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EPISTEMIC INJUSTICE IN THE CRIMINAL TRIAL: ENGAGING WITH GONZALES ROSE, HERDY, JALLOH AND OWUSU-BEMPAH

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ABSTRACT: Jasmine Gonzales Rose, Rachel Herdy, Tareeq Jalloh and Abenaa Owusu-Bempah have each written a paper commenting on my essay «Evidential Reasoning, Testimonial Injustice and the Fairness of the Criminal Trial», which appeared in *Quaestio Facti* in 2024. In this reply I engage with their insightful works. I discuss the advantages of framing in terms of «contributory injustice» the scenarios analysed in my original essay. I briefly study the conditions for the existence of a correlation between credibility excess and credibility deficit. And I provide the sketch of a theory of trial fairness, which I am currently developing elsewhere.

KEYWORDS: evidential reasoning; fairness; testimonial injustice; contributory injustice; credibility excess.

1. INTRODUCTION

I am very grateful to Jasmine Gonzales Rose, Rachel Herdy, Tareeq Jalloh, and Abenaa Owusu-Bempah for engaging with my essay «Evidential Reasoning, Testimonial Injustice and the Fairness of the Criminal Trial» (2024a). Their insightful and constructive responses build on the argument that I defended there, according to which testimonial injustice can render evidential reasoning (and hence, the criminal trial) unfair. This building work involved adding bricks, but also polishing and even

* I am very grateful to Tareeq Jalloh for comments on an earlier draft.

replacing some of the bricks I laid. The result is a construction that I had not fully envisaged at the time of writing my essay; a more solid and functional construction than the one I provided, to be sure. It is now my turn to engage with my readers' contributions with the aim to consolidate and enrich the construction further. Before doing so, however, a clarification is in order.

In her insightful paper, Rachel Herdy attributes to me the intention to provide a «general» theoretical framework; that is, a framework that could capture all significant types of testimonial injustice that may occur in the criminal trial. She correctly shows that my framework is not general in this sense, pointing out three types of testimonial injustice that the framework apparently does not capture. First, is «relational» testimonial injustice, where a credibility excess afforded to a party produces a credibility deficit for the other party, or where a credibility deficit suffered by a witness «ricochets» to the party that called the witness. Second, is agential testimonial injustice, where testimony is obtained from a speaker bypassing their epistemic agency, and is then given a credibility excess. Third, is testimonial injustice *simpliciter*, where the testimony is not grounded in the stock of knowledge of the speaker qua member of a particular social group.

Herdy, however, seems to have misunderstood the goal of my essay. Only once in the essay I call my theoretical framework «general» (Picinali, 2024a, p. 204), and I am quick to qualify this attribute. My work builds on that of scholars—Gonzales Rose and Owusu-Bempah—who had already drawn a connection between testimonial injustice and racist evidential practices. I intended my framework to be «general» only in the sense that it would be applicable beyond the case of racism (indeed, the scenarios I discuss involve a wide range of identity prejudices). Still, given that the types of testimonial injustice mentioned in the previous paragraph are all acknowledged in my essay, one may ask why have I not attempted to offer a framework that could accommodate them. Why have I not, at least, discussed them in greater detail? As stated in the Introduction to the essay, my goal was to show that evidential reasoning—in particular, assessments of relevance and of probative value of individual items of evidence—is susceptible to an evaluation on grounds of fairness, not just to an evaluation on grounds of accuracy. To achieve this goal there is no need to provide a comprehensive taxonomy and analysis of the types of testimonial injustice that may occur in a criminal trial. It is sufficient to argue that *one such type* can occur in evidential reasoning, affecting speakers whose interests are crucial to trial fairness. I, therefore, focused on testimonial injustice that 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 … 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, 2024a, p. 212). And I offered realistic scenarios where such an injustice takes place. Why have I picked this type of testimonial injustice, instead of other—perhaps less complex—types? As explained at 213, this type of testimonial injustice clearly evidences and reinforces a problematic

assumption that seems to characterise work in the rationalist tradition of evidence scholarship: the assumption that «there is only one stock of knowledge or, at least, that there is a stock of knowledge that is to be privileged for the purposes of adjudication» (Picinali, 2024a, p. 207). It is also due to this assumption that the rationalist tradition has failed to appreciate the moral dimension of assessments of relevance and of probative value. Namely, it has failed to appreciate that an oblivious and dogged adherence to the dominant stock of knowledge leads to ignoring or discounting other stocks; and that this, in turn, can render evidential reasoning unjust, rather than merely inaccurate. Such «ignoring or discounting» of stocks of knowledge are the crux of the type of testimonial injustice that I decided to highlight.

While my goal was, therefore, more modest than Herdy seems to have thought, her work—and that of Gonzales Rose, Jalloh and Owusu-Bempah—is important for the pursuit of the more ambitious goal of mapping, understanding and tackling the different types of testimonial—more generally, epistemic—injustice that may realistically occur in the criminal trial. The next two sections make contributions towards this goal, while the last section reflects on trial fairness.

2. TESTIMONIAL, HERMENEUTICAL … CONTRIBUTORY

The type of testimonial injustice that I focus on in my essay has a marked hermeneutical component. According to Herdy, it originates from an underlying hermeneutical injustice, such that a «double» or «compound» (Herdy, 2024, p. 161-162) epistemic injustice apparently takes place. The credibility deficit is indeed caused by the partiality of the hermeneutical resources that the adjudicator employs to interpret the item of evidence. The adjudicator relies on the dominant stock of knowledge, ignoring or discounting the stock of knowledge that the party has qua member of a marginalised social group. The party suffers a credibility deficit precisely because their argument about relevance and probative value is based on a stock of knowledge which is not subsequently employed by the adjudicator in the assessment of such argument and, consequently, of the evidence.

While I acknowledge this hermeneutical component in the essay (fn 31), Herdy is right in suggesting that the component required more attention (Herdy, 2024, p. 159-163). Later I will come back to the question whether this component is best characterised as a hermeneutical injustice, but I have no reservation about Herdy's claim that the component is «at the root» (Herdy, 2024, p. 159) of the examples that I provide. Moreover, it is amongst the reasons why I singled out for analysis the type of testimonial injustice described in the previous section. If that type of testimonial injustice evidences the problematic assumption of the rationalist tradition discussed earlier, this is because of the hermeneutical imbalance that causes the credibility deficit. In fact, given my stated goal to show the possibility of injustice in evidential reasoning, one might go as far as to argue that it would have been sufficient for me to highlight the hermeneutical imbalance, instead of drawing attention to the

argument about relevance and probative value that a party may advance and to the credibility deficit that such argument may receive. This, I think, would be too fast. Considering only half of the picture—that is, focusing on the hermeneutical imbalance only—would have offered an impoverished understanding of the wrongs involved. In particular, it would have obfuscated the connection between the epistemic injustice and the unfairness of the trial. Let me clarify.

In the essay I argued that when a party is unable to participate effectively in the trial due to their testimony being unjustly discounted or pre-empted, the fairness of the trial is undermined. If fairness is indeed about participation—a point that I will come back to later—then a claim of unfairness requires a showing that participation is affected. While it is all but certain that the hermeneutical imbalance will hamper the participation of the party whose stock of knowledge is ignored—their testimony will be discounted or altogether pre-empted due to such imbalance—it is in the discounting and in the pre-empting of the testimony that the harm to participation is concretised. And such discounting and pre-empting are instances of testimonial injustice, not of hermeneutical injustice *per se*. So, I take Herdy's useful criticism as the argument that I should have said more about the hermeneutical aspect of my examples, not less about the testimonial injustice they involve.

My disproportionate attention to testimonial injustice is also problematic for another reason, addressed in Tareeq Jalloh's brilliant contribution (Jalloh, 2024). Jalloh draws attention to a challenge raised by Arcila-Valenzuela and Páez in a recent article that I referenced, but did not adequately engage with, in my essay (Arcila-Valenzuela and Páez, 2024). Arcila-Valenzuela and Páez argue that it is impossible to ascertain individual cases of testimonial injustice, due to the obstacles to proving the three essential elements of this form of epistemic injustice: an identity prejudice (understood as a stable personal trait), a credibility deficit and a causal link between the two. Let us assume that the challenge is sound. Even so, I don't think it detracts from the importance of studying testimonial injustice in the context of the criminal trial. By the authors' own admission, the existence of testimonial injustice is «undeniable» (Arcila-Valenzuela and Páez, 2024, p. 586), and it is evidenced by studies detecting «widespread credibility inequality» at the population level (Arcila-Valenzuela and Páez, 2024, p. 598): on average, members of some social group are believed less than members of some other group. In other words, if I understand them correctly, Arcila-Valenzuela and Páez claim that credibility inequality at the population level is sufficient evidence to conclude that individual instances of testimonial injustice do occur, even if no specific instance can ever be verified. Be that as it may, a credibility inequality at the population level is bad enough, even if it is the most that we can ascertain; and one should expect such inequality to affect also the criminal process, to the detriment of participants belonging to social groups that typically suffer from such inequality (racial minorities, women, those affected by disability etc.). If so, a discussion of the means

to prevent such inequality in the criminal process is surely valuable and topical, whether or not it is framed in terms of testimonial injustice.

Jalloh, however, offers another response to the «provability» challenge: to shift the focus from testimonial injustice to another type of epistemic injustice with different, and seemingly easier to prove, elements. This is contributory injustice, a form of epistemic injustice that I only touched on in the essay (fn 24). Contributory injustice occurs when there are different hermeneutical resources that the agent could use in an interpersonal epistemic enterprise—crucially, including resources that would allow a member of a marginalised group to conceptualise and to make visible to others their social experience—but the agent chooses to rely on structurally prejudiced hermeneutical resources, such that members of the marginalised group are thwarted in their contribution to the epistemic enterprise (Dotson, 2012, p. 31-32). In other words, the agent is wilfully ignorant of the hermeneutical resources of the marginalised group, and this effectively hinders the ability of members of such group to contribute to shared understanding. A significant difference between contributory injustice and hermeneutical injustice is that the latter—at least in its «central case» (Fricker, 2007, p. 147-152)—consists in a situation where marginalisation has produced a lacuna in the hermeneutical resources, such that the experience of the marginalised group is unintelligible to them (Dotson, 2012, p. 32; cf. Fricker, 2013, p. 1319). If so, contributory injustice is a better fit for the scenarios that I have discussed in my essay, where the epistemic agent at the receiving end of the injustice is able to make sense of their experience, while being unable to make it visible to the adjudicator. Moreover, unlike hermeneutical injustice, contributory injustice has a marked agential component. It is not merely a structural feature of the hermeneutical resources (say, the lacuna characterising hermeneutical injustice), but it is something that an agent (say, an adjudicator) does. This too makes contributory injustice a better fit than hermeneutical injustice for the cases I study in the essay, where the agency of the adjudicator plays a significant role. Finally, contributory injustice puts a stress on the hindrance that the wilful ignorance creates to the participation of marginalised agents in the epistemic enterprise. As pointed out earlier, this hindrance is where the unfairness of the trial materialises. A possible wrinkle with the suggested categorisation is that contributory injustice requires *wilful* ignorance (a choice to ignore), whereas the phenomenon I sought to describe encompasses cases of negligent overlooking of a party's stock of knowledge. Jalloh apparently finds no difficulty with subsuming cases of negligence under contributory injustice, as defined previously (Jalloh, 2024, p. 195). Should he be wrong in this regard, there would be good reason to extend the definition to encompass negligent ignorance.

Apart from descriptive accuracy, treating the phenomenon I study in the essay as an instance of contributory injustice, has the significant advantage of avoiding Arcila-Valenzuela's and Páez's challenge. Notice that contributory injustice—but the same goes for hermeneutical injustice—does not comprise an individual identity prejudice, a credibility deficit and a causal link between the two – these being the ele-

ments that are difficult to prove, according to the challenge. To be sure, both hermeneutical injustice and contributory injustice comprise an identity prejudice. But this is a «structural», rather than an individual, identity prejudice (Fricker, 2007, p. 155; Dotson, 2012, p. 29). It is not the stable personal trait targeted by Arcila-Valenzuela and Páez. It is, instead, a tilt in the hermeneutical resources, such that these «will tend to issue interpretations of [a] group's social experiences that are biased because insufficiently influenced by the subject group, and therefore unduly influenced by more hermeneutically powerful groups» (Fricker, 2007, p. 155). The proof of such tilt does not seem to raise formidable challenges.

Jalloh's shift of focus to contributory injustice is a clever move, and if contributory injustice is extended to encompass cases of negligent ignorance (rather than just of intentional ignorance) the proof of this injustice becomes even more achievable. The step from ascertaining the adjudicator's negligent ignorance of a stock of knowledge to concluding that a party suffered unfair treatment seems a short one indeed.

3. WHEN IS A CREDIBILITY DEFICIT THE CORRELATIVE OF A CREDIBILITY EXCESS?

Jasmine Gonzales Rose (2024) offers an insightful study of the testimonial injustice caused by credibility excesses – a topic also discussed by Herdy (2024) with particular focus on cases of «agential testimonial injustice» (Lackey, 2023). As stated earlier, this is a phenomenon that I acknowledged in the essay, but did not study in any detail. Gonzales Rose's analysis is rich and compelling, and it convincingly shows that an adequate understanding of the phenomenon of testimonial injustice in the criminal trial cannot prescind from a study of the effects of credibility excesses afforded to privileged speakers.

Gonzales Rose invites us to consider the familiar scenario in which a party in the process (say, the defendant) is from a racial minority and the other party (say, the prosecution) and the witnesses it calls (say, police officers) are White. Building on the work of José Medina (2011), among others, she argues that the credibility excess that the White party and witnesses are likely to be afforded automatically translates into a credibility deficit suffered by the opposite party. She calls this phenomenon a «"transferred epistemic harm", to capture the indirect harm that occurs when a privileged speaker's credibility excess correspondingly reduces a subordinated speaker's epistemic ability or agency in a way that causes epistemic injury *qua* knower» (Gonzales Rose, 2024, p. 183). Gonzales Rose also clarifies that this phenomenon, while not unique to the criminal trial, is prevalent there due to the peculiar «credibility economy» (p. 175) of the trial, which she characterises as a «zero-sum game» (p. 180): to increase credence in a party's account means to decrease credence in the account of the opposite party.

Here I would like to clarify the features of criminal fact finding that enable the phenomenon aptly described by Gonzales Rose; in other words, the conditions due to which a credibility excess correlates with a credibility deficit. I start from a passage by Medina, which is used by Gonzales Rose as the springboard for her analysis.

> Credibility is not assessed in the abstract … but rather, in a comparative and contrastive way… So, those who have an undeserved … credibility excess are judged comparatively more worthy of epistemic trust than other subjects, all things being equal; and this is unfair, not only to them but also to others who do not receive this privileged treatment, not because of a failure in equal distribution but because of a failure in proportionality, for the degrees of credibility given to subjects have to be proportional to their epistemic merits and the presumptions that apply to subjects in their situation. A credibility excess constitutes an epistemic injustice when and because it involves the undeserved treatment of an epistemic subject who receives comparatively more trust than other subjects would under the same conditions. The credibility excess assigned to some can be correlated to the credibility deficits assigned to others not because credibility is a scarce good … , but because credibility is a comparative and contrastive quality, and an excessive attribution of it involves the privileged epistemic treatment of some … and the underprivileged epistemic treatment of others (Medina, 2011, p. 20).

It seems that here Medina is making—and perhaps conflating—two distinct arguments. First, he argues that a credibility excess is an epistemic injustice for the mere reason that it causes disproportionality, across epistemic agents, between the respective epistemic merits and the levels of credibility they respectively receive. Notice that for this disproportionality to occur no one needs to suffer a credibility deficit: it is sufficient that, while most agents are assigned a credibility level that is reasonable given the available evidence and the agents' epistemic merits, some agents are assigned a credibility excess. There is a second argument in Medina's passage, and it is the argument that interests me here. Medina argues that a credibility excess *can* correlate with a credibility deficit (although in the following page he shows sympathy for the view that the correlation is not just possible, but very frequent, if not necessary). This means that believing an epistemic agent more than one should, may well involve believing another epistemic agent less than one should. This, according to Gonzales Rose (2024), is precisely what tends to happen in a criminal trial when a defendant from a racial minority is confronted by a White prosecutor and White prosecution witnesses.

While I don't think that a credibility excess always correlates with a credibility deficit, I am persuaded that the correlation generally exists in the context of the interaction between the parties of a criminal trial. And I suggest that this is due to the structure of the decision-problem with which a trial is concerned. Gonzales Rose writes of the credibility economy of the trial that it is a «zero-sum game», and she seems to consider this the reason for the occurrence of the correlation. Her account seems correct, but it falls short of clarifying why the credibility economy of the trial is such a game. A plausible clarification appeals to the consideration that, at the most general level of the trial contest, the parties defend hypotheses that are *mutually exclusive* and *jointly exhaustive*. These are the hypothesis of innocence and the hypothesis of guilt. They are *mutually exclusive* because they cannot both be true. They are *jointly exhaustive* because they fill up the universe of possibilities artificially created by the criminal law. The defendant is

either innocent or they are guilty: *tertium non datur*. In fact, someone who is open to a probabilistic understanding of criminal fact finding may well say that this decision problem is a «one-sum game», in that the sum of the probability of guilt and of the probability of innocence exhausts the entire probability spectrum, thus being equal to one.

Take away either of the two features mentioned, and the correlation between a credibility excess and a credibility deficit ceases to exist. To see this consider a couple of examples. In the first example, we have a historian who is seeking to answer the question of how a particular war started. The historian hears the testimony of a survivor claiming that the war was single-handedly and wantonly initiated by state X; but they also hear the testimony of another survivor claiming that it was single-handedly and wantonly initiated by state Y. The two hypotheses are mutually exclusive. But they are not exhaustive. There are other possibilities countenanced by the historian: perhaps the war was single-handedly and wantonly initiated by a third state; perhaps it originated from an accident, rather than deliberate action, etc. The historian gives a credibility excess to the survivor accusing state X, assigning to that hypothesis a probability of .6 when it only deserves a probability of .5. The historian can do so without also decreasing the credibility assigned to the survivor accusing state Y and the corresponding probability. This probability may remain constant at, say, .2. The credibility excess may simply involve a decrease in the probability of the (disjunction of the) other possible hypotheses (i.e., the responsibility of a third state, the accident, etc.). In the second example, instead, we have a scientific journalist who is writing a piece on what stars are made of. They interview a bunch of astrophysicists. A group of astrophysicists somewhat unhelpfully says that stars are made of some material, without being able to pin down any material. Another group says that stars are made of carbon dioxide. These two hypotheses are (indeed, the first alone is) exhaustive (at least if we exclude the option that stars are an optical illusion), but they are not mutually exclusive. So, the journalist may well assign a credibility excess to the group of scientists claiming that stars are made of carbon dioxide, without also inflicting a credibility deficit on the group of scientists who merely acknowledged that they are made of something.

The mutual exclusivity and the joint exhaustiveness of the hypotheses of innocence and of guilt mean that a credibility excess assigned to a party will translate into a credibility deficit assigned to the other. By the same token, the reverse is also true. As we are reminded by Gonzales Rose, US and UK societies and institutions are such that in a trial contest between a White party and a party from a racial minority, the White party will likely be afforded a credibility excess. This will, therefore, translate into a credibility deficit for the other party. If someone's concern is limited to the question of trial fairness, this analysis of the dynamics between credibility excess and credibility deficit within the trial may suffice. But Gonzales Rose also hints at the externalities of credibility excesses: the effects that excesses afforded in the trial may have beyond the trial itself. She writes:

> When a White speaker's credibility is routinely boosted, this does not exist in isolation or as a one-time occurrence. Rather this is part of an epistemic-privileging routine and pervasive subordination which consistently and systematically exalts members of the White racial group to entrench their power and privilege to the corresponding and collective epistemic detriment of Black and other non-White people (Gonzales Rose, 2024, p. 179).

The credibility excess afforded to White speakers in a trial contest with non-White speakers does not only generate a credibility deficit for the latter and, hence, trial unfairness. It also contributes to entrenching and bolstering racist societal structures and dynamics, with both practical and epistemic ramifications. This recognition is important because it shows that even when a decision-problem is not characterised by mutually exclusive and jointly exhaustive hypotheses, a credibility excess afforded therein to a member of a privileged group may have an unjust impact outside that decisional context, possibly contributing to the infliction, in other epistemic enterprises, of credibility deficits to the detriment of the disadvantaged and oppressed.

4. FAIRNESS, PARTICIPATION AND EPISTEMIC INJUSTICE

In her rich contribution, Abenaa Owusu-Bempah (2024) criticises the English and Welsh law on the evidential significance of the defendant's silence, discusses possible remedies to testimonial injustice in the trial context and highlights forms of such injustice that I only touched on in my essay. These include the case, also discussed by Herdy (2024), of a credibility deficit suffered by a witness and «ricocheted» to the party that called the witness; but also, the case of testimonial injustice suffered by defence counsel, and the case of testimonial injustice suffered by the defendant at the hands of their counsel (Owusu-Bempah, 2024, p. 145-146). The emerging picture is that of a depressingly varied and realistic range of possibilities for epistemic injustice. Owusu-Bempah also raises some probing questions about the conception of trial fairness that I offered in my essay. Here I try to provide some initial answers to these questions, based on work that I am currently doing to develop that conception (Picinali 2024b).

Owusu-Bempah's critique focuses on the complainant and their participation. To begin with, she questions whether the complainant is properly referred to as a «party» and she suggests calling them a «participant» instead (Owusu-Bempah, 2024, p. 144). While in the essay I do call the complainant a «party», here I will use the term «stakeholder», so as not to appear to take for granted the complainant's entitlement to participate or their actual participation. In my essay I wrote that

> for the purposes of my argument it matters not whether the complainant, like the defendant, has a right to a fair trial—that is, an actionable prerogative to a fair contest—or mere protected interests that are relevant to trial fairness—that is, prerogatives that are not actionable by the complainant, but that nonetheless should be respected, through providing appropriate treatment to the complainant, for the trial to be fair. Either way, under a pluralistic conception of fairness a trial cannot be fair if the complainant is not given the treatment that they are owed, given the legitimate interests they have at stake. Indeed, in these circumstances whoever has a right to a fair trial will suffer a breach of said right: they will be denied that to which they have a right. So,

> even if the complainant had no right to a fair trial, the fact that they are not given the treatment they are owed—in particular, the opportunity for meaningful participation—means that the trial was unfair, and that the defendant suffered a breach of their right to trial fairness. While possibly counterintuitive for some readers, this strikes me as the inevitable implication of a pluralistic conception of fairness (Picinali, 2024a, p. 223-224).

Owusu-Bempah is unpersuaded by this passage, as the following excerpt from her article indicates. She writes:

> 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 … 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 (Owusu-Bempah, 2024, p. 144).

Here is a stab at answering these important questions. The institution of the criminal trial is based on values. These values may vary from one jurisdiction to another and from one historical period to another. Modern examples are the value of truth and the value of respect for the subjects involved. There can also be «second-order» values. The institution of the trial will likely involve a framework of rules designed to pursue some foundational values such as truth: respect for these rules is a second-order value on which the trial is grounded. Based on these uncontroversial ideas, I define a stakeholder as anyone who has a protected interest concerning the outcome and/or the conduct of the trial, where an interest is «protected» if its pursuit is supported by the values that inform the trial. So, an interest in a true outcome is protected if truth is indeed amongst such values.

Consider now the complainant. Typically, they have an interest in the conviction of the defendant. Is this a protected interest? Is the complainant, in other words, a stakeholder? The answers to these questions depend on which values inform the trial. If truth is one of them, the answers seem affirmative indeed. How so? It would seem that, unless we know that the defendant is guilty, we cannot conclude that the value of truth supports pursuing the complainant's interest in conviction. But if we knew this, the trial would lose much of its *raison d'être*, such that we would not have a complainant to speak of. In fact, here we must suspend judgement, lest we preempt the judgment of the adjudicator. At most we can say that the defendant *may be* guilty and, hence, that the complainant *may have* a protected interest in conviction. But this reasonable possibility suffices, in my view, to treat the complainant as a stakeholder. Similar considerations lead to the conclusion that the defendant too is a stakeholder. Of course, there likely are other stakeholders (e.g., the prosecution, the public). Moreover, complainant and defendant may have protected interests other than interests in outcomes (e.g., an interest in the respect of procedural rules). There is no need to explore these questions for present purposes.

The next step is to recognise that every stakeholder is entitled to participate in the trial in order to further their protected interests. For the criminal justice system to

stay true to the values that inform the trial, it must allow for the stakeholders' participation: participation is a significant (though, perhaps, not the only) means through which those interests and, hence, those values are furthered in any given trial. The modes of participation may vary from mere observation to examining witnesses or addressing the adjudicator. Moreover, not all stakeholders need to be afforded the same modes and extent of participation. Trial fairness, though, requires that for each stakeholder the same proportion holds between the weight of protected interests and the opportunities to participate. It follows that those with weightier interests should be afforded more significant opportunities to participate. How an interest is weighed and how proportionality between interests and participation is realised in practice are thorny questions that I cannot address on this occasion. The important message here is that anything that disrupts said proportionality causes unfairness. A testimonial injustice suffered by the complainant or by the defendant surely has that potential. If we assume that the law by and large realises, across all stakeholders, a proportionality between the weight of protected interests and opportunities to participate, then a testimonial injustice suffered by any stakeholder is likely to disrupt the proportionality and cause unfairness. A right to a fair trial is understood here as a right to that proportionality; it is therefore breached whenever and however the proportionality is disrupted. Of course, the law governing the current English and Welsh trial may not realise that proportionality, such that the trial may be unfair to begin with, irrespective of any testimonial injustice that were to take place…

This is not a theory, but the sketch of a theory. While it may not persuade Owusu-Bempah, I believe it gives some initial plausible answers to her questions.

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