



Article submitted to the similarity system



Book Review

Jennifer Lackey, *Criminal Testimonial Injustice*, Oxford: Oxford University Press, 2023, 224pp.

ROBERT VINTEN

<https://orcid.org/0000-0002-9919-6503>

Universidade Nova de Lisboa

Campus de Campolide

Lisboa

Portugal

rvinten@fcsb.unl.pt

Article info

CDD: 300.1

Received: 14.08.2024; Accepted: 09.09.2024

<https://doi.org/10.1590/0100-6045.2024.V47N4.RV>

Keywords

Epistemic Injustice

Lackey

Miranda Fricker

False confessions

Testimony

Abstract: At the heart of Jennifer Lackey's recent book is highly original work in identifying a form of testimonial injustice that is

quite distinct from those hitherto identified. Since the publication of Miranda Fricker's *Epistemic Injustice* there has been an enormous flurry of work done on injustices where people are wronged as givers of knowledge (testimonial injustice) or where people are wronged in their capacity as a subject of social understanding (hermeneutical injustice). Fricker's focus in that book was on cases where people are not believed or where deflated credibility is given to their word as a result of prejudice in the hearer. However, Lackey points out that there are many instances where people are wronged not by being granted too little credibility but by being given too much credibility. False confessions, guilty pleas, and eyewitness testimony are sometimes taken as sufficient to imprison people or even execute them, despite the fact that the testimony in question has been extracted through manipulation, deception, and coercion and despite the fact that other evidence is lacking or conflicts with the false confessions, guilty pleas, or eyewitness testimony.

When somebody confesses to a crime their confession is taken as solid evidence to find them guilty of the crime in question. Similarly, when people plead guilty to a crime in making a plea deal, the United States criminal justice system then regards them as *being guilty*, and the person, in making the guilty plea convicts themselves. Moreover, it seems that there is good reason for this. People would surely not confess to a crime that they did not commit or plead guilty to a crime they did not commit because it is not in their interest to do so. Particularly in the case of serious crimes, such as murder or rape, the consequences of confessing to the crime could include losing one's job or one's home, being separated from family and friends, years in prison, or even death.

Another form of evidence that is often taken to be strong evidence of a suspect's guilt is eyewitness identification or eyewitness testimony. In the United States people are sometimes sentenced to death and executed solely on the basis of eyewitness testimony (83). Again, it seems that there is good reason for taking eyewitness testimony to be solid evidence of guilt. If it is true that somebody saw that something happened then it is the case that it happened. We very often take perceptual evidence to be decisive in our

everyday interactions with one another. If I am on holiday with my family and I tell them that the people we spoke to at breakfast were down on the beach in the afternoon and my family asks me how I know that and I respond ‘well, I saw them there’, then they will likely take the issue to be settled and come to believe that the people we spoke to at breakfast were down at the beach unless they have some reason to think I am lying or have some kind of other evidence that conflicts with what I have said. If somebody confidently asserts that they have seen something and we have no reason to think they are insincere then it seems we should take what they have said to be true.

One of the things that Jennifer Lackey does in her recent book *Criminal Testimonial Injustice* is to bring these common sense assumptions into question. Although it might initially seem implausible that innocent people would confess to crimes that they did not commit there are many documented cases of people doing precisely that. Among the 375 post-conviction DNA exonerations in the United States since 1989 29% involved false confessions (31) and, as Kassin et al. point out this “...does not include those false confessions that are disproved before trial, many that result in guilty pleas, those in which DNA evidence is not available, those given to minor crimes that receive no post-conviction scrutiny, and those in juvenile proceedings that contain confidentiality provisions” and so there are likely to be many more cases involving false confessions (Kassin et al., 2010, 3; cited on 31n6). Indeed, Jennifer Lackey provides us with good reason to expect that there will be many more cases in explaining why it is that people confess to crimes that they have not committed.

One of the ways in which people have been made to confess to crimes is through police torture. In 1934 three black men, Arthur Ellington, Ed Brown, and Henry Shields, were found guilty of murdering Raymond Stuart, a white planter and sentenced to death, based solely on their confessions. This is despite the fact that it was clear to both the judge at the trial and the Mississippi Supreme Court, which affirmed their convictions, that the confessions had been extracted by hanging Ellington from a tree and then

repeatedly whipping him and through whipping Brown and Shields until they confessed. Although it was determined in 1936 that confessions extracted through police violence were not admissible as evidence, police torture has continued in the decades since then. An example of this is the 120, mostly black, people, who were tortured by the Chicago Police Department under Commander Jon Burge between 1972 and 1991¹ (32-4). American police now have to hide the fact that they are torturing suspects but the American government has quite openly admitted to using and has defended ‘enhanced interrogation techniques’ on people held in American bases (McGreal, 2011) and the Military Commissions Act of 2006 denied detainees the right to seek relief from mistreatment in court, including torture (United States, 2006).

However, police do not have to resort to torture in order to extract false confessions from people. Police often interrogate suspects for a very long period of time and place them under stress. Lackey cites Drizin and Leo’s study (2004) which found that 34% of interrogations lasted 6-12 hours, 39% lasted 12-24 hours, and the average time was 16.3 hours (36). Police use minimization and maximization tactics, where they either minimize the consequences of confessing or exaggerate the potentially bad consequences of not confessing (36-7). Moreover, police in the United States are allowed to lie to suspects and they have regularly told suspects that they have evidence against them that they do not have. Police officers manipulate, deceive, and coerce suspects into making confessions. This is not just an occasional problem with ‘bad apples’ in the police but is built into widely used, officially endorsed, interrogation techniques. One of the most widely used interrogation techniques is the Reid technique and the Reid technique encourages police to lie to suspects about the evidence they have (38, 133).

Lackey uses the case of Marty Tankleff to illustrate how the police have used the ‘false evidence’ tactic to extract false

¹ <https://chicagotorturejustice.org/history>

confessions (38). Tankleff, aged 17, in 1988, woke to find his parents had both been stabbed and bludgeoned. His mother was dead and his father was unconscious. He called the emergency services and administered first aid to his father. When the police arrived they took him to the police station and interrogated him for hours. The police told him that they had found his hair in his mother's hand and that his father had awoken from his coma and told them that his son was the culprit. Tankleff was confused, thinking that his father would not lie, and wondered if he could have perhaps attacked them and blacked it out. He signed a confession but then immediately recanted. The police had lied to him about the evidence. There was no physical evidence linking him to the crime and his father never regained consciousness. Tankleff was sentenced to 50 years to life in prison, based solely on his confession but after years of fighting for justice he was eventually released in 2007 and all charges against him were dropped in 2008 (38; Kassir et al., 2010, 17-18; 2024).

The situation with plea deals is similar to the situation with false confessions in terms of the tactics used by police. Police try to convince suspects that confessing is the best bet by saying that the consequences of taking the case to trial would be much worse than simply pleading guilty (127). Prosecutors engage in a practice known as 'charge stacking' where they increase the number of charges against the suspect in order to increase the severity of the possible sentence. The charges brought will often be redundant: "For instance, in addition to armed robbery, a prosecutor might stack on aggravated assault, theft, possession of a weapon, use of a firearm during the commission of a crime, and so on" (130). In the case of plea deals, as in the case of false confessions, police can lie about the evidence that they have against the suspect and withhold exculpatory evidence (133), so even innocent suspects might think they are better off taking a plea deal than risk a lengthy sentence or even death by going to trial. This again shows that the assumption that people would not plead guilty to a crime they did not commit because it is against their own interests is mistaken. Innocent people might very well feel that it is in their best interest to confess to a crime they did not commit if the police have

given them the impression that the evidence points to them committing the crime and the consequences of going to trial could be very severe.

Problems of police manipulation, deception and coercion also reappear in the case of eyewitness testimony extracted through interrogations. Eyewitnesses are sometimes threatened with awful consequences for failing to produce an identification of the suspect in a crime, such as arrest and loss of children (83-5). Eyewitnesses are manipulated by cues from interrogators (e.g. telling the eyewitness that other eyewitnesses have identified a certain person), by showing them a photograph of only one suspect, and by presenting line-ups in such a way that only one person in the line-up fits the description of the perpetrator of the crime (83). Moreover, the conditions in which people witness crimes are very often very dissimilar to the case described earlier of identifying people seen at breakfast down at the beach. In witnessing a crime, especially a serious crime, the eyewitness is in a stressful situation and stress is known to decrease the reliability of eyewitness identification. If a weapon is involved in a crime then people tend to focus on the weapon and not upon the physical characteristics of the perpetrator of the crime and crimes will very often be over quickly and are quite likely to happen at night (92-3). The unreliability of eyewitness testimony means that it is the “leading case of false convictions in the United States” (88; Vallas, 2011, 98).

The manipulative, deceptive, and coercive (sometimes physically coercive) methods of police in the United States give us good reason to think that many innocent people are imprisoned there. One of the shocking statistics in Lackey’s book is that 97.4% of federal felony convictions in the United States are the result of guilty pleas and the rate of state felony convictions is similar (7). This means that only a tiny proportion of those convicted of felonies in the United States actually get a trial. Given that the standard of proof is much lower when it comes to guilty pleas rather than in trials

(probable cause² rather than proof beyond reasonable doubt) people can be convicted despite there being very little evidence of their guilt (136). In addition to these concerning facts about those who are convicted there is also the fact that one fifth of people incarcerated in the United States have not been convicted at all. The number of U.S. citizens who are incarcerated but unconvicted has grown rapidly in recent decades and now stands at 470,000, the highest in the world (Smith et al., 2021). The United States also has the highest prison population in the world³ and the second highest rate of incarceration in the world⁴.

Of course, Lackey is not the first to recognize that there are profound, systemic problems in the American justice system. She draws on work by people like Rod Lindsay, Gary Wells⁵ and Saul Kassin as well as upon the work of organisations like the Innocence Project⁶. However, the kind of information that she gathers together in her new book is not as widely known as it should be and it is enormously important that people should be alert to the deep problems in the American justice system given that millions of people are imprisoned in the United States. She demonstrates that there are very widespread and systemic injustices powerfully and clearly.

Moreover, at the heart of the book is highly original work in identifying a form of testimonial injustice that is quite distinct from those hitherto identified. Since the publication of Miranda Fricker's *Epistemic Injustice* there has been an enormous flurry of work done on injustices where people are wronged as givers of knowledge (testimonial injustice) or

² Probable cause is “more than a bare suspicion but less than evidence that would justify a conviction” (Schehr, 2018, 64-5)

³ The largest “in the history of human civilization” according to Matt Taibbi (2014, 2)

⁴ Only Sechelles incarceration rate is higher and no other country comes close (O’Hear, 2018, Q31).

⁵ See, for example, Lindsay, R. C. and Wells, G. L. (1985).

⁶ See, for example, Innocence Project (2009).

where people are wronged in their capacity as a subject of social understanding (hermeneutical injustice). Fricker's focus in that book was on cases where people are not believed or where deflated credibility is given to their word as a result of prejudice in the hearer⁷. However, Lackey points out that there are many instances where people are wronged not by being granted too little credibility but by being given *too much* credibility. The injustices discussed above, of false confessions, guilty pleas, and eyewitness testimony being taken as sufficient to imprison people or even execute them, despite the fact that the testimony has been extracted through manipulation, deception, and coercion and despite the fact that other evidence is lacking or conflicts with the false confessions, guilty pleas, or eyewitness testimony, are cases where people are believed and yet we have good reason to doubt that what they are saying is true.

While it is true that others have argued that testimonial injustice can be the upshot of excessive credibility being given to someone's testimony⁸, what is distinctive about Lackey's discussion is that she discusses excess credibility in connection with *epistemic agency*, which is grounded in the subject's responsiveness to reasons or evidence. If a suspect is deceived by the police about the evidence that the police have then the suspect is not able to respond to the reasons or evidence appropriately. Their responsiveness to reasons is *exploited* by the police to get the police the result they want (a confession or a guilty plea). If an interrogator coerces an eyewitness to get a identification then they *subvert* the epistemic agency of the eyewitness. The suspect is no longer thinking rationally about what they saw and whether the suspect in a line-up is the person they saw but is instead forced to make a practical decision concerning the consequences of making an identification for their life or

⁷ In the introduction to *Epistemic Injustice* Fricker says that "Testimonial injustice occurs when prejudice causes a hearer to give a deflated level of credibility to a speaker's word" (2007, 1).

⁸ See, for example Medina (2011) and Davis (2016).

livelihood. The eyewitness is compelled to cooperate with the authorities in giving them what they want even if they are unsure about what they saw or whether the person in a line-up is the person they saw committing the crime. Manipulative, deceptive, and coercive behaviour from police and prosecutors circumvents, exploits, and subverts the epistemic agency of suspects and eyewitnesses. The suspect who is manipulated into giving a false confession is a victim of what Lackey calls *agential testimonial injustice* (57). In a case of agential testimonial injustice the speaker is wronged, in the first place, by having their testimony extracted through manipulative, deceptive, or coercive means, but then they are also wronged when their testimony is given an excess of credibility because they are regarded as a giver of knowledge only when their testimony has been extracted (63).

In opposition to the one-directional model of testimonial injustice, where injustices always result from prejudice and a credibility deficit being afforded to the speaker, Lackey offers up a multi-directional model of credibility assessments where speakers might be wronged by being disbelieved in some instances but by being given too much credibility in others. The credibility assessments people make interact with prejudices in a variety of different ways. For example, women reporting sexual assaults are all too often given too little credibility however in cases where the suspected perpetrator of the assault is black and the victim is white the testimony of white women is often given an excess of credibility, as a result of the racist belief that a white woman would not voluntarily have intercourse with a black man (149).

So, Lackey's book is both a powerful reminder of profound injustices in the American justice system and a highly original work in terms of philosophical discussion of testimonial injustice. However, that is not to say that it is beyond criticism. It is doubtful that anyone would accept the one-directional model that she sets up as the foil for her multi-directional model in the crude form that she presents it (148). For example, Lackey's discussion of the prejudice involved in testimonial injustice restricts itself to identity prejudice but Miranda Fricker, who Lackey presents as an

example of an adherent to the one-directional model, quite explicitly adheres to a broader conception of prejudice than this. One of the examples that Fricker uses is the case of referees at a science journal who have a prejudice against a certain research method, resulting in testimonial injustices being done to writers who employ that method when they submit material to the journal. The injustice in that case is what Fricker calls an *incidental* testimonial injustice (as opposed to *systematic* testimonial injustices which involve prejudices that track a subject through different dimensions of social activity (2007, 27)). Fricker says that the referees are prejudiced since they are “resistant to the evidence because of some countervailing motivational investment” (2007, 35). But if prejudice means being resistant to evidence due to some kind of affective or motivational investment then Fricker’s model is straightforwardly applicable to the kind of cases Lackey discusses, of police officers or prosecutors ignoring evidence because they are invested in demonstrating the guilt of a suspect rather than carefully examining all of the available evidence to get at the truth of the matter. Indeed, in her recent work, Fricker has done exactly this (Fricker, 2023(a) and 2023(b)).

However, Lackey is correct that in *Epistemic Injustice* the emphasis was on cases where speakers are wronged by receiving a credibility deficit as a result of identity prejudice and although Fricker’s model allows for the sort of cases that Lackey discusses Fricker did not in fact discuss cases like those and, moreover, Fricker thinks of cases where people are wronged as a result of being given an excess of credibility as so exceptional as to not warrant much discussion in her book. Fricker denies that “any token cases of credibility excess constitute a testimonial injustice” and says that “The primary characterization of testimonial injustice... is a matter of credibility deficit and not credibility excess” (2007, 21). In *Criminal Testimonial Injustice* Lackey has demonstrated that cases of testimonial injustice where the speaker is granted an

excess of credibility are both quite common and highly significant.⁹

Author contributions: All authors contributed to the discussion and writing of the manuscript.

Funding: Funded by Fundação para a Ciência e a Tecnologia (FCT), grant number: 2022.01699.CEECIND/CP1725/CT0037.

Associated project:

DOI 10.54499/2022.01699.CEECIND/CP1725/CT0037

Disclosure Statement: No potential conflict of interest was reported by the author.

References

- Davis, E. (2016). 'Typecasts, Tokens, and Spokepersons: A Case for Credibility Excess as Testimonial Injustice.' *Hypatia* 31: 485-501.
- Drizin, S. A. and Leo, R. A. (2004). 'The Problem of False Confessions in the Post-DNA World', *North Carolina Law Review*: 891-1008.
- Fricker, M. (2007). *Epistemic Injustice: Power & the Ethics of Knowing*, Oxford: Oxford University Press.
- Fricker, M. (2023a). 'Institutionalized Testimonial Injustices: The construction of a Confession Myth', *Journal of Dialectics of Nature* (Special Issue on Epistemic Injustice, ed. Huiren Bai), Vol. 45, Issue 7.

⁹ I am grateful to Miranda Fricker for discussing prejudice with me at the conference The European Face of Political Epistemology 2.0, in Cres, Croatia, in July 2024.

- Fricker, M. (2023b). ‘Diagnosing Institutionalized “Distrustworthiness”’, *The Philosophical Quarterly*, Vol. 73, Issue 3.
- Innocence Project (2009) ‘Reevaluating Lineups: Why Witnesses Make Mistakes and How to Reduce the Chance of a Misidentification’, 1-33.
- Kassin et al. (2010) ‘Police-Induced Confessions: Risk Factors and Recommendations’, *Law and Human Behavior* 34: 3-38.
- Lindsay, R. C. and Wells, G. L. (1985) ‘Improving Eyewitness Identifications from Lineups: Simultaneous Versus Sequential Lineup Presentation’, *Journal of Applied Psychology* 70: 556-64.
- Martytankleff.org. ‘The Story’ (2024) accessed 04/08/2024, <https://www.martytankleff.org/the-story/>.
- McGreal, C. (2011). ‘Dick Cheney defends use of torture on al-Qaida leaders’, *The Guardian*, 9th September.
- Medina, J. (2011). ‘The Relevance of Credibility Excess in a Propositional View of Epistemic Injustice: Differential Epistemic Authority and the Social Imaginary’, *Social Epistemology* 25: 15-35.
- O’Hear, M. (2018) *Prisons and Punishment in America: Examining the Facts*, New York: Bloomsbury Academic.
- Schehr, R. (2018). ‘Standard of Proof, Presumption of Innocence, and Plea Bargaining: How Wrongful Conviction Data Exposes Inadequate Pre-Trial Criminal Procedure’, *California Western Law Review*, 54: 51-102.
- Smith, S., Shirley, T., Bell, D., and Jorgensen, I. (2021). ‘Mass Incarceration and Criminalization’, *Social Policy Data Lab*, <https://www.socialpolicylab.org/mass-incarceration> (accessed 9/8/2024)
- Taibbi, M. (2014). *The Divide: American Injustice in the Age of the Wealth Gap*, New York: Spiegel & Grau.

- United States. (2006) *Military Commissions Act of*. [Washington, D.C.: U.S. G.P.O] [Pdf] Retrieved from the Library of Congress, <https://www.loc.gov/item/2011525342/>.
- Vallas, G. (2011). 'A Survey of Federal and State Standards for the Admission of Expert Testimony on the Reliability of Eyewitnesses' *American Journal of Criminal Law*, 39: 97-146.