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What's law got to do with it? Comparing the failure to deter or convict rapists in the United Kingdom and South Africa.

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Abstract:

The journey from reporting rape to convicting rapists is complex leading to high attrition and non-conviction rates. After wide consultation, the law in England and Wales was revised in 2003 to try to secure more convictions. In South Africa, a similar process occurred to produce a new law in 2007. Nonetheless reported rapes have risen and conviction rates have fallen in both jurisdictions and it has been suggested that the failure of the criminal justice system to deal with 'rape….. encapsulates the sheer inadequacy of the law' (Wykes and Welsh, 2009:111) and offers little hope of justice to victims and little deterrence to perpetrators. In South Africa little has changed except more is known about 'the lived experiences of sexual violence' (Artz and Smythe, 2007:17) and more support is offered to victims after the event. This article explores the part played by law in dealing with rape, through a comparison of the United Kingdom and South Africa. Critical gendered analysis of their respective rape laws leads to the conclusion that that law cannot work effectively to deter or convict rapists: only men's willingness to change can stop rape.

Introduction

In South Africa 39,828 rapes were reported in 2016-17 (Africacheck, 2017). Conviction rates are hard to estimate as the South African National Prosecuting Authority does not disaggregate rape from other sexual assaults in its data[1]. A study by the Medical Research Council identified a sample of 3,952 rape cases recorded by police in 2012 of which 8.6% ended in conviction (Wilkinson, 2016). The Institute of Security Studies found that in some provinces only 4% of cases led to conviction (Vetten, 2014:6). In England and Wales in 2016-17, police recorded 41,186 reports of rape, of which 4,520 were male rapes (ONS, 2018*)*. There were just 5,190 prosecutions and 2,991 convictions (CPS, 2017*).* This averages at about 7% of police recorded crime. Yet, seemingly progressive legislative changes were introduced in 2003 in England and Wales[2] and in 2007 in South Africa to try to better address sexual violence. In this article our focus on rape law is for two reasons. It has been much invested in for many years to try to alleviate suffering to, most usually, women and girls (The London Rape Crisis Centre, 1984; Lees, 1996; Myhill and Allen, 2002; Walby and Allen, 2004). Rape is considered a deeply serious offence in law, yet there is a huge disjuncture

[1] Statistics on crime in South Africa are both less detailed, less contemporary and more difficult to access than in England. Vetten (2014) documents the difficulties in finding reliable and detailed data, for example on male rape victims.

[2] The Act was intended to be 'brought into force simultaneously in England & Wales, Scotland and Northern Ireland on 1 May 2004: Police Circular: 4/2003 (2004)

between the seriousness the law and legal institutions attach to the crime and the lack of improvement in deterrence or conviction.

The reasons for comparison between the United Kingdom and South Africa are the close relations of both legal systems and because the more recent South African law[3] developed, to some extent, in relation to developments and critiques of the Sexual Offences Act 2003[4].. South Africa is a rapidly and an actively emerging post-apartheid cultural context where constitutional rights frame social progress, unlike the ongoing neo-liberal conservative socio-political environment of the UK. Yet law reform has not seen any consequent reduction in rape or improvement in conviction in either country. This is despite long histories of copious research and writing about rape, some on law (McGlynn and Munro, 2010) but most on other areas such as victims (Garvey, 2005; Christofides et al., 2006); policing (Gregory and Lees, 1999; Artz and Smythe, 2007); criminal justice processes (Kelly et al., 2005; Vetten et al., 2008); media representation/stereotyping (Mahria, 2008; Wykes and Welsh, 2009) and support agencies (Lupton and Gillespie, 1994). All of these have contributed to knowledge but not seen a diminution in numbers of rapes reported or improvement in conviction rates. So might something be learned about that failure to deter and punish rapists by comparing the role of relatively newly and carefully crafted rape laws in a rapidly emerging African culture like South Africa with those in a long established Western democratic context like the UK?

Rape and the Law: The United Kingdom

Emerging legislation in England and Wales seems to have had little impact on reducing rape, indeed the available data almost suggest the opposite. Yet the process of reform was vigorous and the Home Office involved and consulted criminal justice professionals, advocacy groups and academics. Macgregor (2011) writes that in the UK, at the end of World War 2, only 240 cases were reported. Yet in 2010-2011, a few years after the new Act came into force, there were 14,624 female rapes and 1,310 male rapes (Chaplin at al., 2011). This may not have been because more rapes were occurring but perhaps because the criminalisation of rape in marriage in 1991 and male rape in 1994, alongside feminist consciousness raising, were rewriting the meaning of sexual violence and liberating victims to report rape. The volume of rape is troubling enough in the reported data, yet in the UK some 89% of rapes are estimated to go unreported (ibid) a dark figure which has underwritten much scholarly work on rape victims' reluctance to report and very early withdrawal of complaint leading to no-crimed cases (Kelly et al., 2005). Yet despite the dark figure, and victim reluctance, there has been a huge increase in reporting, an increase not matched by an increase in convictions. The erosion of cases before they reach court in England and Wales happens at several levels, according to research by Lovett and Kelly (2009): 45% are discontinued by police; 35% by the victim during the prosecution process; 6% by the Crown Prosecution Service and 50% of those actually going to trial are acquitted leaving approximately a 7% conviction rate by guilty plea or jury. Until the Sexual Offences Amendment Act 1976[5], rape was dealt with under common law. In 1977, one in three reported rapes led to conviction (Harris and Grace, 1999) yet this had dropped to one in twenty by 2007 (Bourke, 2007). Recently the average conviction rate has remained at just over 7%, much as Lovett and Kelly (2009) found, with over 41,000 reports in 2016-17 resulting in 2991 convictions (CPS, 2017).

[3] The Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 South Africa.
[4] Sexual Offences Act 2003 England and Wales
[5] Sexual Offences Amendment Act 1976

Much work highlights the way stereotypes and myths about rape inhibit proceeding to prosecution (Myhill and Allen, 2002) or, if prosecution goes ahead, there is a failure to convict. Other commentary on such poor justice for women, who comprise the vast majority of victims, has looked for explanations in sexist and even misogynistic practices and representations, reproduced via media discourses, both factual and fictional (Boyle, 2005). Such language is steeped in meaning and values which shape both a victim's assessment of what has happened to them, and the way they are treated throughout the whole prosecution process, contributing to secondary victimisation in the criminal justice system and the news media. There is little commentary on the fact that law is a constitutive part of that discursive context and so imbued with many of those same meanings. Rather law's authority gives it both a veneer of truth and a requirement to comply.

The Sexual Offences Act 2003 (England and Wales) defines the experience of rape in legal terms. From the moment a woman reports the offence '*her* experiences are (re)defined and (re)conceptualised to fit into *the law* and its categories' (Wykes and Welsh, 2009: 112). The law has an account of rape with which women's experiences must fit for a conviction to be likely: an account that fits with very particular models of male and female sexuality and leads to what could be described as a *hermeneutics of suspicion* that shadows women's accounts of rape (Denike, 2000 in Kelly et al., 2006). Arguably, as conviction data suggest, this suspicion, across all areas of criminal justice practice, has increased alongside the legal changes since the 1970s. Moreover, Home Office statistics suggest that rape convictions range from 1% to 14% over England and Wales (Stern, 2010) – with very puzzling and worrying variation between areas. Despite the apparent clarity of the Act, criminal justice practices and processes may well lead to it being interpreted and applied differently by different police forces, the Crown Prosecution Service, courts and jurors.

Simply, the Sexual Offences Act 2003 c.42 Part 1 Rape Section 1 states:

> (1) A person (A) commits an offence if—
> (a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis,
> (b) B does not consent to the penetration, and
> (c) A does not reasonably believe that B consents.
> (2) Whether a belief is reasonable is to be determined having regard to all the circumstances, including any steps A has taken to ascertain whether B consents[6].

The Act has attracted criticism (Temkin and Ashworth, 2004; Finch and Munro, 2006; Wykes and Welsh, 2009) largely in relation to rape, as opposed to the much broader remit it now offers for prosecuting, for example, child sexual abuses. The key areas of criticism have tended to be the retention from the 1976 Act of penile penetration as essential for rape, the issue of consent and the issue of reasonableness[7], all of which, it is argued in the next section, maintain very traditional gendered norms and inhibit progress around rape.

Rape and the Law: South Africa

[6] In general, a person cannot be found guilty of a criminal offence unless two elements are present – an *actus reus* (guilty act) and *mens rea* (guilty mind).

[7] Despite such criticism, both Northern Ireland and Scotland retained exactly the same focus on penile penetration, consent and reasonableness as the Sexual Offences Act 2003 in their later revised legislation on sexual offences: The Sexual Offences (Northern Ireland) Order 2008 and Sexual Offences (Scotland) Act 2009.

Such criticism of the Sexual Offences Act 2003 informed South Africa's review of their sexual offences' law which shaped their revised Act in 2007. The UK, since the 1970s, has experienced something of a feminist and liberal political shift underpinning many changes in attitudes towards equity (in theory at least) alongside legislation around sexuality, racial equality and women's rights. In South Africa the history of the contemporary problems around sexual violence, and struggles to stop it, are very different as also are the research, scholarship and activism that have developed to try to curtail the harm. South African (largely) feminist legal scholar activists have been highly critical of existing laws relating to sexual offences, including the 2003 Act of England and Wales.

As in England and Wales, the law reform process was slow and incremental and subject to the inclinations and reasoning of state legal drafters and parliamentary committees. The process was initially characterised by enlivened debates about the reality of rape, optimism about the potential of the law to protect rape complainants, opportunities to be creative about legal solutions and extensive consultation with civil society organisations. This momentum decelerated and stagnated as various iterations of the legislation emerged. As the law's intention morphed from protection to punishment, idealism surrounding the law as a powerful solution to the rape problem diminished.

The 1957 Sexual Offences Act (32 of 1957) defined rape in South Africa in common law as 'intentional, unlawful sexual intercourse with a woman without her consent' and sexual intercourse was defined as the penetration of the vagina by the penis (Milton, 1996: 435). Both this antiquated definition and the lack of a single statute to address sexual offences were the subject of considerable criticism (Pithey et al., 1998). With *Statistics South Africa* (2000) reporting national police statistics of rape at a staggering 49,280 per annum in 2000, the need for progressive law was a matter of distinct urgency.

Finally, The Criminal Law (Sexual Offences and Related Matters) Amendment Act 2007 was passed by Parliament but it was a distilled version of the original Bill put out for public comment in 2003. This had included a range of comprehensive measures to protect victims of sexual offences which were excluded in 2007. The 2007 Act did very little to address the secondary victimisation of rape victims in their interactions with the criminal justice and health systems; an issue which motivated the law reform movement in the first instance. Substantive protection measures, such as the right to testify via CCTV, intermediaries, and *in camera* hearings were all replaced with a provision authorising the National Director of Public Prosecutions to issue directives on these matters to the members of the National Prosecuting Authority, the equivalent of the Criminal Prosecution Service in England and Wales. Provisions designed to shield the victim from facing confrontation with the accused were also removed from the final Act, so too were provisions that specifically referred to the use of expert testimony in rape trials and the promotion of prosecutor-led investigations in rape cases.

Another unsurprising but disappointing loss was the rejection of a proposal that the new law specify certain legal duties on criminal justice personnel in relation to rape cases like the Domestic Violence Act (116 of 1998) which includes mechanisms for disciplinary action should the South African Police Service fail in their duty. But the Sexual Offences Act did not include any. This lack was indicative of an ideological shift from protecting rape survivors to more *punitive* measures which focus on criminalisation of sexual offences.

The new definition of rape was extended to offences which include the penetration of the mouth, anus and genital organs of one person with the genital organs or another body part of

another person, or an object or part of the body of an animal without consent, rejecting the penile focus of earlier South African and English and Welsh law. Section 3 of the Act defines rape as:

> 3. Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B'), without the consent of B, is guilty of the offence of rape.

So in both England and Wales and South Africa, two massive pieces of legislation were eventually constituted, each pre-empted by complex review and consultation. There are many similarities and significant differences. However, neither seems to work very effectively as instruments of prevention, protection *or* punishment, which begs the question: why not?

Is rape law part of the problem: comparing the United Kingdom and South Africa?

The three key areas of the 2003 Act, also adopted by the legislatures in Northern Ireland and Scotland, that seem to inhibit justice are the continued model of rape requiring *penile penetration*; the definition of *consent* and the label *reasonable*. In South Africa's 2007 Act, these are evident but differently configured: rape is *forceful sexual violation* not just penetration by a penis, *coercion* qualifies consent and *context* is used to explore reasons not individual reasonableness. In this section we explore the implications of similarities and differences in relation to failure to deter, or prosecute, or convict leaving potential victims and victims unprotected and with little recourse to justice.

The Act of Penetration

Unlike in South Africa, in the UK the *actus reus* of rape centres on penile penetration. Extending the Criminal Justice Public and Order Act 1994 which added anal to vaginal penetration, the 2003 Act also added oral violation by a penis to the definition. It acknowledges penetration by other body parts or objects but defines these not as rape but as sexual assault by penetration. As rape requires a penis, only men can rape, though the act includes penetration by a transsexual with a reconstructed penis as rape. Here then the penis is privileged as the organ of rape, discursively reducing other forms of violation to sexual assault, when they may actually be more damaging. This has been commonly held as true for some years, for example, research in New Zealand demonstrated that female survivors 'saw *all* acts of penetration (vaginal, oral and anal) as a fundamental attack on their body and integrity' (Barrington, 1984 in Wykes and Welsh, 2009:114). Phallocentric privileging suggests rape is one thing and penetrative sexual assault is another, when acts like urination into the victim and penetration with hands or objects often accompany penile penetration.

This penile privileging in UK rape law relates to arcane gender values and practices, not least the devaluation of a woman to her father caused by the loss (theft) of her virginity (Temkin, 2002). It also relates to highly particular Judaeo-Christian models of sexuality as only legitimate if reproductive and therefore necessitating a penis, which defines by default other models of sexual engagement as lesser. Further concerns, privileging penile penetration as *worse,* include fears about disease, particularly the fear of AIDS/HIV from the 1980s. This is also evident in the South African law where access to post-exposure prophylaxis (PEP) and the compulsory testing of alleged offenders feature prominently. Last, even popular opinion was given serious credence in the English sexual offences review that pre-empted the Sexual Offences Act 2003, which 'felt [that] rape was clearly understood by the public as an offence

that was committed by men on women' (Home Office, 2000: para. 2.8.2004), hence a penis is obligatory.

All these are arguments are rather easily challenged. Women are no longer literally bought and sold as virgin brides in England, nor owned by their husbands and:

> As regards the risk of pregnancy, the fact that pre-pubescent, post-menopausal, sterilised and infertile women can all be raped rather undermines this reasoning, as of course, does the fact that men can also be raped (Wykes and Welsh 2009:114).

Rape can also be charged if a condom is used or the rapist does not ejaculate (Ormerod, 2005) making pregnancy or disease unlikely. So despite one of the overall aims of the sexual offences review and resulting 2003 Act being to gender-neutralise the law around sexual violence (Home Office, 2000), it has instead retained a very conservative model of rape and the explanation for that is both logical and troubling. Logical because 'rape [is] a crime of men against women' (Naffine, 1994: 24) and to remove the penis from centrality to the definition of the offence would be to disguise the fact that rape is a crime that expresses men's power over women through sexual violence (Gillespie, 1994). Troubling, because retaining penile penetration as the only way in which rape can occur simultaneously leaves in place, and worse trails forward, very stereotypical ideas about men's and women's sexuality. This is not least because penile rape requires an erection and an erection requires sexual excitement and the inference is that the victim somehow causes this. Despite reforms, the vestiges of history are still apparent in the law. Women, and indeed their sexuality, remain regulated by a law that is embedded in deeply patriarchal historical origins; origins that define sex, and punish coercive sexual intercourse, in ways that have little to do with much of the lived experiences of women. UK rape law, as enacted by all three jurisdictions of the UK,is thus part of a continuous discourse that underwrites the sexual violation of women.

In South Africa, on the other hand, the 2007 Act repealed the common law offence of rape – the intentional, unlawful sexual intercourse with a woman without her consent – and replaced it with a more inclusive statutory offence. The use of the term 'sexual penetration' in the new Act means that anal penetration, forced oral sex and insertion of other objects into a victim's anus or vagina also constitute rape. Sexual penetration is defined in s 1 as:

> Any act which causes penetration to any extent whatsoever by- (a) the genital organs of one person into or beyond the genital organs, anus, or mouth of another person; (b) any other part of the body of one person or, any object, including any part of the body of an animal, into or beyond the genital organs or anus of another person; or (c) the genital organs of an animal, into or beyond the mouth of another person.

This definition means that a penis does not have to be inserted more than slightly into or beyond these orifices and therefore does not need to be erect for it to penetrate. It acknowledges the wide range of sexual acts that victims experience as rape. The definition is not object-specific, meaning that any other object or body part inserted into (or beyond) the genital organs or anus of another person, also constitutes sexual penetration. The fact that 'objects' are not defined allows for the penetration of any object to be considered when considering an act of sexual penetration. However, unlike penetration by a genital organ, the insertion of an object into the mouth of another person does not constitute sexual penetration. The definition of sexual penetration also extends to cases where the genital organs of an animal are inserted into or beyond the mouth of another person.

Previously, some – indeed most – of these offences fell under the common law definition of indecent assault for instance, sexual acts such as inserting an object or finger into the vagina, anal rape (penetration with a penis) and inserting a penis into the mouth. As a 'lesser charge', this obviously had implications for sentencing, but most importantly denied the experience of rape as victims experienced it. Previously, a person charged with anal penetration could only be convicted of indecent assault. With the new formulation of rape, a person who commits an act of anal penetration would now be subject to the minimum sentencing applicable to rape, currently 10 years. The Act also created new statutory offences meaning someone who compels or forces someone else to commit an act of rape can be charged with the crime of 'compelled rape'.

Unlike the UK, in South Africa the legal model does appear to be gender neutral and the extended definition of rape is possibly the single most major success of the 2007 Act. The gender-neutrality of the new definition now means that men and boys can be raped and that women can rape (i.e. sexually penetrating a man). The South African Act treats all penetrative sexual assault as rape so acknowledging a much wider range of sexual violence as rape and treating as equal such violations regardless of gender or sexual orientation.[8] It is important to note, however, that the Act separates sexual offences into acts of *penetrative* (rape) and *non-penetrative* (sexual assault) offences. In contrast, definitions of penetration in law in the UK merely replicate no longer appropriate, however popular, stereotypes about men's and women's sexuality as unfortunately so did some Western feminist (Temkin, 2002) and British government (Home Office, 2000) arguments. Nonetheless despite the improved South African definition of rape on paper it seems no more effective legislatively, in practice, going by report and conviction rates, than the archaic, phallocentric UK counterpart. So are there further reasons why conviction is so difficult, which also diminishes deterrence?

Consent

The Sexual Offences (Amendment) Act 1976 defined rape as sexual intercourse with a woman without her consent, without defining consent. Seeking *crystal clarity* the government meant the revised 2003 Act to provide a general legislative definition of consent in Section 74. It provides that 'a person consents if he (sic)[9] agrees by choice, and has the freedom and capacity to make that choice'[10]. The problem is that this focuses on the victim's state of mind rather than on the defendant's state of mind and requires the prosecution to prove the absence of consent, when it is the defendant who should prove he had consent. Westmarland (2004) argues this leads to the victim rather than the defendant being the person on trial which of course, perpetuates precisely the same sexual norms and values as does a focus on penile penetration. The victim must have *led him on,* for him to be aroused. *Ipso facto* women are responsible for male sexual behaviour. In the Sexual Offences Act 2003, the inclusion in the definition of terms like choice, freedom and capacity was meant to suggest consent should be equally negotiated. In 2005, a defining case, *R v Dougal*[11]*,* revealed how far from ideal this definition was when a woman student, too intoxicated to remember her rape but also too drunk to remember having said no, was deemed to have consented. Any man actually

[8] In the United Kingdom, the lack of equity has spawned research on men's experiences of sexual violation, including by women (Weare, 2017). Weare interviewed men who had been 'forced to penetrate' women. 29.7% described their experience as rape whereas the law would describe it as a sexual assault.
[9] The male pronoun is used even though the vast majority of victims are women and girls, again indicative of the arcane, male values reproduced by the 2003 law.
[10] Section 75(2) of the Sexual Offences Act 2003 lists six conditions where consent is deemed not possible, which inform s 76, for example if the complainant was asleep or unconscious at the time.
[11] *R v Dougal* [2005] Swansea Crown Court 435

convicted of rape nowadays, in the UK, must feel singularly unlucky, given such judicial precedents.

During the drafting period for drawing up a new South African Sexual Offences Act, much debate took place as to whether to retain the element of consent in the definition of rape. In practice, it is usually quickly established that intercourse took place – through medico-legal/ forensic evidence or it is admitted by the accused – so what remains is whether the complainant consented. This often means that rape trials focus on whether the complainant was *willing* to have sex. For this reason, in an early version of the Sexual Offences Bill, the South African Law Reform Commission justified the removal of the element of consent in favour of a focus on coercion:

> The advantage of using the term 'coercive circumstances' instead of 'consent' was seen to be multiple: it bore recognition of the fact that perpetrators routinely employ different methods to ensure the submission or compliance of their chosen victim …; it acknowledged that it is unacceptable in court for the actions and behaviours of the rape complainants to be interrogated to a greater extent than those of the accused; and it relieved the prosecution of some of the burden of proof regarding the victim's lack of consent (Fuller, 2007: 11).

Removing consent from the definition of rape would have meant, in theory, a shift from the question of whether the complainant had consented to sex towards whether the accused had used coercion in order to have sex with the complainant. However, the Parliamentary Portfolio Committee on Justice and Constitutional Development argued that even if consent was taken out of the definition, the accused could still raise 'consent' as a defence making removal of consent an important, but merely symbolic, shift in the law.

Under the new SA Act, consent is defined as 'voluntary and un-coerced agreement' (section 1(2)), with a non-exhaustive list of coercive circumstances where voluntary and un-coerced agreement is presumed to be absent. The list includes: the use of force or intimidation; a threat of harm; abuse of power or authority; false pretences or fraudulent means; incapability in law of appreciating the nature of the sexual act, as in (i) asleep; (ii) unconscious; (iii) in an altered state of consciousness, including under the influence of any medicine, drug, alcohol or other substance, to the extent that consciousness or judgement is adversely affected; (iv) a child below the age of 12 years; or (v) a person who is mentally disabled. Mills (2010: 258) has argued this formulation of the definition creates a 'positive consent standard whereby only "yes means yes"'. Moreover, coercion is not limited to force or threat of rape but includes more subtle factors that negate consent. The term harm is important as it allows for a semblance of subjectivity in the complainant's perception. So harm might be reputational harm or damage, financial harm or hardship or harm to any material aspect of a victim's life. An additional unique dimension of this definition is that threats or force exerted can also be directed against a person (the complainant) or property or against another person (a family member, for instance).

False pretence is also a progressive provision, but raises some interesting questions about what constitutes a false pretence. There are several examples: mistaken identity, deception and misrepresentation. With respect to a person 'incapable in law of appreciating the nature of the sexual act' – through sleep, unconsciousness or substance affected – the Act simply codified the existing common law. In relation to children under the age of 12, under the common law, there is an irrebuttable presumption that girls under the age of 12 cannot

consent to sex[12] and gender neutrality now ensures boys under the age of 12 are protected. The statutory protection of persons who are mentally disabled is a new dimension.

Despite the creditable effort at a non-exhaustive list of circumstances, some remained sceptical. Mills (2010: 251) argues that:

> the list of 'coercive circumstances' do not comprehensively reflect one of women and girls' most common encounters with sexual coercion, which is rape by a perpetrator known to them, often in dating and marital relationships. Nor do they adequately take account of women's vulnerability to sexual exploitation through extreme poverty.

There was also speculation about whether the new formulation would mean victims not having to prove that they did not consent with, instead, the defence simply shifting to trying to prove non-coercion. Thus in both legislatures 'consent', however differently framed, remains in practice a deeply problematic area in relation to conviction. Merely changing the terms used seems to do little to change the cultural meanings and practices associated with gender and sexuality with women discursively confined to very traditional models of respectable femininity or blamed for their demise if they do not.

A further area of revision and contention is the notion of reasonableness, which impelled much of the reform in England. After a comment by the House of Lords that 'a man could be found not guilty of rape if he had an honest, even if unreasonable, belief that a woman was consenting' (McGlynn, 2010:139), protestors described UK rape law as a *rapist's charter*. In South Africa there is much less focus on the offender as a subject and much more on the context of the sexual act: a context construed as constitutional and interpersonal and a focus more on reasons than reason.

Reason/reasons

In England, the 1975 case of *DPP v Morgan*[13] established that an accused who made an *honest* mistake had no *mens rea* and could not be convicted. The 2003 Sexual Offences Act added the requirement of reasonableness to the requirement of honesty, despite strong parliamentary opposition. At first this seemed a victory for the feminist lobby but it was rapidly exposed as pyrrhic, as it became clear that the reasonableness measure being used was the subjective one of the defendant, not an objective one that a majority of people might concur on. Here again it is the victim who is the examined object: did she tease, flirt or had she previously had sex with the defendant, which might lead him to reasonably believe she would be consenting? The reasonableness component allows for the trotting out of clichéd ideas about women's behaviour by defendant and barrister alike; ideas which may well resonate with jurors and of course victims, whose self-blame often underpins attrition. In 2002 the prevalence of such ideas was demonstrated by Clarke et al. (2002) who found many men claimed to believe 'no' meant 'maybe' and 'maybe' meant 'yes'. Further ideas commonly held were that women like a 'bit of rough' and pretend resistance (Temkin, 2002); that women need softening up with alcohol to admit what they really want (Masher and Anderson, 1986) or that a reluctant woman must have lesbian tendencies and needs a good 'seeing to' to sort her out. This last is a belief even more common in South Africa, where victims' reports implicate police alongside perpetrators: 'Some policemen in the township

[12] Presentation by Waterhouse (2009) at the GHJRU, University of Cape Town.
[13] DPP v Morgan [1975] UKHL 3, [1976] AC 182, [1975] 2 WLR 913, [1975] 2 All ER 347, 61 Cr App R 136, [1975] Crim LR 717 was a 1975 decision of the House of Lords.

mock you saying: 'How can you be raped by a man if you are not attracted to them?' (Filhani, 2011).

With such ideas still so culturally prevalent, it can be suggested in UK courts, that any reasonable man might espouse them *honestly,* as if immune from decades of efforts to change attitudes to women in the West. Ironically perhaps, as was recognised in the review pre-empting the 2003 Act, 'the more stupid and sexist the man and his attitudes, the better the chance he ha[d] of being acquitted' (Law Commission, 2000: para. 7.20 (2)). Ministers agreed that the phrase reasonable *in all circumstances* must allow for consideration of all *relevant* characteristics of the defendant. It could also infer that a broader situation such as a party, or shared drink, or previous sexual relationship might mean some individuals genuinely believed it reasonable to expect sex, again focusing the lens of credibility on the woman.

As with consent, *reasonable belief,* may also be claimed on the basis of the woman's sexual history, which is a readily made plea, given that:

> For the majority of female victims of rape or assault by penetration (including attempts), the offender was a partner or ex-partner (45%) or someone who was known to them other than as a partner or family member (38%). (ONS, 2017)

Such men can easily claim reasonable belief on the basis of a history of consensual sex or ongoing friendship or familiarity. Despite the efforts under the Youth Justice and Criminal Evidence Act 1999[14] to curtail the use of sexual history evidence, there is ample evidence that this is routinely flouted (Kelly et al., 2006) by barristers to show consent, reasonable belief or to protect their male clients' human rights (McGlynn, 2010).

The existence of a relationship between perpetrator and victim also characterises rape in South Africa (Mills, 2010) but the 2007 law avoided the pitfalls of *reasonable belief* and instead sought to focus on *reasons* for rape in *context* such as a previous lack of state protection for individual dignity, poverty and deprivation and a cultural history of deeply unequal gender relations. The transition to a democratic state meant the passing of a new South African Constitution (Act 108 of 1996)[15] and Bill of Rights. The Bill of Rights set out fundamental protections for South Africans and enshrined a number of rights of particular significance to women. These include the right to equality, including on the basis of gender, sex and sexual orientation; the right to human dignity; the right to freedom and security of the person, which includes the right to be free from all forms of violence from either public or private sources;" the right to adequate housing; the right to access to health care, food, water and social security; and the right to access to court. These rights, according to Pithey et al. (1998:49), imply 'that the state has a duty to prevent, investigate, punish and, where possible, compensate for violations of the right to freedom from violence such as rape'.

Although deeply ideologically commendable it is difficult to find any evidence of such arguments being brought to bear on behalf of victims of sexual violence, rather the opposite. Defendants in both sexual and domestic (often indistinguishable) cases now routinely argue poverty, 'custom and practice', abused childhoods, cultural norms and disadvantage as a legacy of apartheid to explain their actions. In sum, increasingly either colonialism, epitomised by the oppressive, exploitative, racism of apartheid, or the state is being blamed.

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[14] Youth Justice and Criminal Evidence Act 1999 c.23 Part II Chapter 3 Section 41

[15] Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996)

A gang rape indicates the explanatory discourses resorted to when seven young men were 'suspected of holding the girl as a sex slave in a Soweto township residence, filming the rapes with a mobile phone and offering her coins to keep quiet' (Aljazeera, 2012). Comments from a female medical researcher and gender activist focused not on blaming the men, who encouraged each other in the assault, but rather they argued *context* was to blame:

> Massive unemployment, poverty, easy access to weapons and the lingering effects of the racial oppression of apartheid have been cited as reasons for the persistently high levels of violent crime: 'We come from a history of violence, where people have lived and grown up using violence in order to get what they want, to settle conflicts' Lisa Vetten, a gender activist said (ibid).

Women too suffer from deprivation, racism and violent histories yet seem not to turn to dangerousness like men when disempowered (Campbell, 1993). The focus on context in South African law makes it very difficult to consider rape through a gendered lens despite it being a crime overwhelmingly perpetrated on women and girls (men and boys) by men.

So*, consent, coercion, reason* and *context,* however defined and thoughtfully (or not) inscribed in law, seem not to work in practice to either secure conviction or deter sexual violence. So if law is not there to deter perpetrators, protect victims and prevent further harm through effective prosecution then perhaps a question which needs to be asked is what, actually, are these laws doing?

What does rape law actually do in the United Kingdom and South Africa?

The similarities in the constitution of the law between the United Kingdom and South Africa may be more profound in helping to explain the high levels of rape and low levels of conviction, than are the differences. However, South Africa has at least moved away from a phallocentric measure of sexual activity and is, therefore, ideologically and politically equipped to potentially shift meanings around gender and violence in a way that is impossible through British law. Indeed, it challenges credulity that the Sexual Offences Act 2003 should have introduced precisely those phallocentric definitions of rape at the moment they were being dismissed by the South African review team as inadequate law. Nonetheless and despite these criticisms, the problem seems to be a general over investment in the potential of doctrinal law to right wrongs and an underestimation of the extent to which any discourse, however (re)constructed, will tend to serve power. Simply, the goals of the new legislations were ahead of their popular meaning potential so that the intended meanings associated with the new revisions were culturally inchoate. All that seems to have happened is that old meanings have emerged attached to the new discursive formulations. New law has replaced old but the old cultural myths and stereotypes that define gender and sexuality were not simultaneously reconstructed and have simply been attached to the new formats in practice. Sigsworth (2009) discusses how forced sex or rape are firmly associated with violent, stranger attacks. These ideas are deeply entrenched as South African men's sense of entitlement to sex which means any sign of friendliness from a woman might be deemed a sexual invitation. Sigsworth argues:

> The taking of sex is a relatively simple but violent performance of masculinity that can achieve a feeling of ascendancy over both women and other men: rape asserts the subjectivity and physical power of a man whose status might otherwise be insecure, and humiliates the victim as object. In a society where unequal gender relations are coupled

> with ideologies of sexual entitlement and the availability of women for sexual use, the opportunities for sexual violence are manifold. (Sigsworth, 2009: 17-22)

In the United Kingdom inequity may not be so overt nor extreme sexual violence so common but the evidence of misogyny and objectification of women is pervasive. Sexual harassment, revenge pornography and rape threats are now frequently played out anonymously via social media (Wykes, 2017) supporting just that same culture of male entitlement. In some ways the situation for justice for women is worse now than prior to the legislative innovation as arguably there was wide consultation, and much liberal and feminist input to the changes, making it difficult now to protest about the revised laws in the three jurisdictions of the United Kingdom, ensuring their continuing flawed potential.

That law is not working very well to protect women is a truism but law is the most powerful discourse of authority we have. It sits just beneath outright violence, the rule of force as a mechanism of social control and normalisation, and as such its 'content and operation is closely bound up with political agendas' (McGlynn and Munro, 2010:12), including gendered politics and the shoring up of patriarchal power. So it is reasonable to assume that law may not be preventing rape or helping women rape victims but it is doing something. In this section we try to think through these laws less in relation to their purported role against sexual violence and more in terms of what is actually being achieved by each piece of legislation, and what if anything might be done to actually stop rape.

In the United Kingdom, rape law protects men and maintains models of appropriate sexual organisation that perpetuate women's victimhood, consolidating their place on what Kelly (1988) dubbed a *continuum of sexual violence.* But it does more than that as it shores up men's power, generally, both sexual and other. So, there is no real dichotomy of *sex crime* versus *act of power* which characterises much feminist debate about rape. Rape is about power: the physical power to act, to take what is not offered, indeed to take what you might perceive to belong to another man, and the power to prove consent happened and you were reasonable to assume it (Brownmiller, 1975). But rape is also about sex (Mckinnon, 1989) because the law states only men can rape, which is privileging one very small aspect of human sexuality as more important than any other and even the South African legislation retains various penetrations (simulacra of intercourse) in its definition. In the United Kingdom, the very reason defence lawyers have found ways to question women about their sexual history despite, for example in England and Wales, the Youth Justice and Criminal Evidence Act 1999 is just so to secure power over courts' views on consent and reasonableness, including jurors, by playing to outmoded ideas about respectable femininity, outside of which mode any woman is *asking for it.* McColgan (1996:225) argued that 'sexual history is improperly employed to secure acquittals for men who have been guilty of rape' and it seems little has changed since, in either the language used about victims or about rapists.

In the South African legislation it is different. Section 227(2) of the Criminal Procedure Act (CPA)[16] states that an application must be made to the court to use sexual history evidence. Section 227(6) states that an application will not be granted if the evidence in question is sought to support the inference that by reason of the complainant's sexual experience (or conduct), the complainant is more likely to have consented to the offence or is less worthy of belief. In a context where women are routinely regarded as 'deserving' rape for being gay, drunk or in the *wrong place at the wrong time*, the notion of women as 'provocateurs' of

[16] Criminal Procedure Act (CPA) Act 51 1977

sexual assault continues to have considerable cultural currency in South Africa, as it still does in the United Kingdom. Those cultural inflections are regularly reproduced in the news media in both countries.

For example, in 2012 two professional footballers were tried for rape of the same teenage woman in Cardiff, Wales, which they denied, claiming consent[17]. Both men were cleared of rape but Evans was only cleared in 2016, after serving some of his sentence and two appeals, with the judge, at the second, allowing the young woman's sexual history to be admitted as fresh evidence[18]. Evans then successfully sued his first legal team for damages. The liberal *Independent* newspaper reported the appeal process, which focused, like R v Dougal [2005] on drunken consent. Baxter (2016) wrote:

> Evans *admitted that he lied* in order to get a key for the hotel room that the woman was in and that he left afterwards via the fire escape; he also said that he didn't speak to the woman before, during or after having sex with her. Evans' defence team said: 'Drunken consent is nevertheless consent. While disinhibited through drink, she did consent to sex. Lack of memory does not equal lack of consent.'

The article was critical of the judge's decision to allow the defence team to call the young woman's ex-boyfriends as witnesses, who answered defence questions about her sexual behaviour, but it does not engage with the problems of consent and reasonableness. Covertly the article even continues the misogyny it describes, in relation to using sexual history in court, by repeating vitriolic social media messages about the young woman. These messages named her, called her a liar, a slag, spiteful, a c**t and a manipulative lass (ibid). Nor does the article question the men's behaviour in taking turns to have sex with an unknown young woman, too drunk to recall the act. Masculine values are not challenged nor explained.

In 2018, in the UK in Northern Ireland, two rugby footballers were tried for rape and two further players for sexual assault of the same young woman. All were acquitted. Again the case hinged on consent. *The Guardian* reported the trial: [In court the nineteen year old]:

> complainant had to spend eight days in the witness box, being cross-examined by four sets of barristers, all men. Her bloodied thong was passed to the jury for examination (Mackay, 2018).

She was unknown to the players and had been at a club where they were celebrating. After closing time a group headed to a private house to a party: 'She did not know any of them, and later couldn't recall who invited her' (ibid). Photographs were taken and shown in court: 'McIlroy with Olding. They have their trousers down, facing the other young women on the sofa, dancing in their boxer shorts' (ibid). The two accused, the rape defendants, later allegedly boasted of their joint venture on *Whatsapp* describing the sex as 'spit-roasting' and themselves as 'top shaggers'. The alleged exchange ended with the comment 'Mate, no jokes she was in hysterics, wasn't going to end well' (ibid). The young woman claimed the sex had been very rough and she had panicked and frozen. She had told friends the next morning, gone to Rape Crisis and sought medical help for bleeding and had swabs taken. The following day she went to the police. Yet the defence focused on consent and challenged the veracity of the woman's account. One barrister commented that she was 'moving from truth to untruth, or falsehood and self-delusion' (ibid). Protests by women after the verdict of not

[17] R v Chedwyn Michael Evans and Clayton Rodney McDonald [2012] EWCA Crim 2559
[18] Chedwyn Evans v R. 21 April 2016 Court of Appeal

guilty saw them labelled ‘feminazis’. The article does discuss the evident misogyny of rugby culture and reports a UN rapporteur’s comment that ‘masculinity pervades our courts’ (ibid) but this article is an example of *The Guardian’s* ‘long read’ (several full pages). These are in-depth research based reports rather than everyday crime news and yet the piece still barely explores why men might behave in such ways.

There is virtually no critical comment in news outlets in such cases about the presumption of heterosexual men that they have a right to use a completely unknown, very drunk, teenage girls to share for sex and sometimes share the act digitally or send lewd messages about it on social media. The lack of attention to male behaviour is precisely what the element of ‘consent’ does. It turns the rape inside out, where rape complainants have to justify their actions (non-consent) against effort by the prosecution to prove ‘consent’. Until such assumptions are challenged in court as well as the news, jurors and judiciary will be ‘encouraged’ to accept them as *reasonable* and so hegemonic heterosexuality is shored up for all men through the symbolism of that lack of challenge. This is precisely what Brownmiller (1975) meant by *all men are rapist*s, in that all male power is secured by the few men who do rape.

But such a crime is also about sex because it is a rape charge which tells us, commonsensically, that it was penile penetration and that is the ‘worst’ crime because it is the means by which a man can ‘take’ another’s woman (father or partner or potential partner) and besmirch her value. It tells the story of ownership, of monogamous reproductive cells (Foucault, 1978). It simultaneously denies all other modes of sexual expression as lesser and shores up very traditional models of sexuality and gender roles. It is politically patriarchal, conservative and retrogressive. For Foucault, the Victorian focus on the family serviced middle-class socio-economic power, by reproducing discursively heteronormative gender models that aligned women’s sexuality with marriage, motherhood and monogamy. Foucault barely acknowledged that the family construct, as part of a *technology of control* also serviced patriarchal power very nicely. He did though recognise that ‘the exercise of power has always been formulated in terms of law’ (Foucault, 1975:87 which in turn informs many social narratives about meanings and values in our world. Mort (1987) did recognise that power was largely male, though complexly, intersected by class, race, sexuality etc. and that masculine ‘constructed sexualities, identities and pleasures have been complexly written into many of the structures of social and political domination’ (p. 171). Deconstructing such writing, whether in the law or the news, can reveal the power they serve.

News about male sexual violence in South Africa, similarly to the British news, focuses on the woman or women victims rather than the perpetrator and rarely engages with masculinity as problematic. In the trial of Pastor Omotoso in 2018 reports focused closely on the victim and repeated verbatim parts of cross questioning which doubted her word and asked why she had not fought or screamed as ‘Why did you not scream, mam? You knew there were other people in the house, they would hear you?’(IOL News, 2018). Again other men are implicated in the rapes:

> Alleged accomplices Lusanda Solani, 36 of Durban, and Zukiswa Sitho, 28, of Port Elizabeth, allegedly recruited girls all over the country and monitored their movements in the houses where they were being kept. (ibid)

As in the United Kingdom accounts there is no discussion, in this case, or that of the Soweto rapes, in South African news, of men working with other men to abuse nor of the sense of entitlement which underwrites such violation. The Omotoso trial was delayed to allow the

defence attorney to go to the Court of Appeal and seek to have the judge recused on the grounds of bias. The judge then recused himself. The case restarts on 30 July 2019. Cheryl Zondi, who broke down as she testified that Omotoso 'raped and sexually assaulted her from the age of 14' (Naidoo, 2019) faces having to re-testify. She identifies the process of giving testimony as secondary victimisation because of the gruelling questioning from defence counsel trying to discredit her account. The three accused face 97 charges.

Revealingly, joint venture and indeed gang rape generally, expose much rape as being more about men competing for power with other men in a kind of homophobic will to prove their heterosexual machismo (Kimmel, 1994) rather than desire for a woman. The prevalence of gang rape amongst men in deeply competitive masculine proximities such as football, the armed forces, fraternities in the US, street gangs and indeed city investment bankers (*The Telegraph*, 2012) seems to confirm Kimmel's theory. It is unlikely that questioning by prosecutors about the meaning of joint enterprise ever arises in court as it is not central to law, but the effect is that even legal prosecutors seem to accept that men like to have joint sex with semi-conscious, drunken, unresponsive and/or mentally disadvantaged women for themselves and each other, as she clearly cannot benefit. Such acts are increasingly recorded on mobile phones, as in the, previously mentioned, Soweto case, and can be uploaded to *YouTube* allowing immediate identification of the perpetrators and an audience of millions. What further evidence is needed of men's sense of right and their power to get away with it than publicly distributing recordings? Rather than challenge the masculinity and power at the heart of such violence, old stereotypes about victims are circulated in both press and public instances.

In many rape cases, men are filming themselves and/or watching other men take turns with a helpless victim and this is not queried in the news or the courts. Indeed, in such instances other men are complicit with the act by either watching the clips, or tweeting support rather than challenging rape. This public and mediated discourse mimics the *masculinism* that sits so comfortably in a rape court which seems, for all it purports, to be about protecting men from false accusation rather than about protecting rape victims, either in court, or from future assaults by wrongly acquitted men. Indeed, it could be argued that prosecuting rape is more about not prosecuting it and protecting men's power over women and retaining power for all men of power including police officers, prosecutors, barristers, judges, academics and so forth, by only imprisoning the *other* rapist – the dangerous stranger who violates the property of another. Celebrity masculinity, with its associated power and status, seems close to immune from blame, whilst the very few successful prosecutions of 'ordinary' partner or date rape discursively underpin heterosexual and patriarchal interpersonal relationships:

> At both an individual and general level, the law has thus left the dangerous body literally free to act again whilst also metaphorically shoring up very traditional meanings about sexual bodies that have implications beyond the courtroom for gender identity and subjectivity. (Wykes and Welsh, 2009:129)

This is the work being done by rape law in the UK. It preserves male power, over women and other men, both of whom might threaten that authority. These ideas are not new, just ideas not foregrounded frequently enough in academic accounts of sexual violence in the West which tend, as does the law, court and news, to focus on the victim.

South Africans, though, do try to do things differently:

> Masculine power is often defined through men's capacity to affect their will … sex can therefore be seen as an indicator to other men of position, status and masculinity … Men who rape are often more concerned about their own position relative to other men and to women than to their victim. (Sigsworth, 2009:13)

This conceptualisation replicates Kimmel's (1994) perspective explicitly. Sigsworth wrote this in a report on sexual violence in South Africa for the Centre for the Study of Violence and Reconciliation which focuses on inequity, structure, culture, conflict and systemic failure, approaches rare in Western literature but not unsurprising given South Africa's radical thinking about conflict in all contexts. In South Africa the new law was part of massive social change rather than liberal conservative appeasement and it was drafted with critical awareness of the Sexual Offences Act 2003 and cognisant of the importance of the *Akayesu* case (ICTR-96-4-t judgement 2 September 1998)[19] on the Rwandan rapes which refused to deal with rape as body parts but contextualised in conflict, power and genocide. In updating the law to the Sexual Offences Act 2007, the Chamber rejected models of penile penetration, consent and reason. It:

> Expressly eschewed attempts to prescribe a list of sexual acts that would constitute rape … purported to move away from the consent threshold ... and rightly privileges surrounding context and structural inequality and moves away from inappropriate individualistic focus on sexual autonomy. (McGlynn and Munro, 2010:2)

In South Africa gang rape is very common: It may be 'jackrolling' where a girl seen as a snob or unattainable is degraded, while 'streamlining' describes the process of coercing sex as an entitlement. Each publicly demonstrates the rapist's virility to other males (Sigsworth, 2009). Yet, although power is much more clearly foregrounded in both press and policy and academic discourses in South Africa than in the United Kingdom, it is law that is still seen as a key means of challenging the dangerousness of men's *will to power* in both legislatures. But, law, however subtly and differently it conceptualises rape, has contributed little to the work of stopping rape because both law and rape, however formulated, serve male power and authority, including the power of some men over others.

Concluding thoughts

In Britain there seems to be a kind of stasis on what to do about sexual violence but South Africa is a rapidly evolving post conflict democracy with many emerging initiatives which may yet offer the West a better way to stop gendered violence of all kinds. Since the passage of the Sexual Offences Act, South African (largely feminist) advocacy groups and academics have been methodically monitoring the implementation of the Act (*cf* GHJRU, 2019) and continue to make submissions to Parliament about the limitations of the law. They also use 'evidence based advocacy' to promote amendments to the law and reforms in criminal justice practice. There is legal critique evident there, which is often missing from public spaces in the United Kingdom, and with that at least some intellectual momentum.

For now, we can say that rape law however revised, carefully formulated, differently constituted and operationalized in two very diverse cultures is not only *not* leading to the successful prosecution of rape but is arguably acting in support of male sexual aggression because law serves power and most power remains with men and rape retains that power for

[19] John Paul Akayesu ICTR-96-4 | United Nations International Criminal Tribunal Rwanda.

men over women and for some men over others. Moreover, even where law is re-constructed, as was deliberately the case in South Africa, so as to reduce that effect, the very gender neutralisation undertaken diverts from analysis of the masculinity that underpins the crime. In both instances victims, and potential victims, of rape are poorly served.

Rape is a crime but the turn to law and criminal justice to resolve rape comes at a cost because it very readily focuses attention away from the gendered nature of such crime. Even male on male rape is very often an act of feminising the male victim, removing his power and making him less of a man than the perpetrator. Rather than focus on prosecuting the crime, there is a need to retain the critical focus on gender relations and the gendered politics of cultures. This critical focus is necessary because everyday sexism, harassment and a sense of male entitlement create cultures, both in Britain and in South Africa, shot through with dismissal or diminishment of women and girls' experiences, voices and bodies. Those cultures shape laws which serve power, and in both countries power remains overwhelmingly masculinist. There are different cultures and different laws but similar outcomes in relation to rape because in each place rape is the ultimate gendered crime and that gendering needs close focus.

That critical focus has happened systematically for decades in relation to the place of women and girls as victims, and potential victims of rape, with work engaging with the criminal justice system, charitable agencies, the media, and of course the law, with this last leading to the new Acts in England and South Africa in 2003 and 2007 respectively. This work is largely driven by feminist initiatives and/or concern for justice for female victims. There is little focus on why men rape. Efforts to improve justice for women are frequently challenged. Recently, the Justice Secretary for England and Wales, Liz Truss, announced that rape complainants could pre-record evidence, and be cross-examined, outside of the court. This she argued would allow a judge to 'cut out any inappropriate cross-examination of a victim's sexual history before it could be aired in front of a jury' (Summers, 2017: 9) and hopefully protect victims and improve conviction rates. The immediate response, from a support group for male victims of false accusation, *Accused.me.com,* was that this would lead to wrongful conviction, even though false accusation is estimated to constitute only 2-3% of rape allegations (ibid).

Certainly all these efforts, over decades, have placed sexual violence against women and girls on the change agenda but it does seem that the close relationship of law to power ensures that the interests of those with power are served best by, however thoughtfully, revised legislation. Yet not engaging in legislative reform effectively would mean accepting violence against women and girls, as well as broader inequities. 'No part of the women's movement is under any illusion that the law is genuinely transformative' (Menon, 2004, cited in Artz and Smythe, 2008:20) but challenging laws' 'masculinist dimensions' (Artz and Smythe, 2008:20) places the reality of women's experience in the public eye and must be part of a strategy for change. In practice, though, the efforts to use the law to curtail rape and rapists are limited by the cultural currency which skews meanings back to old models of gender, which ultimately serve hetero-sexual masculine and patriarchal interests.

Challenging those interests by focusing on the language that services them brings its own problems, including the risk of:

> Being mistaken for a radical feminist or some other unspecified kind of extremist; being traduced on the one hand as a nihilist and on the other as a law and order ideologue;

> spending inordinate amounts of time unpacking discourses of justification for men's violence only to be told discourse analysis is past. (Howe 2008: 218)

But it is worth continuing to analyse and challenge masculinist discursive constructions because not to do so leaves them and the injustice, gender inequity and violence they underwrite in place, however profound resistance to change is. Michael Kimmel, in a speech on International Women's Day in 2001, paved a way forward, but many years later, the evidence of high levels of rape and low conviction rates, suggests it is going to be a slow and difficult journey. For Kimmel it is essential for men to change, to understand they are not entitled to consume women's bodies, however they might be supplied. His call to men deserves re-iterating because ultimately men can stop rape:

> The feminist transformation of society is a revolution-in-progress. For nearly two centuries, we men have met insecurity by frantically shoring up our privilege or by running away. These strategies have never brought us the security and the peace we have sought. Perhaps now, as men, we can stand with women and embrace the rest of this revolution - embrace it because of our sense of justice and fairness, embrace it for our children, our wives, our partners, and ourselves (Kimmel, 2001).

Yet the continuing evidence of women's experience of both rape and re-victimisation in the justice system shows change is taking a long time and continued challenge is important. Sometimes too it is worth stating the obvious: that the intransigence of sexual violence is certainly buoyed by authoritative, discursive formulations like the law but the intransigence is ultimately due to men, without whose will and work to change gendered power relations little can be done.

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