

# Sexual Assault and Gendered Hate: A Case of Epistemic Injustice

Antuan M. Johnson\*

## *Introduction*

Although many federal and state hate crime statutes expressly include gender as a protected class, prosecutors generally do not enforce these laws on behalf of women who are sexually harassed or assaulted because of their gender. A hate crime is typically defined as a crime against a member of a protected class that is motivated by discrimination against, or animus toward, the group to which the victim belongs.<sup>1</sup> Since the enactment of the first hate crime law in the late 1970s,<sup>2</sup> most states have incorporated some form of bias crime provision in their statutes.<sup>3</sup> Traditionally these

---

\* J.D., Harvard Law School, 2016; B.A., Philosophy, University of Pennsylvania, 2013. I would like to thank Tomiko Brown-Nagin, Catharine A. MacKinnon, Diane L. Rosenfeld, and Milton Wachsberg Meyer for their helpful feedback on earlier drafts of this argument. I would also like to thank Shane Anderson, Annaleigh Curtis, Alicia Lee, and Annie Manhardt for their respective contributions to earlier drafts of this article.

<sup>1</sup> See JESSICA P. HODGE, *GENDERED HATE* 3-7 (2011); Katherine Chen, *Including Gender in Bias Crime Statutes: Feminist and Evolutionary Perspectives*, 3 WM. & MARY J. WOMEN & L. 277, 277-83 (1997).

<sup>2</sup> See VALERIE JENNESS & KENDAL BROAD, *HATE CRIMES: NEW SOCIAL MOVEMENTS AND THE POLITICS OF VIOLENCE* 39 (2005).

<sup>3</sup> Forty-five states and the District of Columbia have enacted bias crime provisions. See ALA. CODE § 13A-5-13 (2016); ALASKA STAT. ANN. § 12.55.155 (West 2015); ARIZ. REV. STAT. ANN. §13-701 (2014); CAL. PENAL CODE §§ 422.55, 422.6 (West 2005), § 422.7 (West 2011); COLO. REV. STAT. ANN. § 18-9-121 (West 2013); CONN. GEN. STAT. ANN. §§ 53a-181j-1 (West 2016); 11 DEL. CODE ANN. tit. 11 § 1304 (West 2013); D.C. CODE ANN. § 22-3704 (West 2009); FLA. STAT. ANN. § 775.085 (West 2016); HAW. REV. STAT. ANN. § 706-662 (West 2007); IDAHO CODE ANN. § 18-7902 (West 2016); 720 ILL. COMP. STAT. 5/12-7.1 (West 2016); IOWA CODE ANN. § 729A.2 (West 2016); KAN. STAT. ANN. § 21-6815 (West 2016); KY. REV. STAT. ANN. § 532.031 (West 2000); LA. STAT. ANN. § 14:107.2 (2016); ME. STAT. tit. 17-A § 1151 (2015); MD. CODE ANN., CRIM. LAW §10-304 (West 2009); MASS. GEN. LAWS ANN. ch. 265, § 39 (West 2012); MICH. COMP. LAWS ANN. § 750.147b (West 2016); MINN. STAT. ANN. § 609.2231 (West 2016); MISS. CODE ANN. § 99-19-301 (West 2016); MO. ANN. STAT. § 557.035 (West 2016); MONT. CODE ANN. § 45-5-221 (West 2009); NEB. REV. STAT. ANN. § 28-111 (West 2009); NEV. REV. STAT. ANN. § 207.185 (West 2013); N.H. REV. STAT. ANN. § 651:6(2013); N.J. STAT. ANN. § 2C:16-1 (West 2008); N.M. STAT. ANN. § 31-18b-3 (West 2007); N.Y. PENAL LAW § 485.05 (McKinney 2010); N.C. GEN. STAT. ANN. § 14-3 (West 2008); N.D. CENT. CODE ANN. §12.1-14-04 (West 2016); OHIO REV. CODE ANN. § 2927.12 (West 2016); OKL. STAT. ANN. tit. 21, § 850 (West 2001); OR. REV. STAT. ANN. § 166.155 (West 2012); 18 PA. STAT. AND CONS. STAT. ANN. § 2710 (West

statutes have included class protection for crimes based on race, color, national origin, and religion.<sup>4</sup> More recently, however, legislatures have moved toward including gender as a protected class.<sup>5</sup> Currently, 28 states and the District of Columbia include gender as a protected class, compared to 45 states that include race and ethnicity.<sup>6</sup> In 2009, the passage of the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act (HCPA) included the categories of gender and gender identity at the federal level.<sup>7</sup> Nevertheless, prosecutors are not utilizing these readily available legal tools to prosecute perpetrators of gender-bias crimes against women.

In this article, I offer a philosophical analysis of epistemic injustice that explains the lack of prosecution of gender-bias crimes. Miranda Fricker's work on epistemic injustice and Catharine A. MacKinnon's work on feminist jurisprudence ground the analysis.<sup>8</sup> My argument is that the problem lies within the classical conception of what constitutes a hate crime. Although this conception appears gender neutral, the application (or lack thereof) of hate crime statutes by prosecutors to bias crimes against women reveals an epistemic injustice with respect to the very notion of hate. The epistemological basis upon which people generally come to understand and recognize

2003); 12 R.I. GEN. LAWS ANN. § 12-19-38 (West 2016); S.D. CODIFIED LAWS § 22-19B-1 (2016); TENN. CODE ANN. § 40-35-114 (West 2016); TEX. PENAL CODE ANN. § 12.47 (West 2001); UTAH CODE ANN. §76-3-203.3 (West 2016); VT. STAT. ANN. tit. 13 § 1455 (West 2014); VA. CODE ANN. § 18.2-57 (West 2016); WASH. REV. CODE ANN. § 9A.36.080 (West 2010); W.VA. CODE ANN. § 61-6-21 (West 2016); WIS. STAT. ANN. § 939.645 (West 2016).

<sup>4</sup> See JENNESS & BROAD, *supra* note 2, at 42 ("Consistent with the liberal movements described earlier in this chapter, there is a definite ranking of status provisions in hate crime law. Race, religion, color and national origin are most often identified as protected statutes. Ancestry, sexual orientation, gender, disability, and ethnicity constitute a second tier of legally recognized protected statuses.").

<sup>5</sup> See HODGE, *supra* note 1, at 7-8, (explaining the government's marked shift toward including gender-bias crimes since the early nineties).

<sup>6</sup> Twenty-eight states and the District of Columbia explicitly include gender-bias crimes. See ALASKA STAT. ANN. § 12.55.155 (West 2015); ARIZ. REV. STAT. ANN. §13-701 (2014); CAL. PENAL CODE §§ 422.55, 422.6 (West 2005), § 422.7 (West 2011); CONN. GEN. STAT. ANN. §§ 53a-181j-1 (West 2016); 11 DEL. CODE ANN. tit. 11 § 1304 (West 2013); D.C. CODE ANN. § 22-3704 (West 2009); HAW. REV. STAT. ANN. § 706-662 (West 2007); 720 ILL. COMP. STAT. 5/12-7.1 (West 2016); IOWA CODE ANN. § 729A.2 (West 2016); LA. STAT. ANN. § 14:107.2 (2016); ME. STAT. tit. 17-A § 1151 (2015); MD. CODE ANN., Crim. Law §10-304 (West 2009); MASS. GEN. LAWS ANN. ch. 265, § 39 (West 2012); MICH. COMP. LAWS ANN. § 750.147b (West 2016); MINN. STAT. ANN. § 609.2231 (West 2016); MISS. CODE ANN. § 99-19-301 (West 2016); MO. ANN. STAT. § 557.035 (West 2016); NEB. REV. STAT. ANN. § 28-111 (West 2009); NEV. REV. STAT. ANN. § 207.185 (West 2013); N.H. REV. STAT. ANN. § 651:6(2013); N.J. STAT. ANN. § 2C:16-1 (West 2008); N.M. STAT. ANN. § 31-18b-3 (West 2007); N.Y. PENAL LAW § 485.05 (McKinney 2010); N.D. CENT. CODE ANN. §12.1-14-04 (West 2016); 12 R.I. GEN. LAWS ANN. § 12-19-38 (West 2016); TENN. CODE ANN. § 40-35-114 (West 2016); VT. STAT. ANN. tit. 13 § 1455 (West 2014); VA. CODE ANN. § 18.2-57 (West 2016); WASH. REV. CODE ANN. § 9A.36.080 (West 2010); W.VA. CODE ANN. § 61-6-21 (West 2016).

<sup>7</sup> 18 U.S.C.A. § 24.

<sup>8</sup> MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER AND THE ETHICS OF KNOWING* (2007); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

hate is unjustly biased against women's experience of sexual assault. This epistemic injustice reveals a gendered hate that renders sexuality and hate incompatible. Here, I contend that our gendered understanding of the world finds the concepts of sex and hate to be mutually exclusive. As a result, women are simultaneously denied collective control and the understanding of sexual assault as an act of hate; consequently, women fail to receive equal justice under the law.<sup>9</sup>

In this analysis, I am concerned primarily with the crime of rape or sexual assault, but I am also attentive to the fact that this analysis could (and should) be extended to sexual harassment in general. The ubiquitous occurrence of sexual harassment in the day-to-day lives of women tends to be dismissed by the law as a manifestation of romantic courtship rather than predatory behavior, which regrettably only strengthens the ideas proposed herein. I use the word "sex" to denote the idea of sexuality, sexual desire, or lust, as opposed to the specific act of sexual intercourse itself.<sup>10</sup> I contend that prosecutors fail to categorize sexual assault as a hate crime (despite the existence of gender inclusive hate crime statutes) because of a lacuna in what might be considered an epistemic apparatus or knowledge resource, which renders sex and hate mutually exclusive. In Part I, I explain the classical notion of hate crimes along with the common rationales offered for including women within that conception. In Part II, I explore Fricker's theory of epistemic injustice and explain the gap in knowledge that renders sex and hate incompatible. In Part III, I contend this epistemic injustice has constituted a gendered hate that precludes the possibility of a sex equality approach to hate crime law.

## *I. Hate Crimes*

### **A. The Classical Hate Crime**

The classical hate crime generally involves a crime motivated out of hostility toward a group to which the victim belongs.<sup>11</sup> The crime is not motivated out of hostility toward the victim as an individual, but out of hostility toward the victim's perceived or

---

<sup>9</sup> See, e.g., Beverly A. McPhail & Diana M. DiNitto, *Prosecutorial Perspectives on Gender-Bias Hate Crimes*, 11 VIOLENCE AGAINST WOMEN 1162 (2005) (finding that despite Texas' gender inclusive bias crime statute, prosecutors were ill-informed about gender-bias crime and struggled to conceive of an incident that would amount to a "gender-motivated" hate crime).

<sup>10</sup> This is not to be confused with the term "sex equality," which refers to the substantive equality (or lack thereof) between the human sex groups.

<sup>11</sup> See, e.g., Kathryn M. Carney, *Rape: The Paradigmatic Hate Crime*, 75 ST. JOHN'S L. REV. 315, 320 n. 21 (2001) ("Bias crimes . . . are crimes committed because of the race, color, or religion of the victim." (citing Anthony M. Dillof, *Punishing Bias: An Examination of the Theoretical Foundations of Bias Crime Statutes*, 91 NW. U. L. REV. 1015, 1016 (1997))); see also Terry A. Maroney, *The Struggle Against Hate Crime: Movement at a Crossroads*, 73 N.Y.U. L. REV. 564, 564 (1998) ("Hate crime may be defined as acts of violence motivated by animus against persons and groups because of race, ethnicity, religion, national origin or immigration status, gender, sexual orientation, disability (including, for example, HIV status), and age.").

actual membership in a group.<sup>12</sup> This definition of a hate crime can be found in early bias crime statutes.<sup>13</sup>

In criminal law, hate crime statutes are generally used as penalty enhancements for specified criminal offenses, rather than distinct or separate crimes.<sup>14</sup> In 1978, California became the first state to pass such a hate crime law, which increased the penalty for a defendant found guilty of first-degree murder if “[t]he victim was intentionally killed because of his or her race, color, religion, nationality, or country of origin.”<sup>15</sup> In 1981, The Anti-Defamation League drafted a model statute that provided for enhanced penalties for crimes committed against victims because of their perceived race, color, religion, national origin, or sexual orientation.<sup>16</sup>

Of course, implicit in these constructions was the idea that not every group would be protected. Only particular crimes committed against members of the law’s enumerated social groups would be considered a protected class. Gender was usually not included in early hate crime statutes. By the 1990s, lawmakers at the state and federal levels moved toward including gender as a protected class.<sup>17</sup>

Today gender remains a protected class in many jurisdictions, but prosecutors generally do not enforce hate crime laws for women who are victims of sexual assault because of their gender.<sup>18</sup> For example, in 2013, California reported 25 gender-bias crimes motivated by bias against transgender or gender-non-conforming people, but none motivated by bias against women.<sup>19</sup> For that same period, California reported 7,459 “Forcible Rapes.”<sup>20</sup> That same year, despite 1,971 reported rapes, Minnesota reported only one anti-female bias crime out of 163 bias incidents.<sup>21</sup> Hodge suggests

---

<sup>12</sup> See Fredrick M. Lawrence, *The Punishment of Hate: Toward a Normative Theory of Bias-Motivated Crimes*, 93 MICH. L. REV. 320, 325 (1994) (explaining that bias motivation of the perpetrator, not necessarily the resulting harm to the victim, is the critical factor in determining an individual’s guilt for a bias crime).

<sup>13</sup> See ANTI-DEFAMATION LEAGUE, HATE CRIME STATUTES: A 1991 STATUS REPORT 2-5 (1991) (detailing the model hate crime legislation and noting that more than half of the state enacted legislation mirrors this model).

<sup>14</sup> See, e.g., *Wisconsin v. Mitchell*, 508 U.S. 476, 479 (1993) (holding penalty enhancement bias crime statutes constitutional under discriminatory selection model); HODGE, *supra* note 1, at 4; Maroney, *supra* note 11 (describing enhancement statutes).

<sup>15</sup> See JENNESS & BROAD, *supra* note 2, at 42 (explaining that since then, some states have vastly expanded the protections, while others such as Delaware and Hawaii have adopted more limited legislation).

<sup>16</sup> See ANTI-DEFAMATION LEAGUE, *supra* note 13.

<sup>17</sup> See HODGE, *supra* note 1.

<sup>18</sup> See *id.* at 64 (noting that New Jersey’s bias crime statute was expanded to include gender on August, 15, 1995, but according to the state’s annual crime reports, only four gender-bias incidents were recorded between 1999 and 2008).

<sup>19</sup> California’s Department of Justice reported 25 gender-bias crimes in total for either transgender or gender-non-conforming offenses and zero anti-female offenses as compared to 863 hate crimes reported in total. CAL. DEP’T OF JUSTICE, HATE CRIME IN CALIFORNIA (2013).

<sup>20</sup> *Id.*

<sup>21</sup> STATE OF MINN., MINNESOTA CRIME INFORMATION 24 (2013).

several explanations for the scarcity of reported gender-bias crimes.<sup>22</sup> For instance, it is possible that investigators struggle to recognize gender bias, or that prosecutors doubt their ability to prove gender bias in court without specific evidence of hate.<sup>23</sup> Some lawmakers prevent prosecutors from even having that option, by excluding sexual assault crimes from coverage.<sup>24</sup> These kinds of reasons for the lack of reported gender-bias crimes often have an underlying explanation—a gendered conception of hate.

## B. Moving Gender into the Classical Hate Crime Framework

Proponents for including gender in hate crime law have largely relied upon fitting their justification within the classical hate crime framework.<sup>25</sup> As Lawrence explains, the framework consistently focuses on the nature of the injury and its effect on the target community:

Bias crimes differ from parallel crimes as a matter of both the resulting harm and the mental state of the offender. The nature of the injury sustained by the immediate victim of a bias crime exceeds the harm caused by a parallel crime. Moreover, bias crimes inflict a palpable harm on the broader target community of the crime as well as on society at large, while parallel crimes do not generally cause such widespread injury.<sup>26</sup>

These proponents argue that gendered crimes against women cause similar injuries to the victim and to the broader community. In the context of women who are raped, for example, it is argued that the nature of the injury sustained exceeds the harm by a parallel crime. This unparalleled nature is partly due to the victim's selection based on gender's (supposed) immutable characteristics, the interchangeability of the victim, and the psychological damage sustained by women.<sup>27</sup> In addition, it is argued that gender-bias crimes result in palpable harm to women as a community because they must arrange their daily lives around the fear of being raped.<sup>28</sup> Carney contends "[w]e, as a society, must come to accept that rape is a violent form of discrimination parallel to other bias-related crimes."<sup>29</sup> While there are strong arguments for including gender as

---

<sup>22</sup> See, e.g., HODGE, *supra* note 1, at 64 (asking whether law enforcement officials do not investigate offenses as possible gender-bias crimes because authorities lack clarity on what constitutes gender bias or whether it fails to fit into the existing model of hate crime law).

<sup>23</sup> *Id.*

<sup>24</sup> See, e.g., *id.* at 45 (explaining the history of the gender-bias crime exemption for sexual offenses in New Jersey's bias crime statute).

<sup>25</sup> See, e.g., *id.* (arguing that rape fits within the doctrinal framework of hate crime laws and, therefore, should be considered a crime of hate); Kristin Taylor, *Treating Male Violence Against Women as a Bias Crime*, 76 B.U. L. REV. 575 (1996) (arguing that gender-motivated violence fits into the theoretical model of bias crime).

<sup>26</sup> See Lawrence, *supra* note 12, at 323.

<sup>27</sup> See Carney, *supra* note 11, at 328 (arguing that because gender-bias crimes are the result of an immutable characteristic, the potential victim becomes aware of her own vulnerability and interchangeability with the actual victim of the crime).

<sup>28</sup> *Id.*

<sup>29</sup> See *id.* at 338.

a protected class within the classical framework, squeezing gender into the framework might not be the most effective approach. Indeed, government agencies seem to disagree with these arguments or are unaware of them.<sup>30</sup>

Some scholars recommend countering the lack of gender-bias crime enforcement by moving law and policy toward a discriminatory selection model.<sup>31</sup> Lawrence explains that there are two distinct models for bias crime enforcement: discriminatory selection and animus.<sup>32</sup> The discriminatory selection model focuses on proving that the victim was selected because of their membership in a group.<sup>33</sup> To establish gender bias, a prosecutor would only have to prove that the victim was selected by the perpetrator because she was a woman. The animus model, by contrast, would require proof that the crime was motivated by the perpetrator's bias against or hatred of the victim's membership in a group.<sup>34</sup> This model presents a heavy evidentiary burden, because prosecutors are essentially required to prove the defendant's "bad thoughts" about women as a group. Given the evidentiary burden under the animus approach, Hodge argues for the discriminatory selection model.<sup>35</sup> As she explains, "Although gender-motivated violence can contain an animus against the victim's gender, since legal actors have a difficult time conceptualizing how to prove this hatred of another gender, it would be advantageous for the gender category . . . if proving animus were no longer required."<sup>36</sup> In other words, Hodge recommends against the animus model as a matter of pragmatism. Though I would agree with Hodge that prosecutors should move toward the discriminatory selection model, I would not evade the animus model because of pragmatic politics. By contrast, I would argue that prosecutors should move toward the discriminatory selection model *because* of animus, not despite it. The move should be understood as a reckoning with truth, which is not a matter of political convenience. The "difficult time" prosecutors have conceptualizing gender-bias crimes points to an epistemological problem that should be challenged head-on for the sake of sex equality.

---

<sup>30</sup> As I review in greater detail in Part III, the interviews in Hodge's study illustrate the cognitive resistance to gender-bias crimes by prosecutors and investigators. At one point, one participant remarked, "If you were a prosecutor, why in the world would you prosecute rape as a hate crime if you didn't have to?" Another stated how "law enforcement officers tend not to perceive gender bias very readily at all. It would only be in the extreme case, usually. That is, you have a sociopath who has a documented hate for women, then it would really get on the law enforcement radar screen." HODGE, *supra* note 1, at 69-72.

<sup>31</sup> See Lawrence, *supra* note 12, at 326-42; HODGE, *supra* note 1, at 67. The discriminatory selection model is based on the Supreme Court's reasoning in *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

<sup>32</sup> See Lawrence, *supra* note 12, at 326-42.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> HODGE, *supra* note 1.

<sup>36</sup> *Id.* at 67.

## II. *Knowing Hate*

In legal scholar Catharine A. MacKinnon's groundbreaking *Toward a Feminist Theory of the State*, the author articulates a theory of sex inequality that explains the epistemological basis upon which men fail to see their harms against women as harms at all.<sup>37</sup> This epistemological basis sets the foundation for substantive gender inequality.<sup>38</sup> For instance, on the issue of rape and consent, MacKinnon explains that because men are more likely to rape than be raped, the material condition of their epistemological position tends to inform a male-dominated legal system in male terms.<sup>39</sup> Thus, an epistemological problem for women becomes a legal reality for anyone who is raped and then represented by a legal system that tends to read consent (instead of sexual coercion) in the context of male dominance. Nearly thirty years after the publication of *Toward a Feminist Theory of the State*, philosopher Miranda Fricker's *Epistemic Injustice: Power and the Ethics of Knowing* articulates a theory of epistemic injustice that reads in concert with MacKinnon's original articulation of sex inequality.

Fricker explains two kinds of epistemic injustices—testimonial injustice and hermeneutical injustice—that are relevant to the current gender-biased conception of what constitutes a hate crime.

### A. Testimonial Injustice

Testimonial injustice occurs when a speaker receives an unfair deficit of credibility from a hearer due to prejudice on the hearer's part.<sup>40</sup> Fricker explains that testimonial injustice involves a distinctively epistemic injustice in which "someone is wronged specifically in her capacity as a knower."<sup>41</sup> More specifically, the unjust credibility deficit the speaker suffers is the result of prejudices "that 'track' the subject through different dimensions of social activity—economic, educational, professional, sexual, legal, political, religious, and so on."<sup>42</sup>

For illustration, imagine an African-American witness to a crime who testifies before a court but is not believed by the jury because of racial prejudice.<sup>43</sup> In this example, let us assume that the witness speaks honestly about her recollection and that she is the star witness of the trial. In addition, assume that there is also conclusive evidence that

---

<sup>37</sup> MACKINNON, *supra* note 8.

<sup>38</sup> Although not her principal focus in *Toward a Feminist Theory of the State*, MacKinnon's theory of sex equality also applies to issues of racial equality. Accordingly, one could consider the extent to which white supremacy has constructed an epistemological basis that has led to racial inequality in life and law.

<sup>39</sup> MACKINNON, *supra* note 8, at 176.

<sup>40</sup> See FRICKER, *supra* note 8, at 28.

<sup>41</sup> *Id.* at 20.

<sup>42</sup> *Id.* at 25.

<sup>43</sup> For a real-world example, consider witness Rachel Jeantel in George Zimmerman's trial. See Jelani Cobb, *Rachel Jeantel on Trial*, NEW YORKER (June 27, 2013), <http://www.newyorker.com/news/news-desk/rachel-jeantel-on-trial>.

she was an innocent bystander at the scene of the crime and witnessed everything. She communicates what she witnessed to the jury, but during deliberations they weigh the other evidence in the case and dismiss her testimony as lacking credibility due to their own conscious or subconscious racial prejudice. In this example, the witness suffers a testimonial injustice with legal consequences. Here it is significant that the jury does not believe the black witness to be a reliable source of truth.<sup>44</sup> In other words, it is not the case that the jurors actually believe the witness but choose to dismiss her testimony due to racial prejudice. Rather, it is because of racial prejudice that the jurors do not believe the witness is a credible source of knowledge at all.

It is important to reflect upon the impact of testimonial injustice in light of the male dominance of the legal system.<sup>45</sup> Perhaps due to prejudice or implicit bias against women, law enforcement and law policymakers do not believe in (or understand) the possibility of including gender within the classical hate crime framework. In 1995, for example, in response to Senator Paul Simon's inquiry about whether the FBI would support the addition of gender to the Hate Crime Statistics Act, the FBI responded:

The inclusion of gender bias to the Hate Crime Statistics Act is not recommended at this time for several reasons, including the following: 1. A gender bias motivation would be very difficult to determine, e.g., is the crime of rape motivated by lust or hate? Police officers would have to explore the psyche of the offender to determine if hate was a motivating factor.<sup>46</sup>

Apparently, the FBI did not consider that rapists who only target a specific gender are necessarily motivated by a gender bias in its most literal sense. I suppose one is to assume that a serial rapist might merely have a "strong passion" for women. The prosecutors and investigators interviewed in Hodge's study offer additional inadequate explanations for failing to pursue gender-bias charges.<sup>47</sup> "One female prosecutor said that when her supervisor had asked her to participate in a study about the gender category, she did not even know what a gender-bias crime was."<sup>48</sup> Throughout the study, participants repeatedly exhibited difficulties conceptualizing gender-bias.<sup>49</sup> This

---

<sup>44</sup> Consider the role that implicit bias plays in the courtroom. See Kang et al., *Implicit Bias in the Courtroom*, 59 UCLA L. REV. 1124, 1129 (2012) ("[A]ttitudes and stereotypes may also be implicit, in the sense that they are not consciously accessible through introspection.

Accordingly, their impact on a person's decisionmaking and behaviors does not depend on that person's awareness of possessing these attitudes or stereotypes. Consequently, they can function automatically, including in ways that the person would not endorse as appropriate if he or she did have conscious awareness.").

<sup>45</sup> The American Bar Association reports that men make up 64% of lawyers. A.B.A., *LAWYER DEMOGRAPHICS* (2016), [http://www.americanbar.org/resources\\_for\\_lawyers/profession\\_statistics.html](http://www.americanbar.org/resources_for_lawyers/profession_statistics.html).

<sup>46</sup> Katherine M. Franke, *What's Wrong with Sexual Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 169, 180 n. 11 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (citing Letter from C. David Evans, Acting Ass't Dir., Crim. Justice Info. Servs. Div., U.S. Dep't of Justice, Fed. Bureau of Investigation, to Hon. Paul Simon 4 (July 5, 1995)).

<sup>47</sup> See HODGE, *supra* note 1.

<sup>48</sup> *Id.* at 65.

<sup>49</sup> See *id.*



common refrain from participants led Hodge to conclude that, for investigators, gender bias was an uneasy fit as a category and inconsistent with what participants regarded as typical hate crimes.<sup>50</sup>

In Hodge's study, members of law enforcement agencies expressed evidentiary concerns; some participants thought proving gender bias in the case of sexual assault would be too difficult. For example, one participant expressed, "[T]he sense of a lot of prosecutors is that if you have a sexual assault, that alone is difficult enough to prove. And on top of that, [more] levels of proof . . . are necessary to show that, in addition to being a sexual assault, the case was motivated by bias . . . ."<sup>51</sup>

Of course, evidentiary standards are important for prosecutors to consider, but that concern simply fails to account for the meaning of bias since sexual assault typically indicates a gender bias based on selection.<sup>52</sup> Other participants in the study suggested that prosecutors tend not to charge gender-bias crimes because sexual assault is already considered a serious enough crime.<sup>53</sup> However, that response cannot suffice either since we know that prosecutors are known to overcharge in cases in order to secure convictions. In fact, nearly half of the participants in the study discussed the frequent use of plea-bargaining in bias-related cases. Thus, neither objection adequately explains why prosecutors fail to view and prosecute rape cases as hate crimes.

Many feminists and women's advocacy groups call for rape to be collectively understood as a hate crime.<sup>54</sup> In response to prosecutorial concerns about evidence, these groups tend to argue that proving gender bias is the same as proving other bias crimes, except for the fact that these crimes overwhelmingly happen to women and consequently are not investigated as crimes of hate in the first instance.<sup>55</sup> Indeed, some feminists have argued that rape is the paradigmatic hate crime.<sup>56</sup> In other words, rape is to women as lynching is to African Americans. Both acts involve the exertion of power by a member (or members) of a dominant group to intimidate a member (or members) of a subordinate one. Given the number and frequency of sexual assaults,<sup>57</sup> we should consider whether a testimonial injustice has occurred when arguments for classifying sexual assault as a hate crime are dismissed because sexual attacks do not match up with the "traditional" understanding of a hate crime.<sup>58</sup>

---

<sup>50</sup> *See id.*

<sup>51</sup> *Id.* at 71.

<sup>52</sup> For my thoughts on the lynching comparison, *see infra* pp. 103–04.

<sup>53</sup> HODGE, *supra* note 1, at 73.

<sup>54</sup> *See* Carney, *supra* note 11; HODGE, *supra* note 1.

<sup>55</sup> *See* Carney, *supra* note 11; HODGE, *supra* note 1.

<sup>56</sup> *See* Carney, *supra* note 11.

<sup>57</sup> A report on sexual offenses and offenders by the Bureau of Justice Statistics indicates that 91% of victims of rape and assault are female and 99% of perpetrators are male. BUREAU OF JUSTICE STATISTICS, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT (1997).

<sup>58</sup> In her work on trauma and sexual assault, Professor Judith Herman of Harvard University Medical School explains how historically women have not been the chief legislators of the meaning of trauma and sexual assault. Analyzing Freud's work, she examines how women have been psychiatrically studied after sexual assaults and how their personal testimonies have lacked credibility in the general public since the inception of clinical psychology. *See* JUDITH

As one may have noticed, much of this debate revolves around convincing powerful men to recognize harms that rarely, if ever, happen to them. In turn, some women have learned to internalize the thinking patterns of male dominance to survive. MacKinnon's analysis argues against taking for granted male-biased epistemological foundations,<sup>59</sup> and Fricker's analysis provides an account that explains the reason powerless groups often concede to male thought. In the context of gender-bias crimes, I contend that arguments for including gender-bias crimes have placed too much emphasis on how "hate" appears to men as a group.

### B. Hermeneutical Injustice

The construction of an androcentric view of hate becomes clearer from a close analysis of hermeneutical injustice. Fricker explains the phenomenon of systematic 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."<sup>60</sup> To illustrate hermeneutical injustice, Fricker tells the story of Carmita Wood in the early 1970s and the sexual harassment she experienced prior to collective understanding of sexual harassment as a practice of sex inequality.<sup>61</sup> In response to the stress and trauma of being sexually harassed by her supervisor, Wood quit her job and filed for unemployment insurance. But her claim was denied when she could not find the words to articulate her experience. She could not find the words to describe her experience because the concept of sexual harassment was missing from what Fricker calls the "collective hermeneutical resource."<sup>62</sup>

The collective hermeneutic resource contains information that helps facilitate our understanding of our social experience.<sup>63</sup> For example, to help us understand our experience in the workplace, we have names for jobs such as assistant and boss, and concepts such as work and overtime. At the time of Wood's case, however, the collective hermeneutic resource did not contain terms or concepts that she could use to understand and articulate her experience of sexual harassment.<sup>64</sup> But, that is not to suggest that there were no terms or concepts in existence. There were certainly terms or concepts to describe bosses who were too friendly with female employees, but the resources that were available were insufficient to describe her experience.

It was not until Wood participated in a women's consciousness-raising group that she came to the realization that her experience was not an isolated incident.<sup>65</sup> Through further discussion and preparation for a public demonstration, the members of the

---

HERMAN, *TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR* (1992).

<sup>59</sup> See MACKINNON, *supra* note 8.

<sup>60</sup> See FRICKER, *supra* note 8, at 154.

<sup>61</sup> *Id.* at 143–53.

<sup>62</sup> *Id.* at 151.

<sup>63</sup> *Id.* at 143–53.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

group identified the missing concept as harassment. After sorting through different terms such as “sexual coercion,” and “sexual exploitation,” the members had an intuitive realization when someone suggested the term “sexual harassment.” They agreed that this term articulated their shared experience of harassment in a way that was not possible before. In other words, the term “sexual harassment” filled a gap that was missing from the hermeneutical resource. Because the women could all identify these invasions of personal space as sexual harassment, this meant that they could all talk about it, understand each other, and validate the wrongfulness of the incidents, thus forming the foundation for collective understanding. This naming of women’s shared experience of sexual harassment led to conceptual clarity that allowed women to challenge sexual harassment in social and legal circuits, which gave way to the collective understanding of sexual harassment that exists today.<sup>66</sup>

Fricker argues that because the concept (now identified as sexual harassment) was unavailable at the time to render Wood’s experience intelligible, she suffered a hermeneutical injustice.<sup>67</sup> For Fricker, Wood was unable to give an account of what happened to her because her experience of harassment was obscured from the collective understanding.<sup>68</sup> Although Wood had knowledge about her experiences with her harasser, she lacked an understanding of what the problem was because of a gap in the hermeneutical resource where the concept of sexual harassment should have been. In fact, even if she came to articulate her experience as sexual harassment on her own despite the gap in the resource, it is doubtful whether others, such as the unemployment agency, would have understood her experience at the time because the very concept was obscured from collective understanding. So, even if she had leaped over the hermeneutical gap on her own, she would have faced great resistance from others who would have likely dismissed her issues as trivial (i.e., testimonial injustice). Here the parallel to overcoming the resistance of a male-biased view of hate should become clear.

Fricker’s analysis points to a key failing in the epistemological foundation that accords with MacKinnon’s analysis of sex inequality. Similar to the idea of Fricker’s collective hermeneutical resource, the epistemological foundation might be thought of as a way of imagining the body of knowledge resources. If we consider MacKinnon’s insight regarding the “material conditions of [men’s] epistemological position,”<sup>69</sup> then we can understand how men’s understanding of the world reifies into life and law when they hold a disproportionate amount of power.<sup>70</sup> In this schema, one can imagine how such a knowledge resource would be skewed toward knowing the things that are relevant and of interest to the dominant group at the expense of subordinated groups (e.g., women). This biased epistemic foundation often fails to meaningfully capture the experience of subordinated groups and consequently influences how we come to understand the world, and in this context, how we come to understand hate.

---

<sup>66</sup> *Id.* at 153-169.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> See MACKINNON, *supra* note 8, at 176.

<sup>70</sup> *See id.*

To be clear, epistemic injustice is not a coincidence or a case of bad luck; it is not equally as disadvantageous for the perpetrator as the victim. The source of this injustice is in the background of social conditions from which the hermeneutical gap develops,<sup>71</sup> which in the case of Carnita Wood's story happens to be a background of male dominance. The wrongfulness of the cognitive disadvantage experienced by Wood is related to the wrongfulness of a social world where men control meaning. The disadvantage that Wood faced was neither coincidence nor bad luck, but rather a consequence of the hermeneutical gap that exists in the epistemic foundation.

In this view, an inquiry into what constitutes hate becomes an inquiry about how hate appears to men. Thus, the standard of what constitutes a hate crime is defined in terms of its significance for men. With that understanding, it becomes clear that part of the "difficulty" conceptualizing gender-bias crimes is related to a male-gendered view of hate. This gendered hate, which I flesh out in the next section, is a male-biased construction of animus that views sex as incompatible with hate. The failure to recognize gendered hate is a consequence of epistemic injustice. For this reason, it would be a mistake to concede the animus approach. If there were a collective understanding of sex and hate that was not mutually exclusive, members of the legal community would understand that the sexual assault of a woman, because she is a woman, constitutes a hate crime.

### *III. A Crime of Passion or Hate?*

The epistemic injustice that exists as a result of a world where men control meaning has constituted a gendered hate that precludes the possibility for a sex equality approach to hate crime law. In short, I define gendered hate as the idea that hate precludes sex. In application to the classical hate crime, gendered hate excuses men if sexuality explains the target of the crime because it renders sex and hate incompatible. The idea that hate is incompatible with sex is often taken for granted in discussions about gender violence, especially in law and policy. For this point, one could recall Republican Senator Orrin Hatch's infamous remarks during the congressional hearings on the Violence Against Women Act: "If a man rapes a woman while telling her he loves her, that's a far cry from saying he hates her. A lust factor does not spring from animus."<sup>72</sup> Though Senator Hatch's argument assumes itself without justification, I find it hard to disagree with the fact that, at least to some extent, rape is about sex.

---

<sup>71</sup> See FRICKER, *supra* note 8, at 152.

<sup>72</sup> See HODGE, *supra* note 1, at 9 (quoting Senator Orrin Hatch, a Utah Republican during the congressional hearings on VAWA: "Say you have a man who believes a woman is attractive. He feels encouraged by her and he's so motivated by that encouragement that he rips her clothes off and has sex with her against her will. Now let's say you have another man who grabs a woman off some lonely road and in the process of raping her says words like, 'You're wearing a skirt! You're a woman! I hate women! I'm going to show you, you woman!' Now, the first one's terrible. But the other's much worse. If a man rapes a woman while telling her he loves her, that's a far cry from saying he hates her. A lust factor does not spring from animus.").

### A. Sex and Violence

Gendered hate renders sex incompatible with hate, just as rape, defined in seemingly gender-neutral terms, renders sex incompatible with violence. Indeed, some feminists have attempted to conceptualize rape as a crime of violence, not sex.<sup>73</sup> Susan Brownmiller, for example, contends that rape is a crime of violence and power, not sexuality or lust.<sup>74</sup> The move from sex to violence could appear reasonable to some. Men tend to understand harm in terms of violence; so perhaps if rape were defined in that context, men would recognize misogyny and stop raping women. This abstraction, however, actually obscures the reality of the crime, for “rape is not less sexual for being violent.”<sup>75</sup> Similar to the evasion of the animus model as explained in Part I, this move away from acknowledging rape as a sexual act prioritizes the existing political framework at the expense of capturing reality. In reality, it is difficult to imagine how rape could be about violence but not sex.

A gender-neutral abstraction of rape as a matter of violence obscures reality, disguising who does what to whom. Over ninety percent of rape victims are women and over ninety-nine percent of the perpetrators are men; the act is gendered.<sup>76</sup> Cautioning reformists, MacKinnon presciently forewarned of the danger of such abstraction, writing, “The point of defining rape as ‘violence not sex’ has been to claim an ungendered and nonsexual ground for affirming sex (heterosexuality) while rejecting violence (rape).”<sup>77</sup> This gender-neutral abstraction of rape amounts to an extraction of sex, which consequently fails to recognize women as victims of gender bias. The gender-neutral reconstruction of rape also makes it appear as though men are similarly situated to the “violent” harm, even when rape overwhelmingly happens to women. This abstraction similarly masks the population of African American and Latino men who find themselves vulnerable to prison rape under a backdrop of violence instead of its actual highly gendered nature. The fact that, in theory, a white person could be lynched by a white mob does not preclude the social understanding that lynching an African American is paradigmatically an act of racial hatred in social context. Likewise, the fact that men sometimes rape people other than women in different contexts does not preclude the idea that rape is necessarily an act of gendered animus. Insofar as members of disadvantaged groups are raped because of their gender (e.g., feminine

---

<sup>73</sup> See, e.g., *id.* at 60 (“It is somewhat encouraging that three of the interviewees believed rape had been exempted from the statute because it was considered to be motivated by power and control. Feminists have fought hard to change the antiquated perception that rape is merely an act of sexual release, and to change the way sex offenses are handled within the criminal justice system.”); see Carney, *supra* note 11, at 338 (“Fortunately, reforms *were* able to transform conceptions of rape from a crime of uncontrolled sexual passion to a crime of violence. The next step in rape reform is to ensure that rape is viewed not only as a crime of violence, but a crime of hate, targeting women on the basis of their gender.”).

<sup>74</sup> See SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* (1986).

<sup>75</sup> MACKINNON, *supra* note 8, at 173.

<sup>76</sup> For statistics, see *supra* note 57.

<sup>77</sup> See MACKINNON, *supra* note 8, at 173–74.

men, transgender people, gay men, and gender-non-conforming people), those acts should also be understood to be acts of gendered hate.

Still, some feminists applaud the move toward redefining rape as violence. Hodge, for instance, praises the “rape as violence” movement, writing, “Fortunately, reforms were able to transform conceptions of rape from a crime of uncontrolled sexual passion to a crime of violence.”<sup>78</sup> The next step, she argues, is to ensure that rape is viewed “not only as a crime of violence, but a crime of hate, targeting women on the basis of their gender.”<sup>79</sup> Although it is true that the “rape as violence” reform helped transform criminal law, one suspects that the reform’s tendency to obscure the reality of rape may partly explain the current inadequacies in enforcement of rape laws across the country. For example, consider “consent” standards that render sexual coercion as sex and not rape, because the sexual attack was not “violent” enough. One could also imagine a discriminatory selection model that denied gender bias because the sexual attack was not “selective” enough, potentially only finding bias in the case of a serial rapist.

The epistemic limitation that occurs as a result of gendered hate is related to a conception of violence that does not include women’s distinct harm based on sex. As mentioned above, it is quite difficult to imagine rape as completely distinct from sex. For example, a heterosexual man who rapes a woman targets the woman because of her membership in the class of women, and so the crime is based on sex. However, the move away from sex is an understandable one. As Senator Hatch’s comments demonstrate, some government officials sincerely believe rape is motivated only by sexual desire. But if Hodge is correct, and the next step in rape law reform is to conceptualize rape as an act of hate, then the connection between sex and violence must be articulated.

## B. Sex and Hate

A sex-equal definition of hate requires equal epistemic consideration of the harms men and women experience, and therefore entails recognizing criminal conduct based on sex. A study conducted by anti-rape activist Timothy Beneke illuminates gendered hate, vividly linking sex and hate.<sup>80</sup> Stan, a participant in the study, discusses his general frustration with powerful women who lack gentleness and compassion, stating:

“[These women] [don’t] understand and perceive how I want to share my life, how I want to care about [them]. When that happens it just destroys me and I feel ripped inside and I feel like ripping [them] apart both sexually and physically.”<sup>81</sup>

---

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> See TIMOTHY BENEKE, MEN ON RAPE: WHAT THEY HAVE TO SAY ABOUT SEXUAL VIOLENCE 36-66 (1982).

<sup>81</sup> *Id.* at 61.

Stan's honest but troubling admission exemplifies violent aggression alongside sexual desire; it is simultaneously physical and sexual. But, is it hateful? Some, like Senator Hatch, believe that sexual lust is incompatible with a hateful motive.

To be sure, some accounts in the study emphasize the crime of passion narrative without attention to hate or violence. For example, Jay, another participant, states, "If I were actually desperate enough to rape somebody, it would be from wanting the person . . . ."<sup>82</sup> This is the narrative of desire that often exists in the minds of law enforcement agents. And following this reasoning, a man who dehumanizes and objectifies a woman, because of her membership in the class of women, is not guilty of hate because sex explains the crime. In other words, it cannot be a hateful crime because he really wanted it, "it" being her. However disturbing, this "crime of passion" narrative reveals a partial truth—the act is about sexual desire. But sexual desire can simultaneously be about sex and hate, as Jay further explains, "[I]t would be from wanting the person but also it would be a very spiteful thing."<sup>83</sup> Here the passion narrative reveals some nexus between sex and hate. Thus, the choice between sex and hate as explanations for rape, like the choice between sex and violence, sets up a false dichotomy. In this frame, one should come to realize that the dichotomy presents the focus from *his* perspective in terms that are significant to him (i.e., the presence of sex and hate). But one need not assume a dichotomy. Viewing sex and hate in tandem reveals that rape is, in fact, about passion. But that passion comes from a lack of compassion; the passion is intimately tied to a gender animus, whether verbally expressed or not.

The failure to recognize rape as a crime based on sex and hate constitutes gendered hate and is an epistemic injustice; its consequence is the protection of women under hate crime law only insofar as women's harms compare to men's. If we return to Hodge's study, we can see the "inconsistency" of gender-bias crimes with the "typical" hate crime model, as a prosecutor states:

"I think the way we traditionally conceptualize biased crimes is based on race and ethnicity, and to a lesser extent, sexual orientation. It does not encompass what we usually think of as gender, as male-female gender . . . . We don't usually think of bias, in the crime context, as encompassing the things that motivate sexual assault. You know what I mean?"<sup>84</sup>

The prosecutor states that sexual assault is not on his radar for bias, because the motivations for sexual assault are not the same as those for other bias crimes ("sameness model"). Still, he does not address *how* the motivations are different apart from stating they are "usually" not thought about as being the same. He also does not explain why the motivations must be the same for men and women to be protected equally. That is, whether women might deserve hate crime protection for sexual assault on their own terms. One could reasonably presume, for instance, that conditions of sex

---

<sup>82</sup> *Id.* at 44.

<sup>83</sup> *Id.* Other interviewees make similar remarks, including Joe, who claims, "If I were to rape, it would be out of lust but it would also be because I was angry." *Id.* at 54.

<sup>84</sup> See HODGE, *supra* note 1, at 58.

inequality offer a justification to break from traditional conceptions in the law, which existed before women had a role in it.

One could also reasonably question the extent to which a sameness model for bias is even a possibility for traditional bias crimes. In theory, the sameness model for men and women may be satisfied in some cases but not in others. For example, one could imagine a Ku Klux Klan member burning a cross on a black family's lawn because of race, without respect to gender. By contrast, one could also imagine a police officer who blackmails vulnerable black women in exchange for sex because of their race and gender. Though the crime is racially targeted as well as sexually driven, the sameness model would not usually recognize this as a hate crime because it assumes sexual assault and bias crimes have exclusive motivations. This sameness model provides women hate crime protection only insofar as they match up to the existing standard for men. On this note, another prosecutor helps us place the problem in its greater context:

“You have to understand the physiology of males, that aggression, the sexual force within, are so intertwined that you really can't separate that physical urge that overtakes someone in these cases that we have, if they commit a murder and a rape. I think there is a sexual release to it, not normal as we know it, but that's why they've chosen a woman. Not because they just totally want to dominate or control, but I think there's a physiological, sexual urge that is somewhat propelling. A lot of people may disagree with me, but so be it.”<sup>85</sup>

Putting aside the troubling, essentializing statement that rape is somehow natural, one can see the point that sexual desire is a part of the equation; hence the problem with gendered hate is that it extracts sex out of the picture, which consequently leaves gendered crimes like rape unexamined for gender bias.

### C. Implications for Rape Law

Gendered hate raises other questions about gender bias in the criminal law. Perhaps such a bias could help explain why most rapes are never reported, many convictions are not obtained, and even when convictions are obtained, sentences for the crime are often short.<sup>86</sup> After all, if there is a male-oriented view of hate that fails to protect women under hate crime law, perhaps there is also a male oriented view of sex that fails to protect women who should legally be considered victims of rape. Consider, for instance, *Dothard v. Rawlinson* (1977), where the court grants a male-only Bona Fide Occupation Qualification (BFOQ) exception for prison guards because “[t]here would [] be a real risk that other inmates, deprived of a normal heterosexual environment, would assault women guards because they were women.”<sup>87</sup> In the opinion, the court expressed no concern for the men inside of prison who endure rape

---

<sup>85</sup> *Id.* at 60.

<sup>86</sup> *See id.* at 73 (citing statistics that show only 37 percent of rape cases reported to the police resulted in an arrest and less than five percent received a prison sentence).

<sup>87</sup> *Dothard v. Rawlinson*, 433 U.S. 321, 336 (1977).



by other incarcerated men, but it did acknowledge that outside of prison, the norm of sex is for women to be accessible and available to men.

Perhaps this normalization of heterosexuality and female accessibility colors the way sex and, consequently, rape is seen in the eyes of the law. For example, in *Commonwealth v. Berkowitz* (1992), a case commonly studied during the first year of law school, the Pennsylvania Supreme Court held there was insufficient “forcible compulsion” for a rape conviction, despite an evidentiary record finding that the victim was pushed and that the defendant was on top of the victim.<sup>88</sup> This makes sense under a view that conceives sex as heterosexual and women as accessible to men’s desires. In this view, the interaction between the victim and rapist in *Berkowitz* can be seen as an everyday interaction of seduction—readily accepted as a “romantic kind of thing” rather than a push or a “fast shove.”<sup>89</sup> If sex *is* women being accessible to men, then one might (as the court did in this case) be quick to dismiss an explanation of forcible compulsion that “includes not only physical force or violence but also moral, psychological or intellectual force.”<sup>90</sup> In this view, it becomes clear that there might not only be a gendered understanding of hate or rape, but a gendered understanding of sex entirely.

#### IV. Conclusion

Gendered hate, a consequence of epistemic injustice, renders sexuality and hate as mutually exclusive, masking the realities of gender-based violence for women. This analysis finds the reification of sex inequality where reality is otherwise hidden or obscured, and therefore, argues for defining sexual assault as a matter of truth and knowledge in defense against the epistemic bias that structures a gendered view of hate.

---

<sup>88</sup> *Commonwealth v. Berkowitz*, 609 A.2d 1338 (Pa. Super. Ct. 1992) (per curiam), *aff’d in part*, 641 A.2d 1161 (Pa. 1994).

<sup>89</sup> *Id.* at 1340.

<sup>90</sup> *Id.* at 1343 (quoting *Commonwealth v. Rhodes*, 510 A.2d 1217, 1227 n. 15 (Pa. 1986)).