


# Sexual Consent and Epistemic Partiality in Rape Fact-Finding

## *Consentimento Sexual e Parcialidade Epistêmica em Investigações de Estupro*

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**ABSTRACT:** Feminist legal theory has contested rape laws and notions of sexual consent to better reflect the experiences of survivors and address power distortions in legal frameworks that perpetuate women's subordination. In this paper, I explore an alternative form of criticism to consent-based rape laws and biases within legal systems. I argue that the justifications that are used to select and weigh evidence in rape cases are epistemically suspect because of the unreliability of their epistemic sources. My argument, building on radical realist social analysis in political theory, aims to unveil an epistemic defect in rape evidentiary procedures, which I call epistemic partiality. I suggest that this epistemic defect brings salient reasons to challenge rape laws based on ideals of consent. I hope to show that a radical realist approach may bring reasons to challenge rape laws and flaws in evidentiary systems without the need to centrally agree with or rely on feminist commitments and political goals. This type of criticism may effectively bypass certain limitations of feminist theory and potentially add to discussions focused on power distortions within legal systems.

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**KEYWORDS:** rape laws; sexual consent; evidentiary procedures; justification; epistemic partiality.

**RESUMO:** *A teoria do direito feminista discute leis de estupro e noções de consentimento sexual buscando refletir de maneira mais precisa as experiências de sobreviventes de crimes sexuais, bem como abordar distorções de poder nos arcabouços legais que perpetuam a subordinação das mulheres. Neste artigo, exploro uma forma alternativa de crítica às leis de estupro baseadas no consentimento e aos vieses presentes nos sistemas legais. Argumento que as justificativas usadas para selecionar e avaliar as evidências em casos de estupro são epistemicamente questionáveis devido à falta de confiabilidade de suas fontes epistêmicas. Meu argumento, construído com base na análise social realista radical na teoria política, visa revelar um defeito epistêmico nos procedimentos de evidência em casos de estupro, que denomino parcialidade epistêmica. Sugiro que esse defeito epistêmico apresenta razões relevantes para desafiar as leis de estupro baseadas em ideais de consentimento. Espero demonstrar que uma abordagem realista radical pode trazer razões para questionar as leis de estupro e falhas nos sistemas de evidência sem a necessidade de concordar ou depender de compromissos e objetivos políticos feministas. Esse tipo de crítica pode efetivamente contornar certas dificuldades da teoria feminista, e potencialmente contribuir para discussões centradas em distorções de poder dentro dos sistemas legais.*

**PALAVRAS-CHAVE:** leis de estupro; consentimento sexual; procedimentos probatórios; justificação; parcialidade epistêmica.

## INTRODUCTION

Why do legal systems fail to adequately adjudicate rape cases<sup>2</sup>? Some strands of feminist theory have roughly suggested that the problem

<sup>2</sup> According to the House of Commons Committee report on ‘Investigation and Prosecution of Rape’, only 1.3% of the recorded rape offences in England and Wales have been assigned an outcome that resulted in a charge or summon (2022). In the U.S., the number of rape convictions reaches 3% of prosecuted cases (Criminal Justice Statics, 2022). Legal systems also fail to address rape claims because it is an extremely underreported type of offence

of rape adjudication is an issue of translation. The forms of sexual assaults experienced by women as such are not appropriately translated into substantive laws. In an attempt to legally address what is lost in translation, some feminists demand liberal systems to modify substantive rape laws, changing legal definitions to adopt a comprehensive definition of rape. For many jurisdictions, rape is now considered a form of illegal sex that occurs when one agent intentionally touches or invades someone else's body without their consent<sup>3</sup>. This broad definition indicates that not only 'forced sex' but any 'sex without consent' - leaving aside specific circumstances<sup>4</sup> - is also rape. However, despite these legal reforms, the number of rape convictions has not increased<sup>5</sup>, and consent-based definitions are still widely contested.

Some feminist critiques suggest that the failure of rape legislation is related to the indeterminacy and vagueness of the idea of 'consent' in the context of sex. They argue that this concept is not appropriate to capture power imbalances and the social position of women, which affect women's agency in sexual relationships. Women, they claim, may often consent to broadly coerced, harmful and unwanted sex as they stand

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(according to the U.S. Justice Department 2022, around 80% of cases of rape are not reported). There is also an extreme delay in prosecuting rape offences. In 2021, the mean time between offence and completion was, on average more than seven years in the U.K (The Guardian, 2022).

<sup>3</sup> In 2018, only 8 out of 31 European countries defined rape as sex without consent. This number has been increasing in the past few years. In 2020, Amnesty International reported that 12 European countries have adopted consent-based rape laws, especially due to the pressure of the #metoo movement and the influence of the Istanbul Convention in Europe. Recently, the Netherlands and Spain have also amended their criminal codes to adopt the legal definition of rape as sex without consent. Worldwide many countries also already adopt consent-based definitions (for example Canada, the U.S, Australia, South Africa, Zambia, India).

<sup>4</sup> In this paper, I take rape as an offense involving adults. I am not addressing cases of statutory rape, when participants are legally incapable of giving consent to the act, such for example when participants are underage or have disabilities.

<sup>5</sup> Quite on the contrary, in the U.K, for example, where rape is defined as non-consensual sex, according to The Guardian (2021), prosecutions fell 60% in four years from 2016 to 2020, even if the number of reports to police increased.

in a subordinate social position in relation to men<sup>6</sup>. Yet, legal systems are blind to acknowledge the particularities of women's experiences given the asymmetries produced by social hierarchies. Besides, some feminists argue that 'consent' requires standards of proof often centring on male perspectives about women's sexuality<sup>7</sup>. For example, in rape evidentiary procedures, it is required by law to determine if the accused could reasonably believe that the plaintiff was not consenting to sex in the circumstances of the putative offence. Scholars argue that the considerations about this 'reasonable belief are often based on male perspectives on the putative victim's behaviour<sup>8</sup>. In this sense, consent given by a woman becomes what a man thinks that consent reasonably is<sup>9</sup>.

These feminist approaches highlighted, therefore, crucial issues within adjudication systems in rape cases. They indicated that laws and considerations on the facts of the matter in rape cases are not neutral but rather gendered and biased to favour men. To challenge this scenario, they attempted to redeploy the law for feminist ends. Some feminist authors have thus suggested that the law should follow a feminist standpoint epistemology, considering women's experiences and privileged epistemic position to reshape laws and legal theorising. Moreover, some approaches have also claimed that legal systems and legal actors should be aware of and orientated by feminist ethical commitments against gender oppression when deciding upon cases where gender is implicated<sup>10</sup>.

This paper aims to bring another form of criticism to rape laws that does not centrally contest consent-based definitions on the grounds of feminist standpoint epistemologies and ethical-based approaches. I will not reject epistemic values typically endorsed in the legal adjudication of rape. Neither will I undertake moral commitments to claim that legal systems should prosecute these cases in the name of feminist values. Instead, I will problematise rape laws by employing a radical realist epistemic

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<sup>6</sup> West, 2020.

<sup>7</sup> E.g. Mackinnon (1989).

<sup>8</sup> E.g. Hubin, Haely (1999), Scheppele (1991); Mackinnon (1989); Anderson (2005); Simon-Keer (2021).

<sup>9</sup> E.g. Mackinnon (1989) (2016); West (2009) (2020).

<sup>10</sup> Mackinnon (1989 (1987); Nicolson (2000).

critique. This is a form of ideology critique grounded in epistemic rather than moral normativity<sup>11</sup>. A radical realist social analysis aims to uncover epistemically flawed mechanisms of power self-justification<sup>12</sup>. Following an externalist epistemology, I intend to examine the reliability of the justifications within evidentiary procedures. Crudely, externalism in epistemology holds that justifications are determined by factors outside an individual's mind<sup>13</sup>. Unlike internalist approaches in epistemology, which consider an individual's internal mental states and processes in determining justified beliefs, externalism focuses on social structures and the relationship between individuals and the external world to make claims about justified beliefs or knowledge.

The question I aim to answer is the following: what, if anything, is wrong with consent-based rape laws when considering evidence rules and procedures? My argument is that what makes consent-based rape laws objectionable is that they are compromised by an epistemically suspect legal framework, including rules and procedures of evidence. Rules and procedures of evidence are suspect insofar as conditions of materiality and relevance of evidence of rape are justified by beliefs produced by unreliable sources, i.e., hierarchies. Hierarchies are unreliable as sources of belief formation because they cause an observable distorting effect, namely epistemic partiality.

Let me briefly illustrate my point with an example. Take the following rough analogy between fact-finding procedures in cases of murder and cases of rape. In a murder case, fingerprints on a weapon might be selected as evidence that someone 'intentionally killed another human being'. The selection of this piece of evidence is justified by a logical assumption that to kill someone; it is likely that a person needs to touch the weapon with which harm was inflicted. The probative value of such evidence may then be justified, for example, by analysing the fingerprints on the weapon and the similarity of these to those of the accused. In cases of rape, however, the structure of the epistemic reasoning is different. The fact that the participants were involved in a romantic relationship

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<sup>11</sup> Rossi (2019); Geuss (2010).

<sup>12</sup> Rossi (2019,2023); Aytac, Rossi (2022)

<sup>13</sup> Alston (1995); Goldman (1999); Srinivasan (2020).

can be used as evidence that sex has been consensual<sup>14</sup>. The selection of this evidence is justified by the assumption that 'it is likely that people in romantic relationships have consensual sex'. The probative value of such evidence also relies on this same assumption; the relationship between the participants likely indicates they had consensual sex.

Looking at rape fact-finding, a critique in line with feminist approaches is that evidence is selected and evaluated in rape cases in the context of a male-biased belief system. Against the presumed neutrality of epistemic values in legal procedures, feminist scholars conflate their epistemology with their social movement political goals. The biases within the law are contested and should be avoided because of a moral commitment: they are unjust or oppressive towards women. I do not intend to criticise this sort of ideology critique in this paper. My aim is simply to pursue an alternative approach, one that does not need additional evaluation of justice and oppression to unveil distortions within evidence procedures in rape cases. I challenge legal frameworks in rape cases by looking at the sources of belief formation of justifications used to weigh evidence and the epistemic consequences they engender. I show that typically, while a reliable process of belief formation generates justifications in cases of murder, *unreliable* epistemic sources often engender the latter.

My broad and general aspiration is to bring the radical realists' form of critique - developed in the context of political theory - to legal theory scholarship. This general aim might also contribute to increasing debates within political theory on the limits and potentiality of this perspective when applied to legal contexts. Note that the purpose of this paper is not to prescribe that rape laws based on consent should be rejected, let alone that we should reject the entire evidentiary legal system. The argument that I put forward is evaluative: consent-based rape laws are

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<sup>14</sup> In my example, I generally consider rape cases involving an adult man and a woman, as I am concerned with the influence of power that men exercise over women in legal fact-finding. Empirically, most cases of rape involve a male aggressor (99%) and a female victim (90%) (U.S. Department of Justice, 2022). This example also aims to capture the fact that many women are victims of sexual assaults by an intimate partner. In 2019, for example, over 1.5 million women in the U.S. reported being raped or physically assaulted by their partners (U.S. Department of Justice, 2022).

compromised by epistemically suspect rules and procedures of evidence to the degree that they are justified by beliefs produced by hierarchies. This position may enable effective political contestation of evidentiary systems and improve the epistemic quality of rape procedures.

The paper's structure is as follows. In the first part, I briefly present an overview of a branch of feminist legal theories interested in power and knowledge interactions in evidentiary systems. Their central arguments are that (i) legal systems cannot reflect women's experiences, as they do not consider the dynamics of substantial power asymmetries between men and women, and that (ii) legal adjudication is based on a flawed ideal of neutrality, given the influences of cultural and moral values. I show that these approaches individuate distortions in evidence rules and procedures by taking standpoint epistemologies and sometimes relying on ethical commitments. I briefly discuss some shortcomings of these strategies and illustrate some reasons for bringing forward an alternative radical realist approach typically applied in political theory to the legal realm.

In the second part, I then present two central moments of legal fact-finding that are necessary to understand the epistemic vitiating of legal adjudication: materiality and relevance. I show how feminist debates challenged such conditions when contesting rape laws. I claim that these conditions may be confronted by means of a radical realist ideology critique grounded in external epistemic justifications. I argue that this approach offers a more parsimonious means to radically object to the fabric of rules and procedures of evidence in rape cases.

In the third part, I illustrate my approach by presenting an analogy between fact-finding procedures in cases of murder and cases of rape. My purpose is to highlight and discuss the origin of epistemic justifications used to select and evaluate evidence. My argument shows that the conditions of materiality and relevance are justified by beliefs produced by unreliable epistemic sources, which are hierarchies. I then argue that they are unreliable because they distort evidentiary procedures by being vitiated by epistemic partiality.

I conclude by discussing some theoretical implications of my argument. I intend to show that an externalist epistemic approach that looks at the reliability of sources of belief formation can contribute to

the debate on rape law by bringing a form of criticism that has not yet been substantially explored within critical legal theory.

## 1. EVIDENCE PROCEDURES AND FEMINIST CRITIQUES

In response to traditional evidence theories, critical legal scholars have developed a body of criticism against purist positivist ontological and epistemic assumptions in fact-finding and evidence evaluation. They propose, for example, alternatives to rethink the conceptions of truth, justice, and reason. At the heart of these debates was a challenge to the enlightenment myth that there is an epistemological subject with the ‘view from nowhere’<sup>15</sup> and to the notion of rationality as a value-free and universal method of knowing<sup>16</sup>. A central claim shared by this scholarship is that social facts and the law are inherently political and partial to the extent that nature of the law is socially contingent on political interests<sup>17</sup>. Part of this critique is led by feminist scholars, who generally contend that substantive laws and legal practices are premised upon and reinforce sexist ideas<sup>18</sup>.

A strand of legal feminism known as ‘dominance feminist theory’ centres its critique on the interaction of power, knowledge and law. It takes gender as the primary social category to distinguish instances of social power. Drawing from Marxist and realist theory, dominance feminist theory broadly suggests that legal systems reflect the interests of a gendered powerful group – men – and defends an indeterminacy within the law, which reflects the influence of external social forces, such as political, cultural and economic factors in legal adjudication. This branch of feminist legal theory roughly aims to uncover distortions or flaws in

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<sup>15</sup> Nagel (1986).

<sup>16</sup> Some feminists however mobilized ideas of rationality to argue that sexism could be eradicated by relying on the enlightenment’s values. E.g, Harding (1989); Bartlett (1990).

<sup>17</sup> This view was mainly sustained by critical legal studies’ scholars in the legal North American debate during the 1970s and 1980s. See e.g, Mensch (1982); Unger (1996); Kennedy (1982) (1998).

<sup>18</sup> Chamallas (2013), p.53.



legal practices and arrangements<sup>19</sup>. They want to show that the law is ‘ideological’ in the sense that the organisation of power structures and social meaning shapes and distorts legal practice, making it unfair, unjust or oppressive towards women<sup>20</sup>. Legal systems are therefore commonly challenged by feminists for their reprehensive function; that is, they are flawed insofar as they favour and support the domination of a powerful social group - men - over the powerless – women<sup>21</sup>.

The common driving force behind much feminist theory is to challenge power relations by reinventing ways of knowing<sup>22</sup>. Roughly, they aim to show that epistemology plays a role in women’s subordination by ignoring women’s perspectives when taken as epistemological subjects<sup>23</sup>. In this vein, dominance theorists typically contend that the law is not orientated by neutral, rational or impartial methods. Instead, they argue that the law follows practices and reasoning that are biased towards men<sup>24</sup>. There are two key ideas that are central to framing aspects of the feminist position concerning legal fact-finding in debates on rape<sup>25</sup>.

The first idea concerns the blindness within legal systems towards women’s social experiences and knowledge. Although systems of adjudication claim to be universal, feminist scholars and other advocates for women argue that substantive laws and doctrines cannot apprehend the actual social forces and real injuries faced by women when they are victims of sexual assault<sup>26</sup>. Catherine Mackinnon, Robin West and Scott Anderson for example, claim that power imbalances between

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<sup>19</sup> For a discussion about the purposes of ideology critique see e.g. Shelby (2003).

<sup>20</sup> My concept of ideology draws from Geuss’ definition. Ideologies are distortion in set of beliefs, attitudes or preferences that resulted of operations of specific relations of power. Geuss (2008), p.52.

<sup>21</sup> Chamallas (2013), p.56-67.

<sup>22</sup> Mackinnon (1989), p.4.

<sup>23</sup> Childs & Ellison (2000), pp.1-12.

<sup>24</sup> Ibid.

<sup>25</sup> I follow Carbadó and Harris’ understanding that there are areas of overlap between intersectional and dominance feminist theories. Collins e.g. is usually seen as an intersectional feminist yet, like Mackinnon, she discusses the implications of power to baselines and starting assumptions about knowledge endorsed by legal systems. See Carbadó and Harris (2019).

<sup>26</sup> Mackinnon (2016); Scott (2016); West (2008). See also Scheppele (1992).

genders are neither systematically nor substantially considered by legal systems<sup>27</sup>. Regarding rape laws based on sexual consent, that is to say, on the idea that absence of consent is what defines the wrongdoing of rape, these authors pursue different accounts to argue that standards of consent include conditions of coerced submission that are a feature of the unbalanced relationship between men and women. The standard of consent in rape laws may consider lawful, for example, interactions that are unwanted, non-voluntary, in different ways constrained or generally coerced in a context of substantial power inequalities<sup>28</sup>.

Mackinnon, followed by other scholars, suggests that the epistemic method to access and justify legal knowledge about what power does to women in the context of sexual assaults should be grounded in raising consciousness among women<sup>29</sup>. She claims that women *qua* women can have access to evidence and achieve the awareness of their justified beliefs about their sexuality and violations. Consciousness-raising, as a feminist method to collectively 'reconstitute the social of experiences lived by women, as women live through it'<sup>30</sup> is then a practice that would enable women to be knowers and socialise their knowledge not as a copy of reality, but as a response to living in it<sup>31</sup>. This view can be broadly associated with typical commitments endorsed by some standpoint epistemologies, which advocate that women's knowledge is socially situated and that women, as a marginalised social group, could achieve a privileged access to knowledge about their social experiences<sup>32</sup>. These epistemological commitments have influenced some reforms of substantial sexual assault laws, e.g. the legislation on sexual harassment outside the workplace and marital rape. Nevertheless, standpoint theory may still be ill-equipped to provide a frame that assures evidentiary procedures free from biases or distortions of factual reality, and so I shall argue below.

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<sup>27</sup> E.g. Mackinnon (1987) (1989).

<sup>28</sup> Mackinnon (2016), p.443.

<sup>29</sup> Mackinnon (1989) pp.83-105.

<sup>30</sup> Mackinnon (1989), p.83.

<sup>31</sup> *Ibid*, p.98.

<sup>32</sup> See e.g. Harding (1990) (2004). Wylie (2003) This is clear e.g. in Mackinnon (1987), pp.86-88.

This brings me to a second claim on the interactions of power and knowledge sustained by feminist scholars, particularly in black feminist epistemology. Hill Collins argues that the logical reasoning through which evidence is selected and evaluated is not a universal quality but rather a politically loaded notion. In her words, the real problem of epistemology is not what is believed to be true, but rather ‘*who is believed and why*’<sup>33</sup>. As white men control the system of knowledge validation, she argues that black women’s experiences have been distorted or excluded from what counts as knowledge<sup>34</sup>. She explains that this happens because the process of knowledge validation is ruled by white men who have established male experiences as universal rather than considering their social situatedness. Thus, value judgments and personal preferences that come from the experiences of white men are often mobilised to evaluate knowledge claims. Still, instead of being seen as biased, they are taken as objective and neutral justifications of ‘true knowledge’. She then suggests alternative processes of knowledge validation, such as personal expressiveness, emotions and empathy, which are also central values in the feminist ethics of care<sup>35</sup>.

The idea of the ethics of care as an alternative way to validate knowledge posits that emphasising individual uniqueness, valuing emotions in dialogue and urging people to develop a capacity for empathy could enable a dialogue between multiple forms of knowledge. These alternative values driving knowledge validation may be morally justified by the position of vulnerability and dependency of the parties involved in a rape case. According to Catriona Mackenzie and other scholars, being in a vulnerable position may relate to the inherent sociality of human life as embodied and social beings or to the relational notion that agents may be in a susceptible position concerning particular sorts of threats to one’s interests<sup>36</sup>. Legal approaches could consider, as Fineman proposes, the concept of vulnerability to address inequalities and disadvantages. In this sense, legal interventions and practices could restore and enhance,

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<sup>33</sup> Collins (2000), p.252.

<sup>34</sup> Ibid, p.251.

<sup>35</sup> Ibid, p.263.

<sup>36</sup> Mackenzie, C., Rogers, W., & Dodds (2014).

to the greatest extent possible, the autonomy and capacities of persons and groups in vulnerable positions<sup>37</sup>.

These alternative processes of knowledge validation would involve that each group is able to speak from its own standpoint and share its own situated, partial knowledge. Besides that, it suggests that no standpoint of knowledge is intrinsically preferable or better than another. Therefore, multiple knowledge claims could be assessed and evaluated in accordance with moral commitments based on the ethics of care. Since traditional knowledge validation processes risk silencing women's voices and narratives, the suggestion is to seek an epistemology based on moral values informed by ideals of care, justice and gender emancipation goals<sup>38</sup>. This process could consider, for example, the position of vulnerability of epistemic subjects and establish interventions to restore fundamental capacities and substantial autonomy of the agents involved in it.

As I see it, this position raises important philosophical and practical questions when it comes to legal practices within rape cases. As Mackenzie et al. point out, debates on vulnerability need to address complex and challenging philosophical queries, which mainly relate to the normative significance of vulnerability<sup>39</sup>. Why or whether vulnerability generates moral or legal obligations and duties of justice, and who bears responsibility for responding to vulnerability are some of the intricate and contentious points that theories driven by ethics of care need to respond to. Moreover, legal scenarios may impose difficult practical dilemmas on such moral theory. Legal frameworks would need to establish criteria and thresholds to determine in which contexts laws and practices can intervene and give a fair advantage to people in groups in vulnerable positions. Additionally, it would need to establish principles and guiding tools for situations in which different types of vulnerabilities compete or intersect. For example, in a rape case, legal mechanisms may determine the report of female victims of rape may have a greater epistemic value than reports of male defendants, given the vulnerability of women as a group in sexual assault-related incidents. However, there might be cases in

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<sup>37</sup> Fineman (2008)

<sup>38</sup> Ibid. pp.251-272.

<sup>39</sup> Mackenzie, C., Rogers, W., & Dodds (2014).

which class, race or ethnicity may put the defendant in an equally severe and normatively salient vulnerable position. The worry that remains is whether power distortions will be actually overcome by a law that relies on a concept of vulnerability. My task here, however, is not to criticise or oppose these approaches. I aim to simply suggest an alternative type of criticism, one that can dismantle power distortions in rape laws eschewing these difficult queries.

Feminist legal scholars such as D. Nicolson and Simon-Kerr apply to some degree Hill Collins' claims to legal adjudication systems<sup>40</sup>. They propose, for instance, that legal inquiry should rely on multiple and diverse sources of information to establish knowledge claims. Simon-Kerr suggests that society would need to undergo a broad cultural shift, taking into account alternative knowledge claims to challenge sedimented traditional meanings, such as ideals of sexuality and gender roles. This would move legal factfinders and decision-makers to be informed by values that are no longer unfair and oppressive towards women<sup>41</sup>. Nicolson also suggests that courts could increase the number of female judges and jurors and educate legal actors about gender oppression<sup>42</sup>. Similarly to the consciousness-raising approaches, these claims illuminate biases and blockages in legal reasoning and can be seen as a work in progress. However, social and psychological empirical research points to some obstacles to applying these suggestions in non-ideal contexts. Empirical data shows, for example, that even 'well-intentioned' judges and female jurors, in general, cannot escape the influence of prejudice and social stereotypes in legal fact-finding<sup>43</sup>. Additionally, it is difficult to apprehend the facts of the matter of forms of implicit prejudices and biases in single cases<sup>44</sup>.

Typically, feminist theories focus on power dynamics within the fabric of knowledge production in legal frameworks, and they usually suggest that legal reforms should be driven by better epistemic practices and laws, meaning practices and laws that are based on

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<sup>40</sup> Nicolson (2000); Simon-Keer (2021).

<sup>41</sup> Simon-Keer (2021), p.376.

<sup>42</sup> Nicolson (2000), pp.33-36.

<sup>43</sup> See e.g. Sherman & Goguen (2019).

<sup>44</sup> Arcila-Valenzuela, M., Páez, A. (2022)

women's standpoints and feminist values. My approach can be seen as a contribution to feminist positions to the degree that I attempt to unveil distortions within legal systems. However, differently from typical feminist approaches, my critique draws its normativity from epistemic (rather than moral or political) sources. In this sense, the flaws of consent-based rape laws should be understood as epistemic rather than moral flaws. This approach is more parsimonious because it does not need additional *a priori* evaluations on moral standards aligned with feminist aims, such as gender justice or emancipation, to bear out reasons to object consent-based rape laws. Moreover, it does not eschew relevant commitments of traditional epistemology, such as impartiality, to defend a feminist alternative.

Note that my point is not to say that feminist views on what power does to women are wrong, let alone politically unnecessary. However, at least in the legal context, we do not need to rely on conceptions of injustice or oppression to find a reason to reject a distorted reality<sup>45</sup>. Epistemic reasons might be sufficient. I propose thus an externalist epistemology that analysis the reliability of the sources of belief-formation to explain the distortions in the selection and evaluation of evidence in rape adjudication when laws are based on consent. My view is externalist insofar as it holds that knowledge produced in legal adjudication acquires the status of being epistemically justified for reasons that are external to the subjects of knowledge<sup>46</sup>. It is also a reliabilist view, to the extent it tries to explain justification in terms of the reliability of the process of true belief-formation<sup>47</sup>.

Far from rejecting or claiming that my position is better than the feminist accounts I have presented here, I submit that a radical realist critique concerned with the reliability of processes of belief-formation can avoid some theoretical and practical objections commonly raised against mainstream feminists (and other morality-based) critical theories, and so I shall argue below.

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<sup>45</sup> Aytac and Rossi (2022) argue that even in social theory we would not need to rely on moral commitments to uncover and reject ideologies in cultural practices.

<sup>46</sup> E.g Goldman (1999).

<sup>47</sup> E.g Ibid; Alston (1995).

## 2. IDEOLOGY CRITIQUE AT LAW AND EVIDENTIARY SYSTEMS

After their heyday in the 1990s, feminists and other strands of critical legal theory have significantly lost strength in legal debates, moving to ethics and related political philosophy subfields. Some legal scholars claim that legal criticism since then has entered a deep coma.<sup>48</sup> According to Robin West, a factor that affected the of critical potentiality of legal theory was the triumph of a realist position in the field. The American Realists' strong claim that law is indeterminate would have turned legal theory into something merely descriptive, losing its normative potentiality<sup>49</sup>. If the law is not but indeterminate, R. West argues, the claims about the law-that-ought-to-be, and struggles for justice, emancipation, or theories about utopian alternatives within legal subfields lose their progressive potentiality<sup>50</sup>.

Although West might be right that legal theory has not been deeply engaged with critical thought as it used to be in the 1980s and 1990s, I contend that grounding sources of normativity outside the law, as realists suggested, does not entail a lack of critical potentiality of the field. Legal realists generally do not deny the progressive possibilities of the law; they simply do not focus on justice as the central aspect of progress<sup>51</sup>. Legal realists broadly claim that the law is indeterminate because legal sources, such as constitutions or precedents, do not justify a decision or offer reasons to explain why judges decide as they do<sup>52</sup>. Their point is to show that legal decisions are influenced by non-legal considerations, for example, for a sense of what would be 'fair'<sup>53</sup>. This idea might suggest that the sources of a critical legal movement are outside the law, but it does not mean that the law cannot aspire to be critical.

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<sup>48</sup> Duncan Kennedy has stated that critical legal studies were "dead as a door-nail" (1990). Other scholars have shared this view, e.g Gabel (2009); West (2011); Stewart (2019).

<sup>49</sup> West (2011), pp.119-122; 156-176; 182-190.

<sup>50</sup> Ibid, p. 156-176.

<sup>51</sup> E.g Holmes (1989), Leiter (2002).

<sup>52</sup> Leiter (2002), p.3.

<sup>53</sup> Ibid.

My approach aims to show that it is possible to ground legal normativity outside of the law and still be radically critical about employing an epistemic ideology critique. This view aligns with a form of analysis applied by radical realists in political theory<sup>54</sup>. Drawing a normative theory not from moral commitments but from epistemic sources concerned with processes of belief-formation and power relations<sup>55</sup>, it is possible to identify epistemic flaws and visualise effective instances in the fabric of the law that need to be politically contested. This approach differs from traditional legal realist accounts, which are mainly concerned with legal predictability and the indeterminacy of the law. I will not discuss these issues, and I also do not aspire to push my argument to criticise the totality of legal systems. I aim to examine the fabric of justification of evidence rules and procedures in rape fact-finding to develop a specific argument. Consent-based laws can be objected to because they endorse rules and procedures of evidence that rely on unreliable epistemic sources, namely hierarchies.

At this point, it is important to make some conceptual clarifications. Evidence in law might be an ambiguous term. It is used to refer to at least three specific ideas. The first sense refers to “objects of sensory evidence”<sup>56</sup>, which are the legal means to establish factual claims, such as oral evidence, documentary evidence or testimonial evidence received in legal adjudication. In cases of rape, testimonies of witnesses are usually presented as evidence in this sense. Second, evidence is used to indicate facts established by these sensory objects. For example, a fact mentioned by a testimony that the accused of rape administered rape date drugs on the day of the crime is presented as an evidential fact or simply evidence to prove the offence. The third sense functions as a relational concept. A factual proposition is evidence only if it can serve as a premise for drawing an inference to a matter that is material to the case. Fingerprints on a knife used to kill a person are considered evidence because it is possible to use this to infer the materiality of the crime. To avoid misunderstandings, I take the term evidence in a broader sense, which refers to ‘information which may persuade a person

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<sup>54</sup> E.g. Rossi (2019); Argenton & Rossi (2021); Aytac & Rossi (2022); Cross (2019), (2021); Prinz (2016); Rackstad, (2018a), (2018b).

<sup>55</sup> Rossi (2019); Argenton & Rossi (2020); Rossi; Sleat (2014).

<sup>56</sup> Haack (2004) p.48.



that something is more or less likely to be true<sup>57</sup>. That said, I will explain the conditions of materiality and relevance taken by legal systems to receive evidence and the perspective of the dominance of feminist theory on this.

To develop my point, I need first to explain two central moments in legal fact-finding based on evidence responsiveness: one which refers to the condition of *materiality*, that establishes what evidence is received (what or whose knowledge is selected to establish the materiality of facts), and one which is focused on the condition of *relevance*, that is a normative standard used to determine the strength of evidential facts (what counts as knowledge to establish the relevance of the evidential facts)<sup>58</sup>. In a wide range of legal systems, these conditions of materiality and relevance are the two basic requirements for receiving evidence in legal adjudication<sup>59</sup>. I unfold these concepts below and try to show some weaknesses of feminist approaches that criticise the state of evidentiary systems. These ideas are important to distinguish my approach as an alternative form of critique, and give a frame to a comparative analysis between evidence procedures in cases of rape and murder that I develop in the next chapter.

First of all, materiality requires evidential facts of a case to refer to elements defined by an applicable substantive law. In criminal law, this is determined by the offence with which the accused is charged<sup>60</sup>. When a person is charged with rape, and the offence of rape is defined as the intentionality of the accused to initiate a non-consented sexual act, the necessary elements that define the materiality of the offence are twofold: absence of consent and intentionality of the accused<sup>61</sup>. This means that evidence can be received in rape prosecutions when it indicates material aspects of intentionality or consent.

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<sup>57</sup> Childs & Ellison (2000), p.1.

<sup>58</sup> E.g. Mackinnon (1989), Gilligan (1983), Scheppele (1992), Collins (2000).

<sup>59</sup> In some jurisdictions, there are also further requirements to receive evidence related to admissibility conditions. Evidence is admissible when it is not explicitly prohibited. For example, some rules in the U.S. prohibit evidence from being presented in a trial, even though it is relevant to a factual proposition. Hearsay, for instance, is considered inadmissible evidence under the U.S. evidence rules.

<sup>60</sup> Wigmore (1983), pp.15-19.

<sup>61</sup> This is a general definition of rape between adults; it excludes statutory rape and cases of rape under specific circumstances.

This is the central focus of dominance feminist scholars in criticising substantive rape laws: *materiality* concerns. As rape laws give the legal basis that determines the selection of evidence evaluated to establish the putative truth of the facts in issue, feminist scholars aimed to show that the classification of rape could not apprehend the material acts committed by the defendant and his state of mind. Theories may diverge to explain how and why legal systems cannot access the facts of sexual assaults. Still, they tend to agree that the problem with rape laws is that it produces legal knowledge that does not match the actual violations experienced by women. The view of Mackinnon, for example, stresses that rape is a matter of social power, while materiality required by rape laws is a matter of autonomy of those involved. She explains that the social circumstance of power imbalances between men and women may turn sex into sexual violence, rather than individuals' willingness to have sex as the legal classification suggests<sup>62</sup>. The issue is that consent-based definitions of rape make the autonomy of the participants a primary problem when the actual social context involves substantial inequalities imposed by social power<sup>63</sup>. Since legal systems require materiality of the absence of consent, the actual unequal position of power between the parties is not selected as evidence. Instead, what is generally received as evidence relates to facts that prove the plaintiff's willingness or autonomy to consent. The definition of rape, therefore, does not consider a woman's own sense of violation<sup>64</sup>.

For this reason, dominance theories suggest that when the law is 'most ruthlessly neutral', for example, when it bases consent around the concept of autonomy despite the participants being substantially unequal, it is, in fact, 'most male'<sup>65</sup>. This is because it takes as evidence of consent factors that favour a male-centred perspective of sexual roles and a male point of view on sexuality<sup>66</sup>. In Mackinnon's words, it is not rape when it looks like sex to men<sup>67</sup>.

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<sup>62</sup> Mackinnon (2016), p.474.

<sup>63</sup> Ibid, p.436.

<sup>64</sup> Id. (1988). p.82.

<sup>65</sup> Id. (1989), p.248.

<sup>66</sup> Id. (1988), p.90

<sup>67</sup> Id. (1989), p.172.

Although this line of criticism is valuable for underpinning social experiences neglected by the law, it may not be efficient to debunk power distortions within legal systems. I'm especially concerned with the grounds according to which we should scan and select what can be called 'women's experiences', and the reasons why we should choose feminist goals over others. This is not to cast doubt on the relevance of feminist goals. My worry is that there are significant disagreements within feminist movements on social experiences and political aims, and it may not be simple to reconcile such complexities through the law. In addition, intersectional approaches in feminism challenge the idea that gender subordination is a dimension that can explain and address by itself power distortions. I contend that an epistemic approach that looks at the reliability of the sources of justifications in evidentiary procedures does not need to take political sides to unveil power distortions. Besides that, a radical realist analysis of evidence procedures does not depend on the epistemic capacity of agents overcoming epistemic barriers to unveil power distortions. This account reveals power distortions independently from vulnerable groups' ability to achieve a standpoint or factfinders' moral commitment of recognising and overcoming their own male socially constructed biases and prejudices.

Whilst Mackinnon and other feminists are mainly concerned with the implications of legal rules to materiality in legal adjudication<sup>68</sup>, some other authors focus on criticising the epistemic values embedded in procedures through which the law evaluates evidence. This position shows that seemingly neutral rules of evidence and procedures marginalise, silence, and distort women's voices. This brings us to think about the second condition for what is considered valid evidence in legal adjudication: relevance.

The standard of relevance is connected to that of materiality. Still, it further requires 'the factfinder's understanding of how a piece of evidence bears on issues that law treats as material'<sup>69</sup>. It refers to 'a tendency that makes a fact more or less probable than it would be

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<sup>68</sup> E.g. Scheppele (1992).

<sup>69</sup> Simon-Kerr (2021), p.373.

without the evidence<sup>70</sup>. It is a binary and relational concept that depends on logical generalisations from experience or expertise that relate the evidential fact to the offence's legal classification. In other words, once substantive laws indicate that specific facts are consequential, relevance assesses whether evidence tends to make a consequential proposition more or less probable<sup>71</sup>.

For example, the material fact that a defendant used to frequent a particular nightclub is not necessarily relevant evidence to a case of rape. This is because personal preferences are not usually a premise from which one can infer the issues that matter to define the materiality of a case of rape. However, this factual circumstance could be received as evidence in a rape case if it is argued, for example, that the accused met the victim in this nightclub. This is relevant evidence, even though it does not necessarily prove consent or intentionality, as it might indicate a tendency that makes a fact more probable.

A significant focus of feminist critique on relevance standards challenges the presumed neutrality of legal reasoning to decide what makes a fact more or less probable when considering the evidence. The general claim is that the standards used to evaluate evidence result from a biased male perspective rather than any universal quality of rationality and logic. Relevance determinations reflect not neutral abstract reasoning but white men's experiences and moral understandings<sup>72</sup>. Thus, the relevance requirement that shapes and validates the process of translating knowledge about facts into legal consequences involves biased value judgments. Authors such as Donald Nicolson, Martha Minow, and, more recently, Julia Simon-Kerr, engage in this debate. They may diverge on understandings of how exactly values and rationality shape knowledge claims<sup>73</sup>, yet they generally agree that evidence evaluation is a gendered process that tends to favour men's social accounts.

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<sup>70</sup> This is the definition adopted by the United States Federal Rules of Evidence.

<sup>71</sup> Simon-Kerr (2021), p.366.

<sup>72</sup> Nicolson (2000), p.33.

<sup>73</sup> For example, Carol Gilligan (1993) proposed a critical correction on the valorization of modes of reasoning associated with men and the devaluation of qualities associated with women. See also McMillan (1992).

The argument presented is that the presumed rationality of legal adjudication that guides relevance evaluations is not neutral and universal but socially constructed and contextual. There is no single or universal knowledge about reality, but knowledge that is socially situated and constructed within social power interactions. The point, thus, is that information provided by evidence within legal systems is evaluated as relevant by epistemic processes that are not value-free. Rather, rules and procedures of evidence embody biased social meanings that prevail due to power dynamics. Legal evidentiary standards such as relevance, therefore, hide a dominant view of the social realm, which favours groups that are at the top of social and cultural hierarchies<sup>74</sup> M. Minow and D. Nicolson, for example, argue that legal factfinders do not neutrally rule on relevance standards, as the probative value of evidence rests on assumptions that “presupposes the universality of a particular reference point”, which is male and white, reflecting “the factfinder’s own epistemology”<sup>75</sup>.

Although I share the view that epistemic processes are not value-free to the extent that factfinders are biased for their own values and interests, I contend that some feminist approaches may throw the baby out with the bathwater when developing some arguments to hold their position. Asserting factfinders’ political and moral inclinations does not automatically imply that the standards of knowledge or epistemic norms are sensitive *per se* to shifting practical or moral considerations. I submit that anyone exposed to the appropriate evidence can recognise the epistemic warrant that such evidence offers. I intend to show that an epistemic approach to consent-based rape laws can make the feminist project compatible with some purist epistemological commitments. We do not need to eschew important aspects of neutrality and objectivity of the law to dismantle power distortions within legal frameworks. Generally, the proposed alternative analysis may bridge the feminist general aim of uncovering power distortions in legal frameworks with important aspects of traditional epistemology.

The feminist views on materiality and relevance point out several biases in evidence rules and procedures in rape fact-finding. They mainly

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<sup>74</sup> Nicolson (2000).

<sup>75</sup> *Ibid*, p.368. See also e.g Minow (1998).

address materiality issues as it orientates rape laws to be reformed, taking women's perspectives into account. They also contend that standards of *relevance* are not neutral or value-free but conditioned by the gendered value judgments and cultural assumptions assumed and reproduced by factfinders. Generally, the feminist suggestion is then that gendered standards such as relevance should reflect women's experiences and social conditions instead of those of men<sup>76</sup>. My approach, however, is different. I will show epistemic defects of justifications that support the materiality and relevance of evidence challenging the reliability of their epistemic origins. I do not need to endorse any *a priori* activist purpose or political reason to put forward my critique. Consent-based rape laws engender epistemic flaws within evidence procedures, which can be dismantled and exposed for purely epistemic reasons.

### 3. RADICAL REALIST ANALYSIS: A CASE STUDY

To begin debunking the rules and procedures of presenting evidence in rape cases, I consider a comparison of evidentiary procedures in cases of rape and cases of murder. These cases are simplified, as the aim is simply to highlight the general structure and reasoning of legal fact-finding in these criminal offences. In the first case, evidence of a relationship between the plaintiff and the accused is received as relevant evidence to prove consensual sex and therefore presented as evidence to warrant the likely materiality of the innocence of the accused in a case of rape. In the context of a murder case, fingerprints are presented as relevant evidence to prove that the accused has killed a person and, therefore, as evidence that warrants the materiality of the guilt of the defendant. The reasoning behind these two cases follows that:

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<sup>76</sup> E.g. Mackinnon (1989); Scheppele (1992). As there is no neutral concept at law, the idea is that criteria to evaluate evidence in cases of rape should be biased towards women, instead of men, to correct substantial inequalities between genders. It was suggested, for instance, that the criterion of reasonability that determines the relevance of evidence of 'intentionality of the accused to commit the crime', that is the *mens rea*, should follow reasonable women's understandings and experiences, instead of men's. See a critique in Hubin & Haely (1999).

Case A)

Legal definition: Rape is intentional sex without the consent of the victim.

Evidence: Plaintiff and accused are involved in a romantic relationship.

Conclusion: All else being equal, it is likely that the plaintiff and the accused had consensual sex.

Case B)

Legal definition: Murder is intentionally killing another human being.

Evidence: Fingerprints of the accused found on the weapon that has inflicted death on the victim.

Conclusion: All else being equal, it is likely that the accused killed the victim.

The relevance of Evidence in cases A and B depends on the factfinder's understanding of how evidence of a romantic relationship or fingerprints might bear on issues that indicate the materiality of the respective conclusions in A and B. The prepositions that factfinders rely on to infer the likely relevance of these pieces of evidence are as follows. In the rape case example, factfinders are likely to support the materiality of the conclusion in A as more or less probable considering the inferential assumption that '*it is likely that people in romantic relationships have consensual sex*'. In the case of murder, the probative value of evidence in B might be inferred considering that '*to kill someone, it is likely that a person needs to touch the weapon that has inflicted death on the victim*'. Therefore, the reasoning guiding the fact-finding in each case is as follows:

Case A)

Legal definition: Rape is sex without consent.

Evidence: Plaintiff and accused are involved in a romantic relationship.

*Inferential assumption: It is likely that people in romantic relationships have consensual sex.*

Conclusion: All else being equal, it is likely that the plaintiff and the accused had consensual sex.

Case B)

Legal definition: Murder is intentionally killing another human being.

Evidence: Fingerprints of the accused are found on the weapon that has inflicted death on the victim.

*Inferential assumption: To kill someone, it is likely that a person needs to touch the weapon that has inflicted death on the victim.*

Conclusion: All else being equal, it is likely that the accused killed the victim.

My question at this point is what exactly makes these inferential assumptions justified? I want to show that power relations contribute to making the assumption in A widely accepted, while this is not the case for B. I shall explain this idea by examining the pedigree of the specific beliefs which sustain these inferences.

The assumption '*it is likely that people in romantic relationships have consensual sex*' is genealogically tied to patriarchal notions of marriage, in which women were seen as the property of their husbands and passive sexual beings. The prohibition of rape dates back to 1900 B.C in Hebrew law when laws punished rape of married women by someone other than their husbands with death, but the rape of unmarried women with a fine and an obligation of the rapist to marry the victim<sup>77</sup>. The logic of the punishment was that women were seen as the property of their husbands or fathers, so rape caused injury to the man who owned the woman. Rape was not conceived as a crime within a marriage because the state's legitimate interest was to secure, protect and stabilise property interests, thus protecting the status quo of family relationships and patriarchal control<sup>78</sup>.

This notion of rape only started to be contested during the 12th century. Canonical scholars tried to distinguish rape from other property crimes, discussing the responsibility of the victim to react to forced or aggressive sex<sup>79</sup>. The debate was centred on how much resistance was

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<sup>77</sup> Baker (2015), p. 225.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.



necessary to classify sexual aggression as rape. However, if those involved were married, this carried with it the assumption that sexual relations did not involve force. The laws continued to sustain the vestiges of this patriarchal thought in which women are men's property and maintained that the essential elements of the crime (force and resistance) only applied if the victim of rape was not the accused's wife<sup>80</sup>.

According to the writer Susan Brownmiller, rape definitions did not substantially change for roughly 800 years until the 20<sup>th</sup> century. In the late 1970s, feminist movements started to claim that rape was a violation of women's will, with or without force, and independent of the marital status between victim and perpetrator<sup>81</sup>. The point was to reimagine the nature of the crime of rape, interpreting it no longer as a crime against the family but instead as one perpetrated against an individual who is touched or invaded against her will. Force and resistance or the marital status of the participants would not play any role in it since what constitutes the offence is now found in the sense that one's sexual autonomy is felt to be violated. This shift in rape legislation brought a comprehensive definition of rape to the law, as sex without consent or mixed definitions that require both physical force and the absence of consent. Despite this, however, the assumption that within marriage, women are expected to consent to sex is still very much alive.

Legal fact-finding procedures tacitly assume that women are subordinate to men's sexual desires and that when a woman is in a relationship with a man, it is irrelevant if sexual contact is unwanted or coerced. The idea is that a woman's desires or intentions are irrelevant when she is in a relationship with a man. This belief is the product of historical social hierarchies, and, despite the changes in substantive laws, the presence of these ideas continues to echo through evidentiary procedures. The nature of the relationship between the plaintiff and the accused is still being used as relevant evidence to prove the materiality of the offence.

On the other hand, the inferential assumption in case B, *"to kill someone, it is likely that a person needs to touch the weapon that has*

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<sup>80</sup> Ibid, p.226.

<sup>81</sup> Brownmiller (1975).

*inflicted death*”, is not justified by its genealogical ties to historical social power relations. Instead, this assumption is justified, for example, by perceptions about the way weapons usually function. One knows that it is likely necessary to touch a weapon to use it against a person when committing a crime. We are guided in our thought processes by our sensory or cognitive perception of how weapons function when used by a person. The justification for the inclusion and the probative value of this type of evidence in a murder case is not based on cultural assumptions originated and disseminated by social power relations.

I want to anticipate one possible objection to this idea. It could be argued that the very difference in what is considered to be justified inferences in cases A and B is related to the *nature* of the facts that need to be proved. In case A, legal systems need proof of sexual consent, which is a subjective evidential fact. Subjective here means that the fact of the matter involves an internal feature of the part involved in the case, which is the mental state of the victim. Evidence of consent seems to depend on the content of consciousness of the victim and not on something that happened externally to her. Thus, justifications are likely to rely on cultural assumptions. In case B, on the contrary, the fact that needs to be proved is the act of killing a person, which is an objective evidential fact, meaning that the fact of the matter happens externally to the participants. Inferential assumptions therefore are likely not to be justified by cultural assumptions.

It is indeed likely that cultural assumptions play a role in evidentiary procedures when there are internal or subjective evidential facts at stake. Yet, cultural assumptions may not *necessarily* influence subjective evidence, and they can also influence the justification of selection and evaluation of evidence that is considered ‘objective’ or ‘external’. Let me illustrate this with two brief examples. Take, first, a case of drug trafficking. A piece of evidence of the crime will refer to the quantity of drug that is found in the accused possession. With this information, an inference will be made as to whether to classify the case as a trafficking offence or as a possession for personal use. Although quantity seems quite an objective matter, it is well-known that racist bias against black people can influence the selection of what counts as evidence of trafficking or self-use of drugs. Second, consider a case of

medical malpractice where it is discussed whether the plaintiff gave her consent to a medical procedure. Although this evidence is based on a subjective factor, the consent of the victim, it is likely that previous consent of the plaintiff to other medical procedures, for example, will not be taken into account as relevant evidence of consent. In this case, it may be considered whether the victim has signed a contract, for instance, which is relevant evidence that is not justified by cultural assumptions.

My next question, therefore, is the following: why exactly are justifications tied to beliefs produced by social hierarchies epistemically suspect? Below I discuss an epistemic effect that makes social hierarchies likely unreliable sources of justification, namely epistemic partiality.

## EPISTEMIC PARTIALITY

Impartiality, alongside positivist ideals of rationality, legitimises evidence-based adjudication as means to solve legal disputes. It is expected that adjudication based on evidence responsiveness can assure a mechanism of resolution that does not give an *unfair* advantage to any party<sup>82</sup>. The ideal of impartiality is supposedly guaranteed by formal procedures establishing equality of treatment between the parties involved. That is, plaintiffs and defendants are expected to have equal opportunity to present evidence and be heard and contest their opponent's arguments. Impartiality is also grounded in the belief that a third person or body of persons can neutrally arbitrate a conflict, meaning that a neutral decision-maker will not have any interest in giving an advantage to one side of the dispute over the other and that their evaluation of the case is determined exclusively by the material facts and the legal basis of the case, rather than by any personal preferences. In short, impartiality usually means that conflicts will be addressed in a manner that is free from unfair, biased mechanisms towards any of the sides in the dispute.

As discussed above, feminist legal theories have heavily criticised legal systems for their unfair partiality. They have shown that procedures and rules of evidence are not substantially equal and that judges and jurors

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<sup>82</sup> Lucy (2005).

are influenced by culture, which involves social stereotypes and prejudices that give unfairly advantage to men and disadvantage to women. However, impartiality is not just a matter of fairness; it also carries an orientation towards determining the truth in a legal dispute.<sup>83</sup> Impartiality does not simply aim to ensure that those involved in conflicts have equal chances of being judged guilty or innocent. If this were the case, we would have adopted flipping coins to solve legal disputes. Impartial adjudications are meant to favour parties who *deserve* victory by virtue of material facts based on a legal system's requirements. This means that impartial adjudication systems aim to generate accurate merit-reflecting judgments orientated by truth-finding proposes<sup>84</sup>. Saying that rape adjudications lack impartiality thus means that rape verdicts often do not coincide with the factual truth.

In cases of rape, as it has been argued above, the justifications that factfinders hold up to align evidence received with verdicts as to innocence and guilt are accepted due to belief systems produced by hierarchies. The patterns of inference and assumptions that lead toward particular conclusions are biased insofar as they have formed in the context of the steep asymmetries of these social hierarchies. Going back to my exemplary case, the assumption that *it is likely that people in romantic relationships have consensual sex* is genetically distorted by the belief that women are passive beings that belong to their husbands. The hierarchy between men and women has generated and reproduced this thought. Actual consent is therefore indifferent to distinguish sex and rape as long as those involved are in a romantic relationship of some sort, because what is at issue when inferring the conclusion from the piece of evidence is not a violation against a woman's autonomy to decide and preside over her own body and sexuality, but instead whether or not she belongs to the man that has had sex with her.

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<sup>83</sup> Goldman (1999), pp.281, 282.

<sup>84</sup> I do not submit that truth is the only relevant value in adjudication. There are other values the law should attempt to, including cost, speed and nonviolation of constitutional rights, for example. In cases that adjudication violates certain rights, the entire procedure might be rejected even if it conduced legal actors to the factual truth.

In this way, the evaluation of evidence is tied to the very patriarchal structure that protects men's power position to rule over women. This ends up falsifying the putative facts in dispute. And favouring the party that is on the top (or closer to the top) of the hierarchy that self-justifies the belief it has engendered. In the legal context of rape prosecutions, the effect of such cultural assumptions inculcated in judgements about evidence is a distortion produced by hierarchies that make widely accepted the belief that a relationship between the two individuals counts as evidence of consensual sex. As a result, the inferential assumption disproportionately supports the conclusion that the sex has consented to and that the man is innocent. The advantage given to the accused is not a product of the material facts at issue but the product of a belief produced by a hierarchy based on gender.

This epistemic effect caused by the inferential assumption does not happen in the case of a suspected murder. In exemplary case B, the inference that *'to kill someone, it is likely that a person needs to touch the weapon that has inflicted death'* does not falsify the facts that need to be proven to give an advantage to one of the parties. It only offers one of the participants an advantage if evidence of fingerprints is found on the supposed murder weapon, which is a premise and a material fact in dispute, not an assumed belief.

My point, therefore, is that beliefs that are the product of social hierarchies are suspect insofar as they distort how social reality is understood and disproportionately disseminate the assumptions held by powerful groups<sup>85</sup>. Legally, this entails that groups at the top of these social hierarchies stand in a privileged position to defend their innocence in cases of rape prosecutions. The problem of partiality, therefore, is not simply that parties are not treated equally or that judges and jurors are influenced by prejudice as they reach their verdicts. Instead, it is an issue that distorts the facts in dispute. By looking at cases of rape, it is possible to see that beliefs produced by social hierarchies entail partiality insofar as they are epistemically defective. They generate unreliable justifications that distort how factual reality is addressed in legal fact-finding.

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<sup>85</sup> Aytac & Rossi (2022)

## CONCLUDING REMARKS

In this paper, I argued that consent-based rape laws are objectionable by virtue of their epistemically suspect legal framework, including rules and procedures of evidence in legal fact-finding. I claimed that some conditions that establish the materiality and relevance of evidence in rape cases are tied to justifications produced by unreliable sources, i.e., power hierarchies. Drawing from a radical realist approach, I attempted to reveal that power hierarchies are unreliable sources of justification because they produce epistemic partiality in the fact-finding process in rape cases.

My view is that this approach can contribute to debates that are concerned with the adequacy of rape laws based on consent. It turns the focus from ideal and non-ideal notions of sexual consent to considerations related to epistemic defects that are engendered in rape fact-finding. Instead of endorsing a priori ethical commitments about women's oppression, this approach brings reasons to object rape laws aligned to the epistemic scope of legal adjudication.

Although I present a specific argument examining rape fact-finding, this approach might be further explored in other legal cases. After all, justifications produced by hierarchies may also be mobilised in other judicial cases that rely on cultural assumptions to select evidence and infer putative conclusions about the facts in dispute. The radical realist analysis aims to enable a more effective contestation of evidentiary systems in rape cases, improving the epistemic quality of evidence procedures.

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