has called them racist. 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.

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. 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, and another set of academics have

2. Thabo Mbeki, When Is Good News Bad News, ANC TODAY, Oct. 7, 2004, http://www.anc.org.za/ancdocs/antoday/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.”).
4. 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, arguing 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).
Mandatory Minimums Making Minimal Difference

studied the effects of mandatory minimum sentencing, 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.”

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


inappropriate fact patterns, such as that the victim was not a virgin, that a father of a ten-year-old was "gentle" when he molested her several times, or that a husband was culturally chauvinist and thus was less culpable for kidnapping and brutally raping his wife. 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. 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.

---

9. S v Mahomotsa 2002 (2) SACR 435 (SCA) at 441 (S. Afr.).
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?¹³ 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.¹⁴ 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.¹⁵ 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 protégés. 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.”¹⁶ 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.”¹⁷ Rape was treated as a sport, and the point of the game had less to do with the victim than with the perpetrators themselves.¹⁸ 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.”¹⁹

¹³. WHY IS THERE SO MUCH VIOLENCE, supra note 6, at 1.
¹⁶. Vogelman & Lewis, supra note 6, at 39.
¹⁷. HARRIS, supra note 15, at 39.
¹⁸. Abrahams & Jewkes, supra note 1, at 1239.
¹⁹. Id.
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, “[T]he 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.”

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. 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. 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.”

South Africa is not alone in its struggle to combat sexual violence during the transition to democracy. 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.

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. Unfortunately, there is no evidence

21. See WHY IS THERE SO MUCH VIOLENCE, supra note 6.
22. Id.
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. 27 Young peoples' attitudes about “normal”
vio lence and sex in the community suggest that widespread sexual assault will
persist in South Africa with a new generation. 28 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. 29 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. 30

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. 31 Journalists have suggested
that “rapes and assaults on women and older children are now so common as to
pass un-remarked;” 32 that South Africa is a “rape-prone society;” 33 and that
“rape has become a sickening way of life.” 34 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. 35

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
27. Wood & Jewkes, Violence, Rape and Sexual Coercion, supra note 6, at 42 n.1.
28. WOOD & JEWKES, “LOVE IS A DANGEROUS THING,” supra note 6 (discussing the role of
violence in adolescent romantic relationships).
30. REP. HEALTH RESEARCH UNIT, HIV AND SEXUAL BEHAVIOR AMONG YOUNG SOUTH
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. Swans, 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.
31. 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.
32. Stephanie Nolen, In South Africa 60 Children a Day are Raped, GLOBE & MAIL (Toronto), Oct.
18, 2003, at F1.
33. Id.
34. Charlene Smith, Rape Has Become a Sickening Way of Life in Our Land, SUN. INDEP. (S. Afr.)
&ArticleIdd=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).
35. 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
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.\textsuperscript{36} In 1999, he publicly exploded over a television advertisement and a human rights report that used exaggerated statistics.\textsuperscript{37} 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.\textsuperscript{38}

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.\textsuperscript{39} 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."\textsuperscript{40}

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 \textit{Washington Post} article in June 2000, "We won't end this epidemic until we understand the role of tradition and 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\%202003%20new.doc.

36. 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, \textit{Development, Crime Prevention and Social Policy in Post-Apartheid South Africa}, 26 CRITICAL SOC. POL'Y 169, 180 (2006).

37. Abrahams & Jewkes, \textit{supra} note 1, at 1231.


40. \textit{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, \textit{supra} note 1, at 1233.
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." 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." Mbeki claimed that to describe rape in South Africa as a cultural phenomenon is to "define[] African people as barbaric savages." 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.' 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.

Mbeki believes media descriptions of crime to be inherently unhopeful 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.

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. He cited Nelson Mandela's description at the time: "[T]heir 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 . . ." Mbeki also portrayed the fear of crime as a white racist attitude towards blacks: "[E]very reported incident of crime communicates the frightening and expected message that—the kaffirs are coming!"

43. Id.
44. Id.
45. 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.
46. Id.
48. Id.
49. Id.
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.\textsuperscript{50} In 2003, 58% of South Africans indicated that they feel very unsafe walking in their area at night, up from only 25% in 1998.\textsuperscript{51} The \textit{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.\textsuperscript{52} 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.”\textsuperscript{53} 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.\textsuperscript{54}

It is not surprising, then, that South Africans trust the media more than the National Parliament, the SAPS, or local government.\textsuperscript{55} 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.\textsuperscript{56} But the media is not blameless either; their exaggerations can result in hysteria and widespread, escalating fear.

\begin{itemize}
\item \textsuperscript{50} \textit{Patrick Burton ET AL., NATIONAL VICTIMS OF CRIME SURVEY 78} (2003), \textit{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.
\item \textsuperscript{51} \textit{Id.} at 50.
\item \textsuperscript{52} \textit{Wash. Post, Kaiser Family Found. & Harvard Univ., SURVEY OF SOUTH AFRICANS AT TEN YEARS OF DEMOCRACY 32} (2003) [hereinafter \textit{SURVEY OF SOUTH AFRICANS}].
\item \textsuperscript{54} Fourteen percent of South Africans have witnessed a murder, most of whom were between the ages of sixteen and twenty-five at the time. \textit{See Burton ET AL., supra} note 50, at 59.
\item \textsuperscript{55} 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. \textit{SURVEY OF SOUTH AFRICANS, supra} note 52, at 41.
\item \textsuperscript{56} 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. \textit{See Harris, supra} note 15, at 22.
\end{itemize}
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.\(^{57}\) Periodically, a catalyst rape case instigates public calls for the reinstatement of the death penalty or even the castration of sex offenders.\(^{58}\) 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.”\(^{59}\) 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.\(^{60}\) 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.\(^{61}\) 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.\(^{62}\)

---

57. 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).


61. See BURTON ET AL., supra note 50.

62. 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.
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.\(^{63}\) In 1996, the Minister of Justice asked the South African Law Commission to investigate two issues: sexual offenses against children and sentencing.\(^{64}\)

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.\(^{65}\) 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.\(^{66}\) In contrast, the child sexual abuse issue paper and the legislation it proposed were amended, critiqued, and debated for close to ten years.\(^{67}\) Finally titled the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, it was not executed until December 13, 2007.\(^{68}\)

The mandatory minimum provisions in the Criminal Amendment Act were introduced as temporary, emergency measures to combat crime.\(^ {69}\) It has been

---

63. HUMAN RIGHTS WATCH, supra note 31.
64. See SA LAW COMMISSION, TWENTY-FIFTH ANNUAL REPORT 64, 85 (1997); O’DONOVAN & REDPATH, supra note 7, at 11.
66. 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.
69. 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/1998/98505_0w0439810048.htm (last visited Mar. 11, 2008). He thus made two predictions: First, that the crime wave would pass, and second, that the mandatory
widely noted that because of the rush, the Act was poorly drafted.\textsuperscript{70} The Act was an emergency political measure to assuage the public’s fears, rather than a well-developed strategy to combat crime.\textsuperscript{71}

\textit{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, firearm offenses, corruption and fraud, murder, terrorism, robbery in aggravating circumstances, and rape, unless “substantial and compelling circumstances” justify a deviation.\textsuperscript{72}

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.


\textsuperscript{71} Id.

\textsuperscript{72} Criminal Law Amendment Act 105 of 1997 s. 51(3)(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;
   ii. by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;
   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
   iv. by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;

b. Where the victim
   i. is a girl under the age of 16 years;
   ii. is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable; or
   iii. is a mentally ill woman as contemplated ....

c. Involving the infliction 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. 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;

---

73. Criminal Law Amendment Act 105 of 1997 s. 511; see also O'DONOVAN & REDPATH, supra note 7, at 19.
74. PASHCKE & SHERWIN, supra note 7, at 11.
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. 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. 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.

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. 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.

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

75. Id. at 8.
76. Id. at 9.
77. 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).
79. S v Malgas 2001 (2) SA 1222 (A) at 1234-25 (S. Afr.).
became known as the Zinn triad: "the seriousness of the crime, the offender, and the interests of society." 80 Individual sentences were tailored to the particular crime and the particular offender to further the goals of deterrence, prevention, rehabilitation, and retribution. 81 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. 82 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. 83

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. 84 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. 85

Indeed, the evidence suggests that in practice the mandatory minimums are actually operating as maximums for most crimes. And because the Malgas

---

80. S v Zinn 1969 (2) SA 537 (A) at 540 (S. Afr.).
81. R v Swanepoel 1945 A.D. 444 (A) at 445 (S. Afr.).
83. Id. at 57-58.
84. PASCHKE & SHERWIN, supra note 7, at 9.
85. Id. at 55-56.
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.\textsuperscript{86}

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.\textsuperscript{87} 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.\textsuperscript{88} 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.\textsuperscript{89} 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.\textsuperscript{90} The Minister of Justice of South Africa reaffirmed this international sentiment: "[I]f there is still no decline in the crime rate [after two years], the

---

\textsuperscript{86} Id. at 55.
\textsuperscript{87} Id. at 51.
\textsuperscript{88} See, e.g., Sloth-Nielsen & Ehlers, supra note 7, at 15; see also Terblanche, supra note 7, at 195.
\textsuperscript{89} 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.
\textsuperscript{90} Terblanche, supra note 7, at 195.
operation of [these] sections can be extended by the President.” He continued: "[I]t is trusted that the imposition of minimum sentences will serve as a deterrent factor for offenders."91

According to international studies, however, there is little evidence that suggests that harsher sentences do in fact deter crime.92 Even deterrence advocates acknowledge that effective deterrence requires swift and certain punishment. Martin Schönteich, of the Institute for Securities Studies, argues that deterrence is based on three “Cs”: “capability, credibility and communication.”93 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.94

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.95 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.96 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.97 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.

94. Schönteich, supra note 92.
95. 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.
96. See HIRSCHOWITZ ET AL., supra note 95, at 2; see also RASOOL ET AL., supra note 6, at 112.
97. RASOOL ET AL., supra note 6, at 135. Note that these cases also included general physical abuse, not necessarily sexual assault.
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.9

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.99

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.100 According to Martin Schönteich, 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.”101 Not surprisingly, then, ten years of mandatory minimum sentencing in South Africa

98. *S v T Makwanyane & Another* 1995 (3) SA 391 (CC) at 442-43 (S. Afr.).
99. 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 reflect 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.
100. Schönteich, supra note 92.
101. Id.
have neither deterred sex offenders nor reduced the incidence of rape. According to SAPS, reported rape rates stayed relatively level between 2001 and 2007.\textsuperscript{102} Current reported rape prevalence varies by province, with the Eastern Cape experiencing an increase of 15.3\% over the last six years.\textsuperscript{103} 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.\textsuperscript{104} 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.\textsuperscript{105} 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.\textsuperscript{106}

\textbf{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,
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. 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. 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. Consistency has drastically improved for Part III, or “ordinary rape,” where the median sentence post-implementation has been exactly ten years, the prescribed minimum. 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. 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.

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

107. PASCHKE & SHERWIN, supra note 7, at 57.
108. See, e.g., S v Abrahams 2002 (1) SACR 116 (SCA) at 127 (S. Afr.) (“[S]ome 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.
109. PASCHKE & SHERWIN, supra note 7, at 55-56.
110. Id. at 567.
111. See infra Part IV.
112. PASCHKE & SHERWIN, supra note 7, at 57.
above or below the mandatory minimum. 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. 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. 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. 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.’”

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.” As Justice Camaron articulated, “some rapes are worse than others, and the life sentence ordained by the Legislature should be reserved for cases

113. 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.


115. See Sloth-Nielsen & Ehlers, supra note 70.

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

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

118. S v Abrahams 2002 (1) SACR 116 (SCA) at 126 (S. Afr.).
devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust."

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.

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.\(^{121}\)

The judge here established a dangerous precedent: A survivor should have to prove that she has suffered psychological or physical harm from the rape.\(^{122}\)

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-

---

119. *Id.* at 127.

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

121. *Id.* at 443.

122. 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).
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.123 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.124

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:

[T]his 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.125

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.126
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.”127 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.128

123. Di Caelers, Experts Raise the Alarm as Courts Let Rapists Off Lightly, CAPE ARGUS (S. Afr.),
124. S v Rammoko 2003 (1) SACR 200 (SCA) at 205 (S. Afr.).
125. MOFFETr, supra note 10, at 3.
126. S v Mvamvu (case 350/2003 (SCA)) at 4-7 (S. Afr.).
127. Id. at 12.
128. 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.
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 doing, he appears to have overlooked the benchmark indicating the seriousness with which the Legislature views offences of this type.129 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.130

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.131 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."132 As a result of their activism, Parliament passed the Criminal Law (Sentencing) Amendment Bill ("the Amendment") in

129. Id. at 12-13.
130. 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.
131. 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.
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.  

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. This inquiry invades the rape victim's privacy, re-traumatizes the victim, and contributes to the anguish of a victim testifying. This fear is even more powerful in traditional contexts where extramarital sexual activity is taboo. Indeed, the Amendment is consistent with international norms that prohibit the consideration of "virginity" or sexual history of the victim in rape proceedings.

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

133. Criminal Law (Sentencing) Amendment Bill of 2007 s. 1(3)(aA).
135. 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.
136. DE BROUWER, supra note 135, at 234.
Mandatory Minimums Making Minimal Difference

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. 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.

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

138. 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);

139. van Zyl Smit, supra note 66, at 104.
chauvinism of the offender remains admissible during the trial, so judges may still be influenced by these factors. 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, "[I]t 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."

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. 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:

140. 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.
142. Criminal Law Amendment Act 105 of 1997 s. 51; see also O'DONOVAN AND REDPATH, supra note 7, at 19.
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). 143

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).

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

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

---

144. 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).
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. 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.

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.

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.

145. Criminal Procedure Act of 1977 s. 296; see SA Law Commission, supra note 141, at 244.
146. Id. at 245.
147. 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.
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.\(^\text{148}\)

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

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."¹⁴⁹ To deny her sex, he testified, would be
tantamount to rape. He declared, "[I]n the Zulu culture, you cannot just leave a
woman if she is ready."¹⁵⁰ 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."¹⁵¹ 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.¹⁵²

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

¹⁴⁹. Michael Wines, A Highly Charged Rape Trial Tests South Africa's Ideals, N.Y. TIMES, April
¹⁵⁰. Id.
¹⁵¹. Id.
¹⁵². Id.
Yale Journal of Law and Feminism

report its progress to the public annually.\textsuperscript{153} 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.\textsuperscript{154} 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.
