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UNDERSTANDING AND PREVENTING TESTIMONIAL INJUSTICE IN CRIMINAL PROCEEDINGS: A COMMENT ON FEDERICO PICINALI «EVIDENTIAL REASONING, TESTIMONIAL INJUSTICE AND THE FAIRNESS OF THE CRIMINAL TRIAL»

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ABSTRACT: Reflecting on Federico Picinali's arguments in «Evidential Reasoning, Testimonial Injustice and the Fairness of the Criminal Trial», this paper aims to further understanding of the scope and implications of epistemic injustice in criminal trials, and the problem of biased evidential reasoning more generally. It demonstrates how legal rules can result in dismissal or oversight of the defendant's stock of knowledge; offers support for Picinali's contention that testimonial injustice to defendants interferes with the right to a fair trial, while questioning whether the same can be said of testimonial injustice to complainants; and considers who can cause, and be a victim of, testimonial injustice. The paper goes on to evaluate Picinali's proposed measures to prevent testimonial injustice in evidential reasoning, while advocating for law reform to restrict the admissibility of rap music as evidence in criminal trials.

KEYWORDS: evidential reasoning, testimonial injustice, relevance, trial fairness, participation in criminal trials.

1. INTRODUCTION

Much of the scholarship on evidence law has neglected the social and cultural context of evidence, taking for granted that evidential and procedural rules are of neutral application and consequence. In particular, little has been said about the relationship between the law of evidence of England and Wales and culturally specific forms of evidence, or the way in which racial prejudice and institutional racism, widely acknowledged to exist in the criminal legal system[1], manifests in the assessment of evidence. Federico Picinali's paper, «Evidential Reasoning, Testimonial Injustice and the Fairness of the Criminal Trial», is, therefore, a welcome contribution to an emerging body of scholarship on discriminatory and oppressive evidential practices in the criminal process[2].

Picinali focuses on the unfairness of testimonial injustice in the assessment of the relevance and probative value of evidence. Drawing from the work of Fricker (2007), he explains that testimonial injustice (a form of epistemic injustice) is caused where, due to identity prejudice against a social group to which one of the parties in the proceedings belongs, evidence is assessed without considering the experience and stock of knowledge of this party (Picinali, 2024, p. 201). Consequently, the party's argument about the relevance and probative value of an item of evidence—an argument that relies on such stock of knowledge—receives a credibility deficit (p. 212). Picinali challenges the rationalist tradition of evidence scholarship, which seems to take for granted that assessments of relevance and probative value are purely factual matters and can be made on the available stock of knowledge about the common course of events. This perspective is oblivious to, or insufficiently interested in, the variability of the stock of knowledge across society. In challenging the rationalist tradition, Picinali seeks to develop a theoretical framework that is applicable beyond the case of racism (p. 204), arguing that the assessment of the relevance and probative value of an item of evidence is suspectable to an evaluation on moral grounds (such as fairness), rather than exclusively to evaluation on epistemic grounds (such as accuracy) (p. 203). Thus, where a participant in the proceedings suffers a credibility deficit due to identity prejudice, this can not only impact the outcome of the trial but also undermines the fairness of the trial, irrespective of the accuracy of evidential reasoning.

Picinali clarifies that the concept of testimonial injustice he presents includes pre-empted dismissals of a speaker's story, before they have communicated anything, and that testimonial injustice is concerned only with misjudgements of credibility due to identity prejudice (p. 211). Where there is a deliberate disregard of the distinctive experience of a party, this is an intentional dismissal or pre-empting of

[1] See, for example, Casey (2023); Monteith *et al.* (2022); Lammy (2017).
[2] See also, Gonzales Rose (2017, 2021); Simon-Kerr (2021); Owusu-Bempah (2022a).

testimony which, while harmful and a case of epistemic injustice, falls outside of the scope of testimonial injustice (p. 214).

I agree with the central thesis of the paper. While the occurrences and consequences of testimonial injustice are difficult, if not impossible, to quantify[3], bias and prejudice can inform the assessment of evidence in criminal trials, with evidence being assessed from an inappropriate perspective. This can be unfair and render the trial unfair. In this response, I will not interrogate the notion of testimonial injustice or the theoretical basis of Picinali's central argument. Rather, I will probe some of his specific points and arguments and evaluate the proposed measures to prevent testimonial injustice in evidential reasoning, while advocating for law reform to restrict the admissibility of rap music as evidence in criminal trials. In doing so, I hope to help further our understanding of the scope and implications of epistemic injustice in criminal trials, and the problem of biased evidential reasoning more generally.

2. INFERENCES FROM SILENCE: TESTIMONIAL INJUSTICE OR BAD LAW?

Picinali (2024, p. 203) explains that testimonial injustice occurs where identity prejudice causes the adjudicator to give a deflated level of credibility to the speaker. He uses examples involving a negative identity prejudice, which «is essentially a spurious association between members of a social group and one or more negative attributes» (p. 210). But, where there is inappropriate reasoning with evidence, in at least some situations, the problem may lie with the law rather than the adjudicator's identity prejudice, as in the example of inferences from silence. In the two other main examples presented by Picinali, the adjudicator's identity prejudice is spelt out. In the case of rap lyrics, the adjudicator does not give appropriate consideration to the defendant rapper's perspective because «the generalisation linking violent lyrics to gang membership and physical violence resonates with their identity prejudice, which associates Black youth with street violence» (p. 216)[4]. In the case of rape myths, the identity prejudice against women, «boils down to a spurious association between members of the group and a negative attribute—precisely, lack of credibility on certain matters» (p.217). However, in the example of the young Black defendant who remained silent during police interview as a form of defiance and self-preservation, the nature of the identity prejudice against Black people and the causal connection between the prejudice and the deflated credibility judgment, is not articulated so explicitly. In this scenario, the legal framework is such that non-prejudicial oversight of the defendant's stock of knowledge, as opposed to testimonial injustice, could easily occur. This is because the law itself permits, if not encourages, silence to be used as evidence of guilt, raising concerns about adjudicators' lack of understand-

[3] See Arcila-Valenzuela and Páez (2022).
[4] See also Jalloh (2022).

ing of legitimate explanations for silence more generally[5]. Thus, an adjudicator's reasoning (that silence is associated with guilt) may stem from a broad, legally endorsed, generalisation that silent suspects have something to hide, rather than their prejudice towards a specific social group.

In particular, under section 34 of the Criminal Justice and Public Order Act 1994, adverse inferences can be drawn from a defendant's reliance on a fact at trial which they unreasonably failed to mention to the police. As explained by the Court of Appeal, «the whole basis of section 34 […] is an assumption that an innocent defendant—as distinct from one who is entitled to require the prosecution to prove its case—would give an early explanation to demonstrate his innocence» (*R. v Hoare,* 2004, en 53). Likewise, the House of Lords clarified that the object of the legislation «is to bring the law back into line with common sense» (*R. v Webber,* 2004, en 33). This is consistent with the traditional rationalist approach to evidence law which privileges a particular version of «common sense», namely that of «White, able-bodied, middle-or upper-class, men» (Picinali, 2024, p. 208). The directions which juries receive on silence can reinforce this «common sense» view. Jurors are directed, among other conditions, that they may only draw an inference from a failure to mention a fact if «there is no other sensible explanation for the failure» (Judicial College, 2023, pp. 17-7). But judges should not inform jurors of possible innocent reasons for silence, unless there is an evidential basis for the reason (*R. v Cowan,* 1996). Thus, unless the defence has presented evidence of, for example, the defendant's lack of trust in the police (which may place an additional burden on the defendant to testify)[6], this will not be brought to the attention of the jury, and the jury will be left, if not encouraged, to speculate that silence stems from guilt. The silence provisions, and the way they have been interpreted and applied, make it difficult to determine when jurors «should be aware of» (Picinali, 2024, p. 213), and take sufficient account of, the defendant's reasons for silence.

In the example presented, then, it may be that the jurors ignore or pre-emptively discount the defendant's stock of knowledge because of identity prejudice against Black people, or it may be that they give inappropriate consideration to the defendant's perspective because the law (backed by judges) invites adverse inferences to be drawn from silence. That the law on silence can result in oversight of the defendant's stock of knowledge (which disproportionately affects Black people)[7], is all the more reason for reform. Jurors should be informed of potential innocent reasons for silence (Quirk, 2018, p. 268), or, better yet, the law should prohibit adverse inferences from silence on the basis that there are many innocent reasons for silence, and it is the prosecution's job to prove guilt, not the defendant's job to speak and explain their innocence (Owusu-Bempah, 2018a, p. 277). This could prevent testimonial

[5] See, for example, Redmayne (2008).

[6] The defendant's failure to give evidence can also attract an adverse inference under section 35 of the Criminal Justice and Public Order Act 1994.

[7] See Phillips and Brown (1998); Bucke *et al.* (2000).

injustice as well as non-prejudicial, but inaccurate, assessments of relevance and probative value of silence. The potential for judicial directions and legislation to prevent testimonial injustice is considered further below.

3. TRIAL FAIRNESS

If a participant suffers a credibility deficit due to the adjudicator's identity prejudice, there is a risk of inaccuracy; the verdict is less likely to be accurate if assessments of relevance and probative value are made from an inappropriate or incomplete perspective. But, as Picinali argues, the risk of inaccuracy is not the only problem. Testimonial injustice can render the trial unfair. This is because testimonial injustice undermines participation, which is central to a fair trial (Picinali, 2024, p. 221). In particular, Article 6 of the European Convention on Human Rights (ECHR) accords the defendant participatory rights, including the right to effective participation, which is derived from the Article 6(3) rights (*Stanford v UK,* No. 16757/90, ECtHR, 23 February 1994). Effective participation includes the ability to follow, understand, and contribute to proceedings by, for example, giving evidence and instructing lawyers (*SC v UK,* No. 60958/00, ECtHR, 15 June 2004). Although the exact scope of the right to effective participation is uncertain[8], respect for the defendant's participatory rights arguably means that their contributions must be taken seriously, with appropriate consideration given to whatever they have to say[9]. In other words, the defendant's contributions should not be unjustly discounted or dismissed as unworthy of consideration or credit (Picinali, 2024, p. 224); they must not suffer testimonial injustice. Picinali thus helps to make sense of why reliance on certain kinds of evidence, such as rap lyrics, can infringe the defendant's Article 6 right to a fair trial.

However, while testimonial injustice to defendants compromises trial fairness, it is not clear that complainants are owed participation, or at least to the extent that testimonial injustice to complainants renders the trial unfair and causes unfairness to defendants, irrespective of the accuracy of the outcome. To advance his argument that testimonial injustice to complainants affects the fairness of proceedings, Picinali (2024, p. 222) relies on a pluralistic concept of trial fairness, whereby «a fair trial is a trial in which suitable treatment is given to *all parties*, as opposed to one party only». He claims that «the trial cannot be fair—and, hence, the defendant's right cannot be respected—if the defendant is the only party in the proceedings who is given the opportunity for effective participation» (pp. 221-222). This conception of trial fairness provides a basis for equitable treatment of the parties, consistent with the long-established principle of equality of arms, whereby each party must be given a reasonable opportunity to present their case under conditions that do not place

[8] See Owusu-Bempah (2018b).
[9] See Owusu-Bempah (2020).

them at a disadvantage *vis-à-vis* their opponent[10]. However, equitable treatment of the parties does not in itself mean that the complainant, as an individual, is owed an opportunity for effective participation in the trial.

In English and Welsh criminal trials, there are two parties: the prosecution and the defence. The defence party includes the defendant, who may be self-represented. While the prosecution is often thought to represent the interests of the complainant, the prosecution acts on behalf of the state, not the complainant. It is more appropriate to refer to the complainant as a «participant». The complainant does not direct or control the presentation of the case, but may contribute to the evidence gathering process and the epistemic exchange within criminal proceedings, primarily by providing information. As Picinali (2024, p. 223) notes, Article 6, including the participatory rights, is not a right ordinarily held by complainants. In fact, as I have written elsewhere, it is the unique position of the defendant as the person on trial, the person facing conviction and punishment by the state, which helps rationalise their participatory rights. These rights convey respect for the defendant's position as the autonomous subject of the proceedings and provide a means to challenge the prosecution case and ensure that the state can meet its burden of proof (Owusu-Bempah, 2020, pp. 4-6).

On the other hand, the European Court of Human Rights has recognised that «principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify» (*Doorson v Netherlands,* No. 20524/92, ECtHR, 26 March 1996, p. 70). The complainant's interests include their life, liberty, security of person, and privacy (*Doorson v Netherlands,* No. 20524/92, ECtHR, 26 March 1996, p. 70). Fairness, therefore, is not contingent only on the rights of the defendant. Also, the overriding objective of the Criminal Procedure Rules (2020) requires that, alongside recognising the rights of defendants, the interests of witnesses and victims be respected (rule 1.1(2)(c) and (d)). The Rules require courts to take every reasonable step to facilitate the participation of any person (rule 3.8(3)(b)), which «includes enabling a witness or accused to give their best evidence» (Criminal Practice Directions 2023, 6.1.1). However, respecting the interests of complainants and facilitating participation is not the same as affording participatory rights or owing an «opportunity to meaningfully participate» (Picinali, 2024, p. 224), breach of which will compromise the fairness of the trial.

Picinali states that it matters not for his argument whether the complainant has a right to a fair trial, or mere protected interests that are relevant to trial fairness (p. 223). But, if the complainant is not a party to the case and does not hold participatory rights, more needs to be said about: the nature and source of the participation owed to complainants; how testimonial injustice to the complainant (independent of the prosecution party) renders the trial unfair; and how testimonial injustice to complainants causes the defendant to suffer a breach of their right to trial fairness, a claim which Picinali recognises will seem counterintuitive to some (p. 224).

[10] See Jackson and Summers (2012, pp. 83-86).

4. VICTIMS AND PERPETRATORS OF TESTIMONIAL INJUSTICE

Picinali focuses on the experience of defendants and complainants. While he recognises that testimonial injustice to other participants can cause unfairness (Picinali, 2024, n. 32), expanding on this point helps to reveal the potential scale and scope of testimonial injustice in criminal proceedings. Take, for example, a defence witness who suffers a credibility deficit due to an identity prejudice. Adapting one of the examples provided in the annex to Picinali's paper, perhaps an eyewitness with a learning disability that affects their speech testifies that the defendant was not present at the scene of the offence (p. 231). However, the adjudicator views the witness's testimony as less credible because of how it is delivered, with broken speech, long pauses and vague words. Due to their ableist prejudice, the adjudicator wrongly perceives people with learning disabilities affecting speech to be unreliable. This not only harms the witness as an individual, denying their capacity to provide knowledge and contribute to the epistemic exchange, it may also interfere with the defendant's right to a fair trial. In particular, it may undermine the defendant's ability to challenge prosecution evidence, examine witnesses, and present their case under conditions that do not place them at a disadvantage *vis-à-vis* the prosecution. Likewise, defence counsel may suffer a credibility deficit which not only harms them personally but could lead to exclusion of evidence or rejection of a valid submission. Take, for example, a judge who mistakes a Black barrister for the defendant because of an identity prejudice which associates Black people with crime (The Bar Council, 2021, pp. 49-55; Howard League, 2021, p. 33; Monteith *et al.,* 2022, p. 17)[11]. This judge may view the barrister's submissions with suspicion, just as they viewed the barrister with suspicion. More specifically, a judge with an identity prejudice towards Black people might refuse to hear submissions from a Black advocate on why their client walked away from the police. Again, this interferes with the defendant's right to participate because the defendant's participatory rights can be, and often are, exercised by proxy through their lawyer.

It is also important to consider who can commit testimonial injustice. Picinali focuses on the assessment of evidence by judges and jurors but recognises that lawyers can commit testimonial injustice too (2024, p. 64). For example, the defendant's lawyer may defend their client in a way that does not appropriately reflect the defendant's experience. This might be a common occurrence. As barrister, Abimbola Johnson (2020), explains:

> The majority of us are white. That whiteness informs the base culture of what we do. Many in the profession mostly come across members of the Black community in court rooms. It is a fallacy to suppose that negative views and assumptions will not find their way into our work unless we consciously make sure they do not.

[11] See also, Black Barristers Network (2020).

The example of rap lyrics shows how lawyers can commit testimonial injustice. Anecdotal evidence suggests that defence lawyers often fail to challenge the admissibility of «rap evidence»[12], simply accepting that writing, performing, or engaging with rap music is evidence of «bad character», and is relevant to an issue in the case, such as gang association, motive, or intention. If these concessions are made without consulting the defendant, or after devaluing the defendant's stock of knowledge as to the culture and conventions of rap music, and if this credibility deficit results from an identity prejudice that associates Black youth culture with crime, testimonial injustice has occurred. Even where defence lawyers challenge admission of the evidence, this is often done without the assistance of an expert, such as a musician, academic or youth worker, who can contextualise and explain rap music for the court or jury. Knowing that many judges and jurors are unfamiliar with the intricacies of rap music, and knowing that the defendant's testimony will be viewed with suspicion, a prudent lawyer would seek to instruct an expert. At the same time, prosecutors often rely on police officers as «experts» to interpret and contextualise rap music. Important questions have been raised about whether police officers are qualified to provide an opinion on rap, and whether they are able to offer an impartial opinion. They may have knowledge of local groups and slang, but they tend not to be well versed in the culture or conventions of rap, viewing it through a crime control lens. This can result in unjustified assumptions about the literal nature of lyrics, based on flawed data skewed towards confirming suspicions of criminality, leading to conclusions that are not properly reached (Ward and Fouladvand, 2021)[13]. In these cases, not only has the defendant suffered a credibility deficit, but the police officer is likely to be granted a credibility excess[14], which, some have argued, can itself amount to a form of testimonial injustice[15]. The right to a fair trial is compromised by the defence lawyer's failure to take sufficient account of (or present) the defendant rapper's stock of knowledge, and also by the inequality of arms between the prosecutor who is backed by an «expert», and the defendant who is not. We should, therefore, not only be mindful of judges and jurors reasoning with evidence, but also of the way in which cases are constructed and presented by the parties.

5. PREVENTING TESTIMONIAL INJUSTICE

Having identified the problem and the harms of testimonial injustice in the assessment of (and reasoning with) evidence, Picinali concludes by surveying possible

[12] Based on discussions with legal professionals at events on the topic of «rap evidence». In an analysis of appeal cases where rap was relied on at trial or sentencing, the admission or use of the music often went unchallenged. See Owusu-Bempah (2022a, pp. 132-133).

[13] See also, Ilan (2020); Owusu-Bempah (2022b).

[14] On judicial faith in police evidence, see Monteith *et al.* (2022, p. 16).

[15] See Picinali (2024, n. 25). On credibility excess, see also, Medina (2011); Lackey (2023, ch.1); Fricker (2023).

solutions. He rightly argues that prevention is better than cure, given the practical obstacles to relying on the higher courts to play a more interventionist role in the scrutiny of the adjudicator's evidential reasoning. These obstacles include the difficulty of scrutinising reasoning and conclusions that are not articulated in writing (Picinali, 2024, p. 226). It can be added that, to treat testimonial injustice, the higher court judges must be willing and able to assess the evidence and the adjudicator's reasoning from an appropriate perspective and must not cause further testimonial injustice. As we saw with the silence example, the higher courts have reinforced a «common sense» generalisation that discounts or disregards the experiences of many. Also, the lack of diversity in the judiciary does not inspire confidence. In the English and Welsh courts, only 37% of judges are women, 10% are from an ethnic minority background (with just one percent being Black), and 30% are under the age of fifty (Ministry of Justice, 2023). The senior judiciary also happens to be the profession with the highest independent school and Oxbridge attendance (Sutton Trust, 2019, p. 11). Even where judges are free from bias and can look beyond their own experience and perspective, there is a question of how testimonial injustice should be «treated». Picinali (2024, n. 63) does not suggest that testimonial injustice to complainants should constitute a ground for appeal by the defendant, and he is open to the possibility that not all instances of testimonial injustice suffered by the defendant warrant an appeal, notwithstanding that they do render the trial unfair. While the potential remedies for testimonial injustice will not be discussed here, they do require further consideration. This is because, even when we focus on prevention, it is difficult to find an adequate solution.

In terms of preventative measures, it is preferable to start with judges. Judges make admissibility decisions and direct juries on the purported relevance of evidence. They can only make fair assessments of the relevance and, therefore, admissibility of evidence, and direct juries appropriately, if they have due regard for the stock of knowledge of the participant to whom the evidence relates. Further, only a small minority of trials are heard by jury. The vast majority are dealt with in the magistrates' court, where the law and facts are determined by a district judge or a bench of lay magistrates.

This brings us back to judicial diversity. Greater judicial diversity is long overdue and, as Picinali (2024. p. 228) suggests, would probably limit the impact that identity prejudice may have on the judicial assessment of the evidence. But even with a more representative judiciary, there is no guarantee that a case will be heard by a judge who does not hold identity prejudice and who can understand and appreciate the stock of knowledge of the participants in the case. Picinali also recommends that judges be encouraged or required to offer detailed articulation of the reasoning underlying their admissibility decisions (p. 228). This too would be a welcome development but, again, only takes us some way. There can be several reasons for a decision, and an unconscious (or conscious) bias could easily be masked by other reasons. Likewise, suggested implicit association tests for judges and jurors could make

them aware of biases they harbour, but it is not clear this helps to root out identity prejudice in the assessment of specific items of evidence. It may also foster a false assurance that the adjudicator only holds biases revealed by the tests. So, in addition to greater judicial diversity, reasoned decisions, and awareness of potential biases, the more «radical» measures must be considered.

To prevent jurors from committing testimonial injustice, Picinali considers the potential of statutory rules to exclude or restrict particular kinds of evidence. Such rules can also further the epistemic aims of the trial and are typically enacted for this purpose. An example is section 41 of the Youth Justice and Criminal Evidence Act 1999 which prohibits the defence from adducing evidence of a complainant's sexual behaviour except in limited circumstances in trials for sexual offences. As well as preventing wrongdoing by jurors, statutory rules can help prevent judges from committing testimonial injustice. By providing admissibility criteria, statutory rules reduce the scope of judicial discretion and, in turn, the opportunity for identity prejudice to inform assessments of relevance and probative value. However, while statutory rules can reduce the opportunity for judges to commit testimonial injustice, usually they do not eliminate it. In determining whether the admissibility criteria are met, testimonial injustice can still occur. Rape myths, for example, can creep into determinations of whether a complainant's sexual behaviour with third parties was so similar to what allegedly happened with the defendant that it cannot reasonably be explained as a coincidence (Youth Justice and Criminal Evidence Act, s.41[3][c][i]). To be effective, the statutory rule may need to create a high threshold for admissibility and provide specific factors for courts to consider, forcing them to address the participant's stock of knowledge.

Such legislation has been proposed in respect of rap lyrics. Following successful campaigns in the US (Nielson and Dennis, 2019)[16] a UK-based group, Art Not Evidence[17], is advocating for legislation to restrict the admissibility of creative expression as evidence in criminal trials (Ahmed, 2023). The campaign is a response to the growing number of cases in which rap lyrics and videos are used to help secure convictions, with police and prosecutors inviting judge and jury to take the music literally and infer from it, *inter alia*, motive, intention, criminal associations, and propensity for certain behaviour. This happens despite the music often having no direct connection to the offence charged and being highly prejudicial, bringing stereotypes of Black male criminality into the courtroom and encouraging jurors to associate Black youth culture with crime. While a primary purpose of the proposed legislation is to keep irrelevant, unreliable and unduly prejudicial evidence out of court, thus furthering the epistemic aims of the trial and protecting freedom of expression, it can also promote fairness by preventing testimonial injustice. The proposed legislation, drafted by members of Art Not Evidence, would create a presumption that creative

[16] For a list of passed and introduced legislation, see *https://www.rapontrial.org*
[17] See *https://www.artnotevidence.org*

expression is not admissible evidence in criminal trials. This presumption could be rebutted if it were proven that the evidence is: literal; refers to the specific facts of the crime alleged; is relevant to an issue of fact in dispute; and is necessary in so far as the issue cannot be proven by other evidence. In deciding whether these conditions are met, the courts would be required to have regard to specific factors which relate to the linguistic and artistic conventions of the expression, the social and cultural context of the expression, and the context in which the expression was created. In other words, regard must be had for the perspective and stock of knowledge of those engaged in the culture or creation of the specific form of creative expression. Since the court may not be well placed to make these assessments, they should employ the help of a suitably qualified independent expert. In the case of rap lyrics, that would most likely be a scholar, musician, youth worker, or perhaps a linguist, but not a police officer.

Picinali (2024, p. 227) refers to *ad hoc* statutory rules to exclude or restrict evidence as a «radical» instrument for preventing testimonial injustice. Given the many circumstances in which an identity prejudice can cause the adjudicator to discount stock of knowledge, it would be radical to enact legislation to restrict or exclude any and all kinds of evidence where there is a risk of testimonial injustice. This would also be impractical and result in the loss of much sound epistemic evidence. However, where there is a real and recognised danger of identity prejudice affecting the assessment of the relevance and probative value of a particular kind of evidence, such as rap music[18], legislation is warranted.

As a less radical measure, Picinali (2024, p. 227) considers judicial discretion to exclude evidence, with judges considering the risk of testimonial injustice in their admissibility decisions. But, as discussed above, judges are not always well placed to consider and appreciate the risk of testimonial injustice, at least not without guidance or assistance from legislation or an expert. Finally, for juries, Picinali considers the possibility of «debiasing instructions» (p. 227). This is an appealing option for situations where the relevance of the evidence is not in doubt, but there is a risk of jurors misjudging its probative value due to identity prejudice. As an example, Picinali refers to directions on rape myths in the Crown Court Compendium. However, as with treating testimonial injustice in the higher courts, or relying on exclusionary discretion, the effectiveness of judicial directions will depend, in part, on the judge's ability to acknowledge and understand the participant's stock of knowledge, and to convey that to the jury. For this, again, they may need the assistance of an expert. In the case of rap, for example, for jurors to properly assess the relevance and probative value of the music, they need to be educated on the culture and conventions of the genre and be warned against drawing from negative stereotypes about rap music and rappers. This would be an improvement on current practice, but there remains a risk that jurors will not adhere to the directions or that directions will not be sufficient

[18] See, for example, Dunbar and Kubrin (2018).

to counter their bias or prejudice. It is, therefore, unsurprising that Picinali refers to this measure as perhaps «wishful thinking» (p. 227).

Each of the proposed preventative measures has limitations, and some measures (namely statutory rules and judicial directions) can only be put in place where the potential for testimonial injustice is pervasive enough to be acknowledged. Given the countless circumstances in which identity prejudice can affect the assessment of evidence (be it based on, *inter alia*, race, ethnicity, religion, gender, or socio-economic circumstances), I am not as optimistic as Picinali (2024, p. 229) to suggest that «an epistemic enterprise such as the criminal trial is a context where inclusion is relatively easy to achieve». But, while it may not be easy, it is still worth pursuing. Picinali shows that, at the very least, there is potential to improve the way adjudicators reason with evidence. Thus, while I have argued that the scope and application of some of the arguments warrant greater explanation or consideration, I conclude this response the way it began, by welcoming Picinali's important contribution to evidence law scholarship that questions the traditional rationalist approach and urges us to do better.

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