

Testimonial Injustice: Incidental Impact on the Law

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I. INTRODUCTION

In 2007, philosopher Miranda Fricker coined the concept of epistemic injustice.¹ One specific type of injustice she identifies is testimonial injustice, which occurs when someone is unjustly denied the status of “knower” by a “hearer” because of an unduly low credibility judgment stemming from some prejudicial stereotype.² Since Fricker’s first discussion, epistemic injustice has become a significant topic in philosophical literature. However, the concept has only recently been analyzed within the context of the legal field.³

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1. See generally MIRANDA FRICKER, *EPISTEMIC INJUSTICE: POWER AND ETHICS OF KNOWING* (2007).

2. *Id.* at 17.

3. Andres Paez & Janaina Matida, *Editorial of Dossier “Epistemic Injustice in Criminal Procedure”*, 9

This previous scholarship has primarily focused on instances where testimonial injustice may occur within the legal system and the direct harms associated with those instances. These direct harms are important, but this note seeks to expand the scope of how testimonial injustice operates in and influences the legal system. This note will argue that, in addition to the direct and personal harms associated with epistemic injustice, testimonial injustice also results in certain incidental harms that impact defendants and the broader society. Though these harms are incidental in nature, it is important to acknowledge them as they operate to undermine fairness, and therefore the legitimacy, of our legal system.

First, Part II gives a thorough explanation of Fricker's initial concept of testimonial injustice, what the associated wrongs are, and the subsequent expanded conceptions of testimonial injustice. Second, Part III.A provides a brief summary of the previous scholarship which discusses where and how testimonial injustice occurs in the law. Third, Part III.B, explains how these instances of testimonial injustice coalesce to cause injustice broadly for defendants in criminal proceedings, even if they were not directly subjected to testimonial injustice themselves, and how this creates a ripple effect that harms society in general. Lastly, Part IV briefly introduces possible solutions or mitigation strategies.

II. TESTIMONIAL INJUSTICE BACKGROUND

Epistemology, the field of philosophy focused on the study of knowledge,⁴ was expanded by Miranda Fricker's introduction of epistemic injustice.⁵ She identified two different types: testimonial injustice and hermeneutical injustice. The scope of this note is limited to analyzing and discussing the concept of testimonial injustice and how it intersects with the law. A conceptual understanding of testimonial injustice is necessary before it can be examined within the legal space; thus, the first part of this section will provide an in-depth explanation of Fricker's initial concept of testimonial injustice. The second part of this section will detail any relevant subsequent expansions of Fricker's initial concept. Finally, the section will conclude with an explanation about why testimonial injustice is a wrong and the kinds of harms it inflicts.

A. MIRANDA FRICKER'S INITIAL CONCEPT OF TESTIMONIAL INJUSTICE

Fricker introduces testimonial injustice as an epistemic dysfunction and wrongdoing that occurs when a hearer, during a testimonial exchange, makes an unduly low credibility judgment resulting from a prejudicial stereotype the hearer attaches to the speaker.⁶ The rest of this section will break down each of the complex concepts embedded in Fricker's definition piece by piece.

Rev. Brasileira De Direito Processual Penal 11, 13 (JAN.-APR. 2023).

4. A.P. MARTINICH & AVRUM STROLL, *Epistemology*, in ENCYC. BRITANNICA (2025), <https://www.britannica.com/topic/epistemology> [<https://perma.cc/T2LF-WNH6>] (last visited Feb. 24, 2025).

5. Paez & Matida, *supra* note 3.

6. Fricker, *supra* note 1, at 17.

The first piece requires understanding a type of social power known as identity power. Fricker asserts that social agents possess the power to influence things in the social world, both actively and passively.⁷ For example, a meter maid actively asserts social power by imposing fines and passively asserts social power by influencing behavior such that people intentionally behave in a way that avoids a fine being imposed.⁸ Fricker claims that power is a capacity, so its existence continues even if it is inoperative at a given moment.⁹ Therefore, social power operates as a means to effect social control either through agential power, i.e. the controlling of other social agents' actions, or through controlling actions structurally.¹⁰ However, even agential power is necessarily connected to structure because "power is always dependent on practical coordination with other social agents."¹¹ Thus, social power is defined as "a practically socially situated capacity to control others' actions, where this capacity may be exercised (actively or passively) by particular social agents, or alternatively, it may operate purely structurally."¹² This leads to the next piece, identity power.

Identity power is a form of social power that requires imaginative social power; in other words, operations of social power that are dependent upon a shared social imagination governing different identities.¹³ Identity power too functions both actively and passively.¹⁴ Take gender identity power, for example. A man actively asserts gender identity power when he acts in his capacity as a man to influence a woman to be silent and defer to him.¹⁵ He passively asserts gender identity power when he engages in social settings where the mere construction of gender is that women are less rational and should not put their word up against a man's.¹⁶ In either case, Fricker contends that both parties must subscribe to the same social conceptions, such as what it means to be a man or a woman, in order for identity power to function.¹⁷ These shared social conceptions often amount to stereotypes.¹⁸ Even if we do not believe the operating stereotype is true, identity power may still be controlling our actions. This happens because identity power operates via society's collective social imagination rather than any single individual's beliefs.¹⁹ Identity power is relevant to testimonial injustice because hearers rely on social stereotypes when assessing a speaker's credibility

7. *Id.* at 9.

8. *Id.*

9. *Id.* at 10.

10. *Id.* at 13.

11. *Id.* at 11.

12. *Id.* at 13.

13. *Id.* at 14.

14. *Id.*

15. *Id.*

16. *Id.* at 15.

17. *Id.*

18. *Id.*

19. *Id.*

during testimonial exchanges.²⁰ It is not inherently wrong to consider stereotypes when making a determination on whether to believe what another person says, but a problem arises when the stereotype used to assess that person's credibility is prejudicial.²¹

Therefore, the next relevant piece to dissect is credibility assessments. During conversations, hearers decide whether to believe or accept testimony by assigning a level of credibility to the speaker.²² However, this assessment can be erroneous.²³ The error may be a result of credibility excess, giving the speaker too much credibility, or a credibility deficit, not giving the speaker enough credibility.²⁴

Regardless of which error occurs, Fricker's theory is that the miscalculation of credibility is tied to prejudice.²⁵ Fricker considers credibility excess to be generally advantageous and credibility deficit to be disadvantageous; therefore, her concept of testimonial injustice is limited to instances of credibility deficits.²⁶ She limits testimonial injustice to credibility deficits because a credibility excess does not "undermine, insult, or otherwise withhold a proper respect for the speak *qua* subject of knowledge."²⁷ In other words, affording a speaker with more credibility than they deserve is not an injustice because it does not negatively impact the speaker's capacity to be seen as someone who has knowledge.

Further, not all credibility deficits amount to testimonial injustice, because not all deficits are the result of prejudice.²⁸ The fallibility of human judgment means some credibility deficits will stem from innocent error rather than prejudice.²⁹ For example, an ethical philosopher hearer may believe a speaker to be a medic at an academic institution instead of a medical ethicist. This mistake results in a credibility deficit when they debate moral fictionalism.³⁰ The credibility assigned to the speaker is lower than it should be, but the error was innocently based on a false belief about professional identity rather than a prejudicial stereotype.³¹ Therefore, for a credibility deficit to amount to testimonial injustice, the hearer must be ethically culpable for the mistaken assessment of credibility because their judgment was poisoned by prejudice.³² Fricker provides a list of historical prejudices often relevant to assessing credibility: "women are irrational, [B]lacks

20. *Id.* at 16–17.

21. *Id.* at 17.

22. *Id.* at 18.

23. *Id.*

24. *Id.* at 17.

25. *Id.*

26. *Id.* at 19–21.

27. *Id.* at 20.

28. *Id.* at 21.

29. *Id.*

30. *Id.* at 21–22.

31. *Id.* at 22.

32. *Id.*

are intellectually inferior to whites, the working classes are the moral inferiors of the upper classes, Jews are wily, [Asians] are sly.”³³

These examples possess commonality beyond mere prejudice; they demonstrate prejudice with respect to perceived identity.³⁴ This is crucial for determining instances of testimonial injustice that have structural significance.³⁵ For example, a group of scientists may have a “dogmatic prejudice” against certain research methods. This causes them to attribute prejudicially low credibility judgments to contributing journal authors that use those disfavored methods to test hypotheses.³⁶ Though this is prejudice, it is highly localized to the specific author and does not render them vulnerable to other kinds of injustice.³⁷ This injustice is incidental, not systematic.³⁸

Fricker’s primary concern is with systematic testimonial injustices, which are connected to other types of injustices via the relevant prejudice at play.³⁹ Such injustices are produced by a prejudice that “tracks” the speaker through other areas of social activity; this “tracking” makes them susceptible to a wide range of other injustices that are systematically connected to testimonial injustice.⁴⁰ Fricker asserts that only prejudices related to social identity have this “tracking” quality.⁴¹ The identity prejudice can cut either for or against the individual, but for the purpose of Fricker’s initial concept, only negative identity prejudices are relevant.⁴²

When a hearer employs an identity prejudice while determining a credibility judgment, they utilize identity power.⁴³ As Fricker notes, “in such a case[,] the influence of identity prejudice is a matter of one party or parties effectively controlling what another party does – preventing them, for instance, from conveying knowledge – in a way that depends upon collective conceptions of the social identities at play.”⁴⁴ Putting these pieces together, Fricker identifies an identity prejudicial credibility deficit as the “central case” of testimonial injustice.⁴⁵ Additionally, to be instantiated in the central case of testimonial injustice, Fricker clarifies that the testimonial injustice relevant to her discussion must also be both persistent and systematic, as this is the most severe form.⁴⁶

Thus, the final step is to understand how exactly identity prejudice functions in the testimonial exchange, particularly through the role of stereotypes. Fricker

33. *Id.* at 22–23.

34. *Id.* at 27.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 28.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 29.

posits that stereotypes are the main mechanism through which prejudice corrupts credibility judgments.⁴⁷ In this context, stereotype is used neutrally to mean “widely held associations between a given social group and one or more attributes.”⁴⁸ Thus, the act of stereotyping “entails [a] cognitive commitment to some empirical generalization about a given social group” and functions within a spectrum of varying strength levels.⁴⁹ Social psychologists note that perceivers use shortcuts to transmit information quickly during the formation of social judgments; this supports the assertion that stereotypes are used while making credibility judgments.⁵⁰

Thus, hearers are faced with the crucial task of immediately judging a speaker’s credibility, even when they do not have personal knowledge about the speaker.⁵¹ This means hearers make quick credibility judgments on a social generalization related to the epistemic trustworthiness associated with the speaker’s social type.⁵² In other words, everyday testimony with strangers functions because of the snap judgments hearers make by engaging in social categorization of the speaker.⁵³ This is problematic when the relevant stereotype has an identity prejudice with a negative valence embedded within it.⁵⁴ Therefore, the prejudice relevant to cases of testimonial injustice is a negative identity prejudicial stereotype which is “a widely held disparaging association 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 owing to an ethically bad affective investment.”⁵⁵ In other words, the negative identity prejudicial stereotype at the core of testimonial injustice refers to a negative trait commonly associated with a particular social group that stems from strong emotions, and that emotional connection makes it hard to dispel the association even in the face of evidence that it is untrue.

Putting all of these pieces together, testimonial injustice occurs when hearers use negative identity prejudicial stereotypes in a testimonial exchange to form the relevant background assumptions necessary to perceive the speaker as trustworthy.⁵⁶ The negative identity prejudicial stereotype distorts the hearer’s perception of the speaker.⁵⁷ In doing so, the hearer has assigned the speaker less credibility than they deserve and commits testimonial injustice.

47. *Id.* at 30.

48. *Id.*

49. *Id.* at 31.

50. *Id.* at 31–32.

51. *Id.* at 32.

52. *Id.*

53. *Id.*

54. *Id.* at 35.

55. *Id.*

56. *Id.* at 36.

57. *Id.*

B. EXPANDING THE CONCEPT OF TESTIMONIAL INJUSTICE

Though Fricker coined the term, her theory of testimonial injustice is underinclusive, as it does not effectively capture all instances where testimonial injustice may occur. Thus, scholars have since focused on broadening the concept and have expanded the types of cases that may be classified as testimonial injustice. For this note, relevant expansions include credibility excess, agential testimonial injustice, and institutionalized testimonial injustice. The following section will break each down in turn.

The first relevant expanded concept is credibility excess, which was introduced by Jennifer Lackey. This is differentiated from the original concept because it includes cases where hearers give themselves an illegitimate excess of credibility, or the hearer-excess.⁵⁸ Thus, Lackey rejects Fricker's assertion that credibility is not distributive.⁵⁹ According to Fricker, credibility is not distributive because it is not a finite good.⁶⁰ Finite goods are not limited in a way that one person having more necessitates someone else having less.⁶¹ For example, given the fixed availability of land worldwide, only a few people can own large amounts of land, and to do so, they necessarily exclude others from owning the land.⁶² Compare this to something like praise. There is no limit to the amount of praise that may be given; giving praise to one person has no impact on our ability to give an equal or greater amount of praise to someone else.⁶³ According to Fricker, credibility is more similar to the distribution of praise than land, which led to her claim that it is not unjust to give someone too much credibility.⁶⁴

This conclusion is incorrect.⁶⁵ Content-based credibility excesses and hearer-excess credibility support the alternative.⁶⁶ Content-based occurs when stereotypes lead to credibility excess which wrong speakers by affronting their epistemic dignity and undermining "a proper respect for the speaker *qua* subject of knowledge."⁶⁷ For example, a Black man may be wronged in his capacity as a knower when a hearer incorrectly considers him highly knowledgeable about criminal behavior, specifically due to his being a Black man.⁶⁸ The hearer made him an expert in a stigmatized and shameful domain, thereby withholding the respect the man is owed in relation to knowledge.⁶⁹

58. JENNIFER LACKEY, CRIMINAL TESTIMONIAL INJUSTICE 14 (2023).

59. *Id.* at 17.

60. *Id.* at 16–17.

61. *Id.* at 17.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 17–18.

67. *Id.*

68. *Id.* at 17.

69. *Id.* at 17–18.

As for hearer-excess, it wrongs speakers in two distinct ways.⁷⁰ First, the speaker is not given proper epistemic standing within the broader community.⁷¹ Second, despite the speaker receiving the correct amount of credibility, their testimony is still not being believed.⁷² For example, consider a group of male scientists that take their female counterparts to be reliable on what they report, but nevertheless do not accept their testimony because they presume themselves to be *more* reliable.⁷³ Thus, the male scientists wrong the female scientists by “not [giving them] their due in relation to their colleagues” and by undermining their status as knowers by failing to accept their testimony.⁷⁴

In essence, Lackey concludes that credibility is distributive because it is relational.⁷⁵ It matters how a person epistemically judges you, but it also matters how you are judged in relation to other members of the community.⁷⁶ Thus, when a certain group’s credibility is regarded excessively, the downstream effect is some other group systematically being denied the credibility they were otherwise due.⁷⁷

The second expanded concept, agential testimonial injustice, was also proposed by Jennifer Lackey. Agential testimonial injustice is a specific form that grows out of the credibility excess theory. It occurs when a speaker is granted a credibility excess while simultaneously having their epistemic agency denied or subverted.⁷⁸ This occurs when an abusive relationship involves a level of coercion, that coercion is present at the time of reporting, but the coerced reporting is unjustifiably privileged.⁷⁹ In concrete terms, a woman in an abusive relationship endures agential testimonial injustice when she testifies that her partner is not abusive while they are present and retracts that statement once the abusive partner is no longer near, but her original testimony remains more highly regarded than her second.⁸⁰ The case for agential testimonial injustice is more severe in circumstances where the original testimony remains more highly regarded even when the broader context of abuse is known prior to any testimony being given.⁸¹

The third and final expanded concept is institutionalized testimonial injustice. Following her original publication, Fricker accepted the criticism that her original concept of testimonial injustice was too narrow and proposed a new concept that occurs in institutional processes by drawing on both credibility deficits and

70. *Id.* at 18.

71. *Id.*

72. *Id.*

73. *Id.* at 13.

74. *Id.* at 18.

75. *Id.* at 22.

76. *Id.* at 21.

77. *Id.* at 22–23.

78. Jennifer Lackey, *False Confessions and Testimonial Injustice*, 110 J. CRIM. L. & CRIMINOLOGY 43, 61 (2020).

79. *Id.*

80. *Id.*

81. *Id.*

excesses.⁸² She asserts that institutions are capable of embodying certain epistemic virtues and vices that may become entrenched in two different ways.⁸³ First, a habit may take the form of a dysfunctional epistemic process, such as the legal practice of “evaluating evidence through a prejudicial lens.”⁸⁴ Second, a habit may take the form of “a set of epistemic values which constitute an ethos” resulting in an epistemically bad set of values, such as legal institutions having an insufficient amount of care regarding actual truth.⁸⁵ Once the epistemically dysfunctional process or the epistemically bad ethos becomes a stable presence within the institution, it becomes an institutional epistemic character trait and thus an institutional epistemic vice.⁸⁶ Fricker highlights the role institutionalized epistemic processes play in testimonial injustice using U.S. policing, which will be detailed later in the note.⁸⁷

C. WHAT MAKES TESTIMONIAL INJUSTICE A WRONG?

Testimonial injustice may cause significant harm to the person it is inflicted upon. It is crucial to recognize the different wrongs testimonial injustice causes and to discuss the steps that can be taken to alleviate those wrongs. At the broadest level, Fricker claims testimonial injustice results in purely epistemic harms where knowledge that should have otherwise been passed to the hearer is not received.⁸⁸ This failure results in an epistemic disadvantage to the hearer, but it also creates dysfunction within the overall epistemic system by blocking “the circulation of critical ideas.”⁸⁹ However, Fricker’s main focus is on the immediate and ethical harms incurred by speakers that experience testimonial injustice.⁹⁰ She divides these harms into a primary harm and a secondary harm.⁹¹

The primary harm is that the speaker is wronged in their capacity as a knower and, as such, is wronged in “a capacity essential to human value.”⁹² This is problematic because the capacity to transmit knowledge is essential to human value, as it is grounded in our capacity to reason and to do so in a socially recognized way.⁹³ Therefore, the act of inflicting testimonial injustice communicates that the speaker is less than fully human and thereby dehumanizes them.⁹⁴ Fricker notes that “such a dehumanizing [treatment], especially if it is expressed before others,

82. Miranda Fricker, *Institutionalized Testimonial Injustices: The construction of a Confession Myth*, J. DIALECTICS NATURE 1, 5-6 (forthcoming March 2023).

83. *Id.* at 6.

84. *Id.*

85. *Id.* at 6–7.

86. *Id.* at 7.

87. *Id.* at 8.

88. Fricker, *supra* note 1, at 43.

89. *Id.*

90. *Id.* at 44.

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

may make for a profound humiliation, even in circumstances where the injustice is in other respects fairly minor.”⁹⁵

There are also secondary, extrinsic harms which may either be practical or epistemic.⁹⁶ The practical disadvantages that follow from testimonial injustice arise in both one-off cases and in the case of persistent injustice.⁹⁷ A one-off practical harm may be testimonial injustice in the courtroom resulting in a man incorrectly being found guilty and having to face a fine or jail sentence.⁹⁸ A practical harm resulting from persistent testimonial injustice may be a woman’s workplace inaccurately finding her unsuitable for a position of authority, leading to career stagnation.⁹⁹

The purely epistemic disadvantages that follow from testimonial injustice may also arise in both one-off and persistent cases.¹⁰⁰ In the one-off case, the speaker is epistemically harmed if the injustice results in their losing confidence in either the belief itself or the justification for the belief.¹⁰¹ If either occurs, the speaker no longer meets the requisite conditions for possessing knowledge; therefore, the effect of testimonial injustice is the loss of knowledge that was previously possessed.¹⁰² In the case of persistent testimonial injustice, confidence is lost on a larger and more detrimental scale.¹⁰³ The speaker may lose confidence in their abilities generally, which hinders their intellectual and educational development.¹⁰⁴ Further, an ongoing failure in gaining knowledge, via hindered intellectual development, also results in a failure to develop knowledge-related virtues.¹⁰⁵ This may be a lack of intellectual courage, meaning that the speaker backs down from beliefs too quickly if they are challenged.¹⁰⁶

These harms are quite serious. No person should suffer degradation in their capacity as a human nor should someone suffer in regard to their intellectual development at the hands of someone else. Thus, steps should be taken to limit the occurrence of testimonial injustice in our daily practices and exchanges. Further, although the harms Fricker identifies primarily occur for either the speaker or the hearer committing the injustice, this note proposes that testimonial injustice inflicts serious harms upon society as a whole. These societal harms are especially prominent when testimonial injustice occurs often enough to infiltrate the

95. *Id.*

96. *Id.* at 46.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 47.

101. *Id.*

102. *Id.* at 47,49.

103. *Id.* at 47.

104. *Id.* at 47–48.

105. *Id.* at 49.

106. *Id.*

practices within the legal system, because it jeopardizes the legitimacy of the system altogether.

III. TESTIMONIAL INJUSTICE AND THE LAW

There are clear examples that testimonial injustice within the legal field is a real problem. In the last few years, legal scholars have begun writing about testimonial injustice through the lens of the legal community. However, most of the discussion focuses just on identifying the different ways testimonial injustice can occur in the law, particularly in criminal law. The first part of this section will identify and summarize some of this scholarship. The second part of this section will expand the conversation of testimonial injustice in the law by outlining how testimonial injustice incidentally harms the legal system, and thus society, by undermining the fair administration of justice.

A. DIRECT INSTANCES OF TESTIMONIAL INJUSTICE IN THE LAW

Testimonial injustice occurs throughout the legal field in a variety of different ways. Scholars have begun to identify and discuss these instances, with a particular focus on instances within the criminal legal system. This subsection will discuss the literature arguing that testimonial injustice can be found in various practices and types of cases in the criminal legal system such as cases of sexual assault, confessions, lay witness testimony, and expert testimony. Each type will be explained through the lens of one of the previously discussed concepts of testimonial injustice and demonstrated through a concrete example.

The first place testimonial injustice occurs in the law is in cases of sexual assault, which applies the credibility excess theory. Audrey Yap demonstrates how victims of sexual assault are disbelieved due to credibility excess attributed to the perpetrator through the example of Brock Turner.¹⁰⁷ Brock Turner, a former Stanford student and swimmer, was on trial for sexually assaulting an unconscious college freshman outside of a fraternity party.¹⁰⁸ Although he was convicted, parts of the public, and even the judge who sentenced him,¹⁰⁹ felt immense sympathy for Turner due to a credibility excess because he does not fit into the typical mold society associates with perpetrators.¹¹⁰ The social imaginary has a distinct paradigmatic image in its mind when thinking of sexual assault; the image is of a “disturbed” or mentally ill stranger who is morally bankrupt.¹¹¹ The truth, however, is that many victims are assaulted by people they know and who are considered “ordinary.”¹¹² This includes

107. Audrey S. Yap, *Credibility Excess and the Social Imaginary in Cases of Sexual Assault*, 3 FEMINIST PHIL. Q. 1, 2 (2017).

108. Jeannie Suk Gersen, *Revisiting the Brock Turner Case*, THE NEW YORKER, Mar. 29, 2023, <https://www.newyorker.com/news/our-columnists/revisiting-the-brock-turner-case> [<https://perma.cc/Z397-U5NM>].

109. *Id.*

110. Yap, *supra* note 108.

111. *Id.* at 4, 6.

112. *Id.* at 5, 7.

Brock Turner. In his case, his denial of guilt was afforded a credibility excess, by the public and the media, because his image as a “nice, intelligent young white man with a bright future” was unintelligible given the social imaginary’s current paradigm.¹¹³ This credibility excess afforded to non-paradigmatic perpetrators is especially hazardous in cases where the only evidence available is to compare the testimony between the perpetrator and the victim.¹¹⁴

The second place testimonial injustice occurs in the law is in cases of confessions, which applies both the agential and institutionalized theories. The criminal justice system considers confessions to be the “gold standard in evidence.”¹¹⁵ This is problematic if the confession is false; false confessions are an occurrence that have been empirically studied and which is accepted within the legal community.¹¹⁶ A credibility problem occurs when the confessor later attempts to recant their statement because it pits one version of the self against another.¹¹⁷ When the confessing-self is believed over the recanting-self, the confessing-self is given a credibility excess that results in agential testimonial injustice.¹¹⁸ Essentially, by accepting the confessing-self’s statement, if it was gained through mistreatment, “the confessor’s status as a knower is reduced to what she reports only under conditions devoid of, or with diminished, epistemic agency.”¹¹⁹ Thus, there are two epistemic wrongs committed in the case of a false confession.¹²⁰ One occurs via the process of extracting testimony through mistreatment and another when that testimony is given a credibility excess and the recanted testimony is given a credibility deficit.¹²¹

Further, because the “confession myth,” a misguided but influential assumption that people will not confess to crimes they have not committed, there is an “institutional impossibility of retracting a confession” even if it is internally inconsistent, conflicting with other evidence, or given as a result of coercion.¹²² This is due, at least in part, to the interrogation methods the policing institutions train investigators in.¹²³ This method, known as the REID method, aims to extract confessions that lack epistemic reliability.¹²⁴ The lack of epistemic reliability is a result of three different stages of harmful testimonial interactions:

[A]n initial implementation of the prejudice of presumption of guilt by adopting the REID method, a second phase in which the agential testimonial

113. *Id.* at 13.

114. *Id.* at 14.

115. Lackey, *supra* note 79, at 44.

116. *Id.* at 44–45.

117. *Id.* at 57.

118. *Id.* at 59.

119. *Id.* at 59.

120. *Id.* at 61.

121. *Id.* at 65.

122. Fricker, *supra* note 83, at 9–10.

123. Paez & Matida, *supra* note 3, at 25.

124. *Id.*

injustice is carried out (since the questioned person is denied the possibility of intellectual agency, he confesses and is attributed excess credibility), [and] a last phase in which he recants his testimony, without, however, being able to reverse the effects unfairly generated by the previous confession.¹²⁵

The first and third stages are instances of institutionalized testimonial injustice as they rely on institutionalized epistemic norms which govern whether something is credible within the relevant institutional process.

The third place that testimonial injustice occurs in the law involves lay witness and expert testimony, which applies both the initial and credibility excess theories. A lay witness is someone that had watched an event unfold and later provides testimony describing what they saw.¹²⁶ However, there are rules regarding the admissibility of this testimony which serve to gatekeep what characteristics in a witness are valuable in connection with factfinders.¹²⁷ This gives legal officials a certain power of control over juries, which results in a power imbalance that may lead to testimonial injustice by making witnesses seem uncredible.¹²⁸ Witnesses are vulnerable to testimonial injustices because of their dependence on the jury to ascertain the value of their testimony.¹²⁹ This valuation is susceptible to the very identity prejudices central to Fricker's initial concept of testimonial injustice.¹³⁰ When a juror is prejudiced against the witness, they cannot properly receive the information given by the witness and fail to take the witness's testimony into proper account when determining the facts of the case.¹³¹ This results in "the picture otherwise painted in the case [as] incomplete."¹³²

The opposite occurs in the case of expert witnesses, because courts afford their testimony a credibility excess.¹³³ An expert witness, unlike a lay witness, is chosen due to their knowledge of a certain subject, and their testimony only pertains to the intersection between that knowledge and the case at hand.¹³⁴ The use of expert testimony, and thus the expert witnesses themselves, are continually gaining more epistemic power when they are used in trial.¹³⁵ While it may generally be reasonable for novices to give epistemic deference to experts, given their very status as having expertise, this status may lead to experts being afforded an

125. *Id.*

126. Julian A. Burlando-Salazar, Note, *Preventing the Epistemic Harm of Testimonial Injustice in Lay Witness Credibility Assessments*, 103 B.U. L. REV. 1245, 1250 (2023).

127. *Id.*

128. *Id.*

129. *Id.* at 1261.

130. *Id.* at 1263.

131. *Id.* at 1264.

132. *Id.*

133. Alessia Farano, *Discussing Epistemic Injustice: Expertise at Trial and Feminist Science*, 4 MILAN L. REV. 137, 140 (2023).

134. Burlando-Salazar, *supra* note 126, at 1250 n.16.

135. Farano, *supra* note 133, at 141.

unwarranted credibility excess.¹³⁶ This can be seen in cases of flawed convictions involving Shaken Baby Syndrome (SBS).¹³⁷

The prosecution of SBS relies heavily on the testimony of medical experts.¹³⁸ This testimony includes an explanation of the three neurological symptoms that prove shaking occurred, the forcefulness of shaking that is necessary to cause the triad, and the likely perpetrator.¹³⁹ The unwarranted credibility excess occurs when “the ‘expert’s’ testimony is taken to be so decisive that the defense mounted by the defendant’s team seems doomed at the outset” because the expert testimony is favored over the defense’s abundance of otherwise exculpatory evidence.¹⁴⁰ In the case of SBS, the defendant’s exculpatory evidence may include frequently claiming their innocence, having a spotless record of working with children, having character witnesses testifying on their behalf, and even lacking observable signs of trauma on the baby.¹⁴¹ If the expert testimony is favored over the exculpatory evidence just because the testimony came from an expert, testimonial injustice stemming from a credibility excess occurs.¹⁴²

B. THE INCIDENTAL IMPACT OF TESTIMONIAL INJUSTICE IN THE LAW

The preceding section demonstrates that there are instances of testimonial injustice in the legal system that inflict harm directly onto the person experiencing the injustice. This note argues that the current literature fails to examine the full scope of harms caused by testimonial injustice; the harms inflicted by testimonial injustice in the legal system extend beyond those experiencing the injustice themselves. Additionally, society experiences major and troubling harms when instances of testimonial injustice occur in the legal system. Few people would deny the importance and impact the legal system has on society at large. Nor would it be disputed that society’s notion of the legal system is centered around a strong shared sense of fairness and justice. When testimonial injustice occurs within the system, fairness and justice are sacrificed and thus the very justification for society’s faith in the legal system falls apart.

First, a caveat. The primary focus of this argument is the broader impacts upon society when a testimonial injustice occurs within the legal system on a participant in the system other than a defendant. This focus is because examining non-defendant participants better demonstrates how the specific harm being analyzed is incidental to and separate from the primary and direct harm typically associated with testimonial injustice. However, that is not to say that a defendant experiencing testimonial injustice will not also have overarching incidental impacts on

136. Lackey, *supra* note 58, at 19.

137. *Id.*

138. *Id.* at 19–20.

139. *Id.* at 20.

140. *Id.* at 20–21.

141. *Id.* at 20.

142. *Id.* at 21.

society and its perception of the legal system. A defendant may experience testimonial injustice in a number of ways, including the examples regarding confessions and witness testimony from the preceding sections. When this occurs, the defendant will then endure personal harms resulting from testimonial injustice, but will also still contribute to the larger harm inflicted upon society.

The most relevant of the previous examples, to this argument, is lay witness testimony. Lay witnesses experience testimonial injustice when jurors discount the witness's testimony and fail to receive the witness's information due to prejudice. The witness endures the prototypical harm associated with testimonial injustice as they are wronged in their capacity as knowers. Additionally, the testimonial injustice committed against the testifying witness creates a second, indirect harm against the defendant. Although trials are becoming rare,¹⁴³ witness testimony still plays a major role in the resolution of both criminal and civil cases. If a testifying witness faces testimonial injustice such that their testimony is disbelieved, then the defendant is put in a disadvantaged position. If that witness was trying to give information to the jury that would have otherwise suggested or proved the defendant's innocence, then the defendant greatly suffers by the fact that the witness is unable to transmit that information. Therefore, the defendant is not personally experiencing testimonial injustice, but they nevertheless feel an incidental, but major, harm. When a witness testifying on behalf of the defendant endures testimonial injustice, the jury discredits or disbelieves the testimony and wrongfully convicts the defendant. Many would agree that a wrongful conviction resulting from a disbelieved witness, which occurred through no fault of the witness or the defendant, is not aligned with common notions of fairness or justice.

The harm to the defendant is itself sufficiently worth evaluating and seeking solutions to. However, there is also the potential for another harm, one inflicted on society as a whole. If defendants, who otherwise might not have been convicted, are convicted because the jury committed a testimonial injustice against a witness, and this occurs frequently enough for the general public to know, then they could lose faith in the system. When society loses trust in the legal system, because they no longer believe the system functions according to shared notions of fairness and justice, the repercussions could be drastic. The legal system is essential for society to function, and losing trust in the system calls its legitimacy into question. When the legal system's legitimacy is called into question, people lack an incentive to follow the law. If people do not believe the law is a useful mechanism for protection, social unrest increases and respect for judicial orders decreases. With the law as the basis for society, a legal system that many people view as unjust and unfair could result in widespread distrust in both the government and other individuals. This should be avoided at all costs. Therefore, it is

143. New ABA Study Explains Why Civil and Criminal Jury Trials are Disappearing, AMERICAN BAR ASSOCIATION, Dec. 18, 2020, <https://www.americanbar.org/news/abanews/aba-news-archives/2020/12/new-aba-study-explains-why-civil-and-criminal-jury-trials-are-di/> [https://perma.cc/38FU-HDGE].

important to recognize the existence of testimonial injustice and to take steps to eliminate its effects.

Further, instances of testimonial injustice pose a concern for lawyers, a role that must be filled for the legal system to run smoothly. The issue is connected to the *Model Rules for Professional Conduct*, written by the American Bar Association. Rule 8.4(d) states that “it is professional misconduct for a lawyer to engage in conduct that is prejudicial to the administration of justice.”¹⁴⁴ There are at least two possibilities for lawyers to engage in such conduct in connection with testimonial injustice.

The first and most obvious is if the lawyer knows about testimonial injustice and its impact and uses it to their advantage. This may go so far as a lawyer attempting to induce an instance of testimonial injustice. This may be a prosecutor using their cross-examination of the witness to highlight the very identity or stereotype that causes the jury’s unduly low credibility judgment. For example, the jury could be made up primarily of old men who have outdated views about women and certain characteristics they are stereotypically portrayed to have. If the prosecutor knows or suspects that the men have these views, they could ask certain questions or present questions in a manner that is more likely to make a female witness visibly upset while on the stand. When the men on the jury see the woman reacting in such a way, their prejudice against emotional women could lead them to think the entire testimony is being dramatized or that the woman’s emotions are clouding her judgment or memory. Thus, the jury is committing a testimonial injustice by not believing the woman’s testimony and the occurrence of the injustice was instigated by the prosecutor’s actions.

Similarly, it could also be used by a defense attorney against one of the prosecution’s witnesses who presents evidence that would otherwise be harmful to the defendant. Although this conduct would not necessarily have a negative impact on the defendant, it would still result in testimonial injustice and would contribute to the aggregated harmful effect on society. The testimonial injustice may not be leading to a wrongful conviction for the defendant, but it is still leading to an outcome in the case which may not have otherwise occurred. Thus, the fair administration of justice would still be harmed even if a defense attorney is the one instigating testimonial injustice on behalf of their client.

Opponents of the theory, either altogether or of applying testimonial injustice to the *Model Rules for Professional Conduct*, may argue that lawyers’ primary duty is to zealously advocate for their clients, and thus, they should not be concerned with combating or avoiding testimonial injustice. Rather, the rules of evidence give judges the duty of gatekeeping prejudicial evidence or questioning.¹⁴⁵ It is true that the primary duty falls to judges to strike prejudicial statements, but that does not prohibit imposing a duty on lawyers to limit, to the extent possible,

144. MODEL RULES OF PROF’L CONDUCT R. 8.4(d).

145. See 1 Federal Rules of Evidence Manual § 403.01 (2024).

the occurrence of prejudice in the first place. There is no harm in having judges and lawyers work together to address an issue that poses such a threat to the legitimacy of the legal system as testimonial injustice does. Further, imposing a second duty on lawyers could help address any flaws or mistakes resulting from judicial gatekeeping. When the duty falls on the judge, they can only try to rectify the situation after the fact. This could lead to obvious problems including jurors failing to truly disregard a judicially struck statement. For testimonial injustice to be truly combatted, it needs to be avoided at its source; lawyers seem to have the best means to do so.

The second, though more attenuated, form of misconduct is when a lawyer knows or has reason to know testimonial injustice is occurring and will harm the defendant but makes no attempt to stop it. This again may be true for both prosecuting and defense attorneys. Defense attorneys have a duty to their client to stop the testimonial injustice and thereby alleviate the potentially life-altering harmful effect it will have on their client. As for prosecutors, if they know the exact same testimony if delivered without testimonial injustice would lead to a different outcome, i.e. not guilty, then they should be prohibited from using the injustice to their advantage. Although prosecutors rightfully want to convict the guilty, they should not aim to convict for convictions' sake; this occurs if they know exculpatory evidence is being disbelieved due to the identity of the person giving it and they did not try to stop the disbelief from happening.

In either case, the fair administration of justice is clearly being undermined. Not only are these lawyers violating the *Model Rules of Professional Conduct* in a way that itself undermines justice,¹⁴⁶ by being prejudicial, but this misconduct compounds the public's distrust of the legal system. Given the essential role that lawyers play within the system, people must trust them to properly do their job for the system to work. When they are engaging in egregious misconduct like those mentioned above, people will not continue to trust them. This serves to undermine the fair administration of justice outright: if people do not trust lawyers, then the system will not function correctly. People will not share truthful and important information with their lawyers if they do not trust them, and lawyers cannot properly defend their clients without all the information. Thus, justice cannot be administered.

This undermining may even go a step further. If people do not trust lawyers, they may go so far as to refuse to hire them. A large reason lawyers are so important to the system is because they are the ones who have proper training in the law. So, when someone refuses to hire a lawyer, they are forced to represent themselves and engage with the law without being properly trained. This will clearly provide an obstacle, if not an all-out bar, to a fair and just outcome.

146. MODEL RULES OF PROF'L CONDUCT R. 8.4(d).

IV. POTENTIAL SOLUTIONS AND MITIGATION

Given the seriousness of the incidental impacts on defendants and society, it is incredibly important that a discussion be started about finding solutions to avoid testimonial injustice occurring or to mitigate its effects. At the highest level, there are two different approaches that may be taken. First, efforts may be focused on eliminating the possibility of testimonial injustice occurring at all. This would protect the fair administration of justice, since there cannot be an incidental impact of something that never occurs in the first place. This will be difficult to accomplish absolutely, given that the very nature of testimonial injustice makes it difficult to identify and even harder to counteract. However, there is still a benefit in finding solutions that attempt to eliminate testimonial injustice. At the end of the day, stopping even one instance of testimonial injustice is better than stopping none.

Second, given the rule barring conduct that is prejudicial,¹⁴⁷ it would be productive to place some responsibility directly on lawyers to mitigate testimonial injustice. As mentioned above, though the current rules of evidence make judges the sole gatekeeper of prejudicial statements,¹⁴⁸ it may be more productive to have a two-tiered defense against testimonial injustice. At tier one, lawyers should have a responsibility to avoid engaging in practices that are prone to instigate testimonial injustice. At tier two, judges will then retain the responsibility of gatekeeping if an instance of testimonial injustice is unavoidable. At the bare minimum, lawyers should at least be responsible for educating themselves on testimonial injustice. By doing so, they can identify it and make an argument to judges as to prejudicial conduct if judges remain the sole gatekeeper.

V. CONCLUSION

This note argued that when testimonial injustice occurs in the criminal legal system, it causes additional harm beyond those inflicted on the person that the injustice was actually committed against. These harms work to undermine the criminal legal system by disrupting the fair administration of justice that is central to society's trust and acceptance of the system. This problem is exacerbated when lawyers are involved with testimonial injustice. In so doing, lawyers not only violate a *Model Rule of Professional Conduct*—which is problematic in its own right—but this also makes the public distrust them, which further obstructs the fair administration of justice.

147. MODEL RULES OF PROF'L CONDUCT R. 8.4(d).

148. See 1 FEDERAL RULES OF EVIDENCE MANUAL § 403.01 (2024).