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SEXUAL POLITICS AND RESISTANCE TO LAW REFORM: A CRITIQUE OF THE SOUTH AFRICAN LAW COMMISSION REPORT ON WOMEN AND SEXUAL OFFENCES IN SOUTH AFRICA

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INTRODUCTION

In 1985 the South African Law Commission published a Report entitled Women and Sexual Offences in South Africa.[1] The Report is the result of almost 3 years' research initiated at the request of the Minister of Justice in 1982.

During the period 1979-1981 public attention in South Africa was drawn dramatically to the crime of rape. Media reports focused on the high incidence and brutality of the crime and contributed towards a heightened sense of public anxiety and outrage. Slabbert[2] has argued convincingly that during this period the South African public experienced a "moral panic" regarding rape. Public concern extended to concern for the fate of rape victims and their treatment by the criminal justice agencies. This concern was voiced in Parliament. Questions were put to the Minister regarding the procedures involved in the laying of a rape charge and the medico-forensic aspects of the crime.[3] As a result the Minister requested the South African Law Commission to investigate these matters. The resultant Report was published in April 1985.

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1. Project 45.

2. Slabbert "Rape and Moral Panics" (unpublished paper 1983).

3. House of Assembly Debates Questions and Replies, cols 509 and 511, 5 May 1982. See also House of Assembly Debates Questions and Replies col 14, 2 April 1982.

The initiation of an official investigation into rape-related matters was a significant event for several reasons. It indicated a measure of sensitivity to public opinion and promised to provide much needed information on this neglected topic. Comparatively little research has been conducted into rape in South Africa. The absence of a national feminist movement and an apparent lack of concern by the criminal justice agencies have meant that rape does not enjoy a high profile as a social problem in comtemporary South Africa. Consequently, the initiation of an investigation into certain aspects of the crime indicated timely official action.

Rape is a controversial topic involving broader issues such as the level of violence in a society, the social position of women and contemporary sexual mores. An investigation into sexual offences in South Africa therefore provides the occasion for public debate and the formation of public opinion and can be viewed as an encouraging indication of state concern with these matters. In South Africa, where racial issues overshadow sexual ones, this is an unusual and apparently progressive step. The South African state rarely focuses attention on women as a group; the investigation provided South African women with an opportunity to debate issues which concern them.

The forum chosen for this debate was the South African Law Commission, a state-appointed body with a statutorily-based authority to conduct research and make recommendations to the state on matters of legal reform.[4] The Commission can marshall considerable expertise, legal and otherwise, to its research purposes. Its findings make an important contribution to current knowledge about rape in South Africa.

Knowledge is not produced in a vacuum but within particular social, political and institutional arrangements. The Report emerges as a response to public anxiety about rape and rape victims; it is produced by a body which is part of the wider public service of the state and it concerns a complex subject which raises questions concerning the very nature of gender relations in South Africa. It is the content of the knowledge produced by the Law Commission which is analysed in the present work. The analysis proceeds from a critical perspective; its aims are to subject to critical scrutiny the method by which such knowledge was produced and to assess the significance of the Report within the broader socio-political context in which it emerged.

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4. Sections 4 and 5 of the South African Law Commission Act 19 of 1973.

THE REPORT

Four major deficiencies have been identified in the Report. These relate to:

1. The subject of inquiry
2. Research method
3. The aims and guiding principles of the investigation
4. The perceived role of law reform.

With full appreciation that these issues are closely interlinked, they will none the less be analysed separately in order to facilitate an in-depth critical inquiry.

1. THE SUBJECT OF INQUIRY

Rigorous research demands as a prerequisite that the subject of the inquiry be defined and the area of the research be clearly demarcated: one must know what the problem is, and (a closely connected inquiry) where it is located. These questions are, of course, neither posed nor answered within a paradigmatic vacuum, but always from a particular theoretical position, whether articulated or not. These are crucial issues, shaping not only which research questions are posed, but also how they are posed. The definition and location of "the problem" to be investigated is thus of determinative importance in the generation of "knowledge" about it. The starting point not only directs the inquiry, but is a factor in determining its outcome.

The Commission's Report reveals quite clearly its uncertainty as to the subject, field and focus of inquiry. The Minister of Justice initially requested an investigation into the procedure for laying a rape charge, and the medico-legal aspects of rape.[1] The Commission subsequently decided to widen the scope of its inquiry to include related offences (hence the present title of the Report).[2] Replies received by the Commission to its questionnaire indicated that other areas were perceived as meriting attention, viz the definition of rape, the marital rape exemption, the irrebuttable presumption that a boy of less than 14 years is incapable of rape, and the responsibility of district surgeons. In addition, on the strength of representations made to it, the Commission included in its research ambit a range of related issues: the protection of the identity of the complainant and of juvenile witnesses, the time factor in the legal process, the possibility of adjudication of rape cases by the proposed Family Court, the attitude of judicial personnel, the role of crisis services and the relevance of the investigation to other sexual offences against women. The Commission therefore decided to investigate all of these issues.[3]

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1. House of Assembly Debates Questions and Replies, cols 509 and 511, 5 May 1982. See also House of Assembly Debates Questions and Replies, col 14, 2 April 1982. Report para 1.1.

2. Report para 1.2.

3. Report paras 1.2 and 1.4.

It is immediately apparent that the area of research ultimately demarcated extends far beyond the original brief to a very ambitious project. While no objection is made to this fact, it is equally apparent that the widening of the scope of inquiry is accompanied by a diffusion of research focus. The Commission not only canvassed for opinions, it allowed those opinions, which emanate from different sources with divergent concerns, to define the problems requiring investigation.[4] Those whose opinions were voiced indicated a predominant concern for the legal processing of rape cases and its effects on the rape victim. One wonders, therefore, why the Commission saw fit to include recommendations on substantive law[5] and the role of a crisis clinic.[6]

The clearest encapsulation of the research topic and agenda is the following general statement:

> "It appears... that there is a particular need to deal with the victim more sympathetically and to afford her greater protection in the process of law. For this reason this investigation has concentrated on the victim as the starting-point, and the main point to be considered ultimately will therefore be whether the law and process of law relating to rape should be modified or amended so as to provide for any special problems experienced by rape victims."[7]

The Commission does not clarify what "the victim as the starting-point" means. Does it signify that concern for her

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4. Report para 1.4.

5. Report Chapter 2.

6. Report Chapter 5 para 5.

7. Report para 1.9.

welfare provided the motivation for the study? Or that "the law and process of law" are to be analysed from her point of view? Or that the victim herself is the central research concern? It would appear that the first choice is the correct one, as the Report makes little attempt to analyse the law from her point of view. In addition, the Commission does not clarify what the perceived problems are. It rests content with vague and general references to the victim's "problems" and "trauma" or "alleged trauma".[8]

One concludes that the fundamental inquiry is into the nature of the response by the criminal justice system to a complaint by a female that she has been raped. This is a complex and formidable task and, unfortunately, one which the Commission has not treated adequately.

(i) The approach of the Commission

The Commission's approach reveals a failure to contextualise the inquiry. It has not located its investigation within a wider understanding of the operation of the criminal justice system nor does it show any awareness of the relationship between this system and the social order in which it operates.

The concept of a criminal justice system through which criminal cases are processed is almost wholly absent from

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8. See for example Report paras 1.9, 1.17, 2.1, 2.19 and 5.2.

the Report. This is a startling omission, in view of the Commission's own emphasis on the "process of law".[9] The criminal justice system can be conceptualised as a set of state-funded and state-controlled bureaucracies, viz the police, the prosecuting authorities, the courts and the prisons, which, despite inherent tensions and conflict amongst them, are institutionally obliged to co-operate in the collective aim of law enforcement.[10] Because the Commission does not recognise that the ultimate origins of rape lie in the patriarchal social structure,[11] nor that the criminal justice bureaucracy forms an integral part of its social control machinery, it is precluded from recognising the contribution of the criminal justice system to the problems of the rape victims. It can deal with these problems only in terms of the content of certain legal rules and the individual behaviour of law enforcement personnel.

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9. Report para 1.9.

10. There is a substantial body of literature on the criminal justice systems of Anglo-American jurisdictions. See for example, Moody & Tombs: Prosecution in the Public Interest (Scotland); Ericson & Baranek The Ordering of Justice: A Study of Accused Persons as Dependants in the Criminal Justice System (Canada); Saunders & Daudistel The Criminal Justice Process (USA); Blumberg Criminal Justice (USA); Feeley The Process is the Punishment (USA); Bottomly Decisions in the Penal Process (UK); Bottoms & McLean Defendants in the Criminal Process (UK); Carlen Magistrates' Justice (UK); Baldwin & McConville Negotiated Justice (UK); McBarnet Conviction: Law, the State and the Construction of Justice (UK).

11. See infra 'The Treatment of the Victim'.

This is, in fact, what the Commission has done. It conceives of the "legal" problems totally separately from the problem of the treatment of the victim by the criminal justice personnel.[12] The legal rules themselves are not seen as part of that treatment. In the Commission's view there is apparently no relationship between the legal rules (operating within the particular institutional setting) and the behaviour of the officials towards the victim. The problem of the insensitive treatment of the victim is thus dealt with at the level of individual interaction. It is not perceived to be generated and sustained by the legal and institutional framework within which the behaviour occurs. For example, it is submitted here that the law of procedure and evidence in relation to rape cases clearly regards the complainant in a sexual case as different from other complainants: it expects her to follow a special complaint procedure;[13] it defines her sexual history as relevant evidence on which she can be cross-examined at length to

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12. See infra 'The Reform Proposals'.

13. By way of an exception to the general rule against the admissibility of previous consistent statements, evidence of the fact that the complainant in a sexual crime complained of the incident shortly after it occurred, as well as the content of the complaint, is admissible, if the complainant gives evidence. Such evidence is not corroboration of the complainant's evidence, but is used to prove her consistency and therefore her credibility. The complainant must voluntarily complain at the first reasonable opportunity to someone to whom he or she could reasonably be expected to complain. See Hoffman and Zeffert South African Law of Evidence 3ed 22-26 and Schmidt Bewysreg 375-379.

establish her character[14] and it proclaims that it is usually too dangerous to accept her evidence without some independent corroboration.[15] In such a legal context, it is likely that the police, the district surgeon and the court officials will regard and therefore treat the rape victim differently from victims of other crimes. If the law itself casts suspicion on her, then it is probable that those charged with enforcing that law will do likewise, even if they are not fully aware of it.

The "problem" to be investigated is thus not only diminished by its location in certain surface phenomena, ie the legal rules and behaviour of law enforcement officials, but is also subtly redefined. It is split into a series of apparently disconnected problems such as the complaint requirement,[16] the cautionary rule,[17] the medical examination,[18] the laying of a complaint to the police,[19] and so on. This constitutes a distortion of the underlying problem which, from a critical perspective, lies partly in the criminal justice system itself. In this way, the

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14. Section 197 and s227 of the Criminal Procedure Act 51 of 1977.

15. See H 1937 NPD 1; M 1947 4 SA 489 (N); J 1966 1 SA 88 (RAD) and Hoffman and Zeffert supra n13 455-456.

16. Report paras 3.32 and 3.33.

17. Report paras 3.51-3.70.

18. Report paras 5.39-5.70.

19. Report paras 5.6-5.38.

definition and location of the problems to be investigated pave the way for piecemeal reform, ie a tinkering at the minutiae of the system while the basic framework remains untouched.

(ii) Recognising the existence of "the problem"

Even more disturbing, however, is the Commission's explicit doubt that "the problem" exists at all. A careful reading of the Report reveals that this doubt rests on four bases:

(i) Popular concern with the incidence of rape in South Africa is due to alarmist media accounts, based on false statistics.[20] The statistics in question are a projected estimate, established by a certain statistical technique, of the total number of rapes occurring annually in South Africa. NICRO estimates that around 300 000 South African women are raped every year while, according to the official South African Police statistics, little more than 15 000 rapes are reported annually.[21] This discrepancy raises the familiar issues of the "dark figure" of crime and the reliability of statistics. The Commission prudently advises caution in accepting the 300 000 estimate without reservation,[22] and then proceeds to reject it completely. However, it accepts the police statistics without

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20. Report paras 1.6 and 1.7.

21. Report paras 1.6 and 1.7.

22. Report para 1.7.

reservation. Three reasons emerge from the Report: (a) the NICRO statistics are not reliable; (b) the South African Police reject them; and (c) no empirical study of the "true" incidence of rape in South Africa has been carried out.

The "dark figure" of crime is without doubt problematic. It includes instances of behaviour which would possibly be defined as criminal, but which remain undetected and it also includes those cases which are brought to the notice of law enforcement agencies but which are not processed (when, for example, a policeman decides not to open a docket after a complaint is made). It is not known how much activity which could potentially be labelled as criminal if it were adjudicated upon by a court, actually occurs. Those acts which risk public disapproval and punishment are generally covert and secretive. There is a real strain towards their concealment[23] from which the perpetrator benefits. There is therefore an elusive quality to much deviance and crime, making detection problematic in the absence of evidence (for example, a corpse indicating homicide or damaged premises indicating an illegal entry). However, even if a crime is suspected there may be any of several reasons for not reporting it to the police, for instance, the act may be condoned or excused in sympathy for the offender or lack of

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23. Downes and Rock Understanding Deviance 27.

sympathy for the victim.[24] So, for example, if the rape victim's family believes that she invited the attack in some way, and therefore shares the blame for it, no report may be made to the police. The victim herself may be unable or unwilling to define the event as rape.[25] Alternatively, the perception that the police are uninterested or ineffective or hostile may prevent a report being made. Any or all of

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24. Amir Patterns in Forcible Rape concludes that the following reasons are most commonly involved in the concealment of rape:

    (a) Parents wish to prevent further emotional injury and ordeal to a young victim which an investigation and criminal trial would entail

    (b) shame, fear of blackmail and the wish to protect reputation

    (c) adult victims who are not severely injured wish to forget the incident and avoid further ordeal

    (d) the victim refuses to be bothered and to lose time by prosecution

    (e) the victim herself is accused of active participation or provocation of the incident

    (f) fear of the offender

    (g) fear of recrimination by the family

    (h) a wish to protect the offender when there exists a special relationship between him and the victim.

    Cited in Viano (ed) Victims and Society 392.

25. Weis and Borges "Victimology and Rape: The Case of the Legitimate Victim" 1973 8 Issues in Criminology 71-115, contend that the less her experience corresponds to the prevailing view of rape as a brutal attack by a stranger, the more difficult it is for her and others to define her experience as rape. Cited in Walker and Brodsky (eds) Sexual Assault 136. See also Curtis "Present and Future Measures of Victimization in Forcible Rape" in Walker and Brodsky (eds) 61-68, 65.

these factors may be operative in a particular community and may contribute to under-reporting of suspected crimes. The dark figure of crime is an unknowable figure and consequently only projected estimates of this amount are possible.

This does not, however, render the estimate totally useless as the Commission supposes. One method of shedding light on the matter is the self-report study or victimization study[26] which gathers data directly from self-confessed but undetected offenders or from the victims themselves. Before dismissing the figure as irrelevant, the Commission should have attempted to obtain some data from rape victims. A victimological survey of instances of sexual aggression is the best source of information on the incidence of non-reporting.[27] The effort, time and expense undoubtedly required for such an enterprise are more than justified. This data is crucial to the whole project, as it would shed some light on the existence (or otherwise) and extent of the dark figure. In view of this it is difficult to understand

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26. See, for example, Hindelang & Davis, "Forcible Rape in the United States: A Statistical Profile" in Chappell, Geis & Geis (eds) Forcible Rape: The Crime, the Victim and the Offender 87-114, 97-98.

27. Hindelang Criminal Victimization in Eight American Cities: A descriptive analysis of common theft and assault 358, writes: "The victimization survey is the most practical vehicle available for analysing factors associated with the decisions of victims regarding whether or not to call the police when they believe that they have been victimized.".

the Commission's failure even to attempt to solicit any information from rape victims.

A victimological study recently conducted in the Cape Peninsula[28] demonstrated that many rape victims failed to report their victimizations to the police. Of a total number of 1 252 victimizations[29] during the period covered by the survey, only 31,7% were reported. Only 51,7% of rapes and attempted rapes were reported to the police.[30] The most frequent reason given for not reporting a victimization was stated to be fear of revenge by the aggressor (27,3% of responses). The next most frequent reason given was the belief that the police would be unable to apprehend the aggressor (19,2% of responses).[31] Other South African victimological studies also indicate high rates of non-reporting.[32]

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28. Strijdom "A victimological study among Coloureds in the Cape Peninsula" (unpublished PhD thesis), Rhodes University 1982.

29. Incidents of robbery, common assault, aggravated assault, rape and attempted rape and theft were investigated in the survey.

30. Strijdom supra n28 111.

31. Strijdom supra n28 112.

32. See Strijdom and Schurink Primêre viktimisasie in Soweto: 27,2% of victimizations were reported; Boshoff "Misdaadviktimisasie" in Lötter, Strijdom, Schurink et al Eersterust: 'n Sosiologiese studie van 'n Kleurlinggemenskap: 40% of victimizations were reported; Strijdom and Boshoff Die omvang van die rapporteering van misdaad deur Blankes, Kleurlinge en Indiërs: 48,7% of victimizations of whites, 48,7% of victimizations of coloureds and 62,4% of victimizations suffered by Indians were reported to the police.

That the South African Police reject the projected figure of rape should come as no surprise. The police are interested parties and it is hardly likely that the official agents of law enforcement would readily accept that victims of a capital crime regularly refrain from reporting its occurrence to them. In any event, the police can hardly be expected to know the incidence of non-reporting. The opinion of the South African Police regarding the projected estimate is consequently irrelevant to the question of the "true" figure of rape and should not have influenced the Commission in any way.

The lack of empirical data on this issue is a telling indication of general lack of concern with the crime and its victims in South Africa. While this is a serious matter requiring urgent attention, it is not the fatal flaw the Commission assumes it to be. The Commission refused to consider the weighty body of cross-cultural and cross-jurisdictional data on rape and rape victims, apparently on

the basis of their irrelevance to South Africa.[33] It is noteworthy that this is the ground on which the South African Police reject the applicability of the projected estimate of actual rapes (believed to be based on estimates in other countries):

> "because of our totally different social set-up and the heterogeneous composition of the population with its own peculiar cultures and customs."[34]

The meaning of this phrase is obscure. It makes the vital connection between rape, social structure and culture, but only to emphasise South Africa's "total" difference from other parts of the world. Exactly what these differences are perceived to be, why they are so extreme and why they are assumed to account for less rape, is nowhere elucidated.

The South African social formation is not so unique that it has nothing in common with societies elsewhere. The society is deeply divided along class, race and sex lines. It is

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33. See Report para 1.7. See further para 2.3 where the Commission criticizes those who urge a redefinition of the crime along the lines proposed by reformers in America and Canada for overlooking completely the "fact" that "our criminal law does not have the same basis as those systems and is not codified". This criticism is inapposite: the law relating to rape in America, Canada and South Africa is based on English common law and, until reformed in Canada and some American states, was very similar in both its substantive and procedural aspects. The Commission however, misses the point that the crucial issue in law reform is not the similarity between these systems but whether reforms similar to those introduced elsewhere can meet the social needs of South Africa.

34. Report para 1.7.

racist, in that it formally distinguishes its members on the basis of their race and singles out the different races for different and unequal treatment.[35] It has marked class stratification, which runs along racial lines.[36] It is a sexist society which entrenches its female members in positions of inequality relative to its male members.[37] The structures of racism and sexism are supported by a dominant ideology of male supremacy which are reinforced by the state and its apparatuses. The racism, however, is white racism and the sexism is male sexism. The interlocking of these two lines of stratification have created a complex society in which power, authority and the greatest economic rewards are consistently channeled to the elite group of ruling white males. The intersection of race, class and sex

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35. See for example, the Population Registration Act 30 of 1950; The Black Land Act 27 of 1913; The Black Administration Act 38 of 1927; The Development Trust and Land Act 18 of 1936; The Reservation of Separate Amenities Act 49 of 1953; the Group Areas Act 36 of 1966.

36. See Lipton Apartheid and Capitalism in South Africa 1910-1984 and Posel "Rethinking the 'race/class' debate in South African historiography" 1983 9(1) Social Dynamics 50-66.

37. While, as a general statement, this is true for all South African women, it is particularly the case for Black women who are subjected to both common law and customary law. Their capacity to act as full legal subjects has been severely restricted and their structured dependence on men perpetuated. See, for example, Qolo v Ntshini 1950 NAC 234 (S); Ndinisa v Mtuzulu 1963 BAC 74 (S); Mpantsha v Ngoloukulu 1952 NAC 40 (S); Ndhlovu v Ndhlovu 1954 NAC 59 (NE); Ngcobo v Ngcobo 1946 NAC (N & T) 14.

stratification identifies black women as the most oppressed group in our society.

Bozzoli[38] in an analysis of modern, patriarchal South Africa, argues that South African society displays a "patchwork quilt of patriarchies". She attempts to identify specific forms of patriarchy within the white Afrikaner group, the English-speaking group and amongst indigenous peoples.

> "The forging of modern patriarchy thus must be interpreted as the result of the interplay between the process of state formation on the one hand; and the 'historical givens' of the pre-existing societies in the region on the other. This lends tremendous complexity to the analysis which needs to be undertaken. For do we asssert that 'one patriarchy' exists, because of the emergence of a single central state, and the passing of most lines of domination and subordination through that state; or do we retain some notion of 'many' patriarchies, because of the historical and cultural specificity of the experience and resultant social position, of men and women of different groups? Tentatively, I wish to suggest that the notion of many patriarchies needs to be retained, with qualifications, for the modern era."[39]

It is suggested that the following analysis of white patriarchy and rape in America is apposite also to South Africa:

> "All women, regardless of race-ethnicity, live in a white, male-dominated society where the dynamics of male-female interaction are convoluted by the dynamics of racial power. In a racially and

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38. Bozzoli "Marxism, Feminism and Studies" 1983 9 (2) Journal of Southern African Studies 139-171.

39. Bozzoli supra n38 155.

> sexually stratified society, a high incidence of rape is predictable. Rape symbolizes not only a key element of social control working to maintain the system, but also the anger and violence engendered by such a system. Females are victimized several times over. [White] females are potentially appropriate victims for [white] males and are vulnerable to... rape by [black] males, the latter... symbolizing some of the anger and frustration that grows so naturally in a system of unequal power. [Black] females appear to be appropriate victims of both inter- and intragroup rape. If they are raped by white males, it is assumed that they "asked for it" or were simply unpaid prostitutes."[40]

Curtis[41] suggests that in black intragroup rape the rapist may unconsciously imitate the white male. This rape is "the symbolic expression of the white male hierarchy".

If one accepts that the incidence of rape as one form of violence is inextricably linked to the general level of violence in a society,[42] then it follows that the South African social formation could be generating a high incidence of rape. South Africa's "special" circumstances could therefore produce more rape than in other societies,

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40. Williams & Holmes The Second Assault 27.

41. Curtis "Rape, Race and Culture: Some Speculations in Search of a Theory" in Walker and Brodsky (eds) supra n25 117-132, 131.

42. Schwendinger and Schwendinger Rape and Inequality 155 suggest that sexual inequality and rape are related to the general level of violence in a society. This level is itself generated by the political economy, particularly by the articulation between the capitalist mode of production and precapitalist types of production. Bowker Women, Crime and the Criminal Justice System 120 notes the high statistical correlation between the official rate of violent crime and rape and interprets this data as a suggestion that "there must be a general violence factor... in any comprehensive explanation of sexual assault".

not less, as the Commission assumes. The structural and cultural preconditions for this to occur are clearly present in South Africa.

The structural location of black women, which excludes them from sources of wealth and power and encourages their dependence on men makes this group the most vulnerable to rape by both black and white males. Black culture also sustain a marked sexual inequality. The customary institutions of marriage, bridewealth, divorce and succession entrench the inferior status of black women relative to that of black men.[43] Indigenous culture also promotes female submission to the social and moral authority

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43. Marks and Unterhalter "Women and the Migrant Labour System in Southern Africa" (unpublished paper 1978) emphasise the point that in virtually all Bantu-speaking societies women are "subject to the tight control of chiefs, headmen and the heads of families". Cited in Bozzoli supra n38 149.

of men.[44] Such submission may well be conducive to rape practices.[45]

In addition to ignoring these factors, the Commission has also ignored the fact that the law and criminal justice system in South Africa has much in common with that of other countries. The South African law of rape is received law, similar to the common law of Anglo-American jurisdictions. Rape cases are processed through remarkably similar criminal justice systems. These systems are composed of mandatory, institutionalised agencies of law enforcement which are operated and controlled by predominantly white, middle-class, state-paid officials, who are also men.[46] In the

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44. See Bennett "The Status of African Women in Zimbabwe-Rhodesia" (unpublished PhD thesis) University of Cape Town 1980. See Schapera Married Life in an African Tribe and Longmore The Dispossessed: A Study of the Sex Life of Bantu Women in and around Johannesburg.

45. Armstrong "A note on several aspects of rape in Swaziland" 1986 XIX CILSA 474-488, 475 cites a senior counsel in a Swaziland rape case: "In every African society... a person from childhood is taught the importance of obeying and respecting their elders and people who are in authority. What does a girl of 10, 12 or even 14 years do when called by an adult male and ordered to remove her panties and lie down? Can she disobey without thinking that she is going against parental teachings?" Similarly, Schapera, supra n44 found that the husbands' use of their sexual rights in respect of their wives was "a common-place feature of Kgatla married life. The men, however, take up the attitude that intercourse is a duty every woman owes to her husband and that she must carry it out faithfully.... 'These women cannot stop us' I was told; 'we have given bogadi (bridewealth) for them and so we are entitled to make use of their bodies'." Cited in Janssen-Jurreit Sexism: The Male Monopoly on History and Thought 235.

46. See the references supra n10.

light of these factors a comparative appraisal would have contributed greatly to an insight into the problems experienced by rape victims. Foreign data is no substitute for South African data on rape, but it is submitted that the Commission was misguided in rejecting knowledge from other jurisdictions as totally irrelevant to South Africa for the obscure reason which is cited above. On the contrary, it is contended here that the Commission ought to have taken cross-cultural data into account.

(iii) Cross-cultural research

Research conducted elsewhere supports the contention that many rapes are not reported to the police,[47] though estimates on the extent of the under-reporting vary considerably. Several factors could play a role in the decision to report or not to report: the age, marital status and structural location of the victim, the presence or absence of family sympathy for her, the circumstances of

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47. Bowker, supra n42, 103 documents that a 1965-66 survey of self-reports of crimes conducted by the National Opinion Research Center found a much higher rate of self-report crimes than officially noted in the statistics. The NORC found that the most underreported of all crimes was rape, for which the NORC self-report rate was nearly four times the official rate of the Uniform Crime Reports. While caveats similar to those mentioned in respect of official statistics are apposite in respect of these rates, the discrepancy between the self-report rates and the official rates indicates a significant number of unreported rapes. See also Curtis supra n25 63-5; Hindelang and Davis supra n26, 97; Katz and Mazur Understanding the Rape Victim 185-186 and references cited therein.

the event itself and the victim's relationship with the assailant.

The nature of the relationship between the victim and the assailant is an important factor in the decision to report the incident.[48] Research indicates that many rapes occur between aquaintances and between family members.[49] A prior relationship of some kind with the assailant may make the victim unwilling to report the event.[50] Particularly in the family context, the family may be unwilling to press charges against a father or other male relative for the rape of a child of the family. In jurisdictions which recognise the marital rape exemption, the husband may rape his wife with impunity, and these cases are not reported or, if reported, are not proceeded with due to the legal impossibility of conviction. At most, the husband may be convicted of assault, which will distort the statistical data on rape. Studies have shown, however, that despite the frequent occurrence of marital violence the police are loath to intervene in what they perceive to be an

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48. Williams "The Classic Rape: When do Victims Report?" 1984 31 (4) Social Problems 459-467, 460, and references cited therein.

49. In Amir's study, supra n24, only 42% of the reported rapes in Philadelphia during the period 1958-1960 were committed by strangers. Other victimisation surveys indicate differing rates of rape by strangers. See Bowker supra n42, 112.

50. Schwendinger and Schwendinger "Rape Victims and the False Sense of Guilt" 1980 13 (Summer) Crime and Social Justice 4-17; Weis and Borges supra n25.

essentially private matter.[51] Consequently, it is probable that a significant number of instances of marital rape is hidden from public view and cannot be represented in the official rape statistics.

Other reasons for not reporting rape have been clearly voiced by the victims themselves: their reaction of shock, shame or embarrassment at having been raped may prevent them from speaking about it, often for many years.[52] There is the phenomenon of the rape victim's "irrational" feeling of contributory guilt: the perception that she somehow invited the attack and is consequently partially responsible for it. The resultant feeling of shame and disgrace, often shared by the wider community of family and friends, is enough to silence the victim in many cases.[53] Fear of blame or rejection by husband or family may have the same effect. The most notable characteristic of rape victims has been their silence and invisibility. The confession of having been raped is in many instances an invitation to social

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51. See, for example, Scutt (ed) Violence in the Family; Gelles The Violent Home; Finkelhor and Yllo "Forced Sex in Marriage: A Preliminary Research Report" 1982 28(3) Crime and Delinquency 459-478; Bowker supra n42 125; British House of Commons Report on Violence in Marriage (1976) vol 1; Freeman "But If You Can't Rape Your Wife Who[m] Can You Rape? The Marital Rape Exemption Re-examined." 1981 Family Law Quarterly 1; Schapera Married Life in an African Tribe.

52. See Macdonald Rape Offenders and Their Victims.

53. See Russell The Politics of Rape 25-34 and 62-67; Weis and Borges supra n25; Burgess and Holmstrom "Coping behavior of the rape victim" 1976 113 American Journal of Psychiatry 413-418.

disaster. In addition, there may be more practical reasons for not reporting the rape: fear of retaliation by the assailant,[54] lack of confidence in the ability of the criminal justice system to apprehend and punish the assailant,[55] or lack of time to participate in a criminal prosecution.[56]

Other victims decide differently but their complaints are not always accepted as valid by the police. Some of those who attempted to report the rape and press charges were unable to proceed when the police, who perform an initial screening function, decided that they had no case and dismissed the matter.[57] Victims whose cases have gone to trial have expressed the view that had they known what they would have to endure in the criminal justice process they would probably not have proceeded. The process included the detailed, repetitive interrogation by disbelieving or insensitive policemen, the humiliating medical examination and the exposure of her prior sexual conduct in court.

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54. See Strijdom, supra n28, 112.

55. Ashworth and Feldman-Summers "Perceptions of the effectiveness of the criminal justice system" 1978 5 Criminal Justice and Behaviour 227-240; Feldman-Summers and Ashworth "Factors related to the intentions to report rape" 1981 37(4) Journal of Social Issues 53-70.

56. Kidd and Chayet "Why Do Victims Fail to Report? The Psychology of Criminal Victimization" 1984 40 Journal of Social Issues 39-50 and Amir supra n24.

57. Clark and Lewis Rape: The Price of Coercive Sexuality 34-38; Mayne and Levett "The Traumas of Rape - Some Considerations" 1977 1 SACC 163-170.

These factors, combined with high acquittal rates, make the prosecution of a rape case a most unattractive proposition for the victim.

One can attempt to understand these phenomena at various levels and from different points of view. It is argued here that the theoretical perspective which has the greatest explanatory power is one which relates these phenomena to the prevailing social and cultural understanding of rape. Several studies indicate that the common stock of social knowledge about rape includes a variety of sometimes contradictory beliefs about the nature of the event and the nature of women. These beliefs, which are inimical to the interests of rape victims, include the following:

(i) that rape is a rare occurrence;

(ii) that rape is a sudden, violent attack by a stranger in a deserted public place;

(iii) that rapists are usually sick, disturbed people;

(iv) that rape is "caused" by the male, barely controllable sexual drive;

(v) that women secretly want to be raped;

(vi) that rape is precipitated by the sexual attractiveness of the victim;

(vii) that it is impossible to rape an unwilling woman (so the victim must share the blame);

(viii) that many rape charges are false and must be treated with caution.[58]

These beliefs form part of the dominant ideology of rape and structure our common sense notions about it. "Common sense" is the form in which the dominant ideology is transmitted and maintained. It constitutes the lens through which people perceive and interpret rape. In the light of these social beliefs, the perceptions and behaviour of those victims who feel disgraced and shamed and what is often seen as the "insensitive" behaviour by law enforcement agents become understandable: they share the dominant social understanding of rape and have internalised its value system.

Perhaps the most insidious of these beliefs is found in the stereotype of the "true rape": that rape is an unexpected, vicious attack by a stranger in a deserted public place. A person who adheres to this notion will have difficulty in conceptualising as rape an event which does not conform to the stereotype: for example, rape occurring between acquaintances in the home of the victim. Research indicates

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58. See MacKellar Rape: The Bait and the Trap for an examination of these myths. The Law Commission Report, para 5.2, notes the existence of certain rape myths, but declines to comment on them.

that the police,[59] judges,[60] and the general public[61] (including rape victims) share the stereotypic notion of "true rape". Not only does this influence the legal processing of rape cases, but it is also a factor contributing toward non-reporting. A woman who does not identify herself as a victim has nothing to report to the police. The available data suggests that the more the circumstances of the rape correspond to the "true rape" notion, the more likely it is that victims will perceive themselves as such[62] and the more likely they will be to report the rape to the police.[63]

What "everybody knows" about rape thus constitutes a rape mythology which may be devastating to the victim. In his work on small-scale societies, Malinowski wrote the following:

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59. Clark and Lewis supra n57, 57-66; 1968 117 University of Pennsylvania Law Review 277-322; Feldman-Summers and Palmer "Rape: A view from judges, prosecutors, and police officers" 1970 7 Criminal Justice and Behaviour 19-40.

60. See infra 'The Reform Proposals' footnote 177.

61. Burt "Cultural myths and supports for rape" 1980 38 Journal of Personality and Social Psychology 217-230; Feild "Attitudes towards rape: A comparative analysis of police, rapists, crisis counsellors and citizens" 1978 36 Journal of Personality and Social Psychology 156-179.

62. Weis and Borges supra n25.

63. Williams supra n48. This factor may distort significantly the official rape statistics and strengthen social belief in the stereotype.

> "Myth fulfils... an indispensable function: it expresses, enhances and codifies beliefs, it safeguards and enforces morality, it vouches for the efficiency of ritual and contains practical rules for the guidance of man. Myth is thus a vital ingredient of human civilization; it is not an idle tale, but a hard-worked active force; it is not an intellectual explanation or an artistic imagery, but a pragmatic charter of primitive faith and moral wisdom.[64]

A myth orders and validates a particular world view, defines types of behaviour as acceptable or unacceptable according to an encoded set of moral beliefs and may have profound effects on social organisation. Contemporary society is not free of myths, particularly those surrounding the nature and behaviour of women. Mythology provides the conceptual machinery to maintain the dominant symbolic universe. Berger and Luckmann contend that knowledge which is mythological in form is closest to the naïve level of the symbolic universe, ie "the level on which there is the least necessity for theoretical universe maintenance beyond the actual positing of the universe in question as an objective reality".[65]

The success and continued existence of rape myths do not depend on their relation to the "facts" about women but to their relation to the power of those who maintain the myths. Rape mythology, then, can survive despite the generation of inconsistent "facts" about women. When internalised by the

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64. Malinowski Myth in Primitive Psychology 19.

65. Berger and Luckmann The Social Construction of Reality 128.

victim, it may be a powerful yet unseen force militating against the reporting of rape. When internalised by law enforcement agents, it may influence their behaviour towards the victim and the manner in which the case is processed. In many ways, it may play an important role in the construction of a "strong" or "weak" case against the accused.[66]

The research which has attempted to reveal the cultural support for rape behaviour is relevant to South Africa. Having identified South Africa as a patriarchal society, albeit with its own specific forms of male rule, it is evident that the cultural pre-conditions for the emergence of a similar rape mythology are present. It would be astonishing if South African society did not share in the received wisdom of rape (also encoded into the law itself) and if the predominantly white, male law enforcement officials were not influenced by it. It is submitted that it is hardly tenable that factors similar to those mentioned above are not operative in South Africa and do not contribute towards low report figures.

The Commission is correct in one respect: a South African study is required which will attempt to indicate how, and to what extent, these factors contribute to the non-reporting of rapes. But until such time, we cannot facilely dismiss

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66. McBarnet Conviction: Law, the State and the Construction of Justice, 79-101.

these considerations as of no relevance, as the Commission has clearly done. This empiricist position precludes a serious consideration of the possibility of a wide discrepancy between the number of reported and actual rapes and it obscures the social factors that might be structurally and systematically generating this discrepancy. Structural and cultural forces could, in fact, sustain a strong bias against reporting, so that reported cases of rape constitute the exception and not the norm.

From the feminist perspective, in which rape is perceived as a social control practice, it is to be expected that there will be a high incidence of unreported rape, a large number of reported cases rejected by the police as credible, a high dropout rate in the filtering process of the criminal justice system and a low conviction rate in completed cases. These do not represent dysfunctions in the criminal justice system. On the contrary, if violence against women is to be an effective device for controlling women, it must be both possible and probable. The law relating to rape must attempt to secure this state of affairs. Clark and Lewis in a recent Canadian study identified the operation of the above-mentioned factors and concluded that they amount to a de facto decriminalisation of rape in Toronto. The authors provide the following statistical picture:

> "We believe that a rape had most likely occurred in 1Ø4 of the 116 cases we studied. If only 4Ø% of all rapes are reported (the highest of all estimated reporting rates), then these 1Ø4 reported rapes represented the approximately 26Ø

> rapes which actually occurred. The police classified only 42 of the 116 rapes as founded, and arrested 32 suspects. Given an average conviction rate of 51.2%, approximately 17 suspects were probably convicted. Thus only 17 out of approximately 260 rapists are likely to be convicted in Metropolitan Toronto - only 7%. That is the highest estimate that any of the figures, at any stage of the process, would justify. As such, it stands as something of a monument to injustice, and a serious indictment of our criminal justice system."[67]

The fact that some rapists <u>are</u> convicted is highly significant. The system cannot survive intact if it is too blatantly unjust. It must, therefore, while serving predominantly male interests, appear to be fair and, in fact, on occasion, serve women's interests to maintain legitimacy.

Having wrung its hands in despair at the lack of "factual" information it is no surprise that the Commission hastily heads for the safety of official police statistics. It is the Commission's belief that these statistics are a substantially accurate reflection of the number of rapes actually occurring.[68] Nowhere is this reliance justified; apparently their status as official statistics suffices. The Report displays no awareness of the substantial problems surrounding official crime statistics. First, the official rape statistics are at most a record of crimes <u>known to the police</u> and they cannot account for the dark figure of the

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67. Clark and Lewis <u>supra</u> n57, 57.

68. Report para 1.8.

crime.[69] Secondly, it is contended that the official statistics cannot be conceived of as simply passive responses by officials to criminal acts, as the Commission believes. Kitsuse and Cicourel,[70] in their criticism of traditional deviancy theory, which embodies this assumption, point out that this view fails to distinguish between social conduct which produces a unit of behaviour (the "behaviour-producing process") and the organisational activity which produces a unit in the rate of that deviant behaviour (the "rate-producing process") on the assumption that the former accounts for the latter.

> "Thus, rates can be viewed as indices of organizational processes rather than as indices of the incidence of certain forms of behaviour."[71]

In other words the official rape statistics are an indication of what the police are doing about rape and not how many rapes are actually occurring.

Several implications flow from this insight. It does not signify that police statistics are inaccurate and are

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69. Downes and Rock supra n23, 45-46 note that there are certain crimes which may be more accurately reflected in the statistics than others, such as theft of insured goods. In such a case a report must be made in order for the insured to claim.

70. Kitsuse and Cicourel "A note on the use of statistics" 1963 11 Social Problems 131-139.

71. At 137. See also Bottomly and Coleman Understanding Crime Rates 11; Van Zyl Smit "Die Hantering van Amptelike Misdaadstatistiek in die Suid-Afrikaanse Kriminologie" 1977 1 SACC 123-134.

therefore of limited, or no reliability. As Black[72] notes, while it is wrong to assume they can account for the "real" crime rate, the statistics are themselves not "wrong". They are an aspect of social organisation. A crime rate is an empirical phenomenon with its own existential integrity.[73] It is a product of police action. Its meaning cannot be grasped without an understanding of police interrogation procedures,[74] charging practices, routine evidence-gathering methods and common-sense assumptions.[75] Consequently, the official rape statistics reveal more about the behaviour of the criminal justice personnel in regard to rape than about its actual occurrence. The production of the statistics is the production of public knowledge about rape and makes an important contribution to the dominant definition of rape either as a social problem or as a private trouble for the victim.

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72. Black "Production of Crime Rates" 1970 35 American Sociological Review 733-748, 734.

73. Black supra n72, 734.

74. See Downes and Rock supra n23, 46.

75. In the words of Cicourel The Social Organization of Juvenile Justice 28-29:

> "The meaning of official statistics, therefore, must be couched in the context of how men, resources policies and strategies of the police for example cover a given community, interpret incoming calls, assign men, screen complaints, and routinize reports.... The set of meanings produced by ex post facto readings of the statistical records cannot be assumed to be identical to the situational meanings integral to the various stages in the assembly of official statistics."

(ii) The second ground upon which the Commission bases its doubt as to the existence of a "rape problem" is its view that concern for rape victims is misplaced. Such concern, in its opinion, is simply part of the strategy of (unidentified) feminist organisations to improve the status of women. It is "purely a reflection of the activities of women's organizations elsewhere and of a much wider and deeper debate on social change and sexual morality which has been going on since the sixties and seventies in other parts of the Western World...".[76] Rape is correctly identified as a feminist issue. The Report suggests, however, that feminists who tackled the rape issue were not really concerned with sound legal reform. They merely created and utilized a rape controversy for their own purposes of changing the sexual status quo:

> "... it is evident that the initiative for reform [in other countries] in most cases arose from an ideological involvement with the campaign for an improvement in the status of women, rather than from an honest appraisal of defects in existing law and practice."[77]

The implication is clear: feminists are too biased towards their own cause to detect real weaknesses in the law. Rape is only a symbolic rallying point for feminist activists and, had they been less biased and dishonest in their criticism of existing law, their criticisms would not have been made. Feminist groups are thereby discredited. By

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76. Report para 1.3.

77. Report para 1.10.

identifying local calls for an investigation into rape-related issues with feminist activities elsewhere, the Commission is able to treat them with less consideration than they deserve. They are, after all, tainted by association. According to this view there is no rape problem, only a fabrication by feminists in pursuing their goal of equal rights for women. Consequently, all feminist-originated reform proposals are immediately suspect. The Commission maintains this position throughout the Report.

The Commission's undisguised suspicion of the unidentified feminist groups is a notable feature of the Report. There is a marked insider/outsider (or we/they) dichotomy in its approach which is highly revealing. Feminist groups are depicted as "outsiders" whose concerns are not identifiable with "ours", ie the concerns of "society" as represented by the Commission. "Our" concern is with good law reform, while "their" concern is to improve the status of women;[78] "we" identify <u>real</u> problems while "they" do not; "we" are objective, while "they" are biased.[79] The Commission strongly implies that the feminist concern about rape was (and still is) simply part of a strategy to achieve another, <u>unrelated</u> aim, viz an improvement in the status of women.[80]

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78. Report para 2.3.

79. Report para 1.10.

80. Report para 1.10.

Note the Commission's choice of language in the following extract on efforts made in America to re-define the crime:

> "Feminists made use of the current national preoccupation with crime control to induce legislators, prosecutors, and the police (who could not be motivated to law reform by the need for the realization of feminist values) to introduce reform. The latter allowed themselves to be influenced by this, and the result was radical reforms of the law relating to rape. The feminists were not so much concerned with law reform on the grounds of real and identified needs, as with a mighty and symbolic means to obtain equal rights for women."[81]

The language is suggestive of a conspiracy which managed to trick the legislators into feminist-oriented reform. As the Commission has already accepted that the reform has been disappointing in its results,[82] the implication is clearly made that the whole process was an unfortunate mistake from which "we" should learn.

The Commission here denies a link between rape and the wider society, which it recognised in a previous paragraph,[83] and suggests that the struggle for equal rights for women is incompatible with good law reform.

The Commission has clearly misunderstood the feminist position. The feminist aim is without doubt an egalitarian society in which women and men have substantive, not merely formal, equality. Feminists are concerned to identify real

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81. Report para 2.3 (underlining added).

82. Report para 1.11.

83. Report para 1.7.

barriers to this equality and, to this end, have focused on several issues such as marriage, family structure, child care, equal job opportunities and the role of the state and the law in the maintenance of the status quo. The Report correctly points out that rape occupies a special position on the feminist agenda. This is because, from the feminist perspective, rape lies at the heart of unequal and destructive gender relations. On one level, rape is a symbol of entrenched cultural sexism and has galvanised feminist energies. But that does not mean, as the Commission apparently believes, that rape is not a real problem. In feminist terms it is a form of violence against women which has very real consequences for women.

Feminists are depicted as outside society both geographically (these are mainly foreign feminist groups) and conceptually (they propose a radically different view of rape). Their ascribed status as outsiders to the consensus of society renders them marginal to it. The Commission, the mouthpiece of the consensus, reproduces the dominant view of feminist groups as outside society, ie deviant, suspect and not to be trusted.

The feminist perspective, being a woman-centred perspective, poses a challenge to the dominant, male-centred consensus on rape. This threat is dealt with by the Commission by the technique of nihilation. Nihilation is a conceptual procedure which denies the reality of phenomena or

interpretations which do not fit into the dominant symbolic universe.[84] The threat to the dominant social definition of reality, viz the deviant phenomena of feminist groups proposing an alternative reality, is neutralised by assigning to it an inferior or negative ontological status.[85] The feminist perspective thereby acquires the status of a marginal phenomenon, not to be taken seriously. Thus the potential threat which it poses is conceptually liquidated.

The Commission however, goes further than conceptual nihilation of the feminist perspective. It attempts to incorporate this deviant conception within its own symbolic universe, ie a male-centred, patriarchal universe. The feminist groups are perceived as biased towards their own cause, as unscrupulous strategists who use the law for their own ends, as dishonest in their criticisms of rape law and as mistaken in their attempts to change it. The Commission implies that if only they would be more objective (like "us") and more honest (like "us") they would realize their mistake and abandon their stand. This would bring them back into the consensus and they would share "our" symbolic universe. In this way, the potential threat to the dominant

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84. Berger and Luckmann supra n65, 132.

85 Berger and Luckmann supra n65, 132.

patriarchal reality is subtly converted into an affirmation of it.[86]

(iii) The third indication that the Commission does not recognise the existence of a real problem worthy of investigation is the following:

> "Many of the problems which the victim allegedly experiences at present are probably an inevitable result of our adversary system, and proposals to solve these problems should not lose sight of the possibility of prejudice to the accused."[87]

This statement, which appears under the heading <u>starting-point of the investigation</u>, does not augur well for the investigation. At the same time the reader is cautioned as to the competition between the victim's alleged problems and the accused's rights. The former are regarded at most as an unfortunate spin-off of the adversarial system. It is submitted that the Commission's lack of clarity as to the existence and nature of the problems of the victim leads it to confound this matter with the issue of the adversarial form of criminal justice. These issues are related but not identical. For example, from the victim's point of view, it is not simply the possibility of an insensitive, probing cross-examination of her sexual history that is problematic, but the existence of the rule which defines such information as legally relevant in the first place. The rules of

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86. See the discussion by Berger and Luckmann <u>supra</u> n65, 132.

87. Report para 1.9. See also para 4.64.

procedure and evidence are weighted against the complainant in that they impose special requirements on her and render her vulnerable to attack on her moral character.[88] The law encourages the examination of the complainant's sexual behaviour in deciding the issue of her consent to the act in question while protecting the accused from similar inquiry. Thus it is the law itself and not the adversarial method of criminal justice which is the basis of the complainant's problems in respect of the processing of the case. While an aggressive cross-examination can undoubtedly add to her trauma, it is not the real problem to be dealt with, as identified above. An inquisitorial system of criminal justice which allows for judicial scrutiny and assessment of the complainant's sexual morality could still traumatise the complainant.

The Commission's construction of the issue as a problem of the adversary nature of our criminal process is therefore a distortion. It reduces the issue to that of a simple competition between the rights of the accused and those of the victim. In one respect the Commission is correct: a defended trial in an adversarial system <u>is</u> a form of competition. The prosecution and the defence present differing constructions of the event in question. Though they may agree on a number of facts (which then become common cause), they present to the court competing

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88 See ss197 and 217 of the Criminal Procedure Act 51 of

constructions of the reality of the event, ie of the truth. The construction accepted by the court becomes the established "truth" for all purposes. The court's rejection of the complainant's version leads to the accused's acquittal, even though the court may not necessarily accept his version. In any event the rules that regulate the process of establishing "the truth" are provided by the law of procedure and evidence.

It is submitted that the Commission's mistake lies in its assumption that the participants begin the process from a footing of equality and therefore that a proposal to improve the position of the complainant threatens to disadvantage the position of the accused. Hence, before it considers the proposals, the Commission immediately counterposes this suggestion with the caveat of the potential danger to the rights of the accused. By means of a plea to the rights of the accused, it secures a balance of sympathy in his favour. It is argued here that the strengthening of the complainant's position does not automatically entail the weakening of the accused's position, as the Commission implies.[89] The Report suggests that the rights of the accused in the adversary system are superior to those of the victim and enjoy priority. This is one way of blotting out claims to improve the position of the complainant. Safeguarding the rights of an accused

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89. Report para 3.7.

should be a major concern of any criminal justice system but it is not the only interest to be taken into account. The accused's procedural rights are components of his major substantive right to a fair trial, ie an equitable determination of his guilt or innocence. The concept of fairness, however, does not include the placing of the complainant at a disadvantage in the prosecution of the case. It is submitted that the rules of procedure and evidence, which place a special burden on the complainant, do precisely this. The abolition of these rules would remove the disadvantage to the victim's position without prejudicing the right of the accused to a fair trial.

(iv) The fact that the Commission received a limited response to its questionnaire made it wonder "whether there really is so much dissatisfaction in South Africa with the law relating to rape as is generally made out by the press".[90]

This negative view is based on a perceived causal link between the limited response and the existence of the posed research problem. Only two points need be made: first, what constitutes a "relatively limited response"? According to the Report[91] the questionnaire was sent to 223 interested parties and was open for public comment. One hundred and sixteen interested parties and one hundred and five members

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90. Report para 1.13.

91. Report para 1.13 and p192.

of the public responded. From the Report it is impossible to gauge the quality and extent of the comments received, so the reader is obliged to rely on the Commission's evaluation of the response as limited. One is hard pressed, however, to avoid the impression, in the light of the Commission's negative and pessimistic view, that only an overwhelmingly positive and vociferous response (but probably not from feminists) would convince it that a problem exists. It obviously requires convincing. The Commission's evaluation of the response as "weak" must, in the absence of further information, be viewed in this light.

The second point is the Commission's belief that <u>because</u> of the limited response there is probably no real problem. This cannot pass without scrutiny. It misses the obvious point that rape victims do not have a high social visibility and that rape is not a public controversy. The Commission attaches insufficient weight to the hidden nature of the crime and the victim. Rape victims do not often speak publicly of their experience. Thus a high public awareness of the victim's problems cannot be expected and it is probable that the "limited response" is partly a reflection of the invisibility of the crime and of the victim.

2. <u>RESEARCH METHOD</u>

The Report is marred by two major methodological weaknesses, both relating to data sources.

(i) Dependence upon institutionalised authority

The Commission has relied on institutionalised authorities as a major data source. The information-gathering process for the Report was accomplished by way of a general invitation to the public to submit comment, a questionnaire sent to 223 "interested parties", discussions with representatives of agencies with a professional interest in rape-related issues, a closed seminar attended mainly by such representatives and the Commission's own research into law reform.[92]

The Commission placed great reliance on the questionnaire responses. In its own words:

> "Comments on this questionnaire were used to define controversial issues and to single out subjects for investigation, and have helped to determine the need for reform and the alternatives for reform...."[93]

In other words, the Commission has allowed the collective response to decide whether victim-related problems exist, what they are and how they should be solved. Responses were received from various bodies, such as churches, welfare organisations, women's organisations and academics. Not surprisingly, almost half of the responses received (according to the table in the Report) emanated from law enforcement officials and state bodies: judges, regional and district magistrates, Attorneys-General, senior public

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92. Report paras 1.13, 1.14 and 1.15.

93. Report para 1.13.

prosecutors, law societies, the General Council of the Bar of South Africa, the State Attorney, government departments and administration boards.[94] Similarly, the overwhelming majority of parties with whom consultations were held were state officials: 8 Attorneys-General or their deputies; 12 regional magistrates; 36 district magistrates; 3 public prosecutors; 10 members of the South African Police; 7 district surgeons; 4 provincial hospital officers; 10 officers of various state departments; 10 rape crisis representatives and one expert on forensic medicine. Most of these people were men.[95]

The questionnaire itself and a summary of responses do not appear in the Report. Nor is the reader able to assess, purely from the lists of contributors, the quality and extent of the contribution of the various participants. However, on a purely quantitative evaluation, it is clear that the Commission has relied mainly on state-supported sources for its data, viz agents in the criminal justice system. They, however, could not agree on where the problems lay:

> "Because of the divergent nature of the involvement of those concerned and their conviction that other disciplines than their own were really responsible for the victim's trauma there was clearly a need for them to be confronted with one another's views, problems and suggested solutions and to be able to contribute in joint discussions to the formulation of tentative

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94. Report p 192.

95. See Report pp 186-200.

> proposals.... A closed seminar was therefore organized...."[96]

It is implied that if only the criminal justice personnel can get together and exchange views and criticisms, the problems will somehow be ironed out. This increase in mutual understanding between the various agencies might well contribute to the smoother operation of the criminal justice process, but what will it do for the victim? Her problems are not likely to be better understood or alleviated in this way.

The Commission's over-reliance on certain sources cannot be ascribed to any conscious, conspiratorial bias in favour of state authority. On the contrary, it clearly upholds the notions of balance, impartiality and objectivity as research values, hence its aim to expose "actual existing problems",[97] to consider the demand for reform "realistically and objectively"[98] in the light of the present South African law and its insistence that only an empirical study of rape in South Africa can provide "the facts".[99] What emerges from the Report, is the Commission's distinction between facts and opinions which belies its apparently democratic method of investigation. Its attempt

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96. Report para 1.15.

97. Report para 1.10.

98. Report para 1.10.

99. See Report para 1.7.

to get to the truth leads the Commission consistently to search for "the facts" from certain accredited sources and not from others. Thus the over-reliance of the Commission on the official agents of the criminal justice system stems from its demands of impartiality and objectivity and is based on a belief that these agents (whom Hall,[100] in a different context, has called the "institutional spokesmen") have greater access to the truth due to their special position. Their statements are thus accepted as objectively true and authoritative. For example, in its discussion of the evidentiary rule allowing for the cross-examination of the complainant on her character and previous sexual experience, the Commission notes that only "a few individuals" criticise this rule:

> "... the criticism is mainly levelled by representatives of Rape Crisis organisation and a few lawyers. Some members of the public also strongly criticised the present position in their comments to the Commission. The grounds advanced for the criticism emanating from the latter source however are indicative of a probable lack of knowledge of the application of the law of evidence. Those who administer the law (magistrates, prosecutors and attorneys-general) are all agreed that there is no need for reform...."[101]

The operation of a "hierarchy of credibility"[102] is evident, ie those who occupy powerful or high-status positions in

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100. Hall et al Policing the Crisis 58.

101. Report para 3.7. See also para 3.28.

102. The term is adopted from Becker "Whose side are we on?" in J D Douglas (ed) The Relevance of Sociology 99-111.

society are more likely to have their views and opinions accepted as the truth than those in positions of low-status or powerlessness. The hierarchy of credibility reflects the distribution of power. For example, in the institutional hierarchy the official law enforcement agents rank above crisis clinics, and on the lowest rung one would find the person with the lowest status and the least power - the victim herself. Her perceptions and views carry the least credibility. The image of the rape victim as a person of low credibility is reproduced in the law itself.[103] The representatives of the major social institutions of the criminal justice system are able to impose their definitions of the problem and thereby determine the parameters of the research. In this way, the Report has unwittingly reproduced the existing power structure in the criminal justice system and in the wider society.

The discussion of the problem takes place on a certain hierarchical rung and mainly between those whose status-positions are located there, viz the official agents of the criminal justice system. It becomes easy to see the problem as an "in-house" affair - something that can be effectively dealt with in a closed seminar. The conclusion is unavoidable that the Commission has turned to the sources from which it is least likely to obtain the data it

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103. In the evidentiary rules relating to complainants in sexual cases. See infra 'The Reform Proposals'.

requires: to those who are allegedly responsible for the problems of the rape victim.

The investigation is thus reduced to an exercise in self-criticism on the part of law enforcement officials, with the Commission acting as catalyst. It displays little vigorous, independent thought, preferring to gather and arrange the opinions presented to it and to crystallize some measure of consensus on the various topics. It does so in the rather pedestrian manner of aligning all arguments for reform against the arguments opposing reform and then arriving at a conclusion and recommendation which accords with the majority view. Not surprisingly, it recommends few changes to the present law. The possibility is never raised that the criminal justice system itself (and, more specifically, the fact that it is operated and controlled by middle-class, male bureaucrats, who cannot or will not share the victim's perspective) might be part of the problem.

(ii) <u>The absence of the victim</u>

In contradistinction to its over-reliance on institutional sources, the Commission's Report ignores completely the rape victims as a source of information. They are excluded from the investigation with the following glib dismissal:

> "No evidence was sought from victims themselves in order to establish whether they had really experienced the high degree of trauma due to the process of law that is generally alleged by criminologists, sociologists, women's organizations, crisis services and the press

> because the Commission does not have personnel trained for this type of investigation."[104]

This is the only reason put forward by the Commission. It is contended here that in a Report entitled Women and Sexual Offences in South Africa which explicitly adopts the victim as the starting-point, the victim as a source of information would be acknowledged as crucial to the whole enterprise. The omission of this source endangers the credibility of the Report and requires a greater justification than is offered. The Commission apparently disagrees with this proposition, as it offers no further justification nor does it display any hesitancy regarding the validity of its findings. In addition, it must be pointed out that in terms of the South African Law Commission Act,[105] the Commission is granted the power to consult any person or body in the process of its investigation. The Commission may employ "any person with special knowledge of any matter relating to the work of the Commission, or obtain the co-operation of any body, to advise or assist the Commission in the performance of its functions" under the Act.[106] The conclusion is unescapable that the Commission has chosen not to make use of its powers.

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104. Report para 1.17.

105. Act 19 of 1973.

106. Sections 5(3) and 8(2) of the Act.

Two questions, however, must be posed:

(a) What assumptions led the Commission to believe that it could omit the rape victim from the inquiry without endangering the credibility of the Report?

(b) What is the significance and implication of the absence of the victim from the Report?

As regards the first question, it appears that the Commission accepts without question that the institutional authorities are competent to provide knowledge and insight into the problems experienced by the rape victim. There is no perceived need to approach the victim because the Commission (and the authorities themselves) assume that they can speak on her behalf and that their pronouncements will be authoritative.

The assumption that men[107] can produce authoritative knowledge about women is deeply embedded in patriarchal society and reflects the social and moral authority accorded to the powerful group. The generation of such knowledge as a matter of public record is itself a function of social power. This militates against the production of knowledge generated by women themselves which, in the feminist experience, is significantly at variance with knowledge produced by men.

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107. As noted supra n95, the majority of those consulted by the Commission were men.

As regards the second question posed, it is evident that the absence of the rape victim constitutes a major defect in the Report. The victim and her point of view are relegated to the status of non-data.[108] Her independant ability to know is denied and is subsumed under the ability of the institutional authorities to know on her behalf. The Report thus represents an instance of men producing knowledge about women: in this case, raped women and their problems. Their credentials as producers of knowledge are accepted as impeccable; no-one questions their ability to know. This is because the power to produce knowledge includes the power to define that which constitutes data and that which constitutes non-data.[109] There is an inverse proportion between the degree to which the Commission has relied on its sources and the ability of these sources to "know" about the problems of the rape victims and a direct proportion between reliance on the sources and their vested interest in maintaining the present sexual and legal status quo. Under guise of objectivity, the Report is able to pursue an anti-feminist bias which is all the more remarkable for its occasional transparency. This bias reveals the central contradiction in the Report: the Commission rejects what it

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108. Daly Beyond God the Father: Towards a Philosophy of Women's Liberation 11.

109. As Daly notes, women have historically been classified as non-data: absent from history and invisible in the world. Daly supra n108, 7.

perceives as feminist values[110] but claims that the victim is the starting-point of its inquiry.[111] The victim as the starting-point is the essence of the feminist perspective. This perspective takes women's experience as its reference point and it attempts to describe the world from the standpoint of women. Although the Commission has undermined its stated position, ie the victim as the starting point, by the research method it follows, it is clear that the Commission believes that it has reproduced reality from the point of view of the victim. The Commission thereby validates the very position it explicitly rejects.

3. THE AIMS AND GUIDING PRINCIPLES OF THE INVESTIGATION

A notable feature of the Report is the total absence of stated policy considerations and guiding principles. The investigation is placed in a social and political vacuum where "common sense" is presumably the key guide to reform.[112] The lack of conceptual framework in which to understand the central research problem and to situate consequent recommendations is a serious flaw. Some articulation of the main considerations or the criteria used

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110. See Report paras 1.3, 1.10 and 2.3 where the Commission explicitly distances its position from that of "feminists".

111. Report paras 1.9 and 2.19.

112. On the importance of "common sense" as a site on which the dominant ideology is constructed and challenged, see Gramsci Selections from the Prison Notebooks 323-343 and 419-425.

in the formulation of reform proposals would have sharpened the considerably diffused and confused focus of the Report and increased its internal coherence.

The Commission might well have followed the example of the Law Report Commission of Canada which, in its report on Sexual Offences,[113] stated three cardinal reasons why it believed the Canadian law of sexual offences was in need of reform and selected three fundamental principles on which to base reform:

(i) protection of the person;

(ii) protection of children and special groups;

(iii) safeguarding public decency.[114]

The insight, clarity of purpose and vigour with which the Canadian Law Reform Commission approached its task stands in stark contrast with the approach of its South African counterpart. One may or may not agree with the selection of guiding principles but they make the report more intelligible and amenable to critical discussion.

4. THE PERCEIVED ROLE OF LAW REFORM

How then does the Commission view its task? What does it hope to accomplish? Very little, it seems.

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113. Of 1978.

114. Report Chapter 1.

This view is based on a belief that reform of rape laws in other jurisdictions has been disappointing in its achievements. Reform represents merely a "symbolic victory in the struggle for equal rights of women, rather than an actual solution of existing legal problems".[115] Legal reform elsewhere, in the Commission's view, has not accomplished much and "[i]t would be short-sighted not to learn from this evaluation".[116] It is not explained precisely why the reader is asked to engage in cross-cultural comparison on this point, when the Commission rejects its relevance on others. The "symbolic" results of reform accomplished elsewhere are stated to be the promotion of "a greater awareness of the crime and a change in attitude towards the crime, the victim and the rapist, and recognition of the sexual autonomy of women".[117] Why these <u>real</u> gains are relegated to the realm of the symbolic is not clear. If legal reform can indeed accomplish all this, then the first small steps towards genuine social change in rape-related matters will have been taken.

While it would be foolish to expect social problems to be eradicated with a stroke of the legislative pen, it appears that the Commission underplays the potential of reform and has low expectations of what can be achieved. It implies

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115. Report para 1.10.

116. Report para 1.10.

117. Report para 1.11.

that because legal reform cannot eradicate rape, "it would be more realistic to expect minor changes in the attitude towards the victim".[118] If that is the most one can expect from reform, the whole enterprise seems rather hopeless. The Commission from the outset has an almost defeatist attitude to its task. The short-sighted, pseudo realism of the Report constitutes more of a stumbling block than a clear perspective on the potential of legal reform. Its view is reducible to the proposition that, as rape is a social problem, there is little to expect from legal reform.

But the Commission has overlooked the possibility that the law itself forms part of this social problem. The problem consists of not only the occurrence of widespread, undetected and tolerated acts of rape but also of the law's unwitting contribution to their perpetuation: the selective application of the criminal justice process and the content of the law itself. From a feminist perspective it is imperative that this contribution be recognised and dealt with effectively. Many of the social and male-biased beliefs about female human nature and rape are encoded into the substantive and procedural law. The law helps to reproduce them as "knowledge", the effect of which is to hinder the reporting and successful prosecution of rape cases. Legal reform cannot totally eradicate the occurrence

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118. Report para 1.11.

of rape but it can surely attempt to deal with the law's contribution to the problem.

The reform of rape law in other jurisdictions has not proved to be as worthless an exercise as the Commission suggests. In a careful study of reform in Washington, Loh[119] found that the positive effects of the new rape law[120] were the following:

(i) A more precise labelling of the act, ie acts which, under the old law, would have been charged as assault, are dealt with as rape in terms of the new law.

(ii) As the reform proponents had hoped, the gradation of rape has enhanced considerably the negotiating flexibility of prosecutors.

(iii) The punishment for convicted offenders has become more certain even though it is less harsh. Judges are stricter in sentencing and impose suspended sentences only one third as often as under the old

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119. Loh "What has Reform of Rape Legislation Wrought?" 1981 37 (4) Journal of Social Issues 28-52. See also Loh "The Impact of Common Law and Rape Reform Statutes on Prosecution: An Empirical Case Study" 1980 55(3) Washington Law Review 543-625.

120. The law divides rape into three degrees according to the extent of force or threat used: first degree rape is forcible intercourse under aggravated circumstances; second degree rape requires intercourse under compulsion; third degree rape is intercourse without consent or with threat of substantial harm to property rights.

> common law. The commitment to in-patient sexual offender treatment facilities has more than doubled. According to general deterrence theory, it is the certainty of adequate (though not overly harsh) punishment which should result in a lower incidence of the crime.

Loh found, however, that reform has not affected the proportion of cases charged or declined, nor the proportion of convicted cases. This indicates that, regardless of the governing law, prosecutors use the same criteria to decide whether or not to charge and what offence to charge. The author concludes that the main impact of the reform has been an educative one for society at large rather than an instrumental one for law enforcement. The reform law has created a climate for change in the criminal justice system that encourages the enforcement of rape laws as a top administrative priority:

> "The role of the reform of rape law as a catalyst for attitude change may be greater than any immediate impact on the criminal justice system. The criminal law serves not only a general deterrent function. It also has a moral or 'sociopedagogic' purpose to reflect and shape moral values and beliefs of society."[121]

It is submitted that the Commission under-rates the importance of attitude change as an aim of law reform. It bases its negative evaluation of reform in other jurisdictions on its opinion (which is also open to

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121. Loh supra n119, 50.

challenge) that reform has not had much impact on the instrumental function of the law (actual law enforcement); all it has been able to achieve is a change in social attitudes towards the crime and the victim. The Commission thus views the educative function of law as secondary in importance; changing attitudes is seen as a lesser achievement.

It is argued here that the contrary is true: that in the reform of rape law the educative function of law is of primary importance. Changing attitudes towards the victim is a major task and a necessary precondition for more effective law enforcement. Reformed rape law into which is encoded a different image of the victim and which extends more control over the decisions and behaviour of the criminal justice agents would help to create a climate in which further change can occur. Legilative reform is a necessary prerequisite for change but it is not <u>per se</u> sufficient. There must also be a firm commitment to effective enforcement by those who operate the criminal justice system. As the Commission is aware, more effective rape law enforcement necessitates a change in their attitudes towards the crime and the victim. For the process of reform to begin they will be required to play a leading role in the formation of new public attitudes.

CONCLUSION

It is clear from the aforegoing discussion that the Commission is not at all certain whether a research-worthy problem exists. Its demarcation of the area of research amounts to a defining-away: It accepts that there is no significant under-reporting of rape. Allegations to the contrary and to the effect that the legal process itself traumatises the victim are believed to originate in feminist crusades to change society, not in a genuine concern for sound legal reform. The Commission believes it inevitable that the victim should be discomforted in the legal process. A serious defect in the Report is the Commission's unresolved ambivalence as to the existence of the problem. It appears constantly to shift its position from a denial that the legal process causes any problems for the rape victim, to an admission that there might well be a problem, to an acceptance as a working assumption that there might be a secondary victimisation, without being sure that it exists in reality.[122]

In the light of the above and of its beliefs that legal reform can accomplish little, the question must seriously be raised whether the Commission has become entangled in a circular, self-fulfilling formula in which its presuppositions contain its conclusions. The submission

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122. See for example Report paras 1.17 and 5.1.

made here is that it has indeed fallen into the trap of the logical fallacy of the petitio principii.

THE REFORM PROPOSALS

The Commission recommends few changes to the law or the administrative processing of rape cases in the criminal justice system. The recommendation may be summarised as follows, in accordance with the format of the Report.

1. SUBSTANTIVE LAW

The Commission considers three matters under this head, viz the definition of the crime of rape, marital rape and the irrebuttal presumption that a boy under the age of 14 years cannot be guilty of rape.

(i) Redefinition of the Crime

The Commission rejects a proposal to redefine the crime of rape.[1] The following eight reasons for this rejection emerge from the Report:

(a) the impetus for this reform is identified as feminist-inspired and therefore to be treated with suspicion.[2] Objections to the present definition were received almost exclusively from representatives of Rape Crisis and certain women's organisations.[3]

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1. Report para 2.21.
2. See supra 36-41.
3. Report para 2.3.

(b) There were no proponents of redefinition among the "interested persons" who responded to the Commission's questionnaire or with whom discussions were held.[4] At the closed seminar it became evident to the Commission that there is at present no need to redefine the crime.[5]

(c) A redefinition of the crime along the lines proposed, ie viewing rape primarily as an assault, would, by its emphasis on violence, be a retrogressive step. It would constitute a restriction on the legal protection enjoyed by women at present.[6]

(d) A shift in emphasis to the violent nature of the act of rape would not circumvent another of the objections to the current definition, viz the emphasis on the victim's consent. This is because, in the Commission's view, rape and assault are fundamentally different: "The essential element of rape is sexual intercourse without consent while the essential element of assault is the application of violence without consent".[7]

(e) A single criminal category dealing with sexual crimes might lead to legal uncertainty and in consequence is

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4. Report para 2.12.

5. Report para 2.12.

6. Report para 2.13.

7. Report para 2.15.

undesirable. The Commission accepts that rape is a "distinct sexual crime" which must be distinguished from "unnatural sexual intercourse", because the interests protected in each case are different.[8]

(f) Prosecutors would be confused if rape were redefined as a species of assault, graded according to the seriousness of the attack.[9]

(g) Experience in other jurisdictions shows that the redefinition of rape is mainly of "symbolic" significance.[10]

(h) Changing the name of the crime from rape to assault does not change the law of evidence: the same evidence must be given in each case. Since the starting point for the investigation is the alleviation of victim trauma, any such change will do nothing to improve the position of the victim.[11]

These factors are inadequate reasons for rejecting a redefinition of the crime. The Commission's treatment of the issue is marked by bias and a certain amount of confusion. It has a clear anti-feminist stance (which was noted earlier). The Commission advances as one of its

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8. Report para 2.16.

9. Report para 2.17.

10. Report para 2.18.

11. Report para 2.20.

reasons for rejecting a redefinition the fact that none of the interested parties who responded to the questionnaire or with whom discussions were held, were in favour of it. But the Commission has ignored the views of representatives of Rape Crisis and certain women's organisations which were in favour of redefinition. From the Report[12] it is evident that Rape Crisis and 24 women's organisations commented on the questionnaire, that 10 Rape Crisis representatives took part in the discussions[13] and that four representatives attended the closed seminar. It seems that the Commission's definition of "interested parties" excludes these groups. The Report gives no justification for this.

In addition, the Commission has allowed the collective opinion of the "invested parties" to form its own conclusion (see (b) supra) that there is no need to redefine the crime of rape. With respect, it is trite that the existence of the need is an issue which the Commission itself must decide. It cannot evade this issue by accepting the opinion of certain parties as conclusive.

The Commission reveals considerable conceptual confusion in respect of the merits of an alternative definition of rape. It does not see the need for redefinition because it accepts without question that rape really is what the law proclaims it to be (see (d) supra), that rape and assault laws deal

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12. Report p 197-200.

13. Report p 197-200.

with qualitatively different behaviour and that the interests which are protected in each case are essentially different. All of these notions are open to serious challenge.[14] However, the Commission is precluded from a critical inquiry by its inability to break the conceptual grip of the law of rape on its thinking about the problem. Its reasoning therefore becomes circular.[15] It is not able to reconceptualise rape as a form of assault and discuss the merits of such an alternative concept. It thus tends towards confusing reconceptualisation with simple re-naming of the offence (see (h) supra). The objections of confusion for prosecutors and the supposed symbolic significance of the reformed rape law elsewhere are both inadequate: although new laws might initially be confusing, the Commission underestimates the ability of South African prosecutors to cope with such problems. In the light of these allegedly real problems for the prosecution, it is difficult to understand why the Commission views the redefinition of rape as merely "symbolic". The reference which it cites in support of this proposition does not, in fact, support it:

> "The new rape law symbolizes and reinforces newly emerging conceptions about the status of women and the right of self-determination in sexual conduct."[16]

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14. See Hall "Rape: The Politics of Definition" (unpublished paper 1987).

15. See also Report para 2.16.

16. Report para 2.18.

The point here is that the "old" rape law, ie the Anglo-American common law definition of rape, both reflects and reinforces an inferior status for women. Its underlying values and the interests it protected were (and are) inimical to women's interests.[17] Just as the old law stood as a symbol of an old order of sexual inequality, so the reform of rape law (largely as a result of feminist activism as the Commission points out), stands as a symbol of an altered conception of the status of women. It is a highly significant event that women, who have traditionally been excluded from the law-making process, were able to lobby successfully for the introduction of a law which reflects and attempts to protect their interests. The new law thus stands as a symbol or index of a change in women's status and social power. This does not mean, however, that the content of the law is also symbolic. Redefining rape in terms of assault involves a reconception of the nature of the act and consequent changes in the processing of rape cases. That this innovation should encounter initial practical difficulties and uncertainties is hardly surprising, but it cannot constitute a fatal objection to redefinition.

The last reason why the Commission recommends that the crime not be redefined relates to the aims of the investigation. The Commission admits that the investigation did not arise

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17. See Hall supra n14.

out of a need to rationalise the criminal law, nor did consideration of the substantive law fall within its brief.[18] Nevertheless it decided to investigate this matter "because objections are often raised against the definition of rape by certain interested parties in conjunction with representations for the reform of the law relating to rape".[19] In its final opinion, however, the Commission accords more weight to the arguments against reform "especially since the starting-point of this investigation is the alleviation of victim trauma".[20] It is difficult to follow the logic in this argument. The Commission deliberately included in its research a topic which fell outside of its brief and which it believes was not necessary for the investigation, yet it makes a recommendation on this matter on the basis of its <u>irrelevance</u> to the aim of the inquiry! If the Commission is of the opinion that the issue of redefinition is not relevant to the aim of its investigation then it should decline to consider or pronounce upon it. On the other hand, if it does consider the matter, it cannot logically base its recommendation on the tangential relevance of the topic to its particular purpose.

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18. Report para 2.1.

19. Report para 2.1.

20. Report para 2.19.

(ii) Rape in Marriage

The Commission recommends that the marital rape exemption be abolished but that prosecutions should not be permitted without the permission of the Attorney-General.[21]

The process by which the Commission arrives at this recommendation is typical of the process which it adopts throughout the investigation. After a short statement of the current law (or administrative practice, in Chapter 5), the Report lists the arguments advanced for reform and the proposed alternatives. Then it lists the arguments against reform and, lastly, comes to a conclusion and recommendation. Superficially, this process appears to be a sound one. But, in fact, the Commission arrives at its conclusion and recommendations by adopting the view of the majority of those informants whom it regards as authoritative.

The paragraphs of the Report in which the marital rape exemption is discussed are illustrative of this method. The Commission notes that this topic proved to be highly controversial. In its investigation it became clear that opposing views on the topic were almost equally divided.[22]

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21. Report para 2.43.

22. In the Commission's seminar the matter was put to the vote. There was an almost equal split of opinion between those in favour of the exemption and those against it (Report para 2.22). See also Report paras 2.41 and 2.42.

After considering all the arguments, the Commission indicates its own preference for the abolition of the exemption. The arguments are so weighty that, in its opinion, abolition of the rule seems to be the obvious and only acceptable solution.[23] Yet it declines to adopt this solution because it feels bound to take the opposing view into account:

> "... it is not a question of a minority group that is opposed to such reform: the views of an equally large group of lawyers and interested persons cannot simply be ignored."[24]

These views are to the effect that the exemption cannot be abolished without tampering with the institution of marriage, as it is generally accepted.[25] The Commission shrinks from adopting a simple, logical conclusion which it openly endorses because of its wish to accommodate opposing views. It therefore adopts a compromise solution of recommending the abolition of the exemption but allowing prosecution only with the Attorney-General's permission. In this instance there was no clear majority opinion. The Commission's compromise solution is an attempt to take two opposing views into account.

The intended effect of this compromise is not clear. On the one hand it appears to grant to the Attorney-General no

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23. Report paras 2.42 and 2.43.

24. Report para 2.42.

25. Report para 2.42.

greater power than he already has. In terms of the Criminal Procedure Act,[26] the decision of whether to prosecute any criminal case rests with the Attorney-General of the relevant provincial division. In this respect he exercises a wide discretion and is subject only to the Minister of Justice.[27] It is arguable, therefore that the recommendation merely restates the already existing legal position and the qualification was included mainly to allay fears of the more conservative opinion. If that is so, the qualification that no prosecutions for marital rape be instituted without the consent of the Attorney-General introduces no change in the law. As a recommendation for reform it is without import.

On the other hand, it is arguable that the recommendation is intended to be more than a restatement of the current legal position. It is submitted that the qualification represents a retreat by the Commission from its contention that the marital rape exemption should be abolished. The Report itself supports this view. The Commission has advanced three explicit justifications for requiring the Attorney-General's permission: to mitigate the drastic change in the legal position; to prevent unfounded charges coming before the courts and to prevent the possibility of a

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26. Act 51 of 1977.

27. Section 3(5) of the Criminal Procedure Act.

reconciliation being jeopardized by court proceedings.[28] Secondly, the Commission includes in its proposed bill a section specifically making prosecution subject to the Attorney-General's consent.[29] These factors indicate that the Commission contemplates different treatment for cases of marital rape, ie that the Attorney-General should exercise his discretion to prosecute in a manner differently from other criminal cases. The Report does not indicate how the Attorney-General is to reach his decision or whether he is obliged to issue a nolle prosequi when he declines to prosecute, in order that a private prosecution may take place.[30]

It is argued here that the compromise solution is unsatisfactory. The Commission's recommendation does not confront the issue of the rights of married women to bodily integrity and equal protection under the law. In terms of the recommendation, do married women acquire the right to refuse sexual intercourse with their husbands? In theory, they do, but this right is rendered potentially nugatory by the qualification imposed. With respect, there is little to be gained in granting wives this substantive right while making the exercise of the right dependant on the consent of a third party who is not obliged to furnish reasons for his

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28. Report para 2.43.

29. Article 2(2) of the bill. See Report p 179.

30. In terms of s7 of the Criminal Procedure Act.

decision and who acts subject only to the Minister of Justice. The justifications advanced for the qualification are insubstantial: the fear of a large number of false charges being brought before the courts has proved to be groundless in those jurisdictions which have abolished the exemption. It seems that relatively few wives are prepared to lay a rape charge against their husbands,[31] an indication which contradicts the myth of the vindictive wife underlying the Commission's justification.[32] Similarly, the objection that reconciliation may be jeopardized by court action is best dealt with by allowing the complainant to withdraw if she so wishes,[33] and not by the independent action of the Attorney-General. While it is readily conceded that sound law should not seek to encourage the break-up of families, it should give the raped wife the discretion whether to

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31. See Sallman and Chappell "Rape Law Reform in South Australia" Adelaide Law Review Research Paper No 3, 36-39; Geis "Rape-in-Marriage: Law and Law Reform in England, the United States and Sweden" 1978 6 Adelaide Law Review 284-288; Barshis "The Question of Marital Rape" 1983 6 Women's Studies International Forum 383-393, 389.

32. This illustrates the point made supra 30 that social myths may continue to survive despite factual evidence to the contrary.

33. The law could possibly stipulate a cooling off period between the laying of the charge (and the gathering of the evidence) and the actual prosecution, in which reconciliation may be reached if this is possible.

preserve her physical integrity or the integrity of the family unit.[34]

It is contended here that the basis of the objection to abolishing the marital rape exemption is resistance to the idea that "it is indeed so dreadful for a husband to rape his wife that he should be called a criminal for doing it".[35] Such resistance was expressed to the Commission by the "large group of lawyers and interested persons" at its seminar. In a highly revealing paragraph of the Report, the Commission notes that this group put forward the following view:

> "This [sic] husband and his wife have probably often had sexual intercourse with each other before and because there is often a measure of compromise in a sexual relationship, the wife may already in the past have consented unwillingly [sic] to sexual intercourse. If her husband forces her in the said circumstances to have sexual intercourse with him, the element of 'sexual intercourse with a woman without her consent' is technically certainly present and the husband's behaviour may be a sign that the marriage is breaking down. They argue further

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34. A view similar to that of the Commission was expressed in the report of the Criminal Law Revision Committee Sexual Offences (1980) para 33: "Spouses have responsibilities towards one another and to any children there may be as well as having rights against each other. If a wife could invoke the law of rape in all circumstances in which the husband forced her to have sexual intercourse without her consent, the consequences for any children would be grave, and for the wife too.". See also Morris and Turner "Two Problems in the Law of Rape" (1952-55) 2 University of Queensland Law Journal 247-263. The basis of this view is a plea to the wife to give priority to the family unit rather than to her physical integrity.

35. Criminal Law Revision Committee Sexual Offences (1984) para 2.64.

> that this behaviour on the part of the husband is however very far removed from the ugly, loathsome, deplorable deed for which the death sentence can be imposed, and with which the term rape is generally associated."[36]

The resistance to abolishing the exemption rests not on any overt wish to oppress wives but on the acceptance of the stereotype of "true rape" referred to above.[37] This is clear evidence that the stereotype or myth is adhered to by at least some of the officials responsible for the legal processing of rape cases in South Africa. It is quite likely that this will influence the nature of their response to the victim or the disposition of rape cases. It follows that some Attorneys-General may regularly refuse to prosecute cases of marital rape. It is submitted that such a practice would amount to an unwarranted discrimination against married women and, in the light of contemporary thinking, is unacceptable.

(iii) The irrebuttable presumption that a boy under 14 years cannot be guilty of rape

The Report deals with this matter very briefly. It recommends the abolition of the presumption, mainly on the basis that no arguments against reform were advanced to it.[38]

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36. Report para 2.42.

37. See supra 28.

38. Report para 2.52.

2. LAW OF EVIDENCE

Under this head, the Commission considers three legal rules which have been strongly objected to by critics of the present rape law: the rule allowing the complainant to be cross-examined on her previous sexual experience, the complaint in sexual crimes and the cautionary rule applicable to her evidence. Despite the criticisms advanced that these rules are discriminatory, unjustifiable and rest on sexist assumptions entrenched in the law itself, the Commission recommends no changes apart from a minor qualification. It proposes a prohibition on the cross-questioning of the victim on her previous sexual experience with persons other than the accused unless an application is made to the presiding judicial officer *in camera*, stating the grounds for the admissibility of such questions.[39]

The Commission's discussion of this area of the law is notable for its lack of critical insight and its over-reliance on certain sources for information. Regarding the cross-examination of the complainant on her sexual history, the Commission accepts as unproblematic the very issues which it is required to investigate. For example, it affirms as unproblematic that evidence of previous sexual intercourse between the complainant and the accused "is always admissible *because it is directly relevant to the*

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39. Report para 3.28.

issue of consent".[40] Similarly, it regards it as trite that "evidence concerning character"[41] will always be relevant for the purposes of sentencing.[42] This view begs the question: it is precisely the supposed relevance of these issues which is in question and must be investigated.

The operation of a hierarchy of credibility[43] is evident in this section. The Commission discounts criticism of the law emanating from the public as due to probable ignorance[44] but accepts similar criticism from lawyers, prosecutors and magistrates.[45] On the strength of the criticisms of the legal profession, the Commission distinguishes between evidence concerning sexual intercourse with persons other than the accused, and evidence concerning previous sexual intercourse with the accused. In respect of the latter, the Commission accepts that such evidence is always relevant[46] and that the law should not be altered.[47] In respect of the former, however, the Commission notes that the admission of such evidence is prejudicial to the complainant: lawyers,

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40. Report para 3.6 (underlining added).

41. That is, of the complainant's character.

42. Report para 3.27.

43. See supra 49.

44. Report para 3.7.

45. Report para 3.26.

46. Report para 3.25.

47. Report para 3.29.

prosecutors and magistrates admitted to the Commission that despite the right of the court to exclude such evidence, it is often admitted in rape cases and that the complainant's character is thereby unnecessarily and unfairly attacked.[48]

Although the recommendation that the admissibility of such evidence must be argued represents a progressive step, it is submitted here that the Commission once again settles for a half-measure of reform. It attaches insufficient weight to the criticism that this measure has proved to be ineffective in other jurisdictions because the counsel usually apply for and are rarely refused permission to include this evidence.[49] The Commission apparently believes that this will not occur in South African courts. It is contended here that such a belief is unfounded and hardly tenable in the light of the admission by those regularly involved in rape cases that this evidentiary rule is used to attack the complainant's character unnecessarily and unfairly.[50] As it appears from the Report itself the admission is that this

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48. Report para 3.26. It is arguable that a distinction should be drawn not between the sexual partners of the complainant, as the Commission has accepted, but between evidence of prior sexual activity (with the accused or not) which goes to an issue in the case, and evidence which goes to show the complainant's credibility. The latter evidence should be inadmissible, while the former should be admissible. Unfortunately, the Commission does not appear to have considered this.

49. Report para 3.31. See also Newby "Rape Victims in Court - the Western Australian Example" in Scutt (ed) Rape Law Reform 115-126, 117.

50. Report para 3.26.

occurs often, not exceptionally, and despite the court's power to prevent it.[51] This amounts to an admission that this practice is fairly widespread and tolerated by the judicial personnel and occurs "only because... this type of evidence is admissible".[52] In the face of widespread, tolerated, unfair attacks on the complainant's character, the possibility of regularly having such evidence included on application is not at all remote. There is little reason to believe that this will not occur.

Although the recommendation has the merit that it would compel the court to consider the matter before admitting the evidence, it is submitted that this measure will not prove effective unless accompanied by a significant change in attitude towards the victim.[53] An evaluation of the operation of a similar provision in England, s2 of the Sexual Offences (Amendment) Act of 1976, has revealed that this measure has had little impact. The section has been

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51. Report para 3.26.

52. Report para 3.26.

53. Legal reforms which disturb these notions meet with resistance on the part of the criminal justice personnel. For example, Chappell and Singer Rape in New York City: A Study of Material in the Police Files and its Meaning 266, in Chappell, Geis and Geis (eds) 246-271 report that, after the state of California abolished its corroboration requirement, a Los Angeles deputy prosecutor stated: "Legal theory is not legal reality... and in California, just like anywhere else in the country, a woman who hopes to win a rape case better have plenty of corroboration.".

capriciously applied and has been disappointing in its results.[54]

It does not appear from the Report that the Commission is aware of the inequity in our law in s227 of the Criminal Procedure Act[55] or of the sexist assumptions underlying it. The general rule in regard to the protection of one's character in court proceedings is found in s197 of the Criminal Procedure Act. This section provides that an accused who gives evidence at criminal proceedings shall not be asked or required to answer any questions tending to show that he is of bad character. However, where the conduct of his defence involves imputations on the character of the complainant or other state witness, the accused loses this protection.[56] Section 227 constitutes an exception to this general rule: where the accused is charged with an offence of an indecent nature on a woman, then the section allows him to adduce evidence of her character without losing the protection afforded to his character in terms of s197. Consequently, where a woman alleges that she has been raped, sexually assaulted or insulted,[57] the court may inquire into

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54. See Adler "Rape - The Intention of Parliament and the Practice of the Courts" 1982 45 Modern Law Review 664-675, and Adler "The Relevance of Sexual History Evidence in Rape: Problems of Subjective Interpretation" 1985 Criminal Law Review 769-780.

55. Act 51 of 1977.

56. Section 197(a) of the Act.

57. The offence of crimen injuria.

her character but not into that of the accused. The effect of s227 is to place female complainants in cases involving indecency on a different footing from male complainants in indecency cases or from complainants in other cases. The complainant's reputation for chastity and her moral character are considered to be relevant to the issue of her consent to the act complained of. The law allows moral questions to intrude on the assumption that a woman who once consents to intercourse is not likely to refuse again.[58] It is contended that the fact that the complainant had previous intercourse with a person other than the accused is totally irrelevant to the question of her credibility as a complainant in a rape case. The link which the law forges between her credibility and her prior sexual conduct must have as its basis a perceived moral duty to refrain from extra-marital intercourse.[59] Evidence of prior sexual intercourse between the accused and the complainant may or may not be relevant to the adjudication of guilt. To accept (as our present law and the Commission accept) that such evidence is always and necessarily relevant to show consent to the act in question, is to accept the assumption that agreement to a single instance of intercourse is tantamount

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58. This, of course is taken to reflect her "immoral" character. See, for example, V 1962 3 SA 365 (E) at 369, where the court expressed the opinion that a serious imputation on the character of the complainant was not without relevance to the question of the accused's guilt.

59. Waller "Victims on Trial - Prosecutions for Rape" 1977 1 SACC 147-162, 153.

to a blanket consent to intercourse in the future. This is an unwarranted notion and an unsound foundation for a legal rule.

In dealing with the complaint requirement in sexual crimes[60] and the cautionary rule of evidence,[61] the Commission displays a similarly uncritical approach. The method by which it arrives at its conclusions and recommendations[62] is similar to that noted above, in respect of the marital rape exemption, viz after listing the arguments for and against reform the Commission adopts a recommendation consistent with the majority opinion. In respect of both the complaint procedure[63] and the cautionary rule,[64] the Commission concludes that there is no need to reform the law because these rules provoked "no noteworthy discussion" at the seminar.[65] In other words, the Commission has come to its conclusion on the basis of the opinions of those who operate the law under consideration. It has adopted their conclusions as its own, without giving weight to the possibility that these sources are, due to their involvement with the law, least likely to be impartial about it. By its

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60. Report paras 3.32 to 3.50.

61. Report paras 3.51 to 3.70.

62. That the existing law should not be changed.

63. Report para 3.49.

64. Report para 3.69.

65. Report para 3.49.

over-reliance on these views, the Commission is able to avoid dealing with the criticisms of the present law. It does not attempt to refute the criticisms which it lists in the Report; it simply ignores them. Its conclusions and recommendations therefore are not arrived at by a process of reasoning but by an article of faith that the majority opinion of the "accredited sources" is objectively true and authoritative.

It is submitted that the Report does not address the major issue in this area of the law, ie that encoded into the law is a distorted and insulting image of women. The common characteristic of the rules examined by the Commission is their basic assumption that women who complain of having been sexually assaulted are not lightly to be believed. From its starting point of suspicion towards complainants, the law therefore attempts to provide safeguards against false convictions. The law emerges from, and helps to perpetuate, social myths about the nature of women. Women are characterised in these myths as either psychologically disturbed, dishonest or vindictive and are therefore likely to lay false rape charges against men. Extra caution in accepting the validity of a rape complaint is urged in the received wisdom that a rape charge is an accusation easily made but hard to refute.[66] These conventional wisdoms have become entrenched in the law and are explicitly justified in

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66. Hale CJ Pleas of the Crown vol 1 634.

legal literature by eminent authorities.[67] South African

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67. For example, fear of false accusations expressed by courts and commentators often rest on the authority of Wigmore Evidence para 924(a) at 736 who states the following:

> "Their [women's] psychic complexes are multifavious, distorted partly by inherent defects, partly by disease, derangements or abnormal instincts, partly by bad social environment, partly by temporary physiological or emotional conditions. One form taken by these complexes, is that of contriving false charges of sexual offenses by men.... Judging merely from the reports of cases in the appellate courts, one must infer that many innocent men have gone to prison because of tales whose falsity could not be exposed."

Similarly, Glanville Williams The Proof of Guilt 159 approves of the corroboration requirement in the following terms:

> "There is a sound reason for it, because these cases are particularly subject to the danger of deliberately false charges, resulting from sexual neurosis, fantasy, jealousy, spite, or simply a girl's refusal to admit that she consented to an act of which she is now ashamed."

law reflects these wisdoms in their legal garb.[68] Their effect, it is submitted, is to make conviction in sexual cases more difficult to achieve than in other cases. Contrary to Hale's famous dictum, it appears to be relatively easy to refute a rape charge.[69] In any event, the accused, to secure acquittal, is not obliged to refute

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68. For example, Schreiner, JA, in Rautenbach 1949 1 SA 135 (A), 143: "It is not only the risk of conscious fabrication that must be guarded against; there is also the danger that a frightened woman, especially if inclined to hysteria, may imagine that things have happened which did not happen at all.".

    Lewis AJA in J 1966 1 SA 88 (R), 92: "In the case of all females alleging sexual assaults, the need for similar caution, in the absence of corroboration, flows from the fact that such charges are easily laid and difficult for the accused to disprove, and a multiplicity of motives may exist for their being falsely laid. This has been recognised since time immemorial, and a classic example of such a false charge can be found in the Biblical story of Potiphar's wife and Joseph.".

    See also W 1949 2 SA 772 (A). In this case the complainant was a young girl. The court a quo treated her evidence with caution and required corroboration because of her youth. The accused was convicted. On appeal his conviction was set aside by the Appellate Division because the magistrate, despite having required corroboration on account of the complainant's youth, "did not bring his mind to bear on the additional risk arising out of the nature of the charge." (780). The court stated that had the case not been a sexual one, the decision of the court a quo could not have been upset on appeal. However, "because the magistrate appears to have treated the case as if it were an ordinary one, save for the fact that the complainant was a child, it becomes possible and in the circumstances necessary for this Court to interfere" (783). The magistrate's approach therefore might have prejudiced the accused (781). The court allowed the appeal, finding that the case against the appellant had not been proved beyond reasonable doubt, for these reasons.

69. See the case of W supra n68.

or 'disprove'[70] the charge but merely to cast doubt upon the state's case.

Despite evidence to the contrary, the belief that many rape charges are false has survived tenaciously.[71] The Report refers to a New Zealand study which found that only a small percentage of rape charge were false.[72] Data from research elsewhere supports this: police women on the New York Special Rape Analysis Squad declared unfounded only 2% of rape complaints.[73] Whereas police officers in Philadelphia judged 18,2% of reported rapes to be unfounded, the local social workers estimated the figure to be less than 1%.[74] The available evidence indicates that the rate of false reports of rape is no higher than that for other crimes.[75] This is a strong indication that disbelief of the

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70. See the dictum of Lewis AJA, in J cited supra n68.

71. In Michigan, for example, complainants are regularly required to submit to polygraph tests. See Nordby "Reforming Rape Laws - The Michigan Experience" in Scutt (ed) Rape Law Reform 3-34, 26. The South African Law Commission rejected as impractical a proposal to introduce psychiatric tests for complainants. Report para 3.69.

72. Report para 3.59.

73. Brownmiller Against Our Will 435.

74. Peters et al The Philadelphia Assault Victim Study 97-98, cited in Katz and Mazur Understanding the Rape Victim 209.

75. See Katz and Mazur supra n74 207-213.

complainant is the conditioned response of those agencies with whom she comes into contact.[76]

3. LAW OF PROCEDURE

Under this head the Commission discusses several important matters, viz the protection of the complainant's identity, the protection of juvenile witnesses, trials *in camera*, the expeditious processing of rape cases, the possibility of legal representation for the complainant and the possibility of the adjudication of intrafamilial sexual crimes by the proposed family court.[77] Only two proposals are put forward, both aiming at a greater measure of protection for the victim. The first is a legislated prohibition of any particulars which could lead to the identification of a rape victim, from the date of the commission of crime (and for the duration of the proceedings), except where a presiding judicial officer, taking the victim's wishes into consideration, consents to publication.[78] Secondly, the Report recommends the introduction of legislation providing for the automatic hearing of the complainant's evidence *in camera* unless she chooses otherwise.[79] These recommendations are welcomed as providing significantly

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76. Levis "The Politics of Rape - A Feminist Perspective" in Scutt (ed) *supra* n71, 199-205, 202.

77. See Report Chapter 5.

78. Report para 4.16.

79. Report para 4.60.

increased protection for the victim. It is noteworthy that other law reform commissions have not been prepared to extend such protection to rape victims: The Victorian Law Reform Commissioner made no recommendation on this point.[80] The Criminal Law and Penal Methods Reform Committee of South Australia rejected a proposal to the effect that the victim's evidence be given in camera.[81]

It is regrettable that the Commission did not see fit to recommend that an independent legal representative be appointed to act for the complainant in rape cases. Representations to this effect were made by the Association of Law Societies, Rape Crisis and some members of the public.[82] In the view of the Association, such a procedure would encourage victims to report the crime,[83] while the latter groups expressed the view that lack of representation for the complainant is inequitable when the accused has the possibility of legal representation. With a touch of arrogance the Commission suggests that the belief that this situation is unfair stems from ignorance of the basic principles of criminal law.[84] It is not explained why such

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80. See Working Paper No 4: Rape Prosecutions, Court Procedures and Rules of Evidence (1967).

81. Special Report: Rape and Other Sexual Offences (1976) 40-41.

82. Report paras 4.101 and 4.102.

83. Report para 4.101.

84. Report para 4.102.

knowledge is a necessary prerequisite for a sense of justice. It appears from the Report that insufficient information was placed before the Commission to enable it to investigate the issue thoroughly.[85] This is most unfortunate, as the proposal merits serious consideration. It is contended that the complainant ought to have the benefit of legal representation in every case. The present organisation of both the substantive and procedural law focuses attention on the complainant rather than on the accused: it is her credibility, her sexual biography and her moral character which are placed under judicial scrutiny. The Commission notes that at present in our courts complainants are subject to unfair and unnecessary attack[86] and are not always properly informed of court procedure.[87] In view of the fact that the prosecutor acts on behalf of the state, not of the complainant, it appears not merely equitable but necessary that the complainant have a representative to act on her behalf. Such representative could prepare her for the trial, shield her from some of the attack on her character and aid the prosecutor when necessary. Moreover, the representative could argue the

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85. The Report states (para 4.112) that the representations proposing a legal representative for the complainant did not indicate the precise role the representative should assume in the proceedings - a crucial matter. The Report does not state why such information, which is obviously central to a decision on the matter, was not sought by the Commission.

86. Report para 3.26.

87. Report para 4.119.

admissibility of evidence relating to the complainant's prior sexual experience with persons other than the accused in terms of the Commission's own recommendation.[88] It is difficult to support the Commission's view that more training for magistrates and prosecutors on the "'psychological' aspects of handling the rape victim"[89] would reduce the complainant's need for her own representative. Such training would be most valuable in that it could lead to an increased understanding of and sympathy for the complainant. Greater judicial sensitivity, however, is no substitute for legal counsel. Until such time as rape laws are restructured so as to deal more equitably with the complainant, it is submitted that the appointment of a legal representative for her is the most effective means to protect her interests.

It is equally to be regretted that the Commission rejected a proposal from several concerned bodies (the Law Faculty of Unisa, the Association of Law Societies, the Medical Association of South Africa, the Council for Social and Associated Workers and the Department of Health and Welfare)[90] to introduce special procedures to deal with juvenile witnesses in sexual cases. South African law at

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88. Report para 3.28.

89. Report para 4.119. The meaning of this phrase is not clear. It is assumed here to mean awareness of the nature of the complainant's trauma and training in the correct manner of dealing with a traumatised person.

90. Report para 4.17.

present makes no special provision for juvenile witnesses. They are subject to the same procedure and the same measure of protection as adult complainants. The Commission notes a unanimous view, expressed in its discussions, that the ordinary legal proceedings involve even more trauma for the raped child than for the raped adult,[91] a view which is strongly supported by the available research findings.[92]

Upon request, the Commission considered whether a special procedure specifically for juvenile complainants, similar to that adopted in Israel ought to be introduced in South Africa. This procedure, the main aim of which is to protect the child from further trauma, involves a marked departure from the standard procedure: a specialist trained in child psychology and psychiatry (called a youth interrogator) questions the child and decides, on the basis of the child's interests, how to deal with the case. The interrogator determines whether the child should appear in court and who may question him or her. The evidence gathered in the course of the investigation is admissible in court although corroboration is required for conviction. The Commission

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91. Report para 4.23.

92. See Libai "The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System" 1969 15 Wayne Law Review 977, 1032; Parker "The Rights of Child Witnesses. Is the Court a Protector or Perpetrator?" 1982 17 New England Law Review 643-717; Melton "Psychological Issues in Child Victims' Interaction with the Legal System" 1980 5 Victimology 274-284; Foté "Child Witnesses in Sexual Abuse Proceedings: Their Capabilities, Special Problems, and Proposals for Reform" 1985 13 Pepperdine Law Review 157-184.

rejects the viability of this procedure in South African law and recommends that no alteration be made to the present position.

The apparent basis of this decision is that the procedure involves too great a departure from the existing procedure and that its implementation would be problematic.[93] In a criminal justice system which contemplates adult participants, concern for the special treatment of children in the system is both legitimate and proper. If the interests of child witnesses would be served by deviation from the standard procedure then it is suggested that alternative measures which do not infringe upon the accused's right to a fair trial should seriously be considered. The objections raised to the Israeli procedure, ie that the accused has no opportunity to cross examine the child and that heresay evidence becomes admissible, are not fatal as long as other safeguards are present which ensure a fair trial for the accused. It is most unfortunate that, having rejected the Israeli procedure, the Commission did not seriously consider the alternative measures which have been proposed in other jurisdictions.[94]

The Commission's treatment of this important matter leaves much to be desired. It is difficult to reconcile its explicit recognition that child victims are considerably

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93. Report para 4.30.

94. See Foté <u>supra</u> n92 and the references cited therein.

more traumatised than adult victims by the standard legal procedures[95] with its view that "there is no need at present for greater protection of child victims of sexual offences in our system".[96] Similarly, it notes the unanimous opinion arising out of its discussions that children are increasingly the victims of sexual crimes[97] yet it states that "it was pointed out ... that very few cases involving complainants under the age of 14 years occur in practice".[98] Ultimately, the Commission's own point of view remains obscure.

What does emerge from the Report, however, is that the Commission has made use of two methods for arriving at its conclusion. First, as noted above,[99] the Commission adopts as its conclusion the majority opinion which was expressed in the discussions. It appears that the interested persons were the ones to reject the Israeli procedure as too drastic an interference in the South African system.[100] It is their

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95. Report para 4.23.

96. Report para 4.37.

97. Report para 4.23.

98. Report para 4.35. The apparent conflict between these latter statements cannot be explained on the basis that the second statement appears under the heading "Arguments against reform" and that the Commission was simply noting what had been said to it, because the Commission explicitly endorses these arguments in its conclusion (Report para 4.37).

99. Supra 71.

100. Report paras 4.30, 4.34 and 4.37.

consensus that there is no need for greater protection of child victims. The only alternative which emerged from the discussion was a proposal that in the case of juvenile complainants, a social worker be appointed to assist the police and to provide added protection for the child.[101] The Report states specifically that "[t]his proposal was as far as the interested parties were willing to go towards providing special protection for a child victim".[102] Yet this proposal was not pursued due to the perceived manpower shortage.[103] Secondly, the Commission draws a distinction here, as elsewhere in the Report, between theory and practice. This distinction enables it to adopt the conclusion that while, in theory, the child victim is treated as an adult and is vulnerable to secondary trauma in the legal process, in practice, this is not so. In practice the trial is conducted more informally with all the court personnel co-operating to put the child at ease[104] and the child is handled with "great consideration".[105] The source of the information that all is well in practice is, of course, those persons who are responsible for the practice. There is no indication in the Report that the Commission sought corroboration from any other source.

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101. Report para 4.32.

102. Report para 4.32.

103. Report para 4.32.

104. Report para 4.35.

105. Report para 4.38.

The weakness of this method is apparent. While these interested parties might have the most detailed knowledge of actual practices, their opinions on the fairness or otherwise of the handling of child victims cannot be totally impartial. They cannot be the best judges of their own actions. Although their opinions are valuable, the Commission is not justified in accepting them as decisive. By doing so, however, the Commission is able to dispose of certain criticisms of the law as being merely "theoretical".

It is abundantly clear that the Commission takes its cue from the expressed opinion of certain interested parties whom it believes are authoritative and objective. By the devices of over-reliance on these sources and a distinction between theory and practice the Commission is able, in effect, to ignore important criticisms of the law. This process is evident throughout the Report: for instance, the Commission recommends no change in the complaint rule because there is no reason to believe that the rule is being wrongly applied in practice;[106] the application procedure for abortion needs no reform because, though the Abortion and Sterilization Act[107] creates the impression of a cumbersome and time-consuming procedure, the application of its provisions appears to be different in practice.[108]

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106. Report para 3.49.

107. Act 2 of 1975.

108. Report para 4.99. See also paras 2.19 and 5.36.

The Commission has relied heavily on certain sources for information as to whether rape-related problems exist and if so, what solutions are viable. Its method is to test for consensus on each topic and to adopt as its own conclusion and recommendation the predominant view. Where there was no clear consensus, for example, on the issue of the marital rape exemption, the Commission attempted to accommodate the conflicting opinions in a single recommendation.[109] The Commission therefore displays little independent thought on the issues. For some unarticulated reason it considers itself obliged to adopt the views of those to whom it obviously defers as experts. The resultant Report is more of a survey of opinion than an independent investigation.

4. THE TREATMENT OF THE VICTIM

In a separate chapter entitled Treatment of the Victim,[110] the Commission discusses the administrative practices of the various agencies - the police, the district surgeons and court personnel - in respect of the victim. With justification, it rejects the view that the victim's trauma in the legal process can be alleviated simply by changing the law. It accepts that "a change in attitudes and in administrative procedures which are applied daily by the police, district surgeons and court officials, could most

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109. Supra 71.

110. Report Chapter 5.

probably make the greatest contribution towards change".[111] Consequently, the Commission focuses on the administrative practices of these agents and makes recommendations for improvements.

The Commission's discussion of the treatment of the victim highlights two basic defects in the investigation: (i) it proceeds without a clear concept of the nature of the crime and (ii) without a concept of a criminal justice system.

(i) The nature of the crime of rape

The Commission consistently refuses to examine the social and cultural aspects of rape behaviour. It is content to label such a perspective "feminist" and, by discrediting it, dispose of the need to give it adequate consideration. This perspective, though it paints a disturbing picture, should not be so cavalierly dismissed.

From a feminist point of view rape is a social product, originating in the structured inequality of the sexes.[112]

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111. Report para 5.3.

112. In some tribal societies, rape (sometimes gang rape) is overtly used as a method for dominating and controlling women. In these "rape prone" societies, female power and authority is low, while the outstanding feature of "rape free" societies is the relative balance of power between the sexes: Sanday "The Socio-Cultural Context of Rape: A Cross Cultural Study" 1981 37 (4) Journal of Social Issues 5-27. See also Schwendinger and Schwendinger Rape and Inequality Chapters 9 - 12. In modern, "civilised", industrialised societies, the forms of male dominance may be less overt but the link between inequality and rape remains.

Rape practices receive cultural support in the construction of a coercive model of "normal" sexuality, which tends to identify normal sexual behaviour with coercion.[113] From this perspective, rape is not an exceptional or deviant act; it is one of the most overt and extreme forms of the exercise of male power. Its deviant quality resides in its extremeness, not in its essential difference from normal sexual behaviour. Rape is reconceptualised as an assault which assumes a sexual form, the social meaning of which is to degrade and symbolically annihilate the victim.[114] It is

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113. See Griffin "Rape: The All-American Crime" in Chappell, Geis and Geis (eds) Forcible Rape: The Crime, the Victim and the Offender 47-66; Clark and Lewis Rape: The Price of Coercive Sexuality 125-132; Chodorow "Being and doing: A cross-cultural examination of the socialization of males and females" in Gorenick and Moran (eds) Women in Sexist Society 259-291.

114. Data obtained from convicted rapists indicates that men rape for a variety of reasons. In extensive interviews with a 114 convicted rapists Scully and Morolla found that, for some men, rape was a means of revenge or punishment for a perceived wrong. The rapist released intense hostility or anger on a randomly chosen victim who represented for him the individual or category of persons being punished. For some of the men, rape was an added "bonus" committed in the course of robbery or burglary. For others, rape was simply pleasurable: it was a challenge, an adventure, an "ultimate experience" which made them feel good and, in some cases, elevated their self-image. Only 8% of the interviewees indicated that guilt was part of their emotional response to the rape. The majority said they felt good or relieved or felt nothing at all. See Scully and Morolla "'Riding the bull at Gilley's': Convicted rapists describe the rewards of rape" 1985 32 (3) Social Problems 251-263. See also Levine and Koenig Why Men Rape (interviews with convicted rapists).

only exceptionally the product of individual pathology.[115] The feminist position holds that people are socialised to excuse or explain rape and other forms of violence against women as the product of individual exceptional deviance, without general significance for the relations between the sexes. Therefore we have been conditioned not to perceive rape as a method for the control of women. From a critical feminist perspective, this hidden dimension of rape becomes visible: as a political device, the threat or possibility of rape is a controlling factor in women's lives[116] and

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115. See Perdue and Lester "Personality Characteristics of Rapists" 1972 35 Perceptual and Motor Skills 514. The authors conclude after administering Rorshach tests to convicted rapists, that rapists do not differ significantly from those convicted of aggressive non-sexual crimes. Cited in Clark and Lewis supra n113 213. Fisher and Rivlin "Psychological needs of Rapists" 1971 11 British Journal of Criminology, 182-5 employed standard psychological tests to study rapists. The authors interpret their findings to be "consonant with the theory that the act of rape is an expression of hostility by a male who feels weak, inadequate and dependent". See also Cohen et al "The Psychology of Rapists" in Chappell, Geis and Geis (eds) supra n113 291-313; Gibbens, Way and Soothill "Behavioural Types of Rape" 1977 130 British Journal of Psychiatry 32-42.

116. Two studies strongly support the contention that fear of rape can be a potent constraining force in women's lives. They both found that women have a high level of fear of victimisation although the fear is not equally distributed amongst all women. The level of fear is linked to the perception of the degree of risk of victimisation. Both studies conclude that fear of rape significantly restricts women's activities, their spatial mobility and their life choices. See Warr "Fear of rape among urban women" 1985 32 (3) Social Problems 238-250; Riger and Gordon "The Fear of Rape: A Study in Social Control" 1981 37 (4) Journal of Social Issues 71-92.

encourages their dependence on men for protection.[117] As such it is a mechanism helping to perpetuate the inequality between the sexes.

An historical analysis of rape law supports this view. What the contemporary law knows as rape was in ancient law, a species of theft. The "crime" was the theft of virginity. In law this constituted a wrong against the girl's father. His loss was the reduction in the brideprice of his daughter due to the damage she suffered. Recompense was made to him for the net loss to his estate. Rape law was thus closely linked with marriage in ancient society and served to reinforce marriage transactions. Women's chastity and

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117. The possibility or fear of rape causes many women to restrict their daily activities in various ways. This system of self-imposed restriction is encouraged by those who, in good faith, would advise women on how to avoid being raped. The Medical Association of South Africa, for example, has published a booklet for public distribution, Rape: The Full Story. The booklet advises certain precautions for women which include the following:

    (i) Look as tough as possible when you walk.
    (ii) Keep to well lit streets with houses. Avoid alleys, open fields, deserted shopping centres and other deserted places.
    (iii) Walk in the middle of the road.
    (iv) If alone at home, keep the doors locked.
    (v) Do not let anyone know you are at home alone.
    (vi) Do not open the door to anyone you do not know and trust.
    (vii) Do not get into a lift if there is only one man in it and you feel unsafe.
    (viii) Do not hitch-hike alone.

    This practical advice may prevent some women from being raped, but it cannot address the basic problem. One rarely finds this sort of advice being offered to the potential rapist, for instance, on how to avoid situations in which he may be tempted to commit rape.

reproductive powers were counted as assets in the estate of the male who had power over them, ie the father and, subsequently, the husband. These assets were exchanged for a price in marriage. Loss of virginity had significant financial implications for the father who was allowed to demand an amount equivalent to the brideprice from the transgressing male. This position obtained irrespective of whether the loss of virginity was occasioned by consensual or non-consensual intercourse. The daughter could not freely dispose of an asset to which she had no title.[118]

Rape law thus reflects the radically different statuses of men and women in ancient society. Its history reveals a slow evolution from its origins as theft of a guardian's assets to a wrong against the victim herself and is an index of the changing status of women. While it cannot seriously be contended that women today have a status assimilable to that of property, as in ancient law, the link between rape and women's status remains. Rape laws today continue to buttress marriage practices because they protect a woman's "honour" which is still an important bargaining tool in the marriage exchange. The Commission is therefore not justified in ignoring this link. The fact that it does so, however, has important implications for its perception of the crime, the criminal and the victim.

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118. See Epstein Sex Laws and Customs in Judaism; Johns The Oldest Code of Law in the World; Old Testament Exodus 22:15-16 and Deuteronomy 22:28-29; Attenborough The Laws of the Earliest English Kings.

Unfortunately the Commission considers none of this. Implicit in the Report is a perception of rape as a crime without cultural and structural dimensions. The act of rape is therefore deprived of social and political meaning and seems to be understood in terms of the individual pathology of the rapist.

Most crucially, the Commission's attitude precludes it from understanding the victim's trauma. It assumes that the trauma, or alleged trauma, if it exists, is caused largely by unsympathetic policemen, doctors and magistrates. While, on one level this may be true, it is not all the truth. A refusal to consider the cultural definition and received wisdom on rape (in which are entrenched notions of the victim as damaged and defiled) allows it to trivialise the trauma. The victim is not traumatised when the district surgeon is unsympathetic; the shock stems from the physical and/or emotional violence done to her and from the deeply-embedded cultural notion that rape defiles the victim and devalues her. Callous treatment by the criminal justice

personnel constitutes a secondary trauma which can serve to reinforce the primary trauma of the rape itself.[119]

The Commission does not recognise adequately the nature of the crime or the uniqueness of the complainant's position in the law. It is argued here that the social control of women through rape operates through two processes: through fear generated by actual or potential rape and, secondly through the legal processing of rape cases in the criminal justice system. It is the latter component of control which is the subject of the Commission's inquiry. The present construction of rape law situates the victim as pivotal to the proceedings.[120] Particularly when the defence of consent is raised, the major issue in a rape trial is whether or not the complainant has been victimised. Judicial focus on the victim, her sexual morality and experience, allows the agents of the state to decide this question according to male defined-standards of sexual morality for women. It is submitted that the real issue in

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119. Burgess and Holmstrom have investigated the emotional and psychological effects of rape on the victim: see "Rape Trauma Syndrome" in Chappell, Geis and Geis (eds) supra n113 315-328 and "Rape: Its Effect on Task Performance at Varying Stages in the Life Cycle" in Walker and Brodsky (eds) Sexual Assault 23-33; Kaufman et al "Male Rape Victims: Non-Institutionalized Assault" 1980 37 American Journal of Psychiatry 122. It is noteworthy that, despite the Report's frequent reference to the victim's "trauma", it contains no working definition of the trauma. The Commission's understanding of the nature and effects of the crisis is nowhere made explicit.

120. See supra 'Law of Evidence'.

a rape case is whether to grant or deny to the complainant the status of a victim. The more the circumstances of the rape conform to those of "true rape" and the more the complainant is judged to conform to traditional sexual morality, the greater is the likelihood of the court recognising her as a victim. If there is no victim, there is no crime.

The successful prosecution of a rape case involves a contradiction for the victim: public recognition of her status as a victim is a condemnation of the aggression she has suffered and a public recognition that she has been wronged. Yet in cultural terms, it is also a rite de passage for the victim to a devalued status to which shame is attached. The search for official justice involves the ascription of this devalued status. This, it is contended, is the notion which underlies attempts to protect the victim by keeping her out of public view. The Commission misses this point in its opinion that the complainant in a sexual crime is "in a special position because she has to testify about intimate matters...".[121] Other persons may also have to testify about intimate matters in court, for example, spouses in a contested divorce case. While this may be embarrassing, it is not comparable with the position of the rape victim.

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121. Report para 4.46.

From its failure to recognise the unique aspects of rape, the Commission cannot appreciate the necessity for special measures in respect of rape cases. Two examples illustrate this. In the first, the Commission accepts as trite that evidence concerning the complainant's character will always be relevant for the purposes of sentencing.[122] Accordingly, it recommends that no legislative provisions be enacted to regulate the inclusion of such evidence for sentencing purposes.

It is argued here that the notion that the "character" of a victim of a crime should influence the sentencing process is morally indefensible. A brutal attack on an unemployed, alcoholic vagrant should be seen as no less grave an offence than a similar attack on a prominent, upstanding member of the community. Whatever other variables are operative, the character of the victim should not, it is submitted, affect either conviction or sentence. One might argue that the severity of punishment ought to reflect the amount of social harm caused and that such amount depends on the character or social worth of the victim. Thus Snyman[123] has advanced the view that, in the context of the defence of necessity, the killing of a person of great social value causes greater social harm than the killing of, for example, the vagrant mentioned above. While it is agreed that the amount of

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122. Report para 3.27.

123. Snyman Criminal Law 93.

social damage occasioned by a criminal act should be taken into account, the present objection to this view is that it tends to evaluate social harm exclusively in terms of the results of the act in question and this, in turn, is calculated in terms of the social utility of the victim. It underplays the factor of social harm in the act of aggression itself. Differential sentencing on this basis is unjustifiable and conflicts with the principle of equal protection for all under the law. The view proposed by Snyman has not received public support.

In rape cases on the other hand, an analogous view has been explicitly endorsed by the Appellate Division. Schreiner JA in Sibande[124] stated that the rape of a prostitute "would not ordinarily call for a penalty of equal severity to that imposed [for rape] upon a woman of refinement and good character". Apart from the marital rape exemption South African law does not recognise any category of women to which the law of rape does not apply. Thus, while a man may be found guilty of the rape of a prostitute, the law accepts this as less grave an act than the rape of a non-prostitute. The law therefore accepts in principle that women can be categorised according to their character or their sexual worth. This is clear support for the feminist point that, in a male-dominant society, rape law is criminalised to protect a woman's "honour". For women, "honour" or "good

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124. 1958 3 SA 1 (A) at 6.

character" is defined in terms of virginity, chastity or fidelity to a husband.[125] Women's social worth is evaluated according to their sexual worth which, in turn, is calculated in terms of their adherence or otherwise to male-defined standards of sexual behaviour. From this point of view, the prostitute has little or no honour to protect. The less honour a woman has, the less punishment is warranted for its violation. This social and highly sexist categorisation of women has been absorbed into the law and it re-appears to gain acceptance as an apparently neutral legal principle. The Commission certainly accepts it as such and does not perceive the need to alter the present position.

The second example which illustrates the Commission's lack of appreciation for the special problems associated with rape cases, is found in its discussion on the length of time taken to dispose of rape cases.[126] Although the Commission recognises that a prolonged legal process may add greatly to the victim's trauma it accepts that the arguments against legislative intervention outweigh contrary considerations.[127] These arguments are the familiar ones of lack of manpower and impracticability and, more importantly, the perception that there is no justification for giving

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125. Rich, Women and Honour: Some Notes on Lying 1, cited in Jaggar Feminist Politics and Human Nature 253.

126. Report paras 4.61 to 4.82.

127. Report para 4.77.

priority to the speedy processing of rape cases as this would conflict with the way in which cases are presently given priority.[128] Support for this proposition is found in the view, apparently endorsed by the Commission, that complainants in other cases may also experience a degree of trauma comparable with that of the rape victim.[129] Granting priority to rape cases is perceived as unduly favouring the rape victim.

No one can seriously contend that rape victims are the only persons for whom legal proceedings may be disruptive, embarrassing and painful at times.[130] However, to equate the discomforts experienced in other criminal cases with the trauma of the rape victim, is to ignore a considerable body of psychological evidence as to the nature of such trauma.[131] Studies indicate that many victims experience rape as a frightening, life-threatening attack, involving strong, destructive feelings of guilt, shame and self-rejection. The trauma frequently involves a long-term

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128. Report para 4.76. It is submitted that the reasoning here is spurious. The Report does not state that this is impossible to do, simply that, in the way priority is allocated at present, a more expeditious processing of rape cases cannot be accommodated. In the light of a perceived problem, what must be investigated is the feasibility of changing the way in which cases are granted priority on the court role.

129. Report para 4.76.

130. For example, the parent who gives evidence on the kidnapping of his or her child or the person who gives evidence on the murder of a spouse.

131. See supra n88.

psychological disorganisation of the victim.[132] It is a reaction to the acute stress of the rape. Counselling is often required to enable her to reorganise her life and integrate the rape into it. Deep depression is common, involving disturbed sleep patterns and recurrent nightmares.

Irrespective of any physical harm she may suffer, the psychological and emotional effect of rape on the victim includes an aspect which is not present in other crimes. In a society in which women's worth is tied primarily to their sexuality and reproductive powers, a sexual assault attacks not only the body but also the perceived social value of the person. The abuse of female sexuality in rape carries the social meaning of degradation and symbolic annihilation of the person, even if it does not physically kill the victim.

It is this specific cultural dimension to rape which gives it a peculiarly devastating potential for the victim, which is not shared by other victims. The Commission fails to appreciate the harmful effect on such a traumatised person of delays in the legal process. Mayne and Levett[133] give examples of South African cases in which lengthy legal processing and uncertainty as to the date of final disposition retarded the victims' progress and added

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132. See Kilpatrick, Resick and Veronen "Effects of a Rape Experience: A Longitudinal Study" 1981 37(4) Journal of Social Issues 105-122.

133. Mayne and Levett "The Traumas of Rape - Some Considerations" 1977 1 SACC 163-170, 165-166.

considerably to their trauma. It is arguable that, if the Commission had been more aware of the nature and gravity of the victim's trauma, it might not have made the statement that it would be "wrong" in principle to give priority "arbitrarily" to rape trials over other cases.[134] It is suggested here that giving priority to rape cases would be neither arbitrary nor wrong but would be justifiable on the grounds of the special problems of the rape victim. The objections of shortage of manpower and impracticability are not fatal. The Commission's conclusion represents a policy decision to the effect that the problems of the rape victim do not merit an alteration in the present system. The decision reflects the low priority accorded to rape-related issues in the criminal justice system.

(ii) The Criminal Justice System

The second basic defect in this section of the Report has been alluded to elsewhere.[135] While this weakness undermines the entire Report, it becomes acute in the section on the treatment of the victim.

The Report attempts to identify what constitutes unacceptable treatment of the rape victim. This is a laudable attempt, consistent with the Commission's view that a change in the law alone will not bring about significant

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134. Report para 4.78.

135. See supra 7-8.

results. The weakness of the Commission's approach, however, is that it assumes that changes in administrative procedure can do so[136] and it fails to take into account the context in which these practices occur.

The Report's discussion of the role of the police demonstrates this. It is a cursory description of how the police view their function and what their activities are, viz taking a full statement, collecting evidence and sending the victim for a medical examination. In its conclusion, the Report outlines three major criticisms of the police:

(i) an unsympathetic and often sceptical attitude towards victims;

(ii) inadequate knowledge of the correct procedures;

(iii) specific investigation procedures, such as several interrogation sessions and identity parades.[137]

Ultimately, it considers that these criticisms are unfounded. In respect of the first, it is content with the knowledge that "senior officers are aware of the fact that the investigation procedure is traumatic for the complainant and that an attempt is being made to bring this home to all policemen in their training".[138] Exactly what the police perceive the trauma to be is not explained. As regards the second criticism, it draws attention to the existence of standing orders in which the investigation procedure is set

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136. Report paras 1.11 and 5.5.

137. Report para 5.33.

138. Report para 5.33.

out and considers that "[t]o expect that an experienced officer will always be on hand where a complaint of rape is laid, is to expect the impossible".[139] Why an inexperienced officer should also be ignorant of the standing orders, requires explanation. Thirdly, the Commission considers that nothing can be done about the existing investigation procedures.[140] The following paragraph summarises the Commission's approach:

> "The South African Police deserve praise for what is already being done in this regard. It is alleged that instances still occur in practice which are not handled according to theory. Such things are bound to happen in any big organisation and unfortunately these instances are newsworthy and are reported, unlike those cases where the theory is adhered to slavishly. The Commission recommends that in-service training be continued to limit these instances to the minimum."[141]

Several criticisms can be directed towards the Commission's treatment of the topic. First, and most obviously, it is a most cursory descriptive sketch of what the police themselves claim they do. Secondly, the account is placed in a social, legal and institutional vacuum. An understanding of the nature and importance of the police must be grounded on an appreciation of their position in the criminal justice system and their considerable powers.

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139. Report para 5.34.

140. Report para 5.35.

141. Report para 5.36.

The police are in a very real sense the "gatekeepers"[142] of the criminal justice system and, as such, occupy a strategically vital position. The laying of a rape charge constitutes the complainant's point of entry into the system. Police actions at this point are crucially important to the outcome of the case and cannot be understood from the administrative procedures alone. The legal and institutional framework within which the police carry out their functions must be considered. What are the police powers, limitations, duties and extent of discretion? These legal factors shape police activities. Legal rules do not constitute a formalised script to be acted out. Rather, the law may be viewed as a source of authority for official action; it allows the agents "space" within which to act and it provides a source of legitimation for their actions.[143]

Examining only the rules gives a partial view. An understanding of whether and, if so, which police practices constitute unacceptable treatment of the rape victim necessitates an examination of how the police interpret their roles and how they use their powers and discretion.

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142. Goldstein "Police discretion not to invoke the criminal justice process: Low visibility decisions in the administration of justice" 1960 69 Yale Law Journal 543-558.

143. See, in general, Skolnick Justice without Trial; Ericson and Baranek The Ordering of Justice: A Study of Accused Persons as Dependants in the Criminal Justice System; Bottomly Decisions in the Penal Process; Bottoms and McClean Defendants in the Criminal Process; McBarnet Conviction: Law, the State and the Construction of Justice.

The Commission, for example, never considers how the police use their discretionary power to refuse to open a docket. How do the police relate to the victim and the accused and how do these perceptions relate to the routine gathering of evidence?[144] It is essential to consider these issues in a serious investigation into the proper handling of rape cases in the criminal justice system.

There is evidence from rape victims themselves to indicate that police behaviour towards rape victims is (at least fairly often) insensitive. Brownmiller's research supports this. She documents beliefs expressed by police officers that it is not possible to rape an unconsenting woman[145] and that rape complainants are "prostitutes who didn't get their money".[146] A Philadelphia study attempted to understand the manner in which police officers arrive at a decision whether to advise the prosecution of a rape case or not.[147] The police in this study did not accept every rape complaint as valid. Complaints which involved strangers, weapons or violence were most likely to be believed by the police

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144. On the exercise of police discretion to advise prosecution or not ("founding" or "unfounding" a case) see Le Grand "Rape and Rape Laws: Sexism in Society and Law" in Chappell, Geis and Geis (eds) supra n113 71 and Clark and Lewis supra n113 58-60.

145. Brownmiller supra n73 365.

146. Brownmiller supra n73 366.

147. "Police Discretion and the Judgment that a Crime has been Committed - Rape in Philadelphia" 1968 117 University of Pennsylvania Law Review 277-322.

officers. All rapes which were reported to have occurred between parties who had gone out together on the day in question were unfounded. The police declared unfounded 22% of black-on-black rapes but only 12% of white-on-white rapes. The author states that "[i]t appears impossible... not to conclude that the differential... resulted primarily from lack of confidence in the veracity of black complainants and a belief in the myth of black promiscuity".[148] Where victims showed no physical battery, the police conducted investigations in only 42% of the cases. With limited time and resources at their disposal, officers would not investigate cases which in their opinion and from their knowledge of the courts, had a low probability of successful prosecution. It is noteworthy that Mayne and Levett[149] give examples of similar police behaviour in South Africa.

This data indicates that the police believe at least some of the cultural myths about rape, for example, that it is impossible to rape an unwilling woman, that a complainant is a prostitute whose client refused to pay for her services.[150] It is probable that this view of rape and rape victims influences the manner in which the police carry out their functions. The police in the Philadelphia study, for

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148. At 304.

149. Mayne and Levett supra n133.

150. Brownmiller supra n73.

example, appeared to operate with a notion of a "true rape" which conformed to the stereotype of an alleyway attack by a stranger wielding a weapon. They reacted to the various complaints accordingly.

These factors are of great significance for the processing of rape cases. Even where the police do conduct an investigation, their beliefs and assumptions relating to rape may influence the collection of evidence for the state's case. The action of the police in the exercise of this function may be decisive for subsequent proceedings. It may influence the decision of whether or not to prosecute the accused (ie whether there is a strong or weak case against him) and may influence the outcome of the trial. An investigation into rape in Swaziland revealed that both the police and the prosecution are apparently fairly often unwilling to investigate rape cases thoroughly. The study notes instances in which material evidence is either not collected or not produced at the trial, resulting in the acquittal of the accused.[151]

The Commission does not consider the possibility of the systematic use of rules and authority in a biased manner by the police. While it might be objected that such an inquiry lies far beyond the concerns of law reform, a failure to pursue it is no basis for a conclusion that the police are

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151. Armstrong "A note on several aspects of rape in Swaziland" 1986 XIX CILSA 474-482, 477.

doing a fine job and ought to be congratulated. Perhaps they are; but the Commission Report obscures more than it reveals so it is impossible to verify this. Its attempt to probe beyond the legal rules has led the Commission to ignore them and to focus on administrative procedures and police accounts of their activities. Reform is perceived as a question of modifying, at most, certain administrative procedures and not the law on which they rest. The weakness of this approach is evident from the Report. For instance, it leads the Commission to reject as "undesirable" legislation which would attempt to ensure certain standards of conduct in the investigation and handling of rape charges, apparently on the basis that its effectivity would depend on the standard of police training.[152]

It is submitted that the Commission's view is quite untenable. The desirability or otherwise of the legislation

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152. Report para 5.36. The Commission's opinion is obscure. It is not certain from the Report whether the Commission regards such legislation as positively "undesirable" or simply irrelevant, as its effectiveness depends (in its view) on the standard of training of the police officers. The Commission does not give due weight to the consideration that the absence of legislation means the absence of necessary legislative control over police behaviour. It assumes somewhat simplistically, that "if policemen are made aware through training of the fact that speedy completion of the medical examination will make things easier for the complainant, they will realize the need to get the complainant to the district surgeon as soon as possible" (Report para 5.36). It is contended here that the assumption that an awareness of this need will automatically lead to speedy action is questionable, as it does not take into account the possibility that notwithstanding an awareness of the problem the police might accord it little importance.

does not depend in any way on the standard of police training. If, as the Commission suggests, police training at present is of such a low standard that it would jeopardize the successful implementation of the law, the solution is to secure a higher standard of training. Contrary to the Commission's view, the submission made here is that legislative intervention is required, which would establish minimum standards in the acceptable processing of rape cases. The law should lay down objective criteria by which to judge police behaviour. This step would be fair towards the police who would henceforth be fully aware of the standards required of them and, if the law provided an effective remedy for non-compliance, it would be of value to the complainant. At present, the absence of such regulation is part of the underlying problem. Sound and effective legal reform must include greater legislative control over the actions of the criminal justice personnel to render them more accountable.

Throughout its investigation into the treatment of the victim, the Commission consistently attributes problems experienced by rape victims to minor dysfunctions in the system, such as inexperienced officials[153] and work overload[154]. The Commission confidently recommends more in-service training as the major solution on the assumption

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153. Report paras 5.67 and 5.34.

154. Report paras 5.82, 5.34 and 5.93.

that once there are more adequately trained personnel the system will operate more smoothly and the victim's problems will be over.[155] The recommendations are thus to the effect that more in-service training for policemen and doctors is desirable, that the authorities should, in training or by way of circulars, stress the necessity for giving the victim information on venereal disease and that the importance of the pre-trial consultations be "brought home to prosecutors".[156]

While well-trained personnel are vital to the operation of the system, it is unrealistic to believe that an extra lecture here and there or an extra departmental circular can bring about significant change. Where the Commission could have put forward a substantive proposal, it declined to do so:

> "In principle the Commission would have liked to recommend the establishment of rape squads in the metropolitan areas because this could have obvious advantages in raising the standard of training. It appears, however, that such a recommendation would not be practicable and is therefore not made."[157]

At this point one begins to wonder what the purpose of the investigation is. If the Commission is of the view that a specialist rape squad would be a worthwhile innovation it should surely make a recommendation to that effect. Failure

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155. Report paras 5.36, 5.67, 5.78 and 5.94.

156. Report para 5.93.

157. Report para 5.37.

to do so is an abdication of its task. The proposal is, in fact, not an unrealistic or impossible one. The South African Police has established several specialist squads - murder and robbery, drugs and fraud units - and it would be in line with this organisation to establish a rape squad. Mere impracticability is no reason not to make the recommendation. In any event, according to whose opinion is this impracticable? It is on the strength of the perceptions of the South African Police as to manpower shortages and the necessity for such a squad in the light of the number of reported rapes, that the Commission declines to make its recommendation. Its reason is therefore spurious. The unwillingness of the South African Police to establish a rape squad most probably reflects the low level of importance which it accords to rape in comparison with other crimes. This view gains credence in the light of the recent decision of the South African Police to establish a specialist mugging squad in Cape Town.[158]

The Commission's apparent timidity leads it to make weak and half-hearted resolutions. For instance, in its discussion of the medical examination of rape victims, it notes that the multi-purpose centres which have been established in certain cities[159] make "the greatest and most practical

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158. Cape Times Friday 6 February 1987.

159. In Pretoria, Cape Town and Durban. See Report para 5.45.

contribution to the alleviation of victim trauma".[160] It rejects, however, the need for organisation of these services on a national level. In view of its positive evaluation of these centres, the Commission's recommendation is disappointing. It recommends that "the authorities concerned with provincial hospitals... should take cognizance of the success of the existing, victim centres and consider the establishment of similar centres".[161] This recommendation amounts to a proposal that the authorities think about the issue and decide for themselves whether to establish more centres or not. As a reform proposal, it is meaningless.

Similarly, in dealing with the medical and psychiatric aftercare of the victim, the Commission is fully aware of the problems of pregnancy and venereal disease[162] and the role that district surgeons could play in preventing their occurrence. Unfortunately, it again fails to take the opportunity to make a recommendation to deal effectively with these problems which fall squarely within the terms of its brief. The most the Commission is prepared to do is to recommend "that the Department of Health and Welfare give serious consideration to laying down the policy that district surgeons... must include treatment to prevent

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160. Report para 5.66.

161. Report para 5.66.

162. para 5.78.

pregnancy as part of the medico-legal examination of victims, if the victim so desires" and that it be provided at public expense.[163]

In both these instances the criticism directed at the Commission is not that its recommendation is undesirable or inappropriate but that it has failed to make a meaningful recommendation at all. The nationwide availability of crisis centres to which victims can go to receive all the help they need and a state-supported system of information and aid in disease and pregnancy prevention are vitally important matters for rape victims. The fact that there are so few centres and that district surgeons are not bound to advise or aid the victims in this way are matters of grave concern which merit positive and helpful recommendations. In respect of the latter, for example, the Commission apparently did not consider the possibility of legislation to make compulsory a system of routine medical treatment for victims including the availability of effective and safe contraception. Serious consideration should have been given to greater legal regulation of these matters, the lack of which, it is submitted, is part of the problem.

This tendency of the Commission reaches its logical conclusion in its discussion of the attitude of court personnel towards rape victims. The Commission considers two proposals in this sensitive area: first, a proposal

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163. Report para 5.78.

that special courts for sexual offences be created, staffed by specially trained personnel, sensitive to the problems of the rape victim. Secondly, it considers an alternative proposal that rape cases regularly be channelled to a group of suitable officials trained to deal with them.[164] Although the latter proposal found general support, the Commission decided against a general directive to this effect.[165] Its recommendation is that "it be left to the heads of magistrates' offices and senior public prosecutors to decide whether such channelling would be feasible in their specific circumstances, and, if so, whether in their case such a step would in any way serve to alleviate the rape victim's trauma".[166] The Commission has recommended that someone else decide on the feasibility of the proposal, decide whether to implement it or not and also judge whether the proposed measure solves the problem. This represents a complete evasion of its duty as a law reform Commission.

The Commission expresses, with a touch of self-satisfaction, its gratification that, even before its completion, the investigation began to produce results. It notes that the Justice Training Branch had decided to include a lecture on the psychological aspects of the complainant as part of the magistrates' and prosecutors' courses on sexual crimes.

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164. Report para 5.85.

165. Report para 5.93.

166. Report para 5.93.

This measure, it believes, will do much to alleviate the problems of the victim in the courtroom.[167]

The Commission's bureaucratic orientation is especially apparent in its treatment of judicial attitudes towards the complainant. It perceives the problems of the rape victim in the courtroom mainly in terms of the bureaucratic concerns of efficient court organisation. An inquiry into the victim's problems is collapsed into a discussion of better, ie more efficient, court functioning. According to the Report, the victim's problems are due mainly to the prosecutor's problems of an overloaded schedule which does not allow him or her enough time to prepare adequately for the case, to hold a pre-trial consultation with the victim[168] or to prepare her for the trial procedure.[169] The underlying assumption is that, if prosecutors had more time, the victim would have no more problems. Because the Commission perceives these problems in bureaucratic terms, it considers only bureaucratic solutions, viz the institution of special sexual offences courts or the more informal channelling of rape cases to a group of selected officials.[170] These proposals are also evaluated mainly according to criteria which are administratively

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167. Report para 5.94.

168. This occurs mainly in the regional courts where the majority of cases are heard. Report para 5.82.

169. Report paras 5.83 and 5.84.

170. Report para 5.85.

important.[171] The Commission's consideration of this significant matter never transcends the bureaucratic level of understanding.

It is contended that the rape victim's problems cannot be understood solely or even predominantly in these terms. What the Commission fails to appreciate is that a rape victim is highly likely to be a person in acute emotional and psychological distress and her successful recovery may be severely hampered by insensitive and unsympathetic treatment by the officials involved in her case. The criticism directed towards these officials in general is not so much their inefficiency as their attitude towards the victim. The Commission fails to consider the possibility that behind the "administrative" reason for the victim's problems (ie the manpower shortage) lies the more intractable problem of prejudicial attitude towards the victim. For example, a prosecutor who routinely does not prepare the victim for the ordeal of the trial might simply not perceive the need to do so. He or she might be ignorant of the special problems of the rape victim or might believe, along with the policeman noted by Brownmiller,[172] that a rape victim is a prostitute who has not received her money. In either case, to grant the prosecutor more time will make little or no difference to his or her routine processing of

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171. Report paras 5.88 to 5.91.

172. Supra n73.

rape cases. The Commission's underlying assumption that it will do so is, at best, extremely doubtful.

It seems clear that the reason of lack of time and manpower, as an explanation of the failure of the system to meet the needs of the rape victim, is spurious. The Report indicates that the usual practice in the regional court where the majority of rape cases are heard, is not to hold pre-trial consultations with the victim.[173] If this is the accepted practice in these courts, then it has become part of the bureaucratic processing of rape cases. The limited resources available to the courts means that these must be carefully allocated if the courts are to continue to function. The allocation of time and manpower therefore reflects the priorities of the system. The regional courts do not, it is submitted, routinely omit the pre-trial consultation with rape victims because there is no time for them but because the consultations are low on the list of bureaucratic priorities. The lack of time is a result of a <u>choice</u> to allocate resources elsewhere in accordance with the system of priorities. Furthermore, it is probable that the low priority is partly due to widespread adherence by the officials concerned to some of the entrenched cultural myths about rape and rape victims. Indeed, it would be astonishing if those who operate the South African criminal justice system were totally uninfluenced in their behaviour

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173. Report para 5.82.

towards the victim by these apparently cross-cultural social beliefs which, as demonstrated above,[174] have become entrenched in the law. A deeper understanding of the problems experienced by rape victims in court therefore necessitates an investigation into judicial attitudes towards the crime and the victims. The Report notes[175] but does not address the criticism advanced to it that cultural myths about rape influence the attitude of the court towards the victim. The Commission is clearly not prepared to entertain the possibility that judicial officers share such beliefs and react to the victim accordingly.[176] In contra-distinction to this attitude, it is submitted here that this is precisely the information which is required in an inquiry

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174. Supra 84-87.

175. Report para 5.83.

176. On the relationship between attitude and behaviour see Hilgard and Atkinson Introduction to Psychology 538: "An attitude represents both an orientation toward or away from object, concept, or situation and a readiness to respond in a predetermined manner to these or related objects, concepts, or situations." The research on cognitive dissonance indicates that individuals need to correlate their attitudes and behaviour as closely as possible. See, for example, Festinger and Carlsmith "Cognitive Consequences of Forced Compliance" 1959 Journal of Abnormal and Social Psychology 203-210.

nto the complainant's experience during the court proceedings.[177]

CONCLUSION

Ultimately, the Report establishes that any problems the victims may have stem not from the legal rules themselves but from incorrect applications of the rules and are not embedded in the criminal justice system but flow from minor dysfunctions in its operation. Attention is deflected away from the institutionalised law enforcement mechanisms and directed towards individuals in the system. This is a process of trivialisation, clearly operative throughout the Report. By its unwavering orientation towards the male-dominated status quo the Commission allows those agencies which control the operation of the criminal justice system to guide and control the reform impulse. This is a process of containment. The threat to the present legal and institutional status quo in the form of an impetus towards

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177. An American study of the attitudes of judges towards rape cases found that, in general, the judges divided the cases into three basic types, giving each type a different degree of credibility. The rapes were classified according to the judge's perception of the complainant: "the genuine victim" was believed and given a sympathetic hearing; "consensual victim" was perceived to be partly to blame for the event. Judges described this situation as "friendly rape", "assault with failure to please" and "breach of contract". The third category of complainant was the "vindictive female" who laid a false rape charge. Bohmer "Judicial Attitudes Toward Rape Victims" in Chappell, Geis and Geis (eds), supra n113 161-169. See also Barber "Judge and jury attitudes to rape" 1974 7 Australia and New Zealand Journal of Criminology 157-172.

real change, has been checked, turned on its head and made part of a "reform package" which does little more than patch up the facade of the criminal justice process in respect of rape cases, while leaving the basic structures untouched.

The power to produce knowledge includes the power to define what constitutes a problem and what constitutes a non-problem and the power to decide which questions are relevant and which are irrelevant. The institutional authorities, through the Commission, have clearly exercised both these powers: The law enforcement agencies have been defined as a non-problem for the rape victim. Consequently, deeper questions pertaining to their structure and routine operation in respect of rape cases are simply irrelevant.

CONCLUSION

In order to assess the significance of the Law Commission Report on Women and Sexual Offences in South Africa, it is necessary to address three related issues: The Report as a source of knowledge about South African society; the particular forum in which such knowledge is produced; and the wider political context in which this process occurs.

In this work South Africa was identified as a "patriarchal" society: a society in which men are the dominant social class. Dispite the differences in wealth, power and culture between the Afrikaaner group, the English-speaking whites and the black population, the common feature of these groups is a marked sexual stratification. In each group women are usually poorer, less powerful and under the control of men. Although the specific forms of patriarchy differ (Bozzoli's "patchwork quilt of patriarchies"), the pre-eminence of men is the common feature of the groups. A full and detailed analysis of the nature and operation of patriarchy is beyond the scope of this work; nor can the controversies and disagreements over the concept be discussed. The following sketch of the concept of patriarchy adopted here will suffice for present purposes.

Patriarchy is a system of sexual domination, the structures of which affect all areas of human life: the psychology, the socilisation processes, the economic activities and the life

chances of men and women. The organisation of patriarchal society ensures that the greatest wealth, power, privilege and authority are consistently channelled to the dominant group of males. The material basis of patriarchy is reinforced by a belief system which accords social and moral superiority to men and by a male supremacist ideology which draws powerful support from religion, traditional morality, "nature" and "knowledge". The state and its social control mechanisms, including the criminal justice system, institutionalise the social order. The dominant ideology of patriarchy in turn legitimates its material base in a process of reciprocal support, thereby weaving the apparently seamless web of male control.

Patriarchy may be conceptualised as a political system which institutionalises an imbalance of power between men and women. Feminist political theory poses as its central concern the subordination of women and it enlarges the established conception of the political domain by emphasising that every area of life, even the "personal" or "private" sphere, is the sphere of male dominance and female resistance, in Millett's now famous term, the sphere of "sexual politics"[1]. Patriarchy is thus similar to other political systems in which those who rule enjoy power, status and privileges denied to their political subordinates. At the centre of their relations lies a

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1. Millett Sexual Politics.

conflict of interest: the concern of the ruling group is to maintain its position of superiority while the interest of the subordinate group is to change the balance of power.

The dominant group does not maintain its position by force alone but by a variety of co-optive and coercive strategies in highly complex processes. The patriarchal order is maintained largely with the "consent" of women. This consent is not spontaneous; it must be produced and continually reproduced. Patriarchal strategy co-opts women to its order by denying that the relations between the sexes are political or that there is a conflict of interest between them. It gains women's allegiance by positing a unity of interest between men and women and by allowing men to articulate those interests on behalf all. A perspective which challenges the dominant reality of male rule tends to be viewed as deviant and to be marginalised. The Report's treatment of feminists and feminist ideas is a good example of this.

The perpetuation of the patriarchal order cannot be accomplished solely by the engineering of consent to its major institutions. It relies also on the threat or use of violence towards women, not merely as a "fall-back" device when consensus fails, but as a permanent feature of the social organisation. It is thus both necessary and normal even though its occurrence is often denied and much of it remains hidden from perception.

A crucial aspect of male power is the power to produce knowledge. In the words of Bunkle:

> "Men make knowledge. White, privileged men.... This ability to define reality, to tell us what is objective, rational and important, is their basic power. Knowledge is the most important thing men make. It is the power to declare that their view is the truth - the only truth. Such knowledge makes women or indigenous peoples invisible. We [ie women or indigenous people] become deviants from the great white reasonable norm when we insist that what we do does count."[2]

The social definition of reality is linked to the distribution of power in society. It is the powerful group which constructs a male-centred reality and produces knowledge. Codified theoretical knowledge about the world, and in particular about women, is produced mainly by men from within the dominant perspective in the form of books, theses, scientific research and commissions of inquiry. While this is an important source of "scientific" knowledge which may lend legitimacy to the institutional order, the primary knowledge about this order is pre-theoretical and uncodified:

> "It is the sum total of 'what everybody knows' about a social world, an assemblage of maxims, morals, proverbial nuggets of wisdom, values and beliefs, myths... the theoretical integration of which requires considerable intellectual fortitude in itself...."[3]

The construction of reality, the production of knowledge and the exercise of male power are thus inextricably linked.

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2. Bunkle "Encyclopaedic Blunders" Broadsheet 7, cited in Spender For the Record 25.

3. Berger and Luckmann The Social Construction of Reality 83.

Male power has constructed the reality of the patriarchal order; it encodes and transmits its meanings and common-sense knowledge in language; it declares deviance from its meanings and its knowledge "unreal".

This perspective of the wider socio-political context in which the Commission operates and the role of knowledge in the maintenance of the status quo provides the terms of reference in which to assess the Report. The Report purports to be a body of codified knowledge of women and sexual offences in South Africa. In fact, the Report contains little information about women generally or raped women in particular or about sexual offences in South African law.

The knowledge found in the Report is neither neutral nor objective. It reflects the concerns and orientation of the particular forum in which it was generated - the South African Law Commission - and the sexual - political context of which that forum is a part. The Law Commission is a permanent body whose members are usually legally qualified and are appointed by the State President.[4] The Chairman of the Commission is a judge of the Supreme Court.[5] It is therefore a prestigious Commission of considerable authority with the power to influence the policy - and law-making

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4. Section 1(a) of the South African Law Commission Act 19 of 1973.

5. Section 3(1)(a) of the Act.

processes in South Africa.[6] In the research process the Commission is both a user and a producer of knowledge: it draws upon codified (scientific/authoritative) knowledge and uncodified (cultural/"recipe") knowledge. When passed through the medium of the Commission, operating securely within the dominant patriarchal ideology and oriented towards the staate, the end result is a mélange invested with particular status and authority.

The major thrust of the Report on Women and Sexual Offences in South Africa is directed towards establishing three cardinal theses:

(i) Rape is not a serious social problem in South Africa.

(ii) The criminal justice system as presently operated does not pose any special, avoidable problems for the rape complainant.

(iii) Challenges to propositions (i) and (ii) arise from a group of foreign activists (feminists) whose views do not warrant serious consideration in South Africa.

The principal aim of this work has been to demonstrate that these findings are incorrect and that propositions (i) and

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6. The objects of the Commission are to investigate and research legal topics in order to make recommendations for the development, improvement, modernisation or reform of the law (s4). To achieve its objects, the Commission is empowered to draw up research programmes, may consult any person or body in its investigations and may submit draft legislation to the Minister of Justice for consideration (s5).

(ii) are open to serious challenge. The Commission is highly selective in its use of materials and data sources: it chooses to ignore the considerable body of cross-cultural research on rape-related matters and South African victimological studies. Similarly, it pursues an apparently democratic information-gathering process by inviting comment from the public and by sending questionnaires to interested persons. Thus the impression is created of genuine public participation in the identification of and solution to matters of public concern, lending a gloss of legitimacy to the Commission, its investigation and, ultimately, the state which initiated it. In fact, however, the Commission displays an unwavering bias towards the interests of the state as represented by the agents of the criminal justice system. Through the operation of a hierarchy of credibility, the Commission defers to opinions from these sources as authoritative. As demonstrated above, it is these opinions which shape the Commission's conclusions and recommendations, resulting in a notable bias towards the social and legal status quo. The over-representation of these views at the expense of other views supports Pretorius's argument that the most important "function" of state-appointed Commissions is an ideological one: to legitimate the existing socio-political order, whether this effect is intended or not.[7] The Commission's arguments for

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7. Pretorius "Suid-Afrikaanse Kommissies van Ondersoek: 'n Sosiologiese Studie" (unpublished PhD thesis), University of Stellenbosch 1985, 321-322

he retention of the status quo are ideological in the ollowing sense:

> "Individual (or sets of) claims, perspectives and philosophies can be regarded as ideological if they conceal or mask social contradictions on behalf of a dominant class or group. For example, forms of consciousness are ideological in so far as they claim to represent generalizable interests but conceal the particular and sectarian interests of the ruling class and/or in so far as they maintain that societal outcomes represent natural ones, when they are the result of particular constellations of social relations; and/or in so far as they glorify the social situation as harmonious, when it is in fact conflict ridden."[8]

As is evident from the Report the Commission justifies the present law and law enforcement process by these methods. The Report reproduces the dominant patriarchal view of rape: rape as an isolated act of deviance without implications for the relations between the sexes; the rape-related myths are preserved; and rape victims effectively silenced. The political dimension to issues such as the content of the procedural and evidentiary law or representation for the complainant is denied in the Report. The issues are dealt with on a technical level only: the technicalities of the law and the legal system are used to support an ideological position. The Commission's conclusions and ultimate recommendations, while they contain progressive elements, remain firmly within the bounds of the dominant interests. The feminist-inspired challenge to the dominant ideology is anihilated and feminists are cast into the role of

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8. Cited in Pretorius supra n7 18.

scapegoats: it is their activities which stirred up the public concern about rape.

The Report also reproduces components of the dominant ideology of patriarchy. It reflects some of the ideas current amongst the elite group of white, middle-class men whose views predominate in the Report. The Report is thus an important source of information about the dominant ideas the nature and status of women, on raped women, on rapists and on the criminal justice system in South Africa. It is therefore not surprising that the agents of the criminal justice system - an organisations which represents and enforces the interests and values of the powerful group - are not subject to critical scrunity. A close reading of the Report informs the reader more about the powerful group in South African society and their views than about women and sexual offences. The knowledge which emerges from the Report includes the following:

(i) The dominant group does not define rape as a serious social issue requiring special attention.

(ii) It believes that the content of the law and its enforcement are fundamentally fair to rape victims.

(iii) It accepts that the image of the nature of women which is encoded into the law is true and accurate.

(iv) The cultural myths relating to women and rape are operative in our society. Although it is not certain exactly which myths are current nor the extent to which they are adhered, it is certain that those

> which are reflected in the law itself are not questioned by sections of the dominant group. In addition, it is clear from the Report that the myth of the "true rape" is widely believed.[9]

Although the Report recommends some change to the present law which may be regarded as progressive, it remains firmly within the bounds of the dominant patriarchal ideology operative in South Africa today. That ideology defines rape as a private misfortune for the victim, without wider social, cultural or political significance. It must be remembered that the investigation was initiated as a result of expressed public concern about the treatment of the rape complainant by the criminal justice system. Such widespread, vocalised concern contains a potential threat to the status quo in that it may pose a challenge to the definition of rape as a private trouble. The Law Commission Report must be seen as a response to this potential threat. It attempts to check the impulse to reconceptualise rape as a social issue which demands an effective, state-supported, social solution.[10] By identifying local concern for the fate of rape victims with foreign feminists groups, the Report attempts to liquidate the challenge to the sexual status quo and to reassert the dominant view of rape. It

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9. See Report para 2.42.

10. On the distinction between "private troubles" and "public issues" see C Wright Mills The Sociological Imagination Chapter 1.

reaffirms the definition of rape as a private trouble for the victim and denies the social and political dimensions to the rape problem.[11] As such, the Report does not encourage progress; on the contrary, it represents strong resistence to genuine reform.

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11. This is an anti-feminist stance. It was directly as a result of feminist anti-rape movements in other countries that rape was re-defined as a social problem. See Rose "Rape as a Social Problem: A Byproduct of the Feminist Movement" 1977 25(1) Social Problems 75-89.

BIBLIOGRAPHY

BOOKS

AMIR — Patterns in Forcible Rape (1971), University of Chicago Press, Chicago

ATTENBOROUGH — The Laws of the Earliest English Kings (1922), Cambridge University Press

BALDWIN & McCONVILLE — Negotiated Justice (1977), Martin Robertson, London

BERGER & LUCKMANN — The Social Construction of Reality (1966), Penguin Books

BLUMBERG — Criminal Justice (1967), Quadrangle Books, Chicago

BOTTOMLY — Decisions in the Penal Process (1973), Martin Robertson, London

BOTTOMLY & COLEMAN — Understanding Crime Rates (1981), Gower, Hantshire

BOTTOMS & McCLEAN — Defendants in the Criminal Process (1976), Routledge & Kegan Paul, London

BOWKER — Women, Crime, and the Criminal Justice System (1978), D C Heath, Massachusetts

BROWNMILLER — Against Our Will (1975), Simon & Schuster, New York

BUNKLE — Broadsheet1984, New Zealand

CARLEN — Magistrates' Justice (1976), Matin Robertson, London

CHAPPELL, GEIS & GEIS (eds) — Forcible Rape: The Crime, the Victim and the Offender (1977), Columbia University Press, New York

CICOUREL — The Social Organization of Juvenile Justice (1976), Heinemann, London

CLARK & LEWIS — Rape: The price of coercive sexuality (1977), Women's Educational Press, Toronto

DALY — Beyond God the Father: Towards a Philosophy of Women's Liberation (1973), Beacon Press, Boston

DE BEAUVOIR — The Second Sex (1983), Penguin Modern Classics

DOUGLAS — The Relevance of Sociology (1970), Meredith, New York

DOWNES & ROCK — Understanding Deviance (1982), Clarendon Press, Oxford

EPSTEIN — Sex Laws and Customs in Judaism

ERICSON & BARANEK — The Ordering of Justice: A Study of Accused Persons as Dependants in the Criminal Justice System (1982), University of Toronto Press, Toronto

FEELEY — The Process is the Punishment: handling cases in a lower criminal court (1979) Russel Sage Foundation, New York

GELLES — The Violent Home (1972), Sage Publications Inc

GORENICK & MORAN (eds) — Women in Sexist Society (1971), New American Library, New York

GRAMSCI — Selections from the Prisons Notebooks (1971) edited and translated by Hoare and Nowell Smith, Lawrence and Wishart, London

HALE — Pleas of the Crown (vol 1) (1972) Professional Books, London

HALL, CRITCHER, JEFFERSON, CLARKE & ROBERTS — Policing the Crisis (1978), MacMillan, London

HILGARD & ATKINSON — Introduction to Psychology (1967), Harcourt, New York

HINDELANG — Criminal Victimization in Eight American Cities (1976) Ballinger, Cambridge Massachussetts

JAGGAR — Feminist Politics and Human Nature (1983), Rowman & Allanheld, New Jersey

JANSSEN-JURREIT — Sexism: The Male Monopoly on History and Thought (1982), Farr, Straus, Giroux, New York

JOHNS — The Oldest Code in the World (1925) Clark, Edinburgh

KATZ & MAZUR — Understanding the Rape Victim (1979), John Wiley, New York

KUHN & WOLPE — Feminism and Materialism (1978), Routledge & Kegan Paul, London

LEVINE & KOENIG — Why Men Rape (1982), WH Allen, London

LIPTON — Capitalism and Apartheid: South Africa, 1910-1984 (1985) Gower, Aldershot, Hants

LONGMORE — The Dispossessed: A Study of the Sex Life of Bantu Women in and around Johannesburg (1959), Johnathan Cape, London

LÖTTER, STRIJDOM, SCHURINK, et al — Eersterust: 'n Sosiologiese studie van 'n Kleurlinggemeenskap (1979), HSRC, Pretoria

MACDONALD — Rape Offenders and their Victims (1971), Charles C Thomas, Springfield

MacKELLAR — Rape: The Bait and the Trap (1975), Crown Publishers, New York

MALINOWSKI — Myth in Primitive Psychology (1926), Negro University Press, Connecticut

McBARNET — Conviction: Law, the State and the Construction of Justice (1981), MacMillan, London

MEDICAL ASSOCIATION OF SOUTH AFRICA — Rape: The Full Story

MILLETT — Sexual Politics (1970), Virago, London

MILLS — The Sociological Imagination (1959), Oxford University Press, New York

MOODY & TOMBS — Prosecution in the Public Interest (1982) Scottish Academic Press, Edinburgh

RICH — Women and Honour: Some Notes on Lying

RUSSELL — The Politics of Rape (1975), Stein & Day, New York

SAUNDERS & DAUDISTEL (eds) — The Criminal Justice Process (1976) Praeger, New York

SCHAPERA — Married Life in an African Tribe (1971) Penguin, Harmondsworth

SCHMIDT — Bewysreg 2ed (1982), Butterworths, Durban

SCHWENDINGER & SCHWENDINGER — Rape and Inequality (1983), Sage Publications, California

SCUTT (ed) — Rape Law Reform (1980), Australian Institute of Criminology, Canberra

SCUTT (ed) — Violence in the Family (1980), Australian Institute of Criminology, Canberra

SKOLNICK — Justice Without Trial: Law Enforcement in Democratic Society (1966), Wiley, New York

SNYMAN — Criminal Law (1984), Butterworths, Durban

SPENDER — For the Record (1985), Women's Press, London

STRIJDOM & BOSHOFF — Die omvang van die rapporteering van misdaad deur Blankes, Kleurlinge en Indiërs (1980), HSRC, Pretoria

STRIJDOM & SCHURINK — Primêre Viktimisasie in Soweto (1977), HSRC, Pretoria

VIANO (ed) — Victims and Society (1976), Visage Press, Washington

WALKER & BRODSKY (eds) — Sexual Assault (1976), D C Heath, Massachusetts

WIGMORE — Evidence (Chadburn rev. 1970), Little, Brown & Co, Boston

WILLIAMS — The Proof of Guilt 3ed (1963), Stevens, London

WILLIAMS & HOLMES — The Second Assault: Rape and Public Attitudes (1981), Greenwood Press, Connecticut

ZEFFERT — South African Law of Evidence 3ed (1981), Butterworths, Durban

JOURNAL ARTICLES

ARMSTRONG — "A note on several aspects of rape in Swaziland" 1986 XIX Comparative and International Law of Southern Africa 474-482

ASHWORTH & FELDMAN-SUMMERS — "Perceptions of the effectiveness of the criminal justice system" 1978 5 Criminal Justice and Behaviour 227-240

BARBER — "Judge and jury attitudes to rape" 1974 2 Australia and New Zealand Journal of Criminology 157-172

BARSHIS — "The Question of Marital Rape" 1983 6 Women's Studies International Forum 383-393

BLACK — "The Production of Crime Rates" 1970 35 American Sociological Review 733-748

BOZZOLI — "Marxism, Feminism and South African Studies" 1983 9(2) Journal of Southern African Studies 139-171

BURGESS & HOLMSTROM — "Coping Behaviour of the Rape Victim" 1976 113 American Journal of Psychiatry 413-418

BURT — "Cultural myths and supports for rape" 1980 38 Journal of Personality and Social Psychology 217-230

COMMENT — "Police Discretion and the Judgement that a Crime has been Committed - Rape in Philadelphia" 1968 117 University of Pennsylvania Law Review 277-322

FEILD — "Attitudes towards rape: A comparative analysis of police, rapists, crisis counsellors and citizens" 1978 36 Journal of Personality and Social Psychology 156-179

FELDMAN-SUMMERS & ASHWORTH — "Factors related to the intentions to report rape" 1981 37(4) Journal of Social Issues 53-70

FELDMAN-SUMMERS & PALMER — "Rape: A view from judges, prosecutors and police officers" 1970 7 Criminal Justice and Behaviour 19-40

FESTINGER & CARLSMITH — "Cognitive Consequences of Forced Compliance" 1959 Journal of Abnormal and Social Psychology 203-210

FINKELHOR & YLLO — "Forced Sex in Marriage: A Preliminary Research Report" 1982 28(3) Crime and Delinquency 459-478

FISHER & RIVLIN — "Psychological needs of Rapists" 1971 11 British Journal of Criminology 182-185

FOTé — "Child Witnesses in Sexual Abuse Proceedings: Their Capabilities, Special Problems, and Proposals for Reform" 1985 13 Pepperdine Law Review 157-184

FREEMAN — "But If You Can't Rape Your Wife Who[m] Can You Rape? The Marital Rape Exemption Re-examined" 1981 Family Law Quarterly 1-29

GEIS — "Rape-in-Marriage: Law and Law Reform in England, the United States, and Sweden" 1978 6 Adelaide Law Review 284

GIBBENS, WAY & SOOTHILL — "Behavioural Types of Rape" 1977 130 British Journal of Psychiatry 32-42

GOLDSTEIN — "Police discretion not to invoke the criminal justice process: Low visibility decisions in the administration of justice" 1960 69 Yale Law Journal 543-558

KAUFMAN, et al — "Male Rape Victims: Non-Institutionalized Assault" 1980 37 American Journal of Psychiatry 221-230

KIDD & CHAYET — "Why do Victims Fail to Report? The Psychology of Criminal Victimization" 1984 40 Journal of Social Issues 39-50

KITSUSE & CICOUREL — "A note on the use of statistics" 1963 11 Social Problems 131-139

LIBAI — "The Protection of the Child Victim of a Sexual Offense in the Criminal Justice System" 1969 Wayne Law Review 977-1032

LOH — "What has Reform of Rape Legislation Wrought?" 1981 37(4) Journal of Social Issues 28-52

LOH — "The Impact of Common Law and Rape Reform Statutes on Prosecution: An Emprical Case Study" 1980 55(3) Washington Law Review 543-625

MAYNE & LEVETT — "The Traumas of Rape - Some Considerations" 1977 1 South African Journal of Criminal Law and Criminology 163-170

MELTON — "Psychological Issues in Child Victims Interaction with the Legal System" 1980 5(3) Victimology 274-284

MORRIS & TURNER — "Two Problems in the Law of Rape" (1952-55) 2 University of Queensland Law Journal 247-263

PARKER — "The Rights of Child Witnesses: Is the Court a Protector or Perpetrator?" 1982 17 New England Law Review 643-717

PERDUE & LESTER — "Personality Characteristics of Rapists" 1972 35 Perceptual and Motor Skills 514

POSEL — "Rethinking the 'race/class' debate in South African Historiography" 1983 9(1) Social Dynamics 50-66

RIGER & GORDON — "The Fear of Rape: A Study in Social Control" 1981 37(4) Journal of Social Issues 71-92

ROSE — "Rape as a Social Problem: A Byproduct of the Feminist Movement" 1977 25(1) Social Problems 75-89

SANDAY — "The Socio-Cultural Context of Rape: A Cross-Cultural Study" 1981 37(4) Journal of Social Issues 5-27

SALLMAN & CHAPPELL — "Rape Law Reform in South Australia" Adelaide Law Review Research Paper No 3

SCHWENDINGER & SCHWENDINGER — "Rape victims and the false sense of guilt" 1980 13(Summer) Crime and Social Justice 4-17

SCULLY & MOROLLA "'Riding the bull at the Gilley's': Convicted rapists describe the rewards of rape" 1985 32(3) Social Problems 251-263

VAN ZYL SMIT "Die Hantering van Amptelike Misdaad Statistiek in die Suid-Afrikaanse Kriminologie" 1977 1 South African Journal of Criminal Law and Criminology 123-134

WARR "Fear of rape among urban women" 1985 32(3) Social Problems 238-250

WEIS & BORGES "Victimology and rape: The case of the legitimate victim" 1973 8 Issues in Criminology 71-115

WILLIAMS "The Classic Rape: When do Victims Report?" 1984 31(4) Social Problems 459-467

CHAPTER CONTRIBUTIONS

BECKER "Whose side are we on?" in Douglas

BOHMER "Judicial Attitudes Towards Rape Victims" in Chappell, Geis & Geis (eds)

BOSHOFF "Misdaadviktimisasie" in Lötter

BURGESS & HOLMSTROM "Rape Trauma Syndrome in Chappell, Geis & Geis (eds)

BURGESS & HOLMSTROM "Rape: Its Effect on Task Performance at Varying Stages in the Life Cycle" in Walker & Brodsky (eds)

CHAPPELL & SINGER "Rape in New York City: A Study of Material in the Police Files and is Meaning" in Chappell, Geis and Geis (eds)

CHODOROW "Being and doing: A cross-cultural examination of socialization of males and females" in Gorenick & Moran (eds)

COHEN et al "The Psychology of Rapists" in Chappell, Geis & Geis (eds)

CURTIS "Present and Future Measures of Victimization in Forcible Rape" in Walker and Brodsky (eds)

CURTIS "Rape, Race and Culture: Some Speculations in Search of a Theory" in Walker and Brodsky (eds)

GRIFFIN "Rape: The All-American Crime" in Chappell, Geis & Geis (eds)

HINDELANG & DAVIS "Forcible Rape in the United States: A Statistical Profile" in Chappell, Geis & Geis (eds)

LE GRAND "Rape and Rape Laws: Sexism in Society and Law" in Chappell, Geis & Geis (eds)

LEVIS "The Politics of Rape - A Feminist Perspective" in Scutt (ed) Rape Law Reform

NEWBY "Rape Victims in Court - the Western Australian Example" in Scutt (ed) Rape Law Reform

NORDBY "Reforming Rape Laws - the Michigan Experience" in Scutt (ed) Rape Law Reform

REPORTS

British House of Commons, Report on Violence in Marriage (1976)

Criminal Law and Penal Methods Reform Committee of South Australia, Special Report, Rape and other Sexual Offences (1976)

Criminal Law Revision Committee, Working Paper on Sexual Offences (1980)

Criminal Law Revision Committee, Sexual Offences 15th Report Cmnd 9213 (1984)

Peters et al The Philadelphia Assault Victim Study (1976), National Institute of Mental Health

Victorian Law Reform Commissioner, Working Paper No 4 Rape Prosecutions, Court Procedures and Rules of Evidence (1967)

CASES

H 1937 NPD 1

J 1966 1 SA 88 (RAD)

M 1947 4 SA 489 (N)

Mpantsha v Ngolonkulu 1952 NAC 40 (S)

Ndhlovu v Ndhlovu 1954 NAC 59 (NE)

Ndinisa v Mtuzulu 1963 BAC 74 (S)

Ngcobo v Ngcobo 1946 NAC (N & T) 14

Qolo v Ntshini 1950 NAC 234 (S)

Rautenbach 1949 1 SA 135 (A)

Sibande 1958 3 SA 1 (A)

W 1949 3 SA 772 (A)

THESES

BENNETT — "The Status of African Women in Zimbabwe-Rhodesia", PhD Thesis, University of Cape Town, 1980

STRIJDOM — "A Victomological Study Among Coloureds in the Cape Peninsula", PhD Thesis, Rhodes University, 1982

PRETORIUS — "Suid-Afrikaanse Kommissies van Ondersoek: 'n Sosiologiese Studie", PhD Thesis, University of Stellenbosch, 1985

UNPUBLISHED PAPERS

HALL — "Rape: The Politics of Definition" (1987)

MARKS & UNTERHALTER — "Women and the Migrant Labour System in Southern Africa" (1978)

SLABBERT — "Rape and Moral Panics" (1983)