Feminists have long viewed the criminal justice system — the system that women access to gain protection from or recourse against sexual violence — as the ultimate gendered institution, often reinforcing deeply sexist assumptions about women. The sentencing of rape offenders under current minimum-sentencing legislation has done little to change this perception, as judicial officers employ commonly held rape myths and stereotypes in their sentencing practice. This article explores the sentencing of rape offenders under the minimum-sentencing legislation and highlights the need for judicial sensitisation in adjudicating sexual violence matters.

I INTRODUCTION

The South African law on rape has changed dramatically over the past ten years. The Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 is now fully operational. It aims to address the high incidence of sexual violence in the country and specifically contains an inclusive definition of the crime of rape. In addition, rape offenders have been subjected to harsher sentences in terms of the Criminal Law Amendment Act 105 of 1997, which introduced mandatory minimum sentences. However, these legislative initiatives have done little to address the perpetration of the crime. On the contrary, the application of minimum-sentencing legislation has highlighted the judiciary’s acceptance of commonly held rape myths and stereotypes.

Recent judicial decisions such as Moatshe v Legend Golf and Safari Resort Operations (Pty) Ltd, where a labour court judge commented on the inappropriateness of a rape sentence handed down for a violent rape that formed the background to a labour dispute, have highlighted the urgent need for the review of the current minimum-sentencing legislation concerning rape offenders under current minimum-sentencing legislation has done little to change this perception, as judicial officers employ commonly held rape myths and stereotypes in their sentencing practice. This article explores the sentencing of rape offenders under the minimum-sentencing legislation and highlights the need for judicial sensitisation in adjudicating sexual violence matters.

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1 Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (hereinafter ‘the Sexual Offences Act’) defines rape in the following terms: ‘Any person (‘A’) who unlawfully and intentionally commits an act of sexual penetration with a complainant (‘B’), without the consent of B, is guilty of the offence of rape.’ Penetration includes penetration of the genital organs, anus or mouth of a person and includes penetration by an object. For a full discussion of the rape law reform process see Lillian Artz & Dee Smythe Should We Consent: Rape Law Reform in South Africa (2008) 1.

2 See s 51 of the Criminal Law Amendment Act 105 of 1997 (hereinafter ‘the Criminal Law Amendment Act’ or ‘the minimum-sentencing legislation’).
the sentencing of rape offenders. The discussion that follows explores the sentencing of rape offenders under the prescribed minimum-sentencing legislation in various cases. Although this does not comprise a comprehensive review of sentencing practice in these matters, it does reveal a trend as regards the acceptance and perpetuation of rape myths and stereotypes that ultimately reinforces violent behaviour towards women.

The article will rely on feminist legal thought in suggesting legislative reform and judicial sensitisation as measures to address disproportionate and prejudicial sentencing in rape offences.

II CHALLENGING THE ‘REAL RAPE’ MYTH

In 1986, Susan Estrich described what she called a ‘real rape’. According to her, a ‘real rape’ would be perpetrated by a stranger in an alley-way with excessive violence to overcome the woman’s resistance. Only if the assault conformed to these narrow criteria would it be considered ‘real’ enough to take seriously. However, in reality, most rapes deviate from this script: most offenders are known to victims, and offenders use minimal physical violence. Even so, anything that falls short of the stereotypical scenario Estrich delineates is not viewed as a ‘real rape’ and, to some extent, the woman is held responsible for what happened to her; hence the establishment of rape myths and stereotypes.

Rape myths and stereotypes have been described as attitudes and beliefs that are generally false but are so widely and persistently held that they serve to deny and justify male sexual aggression towards women. Some of the most commonly held rape myths include the belief that rape is about sex; that women mean ‘yes’ when they say ‘no’; that scantily dressed women ‘ask’ to be raped; that if a woman says ‘yes’ once, there is no reason to believe her ‘no’ the next time; that the majority of women who are raped are promiscuous and deserve it; that a healthy woman should be able to resist a rapist if she

3 Moatshe v Legend Golf and Safari Resort Operations (Pty) Ltd [2014] ZALCJHB 458. In this case, Snyman AJ stated that the fully suspended sentence that was handed down for a violent rape infringed the applicant’s right to dignity and bodily and psychological integrity. The learned judge felt it his judicial duty to refer the matter to the Magistrates’ Commission, the National Prosecuting Authority and the Department of Justice and Correctional Services to investigate the appropriateness of the sentence that was handed down.

4 The cases that form part of this discussion include the sentencing decisions that were handed down during the 2013–2014 period where the courts specifically focused on substantial and compelling circumstances in deviating from the prescribed minimum sentences.

5 Susan Estrich ‘Rape’ (1986) 95 Yale LJ 1087 at 1092.


7 Estrich op cit note 5 at 1092.

8 Chennells op cit note 6 at 25.

9 Kimberly A Lonsway & Louis F Fitzgerald ‘Rape myths’ (1994) 18 Psychology of Women Quarterly 133 at 134.
wants to; and that women ‘cry’ rape if they have been jilted. These myths serve to trivialise rape victims’ experience of sexual violence and ultimately serve to justify male sexual aggression. What is of concern is how judicial attitudes in the sentencing of rape offenders can reflect, legitimise and enforce rape myths, celebrating male aggressiveness and punishing female passivity.

Rape myths and stereotypes have become so ingrained in society that they have been accepted as the norm against which offenders and, more disconcertingly, rape victims are judged. Ultimately, the perpetuation of these myths is so pervasive that they can be seen as a form of patriarchal control that legitimates women’s subordination in the criminal justice system: ‘[I]f there is one area of social behaviour where sexism is entrenched in law — one realm where traditional male prerogatives are most protected, male power most jealously preserved, and female power most jealously limited — it is in the area of sex itself, even forced sex. Guns and gangs may be recognized as criminal, but to go beyond that is to enter a man’s protected preserve, in life and in law.’

What complicates rape law reform, and the reform of rape sentencing, is the extent to which these myths and stereotypes have become the predominant social discourse that enables society to avoid confronting the reality of women’s sexual violation. The acceptance of these myths and stereotypes has been described as an example of the so-called generally adopted ‘just world’ phenomenon where the predisposition is to believe that the world is a just place where good things happen to good people and vice versa. As such, the belief projected onto society is that rape victims instigated or deserved to be raped. This leads to the question: how does one change society’s beliefs through a legal system that seemingly reinforces it?

Socio-legal scholars have long debated the power of law to effect social

10 Mary White Stewart, Shirley A Dobbin & Sophia I Gatowski “‘Real rapes’ and “real victims”: The shared reliance on common cultural definitions of rape’ (1996) 2 Feminist Legal Studies 159 at 160; Morrison Torrey ‘When will we be believed? Rape myths and the idea of a fair trial in rape prosecutions’ (1991) 24 University of California Davis LR 1013 at 1015.
11 Chennells op cit note 6 at 25.
12 Torrey op cit note 10 at 1055.
15 Lonsway & Fitzgerald op cit note 9 at 136; Elizabeth M Hammond, Melissa A Berry & Dario N Rodriguez ‘The influence of rape myth acceptance, sexual attitudes, and belief in a just world on attributions of responsibility in a date rape scenario’ (2011) 16 Legal and Criminological Psychology 242 at 244.
change. Many scholars have argued that the law is a separate entity which merely dictates rules and norms, as opposed to being an intrinsic part of society.16 In this sense, law is perceived as an instrument of state power, independent of other aspects of social regulation. When viewed as such, law becomes a purely technical regulation.17 Others have argued that law is an expression of society’s values and concerns. As such, law has the power not only to set and alter rules, but also to change the way in which a society thinks and reacts.18 What clearly emerges from these debates is that law’s power to effect change is enticing and should not be underestimated.

Feminists have also questioned the utility of law as an instrument for voicing women’s inequality. Most feminist scholars agree that the law, as a patriarchal creature, is more likely to reproduce existing inequalities rather than change them.19 Indeed, feminist jurisprudence has long exposed the criminal justice system as a system which contributes to upholding male power.20 The difficulty for the feminist project in law has hence been to argue for reform and reconstruction whilst acknowledging law’s inherently subjugating disposition.21

In South Africa, feminists have contributed actively to re-shaping the law on rape, first by challenging harmful myths and stereotypes and, secondly, by arguing for inclusive statutory protection that focuses on protection of the victim rather than male interests in the sexuality of women.22 However, as this article will illustrate, current sentencing practices under the minimum-sentencing legislation have seen the re-emergence of harmful rape myths and stereotypes that call into question the effectiveness of this very legislation.

If the judiciary understood better the true dynamics of rape and the proper application of legislative protection, this could go a long way in shaping public discourse on appropriate gender behaviour. Whilst most citizens accept biases by the police (for example) as being inevitable, they believe that judges, as supposedly objective sources of authority and control, will balance any inequities.23 In analysing recent sentences in rape cases and the myths and stereotypes they reinforce, I argue for the necessity of judicial sensitisation through training. This would enable the judiciary to utilise current legislative

17 Ibid at 45.
18 Thomas B Stoddard ‘Bleeding heart: Reflections on using the law to make social change’ (1997) 72 New York University LR 967 at 971.
20 Artz in Steyn & Van Zyl (eds) op cit note 13 at 171.
21 Ibid at 188.
22 See the current definition of the crime in the Sexual Offences Act supra note 1; Nikki Naylor ‘The politics of a definition’ in Artz & Smythe (eds) op cit note 1 at 22.
23 Torrey op cit note 10 at 1055.

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frameworks appropriately to protect rape victims and to give effect to their constitutional right to equality.24

III THE APPLICATION OF MINIMUM-SENTENCING LEGISLATION IN RAPE TRIALS

In line with our common-law tradition, South African judicial officers traditionally had complete discretion when sentencing offenders. However, soon after 1994, there was heated public debate about the perceived leniency in the sentencing of offenders.25 The South African Law Reform Commission investigated the matter and considered mandatory minimum sentences as one of the options to reform sentencing practices; but did not make any specific recommendations in this regard.26

In an attempt to quell the public’s fears, government proceeded to implement the Criminal Law Amendment Act as a temporary measure to help combat the high levels of violent crime in the country.27 However, the temporary measure became permanent, with minimum mandatory sentences being prescribed for certain offences, unless substantial and compelling circumstances required a deviation.28

Initially, the legislation was criticised as it restricted judicial discretion. However, it met constitutional scrutiny when the Constitutional Court confirmed its legitimacy in S v Dodo.29 The court held that judicial discretion is retained as a judge can depart from a prescribed sentence if he or she finds it to be disproportionate under the circumstances.30 Ironically, as will be illustrated below, it is the provision for the consideration of substantial and compelling circumstances that has led to varied sentences being handed down, especially in rape trials.31

24 Sections 9 and 34 of the Constitution of the Republic of South Africa, 1996 (‘the Constitution’).
28 Sections 51 and 52 of the Criminal Law Amendment Act.
29 2001 (1) SACR 594 (CC).
31 Baehr op cit note 30 at 228; Stephan Terblanche ‘Sentencing’ (2014) 27 SACJ 104 at 110.
In terms of the minimum-sentence legislation, the prescribed sentence for the crime of rape is divided into two categories. The first is a part one offence which prescribes a sentence of life imprisonment if the victim was raped more than once or the offender has committed gang rape; if the offender has been convicted of two or more offences of rape or compelled rape, but has not yet been sentenced in respect of such convictions; if the offender has committed rape knowing he was HIV positive; or if the victim was younger than sixteen, disabled or severely injured.\(^\text{32}\) The second, a part three offence, includes all rapes other than those in part one, and prescribes a sentence of ten years for a first offender, fifteen years for a second offender, and twenty years for a third or subsequent offender.\(^\text{33}\) As stated before, if substantial and compelling circumstances exist that could justify the imposition of a lesser sentence, the judicial officer may consider reducing the mandatory sentence.\(^\text{34}\)

Although the minimum-sentencing legislation was enacted to curb judicial discretion in sentencing, it creates a different kind of discretion in relation to the consideration of substantial and compelling circumstances. This new discretion has been criticised widely as it has allowed several rape myths and stereotypes to be employed by judges for the purposes of justifying downward deviations from prescribed minimum sentences.\(^\text{35}\) Kristina Baehr argues that the prescribed penalties provided for in the legislation have created a scenario where sentencing judges, in exercising and preserving their discretion, almost always consider downward adjustments.\(^\text{36}\) In this sense, some judges focus on factors that justify a lesser sentence, rather than the factors that make rape a serious crime, and tend to find ‘excuses’ for offenders in virtually every sentence they hand down.\(^\text{37}\) What is striking is how these ‘excuses’ correlate with commonly held rape myths and stereotypes.

Early cases which applied the minimum-sentencing legislation clearly show a reliance on these myths and stereotypes. In handing down a rape sentence in *S v Mahomotsa*, the court a quo stated:

‘Although there was intercourse with each complainant more than once, this was the result of the virility of a young man still at school who had intercourse with other school pupils against their wishes, and note, school pupils who had previously been sexually active. . . . Where one is dealing with school pupils, and where, in addition, it appears that the two girls concerned had already had intercourse before, one really shouldn’t lose perspective, especially not in relation to the first count, which dealt with a complainant who had in any event been naughty a few days earlier and had intercourse with someone else. The

\(^{32}\) Section 51(1) of the Criminal Law Amendment Act read with sched 2.

\(^{33}\) Section 51(2)(b) of the Criminal Law Amendment Act read with sched 2.

\(^{34}\) Section 51(3)(a) of the Criminal Law Amendment Act read with sched 2.

\(^{35}\) Hoffman-Wanderer op cit note 25 at 231.

\(^{36}\) Baehr op cit note 30 at 239.

\(^{37}\) Ibid.
injustice which she suffered in this case does not demand an usually severe sentence.'

Although the judgment was overturned by the Supreme Court of Appeal ('SCA') it points to the fact that rape myths and stereotypes can and do influence judicial reasoning.

Of equal concern was the early judgment of *S v Abrahams*, where a father who raped his daughter was not seen to be a threat to society, and this justified a deviation from the prescribed sentence. The matter went on appeal and although the SCA went to great lengths to point out that a rape within a family is as reprehensible as a rape outside the family context, the court nevertheless found substantial and compelling circumstances not to impose the minimum sentence. In this instance, the lack of physical injury to the victim was particularly persuasive.

These judgments' applications of the substantial and compelling criteria were met with outrage by women's organisations. They proceeded actively to lobby Parliament in an attempt to limit the factors that could be considered substantial and compelling in terms of the Criminal Law Amendment Act. Parliament eventually amended the legislation in December 2007 and included a section which provides as follows:

> 'When imposing a sentence in respect of the offence of rape the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:
> (i) The complainant’s previous sexual history;
> (ii) An apparent lack of physical injury to the complainant;
> (iii) An accused person’s cultural or religious beliefs about rape; or
> (iv) Any relationship between the accused person and the complainant prior to the offence being committed.'

Despite the legislature's attempt to address the application of rape myths and stereotypes in sentencing, the amendment has done little to change judicial thinking in this regard. On the contrary, the amendment simply further highlighted the discretion judges have in terms of the legislation. The discussion that follows focuses on rape-sentencing judgments, illustrating

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38 *S v Mahomotsa* (OPD) unreported case no 29/99 (28 July 1999); English translation (of the original Afrikaans text) from Albertyn et al op cit note 27 at 318–19.
39 *S v Mahomotsa* 2002 (2) SACR 435 (SCA).
40 *S v Abrahams* 2001 (2) SACR 358 (C) as interpreted by Baehr op cit note 30 at 234; also see the interpretation in Albertyn et al op cit note 27 at 319.
42 In *S v Abrahams* ibid para 27 the court stated: ‘In my view, the judge correctly concluded that factors of substance compelled the conclusion that a sentence other than life imprisonment is appropriate. The accused’s age is not in itself a mitigating factor; that he reached his middle years without a criminal conviction certainly is. The fact that the accused’s daughter, apart from the ultimate intrusion and violation that are the essence of rape, was not physically injured is also of importance.’
43 Baehr op cit note 30 at 237.
44 Section 51(3)(aA) of the Criminal Law Amendment Act.
how the judicial discretion provided for in terms of the legislation allows for the continued application of rape myths and stereotypes.45

(a) Judicial discretion and the application of rape myths and stereotypes

(i) Real injuries equal real rape equals a serious sentence

The case of S v Nkawu46 is a classic illustration of how judicial officers project their own stereotypical interpretations of what constitutes a ‘real rape’. In Nkawu, the complainant was raped anally but had no serious physical injuries. In considering an appropriate sentence, the judge interpreted the amendment to the minimum sentence legislation as being unconstitutional as it limited his judicial discretion in sentencing, which according to him, ultimately would infringe on the fair-trial rights of the accused.47 He found that the factors addressed by the amendment could indeed be substantial and compelling if considered cumulatively.48 However, the major contributing factor in finding substantial and compelling circumstances in this case was the fact that the victim was not physically injured.49 The court clearly ignored the power dynamics between the victim and rapist — in this instance specifically, the fact that the victim was ten years old whilst the accused was twenty one.50

Rebecca Chennells argues that the continued focus on physical injury reinforces a masculinist construction of the crime since it is not the sexual violation that is punished but the use of force.51 Susan Estrich argues that the judiciary often measures a woman’s response to rape very much against the manner in which they would expect the average male to react when confronted with a threatening situation — if you hit me or try to hit me, I will hit you back.52 A lack of physical injury is interpreted as a lack of resistance which, in turn, is taken to mean that in some sense the woman (or girl) consented. Estrich continues to argue that when a woman does not physically resist, the question becomes whether the force used was sufficient

45 Baehr op cit note 30 at 239. It should be noted that the case discussions included do not reflect a comprehensive review of sentencing practice in rape cases but generally reflect the judiciary’s application and consideration of substantial and compelling factors when sentencing. There exists a definitive need for further empirical research in this regard.
46 S v Nkawu 2009 (2) SACR 402 (ECG) (‘Nkawu’).
47 Ibid para 15. Plasket J’s interpretation of the amendment was confirmed by the SCA in S v SMM 2013 (2) SACR 292 (SCA).
48 Ibid para 17.
49 Ibid para 19.
50 Chennells op cit note 6 at 28. Mention should also be made of the young age of the victim which, as will be illustrated by the other cases, highlights the vulnerability of children to crimes of violence. At the same time, it reiterates the point that the consideration of substantial and compelling circumstances erodes the purpose of the legislation, as minimum sentences are prescribed to protect victims younger than sixteen years of age from sexual exploitation.
51 Chennells op cit note 6 at 29.
52 Estrich op cit note 5 at 1105.
to overcome a reasonable woman’s will to resist.\textsuperscript{53} A ‘reasonable woman’ in a rape scenario is seen as:

‘[O]ne who does not scare easily, one who does not feel vulnerability, one who is not passive, one who fights back, not cries. The reasonable woman, it seems, is not a schoolboy “sissy”. She is a real man.’\textsuperscript{54}

It is clear that the need for physical injury in a rape scenario is very much constructed on a masculinist approach of acceptable behaviour, and this approach expects women to behave as the average man would have behaved in the same scenario. The fact that there is little or no physical injury should not influence the fact that a crime was perpetrated and that an appropriate sentence should be handed down.

The courts, in focusing on factors such as the need for physical injury, influence a victim’s own perception of the perpetration of the crime. In general, victims of rape are very much aware of the social context of rape and how they are perceived in the criminal justice system, from the moment of reporting to prosecution.\textsuperscript{55} As a result, most victims will not report a rape as they fear condemnation, buying into the earlier-outlined ‘real rape’ scenario, often blaming themselves for a lack of ‘good’ judgment by accepting a drink, for example, or a ride home from a perpetrator.\textsuperscript{56}

The Nkawu judgment set the tone for sentencing decisions after the legislative amendment, with the focus once again on physical injury to warrant a serious sentence being handed down. In \textit{S v Mabitse} the court stated:

‘The physical injury symbolises the measure of violence the perpetrator unleashed on a victim. The greater the degree of severity of the rape victim’s physical injury, the greater the degree of the rapist’s moral blameworthiness. I am of the firm view that dictates of justice demand that, in meting out sentence, differentiation be made, based on the degree of violent and brutal force used. . . . [I]t must also be accepted that lack of brutal force is a factor that diminishes the moral blameworthiness of a rape offender’s actions.’\textsuperscript{57}

In \textit{S v Vilakazi}, the rape victim was between the age of fourteen and sixteen. The court held:

‘In this case there was no extraneous violence and no physical injury was caused other than physical injury inherent in the offence. There was also no threat of extraneous violence of any kind. The appellant at least minimised the risk of pregnancy and the transmission of disease by using a condom. The complainant’s evidence that she was raped twice is curious bearing in mind that the appellant was charged with only one count. Once more the evidence on that issue is scant and in the absence of evidence to the contrary I think we are bound to accept that if two acts indeed occurred they might have been so

\textsuperscript{53} Ibid at 1108.
\textsuperscript{54} Ibid at 1114.
\textsuperscript{55} Stewart, Dobbin & Gatowski op cit note 10 at 165.
\textsuperscript{56} Ibid at 168.
\textsuperscript{57} \textit{S v Mabitse} 2012 (2) SACR 380 (FB) paras 17–21 (‘Mabitse’).
closely linked as to amount in substance to the continuation of a single event and ought not to be given undue weight. Indeed, all who are concerned in this case placed no weight on that aspect of the evidence.\(^{58}\)

The above decisions illustrate that the *Nkawu* judgment established a pattern for judges to justify the use (or at least the lack) of physical injury to consider a downward adjustment in the prescribed sentence.\(^{59}\) Despite the *Nkawu* judgment stating that physical injury is but one factor that should be considered cumulatively with others, it is clear from subsequent decisions that the emphasis fell on the lack of physical injury when considering substantial and compelling circumstances to justify deviation from the prescribed sentence. Further examples include *S v SM*, where a fifteen-year-old girl was raped:

‘However, there is nothing before us to refute the proposition that the appellant is capable of rehabilitation, a prospect that would be denied him, should the minimum prescribed penalty be imposed. Further, the act of rape, while an act of violence in itself, was not accompanied by any other physical violence or physical injury to the victim.’\(^{60}\)

In *S v MM*, an uncle had raped his thirteen-year-old niece:

‘It must also be accepted that this was not the most severe form of rape and that the appellant desisted when he realised that the child was crying... In respect of the severity of the rape, referred to in the preceding paragraph, it is plain from the medical report that the doctor did not find any serious physical injuries... And there was no further violence in addition to the rape.’\(^{61}\)

In *S v Shai*, a thirteen-year-old girl was raped:

‘The court is prepared to accept that the following are substantial and compelling circumstances.

- The accused is a first offender.
- He did not injure the complainant.
- The state proves no psychological effects on the complainant.
- [The appellant] has apologised to the family.
- The mother of the complainant has testified [that the family] accepts the appellant’s apology.’\(^{62}\)

Deviation from the minimum-sentencing legislation, as outlined above, is exactly what the legislature attempted to avoid by amending the Act in 2007. However, the judges’ interpretations of substantial and compelling circumstances illustrate how masculine interpretations of the crime have influenced judicial reasoning. We generally presume that judges are an objective source of authority and control in the courtroom, but decisions such as *Nkawu* and those that followed show that the manner in which judicial attitudes toward

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\(^{58}\) *S v Vilakazi* 2012 (6) SA 353 (SCA) para 55 (*Vilakazi*).

\(^{59}\) *Nkawu* supra note 46 was specifically referred to and followed in *Mabitse* supra note 57 paras 13–15.

\(^{60}\) *S v SM* 2014 (1) SACR 53 (GNP) para 12.

\(^{61}\) *S v MM* 2013 (2) SACR 292 (SCA) paras 25–6.

\(^{62}\) *S v Shai* 2014 (1) SACR 204 (GNP) para 22.
rape reflects the same prejudices that are prevalent in society: a ‘real rape’
victim is a victim with real, serious physical injuries. 63

Irrespective of the presence of physical injuries, or the lack thereof, rape
always causes its victims severe harm. 64 The obsessive focus of judicial
officers on the presence of physical injuries, despite the 2007 amendment to
the Act, reflects a misunderstanding of the basic dynamics of rape and this, in
turn, has a long-term negative effect on sentencing. 65 This misunderstanding
and societal prejudice toward rape victims might be addressed by providing
judicial officers with knowledge as to the real dynamics of rape — an
understanding which should then be reflected in their decisions. 66

What is also noteworthy in the Vilakazi judgment is the way in which a
second rape was casually conflated with the first rape, as the two rapes were
closely spaced together. This was also the case in S v MM where the court
considered a repeat rape to not ‘aggravate’ the first rape to the extent that the
minimum sentence should be imposed. 67 Here the court specifically stated:
‘[A]t the time of the second instance, which followed closely on the first,
much of the damage had already been done.’ 68 In this case, the judge also
found the fact that the accused had apologised after the rape to be substantial
and compelling enough to deviate from the prescribed sentence. 69

From the above decisions it is clear that there is no understanding of the
violation associated with rape and a continued belief that when it comes to
rape, or what is interpreted as ‘sex gone wrong’, men cannot help themselves
but at least if he uses a condom or if he apologises, he may be regarded as less
blameworthy, and this justifies a lesser sentence. 70 The following case
discussions focus on the judiciary’s acceptance of a violent masculine identity
as being a normal trait for which men cannot be held responsible.

(ii) Boys will be boys
A stereotypical interpretation of rape is that it is about sex and men’s inability
to control their sexual urges. 71 Lillian Artz & Helene Combrinck state that
society and the criminal justice system often view rape as ‘sex gone wrong’,
overlooking the fact that rape and sex do not belong on the same continuum

63 Torrey op cit note 10 at 1055; Chennells op cit note 6 at 27.
64 Hoffman-Wanderer op cit note 25 at 231.
65 Ibid.
67 S v MM 2010 (2) SACR 543 (GNP).
68 Ibid at 549.
69 Ibid; Lillian Artz & Helene Combrinck “‘A wall of words’: Redefining the
70 For a discussion of the need to introduce expert evidence during rape trials to
understand the psychological impact that rape has on a complainant, see Anastasia
Maw, Gail Womersley & Michelle O’ Sullivan ‘The psycho-social impact of rape and
its implications for expert evidence in rape trials’ in Artz & Smythe (eds) op cit note 1
at 122.
71 Stewart, Dobbin & Gatowski op cit note 10 at 160.
and disregarding the actual dynamics of rape. According to Catharine Mackinnon, if one wants to understand rape, one has to understand social inequalities and power, as rape is perpetrated against those with less social power, with gender being the most significant point of stratification.

The misinterpretation of rape, with its focus on sex and its masculine identity, is particularly evident in the judgments below, where the power dynamics between victim and rapist, women and men, child and adult were not considered. What clearly emerges is the continued belief that rape is the result of male aggression coupled with an uncontrollable sexual need, a need for which men cannot be held responsible.

In *S v GN*, a father was accused of raping his five-year-old daughter. The victim and her two sisters lived with their father in an informal settlement where they shared sleeping quarters. The majority considered the fact that the accused was an economically active member of society, who maintained his children in difficult circumstances, to be substantial and compelling in considering a downward adjustment. Poswa J, writing a minority judgment, went further and stated that for purposes of sentencing, it should be kept in mind that the father was forced to share a bed with his daughter, which provided an opportunity for the rape to happen:

'...ordinarily and in circumstances other than those prevailing in an informal settlement, no father would share a bed with his daughter. That abnormal situation was, in my view, entirely a consequence of social conditions over which the appellant and the children, the entire family, had no control. It, in my view, provided the appellant and will always provide others, as wicked-minded or morally weak as he, with an opportunity that would ordinarily not have been available. Under normal living conditions, the appellant would have had to go out of his way to bring himself to share a bed with his daughter — a fact that might have been well-nigh impossible even for him.'

The reasoning of the court, in finding substantial and compelling circumstances, clearly alludes to the fact that the perpetrator was not able to control his sexual urges and that his circumstances, for which he could not be blamed, contributed to this 'loss of control'.

Certain decisions leave one at a loss for words in their acceptance and application of rape myths and stereotypes. The worrying fact is that this seemingly reflects general sentencing practice in rape trials. The decisions of *S v GK* and *S v EN* illustrate how judges’ own experiences and social understandings of rape and appropriate gender behaviour infiltrate their
decision-making.\textsuperscript{78} From these cases it is clear that women are victims of deeply held patriarchal norms where, from an early age, tradition and stereotypes call for the repression of women and an encouragement of male domination.\textsuperscript{79} South Africa, with its very masculine identity, encourages assertiveness, strength and drive in males whilst females are expected to be submissive, sensitive and modest. This paradigm supports and encourages a social culture of violence toward women.\textsuperscript{80} What the cases further illustrate is that in conflating rape and sex, judicial officers view perpetrators as psychopathic sexual deviants. Accordingly, when the accused then turns out to be relatively ‘normal’ they are less likely to impose the prescribed minimum sentence.\textsuperscript{81}

In \textit{S v GK}, the victim, a seven-year-old girl, was forced to have oral sex with the accused, after which he paid her five rand for her silence.\textsuperscript{82} In considering substantial and compelling circumstances in the context of sentencing, the judge relied on five key factors:

(a) Firstly, it was oral rape. Disgusting and awful as this must have been for the complainant, it was a form of rape which was far less calculated to injure and cause physical pain to a young girl’s body than vaginal or anal rape. As a fact, there was no evidence that the complainant suffered injuries or significant pain. Her virginity remains intact. (In making this observation I do not suggest that this circumstance on its own could be the basis for a finding of substantial and compelling circumstances, but it is a factor to be borne in mind when assessing the circumstances of the case as a whole.)

(b) Second, the evidence does not establish that the appellant ejaculated at all, let alone in the complainant’s mouth or on her body. Whether or not the appellant intended to reach orgasm was not explored at the trial but in the event the fact that he did not do so at least spared the complainant some of

\textsuperscript{78} \textit{S v GK 2013 (2) SACR 505 (WCC) (‘GK’); S v EN 2014 (1) SACR 198 (SCA) (‘EN’); Baehr op cit note 30 at 239.}
\textsuperscript{79} Artz op cit note 13 at 175.
\textsuperscript{80} Deborah A Prentice & Erica Carranza ‘What women and men should be, shouldn’t be, are allowed to be, and don’t have to be: The contents of prescriptive gender stereotypes’ (2002) 26 \textit{Psychology of Women Quarterly} 269 at 275; Albertyn et al op cit note 27 at 300.
\textsuperscript{81} Field & Bienen op cit note 66 at 55 state: ‘It would seem that the perceptions of rape as a sex crime might be tied to the views of the roles of women in rape and sexual activities. Historically, men have been viewed and even encouraged to be aggressors in sexual encounters while women have been characterized as being passive, disinterested receivers of these attentions. Once stimulated by women, however, men have been depicted as being victims of uncontrollable sexual desires and passionate emotions, thus placing the responsibility on a woman for determining how far sexual relations with a man will go. When such relations have gone “too far”; society has been quick to blame the woman while her aggressor has been excused for “just being a man”. Due to some individuals’ conceptions of woman’s monitoring role in sexual activities and their views of rape as a sex crime, it would seem these individuals would likely hold a woman responsible in a rape, particularly if it is believed she “encouraged” the attack. Also the logic that “rape is sex, sex is fun: therefore rape is fun” may subconsciously be used by some in perceiving rape.’
\textsuperscript{82} GK supra note 78 para 40.
the horrors associated with oral rape. (Although the complainant would probably not have understood concepts such as orgasm and ejaculation, the magistrate asked her through the intermediary whether there was anything in her mouth apart from the appellant’s penis. She said no.)

(c) Third, the duration of the act appears to have been quite brief. The appellant got the complainant to move her head forwards and backwards. The evidence does not establish how many times she did so but she testified that she stopped doing it because she did not like it. As noted, the appellant did not reach orgasm.

(d) Fourth, the rape was not accompanied by extraneous violence.

(e) Fifth, although my colleague says it was “cynical” for the appellant to have given the complainant R5 to buy her silence, he at least did not resort to violence or threats of violence to silence her (cf Vilakazi para 55).

The judges’ considerations clearly indicate the acceptance of the ‘real rape’ myth, trivialising the victim’s experience of violation. In fact, the court’s reliance on the ‘real rape’ myth brings back the archaic interpretation of the crime that focuses on the ‘public morals’ that would have been affronted by the crime, as opposed to focusing on the victim and her personal dignity.

This is especially concerning in light of the fact that the Sexual Offences Act was amended to acknowledge oral violation as rape. Again, this illustrates the focus on sex, requiring penetration, rather than focusing on the power dynamics and humiliation associated with rape.

Another case in which the ‘real rape’ myth was used to discredit the victim’s rape experience is S v EN (an SCA decision). Here, a stepfather raped his fifteen-year-old stepdaughter and the following factors were seen as substantial and compelling for the purposes of a downward sentence adjustment: there was no physical harm; no apparent post-traumatic stress; the possibility of previous sexual encounters and the victim’s acceptance of money and gifts. In the words of the court:

‘On the other hand, the complainant did not suffer any serious physical injuries. She submitted to the sexual intercourse on the occasion in question without any threat of violence. The fact that she had accepted gifts and money from the appellant must have played a role in her submitting to the sexual intercourse. When she was asked whether she had screamed for help, she said that she had not resisted or screamed but simply waited for the appellant to finish what he was doing. She also confirmed that the appellant was drunk and fell asleep next to her after the rape. Thus the degree of the trauma suffered by her cannot be quantified. All these factors must be taken into account in considering whether in this case the ultimate sentence of imprisonment for life is proportionate to the crime committed by the appellant. A balance must be struck on all the

83 Ibid para 15.
84 Artz & Combrinck op cit note 69 at 74.
85 See the definition of rape in the Sexual Offences Act contained in note 1 above. Prior to the Sexual Offences Act, rape was defined as intentional, unlawful sexual intercourse with a female without her consent. Naylor op cit note 22 at 22.
86 Naylor ibid at 24.
87 ENsupra note 78.
factors to avoid an unjust sentence. In my view the sentence imposed is disproportionate to the crime committed and the legitimate interests of society.88

It is clear that the court doubted whether the victim was raped at all, especially since she accepted gifts and money, alluding to the fact that she had probably consented to the ‘sexual intercourse’. Notably, in both the cases discussed above, the focus again was on the absence of physical injury.

The continued reflection of rape myths and stereotypes in the sentencing of rapists, notwithstanding the substantial reform of South African rape law in terms of the Sexual Offences Act and minimum-sentencing legislation,89 unfairly discriminates, as the victims, who are mostly female, are required to conform to a set of norms which do not apply to victims of other (non-sexual) crimes.90 The question, therefore, is why, in light of substantial law reform, these myths and stereotypes are still relied on to the extent that they are? Arguably, the answer to this question alludes to something more than the ineffective application or interpretation of the relevant protective legislation. Rather, it points to the fact that these rape myths and stereotypes shape our daily social reality and are accepted as being ‘normal’.91

Stewart, Dobbin & Gatowski argue that there are certain myths and stereotypes that are so embedded in our reality that people in very different positions in a social system draw upon them in the same way and to the same extent.92 For them, rape myths and stereotypes are one example of how all role players in society, including judicial officers, ‘rely on the same taken-for-granted explanations and assumptions about reality’.93 Judicial officers see nothing wrong in relying on these myths and stereotypes as they are so ingrained in a shared common culture that their application in judicial decision-making is not questioned. Laws implemented to protect women

89 Specific rape law reform includes the implementation of the Sexual Offences Act and for example, the abolishment of the application of the cautionary rule in sexual offence matters in S v Jackson 1998 (1) SACR 470 (SCA).
90 Section 9(3) of the Constitution states: ‘The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.’ Estrich op cit note 13 at 815 explains discrimination against rape victims as follows: ‘We do not require people to resist a mugger, even if a mugger was once a friend. We do not insist on witnesses to a robbery. We rarely question the virtue of the robbed store clerk or even the defrauded company owner. We do not downgrade larceny if the victim wore an expensive suit or walked on a dangerous street, or even if he contributed to panhandlers in the past. Yet we require rape victims to prove their virtue, and we impose obligations of actual resistance, corroboration, and fresh complaint on them.’
91 Stewart, Dobbin & Gatowski op cit note 10 at 159.
92 Ibid at 160.
93 Ibid.
from sexual violence may therefore be technically sound but may offer very little substantive protection.94

Why are these myths so ingrained in our common culture? Martha Burt has associated the wide acceptance of rape myths with other pervasive attitudes in society including sexual conservatism, distrust of the opposite sex and a general acceptance of interpersonal violence. These attitudes are especially resonant in the South African context.95 Indeed, the acceptance of conservative attitudes towards sex combined with an acceptance of violence has led to general rape myths and stereotypes being ingrained in our societal values.96

When viewed from this perspective, it is essential to develop an accurate understanding of rape in order to encourage change.97 This calls for judicial officers to be educated on the real dynamics of rape — dynamics that are clearly distinguishable from prevailing rape myths and stereotypes — and this could assist in changing social attitudes. The discussion that follows focuses on the potential for reform of the current minimum-sentence legislation and, more importantly, judicial sensitisation through training so as to address the perpetuation of rape myths and stereotypes.

IV CHANGING JUDICIAL ATTITUDES: THE NEED FOR SENSITISATION

Lillian Artz & Dee Smythe argue that law cannot necessarily change patriarchal attitudes, but remains important because it articulates the experiences of violence and is the arena where justice is seen to be promoted.98 The law, and in this particular scenario, legislative reform, has an important part to play in shifting, or at least acknowledging disparities in the sentencing of rape offenders under the minimum-sentencing legislation.99

Thomas Stoddard, who supports the role of law in effecting change, affirms the ability of the law to alter and enforce rules. At the same time, he emphasises its ability to effect social change that ‘transcends mere rulemaking and seeks to improve society in fundamental and extra-legal ways’ — which he calls ‘culture shifting’ change.100 Stoddard identifies five general goals that he describes as the law’s ‘rule shifting’ capacity (meaning the capacity to set, alter and enforce specific rules, and which occurs mainly through legislative enactment).101 The ‘rule shifting’ capacity of law includes the power to create new rights and remedies for victims; to alter the conduct of

94 Ibid at 161.
96 Burt ibid at 229.
97 Ibid.
98 Lillian Artz & Dee Smythe ‘Introduction: Should we consent’ in Artz & Smythe (eds) op cit note 1 at 15.
99 Ibid.
100 Stoddard op cit note 18 at 973.
101 Ibid.
government; to alter the conduct of citizens and private entities; to express a new moral ideal or standard; and to change cultural attitudes and patterns.  

Most important for Stoddard, however, is the potential of the law to advance the rights and interests of people who are being mistreated by the law, so enabling law’s ‘rule shifting capacity’ to become ‘culture shifting’.  

Stoddard refers to the implementation of the American Civil Rights Act of 1964 as an example of legal reform that was both ‘rule shifting’ and able to initiate social change — or ‘culture shifting’.  

This Act enabled law’s ‘rule shifting’ capacity, as it gave victims of racial discrimination new rights and remedies; it instructed government to promulgate and enforce new rules of conduct for itself; it altered the conduct of private entities and citizens; and it expressed a new moral standard.  

Although Stoddard acknowledges that it is difficult to measure actual social change and law’s ‘culture shifting’ capacity, to him the change in racial interactions over time pointed to the Act’s social impact.  

From Stoddard’s analysis of the Civil Rights Act, he identifies four factors that should be engaged in order to harness law’s ‘rule shifting’ capacity to become ‘culture shifting’. These include: a change that is very broad or profound; public awareness of that change; a general sense of legitimacy of the change; and overall continuous enforcement of the change.  

Stoddard mainly focuses on the power of legislation to engage social change, as it promotes public discussion and knowledge that translates into public awareness.  

Although the minimum-sentence legislation and its amendments have done little to address the continued subjugation of rape victims, it is not to say that future reform cannot have any impact in addressing at least the proper proportionate sentencing of rape offenders. Reform of the minimum-sentencing legislation could well stimulate much-needed debate about the treatment of rape victims in the criminal justice system and further harness the ‘culture shifting’ capacity of law in addressing the acceptance of rape myths and stereotypes.  

With the current variation in sentencing, it is difficult to accept that the sentencing of rape offenders is proportionate. The fact that a maximum sentence is prescribed when specific circumstances are present, knowing that in each case the circumstances would be unique, suggests that the legislature
did not intend for these factual differences, as a rule, to affect the severity of a sentence.\textsuperscript{110}

The current two-part system of the Act does not provide for a range of sentences outside the substantial-and-compelling-circumstances analysis.\textsuperscript{111} Kristina Baehr suggests a complete restructuring of the Act by starting at a base level, and then increasing sentence severity for each additional aggravating factor. In this scenario, sentencing discretion will be focused on the aspects of the crime that actually render it blameworthy, rather than stereotypical preconceptions and myths that would justify a more lenient sentence.\textsuperscript{112}

Although legislative reform is needed, at least to address the proportionate sentencing of rape offenders, reform should be coupled with judicial sensitisation that tackles widely held perceptions of sexuality and how these perceptions influence judicial decision-making. The discussion that follows focuses on the current structure of judicial education and questions whether it could be utilised successfully to harness the ‘culture shifting’ capacity of law.

\textit{(a) Judicial sensitisation through judicial education.}

As discussed, legislative reform could address proportionate sentencing in part, but judicial officers still need to be made aware of the extent to which they rely on rape myths and stereotypes in sentencing rape offenders.

In 2008, the South African Judicial Education Institute was established in terms of the South African Judicial Education Institute Act 14 of 2008 in order to promote the independence, impartiality, dignity, accessibility and effectiveness of the courts by educating judicial officers. The training provided by the Institute is aimed at giving effect to our constitutional values of equality, dignity and freedom.\textsuperscript{113}

The Institute has the potential to play an important role in sensitising judges on the adjudication of sexual violence matters. Judicial officers need to be made aware, through an official forum, of their application of so-called ‘real rape’ requirements in sentencing and how this excludes and trivialises

\begin{footnotesize}
\textsuperscript{110} Hoffmann-Wanderer op cit note 25 at 235.
\textsuperscript{111} Baehr op cit note 30 at 240.
\textsuperscript{112} Ibid.

\textsuperscript{113} Section 2 of the South African Judicial Education Institute Act. Section 5 sets out the functions of the Institute which include: ‘(a) to establish, develop, maintain and provide judicial education and professional training for judicial officers; (b) to provide entry level education and training for aspiring judicial officers to enhance their suitability for appointment to judicial office; (c) to conduct research into judicial education and professional training and to liaise with other judicial education and professional training institutions, persons and organisations in connection with the performance of its functions; (d) to promote, through education and training, the quality and efficiency of services provided in the administration of justice in the Republic; (e) to promote the independence, impartiality, dignity, accessibility and effectiveness of the courts; and (f) to render such assistance to foreign judicial institutions and courts as may be agreed upon by the Council.’
\end{footnotesize}
the rape experiences of the majority of victims. Importantly, general judicial training should introduce principles of feminist legal reasoning to illustrate how the law is able to perpetuate inequality in society. It must encourage acknowledgment of the following perspective in judicial decision-making:

"To adopt a feminist perspective is, first and foremost, to bring a gendered perception of legal and social arrangements to bear upon a largely gender-neutral understanding of them. The object is to highlight the gendered assumptions embedded in such arrangements, assumptions too often rendered invisible by, among other things, the allegedly "objective" analysis of traditional academia. Feminism thus presupposes that gender has a much greater structural and/or discursive significance than is commonly assumed, a significance which is ideologically but not practically diminished by its relative invisibility. In this sense, feminism purports to offer a better understanding of the social world by addressing aspects which have hitherto been ignored or misrepresented, while at the same time, countering the ideological effects to which such misrepresentations give rise."  

This suggestion might seem overly ambitious, as judicial officers generally do not consider feminist reasoning. Rather, they employ traditional legal methods that simply require reliance on legal evidence to determine facts, and on established precedent to provide a framework for analysis.

Yet, the Constitution and its adoption of a substantive notion of equality requires judicial officers to examine the underlying principles that inform laws themselves, and to be alert to the fact that judicial decision-making is influenced by their own beliefs, opinions and ideas. This will require judicial officers, irrespective of their approval or acceptance of feminist legal reasoning, to interpret and apply the minimum-sentencing legislation with an understanding of the real dynamics of rape in order to promote the spirit, purport and objects of the Bill of Rights. In ensuring that judicial officers take cognisance of how current legal constructs disregard women’s experience, the law will be seen to give effect to the Constitution’s commitment to gender equality and non-sexism.

It is evident from what has been traversed in this article that judicial education pertaining to the sentencing of rape offenders is urgently needed.

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114 Chennells op cit note 6 at 25.
118 Section 39(2) of the Constitution states: ‘When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’
119 Catherine Albertyn & Elsje Bonthuys ‘Introduction’ in Elsje Bonthuys & Catherine Albertyn (eds) Gender, Law and Justice (2007) 1 at 5; see also ss 1, 7 and 9 of the Constitution.
An opportunity exists in the newly comprised Judicial Education Institute to provide such sensitisation and to develop an integrated approach in the training of judicial officers. It is important to engage judicial officers to ensure a proper understanding of the protection that the law offers. In this instance, the protection afforded by the minimum-sentencing legislation means little if that protection is not coupled with an interpretation of the law to give effect to the constitutional values of equality, dignity and freedom.

V CONCLUSION

This discussion explored the prevalence and acceptance of rape myths and stereotypes in the sentencing of rape offenders under current minimum-sentencing legislation. Despite the good intentions of the legislation, it has done little to address effectively the perpetration of sexual violence and has proven inconsistent in its application by the judiciary. What has been consistent is the manner in which the legislation has reinforced commonly held rape myths and stereotypes and strengthened judicial reliance on the so-called ‘real rape’ scenario. Indeed, the minimum-sentencing legislation has highlighted deeply held cultural misconstructions of appropriate gender behaviour that reinforces and rationalises male aggressive behaviour.

Ultimately, the criminal justice system has failed South African women in relation to the sentencing of rape offenders, not because it has failed to protect women from male sexual violence, but because of the continued general legal condonation of this behaviour. Seeing that male aggression, rape myths and stereotypes are so entrenched in society — and by implication, in judicial decision-making — the focus should not only be on the ‘rights shifting’ capacity of the law but also its ‘culture shifting’ capacity. A first step in promoting the ‘culture shifting’ capacity of law would be to amend the minimum-sentencing legislation to focus on the perpetration of the crime of rape rather than on mitigating factors that would allow the courts to deviate from a prescribed sentence. The second step would be to sensitisie judicial officers through judicial education to enable a proper understanding of the true dynamics of rape and to expose commonly held rape myths and stereotypes for what they are. Judicial officers should be exposed to feminist reasoning to facilitate an understanding of law as a contested but powerful role-player in shifting inequalities, or at least acknowledging that they exist.

120 Baehr op cit note 30 at 229.
123 Stewart, Dobbin & Gatowski op cit note 10 at 159; Lonsway & Fitzgerald op cit note 9 at 133; Burt op cit note 95 at 217.
124 Artz & Smythe op cit note 98 at 13.