EPISTEMIC TWILIGHT ZONE OF CONSENT

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Abstract

This Article offers an epistemological discussion of consent in sexual violence cases using the theory of epistemic injustice, developed by Miranda Fricker. It introduces an innovative perspective of consent which has not been discussed in the legal scholarship to date.

Fricker's theory of epistemic injustice has been used mostly in philosophy. The legal scholarship has scarcely discussed epistemic injustice. The present Article attempts to fill this gap in the legal scholarship by shedding a new light on the theoretical and practical discourse of consent.

The legal research on earlier stages of the legal process, such as the decisions made by the prosecution, is relatively limited. The discourse of consent by prosecutors, the way consent is analyzed, conceptualized, and interpreted by them, and the way in which it affects their legal decisions remained undocumented and untheorized. This blind spot in the legal literature is the focus of the present Article. Using in-depth interviews with twenty-nine sex crimes prosecutors, it sheds light on a phase in the criminal proceeding that is hardly discussed in legal academic writing.

The epistemological discussion shows that sexual consent is not simply a dichotomous legal category but rather a sociological element. Prosecutorial decision-making in rape cases is not determined exclusively by legal factors but also by "collective knowledge" regarding consent. The interviews reflect what I call "prosecutorial realism," that is, the manner in which prosecutors perceive the approach to consent followed by the courts (or juries). Although prosecutors believe the victim and acknowledge the rape offense, they do not proceed with charges because of their consideration of the discourse of consent in the courts.

This Article contributes to the scholarship in two ways. First, it employs a philosophical theory in the legal analysis of consent, offering non-legal insights to the discussion. Second, it offers an epistemological analysis of consent in the pre-trial stage, which has been neglected by the academic scholarship.

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I. INTRODUCTION

"Imagine living in an epistemic twilight zone, a world where many of your lived experiences are regularly misunderstood, distorted, dismissed, erased, or simply rejected as unbelievable."[1]

The world described by philosopher Alison Bailey sounds imaginary to many of us. It is one in which our stories, narratives, life experiences, and knowledge are misinterpreted, misunderstood, invalidated, and rejected as non-credible by hearers. This world is not imaginary for women who are victims[2] of gendered violence in general,[3] and sexual violence in particular. The present Article deals with this "Imaginary World," focusing on the element of consent in sexual assault and rape[4] cases, which reflects the characteristics of the world described by Bailey.

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[1] Alison Bailey, *The Unlevel Knowing Field: An Engagement with Dotson's Third-Order Epistemic Oppression*, 3 SOC. EPISTEMOLOGY REV. & REPLY COLLECTIVE 62, 62 (2014).

[2] I chose to use the term victim (rather than survivor or complainant) despite its drawbacks because it best reflects the harms of sexual violence and fits the terminology of criminal law. The term victim has its problems, nevertheless. Some critics, in particular critical theorists and feminist critics, point to the negative connotations associated with it, such as weakness, helplessness, and passivity. *See, e.g.*, Pam A. Mueller, *Victimhood & Agency: How Taking Charge Takes Its Toll*, 44 PEPP. L. REV. 691, 699–707 (2017) (discussing the attributes of passivity and weakness associated with this term and the denial of the victims' agency). Feminist critics argue that the use of the term victim has gendered implications because it obscures the agency and activity of women who suffer violence. *See, e.g.*, Elizabeth M. Schneider, *Feminism and the False Dichotomy of Victimization and Agency*, 38 N.Y.L. SCH. L. REV. 387, 387–90, 394–96 (1993); Martha R. Mahoney, *Victimization or Oppression? Women's Lives, Violence, and Agency*, *in* THE PUBLIC NATURE OF PRIVATE VIOLENCE: THE DISCOVERY OF ABUSE 59, 59–61 (Martha Albertson Fineman & Roxanne Mykituik eds., 1994); Ruthy Lazar, *Reconceptualizing Victimization and Agency in the Discourse of Battered Women Who Kill*, 45 STUD. L. POL. & SOC'Y 3, 3–5, 10, 12–15, 17–18 (2008). The term survivor has emerged as an alternative term to describe women who were sexually assaulted or suffered gendered violence, arguing that it connotes characteristics such as activity and agency. *See* Jennifer Dunn, *"Victims" and "Survivors": Emerging Vocabularies of Motive for "Battered Women Who Stay"*, 75 SOCIO. INQUIRY 1, 1–3, 8, 17–19, 21 (2005); Jan Jordan, *From Victim to Survivor – and From Survivor to Victim: Reconceptualising the Survivor Journey*, 5 SEXUAL ABUSE AUSTL. & N.Z. 48 , 48–49, 54 (2013). This term was also criticized, however. *See, e.g.*, Danielle Campoamor, *I'm Not a Sexual Assault "Survivor"—I'm a Victim*, HARPER'S BAZAAR (May 21, 2018), https://www.harpersbazaar.com/culture/features/a20138398/stop-using-survivor-to-describe-sexual-assault-victims. For a discussion of the complexity of the victimhood discourse in the case of battered women, see Amy Leisenring, *Confronting "Victim" Discourses: The Identity Work of Battered Women*, 29 SYMBOLIC INTERACTION 307, 307–08 (2006) (discussing the negative and positive meanings of the term victim for battered women). Defense, in criminal trials, argues that using the term victim in the criminal justice system implies that the defendant is blameworthy, and therefore denies the defendants' presumption of innocence. Some suggest using "complainant" or "complaining witness." *See* Michael Conklin, *Victim or Complaining Witness: The Difference Between Guilty and Not Guilty*, 57 SAN DIEGO L. REV. 423, 423–24, 429–31 (2020) (discussing the effects of using victim or complaining witness on juror decision-making). Notably, this Article focuses on women victims, and not other-gendered victims of violence

[3] Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399, 399–403 (2019).

[4] I use the terms rape and sexual assault interchangeably throughout the Article, acknowledging that the legal term for rape varies from state to state. Some refer to it as rape (first degree, second degree etc.), others refer to it as sexual assault, criminal sexual penetration, or sexual battery. Myka Held & Juliana McLaughlin, *Rape and Sexual Assault*, 15 GEO. J. GENDER & L. 155, 156–61 (2014) (The authors discuss the two terms and their use in US law. They note that in some states, the term sexual assault replaced rape, and they are used interchangeably. However, in other states, rape requires use or threat of force whereas sexual assault requires lack of consent. They also state that the term sexual assault reflects the idea that rape is a violent crime and not a crime of desire.).

Extensive literature deals with consent in rape cases.[5] There is also vast literature on the treatment of rape in the criminal justice system.[6] This Article contributes to the legal scholarship on consent, rape, and criminal law by introducing an innovative perspective of consent, which has not been discussed in the legal scholarship to date. This Article offers an epistemological discussion of consent in sexual violence cases using the theory of epistemic injustice, developed by Miranda Fricker.[7]

Fricker's theory of epistemic injustice has been used mostly in philosophy.[8] The legal scholarship has scarcely discussed epistemic injustice, although testimony, credibility, voice, and justice are central elements in criminal law.[9] The present Article attempts to fill this gap in the legal

[5] The literature on consent is vast and an examination of it is beyond the scope of this Article. For selected literature, see Lucinda Vandervort, *Sexual Consent as Voluntary Agreement: Tales of 'Seduction' or Questions of Law?*, 16 NEW CRIM. L. REV. 143, 143, 146–47 (2013); Jesse Elvin, *The Concept of Consent Under the Sexual Offences Act 2003*, 72 J. CRIM. L. 519, 519–23 (2008) (discussing consent in legislation in England); Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 957–59 (2008); Joseph J. Fischel & Hilary R. O'Connell, *Disabling Consent, or Reconstructing Sexual Autonomy*, 30 COLUM. J. GENDER & L. 428, 428, 430–32 (2015); YES MEANS YES! VISIONS OF FEMALE SEXUAL POWER AND A WORLD WITHOUT RAPE (Jaclyn Friedman & Jessica Valenti eds., 2008); Robin West, *Sex, Law, and Consent*, *in* THE ETHICS OF CONSENT: THEORY AND PRACTICE 221 (Franklin G. Miller & Alan Wertheimer eds., 2009); Michal Buchhandler-Raphael, *The Failure of Consent: Re-conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. GENDER & L. 147, 149–151, 153–54, (2011); Peter Westen, *Some Common Confusion About Consent in Rape Cases*, 2 OHIO ST. J. CRIM. L. 333, 333 (2004). Note that I refer to various scholarly works on consent throughout the article.

[6] For selected literature, see JENNIFER TEMKIN, RAPE AND THE LEGAL PROCESS (2d ed. 2002); JENNIFER TEMKIN & BARBARA KRAHE, SEXUAL ASSAULT AND THE JUSTICE GAP: A QUESTION OF ATTITUDE (2008); Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 670–93 (1999); Katharine K. Baker, *Why Rape Should Not (Always) Be a Crime*, 100 MINN. L. REV. 221, 235–63 (2015) [hereinafter Baker, *Why Rape*] (arguing that the criminal justice system is not fit to treat sexual violence for three reasons: the difficulties in proving non-consent, the pathologic view of the rapist that is contrary to reality, and the resistance of victims being viewed as victims of rape); Fiona Raitt, *Independent Legal Representation in Rape Cases: Meeting the Justice Deficit in Adversarial Proceedings*, 9 CRIM. L. REV. 729 (2013) (discussing the difficulties in prosecuting sexual offenses in the adversarial criminal law and offering a model of independent legal representation to rape victims, which would enhance their rights); Olivia Smith & Tina Skinner, *Observing Court Responses to Victims of Rape and Sexual Assault*, 7 FEMINIST CRIMINOLOGY 298, 298–300, 303, 307 (2012) (offering a qualitative study of rape trials in England).

[7] *See generally* MIRANDA FRICKER, EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING (2007).

[8] *See, e.g.*, Antuan M. Johnson, *Sexual Assault and Gendered Hate: A Case of Epistemic Injustice*, 11 UNBOUND 91, 92–93 (2017); Jane McConkey, *Knowledge and Acknowledgement: 'Epistemic Injustice' as a Problem of Recognition*, 24 POL. 198, 198, 201 (2004); Debra L. Jackson, *"Me Too": Epistemic Injustice and the Struggle for Recognition*, 4 FEMINIST PHIL. Q. 1, 8 (2018); Kristie Dotson, *A Cautionary Tale On Limiting Epistemic Oppression*, 33 FRONTIERS 24, 29–31 (2012); Katharine Jenkins, *Rape Myths and Domestic Abuse Myths as Hermeneutical Injustices*, 34 J. APPLIED PHIL. 191, 191 (2017). Jennifer Lackey stated that "[i]n recent years, the issue of testimonial injustice has gained traction in academic circles. The idea that people can be victims of injustice by having their testimony rejected or devalued simply because they are black or female, for instance, is now widely accepted." Jennifer Lackey, *Norms of Credibility*, 54 AM. PHIL. Q. 323, 326 (2017).

[9] There are only a few papers discussing epistemic injustice in law. An important and leading work is by Deborah Tuerkheimer who discusses the credibility of rape victims in the criminal justice system, calling it "the credibility discount." Tuerkheimer suggests conceptualizing the credibility discount as an epistemic injustice. Deborah Tuerkheimer, *Incredible Women: Sexual Violence and the Credibility Discount*, 166 U. PA. L. REV. 1 (2017). Another paper discusses the narrative of women victims of domestic violence and the gap between their narrative of violence, which stresses the emotional violence that they suffer, and the manner in which courts perceive the violence. The courts cannot acknowledge the emotional violence and do not understand the harms generated by this form of violence. Epstein & Goodman, *supra* note 3, at 405–06. A third work by Rebecca Tsosie focuses on indigenous people. Tsosie argues that the approach of the legal system to the indigenous population excluded their knowledge. Addressing their knowledge as trustworthy, and as a proper interpretation of knowledge, will create a framework of human rights that reflects the needs of the indigenous population. Rebecca Tsosie,

scholarship by shedding a new light on the theoretical and practical discourse of consent.

Most of the writing on consent and rape in criminal law focuses on the legal process in court.[10] The legal research on earlier stages of the legal process, such as the decisions made by the prosecution, is relatively limited.[11] Despite the prevalence of theoretical and legal discussion of consent, the discourse of consent by prosecutors, the way consent is analyzed, conceptualized, and interpreted by them, and the way in which it affects their legal decisions remained undocumented and untheorized. This blind spot in the legal literature is the focus of the present Article. Using in-depth, semi-structured interviews with twenty-nine prosecutors who specialize in sex crimes,[12] it sheds light on a phase in the criminal proceeding that is hardly discussed in legal academic writing.

The epistemological discussion shows that sexual consent is not simply a dichotomous legal category, but rather a sociological and cultural element. Prosecutorial decision-making in rape cases is not determined exclusively by legal factors such as the "reasonable prospect of conviction,"[13] but also by "collective knowledge"[14] regarding consent to sex, sexuality, and sexual violence. The interviews reflect what I call "prosecutorial realism," that is, the manner in which prosecutors perceive the approach to consent followed by the courts (or juries). Although prosecutors believe the victim and acknowledge the legal elements of the rape offense, they do not necessarily proceed with charges because of their consideration of the discourse of consent in the courts.

This Article contributes to the scholarship in two ways. First, it employs a philosophical theory in the legal analysis of consent, offering non-legal insights and enriching the legal discussion of consent. Second, it offers an

Indigenous Peoples and Epistemic Injustice: Science, Ethics and Human Rights, 87 WASH. L. REV. 1133, 1133 (2012).

[10] *See* sources and discussion *supra* note 6.

[11] *See, e.g.,* Jamie Small, *Conceptualizing Consent: How Prosecutors Identify Sexual Victimization in Statutory Rape Cases*, 45 LAW & SOC. INQUIRY 111 (2020) (examining prosecution discretion in statutory rape cases, arguing that norms of "proper" adolescent sexuality affect their decisions whether to proceed with complaints); Wayne A. Kerstetter, *Gateway to Justice: Police and Prosecutorial Response to Sexual Assaults Against Women*, J. CRIM. L. & CRIMINOLOGY 267, 268 (1990); CASSIA SPOHN & KATHARINE TELLIS, POLICING AND PROSECUTING SEXUAL ASSAULT IN LOS ANGELES CITY AND COUNTY (2012) (unpublished report funded by the U.S. Department of Justice), https://www.ncjrs.gov/pdffiles1/nij/grants/237582.pdf; Cassia Spohn et al., *Prosecutorial Justifications For Sexual Assault Case Rejection: Guarding the "Gateway To Justice"*, 48 SOC. PROBS. 206 (2001); Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 JUST. Q. 651 (2001) (examining the effect of victim characteristics, offender characteristics, and case characteristics on charging decisions in cases involving strangers, acquaintances, and intimates); April Pattavina et al., *Examining Connections Between the Police and Prosecution in Sexual Assault Case Processing: Does the Use of Exceptional Clearance Facilitate a Downstream Orientation?*, 11 VICTIMS & OFFENDERS 1, 1–2 (2016) (analyzing legal and non-legal factors that affect police decisions regarding sexual assault complaints, particularly police use of exceptional clearance in sexual assault cases, and the connection to prosecutorial decisions). Note that much of this work was done within the framework of criminology and sociology scholarship.

[12] *See infra* Appendix A (discussing the methodology in detail).

[13] *See infra* Part IV (discussing the prosecutorial discourse of consent).

[14] For explanation and discussion of the term "collective knowledge" by Fricker, see *infra* Part III.

epistemological analysis of consent in the pre-trial stage, which has been neglected by the academic scholarship.

Although the qualitative research was done with Israeli prosecutors, the discussion is pertinent to the American context as well. Prosecutors have similar responsibilities and similar professional duties in the two jurisdictions.[15] Also, in both jurisdictions, the prosecutorial test is "a reasonable prospect of conviction" and prosecutors control the indictment process.[16]

Definitions of sex crimes vary in the United States, and the element of consent may not be included in some state statutes. However, the consent-based model becomes the central element in the United States.[17] Moreover, it is almost always a key issue in rape and sexual assault prosecutions.[18]

This Article proceeds as follows: Part I traces the historical legal context of rape laws and consent in the US. Part II examines various theories of consent, arguing that our "collective knowledge" of consent is shaped by neo-liberal and liberal conceptualizations of this concept. Part III elaborates on the manner in which the neo-liberal and post-feminist paradigms of sexual consent and women's sexuality affect the way rape victims perceive sexual coercion, and the implications on the criminal proceeding. In Part IV, I discuss the theory of epistemic injustice, focusing particularly on hermeneutical injustice. Part IV offers an epistemological analysis of sexual consent at the pre-trial stage. Using the theories of consent discussed in part three, I contend that the discourse of consent at the pre-trial stage both reflects and generates hermeneutical injustice for victims of sexual violence.

II. THE LEGAL CONTEXT OF CONSENT

The legal discussion of consent in rape and other sexual violence cases is not conducted in a vacuum but in the societal and cultural context of sexuality, sex, and gendered relations. This Part provides a short review of the history of rape law in the United States, focusing on the element of consent.

Historically, rape laws reflected the patriarchal view of rape as an act that harmed the honor of men (fathers or husbands of the women who were raped).[19] The reforms of the 1970s, 1980s and later, sparked by feminist

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[15] In the United States, there are state and federal prosecutors. In Israel, prosecutors operate out of five state attorney offices in five geographic districts and there are no federal prosecutors.

[16] In the United States, in most states, the prosecutor makes the indictment decision. It is subject to review at a preliminary hearing. New York and the federal government use grand juries to make indictment decisions, but, in practice, it is almost unheard of for a grand jury to refuse to indict when the prosecutor wants to do so. Thus, the prosecutor makes indictment decisions.

[17] "These considerations favoring a consent requirement are gaining ever increasing recognition. The trend in criminal law, in codes of conduct in schools and colleges, and in social norms more generally–is one of steadily growing support for consent as a legal requirement." Stephen J. Schulhofer, *Consent: What it Means and Why it's Time to Require it*, 47 U. PAC. L. REV. 665, 671 (2015).

[18] CAROL E. TRACY ET AL., RAPE AND SEXUAL ASSAULT IN THE LEGAL SYSTEM 17 (2012), https://sites.nationalacademies.org/cs/groups/dbassesite/documents/webpage/dbasse_080060.pdf.

[19] The historic definition was "carnal knowledge, of a woman, not the man's wife, forcibly and against her will." WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, BOOK IV: OF PUBLIC WRONGS, 139 (Ruth Paley, ed., Oxford Univ. Press 2016) (1765); *see also* SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 30 (1975) (arguing that from the thirteenth to the twentieth century, little has changed regarding rape laws in the United States). Cassia C. Spohn stated that the historic rape law was "designed [not] to protect women from sexual assault, but to preserve male rights

movements,[20] have changed rape laws to reflect the modern view of rape as a crime that harms the sexual autonomy of women.[21]

Feminist analysis has exposed and challenged rape myths[22] that characterize the "rape culture"[23] of our society. Rape culture is a belief system based on patriarchal dominant-submissive models of women, gender roles, sexuality, sex, and femininity.[24] It encourages sexualization of violence and erotization of aggressiveness, perpetuating sexual violence against women.[25]

to possess and subjugate women as sexual objects." Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 JURIMETRICS J. 119, 121 (1999).

[20] Spohn, *supra* note 19, at 121; *see* STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 25–40 (1998).

[21] The focus on sexual autonomy as the element that should be protected by the rape offence is reflected in many scholarly works. *See* Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1372 (2013). A different approach to the question of what should constitute the element underpinning rape laws is discussed by Deborah Tuerkheimer. She argues that sexual agency is the missing element in modern rape laws. *See* Deborah Tuerkheimer, *Sexual Agency and the Unfinished Work of Rape Law Reform, in* RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 166 (Cynthia Grant Bowman & Robin West, eds. 2018).

[22] Rape myths are beliefs and assumptions regarding women, rape, and rape victims. These beliefs are based on patriarchal conceptions of the way women should behave in sexual interactions, the "proper" responses of rape victims to coerced sex, and more. Some examples are the assumption that when a woman says yes to sex once, she is more prone to consent to other sexual interaction; that rape victims promptly complain about the rape; that rape is perpetrated by strangers; and that women who are drinking and partying are more prone to consent. *See* JULIE ALLISON & LAWRENCE WRIGHTMAN, RAPE: THE MISUNDERSTOOD CRIME (1993); Ruthy Kershner, *Adolescent Attitudes About Rape*, 31 ADOLESCENCE 29, 29–34 (1996); Katie M. Edwards et al., *Rape Myths: History, Individual and Institutional-Level Presence, and Implications for Change*, 65 SEX ROLES 761, 761 (2011); Christina E. Wells & Erin Elliot Motley, *Reinforcing the Myth of the Crazed Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U.L. REV. 127, 128 (2001); Rebecca M. Hayes et al., *It's Her Fault: Student Acceptance of Rape Myths on Two College Campuses*, 22 VIOLENCE AGAINST WOMEN 1540, 1540 (2016); Jesse Fox et al., *Sexualized Avatars Lead to Women's Self-Objectification and Acceptance of Rape Myths,* 39 PSYCHOL. WOMEN Q. 349, 349 (2015); Michelle E. Deming et al., *Exploring Rape Myths, Gendered Norms, Group Processing, and the Social Context of Rape Among College Women: A Qualitative Analysis*, 19 VIOLENCE AGAINST WOMEN 465, 466 (2013); BROWNMILLER, *supra* note 19, at 387.

[23] Dianne Herman, *The Rape Culture*, WOMEN: A FEMINIST PERSPECTIVE 20 (Jo Freeman ed., 4th ed. 1989); Erin Sheley, *A Broken Windows Theory of Sexual Assault Enforcement*, 108 J. CRIM. L. & CRIMINOLOGY 455, 465, 470–74 (2018).

[24] *See generally* Beverly Balos & Mary Louise Fellows, *Guilty of the Crime of Trust: Nonstranger Rape*, 75 MINN. L. REV. 599 (1991) (describing rape culture); Courtney Fraser, *From "Ladies First" to "Asking for It": Benevolent Sexism in the Maintenance of Rape Culture*, 103 CAL. L. REV. 141 (2015) (discussing the manner in which sexism creates a culture that is more tolerant to rape).

[25] Catharine A. MacKinnon, *Disputing Male Sovereignty: On* United States v. Morrison, 114 HARV. L. REV. 135, 136–137 (2000); Catharine A. MacKinnon, *In Their Hands: Restoring Institutional Liability for Sexual Harassment in Education*, 125 YALE L.J. 2038, 2038 (2016); *see also Are We Really Living in a Rape Culture?*, *in* TRANSFORMING A RAPE CULTURE 5 (Emilie Buchwald et al. eds., 1993) (defining rape culture as "a complex of beliefs that encourages male sexual aggression and supports violence against women"). *See generally* Catharine A. MacKinnon, *Sexuality, Pornography, and Method: Pleasure Under Patriarchy*, 99 ETHICS 314 (1989).

The reformers[26] focused on several main issues: making the crime gender-neutral;[27] enacting rape shield laws;[28] removing the marital rape exemption;[29] eliminating the evidentiary and procedural rules that made complaints and prosecution of rape complaints almost impossible;[30] and reforming the definition of rape to eliminate force (and the related resistance requirement) and transform it into a consent-based definition.[31]

The element of consent is a key issue in the discussion about the nature of rape laws and the way rape should be defined in law. There are various theoretical approaches to consent,[32] and accordingly, various legal models. The approach to consent in American criminal law reflects a growing recognition of the significance of (non-)consent in determining whether rape occurred. Most states have gradually amended their definition of rape laws to require non-consent,[33] but the element of force has remained part of the legal requirements in many states.[34] In twenty-seven states, penetration without consent is sufficient by itself to establish a criminal offense,[35] but

[26] For a description of the reforms, see Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1949–52. (2016). Notably, these types of reforms were conducted in many other jurisdictions, such as Canada, England, Australia, and Israel. Maria Łoś, *The Struggle to Redefine Rape in the Early 1980s*, *in* CONFRONTING SEXUAL ASSAULT: A DECADE OF LEGAL AND SOCIAL CHANGE 20 (Julian V. Roberts & Renate M. Mohar eds., 1994) (describing feminist reforms in Canada); *see also* Sheila McIntyre, *Redefining Reformism: The Consultations that Shaped Bill C-49*, *in* CONFRONTING SEXUAL ASSAULT: A DECADE OF LEGAL AND SOCIAL CHANGE 293, 313–14 (Julian V. Roberts & Renate M. Mohar eds., 1994); Vanessa E. Munro, *Constructing Consent: Legislating Freedom And Legitimating Constraint In The Expression Of Sexual Autonomy*, 41 AKRON L. REV. 923, 941–47 (2008) (discussing the Sexual Offences Act enacted in England in 2003, vis-à-vis theoretical approaches to sexual consent); Elvin, *supra* note 5, at 519–20.

[27] Susan B. Carbon, *An Updated Definition of Rape*, U.S. DEP'T OF JUST. (Jan. 6, 2012), http://www.justice.gov/opa/blog/updated-definition-rape (announcing that the FBI's definition of rape is "penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.") According to this announcement: "[F]or the first time ever, the new definition includes any gender of victim and perpetrator, not just women being raped by men." *Id. See generally* Philip Rumney, *The Review of Sex Offences and Rape Law Reform: Another False Dawn?*, 64 MOD. L. REV. 890, 894–98 (2001).

[28] Clare McGlynn, *Rape Trials and Sexual History Evidence: Reforming the Law on Third-Party Evidence*, 81 J. CRIM. L. 367, 367 (2017); Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 55 (2002); KATHERINE BARTLETT AND ANGELA HARRIS, GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY 832 (2d ed., 1998); Held & McLaughlin, supra note 4, at 171–80.

[29] Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1477–85 (2003) (describing the history of the marital rape exception); Martha Burt, *Rape in the United States: Progress, Stability, or Retrogression*, 26 CRIM. JUST. REV. 253, 258 (2001). *See generally* Lisa Eskow, *The Ultimate Weapon: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution*, 48 STAN. L. REV. 677 (1996).

[30] Julia Simon-Kerr, *Unchaste and Incredible: The Use of Gendered Conceptions of Honor in Impeachment*, 117 YALE L.J. 1854, 1859 (2008); Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U.L. REV. 945, 947–50 (2004); *see also* Philip Rumney, *False Allegations of Rape*, 65 CAMBRIDGE L.J. 128, 128–30 (2006) (describing evidentiary and procedural rules that designed to test the credibility of victims). *See generally* David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1329–30 (2010) (discussing the complexities in defining false allegations, presenting various studies of this topic, and analyzing 136 cases of sexual assault reported to a police department at Northwestern University determining that 5.9% of the cases were false reports).

[31] *See generally* Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953 (1998) (analyzing the resistance requirement in rape laws, arguing that resistance may benefit rape victims and that verbal and physical resistance should be sufficient to prove both non-consent and force).

[32] *See infra* Part II.

[33] *See* Stephen J. Schulhofer, *Reforming the Law of Rape*, 35 L. & INEQ. 335, 342–43 (2017).

[34] *Id.*

[35] Schulhofer, *supra* note 17, at 672.

even in these states, "many require a demonstration of unwillingness to engage in sexual conduct."[36] This means that if the victim did not demonstrate non-consent, the act would not necessarily be considered rape, even if the victim remained passive and frozen during the sexual encounter.[37] However, many rape victims do not express non-consent due to various reasons, such as fear, shock of the attack, power relations between the two parties (for example, authority relations and dependence), or socialization to not fight back.[38]

The debates surrounding the societal, legal, and normative definitions of consent, particularly the debate regarding the model of affirmative consent,[39] demonstrate the various approaches to women's sexuality, sexual interactions between men and women, and the way women should respond to coerced sex. They also reflect viewpoints about the role of criminal law and the extent of the intervention of the law in sexual encounters.

The model of affirmative consent is at the heart of this debate. Discussion of affirmative consent is beyond the scope of this Article, but, notably, this model has gained support in non-criminal spheres in the United States, including the codes of conduct in more than 1,400 colleges and universities.[40] In criminal law, several states define consent in positive and affirmative language.[41] Other jurisdictions, such as Canada and England,

[36] Tuerkheimer, *supra* note 21, at 173.

[37] Tuerkheimer refers to this requirement as the "new resistance requirement." *See id.* at 173–74.

[38] Charlene L. Muehlenhard & Jennifer L. Schrag, *Nonviolent Sexual Coercion*, *in* ACQUAINTANCE RAPE: THE HIDDEN CRIME 115, 125 (Andrea Parrot & Laurie Bechhofer eds., 1991); *see also* Carol E. Tracy et al., *Rape and Sexual Assault in the Legal System*, WOMEN'S L. PROJECT, June 5, 2012, at 1, 9, http://www.womenslawproject.org/wp-content/uploads/2016/04/Rape-and-Sexual-Assault-in-the-Legal-System-FINAL.pdf.

[39] For a selected literature that supports affirmative consent, see Nicholas J. Little, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1321, 1363 (2005); Lani Anne Remick, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1147 (1993); Lucinda Vandervort, *Affirmative Sexual Consent in Canadian Law, Jurisprudence, and Legal Theory*, 23 COLUM. J. GENDER & L. 395, 419 (2012); Lise Gotell, *Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women*, 41 AKRON L. REV. 865 (2008); Lise Gotell, *The Discursive Disappearance of Sexualized Violence: Feminist Law Reform, Judicial Resistance, and Neo-liberal Sexual Citizenship*, *in* REACTION AND RESISTANCE: FEMINISM, LAW, AND SOCIAL CHANGE 127, 144–46 (Dorothy E. Chunn, Susan B. Boyd & Hester Lessard eds., 2007); Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 441 (2016); Kristen N. Jozkowski, *Barriers to Affirmative Consent Policies and the Need for Affirmative Sexuality*, 47 U. PAC. L. REV. 741 (2016). For selected literature that opposes this model, see Janet Halley, *The Move to Affirmative Consent*, 42 SIGNS 257 (2016); *see also* sources *infra* notes 51–54.

[40] Tuerkheimer, *supra* note 39, at 442. One example is Yale University where consent is defined as "positive, unambiguous, voluntary agreement at every point during a sexual encounter—the presence of an unequivocal 'yes' (verbal or otherwise), not just the absence of a 'no.'" *Id.* at 442 n.1. For a discussion of the discourse of affirmative consent in the American universities, and the debate surrounding it, see Wendy Adele Humphrey, *"Let's Talk About Sex": Legislating and Educating on the Affirmative Consent Standard*, 50 U.S.F. L. REV. 39, 54–64 (2016); Chandler Delamater, Note, *What "Yes Means Yes" Means for New York Schools: The Positive Effects of New York's Efforts to Combat Campus Sexual Assault Through Affirmative Consent*, 79 ALB. L. REV. 591 (2015); Erick Kuylman, *A Constitutional Defense of "Yes Means Yes"—California's Affirmative Consent Standard in Sexual Assault Cases on College Campuses*, 25 S. CAL. REV. L. & SOC. JUST. 211 (2016); Ruby Aliment, *Saying "Yes": How California's Affirmative Consent Policy Can Transform Rape Culture*, 14 SEATTLE J. SOC. JUST. 187 (2015).

[41] For the list of states, see Schulhofer, *supra* note 17, at 672 n.35.

went further, requiring reasonable steps to ascertain consent (in Canada) or including unreasonable belief in consent in the rape definition (in England).[42]

The model of affirmative consent requires the initiator of the sexual act to ascertain the other party's consent before engaging in the sexual act; therefore, not presuming consent unless positive, clear, and voluntary agreement is expressed by the other party.[43]

In short, the instigator of a sexual interaction must inquire whether their partner wishes the act to be done, and the instigator must receive freely given consent to continue. In the absence of such consent, the interaction cannot be seen as voluntary for both parties.[44]

The model of affirmative consent is influenced by the negotiating model[45] and stresses the sexual agency of women.[46] It is based on the

[42] In Canada, consent is defined as the "voluntary agreement of the complainant to engage in the sexual activity in question." The reasonable steps requirement was defined in the defense of mistaken belief in s. 273.2. of the criminal codes: "It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where (a) the accused's belief arose from (i) the accused's self-induced intoxication, [or] (ii) the accused's recklessness or willful blindness, or . . . (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting . . . ." Criminal Code, R.S.C. 1985, c C-46, s 273.2 (Can.). In 1999, in the case of *Ewanchuk* the court stated that: "[T]he mens rea of sexual assault is not only satisfied when it is shown that the accused knew that the complainant was essentially saying 'no', but is also satisfied when it is shown that the accused knew that the complainant was essentially not saying 'yes.'" *See* R. v. Ewanchuk (1999), 1 S.C.R. 330 (Can.). The definition in the Sexual Offences Act in England is as follows: "(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." Sexual Offences Act 2003 c. 42, § 1. Consent is defined as follows: "[A] person consents if he agrees by choice, and has the freedom and capacity to make that choice." *See id.* at §§ 74-75 (defining presumptions of non-consent). Tasmania, Australia, inspired by the Canadian model, amended its criminal code in 2004 and incorporated affirmative consent: "[A] person does not freely agree to an act if the person—(a) does not say or do anything to communicate consent." *Criminal Code Amendment (Consent) Act 2004* (Tas.) s 4 sch 1 (a)2A (Austl.). The defense of mistaken belief was also amended: "[A] mistaken belief by the accused as to the existence of consent is not honest or reasonable if the accused—(a) was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated; or (b) was reckless as to whether or not the complainant consented; or (c) did not take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act." *Id.* s 4 sch 1 (b)14A. In Israel, in the 1990s, in the precedential case of *Beeri*, the Supreme Court ruled that consent should be positive and voluntary. Criminal Appeal 5612/92, Supreme Court in Jerusalem, State of Israel v. Ophir Be'eri et al. In 2001, Israel amended its rape offense and abolished the force requirement. The basic definition of rape in Israeli Criminal Code s. 345(1) is "penetration without consent." Penal Law 5737-1977, § 345(1), 91, (1977–78) (Isr.).

[43] See, for example, the definition in California: "An affirmative consent standard is the determination of whether consent was given by both parties to sexual activity. 'Affirmative consent' means an affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout the sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent." Cal. Educ. Code § 67386 (a)(1) (Deering 2020).

[44] Little, *supra* note 39, at 1345.

[45] *See generally* Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401 (2005).

[46] Remick, *supra* note 39, at 1147. "It also sends a clear message to every man that when he has sex with a woman who willingly states her consent, he is not raping her; when he has sex with a woman who has verbally expressed her unwillingness, he is violating her rights, raping her, and breaking the law. If she has expressed neither consent nor non-consent, he has an obligation to inquire into the situation further before proceeding." *Id.*

mutuality of the decision of whether to engage in the sexual activity.[47] This results in better communication between the parties, diminishes misinterpretation of the woman's behavior, and thwarts construing silence or passivity as signs of consent.[48] By ascertaining consent and verifying the willingness of the woman to engage in the sexual activity, the model allows women's voices to be heard.[49]

The model of affirmative consent reflects and promotes a conception of sex as a communicative, equal, and mutual act. It inverts the patriarchal presumption that women are sexually available unless they clearly and physically resist, thereby fostering women's agency.[50]

Critics of the affirmative consent model argue that the model generates over-criminalization of sexual violence[51] and that it encourages the use of criminal law to promote a "law and order" agenda[52] and radical societal norms.[53] Others have argued that requiring positive and affirmative consent before the sexual act does not conform to societal norms of sexual interaction and gender relations, and therefore, it would be problematic to enforce the model.[54] Another critic contends that this model constructs women's sexuality as helpless and passive, contrary to the modern paradigm of women's sexuality.[55]

Despite extensive changes in rape laws, there is considerable criticism concerning the success of the reforms,[56] in particular in relation to consent.

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[47] "This constitutes a strong endorsement of the idea that responsibility for establishing mutual agreement to the proposed conduct rests with both parties in sexual encounters. Helen M. Cockburn, The Impact of Introducing an Affirmative Model of Consent and Changes to the Defense of Mistake in Tasmanian Rape Trials 111 (June 2012) (unpublished Ph.D. thesis, University of Tasmania), https://eprints.utas.edu.au/14748/2/whole-cockburn-thesis.pdf.

[48] Katharine K. Baker, *Gender and Emotion in Criminal Law*, 28 HARV. J.L. & GENDER 447, 451–52 (2005). *See generally* Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J.L. & GENDER 381 (2005).

[49] Jennifer Nedelsky, *Violence Against Women: Challenges to the Liberal State and Relational Feminism*, *in* POLITICAL ORDER 454, 478 (Ian Shapiro & Russell Hardin eds., 1996). Nedelsky argues that the way consent is defined may shape whose narrative will be heard by law, and whose story will be considered credible, therefore whom the law will protect. *Id.*

[50] "An affirmative consent frame positions women (alongside men) as able to possess and express a willingness to engage in sexual conduct, insisting that, unless this willingness is somehow expressed, one cannot be said to have acted as a sexual subject. Affirmative consent definitions thus rest on a conception of sexuality that underscores its agentic qualities." Tuerkheimer, *supra* note 21, at 174–75.

[51] Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 415, 455 (2016). *See generally* Halley, *supra* note 39 (arguing that the model will encourage women to complain in consensual situations in which consent was not expressed).

[52] JEANNIE SUK, AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY 6–7 (2009) (arguing that domestic violence legislation, inspired by feminists, harms women who are victims of domestic violence because it harms their autonomy and independence). Another argument is that the law-and-order agenda has a negative effect on marginalized groups. *See also* Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 649–50 (2009). For an opposite argument, see Anderson, *supra* note 26, at 1954–59.

[53] *See generally* Gruber, *supra* note 51.

[54] Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 623–29 (2000). Kahan argues that "hard shove laws" are less efficient than "gentle nudge" laws with regard to controversial norms. *Id.* For him, norms of sex and sexual consent are still at the center of a social dispute. *Id.* He suggests employing "softer" offenses and not rape, or non-criminal tools such as public shaming and more. *Id.*

[55] Gruber, *supra* note 51, at 440–43.

[56] Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come*, 84 J. CRIM. L. & CRIMINOLOGY 554, 556–58 (1993); Spohn, *supra* note 19, at 126; Kenneth Polk, *Rape Reform and Criminal Justice Processing*, 31 CRIME & DELINQ. 191, 192–

Research on the application of rape laws has shown that key players in the criminal justice system, including judges, juries, prosecutors, and defense lawyers, still emphasize narratives of force and resistance. This approach generates suspicion of complainants who do not physically or verbally resist.[57] The existing framework of the criminal law often fails to adequately account for women's sexual interactions and behavior in sexual situations, and it fails to properly analyze claims of non-consent.[58]

The model of affirmative consent may transform the current focus on resistance and the voicing of "no" in criminal law into a more positive form of consent, which stresses the voluntariness and willingness of women. Schulhofer noted that

> [t]he legal standard must move away from the demand for unambiguous evidence of [the victim's] protests and insist instead that the man have affirmative indication that she chose to participate. . . . With this change of focus, criminal law should no longer have trouble reaching many of the clear-cut abuses that slip through the gaps in existing law.[59]

III. EPISTEMIC INJUSTICE

Epistemic injustice is a theory developed by Miranda Fricker to describe the notion of injustices that are epistemically distinctive, in the sense that they harm people in their position as knowers.[60] According to Fricker, structural, societal, and cultural power relations affect two of our basic everyday practices: conveying knowledge to others by telling them, and interpreting this knowledge and our own social experiences.[61] Fricker contends that knowledge and experience are shaped by hegemonic groups and therefore are constructed and perceived as universal and true. Accordingly, common knowledge does not reflect the knowledge and narrative of marginalized groups (such as people of color, women, or rape victims). This generates two forms of injustices: testimonial and hermeneutical.

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93 (1985); Julian V. Roberts & Robert J. Gebotys, *Reforming Rape Laws: Effects of Legislative Change in Canada*, 16 L. & HUM. BEHAV. 555, 556 (1992); Jody Clay-Warner & Callie Harbin Burt, *Rape Reporting After Reforms: Have Times Really Changed?*, 11 VIOLENCE AGAINST WOMEN 150, 150–51 (2005); SUSAN CARINGELLA, ADDRESSING RAPE REFORM IN LAW AND PRACTICE (Colum. Univ. Press, 2009); JOHN M. SCHEB & JOHN M. SCHEB II, CRIMINAL LAW 137–41 (5th ed., Wadsworth 2009); Francis X. Shen, *How We Still Fail Rape Victims: Reflecting on Responsibility and Legal Reform*, 22 COLUM. J. GENDER & L. 1, 3 (2011); ROSE CORRIGAN, UP AGAINST A WALL: RAPE REFORM AND THE FAILURE OF SUCCESS (2013); Ronald J. Berger et al., *The Dimensions of Rape Reform Legislation*, 22 L. &. SOC'Y REV. 329, 334–36 (1988).

[57] Louise Ellison & Venessa Munro, Better the Devil You Know? 'Real Rape' Stereotypes and The Relevance of A Previous Relationship In (Mock) Juror Deliberations, 17 INT'L J. EVIDENCE & PROOF 299, 314–20 (2013).

[58] Beatrice Diehl, *Affirmative Consent in Sexual Assault: Prosecutors' Duty*, 28 GEO. J. LEGAL ETHICS 503, 520 (2015) (discussing the manner in which affirmative consent model can assist prosecutors in litigating sexual assault cases).

[59] Schulhofer, *supra* note 20, at 272–73.

[60] FRICKER, *supra* note 7, at 1.

[61] *Id*. at 1–2.

A. TESTIMONIAL INJUSTICE

Testimonial injustice is the injustice of disbelief resulting in the dismissal of a person's credibility because of prejudices.[62] Fricker defines testimonial injustice as "the injustice that a speaker suffers in receiving deflated credibility from the hearer owing to identity prejudice on the hearer's part."[63] Thus, at the heart of testimonial injustice lies the notion of credibility.

Prejudices, in Fricker's theory, operate by way of stereotypes, which she terms "negative identity-prejudicial stereotypes."[64] Testimonial injustice prevails when a person's knowledge and experience are ignored, dismissed, and disbelieved because of systematic identity prejudice. The hearer does not believe the narrator, challenges the narrator's story, and questions their narrative, because the narrator belongs to a group that is associated with negative societal stereotypes and suffers from it.

"Collective knowledge," which is the experience and knowledge of dominant group members (who do not suffer negative stereotypes and who are often the hearers) is universalized, considered to be the norm, and therefore constructed as true.[65] Conversely, members of oppressed and marginalized groups have limited access to the construction of norms and standards.[66] Therefore, their experience is interpreted as different from that of the hegemonic group and they are viewed as "[l]acking the normality of the dominant group."[67] As a result, they are perceived as less trustworthy.

Because these individuals are viewed as "others" and are perceived through stereotypical lenses, they are robbed of their individual traits and unique characteristics and become invisible. Hence, their stories and perspectives are unheeded and dismissed.[68] They are robbed of the basic tools to vocalize their stories: they tell, but the hearers do not really hear them because the hearers dismiss their narrative and construct it as non-credible. Silence becomes a central notion in theorizing testimonial injustice.[69]

The contextual conceptualization of credibility, as related to the societal power structure, transforms the discussion of credibility from an individual into a broader discussion of social locations and societal power relations. Fricker names the harm of injustice as a collective harm, which is derived from and shaped by institutional power relations.

Consistent with this broad concept of injustice, Fricker describes testimonial injustice as systematic and connected to other types of injustices.

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[62] *Id.* at 17, 30–40. Fricker refers to two types of prejudice: personal identity prejudice and systematic prejudice. *Id.*

[63] *Id.* at 2.

[64] "A widely held disparaging association between a social group and one or more attributes, where this association embodies a generalization that displays some (typically, epistemically culpable) resistance to counter-evidence owing to an ethically bad affective investment." *Id.* at 35.

[65] McConkey, *supra* note 8, at 202.

[66] The notion of access to knowledge is also related to the second aspect of epistemic injustice, which Fricker defines as hermeneutical injustice. *See infra* Part II.B.

[67] McConkey, *supra* note 8, at 202.

[68] *Id.*

[69] *See* FRICKER, *supra* note 7, at 16–18 (discussing the silence motif).

It is not a single episode of injustice experienced by an individual, but rather various forms of injustice that the person (and the group to which this person belongs) experiences in a variety of legal, economic, educational, and other settings, because of systemic prejudice.[70]

Testimonial injustice harms not only the narrator but also the group to which the narrator belongs because it enforces prejudices against the group and maintains its subordination and oppression.[71] It also harms society because it denies society knowledge of this marginalized group.

B. HERMENEUTICAL INJUSTICE

Hermeneutical injustice is the injustice of misinterpretation and misunderstanding. According to Fricker, it is formed earlier than testimonial injustice, when the gap in societal collective knowledge, between hegemonic group members and marginalized groups, prevents society from understanding the experience of the latter. Fricker defines hermeneutical injustice as "[t]he injustice of having some significant area of one's social experience obscured from collective understanding owing to persistent and wide-ranging Hermeneutical marginalization."[72]

Similar to testimonial injustice, hermeneutical injustice is linked to societal construction of power and knowledge. Members of oppressed groups have unequal access to the construction of knowledge and do not fully participate in the shaping of normative and credible narratives.[73] This hermeneutical marginalization,[74] according to Fricker, creates a collective understanding that does not include or reflect the experience, knowledge, and narratives of marginalized groups.[75] The lack of concepts to name the phenomenon and conceptualize it correctly results in misunderstanding of the problem, both by the hearer and by the speaker.[76] The primary harm is that the individuals are unable to communicate their experiences in intelligible forms.[77]

Fricker describes the "moment of creation" of hermeneutical injustice: "[T]he moment of hermeneutical injustice comes only when the background condition is realized in a more or less doomed attempt on the part of the

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[70] Fricker states, "Systematic testimonial injustices, then, are produced not by prejudice *simpliciter*, but specifically by those prejudices that 'track' the subject through different dimensions of social activity–economic, educational, professional, sexual, legal, political, religious, and so on. Being subject to a tracker prejudice renders one susceptible not only to testimonial injustice but to a gamut of different injustices." *Id.* at 27.

[71] "[T]estimonial injustice tends to exacerbate oppression, not only of the speaker herself, but also of the prejudged groups to which she may belong. Because prejudice is commonly rooted in structures of power, the suppression of knowledge overwhelmingly disadvantages those who are already subordinated." Tuerkheimer, *supra* note 9, at 46.

[72] FRICKER, *supra* note 7, at 154.

[73] "[W]hen there is unequal hermeneutical participation with respect to some significant area(s) of social experience, members of the disadvantaged group are *hermeneutically marginalized*." *Id.* at 153.

[74] *Id.*

[75] This is a gap in "collective interpretive resources." Fricker notes that this gap places someone "at an unfair disadvantage when it comes to making sense of their social experiences." *Id.* at 1; *see also* Trystan Geoetze, *Hermeneutical Dissent and the Species of Hermeneutical Injustice*, 33 HYPATIA 73 (2018).

[76] McConkey states: "We are less likely to believe what [marginalized groups] say because their claims differ sharply from claims consistent with the dominant interpretations in society." McConkey, *supra* note 8, at 203.

[77] FRICKER, *supra* note 7, at 162.

subject to render an experience intelligible, either herself or to an interlocutor."[78]

Hermeneutical injustice is more difficult to identify than testimonial injustice. Because hermeneutical injustice is embedded in institutional power relations, it is subtle and almost invisible.[79] Unlike testimonial injustice, in which the hearer dismisses the narrator's knowledge and does not believe their story because of recognizable stereotypes, in hermeneutical injustice the hearer cannot, and does not, comprehend the narrator's story, knowledge, and experience. The narrator is hermeneutically marginalized for belonging to a group that does not participate or contribute to the common pool of concepts and social meanings. The "structural wrong"[80] is manifested in the absence of concepts that can identify and explain the knowledge of the narrator. Therefore, it generates a misunderstanding of the harms inflicted on the narrator. The hearer does not recognize the narrator's experience as reflective of what the hearer knows about such experience. This makes the process of identifying and naming the injustice much more complicated.[81]

French philosopher Michel Foucault's conception of subjugation[82] reflects the notion of epistemic injustices and their harmful effects. Foucault describes a process that subordinates and discounts certain types of information by either discounting the content of the information or reinterpreting the knowledge in a way that preserves power relations between the hearer and the speaker.[83]

Recognition scholars[84] point to the connection between epistemic injustice and recognition, or the lack thereof. Paul Giladi describes how both testimonial and hermeneutical injustice represent a failure of recognition. By ignoring and dismissing a person's knowledge, and by depriving a person of trustworthiness, testimonial injustice excludes this person from the community of rational and reasonable knowers. Hermeneutical injustice limits access to the construction of "reasonable" and common knowledge by marginalized groups. Doing so, it fails to recognize these group members as part of our collective understanding.[85] The process of invalidating and

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[78] *Id.* at 159.

[79] Devon W. Carbado, *Colorblind Intersectionality*, 38 SIGNS: J. WOMEN CULTURE & SOC'Y 811, 817–23 (2013). Similarly, Carbado in her discussion of the theory of intersectionality argues that dominance identities are usually invisible and so is the intersection between these identities (white heterosexual men, for example). This dominant model is regarded as the reference for other intersections of identities. She elaborates on the manner in which the dominant group constructs norms of behavior that become the "normative" societal codes. *Id.* at 818.

[80] Fani Ntavelou-Baoum, Theorizing Epistemic Injustice: Three Essays (April 2017) (unpublished honors thesis, Wellesley college) (on file with author).

[81] William L.F. Flestiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming*, 15 L. & SOC'Y REV. 631 (1980). In this seminal article, the authors theorize the process and development of a social change struggle. Literature on law and social change and literature on clinical education discuss the challenges and problems in the process of "naming" by marginalized groups.

[82] MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION (Robert Hurley, trans., 1978).

[83] *Id.* at 81–83.

[84] Mattias Iser, *Recognition*, STAN. ENCYCLOPEDIA PHIL. (Apr. 25, 2019), https://plato.stanford.edu/entries/recognition.

[85] *See generally* Paul Giladi, *Epistemic Injustice: A Role for Recognition?,* 44 PHIL. & SOC. CRITICISM 141 (2018).

misunderstanding a person's experience and narrative separates this person from others.[86] Similarly to Giladi, Matthew Congdon describes how the denial and misunderstanding of a person's status as a knower alienates the person and restricts the person's relationships with other members of society.[87] In this way, epistemic injustice engenders alienation, loneliness, and otherness.[88]

The idea of otherness[89] is central to the theory of epistemic injustice because those whose stories we do not believe, whose voices we ignore, and whose experience we fail to interpret correctly are all "others"; their narrative is not familiar to most people (for example, the narrative of poor people), and their experience is not common (for example, rape victims, people of color, and refugees).

Victims are also others: people who were harmed while most were not. The link between otherness and victimization is shaped by the psychological assumption that people who behave according to social norms will not be victimized.[90] Consistent with this view, women who were raped or sexually assaulted may have not behaved according to social norms or may have taken unnecessary risks.[91]

Silence is another central motif in the discourse of epistemic injustice and sexual violence. First, the hearers (society, police, prosecutors, jurors, and judges) often do not believe rape victims and therefore ignore their stories. Second, the hearers listen to the person's story but are unable to comprehend it and interpret it correctly. Third, the victims silence themselves. Rape myths and societal prejudices against women and rape victims silence victims in the sense that their narratives are not believed and are not interpreted correctly. They also work to objectify victims whose

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[86] Jackson, *supra* note 8, at 8.

[87] Matthew Congdon, *What's Wrong with Epistemic Injustice?*, *in* THE ROUTLEDGE HANDBOOK OF EPISTEMIC INJUSTICE (Ian James Kidd, José Medina & Gaile Pohlhaus eds., 2017).

[88] *Id.* Fricker also argues, "[T]hose social groups who are subject to identity prejudice and are thereby susceptible to unjust credibility deficit will, by the same token, also tend simply not to be asked to share their thoughts, their judgements, their opinions." FRICKER, *supra* note 7, at 130.

[89] Simone de Beauvoir in her seminal work, *The Second Sex*, constructed "the other," referring to women. She wrote: "Women exist – and are only conscious of themselves – in ways that men have shaped." SIMONE DE BEAUVOIR, THE SECOND SEX (1997).

[90] This is based on the theory of "just world" developed by Lerner. The "just world" theory describes the way people attempt to make sense of a world where bad things happen to good people. They do it by believing that in a just world, a world where people obey social norms, bad things will not happen to good people. Lerner argues: "In their world, bad things do not happen to good people, and apparent instances of injustice are only temporary states of affairs because justice will be done." *See* Melvin J. Lerner, *What Does the Belief in a Just World Protect Us From: The Dread of Death or the Fear of Understanding Suffering?*, 8 PSYCH. INQUIRY 29, 30 (1997). For a discussion that connects victimization with marginalization, see Hadar Dancig-Rosenberg & Noa Yosef, *Crime Victimhood and Intersectionality*, 47 FORDHAM URB. L.J. 85 (2019) (offering the theory of intersectionality as a framework in analyzing identity characteristics of victimhood).

[91] For example, "if a woman previously consented to any connection with a man—developing a friendship with a male colleague or superior at work, accepting a date, going to a bar or a party and talking with a man (i.e., making a stranger a nonstranger through conversation), agreeing to drive a man she has just met to his home, allowing a man she just met to drive her home, dating a man for an extended period of time, consenting to sexual relations with a man once or many times, cohabitating with a man, marrying a man—a presumption arises that she subsequently consented to sexual contact during the incident in question. [Also], she is considered responsible for having placed herself in a situation that might result in sexual contact, and, therefore, she must accept the consequences of her own conduct (i.e., nonconsensual sexual contact)." Balos & Fellows, *supra* note 24, at 604–05. For a discussion of the implications of "risky" behavior of women, see *infra* Part III.D. *See also* sources cited *supra* note 30.

views and opinions are deemed unimportant or unreasonable.[92] Fricker argues, "[T]hose social groups who are subject to identity prejudice and are thereby susceptible to unjust credibility deficit will, by the same token, also tend simply not to be asked to share their thoughts, their judgements, their opinions."[93] Fricker refers to this aspect of injustice as pre-emptive testimonial injustice,[94] arguing that this is another expression of silencing and epistemic injustice that prevents victims of even sharing their stories.

Another aspect of silence relates to what I call "the silent culture of sex." Women are socialized not to talk about sex or sexuality. There are cultural norms that depict women who speak about sex as promiscuous and immoral.[95] Although it is well documented that rape is not an act of sexual desire but rather an act of power and control,[96] a story of rape, particularly a story of rape that is being told in court, is often transformed into a discussion about sex and sexual desire. Victims are being asked to describe in detail the sexual act. Despite the rape shield laws, they are asked about their sexual practices.[97] Therefore, rape victims are forced to talk about sex, not about violence and coercion, and by doing so, they break the taboo of silence surrounding women and sex. They talk about something that society believes they ought not to talk about. This discourse generates negative associations regarding the victims' sexuality and distances them from the paradigm of the "ideal victim," who should be "sexually pure" and virtuous.[98]

IV. THE COLLECTIVE KNOWLEDGE OF CONSENT

The discourse of consent to sex in the criminal law is part of the discourse of sex, gender, and sexuality. The discourse of female sexuality can be characterized as binary: at one end are the radical feminist approaches that emphasize the connection between sexuality and gendered power relations,[99] and at the other end are the post-feminist approaches that stress the connection between strength, power, and female sexuality.[100]

The collective knowledge of consent is also binary, having been created and constructed over the years within the framework of "classical" liberal discourse, and subsequently influenced by other approaches such as the

[92] Fricker states: "When someone suffers a testimonial injustice, they are degraded *qua* knower, and they are symbolically degraded *qua* human." FRICKER, *supra* note 7, at 44.

[93] *Id.* at 130.

[94] *Id.*

[95] Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 679–680 (1998).

[96] Anderson, *supra* note 29, at 55–56.

[97] *See generally* Brett Erin Applegate, *Prior (False?) Accusations: Reforming Rape Shield to Reflect the Dynamics of Sexual Assault*, 17 LEWIS & CLARK L. REV. 899 (2013) (discussing prior rape accusations by victims and their use by defense in rape cases, and arguing that the approach taken by many states to prior accusations has harmful implications for victims and that rape shield laws must be amended in a way that acknowledge the unique dynamic of sexual violence, particularly the myth of false allegation).

[98] Aviva Orenstein, *Special Issues Raised by Rape Trials*, 76 FORDHAM L. REV. 1585, 1587 (2007) ("Traditionally, successful rape allegations involved a virtuous, ideally virginal woman, who is attacked by a creepy stranger.").

[99] *See infra* Part III.D (discussing radical feminist view of consent).

[100] *See infra* Part III.C (discussing post-feminist approach to consent).

feminist critical theories. Over the years, additional approaches have influenced the consent discourse, which has become more complex.

Despite the various nuances that have been added to the discourse of consent, the prevailing assumptions about consent in the criminal arena are largely influenced by liberal and neoliberal perceptions. This section introduces the main theoretical paradigms present in the consent discourse: liberal, neoliberal, post-feminist, and radical-modern feminist.

A. THE LIBERAL CONSENT DISCOURSE

The collective knowledge of consent, sexual coercion, and sexual relations between men and women has been shaped and influenced over the years by classical liberal theory.[101] In this theory, the autonomy of the individual, free choice, and the principle of rationality occupy center stage. In the traditional liberal paradigm, humans are atomistic creatures seeking to promote their self-interest and, as such, lack reciprocal relations with society.[102]

Traditional liberalism can be characterized as one of negative rights that produce a dichotomy between the individual and the state.[103] The right to property, freedom of speech, liberty, and other rights allow individuals to manage their affairs and make choices without interference by the state. Negative rights extend also to the right to privacy, which includes, among others, the right to engage in a wide range of sexual practices.

The classic liberal ethos shaped our societal perceptions and collective knowledge of the relations between individuals in society, and among others, our intimate relations, and sexual interactions. According to the traditional liberal paradigm, the desired and appropriate distance between the state and the individual is one in which the state does not interfere in the intimate space of the individual. These conceptions, combined with the central place of autonomy, rational free choice, and a focus on the individual's self-interest, have shaped paradigms of consent in gender relations.[104]

Consistent with the liberal model, consent is devoid of social, gendered, institutional, or cultural context. It revolves around the atomistic conception of the individual, according to which the autonomous and rational person faces a range of possibilities;[105] their choices, based on the moral validity of

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[101] West, *supra* note 5, at 221.

[102] John Rawls, *The Basic Structure as Subject*, 14 AM. PHIL. Q. 159, 160 (1997); JOHN RAWLS, A THEORY OF JUSTICE 516 (1971).

[103] For a critical reading of the dichotomy between negative and positive rights in relation to the duty of the state to protect from domestic violence, see Robin West, *Rights, Capabilities, and the Good Society*, 69 FORDHAM L. REV. 1901 (2001).

[104] Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 805–06 (1999); Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U.J. GENDER SOC. POL'Y & L. 13, 14 (2000) (criticizing the conceptualization of autonomy as detached from gender-based social locations, etc.); *see also* KAREN GREEN, THE WOMAN OF REASON: FEMINISM, HUMANISM AND POLITICAL THOUGHT 72 (1995) (arguing that the liberal theory has failed to divide between consent and acquiescence: "Consent as ideology cannot be distinguished from habitual acquiescence, assent, silent dissent, submission, or even enforced submission. Unless refusal of consent or withdrawal of consent are real possibilities, we can no longer speak of 'consent' in any genuine sense").

[105] *Id.*

consent, are informed, free, and autonomous.[106] Consent is the "moral magic" word that distinguishes what is allowed from what is prohibited.[107] According to American legal scholar George Fletcher, "no idea testifies more powerfully to individuals as a source of value than the principle of consent."[108]

This collective knowledge of consent affects the way by which the credibility of victims who do not conduct themselves in accordance with the liberal paradigm is perceived, and the manner in which the sexual interaction forced upon them is interpreted by the legal system, as presented in detail in Part III.D.

B. THE NEOLIBERAL DISCOURSE AND CONSENT

Neoliberalism is a political-social-economic ideology that promotes market principles free from all state interference through reduced regulation, privatization of public operations, protection of the individual's property rights, weakening of organized labor, and reduction in social services.[109] Similar to traditional liberal views, neoliberalism also regards the individuals as atomistic beings, responsible for their choices, decisions, actions, and their consequences.[110] The neoliberal approach of "active citizenship" perceives individuals as capable of satisfying their needs and desires based on their choices.[111] The social, economic, or cultural context has no place in shaping one's life and story.[112] Similar to the liberal model of consent, consent in the neoliberal paradigm is a product of the individuals' decision and their sole responsibility:

> [I]t also carries responsibility for the self to new heights: the rationally calculating individual bears full responsibility for the consequences of his or her action no matter how severe the constraints on this action, e.g., lack of skills, education, and childcare in a period of high unemployment and limited welfare benefits.[113]

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[106] This view is reflected in Rawls's theory, particularly in his idea of "the Veil of Ignorance." *See* RAWLS, *supra* note 102.

[107] *See* Robin West, *Consent, Legitimation, and Dysphoria,* 83 MOD. L. REV. 1, 19 (2020) (suggesting to re-think the focus on consent as the social and legal demarcation between legitimate sex and rape). *See generally* Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121 (1996).

[108] GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 109 (1996).

[109] *See* ROSALIND GILL & CHRISTINA SCHARFF, NEW FEMININITIES POSTFEMINISM, NEOLIBERALISM AND SUBJECTIVITY 5–6 (2011) (providing an explanation and description of Neo-Liberalism).

[110] Still, neo-liberalism perceives and constructs the norms of free choice and rationality as "natural." *See* Wendy Brown, *American Nightmare: Neoliberalism, Neoconservatism, and De-Democratization*, 34 POL. THEORY 690 (2006) (discussing the connection between neo-liberalism and neo-conservatism and its implications on the political-social elements of American society). She notes: "Part of what makes neoliberalism "neo" is that it depicts free markets, free trade, and entrepreneurial rationality as *achieved and normative*, as promulgated through law and through social and economic policy-not simply as occurring by dint of nature." *Id.* at 693.

[111] Wendy Larner, *Neoliberalism: Policy, Ideology, Governmentality*. 63 STUD. POL. ECON. 5, 13 (2000).

[112] Catherine Rottenberg, *The Rise of Neoliberal Feminism*, 28 CULTURAL STUD. 418, 421 (2014).

[113] Wendy Brown, *Neo-liberalism and the End of Liberal Democracy*, 7 THEORY & EVENT 5, 5–6 (2003).

Literature that examines the effect of the neoliberal discourse on the private sphere, and in particular the discourse of sexuality and consent to sex, is almost non-existent. The few studies that have dealt with the relations between neoliberalism, sexuality, and sexual abuse have shown that the neoliberal approach creates a trap for many victims of sexual offenses because of the inherent contradiction between the ideal model of the neoliberal human being as one who is exclusively responsible for their actions, and reality.[114]

C. THE POST-FEMINIST DISCOURSE OF CONSENT

The post-feminist discourse of consent is shaped and influenced largely by the neoliberal model, both in the sense of the importance of the individuals and their free choice, and in that of resistance to state regulation.[115] According to this approach, female sexuality was shaped as passive and victimized as a result of the connection that radical feminism made between sex, sexuality, and oppression.[116] The post-feminist approach focuses on the diversity of female sexuality, emphasizes aspects of passion and power in the discourse of sexuality,[117] and argues that women can stress their sexuality without restraints.[118] According to this approach, sex is a strengthening and empowering act that makes possible sexual independence and liberation.[119]

According to this approach, there is no rape culture. What characterizes society is "sexual hysteria" that encourages women to complain about rape that did not take place, which weakens women instead of empowering them.[120] Post-feminist approaches recognize the influence of patriarchal culture on the sexual scene and its construction but perceive possibilities of resistance and struggle within this arena.

The principle of autonomy of the liberal and neoliberal approaches also underpins the post-feminist approach, which emphasizes the importance of autonomy and individuality for the empowerment of women and of female sexuality. According to this approach, women can navigate their lives based on their choice and will, without external influences and without barriers

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[114] *See infra* Part III.D; Brown, *supra* note 110, at 694, 704–705; GILL & SCHARFF, *supra* note 109, at 6.

[115] For an explanation and discussion of post feminism, see GILL & SCHARFF, *supra* note 109, at 3–4.

[116] Janet Halley, *Sexuality Harassment*, *in* LEFT LEGALISM/LEFT CRITIQUE 80 (Janet Halley & Wendy Brown, eds., 2002); Brenda Crossman et al., *Gender, Sexuality, and Power: Is Feminist Theory Enough?*, 12 COLUM. J. GENDER & L. 601, 604–606, 610–611 (2003).

[117] "I think it is time that feminists reclaim the body as a site of erotic pleasure and intimacy and move these issues back into the center of our theories of sexual citizenship." Katherine M. Franke, *Women Imagining Justice,* 14 YALE J.L. & FEMINISM 307, 311 (2002).

[118] Andrea Press, *'Feminism? That's So Seventies': Girls and Young Women Discuss Femininity and Feminism in* America's Next Top Model, *in* NEW FEMININITIES POSTFEMINISM, NEOLIBERALISM AND SUBJECTIVITY 117, 118 (Rosalind Gill & Christina Scharff eds., 2011). For a criticism of the manner in which "hyper-sexuality" affects Black women, see *id.* at 120.

[119] Halley, *supra* note 39, at 277; Gruber, *supra* note 51, at 421–23; Aya Gruber, *A "Neo-Feminist" Assessment of Rape and Domestic Violence Law Reform*, 15 J. GENDER, RACE & JUST. 583, 588–89 (2012).

[120] Janet Halley, *The Politics of Injury: A Review of Robin West's Caring for Justice*, 1 UNBOUND 65 (2005). For a detailed review of the backlash against progressive feminist reforms, see Baker, *supra* note 6, at 63–67.

affecting their decisions. Women have the ability and the power to decide when, in what way, and with whom to have sexual relations, therefore they bear the responsibility to repulse sexual coercion. The notion of personal responsibility that characterizes these approaches requires women to make lack of consent clear for men to understand that they are not interested.[121]

D. THE RADICAL FEMINIST DISCOURSE OF CONSENT

The radical feminist discourse of consent, identified with Catharine MacKinnon, focused on social power structures and reconceptualization of consent in a patriarchal context. Arguing that the concept of free consent to sexual interactions was defined and constructed from the perspective of men, and was intended to preserve their power in the social and sexual arenas, the radical feminist approach examined this concept with suspicion.[122] Consent excludes women's perspectives on gender and sexuality, and does not reflect the reality of their lives and experiences. The defining axis in MacKinnon's legal theory is the link between gender, female sexuality, and power relations between men and women. According to MacKinnon, sexuality is a tool for oppressing women and for maintaining these power disparities through a series of actions that use female sexuality, the female body, and the women themselves for the purpose of their objectification and oppression.[123] MacKinnon, and other thinkers, argued that most types of heterosexual sexual interaction do not reflect actual, free, and voluntary consent on the part of the woman.[124]

The contemporary radical feminist theory argues that although modern culture elevates female sexuality and presents it in the guise of female empowerment, in practice, this culture continues the commercialization of sexuality and the preservation of patriarchal perceptions. The main argument is that the discourse of empowerment, liberation, independence, and sexual equality, which is promoted by post feminists, does not reflect reality as it is experienced by women, and replicates the old patriarchal order.[125] Thus, it is argued that sex culture, known as "raunch culture,"[126] is not a progressive culture that promotes independent female sexuality but a chauvinistic

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[121] Charlene Muehlenhard et al., *The Complexities of Sexual Consent Among College Students: A Conceptual and Empirical Review*, 53 J. SEX RES. 457, 472 (2016) (criticizing this approach and discussing the problematic implications for women).

[122] *See generally* Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 SIGNS 631, 636–67 (1980); BROWNMILLER, *supra* note 19, at 267–68; CATHARINE A. MACKINNON, FEMINISM UNMODIFIED, 81–93 (1987); Susan Griffin, *Rape: The All-American Crime*, *in* FORCIBLE RAPE: THE CRIME, THE VICTIM, AND THE OFFENDER (Duncan Chappell et al., eds., 1977).

[123] CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 127–28 (1989).

[124] CATHARINE A. MACKINNON, ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 238, 244–43 (2006); Azille Coetzee, *Rape and the Limits of the Law: Revisiting the Criticism Against the South African Sexual Violence Legislation*, *in* A REFLECTIVE INQUIRY INTO GENDER RESEARCH; TOWARDS A NEW PARADIGM OF KNOWLEDGE PRODUCTION AND EXPLORING NEW FRONTIERS OF GENDER RESEARCH IN SOUTHERN AFRICA 3 (Samantha Van Schalkwyk & Pumla Gobodo-Madikizela, eds. 2015) (offering a radical feminist analysis of rape laws in South Africa).

[125] Katharine K. Baker & Michelle Oberman, *Women's Sexual Agency and the Law of Rape in the 21st Century*, 69 STUD. L. POL. & SOC'Y 63, 81–92 (2016).

[126] *See generally* ARIEL LEVY, FEMALE CHAUVINIST PIGS: WOMEN AND THE RISE OF RAUNCH CULTURE (2005).

commercial one that emphasizes the commercialization of female sexuality.[127]

Moreover, embracing sexuality has unique implications for Black women (and other women of color) because of stereotypes regarding their sexuality, which are rooted in slavery and make them further vulnerable to sexual violence.[128]

The literature about post-feminism, neoliberalism, and women stresses three aspects of the connection between post-feminism and neoliberalism: (1) the emphasis on individualism that ignores political, cultural, social, and economic barriers that influence individual choices; (2) the neoliberal and post-feminist individual, who is active, autonomous, and makes free and rational choices that often do not represent the female individual, especially in sexual interactions; and most intriguing, where the two approaches meet, (3) the way in which women are perceived and constructed in the cultural discourse: they are required to act rationally, be in control of their choices, present themselves as free and unconstrained, and assume responsibility for them—much more so than men.[129]

The post-feminist and neoliberal discourse of sexuality and sexual consent is the hegemonic discourse within which young women are educated. Radical feminist criticism suggests that the reality of gender relations, by contrast, is more complex and is still characterized by power relations between men and women,[130] negative-stereotyped sexual constructs regarding sexually liberated women, and archaic norms with respect to "proper" and "correct" masculine and feminine sexuality.[131] This reality is often shaped by and operates following the old gender norms of men being satisfied by women, men's initiative of sexual relations, and women's responsiveness to the initiative.[132] All of these entrap women because on one hand, they are expected (and want) to feel strong, active, independent, and sexually liberated, but on the other hand, in reality, many find themselves in abusive or unwanted sexual situations in which they are weakened and passive.

The fact that today women can talk freely about sex, treat it as a central practice in their lives, and conceptualize it positively does not necessarily make sex and sexuality sources of power and liberation for women.[133] For

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[127] *See generally Id.*

[128] Deborah Tuerkheimer, *Slutwalking in the Shadow of the Law*, 98 MINN. L. REV. 1453, 1482–85 (2014) (discussing the battle of "Slut Walk" and their focus on sexuality as a tool to combat rape, the racialized aspects of "reclaiming sexuality," and the need to critically evaluate the effect of this idea on women of color).

[129] GILL & SCHARFF, *supra* note 109, at 7. Gill and Scharff argue: "Could it be that neoliberalism *is always already gendered*, and that women are constructed as its ideal subjects?" *Id.*

[130] Shelley Budgeon, *The 'Problem' With Single Women: Choice, Accountability, and Social Change*, 33 J. PERS. & SOC. RELATIONSHIPS 401, 401–02 (2016) (exploring how neo-liberalism and post-feminist perceptions that emphasize strong female sexuality and power, autonomy, and free choice do not conform to the social and cultural norms of intimacy, marriage, and family; the latter are still shaped by hetero-normative rules and patriarchal gender norms)

[131] The following comments from interviews with college students exemplify this idea: "Afterwards [referring to after college] you want a wife and not a woman who's done all these people. You know? It's like when you get a new car. You don't want a lot of mileage on it." Another student stated: "A girl that hasn't had sex, they're typically in a lot higher – they're a lot nicer." Jozkowski, *supra* note 39, at 766.

[132] ANASTASIA POWELL, SEX, POWER AND CONSENT: YOUTH CULTURE AND THE UNWRITTEN RULES (2010).

[133] Elizabeth Schneider notes:

many women, gender and sexuality remain arenas involving hierarchies of gendered relations. Post-feminist perceptions teach women that femininity and female sexuality are power, and that women are active, passionate, and capable of exercising that power, but in practice, society binds them by patriarchal chains and punishes them for "wrong" choices in the intimate domain.[134] When they deviate from social sexual constructs, for example, if they assume sexual initiatives and have intercourse with many men, they are perceived as wanton and associated with a plethora of stereotypical conceptions.[135]

Thus, the neoliberal, liberal and post-feminist ethoses have left many victims of sexual offense without "hermeneutical resources,"[136] that is, without knowledge, concepts, and language necessary to help them interpret the sexual situation and understand it from their perspective, and not from the hegemonic social perspective. When the leading principals in the consent debate are free, autonomous, and pressure-free choice, and almost unlimited ability of the individual to make rational decisions, every choice women make with respect to relations with the opposite sex is perceived as possibly avoidable: if they wish to engage in sexual interaction they do, if they do not they simply walk away. To this is added the notion that intimate relations between men and women are protected under the right to privacy and not the "business" of the liberal state.[137]

Many women do not have a "rhetorical space"[138] to tell their story in their own words and to conceptualize the experience that they underwent as rape even to themselves.[139] The contrast between the hetero-normative discourse of sexuality, in which men always crave sex and women respond to that craving, and neoliberal views, confuses women. It makes women assume responsibility for situations of sexual exploitation and blame themselves for sexual coercion.[140] Because of the centrality of the idea of personal

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[H]aving women thinking differently, and arguably more affirmatively, about their own sexuality—doesn't change much in terms of women's power . . . . Many Third Wavers seem to see sex, sexuality and sexual pleasure as primary. Women's interest in sexual freedom, agency and autonomy has the potential to, but does not necessarily, translate into a broader understanding of women's experience and oppression in the world. And sex and sexuality has to be understood in a larger material context.

Regina Austin & Elizabeth M. Schneider, *Mary Joe Frug's* Postmodern Feminist Legal Manifesto *Ten Years Later: Reflections on the State of Feminism Today*, 36 NEW ENG. L. REV. 1, 26 (2001).

[134] "[W]omen are hailed through a discourse of 'can-do girl power', yet on the other hand, their bodies are powerfully reinscribed as sexual objects; women are presented as active, desiring social subjects, but they are subject to a level of scrutiny and hostile surveillance that has no historical precedent. . . . [N]otions of autonomy, choice and self-improvement sit side-by-side with surveillance, discipline and the vilification of those who make the 'wrong' 'choices.'" Rosalind Gill, *Postfeminist Media Culture: Elements of a Sensibility*, 10 EUR. J. CULTURAL STUD. 147, 163 (2007) (criticizing post-feminism).

[135] "In the current raunch culture, young women are encouraged, even expected, to display an active and 'out there' sexuality through their behavior and dress, yet continue to tread an impossibly fine line between being judged a slut if they go too far or frigid if they do not embrace their 'new-found sexual freedom' enough." LEVY, *supra* note 126, at 78.

[136] FRICKER, *supra* note 7, at 155.

[137] *See infra* Part II.

[138] *See generally* LORRAIN CODE, RHETORICAL SPACES: ESSAYS ON GENDERED LOCATIONS (1995).

[139] Debra Jackson, *Date Rape: The Intractability of Hermeneutical Injustice*, *in* ANALYZING VIOLENCE AGAINST WOMEN 39 (Wanda Teays, ed., 2019). Jackson shows how women who were "date raped" by an acquaintance have difficulties acknowledging the rape because they blame themselves and feel shame for what had happened to them.

[140] *Id.*

responsibility in neoliberal discourse, victims feel that they were not sufficiently cautious or did not behave in a manner that prevented the sexual violence by, for example, not saying no to the sexual initiative, remaining silent and submissive, "flirt[ing]" before the act, not physically objecting, going to the abuser's home, and the like.[141] The emphasis on individuality places the individuals' independence and agency at the center, and consequently, their responsibility for what happened to them, without taking into account other factors such as gender power relations.[142]

This hermeneutical injustice experienced by victims of coerced sex affects the legal practice of sexual consent in rape cases. First, it generates low reporting of rape because many victims feel blameworthy, perceiving the rape as a result of their conduct. They may not even recognize the criminality of the act because of the above. Second, if the rape is reported, key actors in the criminal justice system may have difficulties acknowledging the lack of consent because of the conceptions of responsibility, individuality, and free choice.[143]

In a research study that examined the experience of young women's unwanted sex, several important insights emerged that shed light on the relationship between the neoliberal model and intimate relations. Although the discussion focuses on unwanted sex and not rape, these insights may enrich the present discussion. First, unwanted sex is gendered. More women are experiencing unwanted sex than men are.[144] Second, neoliberal norms, together with gendered paradigms of sexuality and gender relations, caused women to accept personal responsibility for the abuse, blame themselves for the unwanted experience, and disregard external pressures that influenced their consent to have sexual relations, such as a background of violent and abusive relationships.[145] The emphasis on individuality and personal responsibility resulted in women turning a blind eye (as their male sexual partners certainly did) to a variety of factors that affected their consent and made sex unwanted. Although the women assumed responsibility for the situation, they did not have a sense of sexual independence and sexual liberation but felt that they remained in a weak position in the sexual interaction.[146]

Another study that examined the sexual practices of young women presented the contradiction between values of sexual liberation and the experiences of women in real life.[147] The researchers showed how, on one hand, young women perceive sex as a source of power, how they resort to

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[141] Laina Bay-Cheng & Rebecca Eliseo-Arras, *The Making of Unwanted Sex: Gendered and Neoliberal Norms In College Women's Unwanted Sexual Experiences*, 45 J. SEX RES. 386, 387–88 (2008).

[142] *See, e.g.*, Rosalind Dixon, Note, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J.L. & GENDER 277, 282 (2008). Dixson explains the argument of "female identity and the feminine as we know it are the pure products of a system of sexual subordination in which men defined themselves as subjects, and women as objects." *Id.*

[143] *See infra* Part IV.

[144] Bay-Cheng & Eliseo-Arras, *supra* note 141, at 386. *See also* William F. Flack et al., *Risk Factors and Consequences of Unwanted Sex Among University Students: Hooking Up, Alcohol, and Stress Response*, 22 J. INTERPERSONAL VIOLENCE 139, 145–46, 150–51 (2007).

[145] Bay-Cheng & Eliseo-Arras, supra note 141, at 386.

[146] *Id.* at 391–94. The main themes that emerged in the study were either gendered, such as "once you said yes, you always say yes" and a "good" female partner always consents to a sexual initiative, or neo-liberal, such as self-blaming of the women and sole responsibility of the unwanted sex.

[147] *See generally* Baker & Oberman, *supra* note 125.

sexual practices that they have not used in the past,[148] and how they perceive sexual consent as free from pressure. On the other hand, however, in-depth interviews with these women showed that stereotypical gender paradigms continue to shape the modern world of sex. The study demonstrated how these women eventually find themselves weakened and vulnerable in many sexual interactions, and how social constructs of gender and sexuality continue to influence consent and preserve archaic images of sexually liberated women as "easy to obtain" and cheap.[149]

In yet another study, interviews with young women showed that the model of the autonomous neoliberal individual conceals and ignores the complexity of consent in sexual intercourse. The interviews showed the clash between the ethos of free choice (which theoretically allows a woman to avoid the risk of sexual coercion if she simply opts not to consent) and the self-perception of these women who can easily say *no*, and the reality characterized by gendered sexual norms that make it difficult for them to say *no* to sexual relations.[150]

Post-feminist perceptions ignore a plethora of factors that influence consent, and, to a large extent, do not allow many women a free choice in sexual relations. The rhetoric of free sexuality is not yet adapted to social structures that are largely rooted in conservative and archaic perceptions of "proper" sexual behavior of women and of heterosexual sexual interactions.[151]

Another implication of the neoliberal paradigm for the discourse of consent and sexual offenses is a reshaping of the "ideal victim" model. As presented in Part II, over the years, the ideal victim of sex offenses has been required to conform to patriarchal and Puritan sexual norms, and to be sexually "pure" and guileless. Only then was she perceived as trustworthy and as not having consented to the sexual intercourse. In the neoliberal paradigm, the ideal victim model has changed into a rational person who makes informed choices and assumes responsibility for her actions and behavior.[152] The neoliberal model makes it difficult for victims of sexual offenses whose choices and actions are not necessarily reasonable to the layperson's view.[153] Such victims blame themselves and are blamed by

[148] Such as sending nude photos to men, having one-night stands for the sake of sex, etc.

[149] *Id.* at 87–89.

[150] Melissa Burkett & Karine Hamilton, *Postfeminist Sexual Agency: Young Women's Negotiations of Sexual Consent*, 15 SEXUALITIES 815, 817 (2012).

[151] Muehlenhard et al., *supra* note 121, at 472.

[152] Elizabeth Comack & Tracey Peter, *How the Criminal Justice System Responds to Sexual Assault Survivors: The Slippage between "Responsibilization" and "Blaming the Victim"*, 17 CAN. J. WOMEN & L. 283, 299 (2005).

[153] See, for example, the analysis offered by Lise Gotell regarding the affirmative consent model in Canada. The application of this model of consent has generated negative implications for victims of sexual violence because of the neo-liberal societal framework. One implication is a new victim-blaming approach: "Within recent Canadian sexual assault decisions, good sexual citizens are reconfigured as being like rational economic actors, assuming responsibility for their actions and the risks that they take. Under the standard of explicit consent, what is bad and untrustworthy is being redefined. As normalized sexual subjects are increasingly reconfigured through concepts of responsibility and risk, so too is the untrustworthy complainant reconstituted. The inverse opposite of the rape-preventing subject is the risky woman, the woman who avoids personal responsibility for sexual safety, the woman who places herself

society for behaving in a risky way that did not prevent the abuse. In many ways, the neoliberal conception of responsibility and individuality shapes the modern attitude of "blaming the victim."[154]

V. CONSENT AS AN EPISTEMIC INJUSTICE

The historical exclusion of women from the construction and development of knowledge, and their limited access to collective interpretative tools and knowledge, have created gendered hermeneutical marginalization. One of the main spheres in which this marginalization is reflected is sexual violence.

Jane McConkey describes the credibility of victims' stories and testimonies as an element that depends upon the "rhetorical space"[155] in which it is uttered. In the case of rape victims, this space is shaped by societal and cultural scripts regarding women and men's sexuality and is affected by gender-based stereotypes regarding women and gendered violence. As a result, the "rhetorical space" of rape victims is limited, does not reflect their needs and experiences, and generates societal and legal mistrust and misunderstanding of rape victims.

In this Part, I discuss the manner in which the consent discourse produces and expresses epistemic injustice, focusing on the hermeneutical injustice of consent. Although I do not elaborate on the testimonial injustice of consent, I begin with a brief review of this aspect of epistemic injustice to provide a broad context for the discussion of hermeneutical injustice.

A. CONSENT AS TESTIMONIAL INJUSTICE

There is extensive research showing that the credibility of victims of sexual crimes, especially women victims, is one of the main barriers to justice for victims in criminal proceedings.[156] Rape victims suffer from identity-prejudicial stereotypes that are based on a long patriarchal history of rape and rape culture.[157] Rape myths, stereotypical assumptions about women, gender, sexuality, and gender relations have prepared the ground for an inherent suspicion toward allegations of rape, especially of women.[158] It is often suggested that there are other reasons for the rape allegation such as revenge, fear to admit they had sex, shame, and more.[159]

Because the offense of rape is based on lack of freely given consent, the discussion of the credibility of a rape story is also a discussion of the credibility of the consent story (indeed, the absence of consent). In practice, the prosecution is required to prove that the victim performed acts attesting to the absence of consent (resistance, shouting, escape, explicit refusal,

within and occupies a space of risk. The risky woman slides into the traditional place of the promiscuous woman under new logics of consent." Gotell, *supra* note 39, at 880–82.

[154] Muehlenhard et al., *supra* note 121, at 305.

[155] *See generally* CODE, *supra* note 138.

[156] Joanne Belknap, *Rape: Too Hard to Report and Too Easy to Discredit Victims*, 16 VIOLENCE AGAINST WOMEN 1335, 1336 (2010); Lisak, *supra* note 30, at 1324. *See generally* Rumney, *supra* note 30.

[157] Balos & Fellows, *supra* note 24, at 73–74.

[158] Tuerkheimer, *supra* note 9, at 42–50.

[159] *See generally* Halley, supra note 116.

certain body movements, and so on). Focusing on the victim means focusing on her actions; her reactions before, during, and after the rape; what she said; and what she did.[160]

By nature of the adversarial process, this focus involves the use, by the defense, of rape myths and of a range of abusive measures to damage the complainant's credibility by infringing on her privacy. When the situation deviates from the archetypal boundaries of rape, that is, it does not conform to the myth of "real rape,"[161] and when the victim does not match the image of the ideal victim[162] or belongs to a minority group,[163] suspicion of her increases and she is perceived as even less credible.[164]

Deborah Tuerkheimer calls the embedded suspicion towards rape victims the credibility discount,[165] arguing that the credibility discount is a predominant motif in the legal response to rape.[166] She further argues that the view of rape victims as non-credible has shifted from formal legal rules to implicit practices in the criminal justice system.[167] In what follows I show how implicit perceptions of sexual consent and the hegemonic knowledge of consent affect prosecution decisions, even when prosecutors believe the victims and perceive them as credible.

B. CONSENT AS HERMENEUTICAL INJUSTICE

1. General

Testimonial injustice is relatively visible and easily identifiable because distrust of individuals is based on stereotypes about them. By contrast, hermeneutical injustice is more difficult to identify. As noted in Part II.B, hermeneutical injustice means misinterpretation and misunderstanding of the narrator's life experience because the experience and perspective of the narrator are not part of the collective knowledge and experience. The analysis of consent in sexual offenses exemplifies this type of injustice in the limitations of criminal law and of all its agents, and often of the victims themselves, to understand and interpret the rape incident correctly, and to acknowledge its criminality—that is, to acknowledge the absence of free consent.

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[160] *See* Tuerkheimer, *supra* note 9, at 35.

[161] Burt, *supra* note 29, at 261. *See generally* SUSAN ESTRICH, REAL RAPE (1987).

[162] The ideal victim is a term that was coined in the 80s by criminologist Neal Christi who described the stereotypical model of a rape victim who is sexually pure, resists the rape to the utmost, and complains immediately. Later, the ideal victim's model was also shaped by a neo-liberal model that requires independence, individuality, and sole responsibility for the actions and their results. *See* Deborah Tuerkheimer, *Judging Sex*, 97 CORNELL L. REV. 1461, 1462 (2012) (describing the manner in which certain women were excluded from the discourse of rape); Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 849–71 (2013) (describing how the rape shield laws harmed women who were not perceived as "real victims").

[163] *See generally* Anne Cossins, *Saints, Sluts and Sexual Assault: Rethinking the Relationship Between Sex, Race, and Gender*, 12 SOC. & LEGAL STUD. 77 (2003).

[164] *Id.*

[165] Tuerkheimer, *supra* note 9, at 7.

[166] *Id.* at 42–50.

[167] *See* Tuerkheimer, *supra* note 21, at 22, 24.

Three manifestations of hermeneutical injustice are likely to appear in the discourse of consent. One is the inability of the law (police, prosecution, jurors, and the courts) and of society to recognize the absence of freely-given consent, and accordingly, to understand the incident and classify it as one of rape. A second manifestation is the difficulties of the victims themselves to conceptualize the situation of lack of consent as sexual abuse. Many victims, particularly women, cannot make their experience intelligible to themselves and, as a result, to others.[168] The third case of hermeneutical injustice in the consent discourse is different from the first two. The victim recognizes the absence of consent, the hearer believes the victim, and the hearer interprets the situation correctly. Apparently, no epistemic injustice is created, yet the hearer (in our case, the prosecution) cannot conceptualize the situation into a legal story of rape, or refuses to do so.

2. Hermeneutical Injustice During the Prosecution Stage: "Prosecutorial Realism"

In this part, I examine this manifestation of hermeneutical injustice. Focusing on the prosecution, during the pre-trial stage, I show how hermeneutical injustice of consent is formed in the prosecutorial decision to close rape cases. At this stage, hermeneutical injustice regarding consent may manifest in two ways. First, the prosecution fails to identify and "notice" the lack of consent because of rape myths and the collective stereotypical knowledge of consent. Injustice of this type was not reflected in the interviews.

A second and more subtle (even invisible) manifestation of hermeneutical injustice is discussed below. This type refers to the situation in which the prosecution (the hearer) believes the victim (the narrator) that she did not consent to sexual relations and recognizes the lack of consent and the sexual coercion. However, the prosecution does not translate the personal story into a legal rape story and does not transpose it from the personal to the legal level.

The inability and unwillingness of the prosecution to incorporate lack of consent into the legal format of rape does not stem from a narrow legal definition of consent. It stems from the collective knowledge about consent, combined with evidentiary difficulties unique to sex offenses. The limitation of the law in recognizing the story of the victim's lack of consent and identifying it is due not only to distinctive and easy-to-identify stereotypes (such as using the victim's permissiveness, dress, or occupation to damage her credibility),[169] but is embedded in our collective knowledge of consent: the "correct" and "reasonable" expression of non-consent, "correct" responses to sexual coercion, and more. This knowledge is perceived as the normative knowledge—right, proper, and accurate.

Although the prosecutors claim to believe the victim, they think that the court will not recognize the lack of consent and not interpret the situation correctly because of the manner in which the court perceives sexual consent. Therefore, they close the case. The hermeneutical injustice is not reflected in

[168] *See* discussion *supra* Part III.D.
[169] *See* sources cited *supra* note 22 and accompanying text.

the misinterpretation of consent by the prosecution, but in the *prosecution's fear of misinterpretation* by the court. This is what I call "prosecutorial realism."

All interviews I conducted show that the prosecution recognizes the uniqueness of the rape dynamics and the responses of the victims, which are not always consistent with the logic of the layperson. Unlike cases of hermeneutical injustice in which the hearer holds stereotypical perceptions about the narrator and therefore fails to identify her story and understand it properly, in this case, the interviewees understand why complainants reacted in a way that could be perceived as an expression of consent (for example, returning to the place of abuse, not physically resisting, not filing a complaint about the abuse, or not filing one immediately). They believe the victims' story, identify the abuse, and acknowledge the sexual violence story.

The prosecution's standard for prosecuting is "a reasonable prospect of conviction."[170] The prosecution is required to "step into the shoes" of the court (or juries in the United States) and anticipate how they will eventually decide the case based on the evidence available to the prosecution in the earlier stage of the proceeding. The prosecution conducts an examination of the evidence, looking to the end point of the criminal proceedings, and asks whether the court or juries, after the evidence is presented to them, can convict beyond a reasonable doubt.

Based on this test, because of the "prosecutorial realism," the prosecutors' assumption that the court may not recognize the lack of consent, most sexual offense cases are closed and do not proceed to the trial stage.

The fact that most rape and sexual assault cases are based on a "word-against-word" scenario adds to the complexity of the situation. Many rape cases present two narratives: one of the victim and the other of the suspect. The prosecution must prove both lack of consent and the defendant's mental state (knowledge or willful blindness). When there is no additional evidence that may support the complainant's story, the spotlight is on the complainant and her behavior, reactions, and actions. The prosecution is concerned about the difficulty in basing the conviction on the sole evidence of the complainant, even if it can do so legally, because of the way in which the court interprets the notion of consent.

This concern of prosecutors is affected by the practical difficulty of proving non-consent to an act that occurs in private with no witnesses and no extrinsic evidence. Moreover, norms of consent, heterosexual stereotypical scripts of sex, and rape myths generate renunciation of the idea that the act was not consensual.[171] Therefore, victims' stories (complaints or testimonies) are often not plausible, no matter what the evidence is.[172]

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[170] "A prosecutor should seek or file criminal charges only if the prosecutor reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in the interests of justice." CRIMINAL JUSTICE STANDARDS FOR THE PROSECUTION FUNCTION § 3-4.3(a) (AM. BAR ASS'N, 2017).

[171] Baker, *Why Rape*, *supra* note 6, at 223.

[172] This of course relates to testimonial injustice. "When it comes to a 'he said'/'she said,' 'her word against his' scenario, there are obvious reasons to give him testimonial priority, from the point of view of upholding patriarchal order. For what if *she* is right? Then he would stand to be proven wrong. She would

Prosecutor Z said: "Sometimes I have cases that I do believe in, but I fear the court will not believe them, because there is this doubt that not everything is explained."[173] How can the prosecution provide explanations that would prevail over social assumptions regarding consent? Usually, it does so through external corroboration. Here is how Prosecutor A addressed the difficulty in issuing a rape indictment without being able to corroborate the victim's testimony:

> "Another difficulty is that she says I said 'no' and he says that she didn't say 'no.' Now who do I believe? A polygraph? It's not admissible in criminal proceedings. How can I decide? So, we try to find supporting indications of truth. Yes, we try, but still there's a difficulty. One who says, 'It was with consent,' and she says, 'It wasn't with consent, I said 'no.' What do I do? It's not that simple. There has to be evidence that she immediately filed a complaint, and so on and so forth . . . . Think how many situations like this exist where we must tell the court 'Believe the complainant, don't believe the suspect,' Why? We don't know. And this is the difficulty in these cases that it was all behind closed doors."[174]

Although no recent complaint is required today to establish the victim's credibility,[175] the prosecution seeks additional signs of truth, such as immediate reporting, as in the above excerpt. This is not to persuade itself of the victim's credibility, but to persuade the court.

Prosecutor K also contends that cases in which consent is at the heart of the dispute are the "most problematic": "The cases that deal with consent, that is, when the complainant comes and tells a story, and the defendant comes and says, things were with consent, and I have no evidence lying around that can corroborate her version. These are very, very problematic cases."[176]

Prosecutor A spoke to the same effect:

> "The great difficulty is that it's all behind closed doors, and it's always one against the other, and when it's one version against the other I have no X-ray vision, I haven't been in the room, I don't know what happened inside the room. Now, you have two people, a man and a woman, each one says something else . . . . It's very difficult, it's very, very difficult to decide what really happened there, especially when the controversy is about lack of consent."[177]

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have the power to take him down with her word, when she is the more credible. And that power does not tend to be granted to historically subordinate people vis-à-vis the dominant without a fight. Such flipping of gendered hierarchies is part of what misogyny is effectively meant to prevent from happening." KATE MANNE, DOWN GIRL: THE LOGIC OF MISOGYNY 185 (2018).

[173] Interview with Z, Anonymous Prosecutor, in Israel (Mar. 2018).

[174] Interview with A, Anonymous Prosecutor, in Israel (June 2019).

[175] *See* sources cited *supra* note 30.

[176] Interview with K, Anonymous Prosecutor, in Israel (July 2019).

[177] Interview with A, *supra* note 174.

According to the interviewees, this is especially true when the complainant's behavior deviates from conventional liberal paradigms, for example, if she did not explicitly clarify her lack of consent, did not resist, or initiated the act. Thus, even if the prosecutors themselves do not follow the hegemonic discourse of consent, they believe that the court's perception of consent is shaped by this discourse. Therefore, the prosecutors think that they should clarify to the court why the complainant did not expressly object, why she did not leave the place, why she continued the relationship with the defendant, why she was silent at the time of the incident, and more. As a result, many complaints based on a single testimony, even if they are credible, do not consolidate into an indictment for fear of misinterpretation by the court.

This finding is consistent with research that shows that prosecutors consider non-relevant legal factors in cases where the victims know the defendants (when they are acquaintances, relatives, or intimate partners). In these cases, "downstream orientation" toward judges and juries, and the prosecution's assumption that consent would be a key issue in trial, led them to focus on victims' characteristics and scrutinize the victims' behavior more carefully, which, as a result, reduced the chances of charging.[178]

Sex offenses are not the only offenses that pose evidentiary hurdles to the prosecution, but in most other cases, when the prosecution believes the victim, it assumes that the court or juries will also find the victim reliable. Generally, there is no discrepancy between the way in which the prosecution treats and perceives the victim and the way in which the victim is perceived by the court. In many sexual offense cases, however, trusting the victim's account of the incident is not sufficient, particularly when the victim does not conform to norms of sexuality and victimhood,[179] and the prosecution seeks further corroboration. When the prosecution does not find it, the case is defined as problematic from an evidentiary point of view.

Prosecutor H criticized the approach according to which external corroboration should be sought for a single testimony, even when the prosecution finds the complainant's version to be reliable:

> [I]t doesn't mean that it's—that we should go only with 100% or only with 99% [of the cases.] To me, this is not right. To me, if there's someone who is believable, a credible girl, and she has a good complaint, a proper complaint, a complaint that can persuade the court that this happened to her, I have to go with her. Even if she's a single witness.[180]

The prosecution's decision to "go only with 100% or only with 99%," as H mentioned, has a narrow legal explanation: the test of reasonable prospect of conviction. Most empirical studies of charging decisions in sexual assault cases find that legal factors—particularly the strength of evidence in the

[178] Spohn & Holleran, *supra* note 11.
[179] Tuerkheimer, *supra* note 128, at 294.
[180] Interview with H, Anonymous Prosecutor, in Israel (Oct. 2017).

case—play an important role.[181] In this study, too, prosecutors explain their decisions in legal terms, arguing that there is no prospect of conviction. However, this legal explanation is wrapped up with non-legal conceptions of consent, women's sexuality, and sexual relations.

This legal explanation reflects the "consent tragedy," because even when the prosecution recognizes the unique dynamics of sexual abuse and believes the victim, its decision is still dictated by the narrow conception of consent held by the court or one that *the prosecution believes to be held by the court*. This is consistent with studies that show how prosecutors seek victims that jurors and the court (and not the prosecutors themselves) will perceive as honest and credible.[182]

The discrepancy between the perceptions of the prosecution and those of the court is evident in all the interviews. For example, Prosecutor V noted:

> It's not a matter of not believing her, on the contrary, there are many cases that I believe in, and I think the things happened, but I can't prove them in court. Yes, because I think that as a judge, I cannot determine that there was rape or sexual abuse here beyond a reasonable doubt. Not at all.[183]

Prosecutor E presented a similar argument:

> I can already see what's going to happen to her in court. So, I try to explain her that she has her truth and I believe her that at that moment something happened that she didn't want to happen, and it's not like he comes out "clean." But still, to go through with the whole saga, when there's a chance that in the end he will be acquitted, and the court will say hard things about it.[184]

Prosecutor D also addressed the gap between the narratives, which is not a matter of evidence or definition of consent but rather a result of societal conceptions of sexual consent:

> I see how difficult it would be to bring a case like this to court. And I'm explaining to her, very delicately, that we need to investigate further, that I'm greatly impressed with her, I truly believe her, but there's nothing I can do because legally I must disengage [from what I believe]. If my impression is that she doesn't answer the difficult questions and doesn't provide explanations for all of the behavior, it's preferable that she would be hurt by me [since no indictment is handed down] than that she would be hurt after a year and a half . . . when the court will not convict.[185]

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[181] Spohn & Holleran, *supra* note 11, at 5–6.
[182] *See* Applegate, *supra* note 97, at 919–20.
[183] Interview with V, Anonymous Prosecutor, in Israel (June 2019).
[184] Interview with E, Anonymous Prosecutor, in Israel (June 2019).
[185] Interview with D, Anonymous Prosecutor, in Israel (Apr. 2019).

Prosecutor Y also described the gap between the personal story and the legal one, and the difficulty of reconciling the personal story of the victim with a legal story of rape:

> But in the end, you have to prove it in court, this is what is terribly difficult to explain. Even if I think that what the suspect did is an ugly act, and he's disgusting, and I can't accept it, in the end, when I have to prove it in court, I have to prove it beyond a reasonable doubt, and this gap is sometimes very hard to explain.[186]

Prosecutor A noted similarly:

> Initially, when we decided not to file an indictment, [the victim said] but how could that be? He did this to me; don't you believe me? And this gap between the factual world and the legal world . . . . As much as I try to explain it to the complainant, this translation of what you feel factually as opposed to how I convert it to a legal concept is very, very difficult.[187]

The gap between the factual truth and the legal truth, and the manner in which the discourse of consent affects this discrepancy and the interpretation given by the court to the victim's story, are also reflected in the interview with Prosecutor B:

> Look, a reasonable chance of a conviction is my professional test. These are cases in which I identify an inherent evidentiary difficulty. What does it mean? It means that, for example, it is her word against his word . . . . I see that the court won't find an anchor, it needs some anchor to say why I believe him and don't believe her and I have to give it this anchor—now, I think that the victim can return to the scene of the abuse—but I see that the court won't get over this thing.[188]

This prosecutor can "get over" behaviors that are inconsistent with our collective knowledge of sexual consent (such as returning to the scene of the rape) and understand that this is a reasonable behavior of rape victims, but she fears that the court will not "get over" behaviors and responses that do not conform to the recognized liberal ethos of consent. In the background of this prosecutor's legal analysis, there are social perceptions of male-female sexual intercourse, the behavior of the two sexes, and the manner of expressing consent and the lack thereof.

The way in which the court is influenced by the liberal and neo-liberal ethos of consent is illustrated in the following excerpt. Prosecutor L explained that the strength of a woman does not benefit her claim of lack of consent because of the social perception that a strong woman should be able to extricate herself from the situation if she wants to:

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[186] Interview with Y, Anonymous Prosecutor, in Israel (Sept. 2017).
[187] Interview with A, *supra* note 174.
[188] Interview with B, Anonymous Prosecutor, in Israel (June 2019).

> Q: You said antagonism. Can you put a finger on something, a set of characteristics that creates antagonism [in court]?
>
> A: Yes. First of all, a strong woman. Totally—they simply can't—
>
> Q: She's not enough of a victim?
>
> A: She's not a victim. [The expectation is that] you could have kicked him in a sensitive place and left.[189]

As noted, it could be argued that the problem is a legal-evidentiary one, caused by the nature of the criminal procedure and adversarial law, which require conviction beyond a reasonable doubt and evidence supporting this level of proof. It may be argued further that this is not the effect of social norms of consent, but a legal decision based on the facts that the suspected acts were carried out behind closed doors; there is insufficient evidentiary support beyond the complainant's testimony; and the prosecution will not be able to persuade the court or juries beyond a reasonable doubt that the complainant did not consent, or will fail to persuade the court that the complainant expressed her lack of consent in a manner of which the defendant was aware.

This type of claim provides a legal explanation for a story that is not only legal. This is not merely a story of evidence and its evaluation. This is not just a story about the prosecution's reasonable prospect of conviction test of indictment and about a "cold" legal analysis the prosecution makes in deciding whether or not to indict. It is also a story about enshrined societal norms regarding gender relations, the "reasonable" sexual behavior of women, and the "correct" and "familiar" responses to sexual coercion. It is a story about how we perceive consent to sexual interaction and, more importantly, about the way in which we believe women must express a lack of consent. This is a story about women's and men's sexuality and the social story of sexual interactions. Focusing only on legal reasoning ignores the non-legal reasoning underlying the prosecution's decision of no reasonable prospect of conviction.

The liberal and neoliberal principles of personal responsibility, free choice, and individualism, and the post-feminist conception of sex as a source of women's empowerment are significant for women. They succeeded in breaking down many of the patriarchal and conservative barriers that bound women to traditional sexual roles and made it possible for women to choose equal and empowering sex. At the same time, they have created significant barriers to the social ability to detect lack of consent in situations in which power relations are not visible or in situations where there is no clear expression of lack of consent.[190]

They also shaped the "modern ideal victims" as ones who are responsible for making informed decisions about their actions and for not acting "foolishly," improperly, riskily, or incorrectly. For example, Prosecutor H said:

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[189] Interview with L, Anonymous Prosecutor, in Israel (Feb. 2019).
[190] *See* discussion *supra* Part III.D.

> I think [prosecutors] are very much worried, and for no good reason . . . . They decided not to continue with this complaint, and I find it painful. It's as if they're looking for everything to be clear and understandable . . . . I told the prosecutor, are you really not sure? Does it look like consent? If a minute earlier he choked her to a point of losing consciousness, is this consent? Is it? *The perception is that people are responsible for their fate and their body, and in the end, if a person didn't say, if a woman didn't specifically say in this case: "I don't want to, leave me alone," or genuinely struggled, then it's not enough.* It's hard to explain why suddenly the next day she did want him, why the next day she was willing. Maybe the next day he was fine and sweet, and kissed her and brought her flowers, but at that moment, when he strangled her, to say that she consented seems to me problematic. But people are debating this issue because it's something you really want to clarify. That she said no, about this. She said no, she was not willing.[191]

Studies show how difficult it is for people to believe a story of rape.[192] One reason is misinterpretation (that is often gendered) of women's behaviors as indicia of consent.[193] Often, this miscommunication is a result of outdated beliefs about sexual relations.[194] Another reason is sexually liberated post-feminist norms that make it more complicated for women to claim non-consent.[195] As discussed earlier, what we think and know about consent is shaped by hegemonic perceptions that are not in line with the reality of women's consent and the manner in which rape victims respond to sexual coercion. Adding to that, the evidentiary characteristics of rape cases make it almost impossible to acknowledge non-consent. As Katharine Baker puts it:

> The problem is that rape is a crime that by its nature has no witnesses, produces no demonstrable evidence, and inevitably brings with it a perfectly plausible theory of legality, i.e., consent. The crime also involves, indeed the essence of the injury stems from, an act that most people find very difficult to talk about.[196]

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[191] Interview with H, *supra* note 180 (emphasis added).

[192] Orenstein, *supra* note 95, at 672–77.

[193] Coreen Farris et al., *Sexual Coercion and The Misperception Of Sexual Intent*, 28 CLIN PSYCH. REV. 48 (2008); Katie Scott & Clint Graves, *Sexual Violence, Consent, and Contradictions: A Call for Communication Scholars to Impact Sexual Violence Prevention*, 8 PURSUIT: J. UNDERGRADUATE RSCH. U. TENN. 159, 163–65 (2017) (providing an overview of theories of miscommunication in relations to sexual relations).

[194] Eugene J. Kanin, *Date Rape: Unofficial Criminals and Victims*, 9 VICTIMOLOGY 95, 97 (1984) (stating that some perpetrators in the study had mistakenly interpreted their victims' fear as acquiescence).

[195] Baker, *Why Rape*, *supra* note 6, at 235–36 (presenting studies on modern sexual practices that women are involved in, such as hook-ups, noting that liberating opportunities for sex make it difficult to believe women's claim of non-consent).

[196] *Id.* at 240.

The following, by Prosecutor A, illustrates the "prosecutorial legal realism" that characterizes the prosecution. On one hand, the prosecutor believes the complainant's claim that there was no consent. On the other hand, because the prosecution assumes that the court will have difficulties believing her or will fail to understand how she conveyed a lack of consent to the suspect, it closes the case.

> A: The very great difficulty is when often, in the complainant's reality, that is, in her reality she was raped, it was not with consent and she struggled, okay. And then, there's the defendant, the suspect at this point, what he was experiencing at that moment. I mean, when you [the victim] say that you struggled, you say, I said "no" to him, and that's it?
>
> Q: Why isn't that enough?
>
> A: Why isn't that enough? Depends, I didn't say it's not enough, it all depends on the circumstances . . . . He says, it was with consent, she wanted it, we fantasized about it, we were in a relationship.
>
> I check the facts. I tell her, come and tell me, persuade me, how was he to understand that you didn't want to, how was it expressed? Did you say "No"? Did you struggle? You yelled? Did you do something that could make him understand that when he came and touched you that you weren't interested?[197]

The issue of intimate relations strengthens the manifestation of hermeneutical injustice in the legal discourse of consent in rape cases. Although much sexual abuse occurs in intimate relationships,[198] society has difficulty recognizing this abuse given the intimacy, emotions, and connection between the two parties. In the case of marriage, the difficulty of correctly interpreting the story of sexual violence and understanding it increases because, over the years, marital rape has not been recognized as a criminal offense.[199] When the law does not recognize the rape story of married women, society cannot recognize it and interpret it properly. Even after the law defined it as a criminal offense, the collective knowledge of marital rape has created and preserved hermeneutical injustice of marital

[197] Interview with A, *supra* note 174.

[198] Sexual violence in intimate relationships is one of the most under-reported crimes. *See* Patricia Mahoney & Linda M. Williams, *Sexual Assault in Marriage: Prevalence, Consequences, and Treatment of Wife Rape*, *in* PARTNER VIOLENCE: A COMPREHENSIVE REVIEW OF 20 YEARS OF RESEARCH 113, 123 (Jana L. Jasinski & Linda M. Williams eds., 1998); *see also* DIANA E.H. RUSSELL, RAPE IN MARRIAGE (2d ed., 1990). According to Russell's study, fourteen percent of the women who had ever been married in her sample were the victims of at least one completed or attempted rape by their husbands or ex-husbands. However, Russell notes that the data underestimates the real prevalence of wife/partner rape. *See also* Melanie Randall & Lori Haskell, *Sexual Violence in Women's Lives, Findings from the Women's Safety Project, a Community Based Survey*, *in* 1 VIOLENCE AGAINST WOMEN 6, 23 (1995) (finding that thirty percent of the women who were sexually assaulted as adults were victimized by intimate partners). This study was based on in-depth interviews with 420 women in the city of Toronto in the years 1991 and 1992.

[199] *See generally* Anderson, *supra* note 29.

rape. Victims were not able to name the abuse they suffered, and key players in the criminal justice system did not identify the story of the victims.[200]

An example is offered in an interview with Prosecutor A:

> The most difficult cases are, first, when there is a previous relationship, a previous couple relationship, and throughout the relationship there was always consent to sex . . . . [S]uddenly there is a breakup or some constitutive event that leads to the complaint, so there were two instances [of rape, for example]. Apparently, they happened, apparently, she really struggled, but it is necessary to explain the "evolution" of the complaint for that matter, which is something that needs to be explained. It is true that the court knows that a complainant usually [does] not complain, but there has to be a convincing explanation, Why didn't you say? Why didn't you tell? How did you keep it in that long? Is there a reason?[201]

Many prosecutors feel frustrated by this "prosecutorial realism," by the discrepancy between how the prosecution sees the case and how it thinks the court will see it. The frustration stems from the injustice done to the victims. Similar to Prosecutor H above, Prosecutor T expressed frustration at the fact that many cases in which the prosecution believes the complainants are still being shelved, despite this trust. She said, "I come to situations that even though she is telling the truth, we have no way of proving it in court, and the helplessness I feel . . . of the system that I'm actually a part of."[202]

Prosecutor D added:

> If the suspect always claims it was consensual, and the defense counsel, before even hearing what the story is about, will tell him to say it was consensual, as if this is the first piece of advice, then you're stuck. You're stuck with the proof, and it's just absurd.[203]

Indeed, as Prosecutor T said:

> I need to consider the situation. In this sense, we do much more extensive judging, in my opinion, than the courts, because we are already bringing to court the cases that are really "sealed" from all directions or from almost all directions. In the end they will probably only have to decide. We really serve it all up to them all pre-chewed. Here in our offices, here—it's almost war.[204]

Unlike many studies that focus on the way prosecutors dismiss victims' claims because of stereotypical assumptions about them, this Article focuses

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[200] Ruthy Lazar, Constructions of Marital Rape in the Canadian Criminal Justice System (2009) (Ph.D. dissertation, Osgoode Hall Law School) (on file with author).
[201] Interview with A, *supra* note 174.
[202] Interview with T, Anonymous Prosecutor, in Israel (July 2019).
[203] Interview with D, *supra* note 185.
[204] Interview with T, *supra* note 202.

on the implicit beliefs that shape prosecutorial practices. The difficulty is not in the stereotypical discourse of the prosecutors or a misinterpretation on the part of the prosecution of the story of the sexual violence. Also, this is not a discourse of evidentiary injustice, in which the prosecution does not believe the victims and concludes that there is insufficient evidence to proceed to trial. The interviewees, perhaps because of their experience in the area of sexual offenses, succeed in counteracting archaic conceptions of sex, sexuality, and consent. The discourse is more complex because it is concealed (even to the prosecutors themselves) and bolstered by formal legal reasons.

The consent discourse of the court, according to the interviewees, does not allow for proper identification and interpretation of the sexual offense. The discourse of the court presupposes that many choices are available to women—expecting them to make rational decisions, "reasonably" manage the sexual interaction, and respond to sexual coercion according to the collective knowledge of sexual consent. This is how hermeneutical injustice is created. This is how hermeneutical injustice is preserved.

Although the gap between factual and legal truth is a general characteristic of the criminal procedure and exists not only in sexual offense cases,[205] the unique characteristics of these cases, and the social discourse within which these cases are conducted, greatly increase this gap, and, accordingly, create and intensify the hermeneutical injustice discussed in this Article. First, unlike other cases, sex cases are usually based on "her word against his" so that they rely almost exclusively on the victim, who is perceived as less trustworthy. Second, in many cases, the complainant is not the "ideal victim," and her behavior, reactions, statements, and overall conduct do not comply with the liberal model, which assumes rational and informed conduct, free choice, and responsibility for these choices. Third, the modern post-feminist conception of strong and empowering female sexuality is incompatible with many sexual interactions in which the woman is at a disadvantage. The discourse of consent and the discourse of rape are shaped largely by paradigms that assume a woman can leave, return, and respond as she sees fit, and be fully responsible for her conduct and choices. Thus, there is difficulty in recognizing hidden power relations and understanding the responses of many victims who do not express lack of consent and do not resist, which in turn produces a misinterpretation of the complainant's conduct (in this case, an expectation or assumption of misinterpretation on the part of the court). Fourth, the discourse of consent is still influenced to a great extent by rape myths and stereotypes about gender, sexuality, and gender relations.[206] In view of all the foregoing, even if the prosecution believes the victim, identifies the absence of consent, and recognizes the coercion and sexual abuse, it may define the case as having no reasonable prospect of conviction because, according to its opinion, the

[205] Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 288–89, 304–05 (2013); Gary Goodpaster, *On the Theory of American Adversary Criminal Trial*, 78 J. CRIM. L. & CRIMINOLOGY 118, 127–34 (1987).

[206] *See, e.g.*, John F. Decker & Peter G. Baroni, *"No" Still Means "Yes": The Failure of the "Non-Consent" Reform Movement in American Rape and Sexual Assault Law*, 101 J. CRIM. L. & CRIMINOLOGY 1081, 1082 (2011).

court will not know, want, and be able to interpret the absence of consent correctly. The discrepancy between factual and legal truth has implications for how the victim's story is conceptualized, defined, interpreted, and heard by the hearer—more specifically, how it is not heard by the hearer.

This gap between the perception of the prosecution and the court, and the injustice inherent in it, can be summed up in the following excerpt from Prosecutor T:

> A: Victory means bringing the complainant's truth to court and someone else, who is not us, recognizing her truth. This is victory. Because I think one of the most powerful mechanisms that allow sexual assault is, of course, the secret. But it's not only the secret. It's the fact that complainants come to the police and complain, and it doesn't proceed to the criminal process, it remains inside the closed case because it can't be proven. And it's not because the police aren't doing their job and it's not because we're not doing our job. It's because there's a human situation here . . . . This is a very[,] very severe offense of 16 years of prison or more. The court must decide whether it did or didn't happen, and it doesn't always have the tools, and we cannot always provide these tools to the court. It's enormously difficult to tell the complainant that this isn't enough.
>
> Q: Despite the fact that you believe her?
>
> A: Despite the fact that I believe her.[207]

CONCLUSION

The common theoretical and practical discourse of justice in criminal law has to do with suspects' and defendants' rights.[208] Over the years, the concept of justice in criminal law has been extended to also include the victims of the offense, an extension manifest in legislation and in the ample literature that discusses victimhood and the rights of crime victims. An important aspect of the victimology scholarship is the theory of procedural justice, which emphasizes the process that the victims undergo in the criminal proceedings (such as transparency of information and granting victims a voice) and not necessarily its outcome.[209]

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[207] Interview with T, *supra* note 202.

[208] Issues include, for example: mass incarceration, racism in the criminal justice system, police practices, the death penalty, and the injustice of conviction of innocent people. *See, e.g.*, SHARON DOLOVICH & ALEXANDRA NATAPOFF, THE NEW CRIMINAL JUSTICE THINKING (2017) (discussing various theoretical and practical aspects of the criminal justice system and criminal law in the modern era).

[209] *See* Mary Margaret Giannini, *Redeeming an Empty Promise: Procedural Justice, the Crime Victims' Rights Act, and the Victim's Right to Be Reasonably Protected from the Accused*, 78 TENN. L. REV. 47 (2010) (discussing procedural justice theory and its implication to victims in the American context); Debra Patterson & Rebecca Campbell, *Why Rape Survivors Participate in the Criminal Justice System*, 38 J. COMMUNITY PSYCH. 191, 198 (2010).

The legal discussion of consent has also developed over the years. Analyzing consent as a unique failure of epistemic injustice provides a different view of the discourse of consent and victimology. Employing epistemic injustice theory contributes to a better understanding of the complexity of consent in cases of sexual offenses and offers an analysis of the epistemic harm to victims based on the consent element, apart from the outcomes of the criminal proceeding.

The discussion about consent as an expression of hermeneutical injustice sheds light on the implicit discourse of consent by prosecutors and reveals the limitations of criminal law in dealing with sexual consent. The consent discourse continues to be tied up with the collective knowledge of sexuality, sex, and gender relations, and therefore is limited in its ability to acknowledge rape, articulate it, and interpret it correctly.

It has been argued that "[n]o other serious violent crime leaves so much justice undone."[210] This Article argues that no other legal element creates and preserves as much epistemic injustice, particularly hermeneutical injustice, as does consent. Prosecutor T put it best:

> There is a very great difficulty in the cases that we must shelve. Then the question arises, how difficult is it to actually take this human event and translate it into legal concepts, and insert it into this criminal category. In what language should one speak with the complainant? In other words, I must transcribe for her the difficult event she experienced in legal terms, and often explain to her that it is not enough, that the legal world is a limited one. *Now I say this in almost every conversation, that the legal world does not reflect the world outside*.[211]

APPENDIX A: METHODOLOGY

The quotations in this Article and the ideas they express are based on the qualitative method of in-depth interviews. Qualitative methodology is used to examine a phenomenon from the perspective of individuals experiencing it, to describe the world of the interviewees and the way in which they grasp the meanings of the phenomenon under study. In-depth interviews enable the researcher to learn what the interviewees are experiencing, feeling, and thinking about the given phenomenon. The objective of the study was to examine the criminal process of sexual offenses from the point of view of the legal actors who drive the process, namely, the prosecution. In-depth interviews made it possible to hear firsthand about the relevant phenomenon, understand it from the interviewees' perspective, and obtain a deep and rich picture of the phenomenon.

The study population included twenty-nine prosecutors handling a variety of cases of sexual offenses, mainly serious cases tried in district court,

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[210] William S. Laufer & Robert C. Hughes, *Justice Undone*, 58 AM. CRIM. L. REV. 1, 18 (2020) (discussing the "dark figure" of sexual violence crimes, referring to the fact that the criminal justice system fails to offer justice to victims of rape and sexual violence crimes).

[211] Interview with T, *supra* note 202 (emphasis added).

in all of the districts of the State Attorneys of Israel (North, Haifa, Central, Tel Aviv, Jerusalem, and South). In each district, interviewees were selected from a list of prosecutors with experience in the field of sexual offenses who handled cases of this type regularly (in other words, there were no interviewees who handled only one or two cases). The sample included twenty-six women and three men of different ages, most of them between thirty and fifty years old. Some of the interviewees were "supervisors," a relatively senior position at the District Attorney's office.

Interviews were semi-structured. Each interview lasted about an hour and a half, and, with one exception, all the interviews were recorded and transcribed. In the course of the interviews, I sought to understand the key features of the decision to prosecute sex offenses, the characteristics of these cases, the experience of the victims from the perspective of the prosecution, how they experienced the trial in court, and more. After the interviews were transcribed, initial coding was performed to identify the instructive, important, central, and recurring terms that emerged in each interview. Each interview was coded in-depth, and a comparative examination of the concepts was conducted. At the end of this stage, a second round of coding was performed, in which the words and concepts that emerged in the initial coding were compared and cross-referenced between the various interviews. The comparison and cross-referencing yielded various categories. In the third stage, yet another coding round was performed, in which I examined the various categories, the frequency with which the interviewees used them, and their meaning. After this coding, some of the categories were combined and themes were created. In this Article, I quoted excerpts from many of the interviews to illustrate the ideas that emerged in the most comprehensive way possible.