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Discussing epistemic injustice: expertise at trial and feminist science

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ABSTRACT

The paper discusses the notion of epistemic injustice, with specific reference to gender injustice, which arose within the studies of social epistemology, testing its potential applications in the judicial field. In particular, scientific evidence could, if used by the judge with a deferential attitude, generate hypotheses of epistemic injustice, both at the stage of the formation of scientific knowledge mobilized in court and in its use.

Keywords: Epistemic Injustice; Expertise; Scientific Evidence; Feminist Epistemology.

Il contributo discute la nozione di ingiustizia epistemica, con specifico riferimento all'ingiustizia di genere, nata all'interno degli studi di epistemologia sociale, testandone le potenzialità applicative in ambito giudiziario. In particolare, la prova



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scientifico potrebbe, qualora utilizzata dal giudice con atteggiamento deferente, provocare ipotesi di ingiustizia epistemica, sia nella fase di formazione del sapere scientifico mobilitato in giudizio, sia nel suo utilizzo.

Parole chiave: ingiustizia epistemica; epistemologia sociale; saperi esperti; epistemologia femminista.

This paper has been subjected to double-blind peer review

Discussing epistemic injustice: expertise at trial and feminist science

SUMMARY: 1. Introduction – 2. The expertise at trial – 3. Feminist epistemology

1. Introduction

In the paper I intend to discuss – The Editorial of dossier “Epistemic Injustice in Criminal Procedure” by Andreas Páez and Janaina Matida¹ – the authors advocate for a broad notion of “epistemic injustice”, the increasingly popular conceptual tool firstly used by Miranda Fricker in 2007².

After presenting Fricker’s notion of epistemic injustice, distinguishing testimonial justice from hermeneutical injustice, the authors endorse a more comprehensive notion of epistemic injustice, in particular focusing on testimonial injustice.

The “testimonial injustice” according to Fricker occurs “if and only if she receives a credibility deficit owing to identity prejudice in the hearer”³. The authors criticize the restrictive meaning of this case, as Fricker openly excludes explicit prejudices from testimonial injustice, being the latter an uncontroversial form of sexism / racism / classism, or other⁴.

Testimonial injustice is rather a new conceptual tool crafted with the purpose of detecting the more subtle forms of epistemic discrimination. In the narrow version, implicit biases seem to be the only drivers of epistemic injustice. As a result, many forms of epistemic injustice go nameless. And, above all, many forms of judicial epistemic injustice remain unrecognized; they cannot be used to overcome a judicial decision affected by them.

In fact, the authors’ purpose is to broaden the understanding of the epistemic injustice, by using it not only as a theoretical instrument, but rather as a pragmatic tool to promote the effectiveness of access to justice and of rights enforcement.

In doing so, they draw on recent contributions to the debate, such as: Lackey’s evaluation of the notion of excess of credibility, and the subsequent

¹ A. Páez, J. Matida, *Editorial of dossier “Epistemic Injustice in Criminal Procedure”*, in *Revista Brasileira de Direito Processual Penal*, 2023, vol. 9, n. 1, p. 11-38.

² M. Fricker, *Epistemic Injustice: Power and the Ethics of Knowing*, Oxford University Press, Oxford, 2007.

³ M. Fricker, *Epistemic Injustice*, cit., p. 28.

⁴ M. Fricker, *Evolving Concepts of Epistemic Injustice*, in I.J. Kidd, J. Medina, G. Pohlhaus (eds.), *Routledge handbook of epistemic injustice*, New York: Routledge, 2017, p. 53-60.

notion of “agential epistemic injustice”⁵; Medina’s “epistemic activism”⁶; Anderson’s idea of “virtuous institutions”⁷.

The latter idea refers to the positive impact on institutions that the conceptual tool of epistemic injustice should have. Having identified the various forms of epistemic injustice that affect our legal systems, the authors aim to provide positive tools for changing the status quo. One of these is a shift from an individual conception of epistemic virtues (such as Fricker’s account of epistemic justice - though tempered in her more recent work) to a collective one, namely the institutions directly involved in preventing epistemic injustice.

I will present some additional remarks, with a particular focus on gender epistemic injustice and the use of science (the expertise) at trial. I will argue that in some cases this *excess of credibility* might affect expert testimony, so determining a case of direct and indirect testimonial injustice, that, under the narrow version of epistemic injustice, will go undetected.

2. The expertise at trial

The paper presents a very fruitful recollection of the recent debate about epistemic injustice, highlighting the different lines of criticism addressed to what they define a narrow concept of epistemic injustice.

According to Fricker, epistemic injustice recurs only when: a) a person has an implicit identity prejudice; b) the identity prejudice determined the unjustified credibility deficit; c) there actually was a credibility deficit in the testimonial exchange⁸.

The first critique addressed to this notion is its limited field of application. Moreover, it seems very hard to detect the implicit prejudice that instantiates a case of epistemic injustice: “the only way to determine whether the hearer has an implicit identity prejudice as a stable personal trait – according to the authors – is using implicit attitude tests such as the IAT”⁹, which has been recently proved

⁵ J. Lackey, *False confessions and testimonial injustice*, in *Journal of Criminal Law & Criminology*, 2020, vol. 110, p. 43-68.

⁶ J. Medina, M. S. Whitt, *Epistemic activism and the politics of credibility. Testimonial injustice inside/outside a North Carolina jail*, in H. Grasswick, N. A. Mchugh (eds.), *Making the case: Feminist and critical race philosophers engage case studies*, SUNY Press, Albany, 2021, p. 293-324.

⁷ E. Anderson, *Epistemic justice as a virtue of social institutions*, in *Social Epistemology*, 2012, vol. 26, n. 2, p. 163-173.

⁸ M. Fricker, *Epistemic Injustice*, cit., p. 26 ss.

⁹ A. Páez, J. Matida, *Editorial of dossier*, cit., p. 15. This test was originally proposed to detect racial prejudices (see A. G. Greenwald, D. McGhee, J. Schwartz, *Measuring individual differences in implicit cognition: The implicit association test* in *Journal of Personality and Social Psychology*, 1998, vol. 74, p. 1464-1480).

unreliable¹⁰. The criticism addressed by the authors is quite compelling, and some practical examples of the issues raised by the use of IAT at trial might be seen in the Italian legal system.

In fact, implicit association test (IAT) is still considered reliable in Italy and used – not without criticism – also in a slightly different version, the “autobiographical implicit association test” (a-IAT)¹¹, to detect the “truth” of the statements made at trial¹². In a 2013 decision, the Italian Supreme Court of Cassazione implicitly stated the scientific reliability of this technique, while the local Court of Appeal of Salerno – who was involved in the Cassazione’s decision – denied it¹³. It is interesting the reasoning that led the Court of Salerno to reject the Cassazione’s evaluation, as the judges engaged in a thorough examination of the psychological scholarship on the subject, assessing the lack of scientific reliability of the technique¹⁴.

This leads to another topic pointed by the authors, the case of *excess of credibility*¹⁵ as a form – undetected under the narrow version – of epistemic injustice.

In fact, expert testimony is gaining more and more epistemic power, and so the expert witnesses involved at trial.

Apparently, the reliance on expert witnesses might far be understood as a form of epistemic injustice, even in the broader sense – the excess of credibility as

¹⁰ E. Machery, *Do indirect measures of biases measure traits or situations?* In *Psychological Inquiry*, 2017, vol. 28, n. 4, p. 288-291.

¹¹ G. Sartori, S. Agosta, C. Zogmaister, S.D. Ferrara, U. Castiello, *How to Accurately Detect Autobiographical Events*, in *Psychological Science*, 2008, 19, p. 7727-80; S. Agosta, G. Sartori, *The Autobiographical IAT: A Review*, in *Frontiers in Psychology*, 4, 2013, p. 165-176.

¹² Trib. Cremona 19th July 2011, n. 109, on which see L. Algeri, *Neuroscienze e testimonianza della persona offesa*, in *Rivista italiana di medicina legale*, 2012, p. 903 s. In the above sentence, the a-IAT was used to ascertain the declarations made by a girl sexually assaulted by her employer during a school internship. The judge in that case accepted the results of the a-IAT – proving the girl truthful – and condemned the employer.

¹³ Court of Appeal of Salerno, December 16th2016, in www.penalecontemporaneo.it/upload/3744-corte-appello-salerno-re-visione-aiat.pdf.

¹⁴ The topic of the evaluation of scientific reliability of the expertise is among the most debated in the legal scholarship. *Ex multis*, see R. Allen, *Expertise and the Daubert Decision*, in *Journal of Criminal Law and Criminology*, 1994, 84, p. 1157-1175; S. Jasanoff, *Science at Bar Science at Bar. Law, Science and Technology in America*, Harvard University Press, Cambridge-London, 1995; K.R. Foster, P.W. Huber, *Judging Science. Scientific Knowledge and the Federal Courts*, The MIT Press, Cambridge (MA)-London, 1999; S. Haack, *Federal Philosophy of Science: A Deconstruction - And a Reconstruction*, in *New York Universal Journal of Law and Liberty*, 2010, 5, p. 394-435.

¹⁵ As Miranda Fricker puts it: “The primary characterization of testimonial injustice, then, remains such that it is a matter of credibility deficit and not credibility excess”. M. Fricker, *Epistemic injustice*, cit., p. 21.

defined by Lackey¹⁶. The example reported in the paper¹⁷ occurs when a male scientist refuses to trust female colleagues because of inner sexist prejudices, and so he values more his own claim instead of the female colleagues' ones – it is also called “epistemic arrogance”. In this case, the prejudice acts directly undermining the credibility of a scientific assumption made by a woman.

The case of expert “testimonial” injustice requires a deeper analysis to be detected.

In fact, these prejudices are presented as a scientific claim, they are rhetorically validated by science.

An example of this can be found in a recent Italian court case involving rape. In this case we also have a view adopted by the UN “Committee on the Elimination of Discrimination against Women”, where the Italian Court of Cassazione was found guilty of failing to ensure de facto equality in a case of sexual violence that was not recognized as such because of gender stereotypes and gender myths¹⁸.

Between others, the Committee based its recommendation on the claim that the judicial authorities favored certain forensic evidence, namely regarding the use of a condom during the sexual intercourse, based on which the credibility of the victim was contested¹⁹.

Forensic science in this case might be interpreted as a tool for perpetuating gender stereotypes through the epistemic validation of science. Another example might be the Parental Alienation Syndrome, only recently recognized as scientifically unreliable by the Italian Supreme Court²⁰.

After all, medical and psychological expertise have long been used as an instrument of control of the female body.

In the well-known pages that Foucault devotes to medical expertise, it is crystal clear how medical discourse - even if of a particular kind, the medico-legal

¹⁶ Jennifer Lackey refers to false confessions as cases of excess of credibility: J. Lackey, *False confessions and testimonial injustice*, cit., p. 53.

¹⁷ A. Paez, J. Matida, *Editorial of dossier “Epistemic Injustice in Criminal Procedure”*, cit., p. 20.

¹⁸ Committee on the Elimination of Discrimination against Women (2019) Views adopted by the Committee under article 7 (3) of the Optional Protocol, concerning Communication No. 148/2019.

¹⁹ “The Committee also notes the author’s claim that the legal proceedings conducted in her case were imbued with gender stereotypes regarding the behaviour to be expected of women and of female rape victims, which distorted the judge’s discernment and resulted in a decision based on preconceived beliefs and myths rather than facts, which contrasted with the leniency that the judge showed towards the accused in accepting his statements”: View of the Committee, EDAW/C/82/D/148/2019, p. 14.

²⁰ Corte di Cassazione, I sez. civ., 24 marzo 2022, ord. 9691.

discourse - has effects of power, might decide of one person's life and death²¹. Expert opinion is a discourse that has claim to truth, and power to death²². And this was possible not because of the intrinsic epistemic force of expert opinion, but precisely because of its twofold nature, discourse of truth and discourse of power. This would produce, as other historians and sociologists of science since Foucault have well pointed out, a transformation of medical practice itself, and ultimately, of scientific knowledge²³.

Moreover, going back to the beginnings of medico-legal expertise, the first medieval case known to us, thanks to a letter written by Cino da Pistoia, concerned the determination of paternity²⁴. It was a request addressed to a doctor, Gentile de Gentili, concerning the possibility of delivering a healthy child seven months after the alleged consummation of the marriage. Many cases of medico-legal expertise were aimed at establishing virginity, the ability or inability to procreate, which, as we know, was always attributed to the woman²⁵.

The spread of medico-legal practices, however, date back to the so-called "positive school", when Lombroso tried to claim on a scientific basis that certain characteristics of crime were rooted in gender, the famous "donna delinquente"²⁶. Beyond the period of the positive school, this stigmatization of the criminal woman

²¹ Expert opinions are, in Michel Foucault's words: "Discourses that can kill, discourses of truth, and, the third property, discourses (...) that make one laugh." M. Foucault, *Abnormal. Lectures at Collège de France (1974-1975)*, Picador, New York, 2004, p. 54

²² "Where the institution appointed to govern justice and the institutions qualified to express the truth encounter each other, or more concisely, where the court and the expert encounter each other, where judicial institutions and medical knowledge, or scientific knowledge in general, intersect, statements are formulated having the status of true discourses with considerable judicial effects. However, these statements also have the curious property of being foreign to all, even the most elementary, rules for the formation of scientific discourse, as well as being foreign to the rules of law and of being, in the strict sense, grotesque". M. Foucault, *The Abnormal*, cit., p. 65.

²³ Notably, Sheila Jasanoff has developed in the legal scholarship some of the Foucauldian intuitions about the intertwining of power and knowledge, leading, more broadly speaking, to the birth of the Science and Technology Studies (STS). See, for instance, S. Jasanoff, *States of Knowledge. The co-production of Science and Social Order*, Routledge, New York, 2004.

²⁴ H. Kantorowicz, *Cino da Pistoia ed il primo trattato di medicina legale* in *Archivio storico italiano*, 1906, 37, p. 115-128.

²⁵ On the diffusion of medical expertise to judicially ascertain rapes: H. Kumper, *Learned Men and Skillful Matrons: Medical Expertise and the Forensics of Rape in the Middle Ages*, in: Sara M. Butler, Wendy J. Turner (Eds), *Medicine and the Law in the Middle Ages* (Medieval Law and Its Practice 17), Leiden et al. 2014, p. 88-108.

²⁶ C. Lombroso, G. Ferrero, *La donna delinquente, la prostituta e la donna normale* (1893), Et. al., 2009.

that also emerges from the judicial reports that Foucault transmits in “Abnormal”²⁷.

Thus, forensic medicine was born with a more-or-less hidden intent to discipline the female body: medical knowledge is functional to a certain kind of biopolitical device.

Drawing also on Foucault’s theories, feminist post-modernism has criticized the epistemological foundations of science itself²⁸.

This leads to the philosophical background of the notion of epistemic injustice, *i.e.* the social epistemology and feminist science debate.

3. Feminist epistemology

Feminist epistemology might be considered a paradoxical expression: shouldn’t science be value-free to be good?

Starting from this assumption, the early debate of feminist epistemology aimed at unveiling the hidden gender prejudices in the making of science, thus “exposing androcentric and sexist biases in scientific research”²⁹. Within this theoretical framework, we might understand the example of testimonial injustice above: the scientist who doesn’t believe his female colleagues because of his sexist prejudices.

The intent here is to restore the truth-oriented scientific values, and in doing so, the demonization of biases is necessary.

Against this view (called “feminist empiricism”³⁰), many feminists have argued that cognitive bias can also be epistemically productive, as science would improve if it were allowed to incorporate feminist values³¹.

²⁷ Even the sexual preferences, as it is well known, were seen as clues of monstrosity, to be condemned: “it is the simple fact that for a woman she has perverse tastes, that she loves women, and it is this monstrosity, which is not a monstrosity of nature but a monstrosity of behavior, that calls for condemnation”, M. Foucault, *Abnormal*, cit., p. 183.

²⁸ D. Haraway, *Situated Knowledges*, in Ead., *Simians, Cyborgs, and Women*, Routledge, New York, 1991.

²⁹ E. Anderson, *Feminist Epistemology and Philosophy of Science*, in E. N. Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Spring 2011 Edition), URL = <<http://plato.stanford.edu/entries/feminism-epistemology/>>.

³⁰ S. Harding, *The Science Question in Feminism*, Cornell University Press, Ithaca-London, 1986.

³¹ This is, for instance, the opinion advocated by Louise Antony in discussing the so-called “bias paradox”: L. M. Antony, *Quine as Feminist: The Radical Import of Naturalized Epistemology*, in L. Antony, C. Witt (ed), *A Mind of One’s Own: Feminist Essays on Reason and Objectivity*, Westview Press, Boulder e Oxford, 1993, p. 185-225.

This was pointed out by feminist standpoint theory³², claiming that the female standpoint provides privileged access to a certain kind of knowledge because of the special position women have historically held in society³³.

Well before the emergence of the Feminist Standpoint Theory, we find a compelling example of this phenomenon in the popular 1916 short story, "Jury of her peers", by Susan Glaspell³⁴.

The story is taken from a real murder case – an old man found dead in his bed by his wife, who will be later convicted for that murder³⁵.

We might define it as a kind of ante litteram manifesto of feminist epistemology, since much of the story revolves around the inability of the men in charge of the investigation to first discover what had happened and then to understand the reasons for the woman's gesture. This inability, which today we would call epistemic ignorance, is confronted by women - the sheriff's wife and the witness's wife. They can read the signs of domestic violence, of frustration, of submission, because they are part of the same patriarchal system. And they can understand and sympathize with the wife who is portrayed by the men as a bad housekeeper: the husband had killed his wife's songbird with his hands, the proverbial last straw that led the wife to kill her abusive husband. The wives discover the truth, understand the motives, and decide to hide the evidence, moved also by the guilt of not having helped Minnie when they could have.

They are in a privileged position to access the truth because they know the power structure in which they are involved³⁶.

³² Feminist empiricism and feminist standpoint theory originally have very little in common, the latter holding a radically skeptical position: assuming a certain point-of-view would mean acknowledging the situatedness of every form of knowledge. For a comprehensive overview of the different positions within the feminist science debate see E. Anderson, *Feminist Epistemology and Philosophy of Science*, cit.

³³ As famously bell hooks put it: "Living as we did—on the edge—we developed a particular way of seeing reality. We looked both from the outside in and from the inside out... we understood both". B. Hooks, *From Margin to Center*, South End Press, Boston, 1984, vii. The experience of the marginalized reveal problems to be explained, forcing us to revise the beliefs, but also prejudices and biases, of the epistemically dominant groups in society.

³⁴ K. Orit, *To Kill a Songbird: A Community of Women, Feminist Jurisprudence, Conscientious Objection and Revolution in A Jury of Her Peers and Contemporary Film*, in *Law and Literature*, 2007, 19, 3, p. 357-376.

³⁵ The real case was covered by the same Susan Glaspell, at that time a reporter at The Moines Daily News, and the name of the accused woman was Margaret Hossack, convicted for the murder of her husband John.

³⁶ The relevance of the *Jury* for legal feminist scholarship is very clearly underlined by Orit: "Feminist legal culture is thus a clear outcome of and response to patriarchal legal dominance, yet it manifests a distinct ethos of compassion and care. Two feminist perspectives that are often perceived as contrary and adversal, the ethics of care and the dominance theory, seem completely coherent and mutually explanatory in Glaspell's story. Patriarchal law is so deeply oppressive to women that their only rational means of

This literary example could be very useful in understanding epistemic injustice within legal epistemology, also extending Fricker's notion: adopting the standpoint of a marginalized group, i.e. women, could be useful in better understanding reasons and excuses, in assessing responsibility at trial³⁷. And this would follow recent understandings of Feminist Standpoint Theory, which seeks to incorporate some of the essentialist critiques of postmodern feminism: the danger of creating a one-dimensional woman – middle-class, white, heterosexual³⁸.

However, while the contribution of feminist standpoint theory to the understanding of social phenomena is obvious, it is not the case for feminist science.

This is a crucial point, because science at trial is likely to become a tool for reiterating the monolithic knowledge of reality and, above all, for reproducing sexist stereotypes and gender subordination – as seen in the above Italian rape-case³⁹.

Undoubtedly, postmodern theory has exposed the situatedness of any form of knowledge and helped to raise awareness of the different meanings and standpoints that marginalized people have in the production of social knowledge. The postmodern critique emphasizes the partiality, the uncertainty, and the contestability of every form of knowledge, that is, following Foucault's path, a power mechanism.

resistance and survival is communal disobedience (...). Extending existing individual legal rights to women is irrelevant reparation. In order for women to survive the law, their collective social oppression must be acknowledged, and the reality of their social conditions must be viewed from their own unique perspective". K. Orit, *To Kill a Songbird*, cit., p. 363.

³⁷ The productive relationship between excuses and responsibility, seen as an instrument to reveal the philosophical structure of it, has been highlighted by J. Gardner, *The Gist of Excuses*, in *Buffalo Criminal Law Review*, 1998, vol. 1, n. 2, p. 575-598. Previously, it was Herbert Hart to claim this connection: H.L.H. Hart, *Legal Responsibility and Excuses*, in Id., *Punishment and Responsibility: Essays in the Philosophy of Law* (1968), Oxford University Press, Oxford, 2008.

³⁸ The feminist debate on the subject is huge. The ground-breaking work is probably K. Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence against Women of Color*, in *Stanford Law Review*, 1991, 43, 6, p. 1241-1299. More recently, from a class-centered critical standpoint, see N. Fraser, *Fortunes of Feminism. From State-Managed Capitalism to Neoliberal Crisis*, Verso, London-New York, 2013. On the Italian legal feminist perspectives see A. Simone, I. Boiano, and A. Condello (Eds), *Legal Feminism: Italian Theories and Perspectives*, Routledge, New York, 2022.

³⁹ More in general, the acritical acceptance of a scientific expertise has been called "deferentialist" by Susan Haack, in S. Haack, *Science is Neither Sacred nor a Confidence Trick*, in *Foundation of Science*, 1995/96, n. 3, p. 323-335.

But when it comes to science and trial, of course, we must endorse other fundamental cognitive and legal values⁴⁰.

Sticking with traditional epistemology – the knowledge structures of science – feminist critique, in its attempt to overcome radical constructivism, led to a new consciousness: feminist standpoint empiricism⁴¹. The basic assumption is that science should accept the claim of standpoint theory that better (*i.e.* feminist) values produce better theories. In fact, the exclusion of sexist standpoints has been shown to be epistemically justified because it allows physical or biological phenomena to be seen in a new light, adding a new perspective, and thus producing new important discoveries.

Within this context, law can and must play a key role, for example, in promoting certain research programs over others⁴². Law and science must be subject to a double institutionalized process⁴³ of redressing epistemic injustices.

In this respect, the quest for an institutional turn in epistemic justice⁴⁴, rather than leaving the burden of individual virtue to the individual, is entirely to be welcomed.

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⁴⁰ For further understanding see the classical M. Damaska, *The Faces of Justice and State Authority. A Comparative Approach to the Legal Process*, Yale University Press, New Haven, 1991.

⁴¹ K. Intemann, *Feminist Standpoint*, in L. Disch & M. Hawkesworth (Eds.), *The Oxford Handbook of Feminist Theory*, Oxford University Press, Oxford, 2016.

⁴² European research programs seem to be moving in this direction. On the RRI (responsible research and innovation), and its criticalities, see for instance: D. Ruggiu, *Inescapable Frameworks: Ethics of Care, Ethics of Rights and the Responsible Research and Innovation Model*, in *Philosophy of Management*, 2020, vol. 19, p. 237-265.

⁴³ The mutual relationship between science and law has been advocated by Sheila Jasanoff, building on the Bruno Latour's notion of co-production: S. Jasanoff, *Science and Public Reason*, Routledge, New York, 2012.

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