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### A Critical Perspective on Testimonial Injustice: Interrogating Witnesses' Credibility Excess in Criminal Trials

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## **A CRITICAL PERSPECTIVE ON TESTIMONIAL INJUSTICE: INTERROGATING WITNESSES' CREDIBILITY EXCESS IN CRIMINAL TRIALS. A COMMENT ON FEDERICO PICINALI'S «EVIDENTIAL REASONING, TESTIMONIAL INJUSTICE AND THE FAIRNESS OF THE CRIMINAL TRIAL»**

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**ABSTRACT:** This paper offers a critical race theory perspective on the testimonial injustice experienced by racially minoritized criminal defendants in evidential practice. It builds off Federico Picinali's paper, *inter alia*, substantiating how minoritized criminal defendants experience testimonial harm through credibility deficit, by exploring epistemic injustice to the same when prosecutorial witnesses receive identity-based credibility excess. It argues that in an adversarial criminal legal system, the testimonial injustice of credibility excess afforded racial in-group prosecutorial witnesses should be considered in tandem with the testimonial injustice of credibility deficit imposed on racial out-group defendants. Only then can the epistemic harm and resultant unfairness at trial for defendants be fully assessed. The paper advocates for expanding the definition of testimonial injustice to encompass the epistemic wrong of socially biased credibility excess and «transferred epistemic harm». In instances of transferred epistemic harm, the harm inflicted by an epistemic wrong impacts the speaker's interlocutor rather (or more) than the speaker themselves.

**KEYWORDS:** epistemic injustice, testimonial injustice, critical race theory, evidential reasoning, criminal trials.

**SUMMARY:** 1. INTRODUCTION.— 2. TESTIMONIAL INJUSTICE AS CREDIBILITY DEFICIT OR EXCESS.— 3. CRITICALIST APPROACH TO TESTIMONIAL INJUSTICE.— 4. CONCLUSION.— BIBLIOGRAPHY.

## 1. INTRODUCTION

Federico Picinali's paper, «Evidential Reasoning, Testimonial Injustice, and the Fairness of the Criminal Trial» (2023), persuasively identifies and examines testimonial injustice where lay and professional adjudicators evaluate testimony based on their limited stock of knowledge and fail to recognize, consider, and ultimately hear gendered, racialized, and classed experiences. He contends that adjudicators privilege one stock of knowledge in evidential inquiry, without recognizing that knowledge is variable and other stocks of knowledge exist. This diminishes adjudicators' belief in traditionally subordinated speakers' lived experiences and contributes to epistemic injustice that results in unfair trial outcomes. For instance, Picinali effectively explains how testimonial injustice is apparent in the way adjudicators interpret evidence of Black flight from or silence while in the presence of law enforcement as indicative of consciousness of guilt rather than as a reasonable reaction and effort to protect oneself from racist policing practices.

Picinali emphasizes the deflated credibility afforded minoritized defendants and complainants in the criminal process. Such emphasis is reasonable since testimonial injustice is traditionally understood to arise from an unfair assessment that a subject lacks credibility. He identifies how factfinders assess evidence through their dominant identity-based viewpoints to the detriment of out-group defendants and complainants. While beyond the scope of his paper, the undeserved credibility boost afforded racially privileged prosecutorial witnesses is an important and overlooked part of evaluating testimonial injustice in the criminal evidence context. This is all the more true in adversarial legal systems, such as in the United Kingdom and the United States, where an unfair credibility boost harms the opposing party.

My paper seeks to supplement Picinali's exploration of the credibility deficit suffered by racially minoritized criminal defendants by exploring racialized credibility excess, an epistemic wrong that is frequently bestowed on the prosecution's witnesses and can often lead to epistemic harm and unfair criminal adjudications. Inspired by Picinali's observation that adjudicators rely on their own privileged knowledge and therefore fail to consider subordinated peoples' knowledge about how systems of subordination play out and are experienced, I consider how scholars similarly draw upon reservoirs of dominant knowledge about how racism operates and neglect to consider how privilege limits their own ability to recognize racialized epistemic wrongs and harms. This exploration builds off the work of José Medina (2011) who has sought to expand Miranda Fricker's (2007) definition of testimonial injustice to include credibility excess. This paper applies a critical race theory lens to the ad-

versarial criminal legal system to engage and test the bounds of Fricker's claim that testimonial injustice manifests as credibility deficit, not as a credibility excess.

As originally imagined, testimonial injustice comprises only the epistemic wrong and harm to a speaker's credibility *qua* knower in terms of a credibility deficit. This wrong and harm are customarily understood as individualized, affecting only the speaker. At trial, the speaker's race is all too often relied upon to determine credibility (Capers, 2019, p. 890). In the context of the criminal trial, where the accused tends to come from a racially subordinated social group and the primary prosecutorial witness tends to come from a racially privileged social group, there can be dual forms of testimonial injustice which occur simultaneously: the accused's credibility deficit and the prosecution witness's credibility excess. I argue that both are forms of testimonial injustice which harm the criminal defendant<sup>1</sup>. I propose a more inclusive working definition of testimonial injustice, one that encompasses the epistemic harm caused by giving privileged speakers an undeserved credibility surplus. I urge legal scholars and adjudicators to recognize how epistemic injustice can involve transferring epistemic harm to an interlocutor.

The criminal trial is a unique epistemic domain because the credibility economy is artificially constrained due to adversarial knowledge dynamics. Consequently, in criminal trials, credibility excess can lead to testimonial injustice with clearly identifiable proximate and multifaceted impacts that teach us valuable lessons about epistemic injustice and warrant deeper inquiry.

## 2. TESTIMONIAL INJUSTICE AS CREDIBILITY DEFICIT OR EXCESS

In the ground-breaking book, *Epistemic Injustice: Power and the Ethics of Knowing*, Miranda Fricker (2007) coined the term «epistemic injustice», describing it as a wrong against someone in their capacity as a knower (p. 44). Fricker identified «testimonial injustice» as one of two primary forms of epistemic injustice «wherein a speaker receives an unfair deficit of credibility from a hearer owing to prejudice on the hearer's part» (p. 9). Fricker acknowledges that prejudice can inflate or deflate the credibility of a speaker but discusses few significant harms resulting from cre-

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<sup>1</sup> A similar phenomenon can occur in trials where there is no racially-minoritized defendant, such as when a relatively racially-privileged police officer or vigilante is prosecuted for killing a racially-minoritized victim of color. An example of this occurred in the prosecution of White-Hispanic George Zimmerman for the shooting death of a Black youth, Trayvon Martin, where the prosecution's Black witness's race and racialized attributes were relied upon to diminish her credibility as a witness and the defendant's race and engagement in dominant racial narratives was used to increase his credibility (Capers, 2019, pp. 893-94). In the civil rights context, Anne E. Ralph (2024), has observed that qualified immunity for public officials, like police officers, «grants defendants a credibility excess and relegates plaintiffs to a status as lesser knowers» (p. 1362).

dibility excess (p. 18). Thus, the original definition of testimonial injustice set by Fricker requires 1) a wrong 2) against a speaker 3) due to negative identity prejudice 4) resulting in an unfair credibility deficit. This definition does not imagine that an epistemic wrong to a speaker based on credibility excess could exist, much less harm an interlocutor.

A few scholars have argued for expanding the definition of testimonial injustice to include epistemic harms which stem from credibility excess. For instance, Emmalon Davis (2016) has explored how «positive» stereotypes harm speakers (p. 3). She theorizes that an identity prejudice credibility excess occurs when a speaker is assessed as credible with respect to some bit of knowledge on the basis of prejudicial stereotypes associated with the speaker's social identity. She posits various harms that can result, including essentializing people from certain social groups which impacts their ability to speak as individuals or be adequately heard on topics that diverge from stereotypes. Sarah Lackey (2023) has advocated for «agential testimonial injustice» to be recognized in the false confession context where «testimony is extracted from speakers in a way that bypasses, exploits, or subverts their epistemic agency and is then given an unwarranted excess of credibility» (p. 32). Lisa Washington (2022) has further applied agential testimonial injustice to the family regulation system where «[s]urvivors are affected by testimonial injustice both when their authentic knowledge is discredited and when they are forced to participate in knowledge production within a coercive environment» (p. 1137).

Most notably for this paper's analysis of the epistemic harm to a criminal defendant via the credibility excess afforded a prosecution's witness, José Medina (2011, p. 17-19) has focused on the interactive aspects of credibility. He proposes a proportionality analysis of testimonial injustice:

So, those who have an undeserved (or arbitrarily given) credibility excess are judged comparatively more worthy of epistemic trust than other subjects, all things being equal; and this is unfair, not only to them but also to others who do not receive this privileged treatment, not because of a failure in equal distribution but because of a failure in proportionality, for the degrees of credibility given to subjects have to be proportional to their epistemic merits and the presumptions that apply to subjects in their situation. A credibility excess constitutes an epistemic injustice when and because it involves the undeserved treatment of an epistemic subject who receives comparatively more trust than other subjects would under the same conditions. The credibility excess assigned to some can be correlated to the credibility deficits assigned to others not because credibility is a scarce good (as the distributive model wrongly assumes), but because credibility is a comparative and contrastive quality, and an excessive attribution of it involves the privileged epistemic treatment of some (the members of the comparison class, *i. e.* those like the recipient) and the underprivileged epistemic treatment of others (the members of the contrast class, *i. e.* those unlike the recipient) (p. 20).

Medina's proportionality analysis lends itself well to the adversarial context where evidence by opposing party witnesses competes for the factfinders' belief. When factfinders must believe one witness to the comparative detriment of the other party (*i. e.*, who had right of way in an accident or who threw the first punch in a fight) the economy of credibility is particularly constrained. This is especially true in the crimi-

nal context where factfinders are asked to evaluate testimonial credibility and render a verdict that impacts the defendant's liberty. At a criminal trial, the epistemic wrong of credibility excess can cause tangible epistemic harm and should be recognized as a form of testimonial injustice.

Fricker uses Harper Lee's novel *To Kill a Mockingbird* as her central example of testimonial injustice (Fricker, 2007, p. 23). In this fictional case, an African American man, Tom Robinson, is unjustly and wrongfully prosecuted for the rape of a younger White woman, Mayella Ewell (Lee, 1960). Robinson takes the stand in his defense and refutes any wrongdoing but is not believed due to the racist negative identity prejudice targeted at Black men. Medina (2011) engages with this case as well but looks to the credibility excess which «give[s] essential support to the epistemic disparities at play and the biased testimonial dynamic that leads to the injustice» (p. 23). He studies the prosecution's key witness, Mayella Ewell, and how as a White person she is demonstrably—as evidenced by the differential treatment she receives from the officers of the court (judge and attorneys)—afforded more credibility than the defendant.

Medina observes that «the discrediting of [Tom Johnson's] testimony does not happen in a vacuum; his credibility is not undermined independently of the credibility of those around him» (p. 24).

Medina reflects that

[c]redibility deficits and excesses clearly go together in this case. This is not surprising since we are dealing with an epistemic injustice that is grounded in a *comparative* social injustice: the unfair differential agency given to members of different racial groups, whites and non-whites; and the epistemic aspects of that agency will also be attributed differentially, giving more to some and less to others. As the social advantages and disadvantages produced by racism go together, so do the epistemic advantages and disadvantages produced by racism (p. 24).

Fricker's (2007) examination of the testimonial injustice endured by Tom Johnson directly is only half the story. Medina's (2011) consideration of the epistemic harm resulting from the prosecution's witness's credibility excess begins to complete that story.

Like the tragic figure of Tom Johnson, Picinali's (2023) hypothetical criminal defendants, if tried, would likely not only suffer the credibility deficit epistemic harm he reveals, but also the epistemic harm resulting from credibility excess given to law enforcement officers introduced by prosecutors. For instance, in his rap lyrics hypothetical, a law enforcement officer might testify that the meaning of the defendant's song lyrics is an admission to a lifestyle of street crime. In the asylum seeker hypothetical, a law enforcement officer might testify about how a substantial sum of cash under a mattress is indicative of the illegal drug trade. In England and the United States alike, police officers are disproportionately White and may benefit from race-based positive identity prejudice as an individual or agent of a white institution<sup>2</sup>, compounding the harm of testimonial injustice to the defendant. Picinali's defendants would not

<sup>2</sup> From a critical race theory perspective, law enforcement agencies are considered white institutions because they were established to protect white interests and maintain a racial hierarchy (*i. e.*,

only be disbelieved because their minoritized life experiences contradict the factfinders' worldview and stocks of knowledge, but also because that worldview is affirmed through the testimony of over-believed identity-privileged officers.

Under Medina's theory (2011), the prosecution witness's credibility excess can amount to an epistemic harm to the defendant. This is due to credibility's interactive nature. The defendant's already-lessened credibility will be judged in an adversarial environment in juxtaposition to the prosecution witness's augmented credibility. Here, the prosecution witness's credibility excess constitutes an epistemic injustice because it involves treating the defendant with comparatively less trust, despite a mandated presumption of innocence. Credibility in the criminal justice context is a «comparative and contrastive quality» where excess attribution to the prosecution witness works to the detriment of the under-privileged defendant (Medina, 2011, p. 20). As such, the testimonial injustices faced by Picinali's (2023) hypothetical defendants are likely even more dire than he described.

### 3. CRITICALIST APPROACH TO TESTIMONIAL INJUSTICE

Why do scholars often overlook the impact of credibility excess in analyzing epistemic injustice? One explanation might be that scholars typically approach the analysis of racial injustice from traditionalist or anti-discrimination perspectives without considering a critical race theory («criticalist») perspective, which is an anti-subordination perspective. Critical race theory is a body of scholarship which examines the nature of race and racism as it manifests through institutions, systems, and structures to impact law, legal norms, society, and everyday life. Central tenets of critical race theory are how racialization and racism are enduring and pervasive social phenomena designed to entrench power and preserve privilege for racial insiders by subordinating racial outsiders (Gonzales Rose, 2017, p. 2249). Critical race theory examines racism from the perspective of racial outsiders or from the «bottom up» rather than from the perspective of those favored by racial hierarchy (Gonzales Rose, 2017, p. 2258). In contrast, an anti-discrimination approach views racism more narrowly as manifesting primarily as negative bias or bigotry expressed between individuals.

Fricker (2007) appears to predominantly employ an anti-discrimination approach to racialized testimonial injustice, rather than a criticalist anti-subordination approach. The core beliefs behind an anti-discrimination approach are as follows: the legal system is created to evenhandedly resolve claims and administer justice; racism is fundamentally racial discrimination based upon dislike or undervaluing of traditionally excluded racial groups; racism is primarily expressed through racially disparate treatment between individuals based on group membership; similarly-situated

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policing beginning with the slave patrols in the U.S.), ensuring that the liberties and property of racial insiders were safeguarded while restricting the liberties and seizing the property of racial outsiders.



individuals should be treated similarly; if they are not treated similarly then the system is broken or at least cracked, and in need of repair. Thus, under an anti-discrimination approach, when equally-credible Black speakers are not believed to the same degree as equally-credible White speakers, there is a bias between individuals which amounts to an injustice that is abhorrent to the principles of the system. Hence, Black speakers are epistemically harmed whenever they are afforded less epistemic trust absent any legitimate basis.

A critical race theory approach, on the other hand, believes the legal system was designed to entrench power and privilege in racial insiders and maintain racial hierarchy, subordination, and control of racial outsiders. Racism includes racial discrimination against traditionally excluded or marginalized groups—and thus a criticalist understands the testimonial injustice of credibility deficit but does not end their analysis there. Modernly, racism centers on maintaining power in racially privileged groups and is primarily implemented through policies, systems, institutions, and structures. Thus, there is a moral imperative that everyone be treated equitably; but when they are not, the system is believed to be working as designed. As such, when Black speakers are not believed to the same degree as equally credible White speakers, the subordinated Black speaker experiences multiple levels of injustice: first as an individual who received disparate treatment and also as a member of a racial group that is subordinated through listeners unfairly privileging the White speaker. When a White speaker's credibility is routinely boosted, this does not exist in isolation or as a one-time occurrence. Rather this is part of an epistemic-privileging routine and pervasive subordination which consistently and systematically exalts members of the White racial group to entrench their power and privilege to the corresponding and collective epistemic detriment of Black and other non-White people.

Contrasting an anti-discrimination perspective with a criticalist perspective reveals fundamental differences in understanding both how legal systems and racism operate and how epistemic injustice can be understood. From a criticalist perspective, epistemic injustice manifests as both an individualized epistemic harm to the subordinated speaker and as a collective epistemic harm to the subordinated speaker via the credibility excess to the privileged speaker. The criminal legal system magnifies these epistemic harms, particularly when the subordinated speaker is a defendant, and the privileged speaker is the prosecution's witness.

In the criminal trial context, the credibility economy is artificially constrained. Factfinders, especially jurors, are told to make credibility determinations to decide criminal liability. While credibility might not be truly finite in the adversarial criminal system, a factfinder may experience credibility as finite. Jurors are put in the position of determining who is speaking the truth which can lead to a sense of a limited amount of epistemic trust or authority that can be allocated among opposing witnesses at trial.

For instance, imagine a battery prosecution where the defendant claims self-defense and the prosecution's eyewitness, a police officer, testifies that the defendant



threw the first punch. In a jurisdiction where an initial aggressor cannot succeed on a defense of self-defense, it would defy the judge's instructions on the law for a juror to equally believe the police witness and the defendant. Self-defense and initial aggression cannot be equally true legally. Therefore, the juror is pressured to choose whether to believe one of them<sup>3</sup>. Does the juror believe the police officer who witnessed the altercation or the defendant who experienced it? Fricker (2007) may argue that one can attribute equal credibility to both witnesses. However, the criminal legal system artificially constrains the credibility economy, treating it as a zero-sum game during trial. Jurors are regularly called upon to determine one witness's credibility to another witness's detriment. This means that a credibility excess on the prosecutor's side of the «v» will often harm the defendant—and this disadvantage is epistemic.

In this battery hypothetical, let's suppose the defendant is Black and the police officer is White. If implicit racial bias causes the juror to believe that Black people are more violent and less forthright and honest, the juror will find the defendant less deserving of belief and discredit his testimony. This credibility deficit moves the needle towards a verdict of guilt. Racial bias is relational and correlative. Devaluing one racial group correlates with overvaluing the counterpart racial group. If there is an implicit bias against one racial group as being more violent and untruthful, the non-corresponding racial group would be considered more peaceful and truthful. If blackness is devalued, it is likely that whiteness is over-valued. It follows that the juror's same implicit bias will influence the juror to more readily believe the White police officer. When the prosecution's police witness's testimony is subject to this credibility excess, the needle also moves towards a verdict of guilt.

Thus, both the defendant's credibility reduction and the prosecution witness's credibility excess make the defendant more likely to be found guilty—not on the facts, but on an improper basis of negative identity bias. If a defendant is subject to two instances of unfair, identity-based credibility determination—1) his credibility deficit and 2) an adverse witness's credibility excess—and consequently is believed less, then the question becomes: can the latter amount to testimonial injustice?

It seems unnecessary to limit testimonial injustice to cases where harm is inflicted directly on the targeted speaker themselves. As established by Medina (2011) and the discussion above, racial privilege can hurt racially subordinated interlocutors in the criminal context. The way racial privilege simultaneously augments one speaker to the corresponding detriment of a subordinated adverse party was present in Fricker's initial utilization of *To Kill a Mockingbird* but was left largely unaddressed (Fricker, 2007). The credibility excess bestowed on the prosecution's witness was not explored when she crafted the definition of testimonial injustice.

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<sup>3</sup> A juror could believe both witnesses equally which would be a cognitive impasse of sorts that supports reasonable doubt of the accused's guilt. I'm not arguing that credibility is inherently limited in trials, but rather that jurors often feel compelled to treat it as if it were.

In that case, when Mayella Ewell took the stand to lie that she was raped, she was treated as a privileged knower. The presiding judge stated he would protect her and even defense counsel treated her above the social station particular to what her class and gender would have garnered in 1935. Mayella Ewell's social status was that of a poor, uneducated, and uncouth woman; that, combined with her claim of sexual assault, would usually be afforded a pronounced (and unfair) credibility deprivation. However, the court showed only respect, trust, and confidence in her reliability and veracity. Mayella Ewell is revered because she plays her role in reifying societal prejudice (that Black men pose a threat of sexual violence to White women) and racial hierarchy (that Black men's liberty should be constrained and controlled by the State). As the prosecution's witness, Mayella Ewell plays a significant role in robbing Defendant Tom Robison of his already-limited epistemic ability to be believed.

Just as Medina (2011) notes that Tom Robinson's credibility deficit did not occur in a vacuum and was dependent on Mayella Ewell's credibility excess, Ewell's credibility excess did not occur in a vacuum and was dependent on Robinson's credibility deficit. Gifted the credibility boost needed to maintain the racial hierarchy desired by the racial majority in 1935 Maycomb Alabama, Mayella Ewell is believed to be undoubtedly honest and accurate. The credibility excess I refer to is not from a baseline of the human dignity that everyone deserves. She certainly deserved full credibility irrespective of her gender, class, education level, and status as a complainant of rape<sup>4</sup>. I rather refer to the baseline from which she would normally be judged, absent any boost resulting from bias against the defendant. In other words, where would her credibility start independently of the racism against the defendant? And, how big of a lift does she receive from the racism against the defendant?

One admittedly overly simplistic but elucidating way to get a sense of Mayella's enhanced epistemic standing is to attribute numerical value to her credibility. Let's say that any testifying witness who takes a solemn oath in court is generally believed at a social status-neutral rate of 50/100. This means there are equal chances that the witness will be believed or not believed. Now let's take the witness's social circumstances into account. Mayella Ewell is poor, illiterate, female, and claims rape. Each of these social identities or experiences is unfairly socially stigmatized. She would suffer a significant credibility decrease, would likely not be believed, but would not be completely disregarded. Perhaps Mayella would be afforded something close to a 25/100 credibility score.

Now, let's consider her credibility when juxtaposed as the prosecution witness against a Black male defendant. Her credibility would soar. She will certainly be believed by the judge and jury. In fact, she was entirely believed, despite evidence refuting her testimony (that the defendant had a physical disability inconsistent with her story and injuries). Here, it makes sense to estimate that she received close to a

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<sup>4</sup> As Deborah Tuerkheimer (2017) has explained «rape accusers remain subject to a pronounced credibility discount» (p. 56).

95/100 credibility score at the trial against Tom Robinson. This means that her credibility would have increased by 70% because of the demographics of the defendant. These numbers are of course all fashioned to make a point. But the exercise illustrates how, because she claims rape against a Black man, her testimonial credibility skyrockets. In a social and legal setting which wants to control, shackle, and imprison Black men due to racial prejudice, her credibility as a witness experiences a dramatic surge. This credibility excess leads directly to the defendant's criminal conviction.

In utilizing only part of the Tom Robinson testimonial evidence as the central example of testimonial injustice, Fricker (2007) restricts the scope of testimonial injustice to instances where there is a reduction in credibility, rather than including situations characterized by credibility excess. This represents an anti-discrimination perspective rather than a criticalist perspective on how racism manifests, endures, and is experienced by those who are directly impacted by it. To view credibility deficit as the only epistemic wrong is to assume that the dominant group is the baseline of fair epistemic treatment, including belief. This is a «top-down» perspective on racism. Critical race theory encourages a «bottom-up» perspective: an analytical approach that emphasizes the experiences and perspectives of marginalized groups. Here, a bottom-up perspective sees a reality where the racially dominant group receives stocks of unearned and unjustified perceptions of credibility, belief, knowledge, intelligence, expertise, competency, legitimacy, and other forms of epistemic authority simply by virtue of being racialized as the White or dominant racial group.

In critical race theory terms, the limitation of testimonial injustice to credibility deficit reflects «White normativity»: an implicit assumption that the white experience is the norm. White normativity informs Fricker's limited definition of testimonial injustice by assuming that the baseline epistemic status of White speakers is natural, deserved, and the norm. There is a lack of awareness that White credibility might be unfairly and unnaturally enhanced and that members of non-White racial groups can be adversely affected by a White speaker's heightened credibility. There is a presumption that since credibility excess does not hurt the privileged speaker directly, there is no need to notice an injustice.

From this advantaged viewpoint, it follows that race, gender, class, and other insider social group epistemic privileges are not perceived as causing harm, and speakers from outsider social groups can only experience wrongs through the individual disparate treatment of being believed less. This individualist<sup>5</sup> and demographically privileged view restricts both the scope of perceived wrongs and any redress for resultant harms. Scholars approaching racial inequities from an anti-discrimination perspective are often comfortable examining racial bias against people of color while overlooking the unfair benefits of racism to White people. Doing this while developing epistemic injustice theorizations means that White epistemic privilege can

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<sup>5</sup> Sarah Bufkin (2024) has thoughtfully critiqued Fricker's account of epistemic injustice, finding her theorization to be too individualized to fully account for racialized imaginaries and discourses.

continue largely unchecked, unquestioned, and underexplored in the field, while scholars feel virtuous because they have expressed concern for limited harm to minoritized people.

Affording epistemic privilege to a speaker because of one's unconscious notions of white superiority is an epistemic wrong in itself. It not only perpetuates systemic inequalities but also undermines the pursuit of knowledge and understanding. This is particularly unjust in the legal context because it disregards the pursuit of truth and objectivity. It illegitimately favors one racial group as knowers to other racialized knowers' detriment and contravenes notions of equality. The fact that epistemic privilege benefits, instead of hurts, a White speaker should not preclude it from being considered an epistemic wrong. The epistemic wrong of credibility excess should be recognized as a basis for testimonial injustice.

Generally, in Law and everyday parlance, an injustice can be understood as an instance where a wrong prompted by societal prejudice violates principles or rights to fairness, equity, or freedom and results in harm. Thus injustice = prejudice + wrong + harm. In the testimonial injustice literature, «wrong», «harm», and «injustice» are sometimes used interchangeably. Gerry Dunne and Alkis Kotsonis (2024, p. 2) have explored the causal relationship between epistemic wrongs and epistemic harms and have wisely urged scholars to not conflate the two concepts.

Our understanding of testimonial injustice should be expanded to include the epistemic wrongs and harms related to credibility excess. I propose an expanded working definition of testimonial injustice. A testimonial injustice occurs where 1) the social wrong of negative identity prejudice prompts 2) an epistemic wrong of credibility deficit or excess to a speaker in their capacity as a knower 3) which results in a harm to the speaker or their interlocutor as a knower. All three factors need to be present in order to amount to testimonial injustice. Here the epistemic harm can be direct or indirect. In adversarial criminal trials, the credibility economy is constrained, jurors may be put in a position to treat credibility as a finite good, and thus the testimonial credibility afforded prosecution versus defense witnesses plays out in a zero-sum game.

As a conceptual starting place, I suggest the term «transferred epistemic harm», to capture the indirect harm that occurs when a privileged speaker's credibility excess correspondingly reduces a subordinated speaker's epistemic ability or agency in a way that causes epistemic injury *qua* knower. The epistemic wrong (the social prejudice to unjustifiably augment a privileged speaker's credibility) causes harm in the epistemic domain. The harm does not affect the target of the wrong (the privileged speaker) but instead affects their corresponding underprivileged interlocutor who is consequently regarded with even less belief. The epistemic harm tethered to and resulting from the epistemic wrong transfers from the privileged target to the underprivileged interlocutor, who accordingly is believed even less than before the credibility excess wrong.

The archetype example of this is a criminal trial where the defendant is vulnerable to negative social bias. In a criminal trial's constrained credibility economy, an epistemic wrong to the privileged speaker cashes out ultimately to be an epistemic harm to the underprivileged speaker. In this environment, the epistemic wrong attaches to the privileged speaker but the harm is transferred to the subordinated speaker. The injustice does not «spill-over» because it did not first fill the speaker. The harm is not «collateral» because the central aim of racism is to maintain racial privilege. I conclude that credibility excess to a privileged speaker, which harms the underprivileged interlocutor, should be recognized as testimonial injustice.

#### 4. CONCLUSION

In «Evidential Reasoning, Testimonial Injustice, and the Fairness of the Criminal Trial», Federico Picinali (2023) examines lay and professional adjudicators' devaluation of minoritized defendants' and complainants' racialized and gendered knowledge and lived experiences. His work provides a valuable contribution to intersecting literatures on testimonial injustice and racist evidential practices. This work would be further bolstered by examining how testimonial injustice also stems from credibility excess. His analysis's absence is not due to any shortcomings in his work, but instead due to a void in the field of epistemology to recognize and theorize how identity-biased credibility excess can amount to a form of epistemic injustice. Paradoxically, the problem here is one of hermeneutical injustice: the other primary form of epistemic injustice Miranda Fricker (2007) identified.

«Hermeneutical injustice is: the injustice of having some significant area of one's social experience obscured from collective understanding owing to a structural identity prejudice in the collective hermeneutical resource» (Fricker, 2007, p. 155). The lack of an epistemological framework to explain the injustice of having the social experience of one's testimony devalued due to identity-based bias resulting from the opposing party's credibility excess, means that scholars overlook this epistemic injustice. This paper has attempted to advance the conversation.

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