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Corrective Rape: An Extreme Manifestation of Discrimination and the State's Complicity in Sexual Violence

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growing phenomenon in South Africa,⁸ cases are being increasingly reported in various countries, including: Thailand,⁹ Zimbabwe,¹⁰ Ecuador,¹¹ Uganda,¹² Jamaica,¹³ and India.¹⁴ What is more alarming than the sheer prevalence of this act of violence, however, is the failure of the legal system to provide an adequate remedy to the survivors.

When Simelane's murderers were brought to trial, no mention of a hate crime was made.¹⁵ The judge did not want to use the word "lesbian," and instead asked the prosecutor, "[i]s there another word that you can use instead of that one?"¹⁶ Though the judge convicted two of the five men responsible for Simelane's death, he said that Simelane's sexual orientation had "no significance" in the rape or murder.¹⁷ During their sentencing, her killers laughed.¹⁸

It is easy to assume that corrective rape is something that happens only in countries that are characterized as third-world, "less civilized," war torn, steeped in violence, or where homosexuality is illegal or discrimination against the LGBT community is accepted. However, this assumption ignores the sexual violence that has happened and continues to happen around the world in apparently civilized countries. For example, South Africa has some of the most progressive constitutional protections of human rights for LGBT people in the world.¹⁹ Yet, the rates of gender violence in South Africa are among the highest in the world.²⁰

Likewise, in the United States, the actual causes of corrective rape are usually ignored or de-emphasized,²¹ thereby perpetuating the rates of sexual violence. Sexual violence is often framed in terms of the personal

8. Andrew Martin et al., *Hate Crimes: The Rise of 'Corrective' Rape in South Africa*, ACTIONAID, Mar. 2009, at 1, 8.

9. Miseses, *supra* note 1, at 2.

10. Brown, *supra* note 4, at 47.

11. Irene Caselli, *Ecuador Clinics Said to 'Cure' Homosexuality Stir Debate*, CHRISTIAN SCIENCE MONITOR, Feb. 10, 2012, at 1.

12. Brown, *supra* note 4, at 47.

13. *Id.*

14. Jessamyn Bowling et al., *Perceived Health Concerns Among Sexual Minority Women in Mumbai, India: An Exploratory Qualitative Study*, 18 CULTURE, HEALTH, & SEXUALITY 826, 826 (2016).

15. Victoria A. Brownworth, *Op-ed: The Other Ex-Gay 'Therapy'*, ADVOCATE (July 10, 2013, 6:15 AM), <https://www.advocate.com/commentary/2013/07/10/op-ed-other-ex-gay-therapy?page=full> [<https://perma.cc/3C2Y-MTH6>].

16. *Id.*

17. Martin, *supra* note 8, at 10.

18. Brownworth, *supra* note 15, at 15.

19. Brown, *supra* note 4, at 45.

20. Julie Goldscheid, *Gender Violence and Work in the United States and South Africa: Parallel Processes of Legal and Cultural Change*, 19 AM. U. J. GENDER SOC. POL'Y & L. 921, 924 (2011).

21. *Id.* at 952.

dynamics of a relationship, rather than as a problem deeply rooted in traditional gender and sexual orientation norms.²² Americans seem to have a distorted, de-politicized view of rape, one that fails to include anyone but heterosexual women.

However, corrective rape is political, systemic, group-based violence.²³ In this Note, I will demonstrate that corrective rape is defined by the distribution of power in society, and not by individualized relationship dynamics or personal antagonism between the rapist and victim. Section II addresses the populations that face the threat of corrective rape, including lesbians, asexual women, and transgender men, and discusses the reasons behind each group's victimization. In Section III, I discuss the ways in which corrective rape is a violation of bodily autonomy and sexual identity, which ultimately leads to a lack of true societal equality. Section IV examines the current legal response to corrective rape, such as the failure to prosecute corrective rape as a hate crime in the majority of cases. In Section V, I argue that states need to provide a stronger legal response that protects victims of corrective rape and adequately addresses their legal needs. I end by proposing a threefold response which includes: 1) enacting hate crime statutes in the states that have not yet done so and strengthening the legislation in states that have; 2) recognizing corrective rape as a distinct hate crime; and 3) providing legal mechanisms that would compel prosecutors to charge corrective rape as a hate crime.

II. POPULATIONS FACING THE THREAT OF CORRECTIVE RAPE

A. LESBIANS

Lesbians are the population most prominently subjected to corrective rape. Lesbians are raped in ways that are intended to be punitive or "curative" because "they undermine antiquated notions of masculinity and heterosexuality and refuse men's proposals and advances."²⁴ Corrective rape is a weapon used by men to teach lesbians how to be "real" women.²⁵ It acts as a reminder to lesbians, and others who choose not to follow the patriarchal and heterosexual behavioral norms, that they will be punished

22. Goldscheid, *supra* note 20, at 952.

23. Clare McGlynn, *Rape as 'Torture'?* Catharine MacKinnon and Questions of Feminist Strategy, 16 FEMINIST LEGAL STUD. 71, 75 (2008).

24. Amanda Lock Swarr, *Paradoxes of Butchness: Lesbian Masculinities and Sexual Violence in Contemporary South Africa*, 37 SIGNS: J. OF WOMEN IN CULTURE AND SOC'Y 961, 962 (2012).

25. Victoria A. Brownworth, *Lesbians and Rape: Another Coming-Out Story*, HUFFINGTON POST (July 23, 2013, 9:30 AM), https://www.huffingtonpost.com/victoria-a-brownworth/lesbians-and-rape-another-coming-out-story_b_3616916.html [<https://perma.cc/CS7A-VXDR>].

for failing to conform.²⁶ Any kind of “otherness” will be extinguished and corrected, and because lesbians epitomize the “other” in society, they bear the brunt of this punishment.

Corrective rape against lesbians is not perpetrated solely because they are identified as not following sexual orientation norms; being “read” as lesbian and gay is primarily about interpreting gender presentation.²⁷ Therefore, sexual orientation-based discrimination is largely based on the policing of gender.²⁸ Corrective rape is a punishment for the gay woman’s perceived violation of both heteronormative masculinity and femininity in an institutionally heterosexual society.²⁹ In this way, the heteronormative gender structure can single out anyone who “resists heterosexuality’s configuration of masculinity/femininity, perhaps by failing to participate (or participate correctly) in the social economy of (hetero) sexual desire.”³⁰ In fact, perpetrators of homophobic violence themselves even admit that their actions were not based on their phobia or hatred of homosexuality or of gay or bisexual people, but instead on targeting their victim’s violation of gender.³¹

Butch lesbians in particular are frequently the victims of violent physical attacks and rape.³² Their expression of their sexual orientation is the most visible, and therefore most likely to be considered to undermine masculinity and claims to male bodies.³³ Butch lesbians, known for the strength and power communicated through their expression of their sexual orientation, paradoxically become the most vulnerable because of “the tripartite threat they pose: to heterosexuality (through their relationships with women), to gender norms (through their expressions of masculinities and disregard for femininities), and to sex (through challenging expectations surrounding somatically female bodies).”³⁴

Because “the lesbian body is a body out of control in a heteropatriarchal sense,”³⁵ corrective rape is the attempt to bring these bodies back under the control of society, governed by heteropatriarchal rules. Corrective rape may be the most drastic attempt to accomplish this

26. Susan Hawthorne, *Ancient Hatred and Its Contemporary Manifestation: The Torture of Lesbians*, 4 J. OF HATE STUD. 33, 47 (2005-06).

27. CJ Deluzio Chasin, *Making Sense in and of the Asexual Community: Navigating Relationships and Identities in a Context of Resistance*, 25 J. OF COMMUNITY & APPLIED SOC. PSYCHOL. 167, 170 (2015).

28. *Id.* at 170.

29. *Id.*

30. *Id.* at 170–71.

31. *Id.*

32. Lock Swarr, *supra* note 24, at 962.

33. *Id.*

34. *Id.* at 963.

35. Hawthorne, *supra* note 26, at 47–48.

goal, but there are similar, subtler measures carried out by likeminded perpetrators. For instance, the creation of lesbian pornography takes a private romantic relationship, otherwise inaccessible to men, and co-opts it for a profitable commercial enterprise.³⁶ For many lesbians, this kind of pornography is humiliating because it is the intimate made public. Meanwhile, when this kind of pornography features heterosexual women posing as lesbians, it fetishizes gay women and reduces them to things that are only wanted for consumption by a privileged group. It is appropriate “of lesbians who are tortured because they are lesbians; of lesbians who have been pushed off buildings in Iraq, falling to their death, because they are lesbians; of lesbians who are beaten and raped because they are lesbians; of lesbians who are whipped, whose hands are amputated, who are forced into unwanted marriages because they are lesbians; and of lesbians in most countries who are silenced because they are lesbians.”³⁷ Lesbian pornography ignores this reality, preferring instead to represent the “lesbian feminized, a lesbian who has moved back into the category of women.”³⁸ As a result, “the lesbian comes back into the control of the patriarchal framework of naturalized women and men.”³⁹

Because lesbian bodies are “out of control” in this way, the perpetrator of corrective rape dispenses all culpability by perceiving the victim to be the one at fault.⁴⁰ His conscience is clear because, in his mind, it was her choice to violate gender and sexual orientation norms.⁴¹ The rapist’s psychological stance is that “if only she would do what is best for her, she would not have to suffer. In fact, he will help her by raping her, by showing her what a real man can do for her, how what she needs is ‘a good fuck, from real men.’”⁴² The rapist believes that his act of corrective rape is not only the victim’s fault because if she chose to behave differently, she would not have to suffer, but also that the act is in the victim’s interest.⁴³

The trauma that rape victims experience is often intensified for lesbians. Victoria Brownworth, the first out lesbian to have a column in a daily newspaper, shared her experience in “Lesbians and Rape: Another Coming-Out Story.”⁴⁴ She stated that “revealing what it means to be a lesbian violated by a man is almost unbearable. It was certainly unbearable

36. Hawthorne, *supra* note 26, at 42.

37. *Id.* at 43.

38. *Id.* at 42.

39. *Id.*

40. *Id.* at 48.

41. *Id.*

42. Consuelo Rivera-Fuentes & Linda Birke, *Talking With/In Pain: Reflections on Bodies Undue Torture*, 24 WOMEN’S STUD. INT’L. F. 653, 663 (2001).

43. *Id.*

44. Brownworth, *supra* note 25.

for me.”⁴⁵ Being raped forces lesbians to repeatedly out themselves to others, oftentimes before they are ready to do so. Questions by doctors, police, and prosecutors revolve around heterosexual sex, “to which you must answer, ‘No, I’m a lesbian’ each time.”⁴⁶ In addition, because lesbians are less likely than heterosexual women to be using birth control methods, they are especially likely to become pregnant when raped.⁴⁷ Thus, many lesbians face the trauma of dealing with a pregnancy that is the result of rape, in addition to the trauma of being a victim of rape and a victim of a hate crime.

The trauma of rape is also intensified for lesbians because of the ensuing process of reclaiming their sexuality. Brownworth described reclaiming her sexuality after she was raped twice as “a long and arduous struggle” because “sex is reframed through the grotesque prism of rape.”⁴⁸ She states that, “How you touch another woman will never [be] the same. How you allow yourself to be touched may never be the same.”⁴⁹

Sexualized violence against lesbians tears apart the social fabric.⁵⁰ Even those who are not personally affected by corrective rape will nevertheless feel the effects of the dehumanizing treatment of lesbians in society and of the subsequent demoralization of the culture. If corrective rape against lesbians remains a matter of indifference, then every individual’s civil rights remain in jeopardy.⁵¹

B. ASEXUAL WOMEN

Another population that is subjected to corrective rape is asexual women.⁵² Asexuality—an identity for a person who does not experience sexual attraction⁵³—is an emerging concept in our society. Though it has become increasingly normalized throughout the last few decades to have an open attitude around sexuality,⁵⁴ discussion of asexuality has been largely ignored until recently.⁵⁵ Research and discourse on asexuality have been naturally overshadowed by the more prominent and more common sexual

45. Brownworth, *supra* note 25.

46. *Id.*

47. Ruthann Robson, *Lesbians and Abortion*, 35 N.Y.U. REV. L. & SOC. CHANGE 247, 260 (2011).

48. Brownworth, *supra* note 25.

49. *Id.*

50. Hawthorne, *supra* note 26, at 44.

51. *Id.* at 51.

52. Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303, 368 (2014).

53. *Overview of Asexuality*, THE ASEXUAL VISIBILITY & EDUC. NETWORK, <https://www.asexuality.org/?q=overview.html> [<https://perma.cc/CEW4-JFES>].

54. Amy Kraft, *Changing Attitudes About Premarital Sex, Homosexuality*, CBS NEWS (May 5, 2015 4:10 PM), <https://www.cbsnews.com/news/changing-attitudes-about-premarital-sex-homosexuality/> [<https://perma.cc/WJV6-6RVK>].

55. Emens, *supra* note 52, at 347.

orientations—heterosexuality, homosexuality, and bisexuality.⁵⁶

An unfortunate consequence of this inattention is that we have overlooked the harm and threats that an asexual person faces. For instance, one would not expect that an asexual individual would be the target of prejudice and discrimination.⁵⁷ After all, asexuality is marked by the absence of something (i.e., sexual attraction, and often sexual behavior), and has thus been characterized as “the least visible sexual minority.”⁵⁸ In addition, asexual individuals pose no sexual risk, they do not flaunt their participation in deviant practices, they do not violate religious prohibitions in the way homosexual or bisexual individuals have been condemned for, and, as a group, they do not require any kind of costly accommodation.⁵⁹ Taken together, these facts would instinctively lead one to conclude that asexual people would not be the target of animus, hostility, bias, and discrimination.

However, “outgroup hate” plays a central role in human beings’ social identities.⁶⁰ In a 2012 study, researchers revealed strikingly strong bias against asexual people.⁶¹ Predictably, attitudes towards homosexual, bisexual, and asexual people were more negative than attitudes toward heterosexual people.⁶² The more groundbreaking result was that within sexual minorities, asexual people were evaluated most negatively of all groups, falling behind both homosexual and bisexual people.⁶³ Further, of all the sexual minority groups studied, asexual people were perceived to be the least “human;” they were attributed with significantly fewer human nature traits and were perceived to experience fewer human emotions.⁶⁴ Asexual people are dehumanized by being characterized as both “machine-like” and “animal-like.”⁶⁵ Because sex is so much a part of non-asexual peoples’ lives, and because of the pervasive sexualization of our society, those who reject sex are viewed as less than or not even human.⁶⁶

As attention has increased towards asexuality, animosity towards

56. Emens, *supra* note 52, at 347.

57. *Id.* at 366.

58. Amy Sohn, *Shifting to Neutral: No interest in sex is nothing to get worked up about*, NEW YORK: NEWS & POLITICS (Mar. 7, 2005), <http://nymag.com/nymetro/nightlife/sex/columns/mating/11243/> [<https://perma.cc/8SRT-MMPX>].

59. Emens, *supra* note 52, at 366–67.

60. Michael T. Parker & Ronnie Janoff-Bulman, *Lessons from Morality-Based Social Identity: The Power of Outgroup “Hate,” Not Just Ingroup “Love,”* 26 SOC. JUST. RES. 81, 93 (2013).

61. Cara C. MacInnis & Gordon Hodson, *Intergroup Bias Toward “Group X”: Evidence of Prejudice, Dehumanization, Avoidance, and Discrimination Against Asexuals*, 15 GROUP PROCESSES & INTERGROUP REL. 725, 725 (2012).

62. *Id.* at 731.

63. *Id.*

64. *Id.* at 731–32.

65. *Id.* at 734.

66. Nancy Leong, *Negative Identity*, 88 S. CAL. L. REV. 1357, 1394 (2015).

asexual people has increased correspondingly.⁶⁷ Beyond discrimination, the most extreme form of this animus is sexual violence designed to eradicate asexuality.⁶⁸ Asexual activist Julie Decker reported that sexual harassment and violence, including corrective rape, is disturbingly familiar to the asexual community.⁶⁹ She stated that people who carry out corrective rape do so because “they believe that they’re just waking us up and that we’ll thank them for it later.”⁷⁰ Decker has received death threats and numerous comments that she “just needs a ‘good raping’”—leading her to conclude that when some people hear that a person is asexual, they see it as a challenge.⁷¹ In recounting the sexual assault she personally experienced, Decker said that after speaking extensively about her asexuality with a friend, he tried to “fix” her by sexually assaulting her.⁷² She recalled that he tried to kiss her, and when she rejected his advance, he pushed her against the door, licked her face, and yelled, “I just want to help you!”⁷³

Similar instances of corrective rape are seen in case law. For example, in *State v. Dutton*, the complainant had approached a pastor to discuss her emotional and psychological issues in counseling, including low self-esteem, suicidal thoughts, grief over her daughter’s death, and her eating disorder.⁷⁴ Though she had stated her desire to be asexual and to keep their relationship platonic, the pastor persisted in discussions about sex, and told her that he would be “‘working’ with her on her sexuality.”⁷⁵ He subsequently engaged in criminal sexual conduct with her multiple times, asserting that this sexual conduct was “consistent with her treatment” because it would “remove her inhibitions about sex.”⁷⁶ He told her that sexual contact would “set her free” and that he knew that she was “hung up” sexually.⁷⁷ Though the pastor claimed he had a right to engage in consensual sexual activity with another adult, the complainant was a counseling patient unable to withhold consent to sexual contact by her therapist.⁷⁸

67. Leong, *supra* note 66, at 1382.

68. *Id.*

69. Dominique Mosbergen, *Battling Asexual Discrimination, Sexual Violence and ‘Corrective’ Rape*, HUFFINGTON POST (June 20, 2013, 8:57 AM, updated Dec. 6, 2017), https://www.huffingtonpost.com/2013/06/20/asexual-discrimination_n_3380551.html [<https://perma.cc/XE5D-CUJ7>].

70. *Id.*

71. Mosbergen, *supra* note 69.

72. *Id.*

73. Chris Weller, *What It’s Like to Be Completely Asexual*, BUSINESS INSIDER (Sept. 21, 2015, 9:37 AM), <http://www.businessinsider.com/what-its-like-to-be-asexual-2015-9> [<https://perma.cc/E23Q-JA3M>].

74. *State v. Dutton*, 450 N.W.2d 189, 191 (1990).

75. *Id.*

76. *Id.* at 191–192.

77. *Id.* at 192.

78. *Id.*

C. TRANSGENDER MEN

A third group that is subjected to corrective rape is transgender men. In general, transgender people are some of the most discriminated against members of society. Persistent inequalities in various aspects of life, including lack of legal recognition and protection of human rights, combined with pervasive prejudice, leaves transgender people vulnerable to discrimination and sexual violence.

Some approaches to addressing sexual violence tend to ignore transgender people in the category of rape survivors.⁷⁹ However, transgender people are victims of sexualized violence at an even higher rate than the general population.⁸⁰ This tendency to obscure certain rape survivors is unacceptable because the invisibility itself contributes to the likelihood of sexual violence occurring and it excuses the legal system's failure to respond.⁸¹

Similarly, those who “uncritically accept[ing] heteronormative alignments of sex, gender, and sexuality” reinforce harmful stereotypes about who can be and who is a victim of sexual assault.⁸² As a result, many people fail to recognize certain acts of sexualized violence as rape and misunderstand which individuals involved are the real victims and the real perpetrators.⁸³ This contributes to the law's tendency to marginalize male transgender rape survivors.⁸⁴

In *Undoing Gender*, Judith Butler asserts that gender is a performative process, and though it is a process that is neither natural nor necessary, it is supremely coercive.⁸⁵ Because the norm either guarantees or threatens social survival depending on one's relation to it, the question of how to embody the norm is linked to survival.⁸⁶ For those who transgress normative gender—that is, for those individuals who do not conform to the traditional conception of what it means to be a man or a woman—the norm goes beyond a means of social control, and turns into a form of dehumanizing violence.⁸⁷ When one's gender is recognized as either “real” or “unreal,” those who are considered “unreal” are oppressed because they are treated as “the inhuman, the beyond the human, the less than human.”⁸⁸

79. Alletta Brenner, *Resisting Simple Dichotomies: Critiquing Narratives of Victims, Perpetrators, and Harm in Feminist Theories of Rape*, 36 HARV. J.L. & GENDER 503, 528 (2013).

80. *Id.*

81. Brenner, *supra* note 79, at 528.

82. *Id.* at 526.

83. *Id.*

84. *Id.* at 526–27.

85. JUDITH BUTLER, *UNDOING GENDER* 218 (2004).

86. *Id.* at 217.

87. *Id.*

88. *Id.* at 218.

Under the gender binary, trans bodies become “alien, other, and unworthy of respect, justifying and warranting harassment.”⁸⁹ This is powerful motivation to stay within the bounds of the binary.

Thus, “destabilizing coercive norms is obviously crucial for those whose bodies, identities, and gender expressions completely reject the current binary framework.”⁹⁰ Weakening the hegemony of the gender binary will benefit all of society, even those who comfortably fit into the traditional category of man or woman. Its most important effect, however, will be to reduce the threat of sexualized violence against transgender individuals.

Anti-transgender antagonism does not affect trans men and trans women in the same way.⁹¹ Even sexual violence against trans people is gendered.⁹² Violence against transgender women is motivated by the perpetrator’s need to reassert their own heterosexuality and masculinity to others.⁹³ Therefore, transgender women are primarily assaulted in public spaces so that the perpetrator will have an audience.⁹⁴ Though trans women face higher rates of sexual assaults than trans men in general, types of degrading sexual violence other than penetration are more common, such as forced genital exposure.⁹⁵

In contrast, violence against transgender men can be attributed to the perpetrator’s desire to punish the trans man for failing to label himself as sexually receptive and for adopting availability-associated appearances and behaviors.⁹⁶ As a result, transgender men are usually assaulted in private spaces without any witnesses.⁹⁷ For transgender men who have vaginas, corrective rape is a routine part of the violence they endure.⁹⁸ The rape is a reminder from the rapist that trans men “are women after all, and they will be treated as such.”⁹⁹ In other words, the rapist is sending the message that “biology is destiny” and that these individuals “have no right to act as if they are men.”¹⁰⁰

89. Florence Ashley, *Don't Be So Hateful: The Insufficiency of Anti-Discrimination and Hate Crime Laws in Improving Trans Well-Being*, 68 UNIV OF TORONTO L.J. 1, 19 (2018).

90. Courtney Fraser, *From “Ladies First” to “Asking for It”: Benevolent Sexism in the Maintenance of Rape Culture*, 103 CALIF. L. REV. 141, 191 (2015).

91. Ashley, *supra* note 89, at 21.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.* at 22.

96. *Id.* at 21.

97. *Id.*

98. *Id.* at 22.

99. Ki Namaste, *Genderbashing: Sexuality, Gender, and the Regulation of Public Space*, 14 ENV'T AND PLAN. D: SOC'Y AND SPACE 221, 230 (1996).

100. *Id.*

D. OTHER POPULATIONS?

Lesbians, asexual women, and transgender men are not an exclusive list of populations facing the threat of corrective rape. Corrective rape could presumably apply to any individual who does not conform to traditional expressions of gender or to heterosexuality. For example, other gender minorities, such as non-binary or gender fluid individuals, and other sexual minorities, such as bisexual individuals, may be raped because of their perceived gender identity or sexual orientation. It is difficult to accurately identify which populations are targeted by corrective rape or to quantify the number of corrective rapes that occur each year.¹⁰¹ Not only do most rapes go unreported, but it is also unclear how many are committed because of the rapist's motive to "correct" the victim's sexuality or gender.¹⁰²

It is clearly established, however, that corrective rape does not pertain to the rape of a heterosexual, cisgender person. For instance, though corrective rape has been compared to prison rape, the term would not apply to a homosexual rape of a heterosexual man in prison. Whereas corrective rape is committed because the perpetrator intends to punish the victim for failing to conform to gender and sexuality norms, rape in prison is about power and domination.¹⁰³ The male prison code involves "an exaggerated dominance hierarchy wherein the toughest men dominate those who are less tough" and a "sharp demarcation between those at the top of the dominance hierarchy and those at the bottom."¹⁰⁴ A man who does not "act tough enough" or "fight hard enough" is likely to be accused of "not being a man," and is therefore more likely to be raped in prison.¹⁰⁵ Therefore, the unspoken rules that are followed in order to avoid being raped in prison include: do not appear weak, do not share vulnerable feelings, and do not attend to the feelings of others.¹⁰⁶

In this way, "hegemonic masculinity holds sway over the prison culture" and "men violate it at their own peril."¹⁰⁷ However, prison rape is not a hate crime in the way corrective rape is because it is not a prejudice-motivated crime committed because the victim belongs to a particular group. The crime of prison rape is committed because the fear of being victimized creates a prison culture where it may be essential to survival to prove dominance, and there are limited ways that power can be expressed other than abusing those

101. Brown, *supra* note 4, at 46.

102. *Id.*

103. Terry A. Kupers, *Gender and Domination in Prison*, 39 W. NEW ENG. L. REV. 427, 433 (2017).

104. *Id.* at 432.

105. Kupers, *supra* note 103, at 428.

106. *Id.* at 428.

107. *Id.* at 432.

with less power.¹⁰⁸ Any inmate who fails to appear tough or otherwise ends up at the bottom of this prison hierarchy could be a potential victim of prison rape.¹⁰⁹ In contrast, victims of corrective rape are specifically targeted because they are members of certain sexual or gender minorities.

This conclusion does not suggest that rapes that are not “corrective” are less heinous. It merely means that distinct types of rape should be prosecuted and punished differently. For instance, though prison rape is not a hate crime and corrective rape is, prison rape amounts to torture under international law,¹¹⁰ whereas most corrective rapes do not. The United Nations Convention Against Torture states there are four conditions for an act to qualify as torture: It must result in severe mental or physical suffering; it must be inflicted intentionally; it must be committed by or with the consent or acquiescence of a public official; and it excludes pain and suffering as a result of lawful actions.¹¹¹ Prison rape meets each of these conditions. Therefore, while corrective rape is a hate crime, prison rape is an act of torture, and each should be prosecuted accordingly.

III. VIOLATION OF BODILY AUTONOMY AND SEXUAL IDENTITY

Corrective rape bears many similarities to rape as a weapon of war. During times of war, rape is used as a tool for breaking the morale of the defeated side.¹¹² Rape is so prevalent during conflicts because it is a means of psychological warfare to dishonor, demoralize, and emasculate the opposing side.¹¹³ In *The Prosecutor v. Jean-Paul Akayesu*, rape and other acts of sexual violence were put on equal footing with other war crimes for the first time.¹¹⁴ The Chamber held that like torture, rape is used to intimidate, degrade, humiliate, discriminate, punish, control, and destruct a person.¹¹⁵ Also like torture, it is a violation of personal dignity, and does in fact constitute torture when it is inflicted by or with the consent of a person acting in an official capacity.¹¹⁶ This landmark case also established that

108. Kupers, *supra* note 103, at 433.

109. *Id.* at 432.

110. Alexandra Ashmont, *Raped by the System: A Comparison of Prison Rape in the United States and South Africa*, 26 PACE INT'L L. REV. 54, 79 (2014).

111. Ashmont, *supra* note 110, at 80.

112. Igor Vuletic, *Rape as a War Crime with a Special Reference to Croatian Criminal Law*, 2017 JURA: A PECSI TUDOMANYEGYETEM ALLAM- ES JOGTUDOMANYI KARANAK TUDOMANYOS LAPJA 173, 173 (2017) (Croat.).

113. Lucy Fiske & Rita Shackel, *Ending Rape in War: How Far Have We Come?* 6 COSMOPOLITAN CIV. SOCIETIES J. 123, 127 (2014).

114. *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T (June 1, 2001); see Arpita Saha, *Rape as a War Crime: The Position of International Law Since World War II*, 2 J. OF E. ASIA AND INT'L L. 497, 509 (2009).

115. *Akayesu*, Case No. ICTR-96-4-T.

116. *Id.*

rape could be prosecuted as genocide if the perpetrator had the intent to physically or psychologically destroy a group.¹¹⁷

Just as rape is used as a weapon of war to terrorize and subjugate a population, corrective rape, and the fear of rape, remains a tool to subordinate non-heterosexual and gender nonconforming individuals as a group. Corrective rape at its core is merely a violent manifestation of discrimination.¹¹⁸ Whether committed against the enemy's side during a war or against a non-conforming individual during peacetime, rape and the threat of rape provoke terror, intended to disempower the victim. In both situations, the victim is reminded that they are vulnerable and unequal.

Whereas rape during war is meant to control, punish, and intimidate the enemy; Corrective rape is used to control and violate the victim's bodily autonomy and sexual identity. The perpetrator violates the victim's bodily autonomy because by choosing to proceed to act in the face of his victim's lack of consent, he is consciously and intentionally hurting and degrading the victim.¹¹⁹ Bodily autonomy includes both the right to refuse sexual contact and the right to seek it from willing partners.¹²⁰ The rapist takes both these rights away from the victim and replaces them with his own control. Whenever the rapist "intentionally commits the crime, he knows that he is committing violence against the victim," and that he is committing a crime of hate.¹²¹ To argue that corrective rape is not a hate crime, but rather a miscommunication or a romantic moment gone wrong, relies on rape myths that ignore the discrimination toward the victimized class.

Under the spatial model for understanding the interest in bodily autonomy, the more important an interest is the closer it is to the space that metaphorically defines the self.¹²² If a person's domain is the physical, emotional, psychological, and intellectual space the person lives in, this space then impliedly includes the person's power to consent.¹²³ Therefore, when another person refuses to recognize this power to consent, he attacks and invades that person-defining domain.¹²⁴ The closer the interest of sexuality or bodily autonomy is to a person's core of their self, the more violent the violation is on their personhood itself.¹²⁵ In other words, if bodily autonomy is central to personhood, then corrective rape "assaults the

117. Akayesu, Case No. ICTR-96-4-T.

118. Kathryn M. Carney, *Rape: The Paradigmatic Hate Crime*, 75 ST. JOHN'S L. REV. 315, 338 (2001).

119. *Id.* at 339.

120. Vivian Berger, *Defending Sexual Autonomy*, 20 CRIM. JUST. ETHICS 45, 46 (2001).

121. Carney, *supra* note 118, at 339-40.

122. David Archard, *The Wrong of Rape*, 57 PHIL. Q. 374, 387 (2007).

123. Archard, *supra* note 122, at 388.

124. *Id.*

125. *Id.*

very 'core' of the self and causes great moral injury."¹²⁶

Corrective rape also violates the victim's sexual identity. Compared to other kinds of heterosexual rape, corrective rape occurs against the backdrop of deeply entrenched, pervasive prejudice and discrimination against non-heterosexual and gender nonconforming individuals.¹²⁷ It is a product of social and cultural prejudice that certain sexual orientations or gender identities are viewed as unnatural and in need of "curing." The crucial element of corrective rape—the perpetrator's intention to "cure" the victim—implies that there is something wrong with a person, which has the effect of pathologizing all members of these groups.¹²⁸

For many LGBT individuals, sexual orientation and gender identity are a core aspect of their overall identity. Sexual orientation and gender become deeply entangled with identity for those who do not conform to traditional expressions of gender or sexuality, and in certain ways they become central to one's sense of self.¹²⁹ Like bodily autonomy, the violation of an individual's sexual orientation or gender identity through corrective rape may be more injurious than the violation resulting from other types of rape because these elements of identity and the experiences that come with them are so central to personhood.

This violation of sexual and gender identity contributes to the lack of true societal equality. Rape violates fundamental human rights including: the right to life, liberty, and security; equal protection under the law; and nondiscrimination.¹³⁰ However, corrective rape further infringes on a myriad of peripheral protections affecting autonomy and well-being, which are essential in making the core rights effective. For instance, corrective rape violates the rights to "sexual self-determination, human dignity, humane treatment, privacy, effective judicial recourse, safety, physical and mental integrity, integrity of the person, sexual and reproductive choice, and health."¹³¹

126. Archard, *supra* note 122.

127. Anita Padmanabhanunni & David Edwards, *Victimization in the Lives of Lesbian-Identified Women in South Africa: Implications for Clinical Assessment and Treatment*, 23 J. PSYCHOL. IN AFR. 385, 385 (2013).

128. R. Koraan & A. Geduld, "Corrective Rape of Lesbians in the Era of Transformative Constitutionalism in South Africa," 18 POTCHEFSTROOM ELEC. L.J. 1931, 1938 (2015).

129. Archard, *supra* note 122, at 388.

130. Melanie Randall & Vasanthi Venkatesh, *The Right to No: The Crime of Marital Rape, Women's Human Rights, and International Law*, 41 BROOK J. INT'L L. 153, 177 (2015).

131. *Id.* at 177–78.

IV. CURRENT LEGAL RESPONSE

Most victims of corrective rape will never see their case resolved in the legal system. In addition to the skepticism coming from society, victims of rape also face skepticism from within the legal system.¹³² In general, only thirty-seven percent of reported rapes are criminally prosecuted.¹³³ When a rape case is brought to trial, the glaring mistrust of the victim's claim and doubt as to the violent nature of the crime itself cause re-victimization in the courtroom.¹³⁴

There are cracks in the legal system that need to be addressed, such as hate crime legislation that does not serve to protect victims of rape. Statistics collected by the Federal Bureau of Investigations ("FBI") indicate that one hate crime occurs about every ninety minutes in the United States.¹³⁵ In response to this disturbing data, legislatures have turned their attention to hate crimes in recent years and have enacted legislation aimed at decreasing the rates of victimization of vulnerable populations.¹³⁶ Forty-five states and the District of Columbia have enacted statutes criminalizing various types of bias-motivated violence.¹³⁷ However, because states are authorized to enact their own hate crime legislation, the degree and nature of protection varies widely from state to state.¹³⁸ While each of these state statutes covers bias on the basis of race, religion, and ethnicity, only thirty-one of these statutes cover sexual orientation and a mere seventeen cover gender identity.¹³⁹

Though gender is included in some state statutes as a protected class, prosecutions of gender-motivated crimes as hate crimes are rare.¹⁴⁰ Furthermore, when these gender-motivated crimes are prosecuted as hate crimes, they are usually prosecuted as charges of sexual harassment and battery, and rarely as rape.¹⁴¹

132. Isabelle Barraquiel Reyes, *The Epidemic of Injustice in Rape Law: Mandatory Sentencing as a Partial Remedy*, 12 UCLA WOMEN'S L.J. 355, 358 (2003).

133. Myka Held, *A Constitutional Remedy for Sexual Assault Survivors*, 16 GEO. J. GENDER & L. 445, 445 (2015).

134. Barraquiel Reyes, *supra* note 132, at 358.

135. *Combating Hate Crimes in Every State*, ANTI-DEFAMATION LEAGUE, <https://www.adl.org/news/press-releases/combating-hate-crimes-in-every-state> (last visited Apr. 7, 2018) [<https://perma.cc/4NUG-EAVR>] [hereinafter, *Combating Hate*].

136. Carney, *supra* note 118, at 318.

137. *Anti-Defamation League State Hate Crime Statutory Provisions*, ANTI-DEFAMATION LEAGUE, [https://www.adl.org/sites/default/files/documents/\(3\)Excel-State-Hate-Crime-Statutes-UPDATED-Fall-2017-sheet1.pdf](https://www.adl.org/sites/default/files/documents/(3)Excel-State-Hate-Crime-Statutes-UPDATED-Fall-2017-sheet1.pdf) (last visited Apr. 7, 2018) [<https://perma.cc/EKW-8XUET>].

138. Amnesty International, *Stonewalled: Police Abuse and Misconduct Against Lesbian, Gay, Bisexual and Transgender People in the U.S.* 1, 106 (2005).

139. *Combating Hate*, *supra* note 135.

140. Carney, *supra* note 118, at 318–19.

141. *Id.* at 319.

In the rare instances when a rape is prosecuted as a hate crime, survivors face a number of problems leading up to and during a criminal trial.¹⁴² First, police re-victimize survivors when they attempt to report a rape.¹⁴³ One way this re-victimization occurs is through police failing to properly investigate rape cases.¹⁴⁴ This investigative failure of investigation can be primarily attributed to police officers' reliance on stereotypes of who a sexual assault victim would and should be.¹⁴⁵ While one common consequence of this lack of investigation is that police departments misclassify a rape as a less serious crime, the even more alarming response is that sometimes police inappropriately cleared cases, thereby ending investigation altogether.¹⁴⁶ Some police officers even discourage rape survivors from filing a report or undergoing a rape kit exam.¹⁴⁷

Police also have a tendency to re-victimize rape survivors by using gendered stereotypes in their interactions.¹⁴⁸ For instance, police officers sometimes ask victim-blaming questions of rape victims, such as "Why didn't you scream?" or "Why were you in that neighborhood at night?"—questions which would never be asked of victims of other crimes.¹⁴⁹ Police officers have also threatened to arrest survivors for false reporting, indicating that officers may believe that victims of rape lie about their experience because of some ulterior motive.¹⁵⁰ Survivors' decisions to seek legal action in the criminal justice system are influenced by police officers' actions,¹⁵¹ and police officers' current response seems more likely to perpetuate corrective rape than address the harm being caused.

At trial, prosecutors routinely deny rape survivors the right to equal protection under the law.¹⁵² Because prosecutors have nearly absolute and unreviewable power to choose whether to bring criminal charges and what charges to bring, prosecutors often choose not to prosecute rape cases.¹⁵³ Of those cases that are prosecuted, prosecutors usually decline to add charges of a hate crime.¹⁵⁴ Some prosecutors prefer to treat hate crimes as "just a

142. Held, *supra* note 133, at 446–47.

143. *Id.* at 447.

144. *Id.* at 447.

145. *Id.*

146. *Id.* at 447–48.

147. *Id.*

148. *Id.* at 449.

149. *Id.*

150. Held, *supra* note 133, at 449.

151. *Id.* at 450.

152. *Id.* at 446.

153. *Id.* at 450–51.

154. Earl Ofari Hutchinson, *Idaho Rape Case Screams for a Racial Hate Crime Prosecution*, HUFFINGTON POST (May 27, 2016, 2:27 PM, updated May 28, 2017), https://www.huffingtonpost.com/earl-ofari-hutchinson/idaho-rape-case-screams-f_b_10164758.ht

garden variety criminal case,” while others choose not to bring these charges because they view these prosecutions as “no-win cases with little political gain.”¹⁵⁵ By minimizing the seriousness of the crime, and thereby invoking the stereotype that rape is not a harmful crime, prosecutors actually continue a self-fulfilling prophecy that rape is not a worthwhile crime to prosecute.

Judges similarly respond to rape cases inappropriately, in a way that discriminates against rape victims.¹⁵⁶ Judges use gendered stereotypes to make sentencing decisions for rapists.¹⁵⁷ Despite the fact that rape is one of the most heinous crimes, judges tend to give shorter sentences for rape than for other crimes.¹⁵⁸ In fact, nearly one-half of all convicted rapists are sentenced to less than a year in prison.¹⁵⁹ For a rape victim, this kind of lenient sentencing means that the trauma he or she faced throughout their involvement with the criminal justice system was meaningless, as the justice served equates to “a proverbial slap on the wrist for her convicted attacker.”¹⁶⁰

Judges also blame victims in order to justify their sentencing decision or their decision to find the defendant not guilty.¹⁶¹ In the course of trials, judges make victim-blaming comments, which can influence the jury and their own sentencing decisions.¹⁶² For instance, a judge in a Georgia rape case overturned the defendant’s conviction, citing the lack of evidence that the victim “exhibited visible distress” in being around her alleged attacker at the trial.¹⁶³ He further stated that “at no time prior to her outcry . . . did the victim behave like a victim,” and that the defendant did not “behave like someone who had recently perpetrated a series of violent crimes against her.”¹⁶⁴

Similarly, a judge in Arizona told a victim, who was sexually assaulted by a police officer at a bar, that “if you wouldn’t have been there that night, none of this would have happened to you.”¹⁶⁵ The judge also stated that the

ml [<https://perma.cc/3JRQ-ADZM>].

155. Held, *supra* note 133, at 454.

156. *Id.*

157. *Id.*

158. *Id.*

159. Barraquiel Reyes, *supra* note 132, at 367.

160. *Id.*

161. Held, *supra* note 133, at 455.

162. *Id.*

163. John Munford, *Judge Under Fire for Reversing Rape Verdict*, THE CITIZEN (Mar. 5, 2014), <http://thecitizen.com/2014/03/05/judge-under-fire-reversing-rape-verdict/> [<https://perma.cc/7QNR-V5D4>].

164. *Id.*

165. Eric Betz, *No Jail Time for Flagstaff Cop in Bar Groping*, ARIZONA DAILY SUN (Sept. 6, 2012), http://azdailysun.com/news/local/crime-and-courts/article_0aa8be56-f7a3-11e1-b804-0019bb2963f4.html [<https://perma.cc/G5X3-6Y2H>].

victim “learned a lesson” and she hoped that the victim would “take something positive” out of the experience.¹⁶⁶ In another instance, a California judge went as far as to say that “if someone doesn’t want to have sexual intercourse, the body shuts down. The body will not permit that to happen unless a lot of damage is inflicted . . .”¹⁶⁷ By making these judgments that rely on rape myths and gendered stereotypes, judges not only re-victimize the current survivor in their courtroom, but they may also deter other survivors who have been raped from trusting and relying on the criminal justice system.¹⁶⁸

Some may argue that though rape victims are discriminated against in the criminal justice system, there are still civil remedies available.¹⁶⁹ However, these options are limited and a number of barriers constrain survivors from using these remedies.¹⁷⁰

Federal remedies, which are available to all survivors regardless of what state they live in, allow rape victims to pursue a case against a state actor who violates someone’s constitutional rights under color of state law,¹⁷¹ against an employer who does not take appropriate action when a rapist uses sexual violence against a coworker,¹⁷² and against schools when a student is raped by a member of their school community.¹⁷³ From 1994 until 2000, survivors also had the option to pursue a civil rights claim against their rapist under the Violence Against Women Act (“VAWA”).¹⁷⁴ In *United States v. Morrison*, however, the United States Supreme Court found this remedy to be unconstitutional under the Commerce Clause and the Fourteenth Amendment.¹⁷⁵ These remedies, though symbolically significant, help only a small portion of people who are subjected to corrective rape and are therefore limiting in a practical sense.

In terms of state remedies, one option is for the victim to sue their rapist for an intentional tort.¹⁷⁶ Thirty-two states and the District of Columbia have statutes creating a hate crime civil cause of action.¹⁷⁷

166. Betz, *supra* note 165.

167. Rob Williams, *US Judge Prompts Outrage After Saying: ‘If She Didn’t Want Sex, Her Body Should Have Just Shut Down’ in Rape Case, and Reducing Sentence of Attacker by Ten Years*, INDEPENDENT (Dec. 14, 2012, 10:55 AM), <http://www.independent.co.uk/news/world/americas/us-judge-prompts-outrage-after-saying-if-she-didn-t-want-sex-her-body-should-have-just-shut-down-in-8414674.html> [https://perma.cc/AH7G-F855].

168. Held, *supra* note 133, at 456.

169. *Id.* at 457.

170. *Id.*

171. 42 U.S.C. § 1983.

172. Title VII of the Civil Rights Act of 1964.

173. 20 U.S.C.A. § 1681 (West).

174. *U.S. v. Morrison*, 120 S.Ct. 1740, 1759 (2000).

175. *Id.*

176. Held, *supra* note 133, at 461.

177. *Combatting Hate*, *supra* note 135.

However, this option also has many well-recognized barriers.¹⁷⁸ First, there is the most obvious requirement that the victim must know the perpetrator's identity in order to sue. Another barrier is the absence of rape shield laws to protect victims in a civil case from trauma-inducing questioning by the perpetrator's defense counsel.¹⁷⁹ It can also be difficult for many low-income victims to find an attorney to represent them.¹⁸⁰ In addition, these cases are often complex and can take years before they are completed, which may prolong the stress and trauma a rape victim experiences.¹⁸¹

The second civil option under state remedies is a civil rights claim under a state statute that encompasses gender or sexual orientation-based violence.¹⁸² The obstacle to this option is that survivors' access to justice depends on where they live.¹⁸³ For example, a state VAWA statute has only been adopted by two states, California and Illinois, and two cities, Westchester, New York and New York City.¹⁸⁴ Because so few states have these statutes, they are not a practical option for most rape victims.¹⁸⁵

The current response, under both the criminal and civil justice systems, is inadequate to address the harms being caused by corrective rape. Far too few perpetrators are being brought to justice and far too many rape survivors are being re-victimized during their attempts to access legal remedies. According to feminist legal scholar Catharine MacKinnon, "rape remains a phenomenon in respect of which all legal systems appear to be incompetent."¹⁸⁶

V. HATE CRIME LEGISLATION IN RESPONSE TO CORRECTIVE RAPE

The need to improve the legal response to corrective rape in the United States is clear. Though unlikely to serve as a complete solution, I argue for a threefold preliminary response: First, enact hate crime laws in the states that have not enacted any and strengthen legislation in the states that have; second, recognize corrective rape as a distinct hate crime; and third, provide legal mechanisms to compel prosecutors to charge corrective rape as a hate crime.

178. Held, *supra* note 133, at 461.

179. *Id.* at 461.

180. *Id.*

181. *Id.*

182. *Id.* at 462.

183. *Id.*

184. *Id.* at 461–62.

185. *Id.* at 462.

186. McGlynn, *supra* note 23, at 72.

A. ENACTING AND STRENGTHENING STATE HATE CRIME STATUTES

The first step of this response involves drafting, enacting, and implementing hate crime laws. There are still five states that have not enacted any hate crime laws: Arkansas, Georgia, Indiana, South Carolina, and Wyoming.¹⁸⁷ The Anti-Defamation League, one of the most prominent advocates of enacting hate crime laws, asserts that hate crime prosecution should be a state's responsibility because state or local police investigate most crimes.¹⁸⁸ Federal hate crime law should be used only as "a backstop."¹⁸⁹

Though the forty-five remaining states have enacted hate crime legislation, the majority of state hate crime laws are limited and weak. For example, Utah's hate crime legislation protects traditional characteristics like race, religion, and sex, but fails to include sexual orientation.¹⁹⁰ The current law also leaves out the words "bias" and "prejudice" in its language.¹⁹¹ Because of its unclear language, Utah's law has been characterized as "a nearly useless statute" that prosecutors rarely utilize.¹⁹² It is unsurprising, therefore, that crimes motivated by bias toward gay and lesbian individuals has been steadily rising annually in Utah.¹⁹³ Existing laws need to be more inclusive and comprehensive so that each state's hate crime laws cover: race, ethnicity, national origin, religion, sexual orientation, sex, gender, gender identity, and disability at the minimum.

B. RECOGNIZING CORRECTIVE RAPE AS A HATE CRIME

The second step of the proposed legal response is to recognize corrective rape as a hate crime in our legal system. While every rape can be classified as a serious and heinous crime, the circumstances and context cause rape to be categorized in different ways. Some of the various types of rape include date rape, gang rape, spousal rape, statutory rape, prison rape, war rape, revenge rape, and rape by deception. Most jurisdictions recognize these different classifications, and treat the various types differently in the

187. *#50StatesAgainstHate*, ANTI-DEFAMATION LEAGUE: FIGHTING FOR GOOD, <https://www.adl.org/50statesagainsthate> [https://perma.cc/B2WJ-BBFD].

188. Nancy Badertscher, *South Carolina, Georgia, 3 Other States Don't Have Hate Crimes Laws*, POLITIFACT (July 1, 2015, 12:00 AM), <http://www.politifact.com/georgia/statements/2015/jul/01/various-media-reports/south-carolina-georgia-3-other-states-dont-have-ha/> (last visited Apr. 7, 2018) [https://perma.cc/YV83-QPDP].

189. *Id.*

190. Seth Bracken, *Are Utah's Hate-Crimes Laws Weak, Limited?*, SALT LAKE MAGAZINE, <https://qsaltlake.com/news/2012/09/20/are-utahs-hate-crimes-laws-weak-limited/> [https://perma.cc/GJJ2-Z48L].

191. Mori Kessler, *Senator Hopes to Strengthen Utah's Hate Crimes Law*, ST. GEORGE NEWS (Jan. 30, 2018), <https://www.stgeorgeutah.com/news/archive/2018/01/30/lgl18-mgk-senator-hopes-to-strengthen-utahs-hate-crimes-law/> [https://perma.cc/KW9R-MB6B].

192. Bracken, *supra* note 190.

193. *Id.*

legal system. For instance, statutory rape involving two consenting minors has been considered by some to be a “victimless crime” and therefore rarely generates any criminal action.¹⁹⁴ On the other hand, a rape can constitute torture in international human rights law when perpetrated by a state official.¹⁹⁵ The factors that allow this differentiation within the offense of rape demand alternative remedies and the imposition of additional criminal sanctions for certain types. It is accordingly not without precedent that we recognize corrective rape as its own, distinct type of rape and assign penalties that correspond with its context and with the motive of the perpetrator.

Corrective rape fits naturally within the doctrinal framework of hate crime laws.¹⁹⁶ According to Kathryn Carney, who argues that rape is “the paradigmatic hate crime,”¹⁹⁷ hate crimes possess certain characteristics that act as evidence of the perpetrator’s bias motivation. These characteristics include “selection of victim because of an immutable characteristic; interchangeability of the victim; increased fear among the target group; heightened impact on the community resulting in communal fear; heightened psychological trauma to the victims; an underreporting by victims; serial nature of the attacks on victims and by perpetrators; and an increased level of violence.”¹⁹⁸ Each of these elements is present in the crime of corrective rape, and, therefore, corrective rape fits naturally within the hate crime framework.

First, victims of corrective rape are selected because of an immutable characteristic. They are chosen not at random and not because of who they are individually, but because of their sexual orientation or gender identity.

Second, victims of corrective rape are interchangeable to the perpetrator. Carney asserts that “in the perpetrator’s mind, lines of individuality are indistinguishable” and each member of the target group is a potential victim.¹⁹⁹ The victim could be any lesbian, asexual woman, or transgender man whom the perpetrator identifies as existing in a way that they perceive to be a violation of sexual orientation or gender norms. Oscar Garcia, a Deputy District Attorney who specializes in prosecuting hate crimes, stated “these crimes are message crimes, not just to that one victim.”²⁰⁰ The motive of the rapist is not necessarily focused on the

194. Sherry F. Colb, *The Pros and Cons of Statutory Rape Laws*, CNN.COM (Feb. 13, 2004, 12:48 PM), <http://www.cnn.com/2004/LAW/02/13/findlaw.analysis.colb.statutory.rape/index.html> [<https://perma.cc/L7Q3-UXNB>].

195. McGlynn, *supra* note 23, at 79.

196. Carney, *supra* note 118, at 340.

197. *Id.* at 319.

198. *Id.* at 327.

199. *Id.* at 328.

200. *Prosecuting Hate*, NOT IN OUR TOWN, <https://www.niot.org/action-hub/local-lessons/prosecuting-hate> (last visited Apr. 7, 2018) [<https://perma.cc/M9MB-KUPK>] [hereinafter,

individual victim, but on the population the victim belongs to.

Because of this victim interchangeability, the target group also experiences increased fear and anxiety.²⁰¹ Garcia goes on to say that it is “an entire community that’s victimized when one person of a certain group is targeted because of who they are.”²⁰² When a corrective rape occurs, the non-conforming person acknowledges that they share the characteristic that the rapist is attempting to eradicate.

Similarly, corrective rape causes a heightened impact on the community at large.²⁰³ Society experiences negative effects when hateful attitudes are expressed towards asexual people and the LGBT community through sexual violence. Even those not directly affected by bias-caused violence suffer fear and anxiety, instilling a far-reaching sense of communal fear.²⁰⁴

Fifth, there is a clear fit between the hate crime framework and the crime of corrective rape because of the heightened psychological trauma that victims of corrective rape experience. Each rape survivor integrates their experience differently because of complex variables that affect their reaction to the assault, such as their age, life situation, circumstances of the rape, personality style, and responses of those from whom he or she seeks support.²⁰⁵ However, most victims of rape experience severe, long-lasting psychological harm.²⁰⁶ Rape causes a unique kind of psychological trauma that tends to leave the victim fearful, affect her ability to trust and maintain relationships, affect everyday life “functioning” and leave vulnerabilities that last even when she is “healed.”²⁰⁷ Many victims report experiencing post-traumatic stress disorder, typically characterized by diminished self-worth, anxiety, hostility and blame, sleeplessness, extreme fear and phobic responses, coping difficulties, feelings of helplessness, and depressed expectations for the future.²⁰⁸

Furthermore, victims of corrective rape experience a kind of compound trauma. They suffer not only the traumatic effects of rape, but also those of being a victim of a hate crime. Victims of bias crimes exhibit greater trauma, both physiologically and psychologically, than non-bias crime

Prosecuting Hate].

201. Carney, *supra* note 118, at 343.

202. *Prosecuting Hate*, *supra* note 200.

203. Carney, *supra* note 118, at 344.

204. *Id.* at 329.

205. Toni M. Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395, 429 (1985).

206. Carney, *supra* note 118, at 344.

207. Nicola Gavey & Johanna Schmidt, “*Trauma of Rape*” *Discourse: A Double-Edged Template for Everyday Understandings of the Impact of Rape?*, 17 VIOLENCE AGAINST WOMEN 433, 450 (2011).

208. Carney, *supra* note 118, at 345.

victims.²⁰⁹ Like victims of rape, victims of hate crimes report suffering from a wide range of harms, including low self-esteem, feelings of helplessness, depression, lack of trust, societal withdrawal, excessive fear for the safety of oneself and one's family, substance dependence, and suicidal tendencies.²¹⁰ This increased trauma is the result of the victim being chosen for their identity, which causes increased self-blame and a recovery that is never truly complete.²¹¹ In this way, victims of corrective rape experience a twofold violation—the violation of body for the rape victim and the violation of identity for the victim of a hate crime.

Corrective rape also fits within the hate crime paradigm because of the significant underreporting by victims. As discussed in Section IV of this note on the current legal response to hate crimes, many victims of rape choose not to report their assault because of the response they receive from the ill-equipped, unsympathetic criminal justice system. Both rape and bias crimes are characterized by this notable underreporting by victims.²¹²

In addition, corrective rape should be classified as a hate crime because of the serial nature of attacks on victims.²¹³ Bias crimes often involve multiple attacks on the same victim or the same group the victim identifies with.²¹⁴ Similarly, victims of rape have a very significant chance of being raped again.²¹⁵ This likelihood increases when taking into account the victim's nonconformance with gender or sexual orientation norms. For example, nearly half of all American bisexual women (46%) have been raped in their lifetime, compared to 1 in 6 heterosexual women (17%).²¹⁶ This likelihood of being raped more than once further increases when taking race into account. Women of color and indigenous women experience the highest rates of sexual assault, which signifies "the remnants of colonization and slavery's categorical devaluing of black and brown bodies."²¹⁷

Lastly, corrective rape fits within the hate crime framework because of the increased level of violence of the offense.²¹⁸ Hate crimes are more violent than non-bias motivated crimes and they typically require the

209. Carney, *supra* note 118, at 329.

210. *Id.* at 330.

211. *Id.* at 330.

212. *Id.* at 346.

213. *Id.* at 331.

214. *Id.*

215. *Id.* at 348.

216. *NISVS: An Overview of 2010 Findings on Victimization by Sexual Orientation*, CDC, https://www.cdc.gov/violenceprevention/pdf/cdc_nisvs_victimization_final-a.pdf (last visited Apr. 8, 2018) [<https://perma.cc/6UE8-GAEC>].

217. Lauren Paulk, *Sexual Assault in the LGBT Community*, NCLR (Apr. 30, 2014), <http://www.nclrights.org/sexual-assault-in-the-lgbt-community/> [<https://perma.cc/VKR2-66G2>].

218. Carney, *supra* note 118, at 331.

victim to be hospitalized.²¹⁹ Like all hate crimes, rape is “excessively violent in nature” and many victims require significant medical treatment.²²⁰ Catharine MacKinnon states that rape is a “sufficiently serious harm[s] to pass the torture threshold.”²²¹

Because corrective rape shares all the characteristics typical of an offense motivated by bias, it should be recognized as a distinct hate crime. However, some may argue that recognizing corrective rape as a hate crime is unnecessary. Opponents of hate crime legislation may assert that the simpler response to this offense is to merely increase the rapist's sentence when it can be determined that he was motivated by bias. While increasing the rapist's sentence must be a part of the response to this offense, an increase in sentencing alone is not an adequate response to the severity of the crime. Corrective rape must be labeled and recognized as a hate crime primarily because of the societal perceptions and effects of the crime.

We need to consider the crime from a wider perspective than just the victim's, taking into account societal perceptions of the crime.²²² Rather than just increasing a rapist's sentence, labeling and prosecuting corrective rape as a hate crime will “serve the expressive purpose of the law, validate the victims' experience, and send an unambiguous message that such actions are intolerable.”²²³ The societal belief in the injustice of hate is reinforced when steps are taken to deter and punish bias-motivated offenses.²²⁴ This increased penalty stays within the bounds of proportionality because it reflects a punishment that is relative to the three levels of violation the rapist has committed: violation of law, of body, and of identity.

A hate crime label is appropriate for corrective rape because it would reflect the moral sentiment of society. A penalty for an offense in part signifies moral condemnation of the offender; the law is therefore “an affirmation that society stands behind the values it believes in.”²²⁵ The label would recognize that the offense is “a kind of terrorism”²²⁶ specifically directed at certain groups within society—lesbians, asexual women, and transgender men—and would condemn the perpetrators accordingly for this harmful bias.

Further, the way society responds to the victimization of its members is a reflection of how society values both the victim and perpetrator. For instance, if the law provides no remedy for a person's victimization, then

219. Carney, *supra* note 118,

220. *Id.* at 348.

221. McGlynn, *supra* note 23, at 74.

222. *Id.* at 80.

223. Carney, *supra* note 118, at 349.

224. *Id.*

225. *Id.* at 352.

226. *Id.*

that person receives a message that they are worthless but that the perpetrator has value. By contrast, if corrective rape were to be prosecuted as a hate crime, then the criminal justice system, and society in the larger sense, would be sending the message that the victim is worthy of protection and respect and that the perpetrator's hateful motivation behind the rape is rejected.

In this way, the law has the power to express not only how much society values rape victims over rapists, but also how much it values lesbians, asexual women, and transgender men in general. For instance, a law that only affords a remedy to straight women who have been raped sends the message to lesbians, asexual women, and transgender men that it is not important enough to society to construct a protective barrier that includes them. An inclusive characterization of corrective rape as a hate crime would therefore be properly expressive of the value we assign to survivors and rapists in our society.

Another reason merely increasing the rapist's sentence is not an adequate response to corrective rape is because it would have less of a deterrent effect. District Attorney Oscar Garcia stated that even if the judge ultimately decides not to give the additional penalty to the perpetrator of a hate crime, hate crime enhancements make a difference because they deter potential offenders.²²⁷ He declared that every time a hate crime occurs it becomes an opportunity "to get the message out to would-be hate crime offenders that we're going to fervently prosecute these cases, that we treat them differently and that they are looking at a more severe penalty."²²⁸ Though hate crime enhancements may not deter those who are completely intent on committing these offenses, they may be able to reach "those who are maybe on the fence, who are the wannabes, and especially the juvenile offenders."²²⁹

C. COMPELLING PROSECUTORS TO CHARGE CORRECTIVE RAPE AS A HATE CRIME

Enacting and strengthening hate crime statutes, and including corrective rape as a distinct hate crime within those statutes, is not enough to address the issue. In order for these statutes to have any practical effect, prosecutors will need to actually bring charges of a hate crime in corrective rape cases. This is problematic because prosecutors have broad discretion in deciding whether and what charges to bring, as discussed in Section IV on the current legal response.

227. *Prosecuting Hate*, *supra* note 200.

228. *Id.*

229. *Id.*

In some countries, prosecutors have what is known as an absolute duty to prosecute for most crimes.²³⁰ For example, in Sweden, the prosecutor is obliged to initiate a prosecution if he considers there to be sufficient evidence to prove that a crime has been committed and that a certain person is the offender.²³¹

In contrast, the decision to institute criminal proceedings in the United States is initially and primarily the responsibility of the prosecutor.²³² Prosecutors can choose not to prosecute certain offenses, even when there is sufficient evidence to support a conviction and even where circumstances and good cause consistent with the public interest warrant prosecution.²³³ Some factors the prosecutor may consider when deciding whether to bring or decline charges include the extent of the harm caused by the offense, the proportionality of the potential punishment to the particular offender, the motives of the accuser, the particulars of the offender's character or situation, and the distribution of prosecutorial resources.²³⁴ Because of this broad prosecutorial discretion, prosecutors often choose not to prosecute rape cases.²³⁵ When they do decide to prosecute a corrective rape case, charges of a hate crime have rarely, if ever, been added.²³⁶

One of many downsides to this broad prosecutorial discretion is that a victim of a crime cannot force the prosecutor to bring certain charges, or even to act at all. Courts will not intervene to force the prosecutor's hand or supersede the charging decision.²³⁷ Often, the only means for a private individual to influence a prosecutor's charging decision is through public pressure. However, a survivor of a traumatic hate crime, especially of a sexually violent nature, is unlikely to feel comfortable bringing this kind of public attention to their personal victimization.

A prosecutor's decision not to file criminal charges should be made on the merits of the case. The decision should not be constrained because of a lack of prosecutorial resources or influenced by some ulterior motive. A

230. *Duty to Prosecute*, AKLAGARMYNDIGHETEN: SWEDISH PROSECUTION AUTHORITY, <https://www.aklagare.se/en/the-legal-process/the-role-of-the-prosecutor/decision-to-prosecute/duty-to-prosecute/> (last visited Apr. 8, 2018). [hereinafter, *Duty to Prosecute*].

231. *Id.*

232. *Criminal Justice Standards for the Prosecution Function*, ABA: AMERICAN BAR ASSOCIATION 3-4.2 (June 16, 2016), https://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctionFourthEdition/ [<https://perma.cc/9BMD-6DSG>].

233. Bennett L. Gershman, *Prosecutorial Decision making and Discretion in the Charging Function*, 62 HASTINGS L.J. 1259, 1263 (2011).

234. Gershman, *supra* note 233, at 1265.

235. Held, *supra* note 133, at 451.

236. Ofari Hutchinson, *supra* note 154.

237. Bruce A. Green & Samuel J. Levine, *Disciplinary Regulation of Prosecutors as a Remedy for Abuses of Prosecutorial Discretion: A Descriptive and Normative Analysis*, 14 OHIO ST. J. CRIM. L. 143, 165 (2016).

prosecutor should consider neither the political costs to oneself of bringing charges nor their personal opinions about the victim or the offender. When a prosecutor knows that charges are supported by probable cause, does not have reasonable doubt about the guilt of the accused, and has sufficient admissible evidence to support a conviction, the prosecutor should bring charges against the perpetrator of a corrective rape. The reasons prosecutors have provided for declining to do so, such as not wanting to prosecute cases with little political gain,²³⁸ are unacceptable in light of the necessity of addressing the harm to the victim and the administration of justice.

There have been numerous cases where prosecutors have filed charges in bad faith for the purpose of harassment, retaliation, or discrimination.²³⁹ It can be assumed that the reverse also occurs, in that a prosecutor chooses not to bring charges on some bad faith basis. Though the ABA Criminal Justice Standards prohibit prosecutors from engaging in purposeful discrimination, there is “no question that politics and personal advantage often enter into prosecutorial decision making.”²⁴⁰ Prosecutorial discretion can be misused to refuse to bring criminal charges against an offender because of the prosecutor’s own personal political beliefs. Considering the widespread discomfort and discrimination facing the LGBT community in general, it is not beyond the realm of possibility that prosecutors harbor their own biases against lesbians, asexual women, and transgender men.

Therefore, states need to take further measures to ensure that prosecutors are bringing rape and hate crime criminal charges against perpetrators who commit corrective rape. One potential measure is to revise the ABA Standards and narrow prosecutorial discretion in declining to bring criminal charges. In following Sweden’s model, prosecutors would have the duty to prosecute in certain cases.²⁴¹ When there is sufficient evidence to prove that a crime has been committed and that the accused is the offender, the prosecutor should be obligated to initiate the prosecution. When a lesbian, asexual woman, or transgender man is raped, there should be a presumption that the prosecutor will investigate and bring charges against the rapist if the probable cause and evidentiary requirements are met.

Catharine MacKinnon argues that the state “is typically deeply and actively complicit” in abuses against women by “collaborating in and condoning them.”²⁴² Some examples include the police not being interested in domestic crimes, the prevalence and protection of pornography, and the

238. Ofari Hutchinson, *supra* note 154.

239. Gershman, *supra* note 233, at 1267.

240. *Id.* at 1277.

241. *Duty to Prosecute*, *supra* note 230.

242. McGlynn, *supra* note 23, at 75.

lack of defenses for abused women who kill their abusers.²⁴³ I argue that prosecutors' continual decision to decline to prosecute corrective rape as a hate crime falls within this category of state complicity in sexual violence. MacKinnon claims that although rape is not legal at the time it is committed, its "cover-up, legitimization, and legalization after the fact" effectively give men impunity for rape.²⁴⁴ The state is partially responsible for the sexual violence because "the abuse is systematic and known, the disregard is official and organized, and the effective governmental tolerance is matter of law and policy."²⁴⁵ Therefore, though the individual perpetrator of a corrective rape may not be a state official, a prosecutor's decision not to bring the rapist to justice demonstrates the state's complicity and responsibility.

Another measure that could be taken by states is to allow private citizens to seek a writ of mandamus to compel a prosecutor to file charges. Although most jurisdictions defer to a prosecutor's decision not to file charges, at least one state allows a private person to seek such a writ, asking the court to direct an official to perform a duty that the official is under a legal obligation to perform. In West Virginia, the courts have recognized that the state Constitution requires prosecutors to vindicate the public and victim's rights.²⁴⁶

In *State ex rel. Hamstead v. Dostert*, West Virginia's Supreme Court held that when a person is seeking to enforce a public right, mandamus can be sought by any citizen, taxpayer, or voter.²⁴⁷ Both the public and the accused have rights, one of which is the right to redressing and punishing wrongs committed against them.²⁴⁸ Therefore, when this individual knows or has reason to believe that probable cause exists to charge someone with the commission of a crime, and knows or has reason to believe the prosecutor is failing to perform his duty to act upon this probable cause, that person may seek a writ of mandamus to compel the prosecutor to perform his duties.²⁴⁹

In *Myers v. Frazier*, the West Virginia Supreme Court refined the critical distinction between prosecutorial discretion and duty.²⁵⁰ The Court held that a prosecutor does not have absolute and uncontrollable discretion in determining when criminal charges will be brought.²⁵¹ The courts are not powerless to provide some control in the prosecutor's decision to initiate

243. McGlynn, *supra* note 23, at 75.

244. *Id.*

245. *Id.*

246. *State ex rel. Hamstead v. Dostert*, 313 S.E.2d 409 (W.Va. 1984).

247. *Id.* at 415.

248. *Id.*

249. *Id.* at 415–16.

250. *Myers v. Frazier*, 319 S.E.2d 782, 803 (W.Va. 1984).

251. *Id.*

proceedings.²⁵² The prosecutor may initially have discretion, but once probable cause is shown, he then has a duty to act.²⁵³ The Court also clarified the issue of standing: a person who seeks a mandamus to compel prosecution must possess the necessary facts to establish probable cause or stand in some special position such as being the victim of the crime or close relative of the victim if the actual victim is unable to assist the prosecution.²⁵⁴

More states should recognize the private citizen's right to compel prosecution for corrective rape. Because prosecutors are reluctant or opposed to bringing hate crime charges for corrective rape, victims often have little recourse. A writ of mandamus compelling the prosecutor to investigate and bring criminal charges if there is probable cause would provide lesbians, asexual women, and transgender men who have been raped with a remedy that vindicates their rights.

Critics of my argument that corrective rape needs to be prosecuted as a hate crime may point out that pursuing these prosecutions would fill the courts with serious hate crime litigation for an offense that is "just rape." They may argue that while rape that has been perpetrated because of the victim's gender identity or sexual orientation is serious, rape is also "mundane in its everyday nature, in the ordinariness of the men who commit it."²⁵⁵ In fact, FBI statistics reveal that an estimated 90,185 rapes were reported to law enforcement in 2015.²⁵⁶ Rape occurs "all the time and everywhere" and the men who commit rape are "ordinary brothers, fathers, sons, friends, colleagues, teachers, doctors and the like."²⁵⁷ This commonality of the crime is behind the critics' argument for "keeping rape as rape."²⁵⁸ Hate crimes should be left to those extreme and rare acts motivated by undeniable prejudice towards a target.

However, the criminal justice system currently fails rape survivors because of the very fact that rape is so common, and therefore not being adequately addressed in the courts. Because rape has become characterized as "mundane," it is necessary to reinforce the realistic impact of harm facing those victimized by rape. For many rape survivors, the assault has "ruined their lives, threatened their livelihood through wrecking their well-being and destroyed the security and comfort that they took for granted in

252. Frazier, 319 S.E.2d at 804.

253. *Id.* at 805.

254. *Id.* at 805

255. McGlynn, *supra* note 23, at 82.

256. *Rape*, FBI, 2015 CRIME IN THE UNITED STATES, <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/offenses-known-to-law-enforcement/rape> (last visited Apr. 8, 2018) [<https://perma.cc/H6K3-KA2M>].

257. McGlynn, *supra* note 23, at 82.

258. *Id.*

their lives.”²⁵⁹ The experience is serious, harmful, and painful, for both the victim and society. Underestimating the trauma of rape leads to the state’s complicity in sexual violence. Few governments do enough to prohibit, punish, and prevent rape. Thus, now is the time to turn our attention to the lesbians, asexual women, and transgender men who are victims of corrective rape and take steps to provide a remedy for the hate crimes they experience.

The criminal justice system needs to embrace the idea that corrective rape is a hate crime. Doing so will provide a more fitting punishment for the perpetrator, serve the expressive purpose of the law by valuing the survivor over the rapist, deter hate-motivated behavior, decrease the prevalence of harmful rape myths in society, and send an unambiguous message that such actions will not be tolerated.²⁶⁰ Most importantly, labeling and prosecuting corrective rape as a hate crime may help to “symbolically heal the wounds of those that become victims of such injustice.”²⁶¹

VI. CONCLUSION

It is the responsibility of each state to take the necessary steps to enable those who do not conform to gender and sexual orientation norms to have power over their health, safety, and security. One such step is to provide an adequate remedy to individuals who have experienced corrective rape. Hate crime statutes that are inclusive and enforced are one potential method of providing victims with the justice they deserve. State legislatures, however, should not become complacent with enacting hate crime legislation in response to corrective rape, but should strive to confront sexual violence in all its forms. Lesbians, asexual women, transgender men, and all other non-conforming individuals should not need to wait until social consciousness catches up before they are entitled to legal protection. Any success in transforming our society to be one without sexual violence will require broad changes in law, in attitude, in the norms we uphold, and in the legal culture—the time for these changes is now.

259. McGlynn, *supra* note 23, at 82.

260. Carney, *supra* note 118, at 349.

261. *Id.*