

TESTIMONIAL INJUSTICE IN EVIDENTIAL REASONING: A REPLY TO FEDERICO PICINALI*

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ABSTRACT: This article critiques Federico Picinali's theoretical framework for explaining how testimonial injustice impacts evidential reasoning. It argues that Picinali's framework, though intended to be general, falls short in capturing various forms of testimonial injustice in the assessments of relevance and probative value. Two reasons are offered to support this conclusion. First, Picinali's emphasis on the idea of stock of knowledge offers an intricate manifestation of the phenomenon, leaving aside cases of testimonial injustice *simpliciter*. Second, his framework overlooks instances of credibility excess and how epistemic harms that affect different agents may ricochet to the parties. It is argued that Picinali's framework can be improved by adopting a description of testimonial injustice in the assessments of relevance and probative value that is less intricate and more relational.

KEYWORDS: evidence law, testimonial injustice, hermeneutical injustice, credibility, intelligibility, stock of knowledge.

SUMMARY: 1. INTRODUCTION.— 2. SIMPLE AND COMPOUND FORMS OF TESTIMONIAL INJUSTICE.— 3. BEYOND CREDIBILITY DEFICITS, COMPLAINANTS, AND DEFENDANTS.— 4. CONCLUSION.— BIBLIOGRAPHY.

* I would like to thank Federico Picinali for his initial willingness to discuss some of the points I make here.

«In some authoritative contexts
it is what you *count as* that determines your fate».
Fricker (2023)

1. INTRODUCTION

In «Evidential Reasoning, Testimonial Injustice and the Fairness of the Criminal Trial», Federico Picinali (2024) attempts to apply Miranda Fricker's concept of testimonial injustice to reasoning about evidence in the law. His goal is to offer a «general theoretical framework» for detecting instances of this type of epistemic injustice. He focuses on two central features of evidential reasoning: assessing the relevance of a piece of evidence, for the purpose of determining admissibility, and weighing its probative value, for the purpose of establishing proof to the required standard. Following Fricker's definition of testimonial injustice, Picinali explains how negative prejudicial stereotypes regarding the identity group to which the complainant or the defendant belongs may affect decision-makers' evidential assessments of the evidence presented by them. He further argues that epistemically unjust assessments of relevance and probative value have an often-neglected legal significance—it violates the right to a fair trial, as provided for in Article 6 of the European Convention on Human Rights. The fairness of the trial is affected because the party whose evidence is prejudicially assessed is not given the opportunity to participate in the process of fact-finding. In Fricker's (2007, p. 20) terminology, the party has been «wronged specifically in her capacity as a knower».

Picinali (p. 212)¹ offers the following description of testimonial injustice in the assessments of relevance and probative value of an item of evidence:

In the assessments of relevance and of probative value, testimonial injustice occurs when the stock of knowledge that a party in the proceedings 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.

In the above description, testimonial injustice is presented as a function not only of the adjudicator affording less credibility to the parties in virtue of an identity prejudice against them; besides a prejudicial *credibility* deficit, there seems to be an *intelligibility* deficit. The latter consists in the adjudicator failing to make sense of the parties' «stock of knowledge» that is purported to give meaning to the evidence presented by them. Picinali (p. 209) is concerned «with cases in which a party in the proceedings

¹ From now on, all references to Picinali pertain to the article under discussion, so I will refrain from mentioning the year of the publication.

does not meet the challenge of “making visible” to the adjudicator their socially dependent experience and stock of knowledge and, hence, their interpretation of the world—in particular, of the evidence».

In the background of Picinali’s theoretical framework is a rightful denunciation of a second-order assumption he attributes to the so-called rationalist tradition of evidence law². Accordingly, rationalist legal scholars have taken for granted the idea that assessments of relevance and probative value must be based on an invariable understanding of the idea of stock of knowledge. Roughly, the rationalist account goes something like this: when reasoning about the relevance and probative value of a piece of evidence, the adjudicator is required to resort to generalizations regarding the association of events; these generalizations, in turn, are grounded on the stock of knowledge of an existing society, which is understood as the total body of information accumulated through logic (informally speaking), common-sense, and general experience. Picinali denounces this assumption, claiming that there is no such thing as a unique stock of knowledge to which adjudicators must resort for making epistemically appropriate evidential assessments. Experiences vary across a society; and believing that there is a universal repository of social experiences for the purpose of determining facts in judicial proceedings would imply imposing one worldview over others³.

As Picinali (p. 208) explains, while members of a white upper-class social group strongly correlate events *A* and *B* (e. g., «a Black working-class youth’s flight from the scene of the crime» and «the suspect had something to hide from the police», respectively), members of a black lower-class social group might interpret things quite differently («a Black working-class youth is likely to run away from the police for fear of suffering an injustice»). Under the stock of knowledge that informs the first group, *A* might be relevant to *B* because it makes it more likely to be true; and to a significant probative degree. However, under the stock of knowledge that informs the second group, *A* might be irrelevant to *B*; or, if relevant, depending on the circumstances, to a lesser degree. Picinali takes the following evidential reasonings as vivid examples of testimonial injustice in the assessments of relevance and probative value: the interpretation of the silence of black people in police interrogations as a sign that they are hiding something (when in fact they distrust the police and fear that their words might be distorted); the interpretation of violent rap lyrics as a sign that the subject belongs to a gang or has a propensity to be violent (when in fact it is a typical style of this artistic genre that guarantees success in the market); and the interpretation of the victim’s lack of resistance to sexual attack as a sign that she consented (when in fact this is a myth about how rape occurs)⁴.

² See Picinali (n. 10) for references to scholars of this Tradition; see also Twining (2006, pp. 35-98).

³ Picinali has been inspired by the work of Gonzales Rose (2021) and Owusu-Bempah (2022).

⁴ For the sake of economy, I will not consider the cases Picinali detailed in the Appendix.

Picinali's work has the merit of spotting the central aspects of evidential reasoning that are affected by prejudicial stereotypes—relevance and probative value. Mirroring Fricker's insight about how the prejudicial reduction of one's status as a knower constitutes a distinctive epistemic wrong, he also deserves recognition for demonstrating how prejudicial assessments of one's evidence in legal proceedings result in a distinctive institutional wrong—it violates the party's right to a fair trial⁵. However, in what follows I argue that Picinali's general theoretical framework requires adjustments so that it can deliver what he explicitly promises—that is, an understanding of testimonial injustice in evidential reasoning that is genuinely «general»⁶. A general theoretical framework is considered a kind of conceptual frame that can detect a range of instances of a given phenomenon in practice. I contend that Picinali's framework can be improved by adopting a description of testimonial injustice in the assessments of relevance and probative value that is *less intricate* and *more relational*.

This reply is divided into two parts. First, I will argue that Picinali's description above and the examples he offers seem to confuse testimonial injustice with hermeneutical injustice. Hermeneutical injustice is here understood as «the injustice of being frustrated in an attempt to render a significant social experience intelligible (to oneself and/or to others) where hermeneutical marginalization is a significant causal factor in that failure» (Fricker and Jenkins, 2017, p. 268). Picinali recognizes that there may be a hermeneutical component in his description of testimonial injustice, but does not delve deeper into this discussion (see n. 31). My point here is, to the extent that his theoretical framework compounds testimonial and hermeneutical elements, it would only be able to detect intricate instances of epistemic injustice—*i. e.*, scenarios in which there are both credibility and intelligibility deficits. Yet, it will leave out situations in which the credibility of a testimony is prejudicially deflated, but where the information that is being conveyed by the party is not sensitive to any given stock of knowledge. Second, I will argue that Picinali's account fails to see the relational character of credibility assessments in the judicial context. This limitation can be seen in two aspects of his theorizing. First, in his choice not to deal with cases of credibility excess; and second, in his decision to focus on the parties, disregarding other epistemic agents in the proceedings (*e. g.*, victims, witnesses, and experts). These agents are actively involved in the proceedings, and an epistemic wrong done directly to one of them can ricochet to the parties. So, to the extent that Picinali's

⁵ A similar approach, which also claims that epistemic injustices amount to legal harm, is taken by Deborah Tuerkheimer (2017). She argues that «credibility discounting»—a notion proposed by Karen Jones (2002), which involves a form of double epistemic injustice—should count as an actionable form of discrimination. Her work suggests the use of different legal frameworks, depending on the actor and the setting. Tuerkheimer is particularly interested in the discounting of rape accuser's credibility. For a critical view that undermines the potential for litigation, see Arcila-Valenzuela and Páez (2022). For an approach to epistemic injustices in the criminal proceedings focused on the institutional dimension, see Coloma and Rimoldi (2023).

⁶ My proposal aligns with Páez and Matida (2023), who also argue for the utility of adopting a more expansive, liberal version of the concept of epistemic injustice for legal purposes.

framework is limited to analyzing cases of credibility *deficit* attributed to the *parties*, it fails to capture exemplary cases of testimonial injustice in the adjudicator's assessments of relevance and probative value—as it happens in recurrent cases of false confession and eyewitness testimony⁷. The curtailment of his scope of analysis in these two directions can be explained by a non-relational understanding of the economy of credibility in judicial transactions.

2. SIMPLE AND COMPOUND FORMS OF TESTIMONIAL INJUSTICE

Let me start with a real case, decided in 2022 by the Superior Court of Justice of Brazil (HC 790.250/RJ, 2022/0392898-1)⁸. A Brown defendant, Alexandre Augusto Andrade da Ressurreição, was being prosecuted for the crime of robbery. Armed men, who had jumped off a vehicle, approached the first victim and took her belongings. The victim wrote down the license plate number of the vehicle used to commit the crime. The police arrived at Alexandre since the car was registered in his name. After carrying out an eyewitness identification procedure in the form of a photo show-up, the victim identified Alexandre as the man who, from the passenger seat, announced the robbery. Another victim, from a robbery that occurred on the same night and with the same *modus operandi*, also recognized Alexandre in a second photo show-up. Faults in the process of eyewitness identification partly determined Alexandre's final acquittal (and a consideration of them will be relevant in the next section). But what is important to highlight now is that Alexandre's testimony, which was discounted in the case, did not convey information whose relevance and probative value could only be accessed through the adjudicator's being able to make sense of his stock of knowledge *qua* Brown defendant. Alexandre claimed that he did not commit the crime, explaining that he had sold the car months before (proven by documentary evidence that he requested the local authority to change his name on the vehicle registration); and, furthermore, that at the time of the robbery he was having an audio conversation with his friends (proven by records on the WhatsApp application of his cellular phone). This is a case that seems to manifest a simple form of testimonial injustice. The argument offered by a Brown defendant did not receive the credibility that corresponded to the evidence that he was saying the truth; but the reason for this credibility deficit does not seem to be related to the adjudicator discounting or ignoring the stock of knowledge that the defendant had *qua* member of a particular racial group—as Picinali's description of testimonial injustice

⁷ See recent work on these topics by Lackey (2020; 2021); Medina (2021); Medina and Whitt (2021); and Fricker (2023). I will return to these in section 2.

⁸ See also Matida and Garcez (2023). The decision I am criticizing here is that of the Court of Justice of the State of Rio de Janeiro, which convicted Alexandre based on the prosecutor's appeal. The defendant had been initially acquitted by the trial judge and was finally declared not guilty by the Superior Court of Justice of Brazil.

requires. The claim that he had previously sold the car and was sending voice messages through a mobile phone application at the time of the robberies are perfectly intelligible irrespective of any stock of knowledge⁹. What this example reveals is that there are cases of testimonial injustice in evidential reasoning that occur even in the face of an attempt to communicate perfectly intelligible information.

This simple form of testimonial injustice—as opposed to a compound one, which I will explore next—is also clear in the famous fictional case that Fricker used to illustrate testimonial injustice in the beginning of her book. In her first chapter, she mentions the injustice that Marge Sherwood suffers in Anthony Minghella's screenplay for *The Talented Mr. Ripley*, a novel written by Patricia Highsmith. When Marge tells Herbert Greenleaf, the father of her murdered fiancé Dickie, that she suspects Ripley might have killed him, her words are dismissed as hysterical and mere «female intuition»¹⁰. There is no difficulty in understanding the relevance and probative value of Marge's testimony: she found Dickie's ring, which he promised her to never take off, inside Ripley's stuff. The evidence she presents is discredited because Greenleaf has an identity prejudice against her for being a woman; but Marge did not attempt to transmit information she had *qua* member of her gender group¹¹.

Picinali's examples of silencing, rap lyrics, and rape myths are not like the simple cases of testimonial injustice above. They all involve a party trying to convey information whose meaning depends on the interpretive resources internal to their powerless social groups. The adjudicator is incapable of understanding the information due to a gap in the collective interpretive resources available to him. Picinali's examples clearly illustrate cases of «hermeneutical marginalization». As Fricker (2007, p. 254) explains:

From the epistemic point of view, what is bad about this sort of hermeneutical marginalization is that it renders the collective hermeneutical resource structurally prejudiced, for it will tend to issue interpretations of that group's social experiences that are biased because insufficiently influenced by the subject group, and therefore unduly influenced by more hermeneutically powerful groups (thus, for instance, sexual harassment as flirting, rape in marriage as non-rape, post-natal depression as hysteria, reluctance to work family-unfriendly hours as unprofessionalism, and so on).

Thus, a clear hermeneutical component is built into the foundation of Picinali's description of testimonial injustice, rendering it more intricate than necessary.

⁹ As I will explain in the next section, Alexandre's case also involves a type of *agential testimonial injustice*, in which the eyewitnesses' identifications received a credibility excess. It may even be that Alexandre's evidence was *also* discounted in proportion to the excess of credibility attributed to the victims' testimony; but the point I want to highlight here is that Alexandre's evidence is simple and easy to understand, for it does not refer to any stock of knowledge about Alexandre *qua* member of a social group.

¹⁰ For a description of Mr. Greenleaf's response as a case of gaslighting, see McGlynn (2020). Fricker disagrees, for gaslighting involves a deliberate manipulation of judgment. She insists that the way she conceptualizes testimonial injustice does not involve conscious manipulation (Fricker, 2017, p. 54).

¹¹ Perhaps a situation of hermeneutical injustice is also present here, considering Marge's *style of expression* when she repeatedly screamed «I know it was you!» (see Fricker, 2007, p. 161).

Indeed, it is worth noting that the examples offered by Picinali have been previously related to hermeneutical injustice. The very first example, involving Black and Brown flight from the police, has been described as both testimonial and hermeneutical injustice. More specifically, it has been treated as a case of «racialized reality evidence» (Gonzales Rose, 2021, p. 386), a kind of data that is only intelligible against the background of the hermeneutical resources of a specific racial group. The examples of silencing and rap lyrics also seem to fall into this context. When considering the assessment of the relevance of rap lyrics, Owusu-Bempah (2022) suggests that what is missing is «an appropriate conceptual framework». Additionally, Jalloh (2023) suggests that the critical scrutiny of drill lyrics, a rap genre known for its portrayal of violent themes, is an instance of both testimonial and «contributory» injustice, a concept identified as a form of willful hermeneutical injustice (Dotson, 2012). Perhaps what complicates the assessment of these lyrics in a fair manner is not just their content, but also their expressive style (Fricker, 2007, p. 160). Finally, in the case of rape myths, Jenkins (2017) takes a distinct approach, presenting them as a specific form of hermeneutical injustice¹². On the other hand, Tuerkeimer (2017) views them as a case of double epistemic injustice, involving both testimonial and hermeneutical aspects (more on this below). In any case, what I want to highlight here is that at the root of Picinali's examples lies a problem of intelligibility. Black youths, hip-hop musicians, and victims of sexual violence represent powerless groups in society. They are unable to contribute to the construction of the meanings that constitute the dominant stock of knowledge that informs legal authorities; and this interpretive difficulty is what basically explains the discounting or ignoring of their testimonies.

These sorts of cases are similar in structure to the legal example that Fricker herself draws from Harper Lee's novel, *To Kill a Mockingbird*. Tom Robinson, a Black man, is wrongly accused of having raped Mayella Ewell, a young white woman; and the jury in the case, due to its racial prejudice and despite the evidence of innocence provided by the competent defense attorney, Atticus Finch, attribute a lack of credibility to his testimony. But Tom is not only a victim of testimonial injustice. When he testifies that he helped Mayella with her tasks because he felt sorry for her difficult life, the prosecutor cynically questions him: «You felt sorry for *her*, you felt *sorry* for her?» (*apud* Fricker, 2007, p. 24). As José Medina (2011) remarks, this passage shows the questioning of the very idea that a Black man could feel sorry for a young white girl. «What lacks all credibility», Medina (p. 25) says, «is not simply Tom Robinson as a knower and informer in general, but the idea of black pity for white subjects in Jim Crow Alabama». Furthermore, the story also narrates Tom's difficulty in explain-

¹² Jenkins (2017, p. 10) argues that rape myths can operate to impede the victims themselves to properly conceptualize their experiences: «The relevant conceptual resources are available at some social locations but are inaccessible to the person who needs to render their experience of injustice intelligible». This is an extreme form of hermeneutical injustice, indeed. Here I am arguing that Picinali's case of rape myth, which focuses on the impact of the inaccurate perception about rape *on the adjudicator*, is also a case of hermeneutical injustice.

ing that Mayella had become sexually interested in him, a hypothesis that sexualizes interracial relationships and was completely off the radar at the time¹³. In a nutshell: «There is testimonial injustice in the forefront, but the deeper epistemic injustice in question—the one rooted in the cultural oppression inscribed in a biased social imaginary—is a hermeneutical injustice» (p. 27). This compound form of epistemic injustice appears to occur in the examples provided by Picinali.

Fricker (2007, p. 159) explains that hermeneutical marginalization produces a kind of epistemic injustice that remains «dormant» until a speaker struggles to make sense of her experience, either to herself or to others. It is precisely this second situation, in which the speaker attempts to communicate her experience intelligibly to a third person, that gives rise to what Fricker recognizes as a distressing situation; that is, that hermeneutical injustice might be mingled with testimonial injustice. This is a worst-case scenario, for it amounts to a kind of «double epistemic injustice» (p. 160). Situations of double epistemic injustice tend to occur when the identity prejudice that harms the subject is systematic, in the sense that it attaches to a trait that negatively affects the person in various aspects of her life—as it occurs with cases of race and gender. Fricker (p. 159) explains:

This will indeed tend to be the case wherever the hermeneutical injustice is systematic, because members of multiple marginalized groups will tend to be subject to identity prejudice. If they try to articulate a scantily understood experience to an interlocutor, their word already warrants a low *prima facie* credibility judgment owing to its low intelligibility. But if the speaker is also subject to an identity prejudice, then there will be a further deflation. In such a case, the speaker is doubly wronged: once by the structural prejudice in the shared hermeneutical resource, and once by the hearer in making an identity-prejudiced credibility judgment.

Addressing the question of which injustice is more basic—hermeneutical or testimonial—is like trying to respond to the chicken and egg causal dilemma. In fact, there seems to be a mutually constitutive relationship between them. When a person suffers from a systematic hermeneutical marginalization, her attempt to communicate an obscure aspect of her social experience will be met with doubt and incredulity; on the other hand, when that same person is systematically given a prejudicial credibility deficit, the information she is trying to convey will remain in oblivion¹⁴. According to Fricker, these conditions lead to what Karen Jones (2002, p. 160) calls «runaway reductions» of trustworthiness and plausibility, characterized by a «two-way mutually reinforcing loop». As Jones explains, «[o]ur low initial trustworthiness rating leads to a reduction in the plausibility rating we would have given to the content of the story, and this in turn confirms our initial assessment of untrustworthi-

¹³ It is also possible to see here a case of credibility excess (see section 2 below). «Credibility deficits and excesses clearly go together in this case», writes Medina (2011, p. 24). As Lackey (2023, p. 149) explains: «Racist beliefs that a white woman would not voluntarily have intercourse with a Black man result in a massive excess of credibility being afforded to white women who report being raped by a Black man».

¹⁴ Fricker and Jenkins (2017) argue that this situation leads to a preservation of ignorance and cite as an example the case of trans experience that only recently began to make sense.

ness, which in turn makes us even more confident in our low plausibility ratings»¹⁵. These considerations suggest that while hermeneutical and testimonial injustices are distinct, they often cannot be separated and defined in isolation—in reality, they reinforce each other.

The idea that hermeneutical injustice can manifest itself in combination with testimonial injustice is already clear in Fricker's initial writings, as seen in the passages quoted above. However, it becomes more apparent when Fricker (2013; 2016) responds to critics who contended that marginalized groups have distinct ways of functioning, and it may be that some are more articulate than others and rely on localized interpretative practices that give meaning to their experiences¹⁶. Some groups develop concepts and meanings to represent their social experiences; the problem, however, is that they are unable to share these interpretive resources with members of dominant groups. Addressing these critiques, Fricker (2013, p. 1319) takes the opportunity to advance the concept of hermeneutical injustice, saying that it is an «internally diverse» phenomenon. Accordingly, there are cases of «maximal» hermeneutical injustice, in which a person is not able to make sense of her own experience¹⁷. But other situations approach a «midway» scenario, in which a person can make sense of her own experience to herself and to members of her social group, but is incapable of sharing it with members of other relevant groups—for instance, legal authorities.

The previous explanation clarifies that hermeneutical gaps can be located at various points along a continuum. At the extreme, no interaction is necessary to give rise to the epistemic injustice, for it affects a person's own ability to make sense of her experience. Yet, when the gap is located at some intermediate point, a person can make sense of her experience within her social group, but cannot share it with members of more distant social groups. In these situations, especially when the testifier faces systematic identity prejudice, hermeneutical injustice arises within a communicative context and often becomes intertwined with testimonial injustice¹⁸. This compound

¹⁵ Jones (2002) is interested in exploring the problem of credibility in respect to astonishing reports. She begins with a case study of Fauziya Kassindja's story. Kassindja was an asylum-seeker in the United States who had fled Togo to avoid being forced into a polygamous relationship and genital mutilation. Judge Donald Ferlise, from the Immigration and Naturalization Service, judged her testimony to be non-credible; and Jones (2002, p. 160) identifies in his judgment the occurrence of the dynamics of runaway reductions.

¹⁶ See Medina, (2011; 2012; 2013); Mason (2011); and Pohlhaus, Jr. (2012). These critics have also argued that the deficit of intelligibility in these cases might have an agential or intentional component in addition to a structural one. Fricker (2017, pp. 54-57), however, replies that intentional epistemic harms are not the kind she intended to capture with her concept of hermeneutical injustice (see Herdy and Castelliano, 2023).

¹⁷ These are the stories of Wendy Sanford and Carmita Wood, which Fricker extracts from Susan Brownmiller's book, *In Our Time: Memoir of a Revolution* (1990). In the 1960s, there was a conceptual lacuna in the interpretive resources available that prevented these women from understanding their experiences of post-partum depression and sexual harassment, respectively.

¹⁸ I contend that cases of maximal hermeneutical injustice, where individuals lack the concepts to understand their own experiences, do not align with the typical cases that come before the courts. This

form of epistemic injustice is what best describes Picinali's examples. Thus, using Picinali's description, it is appropriate to say that, regarding the assessments of relevance and probative value, a *double epistemic injustice* occurs when «the stock of knowledge that a party in the proceedings has *qua* member of a social group is ignored or discounted due to the adjudicator's identity prejudice against that group».

Testimonial injustice *per se* has a more basic structure that could have been explored by Picinali in his attempt to offer a general framework for diagnosing this kind of epistemic injustice in evidential reasoning. The deflation of a person's credibility when attempting to communicate information that would otherwise be perfectly intelligible and supported by the evidence available is what best captures the occurrence of this phenomenon *simpliciter*. Likewise, he could have offered less intricate examples. A case that illustrates testimonial injustice *per se* would be a party testifying to ordinary, commonsensical information (which in turn is supported by the evidence) and not being believed because she is Black or Brown, Hispanic, Muslim, trans, and so on. Think of a situation in which a Muslim suspect or defendant says he has never been in a certain place, and such information is corroborated by other pieces of evidence¹⁹—a situation analogous to that of Alexandre, with which we started the discussion of this section; yet the information is discredited. It is precisely in these cases, in which the ordinary information would be believed if it were offered by a person against whom no identity prejudice exists, that testimonial injustice has its bite. The fact of never being in a certain place is not the type of information whose intelligibility depends on any stock of knowledge. This situation would simply go unnoticed under Picinali's framework²⁰.

is due to the dynamics of judicial proceedings. Both the complainant and the defendant must be able to provide arguments that employ legally plausible concepts and interpretations. For this to occur, it is essential for the complainant and the defendant to have means to comprehend their own experiences sufficiently to convey them to an attorney, who will then attempt to fit them under a plausible legal framework. See Herdy & Castelliano (2023).

¹⁹ The case I have in mind is that of Brandon Mayfield, an American attorney who was arrested, imprisoned, and subjected to search and surveillance by the United States Federal Bureau of Investigation (FBI). Mayfield was mistakenly identified as the source of a fingerprint found in a bag of detonators near the scene of the 2004 Madrid bombings. He testified that he had not traveled outside the country for many years, and his testimony was corroborated by evidence that his passport had expired. Investigators, however, dismissed his wording, arguing that he probably traveled under a false name. Mayfield was a Muslim, married to an Egyptian woman, and has previously offered legal assistance in a case of custody to an immigrant convicted of terrorism. See Kassir *et al.* (2013).

²⁰ Picinali (p. 213) recognizes that a testimonial injustice in evidential reasoning may occur when the speaker gives a testimony that is not based on her stock of knowledge. The example he offers, however, is that of a *witness* offering perceptual testimony. He then says he will not focus on cases like this because he wants to connect testimonial injustice with the right to a fair trial. Here I am calling attention to a case in which the *party* suffers a prejudicial credibility deficit regarding the transmission of intelligible information. The relationship between the epistemic wrong inflicted on the defendant—for having her testimony prejudicially discredited when presenting intelligible information—and the right to a fair trial is straightforward.

I want to conclude this section with a remark regarding the consistency of Picinali's theorizing in light of the second-order assumption he wants to denounce. As said, his work is premised on a critical view of evidence law's resistance in admitting that a plurality of worldviews might inform the assessments of relevance and probative value. Now, if this is the problem he wants to address, which is inherently interpretive, then it would have been more effective for him to discuss hermeneutical injustices in evidential reasoning instead. But although Picinali did not frame his theorizing in this way, this is what he tacitly did—I believe his theoretical framework represents midway situations of hermeneutical injustice, which ultimately becomes cases of double epistemic injustice. The testimonial injustice identified by Picinali is just one side of the coin.

3. BEYOND CREDIBILITY DEFICITS, COMPLAINANTS, AND DEFENDANTS

In the previous section I argued that the *intricacy* of Picinali's theoretical framework compromises its purported general scope. It applies neatly to cases of double epistemic injustice (which refer to the simultaneous occurrence of testimonial and hermeneutical injustices), but leaves out cases of testimonial injustice *per se*. To support this argument, I explored Fricker's concept of hermeneutical injustice, showing that it refers to a multifarious phenomenon that can reveal itself along many dimensions. I did so to show that Picinali's framework described and exemplified the occurrence of midway cases of hermeneutical injustice, in which intelligibility and credibility deficits are mutually dependent. Now I want to argue that the *non-relational* aspect of Picinali's framework also compromises its scope. My argument here is twofold. On the one hand, to the extent that he chooses not to deal with credibility excesses, Picinali's framework fails to capture cases of agential testimonial injustice in the adjudicator's assessments of relevance and probative value; on the other hand, to the extent that he concentrates on the epistemic wrongs suffered directly by the parties, it also fails to detect cases of *ricocheted* testimonial injustice that might result in a violation of the right to a fair trial. I presume that Picinali overlooks the importance of both credibility excesses and the epistemic wrongs that other participants in the proceedings may experience because he does not fully appreciate the dynamics of the economy of credibility in the judicial context.

Let me start by recalling the real case of Alexandre from a different angle. As said, Alexandre was a Brown defendant prosecuted for robbery. The police arrived at him because the car used to carry out the crime was registered under his name. Alexandre's testimony suffered a credibility deficit despite the existence of non-testimonial evidence that corroborated his version of the facts—*i. e.*, digital evidence, which con-

sisted of an audio recording of his conversation with friends at the time of the crime, and documentary evidence, which consisted of a request to transfer ownership of the car. In the previous section, I argued that Alexandre's case exemplifies the occurrence of testimonial injustice *simpliciter*. I wanted to show that a testimonial injustice can occur even when the information being transmitted by the party is not related to a specific stock of knowledge. But now, from a different angle, I want to argue that this case also manifests a distinct kind of testimonial injustice, one in which credibility excess plays a fundamental role. Moreover, it also shows how a credibility excess attributed to a witness might *ricochet* and affect the adjudicator's assessments of the relevance and probative value of the defendant's testimony.

Alexandre's guilty verdict was grounded on two eyewitness misidentifications that received an excess of credibility despite the epistemic fragility of the conditions in which they were obtained. The two victims who misidentified Alexandre were first shown a single photo of him rather than an array with fillers resembling their description of the perpetrator; afterwards, one of the victims misidentified the defendant again, now allegedly in the manner provided for in Article 226 of the Brazilian Code of Criminal Procedure (*i. e.*, through a live line-up procedure in the police station). At last, the first victim who had identified Alexandre twice was called to repeat the eyewitness identification a third time, now on a trial session held three years after the date of the crime. Surprisingly, the court that convicted Alexandre highlighted the fact that, at the time of the final identification in court, «the victim recognized him, without the slightest doubt, as one of the perpetrators of the crime» (Superior Court of Justice of Brazil, HC 790.250/ RJ 2022/0392898-1, p. 152). The credibility excess attributed to the testimony of the victims represents a case of «agential testimonial injustice». Jennifer Lackey (2024, p. 57) explains that «a speaker is the victim of agential testimonial injustice when testimony is extracted from her in a way that bypasses, exploits, or subverts her epistemic agency and is then given an unwarranted excess of credibility». This is a kind of testimonial injustice that Lackey conceived to account for situations that typically emerge in the context of the criminal justice system; but surprisingly, it does not align with Picinali's general theoretical framework.

The idea of epistemic agency refers to the capacity of individuals to form beliefs and decide based on reasons and evidence. In Alexandre's case, there was a preliminary situation in which the epistemic agencies of the victims were manipulated by the police officers with the objective of extracting information—both at the show-up and line-up procedures; then, they were granted a credibility excess. The manipulation of the victims' epistemic agencies occurred due to three factors: the show-up of a single photo, which funneled their selection into a pathway that led directly to Alexandre; the conduct of a live line-up after a prior exposure to the defendant's image, making it more likely that the victims would recognize Alexandre again; and, finally, the repetition of the identification procedure in court, long after the crime. The subsequent step, as Lackey suggests, is an unwarranted attribution of credibility to such testimonies. This, in turn, can operate in the following ways: «eyewitness

testimony is *weighed too heavily*; it is *resistant to counterevidence*; it *distorts other evidence*; and it *blocks the seeking, gathering, and proper interpretation of additional evidence*» (Lackey, 2024, p. 87). In the case of Alexandre, what stands out is not only the high weight attributed to the second witness' confidence after having carried out repeated identifications of the defendant and long after the crime (as indicated by the wording of the verdict above), but also the adjudicator's resistance to admit contrary non-testimonial evidence. The victims' epistemic agency could have been preserved in this case if legal authorities had conducted the procedures in accordance with the psychological evidence on how to ensure reliable eyewitness identifications²¹. Using suggestive methods that contaminate the memory of victims for the purpose of extracting testimonies that will then receive a high degree of credibility generated an agential testimonial injustice.

Weakening the epistemic agency of a person is in itself an epistemic wrong; but it is arguable whether giving her a credibility excess in these situations can also be regarded as inflicting epistemic harm. After all, receiving a credibility excess is normally advantageous²². In developing the concept of agential testimonial injustice, however, Lackey argues that an excess of credibility attributed to a testimony extracted under conditions of undermined epistemic agency also causes an epistemic harm to the speaker. The person is epistemically wronged because «her status as a knower is reduced to what she reports only under conditions devoid of, or with diminished, epistemic agency» (Lackey, 2023, p. 63). It is as if the punitive legal authority said: «I value your testimony positively only when I have undermined your ability to form beliefs and make decisions based on reasons and evidence». So, in agential testimonial injustice the speaker suffers *two* epistemic wrongs—first, when her testimony is extracted; and second, when the extracted testimony is given an excess of credibility²³.

The notion of agential testimonial injustice was initially developed by Lackey (2020) to account for the phenomenon of false confessions; but it has now been expanded to capture many other instances in which a speaker is granted an excess of credibility in situations in which her epistemic agency has been debilitated²⁴. In the case of false confessions, given that the speaker is the suspect who later becomes the defendant, it is easy to see that the epistemic wrong she suffers will ultimately

²¹ See Lin *et al.* (2019); also, Garret (2011, pp. 45-83).

²² Fricker (2007, pp. 20-21) recognizes that it is possible to see a special case of testimonial injustice when a person receives a credibility excess, but only in its «cumulative» form. This happens, for instance, when a person's character gets corrupted by the excess of trust that people place in her *in the long run*. However, she denies that there can be any instance in which excess constitutes an epistemic harm. Cf. Davis (2016).

²³ See Lackey (2023, p. 96).

²⁴ In *Criminal Testimonial Injustice* (2023), Lackey explores the agential testimonial injustice that suspects, defendants, witnesses, and victims suffer in all stages of the United States criminal justice system. She begins by analyzing confessions and eyewitness identifications, but then proceeds to other institutional practices: guilty pleas, recantations of sexual violence, and sentencing hearings and parole boards.

result in a violation of her right to a fair trial. The suspect confesses to a crime she did not commit—after being lied about the presence of incriminating evidence or sleep deprived for days; afterwards, when she retracts, under conditions of proper epistemic agency, her recanting words are ignored or discounted. The consequence is that her first confession receives a credibility excess that results in *her* being wrongly convicted²⁵. However, in the case of eyewitness misidentifications, the dynamics of credibility are more complex. The speaker's epistemic agency may be undermined with the aim of extracting her testimony, which is then overly credited; however, these epistemic wrongs will not cause her any *legal* wrong. At most, if the eyewitness is also the victim, the excess of credibility given to her corrupted epistemic agency will not lead to the prosecution of the true offender.

I suspect this is why Picinali was reluctant to include instances of agential testimonial injustice in his analysis, especially when the credibility excess is attributed to agents beyond the involved parties. I refer here to the following passage:

Unlike the standard notion of testimonial injustice, agential testimonial injustice involves a credibility excess. [...] In this article I will work with the standard notion only, but my considerations concerning participation and trial fairness may well apply to cases of agential testimonial injustice suffered by the defendant or the complainant». (p. 204, n. 6)

To be sure, Picinali's reluctance to include other agents extends beyond instances of agential testimonial injustice (credibility excess). His broader concern about the connection between testimonial injustice in evidential reasoning and the concept of trial fairness also explains his decision not to include cases of standard testimonial injustice (credibility deficit) when experienced by epistemic agents other than the parties. I refer to the following passage:

[I]n this article I focus on the testimonial injustice suffered by the defendant and the complainant, as opposed to other participants. This is because, as I will discuss later, the defendant and the complainant are owed opportunities to participate in the enterprise of fact finding; and undermining these opportunities, as testimonial injustice does, is relevant to whether evidential reasoning and the trial were fair under art. 6 ECHR. Since my aim is to show that evidential reasoning can be unfair due to testimonial injustice, I need not look beyond the cases of the defendant and of the complainant. (p. 213)

Picinali admits that one could argue that the party's opportunity to participate in the trial may be negatively affected if a witness presented on their behalf suffers an epistemic injustice. He also admits this scenario would be unfair. However, «[w]hile reasonable»—he adds—this is not an argument I will pursue here» (p. 213, n. 32).

In what follows, I will attempt to sketch the argument Picinali chose not to pursue. As mentioned at the beginning of this section, I believe his framework overlooks the legal significance of both credibility excesses and the epistemic harms experi-

²⁵ Fricker (2023) characterizes these processes as examples of «institutional testimonial injustice», which result from an institutional epistemic vice.

enced by agents other than the parties in the proceedings because he does not fully appreciate the dynamics of the economy of credibility within the judicial context.

It is true that Fricker (2007, p. 20) initially claimed that credibility was a kind of epistemic good that does not function according to a distributive model of justice. Epistemic goods that are finite and can be unfairly distributed—*i. e.*, delivered in deficit or in excess—are «those for which there is, or may soon be, a certain competition»; but credibility, she contends, «is not generally finite in this way, and so there is no analogous competitive demand to invite the distributive treatment». Contrary to Fricker's view, Medina (2011; 2021) and Lackey (2020) have argued that credibility is an epistemic good that may assume a distributive character—and this appears to be especially true of the judicial context, which is adversarial in nature. Complainants and defendants are competing over who offers the most credible version of the facts. Believing more in one of the narratives implies disbelieving the other, to the exact extent. Lackey's recent book, which has been titled *Criminal Testimonial Injustice*, is clear in recognizing the distributive dimension of credibility assessments in the judicial context: «Imagine a court of law: the evidence being presented from the prosecution is often in direct opposition to that offered by the defense. To side with one is necessarily to side against the other» (2023, p. 27)²⁶.

To fully appreciate the relational character of credibility assessments in judicial context, it is necessary to see not only the interaction between the complainant and the defendant; but also include what happens in the assessments of the testimony offered by other participants in the proceedings—both in terms of deficit and excess of credibility²⁷. Take the case of (lay or expert) witnesses who provide testimony on behalf of one of the parties. If their testimonies are prejudicially discounted, the corresponding party may suffer a *ricocheted harm* as a result. A ricocheted harm can be understood as the secondary, or indirect effect of a wrong that rebounds after its initial occurrence. For instance, when an expert witness is discredited due to an identity or other type of prejudice (*e. g.*, because she is woman, Black, immigrant, etc.), she is certainly the direct target of a testimonial injustice; however, the party that would eventually benefit from the information she attempted to communicate also suffers an indirect, ricocheted harm—in this case, a legal harm. This is also true when the expert witness receives a credibility excess (*e. g.*, because of the mere fact that she is an authority in her field). Lackey (2018) calls this last type of epistemic injustice «expert excess testimonial injustice»; and illustrates its workings with the cases of Shaken Baby

²⁶ Medina (2011, p. 18) has also emphasized that credibility assessments are «comparative and contrastive».

²⁷ Lackey (2023, p. 145) says Fricker's view of credibility assessments and epistemic harm represents a «one-directional model»; she thus proposes a «multi-dimensional» or «multi-directional» model as follows: «On this model, the wrongs inflicted upon speakers do not involve a linear regression of deficits leading to an ever-increasing discounting of credibility, but a multi-directional attack that twists and turns, resulting in excesses and deficits that perpetrate injustice alike» (p. 148).

Syndrome convictions²⁸. So, from the standpoint of the parties, they may be subject to a ricocheted harm when a testimony that increases the likelihood of their factual hypothesis is prejudicially discredited; or, conversely, when a testimony that decreases it is given an excess of credibility. It seems clear that in both situations there is an unfair assessment of the probative value of a piece of evidence, which in turn may affect a party's right to a fair trial.

Ultimately, this relational view of testimonial injustice, which takes into account the epistemic wrongs borne by all agents that convey information in the proceedings, expands upon Picinali's (p. 222) pluralistic understanding of trial fairness. A pluralistic view of fairness should be concerned not only with the opportunities for participation of both parties, but also with the *means* those parties have to support their claims. Why should the «opportunity for meaningful participation [...] in the epistemic enterprise of fact-finding» (p. 222) be limited to an analysis of the form of participation that consists solely of the testimony of the parties—in other words, the defendant and (to a certain extent) the complainant? Testimony provided by the parties themselves is not the only means to support or refute their factual claims in the proceedings. Trial fairness also depends on how the testimonies of other agents in the proceedings are treated. Picinali's decision not to look beyond the testimony of the defendant and the complainant should thus be reconsidered in view of a more profoundly pluralistic view of trial fairness; for the testimonies of witnesses, experts, and victims may serve as important avenues through which the parties themselves effectively participate in the process of fact finding. When their testimony is discredited or overvalued due to an identity prejudice, the epistemic harm they suffer will ricochet and affect a party's opportunity to rely on them.

Unfortunately, I do not have space to elaborate on this last point. However, I hope to have sketched the dynamics through which testimonial injustices practiced against epistemic agents other than the parties in the proceedings will ultimately ricochet or rebound to the parties themselves, thereby violating their right to a fair trial. This leads me to conclude that the non-relational aspect of Picinali's theoretical framework, which is evident in his choice not to address cases of credibility excess and ricocheted harms suffered by parties, also undermines its purported generality.

4. CONCLUSION

I have argued that Picinali's intricate and non-relational way of theorizing about testimonial injustice in evidential reasoning seems inconsistent with the underlying objective of his work. His allegedly general theoretical framework does not

²⁸ See also Tuerkheimer (2015). To make clear, Lackey's understanding of social identity and its relationship to prejudicial stereotypes is not limited to aspects such as race and gender. See Lackey (2018, p. 156).

seem to be general enough to capture different forms of manifestation of testimonial injustice in the assessments of relevance and probative value. Two reasons have been offered to support this conclusion. First, Picinali's focus on the idea of stock of knowledge offers an intricate manifestation of the phenomenon, leaving aside cases of testimonial injustice *simpliciter*. Second, he fails to consider the dynamics of credibility in judicial proceedings, thus overlooking the importance of cases of credibility excess and how epistemic wrongs caused to other agents may ricochet to the parties, causing them an epistemic and, most importantly, a legal wrong. It is argued that Picinali's framework can be improved by adopting a description of testimonial injustice in the assessments of relevance and probative value that is *less intricate* and *more relational*.

Certainly, Picinali will object to my analysis by reminding that he explicitly cautioned that his framework was construed to represent sufficient, rather than necessary conditions. Because these conditions are sufficient, his description does not need to include the cases of testimonial injustice per se that I exemplified in section 2—nor (for that matter) the compound ones. Likewise, it does not need to include the cases of agential testimonial injustice that I have explained in section 3. Indeed, Picinali's strategy of providing *sufficient* conditions to describe a given phenomenon is consistent with the aim of creating a theoretical framework that, when applied in practice, ensures the phenomenon is captured, while remaining flexible enough to accommodate possible variations. However, the positing of a sufficient condition that nevertheless represents an intricate and narrow manifestation of the phenomenon might result in a scheme that misses the bulk of cases.

This reply is lacking in two respects. First, I did not discuss Picinali's suggested measures for treating and, more importantly, preventing testimonial injustices in evidential reasoning. Second, I did not propose an alternative to his supposedly general theoretical framework. And so, I would like to conclude by briefly mentioning these unexplored topics—areas I hope to explore in future opportunities. As for the first point, I believe one potential avenue not mentioned is to investigate how experts, such as sociologists, psychologists, and cultural anthropologists, can assist adjudicators in bridging interpretive gaps. These experts can offer a kind of *framework evidence* with contextual background to assist adjudicators in grasping the marginalized experiences presented as evidence (Tuerkheimer, 2023)²⁹. As for the second point, of course, I do not have a better general theoretical framework to offer as an alternative to Picinali's. However, to be practically useful, I believe a more general description of testimonial injustice in the context of evidential reasoning should consider both simple and compound cases; situations involving a deficit as well as an excess of credibility; and instances where parties experience a direct as well

²⁹ For an understanding of framework evidence, see Monahan *et al.* (2009). I recognize that needing to bring in an expert to explain a social experience of a marginalized group may also constitute a type of epistemic injustice. One way to address this would be to involve *amicus curiae*, although this may not work in the everyday reality of litigation.

as a ricocheted epistemic harm. It would have been interesting to see how Picinali might have refined his framework to account for these multiple manifestations of testimonial injustice in evidential reasoning.

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