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CONTROLLING THE NARRATIVE: THE EPISTEMOLOGY OF HIMPATHY IN SEXUAL ASSAULT TRIALS¹

abstract

This paper develops an original approach for theorising about himpathy by examining the courtrooms' environment. Kate Manne (2018) defines himpathy as the excessive sympathy sometimes shown towards male perpetrators of sexual violence. While Manne discusses himpathy in connection with the moral and political problem of exonerating narratives and through the lens of testimonial injustice, we want to explore cases in which the testimony of the rape survivor is believed, but nevertheless misinterpreted due to conceptual resources that obscure women's experience of sexual violence. We argue that the concept of himpathy can be expanded and himpathy can be seen as an instance of hermeneutical injustice in which epistemic and emotional dysfunctions are deeply intertwined and sustained by forms of meta-blindness (Medina, 2013) that present the male standpoint as neutral. We then put this insight into practice to analyse how himpathy influences the constitution of testimonial evidence in Italian criminal trials for sexual violence. The aim is to shed proper light on the role of himpathy in presenting biased epistemological stances as impartial in judicial reasoning.

keywords

himpathy, hermeneutical injustice, meta-blindness, sexual violence, legal interpretation

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Content note: this article contains discussions of sexual violence.

1. Introduction

In recent years, feminist studies on the epistemology of testimony have shown how gender-based prejudices, rape myths and other sexist social meanings can lead to the downgrading of women's credibility who report gender-based violence.¹ The philosophical tool of epistemic injustice (Fricker, 2007) has been effectively adopted to analyse the criminal justice system's response to sexual assault and a growing literature is exploring the epistemic dysfunctions in the evaluation of rape survivors' testimony by legal institutions.² Acknowledging that credibility is fundamental to the legal treatment of sexual violence – as epitomised by the iconic “he said/she said” contest – in this paper, we aim to shed light on cases where, even if believed, the victim's testimony is nonetheless distorted by a prejudicial lens that makes judges blind to their own incapacity to gain an impartial perspective. Data on Italian prosecutions for sexual violence (ISTAT, 2018) suggests that these cases are quite common. Less than 9% of victims report having been raped, and only half of the cases under investigation proceed to trial.³ In cases that make it to trial, the victim's testimony is often accompanied by many other sources of evidence such as medical reports, eyewitnesses and sometimes even video footage of the assault. Nevertheless, evidence may still be considered insufficient or irrelevant and is sometimes twisted to the detriment of the complainant.⁴ In these cases, to investigate the epistemic processes that prevent impartial judgment more thoroughly, it could be useful to move beyond the problem of credibility assessment. Or rather, to take a step back.

Prominent accounts of sexism in legal discourse hold that, in gender-based violence

1 Data show that women, compared to men, suffer significantly higher rates of gender-based violence and that in these cases the perpetrators are more than 90% men (see https://www.interno.gov.it/sites/default/files/2023-12/il_punto_il_pregiudizio_e_la_violenza_contro_le_donne.pdf). For this reason, in this paper, we will focus on male violence against women. In particular, we will focus on the crime of sexual violence. Although we will not address this here, it is worth noting that LGBTQIA+ people suffer high rates of sexual violence and can also be targets of hate crimes. For relevant discussion, see for instance Viggiani (2015).

2 Among the most prominent works, Tuerkheimer (2017, 2021); Ferzan (2021); Lackey (2023).

3 ISTAT data show that in 2018 there were 6480 suspects of sexual violence and 279 suspects of gang rape. Of these, 47% and 43% of the cases were dismissed, respectively. See for reference: <https://www.istat.it/it/violenza-sulle-donne/il-percorso-giudiziario/procedimenti-definiti-in-procura>.

4 Respecting the presumption of innocence, we intend to be cautious in calling people who have been accused *guilty*. On the other hand, we acknowledge that some accused of crimes are presumed *more* innocent than others (Srinivasan, 2021, p.9). Adhering to the logic of the #MeToo movement, we consider necessary to qualify as “rape” what has been reported by the survivors as a *corrective* political gesture to support women who tend to be disbelieved and mistreated by the judicial system.

crime trials, the seemingly *impartial* posture of the law reflects a bias towards men.⁵This often happens unwittingly and is linked to the fact that the *male standpoint* (Harding, 1991) shapes the construction of social reality by presenting it as *natural*. Kate Manne's account of *himpathy* (2018, 2020) provides us with preliminary theoretical resources to explore the *effects* of such imposition of the male reality on a practical level. By looking at familiar and concrete cases, Manne defines *himpathy* as the excessive sympathy sometimes shown towards male perpetrators of sexual violence and theorises about the moral and political problem of "exonerating narratives" in connection with testimonial injustice (Manne, 2018, pp. 178-179). In this paper, we offer a supportive elaboration of Manne's analysis by drawing out the hermeneutical dimension of *himpathy*. The aim is to account for cases in which the accused are privileged over the victims even when it is difficult to find a proper affective investment towards them and when the testimonies of rape survivors are believed. Thus, while Manne theorises about the problem in relation to testimonial injustice and as an unequal distribution of sympathy, we aim to examine the phenomenon as an instance of hermeneutical injustice. As we will attempt to show, our reading of *himpathy* may help to better analyse the effects of this phenomenon on the interpretation and application of the law in the context of legal proceedings.

We will proceed as follows. After placing *himpathy* within a broader conceptual background related to the complex networks of oppression that run through our society (§2.1), we will seek to describe what role Manne gives to this notion in her view (§2.2). In so doing, we will take an Italian case of rape acquittal as an example to illustrate the difference between "'down girl' moves" (Manne, 2018, p. 68) and sympathy accorded to perpetrators of gender-based violence. The attentional focus, in the former cases, targets the victim to debase or guilt-trip her, while, in the latter cases, gives relevance to the man's interpretation of the events, obscuring hers. Using epistemic attentiveness as a key to understand *himpathy*, in (§3) we broaden Manne's analysis by emphasising the role of *himpathy* in maintaining hermeneutical insensitivities that wrong women as a group, and rape survivors in particular. We first outline Miranda Fricker's notion of *hermeneutical injustice* (2007) and expand it by drawing on Katharine Jenkins work on rape myths (2017, 2021) and on José Medina's work on *meta-blindness* (2013). We then argue that *himpathy* can be seen as an instance of hermeneutical injustice in which epistemic and emotional dysfunctions are deeply intertwined. In (§4), we put this insight into practice to analyse how *himpathy* can constrain the complainant's testimony at the trial stage. By observing the complainant's examination in an Italian trial, we argue that the assumption of an epistemic lens that reflects "his perspective" can lead the Court to ask questions that covertly give priority to the defendant's lived experience over those of the victim, thus failing to ensure an *impartial* hearing.⁶ Our analysis will show how these epistemic processes exacerbate imbalances between inadequate regard for survivors and excessive regard for offenders.

5 Cf., for instance, MacKinnon (1989); Pitch (1998); Ehrlich (2001).

6 In the Italian judicial system, the examination of the witness (*esame incrociato*) consists of three stages: direct examination (*esame diretto*), cross-examination (*controesame*) and re-examination (*riesame*). The direct examination (*esame diretto*) of the witness is conducted by the party that called that witness and aims to provide evidence of certain facts; the cross-examination (*controesame*) is carried out by the counterparties. Exclusively at this stage, questions that tend to suggest their own answer (so called *leading questions*) are allowed with the usual aim to undermine the credibility of the witness. When the cross-examination (*controesame*) is over, the party who called the witness is entitled to a reexamination (*riesame*), and the judge can ask further questions (see art. 496-499 C.P.C.)

2. What “himpathy” means

Within *Down Girl* and *Entitled*, Kate Manne introduces the term “himpathy” referring to the excessive sympathy that is shown towards men who perpetrate gender-based violence (Manne, 2018, p.197; 2020, p.36). This section briefly outlines the background in which the phenomenon operates (§2.1) and highlights its peculiarities (§2.2). If himpathy is the mirror image of misogyny (Manne, 2018, p.197), we need to understand what sets it apart from “*down girl*” moves, which are actions aimed at debasing women to support the patriarchal order.⁷ Analysing the difference between these phenomena, it will emerge that himpathy is more than an emotional investment. Indeed, although the original reading of the phenomenon characterises it as a form of sympathy, we will propose in (§3) to expand the concept to encompass cases where the phenomenon stems from hermeneutic insensitivities fuelled by the oppressive milieu in which we live.

2.1. Broadening the Picture

“Himpathy” refers to granting unwarranted sympathy to a man who has committed violence, in which there is an imbalance of power between perpetrators and victims. This kind of benevolence is mainly reserved for those who have characteristics that cast them as privileged within the social hierarchy: white, cisgender, heterosexual, able-bodied and wealthy men. Conversely, some individuals are positioned in a subordinate role based on characteristics attributed to them, whether real or imagined. In fact, people tend to classify individuals into social categories which can be linked to intricate webs of oppression. In order to understand how this phenomenon works, it is useful to open a brief parenthesis and stress the intersectional dimension of it. Oppressive structures are interdependent (Young, 1990), and forms of oppression vary depending on the circumstances and the social identity of those undergoing them (Crenshaw, 1991). Social identities and practices significantly impact our ordinary lives: they affect how we interact with each other and distribute power, opportunity, and prestige. The influence of these social meanings and practices lies in their reliance on a taken-for-granted, or uncontested, theoretical background that includes (pre)judgements and expectations of ourselves and others.⁸ For example, the division into binary social categories, such as man and woman (see Haslanger, 2012), tends to build interactions that produce and reproduce oppressive practices. Several thought-provoking works explore the relationship between social kinds, institutions and oppression.⁹

Moving back to sympathy towards the socially privileged, Manne identifies this phenomenon within societies at least historically bonded with patriarchy. Manne uses the term “patriarchy” without an explicit definition, suggesting that it indicates “a man’s world” (2018, p. 33), i.e., a system of oppression leading to women’s subordination. Anthropologist Sherry Ortner has developed an overt definition of patriarchy that helps to reason about the nature of the patriarchal order. This definition – which is compatible with Manne’s analysis¹⁰ – can help explain the landscape in which himpathy operates. Patriarchy, according to Ortner (2022), can be defined as:

7 The question of what should be understood as patriarchy is complex and not directly addressed by Manne. In (§2.1) we will propose as a supplement a more overt definition of what can be considered patriarchy, provided by the American anthropologist Sherry Ortner (2014; 2022).

8 It is important to bear in mind the difficulty of social actors not only in identifying the problematic nature of the social space they inhabit but also in contesting it. Social practices can be considered normative because they allow coordination between individuals, where coordination is not optional (Haslanger, 2018).

9 See, for instance, Haslanger (2012), Ásta (2018), Brännmark (2021), Burnam (2023), and Jenkins (2023).

10 Manne and Ortner both portray patriarchy as a heterogeneous reality that is organised in very different ways and contexts. Moreover, both identify a dual direction of reward and punishment in enforcing patriarchal norms. A difference between the two authors is that Manne seems to see patriarchy as oppressive only on the gender axis. In

a social formation of male-gendered power with a particular structure that can be found with striking regularity in many different arenas of social life, from small-scale contexts like the family, kin groups, and gangs, up through larger institutional contexts like the police, the military, organized religion, sports, the state, and more (p. 2).

Ortner uses the metaphor of military hierarchies to explain how this social formation works. Society is organised according to a chain of command where individuals accept the authority of superiors and have authority over subordinates, and where the central organising principle is an ideal “mutual support” (ibid., p.3). Violence is part of the control system, along with the pact of care and protection for the supporters of the order in force. One consequence is the frequent impunity of violence conducted against oppressed groups: the system protects its adherents by defending acquired positions of privilege, removing the responsibilities of the oppressors, and presenting them as *victims* of any legal, material and social repercussions they may face due to a subordinate’s accusation. When an agent who possesses these socially rewarded characteristics is accused by an individual who belongs to socially oppressed categories, it is easy for the victim’s testimony to be belittled, denigrated, or disbelieved. Even if actions of this sort can be conducted individually, they have a strong impact because they are rarely isolated phenomena. The individuals act with the support of the collective, a type of support that often manifests itself as a contribution to creating a social environment in which oppressive practices – such as rape – are tolerated.¹¹ This is even more damaging when it is the criminal justice system that grants sympathy to the abuser.

2.2. *The Peculiarity of Himpathy*

When a man is accused of a crime, it will likely cause a loss of respect and power. So, as we mentioned above, if the accusation comes from someone socially regarded as inferior to his social position, then his reputation has to be preserved. Himpathy allows one to sympathise with the abuser by defending him from the charge of having committed a crime. Manne (2018, 2020) distinguishes misogyny and himpathy by describing them as two sides of the same coin. While, in her account, misogyny is aimed at “bringing women down” by positively reinforcing women with punishments or rewards based on how well they adhere to prevailing gender norms,¹² himpathy helps defend men when they are “in trouble”. It is therefore theoretically possible to distinguish between (i) manifestations of misogyny designed to discredit, obscure and diminish victims of violence, and (ii) manifestations of sympathy granted to abusers.

To better clarify how to differentiate between (i) and (ii), we take as an example the case of an acquittal verdict published in 2015 by the Court of Appeal of Firenze (henceforth the case of Fortezza da Basso).¹³ The case concerns a gang rape involving six men, as the defendants, and a woman, as the complainant. This instance provides us with useful cues to distinguish between manifestations of the inclination to strike the victim by treating her as a guilty person and

contrast, Ortner argues that other types of oppression are also contained within the concept of patriarchy because male domination presupposes the desire to dominate on an absolute basis (Ortner, 2014; 2022).

11 For an account of rape as a sexual-political institution, see Card (1991).

12 Manne proposes to generally define misogyny “as the ‘law enforcement’ branch of a patriarchal order, which has the overall function of *policing* and *enforcing* its governing ideology” (Manne, 2018, p. 63). For an alternative account, see the elaboration of the concept of sexist ideology proposed by Hänel (2018).

13 This case became popular because this ruling in 2021 led to Italy being condemned by the European Court of Human Rights (ECHR), which sued the Court of Appeal of Firenze for upholding gender-based stereotypes and prejudices. The Italian judgment is available at <https://abbattoimuri.wordpress.com/2015/07/23/firenze-testo-sentenza-di-assoluzione-per-stupro-di-gruppo-alla-fortezza-da-basso/>.

demeaning her (i), and manifestations of sympathy directed towards the defendants (ii). Here, the rape was downgraded by the Court as a morally reprehensible sexual activity:

It only remains to examine the possible revocation of the consent that, *rightly or wrongly*, the group had evidently considered to exist during the party in Fortezza [...] everyone had misinterpreted her previous availability, steering her towards *group intercourse* that at the end *in its squalor had satisfied no one*, not even those who *had undertaken the venture* (emphasis added, our translation).¹⁴

Through a series of flawed reasoning expressed in sexist arguments, the defendants are portrayed as euphoric and tipsy boys who had “succumbed to instinct in a moment of superficiality”. Typically, himpathy is a concern for the accused’s well-being, their family, and their lost reputation. Here, the defendants are not presented as adults responsible for their actions, but as boys caught up in a moment of euphoria who were unable to restrain their “animal instinct” after the “promise” of sexual intercourse. The complainant, on the other hand, is portrayed as “an uninhibited and provocative individual” capable of defending herself.¹⁵ The description adopted seems to go against the evidence provided during the trial: the woman had been raped while visibly intoxicated, to the extent that she had been forcibly dragged to the scene where the assault took place because she was unable to stand on her legs.¹⁶ The sentence contains multiple attempts to blame the complainant by citing several irrelevant details about her sexual and “moral” conduct before and after the event. The acquittal exemplifies some characteristic aspects of the representations of rape and, among them, the tendency to overturn the narrative of abuse.

The presented narrative appears to indicate a reversal of roles between the abuser and the abused. As Manne argues, this is a recurring element in many cases of rape or domestic violence. The defendants are regarded with sympathy as victims of the consequences of the complaint, whereas the complainant is portrayed as the primary agent responsible for making them victims (cf. Manne, 2018, pp. 201-202). In several passages of the example under discussion, indeed, the complainant is presented as fully responsible for what she suffered. This representation can be seen as straddling the line between a “down girl” move and himpathy. This overlap is explained by the fact that in everyday reality the two practices often occur together. Social meanings, in fact, often lead to blaming women, overturning the position of aggressor and victim. The movement is twofold. When the focus is on the victim, the six rapists pass significantly into the background: it is the complainant, her behaviour and her past that are put under scrutiny. When the focus is on the abusers, the attention is on what the perpetrators must endure and their representation of reality, and their conduct is read with more indulgence. This aspect, straddling victim blaming and himpathy, allows us to see more clearly the subtle difference between the two phenomena: a shift in attentional focus, with radically different consequences for the subjects considered. The woman blamed; the man protected.

When such cases are reported in the media, there is often a tendency to sympathise with and protect the accused, rather than the victim. The abuser is no longer the one who

14 Original text: “Non resta che esaminare l’eventuale revoca del consenso che, *a torto o a ragione*, evidentemente il gruppo aveva ritenuto esistente durante la festa in Fortezza [...] tutti avevano mal interpretato la sua disponibilità precedente, orientandola ad un *rapporto di gruppo* che alla fine *nel suo squallore non aveva soddisfatto nessuno*, nemmeno coloro che *nell’impresa si erano cimentati*”. (p.18, emphasis added)

15 The quoted passages are taken from the judgment and are translated into English by us.

16 It should be noted that there were third-party witnesses who supported the victim’s claim of sexual violence.

committed the crime, but the one who has to face the accusations or the consequences of his conduct. This emotional investment in the accused is what Manne calls “himpathy”. However, concerning legal processes of this kind, it is possible to glimpse another level at which himpathy works. In (§3), we will propose an analysis of the epistemology of himpathy to test how we can connect this overlooked layer.

In Manne’s view, himpathy often radically distorts the framing of men’s violence against women. It “imaginatively transforms” (Manne, 2020, p. 41) presumptively gender-based violence into innocent acts of passion. As we have seen in (§2.2), the disposition to side with men against women who accuse them can lead to reframing sexual violence in terms of “just sex”. This imaginative work suggests that himpathy entails more than an affective investment. Indeed, it seems to be rooted in a biased social imaginary dense with distorting concepts which prevent the full recognition and legitimacy of perspectives other than the dominant ones. In this section, we collocate himpathy within the framework of hermeneutical injustice (Fricker, 2007) to shed light on its epistemic dimension. We first introduce the standard view of hermeneutical injustice (Fricker, 2007) and expand it drawing on Medina’s work (2013), and then argue that himpathy can be seen as an instance of hermeneutical injustice in which epistemic and emotional insensitivities and dysfunctions are deeply intertwined.

Epistemic injustice in general occurs when a subject is wronged in her capacity as a knower (Fricker, 2007). In Fricker’s view, hermeneutical injustice is a species of *discriminatory*¹⁷ epistemic injustice that happens when a subject who is already hermeneutically marginalised is thereby put at an unfair disadvantage when it comes to making sense of a significant area of her social experience.¹⁸ While acknowledging that there might be cases of “incidental” hermeneutical injustice, the guiding interest in theorising the epistemic dimensions of structural injustice led Fricker to cast the *systematic* forms of hermeneutical injustice as central (Fricker, 2007, p.147). Fricker’s classic example of hermeneutical injustice is drawn from Susan Brownmiller’s memoir (1990) and concerns the case of Carmita Wood, a woman who experienced what we now call *sexual harassment* in the workplace at a time before such a concept existed. Incapable of explaining the wrong done to her in a way that accurately represented its seriousness, Wood found herself unable to claim unemployment benefits after being compelled to quit her job. The difficulty Wood experienced in accurately conceptualising and communicating her experiences of sexual harassment due to the *lack* of an appropriate concept was a hermeneutical injustice.

While Fricker’s initial focus was on instances of hermeneutical injustice in which even the subject herself is unable to make sense of her own experience, in her subsequent work she argues that hermeneutical injustice is internally diverse to how widespread the failure of understanding is (Fricker, 2013, p. 1319). There can be cases in which the subject herself possesses the concepts to understand what is happening to her, but “owing to the collective hermeneutical gap about the wider community as a whole, still cannot expect to communicate it successfully to significant social agencies in order to describe or protest the experience” (ibid.). A rape victim, for example, may be clear about what she has suffered, but may find

3. Himpathy revisited: hermeneutical injustice and the problem of meta-blindness

17 By revisiting the broad idea of “epistemic injustice” and explaining how it can take either distributive or discriminatory form, Fricker has recently labelled both testimonial and hermeneutical injustice as forms of *discriminatory* epistemic injustice, to distinguish them from cases where someone is *wronged in their capacity as a knower* primarily because of distributive injustice. See Fricker (2013, 2017).

18 A person is hermeneutically marginalised when she belongs to a social group which does not have access to equal participation in the production of knowledge with respect to some significant areas of social experience. See Fricker (2007).

herself in a communicative exchange where her perspective is unintelligible, or otherwise not recognised by her interlocutor as a genuine epistemic counterpoint that deserves full consideration. Drawing on Fricker's work, Katharine Jenkins argues that hermeneutical injustice can also involve *faulty* concepts, such as a concept of rape that is explicitly defined and understood in a way that excluded marital rape,¹⁹ and *distorting* operative concepts that prevent the correct application of accurate hermeneutical resources, such as rape myths (Jenkins, 2017, 2021). Thus, for instance, a judge might have a correct belief about the wording of the law on rape, but rape myths such as "Rape is always perpetrated by strangers" or "Rape always involves overwhelming physical force" may lead her to apply an incorrect criterion for establishing whether rape was committed in a particular instance (Jenkins, 2021, p.45). In (§4), we will focus specifically on cases in which hermeneutical injustice is caused by distorting concepts.

In distinguishing hermeneutical injustice from deliberate forms of manipulation and concealment, Fricker advocates continued strictness about hermeneutical injustices being *unintentional*, while emphasizing the importance of recognising the role of our agency in sustaining them and stressing that non-deliberateness does not entail non-culpability (Fricker, 2007, 2013, 2017). Whereas Fricker is primarily interested in the subject who suffers hermeneutical injustice, we are interested here in shifting the focus to the agents who sustain and reinforce it, albeit unintentionally. Jose Medina's work on the problem of *meta-blindness* (Medina, 2013) provides us with a useful philosophical tool.

By drawing on classic authors (i.e., W.E.B. Du Bois and Franz Fanon) and contemporary ones (i.e., Linda Alcoff and Charles Mills) who talk about insensitivities in terms of blindness, Medina defines *meta-blindness* as "the inability to recognise and acknowledge one's limitations and inabilities" (Medina, 2013, p.76), that is, as the difficulty typically faced by hermeneutically privileged knowers in realising and appreciating the limitations of their horizon of understanding. Whereas a metaphorically *blind* person may be aware that there are aspects of the epistemic world that are beyond her grasp, the *meta-blind ignoramus* assumes that there is nothing else to perceive beyond what she can see from the – typically dominant – perspective adopted. Epistemic arrogance, laziness and closed-mindedness contribute to this pronounced *insensitivity to insensitivity* and constitute obstacles to the process of knowledge acquisition (Medina, 2013, p.76). In Medina's view, hermeneutical injustices are rooted in forms of meta-blindness that are both individual and collective: the social imaginary renders certain relevant social experiences unintelligible and, as a result, subjects become meta-blind to their lack of *empathy* and *inability to trust* when it comes to those experiences (Medina, 2013, p.82). Thus, the problem of meta-blindness is not only cognitive but also emotional, since it involves a failure to relate to socially disadvantaged subjects affectively. Medina's toolkit enables us to reveal the other side of the coin: the agent who inhabits without resistance an *unjust* perspective (such as a sexist, racist, ableist, or classist perspective) tends to sympathise with privileged subjects whose experiences are intelligible and publicly recognised as significant.

Within this framework, *himpathy* can be seen as an instance of hermeneutical injustice in which epistemic and emotional insensitivities and dysfunctions are deeply intertwined. The excessive sympathy granted to certain men who abuse women is often unintentional and is caused by the actualisation of the systematic hermeneutical marginalisation of women which makes the male standpoint the only one that matters. Through the prejudicial lens provided by sexist social meanings, the perspective of the aggressor becomes the most

¹⁹ Until the 1970s, in most European and North American countries marital exception rule allowed the husband the right to non-reciprocal sexual domination.

intelligible, credible and authoritative one, making it difficult for policemen, prosecutors, judges and other significant social agents to genuinely engage with epistemic counterpoints. In other words, *meta-blind* individuals will systematically read the facts without actively searching for more alternatives than the readily accessible ones, thus failing in evidentiary exploration and unbalancing their “*feeling of trust*” (Fricker, 2007, p. 76) in favour of the accused.²⁰

While Manne’s examples of himpathy concern subjects who enjoy most, if not all, major forms of privilege and who are benevolently perceived as “good guys” (Manne, 2018, p.179), our elaboration of Manne’s analysis permits us to include cases where himpathy stems from *hermeneutical insensitivities* (Medina, 2013) that privilege men *in general*, and that indirectly favour over complainants even those accused of gender-based violence for whom no excessive sympathy is felt. The integration that we are suggesting can be used to shed light on instances of himpathy in institutional settings such as the courtroom, where it is common to see socially disadvantaged subjects under prosecution,²¹ and where sympathy towards the accused is in some respects *a priori* embodied in the law and implicitly embodied in the interpretative criteria adopted to apply it.²² In these cases, himpathy results from *institutionalised* epistemic methods or processes based on structural gender-based prejudice, and the judge may unintentionally prioritise the experience of the accused even though she feels no particular sympathy towards him.²³ The last section applies this insight to explore the phenomenon of himpathy in gender-based violence crime trials. While (§2.2) analyses himpathy by looking at the reasons for judgment, in (§4) we will look at the way it operates during the examination of the complainant. By offering one example selected from a recent legal proceeding for sexual and domestic violence, we will attempt to show that himpathy can lead the Court to ask questions that implicitly give systematic priority and relevance to the defendant’s experiences and feelings over that of the complainant, thus precluding an impartial hearing.

In (§3), we have stated that himpathy entails more than an affective investment. Working within the framework of epistemic injustice, we expanded Manne’s analysis to account for the structural hermeneutical inequalities and dysfunctions that shape our reasoning along multiple axes of oppression. Drawing on Medina’s work, we also argued that what makes himpathy particularly pernicious is the fact that the epistemic perspective assumed – usually the male, white, heterosexual, able-bodied, and wealthy one – is inhabited by meta-blind agents that regard it as *impartial*. In this section, we put this integrated understanding of himpathy into practice to show what aspects it can help enlighten. To this end, we offer an example taken from a judicial proceeding held in 2023 in the Court of Milano. While in the case of Fortezza da Basso, we looked at the reasons for the acquittal, here we investigate the way himpathy directs the devising of the questions asked to the complainant during the examination. We focus on the way the reported rape is defined at the trial stage – and thus juridically qualified – attributing centrality to the sexuality of the accused, and the sexual pleasure he experienced at the time of

4. Himpathy in the Courtroom

20 Note that our analysis of himpathy is fully compatible with Fricker’s account of identity-prejudicial stereotype, according to which the (typically epistemically culpable) resistance to counterevidence is related to an ethically bad affective investment (Fricker, 2007, p.35).

21 For an account of how race-based prejudice contributes to the conviction of innocent people, see Taslitz (2008). See also Lackey (2020, 2023).

22 On sexism embedded in the Italian law on gender-based violence, see Pitch (1998). While a critique of the explicit legal definition of sexual violence is needed, in this paper we focus on the operative concepts that implicitly shape judicial practices.

23 See Fricker (2023) for a critique of institutionalised epistemic vices.

the act. This further example will allow us to display how himpathy can operate in courtrooms by obstructing the offering and uptake of testimony.

We consider it important to look at the trial stage because if himpathy affects the hearing, it risks undermining the victim's testimony, which under the Italian law counts as *evidence* (see, Di Nicola Travaglini & Menditto, 2020).²⁴ Institutionalised power imbalances in the legal setting make this risk even higher (Ehrlich, 2001). In the context of the courtroom, epistemic negotiations are constrained within a codified, asymmetrical and strategic conversational context in which the judge officially wields epistemic and practical authority over all trial parties. This authority gives the judge the right to lead the examination of the witness, and to choose – in principle, within the limits of the law – what counts as evidence and what as irrelevant, what counts as a crime and what can be dismissed.²⁵ When himpathy penetrates the discursive arena of gender-based violence crime trials, this 'super-power' (Fricker, 2023, p.14) can lead to favour the accused over the victim. With this in mind, let us now turn to the example.

The following fragment is taken from the direct examination of the complainant. Here, the judge just intervened to ask the witness to describe in detail how she used to be abused by her husband. The declarant responded by reporting the brutal mistreatments she underwent throughout ten years of domestic violence. She then described the dynamics of one of the sexual assaults that occurred by saying that the defendant, on that occasion, had torn off her clothes, pushed her into bed, and raped her by strangling her until she passed out. Immediately after hearing the complainant's (henceforth C) words, the judge (henceforth J) asks:

J: Excuse me, but I have to ask, *were you penetrated?*

C: Yes.

J: He entered inside you. *And did he come?*

C: What?

J: *Did he come?*

C: No.

J: *The act was only done but not brought to completion.* But when did this happen, after he put his arm around your neck or before?

[...]

J: So everything else happened after you two had this *sexual intercourse which was not completed but started* (emphasis added, our translation).²⁶

In this exchange, the judge asked a series of questions aimed at verifying the quality of the act of sexual violence perpetrated, ending up by qualifying sexual violence according to the

²⁴ Cf. fn. 6.

²⁵ For a pragmatic analysis of sexist ideology in Italian crime trials for gender-based violence, see Volta (2024).

²⁶ This excerpt is taken from the hearing transcripts, which were held in the Court of Milan in 2023. For privacy reasons, we do not provide the references of the charge and the hearing transcripts at issue. Original text:

"J: Mi scusi, ma glielo devo chiedere, *lei è stata penetrata?*

C: Sì.

J: Lui è entrato dentro di lei. *E lui è venuto?*

C: Come?

J: *È venuto lui?*

C: No.

J: *Soltanto l'atto è stato fatto ma non portato a compimento.* Ma questo quando è successo, dopo che le ha messo il braccio al collo o prima?

[...]

J: *Quindi tutto il resto è successo dopo che voi avete avuto questo rapporto sessuale non completo ma iniziato.*" (Emphasis added).

sexual satisfaction of the defendant. The judge, facing the accused's failure to reach orgasm, reframes sexual violence in terms of *incomplete sexual intercourse*, adopting interpretative criteria that unwarrantedly diverge from the legal category of "sexual acts".²⁷ Therefore, the Court downplays the act of sexual violence by implicitly defining it as sexual intercourse participated in by both ("you two had this sexual intercourse").

This example can be seen as an instance of hermeneutical injustice because the judge seems unable to see the epistemic saliences owing to sexist attitudes toward rape rooted in structural prejudice (Jenkins, 2021). Failing to fully grasp the aggravated sexual assault reported by the complainant, the judge verifies the quality of the act by adopting rape myths under which sexual violence always involves sexual penetration, which in turn counts as "complete" only when the man reaches orgasm. These wrong operative concepts – which stem from a definition of *rape-as-forced-penetration* that used to be embodied in Italian law (see ex. art. 519 of the Italian Crime Code) – lead the judge to consider the sexual satisfaction of the accused at the time of the rape as significant. As a result, the focus is shifted from the violation of the victim's sexual freedom to the sexuality of the aggressor and the way it manifests itself. Himpathy can be seen here in the *assumption of a male perspective* that systematically privileges the accused defining rape precisely from *his* sexual fulfilment. What makes this perspective epistemically powerful is its appearance of *objectivity* within the context of the trial. The judge acts blind to the fact that her hermeneutical capacities are seriously compromised by a sexist conception of rape and – confident in the impartiality of her perspective – focuses on aspects that should be deemed irrelevant. This downplays the intensity of the harm ("The act was only done but not brought to completion").

By looking at the hearing transcripts of the example case, it can be noted that himpathy is enacted regardless of any excessive emotional investment towards the defendant. Indeed, while in the gang rape case discussed above the affective dimension of this phenomenon comes to the fore (see §2.2), in this latter example himpathy seems primarily operative at the epistemic level. This aspect allows us to apply our broadened conceptualisation to cases where oppression works on multiple axes impacting both parties. For example, when both the defendant and the complainant are discriminated against because of racist or classist prejudices, the defendant could be nevertheless considered more reliable – or worthy of concern – than the complainant. This is in line with Manne's commitment to consider the experiences of more marginalised individuals. In our view, through the lens of hermeneutical injustice himpathy can be defined as a possible symptom of the hermeneutical gaps sustained by unjust socio-political conditions and structures that privilege men, thus revealing its ethical and political as well as epistemic side.²⁸ This again follows Manne's project of highlighting the structural and political dimensions of misogyny.

Himpathy is one matrix of the asymmetrical distribution of emotional attachment and hermeneutical sensitivity. It is the emotional and epistemic expression of a patriarchal order aimed at preserving male supremacy and protecting men who have a social position that intersectionally benefits them (see §2.1). Whereas misogynous "*down girl*" moves aim to keep women "in their place" (Manne, 2018), practices of himpathy further shift power towards men

27 In the Italian legislation, the distinction between "carnal knowledge" (*violenza carnale*) and "violent libidinal acts" (*atti di libidine violenti*) was abolished in 1996 with the introduction of a new law that aimed to shift the focus from the "concupiscence" of the offender to the violation of the sexual sphere of the victim and to reduce the risk of damaging the latter's dignity at trial. Currently, the legal notion of "sexual act" (*atto sessuale*) includes any bodily contact, even if extemporaneous, that invades the sexual freedom of a person (see Art. 609-bis of the Italian Crime Code; see also Di Nicola Travaglini & Menditto, 2020, p. 225).

28 For a political account of epistemic injustice, see Fricker (2013, 2017). See also Medina (2013).

by bringing disproportionate attention to the accused in defining the *reality* of gender-based violence. In this way, they present their epistemological stance as impartial, objective, and rational. It is precisely the blindness to the partial stance taken that makes this perspective so harmful and unjust: when himpathy affects the epistemic processes of the trial, meta-blindness can lead the judge to interpret the *critical openness* to the complainant's perspective as an *unfair disadvantage* for the accused. From the analysis we suggested in this paper, himpathy seems to act in a way that makes us feel "from the inside, like simply being fair to the men who stand accused, rather than being unfair to the women who are making these accusations" (Manne, 2018, p.219). The upshot of this disposition is a culture of impunity that easily brings those who suffer sexual violence – and gender-based violence more broadly – to not report, to retract or to consider the trial as a losing battle.

5. Conclusions

The concept of "himpathy" was introduced by Manne to identify the excessive affective investment towards men who commit sexual violence. This paper aims to provide a more comprehensive analysis of himpathy and to broaden its margins to include cases where "excessive sympathy towards men" is not the sole directive of this phenomenon.

After placing himpathy within a broader conceptual background and defining what role Manne gives to this notion (§2), we pointed out some nuances of the phenomenon that the original formulation does not fully capture. Using epistemic attentiveness as a key to understand himpathy, in (§3) we argued that this phenomenon cannot be reduced to its emotional manifestation and showed that it could be usefully analysed through the lens of hermeneutical injustice. In (§4), we put this insight into practice and analysed how himpathy can constrain the complainant's testimony at the trial stage, even when the emotional engagement is not so impactful. We used an example case to illustrate how himpathy leads to a condition of meta-blindness, where taking "his perspective" is deemed to be fair to both parties.

Our account has certain benefits. By examining institutional contexts as proposed, we can delve deeper into the political and social implications of himpathy. We can explore how structural prejudice confers epistemic prominence to unjust social meanings, and we can bring clarity and insight when it comes to women who fail to successfully communicate their mistreatment to significant institutions, such as Courts. Furthermore, by moving the emotional dimension to the sidelines, we can gain a deeper understanding of the impact of himpathy in situations where oppression obstructs the ability to connect with the abuser on a sympathetic level.

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