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Testimonial Epistemic Injustice in the Courtroom

By

Caitlin Colangelo

Advised by Professor Richard Kenneth Atkins, Ph.D.

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Introduction

The topic of this thesis is testimonial epistemic injustice in the courtroom context. Testimonial epistemic injustice occurs when someone's testimony is unduly downgraded (credibility deficit) or unduly upgraded (credibility excess) due to a structural social prejudice held by the listener. Examples of structural social prejudices are prejudices concerning race, gender, class, and degree of education obtained by the testifier. Credibility assessments are influenced by listeners' biases, the social context of the interaction, and the perceived disposition of the testifier. In this paper, I intend to examine (1) what testimonial epistemic injustice is and (2) what can be done to address testimonial epistemic injustice in courtrooms.

Part One of this thesis will survey a philosophical background on testimonial epistemic injustice. I will primarily rely on Miranda Fricker's *Epistemic Injustice: Power & the Ethics of Knowing.* I will also draw on C. A. J. Coady's *Testimony: A Philosophical Study,* and additional key texts including articles written by José Medina and Jennifer Lackey.

Part Two of this thesis will apply the philosophical framework established in Part One to the courtroom context. I will outline specific cases of testimonial epistemic injustice in courtrooms and propose both public-facing and courtroom-facing measures to address these issues. Part Two will include analysis of the epistemic treatment of paid and unpaid expert testimony and jailhouse informants. I will also examine how prejudice influences attorneys' choices during jury selection. Throughout Part Two, I will propose structural solutions to address the impact of prejudice on peoples' credibility assessments in the courtroom.

PART ONE

Testimony and the Nature of Epistemic Injustice

Section One

Testimonial Epistemic Injustice in Focus

In this section, I will first distinguish between formal and informal testimony, drawing on C. A. J. Coady's *Testimony: A Philosophical Study*. Second, I will describe what testimonial injustice is, predominantly relying on Miranda Fricker's *Epistemic Injustice: Power & the Ethics of Knowing*. In the course of doing so, I will bring additional authors into the conversation, distinguishing between different types of epistemic injustice and elaborating on the practical impacts of these types of epistemic injustice.

Two Types of Testimony

As C. A. J Coady explains, testimony can be divided into two subcategories, formal and informal testimony. Informal testimony occurs when a speaker is "engaged in the speech act of testifying to the truth of some proposition, which is either in dispute, or in some way in need of determination, and his attestation is evidence towards the settling of the matter" (Coady, 1992, p. 38). Something as simple as a "deer crossing" street sign constitutes informal testimony because it testifies to the truth of the matter asserted. Coady further explains informal testimony as testimony given in "everyday circumstances [that] exhibit the 'social operations of the mind,'" which can constitute "giving someone directions to the post office, reporting what happened in an accident, saying that, yes, you have seen a child answering to that description, telling someone the result of the last race" (Coady, 1992, p. 38). Informal testimony can include statements offered in an effort to settle a dispute or to establish a fact in response to the issue in question. This thesis will primarily focus on formal testimony, as opposed to informal testimony.

In contrast to informal testimony, formal testimony is given in courtrooms, and has several restrictions regarding its admissibility. For example, in typical cases, hearsay is inadmissible. Hearsay is legally defined as "an out-of-court statement admitted for the truth of the matter asserted" (Hearsay Evidence, 2019). In other words, hearsay occurs when someone gives oral or written testimony referencing what other people have previously said. One example of hearsay is if a witness says, "Harold, my neighbor, told me that he saw someone running with a gun up Wisconsin Street around 3 a.m. yesterday." This statement would likely be inadmissible in court because of the Confrontation Clause in the Sixth Amendment, which states, "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against them" (The Constitution, n.d.). Hearsay evidence is not allowed in courtrooms except under certain limited circumstances (Rule 803, n.d.). One hearsay exception is an excited utterance. In this case, someone makes a statement under distress or excitement related to a startling condition or event. For example, someone named Kate might see a shooting and exclaim "Oh my gosh, George just shot Sally." A different bystander can give formal, admissible hearsay-based testimony about what he heard Kate say.

Coady describes formal testimony as having four factors. The first requirement is that the testimony is evidence. The witness must be properly sworn in or follow some other procedure that properly gives "status to the inquiry" (Coady, 1992, p. 32). The testimony, therefore, must be directed to some unresolved question at hand, because otherwise, it is not evidence *for* anything.

The second requirement is that a person A is offering her remarks as evidence, which means we are invited to accept p *because* A says that p. People giving formal courtroom testimony must be aware that they are giving testimony. This distinction is best understood

through an example. Someone who does not offer their remarks as evidence might offhandedly say “I saw Harold get very angry the morning of July 28th” under her breath in the back of a courtroom, whereas formal testimony would take place at the stand, under oath. The person who utters something under her breath does not offer their remarks as evidence as to Harold’s mental state on July 28th.

A third requirement is that the person A is in an appropriate position to give the testimony. This means that the testifier has the requisite competence, credentials, and authority to testify to the matter at hand. In the courtroom, this typically means the testifier has firsthand perceptual knowledge of the crime, or has academic training in a subject that would assist the jury in interpreting the facts related to the case. In other instances, it means more generally that the testifier has requisite knowledge to testify to what is at issue. In the case of character witnesses, this means the testifier can provide information as to the person’s character traits and reputation in the community. Because testifiers must have requisite competence, credentials, and authority to testify, formal testimony does not typically include hearsay. Someone giving testimony based on hearsay is typically not deemed to have appropriate authority on the topic. As mentioned earlier, the condition that the testimony cannot be hearsay has several exceptions.

The fourth requirement is that A has been formally acknowledged as a witness and is giving the testimony in the appropriate ceremony. In the courtroom context, this means that the witness takes the stand, and is giving the testimony under oath. This thesis will focus on formal testimony. In Part Two, I will analyze how social prejudices influence jurors’ assessments of expert testimony and jailhouse informant testimony in the credibility economy of the courtroom. I will also analyze how the treatment of prospective jurors’ formal testimony given during jury selection is influenced by attorneys’ identity-based prejudices.

Fricker on Testimonial Injustice

Miranda Fricker, a prominent epistemologist and author of *Epistemic Injustice: Power and the Ethics of Knowing,* defines testimonial epistemic injustice as the injustice that occurs when "prejudice causes a hearer to give a deflated level of credibility to a speaker's word" (Fricker, 2009, p. 1). Listeners' biases can lead to either a credibility deficit or credibility excess for the testifier. In either of these cases, an improper distribution of trust occurs. Fricker focuses on cases of testimonial epistemic injustice resulting from credibility deficits. She argues that typically, only credibility deficits constitute testimonial injustice, because "on the whole, excess will tend to be advantageous, and deficit disadvantageous" for the testifier (Fricker, 2009, p. 18). The impact of being granted more credibility than deserved is typically neutral or beneficial for the subject granted more credibility than deserved. For example, if you fully believe what a dermatologist says about your kidney infection, you grant her excess credibility due to her identity as a doctor. A dermatologist would not have expert knowledge on nephrology. However, the doctor is not *epistemically* harmed in this interaction. She would not experience negative consequences to her ability to act as a knowledge-giver or knowledge-receiver due to your attributing her excess credibility. There may be negative consequences, like your becoming sicker due to trusting an inadequate medical opinion, but the doctor would not be harmed epistemically.

Epistemic injustice, on Fricker's account, requires that someone is harmed in her capacity as a knower due to a social structural identity-based prejudice (e.g., race, gender, sexuality, class, or one's profession). For example, if a Hispanic person's testimony is downgraded *because she is Hispanic*, the Hispanic person is harmed in her capacity as a knower. A structural prejudice is

systematic, as opposed to incidental, when it is repeated through time and tracks across different social dimensions (i.e. at work, at the grocery store, at school).

Fricker argues that it is wrong to interpret cases of credibility excess and deficit as cases of "distributive unfairness," because credibility is not finite, nor is it in short supply (Fricker, 2009, p. 19). According to Fricker, "there is no puzzle about the fair distribution of credibility, for credibility is a concept that wears its proper distribution on its sleeve" (Fricker, 2009, p. 19). When credibility is correctly distributed, its distribution is straightforward: people who are known to be reliable truth-tellers are deemed credible. In just circumstances, credibility is distributed proportionally, according to the degree the speaker's testimony can be expected to be true.

However, stereotypes and prejudices may influence credibility judgements. Fricker defines stereotypes as "widely held associations between a social group and one or more attributes" (Fricker, 2009, p. 30). Prejudices are pre-judgements. For Fricker, stereotypes are not always conscious. Someone's perception of a person may be influenced by commitments that derive from the collective imagination, which "permit[s] less transparency than beliefs" (Fricker, 2009, p. 31). Prejudices stemming from the collective imagination may operate structurally (forming social rules and norms), and often operate non-reflexively, which makes them difficult to detect. Imagine a society in which women are not respected, and it is taboo for a woman to voice her opinion. In this social context, a woman may not answer a question, even if she is the only person in the room who knows the answer to the question and even if no one explicitly tells her not to answer the question. In this way, the social imagination can "control our actions even despite our beliefs" (Fricker, 2009, p. 15). Neither the woman, nor anyone else in the room, needs to hold a conscious prejudicial belief against the woman for the power of the prejudice to

operate on the subconscious level. Prejudices can function structurally, at the level of social norms, or agentially, at the level of individual people. At the structural and agential level, prejudices are often non-reflexive and function automatically.

Colloquially, the term 'stereotype' carries negative connotations, but Fricker's conception of stereotypes can be either positive or negative, and either reliable or unreliable. On her account, a stereotype is a heuristic that influences one's analysis of someone else's credibility, which is useful because people are oftentimes tasked with making snappy judgements. Fricker explains that using an unreliable stereotype to make a judgment of someone else's personality is not always a *culpable* mistake, for it is possible that the available evidence is misleading. For example, one person A may mistrust another person B due to B's shifty nature, because A believes that darting eyes indicate lying. However, B may be telling the truth but suffer from social anxiety. A makes a snap judgment and is mistaken about B lying, but A's mistake is not culpable. Acting shiftily often is a signal that one is lying. Or, it is possible that the "subject's patterns of judgements are influenced by the prejudices of his day in a context where it would take a very exceptional epistemic character to overcome those prejudices" (Fricker, 2009, p. 33). Fricker allows for certain instances where a prejudice against someone is nonculpable due to the social circumstances.

Nomy Arpaly offers a key example of nonculpable testimonial injustice, which Fricker references. Arpaly imagines a young boy, Solomon, lives in a small, isolated farming community where women are not believed to be capable of complex abstract thinking. In this community, women are never seen reading or doing complex mental activities. If Solomon shifts his belief after studying alongside women at college, then his prejudice against women was an honest mistake due to the social circumstances in which he was living. However, if Solomon maintains

his belief despite counter-evidence that women are capable of abstract thinking, then he is both epistemically and ethically flawed (Fricker, 2009, p. 34). The lack of Solomon's reasons-responsiveness to his negative identity prejudice against women makes him ethically and epistemically culpable for his poor judgment. Negative identity prejudices are "widely held disparaging association[s] between a social group and one or more attributes, where this association embodies a generalization that displays some (typically, epistemically culpable) resistance to counter-evidence[1] owing to some affective investment on the part of the subject)" (Fricker, 2009, p. 35). Negative identity prejudices follow a person through time, and are not one-off, incidental judgments.

Fricker explains three negative consequences that result from testimonial epistemic injustice. One negative consequence is that the speaker makes an "unduly deflated assessment of the speaker's credibility, perhaps missing out on knowledge as a result" (Fricker, 2009, p. 17). Knowledge is the listener fails to gain knowledge because of the listener's prejudice. A second negative consequence is that the hearer "does something ethically bad—the speaker is wrongfully harmed in their capacity as a knower" (Fricker, 2009, p. 17). Thirdly, being harmed in one's capacity as a knower can lead to a loss in confidence in someone's own beliefs. If someone is repeatedly undermined in her capacity as a knower, she may come to doubt her own epistemic abilities, making her uncertain of her own judgments and causing her to undeservedly defer her judgements to what others dictate.

[1] See "The Epistemology of Prejudice" (2013) by Andre Begby for an analysis of why prejudices are resistant to counter-evidence. He describes prejudices as *epistemically insidious,* because they are often invisible to self-reflection, and resistant to counter-evidence that should make us second-guess them. He examines Normy Apalay's example of Solomon, and argues that the only thing required of Solomon after meeting women who are intelligent is to acknowledge that *some*, or *few* women are intelligent. He is not actually realistically required to rid himself of the entire prejudice in the face of counter-evidence which shows him only a few women who are intelligent.

Undermining someone's capacity as a knower is an affront to her very personhood. A State of Nature conception of knowledge-sharing, as developed by Edward Craig and Bernard Williams and shared by Fricker, shows why involvement in the epistemic community is central to personhood. The State of Nature is a society[2] in which humans live in groups and have minimal social organization.

In the State of Nature, people have three epistemic needs. The first epistemic need is that people need to possess enough truths and avoid enough falsehoods to facilitate survival. For example, people need to have enough knowledge about what foods are safe versus toxic to consume.

The second epistemic need is that people need to participate in an epistemic practice by which knowledge is pooled or shared. Practically, a division of epistemic labor is needed because no one can know everything. As Axel Gelfert explains in his book, *A Critical Introduction to Testimony*, "much of our knowledge depends on others" (Gelfert, 2014, p. 7). We are epistemically dependent on others: our beliefs, "depend for [their] formation, sustainment, or reliability on the knowledge (or beliefs, or other cognitive states and processes) of other epistemic agents" (Gelfert, 2014, p. 12). Epistemic labor is naturally distributed in cases of positional advantage where some people have sensory advantages pertaining to a particular question because different people are in different places at different times. For example, if people are trying to ascertain whether a predator is coming, someone who has climbed up a tree has a positional advantage in answering the question over people who are at ground level.

[2] See: Edward Craig "Knowledge and the State of Nature" (1990) and Bernard Williams *Truth and Truthfulness: An Essay in Genealogy* (2004), as well as Miranda Fricker's *Epistemic Injustice: Power and the Ethics of Knowing* (2007), Chapter 5.

Third, the State of Nature causes a need to encourage dispositions that stabilize relations of trust. It is beneficial for people to cooperate with others because it allows them to reasonably expect cooperation. Believing that everyone is set out to deceive you is not advantageous, because then you are limited to only the knowledge you can acquire on your own. Because of the mutual benefits of cooperation, the virtues of accuracy and sincerity become important for testifiers. The virtue of testimonial justice (accurate judgment of others' credibility) becomes important for listeners to guard against deception.

We can acquire knowledge from a testifier only if we deem the testifier to be trustworthy (whether unreflectively or reflectively). Epistemic trustworthiness requires both accuracy (making true assertions) and sincerity (believing that what you say is true). According to Fricker, "[a]ccuracy and [s]incerity sustain trust as regards to contributing to the knowledge pool" (Fricker, 2009, p. 116). Stereotypes assist us in quickly assessing a person's accuracy and sincerity, and therefore, in assessing the credibility of their testimony.

However, negative and positive prejudicial stereotypes may lead to testimonial epistemic injustice. Prejudicial stereotypes embody a false association, an "*un*reliable empirical generalization about the social stereotype in question" (Fricker, 2009, p. 32). As discussed, when a person ignores evidence suggesting the prejudicial stereotype she inherited from her environment is inaccurate, she becomes epistemically and ethically culpable for holding the prejudice. Epistemically, she is culpable for preventing people from contributing to shared epistemic resources, and ethically, she is culpable for harming the testifier in their capacity as a knower. Part of the harm perpetrated on the ethical dimension is that testifiers may begin to doubt their own judgements. Also, testifiers experiencing testimonial epistemic injustice are degraded as a human because knowledge-sharing is essential to personhood. In general, in order

for a belief to be responsibly formed and maintained, the belief must be sensitive to additional evidence. Identity-based prejudices afford testifiers with more or less credibility than deserved. The virtue of testimonial justice for listeners entails having reasons-responsive beliefs and consciously analyzing one's prejudices that may otherwise operate on a subconscious level.

Two Critiques of Fricker

Fricker's framework can be critiqued for two main reasons: (1) she has an overly narrow account of how credibility assessments function, and (2) credibility excess can also result in testimonial epistemic injustice. These critiques show that Fricker's account of testimonial injustice is overly narrowly and can be broadened to include different kinds of testimonial injustice.

Critique One: Credibility Assessments Are Not Only Influenced by Prejudice

In "Epistemic Injustice and Epistemic Trust," Gloria Origgi explains that additional factors other than prejudices contribute to our decisions to trust or doubt someone's testimony. She writes, "[the] credibility economy is based on a broader spectrum of attitudes, complex values, cognitive inferences, and emotional commitments (trusting a gut feeling), that are at the basis of our epistemic trust" (Origgi, 2012, p. 224). A few examples of these additional factors aside from prejudice are conformism (confirmation bias), social norms, robust signals (signs that are difficult to fake, like speaking with an Italian accent and claiming to be Italian), moral commitments, and emotional reactions.

Origgi separates epistemic trust into two components, default trust and vigilant trust. Default trust is the minimum trust we need to allocate to anyone with whom we are speaking in

order for the act of communication to take place. Vigilant trust is "the complex of cognitive mechanisms, emotional dispositions, inherited norms, reputational cues we put at work while filtering the information we receive" (Origgi, 2012, p. 224). Depending on the stakes, we depend on either default trust or vigilant trust to make our judgment.[3] It is important to consider how factors like conformism can interact with our prejudices when making our credibility assessments. The results of credibility assessments are situationally dependent, as we apply our credibility heuristics to every unique situation. In this application, prejudice is only one factor contributing to our overall decision to trust someone. I will be adopting Origgi's broader conception of social (not merely identity) prejudice in this thesis.

Critique Two: Cases of Credibility Excess Can Constitute Testimonial Injustice

Although Fricker's project does not focus on cases of credibility excess, cases of credibility excess can constitute testimonial epistemic injustice. In what follows, I explain three ways in which this can occur.

Way One: Interactivity and the Credibility Economy: In "The Relevance of Credibility Excess in a Proportional View of Epistemic Injustice: Differential Epistemic Authority and the Social," José Medina argues that "the disproportionate epistemic trust given to the speaker affects everybody involved in the interaction and not just the speaker, for it affects the very dynamic that unfolds in the interaction" (Medina, 2011, p. 19). In other words, a person's evaluation of one person's credibility influences her evaluation of another person's credibility. According to Medina, "credibility is not assessed in the abstract, independently of social positionality and

[3] This is essentially the difference between reflexive and non-reflexive judgements that Fricker refers to in *Epistemic Injustice: Power and the Ethics of Knowing* (2007).

judgments of normalcy, but rather, in a comparative and contrastive way" (Medina, 2011, p. 20). Credibility is inherently "interactive" because it "involv[es] implicit comparisons and contrasts" (Medina, 2011, p. 19). Therefore, a credibility excess constitutes an epistemic injustice when it involves granting undeserved trust towards an epistemic subject "who receives comparatively more trust than other subjects would under the same conditions" (Medina, 2011, p. 20).

For example, it is epistemically unjust if a White person is believed more than a Black person would be believed under the same circumstances. Fricker describes a counterfactual conception of epistemic injustice in cases of deficit when she writes, "the basic idea is that a speaker suffers a testimonial injustice just if prejudice on the hearer's part causes him to give the speaker less credibility than he would otherwise have given" (Fricker, 2009, p. 4). But this counterfactual conception over the degree of credibility that *would* be given is also applicable in cases of epistemic injustice resulting from credibility excess. Her "otherwise would have" frame of thought is directly applicable to cases of credibility excess. In cases of credibility excess, people are given more credibility than they otherwise would be given, due to a social identity prejudice.

Medina's conception of the interactive elements of the distribution of credibility is especially applicable in courtrooms where jurors must assess the probative value of different witnesses' testimony. In the courtroom, if two persons' testimonies (person A and person B) contradict one another, in order to make a determination as to the defendant's guilt, jurors must choose to whom to award more credibility. This distribution of credibility is inherently comparative. If A and B make opposite claims as to what is a fact, the jurors must choose whom to believe, as they cannot believe both of them. In this way, it may happen that person B is not believed because person A is believed. When a witness's social position contributes to the reason

why A is granted more credibility than person B, this results in testimonial epistemic injustice for B.

Credibility excess also influences the degree of resistance one's belief has to counter evidence. If person A affords person B more (or less) credibility than person B deserves, it is harder (or easier) for A to stop believing in what B tells A. For example, if A gives a Black man less credibility than a White person from the start because he is Black, it is harder for A to start trusting the Black person. A's belief, based on the White person's testimony, is not easily undermined by future evidence. In the course of inquiry, A will not be easily persuaded that the Black person is correct. Similarly, if a Black person gives expert testimony about where a gun was fired from, and if a juror believes his testimony at a credence of 80%, this belief is easier to defeat with counterevidence than a belief A holds at a credence of 95%.

Further, if one grants someone more credibility than she deserves because of her social position, that person may think the standard of reasonable doubt has been met when it has not been met. Criminal law procedures often rely on the reasonable person test, which implies a shared rational capacity of all people to extract themselves from their positionality in society, and neutralize their biases, in order to reach an objectively reasonable judgment.

Way Two: Epistemic Othering: In "Typecasts, Tokens, and Spokespersons: A Case for Credibility Excess as Testimonial Injustice," Emmalon Davis supports Medina's claim that credibility excess can constitute testimonial epistemic injustice. She argues that "positive prejudice generates unique epistemic harms" (Davis, 2016, p. 487). These stereotypes are positive in the sense that they involve a trait that is generally respected or desired by the attributer. The attributer is ethically flawed because she fails to recognize the individuality of

members of the same social group, downgrading the testifier's humanity. In the cases of credibility excess that Davis describes, people of one social group are treated as interchangeable with another person from their social group. The attributer is epistemically flawed because she prevents knowledge from being pooled by turning to an inadequate source.

Davis describes the harm resulting from credibility excess as "compulsory representation," which is when people are *only* acknowledged as knowledge-givers when they are expected to contribute something unique to the knowledge pool. In other words, even though marginalized people may "receive a spike in credibility (and capital) within contexts in which they are stereotyped to be knowledgeable, these individuals are often considered incompetent in contexts not pertaining to their difference" (Davis, 2016, p. 493). Compulsory representation occurs when "one's epistemic capabilities are exclusively confined to what the dominant perceives to be essentially nonderivable" (Davis, 2016, p. 490). "Nonderivable" means the listeners think only someone from the speaker's background can give her the information she needs (Davis, 2016, p. 490). If the listener thinks she can get the information anywhere else, she will not ask the person being stereotyped. The person acting as an information source suffers from testimonial epistemic injustice because this excess credibility is undeserved, and because the testifier is deemed incompetent in situations where the testifier is not believed to have special knowledge. Her being perceived as incompetent constitutes testimonial epistemic injustice due to a credibility deficit, and she is granted less credibility than she otherwise would be granted if her identity were different.

One example of compulsory representation is if struggling algebra students approach an Asian student because they believe that Asian people are especially good at math. In this case, the Asian student is given excess credibility, owing to her identity, which harms her in her

capacity as a knower, because she is not perceived as she should be and is given an unwarranted *responsibility* to help the other students. This unwarranted responsibility constitutes an epistemic burden. The student would not have been approached for help in another subject, such as social studies, even if she were the highest scoring social studies student at her school. If her peers could get the information from another source, they would not ask her for help. Therefore, because her identity is considered to give her extra, undeserved credibility owing to her membership in a social group, this instance constitutes testimonial epistemic injustice. She is reduced to her identity as an Asian person. In this reduction, she is epistemically other-ed.

A second example would be if a faculty supervisor approaches a Black philosophy professor who specializes in epistemology and asks him to serve as a committee member in a conference about the philosophy of race in America, even though the professor has no academic training in the subject. In both instances, the person's identity affords the person comparatively more credibility than he or she otherwise would have received. A White epistemology professor would not have been approached to teach a conference on the philosophy of race in America, and a White student with average mathematical abilities would not be asked to help others with their math homework. The people subject to the prejudice do not have experiences that *should* give them advanced epistemic standing on the subject at hand. People given such credibility excess are epistemically other-ed. People who are epistemically other-ed are seen as different from other knowers in a crucial, circumstantially undeserved way, owing to their identity. This excess credibility constitutes testimonial epistemic injustice.

Way Three: False Confessions: Jennifer Lackey's article "False Confessions and Testimonial Injustice" describes another instance of testimonial injustice resulting from excess credibility

afforded to the testifier. Cases of credibility excess and deficit are always contextually dependent. In cases of testimonial epistemic injustice, someone does not receive the epistemic treatment she deserves. In her article, Lackey shows that "when the testimony of a confessing self is privileged over a recanting self because of prejudice, whether racial or otherwise, a unique kind of testimonial injustice results that is due to a credibility excess" (Lackey, 2020, p. 52). Often, false confessions stand as strong evidence against exculpatory evidence, leading to wrongful convictions.

For example, imagine a woman who testifies "that her partner has never been abusive while he is sitting next to her in an interrogation room," but then retracts this statement once she is no longer in his presence (Lackey, 2020, p. 61). If her earlier testimony is favored over her recantation for "no good reason," this is an instance of what Lackey calls agential testimonial injustice (Lackey, 2020, p. 61). In this case, the woman's recanting self should be clearly favored because her confession was given in the presence of her abuser. In other instances, when people falsely testify because they are sleep deprived or manipulated, their recanting self is not believed. When a confessor's initial testimony is favored over their recantation, "the confessor's status as a knower[4] is reduced to what she reports only under conditions devoid of, or with diminished, epistemic agency" (Lackey, 2020, p. 60). The privileging of a confession given under strained epistemic circumstances constitutes epistemic injustice because the person is getting more credibility than deserved in that instance.

This testimonial injustice results in two different epistemic wrongs. Both of these epistemic wrongs are part of the testifier being harmed in their capacity as a knower. According to Lackey, the first injustice is that the testifier's epistemic agency is subverted because the

[4] Lackey refers to someone's epistemic capacity as their status as a knower. In practice, this is identical to Fricker's phrase capacity as a knower.

person is only regarded as a giver of knowledge when her epistemic agency is undermined. Situational factors like "the length of the interrogation, sleep deprivation, the presentation of false evidence, and minimization tactics" can influence the likelihood of a false confession (Lackey, 2020, p. 45). Minimization tactics are when an investigator minimizes the (often legal) consequences of a confession to the person being interrogated. When the testifier's testimony is only regarded as valid under these conditions, her epistemic agency is undermined, and the person is harmed in her capacity as a knower.

The second injustice is that the extraction of testimony under conditions which subvert the testifier's epistemic agency manipulates the testifier's doxastic state and potentially causes the testifier to have false beliefs. Coercive, manipulative, and deceptive tactics allow interrogators to "alienate a suspect from her own epistemic resources and bring about beliefs that are disconnected from her epistemic agency" (Lackey, 2020, p. 62). In other words, the extraction methods interfere with the reasons-responsiveness of the subject's beliefs. Extracting someone's testimony in this perverted way subverts a person's epistemic agency and sometimes causes the person to actually believe her false confession is true. Therefore, the testifier is harmed in her capacity as a knower. Lackey describes an example of this where a boy named Marty Tankleff, aged seventeen, was accused of murdering his parents, despite a total absence of evidence against him. Tankleff denied the charges for several hours, until an investigator said that his hair was found near his dead mother's body, and that his father had emerged from a coma to say that his son had tried to kill him. After hearing this falsified evidence, Tankleff confessed to the crime. He immediately recanted. He was incarcerated for 19 years until the charges were dismissed.

In cases of false confessions and recantations, credibility is finite (Lackey, 2020, p. 59). Either the confessing self or the recanting self can be believed, but not both, because they contradict each other. Lackey links this credibility excess to an identity-based prejudice because when someone confesses, it "triggers in others the belief that the confessor is thereby a 'criminal,'" and people view 'criminals' extremely negatively (Lackey, 2020, p. 65). This labeling leads to a prejudice against the confessor, causing people to attribute more credibility to the confessing-self than the recanting-self.[5] Further, there is an intersection between classical prejudices like race and cognitive functioning: 85% of juvenile exonerees who falsely confess are African American (Gross, et. al., 2012, p. 523).

Epistemic Culpability

Many philosophers who write on testimonial epistemic injustice distinguish between cases of epistemic bad luck and testimonial injustice. In order for the deflation or inflation of someone's credibility to rise to the level of testimonial injustice, the deflation/inflation must be both systematic and repetitive. Some credibility deficits are simply the result of "innocent error: error that is both ethically and epistemically non-culpable" (Fricker & Brady, 2016, p. 21). In cases of innocent error, the listener's judgment is perverted in ways for which the listener cannot be held accountable. For example, it would be an innocent error if an archaeologist engages in conversation with her neighbor about a topic of high controversy within the archaeology profession, and because she doesn't know her neighbor is also an archaeologist, she downgrades her neighbor's testimony about that topic (Fricker & Brady, 2016, p. 21). By contrast, credibility deficits caused by prejudice result in testimonial injustice for which the listener can be blamed.

[5] See *Criminal Oppression: A Non-Ideal Theory of Criminal Law and Punishment* by Amelia Wirts (2020) for more information on the practical effects of the stereotype of the "criminal."

The injustice is systematic, as opposed to incidental, because it tracks through different dimensions of social activity.

In their article "Fault and No-fault Responsibility for Implicit Prejudice—A Space for Epistemic 'Agent-Regret,'" Michael Brady and Miranda Fricker expand on the concept of agent regret. They explain that sometimes, epistemic subjects "blamelessly [inherit] bad epistemic goods from her environment (the implicit prejudice) so that the epistemic fault of motivated maladjustment to the evidence has already been committed off-stage by the collective" (Fricker & Brady, 2016, p. 21). Their account suggests that the subject has not been culpably negligent in failing to realize the prejudice she has inherited, and that her membership in the collective does not implicate her in creating this prejudice. For Fricker, there are some contexts where listeners are morally responsible to examine their own biases and ignorance, and others where listeners are not responsible to do so.

Fricker describes Herbert Greenleaf's unjust silencing of Marge Sherwood in *The Talented Mr. Ripley* as epistemically nonculpable testimonial injustice because of "the historical context" (Fricker, 2009, p. 89). In this novel, Mr. Greenleaf downgrades Ms. Sherwood's testimony that Ripley killed her husband because she is a woman. In the historical context, women were viewed as stereotypically over-emotional, excessively relying on their intuitions in the face of reason. Mr. Greenleaf's prejudices against Ms. Sherwood lead him to judge her as nontrustworthy, even though she is correct in saying Riley killed her husband. Mr. Sherwood's prejudice operates at the nonreflexive level, and he is nonculpable for the testimonial injustice because the context did not reasonably require him to analyze how he was making his credibility judgment. In contrast, some contexts require reflexive, active judgements of one's prejudices.[6]

[6] This level of reflection relates to Gloria Origgi's distinction between default and vigilant trust as explained on page 14–15 of this thesis.

For example, jurors are held to a higher epistemic bar than people in everyday conversations, and therefore, jurors must examine their own biases throughout their deliberations. Fricker explains that "sometimes there can be a fault at the reflexive level . . . depending on how far the context places the onus on the hearer to shift intellectual gear and engage in active, self-critical reflection" (Fricker, 2009, p. 89). Overall, Fricker asserts that the listener's culpability for a testimonial injustice rests on the context of the injustice. All cases of testimonial epistemic injustice "illustrate a hearer or hearers *failing to correct for* identity prejudice in their testimonial sensibility" (Fricker, 2009, p. 89).

In *To Kill a Mockingbird,* the jurors are culpable for failing to move beyond their historical circumstances because there is "ample opportunity to grasp and make good the conflict between the distrust which their corrupted sensibility spontaneously delivers and the trust which a proper attention to the evidence would inspire" (Fricker, 2009, p. 90). In this text, a Black man, Tom Robinson, is accused of raping a White woman, Mayella Ewell. The novel is set in Maycomb, Alabama in the 1930s. The jurors' belief that Tom Robinson committed the crime is not responsive to counterevidence that entirely rules out the possibility of him committing the crime. For example, the bruises on Mayella's body could only be made by someone who is right-hand dominant, and Tom Robinson's right arm is maimed so he could not possibly strike with his right hand. However, there is a "heightened testimonial experience afforded by the trial," so the jurors *should* have analyzed their prejudices in this circumstance and adjusted their opinions accordingly (Fricker, 2009, p. 90). The jurors failed to "engage in active, self-critical reflection" (Fricker, 2009, p. 89).

It is possible that there are certain circumstances that eliminate the possibility for agent culpability in cases of epistemic injustice. These epistemic deserts would be created by the

historical circumstances and informed by what could be realistically expected of people in those circumstances. Fricker explains, for example, that although Mr. Greenleaf may not be epistemically culpable for mistrusting Ms. Sherwood's testimony, we may still feel a *resentment of disappointment* towards his actions (Fricker, 2009, p. 104). Fricker elaborates on this concept, writing that a *resentment of disappointment* is "an attitude which is closely related to blame, but falls short of it" (Fricker, 2009, p. 104). This draws a distinction between routine moral discourse and exceptional moral discourse. It cannot be realistically expected for everyone, under all circumstances, to execute "more imaginative moves in which existing resources are used in an innovative way that stands as a progressive move in moral consciousness" (Fricker, 2009, p. 104). Fricker writes, "one cannot be blamed for making a routine moral judgment;" however, one can be "held responsible" depending on how exceptional the epistemic move would have been (Fricker, 2009, p. 105). Fricker seems to place minimal responsibility on people for the interpretive resources (hermeneutical resources) at their disposal, as changing these resources would typically take an exceptional epistemic move.

Section Two

Epistemic Virtue, Epistemic Friction, and World-Traveling

In this section, I will describe three solutions to the problems posed by testimonial epistemic injustice: the virtue of testimonial justice; epistemic friction; and world-traveling. After that, I will apply the concept of world-traveling to hermeneutical injustice, contributory injustice, and testimonial injustice to show how world-traveling can reduce epistemic injustice.

Three Solutions to the Problem of Testimonial Epistemic Injustice

The Epistemic Virtue of Testimonial Justice

In order to address testimonial epistemic injustice, philosophers suggest cultivating various virtues. Fricker maintains there is a virtue of testimonial justice. Fricker explains that in the Tom Robinson case, mentioned earlier, the jurors "fail to take into account the difference it makes to their perception of Tom Robinson as a speaker not only that he is Black but equally *that they are White"* (Fricker, 2009, p. 91). Their whiteness influences the ways in which they perceive Tom Robinson, a Black man. Miranda Fricker describes the virtue of testimonial justice as having both an intellectual and ethical dimension, because the truth and the good are its shared ends. For both ends, the goal is "neutralizing prejudice in one's credibility judgements" (Fricker, 2009, p. 122). However, this goal materializes differently in the ethical dimension, as compared to the intellectual dimension. In the intellectual dimension, the goal of testimonial justice as a virtue is "achieving the appropriate openness to truth," or making it unlikely for the listener to miss out on the truth (Fricker, 2009, p. 122). In the ethical dimension, the ultimate goal is justice, and to avoid "doing one's interlocutor a testimonial injustice" (Fricker, 2009, p. 122).

The reason for the epistemic exclusion contributes to the ethical dimension of the injustice, as it is driven by prejudice. The effect of the testimonial epistemic injustice is epistemic, as it prevents knowledge from being shared. For example, if someone does not trust a woman's testimony because she is a woman, the inability of the woman to contribute to the knowledge pool constitutes the epistemic injustice, whereas the reason for the loss of knowledge (that is, the prejudice) lends itself to the ethical dimension. Fricker suggests that an Aristotelian sense of virtue should be applied here—we should only understand someone to possess the virtue of testimonial justice when she is exercising the virtue for its own sake and her disposition is

stable. Applying this virtue is not an exact science, because people should merely be given the credibility they deserve. In this way, the virtue of testimonial justice cannot be codified and requires constant self-reflection.

Epistemic Friction

Medina asserts, "we have to aspire to [make] our credibility judgments as proportionate to epistemic deserts and credentials as possible, avoiding disproportions that reflect and are grounded in (positive and negative) prejudices that involve the differential treatments of members of different groups" (Medina, 2011, p. 20). In this way, we must critically analyze the ways our prejudices may be distorting our perception of others' epistemic credentials. To combat epistemic injustices, Medina suggests developing a virtue called epistemic friction, which involves "actively search[ing] for more alternatives than those noticed [immediately]," acknowledging these alternatives, "(or their possibility), and . . . attempt[ing] to engage with them whenever possible" (Medina, 2011, p. 29). Epistemic friction involves analyzing our own positionality in society and how that influences our judgements.

World-Traveling

In "'World'-Traveling, and Loving Perception," María Lugones discusses the concept of world-traveling, which involves shifting from your epistemic resources to others' epistemic resources to see the world from their perspective. She contrasts world-traveling to Marilyn Frye's notion of arrogant perception, where one strongly believes in her own point of view to the point where she can never see things from someone else's perspective. People with arrogant perception refuse to accept the incompleteness of their own worldviews. In order to world-travel,

we must embrace playfulness, which involves accepting that one may look ridiculous or silly in trying to enter and understand someone else's world. Playfulness is "openness to being a fool, which is a combination of not worrying about competence, not being self-important, not taking norms as sacred and finding ambiguity and double edges a source of wisdom and delight" (Lugones, 1987, p. 17). It is epistemically virtuous to world travel, and to recognize that no single world, as one experiences it, is complete, just as no set of hermeneutical resources is complete. Epistemic virtues allow us to inhabit other worlds in a loving way, and gain knowledge that was otherwise obscured from our prior perspectives.

Applying World-Traveling to Epistemic Injustice

In what follows, I will apply the concept of world-traveling to different types of epistemic injustice (viz., hermeneutical and contributory injustice), to show how world-traveling can reduce epistemic injustice. Then, I will relate Charles Mills' conception of white ignorance to contributory injustice and hermeneutical injustice. I will explain how Mills suggests addressing the effects of white ignorance, contributing to the discussion about epistemic injustice and corresponding blame. Finally, I will relate these concepts to testimonial epistemic injustice.

Hermeneutical Injustice

One other type of epistemic injustice is hermeneutical injustice. Fricker defines hermeneutical justice as "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, 2009, p. 155). Hermeneutical injustice considers the difficulty that arises for people when they cannot interpret their experiences, or cannot communicate their

experiences to others due to something lacking in the concepts available to them. Women experienced hermeneutical injustice before the term sexual harassment was coined, because it was difficult for them to explain their experiences of harassment to others. It is important to note that different communities have different concepts and hermeneutical resources. Even though the dominant group did not have adequate concepts to understand or even discuss sexual harassment before the term was coined, communities of women mostly understood their experiences before the term became widespread. It is important to world-travel, as Lugones describes, for precisely this reason. World-traveling enables one to understand other groups' hermeneutical resources, closing gaps in understanding.

Rebecca Mason critiques Fricker for "misdescrib[ing] dominant hermeneutical resources as collective," and argues that "Fricker fails to locate the ethically bad epistemic practices that maintain gaps in dominant hermeneutical resources, even while alternative interpretations are in fact offered by non-dominant discourses" (Mason, 2011, p. 301). World-traveling allows people to shift between dominant and non-dominant resources.

In his article, "Hermeneutical Injustice and Polyphonic Contextualism: Social Silences and Shared Hermeneutical Responsibilities," Medina comments on the lack of responsibility involved in hermeneutical injustice on Fricker's account. He writes, "if one exhibits a complete lack of 'alertness or sensitivity' to certain meanings or voices, one's communicative interactions are likely to contain failures in hermeneutical justice for which one has to take responsibility, even if it is a shared and highly qualified kind of responsibility" (Medina, 2012, p. 218). Medina critiques Fricker for separating hermeneutical injustice from the communicative responsibility of interlocutors. He explains that even though sometimes hermeneutical injustice is perpetrated

"without [someone's] knowing it and despite their best communicative intentions," they can nonetheless be responsible for the injustice, as they are *complicit* (Medina, 2012, p. 218).

Even though hermeneutical lacunas are not produced by any single person, because they require "patterns of impoverished communication with specific hermeneutical insensitivities," some people typically have some agency to widen the gaps or "contribute to their erosion" (Medina, 2012, p. 218). Fricker's account emphasizes the structural dimension of hermeneutical injustice, and significantly divorces the systemic aspect of the injustice from the people who work within the system. As Medina implies, responsibility operates on a spectrum, and it is unproductive and wrong to simply separate people from the institutions in which they operate and then to allow this separation to absolve them of all epistemic responsibility in cases of hermeneutical injustice.

While Fricker qualifies her account, making the responsibility dependent on circumstances, Medina takes the requisite responsibility one step further, implying that people are most-often responsible for addressing interpretive failures. Fricker mostly references a hermeneutical lacuna as a result of structural features in the situation, where people do not intentionally obscure other resources. Medina views hermeneutical injustice more broadly. For Medina, people commit hermeneutical injustices when they are not willing to understand, or do not try to understand, alternate hermeneutical resources. He describes a hermeneutical lacuna created by ignorance. World-traveling offers a way all people can take agency in closing the gaps in the hermeneutical resources available to them.

Contributory Injustice

Another type of epistemic injustice is contributory injustice: when nondominant discourses are not able to contribute to our shared epistemic resources. Contributory injustice is not about individuals not being permitted to add to the knowledge pool. Instead, it concerns failing to recognize other collective resources that are outside the dominant perspective. In cases of contributory injustice, resources outside of the dominant perspective are blocked from contributing to our collective epistemic and hermeneutical resources. Contributory injustice involves a failure to world-travel. Contributory injustice is connected to the social dimension of knowledge and to the objectification of concepts. Sometimes a subpopulation will have the vocabulary to describe a concept even if the dominant group does not. In some of these cases, the concept will spread from the subpopulation to the dominant group, and the concept will be continually reconceptualized. This process is called the objectification of concepts. In cases of contributory injustice, certain groups of people are blocked from participating in the objectification of concepts.

Kristie Dotson discusses both hermeneutical and contributory injustice in her article, "A Cautionary Tale: On Limiting Epistemic Oppression." She critiques Fricker for using a "closed conceptual structure to identify epistemic injustice" (Dotson, 2012, p. 25). Dotson argues that Fricker's "framing of epistemic bad luck as an antithesis to epistemic injustice conceptually forecloses the possibility of other forms of epistemic injustice," which perpetuates epistemic oppression (Dotson, 2012, p. 25). Dotson presents contributory injustice as a type of epistemic injustice which Fricker overlooked. For Dotson, contributory injustice occurs when an agent "willfully refus[es] to recognize or acquire requisite alternative hermeneutical resources" (Dotson, 2012, p. 32). People who experience contributory injustice "can readily articulate their

experiences," but these articulations "generally fail to gain appropriate uptake according to the biased hermeneutical resources utilized by the perceiver" (Dotson, 2012, p. 32).

Fricker's conception of hermeneutical injustice implies that people are *sometimes* prevented from understanding their own experiences due to a lacuna in the concepts available to them. Dotson's concept of contributory injustice describes the specific injustice that occurs when members of a nondominant group understand their experiences and share adequate conceptual resources to discuss their experiences with each other, but because they are excluded from the objectification of concepts the nondominant concepts are not adopted by the dominant group. The nondominant group is, therefore, unable to contribute to the knowledge pool (hence the term contributory injustice). Dotson describes contributory injustice as an epistemic agent's situated ignorance, "in the form of willful hermeneutical ignorance, in maintaining and utilizing structurally prejudiced hermeneutical resources that result in epistemic harm to the epistemic agency of a knower" (Dotson, 2012, p. 31). If world-traveling is conducted, people can access nondominant hermeneutical resources, and gain knowledge that is otherwise blocked from their understanding.

White Ignorance and Culpability

Charles Mills' concept of white ignorance is related to contributory injustice in several important ways. Charles Mills describes white ignorance as the reconstructed interpretation of how race functions in society, which ignores the ways white people have historically been, and are presently, advantaged by systemic prejudices against people of color. In this sense, White people commit contributory injustice when they prevent people of color from contributing to discussions about the reality of racial relations. However, people of color can also experience

white ignorance, as their perception of reality can be distorted by the dominant interpretive resources. Mills' perception of culpability significantly differs from Miranda Fricker's. In his article, "White Ignorance," Mills suggests that we are always responsible for examining our biases.

Mills' notion of white ignorance does not fall under Fricker's concept of hermeneutical injustice, because although people influenced by white ignorance do not interpret the world correctly, they possess the tools they would need to accurately interpret the world. Mills writes, "foundational concepts of racialized difference, and their ramifications in all sociopolitical spheres, preclude a veridical perception of nonwhites and serve as a categorical barrier against their equitable moral treatment" (Mills, 2017, p. 27). In this situation, people possess concepts of racialized difference, but the concepts cause them to have an illusory idea of what is the case. Mills' description of testimonial injustice coincides with Fricker's: "if one group, or a specific group, of potential witnesses is discredited in advance as being epistemically suspect, then testimony from the group will tend to be dismissed or never solicited to begin with" (Mills, 2017, p. 31). Both Mills and Fricker describe a version of epistemic injustice, namely testimonial injustice, stemming from discounting a certain group's testimony due to a negative prejudice held against them. Mills has in focus a narrower conception, though, since he is specifically concerned with racialized injustice whereas Fricker includes any kind of stereotype.

Because of the pervasiveness of white ignorance, Mills suggests a "systematic national re-education on the historic extent of Black racial subordination in the United States and how it continues to shape our racial fates differentially today" (Mills, 2017, p. 31). This "systematic re-education" would be difficult, because white ignorance is "established in the social mind-set," making its influence "difficult to escape, since it is not a matter of seeing the phenomenon with

the concept discretely attached but rather of seeing things through the concept itself" (Mills, 2017, p. 27). Breaking free from society's dominant conceptual structure is not without difficulty, as evidenced by peoples' negative gut-reactions to the integration of critical race theory into curriculums across the United States. Mills argues that "improvements in our cognitive practice should have a practical payoff in heightened sensitivity to social oppression and the attempt to reduce and ultimately eliminate that oppression" (Mills, 2017, p. 22). A heightened awareness of biases would assist juries in being as epistemically responsible as possible and allow juries to engage in deliberation while reflecting on how their biases may be influencing their assessments of others' credibility. Overall, in order to combat the epistemic effects of negative prejudicial stereotypes, people can work to cultivate various virtues, as previously outlined.

Rebecca Mason's distinction between two kinds of unknowing assists in connecting Mills' conception of willful ignorance, and the requisite agential culpability, to Fricker's conception of hermeneutical injustice where a lacuna in interpretive concepts prevents everyone from understanding certain circumstances. In her article, "Two Kinds of Unknowing," Mason describes two knock-on effects of hermeneutical injustice: both an "unknowing to which members of non-dominant social groups are subject by virtue of their systematic hermeneutical marginalization," and "an unknowing to which members of dominant groups are subject by virtue of their ethically bad knowledge practices" (Mason, 2011, p. 295). Separating the concepts in this way allows for significant culpability for dominant group members and suggests that dominant group members may be complicit in hermeneutical marginalization, or even active perpetrators of marginalization, as in some cases of white ignorance. The difference between culpability and accountability becomes relevant here: although all dominant members may be

culpable as they are complicit in the epistemic injustice, it may be unrealistic to hold them accountable.

Relation to Testimonial Epistemic Injustice

World-traveling, to the extent that it helps people understand alternative hermeneutical resources and overcome hermeneutical injustice, contributory injustice, and white ignorance, is helpful in reducing testimonial epistemic injustice. World-traveling reduces the degree to which people are epistemically other-ed, because if people can see the world through other peoples' perspectives, they are less likely to downgrade their credibility due to a social identity prejudice. If people can empathize with others' experiences, they are more likely to accurately judge their credibility. Epistemic othering causes credibility excesses and credibility deficits because it interferes with accurate credibility assessments.

Similarly, epistemic friction helps reduce testimonial epistemic injustice because it encourages people to examine their biases and evaluations of other peoples' credibility. As discussed, epistemic friction involves acknowledging how our own positionality in society influences our credibility assessments. In the courtroom, it is helpful for jurors to be aware of their thought processes in their credibility assessments to neutralize their biases. I will elaborate on this concept in Part Two of this thesis.

PART TWO

Courtroom Applications

In Part Two of this thesis, I will apply the insights from Part One to three different facets of the courtroom in the American context. First, I will discuss the treatment of expert testimony in the courtroom and relate this to testimonial epistemic injustice. Second, I will examine the treatment of the testimony of jailhouse informants. Third, I will explore how prejudice influences attorneys' choices during jury selection. Throughout Part Two, I will propose solutions to combat the impact of prejudice on peoples' credibility assessments in the courtroom.

Section One

Expert Testimony and Epistemic Injustice

Excessive trust afforded to expert testimony given in courtrooms is a troubling example of epistemic injustice. In such cases, non-expert testifiers are subject to a credibility deficit because they are viewed as not as knowledgeable as the expert based on a social stereotype. This can be problematic when an expert is testifying to the supposed truth of faulty science. Experts are typically reliable informers as to the truth of a matter. However, the adversarial system can raise problems, as experts may be motivated to testify to falsehoods or to present the truth in misleading ways.

When jurors listen to expert testimony, they are directed to treat the testimony how they would treat any other piece of testimony and to avoid granting the testimony special weight because of the authority of the testifier (2.13 Expert Opinion, n.d). Jurors are instructed to believe all, part, or none of the testimony given by witnesses (1.7 Credibility of Witnesses, n.d). However, given the expert's privileged epistemic position, it can be difficult for jurors to critically evaluate the expert's testimony. There is a need to balance the probative value of the

evidence against the prejudicial effects that come with hearing the testimony given by an expert (Ward, 2016, p. 272).

If jurors place too much trust in an expert, they may neglect their fact-finding responsibilities (Ward, 2016, p. 266). For example, when an expert testifies about fingerprint science, explaining that prints picked up at the crime scene exactly match the defendant's, jurors do not have the specialized knowledge needed to factually assess the content of the testimony. Sometimes, the science may be doubtful, but the jurors will not know this unless the opposing attorney exposes the information during cross-examination.

Further, if expert witnesses state their opinions in mathematical terms, they may give the appearance of certitude (Ward, 2016, p. 273). In this scenario, if an expert declares she is 95% certain that the defendant would commit a crime again, the phrasing makes it appear as though the expert is positive of the statement, and it is factual, even though this may not be the case. Alternative explanations of the facts may be supported as well. There are two separate issues with mathematical credibility statements, the first being whether the science is valid, namely, whether one can really be 95% sure of something within the field, and the second being whether the percentage applies to the particularity of the case. In this scenario, even if 95% of perpetrators re-offend, it does not follow that this particular person will reoffend.

Jurors' ability to evaluate scientific information is especially prevalent in cases where two experts claim opposing statements are true. Both statements cannot be true at the same time, but both experts use science to support their positions. There are two ways to evaluate expert testimony. There is the central route, which involves evaluating the information itself, and there is the peripheral route, which involves evaluating the credibility of the expert. Evaluating the information supplied by the expert requires understanding the science to which the expert

testifies. However, lawyers are oftentimes not well-positioned to directly evaluate the science. Cross-examination of an expert witness is meant to expose what is true versus false, but sometimes, attorneys have difficulty identifying what is false because they do not have firsthand knowledge of the issue in question. Typically, when an attorney cross-examines an expert witness, the attorney's only knowledge about the specialized field comes from her independent research. The attorney is not typically an expert in the issue at hand. Further, should an attorney discredit the opposing side's expert testimony, it is possible that the jurors will discredit the attorney's own expert's testimony because they believe the issue at hand lacks consensus in the field, therein leading to a hidden credibility cost in discrediting an opponent's expert testimony.

When two experts claim opposing statements are true, jurors are required to assess the testimony based on non-factual matters, turning to typical indicators of credibility, such as the expert's ability to answer various questions about the topic. Although jurors are tasked with being fair and impartial, this is an unattainable ideal because of biases inevitably held by jurors. If these biases are not acknowledged, the Criminal Justice System risks being regularly vitiated by silently operating biases. Sometimes, jurors' biases influence their perception of the expert testifier. In this way, a juror's preference for expert A's testimony that *p* over expert B's testimony that *not p* may be based in negative prejudicial biases. For example, the jurors may be drawn to believe a male expert testifying that Gloria did not shoot her husband, rather than a female expert testifying that Gloria did kill her husband, because of a gender-based prejudice. And, because in courtroom scenarios, expert A and expert B cannot simultaneously be equally trusted, choosing to trust one expert over another results in less trust for the other expert. This would be a classic example of testimonial epistemic injustice due to credibility deficits or credibility excesses, in the expert-to-expert context. In the next subsection of this paper, I will

discuss two key court cases governing the admittance of expert testimony in the U.S. Later, I will dive into the difficulties non-experts face in evaluating admitted expert testimony.

Two Court Cases Governing Expert Testimony Admissibility

Currently, two main Supreme Court cases guide the treatment of expert witness testimony: *Frye v. United States (1923)* and *Daubert v. Merrell Dow Pharmaceuticals (1993).* It is important to note that both Frye and Daubert are federal cases. Not every state has adopted the Daubert or Frye standards. Below, I will describe the results of these cases and explore how experts can rightly elicit weak epistemic deference from jurors by making epistemically responsible statements of certainty and probability.

Frye v. United States

Frye v. United States is a 1923 Supreme Court decision wherein results from a specific lie detector technology were ruled to be inadmissible as evidence because the scientific community did not generally accept the technology (Cappellino, 2021). Through this case, the Frye standard was developed, which was also referred to as the general acceptance standard. This standard states that admissible scientific evidence must be generally accepted by the relevant scientific field (Cappellino, 2021). A decade later, in 1993, as part of the Daubert ruling, the Frye rule was deemed to be inconsistent with federal evidentiary rules, namely Rule 702 (Cappellino, 2021). The two standards of Rule 702 most clearly in conflict with the Frye rule were the requirements of relevance and reliability for admitted expert testimony (Cappellino, 2021). The Frye rule's standards of general acceptance conflicted with the standards of relevance and reliability because the Frye rule requiring general acceptance was much stricter. Something can

be relevant and reliable without being generally accepted by the relevant scientific community. Some believed the Frye Standard was too restrictive, and that a second-order type of Frye rule would be more appropriate (Fried, 2021). A second-order type of Frye rule would consider the scientific method used to discover the science, rather than the science itself. Under the Daubert standard, "the Court encouraged a more liberal approach to admitting expert testimony, stressing the importance of subjecting witnesses to vigorous cross-examination instead" (Cappellino, 2021).

In practice, the Frye standard was difficult to apply, because it is tricky to differentiate between cases where there is agreement or disagreement within a scientific community. This difficulty was somewhat surpassed with the adoption of the Daubert preceding, which requires judges to instead look at the method behind the science. However, as I shall explain shortly, the Daubert rule has its own issues in application. Although the Daubert standard provides specific criteria to consider, the application of this criteria is subject to dispute. One difficulty in applying both the Frye rule and the Daubert rule comes with the dynamic nature of science. Sometimes, disagreement within a scientific community becomes increasingly apparent over time, as science develops. This can mean that the agreement within a scientific community changes (relating to the Frye rule), or the technology and methods that were once considered reliable are no longer trusted (relating to the Daubert rule).

For example, Shaken Baby Syndrome was historically diagnosed by the presence of "the triad," a subdural hematoma (bleeding between the dura mater and the brain), retinal hemorrhages, and various forms of brain symptoms (encephalopathy) (Elinder, et.al, 2018). Many professionals previously believed that nothing but shaking a baby could cause Shaken Baby Syndrome, but it has since been proven that these symptoms can be caused by other

circumstances, such as short falls. However, as one can imagine, if an expert gave testimony that *the only way* the injuries could have happened is through shaking the baby, the jury would likely be heavily convinced that the child had been shaken.[7] Therefore, the expert's statements provide her with more credibility than deserved because it is well known in the field that there is not a consensus about Shaken Baby Syndrome. There is and has been significant disagreement within the scientific community about Shaken Baby Syndrome (Little, 2019).

Accordingly, in some cases, an expert testifying that the only cause of a baby's death could have been shaking would grant them undue excess credibility because this statement would not be in accordance with the available science. In this scenario and in similar situations, the science is in dispute, but an expert testifies to it nonetheless. Here, the "would grant them undue excess credibility" counterfactual language stems from an expert whose testimony exceeds the certainty threshold of what *would be* appropriate, given the general knowledge accepted by the relevant scientific community. An expert witness testifying about Shaken Baby Syndrome would instead be justified in saying that *one* of the possible causes of the baby's death was that the baby was shaken, as opposed to saying *the only cause* was that the baby had been shaken. In order to be maximally epistemically responsible, experts should give certainty statements in accordance with the consensus within their scientific community.

Daubert v. Merrell Dow Pharmaceuticals

Years after *Frye v. United States*, in 1993, Charles Fried argued *Daubert v. Merrell Dow Pharmaceuticals* in front of the Supreme Court. In this case, the parents of two children with birth defects sued Merrell Dow Pharmaceuticals, alleging that the birth defects were caused by

[7] See Julie Baumer's exoneration described at https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3017.

Bendectin, an anti-nausea medication marketed by Merrell Dow Pharmaceuticals. This case belongs to the category of litigation called a toxic tort, which is a personal injury lawsuit where the injured party is responsible for proving the injury exists and was likely caused by the substance (Fried, 2021). The parents of the injured children (plaintiffs) used information including "*in vivo* studies of the effects of Bendectin on animals in the womb, *in vitro* studies on Bendectin's effects on cells studied in a laboratory, analyses of the chemical structure of Bendectin, and a meta-analysis of the large-scale population studies of the effects of Bendectin" (Abboud, 2019). In 1989, this case was dismissed by the trial court, because the type of evidence used by the plaintiffs was not generally accepted by the scientific community as proof of a causal link between the drug and the injuries. The case was appealed to the Appeals Court, which affirmed the prior findings under the Frye standard, before the case headed to the Supreme Court in 1993.

In 1993, the Supreme Court ruled that for expert witness testimony to be admissible in court, the expert witness must use "scientifically valid reasoning that can properly be applied to the facts at issue" (Daubert v. Merrell Dow Pharmaceuticals, n.d.). Under the *Daubert* standard, there are five non-exhaustive factors that may be considered in determining whether the methodology is valid: (1) whether the theory or technique in question can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread acceptance within a relevant scientific community (Daubert Standard, n.d.). *Daubert* allows lawyers to file motions to attempt to exclude testimony from expert witnesses if one of these factors is not met. The onus is on the Court to determine whether the expert testimony is relevant or reliable. The Court being the decision-maker in whether expert

testimony is admissible in the courtroom is consistent with the way the Criminal Justice System is designed because the admissibility of evidence in a courtroom is under the purview of judges. In 402 evidentiary hearings, judges evaluate the admissibility of different types of evidence (Fried, 2021). In a 402 hearing about expert testimony, because of *Daubert,* the question to be answered is whether the expert testimony depends on a proposition that was arrived at by validated methods of science (Fried, 2021).

Experts are witnesses and must speak the truth as they know it, as they give testimony under oath. Typically, it is the duty of "the other side" to expose inaccuracies in an expert's testimony. For example, it is the other side's obligation to indicate to a jury that the scientific community has not reached a consensus on an issue or that another expert could reasonably argue for the opposite conclusion of what the expert witness has argued. However, if the attorney cross-examining the expert does not ask questions that bring these factors to light, that is the attorney's error, not a procedural problem.

Worryingly, failing to expose the inaccuracy of the science is an error easily made, because as previously explained, attorneys are not typically in a position to evaluate the science that experts present. However, experts *can* qualify their testimony with statements about their level of certainty. In a totally just world, experts would give epistemically responsible statements. Statements about their certainty would align with how sure one can actually be, in accordance with the science in the field at hand. If there is significant disagreement among the scientific community, this lack of consensus should ethically be recognized by experts giving testimony.

In a conversation with Charles Fried, the attorney who argued *Daubert v. Dow Pharmaceuticals*, he explained that there is a difference between the goals of a procedurally fair

trial and the quest for ultimate truth. If the jury decides to believe one person over another and both are epistemic peers, this is not a procedural problem. The procedure is just because both sides had an opportunity to argue their case. The ultimate truth may not always be secured in a trial due to biases held by jurors and other mitigating factors, like inadequate cross-examination of an expert witness or faulty judicial applications of the *Daubert* findings. As Blackmun states in his majority opinion, "a gatekeeping role for the judge, no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations" (Daubert v. Merrell Dow Pharmaceuticals, n.d.). However, this is not grossly unjust, because it is realistically the procedure that secures the most justice. Blackmun recognizes this, as he continues to write that the Rules of Evidence are "designed not for the exhaustive search for cosmic understanding but for the particularized resolution of legal disputes" (Daubert v. Merrell Dow Pharmaceuticals, n.d.). Deliberative fairness in jurors' decision-making differs from procedural fairness. Charles Fried explained that the structure of the trial may be as good as it is going to get in terms of securing deliberative fairness, because of efficiency concerns. There are hundreds of thousands of court cases, and decisions need to be made. Future scientific inquiry may supply evidence that had it been available, would have resulted in a different finding in the trial. However, this is part of the conflict that naturally arises when science is used in the courtroom.

Even in acknowledging the goal of the justice system, it is important to recognize that concerns about testimonial epistemic injustices are not merely procedural concerns. Even if a procedure is fair, a jury may decide a case wrongly because its deliberations are flawed. A hearing may be procedurally fair but epistemically unjust because the jurors or judges may have social prejudices that affect their epistemic duties to fairly evaluate the evidence and fact find.

Social prejudices lead to inaccurate credibility assessments, causing jurors and judges to afford testifiers with less or more credibility than deserved. In the case of experts, the worry is that jurors and judges may afford the expert with excess credibility, causing testimonial epistemic injustice for other speakers due to finite credibility in the courtroom. If an expert is awarded excess credibility because of her identity as an expert, the other people in the courtroom receive less credibility than deserved because of a social prejudice: they are viewed as not as knowledgeable as an expert.

In the next subsection of this paper, I will outline ways for jurors and judges to evaluate the credibility of an expert witness, which becomes relevant once the science has been deemed admissible by Daubert or Frye standards.

Evaluating Expert Testimony

As explained earlier, it is typically difficult for judges and jurors to evaluate expert testimony using the central route. The peripheral route is most useful, because jurors and judges lack the knowledge required to directly evaluate specialized expert testimony. The peripheral route involves analyzing the credibility of an expert witness, rather than the science presented by the expert witness.

In his book, *Testimony*, C.A.J. Coady describes three questions that assist jurors in conducting their credibility assessments: (1) whether the witness is an expert in the field, (2) whether the field is a genuine area of science, and (3) whether, when given a positive answer to (1) and (2), the expert's particular dispositions are credible (Coady, 1994, p. 281). According to Coady, these three questions pose a peculiar problem for jurors: due to the specialized knowledge needed to provide answers, "they seem to be questions that only an expert can

answer" (Coady, 1994, p. 281). If a person asks expert B to assess the credibility of expert A, the problem repeats itself *ad infinitum*: the person would need to find an expert C to assess expert B's assessment of expert A, and so on. One possible solution to this paradox is allowing for a speaker's credentials to provide reason to not be skeptical of their expertise, and to judge whether the field is a genuine area of science based on the dominant opinion of educational institutions (Coady, 1994, p. 289 and p. 291).

Alvin Goldman, in his article "Experts: Which Ones Should You Trust?," also offers ways to overcome this paradox. He suggests five sources of evidence that nonexperts can evaluate in trying to assess an expert's trustworthiness. The first source he turns to is arguments supporting the expert's views. The jurors' assessments of experts' credibility can be influenced by the experts' argumentative performance. As Axel Gelfert explains in *A Critical Introduction to Testimony*, although jurors may be unable to factually check the validity of experts' rebuttals, they may "very well have sufficient background knowledge and organizational skill to recognize an expert's genuine rebuttal . . . from, say, an evasive response" (Gelfert, 2014, p. 188).

Second, Goldman suggests looking for agreement from other experts. If several experts agree on the same proposition, this adds credibility to the expert-at-hand's views. Turning to consensus among experts is strongly related to the third criterion: appraisals by meta-experts of the experts' expertise (for example, credentials). According to Goldman, "academic degrees, professional accreditations, [and] work experience," all reflect "certifications by other experts of [the expert's] demonstrated training or competence" (Goldman, 2001, p. 97).

Fourth, Goldman suggests one look for evidence of relevant interests and biases. Jurors are tasked with assessing the credibility of experts by assessing the experts' arguments and relevant biases. There is typically disagreement within scientific fields, making it unwise to trust

an expert's claims solely because she is an expert. One expert can rationally believe *p*, while another expert rationally believes *not-p*.[8] Moreover, experts' biases may lead them to believe some claim is true when it is not—experts are as subject to biases as laypeople. One possible relevant bias held by an expert would be if the expert was paid for her testimony. Experts who are perceived to merely testify to whatever the side that is paying them wants them to testify to are often referred to as a "hired gun." The issue of a "hired gun" is an important example of excess credibility resulting in testimonial injustice because of finite credibility in the courtroom. As previously explained, if an expert is awarded undeserved credibility because of her authority as an expert, other people in the courtroom are awarded less credibility, resulting in testimonial epistemic injustice. I shall examine the problem of hired guns in more detail later.

Fifth, Goldman suggests evaluating evidence of the experts' past performance and their individual track records. Essentially, this involves assessing how often the experts have "gotten it right" in the past. One can examine how the expert is viewed in their field in attempting to ascertain their track record.

The Role of Judges in Admitting Evidence

In this subsection, I will discuss three instances where excess credibility afforded to expert witnesses has the potential to become detrimental in the courtroom: paid experts, faulty science, and opinions on ultimate issues.

Paid Experts

[8] See papers on the philosophy of epistemic peer disagreement. For example, "Disagreement as Evidence: the Epistemology of Controversy" (2009) by David Christenson.

There are several reasons why experts may give biased testimony. Paid experts may say whatever the person who hired them wants to hear, because they either want to either be hired again in the future or because they feel obligated to please whomever hired them. For this reason, sometimes unpaid experts have more credibility than paid experts. Some concerns for bias are reduced when experts are unpaid.

Expert witnesses can also impact the distribution of credibility in a courtroom because sometimes only one side can afford to hire an expert witness. This disparity leads to increased credibility for the side which hires an expert witness, causing the side which cannot afford to hire an expert witness to lose credibility because it does not have an authoritative figure to refute the other side's claims. The best check on an expert witness's credibility is another expert witness who testifies to opposing interpretations of the facts. The authority of both experts allows the jury to view their testimony on equal footing. Therefore, if one side cannot afford to hire an expert witness, it is likely more difficult for them to discredit the testimony of the paid expert witness.

Faulty Science

Although Daubert and Frye are designed to allow only trustworthy science in the courtroom, sometimes judges admit unreliable expert testimony in the form of faulty science. Examples of faulty science are bite mark identification, tire print matching, and comparative bullet lead analysis. In cases of faulty science, the expert witness is afforded excess, undeserved credibility. However, in these cases, the excess credibility does not result in testimonial epistemic injustice for the expert witnesses themselves because they are not harmed in their capacities as knowers. As explained in Part One, due to the comparative nature of credibility, this

excess can lead to less credibility for persons on the opposing side, which would lead to their being harmed in their capacities as knowers. For example, in the past, if someone was charged with murder and the victim had bitemarks on her back, forensic ontology (bitemark identification) may have been used to link a suspect's teeth to the victim's injuries. In this instance, if a jury heard an expert testify that the suspect's teeth exactly match the victim's injuries, and that it is extremely unlikely that any other person's teeth would also line up so clearly with the bitemarks, the jury will likely afford this expert more credibility and other witnesses less credibility. The expert is typically afforded additional credibility due to their supposed scientific knowledge. Excess credibility afforded to the expert witness who is testifying to the supposed truth of junk science may help reach the standard of reasonable doubt, contributing to a false conviction.

One person who endured the practical consequences of inappropriate credibility distributions in the courtroom was Steven Barnes, who was wrongfully convicted of murder in 1989 due to faulty science. Steven Barnes was convicted of the murder of 16-year-old Kimberly Simon whose body was found on the side of the road in upstate New York (Steven Barnes, 2020). She had been raped and strangled to death. Three forms of invalid science contributed to the conviction of Steven Barnes. One form of faulty science was that a criminalist testified "she conducted a photographic overlay of fabric from the victim's jeans and an imprint on Barnes' truck and determined that the two patterns were similar" (Steven Barnes, 2020). Second, she testified that two hairs taken from Barnes' truck were "microscopically similar to the victims' hairs and dissimilar from Barnes' hair" (Steven Barnes, 2020). Third, she testified that the lab compared "soil samples taken from Steven's truck with dirt samples taken from the crime scene a year after the murder and [said] that they had similar characteristics" (Steven Barnes, 2020).

None of the three scientific methods she used are considered valid forensic science. There is not adequate empirical data on the "frequency of various class characteristics in human hair, soil samples or imprints," meaning that the analyst's assertion "that these items of evidence were consistent or similar is inherently prejudicial and lacks probative value" (Steven Barnes, 2020). Further, Barnes had a strong alibi as to his whereabouts at the time of the crime. Several people testified that Barnes was at a local bowling alley when the crime was committed. The Innocence Project took on Barnes' case in 1993 and DNA testing set him free in 2008 (Steven Barnes, 2020).

Expert Testimony and Opinions on Ultimate Issue

Another place where excess credibility in the case of expert witnesses becomes relevant is when experts make statements based on the end result of the case at hand. This is called an Opinion on an Ultimate Issue (Rule 704 Federal Rules of Evidence, n.d.). An Opinion on Ultimate Issue is an opinion as to one of the elements of the crime for which the person is being charged. For example, to charge someone with murder, prosecutors must prove (1) there was an intent to cause death and (2) the person caused death (Connecticut Judicial Branch Criminal Jury instructions, n.d.). An expert providing an Opinion on Ultimate Issue would testify to the truth of one of these factors.

In general, statements of an Opinion on Ultimate Issue are not automatically inadmissible. However, in a criminal case, an expert witness cannot provide her opinion about "whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone" (Rule 704, n.d.). Essentially, the expert cannot testify directly to the guilt or innocence of a defendant

because the function of the jury is to decide the facts, and an expert's opinion about the defendant's guilt would likely bias the jury's finding. This relates to weak versus strong epistemic deference, which I shall now explain.

Evaluating the credibility of an expert witness is an important part of weak epistemic deference, as opposed to strong epistemic deference. Tony Ward distinguishes between two types of epistemic deference, one strong and one weak, and argues that "only the weak conception is appropriate in a legal context" (Ward, 2016, p. 263). In Ward's article, "Expert Testimony, Law and Epistemic Authority," he explains that weak epistemic deference occurs when a person X's asserting that p functions as "a reason in my deliberations," where I treat X's assertion that p "as a piece of evidence that counts in favor of p" (Ward, 2016, p. 264). In contrast, in cases of strong epistemic deference, I would use X's inferences to replace my "own deliberations, and simply believe p to the same degree that X professes to believe it" (Ward, 2016, p. 264). Weak epistemic deference allows for a discrepancy between expert testimony, and jurors' certainty of a defendants' guilt, because weak epistemic deference allows jurors to critically analyze evidence provided by experts, instead of accepting it at face value. An Opinion on Ultimate Issue encourages strong epistemic deference, as opposed to weak. In cases of Opinions on Ultimate Issue, one concern is that the expert will replace the jury as fact-finder, causing the jury to defer to the expert's opinion.

Stephen J. Yanni discusses the issue in his article "Experts as Final Arbiters: State Law and Problematic Expert Testimony on Domestic Violence in Child Custody Cases." He explains that "expert assessments of domestic violence in child custody contexts lack uniformity and reliable methodology," but courts still heavily rely on this expert testimony in making their decisions (Yanni, 2022, p. 563). In fact, courts follow an expert's custody recommendation up to

90% of the time (Yanni, 2022, p. 534). In domestic violence cases, expert testimony seems akin to ex-ante determination of guilt, slipping into a "troubling inconsistency" because it is "territory otherwise prohibited" in similar legal contexts (Yanni, 2022, p. 599). Furthermore, sometimes, inadmissible evidence influences the experts' judgements, like past findings of domestic violence restraining orders. In this situation, there is a worry that courts are strongly deferring to experts. Inadmissible evidence influencing expert evaluations of a situation is problematic. The experts' reasoning is left unchecked since the experts do not explain it to the jury. Although other concerns must be balanced here, like aiming to minimize harm to the child, if evidence is deemed inadmissible, it should not be used in an experts' evaluation of a case, especially if the court is very reliant on the expert's opinion. Yanni suggests "until advances in psychological science result in reliable methods for evaluating specific claims of domestic violence, experts should limit their opinions accordingly" (Yanni, 2022, p. 569). Opinions on an Ultimate Issue likely influence the jury and judge's opinions because the authority of the expert inflates the credibility the jury grants the experts, swaying their opinion of the case in one direction.

Arguments about an ultimate issue are typically (at least partially) from authority because nothing particularly allows experts to predict the future or reconstruct the past. In "Why Arguments from Expert Opinion are Weak Arguments,"' Moti Mizrahi explains that arguments from authority are weak arguments because the premises don't make the conclusion more likely to be true. In this article, Mizahri refers to strong epistemic deference and the movement in the argument from "Expert E says that p" to "p." He uses empirical evidence on expertise to prove his point. Mizhari is concerned with cognitive authority based on knowing more than other people, rather than administrative authority where "because I said so" means "because I have the decision-making power." He cites Philip Tetlock, who conducted a long-term study based on

expert predictions from multiple fields, including academics, economists, policymakers, and journalists. Tetlock found that the experts were only “slightly more accurate than chance and much less accurate than decision procedures” (Tetlock, 2005). As Tetlock puts it, most of the experts he studied did no better than “a dart-throwing chimpanzee” (Tetlock, 2005).

Mizahri argues that we *can* defer to the science that the expert presents even if we should not simply defer to the opinions of experts. (Mizrahi, 2013, 70). This opinion is consistent with the findings of *Daubert*, which bases the admissibility of expert testimony on the methods used by the scientists rather than on the credentials of the testifier. This argument would look like: (1) Expert E has found that X, Y, Z; (2) Given X, Y, Z, p; (3); So, it is likely that p. One position to take is that the expert can supply premise one. However, it is the juror's responsibility to figure out premise two, or the lawyer's responsibility to suggest it. In other words, it is the juror’s responsibility to draw the inference connecting X,Y, Z to p. Ascertaining premise two could be accomplished by corroborating the evidence presented by the expert, and finding that p is true through a combination of other facts.

Ways to Address Excess Credibility Afforded to Experts in the Courtroom

The possibility of testimonial epistemic injustice due to excess credibility afforded to experts exposes a need for jury members and judges to become aware of the methods behind their credibility assessments. In this section, I will first outline how people can develop moral virtue to aid in their credibility assessments. Next, I will outline systemic solutions to address improper credibility distributions in cases of expert testimony.

Cognitive Solutions

In "Democracy, Public Policy, and Lay Assessments of Scientific Testimony," Elizabeth Anderson proposes a set of criteria that can be used to make reliable assessments of experts' credibility. The criteria are credentials, honesty, and epistemic responsibility. She assumes novices have the ability to act impartially, even if that means changing a previous deeply-held belief. Anderson explains that to determine if experts can be trusted to give reliable information, novices must make sure that the expert-at-hand is really an expert in her field, and that the expert is honest and responsible in her research (Anderson, 2012, p. 146). Honesty entails that the experts are "disposed to honestly communicate what they believe—not only to say what they believe, but to avoid misleading by reporting only selected beliefs, or beliefs liable to be misinterpreted without further explanation" (Anderson, 2012, p. 145-146).

Anderson argues that people must evaluate three factors when deciding whether to trust someone: competence and sincerity, expert consensus (determined by whether the expert participates in endeavors like peer review), and epistemic responsibility ("responsive accountability to the community of inquirers") (Anderson, 2012, p. 146). These are criteria which allow people to follow the peripheral route and analyze the expert's argument based on the credibility of the expert herself, rather than the accuracy of the claim presented. The analysis Anderson suggests is accomplished by first constructing a hierarchy of expertise, with lay people without a college degree at the bottom, and experts with considerable experience in the field or academic certifications like a PhD are at the top. Creating the hierarchy of expertise is important because there are degrees of expertise even among experts. People who are leaders in the field are ranked above scientists who are research active in the field (Anderson, 2012, p. 147). As Anderson explains, novices can conduct research to place the expert within this hierarchy.

However, there are limitations to applying Anderson's suggestions in the courtroom because jurors are not allowed to conduct outside research. Anderson also argues that "before a consensus, the best course for laypersons is to suspend judgment" (Anderson, 2012, p. 149). Suspending judgment is not possible when a court case needs to be settled in a timely manner.

In addition, according to Johnny Brennan, author of "Can Novices Trust Themselves to Choose Trustworthy Experts? Reasons for (Reserved) Optimism," "novices can assess an expert's honesty by searching for evidence of dishonesty" (Brennan, 2020, p. 229). This includes "conflicts of interest, plagiarism, faking data, and cherry-picking data" (Brennan, 2020, p. 229). In a courtroom, it is the responsibility of the attorney cross-examining the expert to expose answers to these questions. To determine which questions to ask to expose this information, the attorney can conduct independent research and perhaps speak to the expert's peers to understand how the expert is perceived in her field. Sometimes, insider knowledge is extremely helpful in assessing expert testimony. One example of insider information is how well respected the expert is within her academic sphere, but this information is not easily accessed by jury members. Insider information would allow jurors to know whether a scientist was acting as an epistemic trespasser, which is when someone who is an expert in one area gives an opinion in an area outside of their expertise.[9] One example of an epistemic trespasser would be a neurologist offering her opinion on a topic related to epidemiology, such as whether masks slow the spread of COVID-19. Epistemic trespassing is yet another reason to be wary of accepting an expert's arguments on the sole basis of her status as an expert. Although someone may be an expert in one field, her being an expert does not make her qualified to provide an opinion on an issue in another field.

[9] See "Epistemic Trespassing" (2019) by Nathan Ballantyne for more on this topic.

Brennan, like Anderson, endorses peripheral route assessments of expertise as a way for laypeople to analyze expert's testimony. He explains that novices have a "harder time than expected (or hoped) when trying to follow procedures intended to help them pick trustworthy experts" (Brennan, 2020, p. 3-4). He chalks this shortage up to two reasons: (1) novices lack knowledge that is inaccessible to them either because it is too difficult to understand, or it is not easily found on the internet, and (2) they resist changing their wrong opinions due to cognitive biases. Cognitive biases provide an expert with excess credibility that is not *solely* based on their identity or social position. Rather, the expert's identity can interact with the listener's cognitive-based prejudice. As Anderson states it, "people tend to accord higher credibility to the testimony of people who share their background and value orientation" (Anderson, 2011, p. 158). This corresponds with Gloria Origgi's views, as outlined in Part One. As discussed, Origgi believes that factors such as conformism, social norms, robust signals, moral commitments, and emotional reactions all contribute to our decisions to trust or mistrust someone.

One example of a cognitive bias is confirmation bias, which is when one believes information that already conforms to one's beliefs more than one believes other information. In this case, a juror may believe an expert more than she should because the expert is testifying about something the juror already believes. We tend to live in epistemic bubbles, which "combine universal cognitive biases with a closed epistemic network of like-minded individuals who share judgments about which sources are credible, resulting in increased vulnerability to false and extreme beliefs that are strongly resistant to correction" (Brennan, 2020, p. 17). We surround ourselves with people who think like we do, and we are more receptive to information coming from people who think the same way we do.

Three cognitive mechanisms underpin the bias blind spot: (1) "An evidential asymmetry in how we judge ourselves and others;" (2) "A tendency to assume naïve realism, the idea that our experience of the world is the right one;" (3) "The motive of self-enhancement—we see ourselves in an overly positive light and don't notice if we lack a positive trait in order to protect our egos" (Brennan, 2020, p. 15–16). We judge others based on their outward behavior, but we judge ourselves on the basis of introspection, which makes it difficult to see our own biases, as we perceive ourselves *through* our biases. Jurors have a moral and epistemic responsibility to be meta-aware of how their biases and other cognitive processes operate. As stated in Part One, the ultimate goal of the virtue of testimonial justice in the ethical sense is "justice," and to avoid "doing one's interlocutor a testimonial injustice" (Fricker, 2009, p. 122). In the intellectual dimension (epistemic), the goal is to achieve "the appropriate openness to truth," and to make it unlikely for the listener to miss out on the truth (Fricker, 2009, p. 122). Dialogic irrationality is a failure to respond rationally to counterevidence, which occurs if people are unaware of their bias blind spots, due to the three mechanisms discussed above (Anderson, 2011, p. 147). Jurors must be aware of their biases to avoid being dialogically irrational in their credibility assessments of witnesses. Generally, introspection is not a reliable way of discerning bias, because biases can evade our perception. As Johnny Brennan explains, "biases impede novices' abilities to get a clear-eyed view of their cognitive and metacognitive patterns" (Brennan, 2020, p. 22).

Brennan turns to Karen Jones, author of "The Politics of Credibility," for a solution. In this article, Jones suggests that we can take a meta-stance on our decisions to trust or mistrust someone. Jones examines situations in which "the trustworthiness of the testifier and the plausibility of the story itself" pull you in two different directions (Brennan, 2020, p. 18). She suggests looking at patterns in our past judgements to resolve these situations. Biases produce

evidence through patterns of behavior. Uncovering these patterns is "possible if novices look to their 'track records' of decisions and actions" (Brennan, 2020, p. 23). Although biases are difficult to detect, they *can* be detected. Accordingly, there is not a need to be overly skeptical of our ability to carry out unbiased thinking. Jones advises us to track our patterns of trusting and distrusting certain kinds of testifiers and to allow those patterns to influence the credibility we ultimately assign to the speaker. For example, a judge who is aware that she tends to give longer sentences to Black people than White people can use this knowledge to be skeptical of her initial assessments of how long someone's sentence should be and adjust the sentence accordingly.

Moreover, Jones argues that the burden of evidence changes when we become aware that we tend to trust some people over others. This triggers our responsibility to avoid epistemic injustice in the courtroom. If we tend to trust one person over others, we must seek additional information to counteract our bias, to be sure that our decision is not infected by bias. Epistemic virtues can be used to avoid harming people in their capacities as knowers. Epistemic virtues also help us become aware of a pattern in trusting people uncritically and unreflectively, which signifies the need to analyze our credibility-attribution process.

Intellectual humility is a virtue that can help one be a responsible juror by assessing one's biases. Dennis Whitcomb, along with Heather Battaly, Jason Baeher, and Daniel Howard-Snyder examine this topic in "Intellectual Humility: Assessing Our Limitations." These authors explain that intellectual humility is "having the right stance towards one's intellectual limitations," which involves "submit[ting] that the right stance is to be appropriately attentive to [our limitations] and to own them" (Whitcomb, et. al., 2015, p. 8). The authors further explain that intellectual humility involves acting as the "context demands" (Whitcomb, et. al., 2015, p. 9). People who are intellectually humble tend "to admit their limitations to others, avoid pretense, defer to

others, draw inferences more hesitantly, seek more information, and consider counter-evidence" (Whitcomb, et. al., 2015, p. 9). Intellectual humility allows people to accurately gauge how sure they should be of their beliefs, allowing them to adjust their beliefs accordingly. Jurors should develop and apply the virtue of intellectual humility to better understand the judgements they make at trial.

Emily Pronin's article, "Perception and Misperception in Human Judgement" elaborates on the bias blind spot, explaining that people typically are poor at judging when something clouds their judgment. Pronin chalks the bias blind spot up to two factors; the first being that people rely on introspective evidence to determine their biases, and the second being that people generally assume their way of seeing reflects reality and that those who disagree with them are therefore biased. In the courtroom, this can mean that it is difficult for jurors to judge when their prejudices are influencing their perception of the facts. It may be the case that jurors' biases cause them to believe one person over another, but the juror may be ignorant of this due to the factors Pronin outlines.

However, jurors have a moral and epistemic responsibility to do their best to evaluate their biases and try to neutralize them. As mentioned in Part One, Miranda Fricker argues that the moral responsibility of a listener depends on the context in which she is listening. In the courtroom, the listener is morally obligated to assess their evaluations of others' credibility for biases because the stakes of a trial are so high.

Tony Ward mentions the moral duty of jurors and judges in his piece "Expert Testimony, Law and Epistemic Authority." He explains that "decisions about what the courts are to take to be true must not only be reliable (or at least avoid one type of error, wrongful conviction) but must be justified from the perspective of those who make them" (Ward, 2016, p. 266). It is up to

the jurors and judges to rely on their perceptions made from their own faculties, making it ethically necessary that they do their due diligence in assessing their evaluations of the evidence. In the next subsection, I will discuss possible systemic changes to America's treatment of expert testimony that would assist in ensuring proper credibility distributions in cases of expert testimony.

Systemic Solutions

In "Irreconcilable Differences? The Troubled Marriage of Science and the Law," Susan Haack explains the origin of many problems linked to expert testimony. Haack points out the tension between science's goal as discovery, on the one hand, and the adversarial nature of the legal system, on the other hand. The goals of a scientist are different from the goals of an attorney. Haack writes, "the obligation of a scientist, qua inquirer, is to seek out as much evidence as he possibly can and to assess it as fairly as possible," but the obligation of an attorney, "qua advocate, is to make the best possible case for his client's side of the dispute—including playing up the evidence that favors his case, and explaining inconvenient evidence away if he can't get it excluded" (Haack, 2009, p. 13).

Additionally, the case-specificity of legal cases means the legal system is tasked with answering questions that science is not designed to answer. For example, there may be many mitigating factors influencing a medical outcome, but the question in dispute may be whether a certain drug caused injuries to the plaintiff. Haack provides the example of General *Electric Co. v. Joiner, 522 U.S. 136 (1997)*, in which Mr. Joiner sued General Electric, claiming that exposure to PCBs caused his lung cancer.[10] Although "the toxicity of PCBs was well-established," it was

[10] Read more about this case here: https://supreme.justia.com/cases/federal/us/522/136/

difficult to prove how much the toxicity of PCBs contributed to his development of lung cancer, given that he was a smoker and that he had a family history of lung cancer (Haack, 2009, p. 16).

Haack describes several recent changes aimed at combating some of the difficulties surrounding expert testimony in the courtroom. Three examples are educating judges on scientific topics, allowing cases to be reviewed with DNA evidence, and the possibility for appointment of a CASE (Court Appointed Scientific Expert). Educating judges on scientific topics allows judges to evaluate expert testimony more easily. If judges know more about the topic being testified about, they are enabled to partially evaluate testimony on the central route. DNA evidence can act as a check on false convictions based on inaccurate expert testimony. Allowing new forensic science to guide the re-examination of a court case counteracts the finality of legal decisions and acknowledges the dynamic nature of scientific discovery.

Further, there is the possibility of appointing a CASE expert. These are "independent scientists who would educate the court, testify at trial, assess the litigants' cases, and otherwise aid in the process of determining the truth" (Bandow, 1999). Downsides to court-appointed experts include that often, if judges announce they will seek outside expert counsel, the case is promptly settled (Haack, 2009, p. 21). Moreover, the experts appointed by the court sometimes do not agree. Haack provides the example of *Soldo v. Sandoz Pharmaceuticals, Inc.*, "where two of three court-appointed experts concluded that the methodology the plaintiff's expert witnesses had used in arriving at the opinion that Ms. Soldo's stroke had been caused by the anti-lactation drug Parlodel was not reliable, but the third concluded it was" (Haack, 2009, p. 21-22).

Additional changes to consider are possible alternative arrangements in terms of the procedural treatment of expert testimony. The article "Balancing Legal Process with Scientific Expertise: Expert Witness Methodology in Five Nations and Suggestions for Reform of Post-

Daubert U.S. Reliability Determinations," by Andrew Jurs, discusses other countries' arrangements and makes recommendations for changes to the United States' system. He explains that although some people suggest that judges undertake independent research to evaluate experts' claims in ruling on the admissibility of their testimony, most judges view an active research role as outside "their perception of the boundaries of the judicial role" (Jurs, 2012, p. 1352). As discussed, another option could be the appointment of independent experts, which is allowed under Rule 706. However, judges infrequently use this option (Jurs, 2012, p. 1353). In a study conducted by Cecil and Willging, about "20% of their sample—86 of 431 judges—had ever appointed an expert under Rule 706" (Jurs, 2012, p. 1353).

Other countries can serve as case studies to modify the American system to help ensure that expert testimony is properly evaluated, and therefore, that credibility is distributed accurately. In Japan and Germany, "the judge selects an expert to assist the judge to decide contested issues of evidence" (Jurs, 2012, p. 1407). Experts must be totally neutral parties and are deemed qualified because of their knowledge of the field and because they will be fair. According to Jurs, the United States would benefit from this change because it would remove the adversarial side to expert testimony, reducing bias. It is important to acknowledge that even unpaid experts may be biased because they may perceive the trial to be a competition, making them want to "win" the trial for recognition or fame (Howard, 1986). Therefore, even removing or reducing pay for expert witnesses would not completely eliminate the bias that expert witnesses experience in being called to testify in a case, unless the adversarial set up is altered. The appointment of a single neutral expert would eliminate bias related to trying to "win" a case.

This suggested change is different from the CASE system because in the CASE system, experts are vetted only after being selected, but under this system, experts would be pre-vetted.

Further, the CASE system was an option available to judges, but this suggested change would alter how the entire trial system operates in the U.S. Jurs suggests that institutional backing could allow this change to be very successful because it would provide "additional funding, a high profile, and consistent levels of use over time," three factors the CASE system did not have (Jurs, 2012, p. 1414).

The next section of this thesis will discuss concerns of testimonial epistemic injustice due to credibility deficits in the context of jailhouse informants.

Section Two

Jailhouse Informants

The testimony of jailhouse informants is often downgraded, as incarcerated people have something to gain from giving testimony: a potentially shortened jail sentence or other benefits enjoyed in prison. Jailhouse informants are currently incarcerated people who give tips to law enforcement to help them solve crimes. Jailhouse informants often expect to receive benefits regarding their own case, such as reduced charges in a pending criminal case, sentence reduction, special inmate privileges, assistance to family, or monetary payments (Informing Justice: The Disturbing Use of Jailhouse Informants, 2021). In Connecticut, one way the Cold Case Unit aims to elicit testimony from incarcerated people is by distributing playing cards with photographs of victims on them (Cold Case Cards, n.d.). Incarcerated people play typical card games with these cards, like rummy, hearts, or solitaire. While playing, they discuss the victims depicted on the cards, oftentimes drawing out tips for law enforcement to investigate.

However useful jailhouse informant testimony may be, there are serious credibility concerns surrounding the use of jailhouse informant testimony as evidence in the courtroom. Evaluating the testimony of jailhouse informants is difficult because listeners must balance the biased interests of the jailhouse informant against how truth-conducive the information to which they testify appears. This relates to the two virtues outlined in part one: accuracy and sincerity. As previously explained, accuracy involves asserting the truth, and sincerity involves believing that what you say is true. The biases of the jailhouse informant may mean they fabricate stories with the aim of receiving personal benefits.

Many people argue that the use of jailhouse informant testimony in the courtroom should be carefully limited. According to the Innocence Project, false jailhouse informant testimony contributed to nearly one-in-five DNA exoneration cases to date (Informing Justice: The Disturbing Use of Jailhouse Informants, 2021). Further, jailhouse informants play a role in even the highest stake of false convictions. 21% of 123 death row exonerations involved jailhouse informants (Safeguarding Against Unreliable Jailhouse Informant Testimony, 2019). The Innocence Project suggests several factors for the court to consider before admitting the use of jailhouse informant testimony. The accuracy and sincerity of the jailhouse informant can be evaluated based on these criteria. Several of these factors are the criminal history of the informant, any deal that has been made with the jailhouse informant, prior recantation of the testimony, and if the informant has acted as an informant in other criminal cases (Safeguarding Against Unreliable Jailhouse Informant Testimony, 2019). The Innocence Project suggests that juries evaluate these factors in deciding how much weight to assign to the informant's testimony.

In Robert Bloom's article "What Jurors Should Know about Informants: The Need for Expert Testimony," he argues for the use of expert testimony to assist juries in their assessments

of jailhouse informant testimony. While an expert cannot testify to the actual credibility of a witness, an expert can educate jurors on topics which "may help [them] weigh the credibility of a witness" (Bloom, 2019, p. 357). Experts can testify to facts of the case, but they cannot testify to whether conditions established by ultimate issues are or are not satisfied. They can say, for example, that Jones had plans to commit murder in his backpack. They cannot say that Jones intended to cause death. In one study, expert witnesses were shown to have a positive effect on helping jurors improve their sensitivity to eyewitness identification (Loftus, 1980). Bloom believes that expert testimony could similarly help jurors assess their evaluations of jailhouse informants' testimony.

Bloom provides an example of a Connecticut case, *State v. Lenihart*, where expert testimony was eventually admitted for informants. In this case, "George Michael Leniart was convicted of murder and capital felony in connection with the kidnapping, sexual assault, and murder of a teenage victim" (Bloom, 2019, p. 360). In his appeal, Lenihart claimed that the "evidence was insufficient to support his conviction because the only evidence of the victim's death was the testimony of four witnesses who told the jury that he had confessed to them about killing the victim and disposing of her body" (Bloom, 2019, p. 360). The court found that expert testimony would have assisted the jury in this case and remanded it for a new trial. Jury instructions about jailhouse informant testimony can ask jurors to hold jailhouse informant testimony to greater scrutiny because of the propensity of informants to lie and can ask jurors to seek greater corroboration for informants' claims. The American Bar Association (ABA) adopted this criterion, along with many other states (American Bar Association, n.d.). The ABA urges governments to ban prosecutions based "solely on the uncorroborated testimony of jailhouse informants" (American Bar Association, n.d.).

A credibility deficit in terms of jailhouse informant testimony is likely rare, as it seems that more often than not, people *should* be skeptical of jailhouse informant testimony. Several court cases point to a need for caution. In *State v. Arroyo*, the defendant was convicted of felony murder, and conspiracy to commit murder in the first degree and larceny in the fifth degree. However, he appealed to the Appellate Court, arguing that the court should not have denied his request for "special credibility instruction" regarding the testimony of two jailhouse informants (State v. Arroyo, n.d.). The appellate court affirmed the ruling, arguing that *State v. Patterson* (the case which requires special credibility instruction for jailhouse informants) did not apply because there was no evidence that the state had promised the informants any deal in exchange for testifying. The case was then appealed to the Supreme Court of Connecticut, which affirmed the judgment but nonetheless held that the rule from *State v. Patterson* should be expanded to cases in which the jailhouse informant was not promised anything in exchange for his testimony.

The key factors in relation to whether a testifier should be trusted are accuracy and sincerity. The accuracy of what a jailhouse informant testifies to is covered by the jury instruction that the jailhouse informant testimony should be strongly corroborated with other facts. The requirement of sincerity is addressed by the instruction that the jury should be sure to use extra caution in evaluating the credibility of the jailhouse informant.

The New York Times article, "How This Con Man's Wild Testimony Sent Dozens to Jail, and Four to Death Row" attempts to answer the question of why prosecutors rely on jailhouse informant testimony when it is oftentimes unreliable. The article tells of Paul Skalnik's role as a jailhouse informant in a Florida case involving the violent death of a 14-year-old girl, Shelly Boggio. There were few clues left at the crime scene, including no viable DNA evidence, and no murder weapon. Four men in Pinellas County Jail were questioned with newspaper articles

containing details about the crime in front of them (Colloff, 2019). None of the men interviewed that day knew anything. However, one of the men being interviewed, Michael Sorrentino, later testified that "had I wanted to say something, or fabricate something, all the tools were there to give [the detectives] whatever they might be looking for" (Colloff, 2019). After this questioning, word spread in the Pinellas County Jail that the case "needed a snitch" (Colloff, 2019). Within the next three years, three people came forward, one being Paul Skalnik, a known and regular jailhouse informant facing 20 years in prison on charges of grand theft. Assistant State Attorney Beverly Andrews told the jury that Skalnik had not been promised anything in return for his testimony.

Skalnik's story was that when he was passing by Dailey's cell (one of the suspects of the crime), Dailey thought that Skalnik was a private investigator and tried to speak to him for legal advice. At this point, according to Skalnik, Dailey confessed that he had stabbed the girl and thrown the knife away. The jurors found Dailey to be guilty and recommended that he be executed. Five days after the conviction, Skalnik was released from jail. A memo released by the Florida Parole and Probation Commission attested his release to his "cooperation with the State Attorney's Office in the first-degree murder trial" (Colloff, 2019). Stalnik had previously been identified as a flight risk and danger to society a year earlier in parole hearings. This case is a clear example of reason to be skeptical of a jailhouse informant's accuracy and sincerity. Stalnik had acted as an informant in several past cases, but his testimony was still admitted and relied upon in court. In cases like this, credibility excess afforded to jailhouse informants results in epistemic and political injustice. Similar to cases of expert testimony, excess credibility afforded to jailhouse informants can result in epistemic injustice because credibility is finite in the courtroom. If a juror believes a jailhouse informant or expert witness more than he should, the

people who are afforded less credibility than deserved experience testimonial epistemic injustice due to a credibility deficit. In these cases, a social prejudice contributes to the credibility assessment of the listener.

A tough-on-crime mentality, and promotional systems for prosecutors which measure their success based on how many people are incarcerated, encourage the use of unreliable jailhouse informant testimony, as these policies motivate seeking convictions for the sake of the conviction itself. Measures to curb the use of jailhouse informant testimony are becoming increasingly popular nationwide, given the research showing its relation to wrongful convictions. In 2018, Illinois passed legislation to require judges to hold reliability hearings before trials to evaluate whether informants should be allowed to testify (Colloff, 2019). This also requires prosecutors to disclose their planned use of jailhouse informants at least thirty days before trial (Hansen, 2018). In 2019, Connecticut passed a bill that created the first statewide system in America to track the use of jailhouse informants (Collins, 2019).

Data collection will assist in keeping a tally of how many times a certain person acts as an informant and will also inform policy changes. Overall, it is unlikely for jailhouse informants to experience testimonial epistemic injustice due to a credibility deficit because it is prudent for jurors to be skeptical of their testimony. New legislation will assist in ensuring jurors evaluate their credibility assessments of jailhouse informants. This legislation will be key in protecting against testimonial epistemic injustice for jailhouse informants whose testimony may be unduly downgraded due to their identity as a jailhouse informant. If jurors are instructed to take extra care in their credibility assessments of jailhouse informants, they will be better able to discern when to trust or mistrust jailhouse informants.

Section Three

Jury Selection

Testimonial epistemic injustice also takes place during jury selection, when prosecutors evaluate if they believe that jurors' answers to their questions are credible. Jury selection involves formal testimony, where the testimony of prospective jurors is characterized by their answering of questions during voir dire. Juror testimony follows C. A. J. Coady's four requirements for formal testimony: the testimony is evidence, the prospective juror is offering their remarks as evidence, the prospective juror is in an appropriate position to give the testimony, and the prospective juror is formally acknowledged as a witness. Potential jurors are sworn under oath to answer questions truthfully and are in an appropriate position to answer the questions because they are answering questions about their personal beliefs and experiences. They have the requisite knowledge and authority.

The identity of a juror may lead attorneys to downgrade the juror's claim that they will be unbiased and fair, causing the attorney to strike the juror from the jury. This leads to testimonial epistemic injustice for the prospective juror, as she may be harmed in her capacity as a knower. More specifically, such jurors may be undermined in their capacity to act as a rational agent capable of unbiased reasoning. Peremptory challenges allow attorneys to dismiss people from the jury without stating a reason. Peremptory challenges are different from challenges for a cause, where attorneys must state why they are dismissing a juror. The idea behind peremptory challenges is that attorneys cannot always articulate their reasoning for thinking that a juror is biased.

Because attorneys do not need to state why they dismiss jurors under a peremptory challenge, peremptory challenges can allow attorneys to dismiss jurors on the basis of race. *Batson v. Kentucky* (1985) was one court case which has been key in trying to remove racial biases from jury selection.

Batson v. Kentucky

During jury selection, jurors may be improperly struck from a jury on the basis of their race. *Batson v. Kentucky* overturned *Swain v. Alabama*, which had recognized the peremptory challenge as a valid legal practice so long as it was not used intentionally to exclude Black people from juries. In *Swain v. Alabama*, a Black man was convicted of rape in Talladega County, Alabama, and sentenced to death. Of those in Talladega County eligible for jury selection, 26% were Black, but from 1953 to the time of the case (1964), jury panels averaged 10% to 15% Black people. In *Swain v. Alabama,* of the eight Black people on the venire (the pool from which people are selected for the jury), two were exempt, and six were peremptorily struck by the prosecution. The Court found that the petitioner failed to show purposeful discrimination based on race, and that the Constitution did not require an examination of prosecutors' reasons for striking people from a jury.

About twenty years later, in *Batson v. Kentucky* (1985), the prosecutor used peremptory challenges to strike four Black jurors from the jury. In the case, Batson, a Black man, was charged with second-degree burglary. The Supreme Court decided that the prosecutor's actions violated both the Fourteenth and Sixth Amendments because a neutral reason was not identified for why the Black people were excluded from the jury. The relevant part of the Sixth Amendment states that the accused have a right to a "speedy and public trial, by an impartial jury

of the State and district wherein the crime shall have been committed" (The Constitution, n.d.). The "impartiality" requirement of a trial helps block racially motivated strikes during jury selection. The Equal Protection Clause of the Fourteenth Amendment states that "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws" (The Constitution, n.d.). *Batson v. Kentucky* developed the concept of a Batson Challenge, which is an objection to the validity of a peremptory challenge, on "grounds that the other party used it to exclude a potential juror based on race, ethnicity, or sex" (Batson Challenge, n.d.). The Batson Challenge provides a three-part framework: (1) the objecting party must make a prima facie case of discrimination, (2) the burden shifts to the party which struck the juror to point out a race-neutral explanation, and (3) the trial court determines if there was discrimination at play.

In *Batson v. Kentucky*, Justice Thurgood Marshall suggested that peremptory challenges should be eliminated. He pointed out the difficulty of the court in assessing lawyers' motives. He believed that through peremptory challenges, lawyers could still discriminate and eliminate Black jurors on the basis of race, as long as the discrimination wasn't blatant. He wrote, "the decision today will not end the racial discrimination that peremptories inject into the jury selection process," because that goal "can be accomplished only by eliminating peremptory challenges entirely" (Batson v. Kentucky, n.d.). He pointed out that "any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons" (Batson v. Kentucky, n.d.). He explains that the potential to remove jurors on the basis of race under the guise of a peremptory challenge suggests that the Court should ban them entirely from the Criminal Justice System.

Other Relevant Court Cases

There are two recent court cases, *Foster v. Chatman* and J*ames Purkett, Superintendent, Farmington Corrections Center v. Jimmy ELEM,* where a Batson Challenge exposed blatant racial discrimination during jury selection.

In the more recent case, *Foster v. Chatman* (2017), the Supreme Court ruled that Black jurors were improperly struck from Timothy Chapman's jury that sentenced him to his death. In this case, the testimony of the jurors took place during voir dire and constituted their answers to the attorneys' questions. The prosecutors highlighted the names of every Black juror during jury selection and denoted that the highlighting "represent[ed] Blacks" (Foster v. Chatman, n.d.) A further note was discovered where the prosecutor compared prospective Black jurors and concluded "if it comes down to having to pick one of the Black jurors, [this one] might be okay" (Foster v. Chatman, n.d.). In this case, the testimony of the jurors about their ability to serve on the jury was downgraded due to the overt racial bias of the prosecution. The prosecution believed that Black people would be less likely to convict Timothy Chapman.

In the case *James Purkett, Superintendent, Farmington Corrections Center v. Jimmy ELEM* (1995), two jurors were struck because of their hair style and facial hair, which was ruled to be discriminatory. The prosecutor was quoted as saying, "I struck [juror] number twenty-two because of his long hair. He had long curly hair. He had the longest hair of anybody on the panel by far. He appeared to not be a good juror for that fact, the fact that he had long hair hanging down shoulder length, curly, unkempt hair. Also, he had a mustache and a goatee type beard. And juror number twenty-four also has a mustache and goatee type beard. Those are the only two people on the jury . . . with facial hair . . . And I don't like the way they looked, with the way the hair is cut, both of them. And the mustaches and the beards look suspicious to me" (Purkett

v. Jimmy ELEM, n.d.). The hair of the jurors was not deemed to be race-neutral but rather pretextual. The Court of Appeals reversed and remanded the case.

Although the peremptory challenges in these two cases were deemed to be invalid, most of the time, juror eliminations based on race are not challenged, as it is difficult to ascertain when a dismissal is based on someone's race.

The Data

It is oftentimes important for juries to be racially and ideologically balanced. Because the jury system operates on a twelve-person basis, the biases of different jurors ideally act as a check on one another, helping prevent injustice unless the bias is held by many or all of the twelve jurors. Having twelve jury members is intended to increase the fairness of a trial because ideally, jurors' biases will balance each other out. If an all-White jury convicts a Black perpetrator, there is reason to be suspicious of a widely-held bias. If juries are all the same race, in cases which may turn on racial factors, it is more likely that racial bias will infect the decision-making process than if there are members of multiple races on the jury. Attorneys are allowed to dismiss people during jury selection to eliminate people who would be biased against their side. Sometimes, people hold biases which may make them uncapable of making fair decisions on a case. For example, the defense would likely dismiss a juror on a sex assault case who discloses that she has been sexually assaulted in the past. However, as decided in *Batson v. Kentucky,* a juror's race does not indicate that he is uncapable of making a fair decision on a case.

Racially discriminatory jury selection practices have detrimental impacts on the fairness of trials. A 2012 study of felony trials in Florida found that Black defendants are sixteeen percent more likely to be convicted than White defendants when no Black person serves on the jury. This

gap disappears if the jury has a single Black member (Anwar, et. al., 2012). The difference in the rate of convictions depending on the racial composition of the jury raises concerns about districts where the minority of people are Black since there is a lower percentage of Black people capable of being selected to serve on juries. A relevant philosophical question becomes: what does 'jury of one's peers' mean? Should people always have someone on the jury who is a member of their own race?

Moreover, it is possible that peremptory challenges remove the balanced biases of a group which is produced by a random selection of jurors. Jurors are randomly selected from a list of people with driver's licenses and local home addresses. The views of this random selection of people are likely balanced. Even if one juror is biased towards the defense, another juror will likely be biased towards the prosecution.

Possible Changes to the Peremptory Challenge System

To understand the possibility of changing the peremptory challenge system to reduce discriminatory applications, it is helpful to consider the original intent behind peremptory challenges. Peremptory challenges were originally thought to be an important right for the defense. The stakes are higher for the defense than the prosecution in criminal cases because the defendant's life may be at stake. In the past, the defense was offered more peremptory challenges than the prosecution (Leak, 2021, p. 1). In *Swain v. Alabama,* the Supreme Court described peremptory challenges as "one of the most important of the rights secured to the accused" (Swain v. Alabama, n.d.). However, the allocation of peremptory challenges is changing. In the middle of the twentieth century, twenty states allocated more peremptory challenges to the defense for some offenses. Today, "only nine states maintain an unequal allocation of

peremptory challenges to some degree, and only five states afford a greater number of peremptory challenges to the defense than the prosecution in noncapital offenses" (Leak, 2021, p. 1).

Savanna Leak's article "Peremptory Challenges: Preserving an Unequal Allocation and the Potential Promise of Progressive Prosecution" asserts that unequal peremptory challenges better secure perceived and actual fairness of a trial. Leak explains that the unequal distribution of peremptory challenges increases public perception of the fairness of a trial. The inequality inherent in allocating more peremptory challenges to the defense coheres with the philosophy that people are innocent until proven guilty. Both policies recognize that the stakes of a criminal trial are higher for the defense. Leak also argues that giving the defense more peremptory challenges helps counteract if the prosecution is discriminatory in their peremptory challenges due to incentives to secure convictions. A study intended to look into the extent of discrimination in peremptory challenges examined peremptory challenges in capital cases in Pennsylvania and found that: (1) discrimination on the basis of race and sex by prosecutors and defense attorneys is widespread; (2) prosecutors are "considerably more successful than defense counsel in their attempts to control jury composition"; and (3) the prosecution's "'advantage' in the use of peremptory challenges" increases the probability of death sentences for defendants, increases "discrimination in the application of the death penalty," and "denies defendants a trial by a jury that includes at least one of their 'peers'" (Leak, 2021, p. 300). As proven in that study, peremptory challenges may be discriminatorily applied, making it helpful for the defense to have more peremptory challenges than the prosecution. Leak argues that if progressive prosecution leads to increased fairness in the Criminal Justice System overall, and specifically in the exercise of peremptory challenges, the need for the unequal preremptories may be removed.

One solution to the discriminatory application peremptory challenges could be eliminating them altogether, as Justice Thurgood Marshall suggests in *Batson v. Kentucky*. However, the removal of peremptory challenges is not widely supported because peremptory challenges are intended to remove people who seem biased for a reason that cannot be articulated. Maricopa County prosecutor Kenneth Vick says that "expecting a prospective juror to candidly admit that they cannot be fair is unrealistic" (Millhiser, 2021). Many outside factors go into an attorney's credibility assessment of a prospective juror, including their body language and other subtle signals. Arizona recently decided to eliminate peremptory challenges (Millhiser, 2021). Time will tell the impact of Arizona's elimination of peremptory challenges, which went into effect in January of 2022.

Another possible solution could be a blind voir dire, where attorneys cannot physically see potential jurors. This would ensure the juror's race does not influence the attorney's opinions of the juror's ability to serve on the jury. However, a blind voir dire would also mean that the juror's facial expressions and body language could not be seen, both of which are important indicators of a juror's ability to be fair and impartial. Further, even if voir dire were blind, the possibility of discrimination based on a juror's accent persists.

Accent Discrimination as an Example

Jasmine Gonzalez Rose discusses discrimination based on accents during jury selection in her piece "Color-Blind but Not Color-Deaf: Accent Discrimination in Jury Selection." In this scenario, a juror's ability to serve on a jury is downgraded because of his accent, which is typically linked to his race. Gonzalez Rose describes the treatment of E.F. in New Britain, Connecticut who was questioned as a juror. The judge asked about E.F's English language

background even though there was no indication that the judge, prosecutor, defense counsel, or court recorder had any trouble understanding him. The judge asked, "if I can just interrupt for a moment, English is not your first language, is it?" "No," responded E.F., who also explained that he knew English very well but had an accent (Gonzalez Rose, 2020, p. 311). The judge replied, "No, no, I understand—I just want to—whenever anybody talks to me in an accent, and it's not just Spanish, I often inquire whether they can understand English well enough to be a juror. So, you're comfortable doing that and that's fine" (Gonzalez Rose, 2020, p. 311). However, the judge still excused E.F. for cause, stating a "significant language barrier" would interfere with his ability to sit on the jury.

Accent discrimination is linked to racial discrimination. As in this case, someone who speaks with a Spanish accent may be Hispanic. Accent discrimination is something that currently makes juries non-representative as jurors with accents may be dismissed. Accent discrimination during jury selection challenges the possibility of a blind voir dire. Gonzalez Rose suggests providing juror language accommodations to reduce accent discrimination during jury selection (Gonzalez Rose, 2020, p. 351). She acknowledges that suggesting language accommodation for accent discrimination is counterintuitive, as, "by definition, accent discrimination is discrimination on the basis of (perceived) pronunciation and not actual language (in)ability" (Gonzalez Rose, 2020, p. 352). Gonzalez Rose explains that language accommodations could foreclose the possibility of removal on the basis of someone's accent. The juror would be given a translator, rather than be removed.

Other Applications

Jurors' testimony during voir dire can be downgraded due to any social structural prejudice held by attorneys. Examples of prejudice include race, gender, and class. Gender prejudices become especially relevant in sexual assault cases. *Batson* was expanded in *J.E.B v. Alabama* to include protections against gender discrimination. Further, in *Hernandez v. New York,* the Supreme Court banned juror discrimination based on ethnicity. In this case, the prosecutor excluded Spanish-speaking Latino prospective jurors during voir dire.

Overall, the downgrading of a prospective juror's testimony during voir dire can lead to testimonial epistemic injustice. The juror may receive less credibility than deserved and therefore be eliminated from jury service. As discussed, possible changes to mitigate discrimination during jury selection include eliminating peremptory challenges or making jury selection blind. However, peremptory challenges help protect the rights of the defense. Therefore, it is perhaps more prudent to aim to develop epistemic virtues to combat discriminatory peremptory challenges instead of removing them altogether. The same virtues described in the section about expert testimony would assist attorneys in making sure their assessments of jurors' credibility were accurate. In order to cultivate these virtues, attorneys would need to be earnest in their efforts to make unbiased, neutral decisions during jury selection. It would also be beneficial to remove incentives that encourage prosecutors to seek convictions for the sake of convictions (for example, promotions based on number of convictions) because these can encourage discrimination during jury selection.

Overall, epistemic virtues will help in reducing testimonial epistemic injustice and encouraging accurate credibility assessments in the courtroom in cases of peremptory challenges, jailhouse informants, and expert testimony.

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