

## UNDERSTANDING EPISTEMIC INJUSTICE AS CONTRIBUTORY INJUSTICE: A COMMENT ON PICINALI'S ARGUMENT

Tareeq Jalloh

University of Sheffield

*Tojalloh1@sheffield.ac.uk*

**ABSTRACT:** This paper offers some further support to Federico Picinali's argument, in «Evidential Reasoning, Testimonial Injustice and the Fairness of the Criminal Trial», that a trial is unfair when assessments of relevance and probative value includes an epistemic injustice, namely a testimonial injustice. It has been argued that there are barriers to establishing testimonial injustice in specific cases, such as the ones Picinali surveys. This paper argues that even if we accept that there are concerns about establishing the occurrence of a testimonial injustice in the cases Picinali identifies, we can reformulate the epistemic injustice that renders the trial unfair as a contributory injustice. Reformulating the epistemic injustice as a contributory injustice evades the concerns we might have with establishing testimonial injustice, allowing Picinali's broad argument that a trial is unfair when an assessment of evidence includes an epistemic injustice—contributory, or testimonial—to remain intact. This reformulation also offers new propositions on how to combat epistemic injustice.

**KEYWORDS:** criminal proceedings, trial fairness, rap music, contributory injustice, preventing epistemic injustice.

**SUMMARY:** 1. INTRODUCTION.— 2. PICINALI'S ARGUMENT.— 3. OBJECTIONS.— 4. CONTRIBUTORY INJUSTICE.— 5. PREVENTING CONTRIBUTORY INJUSTICE.— BIBLIOGRAPHY.

## 1. INTRODUCTION

In his excellent paper, Picinali argues that assessments of relevance and probative value are susceptible to a moral/legal evaluation—that is fairness—on top of an evaluation on epistemic grounds—such as accuracy. He does this by showing that an assessment of relevance and probative value is unfair, and by extension, a trial is unfair, when this assessment includes a testimonial injustice. Consequently, Picinali (2024) calls for a more «interventionist role of higher courts in the scrutiny of the adjudicator’s evidential reasoning» by surveying ways to prevent testimonial injustice in the institutional context of the jury trial (p. 226).

Recent literature has questioned whether we can establish that a testimonial injustice has occurred in a criminal trial. This is because we often cannot know whether the necessary conditions of testimonial injustice—1) the hearer has an identity prejudice of which they may or may not be aware of; 2) the identity prejudice causes the unjustified credibility deficit; 3) there is a credibility deficit in the testimonial exchange—have been met (Arcila-Valenzuela and Páez, 2022). In this paper, I argue that even if we take these concerns about establishing testimonial injustice seriously, this is not detrimental to Picinali’s argument. This is because his argument allows us to substitute testimonial injustice with contributory injustice without any significant consequence. And contributory injustice is not beset by the same obstacles to identifying it. Therefore, his broad argument that a trial is unfair when an assessment of evidence includes an epistemic injustice—contributory, or testimonial—remains intact.

The paper proceeds as follows: section 1 is an overview of Picinali’s argument. Section 2 explores the objection that we cannot confidently establish that a testimonial injustice has occurred in any of the cases Picinali identifies. In section 3, I argue that taking this objection seriously does not matter much to Picinali’s overall argument for the conclusion that courts should concern themselves with evaluations of fairness. This is because we can reformulate the epistemic injustice that renders the trial unfair as a contributory injustice rather than a testimonial injustice. Section 4 argues that the preventative measures Picinali identifies can be maintained to prevent contributory injustice. Further, reframing the epistemic injustice rendering a trial unfair as a contributory injustice presents new propositions on how to combat epistemic injustice.

## 2. PICINALI’S ARGUMENT

Picinali’s (2024) starting point is the recognition that adjudicators often rely on generalisations, such as «if there is flight from the scene of the crime, the person fleeing is guilty» to assess the relevance and probative value of an item of evidence (p. 206). Evidence is relevant if it is logically probative, *i. e.*, making the matter which requires proof more or less probable, and it has probative value if the relevant evi-

dence alters the probability of the matter which requires proof. Generalisations like «if there is flight from the scene of the crime, the person fleeing is guilty» require the adjudicator to estimate the probability of guilt given the defendants' flight—posterior probability of guilt—against the probability of guilt if the defendant had not fled the scene—prior probability of guilt. If the posterior probability of guilt is greater than the prior probability of guilt, then the evidence is incriminating (p. 206).

Generalisations like this originate from the rationalist tradition, where judgments about guilt and assessments of relevance and probative value are based on the available stock of knowledge or propositions to assess evidentiary items. Whilst Picinali does not say much about what constitutes a stock of knowledge, I take it to be the available set of known propositions, putative facts about the world, described with particular concepts; inferences made from some of those facts; normative structures that rank what is a good/bad reasons are all included in a stock of knowledge. Picinali, however, claims that the rationalist tradition has paid insufficient attention to the variability of experience and, therefore, stocks of knowledge, across society and from person to person. The rationalist tradition assumes only one stock of knowledge and has not accommodated for the unfairness of evidentiary reasoning due to the variability of stocks of knowledge. For instance, where a black youth fleeing the crime is seen as incriminating by a white police officer, this ignores the competing generalisation according to which a black youth is likely to run from an officer due to fear of suffering injustice at their hands, regardless of involvement in crime. The seeming obliviousness of the rationalist tradition to the variability of stocks of knowledge maintains and contributes to the stock of knowledge of the powerful, «namely white, able-bodied, middle-or upper-class men» being the dominant stock of knowledge in criminal fact finding (Picinali, 2024, p. 208).

Now, Picinali asserts that given the differences in stocks of knowledge across a society, and depending on what stock of knowledge is considered in assessments of evidentiary items, a party in the proceedings may be a victim of testimonial injustice and, crucially, unfair treatment in the trial. Testimonial injustice occurs «when a speaker suffers a credibility deficit due to the hearer holding an identity prejudice against a social group to which the speaker belongs» (Picinali, 2024, p. 210). Picinali is concerned with pre-emptive testimonial injustice, where a hearer's prejudice a priori dismisses a speaker's story, even when the speaker has not said anything. With this notion of testimonial injustice clarified, Picinali moves on to how this affects evidential reasoning. He writes that this occurs:

When the stock of knowledge that a party in the proceeding has *qua* member of a social group is ignored or discounted due to the adjudicator's identity prejudice against that group (or against another group to which the party belongs) and, as a result, the party's argument about the relevance and the probative value of an item of evidence—argument that relies on such stock of knowledge—receives a credibility deficit (Picinali, 2024, p. 212).

Picinali's focus is on cases where the testimonial injustice is instantiated through discounting or ignoring the stock of knowledge of a party due to membership of a certain social group. He offers three examples of this sort of testimonial injustice in

evidential reasoning; two involve the defendant suffering a testimonial injustice—silence and rap lyrics—and one involves the complainant—rape myth. In the case of rap lyrics, for instance, an adjudicator relies on the generalisation that someone who writes lyrics and raps about violent crime, drugs and gangs «has a propensity to act violently towards other people, in particular, members of other gangs and crews» (Picinali, 2024, p. 215). However, the adjudicator ignores the rules and conventions of the genre of rap, according to which rapping about violent gangs and drugs is an effort to construct a credible street persona and undertake successful commerce, and this is due to their identity prejudice, associating black youth with street violence (for discussion, see Jalloh, 2022).

One wrong of testimonial injustice that Picinali (2024) identifies is that «it infringes the right to a fair trial» (p. 220). We can take trial fairness as demanding that those accused of criminal offences can challenge the evidence presented against them and level their own evidence against the prosecution in adversarial proceedings. This fairness entails that each party gets what they are owed, namely meaningful participation in trials, specifically the «epistemic enterprise of fact finding» (p. 222).

With this conception of fairness, Picinali asserts that a trial is unfair when the defendant or complainant suffers a testimonial injustice due to the adjudicator's evidential reasoning. Recall that testimonial injustice occurs in assessments of relevance and probative value when a party's stock of knowledge is not appropriately considered due to identity prejudice, «such that the testimony of this party concerning the evidence at issue is discounted or pre-empted» (Picinali, 2024, p. 224). As a result, the party's ability to participate in proceedings—specifically the fact-finding process—is stifled since their word and experience is unjustly discounted or pre-empted. This renders the trial unfair since the party suffering the testimonial injustice is denied the treatment that a fair trial requires: participation in the enterprise of fact finding.

Having arrived at this conclusion, Picinali surveys some measures to prevent the unfairness of testimonial injustice in criminal proceedings. He mentions that imparting to both lay and professional adjudicators a virtue ethical and virtue epistemological approach might prove helpful. However, he sees different approaches needing to be taken depending on whether the adjudicator is lay or professional. We will explore all four measures in section 4.

### 3. OBJECTIONS

The occurrence of testimonial injustice requires three facts to be established. First, the hearer has an identity prejudice they may or may not be aware of. Second, identity prejudice causes an unjustified credibility deficit. Third, there is a credibility deficit in the testimonial exchange (Arcila-Valenzuela and Páez, 2022). Arcila-Valenzuela and Páez have argued that we cannot establish with any degree of confidence whether there has been testimonial injustice in specific cases, such as the ones highlighted by Picinali in this paper.

Starting with the first condition, they argue that we should understand identity prejudice as implicit, since identity prejudice is usually discussed where the hearer is unaware of identity prejudice that might cause them to give a deflated credibility assignment. They also define implicit prejudice as stable associations between, for instance, racialised words and evaluative attributes. Arcila-Valenzuela and Páez (2022) reason that this definition is consistent with how identity prejudice is defined by Fricker. For instance, they see implicit prejudice as preserving their identity through time, claiming identity prejudices are «resistant to counter-evidence owing to an ethically bad affective investment» making them «epistemically culpable» (Fricker, 2007, p. 35, as cited in Arcila-Valenzuela and Páez, 2022). They also see Fricker's primary preventative solution, which is based on personal virtues, as supporting the interpretation of bias as a stable personal trait. Moreover, implicit prejudice is usually detected through implicit measures, such as implicit associations tests (IATs). However, they argue that if implicit measures captured stable traits like the negative identity prejudice of testimonial injustice, there should not be considerable fluctuation in results over time, *i. e.*, they should have high test-retest reliability. However, Arcila-Valenzuela and Páez cite multiple studies that suggest low correlations between a person's score on implicit measures across time. They conclude that all these studies suggest implicit bias fails the reliability test for stable traits. The implication of this for testimonial injustice is that implicit measures are not indicating that hearers have the type of identity prejudice necessary for testimonial injustice, namely stable traits.

Moreover, the low predictive validity of implicit measures for testing the causal relationship between an implicit measure and judgements/behaviours shows that, even if we were to trust that an implicit measure indicates a hearer has an implicit prejudice (in the way implied by Fricker), there is no evidence of a causal connection between the implicit measure and the hearer's judgement (Arcila-Valenzuela and Páez, 2022, p. 6-7). The upshot of Arcila-Valenzuela and Páez's analysis is that we cannot know whether there has been a testimonial injustice in the specific cases Picinali identifies. For instance, in the case of Picinali's argument that rappers suffer a testimonial injustice when their words receive a credibility deficit in criminal courts, we cannot know a testimonial injustice has occurred in these cases because *i*) we do not know that the adjudicator holds an implicit prejudice in the way implied by Fricker—a stable identity trait; *ii*) even if they held this prejudice, it is not clear that this is causing the deflated assignment of credibility to rappers' testimony. Crucially, more needs to be done to defend the view that a testimonial injustice is occurring given the low test-retest reliability of implicit measures—implying it's not a stable trait—and the low predictive validity—implying identity prejudice such as racism is not causing the deflated credibility assignment<sup>1</sup>.

---

<sup>1</sup> There are responses to these worries regarding stability and predictive validity (see Hahn *et al.*, 2014; Berger, 2020).

Regarding the third condition of testimonial injustice, Arcila-Valenzuela and Páez (2022) argue that on a popular sense in which we can understand what a credibility deficit means here—«minimum credibility thesis»—it is far from clear whether we can determine a credibility deficit (p. 9). The minimum credibility deficit thesis states that there is a minimum degree of credibility that the speaker should have been given by the hearer, given the available evidence. However, Arcila-Valenzuela and Páez argue it is doubtful that such a minimum credibility amount in a given context exists, given that testimonial exchange is heavily personally, socially and culturally contextualised. Crucially, there is no neutral situation or context in which a minimum amount of credibility owed to the speaker can be established. Moreover, even if it could be argued that factoring in the personal, social and cultural factors into context might restore the idea of a normative minimum amount of credibility, there would not be a general epistemic standard for credibility, which Arcila-Valenzuela and Páez argue would render all talk of a credibility deficit meaningless, since there would be a sense in which all credibility assessment is as good as the other as long as no prejudice is involved.

Picinali (2024) notes that his article is not in the business of offering data about the frequency of occurrence of testimonial injustice, but instead, he asserts that he has explained how they can occur in assessments of evidence and why, when this does happen, it renders the trial unfair (p. 225). However, suppose we take these concerns about the lack of evidential support to verify a singular instance of testimonial injustice seriously. In that case, we might be worried that Picinali needs to show how we can be sure that what is going on when an adjudicator uses a stock of knowledge that is unreflective of a party's experience amounts to a testimonial injustice by demonstrating that the three conditions needing to establish a testimonial injustice have been met.

Now, in the remainder of this article, I argue that even if we take these concerns seriously there is a way Picinali can respond that keeps his broad argument intact. Picinali could reformulate his argument by diagnosing the issue as a contributory injustice, rather than a testimonial injustice. This way, his central broader argument still stands: an epistemic injustice—contributory, not testimonial—renders a trial unfair<sup>2</sup>.

#### 4. CONTRIBUTORY INJUSTICE

Contributory Injustice is a related but distinct form of epistemic injustice from testimonial injustice<sup>3</sup>. It will be an appealing notion to look at here, given its ability

<sup>2</sup> Picinali notes that the injustice he describes may have a hermeneutical component.

<sup>3</sup> Hermeneutical injustice and contributory injustice are conceptually distinct. Hermeneutical injustice concerns the inadequacy of shared hermeneutical resources, due to differences in who gets to contribute to them, for expressing and understanding experiences (Fricker, 2007). And contributory

to accommodate the more structural forms of epistemic injustice at work in the context of the trial. Contributory injustice occurs when «an epistemic agent's wilful hermeneutical ignorance in maintaining and utilising structurally prejudiced hermeneutical resources thwarts a knower's ability to contribute to shared epistemic resources within a given epistemic community by compromising her epistemic agency» (Dotson, 2012, p. 32).

Hermeneutical resources are the shared meanings members use to understand and communicate their experiences. When the hermeneutical resources that an epistemic agent uses are biased or structurally prejudiced a contributory injustice occurs. A perceiver uses structurally prejudiced or biased resources when they are an ill fit for some social groups' experiences of the world, and this perpetuates epistemic exclusion for those of whom the resources are an ill fit. Such a use is wilfully ignorant if alternatives are available, and others should be aware of them. Contributory injustice occupies a middle ground «between agential and structural perpetuation of epistemic injustice» (Dotson, 2012, p. 31). Insofar as *an agent's* use of structurally prejudiced resources acts as a catalyst for contributory injustice, it is agential. It is also structural since biased hermeneutical resources also act as catalyst for contributory injustice.

An example of contributory injustice would be where less powerful groups (women) describe behaviour as «sexual harrasment», where more powerful groups (white men) insist on using the conceptual resources of «boys being boys» to describe the same behaviour. Where someone has the conceptual resources to render their experience intelligible, if another person insists on using conceptual resources that are not inclusive of «sexual harassment», the use of the latter conceptual resources hinder women's contributions to shared understandings (Jalloh, 2022)<sup>4</sup>.

Whether a testimonial injustice occurs (and whether we are ever in a position to know either way), I argue that a contributory injustice occurs when adjudicators rely on generalisations that do not reflect the experience and stock of knowledge of a party and, therefore, contributes to the epistemic exclusion of said party. To see this, consider Picinali's first example of an adjudicator relying on the generalisation «if flight from the scene then (infer) guilt». The adjudicator may not have paid attention to the fact that stocks of knowledge and experience differ across a society, so where a black youth fleeing is incriminating to a white police officer, this ignores the competing generalisation that black youth are likely to run from the scene of a crime out of fear of suffering an injustice at the hands of a police officer. This competing generalisation—«if flight from the scene then (infer attempt to seek) safety»—does not receive the right uptake by the adjudicator. We can think of this in terms of contributory injustice since there are different hermeneutical resources that we can use to make sense of black youth's experience of the world, such as differing generalisa-

---

injustice occurs when the problematic sets of hermeneutical resources are applied, with wilful ignorance, frustrating an agent's ability to contribute to shared knowledge (Dotson, 2012).

<sup>4</sup> This comes from Fricker (2007) and Dotson's (2012) treatment of the Carmita Woods case.

tions about a black youth fleeing from the scene of the crime. However, the adjudicator uses hermeneutical resources that are unreflective of the collective experience of black youth by going with the generalisation «flight from the scene then guilty». As a result, they perpetuate epistemic exclusion since they contribute to, maintain and utilise the stock of knowledge of the powerful in criminal fact finding. Whilst the example about banter/sexual harassment above concerns conceptual resources—the actual resources used to describe a phenomenon—this case involves the inferences made about a behaviour (what explains it, what reasons the agent has for it). We might therefore consider it an interesting extension of the notion of contributory injustice.

Now, regarding an adjudicator taking rap lyrics as evidence of bad character or gang membership, Picinali argues that this constitutes a testimonial injustice where the defendant utters words contesting this by saying these lyrics are metaphorical and to make money. He also argues that even if the defendant does not utter these words, they still suffer a testimonial injustice but of the pre-emptive sort. On both construals, the defendant would suffer a testimonial injustice were he to have his word or the speech he would offer ignored because of some identity prejudice.

Even if there are obstacles to diagnosing the problem as a testimonial injustice, perhaps because of difficulty in determining whether or what identity prejudice is causing the deficit, or whether what is actually going on in the case of rap is a deficit, I argue that another epistemic injustice is occurring. When adjudicators rely on the stock of knowledge that «people who write lyrics about gangs and guns are likely to be a gang member and have a propensity to act violently to other gangs or crews», this constitutes a contributory injustice, as I have argued elsewhere (Jalloh, 2022). There is another stock of knowledge, or set of hermeneutical resources, we can use to challenge the aforementioned generalisation. For instance, consider the generalisation: «where a rapper pens lyrics about gangs and guns, they are looking to build a street credible persona, undertaking successful commerce and voicing frustrations at their living conditions». This stock of knowledge reflects the experience of rappers and those within the rap industry who emphasise the need for familiarity with rap's conventions to avoid conflating a musical persona and performance with a driller sitting in the dock. This conflation thwarts rappers' ability to contribute to shared knowledge since it prevents fact finders from accessing the generalisations reflecting the lived experience of the marginalised to inform their understanding of evidence in criminal trials.

We also see a contributory injustice in the other cases Picinali (2024) describes. For instance, where a black youth remains silent during a police interview and is taken by the adjudicator to be guilty as a result, the adjudicator relies on the generalisation that «silence equals guilt, and that any later defence is fabricated». However, this ignores the generalisation or hermeneutical resources that reflect black youth's experience with the police. Namely, the generalisation that «silence acts as defiance against racist misinterpretation of speech». When the adjudicator relies on structur-



ally prejudiced hermeneutical resources, such as «silence equals guilt», they commit a contributory injustice since they are wilfully ignorant about the perspective and conceptual resources and meanings used by black youth.

Moreover, in the case of a complainant claiming that she did not consent to sexual acts, but the adjudicator arguing this has little probative value based on the generalisation that rape only occurs if physical resistance was involved, this constitutes a contributory injustice. This is because the generalisation used by the adjudicator—«for rape to occur, there must have been resistance»— is a rape myth and, therefore, irrelevant. Basing an evidentiary assessment on a rape myth utilises structurally biased hermeneutical resources and ignores other available resources: the stock of knowledge of complainants, which indicates that sexual intercourse can be non-consensual even if there are no signs of resistance.

In all three cases of «rap lyrics», «silencing» and «rape myths», the party suffers a contributory injustice because an inapt set of hermeneutical resources are used to understand their experience of the world. This leads to their epistemic exclusion in the process of fact finding in criminal trials.

In all three cases, the adjudicator will be wilfully ignorant if they are aware of unbiased hermeneutical resources/generalisations, but they continue to use biased generalisations. Moreover, the adjudicator is still wilfully ignorant, even if they are unaware of the generalisations that reflect the experience of the party in question. This is because, as adjudicator, they ought to be aware of such stocks of knowledge. Crucially, I have shown that whilst testimonial injustice is just one form of epistemic injustice that might affect how evidence is treated and weighed, contributory injustice is another epistemic injustice that doesn't face the concerns testimonial injustice does.

How does contributory injustice render the trial unfair? Recall fairness in the criminal trial consists in giving each party what is owed to them. That is, fairness demands that they be afforded meaningful participation. Now, when a contributory injustice occurs—adjudicators use biased hermeneutical resources to understand a party's experience of the world—there is a hampering of the party's ability to participate in proceedings, particularly in fact finding. This is because their experience of the world is not properly considered. They are denied the treatment they are owed in criminal trials—in particular, having the hermeneutical resources that speaks to their experience of the world considered by the adjudicator. Consequently, given their interests at stake in the criminal trial, namely the opportunity for meaningful participation in fact finding, a trial where contributory injustice occurs is an unfair trial.

In this section, I have argued that if we take the cases Picinali explores as contributory injustices rather than (or as well as) testimonial injustices, Picinali can evade the objections I pre-emptively aired in section 2, whilst maintaining the broad structure of his argument. This is because he can maintain that an epistemic injustice renders the trial unfair, but the epistemic injustice at stake is a contributory injustice—not a testimonial injustice.

Unlike testimonial injustice, a contributory injustice does not require that three conditions Arcila-Valenzuela and Páez (2022) identify be met. Instead it is necessary that an adjudicator uses biased or structurally prejudiced hermeneutical resources that are an ill-fit for a social group's experience and that this perpetuates epistemic exclusion for those of whom the hermeneutical resources are an ill-fit. As I have shown in this section, we see this in the cases Picinali (2024) identifies. By identifying these structurally prejudiced resources, I demonstrate how there can be epistemic injustices of this sort that do not face the obstacles that Arcila-Valenzuela and Páez (2022) identify. If there is epistemic injustice—of either kind—then trial fairness is threatened.

## 5. PREVENTING CONTRIBUTORY INJUSTICE

Whilst I have argued that if we reformulate Picinali's argument in terms of contributory injustice, there is little consequence to his broader thesis that epistemic injustice renders the trial unfair, one could point out that the strategies Picinali identifies for preventing testimonial injustice would need to shift to strategies needed to prevent contributory injustice. Crucially, this might radically alter what adjudicators must do to prevent epistemic injustice from rendering the trial unfair. As Picinali (2024) writes, «understanding the problem through the correct theoretical framework is the necessary starting point for detecting it in practice and for formulating a solution» (p. 219). I am proposing we understand the problem Picinali identifies through the framework of contributory injustice rather than testimonial injustice. Whilst this might seem to be a significant departure from Picinali's original argument, I hope to show that many of the preventative measures he identifies to prevent testimonial justice will also help prevent contributory injustice.

Picinali pays attention to preventing testimonial injustice in the institutional context of the criminal trial. He identifies four measures based on the type of adjudicator he has in mind. First, he considers restricting the admissibility of the evidence in question, such that the jury will not hear about it, or they will hear about it only when the risk of testimonial injustice in their assessment is contained (p. 227). The introduction of exclusionary and restrictory rules have been defended in the case of rap lyrics both in the UK and overseas<sup>5</sup>. Also, Picinali notes that section 41 of the Youth Justice and Criminal Evidence Act 1999 (as cited in Picinali, 2024, p. 227) restricts the admissibility of sexual history evidence to safeguard the accuracy of the verdict and to prevent the effects that might occur due to stress and loss of privacy. Whilst Picinali argues for restricting or excluding evidence that risks the jury committing testimonial injustice, this can be easily reformulated to focus also on prevention of contributory injustice. In the case of rap lyrics, for instance, the exclusion of lyrics prevents the jury from using prejudiced hermeneutical resources (that

---

<sup>5</sup> See Art on trial (2022); Art Not Evidence (2023); Owusu-Bempah (2022).

misinterpret lyrics). Therefore, this institutional reform also addresses contributory injustice since excluding the use of evidence in these ways avoids the jury relying on biased hermeneutical resources.

Second, he considers the overdue measure of increasing the diversity of the judiciary as a way of preventing professional judges from committing testimonial injustice in their evidential reasoning. Picinali (2024, p. 228) asserts that this would probably limit identity prejudice's impact on the judicial assessment of evidence. We can also frame this as a preventative measure regarding contributory injustice. Dotson (2012) asserts that addressing contributory injustice requires that one recognises the existence of different hermeneutical resources and that one has the ability to switch between these different conceptual resources and shared meanings. This requires that the agent is able to see beyond the limitations of any set of hermeneutical resources. Drawing on the work of Mariana Ortega, Dotson highlights «world travel» as a way to address contributory injustice. Ortega (2006) writes world-travelling requires we «really listen to peoples' interpretations however different they are from our own» (p. 69, as quoted in Dotson, 2012, p. 34). Ortega believes world-travelling would compel us to appreciate genuine differences between peoples, such as differing hermeneutical resources. It seems plausible that increasing the diversity of the judiciary would expose people to different hermeneutical resources or stocks of knowledge based on that person's experience of the world. Exposing people to different hermeneutical resources would probably go some way to limiting their use of biased or unrepresentative hermeneutical resources in their assessments of evidence. The idea is that a more diverse judiciary might mean judges will likely use unbiased hermeneutical resources. For instance, where an entirely white judiciary might see running from the crime scene as a sign of guilt, a more diverse judiciary would likely come across the idea that running does not equal guilt, but rather fear. Whilst increasing the judiciary's diversity seems like an important reform, we should not overestimate the role a diverse judiciary might have in guaranteeing that unbiased hermeneutical resources are used. My focus on contributory injustice makes the limited utility of this strategy clearer: if we have a super diverse judiciary but they are still using the same set of biased hermeneutical resources, we are going to face the same problems. We need it to be the case specifically that a more diverse judiciary disrupts the biased hermeneutical resources used.

A third measure aimed at judges would require them to offer a detailed articulation of their underlying decisions on admissibility. Picinali (2024) sees this measure as «steadfast for evidence of such a kind that the risk of unfairness in evidential reasoning is marked» (p. 228). He draws on David Lammy's (2017) assertion «that bringing decision-making out into the open and exposing it to scrutiny is the best way of delivering fair treatment» (p. 6, as cited in Picinali, 2024, p. 29); Lammy and Picinali hold that justifying a decision publicly exposes and deters prejudice or bias. Making decisions on assessments of evidence public would prevent contributory injustice since it would prompt adjudicators to expose and challenge biased hermeneutical resources. It would involve giving parties more opportunity to challenge the

inferences that are being made and to bring to light instances in which prejudiced resources are being used. The prospect that their assessments of evidence will be public would put extra pressure on judges to ensure their assessments are fair.

The last measure that Picinali (2024) considers, targeted at both lay and professional adjudicators, is to demand that adjudicators regularly take implicit association tests (p. 228). This is for them to learn or be reminded of their implicit biases. He claims that research shows that awareness of our implicit biases increases our ability to disengage them in cognitive tasks carried out soon after awareness is acquired. However, it seems that whether or not (implicit) prejudices cause distorted assessments of credibility (something that section 2 might make us suspicious of), knowing about one's biases will not necessarily help with contributory injustice, since it involves also the structural aspect of the shared conceptual resources we use: someone with no biases might participate in structurally prejudiced resources, and so be involved in entrenching contributory injustice. Crucially, in contributory injustice, there are both individual and structural aspects, so individual measures would only be, at best, a partial step—raising awareness of prejudicial conceptual resources will also be needed.

In conclusion, I have argued that contributory injustice can serve as a substitute for testimonial injustice to maintain the conclusion that epistemic injustice renders a trial unfair. Section 1 presented Picinali's argument. Section 2 explored the objection that barriers prevent us from establishing that a testimonial injustice has occurred in the cases Picinali identifies. Section 3 argued that we can reframe the epistemic injustice rendering a trial unfair as a contributory injustice rather than a testimonial injustice to evade this objection. Section 4 argued that a reformulation of the epistemic injustice in question to contributory injustice allows for the preventative measures Picinali identifies to be maintained and also provides new ideas on combatting epistemic injustice.

## BIBLIOGRAPHY

- Arcila-Valenzuela, M. and Páez, A. (2022). Testimonial Injustice: The Facts of the Matter. *Review of Philosophy and Psychology*, 1-18.
- Art Not Evidence* (2023, November 22). <https://artnotevidence.org/>
- Art on Trial: Protect Black Art* (2022, November 1). <https://www.protectblackart.co/>
- Berger, J. (2020). Implicit Attitudes and Awareness. *Synthese*, 197, 1291-1312.
- Dotson, K. (2012). A Cautionary Tale: On Limiting Epistemic Oppression. *Frontiers. A Journal of Women Studies*, 33(1), 24-47.
- Fricker, M. (2007). *Epistemic Injustice: Power and Ethics of Knowing*. Oxford University Press.
- Hahn, A., Judd, C. M., Hirsh, H. K. and Blair, I. V. (2014). Awareness of Implicit Attitudes. *Journal of Experimental Psychology: General*, 143(3), 1369-1392.
- Jalloh, T. (2022). Does the Critical Scrutiny of Drill Constitute an Epistemic Injustice. *The British Journal of Aesthetics*, 62(4), 633-651.
- Lammy, D. (2017). *The Lammy Review*. <https://assets.publishing.service.gov.uk/media/5a82009040f0b-62305b91f49/lammy-review-final-report.pdf>

- Ortega, M. (2006). Being Lovingly, Knowingly Ignorant: White Feminism and Women of Colour. *Hypatia*, 21(3), 56-74.
- Owusu-Bempah, A. (2022). Prosecuting Rap: What Does the Case Law Tell Us. *Journal of Popular Music*, 41(1), 427-455.
- Picinali, F. (2024). Evidential Reasoning, Testimonial Injustice and the Fairness of the Criminal Trial. *Quaestio Facti*, 6, 201-236.

## Cases and Legislation

Youth Justice and Criminal Evidence Act 1999. <https://www.legislation.gov.uk/ukpga/1999/23/contents>

