


# Editorial of dossier “Epistemic Injustice in Criminal Procedure”

*Editorial do dossiê “Injustiça epistêmica nos contextos penal e processual penal”*

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**ABSTRACT:** There is a growing awareness that there are many subtle forms of exclusion and partiality that affect the correct workings of a judicial system. The concept of epistemic injustice, introduced by the philosopher Miranda Fricker, is a useful conceptual tool to understand forms of judicial partiality that often go undetected. In this paper, we present Fricker’s original theory and some of the applications of the concept of epistemic injustice in legal processes. In particular, we want to show that the seed planted by Fricker has flourished into a rich field of study in which the concept is used to analyze many different phenomena in law, not always following the original characterization

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provided by her. This has led to a distinction between what we will call the *narrow* version of the concept, which is closer to Fricker's original account, and the *wider* version of epistemic injustice, which is a more controversial notion because it is always on the verge of morphing into other well-known concepts like sexism, racial discrimination, oppression, silencing, and gaslighting. We will show that the value of the narrow version is mostly theoretical, and that in order to use the concept of epistemic injustice one must adopt a more liberal understanding of it.

**KEYWORDS:** Testimonial injustice; hermeneutical injustice; judicial partiality; identity prejudice; racial discrimination; sexual discrimination.

**RESUMO:** *Há uma crescente conscientização a respeito das muitas sutis formas de exclusão e parcialidade que afetam o correto funcionamento do sistema criminal de justiça. O conceito de injustiça epistêmica, introduzido pela filósofa Miranda Fricker, é uma ferramenta conceitual útil para entender as formas de parcialidade judicial que frequentemente passam despercebidas. Nesse trabalho, nós apresentamos a teoria original de Fricker e algumas aplicações no processo judicial. Em particular, pretendemos demonstrar que a semente plantada por Fricker floresceu e se transformou num campo de estudos rico, no qual o conceito é usado para analisar diversos fenômenos do contexto processual, nem sempre seguindo a caracterização inicialmente oferecida por ela. Isso levou a uma distinção entre o que chamaremos de versão estrita do conceito, mais próxima do tratamento original de Fricker, e uma versão mais ampla de injustiça epistêmica, que é uma versão mais controversa dado o fato de que está sempre no limite de contato com outros conceitos bem conhecidos de todos, como sexismo, discriminação racial, opressão, silenciamento e gaslighting. Nós argumentaremos que o valor da versão mais estrita de injustiça epistêmica é sobretudo teórico, e que, para efetivamente dar-se uso ao conceito de injustiça epistêmica, convém adotar uma compreensão mais liberal dele.*

**PALAVRAS-CHAVE:** Injustiça testemunhal; injustiça hermenêutica; parcialidade judicial; discriminação racial; discriminação sexual; preconceito identitário.

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## INTRODUCTION

Socially and politically disadvantaged people are often denied full and equal recognition as knowers. Either their testimony receives an unwarranted credibility deficit owing to an identity prejudice in the receptor of their words, or they are excluded from full participation in power structures that control the discourse and conceptual landscape that help them make sense of their own lives. This type of injustice has been labeled “epistemic injustice” by the philosopher Miranda Fricker. Her influential theory, presented in her book *Epistemic injustice: Power and the ethics of knowing* (2007), set the stage for the contemporary discussion of the concept.

Fricker’s theory, which has been expanded and modified in subsequent articles, has been very influential in epistemology, ethics, and political philosophy. Only recently did it start to have an impact in the philosophy of law and in legal practice. Although the American and British legal systems seem to remain oblivious to the idea of epistemic injustice (Tuerkheimer, 2017), there is a growing interest in this concept in other regions, including Brazil and Latin America in general. There is a growing awareness that there are many subtle forms of exclusion and partiality that affect the correct workings of our judicial systems. The dossier in this number of the *Brazilian Journal of Criminal Procedure* (RBDPP) is a contribution to the detection of different forms of epistemic injustice in the legal systems of different countries, and an exploration of possible procedural preventive measures and remedies.

In this paper, we want to provide an overview of the theoretical development of the concept of epistemic injustice and to present some of its applications in legal processes. In particular, we want to show that the seed planted by Fricker has flourished into a rich field of study in which the concept is used to analyze many different phenomena in law, not always following the original characterization provided by her. This has led to a distinction between what we will call the *narrow* version of the concept, which is closer to Fricker’s original account, and the *wider* version of epistemic injustice, which is a more controversial notion because it is always on the verge of morphing into other well-known concepts like sexism, racial discrimination, oppression, silencing, and

gaslighting. We will show that the value of the narrow version is mostly theoretical, and that in order to use the concept of epistemic injustice one must adopt a more liberal understanding of it.

The paper is organized as follows. In the first section, we present Fricker's original theory and the refinements that she and others introduced during the following years. We will argue that this narrow version of the theory is of very limited use in law. In section 2, we present more recent developments of the idea of epistemic injustice, with a special focus on testimonial injustice. In section 3, we present some examples of how the notion of epistemic injustice has been used to analyze recent legal cases. Section 4 explores possible remedies to epistemic injustice. In particular, we will argue that the path forward is to focus on institutional and structural reforms.

## 1. THE NARROW CONCEPT OF EPISTEMIC INJUSTICE

Fricker's theory of epistemic injustice characterizes two different ways in which subjects can be harmed as knowers. The first variety, called *testimonial injustice*, occurs when a person's words are either ignored or receive reduced credibility due to an identity prejudice in the hearer. It is assumed that the speaker has shown no signs of incompetence or dishonesty that might justify the use of a prudential epistemic norm against her. The only reason her words do not receive the credibility they deserve is the hearer's prejudice. The second variety of epistemic injustice, called *hermeneutical injustice*, is not caused by prejudiced listeners but rather by structural social inequalities that impede disadvantaged people from having access to the necessary conceptual apparatus that will enable them to make sense of their own reality and of the harms received within that structure. We will examine both forms of epistemic injustice in turn.

### 1.1 TESTIMONIAL INJUSTICE

According to Fricker's original definition, a speaker sustains a testimonial injustice if and only if she receives a credibility deficit owing to an identity prejudice in the hearer (2007). This definition allows both

explicit and implicit forms of discrimination. In one of the central examples in the book, Marge Sherwood, a character in the novel *The Talented Mr. Ripley*, tries to communicate her suspicions about Ripley to her father-in-law, Herbert Greenleaf. He openly dismisses them because of the identity prejudices he holds about women. He assumes that women are too emotional to provide a rational assessment of the situation, silences her, and in a clear case of gaslighting (Abramson, 2014), tries to manipulate her to make her doubt her own assessment of the situation.

In later writings, Fricker has restricted the concept of testimonial injustice to the discriminatory effects of *implicit* prejudice, thereby establishing a clear difference between testimonial injustice and explicit discrimination. Her intention is to focus the analysis on those cases that are “easy to miss” (2017, p. 54) because they do not arise from situations involving declared racist or sexist individuals. Under this narrower version of the concept, the examples of Marge Sherwood in *The Talented Mr. Ripley* and of Tom Robinson, the black man accused of raping a white woman in the novel *To Kill a Mockingbird*, do not qualify as cases of testimonial injustice.

Under this narrower conception, to verify the occurrence of a singular instance of testimonial injustice three facts must be established. The first is whether the hearer in fact has an implicit identity prejudice; the second is whether that prejudice was in fact the cause of the unjustified credibility deficit; and the third is whether there was in fact a credibility deficit in the testimonial exchange. As one of us argues elsewhere (Arcila-Valenzuela & Páez, 2022), none of these facts can be established with confidence, and therefore testimonial injustice is an undetectable phenomenon in singular instances. Regarding the first fact, the only way to determine whether the hearer has an implicit identity prejudice as a stable personal trait is using implicit attitude tests such as the IAT (Greenwald et al., 1998). These tests have been recently discredited as measures of individual traits, and no clear alternative has emerged for the empirical study of implicit prejudice (Machery, 2017, 2021). Secondly, even if there were sufficient evidence to prove that the hearer has an implicit prejudice, it is impossible to prove the causal role of that prejudice, given that contextual elements and cognitive biases are also known to play an important role in our perception of people’s

credibility. Finally, the evidence available in a testimonial exchange is never sufficient to determine the “correct” degree of credibility owed to a speaker; it is always underdetermined by the evidence. It is therefore impossible to establish with confidence whether a credibility deficit has occurred.

The legal implication of these evidential problems is that not a single legal decision can be impugned on grounds of testimonial injustice. Doing so would require proving the three facts mentioned above, and we believe this is an impossible task. And if individual legal decisions cannot be changed on that basis, it is a concept that is of great theoretical interest, but one that lacks the potential to be used in the analysis of real legal scenarios. As we will see in the next section, other authors are aware of the limitations of Fricker’s original characterization and have offered more liberal accounts. In particular, there is a shift in focus from psychological to structural causes of discrimination, as we will see in section 2.

## 1.2 HERMENEUTICAL INJUSTICE

Many aspects of human experience are poorly understood because we either lack the relevant concepts or the expressive tools to communicate that experience to others. When people belong to a group with scarce social power, they will have less influence over the discussion of social experiences. The collective hermeneutical resource will more likely be attuned to the experiences of the more powerful social groups. A hermeneutical injustice occurs when “a gap in our collective hermeneutical resources puts someone at an unfair disadvantage when it comes to making sense of their social experiences” (Fricker, 2007, p. 1). While testimonial injustice is the result of individual prejudice, hermeneutical injustice is a structural problem in which prejudice has become ingrained in the social fabric.

The most famous example of hermeneutical injustice—which fortunately found a remedy through social activism—is the story of how the term “sexual harassment” became part of the collective conceptual resources available to women who had to endure unwanted sexual advances in the workplace without being able to understand exactly

why they were being harmed. The term appeared in the 1970s in the context of the feminist movement in the United States, after many women repeatedly described being fired because they were harassed and intimidated by men. Lin Farley and her colleagues at Cornell University crafted the term “sexual harassment” to describe the problem and generate interest in the issue (Farley, 1978). In that way, a hermeneutical resource previously unavailable became a useful tool for these women to understand the situation and seek remedy. Catharine MacKinnon (1979) is usually credited with being the first person to offer a legal formulation of the concept.

One might be tempted to attribute hermeneutical injustice to sheer bad luck or bad timing, like being affected by a disease that had not been discovered or understood by medical science at the time. Furthermore, some might argue that sexual harassers are also harmed by the lack of hermeneutical resources, and therefore, that it is incorrect to think of the situation as an injustice that only affects women. Fricker argues forcefully against both claims. In the case of sexual harassment, the gap in our collective hermeneutical resources affects women to a far larger extent than men. The harm endured by women is incomparably greater than that endured by men. This differential effect is unjust. Furthermore, this injustice is not just bad luck. The hermeneutical gap “derives from the fact that members of the group that is most disadvantaged by the gap are, in some degree, *hermeneutically marginalized*—that is, they participate unequally in the practices through which social meanings are generated” (Fricker, 2007, p. 6).

Unlike the case of testimonial injustice, Fricker’s account of hermeneutical injustice does not suffer from evidential problems. The example of sexual harassment makes it clear that it is a real social phenomenon, and since no one is individually accountable for it, there is no need to prove individual responsibility. Some authors have pointed out, however, that Fricker’s account is one species of a more general genus. While many structural inequalities are the result of the social and political forces that shape different societies, it must be acknowledged that some structural inequalities are willfully preserved by a dominant group, creating what Pohlhaus (2012) calls a state of “willful hermeneutical ignorance.” It occurs, in her view, “when dominantly situated knowers

refuse to acknowledge epistemic tools developed from the experienced world of those situated marginally. Such refusals allow dominantly situated knowers to misunderstand, misinterpret, and/or ignore whole parts of the world” (p. 715). Building on the idea of willful hermeneutical ignorance, Dotson (2012) argues that hermeneutical ignorance can also be generated by forcefully excluding groups or individuals from the discussion of social experiences. She calls this obstruction of a person’s epistemic agency, “contributory injustice” (p. 31).<sup>3</sup> On a more hopeful and pluralistic note, Medina (2012) argues that instead of looking for gaps in the hermeneutical resources of society as a whole, one should take into account that many disadvantaged groups create their own interpretative resources. In his book, *The epistemology of resistance* (2013), Medina argues that knowers have a “shared responsibility with respect to epistemic justice for the correction of blind spots and social insensitivities associated with racism and (hetero)sexism” (p. 25). He suggests that members of privileged groups who cannot understand the experience of less privileged members of society have an obligation to abandon their comfort zone and seek “epistemic friction” (p. 26) that will sensitize them to the experiences of the disadvantaged.

## 2. A WIDER CONCEPT OF TESTIMONIAL INJUSTICE

Given the limitations of Fricker’s original concept of epistemic injustice, there is a worry that many forms of epistemic wrongs can go undetected. Anderson (2012), Dotson (2012, 2014), and Pohlhaus (2017) have argued for a wider conception of epistemic injustice. Anderson, for example, states that “we need to get past the prejudice model of testimonial injustice and consider other ways in which disadvantaged social groups can be unjustly denied credibility” (2012, p. 169). In this section we will examine some criticisms of Fricker’s original proposal, and some of the alternative ways of understanding the concept that can be found in the literature. Due to space restrictions, we will only be able to discuss the case of testimonial injustice.

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<sup>3</sup> Fricker’s response to Pohlhaus and Dotson can be found in “Epistemic injustice and the preservation of ignorance” (2016).



The opening example of Fricker's original account of testimonial injustice is of a racially charged testimonial exchange between the police and a black person who is disbelieved because of his race (2007, p. 1). The example reveals Fricker's intention to motivate a socially relevant discussion focused on *systematic* cases of testimonial injustice. Systematic in this case means that there are prejudices "that track the subject through different dimensions of social activity—economic, educational, professional, sexual, legal, political, religious, and so on" (p. 27). Her interest is not in *incidental* cases of testimonial injustice. If a journal rejects a scientist's paper because the editors have a prejudice against a certain research method, the reduced level of credibility harms the scientist as a knower. However, the prejudice in question does not affect the person in other spheres of his or her life.

Fricker's reconstruction of these systematic cases is valuable as a conceptual tool that makes visible many injustices present in the epistemic transactions of social life. It is a contribution to the changes that are necessary to build a more just and equalitarian society. The powerful instrument she has crafted has allowed others to look beyond the conceptual horizon that she originally established. Jennifer Lackey, for example, has argued that the concept of testimonial injustice should be expanded to include credibility excesses. Fricker briefly considers such cases, but she believes that they are not a form of injustice at all because the subject normally suffers no harm. On the contrary, it creates opportunities and raises his self-confidence. These benefits are incomparable to the harm caused by the prejudices that reduce the credibility of an agent. Secondly, although Fricker recognizes that excess credibility might, over time, make a person arrogant and dogmatic to the point that these characteristics can prove disadvantageous to the subject, she thinks it is not reasonable to bring under the same conceptual umbrella the harms created by credibility deficits and excesses. The former occur in individual cases while the latter are the cumulative effect of many instances of credibility excess: "I do not think it would be right to characterize any of the individual moments of credibility excess that such a person receives as in itself an instance of testimonial injustice, since none of them wrongs him sufficiently in itself" (p. 21).

Lackey is not convinced by this argument. She presents cases in which credibility excess produces immediate harm. For example, suppose a black man is regarded as a drug expert just because of his race (Lackey, 2018, p. 153). It is a case of unwarranted excess credibility because there is no reason to infer from the man's race that he should know more about drugs than a non-black person. Also, it produces immediate harm to the person, who will feel disrespected and whose job, personal affairs, and perhaps even his legal status might be affected by his unwanted role as a drug expert.

Lackey's objections to Fricker's proposal go even further. In particular, she wants to reflect on the idea of credibility excess in general. "It is worth pausing here to reflect on the notion of credibility excess in greater detail, especially as it relates to testimonial injustice" (p. 150). A first case occurs when the hearer attributes an unwarranted excess credibility to his own beliefs. Despite having evidence that the speaker is offering valuable testimony, the hearer ends up giving more credibility to his own beliefs despite lacking rational support for them. The example she offers is of a male scientist who disbelieves the claims made by his female colleagues, despite their expertise and the concrete evidence they offer for the claims they make. These epistemic interactions bring out the scientist's sexist prejudice, which blocks him from giving a fair hearing to what his female colleagues say and automatically leads him to privilege his own opinions. Subjects with racist, sexist or classist prejudice tend to replicate such cases of excess credibility in multiple dimensions of social life, generating systematic testimonial injustice. One wonders, however, whether this variety of testimonial injustice is sufficiently different from racism, sexism, and classism as they have been traditionally understood to merit a new conceptualization.

Lackey also calls our attention to cases in which hearers give excess credibility to their peers. To deal with these cases, Lackey indicates that it is necessary to look at the entire conversational context in order to map several epistemic transactions and not just the one that takes place between a hearer and a speaker. It is possible that the credibility due to a speaker A is not recognized because speaker B is unfairly considered the best source of knowledge. The excess credibility conferred on B, in this case, corresponds to the deflated credibility that was no longer

attributed to A (p. 154). This idea clashes with the conceptual contours initially elaborated by Fricker because, according to Fricker, credibility is not subject to distributional problems. It is not a good that, by giving a lot to one person, one runs the risk of leaving another without his share. It is therefore not like land, food, medical care, etc. (Fricker, 2007, pp. 19-20). But is it really not? Let us examine the problem of credibility in the criminal justice system, which is the context that eventually led Fricker to modify her original position on excess credibility.

In criminal justice, where criminal facts are under discussion, the result of the process will ultimately depend on who managed to have their version of the facts as more worthy of credence. In cases of sexual violence, for example, giving credibility to the victim's word is equivalent to denying credibility to the explanatory version offered by the accused. In cases of drug trafficking, a decision based on what was stated by the police means disregarding the factual hypothesis pointed out by the defense and the defendant. And that is what courts do, it must be said, almost by default. In situations like these, in which epistemic transactions are a credibility competition between subjects, excess credibility and reduced credibility are two sides of the same coin.

In addition, it is important to highlight that, unlike incidental testimonial injustices that occur in other contexts, such as scientific and academic exchanges, the testimonial injustices that occur within the sphere of criminal justice are systematic. They are experienced by subjects who already suffer injustices in other dimensions of social life due to their disadvantaged status. Nor should it be forgotten that criminal justice deepens these layers of injustice because it serves to further marginalize its victims: anyone involved in a criminal process (sometimes, conviction is not even necessary) will come to be seen as an unworthy person in several other cases, i.e., stigmatized as a criminal.<sup>4</sup> This is why the correct distribution of credibility within the criminal system is especially relevant.

Fricker's support for Lackey's redefinition of testimonial injustice, as we mentioned above, was largely due to the latter's analysis of the

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<sup>4</sup> A defendant who was not convicted, but who underwent precautionary measures (such as asset seizure, search and seizure, and preventive detention) will hardly leave the justice system intact, even if he is acquitted.

justice system. Before addressing Fricker's current position, let us consider what Lackey (2020) calls "agential epistemic injustice." The terminology chosen by the author refers to a type of testimonial injustice that occurs because the speaker's epistemic agency is neutralized through the use of techniques such as psychological manipulation, coercion, degrading treatment or torture. He is prevented from acting as an epistemic subject. Under pressure, the subject ends up declaring what the prosecutors want him to say. Once he recovers his autonomy and has his epistemic agency restored, the subject retracts what he previously reported.

Lackey points out the paradox in the traditional legal treatment of statements obtained through coercion: when the subject is least in a position to transmit useful information and provide reliable reports of reality, that is when he will have more credibility. "Indeed, the excess given in false confessions quite literally amounts to the state saying that confessors are knowers with respect to the testimony in question only insofar as they are not epistemic agents" (2020, p. 60). From this questionable logic, the confession that was extracted through mistreatment gives rise to an epistemic injustice of the agential type. The injustice is made worse after the forced confession is obtained. Once the agent recovers his epistemic agency, the retraction he offers through the autonomous exercise of his intellectual faculties is promptly discredited.

Investigative-evidential practices are based on the mistaken premise that torture, threat, and degrading treatment represent a fruitful way for the better reconstruction of the facts. We know that this is not correct: when we are put under physical and psychological suffering, we are both encouraged to lie, and depending on the intensity of the procedure, we become more subject to false memories. In these cases, not only does the subject issue false statements about the facts, but he starts to believe in them. That is what happened to Michael Crowe, a 14-year-old teenager, who after 27 hours of police interrogation, came to believe that he had murdered his sister: "I'm not sure how I did it. All I know is I did it."<sup>5</sup> As underlined by Drizin and Colgan (2004, p. 141) when looking into the case, even though Crowe then believed that he

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<sup>5</sup> Michael Crowe's interrogation can be seen in the following video: <https://www.youtube.com/watch?v=yJcqjPxtIXc&t=345s>

had taken his sister's life, he was unable to give details of how he had done it. Crowe was prosecuted and convicted. Fortunately, by a stroke of luck, evidence (DNA) was found that the crime had been committed by Raymond Tuite. However, even after being acquitted, the damage caused to Crowe and his family by this flawed investigation is undeniable. Epistemic injustice of the agential type is the main vector of production of these damages. It combines with "tunnel vision" (Meissner & Kassir, 2004; Findley & Scott, 2006), working as the perfect combination to make decisions with total disregard for the evidence and the search for truth. And if this happened to Crowe, a white, middle-class teenager, it is not difficult to imagine what is systematically done against black people. According to this logic, the criminal justice of different legal systems is an instrument of control of the most vulnerable portions of the population.

Lackey (2022) points out that something similar occurs with eyewitness identification testimony. Examining the problem in the US criminal system (and replicated in many other systems), Lackey observes that the practices traditionally applied by the police in eyewitness identification are manipulative, deceptive, or coercive. Through epistemically questionable procedures, the justice system distorts the memory of the victims/witnesses and makes them certain that the culprit is right in front of them. This is a case of epistemic agential injustice to the extent that excess credibility is given to an identification obtained through manipulation and suggestion, that is, taking the witness as a knower precisely when her chances of acting as a knower have been obstructed. Techniques such as biased instructions ("we caught the culprit and we need you to come and recognize him"), show up (either by photo or in person), positive feedback ("you correctly identified the culprit!") are just some of the ways in which the witness' epistemic agency is curtailed at the time of the identification test.

These are the kind of arguments that led Fricker to accept that the concept of testimonial injustice also applies to cases of excess credibility. In "Institutionalized testimonial injustices: The construction of a confession myth," translated into Portuguese for this number of the RBDPP, Fricker points out that these cases constitute institutionalized testimonial injustices:

I would like here to contribute a further thought among the various suggestions in the context in the literature, and in particular to pick up on Jennifer Lackey's recent suggestion that there is a distinctive and important kind of testimonial injustice she calls "agential testimonial injustice," which is exemplified in the phenomenon of false confession in the context of police interrogation. This is what I shall build around to advance the idea of institutionalized testimonial injustices" (Fricker, 2023, pp. 45-46).

Her objective is to underline the role of institutions in consolidating agential injustice in the justice system, resisting an approach that presents individual practices as the main problem to be solved. Thus, while it is true that Fricker still defends the pertinence of the epistemology of virtues and continues working on vices and virtues, she does so as a strategy for building an institutional ethos compatible with the value of avoiding unjust convictions: "I would urge that when we are concerned with some of our most important values, such as not convicting the innocent, the more ethically laden language of virtue and vice is surely apt because we care about the institutional ethos that departs from those values" (Fricker, 2023, p. 47).

In developing her argument, Fricker rightly points to the incorporation of the REID interrogation model (Inbau et al., 2005) into the training of US investigators and law enforcement. REID interrogation consists of a combination of steps that must be followed with the direct objective of obtaining a confession. These steps, in turn, correspond to three phases: custody and isolation (the suspect is detained and isolated; anxiety and uncertainty are generated in order to weaken resistance); confrontation (the suspect's guilt is assumed and he or she is confronted with alleged incriminating evidence that may not be genuine, denials are rejected, even if they happen to be true, and the consequence of continued denial is emphasized), and minimization (the interrogator tries to gain the suspect's trust and provides face-saving excuses for the crime, including suggesting that it was an accident or that the victim deserved it). It is not difficult to see why the REID method is flagged by psychology experts as a facilitator of false confessions (Moscatelli, 2020). Fricker correctly argues that incorporating REID interrogations into American police investigations represents the institutionalization

of a biased presumption of guilt, insofar as it ascribes vicious epistemic powers to investigators.

Fricker dissects the vicious testimonial interactions in question into three phases:

- An initial implementation of the prejudice of presumption of guilt by adopting the REID method.
- A second phase in which the agential testimonial injustice is carried out (since the questioned person is denied the possibility of intellectual agency, he confesses and is attributed excess credibility).
- A last phase in which he recants his testimony, without, however, being able to reverse the effects unfairly generated by the previous confession.

This behavior is not just the result of the individual choices of the interrogators. As emphasized by Fricker, the institutional component of the criminal system is strongly present in each of the three stages. The police, as an institution, train their investigators to extract confessions that lack epistemic reliability, especially from the most vulnerable segments of the population. We agree with her emphasis on the institutional character of this dynamic. From the beginning of a criminal investigation, to its culmination in an erroneous conviction, a criminal action goes through various stages and has the participation of various actors and, of course, various institutions. It would be interesting if future research were dedicated to detailing the different institutional contributions that, in addition to police officers, prosecutors, public defenders, and judges, lead to an unjust conviction.

The approach that highlights the institutional aspect of epistemic injustice certainly helps in building more robust and potentially more efficient solutions to a problem with such deep roots. Thus, Fricker's recent position, embracing Lackey's more liberal conceptual proposal, ends up ensuring greater practical applicability of the concept of epistemic testimonial injustice.

This institutional focus can be complemented by José Medina's approach to epistemic injustice. Medina underscores the need to extend our gaze beyond inter-individual epistemic transactions to capture not just a

single moment, but the multiple transactions that make up social life. Even before Lackey, Medina had already pointed to excess credibility as a kind of testimonial injustice (Medina, 2011). In Medina's terms, the detection of epistemic injustice requires looking at chains of social interactions that cannot be reduced to isolated pairs: "Because epistemic injustices are temporally and socially extended, they call for a sociohistorical analysis that contextualizes and connects sustained chains of interactions, being able to uncover how contributions to justice and injustice appear and develop in and cross sociohistorical contexts" (p. 17).

In our view, Medina's contextualist proposal is adequate to make visible the unfair distribution of credibility in social life. Furthermore, it can and should be combined with Fricker and Lackey's institutional proposals to provide a greater critical understanding of why our institutions work the way they do (and not as we would like them to). The complementary nature of these approaches becomes clearer from reading "Epistemic activism and the politics of credibility: Testimonial injustice inside/outside a North Carolina jail" (Medina & Whitt, 2021). In this article, the authors focus on the reality of pre-trial detainees at a North Carolina jail and detect that inmates are systematically victims of testimonial injustice. The stigmatization that has already marked them as defendants means that they are not regarded as knowers, even when it comes to their living conditions. Who better than them to give a testimony about what it's like to be a detainee? Paradoxically, precisely because they have this "expertise" (because they were labeled as suspects), their testimony will not be taken into account: "They are viewed as unreliable in many senses, including in their capacity as truth-tellers and narrators of their own experiences" (p. 299).

In this context, the authors introduce an organization called the Inside-Outside Alliance (IOA). In a scenario of almost total invisibility of those in custody and their living conditions, the IOA began to bridge the gap between prisoners and the world beyond bars. They work to pressure institutions and political powers to guarantee the dignity of detainees. Medina and Whitt point to the importance of this relationship between the oppressed and their allies, calling the political engagement that results from it "epistemic activism." The name makes sense, since the purpose behind organizations such as the IOA is to amplify the voice



of detainees, contributing to their epistemic empowerment process. This epistemic empowerment, in turn, has the potential to encourage greater organization inside the prison, and thus to develop ways of collectively resisting, as far as possible, institutional attempts to silence their voices. Finally, we believe that Medina and Fricker's recent ideas seem to go hand in hand, even though Medina remains more practical than Fricker. But the point is that both Fricker and Medina argue that it is essential to think of solutions that include institutions and not just individuals. Although Fricker always says that the political dimension that contemplates structural solutions to epistemic injustice was already present in her 2007 work, it is clear that the proposals that followed contributed substantially to bring out the political dimension of the problem. It was this movement that generated the broader version of the concept, transforming it into a useful tool for various dimensions of social life, including the scope of criminal justice.

### **3. APPLICATIONS OF THE CONCEPT IN RECENT LEGAL CASES**

The concept of epistemic injustice has started to appear in judicial opinions and analyses in several countries around the world. Here we want to present some examples of how it has been used, sometimes in a very liberal sense that does not square easily with Fricker's original characterization, which we described in section 1.

One of the main areas in which epistemic injustice has been a useful tool of analysis is in cases of sexual violence against women. There are deeply ingrained doubts about the veracity of women alleging rape. There is plenty of evidence that credibility discounts are routinely meted out by police officers, prosecutors, judges, and jurors in cases of sexual violation (Tuerkheimer, 2017, p. 3). Also, the way that sexual violence in general, and rape in particular, is defined in many legal codes can be seen as a case of hermeneutical injustice. There is a strong tendency to associate rape with force and violence. This ignores the fact that many cases of sexual assault occur within the household and the rapist is someone the victim knows well. Many women offer no resistance in such cases and are not even sure whether they constitute rape under the law;

for example, many women believe marital rape does not fall under the definition of rape and do not report it. The absence of violence is often used to dismiss rape accusations, an attitude that reinforces the idea that women are untrustworthy and emotionally unstable (p. 25). In Debra Jackson's words,

When it comes to experiences of sexual harassment and sexual assault, the testimony that elicits social and legal response is generally restricted to that which conforms to social scripts about legitimate victims. For example, affluent white women who are sexually assaulted by strangers and suffer substantial injuries are the most likely to be believed. Their experience fits the model of "real rape." But those whose experiences do not conform to the model of "real rape" are those which are denied uptake and choral support. Women who are sexually assaulted by acquaintances are unlikely to be believed due to the wide acceptance of rape supportive attitudes (2018, p. 5).

In Colombia, the Special Jurisdiction for Peace (JEP) explicitly uses the concept of testimonial injustice in its *Communication Protocol with Victims of Sexual Violence* (Jurisdicción Especial para la Paz, 2018). The concept is used to avoid revictimization and stigmatization of women and LGBTI victims in the Colombian internal armed conflict.

In the case of Brazil, epistemic injustice has become a very useful conceptual tool to give visibility to the unequal economy of credibility that characterizes its criminal justice system. Women have their credibility reduced both when they are victims and when they are accused of having committed a crime. When they look for the police to report having suffered a gender crime such as sexual assault or domestic violence, their testimony is commonly received with distrust. Sexism permeates the reasoning patterns of most police officers. And because they assume they probably won't be considered knowers, Brazilian women stop seeking police help in most cases.<sup>6</sup> This is an example of what Dotson (2011)

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<sup>6</sup> According to the recently issued report "Visível e Invisível 2023," which interviewed 1042 women in 126 Brazilian cities in January 2023 to detect violence against them in the last 12 months, 28.9% of the women answered affirmatively to the question about whether they suffered any violence during

calls “testimonial smothering,” a silencing practice in which speakers recognize that their audience is unwilling to offer them a fair hearing, and therefore limit their testimony. Dotson regards testimonial smothering as a form of epistemic violence.

As expected in male-dominated societies such as Brazil, women continue to have their reports disregarded when they sit in the dock. Accused women who are mothers of children under the age of 12 have the right to replace pre-trial detention with house arrest,<sup>7</sup> but despite this, their reports about their family situation are systematically disregarded by magistrates, male and female alike. In their view, these mothers need to prove that their children really need them. That is, these judges deny giving credibility to the women’s reports because they give themselves excess credibility. From the pedestal of their experience, they believe that they are the ones who know best what happens in the lives of those families, never the mothers. This is what the “Free Mothers 2021” report issued by the IDDD (*Instituto de Defesa do Direito de Defesa*) shows.<sup>8</sup>

Finally, it would not be possible to leave out the testimonial injustices that the Brazilian justice system commits against the black population, from the preliminary investigation to the almost automatic condemnatory outcomes. The convictions of innocent people on the basis of invalid witness identification can be examined from the perspectives of Lackey and Fricker. In investigations of thefts, it is often the case that the word of the defendant (black, poor and from the *favela*) is not taken

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this period. Of these, only in 22.6% of cases did the victim decide to go to a police station. 45% of the women responded that they did nothing in the face of aggression. The report is available here: <https://forumseguranca.org.br/wp-content/uploads/2023/03/visiveleinvisivel-2023-relatorio.pdf>

<sup>7</sup> As established by Law 13.769/18 and by the collective HC n. 143.641/SP of the Supreme Court.

<sup>8</sup> In 2020, IDDD went to the Pirajuí Women’s Penitentiary, in the interior of São Paulo, which guards 196 women. 152 women answered the question about whether they had children under 12 years old. The answer of 105 of them (69%) was affirmative. Their right was systematically violated because their testimony was discredited by the Brazilian justice system. The report is available here: [http://www.iddd.org.br/wp-content/uploads/2020/07/Maes\\_Livres\\_IDDD.pdf](http://www.iddd.org.br/wp-content/uploads/2020/07/Maes_Livres_IDDD.pdf).

into account. When he is heard (because in many cases he is not even heard at all), his version is quickly disqualified. Recently, the Superior Tribunal of Justice had the opportunity to acquit Alexandre Augusto Andrade da Resurreição (HC n. 790.250, Min. Rogerio Schietti), unjustly convicted by the Court of Justice of Rio de Janeiro. The version of the facts offered by the accused was that the car used in the theft of which he was accused had been his, but that he had sold it, and that he was home exchanging audios with friends on WhatsApp during the time of the theft. Despite proof of sale of the car, Alexandre, who is a public servant of the respected Oswaldo Cruz Foundation (Fiocruz), with a college degree and enrolled in a master's degree in pharmacy, was convicted because the victim recognized him, based on his photograph, with 100% certainty. The formula consists of combining agential testimonial injustice against the victim (who is subjected to a vitiated witness identification method and who, despite not having been able to exert his epistemic agency, has credibility attributed) and reduced credibility against the accused, who, even in the presence of exculpatory evidence, is disregarded as a knower.

In addition to these contaminated cases of witness identification, it is also important to trace those cases in which excessive credibility was automatically attributed to the police without any concern for obtaining other versions. During police operations, police statements are systematically given more credibility than the testimony of victims of police violence. In one case, the police version was deemed more credible than that of two relatives of the people who died during the operation (Matida, 2020). In addition, at the end of 2021, the STJ decided to acquit a young adolescent (AgResp n. 1.940.381/AL, Min. Ribeiro Dantas) previously convicted of an infractional act equated to the crime of homicide based only on testimony given by a police officer who had not even witnessed the events (hearsay testimony). The hypothesis of legitimate defense offered by the accused was never investigated, which meant a lost chance to present exculpatory evidence (Morais da Rosa & Rudolfo, 2017). There was an undeniable reduction in credibility for the accused because unwarranted credibility was attributed to the police (Matida et al., 2022; Nardelli, 2023). It is worth mentioning that, in this case, a judicial decision expressly mentions the epistemic injustice committed against the accused.

#### 4. REMEDIES FOR EPISTEMIC INJUSTICE

In this final section we want to briefly focus on *remedies* to epistemic injustice. Fricker's original solution to both testimonial injustice and hermeneutical injustice is the cultivation of two corresponding virtues. The virtue of *testimonial justice* allows the hearer to detect and correct the influence of identity prejudice on his or her credibility judgments (2007, p. 6). The virtue of *hermeneutical justice* "is an alertness or sensitivity to the possibility that the difficulty one's interlocutor is having as she tries to render something communicatively intelligible is due not to its being a nonsense or her being a fool, but rather to some sort of gap in collective hermeneutical resources" (p. 169). Both solutions assume that hearers will be able to identify instances of epistemic injustice that need to be corrected. This is a highly dubious assumption in the case of testimonial injustice, as we argued in section 1. Even if hearers could identify these instances, prejudice is difficult to control and correct even by the most conscientious and well-intentioned agents (Alcoff, 2010). The failure of implicit bias training programs adopted by many police departments around the world is further proof of the difficulties of attempting to correct for prejudice at the individual level (Carter et al., 2020).

From her presentation in *Epistemic injustice*, one might end up with the impression that Fricker only defends an individualistic solution to both forms of injustice. On the contrary, in several subsequent publications (e.g., 2010, 2012) she has argued that to counter systematic discrimination it is necessary to think in terms of collective virtues and responsibilities. Only collective action and stronger institutions can offer some resistance to systematic discrimination. Such changes shift responsibility for the prevention and mitigation of implicit prejudice from individual agents to institutions. Nonetheless, in Fricker's view these structural changes require the agency of virtuous individuals who can promote and jumpstart them.

Other authors have developed further the idea of virtuous institutions. Anderson (2012), for example, argues that instead of focusing on individual virtues we should concentrate on the general principles that govern our systems of testimonial gathering and

assessment. Just like transactional theories of justice can lead to disastrous consequences for the collective, individual theories of virtue that only regulate “the local properties of transactions and not their global effects” (p. 164) can be cumulatively bad even when all individual interactions are epistemically just. Structural or systemic theories of justice—for example, Rawls’ (1971) theory of justice—impose constraints on permissible rules to control “the cumulative effects of individual transactions that may be innocent from a local point of view” (p. 164). In a similar vein, Anderson argues, the rules that govern our epistemic practices can be designed to keep in check the effect of prejudice, “at least in institutional settings such as criminal and civil trials” (p. 168). Such structural remedies can be seen as virtue-based remedies for collective agents. Among the areas that are ripe for structural intervention are: differential access to markers of credibility such as high-quality education and the use of standardized grammar; ingroup favoritism, or bias in favor of groups to which one belongs; and the shared reality bias, which is the tendency of individuals who interact frequently to converge in their perspectives about the world. Both ingroup favoritism and the shared reality bias “will tend to insulate members of advantaged groups from the perspectives of the systematically disadvantaged” (p. 170). This isolation generates hermeneutical injustice, which in turn exacerbates structural testimonial injustice, “as it is hard to give credence to people whom one finds unintelligible” (p. 170). Institutions that promote epistemic virtues will thus be an antidote to both forms of epistemic injustice.

As Anderson points out, filling out the details of all the possible institutional changes that will prevent, mitigate, or correct epistemic injustice would fill many books. We would add that the remedies are not universal and, at least in the case of the judicial system and its rules of procedure, they should be attuned to the specific socioeconomic circumstances in which the law is applied. Finally, any reform of the judicial system that pretends to tackle the problem of prejudice and unwarranted stereotypes must be based on solid evidence provided by the social sciences and not on wishful thinking (Páez, 2021).

## 5. CONCLUSION

In this paper we have presented a general outlook of the concept of epistemic injustice, with a special focus on testimonial injustice, from its origin in the work of Fricker, to some of the most recent developments, including its application in legal contexts. We can detect a shift in focus from singular discursive exchanges distorted by prejudice —what we have called the narrow version of the concept— to a wider conception that focuses on social and knowledge structures whose epistemic rules and principles have discriminatory effects. Lackey, Anderson, Medina, Dotson, Pohlhaus, and Fricker —in her most recent work— all highlight the institutional aspects of testimonial injustice. This shift in focus helps in building more robust and potentially more efficient solutions to a problem with such deep roots.

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### Additional information and author's declarations (*scientific integrity*)

*Acknowledgements*: The authors would like to thank Miranda Fricker and Migdalia Arcila-Valenzuela for useful discussion of some of the topics in this article.

*Conflict of interest declaration*: the authors confirm that there are no conflicts of interest in conducting this research and writing this article.

*Declaration of authorship*: all and only researchers who comply the authorship requirements of this article are listed as authors; all coauthors are fully responsible for this work in its entirety.

- *Andrés Páez*: conceptualization, methodology, data curation, investigation, writing –original draft, validation, writing–review and editing, final version approval.
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*Declaration of originality*: the authors assure that the text here published has not been previously published in any other resource and that future republication will only take place with the express indication of the reference of this original publication; they also attest that there is no third party plagiarism or self-plagiarism.

**HOW TO CITE (ABNT BRAZIL):**

PÁEZ, Andrés; MATIDA, Janaina. Editorial of dossier “Epistemic Injustice in Criminal Procedure”. *Revista Brasileira de Direito Processual Penal*, vol. 9, n. 1, p. 11-38, jan./abr. 2023. <https://doi.org/10.22197/rbdpp.v9i1.821>



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