

Consent and Coercion in the Law of Rape in South Africa

A Feminist Transformative Approach

SHEREEN W. MILLS

En Afrique du Sud, la loi 32 de 2007 sur les offenses sexuelles a été redéfinie et répandue à une grande échelle. Ce texte examine la redéfinition du consentement en introduisant une liste non-exhaustive des circonstances coercitives qui sont utilisées pour vicier le consentement. Il montre comment le contexte systémique du viol en Afrique du Sud interprète le consentement et les circonstances coercitives et explore de nouvelles possibilités pour définir le consentement en établissant de nouvelles normes qui permettront de comprendre ces circonstances qui reflètent la vulnérabilité et l'inégalité des femmes.

In December 2007 the *Sexual Offences Act 32 of 2007* (referred to as “the Act”) was passed into law in South Africa, the conclusion of an eleven-year law reform process. The Act effects wide reaching and progressive changes to the definition of rape. It moves away from the archaic notion of rape as penetration of a woman’s vagina by a man using his penis, recognizing as rape a number of penetrative acts.¹ These changes cover a range of offences that were not previously recognized as rape but as lesser offences, such as male rape, and, it is argued, reflecting for the first time the reality of rape for women and children in South Africa.

The most significant change to the

definition of rape, however, lies in the redefinition of consent through the introduction of a non-exhaustive list of coercive circumstances, which operate to vitiate consent. This paper examines the implications of this model, which retains consent as agreement voluntarily given and simultaneously creates an area of presumed non-consent where coercion will be found to exist. It is argued that, despite the re-inclusion of consent in the definition of rape, it is clear from this formulation that the intention of the legislature is to effect a major change from previous understandings of consent and coercion, and it is not a case of “business as usual.” This reform is in line with those passed in foreign jurisdictions that have undergone extensive rape law reform.²

This paper first looks at the context of rape in South Africa, including the political backdrop to the reforms. In the second part, it examines rape myths that continue to plague South African society and its jurisprudence, demonstrating the need for reform. The third part outlines the key elements of the new law, placing these in the context of rape law reforms pursued in other jurisdictions. The Act’s definition of consent is the subject of the fourth part of this paper. Part four examines consent as “voluntary and uncoerced agreement,” arguing that the new law, by embracing a posi-

tive conception of consent, sets new norms for consent that differ from dominant social norms that rely on rape myths and stereotypes (Wright 200-201).³ It is argued that by listing coercive circumstances in which consent will be vitiated and by making that list non-exhaustive, the Act allows for a widened understanding of coercive circumstances that reflect the systemic context of rape, poverty, and unequal gender power relations post-apartheid, given the extremely high incidence of sexual violence.

This focus on context allows us to redefine rape to take account of the reality of women’s lives and systemic inequality, giving effect to the constitutional right to substantive gender equality and the right of South African women to be “free from all forms of violence from either public or private sources.”⁴ This argument is made in the context of high rates of rape, high rates of underreporting, low conviction rates, extreme poverty⁵ (which not surprisingly coincides with race, with black women being the most vulnerable economically and socially), and high levels of sexual coercion in heterosexual relations in South African society.

Context of Rape in South Africa

The nature and extent of gender based violence in South Africa can be understood in its historical, po-

litical, and social context. South Africa is a relatively young democracy that achieved liberation from the oppressive racial regime of apartheid in 1994 when the first general elections were held. It has one of the most progressive Constitutions (Act 108 of 1996) in the world. Despite a peaceful transition to democracy, the levels of gender based violence in South Africa are extremely high. The impact of the joint legacies of colonization and apartheid on black women has been to increase their vulnerability to gender based violence (Bonthuys et al. 342). The intersection of patriarchal traditions with cultural and religious customs has tended to subordinate women of all races and classes, with violence being embedded in sexual relationships (Albertyn et al. 112).

South African women's vulnerability to sexual violence is compounded by secondary traumatization and victim-blaming because of the extent to which coercion has been normalized. Official statistics on reported rapes in South Africa stand at 55,000 for the year 2005/6.⁶ South Africa fits the definition of a rape-prone society, that is, one in which women have limited power and authority, men enact notions of masculinity based on machismo, and there is an acceptance of high levels of violence as normal (Vetten 9-12; see also Albertyn et al. 300-301). Rape must thus be understood within the context of the very substantial gender power inequalities that pervade society. Male control of women and notions of male sexual entitlement feature strongly in the dominant social constructions of masculinity in South Africa. Sexual and physical violence against women are used as strategies of control (Jewkes and Abrahams 1238). Perceptions of "ownership" of female sexuality by men are pervasive, and are often reinforced by women's economic dependence (Vogelman and Eagle 210; see also Albertyn et al. 301). Men's perceptions of ownership are further complicated by women's poverty. For example, an exchange element

in sexual relationships is common, particularly amongst young people, with a premium placed on having a partner with economic resources. In relationships of dependency, women find it very difficult to protect themselves from sexual exploitation and very often have to tolerate abuse (Jewkes and Abrahams 1239).

One obvious legacy of apartheid is the high levels of poverty and

The experience of coerced sex at some stage in a South African woman's life would appear to be the norm. Women themselves have come to accept a level of coercion in relationships as normal.

unemployment in black communities. There is a pronounced gender dimension to poverty that intersects closely with race. Black women are the most socio-economically vulnerable. They are most likely to be unemployed or employed in menial, low paying jobs (Mills 28). Their socio-economic vulnerability renders them disproportionately vulnerable to sexual violence both within relationships and in public spaces. Rape and coercion is of particular concern because of the possibility of HIV transmission, given the high level of HIV/AIDS in South Africa. It is believed that most of the risk of HIV transmission occurs through "normal" sexual coercion in relationships (Jewkes and Abrahams 1242). Women's limited ability to negotiate the terms of sexual encounters and their socio-economic vulnerability have caused an increased incidence of infection, particularly amongst young

women (Bonthuys et al. 377).

Research studies suggest that experiences of non-consensual sex are very common. There is a high prevalence of marital or dating sexual coercion, especially amongst adolescents. The experience of coerced sex at some stage in a South African woman's life would appear to be the norm. Women themselves have come to accept a level of coercion in relationships as normal. In addition, popular conceptions of rape as a violent attack by a stranger or gang are reflected in only a very small proportion of women's experiences of coerced sex. Most rape is by a perpetrator known to the woman (Jewkes and Abrahams 1240).

Rape Myths: Rape in Law, Rape in Society

A closer look at context also reveals that there is a high level of tolerance of the crime of rape as well as high acceptance of rape myths in South African society (Jewkes and Abrahams 1240). Many of these myths are used to justify coerced sex and are reproduced in legal discourse. They influence the way that rape cases are dealt with first by the community, then by the various role players in the criminal justice system, up to and including the trial stage. The issue of consent is central at all stages in determining whether a rape occurred. Discourse in South African communities is dominated by the idea that a rape is not really rape unless it involves force or violence. People often use the word rape only to describe acts of strangers, particularly violent acts, or gang rape (Jewkes and Abrahams 1232). This fits in with the conceptualization of the ideal or traditional rape—rape by a stranger with a weapon in a dark alley, with threats to kill or violent force preceding the act of rape—what Susan Estrich refers to as "real" rape (1088).

Although most prevalent myths have been refuted by empirical research, they continue to exert enormous power on the attitudes

of role players—the complainant, police, prosecutors, magistrates, and judges—in the criminal justice system. For example, police are particularly prone to believing that women lie easily about rape, and that where there are no signs of violence it is unlikely that rape has occurred (Smythe and Waterhouse 199). Lisa Vetten et al.'s 2008 study on attrition rates in Gauteng province shows, from a survey of studies done in South Africa and other jurisdictions, that there are a number of factors that affect a woman's credibility before the police, most commonly prior consensual sex (22-23), the assumption presumably being that if the woman has consented previously she is likely to have consented again. There is also evidence to suggest that the nature of the relationship with the accused affects police willingness to accept and investigate rape reported by women against their former boy-friends (Francis 9-11). The use of a weapon and/or the use of force and the amount of resistance shown by the woman are also important indicators of the likelihood of arrest in rape cases (Artz and Combrinck 90).

In the traditional rape scenario, the law attributes to the raped woman certain responses, conceptualizing the ideal rape victim as one who puts up the utmost resistance.⁷ Where the perpetrator is not a stranger but someone she knows, she is expected to struggle or at least say “no” unequivocally, to prove absence of consent. At the same time she is expected to be sexually passive. The ideal rape “victim” also possesses certain attributes. She is either chaste or in a faithful relationship with one person, preferably her husband (safely contained within the domain of her father or her husband). She does not exercise any degree of sexual agency outside of institutionally sanctioned relationships. She is modest in dress and behavior. She is risk averse and circumscribes her life to protect herself from possible exposure to rape. She does not frequent bars, nightclubs, or shebeens (taverns) on her own.

The controversial 2006 rape case of *Sv Zuma* ((2006) 3 All SA 8) (in which South Africa's then Deputy-President, now President, was acquitted of raping the daughter of a friend), illustrated to feminists that while much had changed on paper, not much has changed in law and society. The so-called “common-sense” approach to law espoused in the *Zuma* judgment relied on a number of dominant social

The law attributes to the raped woman certain responses, conceptualizing the ideal rape victim as one who puts up the utmost resistance. She is expected to struggle or at least say “no” unequivocally.

attitudes and myths about male and female sexuality (Kelly 2001: 32), rendering the rape invisible. Public discourse was heavily influenced by notions such as that the complainant was “asking for it” by wearing a kanga (a sarong-like wrap) to bed without underwear, or that Zuma could not be expected to restrain himself (Mills 2). The court thus inferred consent from certain facts, namely, that the complainant slept over at the accused's house, that she was inappropriately or provocatively dressed “in front of a virile older man,” that she did not resist enough, and that no force was used. The court found consent despite the fact that the complainant had indisputably said “no” three times. A negative inference was drawn from evidence of the complainant's previous sexual history, including that she had taken a bath with a man she known for a week. The court referred to South African legal textbooks

that label sexual acts by women in circumstances other than marriage as “misconduct.” The court also found it noteworthy that the complainant was “heterosexual with a tendency towards lesbianism.”

A number of myths play out in this judgment. One of the most insidious is the women as complicit myth, namely, women ask for it by engaging in provocative or risky behavior. Another is the rape as seduction myth, which holds that a certain level of coercion is a normal part of heterosexual interaction. A third is that because women cannot be relied upon either to know or say what they want when it comes to sex (the “no means yes” myth), consent can be inferred from incidental facts relating to the behavior of the complainant and the circumstances of the rape. Thus the court in *Zuma* justified inferring consent from the way the complainant dressed, the fact that she did not resist, the fact that no force was used, the fact that the accused was known to her—even though she said no: good girls often say no when they mean yes. The assumption is that sex can be, or can become, consensual because of the way sexual interaction happens under the dominant-submissive model of sexuality. This model underpins how law thinks about sex, and also shows how society regards sex in South Africa where studies demonstrate that men expect women to resist and coercion is the norm.

Possibly the most detrimental effect of rape myths and stereotypes in law is the reinforcement given to perceptions that women are likely or have a propensity to lie about rape. In non-real rapes, where a woman is raped by a perpetrator known to her—such as an acquaintance, a boss, or a teacher—where there is abuse of power or breach of a relationship of trust, consent is often inferred without reference to the context of unequal power in the relationship. Although South African courts have in the past sometimes taken account of the circumstances in

which the rape takes place to find abuse of power or authority (see *S. v. Volschenk; S. v. S.*), the reality is that rape myths and stereotypes continue to inform how rape cases are dealt with. The coercive circumstances listed in the *Sexual Offences Act* speak to women's experiences, but are not comprehensive.

The challenge is to apply and interpret these coercive circumstances so as to protect and advance women's rights in a highly unequal society where rape has become normalized and rape myths feature strongly. We cannot simply continue to adopt a "common sense" approach to consent in rape, as espoused in the 2006 *Zuma* judgment. Such an approach relies in its evaluation on dominant social attitudes, myths, and customs—values that tolerate rape (Kelly 32). We are enjoined by the Constitution to consider the implication of a "common sense" approach in the context of a highly unequal society where most of what passes as consensual sex has an element of coercion due to unequal gender power relations exacerbated by extreme poverty and inequality.

Law Reformed

The South African government post-transition has shown its commitment to dealing with violence against women through a range of policy and legislative measures. Section 12(1)(c) of the Bill of Rights in the Constitution of the Republic of South Africa 108 of 1996 explicitly guarantees the right to freedom from all forms of violence from either public or private sources (Combrinck 172). In civil society, NGOs (particularly women's organizations) and the Government formed a partnership via the National Network Against Violence Against Women (Baden et al. 35). Not only did women's organizations create and sustain networks on violence against women, but they were also active in organizing public awareness campaigns, assisting victims, litigating

and engaging in advocacy, and lobbying for new legislation. Such large scale mobilization around the problem of violence against women was a new phenomenon in South Africa (Vetten 102). As a result, women's organizations have been influential in shaping law on violence against women, both domestic violence and sexual violence, around a feminist agenda. For example, in 2003,

We are enjoined to consider the implication of a "common sense" approach in the context of a highly unequal society where most of what passes as consensual sex has an element of coercion.

women's organizations and other NGOs came together to form the National Working Group on Sexual Offences, to campaign around and raise awareness of the Sexual Offences Bill, bringing rape to the forefront of public consciousness. The 2007 *Sexual Offences Act* was at least in part a result of the engagement of the Working Group with the South African Law Reform Commission (SALRC) and with Parliament.

South Africa's foray into rape law reform must be placed in the context of similar reforms in other countries. Recent attempts at reform of consent in other jurisdictions have worked in two ways broadly: either consent has been removed from the definition of rape, with a shift of attention from consent to coercive circumstances, as was implemented in Michigan, New South Wales, and Namibia; or consent has been defined to mean free or voluntary agreement with a

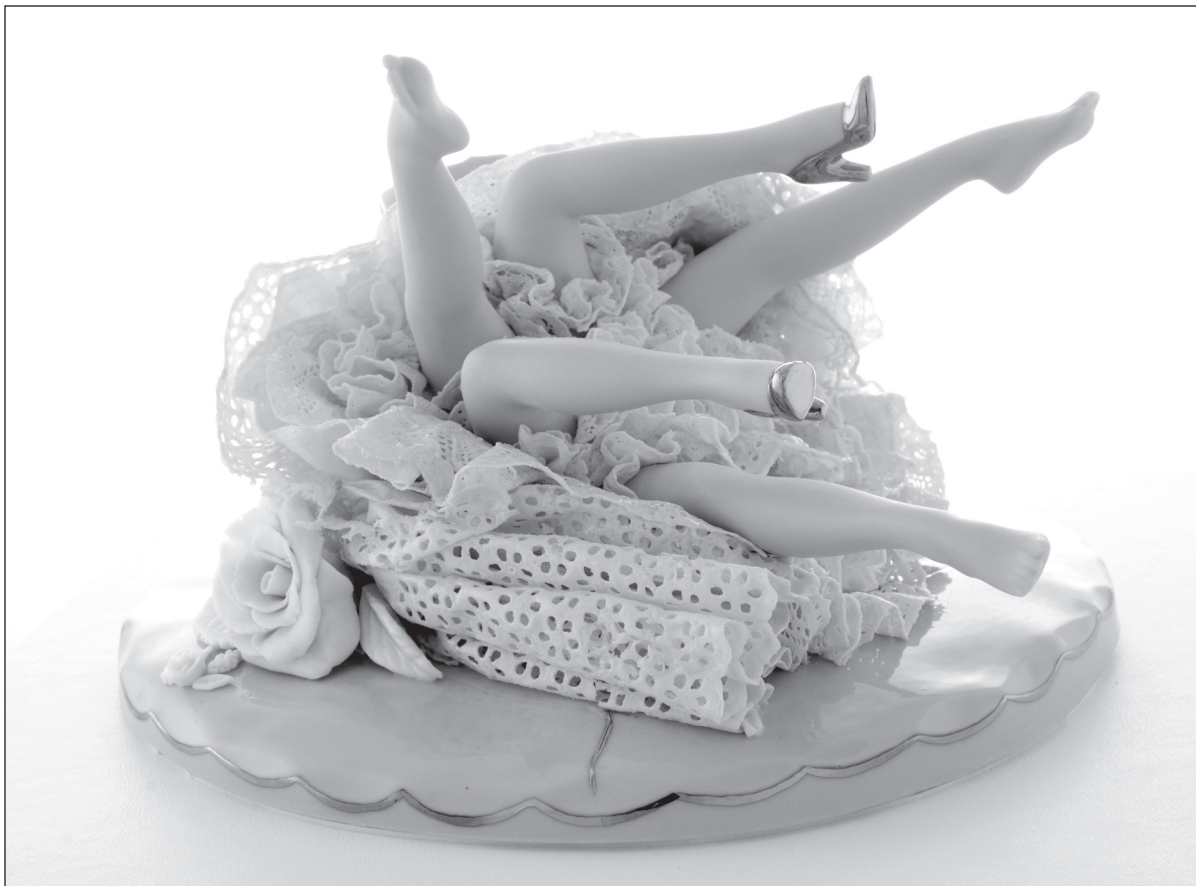
non-exhaustive list of contexts that vitiate consent, as pursued by the UK, Canada, and South Africa (Kelly 39-40).⁸

In South Africa, the element of consent was ultimately retained in the definition of rape and other sexual offences (Albertyn et al. 316-7; see also Naylor 47).⁹ The original intention of the SALRC in initiating its review of the law of rape was that consent would no longer be an element of the crime (although still a defence) and that the focus would be instead on coercive circumstances. The Commission noted in this regard that:

A shift from absence of consent to coercion represents a shift of focus of the utmost importance from the subjective state of mind of the victim to the imbalance of power between the parties on the occasion in question. This perspective also allows one to understand that coercion constitutes more than physical force or threat thereof, but may also include various other forms of exercise of power over another person: emotional, psychological, economical, social or organizational power. (SALRC 1999: 114 § 3.4.7.3.14)

The list of coercive circumstances that was envisaged included the use of force, threat of harm and abuse of power or authority, as well as unlawful detention and circumstances pertaining to fraud and capacity (Naylor 43). Significantly, the notion of abuse of power or authority that the Commission identified and supported is wider than in the preceding case law, as it envisages a range of contexts where abuse of power can be found to have taken place other than in an institutional setting.

In the draft Bill appended to the Commission's 2002 discussion paper (SALRC 2002), and in the first draft *Sexual Offences Bill* (B50-2003), three broad categories of coercive circumstances were set out in detail,



Shary Boyle, "Little Brown Bat," 2008, lace draped porcelain, gilt, 23m x 23cm x14cm.

namely, use of force, threat of harm, and abuse of power or authority. These were labelled as coercive circumstances that rendered the act of penetration *prima facie* unlawful. Alongside this, fraud and incapacity were also deemed circumstances that rendered the act *prima facie* unlawful. It was taken as given that consent would not be an element of the definition of rape (Albertyn et al. 317; Naylor 46-48). Unlawful detention was thus omitted.

However, when the 2003 draft Bill was tabled in Parliament, much debate ensued about the necessity to move from a consent model to one grounded in coercive circumstances. The Chairperson of the Parliamentary Portfolio Committee held the strong view that there was no need to make this move. In a context in which the SALRC had so thoroughly canvassed the issue of consent, working together with women's organizations on this proposed definitional shift, this turn

of events had not been anticipated by campaigners and activists (Naylor 49).

In 2006, a revised draft of the Bill (B-2006) was tabled in Parliament. In drafting it, the Parliamentary Portfolio Committee decided to retain the common law position with regard to consent and to draw all the different circumstances that would not amount to consent into one single provision, as circumstances which would vitiate consent—a trend that it held was reflected internationally (Naylor 48). Under this formulation, if any of the coercive circumstances are proven, the act will amount to rape. The element of consent is retained in the definition of rape and other sexual offences, together with a list of coercive circumstances, which are designed to take account of the power imbalance between the parties. Thus, the Act defines rape as an act of sexual penetration without the consent of the complainant (s 3), and consent

is understood to involve voluntary or uncoerced agreement (s 1(2)). Alongside this, the Act also identifies, in section 1(3), a non-exhaustive list of circumstances in respect of which a person does not voluntarily and without coercion agree to an act of sexual penetration, i.e. coercive circumstances where consent is vitiated, namely:

- (a) Where B (the complainant) submits or is subjected to such a sexual act as a result of— i) the use of force or intimidation by A (the accused person) against B, C (a third person) or D (another person) or against the property of B, C or D, or (ii) a threat of harm by A against B, C or D or against the property of B, C or D;
- (b) where there is an abuse of power or authority by A to the extent that B is inhibited from indicating his or her unwilling-

ness or resistance to the sexual act, or unwillingness to participate in such a sexual act;

(c) where the sexual act is committed under false pretences or by fraudulent means, including where B is led to believe by A that— (i) B is committing such a sexual act with a particular person who is in fact a different person; or (ii) such a sexual act is something other than that act; or

(d) where B is incapable in law of appreciating the nature of the sexual act, including where B is, at the time of the commission of such sexual act— (i) asleep; (ii) unconscious; (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that B's consciousness or judgment is adversely affected; (iv) a child below the age of 12 years; or (v) a person who is mentally disabled.

The Act in its final form retains the use of force, threat of harm, and abuse of power formulation of previous drafts. However, "coercive circumstances" now subsume all categories under it, including fraud and incapacity. The ground of abuse of power or authority is the most innovative. It covers situations where the perpetrator abuses a position, which inhibits the victim from indicating her or his unwillingness. It recognizes that women and young girls and boys, and in certain circumstances, men, may find it hard to say no in situations where there is an imbalance of power. The most obvious examples are institutional settings such as school, work, and prison. However, it is clear that it was the intention of the SALRC that abuse of power or authority be interpreted widely to include various other forms of exercise of power, namely, emotional, psychological, economic, social, and organizational power, as set out above (1999: 114 Para 3.4.7.3.14).

Consent as Voluntary and Uncoerced Agreement

The implications of this legislative model, which retains consent voluntarily given and, at the same time, creates an area of presumed non-consent, are potentially far-reaching. The offence of rape was historically construed narrowly, confined to situations where the

The problem with the use of a consent standard in the law of rape is that it does not look to see whether the parties were social equals, nor does it require mutuality or a positive choice to engage in sex.... 'Yes' can be coerced.

woman's resistance was overcome by physical force or violence, and non-consent was proved by her physical resistance. Rape was later widened to include fraud and deception, and force was no longer required (Artz and Combrinck 79; Burchell 708). Although in theory physical resistance or expressly stated or shouted opposition was not required in law, force and resistance requirements were often used to interpret whether the act was consensual (Naylor 26). At common law, circumstances that rendered consent invalid included fear induced by violence or threats. Even in the absence of threat, consent would be deemed to be invalid where there was the apprehension of power to harm in a manner other than physical. This was so in *S. v. S.* (1971(2) SA 591 (A)) where a woman acquiesced in a policeman's demand for sexual intercourse because she believed he had the power

to hurt her (Burchell 709-710; Snyman 447-8). To succeed as a defence, consent had to be consciously and voluntarily given (Snyman 447).

The new Act codifies the existing common law and develops it further by deeming certain specified circumstances to be coercive. Firstly, by the specific inclusion of voluntary [free] agreement, the Act emphasizes sexual autonomy rights and allows us to move towards a wider understanding of rape that incorporates a positive consent standard where only yes means yes. The language of free agreement suggests that mere submission is not read as consent. As Rebecca Cook puts it, an equality approach to the question of consent "starts by examining not whether the woman said "no," but whether she said "yes." The right to physical and sexual autonomy means that they have to affirmatively consent to sexual activity. To assume otherwise is a breach of their equality rights..." (Cook et al. para 12). Wright similarly asserts that "voluntary agreement" in the Canadian law requires positive affirmation to the sexual encounter (Wright 177).¹⁰ The notion of implied or inferred consent, which inherently relies on rape myths, is thus flawed because it does not allow for voluntary agreement (Wright 199). The objective of a reformed law is for courts to recognize the dangers of resorting to stereotypical notions that work to strip women of their autonomy.

Catharine MacKinnon, however, points out that the problem with the use of a consent standard in the law of rape is that it does not look to see whether the parties were social equals, nor does it require mutuality or a positive choice to engage in sex (243). It certainly does not take account of gendered power relations. MacKinnon points out that, "until equality exists not even 'yes' can reliably mean 'yes.' 'Yes' can be coerced. It can be the outcome of forced choices, precluded options, constrained alternatives, as well as adaptive preferences conditioned by inequalities" (246). Consent in the law of rape envisions

instead the stereotypical dominant-submissive model of sexuality: men press on and women either acquiesce or resist. Consent is then proved if the person being acted upon does not say no. In fact, it often even includes saying no. As illustrated in *Zuma*, no is not enough for courts, which infer consent from incidental factors like dress and failure to resist (see *S. v. Zuma*). Secondly, by requiring that the agreement be, in the alternative, uncoerced, and by setting out a non-exhaustive list of the circumstances in which voluntary (free) agreement will be absent and coercion will be deemed to have occurred, including use of force, threat of harm, and abuse of power or authority, the Act recognizes that there are circumstances where consent is vitiated, where yes cannot be said to mean yes. Our new legislative regime symbolizes a shift in how we understand rape in the context of South Africa. Neither implied consent nor coerced consent is considered a valid form of agreement to sexual interaction (Wright 200). By deeming certain circumstances to be coercive and thus evidence of non-consensual sex, the law recognizes that an imbalance of power between the parties can operate to vitiate consent, such that the victim has submitted, not consented, to the act (Artz and Combrinck 89; see *S. v. Swiggelaar*).

This focus on context has the potential to allow us to redefine rape to take account of the reality of women's lives on an individual level and on the level of systemic inequality, giving effect to the right to gender equality. As submitted by the Law Reform Commission, it also "allows one to understand that coercion constitutes more than physical force, or threat thereof, but may also include various other forms of exercise of power over another person: emotional, psychological, economic, social or organizational power" (SALRC 1999: Par 9.4.7.3.14).

Thirdly, in interpreting coercive circumstances, our starting point is that South African law currently rec-

ognizes that coercion goes beyond the listed grounds of use of force or threat of harm. With regard to the latter, criminal law scholars in South Africa have argued that the listed ground of "threat of harm" can be interpreted to include emotional harm or economic hardship (Artz and Combrinck 89). For example, it is argued that threat of violence against another in a close relationship or threat of the loss of a job should be recognized as duress that negates consent (Burchell 709-710; Snyman 448).

South African courts have also recognized that abuse of power or authority can vitiate consent. There are a number of early Appeal Court cases in the Appellate Division where the accused, instead of relying on physical force or threat thereof, abused an imbalance of power between himself and the victim in order to force the victim to submit to sexual intercourse (*S. v. Swiggelaar*). In *S. v. Volschenk*, the threat to lay a criminal charge by a policeman vitiated consent. In *S v S*, the policeman made no threat but the woman believed he had the power to harm her (Artz and Combrinck 89).

As the courts have already recognized the effect of an imbalance of power on consent in an institutional or organizational context, developing a widened interpretation of abuse of power as envisaged by the SALRC to include emotional, psychological, economic, and social contexts is the next step. It is argued that the SALRC formulation of abuse of power or authority can—and should—be interpreted to take account of unequal power in relationships as well as systemic power imbalances, in particular those generated by the economic vulnerability of women in situations of poverty and inequality. It entails developing an approach that takes account of the many ways in which women, especially young women in South Africa, are rendered vulnerable to sexual violence. A significant proportion of sexual coercion is committed in dating and marital relationships (Jewkes and Abrahams 1238). While women are in theory protected

from these acts of sexual violence by the law, in practice police and other players in the criminal justice system are reluctant to believe such claims (Smythe and Waterhouse 199; Vetten et al. 22-23; Francis 9-11).

It is up to the courts to recognize the dynamics of unequal power that may prevent women from saying no in these situations, and how economic dependency makes it even harder for women to say no. Similarly, in situations of poverty, women are more likely to put themselves at risk by submitting to sexual interaction out of desperation. This is not to say that these cases would necessarily reach the courts—women's own conception of rape, informed by that of society, may prevent women from bringing such cases, and if women did bring them, they are more than likely to be filtered out at various points in the criminal justice system. It is nevertheless important that we adopt an approach that has as its starting point the inherent inequality of women in the context of rape. The enquiry into whether voluntary consent was obtained would form part of the broader enquiry into coercion and context.

The 2008 Supreme Court of Appeal case of *Egglestone v S*, decided before the implementation of the Act, provides an example of such an enquiry into context. Here high school teenage women from impoverished black communities were recruited as escort agency prostitutes, having initially been lured by the promise of work modelling lingerie. The accused was charged with kidnapping and subjecting the women to a number of acts of indecent assault and rape. The court, in considering the issue of consent, clearly rejected the notion that consent could be inferred from the fact that the women had stayed at the venue voluntarily or from their passive submission to the sexual acts perpetrated upon them by the accused. The court also held that a negative inference could not be drawn from a failure on the part of the complainants to report the rape to the police at the earliest

opportunity. Thus, in the absence of consent from the complainants, the court rejected the accused's defence that he was "training" the women. The court instead explicitly took account of how poverty rendered the women vulnerable, holding that he "had targeted young women who would respond to the prospect of making money due to their poverty." (*Egglestone v. S.* 216).

What is envisaged here is that the court would be enjoined to interrogate the circumstances in which the rape occurred. What would be required of the court is an understanding of the circumstances of the case within the wider context of unequal power relations, gender inequality, poverty, and vulnerability.

Conclusion

This paper thus argues for a contextual approach to consent that takes account of the gender power imbalances (SALRC 1999: Par. 3.4.7.3.14) inherent in a highly unequal society and reflected in individual relationships. Now that the law has been reformed, it is necessary to undertake the process of transforming the law—ensuring that the way it is interpreted through the courts reflects the reality of women's lives. Only by interpreting the law in this way will we be complying with women's right to be free from violence, and with our constitutional commitments to gender equality both as a right and a value.

If one accepts that the role of rape law is to define the conduct of sexual relations, not simply to perpetuate the status quo, then it is clear that courts need a nuanced understanding of the complexity of the context of rape and inequality in South Africa in order to understand circumstances in which women may submit through coercion. The so-called common sense approach to consent espoused in *S v Zuma*, which relies for its content on rape myths and stereotypes reflected in social attitudes to rape, cannot be perpetuated.

In the South African constitutional context, the imperative towards transformative equality requires from all players in the justice system a conscious interrogation of the law's hidden biases and assumptions, and an interpretation and development of the law to reflect the reality of women's experiences, the pernicious effect of rape on women, and how rape reinforces their unequal position in society.¹¹ This approach will also help us in shaping our understanding of the right to freedom and security of the person, specifically the right to freedom from violence both public and private. It is essential that the law be interpreted and developed so as to counter dominant social constructions of what constitutes a "real" rape, and to reflect women's reality of systemic inequality.

The author would like to thank Professors Steven Friedman and Jackie Dugard for comments on the first draft of this paper.

Shereen W. Mills has worked as a senior researcher at the Centre for Applied Legal Studies of the University of the Witwatersrand in Johannesburg for over ten years. She is a black feminist lawyer who engages in research, advocacy, and strategic litigation on issues of violence against women and children. She has been involved in a number of cases on gender-based violence and the right to equality. She was admitted as an Attorney of the High Court of South Africa in 1993.

¹Such as penetration by objects other than a penis, and penetration of any orifice.

²For example, Canada, United Kingdom, Namibia and New South Wales. See Naylor (27).

³Wright argues that Canada occupies a relatively unique position in that the dominant cultural-sexual script of consent in rape is no longer reflected in law—implied and coerced consent are not considered to be valid forms of agreement to sexual engagement (200-201). By

inscribing a women's perspective into consent rather than the accepted male perspective it attempts to provide a new script for sexual engagement, or at least to codify an existing consensual script (191).

⁴Section 12(1)(c) of the *Constitution of the Republic of South Africa Act* 108 of 1996.

⁵For context on this see Jewkes and Abrahams (1232, 1234); Rasool et al. (52); Albertyn, Artz, and Combrinck et al. (302); Vetten et al. (34).

⁶Women's organizations working on rape estimate that the actual incidence of rape is twenty times the number of rapes reported to the police. This is based on estimates of underreporting, and does not include other forms of sexual violence. It is also estimated that only one in nine rapes involving physical force are reported. Coerced sex does not even enter into the picture. See Jewkes and Abrahams (1232-1234); Vetten et al. (16); Smythe and Waterhouse (199-200).

⁷Estrich points out that the law in the USA has since made the concession that "utmost resistance" is no longer necessary, and reasonable resistance will suffice—on the basis that "chastity may be valuable, but ... it may not be more valuable than life itself."

⁸Research shows that even in jurisdictions that have shifted emphasis from consent to coercive circumstances, consent has still been a factor and is likely to remain an issue in the majority of sexual violence cases. See also Temkin (176-7).

⁹The SALRC had so thoroughly canvassed the issue of consent versus coercive circumstances that it was not foreseen by civil society that consent would subsequently be reinstated in the Act. In 2003, the *Criminal Law (Sexual Offences) Amendment Act* was referred to the Parliamentary Portfolio Committee on Justice and Constitutional Development for review, where the Chairperson decided that he did not see the necessity to remove consent from the definition of rape. Consent was subsequently

reinstated.

¹⁰See *R v. Ewanchuk*, which rejected any doctrine of “implied consent.”

¹¹See Albertyn and Goldblatt for a general discussion of substantive equality in a transformative context.

References

- Albertyn, Catherine, Lillian Artz, Helene Combrinck et al. “Women’s Freedom and Security of the Person.” *Gender, Law and Justice*. Eds. Elsie Bonthuys and Catherine Albertyn. Cape Town: Juta, 2007. 295-381.
- Albertyn, Catherine and Beth Goldblatt. “Equality.” *Constitutional Law of South Africa Cape Town*. Second Edition, Volume 2. Eds. Stuart Woolman, Theunis Roux, and Michael Bishop. Cape Town: Juta, 2008. 35: 1-85.
- Albertyn, Catherine, Beth Goldblatt, Shireen Hassim et al. *Engendering the Political Agenda: A South African Case Study*. Johannesburg: Centre for Applied Legal Studies, 1999. 1-140.
- Artz, Lillian and Helene Combrinck. “A Wall of Words: Redefining the Offence of Rape in South African Law.” *Criminal Justice in a New Society*. Eds. J Burchell and A. Erasmus. Cape Town: Juta, 2003. 72-91.
- Baden, Sally, Shireen Hassim, and Sheila Meintjes. *Country Gender Profile: South Africa*. Brighton: Institute of Development Studies, 1998. 1-125.
- Bonthuys, Elsie, Tracy-Lynn Field, Shereen W. Mills et al. “Gender.” *The Law of South Africa*. Ed. W. A. Joubert. Durban: LexisNexis Butterworths, 2005. 277-386.
- Burchell, Jonathan. *Principles of Criminal Law*. Cape Town: Juta, 2006.
- Combrinck, Helene. “The Dark Side of the Rainbow: Violence against Women in South Africa after Ten Years of Democracy.” *Advancing Women’s Rights: The First Decade of Democracy*. Eds. Christina Murray and Michelle O’Sullivan. Cape Town: Juta, 2005. 171-199.
- Cook, Rebecca et al. “Report to the UN Special Rapporteur on Violence Against Women—Analysis of Canadian Law, cited in Interights Comment *MC v Bulgaria* April 2003 European Court of Human Rights, Case No. 39272/98. Online: <<http://www.interights.org/News/McvBulgariaamicus>>.
- Estrich, Susan. “Rape.” *Yale Law Journal* 95 (1986): 1087-1184.
- Francis, Virginia. *A Rape Investigation in the Western Cape: A Study of the Treatment of Rape Victims at Three Police Stations in the Cape Flats*. Unpublished research report. Bureau of Justice Assistance, 2000. 1-20.
- Jewkes, R. and N. Abrahams. “The Epidemiology of Rape and Sexual Coercion in South Africa: An Overview.” *Social Science and Medicine* 55 (2002): 1231-1244.
- Kelly, Liz. *Routes to Injustice: A Research Review on the Reporting, Investigation and Prosecution of Rape Cases*. University of North London, Child and Woman Abuse Studies Unit, 2001. 1-46.
- MacKinnon, Catharine A. *Women’s Lives, Men’s Laws*. Cambridge: Belknap Press of Harvard, 2005.
- Mills, Shereen W. “Women’s Poverty and the Failure of the Judicial System.” *What About the Children: The Silent Voices in Maintenance*. Eds. Debbie Budlender and Bhengkosi Moyo. Braamfontein: Tshwaranang Legal Advocacy Centre, 2004. 254-50.
- Mills, Shereen W. “Telling Stories: Metaphors, Myths, and Stereotypes in the Zuma Rape Trial.” Unpublished manuscript. Pretoria: Human Sciences Research Council (HSRC), 2007. 1-14.
- Naylor, Nikki. “The Politics of a Definition.” *Should We Consent: Rape Law Reform in South Africa*. Eds. Lillian Artz and Dee Smythe. Cape Town: Juta, 2008. 22-51.
- R v. Ewanchuk*, [1999] 1 S.C.R. 330.
- Rasool, Shahana, Kerry Vermaak, Robyn Pharoah, Antoinette Louw, and Aki Stavrou. *Violence Against Women: A National Survey*. Pretoria: Institute for Security Studies, 2000.
- S. v. Egglestone* [2008] 4 All SA 207 (SCA).
- S. v. S* 1971 (2) SA 591 (A).
- S. v. Swiggelaar* 1950 1 PH H61 (A).
- S. v. Volschenk* [2008] 1968 2 SA283 (D).
- S. v. Zuma* [2006] JOL 17305 (W).
- Smythe, Dee and Samantha Waterhouse. “Policing Sexual Offences: Policies, Practices and Potential Pitfalls.” *Should We Consent: Rape Law Reform in South Africa*. Eds. L. Artz and D. Smythe. Cape Town: Juta, 2008. 198-223.
- Snyman, C. R. *Criminal Law*. Durban: LexisNexis, 2008.
- South African Law Reform Commission (SALRC). “Sexual Offences: Substantive Law.” Discussion Paper 85. 1999.
- South African Law Reform Commission (SALRC). “Sexual Offences: Practice and Procedure.” Discussion Paper 102. 2002.
- Temkin, Jennifer. *Rape and the Legal Process*. 2nd ed. Oxford: Oxford University Press, 2002.
- Vetten, Lisa. “Roots of a Rape Crisis.” *Crime & Conflict* 9 (1997): 300.
- Vetten, Lisa, Rachel Jewkes, Romi Sigsworth, Nicola Christofides, Lizle Loots and Olivia Dunseith. *Tracking Justice: The Attrition of Rape Cases through the Criminal Justice System in Gauteng*. Johannesburg: Tshwaranang Legal Advocacy Centre, the South African Medical Research Council and the Centre for the Study of Violence and Reconciliation, 2008. 1-60.
- Eagle, Jill, and Lloyd Vogelmann. “Overcoming Endemic Violence against Women in South Africa.” *Social Justice* 18 (1991): 209.
- Wright, Joanne. “Consent and Sexual Violence in Canadian Public Discourse: Reflections on Ewanchuk.” *Canadian Journal of Law & Society* 16 (2) (2001): 173-204.